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CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN THE UK, CANADA AND HONG KONG

DR. DANIEL ALATI[1]

ABSTRACT

In any jurisdiction, national security legislation is not developed or enacted in a vacuum and, as such, interdisciplinary analyses of this legislation are both necessary and useful. This paper notes that the UK, Canada and Hong Kong's counter-terrorism policy-making has been influenced by their domestic legal and political structures and cultures, including their: respective legal systems; the relative stability of government and political institutions; mechanisms for parliamentary scrutiny and oversight; and experiences with terrorism. It analyses contemporary developments in these countries, such as terrorist attacks on the Canadian Parliament and the Occupy Central movement in Hong Kong, in order to discuss the human rights implications of the legislation that has been (or will be) enacted in the aftermath of these events. It concludes that terrorism can be best dealt with through existing criminal law, rather than national security legislation that is often hastily enacted, lacking in oversight, and overly politicized.

Key Words: National Security, International Terrorism, Human Rights and Civil Liberties, Contemporary Global Security

INTRODUCTION

In any jurisdiction, national security legislation is not developed or enacted in a vacuum and, as such, interdisciplinary analyses of this legislation are both necessary and useful. This paper notes that the UK, Canada and Hong Kong's counter-terrorism policy-making has been influenced by their domestic legal and political structures and cultures, including their: respective legal systems; the relative stability of government and political institutions; mechanisms for parliamentary scrutiny and oversight; and experiences with terrorism. It analyses contemporary developments in these countries, such as terrorist attacks on the Canadian Parliament and the Occupy Central protests in Hong Kong, in order to discuss the human rights implications of the legislation that has been (or could be) enacted in the aftermath of these events. In particular, it focuses on new anti-terrorism specific legislation in Canada and the United Kingdom and the lack of such legislation in Hong Kong, where the criminal law is the primary mode of criminalizing offences pertaining to national security. It concludes that terrorism can and should be dealt with through existing criminal law, rather than national security legislation that is often hastily enacted, lacking in oversight, and overly politicized. This national security legislation is often politically motivated and carries human rights implications that may take decades to be rectified through the courts. It is further noted that these human rights implications are exacerbated in Canada, where no specific parliamentary mechanism for oversight and review of national security policies exists. Recommendations in regards to rectifying this problem are suggested in the paper's conclusion.

CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN CANADA

On October 22nd, 2014, Canada suffered the most significant domestic terrorist attack in its history when Michael Zehaf-Bibeau shot and killed an unarmed soldier stationed at a War Memorial. He

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was subsequently killed after having entered the Canadian Parliament buildings in Ottawa, where heads of each of Canada's political parties, including the Prime Minister, were holding their usual caucus meetings.[2] The events took place only days after another man who had apparently taken to radical Islam, Martin Rouleau, drove his car into two Canadian forces personnel.[3] The attacks prompted immediate political condemnation and the introduction of two new pieces of legislation, including Bill C-44[4] on October 27th and, more recently, Bill C-51,[5] despite the fact that Canada already has the *Anti-Terrorism Act*[6] and several criminal law provisions aimed at combating terrorism. While Bill C-44 had been in the works before the October 23 attacks, Bill C-51 can be seen as a direct response to those attacks and has attracted a significant amount of attention and concern from civil liberties groups, parliamentarians and academics.[7] This section will detail and analyse the content of these new pieces of legislation, noting that the civil rights concerns they arouse are particularly exacerbated because of a significant shortcoming of Canada's political structure: its glaring lack of mechanisms for parliamentary oversight and accountability of counter-terrorism legislation and practices. Moreover, it will note a disturbing trend that is common to both Canada and the UK, that is, legislative responses in the aftermath of terrorist attacks despite several existing anti-terrorism mechanisms and numerous provisions pertaining to terrorism under the normal criminal law. This will prove particularly useful for comparative purposes when focus turns to Hong Kong, a jurisdiction that has resisted pressures to enact specific anti-terrorism legislation.

In an official press release on the day Bill C-44 was tabled, the Conservative government reminded Canadians that the threat of terrorism "continues to be apparent both abroad and at home" and specifically mentioned the ongoing threat posed by the "Islamic State in Iraq and the Levant (ISIL) against Canada".[8] The Bill, which has currently passed through the House of Commons and has had its first reading in the Senate, will make a number of amendments to the *CSIS Act*,[9] including: a) confirming CSIS' authority to conduct investigations outside of Canada; b) providing protections for the identity of CSIS human sources from disclosure; c) providing protection for the identity of CSIS employees who may engage in covert activities in the future; and d) giving the Federal Court authority to issue warrants for CSIS to investigate threats to national security outside of Canada.[10] While the Bill will undoubtedly pass into law given the current Conservative government majority in the House of Commons, several academics and Parliamentarians have raised concerns pertaining to the Bill's political purpose and human rights implications.[11] Perhaps the most significant concern with the Bill is that it would extend a "blanket" protection to CSIS human sources, despite the fact that the Canadian courts have

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[2] Ian Macleod, 'Anti-terrorism bill built around an attack that still raises questions' *Ottawa Citizen* (28 January 2015).

[3] Allan Woods, 'Canadian soldiers run down in possible Quebec terror attack' *Toronto Star* (20 October 2014).

[4] Protection of Canada from Terrorists Act, C-44.

[5] Anti-terrorism Act, 2015, C-51: Tabled for first reading on 30 January, 2015.

[6] Anti-terrorism Act, S.C. 2001, c. 41.

[7] John Barber, 'Canada's new anti-terror legislation prompts civil liberties fears' *The Guardian* (30 January 2015).

[8] Government of Canada, 'The Government of Canada Introduces Protection of Canada from Terrorists Act' (27 October 2014), available at: http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=897129&crtr.tp1D=1&_ga=1.54539176.2078202319.1410971187.

[9] Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23.

[10] For more information on the Bill, see legislative summary and other materials at: http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C44&Parl=41&Ses=2&billId=6729100&View=8

[11] Kent Roach, 'The problems with the new CSIS human source privilege in Bill C-4' (2014) 61(4) Criminal Law Quarterly 451; Mr. Randall Garrison (NDP) argued in regards to the blanket protection of human sources: "Even the bill itself acknowledges that this could be a problem when it comes to using CSIS information as the basis for criminal charges. Our criminal justice system, quite rightly, does not look favourably on anonymous testimony or evidence whose validity cannot be challenged in court". House of Commons Debates (18 November 2014) 1110.

consistently ruled that this protection is best extended on a case-by-case basis.[12] Challenging material gleaned from these sources in criminal proceedings while maintaining due process rights would prove difficult and, as will be discussed further below, providing CSIS with further powers is additionally problematic because Canada lacks any meaningful mechanisms for parliamentary review and oversight of counter-terrorism activities.

Bill C-51 is perhaps the more problematic of the two pieces of legislation, given its omnibus nature.[13] Upon unveiling the new package of measures, Prime Minister Stephen Harper reiterated that, "The world is a dangerous place and, as most brutally demonstrated by last October's attacks in Ottawa and Saint-Jean-sur-Richelieu, Canada is not immune to the threat of terrorism".[14] The Bill proposes a number of new measures, including: a) the enactment of a Security of Canada Information Sharing Act, which will allow Canadian government institutions to disclose a wide range of information to agencies such as CSIS or the RCMP; b) the enactment of a Secure Air Travel Act, which will establish a ministerial procedure for the listing of terrorist suspects; c) amendments to the Criminal Code which will re-instate "recognizance" measures instituted after 9/11 that had previously expired under a sunset clause; d) amendments to the criminal code providing for offences of advocating or promoting the commission of terrorism offences "in general"; e) amendments to the CSIS Act giving CSIS additional powers within and outside Canada; and f) amendments to the Immigration and Refugee Protection Act that would further allow Ministers to claim non-disclosure of security sensitive information.[15] The human rights implications of the bill have immediately raised concerns.[16] The most problematic aspect of the Bill pertains to its exceptionally vague definition of "threats to the security of Canada", which could result in the criminalisation of legitimate and peaceful political protest. The aforementioned recognizance measures, which would allow for detention on suspicion, were a product of the 2001 Anti-Terrorism Act that were never used prior to their expiry in 2007. The changes to the Immigration and Refugee Protection Act, would further complicate an accused's ability to see the case against them in security certificate proceedings.[17] The potential human rights implications of these proposed changes, along with those that would give additional powers to CSIS, are again further exacerbated by the fact that Canada's political structure glaringly lacks any mechanisms for parliamentary review and oversight of counter-terrorism activities.

Understanding Canada's lack of parliamentary review and oversight mechanisms for counter-terrorism activities requires some historical context. In the aftermath of 9/11 and the enactment of the 2001 Anti-Terrorism Act, several reports mandated by that act led to Parliament proposing a specific National Security Committee of Parliamentarians though Bill C-81.[18]

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[12] *R. v. Hape* [2007] 2 SCR 292; *Canadian Security Intelligence Service Act (Re) (F.C.)* [2008] 4 FCR 320.

[13] The Bill will enact two new pieces of legislation, the Security of Canada Information Sharing Act and the Secure Air Travel Act, and will amend the Criminal Code, the CSIS Act, the Immigration and Refugee and Protection Act and several other acts.

[14] Government of Canada, 'PM Announces Anti-Terrorism Measures to Protect Canadians' (30 January 2015) available from: http://www.pm.gc.ca/eng/news/2015/01/30/pm-announces-anti-terrorism-measures-protect-canadians.

[15] For more information on the Bill, see legislative summary and other materials at: http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C51&Parl=41&Ses=2&billId=6842344&View=8

[16] Elizabeth May, leader of the Green Party, queried: "Is Stephen Harper using the imagined fear of widespread security threats to score political points before the next election?" see: 'Elizabeth May issues statement: Anti-Terrorism Act must be rejected' (*Green Party Website*, 2 February 2015) <https://www.greenparty.ca/fr/node/25166> Accessed 3 February 2015; Globe and Mail, 'Parliament must reject Harper's secret policeman bill' (1 February 2015).

[17] Canadian Courts have already found that security certificate proceedings under immigration law, in which the accused only receives information through a vetted "special advocate" that can no longer communicate with them once they have seen national security sensitive information, infringe various human rights including the right to a fair trial, see: *Charkaoui v. Canada (Citizenship and Immigration)* [2007] 1 SCR 350; *Almrei (Re)* [2011] 1 FCR 163; *Canada v. Almalki* [2011] FCA 199.

[18] Bill C-81, An Act to Establish the National Security Committee of Parliamentarians, November 24, 2005.

Unfortunately, on November 30th, 2005, Parliament was dissolved and Bill C-81 died on the Order Paper before becoming legislation. Future reiterations of the Bill died as a result of the minority government instability that characterized Canadian politics for most of the 2000s. This was despite the fact that two separate, independent judicial inquiries into human rights abuses by both CSIS and the RCMP strongly recommended that such a committee be created as a matter of urgency.[19] In 2009, a Standing Committee on Public Safety and National Security argued that it was "regrettable that the government has not yet established the independent national security review framework recommended by Justice O'Connor" and noted that this framework was "essential to prevent further human rights violations".[20] Regrettably, although two bills nearly identical to Bill C-81 (Bills S-220 and C-551) were introduced into Parliament in 2013 and 2014, both lack the support of the Conservative government and, subsequently, neither have made any consequential progression through the parliamentary process.[21] As such, contemporary developments in the realm of Canadian national security analyzed here clearly suggest that the Conservative government is more interested in enacting new and sprawling legislation for political purposes (even though this legislation may carry severe human rights implications) than it is in addressing a fundamental deficiency of its political structure and national security framework. This is despite the fact that numerous provisions of existing criminal law covering terrorist offences exist and offer procedural safeguards to prevent the inevitable human rights abuses that require parliamentary oversight and accountability. As will now be illustrated in analysis of the United Kingdom, this troubling reliance on measures outside of the ordinary criminal law to combat terrorism is not a phenomenon specific to Canada.

CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN THE UNITED KINGDOM

The United Kingdom is crucially different from Canada in that it has had extensive experiences of terrorism, resulting in scores of anti-terrorism legislation and a variety of mechanisms for oversight and review of counter-terrorism practices, including parliamentary committees (such as the Joint Committee on Human Rights and the Home Affairs Committee) and a dedicated independent reviewer of terrorism legislation. Nonetheless, despite the wealth of this existing legislation and a multitude of criminal law provisions pertaining to terrorism, the United Kingdom is not immune to the phenomenon of enacting legislation in the aftermath of horrific events. The January 7th attacks at the Paris satirical magazine Charlie Hebdo drew immediate global media attention and political condemnation, sparking several debates pertaining to the rights to free speech and expression.[22] Although the recently passed UK Counter-Terrorism and Security Act (CTSA)[23] was introduced before the Paris attacks,[24] it was subject to a semi-fast-track procedure that saw it progress from Report stage in the House to full Royal Assent in just over a month. This has raised concerns that proper pre-legislative scrutiny of the Act was rushed, which is particularly

[19] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, R*eport of the Events Relating to Maher Arar* (Ottawa: 2006); The Honourable Frank Iacobucci QC LLD, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: 2008).

[20] Standing Committee on Public Safety and National Security, *Review of the Findings and Recommendations Arising from the Iacobucci and O'Connor Inquiries* (Ottawa: Standing Committee on Public Safety and National Security, June 2009).

[21] For information on both bills, see: http://openparliament.ca/bills/41-2/S-220/; http://openparliament.ca/bills/41-2/C-551/

[22] John Irish and Alexandra Sage, 'Police hunt three Frenchmen after 12 killed in Paris attack' (*Reuters*, 7 January 2015) <http://www.reuters.com/article/2015/01/07/us-france-shooting-idUSKBN0KG0Y120150107> accessed 7 February 2015

[23] Counter-Terrorism and Security Act, 2015, No. 217: The CTSA received Royal Assent on 12 February 2015.

[24] The Act's first reading was in the House of Commons on 26 November 2014.

disconcerting given the omnibus nature of the Act and its human rights implications.[25] The CTSA makes provision for a number of new controversial anti-terrorism powers, including: a) temporary exclusion orders (TEOs) through which British citizens suspected of involvement in terrorist-related activity abroad can be barred from returning to the UK; b) travel bans, through which a police or immigration officer can seize a person's passport to prevent them from leaving the country if they reasonably suspect that the person intends to leave in connection with terrorism-related activity; c) increased sanctions for airline carriers, whereby they will be required to supply advanced passenger and crew information and refuse boarding to anyone on a government list; and d) compulsions for education providers to enact the government's PREVENT strategy, which had previously been voluntary, in order to counter terrorism by targeting radical extremist ideology. According to Home Secretary Theresa May, "This important legislation will disrupt the ability of people to travel abroad to fight and then return, enhance our ability to monitor and control the actions of those who pose a threat, and combat the underlying ideology that feeds, supports and sanctions terrorism".[26]

As is currently the case in Canada, David Cameron knows that he and his party will shortly be campaigning for election.[27] As we have seen on many occasions since 9/11 in both the UK and Canada, new terrorism legislation is most politically tenable in the direct aftermath of high-profile attacks and, in particular, in election years, when few political leaders are willing to oppose the legislation and risk being branded "soft" on terrorism. It is in this political climate that legislation with severe implications for human rights is often used as a political tool, with disregard for its true implications and less time for consideration of these implications, despite the fact that existing legislation, or the ordinary criminal law pertaining to anti-terrorism, is already on the statute books. It is worth noting that this process also occurred in the UK after 9/11, when the *Anti-Terrorism, Crime and Security Act 2001,*[28] a sprawling, complex and enormously problematic legislation, achieved Royal Assent within two months of those attacks. A similar process occurred after the landmark decision of *A. v. Secretary of State for the Home Department*,[29] a case in which several provisions under the ATCSA 2001 were found to be incompatible with human rights. The Prevention of Terrorism Act 2005,[30] enacted at least in part as a result of the decision in that case, "was passed in 17 days amidst much controversy".[31]

To be fair, the legislative response in the aftermath of the 7 July 2005 bombings in London, in the form of the *Terrorism Act 2006*,[32] was much more carefully considered. It is worth noting that the legislation came into force on March 30th, 2006, nearly nine months after the attacks occurred. Lord Carlile, the government's former independent reviewer of terrorism legislation opined that the bombings "rightly and inevitably catalyzed an earlier examination of potential additional legislation than had been envisaged at the time of the enactment of the Prevention of Terrorism Act 2005".[33] He seemed encouraged by the fact that there was a full public debate on

[25] Karma Nabulsi, 'Theresa May's Prevent bill is extremism in the name of security' *The Guardian* (4 February 2015); Frances Webber, 'Farewell Magna Carta: the Counter-Terrorism and Security Bill' (*Open Democracy*, 19 January 2015) <https://www.opendemocracy.net/ourkingdom/frances-webber/farewell-magna-carta-counterterrorism-and-security-bill> accessed 5 February 2015.
[26] Alexis Flynn, 'Tougher Antiterror Law to Take Effect in UK' *The Wall Street Journal* (12 February 2015).
[27] The Canadian federal election is tentatively scheduled for October 2015 and the UK election is scheduled for the 7th of May, 2015.
[28] Anti-Terrorism, Crime and Security Act 2001 c. 24.
[29] *A v. Secretary of State for the Home Department* [2004] UKHL 56.
[30] Prevention of Terrorism Act 2005 c.2
[31] Ed Bates, 'Anti-terrorism control orders: liberty and security still in the balance' (2009) 29 Legal Studies 99.
[32] Terrorism Act 2006, c.11
[33] Lord Carlile, *Proposals by Her Majesty's Government for changes to the laws against terrorism* (Home Office, 2005), para. 6

the possible changes that might be made to the law.[34] Nonetheless, it has too often been the case (both in the UK and Canada) that swiftly-enacted anti-terrorism legislation in the aftermath of a serious attack is considered more for its political utility than it is for its human rights implications. As aforementioned, this issue is less exacerbated in the UK, where the JCHR and Independent Reviewer are mandated to release regular reports pertaining to several counter-terrorism provisions. Nonetheless, we have seen that it is the UK courts and those accused of terrorist offences (with inevitable additional effect on Muslim populations) who have to bear the human rights burdens of this kind of policy-making. For instance, controversial "detention without trial" provisions that were enacted by the 2001 ATCSA and reincarnated into "control orders' by the 2005 PTA were found to be inconsistent with fair trial rights by the European Court of Human Rights[35] and the U.K. Supreme Court.[36] As a result of the UK's legal structure, the Court was only able to issue a declaration of incompatibility rather than strike down the law. The Government has since done away with control orders and enacted Terrorism Prevention and Investigation Measures,[37] but this process took more than a decade from the time of their original enactment and some of the main concerns with the measures still remain.[38]

It is within this context that concerns with the newly enacted Counter-Terrorism and Security Act must be situated. It has been noted that provisions allowing the UK to stop a citizen's re-entry into the country have been criticized by civil rights groups as a violation of international law.[39] Commentators have expressed concern over what impact the Act's compulsion to implement the PREVENT strategy might have on the UK's schools and universities.[40] If the years since 9/11 and the above analyses of legislation passed in the aftermath of those attacks has illuminated anything, it is that it might take decades for the human rights implications of this legislation to fully play themselves out in the courts, without the necessary promise that either the courts or the UK's parliamentary oversight mechanisms will be able to rectify them in a truly meaningful or satisfactory way. The disturbing trend of anti-terrorism legislation being hastily enacted (in both the UK and Canada) for political purposes, despite real human rights concerns and several provisions under existing and ordinary criminal law to combat terrorism, needs to be noted and argued against. As such, it is not surprising to see open letters written by coalitions of interested parties (such as the UK Green Party, the Islamic Human Rights Commission, Rights Watch UK, and the NUS National Executive Council) arguing that, "Ordinary criminal law remains adequate to protect the public from violence; terrorist attacks have resulted from inadequately using intelligence and available powers, not from inadequate powers".[41] As will now be illustrated in

[34] ibid, para. 7.
[35] *A v. United Kingdom,* App No 3455/05 [2009] ECHR 301.
[36] *Secretary of State for the Home Department v AF* [2009] UKHL 28.
[37] Terrorism Prevention and Investigation Measures Act 2011 c. 23: although many argue that the restrictions in these measures are less drastic than those that were present in control orders, TPIMs still raise the main human rights issue (an inability for the accused to know the case against them in closed material proceedings) that was the subject of concern for the European Court and the U.K. Supreme Court. For further commentary, see: Clive Walker and Alexander Horne, A., 'The Terrorism Prevention and Investigation Measures Act 2011' [2012] CLR 421.
[38] For a discussion of the continuing human rights implications of 'Closed Material Proceedings', including those used under TPMs and the Justice and Security Act 2013, see: Greg Martin and Rebecca Scott Bray, 'Discolouring democracy?' (2013) 40 Journal of Law & Society 624, 634; John Jackson, 'Justice, security and the right to a fair trial' [2013] Public Law 720; John Ip, 'Al Rawi, Tariq and the future of closed material procedures and Special Advocates' (2012) 75 Modern Law Review 606, 617.
[39]Taylor Brailey, 'UK enacts strict anti-terror legislation' (*The Jurist*, 13 February 2015) <http://jurist.org/paperchase/2015/02/uk-enacts-strict-anti-terror-legislation.php> Accessed 13 February 2015.
[40] Karma Nabulsi, 'Theresa May's Prevent bill is extremism in the name of security' *The Guardian* (4 February 2015).
[41] Editorials and Letters, 'Groundless anti-terror laws must go' (*The Guardian,* 5 February 2015) <http://www.theguardian.com/politics/2015/feb/05/groundless-antiterror-laws-must-go> accessed 8 February 2015.

analyses pertaining to Hong Kong, reliance on the ordinary criminal law rather than specific anti-terrorism legislation is a viable way forward.

CONTEMPORARY NATIONAL SECURITY AND HUMAN RIGHTS ISSUES IN HONG KONG

As was the case in the above analyses of Canada and the United Kingdom, some information about Hong Kong's legal and political structures and cultures is necessary in order to understand its national security framework. Any analysis of any kind of laws in Hong Kong begins with the Basic Law,[42] the constitutional agreement through which Hong Kong was handed over by the United Kingdom and reunified with China, becoming a Special Administrative Region. The Basic Law is a complex document with a complicated history, a microcosm in and of itself of the complicated relations between Hong Kong and China, as has been evidenced by this past year's Occupy Central protests. These protests warrant brief discussion here because of concerning suggestions made by Chinese officials during (and after) them pertaining to Article 23 of the Basic Law, the national security provision.[43] Nearly 1.2 million people participated in last year's protests pertaining to universal suffrage before they were eventually cleared by court injunction in December.[44] The protests were a response to an August 31st, 2014 decision of the Standing Committee of the National People's Congress (NPCSC) that effectively held that candidates for the Hong Kong Chief Executive election would be determined by a selection process largely controlled by Beijing's interests.[45] As the protests gained international media attention and tensions grew higher, concerns grew over the possibility of a forceful response from Beijing that could possibly mirror the 1989 Tiananmen Square massacre.[46]

It is against this backdrop that Article 23 of the Basic Law was contentiously drafted and has been cautiously treated ever since. The Article provides: "The Hong Kong Special Administrative Region shall enact laws on its own to prevent any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies".[47] Gittings notes that, "More than virtually any other provision, Article 23 was widely seen as a threat to Hong Kong's separate system… Instead, the wording of Article 23 was rephrased in more specific language to refer to offences which, in most cases, were already covered by existing laws in Hong Kong".[48] To date, the Hong Kong government has not successfully enacted national security legislation to give effect to Article 23 of the Basic Law. Its last attempt was in 2003, when the introduction of the National Security (Legislative Provisions) Bill[49] sparked intense public opposition and a 500,000 person strong street protest. Understanding

[42] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1 July 1997.
[43] Kenneth Lau, 'Outrage over NPC deputy's call to apply mainland security law' *The Standard* (21 January 2015).
[44] '1.2 million people took part in Occupy protests, poll shows' (*Hong Kong Economic Journal*, 19 December 2015) <http://www.ejinsight.com/20141229-1-2-million-people-took-part-in-occupy-protests-poll-shows/> accessed 30 January 2015.
[45] For a comprehensive compilation of news and events pertaining to the movement, see the South China Morning Post's dedicated OCM website at : http://www.scmp.com/topics/occupy-central.
[46] The massacre occurred on 4 June 1989 after student-led popular protests had spread throughout China and, most specifically, in Beijing. Chinese authorities declared martial law, leading to unprecedented military action and death tolls that have ranged from 300 to the thousands (though never officially confirmed. For more information, see: Noah Rayman, '5 Things You Should Know About the Tiananmen Square Massace' (*Time Magazine*, 4 June 2014) <http://time.com/2822290/tiananmen-square-massacre-anniversary/> accessed 29 January 2014.
[47] Basic Law, Article 23.
[48] Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 26.
[49] 2003, c127.

the past (and present) public opposition to the Bill again requires political and cultural context. Gittings notes that Article 23 has been "firmly associated" with the events at Tiananmen Square since its inception, noting that, "That linkage came back to haunt the Hong Kong SAR government 14 years later when intense public opposition forced it to abandon proposed legislation that sought to implement the provisions of Article 23".[50]

As a result, Hong Kong has dealt with national security related offences exclusively through its criminal law.[51] While some academic commentators argue that Hong Kong has a constitutional duty to implement Article 23,[52] others argue that "the principle of minimum legislation" needs to be the guiding principle of any legislation enacted to implement the article.[53] To date, the latter has obviously been preferred, and the Hong Kong government has seen no political advantage to attempting to re-introduce the measures that were so publicly opposed in 2003. This is in stark contrast to the process that has been observed and described in relation to Canada and the United Kingdom. Granted, unlike both of those jurisdictions, Hong Kong has never suffered a terrorist attack, and the political advantage that "being tough on terrorism" affords in Canada and the UK does not extend here. Nonetheless, it is remarkable how different the discourse pertaining to the need for strict-anti terrorism legislation is in the jurisdictions. Even in the heat (and the aftermath) of the Occupy Central protests, when some Chinese officials were calling for the imposition of Chinese national security law, discussion has centred around how the criminal law of Hong Kong is already sufficient to address national security concerns.[54] The Hong Kong experience illustrates how much previous political and cultural history can impact upon the development of national security legislation. Moreover, when contrasted with Canada and the United Kingdom, it also illustrates the weight of significant events (such as domestic terrorist attacks) and the political advantages of being seen to act in the aftermath of those events.

CONCLUSION

As this paper has illustrated, national security legislation is not developed or enacted in a vacuum. Interdisciplinary analyses of this legislation are thus useful because they help to illuminate the political, legal, historical and cultural contexts through which the legislation is debated, enacted, implemented and amended. This paper has argued that the UK, Canada and Hong Kong's counter-terrorism policy-making has been influenced by their domestic legal and political structures and cultures, including their: respective legal systems; the relative stability of government and political institutions; mechanisms for parliamentary scrutiny and oversight; and experiences with terrorism. It has used contemporary developments in these countries, such as terrorist attacks on the Canadian Parliament and the Occupy Central movement in Hong Kong, in order to discuss the human rights implications of the legislation that has been (or will be) enacted in the aftermath of these events. In particular, it focused on new anti-terrorism specific legislation in Canada and the United Kingdom and the lack of such legislation in Hong Kong, where the criminal law is the primary mode of criminalizing offences pertaining to national security. Although it is accepted that Hong

[50] Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 27.
[51] More specifically, through provisions in the Crimes Ordinance (Cap. 200), Official Secrets Ordinances (Cap. 521) and Societies Ordinance (Cap. 151). For more information, see: Department of Justice, 'Collection of existing statutory provisions relevant to the National Security (Legislative Provisions) Bill (February 2003) LC Paper No. CB(2)1215/02-03.
[52] Bob Hu, 'The Future of Article 23' (2012) 41 Hong Kong Law Journal 115.
[53] Benny Tai, 'The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law' (2002) 32 Hong Kong Law Journal 579.
[54] Cliff Buddle, 'Hong Kong's Article 23 obligations are already in our legal armoury' *South China Morning Post* (29 January 2015); Stuart Lau, 'Calls for Hong Kong national security law shot down by legal expert Albert Chen' *South China Morning Post* (20 January 2015).

Kong has not had the same experience with terrorism that Canada or the UK has had, it is still argued that terrorism can and should be dealt with through existing criminal law, rather than through national security legislation that is often hastily enacted, lacking in oversight, and overly politicized. As analyses of Canada and the UK have shown, this national security legislation is often politically motivated and carries human rights implications that may take decades to be rectified through the courts. These human rights implications are exacerbated in Canada, where no specific parliamentary mechanism for oversight and review of national security policies exists. It is thus recommended that, as a matter of urgency, the Conservative government (particularly if Bills C-44 and C-51 are going to pass) needs to support either Bill S-220 or Bill C-551 and give Canada the parliamentary committee that it has sorely needed for more than a decade.

POLICIES, PROPAGANDA, AND PURDAH: FORCED INCLUSION OF WOMEN IN THE EARLY 1900S IN TURKEY AND SOVIET CENTRAL ASIA

JESSICA WILLIS[1], HUMAIRA HANSROD[2] AND AHSEN UTKU[3]

ABSTRACT

It has become fashionable to talk about female empowerment as an imperative for development. But what does female empowerment mean? The discourse has often linked female empowerment to women's inclusion in the public space, and the Islamic veil has been criticised as a barrier to that inclusion. We define inclusion as *access to and participation in the public sphere*. Based on this, we define forced inclusion as the *use of policies and the promulgation of laws designed to force a secluded segment of the population into the public space*, and we hypothesise that forced inclusion policies actually decrease a woman's inclusion in the public sphere and force her to retreat into the home. We take advantage of a century of female inclusion initiatives for Muslim women by reviewing the short-, mid-, and long-term effects of two case studies of forced inclusion: Soviet Central Asia and the early Republic of Turkey.

Key words: inclusion, unveiling, transition, gender, policy

INTRODUCTION

In last the three decades, it has become fashionable in the development community to talk about female empowerment as an imperative for development. The authors of this paper do not contest this, but ask: what does female empowerment mean? What does it look like in practice, and how is it achieved? This discourse on female empowerment has often linked female empowerment to women's inclusion in the public space, and the veil—the wearing of which is a practice that is most common in Muslim societies—has been criticised as a barrier to inclusion. The fact that female inclusion initiatives for Muslim women have been tried throughout the last century gives academia a unique opportunity to examine how such initiatives have impacted female empowerment in the short-, mid- and long-terms. The authors have taken advantage of this opportunity by reviewing two case studies of forced inclusion: 1920s Soviet Central Asia and the Republic of Turkey.

This paper first defines inclusion as access to and participation in the public sphere. Based on this, forced inclusion is defined as the use of policies and the promulgation of laws designed to force a secluded segment of the population into the public space. Before approaching the case studies, the authors hypothesised that forced inclusion policies would actually decrease a woman's inclusion in the public sphere and force her to retreat into the home.

Soviet Central Asia and the early Republic of Turkey were chosen as the case studies because they differed in three key aspects: ideology, regime type, and methods. The Soviets in Central Asia wanted to mobilise Uzbek women in order to spread Communist ideology. While they did pass laws designed to attack the traditional social order, Soviet policies mostly centred on propaganda. In Turkey, the state sought to modernise the country by *westernising* its people.

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Furthermore, the Soviets were colonial foreigners in Central Asia, whereas the regime in Turkey was indigenous and led by Mustafa Kemal Ataturk, a highly popular war hero. In Central Asia, enforcement of Soviet policies often used violent methods, while forced inclusion polices in Turkey were mostly driven by laws governing how Turks dressed and spoke. While Ataturk also wanted to modernise Turkey, he was motivated more by a desire to eradicate institutions he deemed responsible for the defeat of the Ottoman Empire in WWI—namely, what he perceived as the backward and provincial weaknesses of the *Khalifat* and unsophisticated nature of Ottoman society. Ataturk wanted to facilitate the transition from empire to a modern, Western-style nation-state by making Turkey "look" more European; the Soviets wanted another Communist state. However, it is the ways in which these two cases were similar—that they were contemporaries of each other, that they had common religion, and that they shared a common Turkic heritage—that has allowed the authors to isolate the variables they were most interested in analysing. Those variables were the policies implemented, the stated goals, and the regime type.

CENTRAL ASIA BACKGROUND

At the time of the Bolshevik take-over in 1918, Central Asian society was based on a rigid system of patriarchy, tribalism and patronage, and was divided into two groups: pastoralists who led nomadic lives; and oasis dwellers whose livelihoods depended on agricultural production. While the oasis dwellers and their nomadic brethren's livelihoods differed, they adhered to similar social norms. Both systems followed Islam and upheld Islamic law (*Sharia*) and its customary derivative (*adat*). They were both patriarchal systems, with men serving as the heads of households and female elites remaining in seclusion while poorer women worked in the fields or tended herds. The power dynamics in both groups were based on an elaborate patronage network. Marriages were arranged between tribal elders or fathers, or by kidnapping and rape. While a bride did not have much choice in either arrangement, her family would be compensated for the loss of her economic contribution to the household via the "bride-price" (*qalin*) from the groom's family. The bride would come to the union bearing an extravagant dowry (in the form of clothes, livestock, and household items) intended to follow her in the event of divorce or widowhood.[4]

During the Tsar's reign in Central Asia, the Russians did not try to change social norms. Russian policy at that time was essentially one of non-interference as long as the Central Asians nominally submitted to Russian suzerainty and adhered to Russo–Central Asian trade agreements.[5] After the Russian Revolution in 1917 and the establishment of the Soviet Union, Soviet leadership took a very different view of Central Asian society. Since the prerequisite economic conditions for the development of Communism did not exist in Central Asia (specifically an industrial complex based on the economic production of an exploited proletariat), the Bolsheviks called upon Marx's theory on the sex- and gender-based origins of the division of labour to justify the mobilisation of a feminine 'surrogate proletariat.'[6] In order to mobilise the surrogate proletariat, the Soviets needed to engineer female discontent and "minimize the obstacles in the way of a woman's perceiving, articulating, and acting upon discontent."[7] They called this operation *Hujum*, the Uzbek word for attack.

[4] Douglas Taylor Northrop, *Veiled Empire* (Cornell University Press 2004) 392.
[5] Edward Allworth, *Central Asia, 130 Years Of Russian Dominance* (Duke University Press 1994) 650; Dilip Hiro, *Inside Central Asia* (Overlook Duckworth 2009) 448.
[6] Gregory J. Massell, 'Law As An Instrument Of Revolutionary Change In A Traditional Milieu: The Case Of Soviet Central Asia' (1968) 2 Law & Society Review 179.
[7] ibid 189.

The *Hujum* was a coordinated effort that attacked traditional gender roles in order to break the power of traditional elites and to align Central Asia with Soviet ideology.[8] First, the Soviet leadership in Central Asia passed laws designed to provide women with recourse in situations deemed to be counter to Soviet ideology. These laws banned polygamy, child marriage, and bride price. They further abolished forced marriage and marital rape. Finally, the Soviet leadership promulgated laws that allowed women to initiate divorce and granted them equal standing in legal proceedings.[9] Second, the Soviet leadership encouraged 'independent' civil society organisations, such as the Soviet Department for Work with Women, called the *Zhenotdel*, to inform women of their new rights, encourage them to take advantage of those rights, and 'persuade' them to reject *purdah* (the practice of seclusion). Purdah in traditional Central Asia was expressed both by limiting women to their homes and by enforcing specific dress, such as the *paranji* and *chachvon* (the particularly Uzbek method of veiling).[10] The attack on purdah was characterised by mass unveilings and *paranji*-burning, fiery speeches by liberated women, and indigenous Soviet officials displaying their own unveiled family members.[11] Initially, the *Zhenotdel* predicted that it would take six months from implementation of Soviet policies to full female liberation and inclusion.[12] The prediction turned out to be optimistic.

Reaction to the *Hujum* by Central Asian women and men ranged from avoidance, to selective participation, to militant response. Initially, most Muslim women ignored the new policies. They did not unveil, did not take advantage of their "new rights", and did not bring their grievances to the newly established Soviet courts.[13] As the *Zhenotdel* increased its outreach, those who participated in the *Hujum* either selectively unveiled and expressed their grievances depending on the situational context, or they genuinely converted to Communism and militantly pursued the implementation of Communist ideals.

Selective participants unveiled to gain access to scarce resources, such as literacy programmes and food supplies, but often re-veiled as soon as they left Soviet administration centres. Those who did not return to wearing the *paranji* and *chachvon* would still cover their hair and faces with shawls or sleeves and refrained from speaking to men other than their immediate kin.[14] Some women actively opposed the *Hujum* and refused to unveil. These women also publicly decried men who allowed their wives, sisters and daughters to unveil.[15] However, the majority of women, particularly those in rural areas, did not know about such policies and those who did know responded by ignoring the *Hujum*. Soviet authorities discovered that those most attracted to the Soviet cause were the disenfranchised, outcast, and downtrodden, such as widows, orphans and prostitutes. These women already lacked the social capital to fully engage in Central Asian society, and in the end became a liability for the Soviet apparatus since they tainted the *Hujum*'s legitimacy and alienated the wider population.[16]

Most Central Asian men evaded, and equivocated with respect to, *Hujum* policies. Male coping strategies included: avoiding the new legal system altogether by not registering weddings, births or deaths; using substitutes for their wives in mass unveiling events; and retaliating against

[8] Northrop (n 4) 365.
[9] Massell (n 6) 179-228.
[10] Northrop (n 4) 365.
[11] Massell (n 6) 179-228.
[12] Northrop (n 4) 12.
[13] Massell (n 6) 203.
[14] Northrop (n 4) 97.
[15] ibid 193.
[16] ibid 90.

women who did unveil or who sought to claim their rights under the new legal order.[17] (Massell, 212) Both civilian men and indigenous Soviet officials perpetrated this retribution through domestic and street violence. The period was also characterised by a distinct increase in sexual violence.[18] Despite legal prohibitions against anti-*Hujum* attacks, prosecutions for such violence were rare and the punishment weak.

By the late 1920s, the *paranji* and veiling practices in general remained integral to Central Asian identity. Purdah, both domestic seclusion and wearing the *paranji* and *chachvon* in public, had become more prevalent and were turned into an act of defiance.[19] As the *Hujum* progressed and became more violent, the attack on traditional gender roles acted as a catalyst for a massive backlash and open rebellion in Central Asia. While the rebellion lasted for years, it lost much of its momentum after the Soviets abandoned the *Hujum* by 1930.[20]

TURKEY BACKGROUND

The Turkish Republic was established in a day but the transition from empire to nation-state took years. After devastating wars in the Balkans, the loss of Turkish-controlled European lands, and rising nationalist movements, nationalism became the most prominent of the political projects that were proposed to save the nation. The failures of Ottomanism (with its emphasis on Ottoman identity) and Islamism (with its emphasis on Muslim religious identity) to develop the country at the end of the nineteenth century motivated Ottoman elites to adopt Turkism (an emphasis on Turkish identity) with the introduction of new reforms by Abdülhamid II from 1876 to 1909.[21]

Forced inclusion in Turkey was imposed through the top-down policies and laws of the new Republic, beginning in 1923. The founding Republican People's Party (CHP) and its affiliated ideology, *Kemalism*, significantly defined gender roles and provided "both men and women the prescriptions of how to become 'modern' and 'civilized'."[22] The Turkish Republic claimed the exclusive prerogative to advocate women's rights to equality and empowerment. The nation-building process based on the ideology, policies, and reforms of *Kemalism* presented the 'perfect modern Turkish woman'—unveiled, dressed in Western clothes, yet still the chaste mother—as the image for all women, regardless of their cultural, social, economic, ethnic and religious background. Despite its dominance and power, *Kemalist* ideology encountered resistance. Mere propaganda about women's empowerment through textbooks and the press was not strong enough to persuade the population, nor did the discourse reach all levels of society.[23] Propaganda was therefore translated into law.

Top-down measures sought to integrate women into the public system, especially through changes in the civil or dress code. For instance, polygamy was banned in the new civil code while Western women's fashion was introduced.[24] The sentiment of "catching up" did not cease to haunt the new Republic's elites even as new laws and propaganda tried to erase all connections with the past in the collective memory. For this reason, although the war of liberation was fought against Western powers, Turkey as a nation-state now accepted and embraced the "universal validity of Western modernity as *the way* of building modern Turkey. For Atatürk and his followers, it was

[17] Massell (n 6) 212.
[18] Northrop (n 4) 256-262.
[19] ibid 91.
[20] ibid 91-92.
[21] Ayhan Aktar, Niyazi Kızılyürek and Umut Özkırımlı, *Nationalism In The Troubled Triangle* (Palgrave Macmillan 2010) 88.
[22] Jane L Parpart, Shirin Rai and Kathleen A Staudt, *Rethinking Empowerment* (Routledge 2003) 112.
[23] ibid 112.
[24] Feride Acar and Ayşe Güneş-Ayata, *Gender And Identity Construction* (Brill 2000) 337.

only through rapid modernization that Turkey could progress."[25] The modernisation of the Ottoman elites in their lifestyles and clothing had started even before the declaration of the Republic. Bureaucrats and officers educated in Western-style schools and colleges of the nineteenth-century Ottoman Empire were convinced that they had to "catch up" with the West.[26] Speaking French, having European-style furniture, and wearing Western clothes, including suits and ties instead of veil, *fez*, *çarşaf* and *peçe*, were actions perceived to be symbols of modernity.[27]

The most important Turkish law regarding female inclusion was the 1925 Women's Dress Code, which made it illegal for veiled women to attend school or work as civil servants. Furthermore, Turkey adopted the Swiss Civil Code in 1926, which completely contravened traditional family law. The dress code, of particular concern here and one of the most critical reforms in terms of women's status, was adopted in 1925. It included the Hat Law for men, which mandated the wearing of European hats and prohibited the *fez* and all other ethnic, traditional, or religious forms of headgear.[28] The Swiss Civil Code was adapted in Turkey in 1926 as the basis for Turkish family law.[29] In 1930, women were granted the right to be elected in municipal elections and, in 1934, to be elected to the parliament, as well as to vote. Finally, in 1934, the Last Name Law mandated that Turks obtain or create a last name, while their Ottoman titles were removed.

The tone of the reformation process was perceived as an indirect attack against the language of Islam, which for centuries had provided Anatolian Muslims with the norms of everyday conduct.[30] The first decades of the Republic witnessed various reactions, some more vociferous than others, from different parts of Turkish society. The gendered consequences of Republican policies, however, created more 'quiet' reactions within the society. The most visual reflection of the new state's conception was to be seen in the case of women's clothing. The image of the Western-looking, unveiled Turkish woman represented Republican modernity. The metamorphosis in the clothing of Ottoman women occurred gradually throughout the 1900s in various degrees and speeds for women of different social, economic, and ethnic backgrounds. Elite and urban women seemed to accept and undergo the transformation faster than rural women. In fact, by the end of the World War I, most women in Istanbul had already unveiled.[31]

However, the unveiling of women in big cities did not necessarily mean that the rest of the society followed suit. Women who unveiled initially faced a number of opposing reactions from those who tried to protect religious and traditional norms from the new secular policies. Republican women endured retribution, in forms such as verbal harassment, being spat on, being stoned, and even physical beatings.[32] However, one of the striking aspects of the conflict regarding women's clothing and unveiling in the Republican era was the gradual decay of the traditional and religious basis of the conflict and the adoption of "a [more] secular debate focused on the requirement of the nation's progress and modernity."[33] Women's clothing remained a serious and contentious issue even among elites and in the press, but the argument in such intense debates shifted to

[25] Emin Fuat Keyman, *Remaking Turkey* (Lexington Books 2007) xx.
[26] Akar (n 21) 86.
[27] Hale Yılmaz, *Becoming Turkish* (Syracuse University Press 2013) 22.
[28] ibid 22.
[29] Acar (n 24) 101-102.
[30] Yılmaz (n 27) 10.
[31] ibid 86.
[32] ibid 84-85.
[33] ibid 87.

whether traditional values (and women's apparel, such as the traditional *çarşaf* and *peçe)* would hinder Turkey's progress toward a modern state.[34]

ANALYSIS — CENTRAL ASIA

In the short-term, the Soviet attempt to mobilise the "surrogate proletariat" did not destroy the traditional social order; in fact, it had the opposite effect, of strengthening the status quo. In contrast to Soviet hopes, the *Hujum* reinforced traditional gender roles, and even forced those women who had not historically been subject to *purdah* (the poor, agricultural workers and the nomads) into seclusion. Forced inclusion polices placed women in "forced-seclusion" as a way to protect themselves from violent retribution, or as an act of defiance against the colonial regime.[35] Not achieving the intended success, Soviet policy subsequently shifted focus from mobilising women and creating a new class to encouraging inclusive economic industrialisation and collectivisation.[36]

In the mid-term, almost immediately after the *Hujum* was officially abandoned in 1930, the purges of Stalin's Great Terror swept across the entire Soviet Union, decimating the Communist Party, instilling a general atmosphere of fear, and killing the dream of an independent Central Asia.[37] The death of this dream and the realities of World War II spurred the evolution of a Soviet identity in Central Asia. European orphans and widows were evacuated to the Soviet East, along with production capability. This created industrial jobs for Uzbeks and other Central Asians, forming the proletariat that the Bolsheviks had desperately wanted to mobilise in the 1920s. Central Asians were conscripted into the Red Army and served alongside their Russian, Ukrainian, and Georgian counterparts, fostering bonds of camaraderie and shared experience.[38] Many Central Asians no longer saw themselves as first and foremost Uzbeks or Tajiks, but as Soviet citizens, indicating how war and a common enemy brought about what strategic planning could not.

By the 1960s the *paranji* and *chachvon* had fallen out of fashion, in favour of Russian style headscarves. The extensive Soviet education system facilitated the movement of the female labour force out of the informal sector into the formal economy, by providing them with skills and basic literacy.[39] The new era of female inclusion was shaped more by the slow institutionalisation of Soviet ideology and industry than by a revolutionary mandate. It was a ground-up change, not a top-down directive. After the collapse of the Soviet Union in 1991, there was a brief resurgence of the *paranji* and *chachvon*, concomitant with a resurgence of political Islam. The resurgence nonetheless was short-lived and the *paranji* and *chachvon* were soon replaced, for those women who chose to veil, by the *hijab*, a Saudi import.[40] The *hijab* allowed Central Asian women to participate in the public sphere without compromising their religious or cultural identities.

