2015

FLE Learning

Law Conference 2015 (Cambridge) Series

Academic International Conference on Interdisciplinary Legal Studies - AICILS
Annual International Conference on Law and Policy - AICLP
Annual Conference on Intellectual Property and Information Law - ACIPIL

Conference Proceeings
13th-15th July 2015
University of Cambridge, Newnham College Cambridge, United Kingdom

ACIPIL Cambridge

AICLP Cambridge

AICILS Cambridge

FLE Learning

Law Conference 2015 (Cambridge) Series

Academic International Conference on Interdisciplinary Legal Studies – AICILS
Annual Conference on Intellectual Property and Information Law – ACIPIL
Annual International Conference on Law and Policy – AICLP
13-15 July 2015

CONFERENCE PROCEEDINGS

Disclaimer

Whilst every effort has been made to ensure that the information contained in this publication is correct, neither the editors and contributors nor FLE Learning accept any responsibility for any errors or omissions, quality, accuracy and currency of the information, nor any consequences that may result. FLE Learning takes no responsibility for the accuracy of URLs of external websites given in this publication nor for the accuracy or relevance of their content. The opinions, advices and information contained in this publication do not necessarily reflect the views or policies of the FLE Learning.

Format for citing papers

Author surname, initial(s). (2014). Title of paper. In Proceedings of the Annual International Conference on Law, Economics and Politics, (pp. xx-xx). London, September 1st – 3rd, 2014.

Law Conference 2015 (Cambridge) Series © 2015 FLE Learning Ltd
ISBN: 978-0-9930368-6-6 (Online)
These proceedings have been published by the FLE Learning Ltd trading as FLE Learning.
T: 0044 131 463 7007 **F**: 0044 131 608 0239 **E**: submit@flelearning.co.uk **W**: www.flelearning.co.uk

CONTENTS

THE ROLE OF MEDIA IN MAINTAINING THE EQUILIBRIUM OF INTER-BRANCH RELATIONS IN GOVERNMENT.....

Leah Angela Robis 6

ENERGY DEVELOPMENT AND THE CLASH OF SECURITIES .....

Angelica P Rutherford 16

LEGAL PRACTICE IN APPLYING THE EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS FROM POLAND'S JUDICIARY PERSPECTIVE.....

Mr. Dariusz Szawurski-Radetz 26

OLD WORLDS FOR NEW: HISTORIANS, "USEABLE' HISTORY AND POLITICAL REDRESS IN POST-APARTHEID SOUTH AFRICA .....

Craig Paterson 36

The practical challenges of facilitating environmental laws: the role of rural organisations in Queensland Australia .....

Jo Kehoe.....42

CULTURAL AND RELIGIOUS RELATIVISM AS OPPOSITION TO THE AIMS OF INTERNATIONAL HUMAN RIGHTS LAW: REVISITING THE UNIVERSALISM VS. REGIONALISM DEBATE.....

Musa Njabulo Shongwe*.....50

Death Penalty: Is it ever justified? .....

Apala Chaturvedi & Shanu Jain.....69

INTER-JURISDICTIONAL GOVERNANCE COORDINATION, COMMUNITY SUPPORT AND COMPLIANCE WITH THE ILO 169 CONVENTION ON INDIGENOUS RIGHTS: FINDINGS OF A CROSS-SECTIONAL STUDY OF THE INDIGENOUS PEOPLE OF THE KALASH VALLEY IN PAKISTAN .....

Syed Toqueer Akhter & Mahina Ghalib **80**

Understanding the Impact of Smart Cities and the Need for Smart Regulations .....

Manick Wadhwa 92

FOREIGN INVESTMENT, TECHNOLOGICAL DIFFUSIONAND COMPETIVENESS OF EXPORTS: A CASE FOR TEXTILE INDUSTRY IN PAKISTAN 102

Syed Toqueer Akhter and Muhammad Awais 102

RECIPROCITY AND INTERDEPENDENCE IN BILATERAL TIES BETWEEN PAKISTAN AND INDIA: A GAME THEORETIC EXPLANATION. 116

Ali Ahmed Aamir Mirza and Syed Toqueer Akhter 116

TORTUOUS LIABILITY OF GOVERNMENT IN INDIA 124

Vaibhav Kartikeya Agrawal : 124

Compulsory Licensing: A Tool for Balancing Technology Transfer and Social Welfare ..

Vinita Krishna and Sudhir. K. Jain 132

The Intersections of 3D Printing Technology with Intellectual Property Law 142

Dr. Tesh Dagne 142

A Critical Review of the Merits Factor in Civil Mediation 142

Mr. Masood Ahmed 142

Learners without eyesight but vision : However does the Indian Educational Law have the spectacle? A Study 143

Dr. Ashish Virk and Dr. Aman A. Cheema (Co-Author) 143

New Institutionalism and Sharia Law in the West 144

Ms. Amira Aftab 144

A content analysis of media coverage of medical malpractice disputes in Taiwan 144

Prof. Shu-Yu Lyu 144

Courting Social Change in Developing Countries - Exploring means to improve the court's capacity in law and policy making 145

Ms. Harsimran Kalra 145

Gender Justice and Uniform Civil Code - A Study of India 146

Ms. Aastha Agnihotri and Professor Simmi, Himachal Pradesh University, Professor Dept. of Public Administration (Co-Author) 146

Rethinking Legitimacy of Criminal Justice : Bridging the Criminal Law – Criminology Divide. .....

Mr. Lucas Noyon and Dr. Jan de Keijser, Professor of Criminology (Co-Author).....147

PROGRAMS IN NIGERIAN HIGHER INSTITUTIONS AND GRADUATES UNEMPLOYMENT .....

Abolo Evuarherhe Veronica and Sola Niyi Ayeomoni.....148

DEFEATING HUMANITY? *(*AN ETHICO-LEGAL DISCOURSE) .....

Madhu Kapoor 148

RARITY OF LAW: ĀPAD DHARMA.....

Kakali Ghoshal.....149

Compulsory Licensing: A Tool for Balancing Technology Transfer and Social Welfare ..

Vinita Krishna and Sudhir. K. Jain 149

EROSION OF CENSORSHIP IN CLINICAL SETTING .....

Sarala Kapoor 150

UNIVERSAL BASIC EDUCATION ACT IN NIGERIA: A REALITY OR PLACEBO?

JACOB ADEYANJU.....150

LISTENER DELEGATES LIST.....151
EVENT SPONSOR.....151

THE ROLE OF MEDIA IN MAINTAINING THE EQUILIBRIUM OF INTER-BRANCH RELATIONS IN GOVERNMENT

Leah Angela Robis*

This paper studies how the role of courts and judges has changed in recent history and examines the effect of these changes on the relationship of judicial independence and judicial accountability. In particular, the constitutional crises in Malaysia and Russia are discussed to demonstrate the political nature of demands for judicial accountability, and how public opinion legitimises an attack on the judiciary. The paper also studies the general characteristics of media and relevant international human rights standards on free expression to understand reaction of the judiciary and the public to the events surrounding the respective crises. It concludes that a society which enjoys free access to information and exchange of ideas can form an informed opinion as to the propriety of an attack on the judiciary, and therefore protect the balance of power among the branches of government.

Key words: judicial independence, judicial accountability, free expression, public opinion, media

INTRODUCTION

This study examines how excessive demands for judicial accountability could compromise judicial independence and create an imbalance in governmental inter-branch relations.[1] Recognising media as a platform for enforcing judicial accountability,[2] this paper analyses how free expression[3] could maintain the balance of power among the branches of government.

Cultural, social and political norms determine the stature of courts and the expected behaviour of judges in society.[4] While both common and civil law traditions view courts as enforcers of the law,[5] the Anglo-American tradition allows judges to participate in policy determination through the exercise of power of judicial review.[6] This power, which refers to the duty of courts to ensure that all governmental acts are consistent with the constitutional mandate,[7] enables courts to review the constitutionality of legislation and administrative actions, and nullify them whenever they are found to be repugnant to the fundamental law.[8]

After the Second World War, new democracies adopted the United States (US) doctrine of constitutional supremacy by expressly including judicial review as a component of judicial power in their constitutions.[9] This phenomenon led to the judicialization of politics or the

* DPhil Candidate (2018) and Master of Laws in Human Rights (2014), The University of Hong Kong

[1] Stephen Burbank, 'Judicial Independence, Judicial Accountability and Intergovernmental Relations' (2007) 95 Georgetown Law Rev 909

[2] Mary L. Volcansek, Elisabetta de Franciscis and Jacqueline Lucien Lafon, *Judicial Misconduct: A Cross-National Comparison* (University Press of Florida 1996)

[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19

[4] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP 2002)

[5] ibid 69; Volcansek et al (n 2) 3; Diana Kapiszewski, Gordon Silverstein, Robert A. Kagan, 'Introduction' in Diana Kapiszewski, Gordon Silverstein, Robert A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013)

[6] Guarnieri and Pederzoli (n 4).