ANALYSIS — TURKEY

The dress-code reforms and secularisation policies discussed were some of the main pillars upon which Republican Turkey was founded, and their effects on different socio-economic contexts resulted in heated clashes when confronted by strong patriarchal and traditional elements. Some

[34] ibid 86.
[35] Yvonne Corcoran-Nantes, *Lost Voices* (Zed Books 2005) 208; Northrop (n 4) 91.
[36] Northrop (n 4) 91.
[37] Allworth (n 5) 650; Hiro (n 5) 448; Northrop (n 4) 392.
[38] Northrop (n 4) 347–350.
[39] Corcoran-Nantes (n 35) 60.
[40] Northrop (n 4) 356.

policies even had the opposite effects to those desired. For instance, forced unveiling in public spaces, such as schools, and the introduction of a mixed-sex education system sought to increase gender equality in access to education while promoting modernist ideals. In the short-term, however, these reforms reduced "actual" inclusion, preventing girls from getting an education in many parts of Turkey. Economically, most families in rural areas could not afford to pay the school costs for all their children, leading to the prioritisation of sons' education. Culturally, the integrated education of male and female students in the newly established coeducation system impelled most traditional families to not send their daughters to schools, so they would not mingle with boys.

Despite Republican promises of gender equality, the state mechanism continued to be patriarchal in nature and the visibility of women in the public sphere remained limited in the short- and mid-term.[41] The dress-code reforms and laws simply institutionalised the opportunities that urban and elite women already enjoyed, to the detriment of poor, rural women. Furthermore, in terms of gender equality, the Civic Code of 1926 supported male superiority and domination over women. Amidst the propaganda of the ideal Turkish woman as modern and Westernised in dress, she was still expected to maintain her traditional gendered role. The Civic Code designated the husband as the head of the family and legitimised his "rights" over his wife.

The long-term effects of these reforms on the actual inclusion of Turkish women are perhaps the most fascinating. A 2003 UNICEF report indicated that many families in traditional and rural areas still believed that girls' education was not a priority for the family and that girls should be raised to help with traditional female tasks, such as domestic work.[42] As at April 2014, only 77 of the 540 parliamentarians in the Turkish Parliament were women.[43] The net schooling ratio of girls for 2012–2013 was 98.92% for primary school, 92.98% for lower secondary school, 69.31% for upper secondary school, and 38.61% for higher education.[44] This disconnect in female education can be linked to the 1984 university headscarf ban, which prohibited women from wearing a head covering in universities. The lack of access to university education also limited women's choices in the labour force, forcing them to take lower-paid jobs. Until the ban was officially lifted in 2013, veiled women were forced to remove their headscarves, wear wigs, study abroad, or not seek higher education, while men from the same socio-cultural communities faced almost no challenges.

While most of the articles of the Civic Code regarding a woman's legal status were finally lifted or changed in 2001, sexual and gender-based violence against women continues, such as forced virginity testing, beating, marital rape, and honour killing. This indicates that changing or "equalising" laws alone does not always address the underlying social dynamics of gender inequality. Women's uneven participation in the labour force also displays the unequal effects of forced inclusion.

CONCLUSION

Forced inclusion policies in Soviet Central Asia and Turkey included propaganda and new laws, although each regime tended to favour one over the other. In Central Asia, *Hujum* propaganda attacked traditional gender roles by calling on women to initiate divorce and denied public services

[41] Unicef.org, 'UNICEF Türkiye / Kaynaklar / Çocuklarımız Için Bir Fark Yaratalım / Kız Çocuklarının Eğitimi' (2015) <http://www.unicef.org/turkey/dn/_ge29.html> accessed 5 January 2014.
[42] Ibid.
[43] Tbmm.gov.tr, 'Türkiye Büyük Millet Meclisi Milletvekilleri Dağılımı' (2015) <http://www.tbmm.gov.tr/develop/owa/milletvekillerimiz_sd.dagilim> accessed 15 February 2015.
[44] Ministry of National Education, 'National Education Statistics: Formal Education 2012-2013' (Official Statistics Programme 2013) 1.

to women who remained veiled. In Turkey, propaganda focused on linking the act of unveiling to nascent Turkish nationalism. In both cases, political and social elites were expected to lead by example by publicly having their wives and daughters unveil. For the most part, however, forced inclusion in Turkey was driven more by the promulgation of new laws than by propaganda, as was the case in Central Asia. The most important Turkish law regarding female inclusion was the 1925 Women's Dress Code, which made it illegal for veiled women to attend school or work as civil servants. Furthermore, Turkey adopted the Swiss Civil Code in 1926, which completely contravened traditional family law. The Soviets attempted to implement similar legal reforms, but did not succeed. As part of *Hujum* in 1926, the Soviets passed a series of laws first banning the use of traditional family law and then outlawing several specific practices. Nonetheless, implementation of these laws was sporadic and by 1930 the Soviets quietly abandoned the *Hujum* altogether.

How did Uzbeks and Turks respond to these policies? This paper coded reactions as cooperation, evasion, and/or defiance. Within each reaction type the authors assessed the reaction on a scale from universal to none at all. The analyses indicated that in the short- and mid- terms, evasion was the most common reaction in Central Asia, as cooperation was in Turkey, and this generalisation is supported by more nuanced analyses in the paper.

Most men in Central Asia evaded the *Hujum* by keeping their female family members even more secluded than before and avoiding the new administration in matters of family law altogether. There was a definite increase in gender-based sexual violence against women who unveiled, across socio-economic divisions. Women in Central Asia were also unlikely to cooperate with the *Hujum*, except for the most disenfranchised members of society who had the most to gain from the new Soviet ideology. A common evasion tactic was to unveil and re-veil depending on the situation. Furthermore, some women evaded the *Hujum* by retreating to the private sphere altogether.

In Turkey, men and government officials almost universally cooperated, only rarely defied, and almost never evaded the new forced inclusion laws, because they viewed Ataturk as a national hero. There was no popular will to evade, and defiance was seen as an act of treachery against Ataturk himself. Furthermore, the new dress codes did not seek to alter the Turkish patriarchal system in practice, so there was only a limited threat to men's hegemonic masculinity. Those who did defy the new policies and laws were mostly religious and ethnic minorities who saw these laws as yet another attack on their cultures and lifestyles. It was just as common for rural women in Turkey to evade forced inclusion policies, as it was for urban elites to cooperate. Urban female elites accepted the view that unveiling was necessary in order to develop a new and modern Turkish identity. Rural women mostly ignored the new Women's Dress Code because it did not impact on their day-to-day lives, especially because rural enforcement was weak. Furthermore, rural women traditionally only wore simple headscarves to cover their hair. This style of dress was not viewed as a threat to the image of a modernised Turkey and was therefore ignored. These women were the least likely to attend school or university and, as such, were the least likely to work in civil positions that required unveiling. Now, women who are unveiled, educated and professional, earning salaries comparable to their male peers are few and "have been the creation, as well as the showpiece, of the Republic as living testimony of its success in achieving the goals of modernity and [Westernisation]."[45]

In the short-term, there was very little impact on female inclusion in practice in Turkey while there was a definite increase in female *seclusion* in Soviet Central Asia. It is the mid- and long-term results that appear most significant. In the 1950s, practically no one went veiled in

[45] Acar (n 24) 336–337.

Turkey or Central Asia. This seems to be linked to the popularity of the 1925 Women's Dress Code in Turkey, while unveiling in Uzbekistan (as it was called by that time) was due more to the internalisation of Soviet identity.

In Turkey in the 1960s and 1970s, wearing the veil became a symbol of defiance and an expression of individualism. This has only increased over the last 50 years and has resulted in fewer educated women and a younger average age at time of marriage. Conversely, in Uzbekistan, for every one hundred male secondary school students, there are 98 female students in Uzbekistan.[46] Even after the collapse of the Soviet Union, most women abandoned the practice in favour of the more modern Middle-Eastern import, the *hijab*. The *hijab* allows women to engage in the public sphere without compromising their religious or cultural identities.

Based on these analyses, the authors conclude that their hypothesis was wrong. Forced inclusion did not mean a definite rise in female seclusion, as this also depended on the regime type and how policies were implemented. Policies that stressed propaganda and mandatory education, without proscribing the veil, brought women into the public sphere more easily than mandatory, law-driven policies. The regime type also played a large role in the success of such programmes. The foreign-imposed policies of the Soviets were unlikely to succeed, unless they were not seen as an attack on the traditional social order and focused on gradual internalisation. As the case studies discussed demonstrate, forced inclusion as a policy is not an effective tool to achieve political goals that are not aligned with most constituents' lifestyles, and misusing this tool is bound to produce unintended consequences.

[46] Data.worldbank.org, 'Ratio Of Girls To Boys In Primary And Secondary Education (%) | Data | Table' (2015) <http://data.worldbank.org/indicator/SE.ENR.PRSC.FM.ZS> accessed 13 February 2015.

SHAREHOLDER PRIMACY AND THE INTERESTS OF THE COMPANY: HOW ECONOMIC THOUGHT CAN BE TRANSFERRED TO LAW

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ABSTRACT

Economic reasoning has become so intrinsic to company law that it is getting harder to distinguish between legal and economical approaches in this field. Furthermore, in the scholarship of company law it has become customary to combine comparative method and economic analysis of law. In this context, the contractual theory of corporations currently dominates economic analysis of corporate law. However, economic thought is not always clearly reflected in legal norms. A good example from corporate law field is the position of shareholders.

This article will therefore: (i) review the main arguments of contractual and agency theories of the corporation which support the shareholder primacy principle; (ii) analyse how this principle can be reflected in positive company law; and (iii) review to what extent the shareholder primacy principle is reflected by a legal concept of the interests of the company.

Keywords: Company law, law and economics, interests of the company, shareholder primacy

INTRODUCTION

In the scholarship of company law it has become traditional to combine comparative method and the economic analysis of law.[3] Some US scholars even imply that economics of corporate law is a synonym for corporate law jurisprudence itself.[4] In this context, the contractual theory of corporations currently dominates the economic analysis of corporate law. This theory explains the contractual origin of corporations and the enabling nature of corporate law norms. In addition, the theory incorporates economic agency theory and explains the superiority of shareholders' interests in corporate law, i.e. why company law norms (or 'the standard contract')[5] provide, or should provide, rules which primarily ensure the interests of the shareholders. According to some authors, the adoption of the shareholder primacy model is increasingly taken for granted in, *inter alia*, transition economies.[6]

However, economic thought is not always clearly reflected in legal norms. A good example from the field of corporate law is the role of shareholders. In most continental European jurisdictions, shareholders are viewed only as members of a particular company; while managers have fiduciary duties towards the company and so have no direct legal obligations towards shareholders. Economic theorists, on the other hand, claim that shareholders should be considered as principals, and managers as their agents. Thus, managers would seem to have direct fiduciary duties towards the shareholders. Such a dichotomy in thought creates ambiguities and it is difficult to determine the line where economic arguments end and the legal position starts.

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[3] S Grundmann, *European company law: organization, finance and capital markets,* (2nd edn, Intersentia, 2012) 41.

[4] B Mcdonell and C Hill 'Introduction: The evolution of the economic analysis of corporate law' in B Mcdonell and C Hill (eds.) *Research Handbook on the Economics of Corporate Law* (Edward Elgar Publishing Limited 2012) 1.

[5] F Easterbrook and D Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 1–4.

[6] S Deakin, 'The coming transformation of shareholder value' (2005) 13 Journal of Corporate Governance and International Review 1, 11.

Therefore, this article is aimed at shedding some light into such dichotomy by analysing the concept of the interests of the company.[7]

A CONTRACTARIAN APPROACH TO COMPANY LAW

The idea that contracts and companies (firms) are related was expressed in the transaction cost theory when Coase argued that long-term contracts are likely to create relationships that could be termed a 'firm'.[8] A similar idea was also expressed by Williamson, who stated that transaction cost theory 'poses the problem of economic organization as a problem of contracting'.[9] However, the origin of contractarianism is usually attributed to Alchian and Demsetz[10] and to Jensen and Meckling.[11]

According to Alchian and Demsetz, a firm is a 'contractual organization of inputs'[12] with a 'centralized contractual agent in a team productive process'.[13] This centralised contractual agent is not a firm but the residual claimant (shareholder) and is intended to monitor the inputs and outputs of other members of the team in order to prevent them from shirking. Following this line of thought, Jensen and Meckling formulated a definition of a firm as a nexus of contracts.[14] Thus, a corporation is nothing more than a multitude of complex relationships, i.e. contracts, between the legal fiction (the firm), the owners of the labour, material and capital inputs, and the consumers of output.[15] In this sense the 'behaviour' of the firm resembles the behaviour of a market, that is, the outcome of a complex equilibrium process.[16] Furthermore, a firm is artificial creation and the emphasis should be on the conflicting objectives of corporate constituents. Thus, the idea of the interests of the company, from the economist's perspective, seems to be almost a meaningless concept.[17] However, this is not the case when one examines positive company law and related legal discourse on the interests of the company.[18]

While rejecting the concept of the interests of the company, contractarian theory embraces the shareholder primacy principle, which substitutes, or is equated to, the interests of the company. However, if a corporation is nothing more than economic contracts obtaining among various constituencies, why does company law establish (to a different degree in different jurisdictions), or should establish, rules which primarily ensure the interests of the shareholders? The contractual theory of the corporation provides several arguments why the shareholder primacy principle and the respective model of the corporation in certain jurisdictions is, and should be, dominant. One of the main normative grounds for this model is explained using agency theory, while other main

[7] For the purposes of this article, the terms 'the interests of the company' and 'the purpose of the company' will be used as synonyms.
[8] R Coase, 'The Nature of the Firm' (1937) 16(4) Economica 392.
[9] O Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (The Free Press 1985) 20.
[10] A Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62(5) The American Economic Review, 777–795.
[11] S Learmount, 'Theorizing corporate governance: new organizational alternatives' (2002). Available online at: <http://www.cbr.cam.ac.uk/pdf/WP237.pdf>, 3; M Jensen and W Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305–360.
[12] Alchian (n10) 783.
[13] ibid 778.
[14] M Jensen and W Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics, 311.
[15] ibid 310.
[16] ibid 311.
[17] F Easterbrook and D Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991) 12.
[18] For example, A Keay, 'Ascertaining the corporate objective: An entity maximisation and sustainability model' (2008) 71(5) The Modern Law Review 663–698.

arguments refer to, *inter alia*, the special status of shareholders (residual claimants), and incomplete contracts, as well as offering broader efficiency and welfare arguments.[19]

At the core of agency theory there are different and conflicting relations among various corporate constituents.[20] It should be noted that the term 'contract' in this context does not have the meaning attributed to it by law. Agency theory states that there are two main actors at any given time (although they can be treated differently depending on the situation): the principal and the agent. The principal in this relationship is the stronger party since he has the authority and power to appoint and direct the agent. The agent, on the other hand, performs all the tasks with the authority delegated to him in the best interests of the principal.[21] An important factor in this theory is the assumption that both the principal and the agent are rational utility maximisers.[22] Consequently, such reasoning leads to conclusion that the agent might favour his own agenda and not the interests of the principal.

Because the agent is considered to be a utility maximiser, agency theorists have assumed that the relationships between the principal and the agent are problematic because of their human nature as clearly shown by Jensen and Meckling.[23] Under such presumptions, the agent is likely to neglect the interests of the principal in order to pursue his own agenda.

Due to the nature of the agent to prefer his own interests over the interests of the principal, conflicts of interest arise. These conflicts of interest are a secondary, undesirable outcome of the agency relations that create the so-called agency costs.[24] If agency costs are low enough, the principal will engage in monitoring the agent and will direct him to act in the interests of the principal. However, if the agency costs are high, the principal is likely to choose not to control the agent and instead to allow the agent to act as he sees it fit.

Due to these agency theory assumptions – that shareholders are the principals and managers are the agents of the shareholders – coupled with the fact that, due to the opportunistic behaviour of agents, the principals might incur agency costs, it is concluded that managers should act mainly for the interests of shareholders.[25] This leads to the reasoning that managers should have duties towards shareholders.[26] This, in turn, should be reflected in the legal regime, which should provide rules that limit agency costs to the maximum extent possible, and should align the interests of managers with the interests of shareholders. Thus, it could be argued that shareholder primacy model lies at the heart of agency theory. Furthermore, economic agency theory can be used as a normative ground for legal intervention in order to protect the interests of the shareholders.

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[19] For an overview of arguments for and against shareholder primacy (including from the property rights theory of the corporation, etc.), see: A Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' (2009). Available online at: <http://ssrn.com/abstract=1498065>.

[20] Jensen (n14) 308.

[21] A practical and illustrative example on the principal-agent relations is given by Posner. See: E Posner, 'Agency Models in Law and Economics' (2000). Available online at: <http://ssrn.com/abstract=204872>, 1.

[22] Jensen (n14) 308.

[23] M Jensen and W Meckling, 'The Nature of Man' (1994). Available online at: <http://ssrn.com/abstract=5471>, 3–5.

[24] Agency costs in agency theory are defined as a sum of: '(1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss'. Jensen (n 14) 308.

[25] A Shleifer and R Vishny, 'Survey of Corporate Governance' (1997) 52(2) The Journal of Finance 737–783.

[26] Although from legal point of view, there are arguments against agency between managers and shareholders. See: A Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' (2009). Available online at: <http://ssrn.com/abstract=1498065>, 13–14.

SHAREHOLDER PRIMACY AND POSITIVE LAW

It is challenging to establish in simple terms how the theoretical shareholder primacy principle is reflected in positive company law. First of all, the concept of shareholder primacy can mean different things for different authors. For example, it can mean:

1. the model of the corporation reflected in the positive law of certain jurisdictions (for example, the USA[27] or other Anglo-Saxon jurisdictions);[28]
2. the standard shareholder-orientated normative model of the corporation;[29]
3. one of the corporate governance theories[30] (for example, which claims that the main control of the corporation is vested in shareholders as a class and the fiduciary duty of the management bodies is to maximise the wealth of the shareholders;[31] or which claims that the purpose of the company is the maximisation of shareholder wealth);[32]
4. part of the contractual theory of the corporation, which explains why company law mainly ensures, and should ensure, as a priority, the interests of the shareholders *vis-a-vis* other stakeholders;[33]
5. the cultural norms and other practices aside from company law as described by Deakin.[34]

Moreover, contractarian scholars usually do not extensively discuss which specific legal norms reflect the shareholder primacy model of the corporation.[35] Some authors stress the regulation of the fiduciary duties, while others use the purpose of the company as a criterion reflecting the legal shareholder primacy model.[36]

Perhaps one of most explicit shareholder models of the corporation is provided by H. Hansmann and R. Kraakman.[37] In these authors' opinion, if the jurisdiction in question does not establish co-determination rules for employees, or any other participation in corporate governance for other stakeholders, one of the main legal indicators of shareholder primacy model *vis-a-vis* other stakeholders (in the normal course of business[38]) could be the legal concept of the interests of the company. Of course, the single criterion of the interests of the company does not show the real power of shareholders in a particular corporate governance system, which also depends on such factors as concentration of ownership, corporate governance structure, and division of legal powers/competences between general shareholder meeting and other corporate bodies. Nevertheless, at a macro level, the legal concept of the interests of the company, in the authors'

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[27] K Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' (2011) 59 American Journal of Comparative Law 29.

[28] J Boatright, 'Shareholder Model of Corporate Governance' in R Kolb (ed.) *Encyclopedia of Business Ethics and Society* (SAGE Publications, Inc., 2008), 1903.

[29] H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 440–441.

[30] Mcdonell (n 4) 7; S Bainbridge, *The new corporate governance in theory and practice* (Oxford University Press, 2008) 8.

[31] Bainbridge (n 30) 8–10.

[32] A Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' (2009). Available online at: <http://ssrn.com/abstract=1498065>, 2, 6–7; A Keay, 'Ascertaining the corporate objective: An entity maximisation and sustainability model' (2008) 71(5) The Modern Law Review, 663–698.

[33] Easterbrook and Fischel (n 17) 37.

[34] See S Deakin, 'The coming transformation of shareholder value' (2005) 13 Journal of Corporate Governance and International Review 1, 11–18.

[35] For example, F Easterbrook and D.Fischel only broadly discuss shareholder primacy as normative and positive principle reflected in US company law. See Easterbrook and Fischel (n 17) 37.

[36] Bainbridge (n 31) 8–10; Keay (n32) 6–7.

[37] H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 440–441.

[38] In the case of insolvency it is common that the interests of the creditors and their protection become dominant, and thus they are secured *vis-a-vis* shareholder interests by company law or bankruptcy law norms respectively. See: J Armour, G Hertig, and H Kanda, 'Transactions with Creditors' in R Kraakman *et al.* (eds.) *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, Oxford University Press, 2009) 115–151.

view, indicates a normative model of the corporation in a particular jurisdiction and serves as a guiding principle for the interpretation of various legal norms, for example, fiduciary duties, inquiry proceedings, or the validity of the transactions contradicting the purpose of the company. Thus, the meaning behind the interests of the company could have not only theoretical, but also practical implications.

The interests of the company can be formulated by legislature *expressis verbis* and can be further explained through the fiduciary duties of the management bodies (for example, by identifying persons to whom such fiduciary duties are owed), or through other legal norms.[39] Furthermore, the purpose of the company can be interpreted as either a specific purpose applicable only to a particular legal form (company) formulated by legislature or courts, or as specific objects, aims and goals established in the articles of association or other internal documents of the company (for example, the provision of IT services, or the protection of investors). The analysis provided in the next part of this article is based on the concept of the interests of the company formulated by the legislature and courts of one emerging economy – Lithuania.

THE CASE OF LITHUANIA

The meaning of the purpose of the company in Lithuanian company law can be revealed through systematic analysis of various legal sources, especially statutory acts and case law.

The Lithuanian Civil Code distinguishes between public and private legal entities.[40] The purpose of the private legal entity (i.e. the purpose of the company, which is considered a private legal person under Lithuanian law[41]) is to meet the private interests.[42] Linguistic analysis of the purpose of the private company can be interpreted broadly – it can be taken as meaning any private purpose and not necessarily the interests of shareholders of a particular company. Nevertheless, systematic analysis of law and intentions of the legislature[43] suggest that the term 'private interests' mainly refers to shareholder value maximisation, which is achieved through profit-seeking. According to the commentary of the Civil Code, private interests should primarily be understood as shareholder profit.[44] Thus, even though the Civil Code does not specifically refer to shareholder value maximisation, this maximisation seems to be the intent of the Civil Code. This conclusion is also partially supported by the provisions of the Law on Companies stipulating that management bodies must act for the benefit of (i) the company and (ii) its shareholders.[45] In addition, according to the Civil Code, fiduciary duties as a general rule are owned to the company, but management bodies are also obliged to act reasonably and fairly towards the members of other bodies of the company.[46] Guidance regarding listed companies is also given by the Corporate Governance

[39] Under Lithuanian law, the purpose of the company (and other interchangeable terms such as the interests of the company, or benefits for the company) are used in several articles of the Lithuanian Civil Code (for example, 2.39 (Name of the legal person), 2.47 (Articles of association of the legal persons), 2.81 (Bodies of the legal person), 2.114 (Recognition of legal person as being illegally established), 2.115 (Mandatory sale of shares), 2.122 (Transfer of voting rights), 2.83 (Invalidity of *ultra vires* transactions), 2.87 (Duties of the members of the legal person's bodies), 2.124 (Inquiry proceedings) and of the Law on Companies, for example, Article 19(8)).

[40] Civil Code 2000, Article 2.34 (1).

[41] Law on Companies 2000, Article 2(2).

[42] Civil Code 2000, Article 2.34 (3).

[43] The legislature's intent is based on the commentary of the Civil Code, which was written to a great extent by the scholars who drafted the Civil Code.

[44] V Mikelėnas, G Bartkus, V Mizaras and S Keserauskas, *Lietuvos Respublikos Civilinio kodekso komentaras*. *Antroji knyga. Asmenys* (Justitia, 2002) 97–99, 119.

[45] Law on Companies 2000, Article 19(8).

[46] Civil Code 2000, Article 2.87.

Code,[47] which is applicable based on the 'comply or explain principle'. According to the Corporate Governance Code, the overriding objective of a company should be to operate in the common interests of all the shareholders by optimising shareholder value over time.[48]

Most extensively, the concept of the interests of the company is being discussed by courts in cases related to the fiduciary duties of management bodies, inquiry proceedings of the company and the validity of the transactions entered against the purposes of the company. Some of the most significant cases are analysed below.

Analysis of case law regarding fiduciary duties mainly reveals that the interests of shareholders (in the ordinary course of business) or the interests of creditors (in case of insolvency of the company) are taken into account when explaining the content of the interests of the company. In a case dealing with the duty of loyalty of members of the management body, the Supreme Court ruled that if management bodies strive to satisfy the interests of only one particular shareholder, this might be considered a violation of the duty of loyalty owned to the company.[49] Thus, in the authors' view, the Supreme Court indirectly upheld the position that acting in the interests of the company should mean acting in the interests of the shareholders *in corpore* (the shareholders as a class) and not in interests of one shareholder (despite the fact that such a shareholder might be the majority owner of the shares). The Supreme Court analysed the profit maximisation rule as a requirement applicable to the company. The court stated that unprofitable transactions executed by management bodies of the company might reduce the value of the shares, and thus might violate the pecuniary rights of shareholders.[50]

However, the court's position and interpretation of the interests of the company is based on the status of the company. The more financial distress the company faces, the more the interests of other corporate constituents are discussed in the court's reasoning. The interests of the creditors are considered especially when a company faces insolvency proceedings. In several cases where the interests of creditors were at stake, the Supreme Court indicated that management bodies have to act for the interests of the company, and that these interests do not always coincide with the interests of shareholders.[51] This also means that members of the management bodies do not have any fiduciary duties to the creditors of the company in the ordinary course of business,[52] during which the main duty of the management bodies is to satisfy the interests of the shareholders.[53] However, in the event of insolvency, the interests of the creditors prevail.[54]

The interests of the company are also reflected in cases dealing with *ultra vires* transactions, where courts analyse such terms as 'profit maximisation', 'profit seeking' or 'not causing harm'. Under Lithuanian law, *ultra vires* transactions are transactions entered into by the management bodies of

[47] Lithuanian Securities Exchange Commission and NASDAQ OMX Vilnius stock exchange. *The Corporate Governance Code for the Companies Listed on NASDAQ OMX Vilnius stock exchange, 2010*. Available online at: <http://www.nasdaqomxbaltic.com/files/vilnius/teisesaktai/The%20Corporate%20Governance%20Code%20for%20the%20Companies%20Listed%20on%20NASDAQ%20OMX%20Vilnius.pdf>, Principle 1.

[48] *Ibid*, p. 6. The role of other stakeholders and their interests seems to be limited to respecting their rights and interests established in the law (see principle 9, ibid 26).

[49] *AB „Klaipėdos Smeltė" v UAB „Birių krovinių terminalas"*, D. B. and R. M. [2008] No. 3K-3-73/2008 (Supreme Court of Lithuania).

[50] ibid.

[51] *BUAB „Barklita" v G. B. and J. G.* [2009] No. 3K-3-528/2009 (Supreme Court of Lithuania); *BUAB „Panevėžio balsas" v UAB „Eksena"* [2009] No. 3K-3-244/2009 (Supreme Court of Lithuania).

[52] *„Panevėžio spaustuvė" v R. Š. , A. B. , A. G.* [2012] No. 3K-3-19/2012 (Supreme Court of Lithuania). „Klaipėdos Smeltė" *v* L. A. [2013] No. 3K-3-290/2013 (Supreme Court of Lithuania).

[53] ibid.

[54] ibid. *BUAB "LRG farmacija"* v D. B., K. B., L. K., M. V. ir G. A. [2013] No. 3K-3-234/2013 (Supreme Court of Lithuania).

the company which contradict the purpose and aims of the company stipulated in the articles of association.[55]

There are various explanations of the interests of the company provided by courts in this context. However, the Lithuanian Supreme Court's overall rhetoric has changed over time to a less strict interpretation of the profit-seeking purpose of the company. For example, some time ago the Supreme Court noted that the company is a profit-seeking legal entity which has the purpose of receiving the maximum profit possible.[56] Thus, a duty to maximise – and not just to receive – profit, or not to cause harm, was introduced by the Court. In another similar case, the Supreme Court also established that even though profit-seeking as a purpose of the company is not established in the articles of association, it is nevertheless the purpose of a private company and the foundation of its existence.[57]

However, in several later cases the Supreme Court discussed only profit-seeking and not the maximisation of profit. For example, the court indicated that the sale of a property for a price significantly lower than the market price runs counter to the purposes of a private legal entity, i.e. to seek profit;[58] likewise, excessively risky and unprofitable transactions might be recognised as contradicting the purpose of the corporation.[59] Moreover, in a more recent case the Supreme Court expanded its interpretation by explaining that the general purpose of a private company is to satisfy private interests, and that profit-seeking is one of the means of achieving this purpose.[60] The court pointed out that unprofitable transactions cannot *per se* be a legitimate ground for invalidating a particular transaction, unless it is obviously harmful for the company and such harm cannot be rectified by other means (for example, through the personal liability of the managers). However, in the light of the circumstances of the case, it seems that the purpose of such reasoning was mainly to stress the importance of the *favour contractus* principle and to limit the possibilities of the shareholders to dispute unprofitable transactions (such a claim is considered an *ultima ratio* remedy).

CONCLUSION

The legal concept of the interests of the company is one of the main indicators of the economic shareholder primacy approach. The concept can be used to link economic and legal thought in order to enrich interdisciplinary research in the field of company law.

Although various approaches regarding the purpose of the company exist, mainstream economic theories, including the nexus of contracts and agency theory, support arguments that the interests of shareholders should be dominant. In this regard, these theories correlate with positive law in any given jurisdiction, which means that such theories are either endorsed or rejected. Such

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[55] Civil Code 2000, Article 1.82.

[56] *BAB "Statūna" v UAB "Parama", UAB "Deklitas", J. S., J. Ž., P. R., D. R., S. R* [2004] No. 3K-3-263/2004 (Supreme Court of Lithuania). The Court ruled that a transaction is against the interests of the company if it is concluded with parties closely related to the members of the management body without obtaining prior approval from the general meeting of shareholders, as required under the law and articles of association, and for a price significantly lower than the market value.

[57] *Akcinė bendrovė „Aksa" v R. M., UAB „Azovlitas"* [2006] No. 3K-3-312/2006 (Supreme Court of Lithuania). The Court ruled that a transaction for a price significantly lower than the market value runs counter to the purpose of the company, i.e. to pursue profit.

[58] *BUAB „Artrio-2" v UAB DnB Nord lizingas, UAB „Lengvasvėjas", UAB „Vėjoratai"* [2008] No. 3K-3-262/2008 (Supreme Court of Lithuania).

[59] *UAB „Profsąjungų autoūkis" and kt. v Lietuvos profesinių sąjungų konfederacija, and others* [2008] No. 3K-3-287/2008 (Supreme Court of Lithuania)..

[60] *BUAB „Balmeto Medis" v AB „Simega"* [2011] No. 3K-3-511/2011 (Supreme Court of Lithuania). In this case, the bankruptcy administrator of the insolvent company UAB "Balmeto Medis" disputed transactions concluded by the company as (*inter alia*) being against the aims and purposes of the company.

a correlation may even occur without direct reference to a particular economic theory. However, a common ground for discussion between legal and economic scholars is required and such ground could be the concept of 'the interests of the company'.

As legal and economic approaches tend to use different jargon, in the authors' opinion, the legal concept of the interests of the company is one of the main indicators of the economic shareholder primacy approach. Analysis of legal rules and the case law of one of the emerging market countries – Lithuania – has revealed that the interpretation of the purpose of the company strongly supports the shareholder primacy model.

HUMAN RIGHTS IN ISLAM: A CRITICAL ANALYSIS IN THE LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW

AHMED BALTO[1]

ABSTRACT:
This paper explores the Islamic approach to human rights law and the emphasis it places on obligations, rather than the Western focus on rights. It will make a case for the effectiveness of the Islamic language of duties, and proposes that it does not, in fact, conflict with the Western language of rights, for two main reasons. First, the proposition of placing obligations on individuals for the sake of society, although not widely practiced in the West, does exist there, and this will be discussed in detail. Second, the language of duties can significantly enhance the language of rights, as long as the ultimate aim is shared by both Western and Islamic ideologies. This shared aim must include the upholding of the basic principles of morality, such as freedom, equality and autonomy.
Key words: Islamic Human Rights, Western Human Rights, Rights and Duties, Basic Morality.

INTRODUCTION

Ongoing, and controversial, discussions about human rights make it important to focus on what we really mean by the term, from both a Western and an Islamic perspective (since both of them represent the prevailing ideologies constituting international human rights law).[2] The aim of this paper is to explain the different methods of approaching human rights, namely the rights approach and the obligation approach. It argues that human rights are essentially a mechanism for applying certain principles in an ideology.[3] This mechanism transforms ideas from theory to practice, making them more effective and practicable. So, if such principles exist in theory in both Western and Islamic ideologies, then one can conclude that the two share the same basic principles; the only difference is that while one prefers that such principles are upheld through the language of rights, the other favours the language of duties.

Furthermore, this paper will assert that the languages of rights and duties have a similar effect when it comes to the application of human rights. In other words, any right for one person should constitute a duty for another, and a duty for someone should constitute a right for someone else. For example, the Holy Quran proclaims the duty of the individual not to violate the privacy of others.[4] This presumes, from a Western point of view, that there is a right to privacy which cannot be violated.[5] Another example is Article 10 of the Universal Declaration of Human Rights,

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[2] Ibraheem Madcore, T*he Islamic Way of Thinking* (1st edn, Samerco Publisher 1984) 9–12.
[3] Ahmed Abdulsalam, *Arab Politics* (The Tunisian Company 1985) 12–13.
[4] "O you who have believed, do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants. That is best for you; perhaps you will be reminded." (24:27).
[5] Emad Kasawnah, 'The Method of the Holy Quran in Presenting Provisions Verses' [2009] 5 (2A) The Jordan Journal of Islamic Studies 18–20.

which stresses the right to a fair trial for individuals;[6] it subsumes an obligation on states to establish an effective judicial system.[7]

HUMAN RIGHTS IN ISLAM

This section explores whether Islamic law endorses rights, duties or both, by considering some religious texts contained in the main source from which it draws – the Holy Quran. This section also looks at the link between Islamic law and the position of God. In other words, it clarifies how some spiritual aspects of the law can enhance the effectiveness of Islamic human rights law.

The Concept of Human Rights and Duties within Islamic Law

In Islam, the term "right" refers to one of God's names and the definition of the term "right" in Arabic refers to *haq*. This word implies one person's authority over another. However, the term "right" has a variety of meanings in the Arabic language and in the Quran itself.[8] One of its direct meanings is "advantage", something which all human beings inherently possess. In the Holy Quran, it is also translated by the words truth, duty, constancy, justice and the opposite of falsehood.[9] In any event, it has to be admitted that the language of rights is very rare in the Islamic context, as most rulings are expressed through the language of duties. That is to say that even if the term "rights" does exist ("And from their properties was [given] the right of the [needy] petitioner and the deprived"[10]), it is still related to God and the importance of following His commands and orders. Similarly, when Professor Ali Usman describes that the Holy Quran renders a right to justice from the verses, "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice...",[11] he derives this right from the individual's obligation to obey God, whose orders are, Muslims believe, always righteously motivated.[12]

Therefore, it can be said that there is no clear definition of the concept of rights in Islamic texts. Instead, Islam indicates moral rules, predominantly in the shape of duties, to be practiced by Muslims. Therefore, and on account of Western influence, Islamic scholars have started to embrace a plethora of different factors when considering rights. In other words, owing to the advances made by Western civilisation and the universality of the human rights claim, Muslim scholars have started searching for rights within Islamic law in an attempt to show similarities with the Western approach. As Bilhari Kausikan argues, "For many in the West, the end of the Cold War was not just the defeat or collapse of communist regimes, but the supreme triumph and vindication of Western systems and values. It has become the lens through which they view developments in other regions."[13]

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[6] "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."
[7] Tabliah Al-Qutob, *Human Rights in Islam-Comparative Study* (Dar Al-Feqr Al-Arabi 1984) 90–93.
[8] Soubhi Saeed, *Islam and Human Rights* (Dar Al-Nahdah Al-Arabia 1994) 3.
[9] Yoosef Al-Badawi, *Ibn-Taimia's Sharia Purposes* (1st edn, Dar Al-Nafaes 2000) 91.
[10] The Holy Quran 51:19.
[11] ibid 4:58.
[12] Ali Manzo Usman, 'Social Human Rights in Islam and the Universal Declaration of Human Rights (UDHR1948): Comparative Study' (2012) 03(5) OIDA International Journal of Sustainable Development 39, 40–41.
[13] Bilhari Kausikan, *Asia's Different Standard* (92 Foreign Policy 1993) 24.

As a result, many Islamic scholars and jurists claim that Islamic ideology contains human rights, just as Western ideology does. For example, Mashood Baderin claims that duties always imply rights, as is the case when the Holy Quran says, "O you who have believed, do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants."[14] Baderin argues that the right to privacy arises from the duty not to intrude on another person's privacy.[15] The fact that the Islamic text includes the language of duties rather than rights should not inflict a fundamental conflict between the West and Islam since the rule of moral decency, which involves respecting the privacy of individuals, should prevail. In a similar vein, Ibin Nujaym defines a "right" as "that to which a human is entitled", while Shalabi defines it as "every benefit comfortable to Sharia".[16]

Similarly, Mohammad Kamali argues that the definition of rights under Islamic law should recognise four elements: first, that it is something (an act/benefit/interest) established by Sharia; second, that there must be a decisive permission to, or, at the very least, no explicit prohibition of, the right concerned; third, the legally responsible person to whom the right applies should be bound by a duty to respect that right; and fourth, the right-bearer may be an individual, or individuals, or God.[17] Therefore, it is observed that the prescriptions in Islamic law which may take the form of prohibition, command or sanction can be seen through *Ijtihad* (independent reasoning of Muslim scholars) as either rights conferred to Muslims or duties imposed on them. This should not be a problem so long as the moral rule is ultimately respected.[18]

Importantly, one of the reasons why Islamic law tends to pay attention to duties more than to rights in expressing its rulings and judgments involves the nature of the relationship between God and the individual in Islam; the idea of duties seems to be more specific and accurate than the language of rights.[19] In other words, since Muslim individuals are obliged to obey God, the orders should be framed in a decisive way, holding the individuals accountable if the orders are not performed. As Mohammad Kamali argues, "A person having a duty must be told specifically, not in general terms, what he/she may or may not do. But a right to life and property, statable as it is, is very general and may be correlated with a long list of duties."[20]

Spiritual Aspects of Islamic Human Rights Law

The theology of Sharia states that individuals must believe that God has ultimate power since He is the creator of the world.[21] Therefore, the validity of rights depends on the individual's submission to God's law, which is believed to be the perfect law. This language necessitates the premise that individual Muslims must behave towards one another as God considers they should. Consequently, they will be rewarded by God, or they will be punished in either temporal life or

[14] The Holy Quran 24:27.
[15] Mashood Baderin, 'Modern Muslim States between Islamic Law and International Human Rights Law' (PhD thesis, University of Nottingham 2001) 55–57.
[16] ibid 41–43.
[17] Mohammad H. Kamali, 'Fundamental Rights of the Individual: An Analysis of *Haqq* (Right) in Islamic law' (1993) 10 (3) The American Journal of Islamic Social Sciences 340, 344–345.
[18] ibid 357–358.
[19] Mohammad Othman, *Rights, Obligations and International Relations in Islam* (Dar Eqra 1982) 77–81.
[20] Kamali (n 17) 364.
[21] Tamier Arief, *Governing by God's Order* (Dar Al-Aqlaqe 1982) 66–67.

the afterlife.[22] Therefore, it is submitted by most Muslim scholars that rights in Islamic law are divided into the rights of God (*huquq Allah*), the rights of humans (*huquq al-ibad*), and a combination of both. It should be noted that the idea that God has rights does not mean that He needs those rights for Himself, rather that they represent a means for maximising the prosperity of human beings.[23] For example, since it is believed that God is the creator of the earth, the most important right for Him is to be worshipped by every Muslim.[24] This right guarantees freedom and liberty for individuals since they will not be subjected to anyone on earth except God.[25] Moreover, some scholars, such as Al-Shaibi, take the proposition further, arguing that God's rights can play a vital role in enhancing the rights of humans, if one considers that everyone must obey His teachings. For example, God orders people to judge with justice,[26] a rule that, if followed, serves individuals well, while at the same time illustrating compliance with God's orders.

In this respect, Al-Qarafi argues that there is no ruling in Sharia that is entirely independent of God's rights, since all rights and duties are derived from His commands.[27] However, the factors adopted in determining whether a ruling represents a right of God, a right of an individual, or a combination of the two, are subject to interpretation and thus vary among the different Islamic schools of law.[28] In any event, in essence, the Holy Quran asserts basic principles of moral decency which are delivered and implemented by the individuals through both the language of rights and the language of duties. This leads one to conclude that ideally, in the Islamic context, the role of "law" enforcement should be obsolete: following the law should be a fundamental priority for everyone. In other words, people's respect for God's law should enable them to exercise self-control and self-censorship in applying Sharia.

In addition, the duties or rights are sourced in God, as the Holy Quran affirms: "These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah – it is those who are the wrongdoers."[29] Therefore, they are holy, and actualising them is also holy. In Islam, it is believed that God knows about the secret thoughts of each individual, as the Holy Quran affirms: "And if you speak aloud – then indeed, He knows the secret and what is [even] more hidden."[30] This belief invalidates the need for formal control to implement duties or rights. By connecting them to the will of God, they are amply implemented, something which no formal control could achieve. This is an important difference between the two ideologies – rights subject to God's law or moral law rather than exercisable against the law.

[22] Paul Kurtz, 'On Human Values' (2006) Science and Spirits 35, 35–36.
[23] Saeed (n8) 84–87.
[24] The Holy Quran 51:56.
[25] Baderin (n15) 48–51.
[26] The Holy Quran 4:58.
[27] Baderin (n 15) 50–51.
[28] Kamali (n 17) 354–355.
[29] The Holy Quran 1:229.
[30] ibid 20:7.

THE EMERGENCE OF THE TERM "HUMAN RIGHTS" AND THE RELATIVE VALUE OF "DUTY" IN THE WESTERN DOMAIN

"Human rights" – a relatively modern term – are defined as the certain inalienable rights which are conferred solely on the basis of humanity. These rights represent core truths about being human and dictate the essence of many other basic rights, such as freedom and equality. In 1948, the UN Charter included the term for the first time.[31] The Universal Declaration of Human Rights (UDHR) is heavily involved in determining human rights. It was declared at the end of the Second World War as a response to the atrocities and conflicts of the past.[32] As Henry Steiner affirms, the UDHR "has retained its place of honor in the human rights movement. No other human rights document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence as on the movement as a whole."[33]

As previously touched upon, the formulation of the language of rights was undertaken, for the most part, by a number of Western states, all of whom were members of the UN in 1945. In other words, many states and communities, especially Islamic ones, did not participate in constructing the language of rights for reasons such as colonialism.[34] Although other states took part in the UN and participated in enacting subsequent human rights declarations at a later time, they did so in the context of an already established system of rights based on philosophical assumptions made in their absence. It is argued that this situation has put pressure on the new members in the UN, who face the choice of either approving what has been agreed before them, or refusing the agreed framework and facing opposition from the majority of the world.[35] As a consequence, the concept of universal human rights, which emerged in the West, has prevailed in the international domain.

Although the West prioritises the individual over society, it is important to realise how some "rights" are restricted (and therefore which duties are introduced) and on what basis those restrictions are justified. By referring to the International Bill of Human Rights, it can be concluded that absolute rights are extremely rare, and, therefore, that there is an increased possibility of imposing duties. Moreover, these articles assert that the proposition of imposing duties on individuals and placing limitations on rights is a convention that the West is familiar with,[36] and that doing so does not jeopardise the protection of individuals.

However, since the main focus here is the individual's interest, two main points should be considered before any duties that may affect rights are imposed: the importance of the fundamental interests of individuals, and how this process will have to be applied through appealing to rational justifications, since even leading proponents of individualism argue that rights should be restricted by laws that recognise the security and integrity of other individuals.[37] Nonetheless, any duty

[31] Henry J. Steiner and Philip Alston, *International Human Rights in Contexts: Law, Politics, Morals* (Oxford University Press 2000) 137.
[32] Bertrand Russell, *History of Western Philosophy* (The Committee of Publishing and Translation 1967) 38–40.
[33] Henry Steiner, 'Securing Human Rights: The First Half-Century of the Universal Declaration and Beyond' (1998) Harvard Magazine 45.
[34] Abdullah Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives' (1990) 3 Harvard Human Rights Journal 13, 15–17.
[35] Russell (n32) 57–63.
[36] Frederic Megret, *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 205–206.
[37] Anwar Raslaan, *Public Rights and Obligations in Variable World* (Dar Al-Nahdah AlArabia 1993) 19–23.

should also consider the individual's demands. Clearly, such duties may vary according to the basic needs of the individual.[38] The only exception that permits the violation of the individual's freedom is when such freedoms violate the freedoms of others, or pose harm to them.[39] This is because the prosperity of individuals is prioritised over everything else; if there is a possibility of harm, either physical or emotional, the protection of the individual's security outweighs everything else, even personal preference.[40]

A COMPARISON OF WESTERN AND ISLAMIC HUMAN RIGHTS LAW

This section concerns the proposition that human rights or duties are solely mechanisms for applying the basic rules of morality. Such rules are advocated by both the West and Islam. However, when each ideology intends to apply such rules, the West uses the language of rights while Islam uses the language of duties. This difference in implementation is the result of cultural and historical factors. Ultimately, it is argued that this does not present a conflict at the level of principle between the two ideologies.