[7] [1803] 5 US 137

[8] ibid

[9] Ran Hirschl, 'The New Constitutionalization and Judicialization of Pure Politics' (2006) 75 Fordham Law Rev 721

means by which courts participate or influence policy through constitutional judicial review.[10] It allows judges to "increasingly dominate[11]" what traditionally was the exclusive domain of the legislature and executive.[12] Consequently, the exercise of this power is met with resistance.[13] A struggle ensues among the branches of government, especially in emerging democracies, and those courts which aggressively exert their powers usually suffer a backlash which reduces their "freedom of action".[14]

Conflicts among the branches of government are often due to clashes between the majoritarian sentiment and constitutional mandate. Legislators and executives decide policy based on public opinion[15] while judges enforce the law.[16] Whenever law and public opinion clash, the executive and legislature regard countermajoritarian political decisions as misplaced assertions of decisional independence[17] to justify political counterattacks on the judiciary. These counterattacks enable the executive and legislature to interfere with or influence the outcome of judicial proceedings.[18] They are undertaken to neutralise the judiciary and compel it to conform to the agenda of the two other branches. An example of a counterattack is the impeachment of US Supreme Court Justice Samuel Chase.[19] The Jeffersonians impeached Justice Chase several key Republican legislations nullified on judicial review.[20] Congress, however, voted against Justice Chase's removal from office.[21] Other examples of political counterattacks include the enactment of laws limiting the jurisdiction of courts and restraining the judiciary's budget.[22]

Political counterattacks are deemed to contradict the concept of judicial independence. Judicial independence is the "ability of courts and judges to perform their duties free of influence or control by other actors".[23] The United Nations Basic Principles on the Independence of the Judiciary provides that "courts must be resolve matters without any restriction, improper influences, inducements, pressures, threats or interference".[24] However,

[10] ibid 721
[11] ibid; Bjorn Dressel, 'Court and Governance in Asia: Exploring Variations and Effects' (2012) 42 Hong Kong LJ 95
[12] Dressel (n 11).
[13] Thomas L. Jipping, 'Legislating from the Bench: The Greatest Threat to Judicial Independence' [2001-2002] 43 S Tex L Rev 141, John C. Knecthle, 'Isn't Every Case Political? Political Questions on the Russian, German, and American High Courts' (2000) 26 Rev Cent & E Eur L 107
[14] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003)
[15] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Studies in Contemporary German Social Thought)* (2nd edn, MIT Press 1996) 415
[16] Stephen B. Bright 'Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions' (1997) NYU L Rev 308, 309
[17] Burbank (n 1) 912
[18] John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Cal Law Rev 353, 355
[19] Ginsburg (n 14) 1012, 1105-1115/4023; Raoul Berger, *Impeachment: The Constitutional Problems* (4th edn, Harvard 1974) 224-251
[20] Berger (n 19).
[21] ibid
[22] Terri Jennings Peretti, *In Defense of a Political Court* (Princeton 1999)
[23] David S. Law, 'Judicial Independence' (2011) Revisita Forumul Judecatorilor 37; Peter H. Russell, 'Towards a General Theory of Judicial Independence' in Peter H. Russell and David M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia 2001)
[24] 'Basic Principles of Judicial Independence' UNGA Res 40/32 (29 November 1985) and 40/146 (13 December 1985) para 2 and 4, UN ECOSOC, 'Strengthening Basic Principles of Judicial Conduct' ECOSOC 2006/03, International Association of Judicial Independence and World Peace and International Bar Association 'New Delhi Code of Minimum Standards of Judicial Independence' (22 October 1982) para 1 and 2, International Association of Judicial Independence and World Peace International Project of Judicial Independence (Judicial

the constitution intentionally makes the judiciary dependent on the executive and legislature[25] to balance inter-branch relations.[26] For this reason, not all interferences on the judiciary are "normatively deplorable"[27] but an objectionable interference cannot be distinguished easily from an allowable one.[28]

What appears to be crucial to the legitimacy of a political counterattack against the court is public support. Either judicial decisions must contradict public opinion or judges must have breached proper judicial behaviour as dictated by social norms.[29] Either perception justifies interference by the executive or legislature in judicial affairs, thus, eliminating the need to determine the legitimacy of a political counterattack.

The public expects courts to be accountable[30] or to exercise "efficiency and transparency"[31] in discharging their functions. The concept of judicial accountability tempers acts deemed as unacceptable decisional independence[32] and behaviour which is inconsistent with social expectations of courts and judges.[33] It guarantees to the public that courts resolved cases without undue interference and in accordance with law. Consequently, demands for judicial accountability have become synonymous with political counterattacks, which could lead to an imbalance of power among the branches of government.[34] The guarantees of judicial independence insufficiently protect courts from excessive interference with their affairs.[35]

This paper takes interest on how the executive and legislature legitimise political counterattacks through calls for judicial accountability. It examines the cases of the Malaysian Supreme Court and Russian Constitutional Court, and compares how their respective heads responded to criticisms in light of the prohibition against judges interviewing directly with media.[36] This study argues that because public opinion validates demands for judicial accountability, free expressionis crucial to maintaining the balance of power among the branches of government. [37] Information disseminated and opinion exchanged freely through an independent and diverse media are the foundations of an enlightened public opinion necessary to keep governmental powers at equilibrium.