Basic Morality as a Basis for Human Rights

It must be noted that the classifications of the acts, whether they represent a right or a duty, are not a primary goal in themselves, rather that they express certain ideas within an ideology. For this reason, we should focus on ideas which refer to morality itself, rather than the mechanism through which morality is applied. To put it differently, in the case of inheritance, we can say that x has the right to inherit or that y has an obligation to give x his share of inheritance, as long as the same end in both scenarios is served, that is, x receives his inheritance. Therefore, when we say that Islamic law calls for human rights, we mean that they are concluded from Islamic law, which primarily calls for the same subject but in the shape of duties. As Mohammad Kamali confirms "… the reality, existence, and significance of rights in Islamic law is undeniable; it is merely the form in which concepts are communicated, a certain view on the same reality, rather than a denial of that reality."[41]

As Louis Henkin contends, human rights "reflect a common sense of justice, fairness, and decency".[42] For example, the moral law forbidding murder is interpreted as a right to life. In this example, the right to life is conferred solely to protect a moral rule which is the preservation of life. As David Stamos asserts, "Human rights according to such a view constitute a means only, not an end, which raises the question of whether there are better means available for the desired ends."[43] In such case, if the end goal is seen as the law of morality then the means to this goal can be applied differently by each ideology: they can, for example, use either human rights or human duties. Ian T. Ramsey confirms that it "is also important to recognize that certain human interests

[38] Fathy Al-Dreney, *The Right and the Extent of Power to Restrain it* (3rd edn, Al-Risalah Organization 1983) 49–51.
[39] Ali Mohammad, *The Political Western Thinking* (Dar Al-Maarefah Al-Jameah 1981) 33–37.
[40] Al-Dreney (n38) 29–30.
[41] Kamali (n17) 342.
[42] Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 2.
[43] David Stamos, *The Myth of Universal Human Rights: Its Origins, History, and Explanation, Along With a More Humane Way* (Paradigm Publishers 2013) 64–65.

are so fundamental and so general that they must be universally acknowledged in some form and to some degree in any conceivable moral community".[44]

This demonstrates the proposition that there is a universal minimum standard of morality which represents the nature of individuals as social entities and responds to the fundamental needs we have in order to live with one another.[45] These needs are essential for maintaining social cohesion and harmony; if they are not fulfilled, social life would be almost impossible and life generally would become impaired.[46] In other words, the basics of morality, which are associated with fundamental human needs, are not like other virtues "such as humility and chastity, which are optional subjects and are based only on pictures of human nature, which men are free to adopt or not as they choose".[47]

The Languages of Rights and Duties: An Analogy

The dominant language that communicates the rulings of Sharia to individuals is the language of duties. This means that individuals are held accountable to perform certain obligations towards others in order to achieve the essence of Islamic moral decency.[48] However, due to Western influence, Muslims have started to adopt the language of rights as well.[49] For example, Muslim scholars such as Mashood Baderin interpret the duty to God not to interfere with anyone's privacy (expressed in the Holy verse "do not enter houses other than your own houses until you ascertain welcome") as a right to privacy. Here, the right of privacy derives from a duty owed to God.

Indeed, it is argued that the Holy Quran sees no great difference between conferring rights on individuals, on the one hand, and imposing duties on individuals for the benefit of the community on the other, since they will both, ultimately, amount to the same thing. There is a correlative relationship between rights and duties, since a conferred right cannot be effective unless there is a duty on others to respect that right. In other words, if there is no obligation on others to respect a certain right, then this right will become a mere interest with no legal claim.[50] For example, the Holy Quran expressly prohibits murder.[51] This provision may be seen either as an obligation not to kill individuals, or as a right to life for individuals; in any event, the Holy Quran aims to preserve the lives of humans. In a similar vein, the Holy Quran orders individuals not to trade unless in a lawful way and with mutual consent. This can be seen either as respect for the right of owing a property, or as an obligation not to steal or control properties without the consent of their owners.[52]

All this supports the notion that the end is more important than the means. In addition, almost all rights have corresponding duties in respect to individuals, and they may be looked upon as two readings of the same reality. As Benn and Peters point out, "right and duty are different names for

[44] Ian T. Ramsey, *Christian Ethics and Contemporary Philosophy* (SCM-Canterbury Press Ltd 1966) 291.
[45] Basil Mitchell, *Morality: Religious and Secular* (Clarendon Press 1980) 45–55.
[46] Joel Feinberg, *Moral Concepts* (Oxford University Press 1969) 67–68.
[47] Mitchell (n 45) 55.
[48] Othman (n 19) 74.
[49] ibid 71–72.
[50] Al-Badawi (n 9) 36–38.
[51] "whoever kills a soul unless for a soul or for corruption [done] in the land – it is as if he had slain mankind entirely. And whoever saves one – it is as if he had saved mankind entirely." (5:32).
[52] Kasawnah (n 5) 23–26.

the same normative relation, according to the point of view from which it is regarded."[53] For example, if one has a right to a property, this presumes an obligation to refrain from entering it on whoever happens to be in a position to enter that property.[54] Therefore, Joel Feinberg confirms that "it is unquestionably true that when one party owes something to another, the latter has a right to what he is owed."[55]

CONCLUSION

It is clear, then, that Western and Islamic human rights discourse share many common terms, but that they have different nuances and implications. Many Western human rights identify – whether consciously or not – with 1400-year-old Islamic principles and values. It is important to reiterate that the term "human rights" is a product specifically of modern Western civilisation, but that Muslims have been influenced by the West, and have subsequently started to use and interpret Islamic law through the language of rights too – though not exclusively.

Ultimately, when we consider Western human rights and Islamic human rights, the differences result from different interpretations and practices. In other words, the differences emerge when explaining the meaning of terms such as morality and dignity, on account of different cultural and historical factors. An example that illustrates the fundamental unity of Western and Islamic views is that both doctrines emphasise the importance of freedom of expression. However, the principle is considered in the context of certain cultural and ideological parameters in each doctrine, since there is arguably no universal definition of the principle. As a result, Islam dictates that these principles respect the rights of the community and serve Sharia aims, while the West requires that these principles serve the individual's needs in society. So the same principle exists in both doctrines, but with different implications.[56]

[53] Stanley I Benn and Richard S Peters, *Social Principles and the Democratic State* (Allen & Unwin 1969) 89.
[54] Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) 134–135.
[55] Ibid 130.
[56] Elizabeth Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' (1994) 15 Michigan Journal of International Law 307, 307–311 <http://heinonline.org> accessed 11 December 2014.

VIOLATIONS OF THE RIGHT TO FREEDOM OF EXPRESSION: THE CASE OF INTERNET RESTRICTIONS

MOHADDESEH MOHEIMANI[1]

ABSTRACT

Freedom of expression and freedom of information are two fundamental rights that have been enshrined in various human rights instruments. However, some states limit these rights for a variety of reasons. If people want to use the internet, they should have access to it and the freedom to use it. In some countries access to the internet is limited and some of the limitations are justifiable and some of them are not. Iran is among the countries that restrict people's freedom to access the internet.

Keywords: UDHR: Universal Declaration of Human Rights, ICCPR: International Covenant on Civil and Political Rights, WSIS: World Summit on the Information Society, CDHRI: Cairo Declaration of Human Rights in Islam

INTRODUCTION

Nowadays, the internet plays an important role in our everyday life. People use this widespread technology in various ways for entertainment, trade, advertisements, communication, medical surgeries, spreading news, political conference, scientific research, and so on. Regulating the internet and access to it are relatively new issues that are attracting jurists' attention. Internet regulation raises myriad questions, such as: Who can use the internet? How should the internet be used? To what extent should people have freedom in their use of the internet?

Iran is one of the countries that limits internet access to a great extent and is considered as an 'internet enemy'. The right to freedom of expression is being violated systematically, despite the fact that freedom of expression is provided for and protected, not only in international conventions, but also in the national law of Iran. Iran is a country with a long and complex history but two revolutions in particular had a great impact on the contemporary Iranian legal system. The first one was the Constitutional Revolution of 1906 and the second one was the Islamic Revolution of 1979. Studying the two revolutions shows the demand from Iranians during the last decades for democracy and freedoms in Iran. Based on international law protecting freedom of expression, this essay argues that Iran's government should not restrict the internet in the country. International conventions, declarations and customs oblige all countries to respect this fundamental right.

INTERNATIONAL DOCUMENTS

The most important and well-known document that protects freedom of expression is the Universal Declaration of Human Rights (UDHR). The UDHR acts as a model for many domestic constitutions, regulations and policies. Some of these constitutions refer directly to the UDHR, incorporate its provisions in national legislation, or use it in the judicial interpretation of domestic laws. Furthermore, some UDHR provisions have been incorporated into international customary law, making them binding for all states, even if a state did not sign the UDHR.[2] One of the articles that have been incorporated into customary law, Article 19, refers directly to freedom of expression:

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[2] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1998) 2 Peking University International and Comparative Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957798> accessed 20 March 2013.

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*[3]

Freedom of expression is not just the right to impart information and ideas or tell others what one thinks or knows in private or via the media; it also means the right to access as wide a range of information and viewpoints as possible. Listening to public debates, reading newspapers, watching the television, accessing information held by public authorities, and surfing the internet, are all part of this right. This right applies to any kind of fact or opinion whether it is useful and correct or not. Just because an idea is false, shocking, controversial or incorrect does not mean that it should be censored. [4]

As the article mentions, the state should 'respect' and 'ensure' freedom of expression and this can be done in a variety of ways such as: 'ensuring that minorities can be heard' or 'preventing the monopolization of the media by the state or private companies'.[5]

Freedom of expression may have different effects on private and public interests. Expressing ideas in the mass media may have a direct and great impact on public opinion and also on political processes.[6] The right to freedom of speech has always been limited by authorities' orders as a threat to security and well-being.[7] Freedom of expression becomes controversial when it threatens an important person's interests or important national interests, such as the ability and liability of a country to raise an army.[8] That is why there is a limit to freedom of expression, because this right can be a threat to other people's rights. Article 29 of the UDHR lists the limitations as follows:

> 1. Everyone has responsibilities to the community in which alone the freedom and full development of his own personality is possible.
> 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society.
> 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.[9]

This article shows us that individuals have both rights and duties and that those rights are limited, otherwise it would not be possible to have social harmony and balance.[10] As the article mentions, all limitations should be based in law and no arbitrary limitation is acceptable. The reasons for the limitations are restricted to morality, public order and general welfare, or the recognition of the

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[3] The Universal Declaration of Human Rights Act 1948.
[4] 'Key aspects' (Article 19) <http://www.article19.org/pages/en/key-aspects.html> accessed 9 May 2013.
[5] ibid.
[6] .James J. Magee, *Freedom of Expression* (Green wood, 2002).
[7] John S. Gibson, *Dictionary of International Human Rights Law* (The Scarecrow Press Inc, 1996).
[8] T M Scanlon, Jr 'Freedom of Expression and Categories of Expression' (1978) 40 University of Pittsburgh Law library <http://heinonline.org/HOL/Page?handle=hein.journals/upitt40&div=30&g_sent=1&collection=journals> accessed 14 March 2013.
[9] ibid No 3.
[10] Peter Danchin, 'Article 29 Duties and Limitations' (The Universal Declaration of Human Rights) <http://ccnmtl.columbia.edu/projects/mmt/udhr/article_29.html> accessed 9 May 2013.

rights and freedoms of others. Thus, even if a limitation is based in law, that law should not limit freedom of expression for reasons other than those mentioned.

Article 30 of the UDHR declares:

> *Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.*

So it prevents states from performing any action that violates the fundamental rights of people as mentioned in the UDHR, including the right to freedom of expression.

Most of the Muslim-majority countries including Egypt, Iran and Pakistan signed the UDHR in 1948.[11] Iran was a member of the United Nations and signed the UDHR in 1948. However, Iran did not incorporate the UDHR into its domestic law or use it in judicial interpretation. Iran is bound by these provisions in international law because, as mentioned before, some of the UDHR provisions have become incorporated into customary law.

The second international document is the International Covenant on Civil and Political Rights (ICCPR). In order to make the UDHR effective, a legal form of treaty was needed and by Resolution 543(IV) of 4 February 1952, the General Assembly directed the Commission on Human Rights to prepare two draft treaties. The first one was a covenant for civil and political rights and the other one for economic, social and cultural rights. The Commission completed its work in 1954. Accordingly, on 16 December 1966, the two covenants were adopted by the General Assembly by consensus, without any abstentions. In 2008, 161 states were parties to the ICCPR, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) had slightly fewer, with 158 ratifications.[12]

The protection of civil and political rights is enshrined in the ICCPR. Article 2 guarantees 'the rights of all individuals within a state party territory or jurisdiction without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[13] Article 3 enshrines the equal rights of men and women.[14]

Article 19 of the ICCPR refers directly to the freedom of expression in more detail than does the UDHR. It declares:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[15]

It is important to note some of the General Comments of the Human Rights Committee (HRC) regarding this article. In this comment the HRC states that 'freedom of expression is necessary for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'. The HRC also adds that it is binding for all states to respect freedom of expression and opinion, ensuring that the rights contained in Article 19 are incorporated into their national laws and are effective. It is interesting that the HRC does not recognize the reservations of states in the first paragraph of the article and considers them

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[11] .Jonathan Russell, 'Human Rights: The Universal Declaration vs The Cairo Declaration' (Middle East Centre Blog, 10 December 2012) <http://blogs.lse.ac.uk/mec/2012/12/10/1569/> accessed 20 March 2013.

[12] .Christian Tomuschat, 'International Covenant on Civil and Political Rights' (Audiovisual Library of International Law, 2008) <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html> accessed 20 March 2012.

[13] ICCPR Act 1966.

[14] Health and Human Rights, ICCPR, <http://www.who.int/hhr/Civil_political_rights.pdf> accessed 25 March 2013.

[15] The ICCPR Act 1966.

'incompatible with the object and purpose of the Covenant'; this gives further protection to the article because some states may wish to make a reservation on this article to justify their violation of these rights.[16]

The HRC also focuses on the new types of dissemination of information in the media such as the internet and mobile phones. It mentions that freedom of expression is not just about traditional methods of information dissemination but also new ones and that state parties must ensure the access of citizens and try to support the independence of these new media.[17]

Article 20 declares the following limitations:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[18]

Any restriction on freedom of expression must meet strict tests of justification and any limitation should be proportional and should not be implemented in a manner that nullifies the substance of the right to expression.[19]

The ICCPR was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and was signed by the Iranian deputy in New York in 1968. It was then ratified by the national parliament in 1972 and by the parliament of senates in 1975.[20]

According to Provision 9 of Iran's Civil Code which is valid today, 'Treaty stipulations which have been, in accordance with the Constitutional Law, concluded between the Iranian Government and other governments, shall have the force of law'. [21]

The outcome documents of the World Summit on the Information Society (WSIS) should also be discussed here. It is important to understand the definition of a summit as well as the role that summits play in international law. After the UN was created in April 1945 in a meeting in San Francisco with delegates of 50 nations, it was recognised that in order to resolve security issues and make progress regarding human development, a forum for discussion was necessary. Such forums are often called summits. High-profile conferences are frequently held as summits. Summits have placed long-term issues, including difficult problems such as environmental degradation and poverty, at the forefront of global issues because they involve heads of state, governments and other high-profile leaders from non-governmental and inter-governmental organisations, as well as leaders from the private sector and civil society.

In both official and unofficial meetings, thousands of NGOs, citizens, governments, academics and business people participate in these global forums. These conferences get front-page headlines and persuade world leaders to provide political support. UN Summits have been held on a variety of issues that have grabbed the attention of the world. They provide the opportunity for a free exchange of views between all delegates and accredited participants.[22] The

[16] General Committee on Human Rights, 'General comment' No. 34 (2011).
[17] ibid.
[18] ibid No 13.
[19] Alex Conte and Richard Burchill, *Defining Civil and Political Rights (*Second edition, ASHGATE, 2009).
[20] 'The International Covenant on Civil and Political Rights' (Human Rights and Democracy Library, December 16 , 1966) <http://www.iranrights.org/english/document-151.php> accessed 23 March 2013.
[21] Civil Law Code of Iran.
[22] 'United Nations Summits' (World Summit on the Information Society, 11 March 2004).

WSIS is one of the UN summits that considers the new and modern age of information and communication technology.

World leaders are able to solve various problems using ICT but are worried about the 'digital divide' at international and national levels that could cause a new class division in society: those with access to ICT and those without it. 'Recognizing that this new dynamic requires global discussion, the International Telecommunication Union, following a proposal by the Government of Tunisia, resolved at its Plenipotentiary Conference in Minneapolis in 1998 (Resolution 73) to hold a World Summit on the Information Society (WSIS) and place it on the agenda of the United Nations'. It was decided that the summit would be held in two phases; the first would be in December 2003 in Geneva and the second in November 2005 in Tunis.[23]

A Declaration of Principles was adopted by the delegates of 175 countries at the first phase of the WSIS in Geneva in 2003.[24] This Declaration demonstrates how an information society can be accessible to everyone.[25] The second phase took place in Tunis in 2005. The results included the Tunis Commitment, The Tunis Agenda for the Information Society and the creation of the Internet Governance Forum.[26]

It is mentioned in this summit that the freedom of expression that was provided for in Article 19 of the UDHR should be respected and it was noted that 'communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone everywhere should have the opportunity to participate and no one should be excluded from the benefits that the Information Society offers'.[27]

UN Summits are not like treaties or covenants, so states are not obliged to follow their rules. However, if these rules are incorporated into international customs, then states are obliged to follow them. The WSIS outcome documents act as a guideline that highlights a bright future for states participating in the ICT field and, because they have been prepared by a group of experts from various countries, they have a broader scope than national rules.

ISLAMIC DOCUMENTS

The Cairo Declaration on Human Rights in Islam (CDHRI) is the most important Islamic document for this discussion. Representatives of 54 Muslim countries signed the CDHRI in August 1990. Many of these countries admitted that the UDHR that was sponsored by the UN was in conflict with Islamic values and so they did not sign it.[28] The emphasis of the CDHRI is on human dignity like that of the UDHR. There is a direct reference in Article 22 of the CDHRI to the right to freedom of expression:

> a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.

<http://www.itu.int/wsis/basic/un-summits.html> accessed 7 April 2013.

[23] 'Why a Summit on the Information Society', (World Summit on the Information Society, 26 March 2008) <http://www.itu.int/wsis/basic/why.html> accessed 7 April 2013.

[24] 'Declaration of Principles' (World Summit on the Information Society, 12 December 2003) <http://www.itu.int/wsis/docs/geneva/official/dop.html> accessed 15 March 2013.

[25] ibid.

[26] 'Second Phase of the WSIS', (World Summit on the Information Society, 31 March 2009) <http://www.itu.int/wsis/tunis/index.html> accessed 5 April 2013.

[27] ibid No 23.

[28] .Ohmyrus, 'Islamic Human Rights?' (Faith Freedom) <http://www.faithfreedom.org/Articles/Ohmyrus30816.htm> accessed 10 March 2013.

> b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.
> c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.
> d) It is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.[29]

There is a limitation in this article to the right to freedom of expression. It is stated that the right to express an opinion should not be in contrary with principles of Shari'ah. The word Shari'ah is a general word and everyone can have a personal understanding of Shari'ah. Different interpretations limit this right to a great extent based on the intentions and understanding of governments and judges.

The Cairo Declaration of Human Rights in Islam is important to notice because it is not western countries but Islamic countries that made this declaration based on Islamic laws and Islamic principles.

As a result, based on Article 19 of the UDHR, Article 19 of the ICCPR, WSIS outcome documents and Article 22 of the CDHR, Iran is obliged to respect the right to freedom of expression in all its forms, including freedom of expression on the internet. If Iranian governments want to limit access to the internet or to filter websites, this should have a basis in law and the law should not be contrary to the international conventions that Iran is a party to, or contrary to international customs that should be followed and respected by all states.

[29] Cairo Declaration on Human Rights in Islam (1990)

HOW PROTECTED ARE CHILDREN UNDER THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY INSTRUMENTS? AN AUDIT OF HIV/AIDS-SPECIFIC REGIONAL STANDARDS RELEVANT TO CHILDREN AFFECTED BY HIV/AIDS

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INTRODUCTION

HIV/AIDS undeniably has a damaging impact on the future of children. It affects the economic, social, cultural, civil, political and environmental rights of all persons and is responsible for leaving a vast number of children across Africa without one or both parents.[2]

The HIV/AIDS epidemic affects children in many ways, but primarily they are affected when the child:

1. is born with HIV;
2. becomes infected with the virus during childhood once they become sexually active;
3. lives in a household affected by HIV/AIDS; and/or
4. lives in a community at risk of HIV infection.

In order to put into proper perspective the reasons why the protection of children's rights is important, it is necessary to highlight the seriousness of the HIV/AIDS epidemic in the Southern African Development Community (SADC) region, and specifically its impact on children. More than one million children under the age of 15 are infected with HIV accounting for 8% of the people living with HIV in the region.[3] A larger proportion of children have lost their parents to AIDS than to any other cause of death.[4] This means that 'if not for the HIV/AIDS epidemic, these children would not have been orphaned'.[5] Historically, the loss of parents on a large scale was a sporadic, short-term problem[6] which was associated with war, natural disasters or disease.[7]

Orphanhood is now a chronic long-term problem.[8] In the pre-AIDS era, an estimated 2 - 5% of children under 15 years of age were orphaned in sub-Saharan Africa,[9] now 17.3 million children have been orphaned by HIV/AIDS globally.[10] Within the orphan population, child-headed households and children living on the streets form the two most vulnerable groups.[11]

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[2] *UNAIDS '2013 Global Report'* <http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/epidemiology/2013/gr2013/UNAIDS_Global_Report_2013_en.pdf > accessed 18 January 2015.

[3] SADC 'Strategic Framework and Programme of Action (2008 – 2015)' <http://www.sadc.int/files/2113/5293/3505/SADC_Strategic_Framework_and_Programme_of_Action_2008-2015.pdf> accessed 26 August 2014.

[4] According to estimates by UNICEF and UNAIDS, there are approximately about 16, 808,000 orphans aged below 18 years. See SADC (n 3).

[5] AVERT 'Children Orphaned by HIV and AIDS (2014)'< http://www.avert.org/children-orphaned-hiv-and-aids.htm#footnote5_4hw16oi> accessed 19 January 2014.

[6] B Clark 'Child maintenance and the role of the South African State' (2000) 8(2) Int'l J. Children's Rights 307.

[7] EJ Kayombo, ZH Mbwambo and M Massila 'Role of traditional healers in psychosocial support in caring for the orphans: A case of Dar-es Salaam City, Tanzania' (2005) 1 J Ethnobiol Ethnomed 3.

[8] G Foster 'AIDS and Child Health' Paper presented at The Amsterdam Homecare Conference, (1997), <http://www.procaare.org/archive/procaare/199705/msg00023.php> accessed 28 December 2014.

[9] ibid.

[10] UNAIDS '2012 Global Report' < http://data.unaids.org/pub/report/2012/jc1700_epi_update_2012_en.pdf> accessed 18 December 2014.

[11] ibid.

Addressing the vulnerabilities of children through the law firstly requires approaches that protect the socio-economic rights of HIV-positive children and those living in affected families. Secondly, it requires that unfair discrimination against those infected and affected by HIV is prohibited. Thirdly, it requires approaches that protect children who may be left orphaned and fourthly, it requires approaches that set obligations to ensure that children at risk of HIV/AIDS are able to protect themselves against infection.

Against this background, the United Nations (UN) Committee on the Rights of the Child General Comment No. 3 (UNGC3) has identified the following broad-based legal strategies that ought to be used to address these issues as part of a comprehensive response to dealing with the impact of HIV/AIDS on children. These strategies are based on the principles that law, policies, strategies and practices should address issues of actual and perceived discrimination against the child, the child's right to survival and development, the participation of children in matters concerning them and the doctrine of the best interests of the child.

Several decades of experience of the HIV/AIDS epidemic have shown that human rights promotion and protection are essential components of HIV/AIDS prevention and the reduction of the impact of the epidemic.[12] Wojick states that, in reviewing the relatively short history of responses to the HIV/AIDS pandemic, a common denominator of effective programmes is the respect for human rights and the dignity of persons.[13] This fact illustrates the connection between HIV/AIDS and the application of human rights principles.[14]

The Convention on the Rights of the Child (CRC) has been ratified by all the member states of the SADC.[15] It requires state parties to take all appropriate legislative and administrative measures which are compatible with the provisions of the CRC and which ensure that the rights of the child are protected in line with the CRC.[16] The African Charter on the Rights and Welfare of the Child (ACRWC) also encourages states to 'adopt legislative or other measures as may be necessary to give effect to the provisions of this Charter'. [17]

Applicability of international instruments to HIV/AIDS

This paper discusses the SADC sub-regional standards which are relevant to the protection of children affected by HIV/AIDS. It examines the extent to which these standards address the rights of children affected by HIV/AIDS in the SADC region and discusses how the SADC member states can adopt these standards to address the rights of children affected by HIV/AIDS. Some of the instruments discussed are binding while others are not. The non-binding instruments operate on the principle of good faith, trust and confidence which SADC member states affirm to uphold. The standards have been divided into two sections, namely HIV/AIDS-specific and the non-HIV/AIDS-specific.

[12] It is well established that human rights standards should guide HIV policy-makers in formulating the direction and content of HIV-related policy and should be an integral part of all aspects of the national and local response to HIV/AIDS. See UNAIDS/UN High Commissioner/Centre for Human Rights, *Guidelines on HIV/AIDS and Human Rights*, Second International Consultation on HIV/AIDS and Human Rights (1996) 4.

[13] ME Wojick 'Global aspects of AIDS' in DW Webber (ed.) *Aids and the Law* (1997) 454.

[14] S Gumedze '*HIV*/AIDS and human rights: The role of the African Commission on Human rights' (2004) 4 AHRLJ 185.

[15] UN 'UN Treaty Collection' (2015) <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en> accessed 22 January 2015.

[16] CRC Art 4.

[17] ACRWC Art 1(1).

Binding, non-HIV/AIDS-specific instrument

These are binding instruments that are non-HIV/AIDS-specific. They are applicable in the protection of children affected by HIV/AIDS, because they contain sections that address the rights of people living with HIV/AIDS (PLWHA). These can be invoked to protect children affected by HIV/AIDS.

Treaty of SADC (1992)[18]

This Treaty was adopted in Windhoek, Namibia, on 17 August 1992 and entered into force on 30 September 1993. Even though it is not HIV/AIDS or child-specific, it contains sections certain that address the protection of PLWHA which can be evoked in the protection of children affected by HIV/AIDS.

One of the founding principles of the SADC is human rights, democracy and the rule of law.[19] The objectives of the SADC Treaty are to promote sustainable and equitable economic growth; socio-economic development that will ensure poverty alleviation, with the ultimate objective of its eradication; and to enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.[20]

Combating HIV/AIDS and other deadly or communicable diseases is one of the objectives of the SADC Treaty. [21] The Treaty tries to ensure that the members states of the SADC realise the urgent need to address the HIV/AIDS epidemic and the rights of people affected by HIV/AIDS. This includes the unequivocal prohibition of discrimination based on ill-health or 'such other ground as may be determined by the Summit'.

Although this Treaty does not list HIV/AIDS as one of the prohibited grounds for discrimination, it is clear that HIV/AIDS can be inferred from the listed grounds (ill-health or 'such other ground as may be determined by the Summit'). The SADC Treaty addresses the need to enhance the socio-economic position of the people in the country and to embark on poverty alleviation mechanisms by member states.

SADC Protocol on Health (1999)[22]

The SADC Protocol was adopted on 18 August 1999 in Maputo, Mozambique by the Heads of State and Governments of SADC countries.[23] This instrument does not deal specifically with children, but it contains sections that specifically address the right to health of citizens, thus this can be evoked in the protection of children affected and infected by HIV/AIDS.

The preamble to the Protocol indicates the awareness by the Heads of SADC countries of the fact that a healthy population is a prerequisite for sustainable human development and increased productivity in member states. In pursuit of the objectives of the Protocol, state parties are required to act in common pursuit of the objectives of the Protocol, which shall be implemented in accordance with the principle of promoting health care for all through the provision of better access to health services for child and adolescent health to ensure their growth and development.
The Protocol on health is an attempt to formulate regional health policies and strategies consistent with the principles contained in article 4 of the SADC Treaty. The intention is to promote health

[18]SADC 'SADC Treaty' <http://www.sadc.int/index/browse/page/119> accessed 28 December 2014.
[19] SADC Treaty Art 4.
[20] SADC Treaty Art 5(a).
[21] SADC Treaty 5 (i).
[22] SADC 'SADC Protocol on Health' <http://www.sadc.int/index/browse/page/152> accessed 20 January 2015.
[23] ibid.

care for all in the region through the provision of better access to health services. The focus of the Protocol on the health needs of children and adolescents cannot be overlooked. As it sets out the obligation on the state to provide for appropriate child and adolescent health services essential for the critical foundation for growth and development of children. All of these are laid down with respect for the rights of children in mind.

NON-BINDING, HIV/AIDS SPECIFIC INSTRUMENTS

These are the HIV/AIDS-specific instruments that have been adopted by the SADC Parliamentary Forum (SADC PF). They are useful in determining the goals of the states in dealing with the HIV/AIDS epidemic. These non-binding instruments will be discussed in the following section.

The SADC Model Law (2008)[24]

The SADC Model Law is a non-binding instrument[25] adopted by the SADC PF at its 24th Plenary Assembly convened in Arusha, Tanzania, in November 2008.

The SADC PF responses to HIV/AIDS 'have taken two different but complementary pathways, linked to and informed by global and continental initiatives, such as UN General Assembly declarations on HIV/AIDS and the 2001 Abuja Declaration on HIV/AIDS, TB and ORID in Africa summit of the Organisation of African states, predecessor of the AU'.[26]

The Model Law describes its aims as being to provide a legal framework for national law reform on HIV in conformity with international human rights law standards.[27] It is a comprehensive instrument and contains provisions that address the gaps in HIV-related legislation and policy in Southern Africa. It focuses on the current inadequate protection against discrimination, the lack of protection and services for vulnerable and marginalised groups and insufficient protection against violence for women, girls and children.[28] Its purpose is to provide countries with the minimum standards that they should include in their laws when legislating on HIV/AIDS issues.

The focus of the Model Law on women, children and members of vulnerable groups is very clear. It deals with the majority of issues that are relevant to children affected by the HIV/AIDS epidemic and clearly sets out the obligations on the state parties. It is human rights focused and indigenous to the SADC region in its origin, mandate and process.[29] Thus it is aimed at assisting member states (in particular policy makers and legislative drafters), to address all the relevant areas of HIV/AIDS in need of legislative reform without usurping the authority of national legislatures.[30]

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[24] SADC PF 'The SADC Model Law' (2008) <http://www.justice.gov.za/vg/hiv/docs/2008_Model-Law-on-HIV-in-Southern-Africa.pdf> accessed 13 December 2014.

[25] 'While a treaty is open for ratification, model legislation is not. While treaty provisions become binding on a state upon ratification, the provisions of a Model Law are not binding under international law. Model legislation like international declarations is not binding. Declarative standards guide States and are often vaguely formulated. Both treaties and model laws need to be given effect in the domestic legal arena'.
See F Viljoen *Model legislation and regional integration: Theory and practice of model legislation pertaining to HIV in the SADC* (De Jure 2008) 383-399.

[26] R Johnson 'The Model Law on HIV in Southern Africa: Third World Approaches to International Law insights into a human rights-based approach' (2009) 9 AHRLJ 128.

[27] The Model Law has adapted provisions drawn from laws in place across eight different countries, of which seven are African States, as well as UN and AU instruments. See Johnson (n 26) 142.

[28] F Viljoen 'SADC PF Model Law on HIV: Analysis of issues and processes' <http://www.chr.up.ac.za/centre_projects/ahrru/docs/Prof%20Frans%20Viljoen.pdf> accessed 29 December 2014.

[29] Johnson (n 26) 149.

[30] SADC 'SADC PF Communiqué Announcing the adoption of the SADC PF Model Law on HIV' (2008) <http://www.sadcpf.org/Announcement-Model%20law%20Endorsement.pdf> accessed 24 December 2014.

The Model Law deals with the consent of the child, especially with regards to HIV-testing and counselling. It reiterates the importance of parental consent or the consent of a legal guardian when an HIV-test is performed on a child under 16 (or any suitable age decided by the state but not above 16). It provides for the procedure for conducting an HIV-test on a mentally incapacitated person[31] and reaffirms the application of the best interest of the child principle in the testing of a child.[32] Article 15(2) further stipulates that the procedure for disclosing the results of an HIV test conducted on a child under 16 or a mentally incapacitated person.

With regard to post-test counselling,[33] the Model Law stipulates that in the case of a positive result, the person providing treatment, care or counselling services has a duty to counsel the tested person or, in the case of a child under 16 or any suitable age decided by the state but not above 16 or a mentally incapacitated person, the parents or the legal guardian of that child or that person, shall counsel on appropriate matters including the medical consequences of living with HIV.

The Model Law guarantees the right to education and the prohibition of the isolation or exclusion of a child, learner or student from an educational institution on account of the child's actual or perceived HIV status or the actual or perceived HIV status of his or her parents and close relatives.[34] It also deals with the obligation to protect all the rights of children living with or affected by HIV, including orphans, under the law, in international instruments pertaining to children, in particular the CRC and the ACRWC.[35]

The Model Law deals with the care of children orphaned by AIDS[36] by enjoining states to ensure that any surviving children of persons deceased due to AIDS related illnesses are given appropriate alternative care, including foster care or adoption. It also places an obligation on the state to provide all the necessary support and assistance for children living in child-headed households. This provision includes access to health care, education and the facilitation of orphaned children's access to all other state provided social assistance schemes available in the state.

In promoting the protection of women and girls, article 26 of the Model Law gives women and girls equal access to adequate and gender-sensitive HIV-related information and education programmes and the means of prevention and health services including women-specific and youth-friendly sexual and reproductive health services for all women of reproductive age and women living with HIV, regardless of their marital status.

The Model Law sets out state obligations to ensure that women and girls are protected against all forms of violence, including sexual violence, rape and other forms of coerced sex, as well as against traditional practices that might negatively affect their health. It safeguards the rights of females by stating that marriage or any other relationship shall not constitute a defence to a charge of rape.[37]

State obligations related to treatment, care and support are addressed in article 36 which requires the state to take all relevant measures to provide access to affordable, high-quality ARV and prophylaxis to treat or prevent HIV or opportunistic infections for PLWHA, including children living with HIV and members of vulnerable and marginalised groups.

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[31] Model Law Art 15 (5).
[32] Model Law Art 13.
[33] Model Law Art 16(2).
[34] Model Law Art 22.
[35]Model Law Art 24.This also includes the protection of children against abuse and exploitation and adopt specific measures to safeguard inheritance rights, land tenure and property rights for children.
[36] Model Law Art 25.
[37] Model Law Art 27.

The Model Law has the value of a Declaration and it benefits from the authority and legitimacy of the SADC PF as the regional organisation of SADC parliaments. It is classified as a 'soft law', which has a persuasive rather than a binding value. It is a reaffirmation of the human rights approach to HIV-related legislation in Southern Africa. It stimulates debate and advocacy in the region.[38] Although not a child-specific instrument, its application for the protection of the rights of children will contribute meaningfully to the protection of the rights of children because of the wide scope of rights covered by the Model Law. Its domestication by states in the region will honour human rights as universally understood, and bring consistency to issues of HIV/AIDS prevention, treatment, care and support.[39]

Maseru Declaration on the Fight against HIV/AIDS in the SADC region (2003)[40]

The Declaration was adopted in Maseru, Lesotho on 4 July 2003 by the Heads of State or Governments of the SADC. The Declaration does not deal specifically with the protection of children but it recognises the need for the protection of children in the HIV/AIDS epidemic. The Declaration is linked to the commitments made by SADC member states in the Abuja and UNGASS Declarations on the need to fight HIV/AIDS and other communicable diseases.[41]

The Maseru Declaration recognises the need for urgency in dealing with the HIV/AIDS epidemic. It outlines five broad priority areas requiring urgent attention and action. These areas of action are foremost in the plan and illustrate the urgent pace with which the Declaration expects the issues to be dealt with. The child-specific actions set out in the Declaration include the call to establish mechanisms for mitigating the impact of the HIV/AIDS pandemic on families, orphans and other vulnerable children.

Despite the fact that the Maseru Declaration is not a child-specific instrument it address some of the special issues affecting children including the need to mitigate the impact of the epidemic on them and the need to ensure that there is adequate alternative care for children.

The fact that it also sees the family and the community as role-players in the protection of orphans speaks volumes about the dedication of the instrument to the protection of children.

Regional Minimum Standards for the Harmonised Guidance on HIV-Testing and Counselling in the SADC Region (2009)[42]

The Regional Minimum Standards for the Harmonised Guidance on HIV-Testing and Counselling in the SADC Region (Regional Minimum Standards) were adopted by the Joint Ministerial Committee of Ministers of Health of the SADC at their meeting held on 9 – 13 November 2009 in Swaziland.[43]

The rationale for the adoption of the Regional Minimum Standards is based on article 10 of the SADC Protocol on Health. [44] The guiding principles of the Regional Minimum Standards are based on the principles of human rights and gender equality promotion. They are evidence based,

[38] Viljoen (n 28).
[39] SADC PF Communiqué (n 30).
[40] SACR 'Maseru Declaration on the Fight against HIV/AIDS in the SADC region' < http://www.sadc-tribunal.org/docs/HIV-AIDS.pdf >accessed 12 December 2014.
[41] Preamble to the Maseru Declaration.
[42] SADC 'Regional Minimum Standards for the Harmonised Guidance on HIV-Testing and Counselling in the SADC Region' (2009) <http://www.sadc.int/files/8514/1172/0467/Regional_Minimum_Standards_for_theHarmonised_Guidance_on_HIV_Testingand_Counselling_in_the_SADC_Region.pdf> accessed 22 January 2015.
[43] ibid 5.
[44] Regional Minimum Standards s 3.

complimentary and participatory. The principles employ the greater and meaningful involvement of PLWHA, the use of interventions which are relevant to the context of the SADC region and partnerships with civil society organisations and institutions in member states.[45]

The document requires member states to set national minimum standards for HIV-testing and counselling; on issues such as the provision of a conducive environment for HIV-testing and counselling; setting the age of consent; regulating HIV-testing and counselling for children and a host of other standards.[46]

Even though this is not a child-specific instrument, there are various aspects of the Regional Minimum Standards which are directed at the protection of children from HIV infection. Several principles of the standards are directed towards the prevention of mother-to-child transmission (PMTCT).[47] In addition, the Regional Minimum Standards regulate the provision of HIV-testing for children, including the use of internationally recognised HIV Test Kits for children.[48]

These provisions are very useful in ensuring that appropriate procedures are followed when providing HIV-testing for children and that the rights of children are not violated when they access HIV-testing facilities.

SADC HIV/AIDS Framework 2010 - 2015[49]

The SADC HIV/AIDS Framework commenced in 2010 and it links issues relating to the protection of children to the five priority areas of the Framework. It mainstreams HIV/AIDS within all policies and programmes undertaken by SADC and reflects the challenges and priorities of the region in responding to the epidemic as stated in the Maseru Declaration.[50]

The third objective of the Framework relates specifically to children. The objective is to reduce of the impact of HIV/AIDS on the socio-economic and psychological development of the region, member states, communities and individuals. The intention of this objective is to ensure that all orphans and other vulnerable children (OVC) and youth will have access to external support by 2015.

Although the Framework is not child-specific, it is a multidimensional response to HIV/AIDS by SADC. It is aimed at intensifying measures and actions to address the devastating and pervasive impact of the HIV/AIDS pandemic in a comprehensive and complementary way. The focus of the response is the mitigation of the impact of the epidemic in order to ensure sustainable human development in the SADC region as stated in the priority areas.[51]

Other SADC instruments

In addition to the instruments listed above, there are a number of health-specific instruments which are also relevant to the protection of the health rights of children affected by HIV/AIDS. These include the SADC Minimum Standards for Child and Adolescent HIV, TB and Malaria Continuum

[45] ibid s 4.
[46] ibid s 5.
[47] ibid.
[48] ibid s 5 & s 7.
[49]SADC 'HIV/AIDS Frame work 2010 – 2015' <http://www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework2010-2015.pdf> accessed 30 December 2014.
[50]Maseru Declaration (n 43).
[51] ibid.

of Care and Support (2013-2017)[52] and the Sexual and Reproductive Health Strategy for SADC 2006-2015.[53]

The purpose of the SADC Minimum Standards for Child and Adolescent HIV, TB and Malaria Continuum of Care and Support (2013-2017) is to 'serve as a framework to guide the regional harmonisation of approaches for a continuum of care and support in HIV, TB and malaria for children and adolescents in the SADC region'.[54] It is a child-specific instrument which is aimed at ensuring that national and community efforts aimed at the survival of children are successful. The SADC Minimum Standards for Child and adolescent HIV, TB and Malaria Continuum of Care and Support (2013-2017) expects that the implementation of these standards will, over the five year period, result in 'harmonisation of prevention, treatment, care and support for children and adolescents affected by HIV, TB and malaria across the SADC region' among other things.[55] The guiding principles of the Sexual and Reproductive Health Strategy for SADC include provisions directed at children. For instance, it enjoins state parties to ensure that priority for service delivery is given to vulnerable population groups such as OVCs and youth, poor women and men, people living with disabilities, old people and people living with HIV/ AIDS.[56] It recognises that children and young people as one of the priority groups[57] and it makes access to sexual and reproductive health services, particularly for vulnerable populations such as OVCs as one of its targets by 2015.

These instruments contain provisions which are adaptable for the protection of the health rights as well as the sexual and reproductive health rights of children affected by HIV/AIDS when they access health care facilities.

THE EXTENT OF PROTECTION AVAILABLE FOR CHILDREN IN THE SADC REGION

There is no specific document on children and HIV/AIDS in the SADC region, however children are offered protection in a number of the general documents discussed above. Some of the significance of these instruments are that:

i. most of the instruments acknowledge the need to protect children in the c= context of the HIV/AIDS epidemic, even though many of the instruments were not made specifically for the protection of children.
ii. children are regarded as members of a vulnerable group to whom special attention must be given.
iii. in most of the instruments, the protection available to the members of the vulnerable groups are inclusively available to children.

In addition, many of these instruments are of great importance to the protection of children as they employ a rights-based approach to protect PLWHA. For instance, the SADC Model Law focuses on the rights of vulnerable and marginalised groups. It suggests specific ways in which different countries can mainstream the rights of PLWHA into domestic legislation. The Maseru Declaration suggests strategies for mitigating the impact of the epidemic on PLWHA while the HIV/AIDS

[52] SADC 'SADC Minimum Standards for Child and Adolescent HIV, TB and Malaria Continuum of Care. and Support (2013-2017)' <http://www.hivsharespace.net/system/files/SADC_Minimum_Standards_2013-2017.pdf> accessed 22 January 2015.
53 SADC 'Sexual and Reproductive Health Strategy for SADC 2006-2015' <http://www.sadc.int/files/7913/5293/3503/Sexual_And_Reproductive_Health_for_SADC_2006-2015.pdf> accessed 22 January 2015.
[54] SADC Minimum Standards s 4.
[55] ibid s 5.
[56] Sexual and Reproductive Health Strategy for SADC 2006-2015 s 3.
[57] ibid s 7.

Framework and Programme of Action suggest ways through which states can intensify their measures and actions to fight the spread of HIV and to address the HIV/AIDS epidemic.

With regard to the protection of children, the SADC Model Law contains the most extensive guidance on how legal frameworks should respond to HIV/AIDS. It deals with a wider array of HIV/AIDS-related issues which affect children than any other single instrument in Africa. It addresses, amongst others, issues relating to discrimination, HIV-testing, access to education and the right to alternative care for children. In addition, the Model Law is the only instrument that uses the language of the best interest of the child and requires this to be a guiding principle. The Model Law further provides a number of minimum standards which could be incorporated into children's laws or dedicated HIV laws. It is however simply a Model Law and a guide for law reform. Further research is required to assess the extent to which countries have adapted the provisions to their laws affecting children.

Utilising UNGC3 as an analytical framework to assess the extent, to which the regional framework addresses the needs of children affected by HIV/AIDS, facilitates the identification of the following:

a) Little focus is placed on sensitive socio-economic issues which impact on children affected by HIV/AIDS such as guardianship and protection of the child's property rights.
b) The SADC Treaty, which is a binding instrument, does not address issues of HIV/AIDS.
c) None of the instruments prohibit indirect discrimination against a child whose parent or guardian is infected by HIV/AIDS.
d) There is very little on child participation in any of the instruments. In fact the Model Law, the Regional Minimum Standards and the Minimum Standards for Child and Adolescent HIV, TB and Malaria Continuum of care and Support in the SADC Region (2013 – 2017) are the only instruments which make provision for children to consent independently to HIV-testing at 16 years.
e) Only the Minimum Standards for Child and Adolescent HIV, TB and Malaria Continuum of care and Support in the SADC Region (2013 – 2017) and the SADC Model Law stipulate the obligations of member states to HIV/AIDS treatment for children.
f) HIV prevention programmes for children is not well developed in the regional framework as there are only HIV-testing guidelines and minimal recommendation for the provision of HIV education in the Model Law and the Minimum Standards for Child and Adolescent HIV, TB and Malaria Continuum of care and Support in the SADC Region (2013 – 2017).

Despite the above, the fact that many of the other documents refer to children in particular and the obligations on the state to address the rights of OVC shows that there is guidance for countries legislating on HIV and children as well as on children-related issues.

CONCLUSION

According to Cameron, 'the recognition that protecting the rights of those with HIV/AIDS was not inimical, but complementary, to disease containment'.[58] Thus it is important that national legal frameworks respond to the existing as well as all the emerging social and economic issues raised by the pandemic. This would ensure that vulnerable children are given adequate protection legally, in line with the obligations of states under international and national laws. States must in turn ensure that the best interest of children is paramount in all legislation dealing with the protection of children affected by HIV/AIDS.

[58] E Cameron 'Legal and Human rights responses to the HIV/AIDS epidemic' (2006) 1 Stell LR 42.

FROM THE LEGAL PERSPECTIVE OF EMERGENCY MANAGEMENT AND TEMPORARY PROTECTION STATUS AND TURKEY'S LEGISTATION AND PRACTICES IN SYRIAN CRISIS

SERDAR TÜNEY[1]

ABSTRACT

Due to the domestic disturbance in Syrian Arab Republic continuing since April 2011, approximately 1.600.000 people have entered Turkey up to the present. With the increase in the abusing of human rights in Syrian Arab Republic since 2012, Turkey has followed an open-door policy toward Syrian refugees on the ground of the long history, cross-cultural bonds and neighborhood rights among two countries. Turkey has been quite generous in providing the Syrians with humanitarian assistance in both temporary accommodation centers and provinces within and outside the borders of it.

This paper first explains what temporary protection status means, then discusses the legislative amendments carried out by Turkey, that has 4 years of experience with regard to the application of temporary protection status, within the scope of the regulation in that the international temporary protection status is defined, and finally offers some practical implementations. It is hoped that this study will contribute to the currently carried out international immigration and asylum regulations and policies by offering new insights.

Key Words: Temporary Protection-Emergency Management-Syrian Crisis-Turkey-AFAD

INTRODUCTION

Immigration is a social phenomenon brought about by the human's inherent capability to move and being in a constant search for meeting his/her own needs. Immigration leads to social, economic and political changes across not only the countries where people migrate to and from but also those they pass through outside the target country. Hence, immigration is to be given paramount importance in governments' strategic priorities and policies, and social orders of societies. In today's world, civil wars and political domestic disturbances are major factors stimulating the migration. Given the restricted resources of countries, governments have been trying to develop various policies and come up with practical solutions to handle with the massive migration. The temporary protected status is hence one of the systems designed with this purpose in mind.

Temporary Protection Status is a temporary immigration status given to the eligible foreigners who are under pressure to leave their native country, cannot return home due to a certain crisis in the home country, enter a different nonnative country to find an immediate and temporary protection, and about whom cannot be taken any legal actions to grant them an international protection status as individuals. Temporary Protection Status is applied when there is a massive immigration to the country closest to the home country because of the instinct to live in a neighboring country. It is a practical and supplementary solution that governments carry out in emergency management by not sending the foreigners entering the country in groups back to their native country within the scope of universal regulations and human rights without spending time on taking legal actions to identify immigrants' status.

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THE IMMIGRATIONS MADE TO ANATOLIA FROM VARIOUS COUNTRIES IN THE PERIODS OF OTTOMAN EMPIRE AND REPUBLIC OF TURKEY

Due to the domestic disturbance and implementations of the Damascus governance in Syrian Arab Republic since 2011, approximately 1.600.000 Syrians have had to immigrate to Turkish Republic. As a consequence of the close historical relations and being continuation of Ottoman Civilization Turkish Republic has hosted innocent refugees from Syria with a sense of benevolence.

Because there have been many times when such massive immigrations to this land take place, Anatolia has again opened its doors to innocent Syrians who have been persecuted and displaced. To gain a better understanding of the immigration made to Anatolia, it is of importance to mention the immigrations from the Balkan States in the period of Ottoman Empire and Republic of Turkey.

In the Period of Ottoman Empire

There used to be many nations living within the borders of the Ottoman Empire. Taking the demographic structure into account, it has been known for a long time that people of 20 different ethnicities from the Balkans to Middle East and from Caucasus to North Africa and 4 religions lived in harmony and peace on such a wide area with a judicious system[2]. However, the wars breaking out due to the historical changes led to the changes in this demographic structure.

That is to say, between the years 1806 and 1812 around 200.000 people, between the years 1856-1865 more than 2.000.000 people and between the years 1877-1878 approximately 1.235.00 people, most of whom were Muslims, had to leave their countries and to immigrate from the Balkans to Anatolia[3].

The events taking place during the Balkan Wars were quite tragic. As known, around 3.242.000 out of the 6.353.000 people who lived on the lands of Ottoman Empire in the Balkan region were Muslim and about 2.315.000 of those Muslims used to live in Serbian, Greece and Bulgaria. However, according to the results of the population census conducted immediately after the Balkan Wars there were only 870.000 Muslims left. As for the rest of them, some had lost their lives in the war while some of them immigrated to Anatolia[4].

In the period of Republic of Turkey

The first immigration movement in the Republic of Turkey was Turkish-Greek population Exchange. Based on the article 1 of "Convention Concerning the Exchange of Greek and Turkish Populations" signed between Turkey and Greece on 30 January 1923, Anatolian Greeks and Turks in Greece were forcibly made refugees as of May 1, 1923. In accordance with this agreement, approximately 457.000 Muslim Turks were subjected to forced immigration until 1927[5]. The

[2] Uğur Kurtaran, 'The System of Nation in Ottoman Empire' (2011) 8 Kafkas University Journal of the Institute of Social Sciences 57, 58 <http://www.kafkas.edu.tr/dosyalar/sobedergi/file/008/5_0.pdf> accessed 13 January 2015.

[3] Tunca Özgişi, 'The Immigrations of Anatolia From Ottoman Empire To Republic of Turkey And Turkish Red Crecsent's Supports' (2011) 31(7) The Journal of International Social Research 386, 387 <http://www.sosyalarastirmalar.com/cilt7/sayi31_pdf/2tarih_uluslararasiiliskiler_siyaset_sanattarihi_arkeoloji/ozgisi_tunca.pdf > accessed 19 January 2015.

[4] ibid 387.

[5] Gökçe Bayındır Goularas, '1923 Populatin Exchange Between Turkey and Greece: The Survival of the Exchanged Population's Identities and Cultures' (2012) 4(2) Journal of Alternative Politics 129, 131 < http://alternatifpolitika.com/page/docs/temmuz-2012-sayi2/fulltext/gokcebayindirgoularas.pdf > accessed 20 January 2015.

number of immigrants from Bulgaria, Yugoslavia and Romania, which were among the Balkan countries, was around 717.122, 500.000 and 122.000 respectively between the years 1923-1990[6].

In a nutshell, there have been a lot of immigrations from various countries to Republic of Turkey throughout the history and more than half of the immigrants were settled and recruited by the government. The rest of them were settled in areas previously settled by their relatives and acquaintances. The successful immigration and settlement policy implemented by Turkey has thus long received a lot of attention in both internal and foreign policy.

THE REGULATION AND PRACTICE OF THE TEMPORARY PROTECTION STATUS IN TURKEY AND OTHER COUNTRIES

Turkey with its long experience in immigration movements provides Syrian refuges with support and tries to make them comfortable by applying a system entitled "Temporary Protection Status" which is present in international law, yet has been adapted according to the particular dynamics of Turkey within the region and included in the national regulations after some modifications.

The Practice of Temporary Protection Status in Countries Other than Turkey

The underlying principle of Temporary Protection Status is based on the principle of non-refoulement. As stated in the Article 33 of the "United Nations Convention Relating To The Status of Refugees"[7]signed at Geneva in 1951, to which Turkey is a party, non-refoulement means the obligations of countries to not expel or return refugees in any manner to the frontiers of territories where his life or freedom would be threated. This principle aims to protect the basic human rights of refugees such as the right to life, the right not to be tortured or treated in inhuman or degrading way[8]**.**

A similar regulation was also included in the Article 3 of the **"**United Nations Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment of Punishment"[9](1984), to which Turkey is a party, as the non-refoulement right of contracting countries when they think that the refugee will be subjected to torture and treated in inhuman or degrading way in a particular country and put forward sound reasons such as the obvious violation of human rights in mass**[10].**

Another agreement which the principal of non-refoulement is stated in and Turkey is a party to is the "European Convention of Human Rights"[11] (1950). In the Article 3 of the agreement it was stated that nobody can be subjected to torture or/and treated in inhuman and degrading way. Besides, the article in question was expanded to include non-refoulement principal in line with the "United Nations Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment of Punishment" (1984) in the practice of European Court of Human Rights[12].

As for the European Union Countries, the Temporary Protection Status, which was an improved version of the non-refoulement principle, was first stated on the "Council Directive

[6]**Y**usuf Sarınay, 'Migrations From The Balkan Countrias To Ankara During The Republican Periad (1923-1990)' (2011) 28(80) Journal of Atatürk Research Center 351, 359-361 <http://atam.gov.tr/wp-content/uploads/05-yusuf-sarinay.pdf> accessed 20 January 2015.

[7] United Nations Convention Relating To The Status of Refugees (Date of Adaption: 25/07/1951, signed at Geneva, on 28/07/1951) <https://treaties.un.org/doc/Publication/UNTS/Volume%20189/volume-189-I-2545-English.pdf> accessed 23 January 2015

[8] Elif Uzun, 'A Comment on the Status of the Non-Refoulemet Principle in International Law' (2012) 30(8) Review of International Law and Politics 25, 26 & 28 <http://usak.org.tr/images_upload/files/Makale%202.pdf> accessed 02 February 2015.

[9] United Nations Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment of Punishment (Date of Adaption: 10/12/1984, entry into force: 26/06/1987) <http://www.unhcr.org/49e479d10.html> accessed 02 February 2015.

[10] ibid 36-37.

[11] European Convention on Human Rights (Date of Adaption: 04/11/1950) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 02 February 2015.

[12] Uzun (n 8) 40.

2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof"[13].

The Temporary Protection Status was defined as **"**a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection" in the Article 2 of the directive. According to the Article 4 of the directive, the duration of temporary protection status is specified as one year. Moreover, in the same article it is stated that the temporary protection status may be extended to six months for a maximum period of one year except the situations where the temporary protection is ended by the decisions of Council.

All in all, it can be pointed out that each country makes adaptations according to its own dynamics and specific circumstances on the basis of the basic regulations stated above. For instance, in The United States of America (USA), which is home to the most immigrants, refugees are granted temporary protection status when their life or freedom is threatened in their home countries due to the domestic disturbance, temporary effects of natural disasters on territories and other extraordinary incidents or events[14]. On the other hand, in Australia temporary protection status is granted to those who enter the country through illegal ways and are not eligible for any illegal entrance type of visa[15].

The System and Practice of Temporary Protection Status in Turkey

The tragic events taking place in Syria are to be considered in a humanistic perspective, which makes Turkey to take on great responsibilities both as a government and society. The immigration movements occurring throughout the history clearly show that people do not tend to leave their home countries as far as their lives or freedoms are not threatened. Hence, it would be wrong to evaluate the issue of Syrian refugees in Turkey only in terms of politics and economics.

As Syrian people leave their native country due to the lack of security of life and property and have to take refuge in Turkey, they become already hungry, sick, injured or traumatized. In order to handle with this issue, Turkey has made legislative regulations in the Temporary Protection Status taking its internal dynamics into account within the scope of international regulations and principles defined regarding the Temporary Protection Status.

Within the Perspective of National Legislation

Turkey has received a lot of immigrants throughout the history by virtue of its geographical, strategic, cultural and political location. Not only Turkey's increasing economic potential but also the political instabilities in neighboring countries are factors driving immigration from other countries to Turkey. Although Turkey was mostly treated as a country of transit earlier, nowadays

[13] Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ddcee2e4> accessed 02 February 2015.

[14] The United States Of America Cizitenship and Immigration Services, Immigration and Nationally Act, Section 244 <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> accessed 03 February 2015.

[15] Australian Government Department of Immigration and Border Protection, The Migration Regulations 1994 subclass 785 <https://www.immi.gov.au/legislation/amendments/2013/131018/lc18102013-01.htm> accessed 03 February 2015.

it is becoming a target country for immigrants as a result of its increasing economic potential and political stability.

To manage the massive immigrations from Syria to Turkey occurring as a result of the domestic disturbance taking place in Syria since 2011 the emergency management legislation has been administered by Republic of Turkey. In the Republic of Turkey "Law on Establishment of Disaster and Emergency Management Presidency"[16], dated 29/05/2009 and numbered 5902, emergency situation is defined as *"the events or incidents posing threat to normal flow of life of the whole or part of a community and requiring emergency actions and the crisis situation arising as a result of those incidents"* and the Disaster and Emergency Management Presidency of Turkey (AFAD) is the sole responsible organization for effective emergency management and civil protection nationwide in Turkey.

In the aforementioned law, AFAD is defined as "*being a leading and coordinating organization which offers a model that can be taken at the international level as being, based on sustainable development, risk-centered, efficient, effective and performing reliable service in the studies related to disaster and emergencies".* Furthermore, in the Republic of Turkey "By-Law on Disaster and Emergency Management Centers"[17], dated 19/02/2011, numbered 2011/1377 and published in Official Gazette numbered 27851, asylum and massive flows of immigration which have taken place or are likely to take place are stated as emergency situations and the general director of AFAD is authorized to manage coordination and collaboration in those emergency situations on behalf of the Republic of Turkey. As a result, the needs of Syrian refugees (sheltering, nutritional requirement, education, health and other expense) having immigrated to Turkey have been met by the government of Turkish Republic in the framework of the Republic of Turkey "By-Law on Disaster and Emergency Spendings"[18], published in Official Gazette dated 06/03/2011 and numbered 27866.

Within the scope of emergency legislation Turkey has achieved a great success in the management of an emergency situation. However, to meet its current needs in the management of immigrants and to keep up with the latest developments it enacted the Republic of Turkey Law on Foreigners and International Protection[19], dated 04/04/2013 and numbered 6458, on the grounds that the emerging situation goes beyond an emergency situation and the flow of immigration from Syria to Turkey is gradually increasing owing to domestic disturbance continuing in Syria. Moreover, Directorate General of Immigration Management was established with the provision of the same law. In the Article 91 of the law, the Temporary Protection Status is defined as **"***Temporary protection may be provided for foreigners who have been forced to leave their*

[16] Republic of Turkey Law on Establishment of Disaster and Emergency Management Presidency (Law Number: 5902-Date of Adaption: 29/05/2009) <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5902.pdf> (Turkish version) accessed 04 February 2015.
16 Republic of Turkey By-Law on Disaster and Emergency Management Centers (By-Law Number: 2011/1377-Published in Date: 19/02/2011 Number: 27851 Official Gazette)

[17] Republic of Turkey By-Law on Disaster and Emergency Management Centers (By-Law Number: 2011/1377-Published in Date: 19/02/2011 Number: 27851 Official Gazette)
<http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=3.5.20111377&MevzuatIliski=0&sourceXmlSearch=afet%20ve%20acil%20durum> (Turkish version) accessed 04 February 2015.

[18] Republic of Turkey By-Law on Disaster and Emergency Spendings (published in Date:06/03/2011 Number: 27886 Official Gazette
<http://mevzuat.basbakanlik.gov.tr/Metin.Aspx?MevzuatKod=7.5.14776&MevzuatIliski=0&sourceXmlSearch=afet%20ve%20acil%20durum> (Turkish version) accessed 04 February 2015.

[19] Republic of Turkey Law on Foreigners and International Protection-(Law Number:6458-Date of Adaption: 04/04/2013) published by Republic of Turkey Ministry of Interior Directorate General of Migration Management Publications
<http://www.goc.gov.tr/files/files/YUKK_I%CC%87NGI%CC%87LI%CC%87ZCE_BASKI(1)(1).pdf> accessed 04 February 2015.

country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection."

As a result of the legislative amendments carried out in accordance with international and national legislation the "Republic of Turkey By-Law on Temporary Protection"[20] entered in force being published in Official Gazette, dated 22/10/2014 and numbered 29153. With this legislation, Syrian people living within the borders of Turkey are granted temporary protection status as individuals. Besides, based on the Article 6 of the by-law in question the Syrians with Temporary Protection Status have as well been subjected to the principle of non-refoulement which was previously mentioned.

In Turkey, Syrian people with Temporary Protection Status are not regarded as refugees, conditioned refugees or asylum seekers, but provided with better living conditions. Given the fact that Syrian people leave their native countries because their lives are in danger, Turkey has granted them temporary protection status to make them feel comfortable with a sense of hospitality, which enables them to benefit from all facilities and services identified within the framework of the legislation. Syrian people with Temporary Protection Status are provided with constant facilities and services in many different fields including education, health, labor market and social aid. As AFAD is authorized by the Article 26 of the by-law to organize and coordinate those services in an effective way as well, it ensures the efficient use of the country resources and capacities publishing a circular, dated 18/12/2014 and numbered 2014/4, to form a frame for the public services offered to Syrians by Turkish government institutions and organizations.

The Turkish implementations within the framework of national and international legislations

Turkey does its best to offer facilities and services to Syrians with Temporary Protection Status within the framework of previously mentioned legislations. In fact, Turkey has spent around 5 billion dollars for Syrians since 2011 when massive immigration movements started AFAD General Director Oktay said that; *"Out of 5 billion dollars only 265 million dollars belong to the international community. We are of the opinion that the international community is not providing enough assistance. The amount of contribution by United Nations (UN) in the 265 million dollars is 170 million dollars."* Oktay also says; *""When we consider the reports of United Nations, we take the first place in both 2012 and 2013 as the country that had the most spending for assistance in terms of GDP. In absolute terms, USA is in the first place, United Kingdom follows USA and we are in the third place. However when we compare our spending for assistance with regards to the national income, the difference between USA and Turkey is seven times wide. Thus we are seven times more generous."*[21]**.** In other words, according to an annual report by Global Humanitarian Assistance issued in 2014 Turkey ranked third in the world in terms of the nominal values with respect to humanitarian aid distributed to Syria and other counties hit by crises or natural disasters, however it should be noted that Turkey ranked first in the world in terms of the

[20]Republic of Turkey By-Law on Temporary Proteciton (published in Date: 22/10/2014 Number:27866 Official Gazette) <http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=3.5.20146883&MevzuatIliski=0&sourceXmlSearch=ge%C3%A7ici%20koruma> (Turkish version) accessed 04 February 2015.

[21] Republic of Turkey Office of The Prime Minister Directorate General of Press and Information, 'Turkey Provided 5 Billion Dollars of Assistance to Syrian Guests'
<http://www.byegm.gov.tr/english/announcement/turkey-provided-5-billion-dollars-of-assistance-to-syrian-guests/73866> accessed 05 February 2015.

gross national product and became the most generous country and surpassed The USA regarding the humanitarian aid distributed across the world[22] [23].

Besides, according to the official figures[24], AFAD, which organized the evacuation of 200.000 people from Kobani in last September, offers 60.000 meals from seven distributive points for Syrian people staying inside and outside of AFAD's Temporary Accommodation Centers in Suruç, which makes more than 5.000.000 hot meals in total distributed three times a day (morning, noon and evening), and provides guests from Kobani with 700 tons of fresh water every day.

In addition, with the aim of meeting the special needs of infants, children and women 30.000 packages of infant formula, 20.000 packages of diaper and 30.000 packages of hygienic material were provided with the coordination of AFAD. Last but not least, the same official figures also indicate that approximately 850 blankets are given out every day to Syrians and 700 electric heaters have been distributed to the people from Kobani so far to meet their heating needs. Syrian people in the region have been so grateful to Turkey that a family named their baby is AFAD after as a sign of their gratitude towards Turkey[25]. Also, AFAD set up AFAD Suruç Temporary Accommodation Center for people coming from Kobani, which provides 35.000 people from Kobani with high quality temporary accommodation conditions. Director General of AFAD Oktay said that**:** *"We have started to take action from the very first day. We are currently hosting around 251,000 Syrian guests in 25 refugee camps. Our siblings from Kobanî see Turkey as a safe port after the incidents in Syria. Therefore, we opened the door of our country to 200,000 people. We have built a brand new city in Suruç which shows the Turkish hospitality."* Thus, Turkey serves more than 251.000 people fleeing war in 25 temporary protection centers[26].

CONCLUSION

Anatolia has been accustomed to the movements of immigration throughout the history, which is a fact rarely known by international society. Not only Ottoman Empire and but also the Republic of Turkey have received a lot of immigrants from diverse countries. The open-door policies followed by the Republic of Turkey owing to the domestic disturbance in Syrian Arab Republic have been successfully implemented. It is also note-worthy that this policy is not without a legal basis, that is to say, the legislation related to the emergency situations, humanitarian aids, and temporary protection status constitute the legal basis for following such a policy. However, it is self-evident that it is hard to manage this movement of immigration with the previously mentioned ways in the long run.

As for the suggested solutions, it should be, first and foremost, noted that the limits of the immigration movements are not easily predictable. That is to say, immigrations initially lead to problems for neighboring countries; however in the long run they pose a threat to the whole world.

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[22] Global Humanitarian Assistance Global Humanitarian Report 2014. <http://www.globalhumanitarianassistance.org/wp-content/uploads/2014/09/GHA-Report-2014-interactive.pdf> accessed 05 February 2015.

[23] "Turkey Outpaces US In Humanitarian Aid Across World" <http://english.yenisafak.com/world/turkey-outpaces-us-in-humanitarian-aid-across-world-2070794> accessed 05 February 2015.

[24] Republic of Turkey Office of The Prime Minister Directorate General of Press and Information, 'Everyday 60.000 Meals Are Those From Kobani' <http://www.byegm.gov.tr/english/announcement/everyday-60.000-meals-are-provided-for-those-from-kobani/74050> accessed 05 February 2015.

[25] Republic of Turkey Office of The Prime Minister Directorate General of Press and Information, 'Everyday 60.000 Meals Are Those From Kobani' <http://www.byegm.gov.tr/english/announcement/everyday-60.000-meals-are-provided-for-those-from-kobani/74050> accessed 05 February 2015.

[26] Republic of Turkey Office of The Prime Minister Directorate General of Press and Information 'Suruç Refugee Camp Inaugurated' <http://bypass.byegm.gov.tr/english/announcement/suruc-refugee-camp-inaugurated/77015> accessed 05 March 2015.

Given the fact that there are limited economic and social resources in the world, it is self evident that the immigrations may cause problems all over the world if the triggering reasons of the immigrations are not adequately dealt with. Therefore, Turkey's view on Syria issue is that all countries in the world and international organization should not consider that issue only within the scope of humanitarian aid and they should collaborate with each other to end the dictatorial government in Damascus, which causes domestic disturbance, through diplomatic ways and to ensure a peaceful transition from dictatorship to representative and democratic governance. Otherwise, the instability in Syria may not only spread to neighboring countries but also pose a threat to the whole world.

Secondly, it is of importance to take the internal dynamics of Turkey into consideration. To make Syrians with temporary protection status integrated into the community they should be involved in both social and business life to earn a living. Thus, they may live in harmony with the rest of the society in Turkey rather than living in a restricted area such as temporary accommodation centers. Such a solution might also prevent possible social, economic and political problems to be encountered. In addition, the well-management of the process of the integration of Syrians with temporary protection status may also contribute to the economic growth and development of Turkey, which is the case in Germany and other European countries. It may further contribute to the improvement of Turkey that has political and economic stability for 13 years. Finally, if such a model serves the purpose, it may be suggested as an example model for other countries to deal with similar problems in different regions.

ON TRANSFERABLE, FALLIBLE AND THE INDIVIDUAL IN POSTMODERN LEGAL CONCEPTUALISM

*ADELA TEODORESCU CALOTĂ,**

ABSTRACT

Postmodern law takes a leap back in time to assume Gorgias' nihilism and reaffirm it at a time when the 'grand [legal] narrative' has reached its eschaton. In this transformed age of non-absolutes, of relativity and 'jigsaw puzzle fallacies', of 'hyperrealities' and 'deconstructions', the law and the individual are trying to reconnect and forge a new type of bond whilst struggling to determine and reshape their identities, and to comprehend and come to terms with an altered world. As behavioural patterns continue to gradually change as influenced by social atomisation and the artificiality and inarticulateness of communication and computer technologies, law is equally undergoing a series of mutations due to global transplantations of legal concepts and the development of legal information retrieval systems. The questions to be addressed then are: could changes in law affect people's attitude towards the legal science, and could these attitudes impact adversely upon the law?

Key words: postmodernity, legal concepts, transplants, legal databases, behavioural patterns.

INTRODUCTION

It appears that contemporary legal conceptualism is entangled in a 'mile of string'; no sooner a strand is found, researched and thus disentangled from the twine that makes up legal conceptualism, than the remaining others interlace ever so tightly until vagueness and approximation knot together with confusion and fallibility.

Metamorphosis is no stranger to law; legal concepts, structures, systems bear the imprint of continual changes in worldwide economic, political, social and cultural trends. Yet, postmodernity opens a chapter of unparalleled challenges to law's applaudable adaptability.

Firstly, the increase in the number of circulated 'legal borrowings' or 'legal transplants' as consequence of the fulminant expansion of global legal infra(*supra*)structures forces national legal systems to process huge amounts of legal information at an accelerated pace. It is a race against time at the end of which nation states successfully ingest all transferable legal items without, however, properly digesting them. Secondly, virtually everything now is a click away of being instantly and comfortably transferred and accessed, law included. It can, nevertheless, be argued that a timely, unrestricted gateway to a multiplicity of legal concepts – and their plurivocal terminological representatives – via legal information retrieval systems augments the intricacy of issues related to multilingualism and the *trans*lation, -fer, and -'plantation' of legal concepts pertaining to different legal systems. The aforementioned topics of discussion have long set the agenda of postmodern jurisprudence. The novelty, in this case, consists of linkages that can be inferred from the way in which (a) changes in legal conceptualism affect behavioural patterns of individuals and (b) the individuals' propensity for an erroneous understanding of legal concepts may, in turn, exacerbate fallibility in law. Thus, it can be argued that transplanting legal concepts under time pressure leads to the superficiality of the adopters as far as their ability to delve into the depth of issues regarding the nature of legal borrowings, their original functions and roles, as well as their viability in the host legal system is concerned. Similarly, the availability of law on

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the Internet induces a certain state of indolence, as users – may they be legally trained, or not – tend to take content for granted without feeling urged to query about the appropriateness or correctness of legal translations.

LAW IN TRANSITION: FROM ILL SUCCESS TO SHALLOWNESS

We live in a globalised age which leans dangerously towards homogenisation, uniformisation, standardisation, essentialization, as well as towards social and cultural mcdonaldization[2]. It is a "policentric word, a sort of 'circle with no centre and no margins'"[3] populated with such disparate concepts as local, trans/supra/multinational, inter/multicultural, multiethnic, or pluri/multilinguistic. Among these appears yet another bizarre concept, namely the 'legal transplant', a medically flavoured metaphor which describes the "process of transmission of legal knowledge, practices, and institutions from one society or jurisdiction to another"[4]. The metaphor is so overwhelmingly rich with meanings and references to such open-textured concepts as 'culture', 'language', or 'society' that it is almost impossible to comprehend as such. For the purpose of this section, attention will hence be paid solely to the transfer of legal concepts from one legal culture to another in the context of European 'legislative inflation', and the impact that the transmigration of massive amounts of law has on the host society and its members.

Fixing and delineating conceptual categories with respect to the issue of the transplantation of law is, however, a challenging endeavour. Ironically enough, in order to pinpoint the core of an extremely malleable and vague concept as the diffusion of law, one firstly has to swim across an ocean of intertwined, even more ambiguous, concepts and phrases, and make it to shore. One such elusive concept is that of 'legal culture'. It is on everybody's lips, nonetheless even the coiner of the expression, N. Friedman, "has recently manifested reticence with regard to the necessity of its existence, by taking into consideration its abstract slippery, character and the difficulty to define it"[5]. Law is inextricably linked to the legal environment it originates from, which ultimately means that it is part of the way in which "a distinct society/ community, through intersubjective communication, understands/ interprets the law on the basis of the same stimuli, as well as the way in which a society/ community speaks/ writes about law on the basis of the same language"[6]. Law taken as a whole cannot be conceived in isolation from socio-cultural and linguistic influences, or from historical traditions and mentalities of the collective. It is this particular interaction between the law and the cultural setting it belongs to that determined P. Legrand to dramatically assert that "there is no such thing as a 'legal transplant'"[7]. The very ideological, linguistic, cultural foundations of legal concepts, norms, institutions and systems lay within and are confined to their birth places. As such, "given that the meaning of the rule is specific to a particular culture, the meaning therefore stays behind if the culture itself cannot be transplanted as well. And if the meaning stays behind, the transplant never happened – all that was displaced from the one jurisdiction to the other was a 'meaningless form of words'"[8]. Though Legrand's view might indeed seem oppressively pessimistic – as one might equally be inclined to suggest that "culture

[2] Cf. Sorin Pârvu, *Postmodernism* (Institutul European 2005) 234.
[3] ibid.
[4] Annelise Riles, 'Comparative Law and Socio-Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds) *Comparative Law* (Oxford University Press 2006) 795.
[5] Manuel Guțan, *Comparative Legal Systems. Introduction into the General Theory of Comparative Law* (Hamangiu 2014) 328 .
[6] ibid 329.
[7] In Jacques du Plessis, 'Comparative Law and the Study of Mixed Legal Systems' in Mathias Reimann and Reinhard Zimmermann (eds) *Comparative Law* (Oxford University Press 2006) 487.
[8] ibid.

is not genetic and be learnt [which in turn] means that not only rules, but also legal culture itself, can be transplanted"[9] – there is truth to it, as the examples below will demonstrate.

Thus, legal transplants, if not carefully understood and manoeuvred, become upsetting 'legal irritants'. But to understand the effects that such 'legal irritants' have on society and individuals, one must first be aware of the purpose for which different legal and political actors engage in the process of transplantation. The finality of all legal transplants is legal change; as such, the legislators, by making use of all mechanisms "which the legitimate power that they exert puts at their disposal"[10] can profoundly change the legal system, and the political elites "can, on the other hand, exert pressure, by means of legal transplant, on the power in the direction of a particular line of legal change"[11]. However, the clear-cut scopes and interests sought by diverse actors partaking at the process of legal transplantation should never be confused with the effects of the transplants on society, "which are relatively independent from the will and the expectations of its achievers"[12]. It is in this case, more than in any other, that the changing nature of societies and their constant evolution amplify latent intricacies in the process of interaction between the exporter and the importer. The "invariable and constant cultural dependence of the imported law"[13] on the original cultural of the exporter brings about confusions, ambiguities and oneiric adaptations and interpretations of the legal transplant. According to G. Teubner, close attention should not be placed on the act of transplantation itself, which is after all purely mechanical, but rather on legal cultural background[14]. Consequently, if the imported law is so tightly linked to its original cultural background, it will leave zero leeway for malleability, it will hence be imposed and thus become a 'legal irritant'[15]. Eventually, "the law of the importing society will not fully assimilate this imported law, instead it will leave room for an 'evolutionist dynamic in which the meaning of the external norm will be reconstructed, and the internal context will suffer from a fundamental change'"[16], such is the case of the process of legal unification within the European Union, burdened with cultural conflicts and divergences.

One speaks of a successful legal transplant when the import of law is rational and voluntary, when it is driven by well-founded, credible reasons for social and legal change and when the actors involved have opted out all other possible alternatives of reform, have consciously resorted to the transplant and assumed full responsibility for its adaptation and integration into the alienee society[17]. Adjustment of the transplant to its host culture presupposes a lengthy, step by step process, during which actors pertaining to all levels of the importing legal system (legislative, judiciary, educational)[18] should analytically take into account "the real needs for change in society and real possibilities of adaptation of the imported law to the culture of the importing society"[19]. On the other hand, one speaks of the bad success of the transplant if it is subjectively determined by the prestige of successful legal models which enjoy widespread recognition and which might "determine the political or the academic elite to appeal to models or quantities of legal import that do not justify themselves through the concrete needs and cultural specificity of the importing

[9] ibid 488.
[10] Manuel Guțan, *Constitutional Transplant and Constitutionalism in Modern Romania 1802-1866* (Hamangiu, 2013) 35.
[11] ibid 36.
[12] Manuel Guțan, *Comparative Legal Systems. Introduction into the General Theory of Comparative Law* (Hamangiu, 2014) 290.
[13] ibid 291.
[14] ibid 292.
[15] ibid.
[16] ibid.
[17] ibid 288.
[18] ibid 300.
[19] ibid 288.

society"[20]; or by the commodity of legislators who are tempted to resort to prefabricated, functional, internationally available legal models rather to their own ingenuity[21]; or by political and economic interests, such are those of post-communist countries that appeal to massive legal imports to integrate into the "family of modern European societies"[22]; or by the weakness or incapability of a certain national legal culture which has either developed, out of commodity or the need of political and economic integration, the "mentality of importer of law", or is incapable, due to lack of expertise or necessary resources to find original solutions to its own legal problems[23].

The aforementioned instances of ill success in the case of legal transplants have been exacerbated by the phenomenon of 'legislative inflation' with which the European Union and its Member States are currently confronting. The issue is two-faceted: apart from dealing with an unprecedented boom of norms and regulations at national level, European countries also face the overwhelming task of processing vast amounts of foreign multilingual legislation at a fast-forward pace. Thus, on the one hand, national legal systems are asphyxiated by a 'flood of norms' – "paradoxically, the problem of instability of laws has emerged, as legislators more and more strive to develop, strengthen and ensure security of legal system by issuing new laws. Unfortunately, new legal norms often become an obstacle or even a cause of misunderstandings not only for society, but also for legislator[s] [themselves]"[24]. On the other hand, national legal systems struggle to manage the massive import of acquis communautaire. Urgency and immediacy disfavour the lengthier, yet saner assimilation of foreign legal orders. Legal specialists and legal translators struggle to overcome time pressure and to manage, as well as they possibly can, the overload of legal information that must be tailored so as to fit the new social and legal circumstances. The effects of such unsound practices on behavioural patterns of both trained and lay individuals are, however, negative and long-lasting.

Superficiality is one such resulting change in the conduct of trained, legal specialists. One should not forget the fact that the engagement of individuals in the laborious processing of legal transplants presupposes, apart from mandatory expert skills in a particular legal field, acquired as a result of long term education, thorough knowledge of one or several other legal systems and cultures and a particular set of unique interdisciplinary skills in the areas of sociology and linguistics. Hence, an expert in legal transplants is not only an excellent specialist in law, but also a talented linguist and knowledgeable sociologist, a well-versed person in areas of international law, legal history and legal genealogy and a shrewd interpreter of political and economic trends and shifts. However, acquisition of knowledge and practical abilities takes time and requires an act of will on behalf of individuals. Yet, in most cases, motivation lacks as time coerced and underpaid legal clerks counterbalance work overload with shallowness and indifference towards conducting comparative studies and in-depth research with respect to cultural and legal (in)compatibilities, to linguistic differences and to the immersion of alien legal concepts into the host society. From this point of view, jurists are no longer perceived as "learned people, [...] but as mere technicians who apply concepts [in an] eclectic and somewhat somnambulant [fashion]"[25].

Negative changes in behavioural patterns of professionals backfire as fatigued specialists systematically create a "'culture of compromise', [...] hybrid in nature and inherently

[20] ibid 296
[21] ibid 279.
[22] ibid.
[23] ibid 280.
[24] Dace Šulmane, '"Legislative Inflation" – An Analysis of the Phenomenon in Contemporary Legal Discourse' (2011) 4(2) Baltic Journal of Law & Politics 78, 84.
[25] Dan Claudiu Dănișor, *Deconstitutionalised Democracy* (Universul Juridic, Universitaria Craiova Publishing House, 2013) 61.

approximate"[26]. Thus, by superficially overlooking the cultural context of the root concepts, the actors involved endanger the process of transplantation, by determining the "election/ imposition of legal solutions from legal models which are socio-culturally incompatible with the importing society"[27]. Moreover, partakers at the process of legal transplantation tend to adopt a 'dictionary' type of approach, in that they facilely juxtapose legal concepts and terms on the basis of pure semantic equivalence, thus disregarding peculiarities related to the palette of scopes and roles a certain concept fulfils into a specific legal system. Hence, what legal translators should do is undergo a "thorough description of concepts, their function and purpose, and their relationship to the other concepts which are part of the same legal setting within one national legal system"[28]. It is only then that a well grounded and researched comparison between legal concepts can begin. Unfortunately, there are but few specialists who acknowledge the fact that there can be no relationship of absolute equivalence between legal concepts, "unless it is a consequence of complete identity of moral values, legal provisions, interpretation rules and forms of application of laws – but this again would mean the same legal framework"[29]. In this case, the process of legal translation, itself a form transplantation too, becomes replete with conceptual confusions and errors, with loose interpretations of unfamiliar concepts or with mimetic transpositions of senseless neologisms. It may hence, be a cause for the failure of the legal transplant, as such a surface translation "cannot manage to capture the whole semantics and the whole cultural baggage of the exporting society into the importing one"[30]. A fragile transplant unsettles society as a whole, and not only the segment of the few directly involved trained specialists. Thus, consequences of a 'legal irritant' may reflect themselves in its utter ignoring, in cases when there is a "total lack of interest from behalf of society to resort to the imported institutions in social relations, which renders these positively useless", or its rejection, when the 'legal irritant' was "so powerful [or instantaneously introduced into the system, without a prior training of society] that it manifested itself as a cultural shock"[31].

ERROR AND INTELLECTUAL INERTIA: LEGAL CONCEPTUALISM GONE ONLINE

We live in a world of hyperreality, of simulacra, of technologically mediated experience, "where what passes for reality is a network of images and signs without an external referent"[32]. Law must learn to wear the new carcase of postmodernity, yet the technological novelties of the age seem to put to a test its own limits. The challenges which legal specialists must face are the above mentioned increase in legal information and legal inflation, alongside the manipulation of legal data through legal information retrieval systems. It is now that interdisciplinarity manifests itself in all its splendour: the jurist is no longer a monoglot expert of law, but a multilingual computer scientist who can proudly and easily handle heterogeneous legal contents in a digital format...

[26] Karen McAuliffe, 'The Limitations of a Multilingual Legal System' (2013) 26(4) International Journal for the Semiotics of Law 861-862.
[27] Guțan (n 12) 296 .
[28]Peter Sandrini, 'Legal Terminology. Some Aspects for a New Methodology' (1999) 22 Hermes Journal of Linguistics 101, 107.
[29] Peter Sandrini, 'Comparative Analysis of Legal Terms: Equivalence Revisited' in Ch. Galinski and K-D Schmitz (eds)*Terminology and Knowledge Engineering* (Indeks Verlag, 1996) 346.
[30] Manuel Guțan (n 12) 297.
[31] ibid 294.
[32] Gary Aylesworth, 'Postmodernism' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2013), <http://plato.stanford.edu/archives/sum2013/entries/postmodernism/> accessed 15 January 2015.

The Facebook and Google revolutions seem to have induced individuals into a state of assumed superiority as far as their computer skills are concerned. They have been gullibly led to think that, if they can control the Google interface and surf a bit online, they can also master such complex systems as the existing online legal databases, among which the mammoth three, N-Lex, EUR-Lex and EuroVoc. The first question then is one of accessibility. Who are these databases addressed to and what kind of difficulties do users come across when they utilise them? Despite appearances, legal information retrieval systems are not ordinary search platforms. Hence, it is most likely that expert users will profit the most in this situation, provided that they accomplish three conditions: to "(1) know and be able to articulate their information need; and [to] (2) know the content and the storage structure of the documents in the database; and [to] (3) be aware of the operation of the retrieval mechanism"[33]. In other words, we speak here of a process of translation. It is expected that legal specialists "translate the information need they have in mind in the form of legal concepts into a query which should be put in technical database concepts"[34]. However, this is an extremely complicated thing to do, especially if one takes into account the many existing conceptual lacunae, as well as the fact that there can be no exact prediction of what kind of legal information specialists need in order to fitfully apply a solution to a particular case – only "lawyers themselves can make this assessment once they have found the documents"[35]. Legal specialists have specific needs which require certain criteria to be fulfilled, namely "authenticity, reliability, timeliness, completeness and continuity of content powerful but easy to use search capabilities, flexibility, presentation of structural and conceptual knowledge, consideration of differing user groups and their specific needs, and last but not least a clear documentation and useful help-tools"[36]. From this point of view, online legal databases evince a series of limitations which experts have to confront with and manage: "(1) the fact that the index of a database only partially describes its information contents, (2) the imperfect description of an information need by the query formulation, (3) the rough heuristics and tight closed world assumption of the matching function, and (4) the presence of the conceptual gap: the discrepancy between the users' views of the subject matter of the stored documents in the context of their professional setting and the reduced formal view on these subjects as presented by information retrieval systems"[37]. To solve a specific legal issue, legal experts use a certain type of legal thinking and legal structural knowledge, which they obtained as a result of long-term legal education and training; they appeal to multiple references and consult diverse types of legal documents, legal commentaries in physical format and subject-oriented case law files[38]. In order to minimise conceptual lacunae, a legal information retrieval system should be able to convey all mechanisms, structures and concepts which a legal person regularly uses[39].

Moreover, alongside issues related to the content of the databases, difficulties with which experts have to deal with are also of technical nature, as, to give the problem a humoristic touch, "'... the lawyer does not wish to learn how his car works: he wishes to drive it'"[40]. One can speak in this case of the functionality of the search engines, that of the basic ones being too limitative, generating much too vague results and displaying documents which often contain the key term of

[33] Luuk Matthijssen. 'A Task-Based Interface to Legal Databases' (1998) 6 Artificial Intelligence and Law 81, 83.
[34] ibid.
[35] ibid.
[36] Doris Liebwald, 'Interfacing Between Different Legal Systems using the Examples of N-Lex and EUR-Lex' in G. Grewendorf and M. Rathert (eds) *Formal Linguistics and Law* (Mouton deGruyter 2009) 263.
[37] ibid.
[38] ibid.
[39] ibid.
[40] ibid 284.

the search, but which present absolutely no relevance to the user and, on the other hand, of the functionality of the 'expert' and 'advanced' types of search which are almost unapproachable due to the fact that their guidelines are extremely long, detailed and written in a quasi-symbolic, cryptic language. Otherwise explained, "the simple search functionality is limited, and the advanced search function hardly manageable"[41]. A small-scale questionnaire[42] concluded at the end of January 2015 and to which nineteen doctoral, postdoctoral legal students and legal practitioners answered, evinces some of key results with concern to the above-raised issues. Thus, when asked 'how [they] would describe the information that the Help – and FAQ, in case of EUR-Lex – Sections [which exist in all afore-mentioned databases, i.e. N-Lex, EUR-Lex and EuroVoc] put at the disposal of users' six respondents said that sections are 'long, detailed and require a long period of time to go through' and other six replied that 'information is exposed in a quasi-symbolic, computerised language which implies technical knowledge'. Further, at the question 'how [respondents] would describe the information that is generated as a result of the 'quick/ simple search' options, based on key words', seventeen respondents said that 'it is [only] partially relevant, and does not totally correspond to the given search'.

The computerised language of databases is an obstacle for experienced users and an even greater one for inexperienced lay individuals who, apart from being hardly aware of the existence of such online legal tools, are puzzled by their complexity and by the volume of different-structured legal information available to them. For instance, at the question 'from the point of view of the needs and expectation of users, which are the biggest difficulties that they may come across when using these databases', six out of nineteen respondents answered that the 'multitude, relativity and variability of results generated by a particular search' pose much concern to them, while ten people said that 'terminological incongruities due to different types of legal language used within national legal systems' represent their biggest problems. Further, at the question 'from the point of view of the accessibility of these databases, who [they] think that these best fit to', twelve respondents agreed that the databases are best suitable for 'expert user[s]'. This might seem somewhat ironic, if one takes into view the fact that EUR-Lex addresses principally to lay citizens, with no special training in the legal field, its sole purpose being that of creating a more transparent Europe and of bringing it a step closer to its citizens[43]. Apart from the obscurity of the way in which the online databases should be utilised by visitors, accessibility is equally hardened by the content, the language of legal texts, treaties, directives etc., which form the law of the European Union and which most people cannot fully comprehend[44]. The simple act of structuring and presenting a whole arsenal of EU and national legislation of Member States in an electronic format does not present any kind of usefulness. And, "in the rare cases lay citizens indeed use a legal database, they will have other questions, and will have other information needs. Citizens primarily need citizen-tailored texts and issue-related information"[45].

However, the key issues that continue to pose much concern to specialists link, from this point of view as well, to language, plurilingualism, semantic spaces and translations. As in the case of any form of transplant, the concepts which legal information retrieval systems manipulate submit to the same semantic and cultural differences and, implicitly, to the inherent vagueness of language, including that of online legal language. To the comfort of accessing a vast area of legal information through the gesture of a click add difficulties to do with the communication between

[41] ibid.
[42] This questionnaire is based on Liebwald (n 36).
[43] ibid 281.
[44] ibid 282.
[45] ibid.

different semantic spaces – "in the area of law it is important to consider the various perceptions and information needs of the large array of people involved in the process"[46] – and difficulties related to intelligibility – "background knowledge and the intention of the reader as well as the design, composition and the characteristics of the text play an important role"[47]. In view of the first aspect mentioned, different semantic spaces exist even within the frame of electronic legal databases, their existence being likely to cause errors in the process of communication between legal and computer experts. "While the computer scientist uses the syntax and semantics of a programming language, the lawyer considers the treatment of legal conceptualities, which are not easy for the legal expert to formulate in a computer sensitive way"[48]. With respect to the second above mentioned item, intelligibility is not an inherent trait of a text, but rather a process of understanding, a mental activity[49]. Upon reading a text, the basic, factual knowledge and individual semantic spaces of readers activate so that "reading comprehension, which is a knowledge dependant representation, goes beyond what is explicitly communicated by the text. Is it possible to represent textual knowledge and implicit human knowledge with machines? It is indeed possible, however, only partially"[50].

Computer and Internet euphoria have influenced and continue to influence human behaviour. Such complex platforms as N-Lex, Eur-Lex and EuroVoc create the impression of an open space that provides its global network of users free, updated legal resources, available online at all times. This sort of availability and transparency seeds, however, indolence alongside with a vicious state of intellectual inertia. When asked if she has ever encountered examples of mistranslated or ambiguously translated legal concepts on any of the on-or offline legal platforms that she uses, a jurist friend of mine answered: 'It has never crossed my mind to ask myself this. I simply take the translated version of the law I need and apply it without considering any other issue'. However, the indifference of users who simply take everything for granted without delving deeper into the origin of concepts fosters fallibility in multilingual, translated law. Such instances, as the alphabetical list provided by EuroVoc, where one discovers that the equivalent in Romanian of the English concept of 'customary law' is 'customs law' (*drept vamal*), or that the English term 'dependant territory' is translated into Romanian by means of an archaic term, 'vassal territory' (*teritoriu vasal*), no longer in modern use and, by no means properly applicable in this context, arouse important concerns over the negotiation of mistranslations in the legal field. Hence, alongside potentially harmful legal effects that such mistranslations may produce, there is also the question as to whether the ceaseless struggle of specialists to create simpler and faster to access, bigger and more complex legal platforms might actually result into attaining the opposite of what they had initially hoped for, i.e. exposing the new generations of legally trained individuals to a whole different type of complimentary, 24/7 available exhibition of law, whilst unconsciously alluring them into a 'mile of string' of legal and non-legal intricacies.

CONCLUSIONS

The postmodern age has brought about relativity and a profound distrust towards objective reality; legal conceptualism, in its current form, is the result of human convention and, as such, it no longer

[46] Doris Liebwald, 'Semantic Spaces and Multilingualism in the Law: The Challenge of Legal Knowledge Management' (2007) 321 LOAIT 131, 132.
[47] ibid.
[48] ibid.
[49] ibid.
[50] ibid.

enjoys absolute power, but only relativity[51]. In a quest for knowledge and identity, the individual and the law seek to accommodate their senses to global fragmentariness and virtual information. It is a vicious circle in which both are changing each, whilst both individual and law are being simultaneously altered by ungovernable forces. Such struggles are, nevertheless, nonsensical at times when nihilism itself is being gradually obliterated only to raise anxiety to its epics of glory once more; and, suddenly, in the calmness of the moment comes the realisation of the fact that no sooner a change in conduct, in behaviour, or mentality has become obsolete than human nature craves for yet another puzzle to be deciphered. And law is one of Man's greatest puzzle hunts.

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[51] Interview with Gheorghe Dănișor, Prof. Univ. Dr., Faculty of Law and Social Sciences, University of Craiova (Craiova, Romania, 25 November 2014).

A CRITICAL EXAMINATION OF THE PATENT LICENSING AND ITS EFFECTS ON PATENT PROPERTY RIGHTS IN NIGERIA

OLADIRAN AKINSOLA AYODELE[1]

ABSTRACT

The influence of Treaties/Conventions especially the Trade-Related Intellectual Property Rights on the Nigerian Patent system cannot be overemphasized. It has become imperative for developing nations like Nigeria to place emphasis on the functionality of national systems of innovations and technology and develop a robust, measureable, sustainable and beneficial Intellectual Property Protection. This paper critically examines the patentability of invention in Nigeria as well as voluntary licensing and other intricacies. In recognition of the fact that inventions are not territorial, the paper attempts a comparative discourse on patent licensing in Nigeria and other selected jurisdictions e. g. India and China with a view to drawing a relationship between them and Nigeria. The paper analyses the effects of Trade-Related Intellectual Property Rights on patent globally and Nigeria in particular. This paper discusses the contributions of WIPO and other Treaties/Conventions towards the development of patent and patent licensing in Nigeria. Through an in-depth analysis of the Patents and Designs Act of Nigeria and its relationship with compulsory licensing, the paper analyses the justification for and against compulsory licensing provisions and identifies the obvious gaps and makes far reaching recommendations for necessary reforms of the existing Nigerian laws to ensure its conformity with international best practices as encapsulated in Treaties and Conventions.

Key words - Invention, patentability, compulsory licence, treaties/conventions.

INTRODUCTION

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.[2] IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.[3] By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.[4]

For instance, an inventor's patent is not, in any real sense the piece of paper issued by the Patent Office but the legal rights which enable him exclusively to exploit his invention i. e. his intellectual creation. Enormous sums of money are spent developing a new drug and when a patent has been obtained, the patentee fights hard to defend the exclusive use of the inventions. Just like any other type of property, intellectual property can be passed onto someone else, by gift, sale or bequest though it is limited in time. Patent system has the fastest development indices in Intellectual Property Law, all over the world, especially in developed countries. A patent confers upon the patentee the right to preclude any other person from doing any of these acts in respect of a product: that is the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use; and where the patent has been granted in respect of a process, the act of applying the process or doing, in respect of a product obtained directly by means of the process.[5]

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[2] World Intellectual Property Organization, <http://www.wipo.int/about-ip/en/> accessed 17 February 2015.

[3] ibid.

[4] ibid.

[5] Patents and Designs Act (PDA), P2 Laws of Federation of Nigeria, 2004, s 6 (1)

In appropriate cases, however compulsory licence can be granted to third parties for the use of a patented product or a product whose patent application is pending, and without the approval or consent of the patentee or potential patentee.[6]

It is usually granted in a variety of situations especially:

- where the patented invention is capable of being worked in Nigeria but has not been so worked;
- where the existing degree of working of the patented invention in Nigeria does not meet on reasonable terms the demand for the product;
- where the working of the patented invention in Nigeria is being hindered or prevented by the importation of the patented article;
- where by reason of the refusal of the patentee to grant licences on reasonable terms, the establishment or development of industrial or commercial activities in Nigeria is unfairly and substantially prejudiced.

Compulsory licence can also be granted to respond to national health emergency within the country concerned or abroad.[7] An individual can apply to court for compulsory licence but the applicant must prove to the satisfaction of the court that he has asked the patentee for a contractual license but has been unable to obtain such a license on reasonable terms and within a reasonable time; and he must offer guarantees satisfactory to the court to work the relevant invention sufficiently to remedy the deficiencies (or to satisfy the requirements) which gave rise to his application.

HISTORY OF PATENT

The practice of granting monopolies by letters patent has a long history.[8] The dawn of industrialization globally was helped and sustained in no small measure by the protection of intellectual property rights (IPRs), which ensured that every man had the right and potential to benefit from the fruits of his sweat and ideas.[9] One of the mechanisms that have helped to ensure this consistent march in the area of protecting ideas and inventions over the years has been the use of patents.[10] The word patent today is synonymous with monopoly.

Patents can be traced to 1559 when the talented Jacobo Aconcio, an elderly Italian émigré who fortified Berwick against the Scots and attempted the drainage of Plumstead Marshes, asked for a patent and pleaded that it was unfair that anyone who wished could copy his invention to his detriment.[11] From that day onward, the Crown had been granting two kinds of monopolies i.e. monopolies over inventions and over things which were already invented.[12] However, during the sixteenth and seventeenth centuries the would-be monopolist had to plead with the king or queen for the right to acquire protection for his invention. Under the terms of the contract, the inventor had to disclose to the king hence the general public, in return for which the Crown granted absolute protection against the unauthorised copying of the invention for a term of years.[13]

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[6] The First Schedule to the PDA has detailed provisions on this.
[7] It is on record that South Africa granted compulsory licences to some pharmaceutical companies to manufacture antiretroval drugs to combat the AIDS epidemic that was ravaging the country.
[8] J Philips, *Introduction to Intellectual Property Law* (4th edn, Butterworths LexisNexis, 2001) 33.
[9] See generally 'History of Patent Law' at < http://en.wikipedia.org/wiki/History_of_patent_law> accessed 17 January 2015.
[10] ibid.
[11] J Philips 'The English Patent as reward for invention' (1983) EIPR 41.
[12] ibid 34.
[13] ibid 35.

It was however, first conceived as it is known today in 1852.[14] This year the responsibility for the patent was taken away from the Law Officers of the Crown and vested in independent Commissioners for Patents. At that time, series of statutory reforms had taken place including the Patents Act 1949 and subsequently the Patents Act 1971. The Patents Act 1971 brought UK patent law closer to their European counterparts, in accordance with the provisions of the European Patent Convention.[15]

THE RECEPTION PATENT LAW IN NIGERIA

The history of Patents and Design law in Nigeria like most other laws, finds its roots in the received English laws and practices in Nigeria. Patents and Design Law like Copyrights Law was received into in Nigeria through two sources that were Common Law of England, the Doctrines of Equity and Statutes of General Application enacted on 1st January 1900. The other statutes enacted after that date could be extended to apply in Nigeria by an enabling Order-in-Council.[16]

The amalgamation of the Northern and Southern Protectorates in 1914 gave rise to the patent enactment for the whole country in 1916 through the *'Patent Ordinance'* of 1916. The Patent Ordinance of 1916 was replaced by the Registration of United Kingdom Patents Ordinance of 1925.[17] In part, the replacement of this ordinance was necessitated by the amalgamation,[18] bringing together all the laws regulating patents in the colony and the protectorates of Nigeria. However, it was also necessitated by the lack of local technical knowledge of the patent system, made obvious in the report on the draft Patent Ordinance of 1916 by the Attorney-General of Nigeria.[19] This enactment was later renamed *'Registration of United Kingdom Patents Ordinance' Cap. 182 of 1958,* then the *Registration of United Kingdom Patents Act and the Patent Rights (limitation) Decree 1968* in which the patent protection was obtainable only by registration for a United Kingdom Patent before such a registration can become valid.

The *United Kingdom Designs (Protection)* Act provided for Designs duly registered in the United Kingdom, conferring rights and privileges to any proprietor of a design registered in Nigeria as obtained in the United Kingdom before 1971.[20] The 1925 Ordinance and the United Kingdom Patents Act of 1949 - became the subject of judicial scrutiny in Nigeria and showed the controversy in the country with respect to the application of foreign laws.

In the case of *Rhone Poulence,*[21] the first claimant took out a United Kingdom Patent No. 716207 in 1951 "in respect of improvement in or the new phenthiazine derivatives."[22] They subsequently registered it in Nigeria in 1957 under the 1925 UK Patent Ordinance as Patent No. 367 under the exclusive licence of the second claimant, a subsidiary of the first claimant. The second claimant engaged in the selling and distribution of the chemical product chlorpromazine under the name *"Largactil,"* which had very wide sales and a good reputation throughout Nigeria.

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[14] The Patent Law Amendment Act 1852, which established a Patent Office, reduced and rationalized application fees, required printing and serial numbering of patent specifications and introduced the concept of the 'provisional' application.

[15] Convention on the grant of European Patents, Munich, 5 October 1973 (Cmnd 5656). <https://www.goggle.com> accessed 17 March 2015

[16] P Ocheme, *Law and Practice of Copyright in Nigeria,* (ABU press, 2000) 8-9.

[17] Registration of United Kingdom Patents Ordinance No. 6 of 1925.

[18] Sipa-Adjah G. Yankey, *International Patents and Technology Transfer to less Developed Countries.* (Grower Publishing Co., 1997) 121.

[19] See Despatches (Jan-Feb) Nigeria 1916, dated 18/02/1916 cited in Yankey 1987 115-116.

[20] MC Okany, *The Nigerian Law of Property* (1986 Fourth Dimension Pub. Co.) 353. See also WJ Baxter, *World Patent Law and Practice* (1973) 316. See also TO Elias, *Nigeria: The Development of its Laws and its Constitution* (1967) 412 & 413.

[21] *Rhone Poulence S.A and May & Baker Ltd v. Lodeka pharmacy Ltd*. [1965] Lagos Law Report (LLR) 9.

[22] Phenthiazine derivatives are chemical substances derived directly or indirectly from the substance phenthiazine and the compound known as chlorpromazine hydrochloride which was the subject matter of the suit.

In 1964, following a supply order from the Federal Ministry of Health, the defendant, an indigenous pharmaceutical company, supplied a large quantity of *Largactil* and also received additional supply order for the same drug. It was also alleged that the defendant displayed the same drugs on its stand at an exhibition of pharmaceutical industries at the Federal Palace Hotel, Lagos in April 1964.

The claimants commenced an action to restrain the infringement of their rights and in the meantime applied for an interim injunction to restrain further breaches pending the determination of the action.[23] The defendant acknowledged the patent right of the claimants, but contended that it was no infringement to supply to the Federal Ministry of Health for the use by the public. The defendant relied on s.46 (1) of the United Kingdom Patents Act 1949 which provides that:

> Notwithstanding anything in this Act, any Government department, and any person authorised in writing by a Government department, may make, use and exercise any patented invention for the service of the Crown in accordance with the … provisions of this section.

Ikpeazu J. held that the UK Patent Act 1949 did not apply in "its totality or as such to Nigeria." He maintained that the only significant effect the 1949 Act had in Nigeria was in respect of the rights and privileges that ensued from the issuance of a certificate of registration after the registration of a United Kingdom patent in Nigeria as provided by Section 6 of 1925 Ordinance. But that this "did not mean that the whole Act applied." Further, the court held that section 46(1) of the 1949 Act was an express power which the Act specifically confers on a government department which could operate in diminution of the patentee's rights. For this limitation to operate in the country, the Nigerian legislature had to make an express provision in favour of a government department to enable them to authorise non-patentees or non-licensees to supply patented product. Since the Nigerian legislature had not made such provision, the conclusion according to Ikpeazu J. was that "the legislature did not intend the power to exist." Consequently, an injunction was issued against the defendant.[24]

The decision noted that section 46 (1) was relied upon and considered in the case of *Pfizer Corporation v. Ministry of Health*,[25] but Ikpeazu J. was not swayed by the judgment in that case simply because an appeal to the House of Lords was pending. Interestingly, the Nigerian court accepted that according to the Act, a patent has the same effect against the Crown as it has against a subject, except for the protection the Crown derives from the Crown Proceeding Act 1947 and from section 46 (1) of the Patent Act."

The House of Lords upheld the decision which allowed any government department to authorise the use of a patent under section 46 (1).

This decision in the *Rhone-Poulence* led to the promulgation of the Patents (Limitation) Decree of 1968,[26] passed by the military leadership in power. This decree continued to be in force by the provision of Part 1 of Schedule 1 of the Patents and Designs Decree 1970. The provision in section 15 made clear the intentions of the Decree. It states that:

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[23] Okechukwu Timothy Umahi, 'Access to Medicines: the Colonial Impacts on Patent law of Nigeria' University of Manchester, United Kingdom.

[24]The decision noted that s. 46 (1) was relied upon and considered in the case of *Pfizer Corporation v. Ministry of Health (1965) 1 All ER*, but Ikpeazu J. was not swayed by the judgment in that case simply because an appeal to the House of Lords was pending. Interestingly, the Nigerian court accepted that according to the Act, a patent has the same effect against the Crown as it has against a subject, except for the protection the Crown derives from the Crown Proceeding Act 1947 and from section 46 (1) of the Patent Act." The House of Lords has upheld the decision which allowed any government department to authorise the use of a patent under section 46 (1) at *450.*

[25] (1965) 1 All ER.

[26] Patents (Limitation) Decree No. 8 of 1968.

> Notwithstanding anything in this Act, where a Minister is satisfied that it is in the public interest so to do, he may authorise any person to purchase, make, exercise, or vend any Access to Medicines: The Colonial Impacts on Patent Law of Nigeria such article or invention for the service of a government agency in the Federal Republic.

The 1968 Decree affected drug importation and supply by exempting government from infringement of a patent right with respect to the articles concerned or the liability to pay compensation or royalty[27] to a patentee or any person deriving title from him. In 1971, the Patents and Designs Act[28] was enacted. Through the Act, government established a Registry in the Commercial Law Division of the then Federal Ministry of Commerce and Tourism in Lagos, vesting the patent Registrar with wide powers in connection with applications for and grants of patents and the administration of the law generally.[29]

PATENTABILITY

According to Section 1(1) of the Act[30]an invention is patentable if only it is new, result from inventive activity and is capable of industrial application. It is now trite that the global standard or criterion for granting a patent is that the invention must be patentable.

Article 83 European Patent Convention was referred to in the case of *Novartis v Johnson and Johnson*. Article 83 requires an invention to be disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

As against attempting to define what constitutes an 'invention' for the purposes of granting a patent, section 1 of the Nigerian *Patents and Design Act*[31] stipulates the circumstances under which an invention could be considered patentable. Under the section, an invention is patentable if:

> 1(a) if it is new, results from inventive activity and is capable of industrial application; or
> (b) if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application.

For the purposes of subsection (1) of this section-

> (a) an invention is new if it does not form part of the state of the art,
> (b) an invention results from inventive activity if it does not obviously follow from the state of the art, either as to the method, the application, the combination of methods, or the product which it concerns, or as to the industrial result it produces; and
> (c) an invention is capable of industrial application if it can be manufactured or used in any kind of industry, including agriculture.

The phrase "the art" means the art or field of knowledge to which an invention relates. By the provision of the Act "the state of the art" means:

> everything concerning that art or field of knowledge which has been made available to the public anywhere and at any time whatever (by means of a written or oral description, by use or in any other way) before the date of the filing of the patent application relating to the invention or the foreign priority date validly claimed in respect thereof, so however that an invention shall not be deemed to have been made available to the public merely by

[27] Patents (Limitation) Decree s. 1(3) of 1968.
[28] Cap 344, Laws of the Federation of Nigeria, 2004.
[29] KM waziri, 'the legal regime of Patents and Designs Law and its effects on national development' Faculty of Law, Department of Private & Islamic Law, University of Abuja, Nigeria.
[30] Patents and Designs Act Cap. 344 Laws of Federation of Nigeria, 1990; Cap. P 2 Laws of Federation of Nigeria, 2004.
[31] Patents and Designs Act Cap. P 2 Laws of Federation of Nigeria, 2004.

> reason of the fact that, within the period of six months preceding the filing of a patent application in respect of the invention, the inventor or his successor in title has exhibited it in an official or officially recognised international exhibition.[32]

By the provision of the Act, Patents cannot be validly obtained in respect of-

> (a) plant or animal varieties, or essentially biological processes for the production of plants or animals (other than microbiological processes and their products); or
>
> (b) inventions the publication or exploitation of which would be contrary to public order or morality (it being understood for the purposes of this paragraph that the exploitation of an invention is not contrary to public order or morality merely because its exploitation is prohibited by law).

It is also important to note that principles and discoveries of a scientific nature are not inventions for the purposes of the Act.[33]

THE RIGHTS OF A PATENTEE

When the conditions for patentability have been met and application has been made in prescribed form the grant of letter patent is to be made with respect to the invention in issue. The grant of a patent confers exclusive rights on the patentee that precludes any other person from engaging in the following acts in respect of the invention covered thereof:

> 3(1) (a) where the patent has been granted in respect of a product, the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use; and
>
> (b) where the patent has been granted in respect of a process, the act of applying the process or doing, in respect of a product obtained directly by means of the process, any of the acts mentioned in paragraph (a) of this subsection.

Under the provision of the Act, the scope of the protection conferred by a patent shall be determined by the terms of the claims; and the description (and the plans and drawings, if any) included in the patent shall be used to interpret the claims. Statutorily, the rights under a patent shall extend only to acts done for industrial or commercial purposes and shall not extend to acts done in respect of a product covered by the patent after the product has been lawfully sold in Nigeria, except in so far as the patent makes provision for a special application of the product, in which case the special application shall continue to be reserved to the patentee.[34]

On the 5th June, 2012, a Federal High Court Judge delivered a remarkable judgment in *Beddings Holdings Limited against INEC & 6 Others*.[35] The Hon. Justice A. Bello affirmed that the Patent and Industrial Design rights (**RP 12994** and **RD 5946** respectively), held by Beddings Holdings Limited (the Plaintiff) for the invention "**Transparent Ballot Box**" had been infringed by the Independent National Electoral Commission when it licensed the importation of transparent ballot boxes by 2 private Nigerian Companies also joined as parties to the suit, without seeking the requisite license from Beddings Holdings Limited. The imported Transparent Ballot Boxes were used for the 2011 General Elections. But Beddings Holdings Limited had obtained both Patent and Design rights for the Transparent Ballot Box since January, 1998.

The Court's ruling is significant in many ways, one of which is the somewhat extreme possibility that the outcomes of the 2011 General Elections and subsequent Electoral exercises may be nullified as a result of the unlicensed use of these ballot boxes by INEC. By importing and

[32] Patents and Designs Act Cap. P 2 Laws of Federation of Nigeria 2004, s 1(3)
[33] ibid s 1(5)
[34] Patents and Designs Act, P 2 Laws of Federation of Nigeria 2004, s 3(3)
[35] Suit No FHC/ABJ/CS/82/11.

using these ballot boxes without the appropriate license or grant from the Inventor, INEC infringed on the right of the Patent Holder. Adopting the proposition that a bad tree cannot yield good fruit, it would appear that the infringement taints the results that proceed from the illegal use of the Transparent Ballot Boxes. This is a clear example of an instance where the courts have placed precedence on the personal rights of an individual over public policy.[36]

THE GRANTEE OF PATENT

Under the Patents and Designs Act (PDA), the right to the grant of a patent is vested in the statutory inventor who is defined under the PDA as 'the person who, whether or not he is the true inventor, is the first to file, or validly to claim a foreign priority for, a patent application in respect of the invention.'[37] The person granted patent under this arrangement is known as the 'statutory inventor'.[38] Despite this, the law requires that the true inventor be named as such in the patent and this requirement is mandatory and cannot be negotiated away or waived by the true inventor.[39]

In a situation where an invention has been made by a person employed by another person or where it has been made in the execution of a contract for the performance of a specified type of work, the right to a patent over such an invention will be vested in the employer or the person that commissioned the inventor to produce the work.[40] However, the statutory inventor does not have absolute right. Where the employee, by the nature of his employment, is not required to undertake inventive activities but has utilized the facilities or data provided by his employer, or where the invention is considered to be of exceptional importance, the inventor is entitled to fair remuneration, taking into cognizance his salary and the importance of the invention.[41] It is important to note that this right to remuneration cannot be modified by contract between the inventor and his employer and the true inventor is entitled to approach the Court to enforce his right, where necessary.[42]

COMPULSORY LICENSING AND ITS EFFECTS ON PATENT PROPERTY RIGHTS IN NIGERIA

The concept of a compulsory licence over patents arose from the historical requirement that a patent holder must 'locally work' a patented product or process. This meant that the patent holder was required to use or produce the patented invention within the country in which the patent was registered. Where a patent holder failed to 'work' the invention locally, the patent was subject to forfeiture.[43] Compulsory licences were developed as a less drastic means to ensure a patent was exploited.[44] Compulsory licensing provisions were included in the first Commonwealth patents legislation in 1903.[45]

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[36] Exploiting Patent Rights in Nigeria: The Case of Beddings and Strange Bedfellows, Posted by legalistiq in Intellectual Property, Public Policy on June 28, 2012, <https://legalistiq.wordpress.com/tagintellectual-propertyinstitute-nigeria> accessed 8 February 2015.

[37] Patents (Limitation) Decree 1968 s 2 (1).

[38] Patents and Designs Act Cap. 344 Laws of Federation of Nigeria, 1990; Cap. P 2 Laws of Federation of Nigeria, 2004..

[39] Patents and Designs Act, Cap P 2 Laws of Federation of Nigeria 2004, s 2(2).

[40] ibid s 2(4).

[41] ibid s 2(4) (a).

[42] ibid s 2(4) (b).

[43] C Correa, 'Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries' (1999 South Centre) 3-4. See also J Reichman and C Hasenzahl, 'Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the United States of America' (Issue Paper No 5 (2003) UNCTAD–ICTSD) *Capacity Building Project on IPRs and Sustainable Development*, 10–11.

[44] ibid.

[45] Compulsory Licensing, gene patenting and human health, Australian Law Report Commission (ALRC 99). <www.alrc.gov.au> accessed 01 February 2015.

A compulsory license is an authorization which is granted by the government without the permission of the patent holder. A compulsory licence is also defined as one that can be granted to third parties for the use of a patented product or a product whose patent application is pending, and this, without the approval or consent of the patentee or potential patentee.[46] It is usually granted in a variety of situations including but not limited to reasons of preventing the abuse of a patent by the patentee or to respond to national health emergency within the country concerned or abroad.[47] For instance, if there are cases of the outbreak of Avian Influenza (bird flu) and Cholera in some parts of Nigeria, such situations could be declared a national health emergency that could empower the Federal Government or the States concerned to grant compulsory licences for the manufacture of the drugs used in treating such ailments without the consent of the right holders. For instance, in 1997 South Africa effected an amendment to its health regulations to allow for compulsory licences to be granted for AIDS drugs and for local pharmaceutical companies to make cheap and affordable generic versions of those drugs.[48]

Under the TRIPs Agreement, countries have the right to issue such licenses. While the Agreement does not limit the grounds - or reasons - for granting compulsory licenses, countries can only use those grounds which are allowed by their national legislation.[49] The development of appropriate national legislation is therefore crucial. TRIPs further states that the conditions under which a compulsory license is granted should be regulated in accordance with the TRIPs Agreement (Article 31).

Under section 31 of the TRIPs Agreement, among other conditions, a compulsory licence must be non-exclusive, non-assignable, be considered on their individual merits, compensation to be paid to the right holder, and the legal validity of the decision to grant such a licence and the decision on remuneration to be subject to judicial review. In addition, it has to be established that the proposed user would have sought the licence on reasonable commercial terms from the right holder and has failed to get a positive response from the holder within a reasonable time. Section 5 of PDA provides as follows:

> **S. 5** A compulsory licence shall not be granted unless the applicant-
> (a) satisfies the court that he has asked the patentee for a contractual licence but has been unable to obtain such a license on reasonable terms and within a reasonable time; and
> (b) offers guarantees satisfactory to the court to work the relevant invention sufficiently to remedy the deficiencies (or to satisfy the requirements) which gave rise to his application.

It is important to note that this last condition may be waived in cases on national emergency for non-commercial use of the patent.

In Nigeria, Section 11 and the First Schedule to the PDA provides for the grant of a compulsory licence respecting a patent in deserving cases. Section 11 provides as follows:

The provisions of the First Schedule to this Act shall have effect in relation to compulsory licences and the use of patents for the service of government agencies.

The provisions of Section 17 Part II of the First Schedule of PDA have effects of exempting the government from liability for using protected invention. It provides as follows:

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[46] The First Schedule to the PDA has detailed provisions on this.

[47] It is on record that South Africa granted compulsory licences to some pharmaceutical companies to manufacture antiretroval drugs to combat the AIDS epidemic that was ravaging the country.

[48] See generally, Someshwar Singh 'Compulsory Licensing Good for US Public, Not others' at <http://www.twnside.org.sg/title/public-cn.htm> accessed 20 January 2015.

[49] The TRIPS Agreement and Pharmaceuticals. Report of an ASEAN Workshop on TRIPS Agreement. <https://www.google.com> accessed 23 January 2015.

S. 17. Paragraphs 15 and 16 of this Schedule shall have effect so as to exempt-
(a) the Government;
(b) any person authorized under those paragraphs;
(c) any supplier of the Government or of any such person; and
(d) any agent of any such supplier, from liability for the infringement of any patent relating to the relevant article or invention and from liability to make any payment to the patentee by way of royalty or otherwise.

In granting the licence, however, one or more of the following conditions must have been established before the Court:

a. that the patented invention is capable of being worked in Nigeria has not be so worked;
b. that the existing degree of working of the patented invention in Nigeria does not meet on reasonable terms the demand for the product;
c. that the working of the patented invention in Nigeria is being hindered or prevented by the importation of the patented article;
d. that, by reason of the refusal of the patentee to grant licences on reasonable terms, the establishment or development of industrial or commercial activities in Nigeria is unfairly and substantially prejudiced.

In making the application to Court for the grant of a compulsory licence, the applicant has to satisfy the Court that he has attempted to obtain a contractual licence from the patentee and has been unable to do so within a reasonable time or on reasonable terms.[50] The applicant would also have to offer guarantees that satisfy the Court that the applicant will work the patent to the extent that cures the deficiencies that had led to the application for compulsory licence.[51]

The PDA did not define what would amount to 'reasonable terms' or 'reasonable time' in the context of which a contractual licence should have been granted by the patentee to a third party. This notwithstanding, it is reasonable to argue that the incidence of reasonability in all cases would have to be determined by the Courts in all circumstances, and each case has to be determined on its own merits. In all circumstances relevant to the grant of a compulsory licence, the particular Court considering an application has to be satisfied that the condition(s) necessary for a grant of such a licence exists. Even so, the patentee is also legally entitled to approach the Court to establish that his actions in relation to the patent are justifiable. In such a situation, if the Court is satisfied with the position of the patentee, the compulsory licence will not be granted by the Court.[52] The only exception to the representation by the patentee in this instance is that it cannot be based on the fact that the product in question is freely available to be imported into the country.[53] The patentee may apply to Court to cancel a compulsory licence if the licensee fails to comply with the terms of the licence or if the conditions that necessitated the grant of the licence have ceased to exist.[54] The Court in any particular case would have to evaluate the evidence adduced by the patentee in support of the application before arriving at a decision one way or the other.

As noted above, Part 2 of the First Schedule to the PDA provides for the use of patented invention by government agencies under the compulsory licensing regime. Section 23 of Part 2 to the First Schedule to the PDA defines a government agency to mean Federal or State Ministry or

[50] Patents and Designs Act Cap. P 2 Laws of Federation of Nigeria 2004, s 5 (a) of the First Schedule.
[51] ibid s 5 (b), Part 1 of the First Schedule.
[52] ibid. s 4, Part 1 of the First Schedule.
[53] ibid.
[54] ibid s 9, Part1 of the First Schedule.

Department of Government and includes a voluntary agency hospital, a local authority, statutory corporation, and any company which is owned or controlled by the government.

INTERNATIONAL FRAMEWORK

International treaties have been a significant driver of the development of modern intellectual property law in India and China, particularly as it relates to compulsory licencing. The most notable example is TRIPS, promulgated by the World Trade Organization (WTO) in 1995, which established minimum uniform standards of intellectual property protection and required that all member states adhere to them.

The effect of TRIPS

The development of TRIPS was as a result of concerted efforts by multinational firms to strengthen intellectual property rights internationally, and specifically in developing economies. The agreement was finalized in 1995 after ten years of negotiation between countries representing developing and established economies. The agreement contains several provisions that are directly relevant to compulsory licensing. Their influence on the compulsory licensing provisions in China and India laws are clear. China entered into WTO in 2001 while India joined in 1995.

WTO membership requires acceptance of TRIPS provisions. TIRPS advocates emphasized the incentives it would provide for research and development of new and valuable inventions, and that the absence of robust protections would chill such innovation and reduce overall social welfare. Opponents pointed to the small markets and profit opportunities that developing companies offered to patentees and reasoned that the costs of reduced access to important inventions and medicines outweighed the marginal benefits that those small markets produced as incentives to research and development.

The core protection that TRIPS establishes, include the extension of patent protection to products and processes, the right to exclude others from use, a minimum term of 20 years for exclusivity and equal treatment of foreign patent applicants.

Article 30 of TRIPS explicitly authorizes member countries to provide limited exceptions to patentability. This provision has been interpreted as authorizing the issuance of compulsory licences. Explicitly, limitation of the right to issue compulsory patents are outlined in Article 31, which includes the requirement that the licence seeker attempts to negotiate a voluntary licence under reasonable commercial terms for a reasonable period of time. Such licences are also limited in Article 31 to supply of the domestic market. Under Article 27(1), member countries must also make patent rights enjoyable without discrimination as to... whether products are imported or locally produced.

The same limitations contained in TRIPS, articles 30 and 31 are reflected in Chinese, Indian and Nigerian laws. Article 53 of the 2009 China Act prescribed that compulsory licenses be exercised for the benefit of the domestic market and Article 54 requires an attempt to negotiate on reasonable terms after a reasonable period of time.

In the 2005, Indian Act Article 84, the controller must consider whether the applicant for a compulsory licence made an effort to negotiate reasonably. This provision is in section 5 (a) of Schedule 1 to the Patents and Designs Act (PDA) in Nigeria.[55] It can be inferred that the limitations imposed by China, India and Nigeria on compulsory licences are a direct result of their participation in TRIPS, and that their willingness to authorize such licences is founded on a belief that TRIPS sanctions such limited exception on patent rights.

[55] Patents and Designs Act, P2 Laws of Federation of Nigeria 2004, s 5(a) of the First Schedule.

Doha Declaration

After TRIPS was enacted, the World Health Organization (WHO) and some non-government interest groups began to raise concerns that an unintended consequence of TRIPS which may seriously undermine access to healthcare in developing countries. In 2001, WTO ministers met at Doha, Qatar to address growing concerns articulated by public interest groups including concern regarding limits on the production of inexpensive AIDS treatment by Indian companies. The Doha Declaration realised that member countries with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS agreement.

In 2003, the WTO General council issued an implementation of paragraph 6 of the Doha Declaration (the Doha implementation) which stated that the limitation in TRIPS Article 31 on issuing compulsory licences only for domestic use was waived, allowing for export of pharmaceutical products to countries with insufficient manufacturing capacities.

The Paris Convention

The Paris convention for the protection of industrial property which came into effect since 1884, was founded on the principle that foreign nationals belonging to any member country should be afforded equal treatment under another member country's domestic intellectual property laws. It was revised in 1967 and administered by the World intellectual property organization (WIPO).

China, India and Nigeria have been parties to the Paris convention. Article 5 empowers treaty members to issue compulsory licence where a patentee has failed to exercise patent rights domestically. Under this article, however, no compulsory licence for failure to work can be granted if (i) there are legitimate reasons for failure to exercise patent rights or (ii) fewer than three years have elapsed from the grant of the patent.

JUSTIFICATIONS FOR COMPULSORY LICENSING

Three core arguments have been proffered in support of the availability of compulsory licensing. These arguments are that compulsory licences result in (1) reasonable limitations on property rights in a balanced regime, (2) overriding benefit to social welfare (e.g access to vital medicines) and (3) the small marginal cost of limited protections in small markets.[56]

The strongest justification for compulsory licensing is that there are limits to private property rights, and that the public interest mandates that property rights sometimes give way to broader social concerns. TRIPS, which is viewed by the international community as a dramatic step forward for patent protection, prescribes in Article 7 that property rights should be granted in a manner conducive to social and economic welfare.[57] Compulsory licensing can be perceived as an important component of the overall balance between exclusive rights to innovations, and broad availability of those innovations in the market. Compulsory licences stimulate innovation in an important manner, in that they enable a variety of parties to use patented inventions as an impetus to advance technology further, particularly in areas that are perceived as beneficial to the public interests. They also ensure that patentees are compensated reasonably through licensing agreements.

From an economic standpoint, the arguments against compulsory licensing are less compelling where developing countries are concerned - particularly countries with poor

[56] Christopher Marotta, 'Licensing in the public interest : Limits on Patent Property Rights in China and India,' (2013) 8(3) Journal of Intellectual Property Law & Practice 213.
[57] ibid.

manufacturing infrastructures. Where there is little wealth and little purchasing power wielded by individuals, there are few marginal benefits to increased patent protections. With little manufacturing infrastructure, there is also little incentive for entities to engage in production activities in less developed countries. The marginal costs of deprivation of free use of innovations can be dramatic for a country with little internal resources or mechanisms for self growth.

JUSTIFICATIONS AGAINST COMPULSORY LICENSING

The need to subsidize and incentivize research and development which drive innovation is considered to be the core purpose of patent laws in general-. The substantial research and development expenses attributed to innovation, particularly in the pharmaceutical industry with their requirements of regulatory approval, necessitate patent protection to recoup costs. According to the European Federation of Pharmaceutical industries and associations, Europe invests more than $27 billion and the United States invests more than US $38 billion annually in pharmaceutical research.[58]

Patent regimes must do more than provide a mechanism for compensation of costs. **They must also incentive activity as a profitable and worthwhile investment**. By allowing countries with manufacturing abilities to subvert intellectual property rights, technological advancement will be chilled. Compulsory licences allow others to free ride on the research and effort of innovators, undermining the incentives driving that innovation. The jurisdiction in favour of compulsory licence provision as making available important inventions fails where the invention ceases to become available as a direct result of those provisions.

CONCLUSION AND RECOMMENDATIONS

Most African countries (including Nigeria) lack the necessary technological and pharmaceutical manufacturing capacities for effective use of compulsory licensing.[59] Among sub-Saharan countries, only South Africa has a limited primary manufacturing capacity (i.e. it is capable of producing active pharmaceutical ingredients).[60] It is equally notable that the existing frameworks for compulsory licensing in several African countries are not fully compliant with the TRIPS Agreement. Every few compulsory licenses have been granted because of lack of infrastructural facilities to patented invention.

For African countries to take full advantage of compulsory licensing, they must develop substantial local manufacturing capacities. In order to address the challenges involved in building manufacturing capacities in each African country , an African free trade area should be developed to serve as a platform not only for the free movement of goods made pursuant to compulsory licences, but also for an economic or financial collaboration towards the development of strong pharmaceutical manufacturing capacities in the continent.[61] Nigeria must take the initiative to protect its interests. It needs to create an environment favourable for restricting the scope of patent rights in the larger interest of public health and technology and for issuing compulsory licences and adopt measures to replace the paradigm of strict regimes. The Nigerian Patents and designs

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[58] ibid 214.

[59] T Anderson, 'Tide turns for drug manufacturing in Africa.' Lancet 2010;375:1597–8. doi: <http://dx.doi.org/10.1016/S0140-6736(10)60687-3> accessed 20 February 2015.

[60] M Berger, I Murugi, F Buch, C Ijsselmuiden, M Moran, J Guzman et al. 'Strengthening pharmaceutical innovation in Africa: Designing strategies for national pharmaceutical innovation: choices for decision makers and countries.' *African Union, Council on Health Research for Development and The New Partnership for Africa's Development* (2010) <www.nepad.org/system/files/str.pdf> accessed 20 February 2015.

[61] Olasupo Ayodeji Owoeye, 'Compulsory patent licensing and local drug manufacturing capacity in Africa' 1, <www.who.int/bulletinvolume/92/3/13-128413.pdf> accessed on 8 February 2015.

Act is long overdue for review and amendment to ensure effectiveness as a domestic legislation that will incorporate the required compulsory licensing provisions and creating smooth administrative procedures to avoid bureaucracy and red tapeism.

SOCIAL AND CITIZEN PERCEPTION ON HUMAN RIGHTS AND SECURITY DUE TO CLIMATE CHANGE POLICIES IN MÉXICO

PEDRO JOAQUÍN GUTIÉRREZ-YURRITA[1]

ABSTRACT

Public risk perceptions strongly influence the way individuals and societies respond to environmental hazards. What do the people perceives as a climate change risk? How do citizens will subsequently behave? These are vital questions for policy makers attempting to address global climate change at three levels of government. Social scientists and policy makers need to know how citizens are likely to respond to climate initiatives because those responses can attenuate or amplify the impacts. In this paper the information of dozens of articles reviewed on the public perception of climate change in Mexico is synthesized. Exclusively scientific literature in JCR, SCI, SCOPUS and LATINDEX was considered. Not taken into account the grey literature due to lack of objectivity and rigor in data and information. The conclusion is that intention to adapt us to CC is desirable, but it is tough when life level drops and citizen confidence in government dwindles and even tougher when people realize that their jobs are at risk and that they are every time more vulnerable to socio-environmental disaster.

Key Words: Vulnerability, risk, environmental disasters, climate, weather, ecology.

INTRODUCTION

If any country in the world susceptible to suffer socio-economic problems and the environmental impacts caused by a gradual or acute climate change that is Mexico. In the ranking of countries with natural megadiversity, México is located within five mega-biodiverse countries. Similarly, the second worldwide country with mega-sociodiversity is Mexico. 62 recognized ethnic groups with more than six million people accustomed to speaking their mother tongue - this is one of the main reasons for their marginalization- are living in high environmental risk. But so far, anyone, none NGOs neither public authorities has been concerned to ask them what is their perception on climate change, how do they think could be affected and if they really do believe in public institutions to construct favourable policies to help them adapt to.

While it seems clear that after this socio-ecosystem background of Mexico one could think already made the necessary studies to mitigate and adapt to climate change, but the answer is no. Although it must be recognized that there are at least 5 good diagnoses concerning to the country's vulnerability to climate change.[2][3] In addition, two monumental books about the challenges and opportunities that climate change presents to Mexico were published recently.[4] [5] Ultimately, some recommendations of which could be the most reasonable policies to mitigate effects of CC on socio-ecosystems with updates data were made.[6] With respect to Government, The Congress of the Union (Parliament) has created two new Federal laws, the General Law on Climate Change in 2012 and the Federal Law of Environmental Liability in 2014; but it has pending in the Parliament, the setting-up of a special fund to address socio-ecological problems arising from climate change.[7]

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[2] C. Gay (D. F., México: INE-UNAM, 1995).

[3] C. Gay (D. F., México: INE-UNAM, 1996).

[4] G. C. Delgado (D. F., México: UNAM, CCA, 2011).

[5] A. V. Botello (D.F., México: UAM-I… 2011).

[6] T. Cavazos (D.F., México: INECC, 2013).

[7] M G Peláez-Gálvez and Pedro Joaquín Gutiérrez-Yurrita, 'Recensión de la Ley Federal de Responsabilidad Ambiental de México y análisis comparado con la ley equivalente española' (2014) 28 (1) Revista Aranzadi de Derecho ambiental 251.

The problem is that despite everything that has been studied, written and desired to implement to mitigate climate change, little progress was made in México.[8] Current public administration does not know how or has no the necessary means to implement a policy that is public and concrete with specific, effective and measurable actions proposed to adapt us to climate change.[9] The deficiency of public administration is enhanced by a large historical gap between population and coordinating authority.[10] The population does not trust the government and the government did not effectively informs the public, the result is the total disarticulation of environmental policies and the low probability of short-term combined, consensual, sustainable and equitable policies be built among all sectors population and levels of government. The perception of the effects of climate change in Mexico is not results of a pronouncement of the population but of programs, most failed, of government to control urban growth, changing land use and prevent environmental disasters. Awkward, erratic and without social objectives, medium and long-term environmental policies are constant in this government, largely because it has no clear plan, concrete and defined indicators of efficiency and effectiveness action. Impossible to have that plan of action if not working with the population, and to work with it, government have to inform and provide it with real-time mechanisms and forms to express social opinion "informed" either empiricism or lyricism, which both forms have much to say to address local environmental, social and economic challenges.

The protection of human rights in order to increase human security can only be done when people are in sync with the policies proposed by the authority, otherwise, the rights of people are violated and falls in environmental, social, economic, labour, legal insecurity, etc., that leads to high levels of social and environmental injustice.[11] The federal government in coordination with local governments has created new mechanisms to reduce greenhouse gas emissions, but few achievements have such programs, due in large part to the high incoordination among the three orders of government and them with citizens.[12] Since COP16 in Cancún (Mexico, 2010) until the recent in Chile, Mexico has attempted to impose environmental policies without social consensus to go on like this we cannot move forward as agreed in Lima (Peru, 2014)[13] for the next COP21 in Paris (France, 2015).[14]

The main objective of this work was to determine the perception that society has how our government faces the challenge of climate change, and adaptation policies of society to get the best of a severe situation.

CONCEPTUAL FRAMEWORK AND METHODS

A review of the scientific literature on how the Mexican population perceives its safety and how believes that the authority guarantees its human rights faced with the challenge of climate change

[8] M Anglés, 'Perspectivas de las acciones colectivas de protección al ambiente', in Profepa-Ceja-Unam (ed) *El futuro de la Justicia Ambiental en México* (D. F., México: Ed. Porrúa. México, 2014) 73-88.

[9] M Acosta-Jiménez, María Valderrábano, and Pedro Joaquín Gutiérrez-Yurrita, 'Environmental Knowledge and Citizen Participation in Environmental Policy Cuauhtepec, Distrito Federal (Mexico)', in *Proceedings of the 8th International Congress on climate change, Territorial classification and socio-economic crisis* (Tiruchirappalli, Trichy, India: Centre for Remote Sensing and Department of Economics, Bharathidasan University, 2013).

[10] A Monsiváis, 'La democracia como política pública: oportunidades para el fortalecimiento democrático'(2013) 47 Revista de Estudios Sociales 1.

[11] B Ortega-Marín, and Pedro Joaquín Gutiérrez-Yurrita, 'A New Way to Protect Natural Areas through the Human Rights. The Case of Ethnic Minorities in Mexico' (2014) 70(3) International Proceedings of Chemical, Biological & Environmental Engineering 64-68.

[12] R Godínez, 'Las conferencias de Cambio Climático de Lima' (2015) 11(64) Derecho Amb Ecol. 31-34.

[13] D Basurto, 'Avances en materia de Cambio Climático' (2015) 11(64) Derecho Ambiental Ecol. 23-26.

[14] B Goldstein, *La percepcion del movimiento* (6th edn, Thomson – Reuters, 2006).

was realized. In order to be totally objective I have tried not to take into account reports from government or NGOs. Only ISI, JCR or other indexed papers where the central theme were how people perceive the climate change in their land, city or, its impact on their production assets, especially in agriculture, fisheries and tourism were taken into account. Articles were classified attending to what population was directed the study. The rural population was also divided into indigenous and mestizos, farmers and gatherers and on landowners and peasants. Social strata have divided the people of the city; strata were classified by economic purchasing power of citizens first and then for its cultural and educational level.

Before starting the study we must define the meaning of perception. Perception is a cognitive process that people perform when through of their senses they perceive signals from the environment. Because we translate these signals according to our culture, education and intellectual capacity in meaningful knowledge, we can define perception as a process by which an individual selects, organizes and interprets environmental stimuli, to give meaning to a fact or event to come. From this perspective it is difficult to quantitatively assess human perception, especially, when it arise from current issues such as climate change. In addition, it is no easy to estimate the government's position on climate change especially when it faced with dilemma of conserving or promote productivity actions in a rural community or in an indigenous people. Individuals are unique and public administration perceives climate change in their locality and under its distinctive living conditions of education, culture economic power and development opportunities.[15] [16] Under this point of view, the issue of human security and human rights becomes quintessential cyclical, circumstantial, controversial, polysemic and politically uncomfortable like no other.[17]

For this and far more it is difficult to say to what extent the problems are due to climate change or merely to the synergy of social development, landscape usage and technological factors. Nevertheless, we should separate the direct socio-environmental problems of the hassles caused directly by a change in regional climate. In this work dozens of papers about perception of climate change in Mexico were reviewed; but only a few environmental problems could be associated to climate change directly. Indeed, exclusively papers that were directly conducted with Mexican population (about 150 papers) and some papers with international data to make comparative studies between nations (about 30) were taken into account to discuss. Because the universe of study is very vast and diverse, I've divided papers into categories: rural-urban; peasant-indigenous; junior-senior; gender; people educated-non-educated people; low-income people-medium and high class. European studies data are used by way of what might be the trend in Mexico.

HUMAN RIGHTS AND HUMAN SECURITY FACING CLIMATE CHANGE

Large number of papers concluded that the citizenry believes that the problems caused by climate change are circumstantial because develop the theme of human security under the human rights directives is to develop the integration of all strategies that arise to prevent the effects of climate change, mitigate and reverse its effects with other environmental impacts, such as desertification

[15] P D Howe (et al), 'Global perceptions of local temperature change' (2013) 3(4) Nature Climate Change 352-356.

[16] A Schmidt, A Ivanova, and M S Schäfer, 'Media attention for climate change around the world: A comparative analysis of newspaper coverage in 27 countries' (2013) 23(5) Global Environmental Change 1233.

[17] P J Gutiérrez-Yurrita (et al), 'The holistic management of the landscape of ethnic communities will reduce climate change and promote its sustainability' (2014) 5(3) International Journal of Environmental Science and Development 317.

processes and eco-diversity loss.[18] [19] [20] [21] [22] [23] [24] [25] [26] [27] All these impacts increase our environmental, social and economic vulnerability. Today, environmental catastrophes have become a socio-environmental disaster with serious consequences throughout the landscape and its uses either in intensity or range of rendering products.[28] [29] [30] [31] In addition, the situation is that the binomial, human security - climate change, should seek strategies to adapt us as individuals and as society to the new natural and socio-economic order, whether in the conversion of rural productive systems, improvement of tourist areas, certificating the logging and developing new concepts of marine fishing, organic production of remarkable products such as coffee or sugar cane, mainly, in México.[32] [33]

It is also a controversial subject because it implies to take into account the great extras are causing threats that presupposes develop "economic" activities out of place and context in which we have not fully national and international legislation applied.[34] [35]A large segment of the public administration considers it essential to modify the current administrative structure and create a much more modern environmental code on concepts and implementation tools that all together

[18] P J.Gutiérrez-Yurrita, 'Efectos del Cambio Climático Global sobre la Biodiversidad' (2007) 4(20) Derecho Ambiental y Ecologia 61.

[19] M. Vite-Pérez, 'La expansión de la vulnerabilidad social ante el desarrollo tecnológico y el deterioro ambiental', in Pilar Longar (ed), *Alternativas Tecnológicas para mitigar los impactos ambientales y efectos del calentamiento global* (D. F., México: CIECAS-IPN. 2011) 21-32.

[20] M Rebollar (et al), 'Differentiation of problems and solutions specifically on the civil protection system in Mexico, Risk conditions at the national level to the local', in *Proceedings of the Vth International Conference in Government, Public Administration and Public Policies* (Madrid, Spain: National Institute of Public Administration of the Treasury Minister, 2015)

[21] C Conde, R Ferrer, and S Orozco, 'Climate change and climate variability impacts on rainfed agricultural activities and possible adaptation measures. A Mexican case study' (2006) 19(3) Atmósfera 181.

[22] H Eakin (et al), 'A stakeholder driven process to reduce vulnerability to climate change in Hermosillo, Sonora, Mexico' (2007) 12(5) Mitigation and Adaptation Strategies for Global Change 935.

[23] G Schroth, 'Towards a climate change adaptation strategy for coffee communities and ecosystems in the Sierra Madre de Chiapas, Mexico' (2009) 14(7) Mitigation and Adaptation Strategies for Global Change 605.

[24] C N Buzinde.(et al) , 'Representations and adaptation to climate change' (2010) 37(3) *Annals of Tourism Research* 581.

[25] H Eakin. A M Lerner and F Murtinho, 'Adaptive capacity in evolving peri-urban spaces: Responses to flood risk in the Upper Lerma River Valley, Mexico' (2010) 20(1) Global Environmental Change 14.

[26] C M Tucker, H Eakin and E Castellanos, 'Perceptions of risk and adaptation: coffee producers, market shocks and extreme weather in Central America & Mexico' (2010) 20(1) Global Environmental Change 23

[27] R Vignola, M Otárola, and G Calvo, 'Defining ecosystem-based adaptation strategies for hydropower production: stakeholders' participation in developing and evaluating alternative land use scenarios and the strategies to achieve desired goals' *Adapt. cambio climático serv. ecosistémicos América Latina* (2010).

[28] L Durand and E. Lazos, 'The local perception of tropical deforestation and its relation to conservation policies in Los Tuxtlas Biosphere Reserve, Mexico' (2008) 36(3) Human Ecology 383.

[29] M S Sánchez-Cortés, and E. L. Chavero, 'Indigenous perception of changes in climate variability and its relationship with agriculture in a Zoque community of Chiapas, Mexico' (2011) 107(3-4) Climatic Change 363.

[30] J San Román (et al), 'Ecological considerations for the management of a protected area with a strong urban pressure: the case of Lake Texcoco, México' (2013) 39(1) International Journal Ecology and Environmental Sciences 26.

[31] B Bravo, and Pedro Joaquín Gutiérrez-Yurrita, 'Introducing a new logical model based on the holistic approach to risk assessment for environmental disaster' (2014) III(73) Geological and Environmental Sciences 60.

[32] P J Gutiérrez-Yurrita, , Luz Arcelia García, and Minerva Rebollar, 'Is ecotourism a viable option to generate wealth in brittle environments? A reflection on the case of the Sierra Gorda Biosphere Reserve, México' (2012) 161(V) Transactions on Ecology and the Environment 141.

[33] K L Mercer, H R Perales and J D Wainwright, 'Climate change and the transgenic adaptation strategy: Smallholder livelihoods, climate justice, and maize landraces in Mexico' (2012) 22(2) Global Environmental Change 495.

[34] P J Gutiérrez-Yurrita, 'Perspectiva ecológica para mejorar la aplicación de la ley ambiental de cara al cambio climático global' (2009) 15(1) Revista Aranzadi de Derecho Ambiental 81.

[35] E Quesada and Pedro Joaquín Gutiérrez-Yurrita, 'Vinculación entre la normatividad mexicana y los estándares internacionales de gestión ambiental (ISO-14000)' (2013) 26(1) Revista Aranzadi de Derecho Ambiental 103.

environmental laws we have and do not work because some of them contradict in Mexico.[36] [37] It is a polysemic issue because it is impossible to typecast human security under one precept, leading to always have to make several coordinated and interdisciplinary action to solve a problem.[38] [39]

Climate change is an uncomfortable issue since solving the riddles of our common future we need to move in the economic sphere (development of the nation and wealth by all individuals) in the regulation and governance (social justice, environmental justice and development of all communities with equity), and the field of conservation biology.[40] [41] Thus, it appears that various components of human security are anathema to other activities of the same subject but say, seek the progress of society or at least reduce two major insecurities of Mexico, food and health.[42] [43] [44] [45] [46] [47]

Most of the educated citizens that living in medium and big cities believe that the riddle proposed involves a paradoxical situation unprecedented in our history, to achieve food and health security, is needed to significantly increase agricultural land and promote further transformation processes of wild nature, which makes us more vulnerable regarding environmental security and of course, to economic security and civil and social security.[48] [49] [50] [51] While rural people believe that occupational safety is constantly at odds with health security, since it is not just about providing the right conditions to execute our business activities in the workplace, but industry inevitably deteriorates our environment, our crops and products of food consumer direct and therefore our health.[52] [53] [54]

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[36] I Rosillo , and Pedro Joaquín Gutiérrez-Yurrita, 'Una Secretaría de Estado con futuro: La Secretaría de la Conservación del Patrimonio Paisajístico para la Sustentabilidad [última parte]' (2011) 7(40) Derecho Ambiental y Ecología 68.

[37] M Cancino, 'Fortalecimiento de la justicia ambiental en México. Consideraciones fundamentales' in Profepa-Ceja-Unam (ed.), *El futuro de la Justicia Ambiental en México* (D.F., México: Ed. Porrúa, 2014) at 17-29

[38] D R Bell, 'Liberal environmental citizenship' (2005) 14(2) Environmental Politics 179.

[39] P J Gutiérrez-Yurrita, 'Holistic management of temporary watersheds in Central Mexico: an improved easy mathematical model for decision-makers' (2014) 40(2) International Journal of Ecology and Environmental Sciences 95.

[40] J Konow, 'Which is the fairest one of all? A positive analysis of justice theories' (2003) XLI Journal of Economic Literature.

[41] J Martínez, 'Los conflictos ecológico-distributivos y los indicadores de sustentabilidad' (2004) 1 Revista Iberoamericana de Economía Ecológica 5.

[42] K Appendini, and D Liverman, 'Agricultural policy, climate change and food security in Mexico' (1994) 19(2) Food Policy 149.

[43] S Varese, and S Escárcega, '*La ruta mixteca: el impacto etnopolítico de la migración trasnacional en los pueblos indígenas de México'* (D.F., México: UNAM – Paper No. 5, 2004).

[44] C Gay (et al), 'Potential impacts of climate change on agriculture: A case of study of coffee production in Veracruz, Mexico' (2006) 79(3-4) Climatic Change 259.

[45] K Appendini, L Cortés and V D Hinojosa, 'Estrategias de seguridad alimentaria en los hogares campesinos: La importancia de la calidad del maíz y la tortilla' (2008) Ruralidad sin agricultura 103.

[46] J Ruane, and A Sonnino, 'Agricultural biotechnologies in developing countries and their possible contribution to food security' (2011) 156(4) Journal of Biotechnology 356.

[47] B A Bee, 'Si no comemos tortilla, no vivimos:" women, climate change, and food security in central Mexico' (2014) 1 Agriculture and Human Value 1.

[48] S O Saldaña and K Sandberg, 'Impact of climate-related disasters on human migration in Mexico: a spatial model', (2009) 96(1-2) Climatic Change (2009) 97.

[49] E Frank, H Eakin and D Lopez-Carr, 'Social identity, perception and motivation in adaptation to climate risk in the coffee sector of Chiapas, Mexico' (2011) 21(1) Global Environmental Change 66.

[50] P K Krishnamurthy, J B Fisher and C Johnson, 'Mainstreaming local perceptions of hurricane risk into policymaking: A case study of community GIS in Mexico' (2011) 21(1) Global Environmental Change 143.

[51] N E Narchi, 'Deterioro ambiental en Xochimilco: Lecciones para el cambio climático global' (2013) 27 Veredas, revista de pensamiento sociológico 177.

[52] A J McMichael and R E Woodruff, *Climate change and human health* (Springer Netherlands, 2005) 209-213.

[53] D Soares , and I Gutiérrez, 'Vulnerabilidad social, institucionalidad y percepciones sobre el cambio climático: un acercamiento al municipio de San Felipe, Costa de Yucatán' (2011) 18(3) CIENCIA ergo sum 249.

[54] D R Lee (et al), Developing local adaptation strategies for climate change in agriculture: A priority-setting approach with application to Latin America' (2014) 29 Global Environmental Change 78.

In this perspective Mexican government have promoted the policy of *bread for today, hunger for tomorrow*, under the name of public policy to generate a program towards sustainable development.[55] [56] It is important to notice that the program has a lot of opposition from NGOs, stakeholders and population due to the lack of clear information concerning our environmental, social and economic indicators.[57] [58] Public administration does not accept the statements of opposition to its erratic and useless environmental policy, because it says that NGOs are manipulating to citizens and that they are wishing to dictate the environmental policy of the country.[59] Urban and rural people agree that environmental policies in Mexico are not public, but so stipulated by law, as they lack the essentials to be public: that people are well informed and involved in their formulation and implementation;[60] however, if the information reaches the public through "scientists" of universities, they accept and support.[61]

We have to bring out the urgent and if it can, then the important, is the classical political thought middle of this country. Feeding 70 million Mexicans is priority and the result should be evident in the very short term; but the cost of this priority will be reflected not immediately in our future and clear images of developing this priority as urgent and unplanned measure, but as a product of misguided and erratic policy of national growth is climate change and one of its lethal consequences, environmental displaced go infertile countryside and mountain logged into town, they perceived a sector of the population, the upper middle class living in cities.[62] [63] [64] Synthesis is this, meteors that promote changes in hydroperiod and water regime of national landscapes are intensified, which makes the perception of people about to rain very different from what is climate change. [65] [66]

DISCUSSION

Human security can be studied under different perspectives and each result will also have different readings and interpretations. This thematic feature makes the average citizen of the same town and even of the same neighbourhood perceives their safety according to their economic status, culture and personal experiences or nearby persons, as documented in different States of the Mexican Federation (Veracruz, Zacatecas, Chiapas, Yucatan, State of México, Queretaro, Hidalgo, Sonora, Chihuahua, Coahuila for instance). How safe and free is humankind? That is the shared question between population and UN that all of us have made repeatedly and that we never come to

[55] P J Gutiérrez-Yurrita, 'El Paradigma de la ecología integral en la gestión de los recursos naturales' (2004) 1(1) Sapĕre 4.
[56] A Costa, 'General Aspects of Sustainable Urban Development' in C. Clinni (ed.), *Sustainable development and environmental management: experiences and case studies* (Berlin: Springer, 2008) 365.
[57] M Campos, A Velázquez and M McCall, 'Adaptation strategies to climatic variability: A case study of small-scale farmers in rural Mexico'(2014) 38 Land Use Policy 533.
[58] ibid.
[59] L Laestadius (et al), 'We don't tell people what to do": An examination of the factors influencing NGO decisions to campaign for reduced meat consumption in light of climate change' (2014) 29 Global Environmental Change 32.
[60] L Galicia. L Gómez-Mendoza, and V Magaña, 'Climate change impacts and adaptation strategies in temperate forests in Central Mexico: a participatory approach' (2013) 1 *Mitigation and Adaptation Strategies for Global Change* 1.
[61] A Robles-Morua (et al), Exploring the application of participatory modeling approaches in the Sonora River Basin, Mexico' (2014) 52 Environmental Modelling & Software 273.
[62] K Schmidt- Verkerk, 'Buscando la vida–How Do Perceptions of Increasingly Dry Weather Affect Migratory Behaviour in Zacatecas, Mexico?' in *Environment, Forced Migration and Social Vulnerability* (Berlin: Springer Berlin Heidelberg, 2010) 99-113.
[63] R Black (et al), 'The effect of environmental change on human migration' (2011) 21 Global Environmental Change 3.
[64] A K Mishra and V P Singh, 'A review of drought concepts' (2010) 391(1) Journal Hydrology 202.
[65] A Dai, 'Drought under global warming: a review' (2011) 2(1) Wiley Interdisciplinary Review: Climate Change 45.
[66] ibid.

understand them thoroughly to reply.[67] But right now the answer of citizenship will be more diffuse than ever and UN's answer will be more absent than before. Formerly human security was perceived in terms of war or crime; secondly in terms of food, work, and health; but at present, human security is very tight to the third generation of Human Rights. Governance is the concept that Europe tries to implement into the called third world.[68] Although México as a country with an emerging economy and a consolidated democracy is trying to implement the new governance model in its public administration, little success has had.[69] Mexican population, whether they live in the city or in a village in the mountains or on the coast, whether indigenous and mestizo, does not feel at all secure in anywhere. But curiously, although people associated their insecurity of their domestic life to environmental risk, they would do little to mitigate climate change if it means losing material satisfaction for them.[70] In Mexico many people think that the perpetrators of environmental degradation together with the government much talk and little do and, it is their responsibility to act to remedy it.[71] [72] This lack of awareness of their personal situation is due largely to ignorance, the growing misinformation on the subject, scepticism of government reports and mistrust of local government activities.

CONCLUSIONS

- Risk perception is skewed to the loss of productive capacity and to public health.
- Public risk perceptions strongly influence the way individuals and societies respond to environmental hazards.
- The issue of concern to the population is to keep their job, their income as a farmer laborer or as much as a forester or fisherman.
- Lack of the awareness of Climate Change is due to the growing mistrust in government.

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[67] J C Gordon, T Deines and J Havice, 'Global Warming Coverage in the Media: Trends in a Mexico City Newspaper' (2010) 32 Science Communication 143.
[68] M T Nance and M P Cottrell, 'A turn toward experimentalism? Rethinking security and governance in the twenty-first century' (2014) 40(2) Review of International Studies 277.
[69] P J Gutiérrez-Yurrita, 'Fuzzy logic applied into a holistic model to manage seasonal watersheds in México' (2014) 1(6) EnviroGeoChimica Acta, special issue 352.
[70] A L Taylor, S Dessai, and W B de Bruin, 'Public perception of climate risk and adaptation in the UK: a review of the literature' (2014) Climate Risk Management.
[71] B Berrang-Ford, J D Ford and J Paterson, 'Are we adapting to climate change?' (2011) 21(1) Global environmental change 25
[72] K VanderMolen, 'Percepciones de cambio climático y estrategias de adaptación en las comunidades agrícolas de Cotacachi' (2011) 82 Ecuador debate 145.

"THE NEGATIVE ATTACHMENT": THE LINK TO PARENTS FOR CHILDREN EXPOSED TO DOMESTIC VIOLENCE

YASSINE BOUROUAIS

ABSTRACT:
Violence is a destructive force in inter-subjective relationships; a child who is exposed to domestic violence is a spectator of a relational disorder, a shocking relationship between two people who influence him both through their behaviours and their speech. When parents are violent, the child sees his attachment figures fail in their main functions, which are to protect him and give him security. We have followed in clinical evaluation research children exposed to domestic violence. The objective was to identify the effects of exposure to violence between parents on the attachment link. The main question raised is to what extent does exposure to domestic violence affect the quality of the attachment bond? We have proceeded with an improvised method that we call Squiggle-history. This a game without rules in which a child draws, hears stories and invents a story in turn. The stories we collected focus on themes of rejection, abandonment, privatisation, loss, murder, and rescue. The stories told by the children reflect the importance of an experience of security and their ability to build a stable relationship with attachment figures. The attachment insecurity also affects the identifications of the subject – the identification process seems altered.
Keywords: Negative attachment, exposure to domestic violence, insecure link, identification process, Squiggle-stories, family drawing.

INTRODUCTION:

Exposure to violence between parents is characterised as a form of child abuse; it is both invisible and destructive. This is not a new phenomenon, but it has long been considered a problem of spouse not including children. These are often the forgotten victims of such violence; if in most cases, the woman is designated a victim of domestic violence, the child is himself considered "collateral damage". However, the consequences of exposure to violence between parents are considerable.

Violence is a destructive force in inter-subjective relationships; a child exposed to domestic violence is a spectator of a relational chaos, a relationship between two people who influence him both through their behaviour and their speech. When parents carry out violence, the child is deeply affected: he sees his attachment figures fail in their main functions, which are to protect him and give him security and comfort. The attachment of the child to a violent donor parent is subject to a test; the child, through being subjected to violence images, has his attachment with the parental couple altered in favour of a rupture.

EPIDEMIOLOGY:

No violence against children can be justified; this is at least what the child protection organisations state. In its reports UNICEF[1] does not refer to conjugal violence but rather domestic violence. We find that the term domestic violence induces a minimisation of the problem, since it gives it an intra-familial status, reinforcing its private and taboo characteristic. Thus, UNICEF defines "domestic violence" as "[...] a form of assaultive and coercive behaviors, including physical, sexual and psychological violence as well as economic coercion exerted by an adult or a teenager against

[1] UNICEF, *Derrière Les Portes Closes. L'impact De La Violence Domestique Sur Les Enfants,* Unicef Report 2005 < Http://www.Oned.Gouv.Fr/Print/3473>.

his current or former intimate partner." What interests us is violence between parents outside of a marital union, because in fact the problem in the terms "conjugal violence" or "domestic violence" is the violence between a man/woman couple, whether or not they are united by marriage.

According to the UNICEF report just quoted, about 275 million children are exposed to violence between parents across the world. This figure is approximate because, according to UNICEF, information on the subject is limited, especially as many countries do not take preventive measures or do not offer support when violence occurs. The victims of conjugal violence are usually women, sometimes men, and the child is considered as collateral damage. UNICEF highlights that the consequences of conjugal violence on women have been largely documented, but we do not know much about children exposed to violence between parents. In 2006, UNICEF, in collaboration with the Body Shop Association, launched an awareness campaign *Let's reduce domestic violence*, the aim being to break the silence by listening to victims.

CONSEQUENCES OF EXPOSURE TO CONJUGAL VIOLENCE: DESTRUCTION OF THE RELATIONSHIP AND THE VALUE OF THE OTHER

In cases where a child is exposed to conjugal violence, the law is often violated by the parent. The child who sees violence between his parents perceives that his models are violating the law; therefore, he becomes, by identification, himself a model of transgressive law in which the other does not exist. Violence between parents strengthens the relational negativism; it involves the security of the child attachment, which puts at risk the child's identification process.

Scenes of conjugal violence impose on a child a massive visual trauma, without involving the child corporally. Often when parents carry out violence, they do not pay attention to the presence of their children, and when they expect a scene of violence, they move them to a room where they hear without seeing. In both cases, the child is involved, even if he is not involved in violent scenes by trying to protect his mother, or even beating her or being the subject of this violence. Thus, domestic violence hinders the developing capacities of the child because they upset his instinctual life.

Thus, the more a child is exposed at a very young age to violence between his parents, the more he will struggle to develop in a stable way[2]. The failure of family relationships and the preponderance of feelings of fear and insecurity inhibit the environment exploration process, which causes the child to introject violent inappropriate models of attachment. Moreover, in this regard, Ferenczi emphasised the anxious identification[3], or when the child introjects the destructive parental objects by assimilating their properties; thus, feelings of guilt, shame and evil, introjected, become a constituent part of himself (self) identity.

Following the scenes of domestic violence which he attends, the child responds with violence because of a phantasm realisation of a taboo, that of murder, who is put into action when he did not ask to be. When he must be repressing.

Children are more vulnerable during pre-oedipal and oedipal periods, the child's ego is in a crucial phase of development and it is fragile before the violence that pervades the relationship between father and mother. The passivity of the powerless and small being, the child, increases his anxieties. The violence between the parents, these two figures of the attachment, who are supposed to protect him by giving him love and security. The psychological effects of such violence are

[2] Roland Coutanceau and Joanna Smith, *Violence et famille : comprendre pour prévenir* (Dunod Edition 2011).
[3] Sandor Ferenczi (1932), *Confusion des langues entre adultes en l'enfant* (Petite Bibliothèque Payot Edition 2004).

traumatic because the child does not understand what is happening, or the reasons for this violence[4].

Domestic violence tends to abolish the difference between subject and object, while problematising primary identification. The lure of primary identification is to enable the subject in the process of formation to imagine the equal of his model. Similarly, exposure to conjugal violence at an early age offers the child the same illusion of equality with the abusive parent. The attachment relationship is no longer based on safety.

Exposure to conjugal violence is a form of psychological abuse that manifests itself in many ways since it has the effect of terrorising the child, isolating him by fear of, or shame due to, violence and, finally, to corrupt him by socialising him to power abuse and inappropriate forms of interpersonal relations.

MODALITY OF INTERVENTION:

We developed a clinical assessment technique for children exposed to conjugal violence. The objective was to identify the effects on the attachment link of exposure to violence between parents. The main question was, to what extent does exposure to conjugal violence affect the quality of the attachment link?

Negative attachment is a concept invented by the French psychoanalyst Anzieu (1990). Anzieu suggests that a negative attachment develops when the attachment impulse is dissatisfied or an alliance takes place between the attachment impulse and a self-destructive impulse instead of the self-preservation impulse[5].

To verify this point of view, we developed a consultation technique essentially based on the game we called Squiggle-story; a game without rules, in which the child draws, hears stories and invents a story in turn. This method is not systematised or standardised, and consists of inviting the child to tell a story freely and instantaneously without any thematic orientation. The child is asked to draw something, such as drawing the family. We were inspired in this method by the work of Winnicott on the Squiggle.

Attachment is a beginner primary affective process in the very first moments of life, so it belongs to the domain of archaic affects (rage, distress, anxiety, hatred) corporally transplanted and part of the body image. The idea is that the attachment is represented as part of the body and therefore the drawing style, or is manifested indiscriminately in the drawing of each character[6].

Kaplan and Main (1986)[7] developed a family drawing analysis system in reference to attachment theory. This method has been approved by the work of Pianta, Longmaid, and Ferguson, 1999; Fury, Carlson, and Sroufe, 1997[8]; Behrens and Kaplan, 2011; Fihrer and McMahon, 2009; Goldner and Scharf, 2011; and Madigan, Ladd, and Goldberg, 2003.

According to R, Kaès (1984), to tell a story or tale "[...] transforms affects (feeling) and non-represented objects, because destructive to represent himself, in tolerable performances; still in representations capable of generating representations."[9] According to the theme of the story and the amount of the deliberate affect, the child will be able to link with the language by experiencing

[4] Andrée Fortin, 'L'enfant exposé à la violence conjugale: quelles difficultés et quels besoins d'aide ?' (2009) 73 EMPAN < http://www.cairn.info/revue-empan-2009-1-page-119.htm> accessed 20 September 2010.
[5] Dider Anzieu, *L'épiderme nomade et la peau psychique* (Apsygée Edition 1990).
[6] Colette Jourdan-Ionescu and Jeanne Lachance, *Le dessin de la famille* (ECPA 2000).
[7] Jude Cassidy and Philipp R Shaver, *Handbook of Attachment: Theory, Research, and Clinical Applications* (Rough Guides, 2002)
[8] Gay Fury, Elisabeth A Carlson and L. Alan Sroufe, 'Children's representations of attachment relationships in family drawings' (1997) 68 Child Development. 1154.
[9] René Kaès, *Contes et divans. Médiation du conte dans la vie psychique* (3rd edn, Dunod 1999).

pleasure. If he is unable to symbolise his affects and metabolise a deliberate amount, he can make sense of the story he tells.

Narrativity in children is a real clinical issue. The ability to tell a story is related to attachment security – internalised representations are the basis for the construction of the feeling of being in security. Therefore, the quality and style of the story told by the child are rooted in relational security. Lebovici clearly confirms this: "Regardless of age, what is important to remember are the correlations that exist between the narrative and the type of attachment patterns, which means that the Self verbal or narrative is rooted in part in the security of attachment procedures but also, conversely, that the subsequent psychological security depends on the quality of the narrativity and verbalization."[10] Lebovici goes on to state and confirm to psychoanalytic method that aims, in therapy, at a reconstruction of the history of the subject in language.

CLINICAL ANALYSIS:

Exploring the attachment of children exposed to conjugal violence through the drawing of the family seems relevant. The tendency to draw non-individualised, floating and disguised, family figures is found particularly in cases of children who have been exposed to violence between parents at a younger age.

The need for attachment is expressed in the drawing of the family. The characters are sometimes close to one another: the desire to be in physical contact being indicative of a proximity search, of a return to the first contacts with the mother, characterised by difficulties such as rejection. Szwec has stated: "When the mother is internalized in the form of an insufficiently reliable object and that regression in the maternal womb seems too dangerous, rejection of passivity as instinctual position can affect development.[11]" Autonomy is then developed in relation to early maturation of the child, the internalisation of the attachment figure on a non-securing basis leads the child to develop avoidance and distancing strategies, which is the essence of the anxious-avoidant attachment.

The stories told by children reflect the importance of the experience of security and their ability to build a stable relationship with attachment figures. In children's attachment security is assessed by representations, and thus language. Hence our interest in this method of "telling a story", as it offers an interesting approach to the exploration of attachment security. The stories we collected focused on themes of rejection, abandonment, privatisation, loss, murder, and rescue. The speech is sometimes disorganised and incoherent; the content and discourse style is representative of the quality of internalised performances of experiences with parents. These experiences being marked by violence, generates a fearful speech. Zigante et al. state: "The child, in his representation capabilities can link this event and treat it by the language with a certain pleasure or else be overwhelmed in his binding capacity and manifest displeasure and/or disorganisation."[12] This speech, which is the perfect result of his binding capacities between representation and affect, is marked by insecurity; the child is attacked in an inappropriate relationship. The affect which is imposed in the stories reflects the fact that the contribution to attachment figures is characterised by avoidance and neglect. It might be possible to state that

[10] Serge Lebovici, *Le bébé, la métaphore et la psychanalyse* (Odile Jacob 2001)

[11] Gerrard Szwec, 'Défaillance de la psychisation du corps chez le bébé non câlin', (2010) 5 Revue française de psychanalyse, <http://www.cairn.info/revue-francaise-de-psychanalyse-2010-5-page-1687.htm>, accessed 23 February 2014

[12] Franck Zigante, Ayala Borghin and Bernard Golse, 'Narrativité des enfants en psychothérapie analytique : évaluation du changement', (2009) 1 La psychiatrie de l'enfant < http://www.cairn.info/revue-la-psychiatrie-de-l-enfant-2009-1-page-5.htm>, accessed 27 July 2010.

stories told are dependent on the subjective reality, as the fantasies are built on a core of reality.[13] Children make explicit connections between the fictional story told and their own history, confirming the projective dimension of this method. Thus, I can refer to Freud who says: "We see the children in their games reproduce all that impressed them in life, by a kind of abreaction against the intensity of the impression they seek to become masters."[14] The stories the children told talk about their problems, they thus constitute a cathartic end, they allow a release of feelings related to memories of painful events they have experienced.

Insecurity imprints the children's experiences. If we accept that the attachment security conditions the future relationship of the child, insecurity in the active relationship creates anxieties and fears of being rejected or abandoned.

The insecurity of attachment may be traumatic; we assume that children exposed to domestic violence may be traumatised in afterwards. Exposure to domestic violence leads to a psychological break, to be internalised, it causes probable unrest on the part of the child. Freud defined the trauma by the lack of emergency in parts of the ego. An absence of meaningful relief facing the eruption in the psychic life of the child – threats, insults, shouts and blows beyond his mentalisation abilities. The feeling of insecurity in a link supposed to be the focal point of future relations is deleterious, Bowlby points (Quoted in Guedeney (2013))[15] : "Children who have had traumatic experiences of attachment in early childhood evolve to a register calls 'controlling with reversing parenting'". The attachment insecurity also affects the identifications of the subject, with role reversal when the child takes the position of the father when he seeks to protect his family, or when he mistreats others.

The intensity of violence is important: if it is traumatic, it can lead to the alteration of primary identification. This intensity bypasses the usual mechanisms; i.e. repression, and strengthens the mechanisms of denial and cleavage. It is seen that cleavage subtracts a part of the ego, which therefore remains empty, and it is this part of the ego that is left blank, to be replaced by identification with the aggressor. As stated by Ferenczi, in front of the influx of excitement, a "cleavage of himself into a sore and brutally destructive part and in another part both omniscient and insensible."[16]

The trauma that affects primary identification affects, later, the premises of the object relationship by sabotaging the use of the primary object: the attachment figure seems inaccessible. Bokanowski has stated: "The trauma reflects a lack of adequate response from the subject facing a situation of distress, a lack that mutilates forever the ego, now a permanent traumatic state and a primary sensation of distress (Hilflosigkeit), which throughout life, reactivates at any opportunity[17]." Inaccessibility to the attachment figure amplifies the persistence of identifying conflicts, leading to disinvestment of the link with the attachment figure. Freud wrote: "Identification is the earliest and most original form of emotional connection.[18]" So any identification conflict will affect the development of attachment. However, this identification conflict can cause a negative attachment, which, according to Anzieu, results from the combination of the attachment impulse and the self-destructive impulse, rather than that of self-preservation.

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[13] André Green 'Agressivité, féminité, paranoïa et réalité', (2002) 4 Revue française de psychanalyse, < http://www.cairn.info/resume.php?ID_ARTICLE=RFP_664_1091> accessed 05 November 2011.
[14] Sigmund Freud (1920) *Au-delà du principe de plaisir* (Petite Bibliothèque Payot Edition 1973).
[15] Nicole Guédeney, Antoine Guédeney and Catherine Rabouam. (2013) '*Violences conjugales et attachement des jeunes enfants'*, 3 Perspectives Psy <http://www.cairn.info/resume.php?ID_ARTICLE=PPSY_523_0222> accessed 03 March 2014
[16] Sandor Ferenczi (1982) *Analyses d'enfants avec les adultes* (Petite Bibliothèque Payot).
[17] Thierry Bokanowski ' Variations sur le concept de e traumatisme : traumatisme, traumatique, trauma' (2005) 3 Revue française de psychanalyse < http://www.cairn.info/zen.php?ID_ARTICLE=RFP_693_0891> accessed 13 January 2008.
[18] Sigmund Freud (1921) *Psychologie des foules et analyse du Moi* (Petite Bibliothèque Payot 2001).

Thus, "the negative experience of attachment hampers access to oedipal organization and creates a resistance to such access.[19]" The analyse of children exposed to conjugal violence offers a very illustrative example of this theoretical path.

CONCLUSION:

Exposure to conjugal violence threatens a child's ability to build a secure and stable connection with major attachment figures; this failure can produce pathological conditions in the acts of the child. The organising role of attachment is lost, replaced by insecurity. Internal continuity of the instinctual and relationship life is seen in decline. Building on the attachment link to repair the damaging effects of conjugal violence seems an appropriate way to make the child feel safe in this link, to enable him to compensate without detaching the attachment figures. The continuity of this relationship is important in childhood; in adolescence, it will be subject to reorganize that relationship and break free.

[19] Didier Anzieu, *Créer-Détruire : Le travail psychique créateur* (Dunod 2012).

PRINCIPLE OF EQUALITY IN FEMINIST DEBATES AND THE WOMEN'S CONVENTION: A BRIEF ANALYSIS

NIK SALIDA SUHAILA NIK SALEH[1]

ABSTRACT

In this paper, I discuss the jurisdictional background and provide a conceptual analysis of equality in feminist debates and the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention) in an attempt to explore a wider understanding of equality and its principles. First, I draw upon Fletcher's (2002) ideas of equality to argue that the basic premise of the argument is founded on the discourses of formal and substantive equality. Hence, it is important to apply equality appropriately to ensure that all human beings are guaranteed equal access to justice. I argue that an extended equality model which focuses on the subordinated group is rather significant in this analysis of gender equality. I trace that the Women's Convention spells out the meaning of equality and how it can be achieved through its principal provisions which guarantee women's rights and needs.

Keywords: equality, disadvantage, non-discrimination, women's rights

INTRODUCTION

The Women's Convention recognizes in its Preamble that 'a change in the traditional role of men and women as well as the role of women in society and in the family is needed to achieve full equality between men and women'. Even though there are various debates on whether the term 'equality of gender' should be changed to 'equity', the Women's Convention is comfortable in its use of the word 'equality', which sets broad standards for Member States[2] (Facio and Morgan, 2009: 5-9). The substance and framework of the Convention expressly convey feminist voices and messages on rights (Lacey, 2004: 53). According to Lacey, it locates the realization of rights and recognises important differences among women.

The Convention defines discrimination against women and sets up an agenda for national action to end such discrimination (Saksena, 2007: 483). In its Title, the Convention underscores states' obligation to prohibit discrimination against women. Under the Convention, equality is non-discrimination (Coomaraswamy, 1994: 47) and discrimination against women violates the principles of equality of rights and respect for human dignity. In the Preamble, the Convention explicitly acknowledges that '*extensive discrimination against women continues to exist'* and emphasizes that such gender discrimination '*violates the principles of equality of rights and respect for human dignity'*.

Article 1 provides that,

'For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. Here, according to

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[2] The term *'equity'* appears only once in the Women's Convention. Preamble: *'Convinced that the establishment of the new international economic order based on **equity** and justice will contribute significantly towards the promotion of equality between men and women'*

the definition of discrimination stated in Article 1, there is a close relationship between equality and non-discrimination.

BRIEF CONCEPTUAL ANALYSIS OF GENDER EQUALITY IN FEMINIST DEBATES

In this Section, I examine the jurisdictional background and provide a conceptual analysis of equality in feminist debates to search for a wider understanding of equality and its principle. I note that, according to feminist standpoints, equality is one of the most fundamental principles of human rights together with justice and dignity. Griffin (2008: 39) has stressed that *'equality is a ground for human rights'*. I note that equality and non-discrimination are the basis of international human rights; as Rehman (2003: 269), McCrudden (2004) and Grant (2007) said, a corollary between equality and non-discrimination is well recognised.

The widespread understanding of equality today is based on liberal equality, that *'things that are alike should be treated alike'.* Non-discrimination is understood as formal equality (Kapur and Cossman, 1996: 178). As stressed by Smith (2003: 185), the usual rule that applies for equality is that *'a situation is unequal if like situations are treated differently or different situations are treated similarly'.* Wesson (2007: 751) and Ahmad (2005: 4) stated that this kind of equality relied upon the proposition that fairness requires similar treatment only. Liberal equality, which is drawn from the aforementioned maxim '*likes should be treated alike',* asserted by Fredman (2001: 154), is associated with *'neutrality',* individualism and autonomy. This might conflict with collective interest and equal distribution of social goods.

Fredman (2003: 43) has stressed that the aim of equality is to give people an equal set of alternatives from which to choose to pursue their own version of a good life, thus, treating different people similarly will deny them their choice for a good life. Fredman has explained that this limited sense of equality which is correlated with neutrality is achieved by forbidding the state's preferences for any group (disadvantage group) but applying similar treatment by laws. Even though this sounds impartial to every individual, the insistence on a particular set of values based on the dominant power which set the choice might result in discrimination against disadvantaged groups. Fiss (1976: 107) has even claimed that the neutral value of similar treatment is merely an illusion.

The aim of substantive equality is to remedy past and present disadvantages (Rebouche, 2009: 712-713). As stressed by Husband (2004: 11), equality of treatment does not take into account the fact that *'the equal application of rules to unequal groups or individuals can have unequal results'.* According to Husband, equal treatment for unequal potential groups tends to reinforce inequalities and can lead to inequalities for groups that have been disadvantaged by a system that fails to take different needs into account. I argue that substantive equality goes further than the notion of equal treatment because it considers different needs between groups and individuals to achieve equal outcomes. Indeed, focusing only on results would not be the best practice because overemphasis on results might cause unfairness inherent in the process of achieving these results. Therefore, the application of formal equality without setting aside substantive equality would help achieve the maximum justice for people, including disadvantaged groups.

There is a varied body of literature on equality based on gender[3] from the feminist perspective. Issues of equality and possible ways to achieve it have always been at the heart of the

[3] See, for example, Elizabeth Wolgast, *Equality and the Rights of Women.* (Cornell University Press, 1980); Catherine McKinnon *Feminism Unmodified* (Harvard University Press, 1987); C Smart, *Feminism and the Power of Law* (Routledge, 1989); Elizabeth

feminist project (Frug, 1992: 4). I trace that most writers have claimed that similar treatment is insufficient because it fails to address societal structures that perpetually disadvantage women. Charlesworth and Chinkin (2000: 10) professed that, even though women's rights to equality are guaranteed with similar treatment, inequality might still exist in the process and the principles of legal systems. As noted by Unterhalter (2005: 30), *'equality is no longer a matter of equal amounts, but a more substantive idea associated with solidarities and confronting injustice'.*

Even though equality has been described as a simple concept (Holtmaat, 2004: 2), its meanings and principles have not been properly understood. I note that similar treatment might not have a value of neutrality because, once the right to equality is related to and enforced by laws, its objectivity and impartiality can be challenged. Because of the *'aura'* of truth and justice, laws have always caused people to believe that truth and justice are incorporated into laws; in fact, however, as Fredman (1997: 2) alleged, laws are made by people in power, and their interests have always been predominantly male, which is why Fiss (1976) challenged the neutral value of similar treatment. I suggest that this might be due to the fact that the concept of similar treatment conceals the real nature of substantive needs and correlative principles of human rights and equality.

In thinking their way through such problems, feminists have developed certain critiques of the concept of equality which informs them. The critique asks that *'equality not be reduced to sameness'* (Fletcher, 2002: 149). In other words, if obstacles still exist to impede genuine exercise of choice, equal treatment is not sufficient (Fredman, 2003: 43). I am in agreement with Smart (1989: 85 and 1995: 188) when she criticized the notion that women should be equal (treatment) to men, as if men are the standard by which women must be judged. As claimed by Fredman (1997: 15), *'the problem with relying in this way on the male norm is that the existing values in a male-dominated world are accepted without challenge and women are required to compete on their terms'.* McKinnon (1987: 34) also condemned the notion of the sameness standard which always measures females against male standards. Women, as such, I argue, must be given equal rights with men in order to gain access to all opportunities that might lead to equal outcomes of justice for them, not similar treatment with men which results in injustice. And indeed, justice for women, to which I refer here, must be defined by women, not men.

Clearly, the idea that equality can be achieved by considering the differences between people is a departure from the notion that it can be achieved only by considering the sameness between them, as the latter requires that laws or policies be applied to treat people in the same way (Fredman, 2003). Therefore, I note that, in achieving gender equality, modern feminism corresponds not only to equal treatment (similar treatment), which is commonly known as *'formal equality'* in the feminist discourses, but also to *'substantive equality*[4]*'* which can be achieved through laws (Smart, 1989: 140).

For feminists, equality of gender may not be achieved if substantive equality is not to be considered, because the objective of substantive equality is to eliminate the substantive inequality of disadvantaged groups (Kapur and Cossman, 1996: 176). That is why feminists, both in the

Kingdom, *What's Wrong With Rights?* (Edinburgh University Press, 1991); Elizabeth Kiss, 'Alchemy or Fool's Gold? Assessing Feminist Doubts about Rights' in Shanley, Mary Lyndon and Uma Narayan (eds.), *Reconstructing Political Theory: Feminist Perspective* (Polity Press, 1997); Ruth Fletcher, 'Feminist Legal Theory' in Reza Banakar and Max Travers (eds.). *An Introduction to Law and Social Theory* (Hart Publishing 2002); Sandra Fredman 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in Borefijn, Coomans, Goldschmidt, Holtmaat & Weelenswinkel (eds.) *Temporary Special Measures – Accelerating de facto Equality of Women Under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women* (2003).

[4] Substantive equality is also referred to as *'positive discrimination'* in certain European contexts and *'affirmation action'* in the United States context

United States and United Kingdom, have been concerned with the inability of the concept of equal rights (which refers to formal equality only) to address the reality of gender inequality (Kingdom, 1991: 114). Wolgast (1980: 48), for instance, did not reject the concept of equality as commonly referring to equal status, but preferred the notion that rights are equally protected if they depend on gender differences. I argue that women, as such, should be treated in a manner which implies they need special protection solely on account of being a disadvantaged group. Fredman (2003: 43) thus stressed that the aims of equality require more than equal treatment: they require equal outcomes.

'DE JURE' OR 'DE FACTO'?

In this analysis, I explore of the principles of the Women's Convention which are best demonstrated by Facio and Morgan (2009). Facio and Morgan established six important substances of Article 1. The first concerns the forms of discrimination which can arise from the distinction, exclusion or restriction of the person (Facio and Morgan, 2009: 10). As discussed earlier, it is important to bear in mind that discrimination may still occur even if different people are treated differently, unless the disadvantaged people are guaranteed special measures to achieve equal results similar to those of advantaged people. Bindman (1992: 52) and Fredman (2001: 160) explained that this direct discrimination could be proved by evidence that the victim of discrimination has been or would be treated less favourably than another person. Less favourably, stressed Bindman, means that *'different treatment must be proved between the complainant and others; it must be shown to be less favourable.'*

Secondly, the Convention defines discrimination as any act or omission that has the *'effect'* or *'purpose'* of denying women's exercise and enjoyment of all rights (Facio and Morgan, 2009: 10). From this perspective, acts or omissions constitute *'discrimination'* not only if they either expressly single out women for disparate treatment but also if they appear to be gender-neutral but, nevertheless, have a discriminatory impact on women. In other words, formal equality may discriminate against women if the outcome of affording equal treatment results in discrimination. This is what Bindman (1992) called indirect discrimination. Indirect discrimination seeks to address practices that have discriminatory effects (Lacey, 1992: 102; Fredman, 2001: 161).

Thirdly, Facio and Morgan stressed the degrees of discrimination, in that the Women's Convention prohibits not only total but also partial discrimination. For instance, if women are allowed to be citizens of a country but the citizenship is not extended to their children. The fourth issue concerns the stage of occurrence of discrimination. Article 1 refers to the existence of rights as the '*moment of creation of laws that establish the right'* as recognition, '*necessities for satisfying right'* as enjoyment and '*active aspect of right'* as exercise (Facio and Morgan, 2009: 10). Thus, states' impairment of recognition, enjoyment or exercise of women's rights goes against the principle of equality under the Women's Convention. Fifthly, Article 1 specifies that the Women's Convention intended to eliminate all kinds of discrimination against women in all aspects of life, to be precise, in civil, political, economic, social and cultural life. Finally, the Women's Convention recognises women as legal subjects who have legal capacity and dignity equal to men.

Based on the substances of Article 1, discrimination can be defined as an act that violates the principle of equality. In Article 1, equality is presented more as substantive equality (*de facto* equality), which requires the delivery of equal outcome rather than equal treatment. I quote Paragraph 8 of the General Recommendation No. 25 of Article 4, Paragraph 1 of the Women's Convention:

'In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under representation of women and a redistribution of resources and power between men and women.'

Indeed, the substance of the Women's Convention encapsulates the meaning of substantive equality by aiming to eliminate *de jure* and *de facto* discrimination (Byrnes, 2002: 124; General Assembly, Report of the Committee on the Elimination of Discrimination against Women. U. N. Doc. A/59/38/Annex (2004)). In order to promote substantive equality, the Convention recognises that women do not share equal treatment with men, and women have to be treated differently from men (Facio and Morgan, 2009: 14-15).

Article 4 states that *de facto* equality between women and men shall not be considered discrimination. Women must not necessarily be treated in the same way as men, with an understanding that women's lack of empowerment arises precisely because they do things that cannot be compared to the things that men do. Hence, equality informed by Article 1 and Article 4 of the Women's Convention suggests that different entitlements to rights for women and men do not necessarily discriminate against women because different entitlements to rights are purposely provided to uphold equality of outcomes by giving special measures to women as a disadvantaged group. This is why Steiner and Alston (2000: 179) stressed that one of the vital characteristics of Article 1 is its reference to '*effect*' as well as '*purpose',* thus directing attention to the intentions and consequences of governmental measures to eliminate discrimination. Therefore, I suggest that, as stated in Article 4, temporary special measures are important.

On the basis of equality, the Women's Convention requires State Parties to take all appropriate corrective measures in the political, social, economic and cultural fields to ensure full development of women (Lacey, 2004: 48). Here, I note that discrimination is not limited to '*state action'* but can also be performed by *'non-state actors'.* The modification of social and cultural patterns of women and men's conducts which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for women and men (Article 5 (a)) is part of the basis of gender equality. However, women are still to be guaranteed equality with men before the law (Article 15). Article 15 states that,

> *'1. States Parties shall accord to women equality with men before the law*
> *2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals*
> *3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void*
> *4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile'.*

Here, I submit that State Parties must not only take actions to achieve equality for both genders, but should also ensure that actions are taken to correct the inequalities.

CONCLUDING REMARKS

In summary, I have argued that the feminist jurisprudence and the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention) are harmonious pertaining to the idea of equality which is based on the different entitlements to rights between the sexes in order to address gender disadvantages. Indeed, as asserted by feminists, focusing on equal rights can be awkward if equality is defined in ways that protect only one group of people and omit others or if it confers similar entitlements on women and men without taking into consideration the disadvantaged group. This might occur even if equality were formulated in gender-neutral language. In laws as such, equality in general, which is legislated in statutes, can still systematically disadvantage women. It is biased and unfair to groups that are non-autonomous and have less power and fewer opportunities. However, I argued that this problem might possibly be overcome were equality to be clearly understood and employed to include a comparison of like with like, unalike with unalike and to give affirmative measures to individuals or groups who are disadvantaged, such as women, or at least to encourage women (the disadvantaged) to see themselves as persons born with equal rights, even though equality is given and practised differently. This might also accommodate the tensions between diverse theoretical and applied understandings of equality from all traditions and practices.

WORKING OF POWER IN INDIAN SOCIETY WITH SPECIAL REFERENCE TO WOMEN

DR. RAJINDER KAUR[*] DR. RASHMI AGGARWAL[**] JAGTESHWAR SINGH SOHI[***]

ABSTRACT

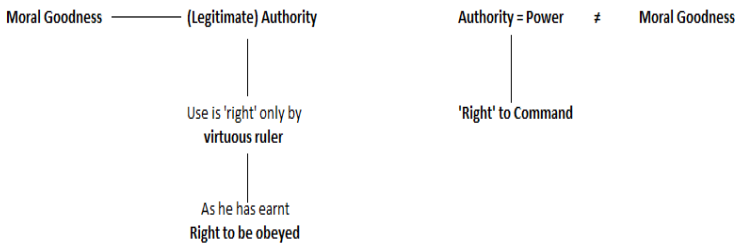
The paper is divided into Six parts, with the first dedicated to understanding the concept of Power; from Machiavelli's positivist 'top-down' exposition to Foucault's more holistic work on the topic. The second part highlights the idea of normalization and the subsequent part to explore power in our Indian society, looking at its play upon the women in the patriarchal society. Thereafter, in the third part is devoted to the connections between 'Power' and 'Right' (not 'Rights') by using the Gandhian triad of *Swaraj-Satyagraha*-Civic Responsibility to show the connect. The fourth part of the paper takes into consideration how 'Rights' act as an instrument of domination in the society. The next part of the paper raises the question of 'Responsibility' to move the society in the 'right' direction and not just a 'rights' oriented society. In the last part of the paper focuses on the story of the *Amra Padatik*, a social collective of children of sex workers in Sonagachi, Kolkata.

UNDERSTANDING POWER

1.1 Machiavellian – Positivist conception

Pre-Machiavelli propounded the Moralistic view of Power there exists a special relationship between moral goodness and legitimate authority. It claimed that the use of political power was 'right'[1] only when exercised by a ruler whose personal moral character was virtuous – in this way he/she earned the right to be obeyed.

Machiavelli criticized these views and claimed that there existed no moral basis on which to judge the difference between legitimate and illegitimate uses of power.[2] For him, concepts of authority and power were essentially coequal – whoever has authority/power has the right to command and this is 'right'[3] isn't raised by the factor of goodness.[4]



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[1] Andrew Vincent, *The Politics of Human Rights* (Oxford University Press, 2010) 12 (In the 'ius' understanding of the word, or the 'adjective' sense of the word). See also Martin P. Golding, *Legal Reasoning, Legal Theory and Rights* (Ashgate, Burlington, 2007) 362-363 (In sense of 'a right' or the welfare conception of the word).

[2] Q. Skinner and R. Price (eds.), *The Prince* (Cambridge University Press, 1988)

[3] Vincent (n 1).

[4] Goodness (Virtue) does not ensure power and the good person has no more authority by virtue of being good.

Machiavelli limits his understanding of the notion of power to a very top-down enterprise, in line with positivist philosophy – where the sovereign makes the commands which then the other has to accept.[5] However, this isn't the case. Foucault explains how power is more of an inter-relation between various actors;[6] its working is net-like rather than that of a chain.[7] Similar views have also been taken by Schaap who explicitly writes that a purely positivist understanding of power is too simplistic and does not begin to understand that power, in modern societies, works more through normalization than prohibition.[8]

Machiavellian (Chain) vis-à-vis Foucauldian (Net) understanding of power

Foucault's model of power is the more sound understanding of the concept, especially when compared to that of Machiavelli. In the political history of free India, one of the most infamous and therefore remembered events has been the invocation of emergency by the Indira Gandhi government in summer of 1975.[9] It was act of use of political power very much in the Machiavellian sense, so much so that an obituary to Democracy was taken out by the free press of the nation.[10] Had, as Machiavelli claims, power been in form of a chain from political ruler to the masses – the people would never have overthrown it in the manner they did in the General Election of 1977.[11]

1.2 Foucauldian – Holistic conception

Foucault's work on power is sometime mistakenly accepted to be similar to Machiavelli on the level that he too understands it in form of 'power-over' as opposed to a 'power-to'.[12] However, his

[5] For a similar view also see Max Weber, 'Domination' in *Max Weber on Law in Economy and Society* (Simon and Schuster, 1967)

[6] Micheal Foucault, 'Power /knowledge: selected interviews and other writings, 1972-1977' in Colin Gordon (eds) (Pantheon Books, 1980) 98 (*'... Power is not to be taken to be a phenomenon of one individual's consolidated and homogeneous domination over others or that of one group or class over others…'*).

[7] ibid (*'... Power must be analyzed as something which circulates… is never in anybody's hands… employed and exercised through a net-like organization…'*)

[8] Andrew Schaap, 'Power and Responsibility: Should we spare the King's head?' (2000) Politics 20(3) 129

[9] The Indian Emergency of 25th June 1975-21st March 1977, when President Fakhruddin Ali Ahmed acted upon the advice of Prime Minister Indira Gandhi and declared a state of emergency under Article 352 of the Constitution of India, where power to rule was bestowed upon her by suspending elections.

[10] Granville Austin, *Working a Democratic Constitution: The Indian experience* (Oxford University Press, 1999) 295 ("On 26 June 1975, a the day after emergency was imposed, the Bombay edition of The Times of India in its obituary column carried an entry that read 'D.E.M O'Cracy beloved husband of T.Ruth, father of L.I.Bertie, brother of Faith, Hope and Justica expired on 26 June."- These words foreshadowed the use of police powers at an extreme level by the State to quell any sort of opposition as well as force upon the Nation its policies).

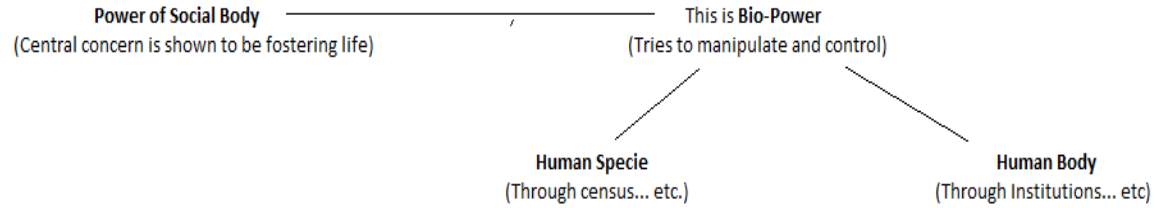
[11] Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Pan Macmillan Limited, 2008) 491-518.

[12] 'Micheal Foucault, 'Afterword: The Subject and Power' in Hubert Dreyfus and Paul Rabinow, *'Michel Foucault: Beyond Structuralism and Hermeneutics*' (2nd edn, University of Chicago Press, 1983) 217 (*"... if we speak of the structures or the*

work is an analysis of the 'power-over' versions of domination, and this he did only to efface the fact that such relations exist in a society. Foucault's work is a much more nuanced study of the reality which describes power as 'being all pervasive'.[13]

This all pervasiveness of power, is having two aspects as based on Foucault's writings – the Temporal all pervasiveness and the Manipulative all pervasiveness of Power, the later providing it the nuancing which Machiavelli lacks.

Foucault charts the history of power from the classical to the modern period. He claims at one point in time the sovereign's power was the right to decide life and death which was derived from the concept of *patria potestas* traced back to Roman law.[14] With the progression of time this power remained no longer absolute and unconditional, but would be used by the sovereign if his very existence was in danger.[15] Foucault notices a discontinuity in the concept of power with what he calls the herald of the modern age, whereby the old power of death was supplanted by the administration of bodies and the calculated management of life – Foucault refers to this as the Power of the Social Body.[16] This power, as referred below, works through societal checks and balances and is thus referred to as a disciplinary power.[17] From this Foucault shows us that Power has been functioning in the society at all times – classical or modern, in one manner or the other and thus is all pervasive temporally.



Next, Foucault undertakes an in-depth analysis of the Power of the Social Body to which he refers as 'Bio-Power'.[18] However, Foucault's work around power has been to efface the domination intrinsic to power.[19]

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mechanisms of power, it is only insofar as we suppose that certain persons exercise power over others" (As can be done when reading such extracts out of Foucault's works).

[13] Michel Foucault, *The History of Sexuality: The Will to Knowledge* (Penguin, London: 1976) 63 ("Power is everywhere and comes from everywhere"); Also see generally Micheal Foucault, *Discipline and Punish: The Birth of a Prison'* (Penguin, 1975).

[14] Patria Potestas – Father of the Roman family had the right to 'dispose' of the life of his children and slaves, just in the way he gave them life.

[15] Paul Rabinow, (ed.),*The Foucault Reader: An introduction to Foucault's thought* (Penguin, 1986) 258 ("… if someone dared to rise up against him and transgress his laws… as punishment latter could be put to death…."); Also see generally Micheal Foucault, *The History of Sexuality, Volume I* (Penguin London, 1976) 135-6.

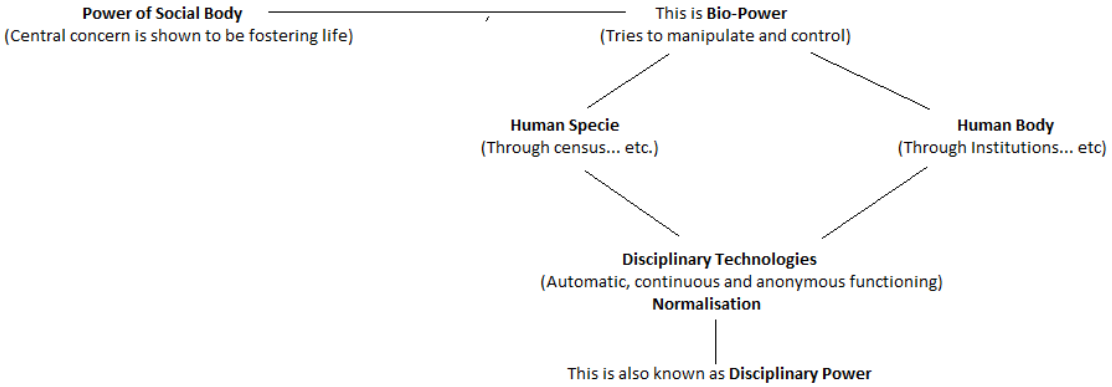
[16] ibid 262 ("… there was a rapid development of various disciplines – universities, secondary schools, barracks, workshops… in the field of political practice and economic observation….").

[17] Micheal Foucault, Discipline and Punish (Penguin, London: 1975) 205 ('… a generalizable model of functioning; a way of defining power relations in terms of everyday life of men…. It is the diagram of a mechanism of power reduced to its ideal form… it is in fact a figure of political technology that may and must be detached from any specific use….'); See Rabinow (n 15) 18-23.

[18] Gordon (n 6) 94.

[19] ibid 95.

The Bio-Power was employed in the society and in two interlinked forms of methods put to use – the first centered on the body as a machine: its disciplining, the optimization of its capabilities, the increase of its usefulness and its docility.[20]



These methods of supervision are what lead Foucault to also refer to Bio-Power as 'Disciplinary Power' which he in turn describes as continuous and anonymous.[21] The continuity of this system presupposes a tightly knit grid of material coercions rather than the physical existence of a sovereign – thus completing the journey from 'power of sovereign' to 'power of social body'.[22] One final element, which must be highlighted here, crucial in the completion of this journey, was the concept of normalization which best describes the whole journey in the following words:

> *"... A power whose task is to take charge of life needs compulsory regulatory and corrective mechanisms.... Such a power has to qualify, measure, appraise and hierarchize, rather than display itself in its murderous splendor... it effects distribution around the norm"*[23]

[20] Rabinow (n 15) 261-2. This was supervised by procedures of power that characterized the disciplines – prisons, schools, mental hospitals, universities etc while the second focused on the specie body: propagation, birth and mortality, the levels of health and life expectancy. Their supervision was effected through an entire series of interventions and regulatory controls, for instance, the carrying out census.

[21] ibid 18-20 & 261-3 (To fully understand this idea it is useful to go through Foucault's explanation of the Benthamite idea of a Panopticon. Another important facet of this idea is the connection it forges between Power and Knowledge, with the latter becoming the agent of transformation).

[22] Gordon (n 6) 156 ("In this form of management, power is not totally entrusted to someone who would exercise it alone, over others, in an absolute fashion; rather, this machine is one in which everyone is caught, those who exercise power as well as those who are subjected to it").

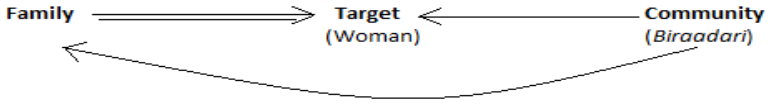
[23] ibid 144.

EXPLORING POWER

It is essential to necessity to provide an illustration connecting this otherwise morose academic study with our everyday life. The medium we choose is the questions of 'Honor' (*Izzat*) that the Khaps[24] raise on a regular basis with horrifying consequences.[25]

In this choice of subject area to explore 'Power' we have been mindful of the methodological precautions as provided by Foucault[26] – firstly, the analysis should concern itself at points where power surmounts the rules of right, which organize and delimit it, and extend beyond.[27] Secondly, the analysis must be done at the level of its direct and immediate relation with the target and not at level of conscious decision making.[28] These concepts are true by choosing to the study the naked use of Power by the Khaps in direct violation of some of the most basic rights, that of life *inter alia*, in name of 'Honor' of the family, community etc.[29]

2.1 Power through Normalization in name of Honor



In the Indian patriarchal system, 'Honour' (*Izzat*) is the cherished value which transcends caste, regional and religious identities – which is gained or lost through inter alia the improper behaviour of women. Women, due to their capacity to procreate, are taken to be the repositories of the family honour while the regulation is left to the men.[30] Since they represent fertility and growth of familial honor, control and protection over them is deemed necessary lest she leads all down the lane of destructive loss of face in the community (*Biraadari*).[31] Thus, there exists a 'dual pressure'[32]

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[24] The Women and Child Development Minister Krishna Tirath explained the concept of Khap Panchayat thus: "A Khap Panchayat is a gathering of members of particular caste or clan of village or from a group of neighboring villages and are informal bodies, they don't have legal status." The influence of these institutions is deep and strong enough to shape the social fabric of the society. In fact, a Khap Mahapanchayat in Haryana has even demanded a "Lok Adalat" status as they consider their decisions on various issues as unanimous. Saumya Ramakrishnan, Khaps Is history now becoming a burden, January 18, 2013 available at <http://barandbench.com/content/khaps-history-now-becoming-burden#.UYeSalKJg-E> accessed 20 July 2013). It is also important to note that these institutions also act as a 'Panoptic on', the source of disciplinary power over the society.

[25] As an illustration refer to Vikas Pathak, 'Khap Panchayats, back in spotlight of notoriety' (Hindustan Times: October 11, 2012) available at <http://www.hindustantimes.com/India-news/NewDelhi/Khap-panchayats-back-in-spotlight-of-notoriety/Article1-942790.aspx> accessed 20 July2013.

[26] Gordon (n 6) 96.

[27] ibid ("… shouldn't concern itself with regulated and legitimate forms of power at its central location… [but] at its ultimate destinations where it becomes capillary").

[28] ibid 97 ("… where it installs itself and produces its real effects").

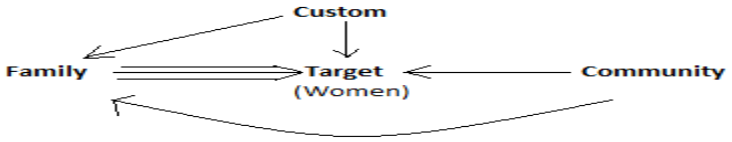
[29] U. Chakravarti, *Gendering Caste: Through a Feminist Lens* (Stree 2003) 148-9; P Chowdhary, *Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India* (Oxford University Press, 2007) 16-17.

[30] P Chowdhary, *Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India* (Oxford University Press, 2007) 16-17.

[31] VK Dewan, *Law Relating to Offences against Women* (Orient Law House, 2000) 35; Also see Suzanne Ruggi, *Commodifying Honor in Female Sexuality: Honor Killings in Palestine* (Middle East Research and Information Project, 2008) available at < http://www.merip.org/mer/mer206/commodifying-honor-female-sexuality> accessed 30 July 2014. quoting Prof. Sharif Kanaana – *"A complicated issue that cuts deep into the history of society... What the men of the family, clan, or tribe seek control of in a patrilineal society is reproductive power. Women for the tribe were considered a factory for making men. The honour killing is not a means to control sexual power or behavior. What's behind it is the issue of fertility, or reproductive power."*

[32] Amnesty International, "Broken bodies, shattered minds: Torture and ill-treatment of women" (2001) available at <http://www.amnesty.org/en/library/asset/ACT40/001/2001/en/b68fe481-dc5f-11dd-bce7-11be3666d687/act40 0012001en.pdf>

(exertion of power through normalization) on a growing woman – that of family, which is in turn created by the community (Figure 6).[33]



To this we must add the weight of religion, passed down by custom, with its draconian notions which are so out of place when seen in light of the present day world ideologies of equality, liberty and dignity.[34] Manu, Mahabharta, Dharamsutra and Buddha have summarized the position of women[35] and this incredible range of 'control mechanism' in effect makes her socially constrained for all her life.[36]

Naked Power of the Khap

Women are taken as the repositories of honour – both familial and that of caste; as such they are treated as objects of protection and violence at the same time.[37] This is justified on grounds of the fear of losing honour, and starts within the four walls of the house but ultimately transcends the cultural paradigm.[38] In some cases the family might be open to amicable settlement but it is forced to treat it as a matter of community honour as compelled to sacrifice their daughters in the collective interests.[39] The reader with a source to witness the same first-hand – *Izzatnagari ki asabhya betiyaan* (Immoral Daughters of the Land of Honor) is a documentary that brings out the plight of families victimized by illegal diktats issued by the Khaps.[40]

CONNECTING POWER TO RIGHT – A CRITICISM OF HOHFELD

Criticizing Hohfeld's Model

After explaining Foucault theory how power actually functions in a society, as all pervasive and in a net-like manner, it is important to discuss the philosophical critique of the very positivistic

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Accessed October 20, 2012– *"The regime of honour is unforgiving: … family members have no socially acceptable alternative but to remove the stain on their honour by attacking the woman"*

[33] V. Nabar, *Caste as Woman* (Penguin Books, 1995) 87.

[34] All one needs to do, to see the importance these hold today, is skim down Part III of Indian Constitution, or any of the umpteen number of International treaties – Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Educational, Social and Cultural Rights to name a few.

[35] Jyoti Vishwanath and Srinivas C. Palakonda, "Patriarchal Ideology of Honour and Honour Crimes in India" 6 (1-2) International Journal of Criminal Justice Sciences 386, 388.

[36] J. Liddle & R. Joshi, *Daughters of Independence: Gender, Caste and Class in India* (Zed Books 1986) 50-64, 89-92.

[37] Vishwanath (n 35) 387.

[38] Chowdhary, (n 30) 17-18; See generally Carolyn Fluehr-Lobban, "Cultural Relativism and Universal Rights" available at <http://www.neiu.edu/~circill/luedke/anth212/cultu.pdf> Accessed 30 May 2013 ("… The act, or even alleged act, of any female sexual misconduct, upsets moral order for the culture of interest and bloodshed is the only way to remove any shame brought about by the actions and restore social equilibrium").

[39] Robert Fisk, "The crime-wave that shames the world" (The Independent: September 7, 2010) available at < http://www.independent.co.uk/voices/commentators/fisk/robert-fisk-the-crimewave-that-shames-the-world-2072201 .html> accessed 30 April 2013 ("... An engaged couple, Yogesh Kumar and Asha Saini, were murdered by the 19-year-old bride-to-be's family because her fiancée was of lower caste.").

[40] It is directed by Film and Television Institute of India graduate Nakul Singh Sawhney, follows the resistance narratives of five protagonists. Read more about it here – Joane, "Khap under the lens" January 20, 2012 available at < http://www.stophonourkillings.com/index.php?q=node/8351> accessed 20 June 2013.

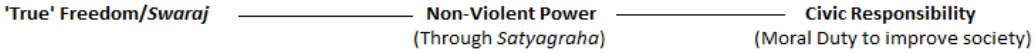
understanding that Hohfeld came up with as regards to fundamental legal conceptions in their application in judicial reasoning[41] (Figure 8).

This is explained through the study of the Gandhian philosophy of non-violent power.[42]

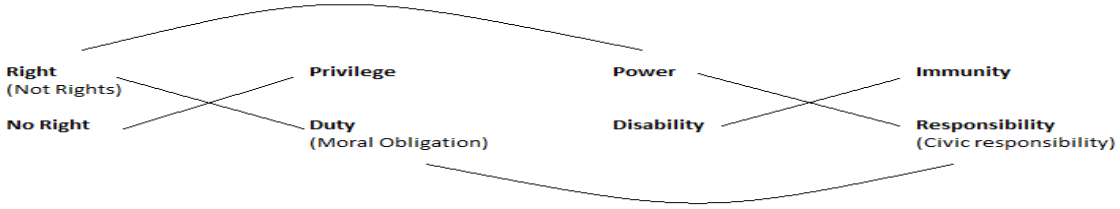
Gandhi's ideology as the Connector of Dots

> "If humanity is to progress, Gandhi is inescapable. He lived, thought, and acted, inspired by the vision of humanity evolving toward a world of peace and harmony. We may ignore him at our own risk."[43]

One aspect of Gandhi's original contribution to political thought and philosophy was the connections he drew between the concepts of freedom, non-violent power and civic responsibility.[44] According to him it was the moral duty or obligation of each in a society to move towards a greater social equality, and the means for this end that he suggested was the idea of non-violent power or *Satyagraha*.[45]



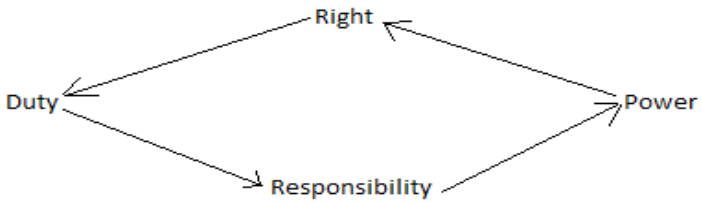
He stressed the importance of people acknowledging their civic responsibility, which in effect cast upon them a duty to bring about equality through the exercise of non-violent power (*Satyagraha*) and only this could lead a society towards right, in the sense of *recht* or ethical justice[46], or 'true' freedom (*Swaraj*). Now we notice that this system of thought (as shown through Figure 9) is very different from the one provided by Hohfeld (Figure 8) and its superimposition on the former provides us with a connection between the Power and Right.[47]



In Gandhi's ideology this cycle started with Duties and culminated at Right. He stated that "the proper question is not what the rights of a citizen are, but rather what constitutes the duties of a

[41] W.N Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L. J. 16, 30.
[42] Dennis Dalton, *Non-Violence in Action – Gandhi's Power* (Oxford University Press, 2011)
[43] Coretta Scott King (ed) *The Words of Martin Luther King Jr*. (New Market Press, 1983) 71.
[44] Dalton (n 42) xi.
[45] ibid.
[46] Vincent (n 1).
[47] Hohfeld treats Power and Rights (in the positivist sense) as totally separate in judicial reasoning; while Gandhi provides connection between Power and Right (in sense of justice) that needs to kept in mind a societal reasoning.

citizen… if a man learns to discharge his duties… learn [his] *Dharma*… rights look after themselves."[48]



The connections drawn above by Gandhi were not only theoretical, but practical. Throughout his life he remained a strong proponent of egalitarianism, a trend of thought that favors equality among living entities.[49] Alternatively it is also defined as an idea keeping a negative attitude towards rules and principles, while maintaining a positive attitude towards group decision-making.[50] When Gandhi first came to India the caste system was entrenched in our society and it 'systematically devalued human labour'.[51] This was a system of domination which Gandhi attacked with the ideals of egalitarianism, much influenced by the John Ruskin,[52] by claiming "that a life of labor… is a life worth living".[53] He ran extensive reform programs from abolition of untouchability and construction of village latrines and wells through volunteers.[54]

RELATION TO RIGHTS (LAW)

'Rights' as instruments of Domination

With the concept of 'Rights', just as with that of Power, Foucault does a historical analysis.[55] This stands true to his general philosophy as explained by Paul Rabinow – that Foucault is highly suspicious of claims of universal truths; and while he doesn't refute them, he historicizes these grand abstractions.[56] Foucault starts his historical study from the ancient times, when the legal thought was built around the royal power which was absolute. The judicial edifice was constructed as a justification of its domination.[57]

[48] "The Collected Works of Mahatma Gandhi Vol. 88" (Electronic Book), (Publications Division Government of India, New Delhi: 1999) at p. 230, 236-7 available at < http://www.gandhiserve.org/cwmg/cwmg.html> Accessed May 20, 2013.

[49] Richard Arneson, "Egalitarianism", The Stanford Encyclopedia of Philosophy (Spring 2009 Edition), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/spr2009/entries/egalitarianism/> Accessed July 25, 2013. It is worth noting here that through the use of the word 'Harijan', Gandhi was actually using 'Right as an instrument of Domination [Refer to Part-D]. Further research needs to be done on the point for me to approve or disapprove the thesis, but as of now I treat it as outside the scope of this paper.

[50] Michael Thompson, Richard J. Ellis, Aaron B. Wildavsky, *Cultural theory* (Westview Press, 1990).

[51] ibid x.

[52] John Ruskin, '1819-1900 – Unto this Last: Four essays on the First Principles of Political Economy' available at < http://etext.virginia.edu/toc/modeng/public/RusLast.html> accessed May 13, 2013.

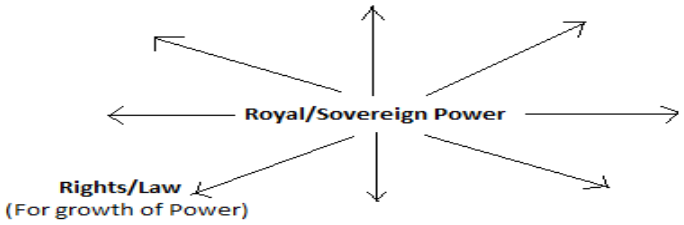
[53] Collected Works (n. 48).

[54] Thompson (n. 50).

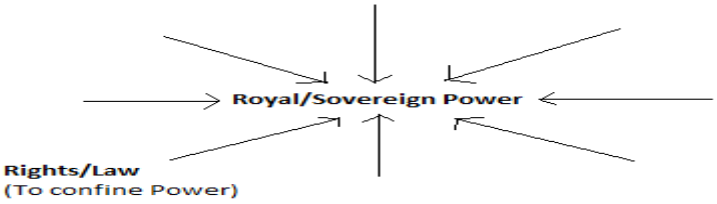
[55] Gordan (n. 6) 94.

[56] Rabinow (n 15) 4.

[57] Gordan (n.6) 94 ("… It is in response to the demands of royal power, for its profit and to serve it as its instrument or justification, that the juridical edifice of our society has been developed").



With passage of time the absoluteness of the sovereign's domination was lost and the theory of rights, the legal structure sought to put limits on it;[58] limits, in theory, only within which the monarch (dominator) could be legitimate.[59]



However, the interesting part to note is that, this theory of rights which seemingly puts limits on the sovereign's power is nothing but a mechanism, an instrument of effacing the 'domination'[60] intrinsic to power. Apart from legitimizing the sovereignty, this theory exerts power on the masses, those dominated by putting upon them the legal obligation to obey the law.[61]

Illustration of Rights enhancing Domination with reference to women in Indian Society.

Under the Indian Constitution, all laws in force in the Indian Territory need to be consistent with Part-III or they shall be liable to be held void, in case of existence pre-constitution, or liable to be struck down, if passed by the legislature thereafter.[62] This provision would have been very important with respect to personal laws, as they could have been declared void if a contravention of in terms of provisions of equality, or discrimination based on sex, caste etc, life and personal liberty were found.[63]

[58] One of the first efforts in this regard in Western Society (with which Foucault deals) was the Magna Carta. Refer to Danny Danziger & John Gillingham, *1215: The Year of Magna Carta* (Touchstone 2004) 278 ("… The greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot").

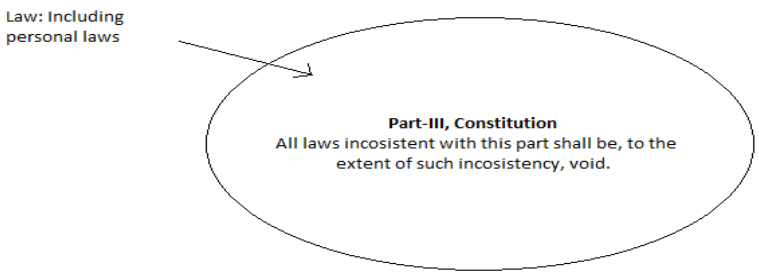
[59] Gordan (n.6) 95 ("… The essential role of the theory of right… was to fix the legitimacy of power").

[60] ibid 96 ("… not have in mind that solid and global kind of domination that one person exercises over others, but the manifold of domination that can be exercised within society").

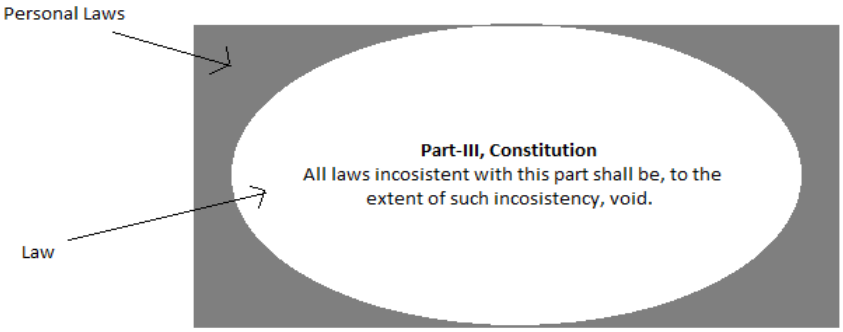
[61] ibid 94 ("… The system of right is centered entirely upon the King, and it is therefore designed to eliminate the fact of domination and its consequences").

[62] 13. Laws inconsistent with or in derogation of the fundamental rights*: (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention be bad. (3) (a) 'law' includes any Ordinance, order, by law, rule, regulation, notification, custom or usage having in the territory of India the force of law.*

[63] Refer Indra Deva (ed.), 'Law and Religious Identity' in '*Sociology of Law*' (Oxford India Paperbacks, 2010)



Over the years, the Supreme Court has either stated that the personal laws cannot be tested on the touchstone of the Constitution[64] or upon testing them against the Constitution has interpreted them to be in consonance of the same[65]. These decisions are all based on the case of State of Bombay v. Narasu Appa Mali[66], where one of the most celebrated division bench of the Bombay High Court[67], decided not to interfere with personal laws on the touchstone of Fundamental Rights. A logical reason for this policy of non-interference is that the court notes the susceptibilities of the groups to which these laws apply and hence adopts a policy approach rather than a legal one.[68]



This is how Power operates in our society and the ways in which it uses the concept of 'Rights' to only further itself. As the existing personal laws had the support of the people (in form of a patriarchal society) behind them, the courts refused to intervene even in the face of most basic violations of Part-III of the Constitution. We will further go into the question of Responsibility – i.e. the path which when followed leads to fulfillment of 'Right' in a society, and ultimately the true freedom of all (*Sarvodaya*).[69]

[64] *Krishna Singh v Mathura Ahir* AIR 1980 SC 707; *Maharshi Avdhesh v Union of India* 1994 Supp (1) SCC 713; *Ahmedabad Women Action Group & Ors v Union of India* 1997 (3) SCC 573

[65] *Anil Kumar Mhasi v Union of India* 1994 (5) SCC 704; *Madhu Kishwar v State of Bihar* 1996 (5) SCC 125; *Githa Hariharan v Reserve Bank of India* 1999 (2) SCC 228; *Daniel Latifi v Union of India* 2001 (7) SCC 740; *N. Adithyan v Travancore Devaswom Board & Ors* 2002 (8) SCC 106; *John Vallamattom v Union of India* 2003 (6) SCC 611

[66] AIR 1952 Bom 84

[67] Fali S. Nariman, 'Judges during and before my Time' in *Before Memory Fades* (Hay House: 2010) 64 – *"... before a Bench consisting of Chief Justice Chagla and Justice Gajendragadkar (later to become CJI) – at that time about the strongest division bench in the country"*

[68] M.P Jain, *Indian Constitutional Law* (Volume I) (5th edn, Wadhwa and Co., 2003) 989-990.

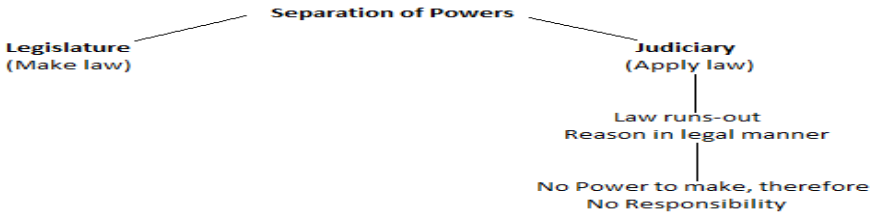
[69] Dalton (n 42) 8.

RESPONSIBILITY, BUT WHOSE?

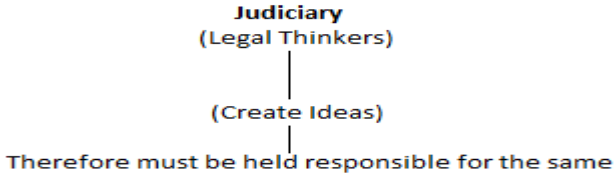
An attempt is made to explore as to who shoulders the responsibility of take the society to its logical end – 'true' freedom (*Swaraj*). Is it judiciary on whom lies this arduous responsibility[70], or it is political masters of the land[71], or it is ultimately the masses who must engage in politics in the Aristotlean sense (which isn't done often)[72].

Entrusting the 'Responsibility' in the Judiciary

Parashar suggests it the responsibility of 'every legal thinker' to achieve social justice.[73] This she suggests by virtue of their position which allows them to create authoritative legal knowledge are therefore must do so in a manner that is inclusive and non-oppressive to everyone.[74] However, due to the reality of positivism more often this opportunity is not taken.



Positivists believe that the job of a judge is to 'apply' the law as opposed to making it,[75] and even when they face a situation where the law has 'run-out' they should only reason in a legal manner.[76] However, Parashar firmly believes that ideas are cultural products 'created' by thinkers and by disassociating the idea and thinker's responsibility these theories only help maintain status quo.[77] She takes recourse to Gerald Postema's argument on professional responsibility; whereby he claims that though it is different from a lay person's responsibility, it in no manner absolves the professional from acting morally.[78]



[70] Archana Parashar, 'Responsibility for Legal Knowledge' in Amita Dhanda & Archana Parashar (eds.) *'Decolonization of Legal Knowledge*' (Routledge, 2009) 178-204.
[71] Ran Hirschl & Evan Rosevear, 'Constitutional Law meets Comparative Politics: Socio-Economic Rights and Political Realities' in Tom Campbell, K.D Ewing & Adam Tomkins (eds.) *The Legal Protection of Human Rights: Skeptical Essays* (Oxford, 2011) 207-229.
[72] Dalton (n 42).
[73] Parashar (n 80) 178.
[74] ibid.
[75] Ronald Dworkin, 'Is Law a System of Rules?' in Ronald Dworkin (ed.) *The Philosophy of Law* (Oxford University Press, 1977) 38-65.
[76] Parashar (n 70) 181 (Referring to question raised in this regard by H.L.A Hart).
[77] ibid 178.
[78] Gerald Postema, 'Moral Responsibility in Professional Ethics' 55 New York University Law Review 63.

Judiciary accepting its 'Responsibility' – The Naz Foundation Case[79]

It is an illustration,[80] of the acceptance of responsibility by the judiciary and Delhi High Court, held that law has no business in the bedroom of consenti**ng adults engaging in an activity that harms no one.**[81]The importance of the judgment lies in the progressive reinterpretation[82], i.e. it accepted this responsibility in the 'right' sense of the word and not the 'rights' sense. The Court has stated that "personal autonomy is inherent in the grounds mentioned in Article 15.[83] As Tarunabh Khaitan puts it; "it is autonomy that allows us to form relationships and pursue the projects that give our lives meaning."[84] Taking note of this, the court provided that Article 15 shall now not only include all range of other analogous grounds that may potentially impair the personal autonomy of an individual.[85] Another innovation lies the said article provides protection, both from discrimination perpetuated by the State ('vertical' protection) but also by a private individual ('horizontal' protection).[86]

Effect of this acceptance of Responsibility on Personal Laws

Swapan Dasgupta that the subversive potential of homosexuality has been the theme of countless drawing-room tittle-tattle, but it is only with the Naz Foundation case has it been accepted that the principle of inclusiveness warranted the negation of existing rules. These rules are largely something which one might refer to as faith-based morality[87] and by the decriminalizing of gay sex; the Court has argued that "Constitutional morality" must take precedence over theology and public opinion, "even if it be the majoritarian view".[88] The wider significance best described in the following words:

> If the criminal ban on homosexuality violates the fundamental rights and dignity of some individuals, it follows that all personal laws must be tested against this principle. If equality becomes the litmus test, can the existing Muslim personal laws relating to divorce and polygamy withstand impartial judicial scrutiny? Can the principle of inclusiveness extend to gays but not to Muslim

[79] *Naz Foundation v Government of NCT and Others* 160 (2009) DLT 277.

[80] Another such illustration being – *Mohammad Ahmed Khan v Shah Bano Begum and Others* AIR 1985 SC 945 (More on that later).

[81] See generally Tarunabh Khaitan, 'Good for All Minorities', *The Telegraph* (Calcutta, 9 July 2009) available at <http://www.telegraphindia.com/1090709/jsp/opinion/story_11202656.jsp> accessed 24 July 2013.

[82] ibid ("… These constitutional innovations make no difference to the actual result in the Naz case. The judges could have reached the same result by a sterile ruling that relied solely on the words of the Constitution. However, they chose to invoke its spirit and have crafted a remarkably progressive jurisprudence on anti-discrimination law.").

[83] Naz (n 79) 112.

[84] Khaitan (n 81).

[85] Naz (n 79) 112 ("… The grounds that are not specified in Article 15 but are analogous to those specified therein will be those which have the potential to impair the personal autonomy of an individual.").

[86] ibid 104 ("… Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another.").

[87] Swapan Dasgupta, 'Inclusive Desire', *The Telegraph* (Calcutta 10 July 2009) available at < http://www.telegraphindia.com/1090710/jsp/opinion/story_11219092.jsp> accessed 26 July 2013 ("… That same-sex relationships were sinful was conventional wisdom in Europe ever since the New Testament declared it a "perversion". "Make no mistake," Paul proclaimed colorfully in his first Letter to the Corinthians, "no fornicator or idolater, none who are guilty either of adultery or of homosexual perversion, no thieves or grabbers or drunkards or slanderers or swindlers, will possess the kingdom of God"." He also refers to Roman Catholic Church's November 2005 re-affirmation, which stated that "the Tradition has constantly considered them (acts of homosexuality) as intrinsically immoral and contrary to the natural law. Consequently, under no circumstance can they be approved").

[88] *Naz (n 79)* ¶ 86 ("… In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.").

> women? Can the government enact Shah Bano-type legislation if it violates a fundamental right of the Constitution? [89]

The next part of the paper emphasized upon the 'realpolitik' factors by Ran Hirschl and Evan Rosevear. Their findings are connected to the after-math of Shah Bano Begum in India.[90]

Does 'Responsibility' lie in Political factors/Politics?

Politics determines 'Rights' – Hirschl & Rosevear

Though the judiciary might be ready to accept responsibility and lead the society towards justice and 'right' it might not ultimately lie in their hands! Hirschl and Rosevear stress that the constitutional protections can never be understood in isolation of political and economic contexts in which they evolve, function and mutate.[91]

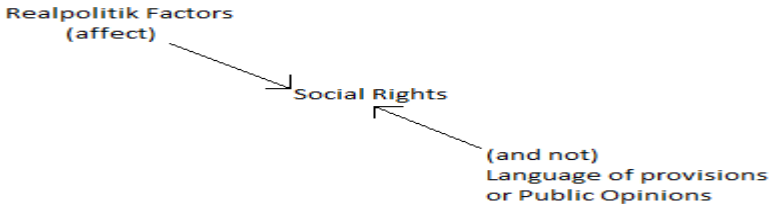


Figure 18
Hirschl & Rosevear on 'What affects Rights?'

They further go onto to claim that though formal constitutional recognition of social rights is supposed to advance their status in actual practice, there is no ready correlation between the two.[92] This claim they back up with studies into various different avenues – neither does the public discourse have any direct bearing on if 'rights' are provided by either the constitution or the courts of a land,[93] nor does the language of the provision[94] or the lack of the provisions as such.[95] On the contrary they show that it is governmental policy, in turn shaped by political factors, that seems to greatly affect the realization of these rights.[96]

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[89] "Naz, minorities and personal laws" on 'Law and Other Things' (11 July 2009) available at < http://lawandotherthings.blogspot.in/2009/07/naz-minorities-and-personal-laws.html> accessed 28 July 2013.
[90] Shah Bano Case (n 80).
[91] Hirschl (n 73) 207-208; For a similar stand also see Mark Tushnet, "The Political Institutions of Rights-Protection" in Tom Campbell, K.D Ewing & Adam Tomkins (eds.), *The Legal Protection of Human Rights: Skeptical Essays* (Oxford, 2011) 297-311.
[92] ibid 211.
[93] ibid 212 ("… Despite the centrality of these issues on Canada's public agenda, as well as Canada's long term commitment to a relatively generous version of a Keynesian welfare state, subsistence social rights are not protected by the Charter Rights and Freedoms and have been altogether excluded from its purview by pertinent Supreme Court of Canada jurisprudence."). In this regard they go onto cite *R v Prosper* [1994] 3 SCR 236, *Gosselin v Quebec* (AG) [2002] 4 SCR 429, *Auton v British Columbia* (AG) [2004] 3 SCR 657 & *New Foundland (Treasury Board) v NAPE* [2004] 3 SCR 381
[94] ibid 213 (After comparing S. 7 of Canadian Charter Rights and Freedoms & S. 21 of the Constitution of India they provide*: "... Despite near identical wording of these provisions, in their interpretations two very different paths have been taken").* Where Canada has refused to recognize the said rights, India has been much more open. In support the following Supreme Court cases can be cited: *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 & *Unni Krishnan v State of Andhra Pradesh* AIR 1993 SC 2178.
[95] ibid 213 (Taking into consideration Denmark and Sweden, which do not enthusiastically practice judicial review the authors state *"... judicial review is not a necessary condition for achieving high levels of human development.").*
[96] ibid 213-4.

This influence of politics on how rights are provided or not in a society can be ideally seen in the Indian context through the case of Shah Bano Begum.[97] The judgment here allowed a Muslim widow the right to maintenance by her former husband, and affirmed this to be in accordance with the dicta of Muslim sacred law. It was believed in the political circles that there was considerable opposition of the view in Muslim circles and as such the legislature brought in the Muslim Women (Protection of Rights on Divorce) Act 1986[98] making Section 125 of the Criminal Procedure Code[99] in-applicable to Muslims.[100] However, a later empirical research among Muslim women in the city of Agra showed that a vast majority of them were of the view that Shah Bano should have got maintenance from her husband.[101] This shows that despite the judiciary and people walking in one direction it is the political masters who held the sway – and thus it is they who must hold the responsibility of the direction a society takes.

Politics leads to 'Right' – Gandhi

Gandhi pressed for the sanctity of manual labor – this he did to reinforce egalitarianism and attack the caste system.[102] Thus for Gandhi, Politics is a much deeper concept as it was for Aristotle – who believed that the most important task for the politician is, in the role of lawgiver (*nomothetês*), to frame the appropriate constitution for the city-state and this involves enduring laws, customs, and institutions (including a system of moral education) for the citizens.[103]

Gandhi believed only true citizens could come to politics, and a 'true' citizen was one who engaged himself in ridding the society of its basic evils, i.e. worked in the direction of following the 'right principles'.[104] In addition to the necessity of following the 'right principle', of inclusivity[105] he also stressed upon the role of religious faith[106]

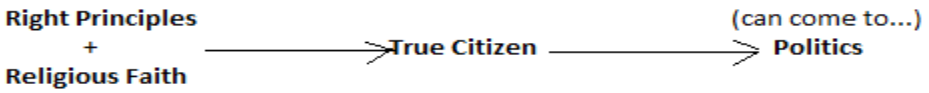
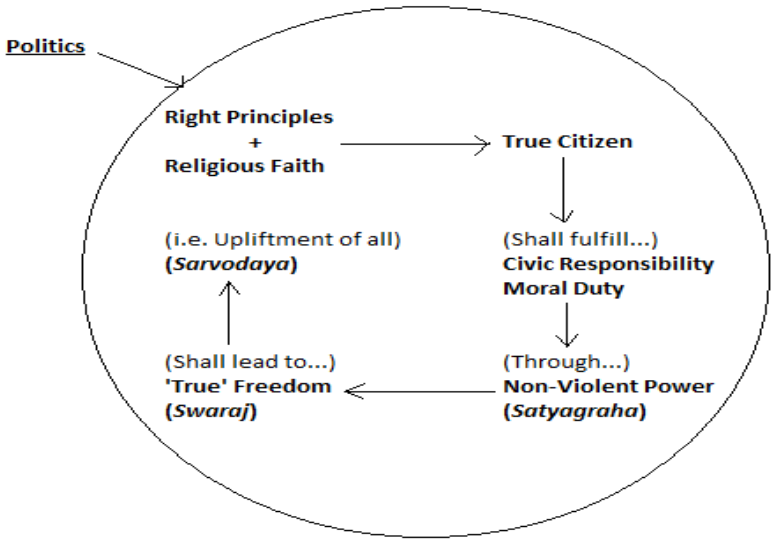


Figure 19
Politics for Gandhi

These are the ideals, 'right principles' and 'religious faith', that Gandhi wished to instill in one and all, i.e. for all to become 'true' citizens and immerse themselves in Politics.[107] A true citizen

[97] In this regard see Kavita R. Khory, 'The Shah Bano Case: Some Political Implications' in Indra Deva (ed.) *Sociology of Law* (Oxford India Paperbacks: 2010) 213; See also O. Chinnappa Reddy, 'May your Religion be the Welfare of Humanity: Secularism' in *The Court and the Constitution of India: Summits and Shallows* (4th reprint, Oxford India Paperbacks, 2012) 164-5.
[98] Act 25 of 1986
[99] Act 2 of 1974
[100] Indra Deva, 'Law and Religious Identity' in Indra Deva (ed.) *Sociology of Law* (Oxford India Paperbacks, 2010) 156.
[101] ibid 111.
[102] Dalton (n 42) x-xi.
[103] Fred Miller, 'Aristotle's Political Theory' in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall edn, 2012) available at <http://plato.stanford.edu/archives/fall2012/entries/aristotle-politics/> accessed 26 July 2013.
[104] Dalton (n. 42) x; This bears a deep resemblance to the words of Aristotle, see Benjamin Jowett (trans.) *Politics Aristotle* (Batoche Books, Kitchener: 1999) 156, available at < http://socserv.mcmaster.ca/econ/ugcm/3ll3/aristotle/Politics.pdf> accessed 1 August 2013(*"... and the good lawgiver should inquire how states and races of men and communities may participate in a good life... ").*
[105] Dalton (n 42).
[106] Collected Works (n 48) ("… Politics, divorced from religion, have absolutely no meaning…").
[107] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, 1999) (Gandhi was a huge proponent of the *Panchayati Raj* system which was basically involvement of all in the day to day running of administration of a small unit in the Nation.).

would thus fulfill his/her civic responsibility or moral obligation (a pre-necessity of becoming a true citizen) of helping in upliftment of all (*Sarvodaya*), through the use of non-violent power (Satyagraha) and it is this that shall lead a society to 'right'/*Swaraj*.



Thus, the ultimate 'responsibility' rests in the masses, and it requires them to become 'citizens' in the true sense of the word.

Responsibility lies with the citizens

This Hohfeldian model holds that 'Power' and 'Liability' are co-related concepts while 'Power' is an opposite of 'Disability' and hence there can be no relation between 'Disability' and 'Liability', for which there must be 'Immunity'.[108]

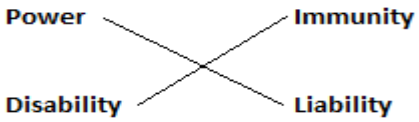


Figure 21
Power-Liability co-relatives of Hohfeldian Model

Through this example we attempt to bring out the reality that those who are 'traditionally' considered as suffering from 'Disability' and therefore provided 'Immunity' are more than capable of exercising 'Power'[109], though how we look upon 'Power' might be different from the mainstream understanding provided to it.

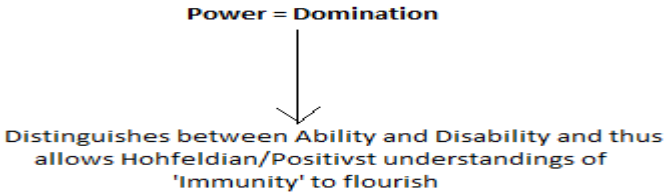
More than a single way of looking at 'Power'

[108] Hohfeld (n 41).
[109] The concept of 'Capacity of bearing Rights' and 'Capacity to Act on those Rights'

In social and political theory there are many ways in which 'Power' has been looked upon.[110] The disagreement is deep, but generally one could say that there exist three basic ways of looking at 'Power'.

(A) Power-over/Domination/The Masculinist Understanding

There is the most known understanding 'Power' as 'Power-over', which is also known as the Conflictual concept of Power. The *locus classicus* understanding of this lies in the definition provided by Max Weber – "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance…."[111] Even Foucault's analysis presupposes that power is a kind of 'power-over'[112] – "if we speak of the structures or the mechanisms of power, it is only insofar as we suppose that certain persons exercise power over others (Figure 22)



(B) The Feminist Understandings of Power

Most feminist theorizing of 'Power' contends by claiming that the 'power-over' understanding is largely domination oriented and implicitly masculinist. As such they argue for a re-conceptualization of power – as a capacity or ability to empower or transform one and others.[113] For example, Jean Baker Miller claims 'Power' as "the capacity to produce a change."[114] She supports the validity of women not wanting to use power as it is presently conceived and used, but in manners that may simultaneously enhance, rather than diminish, the power of others.[115]

(i) *Power as Ability conception*

The understandings of 'Power' are more interesting with reference to 'Power-to' definitions or the Dispositional aspect of Power. Classical articulation of these are offered by Thomas Hobbes, who defines power as a person's "present means… to obtain some future apparent good"[116], and Hannah Arendt, for whom power is "the human ability not just to act but to act in concert."[117] These definitions trace the word 'Power' to its etymological roots in the French word '*pouvoir*' and further to the Latin word '*potere*' both of which mean 'to be able'. Hence, they treat power as something, or rather anything, capable of doing something.[118] They treat power as the capacity,

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[110] Steven Lukes, *Power: A Radical View* (Macmillan, 1974); Also see William Connolly, *The Terms of Political Discourse* (3rd edn, Princeton University Press, 1993).

[111] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, trans. Ephraim Fischoff et al. (University of California Press, 1978) 53; For similar understanding of 'Power' see Robert Dahl, 'The Concept of Power' (1957) 2 Behavioral Science 201, 202-203 (Intuitive idea of Power: *"A has power over B to the extent that he can get B to do something that B would not otherwise do.")*; P Bachrach & M.S Baratz, 'The Two Faces of Power' 56 American Political Science Review 941–52; and Steven Lukes, *Power: A Radical View* (Macmillan, 1974) 30.

[112] Though Foucault, as a de-constructionalist, only does the analysis to efface the domination inherent to society. It is works like his which make it possible for those who follow to re-construct other methods to rebel against the domination.

[113] In other words they tend to understand power not as 'power-over' but as 'power-to'.

[114] Jean Baker Miller, *Toward a New Psychology of Women* (1992) 241 ("… to move anything from point A or state A to point B or state B")*.*

[115] ibid 247-8

[116] Thomas Hobbes, *Leviathan* (Penguin Books, 1985) 150; Similar understanding of 'Power' was also given by John Locke.

[117] Hannah Arendt, *On Violence* (Harcourt Brace & Co., 1970) 44.

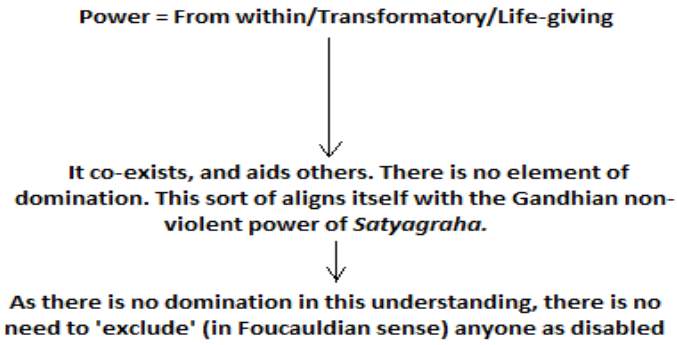
[118] Hanna Fenichel Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (University of California Press, Berkeley, CA: 1972) 276.

potential or ability; which is a potentiality, not an actuality, one which might never be actualized"[119]

(ii) Power as Resource for Empowerment

Another interesting understanding is the one propounded by the Liberal Feminists[120] who understand 'Power' as a 'positive social good' which is at the moment unequally distributed and must be redistributed in a more equitable manner.[121] Still others agree with the 'empowerment' role of power, however see it as something internal to women – for example Held views women's unique experiences as mothers and caregivers as the basis for new insights, of transformatory nature, into power.[122]

Similarly, another interesting view on 'Power' is the 'Power-from-within' understanding given by Hoagland.[123] For her power-from-within is a positive, life-affirming, transformatory and empowering force (Figure 24) that stands in stark contrast to power understood as domination, control or imposing one's will on another.[124]



(C) Analyzing the two diametrically opposite conceptions

Comparing the two understandings of 'Power' – Masculinist and Feminist, we come to a conclusion that whereas the former supports domination and effectuates the Positivist concepts of Disability/Immunity; the later supports a transformation from the system and views 'Disability' as a 'different ability' allowing for greater movement in set patterns of societal domination. This in turn, shall lead towards a better social life, or the Aristotlean good-life.

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[119] *Lukes (n.110)* 69 [Lukes, has given his definition of Power from both aspects – 'Power-over' & 'Power-to'].

[120] See generally "The Subjection of Women" in *'Essays on Sex Equality*', Alice Rossi (ed.) (University of Chicago Press, Chicago: 1970); Also see generally Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, New York: 1989).

[121] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, NJ: 1990) 31 – *"... a kind of stuff that can be possessed by individuals in greater or lesser amounts"*; Susan Moller Okin, *Justice, Gender and the Family* (Basic Books, New York: 1989) 136.

[122] Virginia Held, *Feminist Morality: Transforming Culture, Society, and Politics* (University of Chicago Press, Chicago: 1993) 137 – *"the capacity to give birth and to nurture and empower could be the basis for new and more humanly promising conceptions than the ones that now prevail of power, empowerment, and growth"* and 209 – *"the power of a mothering person to empower others, to foster transformative growth, is a different sort of power from that of a stronger sword or a dominant will"*

[123] Sarah Lucia Hoagland, Lesbian Ethics: Toward a New Value' (Institute of Lesbian Studies, Palo Alto: 1988) 118 – *"the power of ability, of choice and engagement. It is creative; and hence it is an affecting and transforming power but not a controlling power"*

[124] Amy Allen, "Feminist Perspectives on Power", The Stanford Encyclopedia of Philosophy (Spring 2011 Edition), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/spr2011/entries/feminist-power/> accessed 5 August 2013.

SHAKING THE HOHFELDIAN MODEL – THE OPPOSITES: POWER/DISABILITY

Power and Disability were considered opposites and the new paradigm where even those traditionally considered disabled have been extended the power to decide for themselves.

6.1 Applying of the 'New' Paradigm – Amra Padatik

Amra Padatik is a collective formed by the children of sex-workers in Kolkata's Sonagachi area. Their aims are two-fold – work to gain dignity for their mother's work and claiming their own rights as children of sex-workers.[125]

The latter objective – to claim their own rights as 'children' of sex-workers was against a provision in the Immoral Traffic (Prevention) Act 1956[126] allowing the State to forcibly take away children who have been living off the 'earnings of their mothers'[127] as well as 'living with them when they crossed 18 years of age'[128]. These provisions reeked of the old paradigm, of state/society's moral policing,[129] of paternalism and have been best described as a straight-jacketed response to 'save' these children: raid, rescue, rehabilitate them – as their mothers cannot and will not do so.[130] The *Amra Padatik* stood up and claimed their right to be heard in such situations, as primary stakeholders as the law was supposed to be for their protection. From their side they raised three counter R's – resilience, reworking and resistance.[131]

Traditional R's	**Counter R's**
ITPA, 1956	*Amra Padatik*
Raid	Resilience
Rescue	Reworking
Rehabilitate	Resistance
Old paradigm	New Paradigm

These, *Amra Padatik*, were the children considered 'disabled' such that they were worthy of compassion by the positivist state/society. They were, under the Hohfeldian model, to have no 'Power' to change their own position. The State considered it its duty to provide them 'immunity' which they did in terms of differential treatment (taking them away from their mothers). However they stood up for themselves, this standing up for one's rights is what is formalized by the UNCRPD and hence is a boost for all those marginalized sections of society – whether socially or legally so. In addition to these efforts, there is also the responsibility of one and all to work for equality of even the most marginalized that 'true' politics in the Gandhian sense puts on us as citizens.

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[125] Oishik Sircar & Debolina Dutta, 'Beyond compassion: Children of sex workers in Kolkata's Sonagachi' 18(3) Childhood 333-349.

[126] The Immoral Traffic (Prevention) Act 1956 (herein after referred ad ITPA) available at <http://www.ncpcr.gov.in/Acts/Immoral_Traffic_Prevention_Act_(ITPA)_1956.pdf> accessed 12 August, 2013.

[127] S. 4, ITPA, 1956: Punishment for living on the earnings of prostitution — *(1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both…*

[128] S. 16 ITPA, 1956: Rescue of person — *(1) Where a Magistrate has reason to believe from information received from the police or from any other person authorized by State Government in this behalf or otherwise, that any person is living… in a brothel, he may direct a police officer not below the rank of a sub-inspector to enter such brothel, and to remove there-from such person and produce her before him…*

[129] Akin in many ways to Foucault's Normalization.

[130] Sircar (n. 125) 334.

[131] C. Katz, *Growing up Global: Economic Restructuring and Children's Everyday Lives* (University of Minnesota Press).

CONCLUSION

Through this paper an attempt is made to show how 'Power' is constantly at work around us, not just in Foucauldian theory, in practical and everyday situations. It is important we note this situation and are ready to take the 'Responsibility' upon ourselves as Aristotlean citizens and not just be an *Idiote*. Though the State provides us 'Rights', they are just a way of papering over the inherent domination that is all pervasive and it will have to be 'we', as singular and as a collective that will have to struggle for the formation of a 'Right' society. *Amra Padatik* shows that if we are ready to do this, huge strides can be made towards empowerment and *Sarvodaya*.

THE AUTHORITY OF COURT DECISIONS IN CHINA: AN EMPIRICAL SURVEY

PROF. QIAO LIU[1]

The current state of Chinese court decisions is unclear. Whilst China followed the civilian tradition in jurisdictions such as former USSR, Taiwan and Germany in constructing its modern legal system, and hence did not recognise court decisions as a formal binding source of law, at least some of these decisions are gaining influence through the adoption by the Supreme People's Court (SPC, the highest court in China) of a new Guiding Cases system and, more generally, due to the enhanced visibility given to a greater number of decisions of courts at different levels in recent years. This paper proceeds from a previous study on the making of contract law by Chinese courts and sets out a study plan for ascertaining the extent to which Chinese courts/judges are guided or influenced by prior court decisions on the basis of empirical data to be collected from interviews and surveys with Chinese judges. It will explore the possible difficulties in collecting and analysing such data, suggest solutions for them and identify options for conducting the empirical study. It will also draw comparatively the doctrine of precedent in common law countries to address the following enquiries:

• first, whether, despite the current legal status and presentational style of Chinese court decisions, they are starting to develop a line of ratio (partly as a consequence of an increased level of interaction with scholarly works), from which new principles of law can be distilled;

• second, in which ways a prior court decision may, if at all, influence a lower court in deciding a similar point of law and what is the way ahead for the Guiding Cases system to evolve into a more consistent and more stable system of precedents that suits the Chinese soil.

PENAL POPULISM: A CRITICAL EXAMINATION

PROF. MAKOTO USAMI[2]

Penal populism is conventionally construed as the pursuit of hardline penal policies to win votes rather than to reduce crime or promote criminal justice. Instances of this phenomenon have been observed and discussed in cases of many Western societies including Great Britain, the United States, Canada, Australia, and New Zealand. However, there are few empirical studies, much less normative studies, on such tendencies in non-Western legal systems. To fill this gap in the literature, this paper describes and examines penal populism in a broad sense, which has occurred in Japan since the beginning of the 2000s. The Japanese case is unique in that criminal policies have been made tougher to meet demands of victims' movements and the public opinion more generally, whereas politicians have not put forward hardline policies in election campaigns. This case is also paradoxical because crime rate reduced before legislative punishments and judicial decisions became harsher than before.

To begin with, I provide a brief review of the literature on the subject in the English-speaking world and identify its shortcomings. Next, I propose a distinction between narrow and broad conceptions of penal populism to grasp the Japanese case as well as some other cases. The narrow conception entails politicians' intentions to win votes, while the broad conception does not. Then, different aspects of populist punitiveness in contemporary Japan are described, and their political and cultural backgrounds are explained in depth. Moreover, I critically examine this phenomenon in the perspective of justice. I note that the ideal of justice includes two dimensions: comparative proportion and correlative proportion. It is then argued that penal populism—narrow or broad—violates these dimensions of justice. This paper concludes by pointing out that it is essential to pay attention to non-Western legal systems in order to develop the comparative study of penal populism.

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[2] Prof. Makoto Usami, Professor of Philosophy and Public Policy, Kyoto University.

THE ARTIFICIAL REAL ACCESSION IN THE ROMANIAN NEW CIVIL CODE. SPECIAL HYPOTHESIS REGARDING EXECUTION OF WORKS EXCEEDING THE BORDER WITH VIOLATION OF ANOTHER'S RIGHT OF PROPERTY – A COMPARATIVE APPROACH

MS. ADELINA VRANCIANU[3]

The problem of artificial real accession will be analyzed in this study both in terms of old and current Civil Code provisions and in terms of comparative law, European legal and Canadian systems. The current Civil Code from 2009 has brought new changes about the application and solutions regarding artificial real accession. The hypothesis in which a person is making works with his own materials on the real estate belonging to another person is developed and analyzed in detail from national and international point of view.

The scope of this analysis is to point out what are the changes issued from case-law and which ones are new, inspired from other law systems. The study has reserved a special place for the situation of execution of works with own materials exceeding the border with violation of another's right of property, where the variety of solutions brings into discussion the case of expropriation for private interest.

The new Civil Code is greatly influenced by the Civil Code from Quebec in comparison with the old code of French influence. The civil reform was needed and has brought into attention new solutions inspired from the Canadian system which have mitigated the permanent conflict between the constructor and the immovable owner. For example, now, the accession is applied not only with new constructions, but also for reparations or extensions of the immovable in accordance with a new regime for the necessary and the pleasure expenses.
The nature of the accession right and the moment of acquiring property is themes treated in the study.

In conclusion, the new Civil Code solves controversial issues and regulates new aspects, that remain to be confirmed by the future case-law.

APOLOGY AND THE CORPORATION

DR. MICHAEL SIEBECKER[4]

Apology and the Corporation represents a multidisciplinary empirical research project that investigates the connection between corporate financial performance and instances of public apology following some corporate calamity. The empirical research helps to examine more precisely the role that apology might play in corporate law and business practices.

The project on corporate apology entails three primary objectives: (1) determine empirically the connection between financial performance and instances of public apology following some corporate calamity; (2) investigate the nexus between the practice of apology and the fiduciary obligations of trust that corporate managers owe to stockholders and other constituencies; (3) ascertain from a sociological and organizational theory perspective the role that apology could play in business strategy. I hypothesize that public apology will correlate positively with corporate financial performance; apology will constitute an important philosophical component of trust that underpins corporate fiduciary duties; and that apology could provide an effective business strategy from an organizational theory perspective.

To accomplish these objectives, the study will measure the connection between financial performance and instances of apology using the stock prices of public companies listed in the S&P 500 Index following some corporate calamity (e.g., environmental disaster, major data breach, etc.) that occurred over the past twenty years. Using "event study" regression analyses

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to identify corporate calamities that produced a statistically significant drop in stock price and then determine whether subsequent instances of public apology produced statistically significant stock price gains, it will be possible to determine whether corporate apology has a positive effect on stock price compared across industry sectors and across an array of different types of calamities. Based on that empirical evidence, the study will investigate from a jurisprudential perspective how apology relates to the basic fiduciary duties of trust that corporate managers owe to stockholders and other constituencies. Moreover, from an organizational theory perspective, it will be possible to assess whether public corporate apologies represent effective means for repairing and sustaining business relationships.

The project represents an undertaking of substantial scholarly significance. Although apology has been studied in a variety of social and business contexts, an interdisciplinary empirical examination of the connection between stock performance and corporate apology has not yet been undertaken and remains original in design. Moreover, the connection between apology and corporate financial performance relates to ongoing investigations regarding the viability of the $32 trillion market for corporate social responsibility ("CSR"). To the extent a positive correlation exists between corporate apology and financial performance, some degree of trust might exist between corporations and investors to sustain the market for CSR. To the contrary, if no significant correlation between apology and financial performance exists, investors may already fail to trust corporate communications on matters relating to social responsibility. Thus, the project on corporate apology should provide significant clues regarding the basic viability of the $32 trillion market for CSR. In the end, the project will contribute significantly to our understanding of corporate behavior, investing strategies, the importance of corporate transparency, and the rules that should guide corporate disclosures going forward.

ACCOUNTABILITY AS A NORMATIVE FOUNDATION FOR GLOBAL ADMINISTRATIVE LAW

PROF. YUKIO OKITSU[5]

As is readily observable from a global perspective, there are many supranational regulatory bodies and regimes, both public and private, and their decisions can affect individuals in the same way as those by national administrative agencies. It has been argued that such bodies and regimes should be, and are, regulated by legal rules and principles including accountability, transparency, and public participation, referred to collectively by some scholars as 'global administrative law' (GAL). In accord with the idea that such law exists and applies to global administrative actions, this author seeks to explain why and how such rules and principles apply in a global administrative space in which it is difficult to conceptualize the traditional underpinnings of an administrative regime, such as separation of powers, judicial review, and centralized governmental powers that are delegated and restrained by a democratic legislature. In order to approach this question, the proposed presentation will focus on the concept of accountability as a central issue in global administrative law because most GAL scholars observe that one of the primary purposes of global administrative law is to promote and ensure the accountability of global administrative bodies. This presentation will examine and define accountability from the perspective of administrative law and will discuss how this concept can serve as the normative foundation for the existence of administrative law in a supranational context.

Although the term is commonly used without a clear definition throughout legal and political literature in the English-speaking world, the concept of accountability can be defined

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as a relationship between two people or entities in which one party has the obligation to explain and justify its actions to the other. When applied to an administration, it can be classified into two categories: political (democratic) accountability that requires the legislature and the government to be accountable to the public or the people to ensure their legitimacy, and legal accountability that requires governmental and administrative actions to be evaluated according to the law.

However, it is unclear in a global context to which people(s) and to what law(s) global administrative bodies should be accountable due to the lack of a global public and a unified global legal order. In considering this issue, this author supports neither global constitutionalism based on global democracy, because it is too unrealistic or at least premature for the moment, nor state-centrism that reduces the international society to a conglomerate of sovereign states because of the difficulty in explaining the existing global administrative space. Instead, this presentation will propose a third alternative: autonomous pluralism. This requires that each administrative body enjoy autonomy within its functional or territorial jurisdiction and be accountable to its constituency and its internal law. Its internal autonomy, nevertheless, can be denied and other external authorities (such as states, the international society, or competing global administrative bodies ('peers')) are entitled to intervene when its actions exceed the limits of internal autonomy, e.g., endangering fundamental human rights

SECURING REGISTRATION OF RURAL LAND RIGHTS THROUGH A UNIFORM LAND TITLE SYSTEM FOR ECONOMIC DEVELOPMENTS IN SOUTH AFRICA

MR. MAPHUTI TUBA[6]

The Constitution of South Africa, with its mandate to address the injustices of the past and to improve the life of every citizen, makes provisions for a legally secured tenure for persons or communities whose tenure is legally insecure as a result of past discriminatory laws. The Constitution further requires the drafting of legislation to address these injustices. On the twentieth anniversary of South African democracy, it is still a contentious question whether these objectives of addressing rural land tenure rights and their importance to economic development has been achieved. One of the obstacles to achieve these objectives arise from the dual systems of land rights in South Africa: one based on the Western landholding originating from the Dutch and the British, and the other based on customary law. These competing property interests have, to a certain level, been responsible for failure to advance a formal land registration with regard to rural land parcels. The question is whether it is possible to find a middle ground in terms of which both elements of these systems can be applied to construct a proper land registration system for rural land parcels. This paper analyses the land registration systems in South Africa and their effectiveness for economic developments of rural land owners through proper registration. The aim of the paper is to determine whether the elements of both Western and customary landholding systems may be applied to provide a uniform land registration of rural land parcels for economic development of rural land owners.

GAIN-BASED DAMAGES FOR BREACH OF CONTRACT: A SOUTH AFRICAN PERSPECTIVE

MR. KWENA ALBERT SEANEGO[7]

The aim of this paper is to look at contractual remedies in case of breach of contract and the problem posed when a breach is opportunistic. This normally happens when the contract breaker's aim is to make profits out of his/her act of breach, not that he or she cannot perform

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[7] Mr. Kwena Albert Seanego, Lecturer, University of South Africa.

in terms of the agreement. At times, the plaintiff may not suffer financial loss due to breach of contract, but suffer non patrimonial loss as a result. The innocent party, in this kind of breach of contract, cannot claim damages, for only financial loss can be claimed in a contractual agreement. In terms of contractual damages, this position has a potential of leaving the plaintiff with no remedy should he not suffer patrimonial loss while allowing the contract breaker to keep the gains made due to his or breach. This position is certainly not ideal as it leaves a perception that law of contract allows or encourages breach of contractual obligations in order to make profit as a result. Should the position outlined above be allowed to persist, performance interests, which is one of the interests, protected by courts should there be breach, will be inadequately protected. In respond to this problem, a disgorgement remedy has since been recognised in English law and other jurisdictions in the world to deal with this problem and now the question is should South African courts follow their English counterparts in solving this problem or will the remedy be unfit in a South African context?

LEGAL FRAMEWORK OF MEDICAL TOURISM IN MALAYSIA.

DR. FATIMA LAWAL[8]

Medical tourism is becoming a popular option for tourists seeking medical attention across the world. It involves predominantly biomedical procedures, ethical issues combined with travel and tourism. Medical tourism is fast growing multibillion-dollar industry around the world and it is an economic activity that entails trade in services and it's a combination of two of the largest world industries: medicine and tourism. The term has been employed by the travel agencies and the media to describe the rapidly growing practice of travelling across international borders to obtain medical care. Malaysia is one of the countries that are promoting medical tourism aggressively. The key concerns facing the industry include: absence of government initiative, lack of a coordinated effort to promote the industry, absence of a clear cut legal framework, medico-legal and ethical issues and lack of uniform pricing policies and standards across hospitals. This paper therefore examines the legal framework for medical tourism in Malaysia and also looks at the prospects and challenges facing the industry and made some recommendations for creating an enabling environment for this sector to flourish.
KEY WORDS: Medical Tourism, Legal Framework, Environment, Industry and Government Initiatives

RESPONSIBLE BORROWING AND LENDING

MRS. JODI GARDNER[9]

The regulation of high-cost credit (referred to frequently as 'payday loans') has received unprecedented media, academic and government attention recently. The focus has however been almost exclusively on the actions of the lending institutions, which have frequently been labeled as exploitative, predatory and unconscionable. There is a strong legal regime currently in place to limit the lending activities of firms in an attempt to curb their perceived irresponsible behaviour. In the United Kingdom, credit providers are required to abide by the Financial Conduct Authority's 'Irresponsible Lending Guidelines', which set out the steps businesses must take in order to be considered 'responsible' in their lending activities. Despite these legal requirements, there is significant evidence of continued irresponsible behaviour – for example, the UK's largest payday lender, Wonga, was recently found to have breached its obligations and has ordered that the firm refund outstanding loans to hundreds of thousands of borrowers, at a cost of over £330 million.

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[9] Mrs. Jodi Gardner, Associate Member, CHASM, University of Birmingham.

The legal and social obligations on lenders have been subject to significant analysis recently, largely due to this evidence of irresponsible practices. The focus on responsible lending, as opposed to responsible borrowing, in the consumer credit industry provides an interesting contrast to the welfare system, which is strongly focused on responsibility of the individual as opposed to the system as a whole. This paper will look at high-cost credit from the other side of this equation, analysing the concept of responsible borrowing. Whilst there is a legal obligation on firms to lend responsibly, should there also be countervailing obligations, legal or otherwise, on individuals to ensure that they are borrowing in a responsible and appropriate manner? It is clear from the consumer protection legislation that borrowers of high-cost credit have significant rights, but should they also have responsibilities? These could include only applying for credit for necessary expenses and in conditions where they will be able to repay, ensuring that they understand the terms and conditions of the credit obtained and providing lenders will complete and accurate information about their borrowing history and ability to repay. If responsible borrowing is something our system wants to emphasise, we must then also consider how the law, and social policy in general, can engage with these issues. For example, what reforms can be instigated to encourage more responsible and appropriate borrowing activities?

Our paper will analyse the findings from qualitative empirical research with borrowers obtained from an AHRC research grant on responsible lending and borrowing, combined with the available legal, social policy and economic geography literature, to consider these central but often largely ignored issues. It is important to stress that our empirical borrower data has seen little evidence of irresponsible borrowing or inappropriate customer behaviour; regardless, these questions are important to the broader issues about the free market, paternalistic nature of the state and role of the law in society, and are therefore highly deserving of further consideration.

GLOBAL GOVERNANCE AND AFRICA'S DEVELOPMENT

MS. HATUN KORKMAZ[10]

Global governance is a movement towards political, social and economic integration of transnational actors aimed at negotiating responses to problems that affect more than one state or region. It tends to involve institutionalisation. The term "global governance" may also be used to name the process of designating laws, rules, or regulations intended for a global scale. Global governance is an important positive factor developing or underdeveloped countries in the development.

As the British prime minister declared in 2001 , African poverty and underdevelopment has been known as "a scar on the conscinence of the world" for many years. Since the mid-1990s, this continent has defied the old negative stereotypes of poverty and failure by achieving steady economic growth, deepening democracy, improving governance, and decreasing poverty. African countries have made substantial progress over the past two decades, characterised by higher growth and modest improvements in social and human development. It has also experienced an improvement in governance, with the majority of countries embarking on democratic changes, forging ahead towards egalitarian representation, including along gender dimensions, and regular universal elections. The continent may pursue to better position itself to take advantage of global governance and establish a stronger base for long-term development.

This paper explores the effects of global governance in the development of Africa in the 21st Century. The paper has identified the current global governance structure and aspects of

[10] Ms. Hatun KORKMAZ, Lecturer, Erciyes University.

globalization which have major implications for African economic, social and human development.

ANALYSIS OF COMPARATIVE ENGLISH MEDIA REPORTS THAT RELATED TO THE AFTERMATH OF THE FUKUSHIMA DAIICHI NUCLEAR POWER PLANT DISASTER.

DR. MAKOTO SAKAI[11]

The research undertook a comparative analysis of media reports that related to the aftermath of the Fukushima Daiichi nuclear power plant disaster. The paper also researched advanced countries' media reports on the nuclear power technology field, and especially those from the United States, the United Kingdom, Germany, and France and so on. It focuses on researching these countries' news contexts and changes to their nuclear policies, and compared the public opinions on nuclear power policy reflected in each country's media. According to Ulrich Beck, in a society steeped in risks and uncertainty, the existing political system becomes the malfunction, and technology is tinged with political characteristics. Consequently, a new type of democracy that controls risks and uncertainty through academic means is needed. This paper uses the framework of sociology and media studies to clarify the different contexts for nuclear power policy, which Japanese media has not reported well, in the above-mentioned countries, and contribute to the enhancement of self-information-governance educational materials about nuclear power technology. Currently, international media companies publish news in the newspapers and on their websites in English. They post large amounts of content every day, and update it frequently. This paper gathered news texts on the aftermath of the Fukushima Daiichi nuclear power plant disaster from newspapers and websites. For example reports of France and Germany were more realistic among other European countries. It can be said that the response towards nuclear safety of these two governments showed "Contrasted route" to which Japan should refer in the future. The research then categorised these reports into four groups to analyze what the media in the above four counties have reported about Fukushima: 'same context' (typical context), 'a different context from other countries' media', 'a changing context from before', and 'proposals for the decommissioning and reconstruction process in Japan'. After analying the literature, the paper concludes that this nuclear accident in Fukushima is unquestionably "a man-made disaster" occurred by having neglected the improvement of the problem that was bound by the one like "law of the nuclear power village" such as "the nuclear power plant is safe and information disclosure is unnecessary" and pointed out from the outside and the effort of information disclosure. In the near future, what is necessary for Japan is not only to promote the technology around the nuclear reactor but also to introduce "the technology that the civilian observes nuclear power village" composed of the bureaucracy, the academy and the company that have to do with nuclear power generation.

WHEN A TRADE MARK USE IS NOT A TRADE MARK USE? A 3D PERSPECTIVE

DR. JAMIL AMMAR[12]

A trade mark infringement claim is based on use in the course of trade. In Arsenal Football Club Plc v Reed, Advocate General Colomer pointed out that it would not infringe BMW's trade mark for an individual to put in on a key ring. So in principle, it would appear that, unlike use for commercial purposes, the use of a 3D trade marked object for personal use might not fall within the boundaries of infringement. According to Bradshaw and Bowyer, even the use of a 3D branded item for commercial purposes might not necessarily infringe the trade mark,

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[12] Dr. Jamil Ammar, Research Visitor, Edinburgh University.

if the user can prove that the 3D object was not used in 'the trade mark sense'. But what if a user modified a Computer Aided Design (CAD) file to produce trade marked handbags and then reposted the file online for free which empowered others to print 3D counterfeit handbags? Would such an act be considered as a use in the course of trade or a use in a trade mark sense? Would the use of the trade mark in connection with the CAD file be considered a trade mark use per se? Would the answer be different where the logo and item files were separated in the CAD file? What if a trade marked object on CAD file was printed at home for personal use? Would this infringe the mark considering that the number of infringers could reach hundreds of thousands and with some stretch of imagination millions? Drawing on UK and EU trade marks laws and their application to 3D printing, this paper will examine whether key trade mark principles can accommodate the specificities of 3D printing or whether we need to rethink our existing rules in this area. To this end, this paper will question the extent of which the use of a CAD file could infringe a trade mark and, if so, in what context. Highlighting a few challenges for the rights holders the paper stresses the need to rethink the concept of a trade mark use in this rapidly changing field. It is concluded that the current legal system is capable of tackling many trade mark-3D concerns. In this regard, the quality function of a trade mark is likely to gain considerable legal and practical importance within the parameter of 3D printing world. Key words: 3D printing, CAD file, trade mark use, intellectual property

COMPULSORY LICENSE AND ACCESS TO MEDICINE IN INDIA: A CRITICAL ANALYSIS

MR. SAKTHIVEL MANI[13]

With the expansion of product patent regime to the pharmaceutical products due to the TRIPS obligation, many developing countries and the Least Developed Countries (LDCs) have been confronting a crucial social problem i.e., access to medicine at an affordable price. Though India being a developing country has not been witnessing such crucial problems with few exceptions due to its strong generic drug industry. However, those few exceptions are the real disturbing factors because most of the cases are life saving drugs and/or cancer drugs which have been patented. So as to overcome from the public health crisis, compulsory license has been used to reduce the price substantially, which has even been upheld by the Apex Court for such invocation. As a result, this type of medicine is made available at an affordable price for at least 50% of the total population.

If it is the result of compulsory licensing, it is very pertinent to raise a question that whether compulsory licensing will alone take care of the health care crisis in India. This research question will be discussed with the help of available literatures. In this paper, health care issues in brief will be addressed in the first part with a special focus on access to medicine. In the second part, nexus between the patent and access to medicine will be discussed from the post TRIPS scenario. In the next part, how far the Indian compulsory licensing system addresses the issues of access to medicine. These research issues would be addressed by critically analyzing the relevant provisions of Indian Patents Act along with the relevant cases. Appropriate and relevant suggestions which are inevitable would also be provided based on the above discussions.

[13] Mr. Sakthivel Mani, Assistant Professor, University School of Law and Legal Studies.

THE CHALLENGES OF SELF ACTUALIZATION PROCESS AT HIGHER EDUCATION: A STUDY IN THE PUBLIC UNIVERSITIES OF BANGLADESH

MR. MOHAMMED THANVIR AHMED CHOWDHURY[14]

For the economic growth and overall national development the first and foremost pre-requisite is education. However, it is recognized that ensuring primary education for all is only a necessary but not sufficient condition. It needs to be complemented by higher education. But the domination of power and politics is a common phenomenon at most of the public universities in Bangladesh. Very often different types of political and non political movements arise from both students and teachers community which are not publicly manifested. But most of the cases emerge from hidden intention of many beneficiary groups which go against the university rules and to some extent violate the "University Ordinance Act". Due to political unrest, sometime universities remains closed and academic year become lengthy. What a man can be, he must be. This need we may call self-actualisation. It refers to the aspiration for self-fulfillment to become actualised in what he is potential. To determine perceptions of self-actualising behavior as a purpose of higher education, students, teachers, and administrators should essentially agree that higher education should develop self-actualising behaviors. These three groups are equally important and inter connected for a university to develop. But unfortunately we find an opposite picture in most of the public universities of Bangladesh in recent years. Why meritorious students are being involved in different anti academic activities in which they are not supposed to be? This question suggests a sense of responsibility and expresses the problem of autonomy and solitude. These problems demand attention to identify the issues and implications for self actualisation in higher education. Henceforth, it is very important to find out the challenges of self actualisation process in higher education and reveal out the unexpressed true problems of public universities in Bangladesh.
Key Words: Self Actualization, Higher Education, Public University

HISTORY OF INFANT ADOPTION IN MODERN JAPAN: THE PATRIARCHAL NATURE OF JAPANESE SOCIETY

DR. KASHIMI YOSHIDA[15]

From the pre-modern era, Japanese society has had laws and a custom of adoption of both children and adults, and adoption has been a popular focus of legal and anthropological studies in Japan. Regarding modernization of the Japanese adoption system, previous researchers have indicated that, over time, the system has passed through three main purposes: 1) maintenance of "ie" (Japanese traditional family); 2) interests of adoptive parents; and 3) well being of children in need of care.

The Special Adoption Law was established in 1987 as part of child welfare policy. However, recently the number of adoptions under the Special Adoption Law has totaled only about 300 annually, while almost 90% of infants and children in need of care, more than 30,000, live in infant homes or other institutions. Previous researches has not revealed the background of this apparent failure to increase special adoptions.

In order to explain the current situation regarding infant adoption in Japan, this paper aims to provide an alternative historical view of the modernization of Japan's adoption system. The paper examines the impacts of the Child Welfare Act of 1947, the Eugenic Protection Act of 1948, and the Amendment of Civil Code in 1947.

[14] Mr. Mohammed Thanvir Ahmed Chowdhury, Assistant Professor & Head, North East University Bangladesh.
[15] Dr. Kashimi Yoshida, Postdoctoral Fellow, Ritsumeikan University.

Before World War II, professionally trained midwives supported pregnant women and mothers by sheltering their infants and arranging formal and informal adoptions. However, during the US occupation, the Japanese government regulated midwives' practices and established infant homes under the Child Welfare Act of 1947. Soon after, 1948 Eugenic Protection Act was adopted, allowing doctors to perform abortions within the first seven months of pregnancy.

In 1973, Noboru Kikuta, an obstetrician, began a movement calling for new legislation that would protect women's privacy by limiting public disclosure of childbirth and adoption, a "Birth Exception Law," and thus provide an alternative to late abortions and infanticide. However, in the 1970s, concerned over the declining birthrate and encouraged by religious groups and conservative politicians, the Japanese government moved to amend the Eugenic Protection Act to prohibit abortions for economic reasons. As a side effect of this controversy, Kikuta's adoption movement was seen as being radically pro-life or anti-feminist, which resulted in a loss of support for Kikuta from other obstetricians.

With amendments to the Civil Code and abolishment of the "ie" system after World War II, nuclear families slowly became more common in the 1970s. In addition, to maintain social sanctions on unmarried mothers who relinquished their infants for adoption, jurists did not embrace privacy protection for these mothers. Therefore, the 1987 Special Adoption Law for the well being of children growing up in institutions did not reflect proposals calling for changes to increase women's choices and to save fetuses and infants' lives.

This paper concludes that during the "modernization" of Japan's adoption system the stigma attached to unmarried motherhood has been encouraged, which has resulted in less adoptions and growing public concern regarding issues of morality and ethics. This, in turn, has functioned to strengthen and maintain the patriarchal nature of post-war Japanese society.

HEALTH PROFESSIONALS' KNOWLEDGE OF TYPES OF ADMISSION TO A PSYCHIATRIC HOSPITAL

MS. EMANUELE BRITO[16]

This is a descriptive research study, using a qualitative approach, conducted in a psychiatric hospital in the state of São Paulo. The aim of the study was to identify the knowledge of health professionals regarding different types of admission to psychiatric hospitals in accordance to Law 10.2016/01. Data was collected through semi-structured interviews with 33 health professionals who participated in the process of patients´ admission at the psychiatric hospital. Data was analysed through content analysis resulting in the following thematic categories: "Voluntary admission and the requirement to have a responsible person during admission"; "Gaps in the knowledge of health professionals regarding involuntary admission"; "Involuntary admission occurring when the family is the one to hospitalize the patient"; "Involuntary Admission as a synonym to Compulsory Admission"; "Is there involuntary admission?", and "The Role of the Public Attorney in Involuntary Admissions". Results showed the lack of knowledge of health professionals about the differences and types of admissions to psychiatric hospitals.

A STUDY OF THE RISE OF NEW ENERGY VEHICLES IN CHINA

PROF. KATSUHIRO SASUGA[17]

The primary purpose of this paper is to clarify the characteristics of the sharp growth of the Chinese automobile industry, specifically the segment referred to as the "new energy vehicle".

[16] Ms. Emanuele Brito, PhD Student, University of Sao Paulo.
[17] Prof. Katsuhiro Sasuga, Professor, Tokai University.

In the last decade, China has emerged as one of the key centres of global economy, changing the structure of the global economy. China is the fastest growing automobile country, becoming the largest producer and market in the world. Revolutionary China is to remake a once backward auto industry into a stage of modern large-scale assembly and local supplier networks. As a result of increasing sophistication and product quality, the Chinese new energy vehicle had emerged as one of the key segment in its market.

The new reality requires a fundamental rethinking of the answers of how such a new energy vehicle has started to gain a market share, though it is debatable. The automobile industry's policies have undoubtedly been the most critical factor to assist the market building effort, and the Chinese governments have issued various supportive measures to attract foreign leading automakers in order to transfer massive amounts of investment and technologies to China. Sharp economic globalization has drastically transformed the production and service activities in the automobile industry in recent decades. However, the central policy alone cannot explain the huge regional variations in the sector. The local governments have been the critical authorities to allocate resources and grant permissions to business sectors. Thus, the automobile industry provides a particularly illustrative case study of the processes of market development in China, as each of China's core projects takes the form of a joint venture (JV) with foreign automakers.

Closer examination at the production and sales levels reveal that, in addition to central governments, local (state, provincial, and city) governments have played an indispensable role in governance and policy changes in order to support their own regions' move to a higher level of industrial development. Individual companies may determine competitive success differently so this paper focuses on the factors that have led to the development of "new energy vehicle" in China.

INFRASTRUCTURE INVESTMENT IMPACT EVALUATION: EVIDENCE FROM CENTRAL ASIA

MR. UMID ABIDHADJAEV[18]

Restricting focus on case of new infrastructure connection in context of Central Asia, this paper examines how public infrastructure investment affects economic activity and empirically estimates the direction and magnitude of its impact on regional gross production (RGP) growth rate by employing difference-in-difference approach. The approach, belonging to class of treatment effect assessment, allows comparing the actual state of outcome variable in chosen region to that of alternative outcome which might have taken place in absence of treatment in form of railway connection.

For the context of analysis, the research employs the case of the TBK railway connection in Uzbekistan, Central Asian country gradually rebuilding its own integrated railway connection system after collapse of the Soviet Union in 1991. The setting of causal identification in the study explains the variations in growth rates of economic outcomes of first-order administrative divisions by their status of being exposed to positive effects from newly built railway connection in southern regions of Uzbekistan.

Estimation strategy is based on variations in spectrum of three dimensions, including those of timing, regions and sectors. Depending on assumptions of treatment timing, the analysis considers estimation of anticipation effect, launching effect and postponed effect from infrastructure provision. Genesis of regional setting is examined by estimating direct regional effect, spillover effect across regions and connectivity effects, based on findings of earlier empirical literature. Scope of the study also includes estimation of differential impacts of

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infrastructure provision on economic sectors, framed by growth rate of industry, services and agriculture value added.

The evidence suggests that railway connection's impact on RGP growth rate of regions in Uzbekistan after the operation of the TBK railway line in 2008 was positive and significant in the setting of connectivity effects and long-term spillover effects. Positive and significant changes in industrial output of the directly affected and neighboring regions mostly took place during design and construction period, in anticipation of the railway connection. Positive impact of railway connection on economic outcomes is observed to be of diminishing nature, decreasing over time since the start of operation of the railway line.

THE UTILITY OF THE USE OF THE PRINCIPLE OF LEGITIMATE EXPECTATION IN THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN MINERAL RESOURCE DEVELOPMENT

PROF. AMINU KABIR[19]

Mineral resource development is identified with adverse/ rippling consequences affecting the ecological, social, economic and cultural parameters of its hosts. Development economists and political scientists have made substantial contributions to this discourse with outstanding scores of empirical works on resource curse phenomenon and its deleterious effect on the political economy of resource rich countries and communities. Legal scholars have traditionally made their contributions on legal issues surrounding the discovery, development, regulation, use and protection of mineral resource. Recent legal scholarship focus around the context of human rights, the global trend on sustainable development and the tri-sectoral (government-community-company) partnership covering ownership claims of the central, regional or local communities where mineral extraction occurs, environmental protection rights, the rights of communities, revenue allocation and sharing arrangements, equity participation arrangements, and the development of a legal framework that could provide effective enforcement mechanism and remedies for or to the various mining stakeholders. Very little attention has been given to the latter – the enforcement regime for mineral socioeconomic rights. The overarching theme of this work looks at the viability of the administrative law principle of legitimate expectation as a mechanism for the enforcement of socio-economic rights in mineral resource development. It first examines the thematic issues and positive legal framework that establishes the tripartite relationship between the governments, communities and individuals underpinning mundane socio-economic obligations and responsibilities in mineral resource development and whether the relationship create justiciable rights and obligations. The paper then appraises the options available to potential litigants and the extent to which they have access to judicial forum and remedy. The paper proceeds to examine the normative scope and contours of the principles of legitimate expectation and teases the viability of its invocation in the enforcement of socioeconomic rights and obligations by aggrieved individuals and communities affected by mineral resource development.

EXPANSION OF PRIVATE JUSTICE AND PROTECTION OF PUBLIC INTEREST

MS. AGNIESZKA ASON[20]

One of the most significant political choices determining the shape of global justice in the 21st century is the promotion of international commercial arbitration. Once a modest alternative to litigation, arbitration is currently a preferred method of dispute resolution, especially in multi-jurisdictional settings. As a form of private justice, it offers confidentiality, neutrality and

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flexibility of proceedings. Yet, in some cases, it might threaten public interest. For that reason, decisions rendered by arbitral tribunals are subject to an incidental control exercised by national courts. The standard of review of arbitral awards is subject of a heated debate in scholarly writing. In practice, it is gradually decreasing. This phenomenon, undoubtedly a 'race to the bottom' at international level, has a detrimental effect on the effectiveness of available control mechanisms. Eventually, the court review incapable of identifying infringements is degraded to an illusion. Nonetheless, a low level of judicial scrutiny is considered arbitration-friendly and, as such, it is endorsed in jurisdictions being both established and emerging arbitration venues. With billions of dollars in legal fees at stake, the rivalry for arbitration business is fierce. This paper argues that the idea of attracting international tribunals at the cost of domestic values is short-sighted. It demonstrates that the protection of public interest, reflected in a thorough review of arbitral awards at the enforcement stage, is a prerequisite to the success of international arbitration in the long term.

THE UN GUIDING PRINCIPLES AND THE KING REPORT ON CORPORATE GOVERNANCE: THE NEED FOR INTERSECTION BETWEEN TWO PARALLELS IN RELATION TO SOUTH AFRICA'S CORPORATE SPHERE

MS. LOYISO MAKAPELA[21]

The custom of excluding external stakeholders, such as disadvantaged individuals and communities as well as the environment, from the corporate vision is undoubtedly a thing of the past for many large companies and corporations the world over, and South Africa is not an exception.The rise in prominence of concepts such as corporate governance, corporate accountability and corporate social responsibility has had a substantial contribution to this change, in conjunction with a myriad of other mechanisms created either by companies themselves or by stakeholders.

Corporate governance codes have the distinctive quality of being country specific or unique to a particular country, unlike the UN Guiding Principles Framework, which is a regulatory and voluntary instrument that has international application and relevance as one of its defining characteristics and is applicable to both States and corporations. It has enjoyed widespread observance by a range of States and corporations. Corporate governance frameworks mostly only deal with the direction and control of companies.

In the South African context the King Report on Corporate Governance enjoys arguably higher level of observance and adherence than the UN Guiding Principles, which is the case in many countries. Put otherwise, in most scenarios the two instruments co-exist, somewhat separately, in the corporate sphere of most nations, which in itself is unsurprising given the nuanced differences between the two instruments in terms of form, content, aims and operation. As such, this paper posits the hypothesis that the incorporation of certain aspects and provisions of the UN Guiding Principles into the King Report would only serve to enhance the corporate governance framework in South Africa in that it has the potential to result in increased considerations of key stakeholder-related factors, a result which is of particular importance and necessity given the country's socio-economic conditions.

This hypothesis shall be proven by firstly undertaking an overview of both instruments with special emphasis on aspects relating to sustainability and socio-economic considerations in terms of the King Report with the corresponding aspects as contained in the UN Guiding Principles so as to explore the ways in which features of the latter instrument could enrich and add to the relevant provisions of the former instrument.

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Secondly, the importance of the need for the inclusion into the King Report of provisions directed towards the achievement of greater observance for socio-economic factors relating to internal, but especially external, stakeholders shall be argued.

Lastly, it is concluded that in light of the incorporation of the King Code into the listing requirements of the Johannesburg Stock Exchange, it is evident that great strides are being made in the right direction in South Africa's corporate sphere, and, it is hoped, this may be just one of the contributory ways inwhich these strides are made.

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