Group on Strengthening Judicial Integrity) 'Mt. Scopus Approved Revised International Standards of Judicial Independence' (19 March 2008) para 2, The Asia Foundation (LAWASIA: The Law Foundation for Asia and the Pacific) 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region' (28 August 1997) para 1in relation to para 8 and 9

[25] Ferejohn (n 18) 356-365

[26] ibid 356

[27] ibid 355

[28] ibid 356

[29] Peretti (n 22) 135-136

[30] James Michael Scheppele, 'Are We Turning Judges to Politicians' (2005) 38 Loy LA L Rev 1517

[31] Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Trial and Independence of the Judiciary and Accountability of the English Judiciary* (2nd edn, CUP 2013) 79

[32] Burbank (n 1) 912;

[33] ibid

[34] ibid 913

[35] Law (n 23) 39

[36] Mt. Scopus Revised Standards para 6.1

[37] UNHCR 'General Comment 34: Article 19 Freedom of expression and opinion' (12 September 2011) CCPR/C/GC/34 para 12, 14, 20

THE CASES OF MALAYSIA AND RUSSIA

The Malaysian Supreme Court

The 1988 Malaysian constitutional crisis climaxed with the removal from office of Supreme Court Lord President Tun Salleh Abbas.[38] Tun Salleh was found guilty of misbehaviour[39] for exhibiting "prejudice and bias against the government",[40] but antecedents reveal that he was removed from office to coerce the judiciary to cooperate with Prime Minister Mahathir Mohammad.[41] It must be noted that the Malaysian Supreme Court cited Mahathir in contempt for describing the judiciary as "obtrusive"[42] in an interview with Time Magazine. Mahathir made this comment in light of several decisions nullifying executive acts undertaken or ordered by him due to unconstitutionality.[43]

Judicial review in Malaysia evolved as a safety valve against arbitrary administrative actions.[44] Mahathir obviously resented this fact, and being cited for contempt did not stop him from publicly undermining judicial authority in order to neutralise the courts. Unfortunately, the judiciary was caught in the political crossfire that gave rise to the UMNO 11 case.[45] This case gave Mahathir the opportunity to seize the Supreme Court.

The UMNO 11 case involved an intra-party dispute questioning the legality of Mahathir's election as party leader.[46] Supporters of the faction led by Tengku Razaleigh Hamza petitioned the court to nullify the 1987 party election[47] claiming that delegates of 30 unregistered branches of the party voted therein.[48] Allegedly, these agents lacked authority, and their participation in election rendered the process void.[49] After due hearing, the court found that UMNO indeed failed to register these branches with the Registrar of Societies as required by Section 12 of the Societies Act of 1966,[50] and consequently declared these branches "unlawful societies".[51]

The UMNO 11 decision was based on law. Unfortunately, it left Mahathir without a party, and consequently gave the opposition reason to demand for his resignation.[52] While what is crucial for a Malaysian Prime Minister is the confidence of Parliament, not the leadership of a party,[53] Mahathir nonetheless downplayed the significance of the UMNO 11 decision in media by describing it as "a technical matter".[54]

---

[38] AJ Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 Int'l & Comp LQ 57
[39] HP Lee, 'Fragile Bastion Under Siege—The 1988 Convulsion in the Malaysian Judiciary' (1990) 17 Melb U L Rev 386, 396-397 citing FED CONST (MALAYSIA) art 125(3)
[40] ibid 402
[41] ibid 414; Harding (n 38) 71; UNHRC Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council" A/HRC/4/25 para 27
[42] Lee (n 39) 388-395; Harding (n 38) 74-76
[43] Lee (n 39) 390 citing *Lim Kiat Siang v Dato Seri Dr Mahathir Mohamad* (1987) 1 MLJ 383, Harding (n 38) 76
[44] Andrew Harding, 'The Problems and Characteristics of Judicial Review in Malaysia' in Yang Zhong (ed), *Comparative Studies on the Judicial Review System in East and Southeast Asia* (Kluwer Law International 1997)
[45] Harding (n 38) 57-59; Lee (n 39) 394-395 citing *Mohd Noor bin Othman v Mohd Yusuf Jaafar* [1988] 2 MLJ 129
[46] Harding (n 38) 58
[47] ibid
[48] ibid
[49] ibid
[50] ibid
[51] ibid 59
[52] ibid 60
[53] ibid 60-61
[54] ibid 60; Ginsburg (n 14) 935-944/4023

Meanwhile, wary of the escalating tension between the judiciary and executive, Tun Salleh immediately calendared the appeal of the UMNO 11 decision for hearing.[55] He also requested the king to intervene and resolve the power struggle between the executive and judiciary.[56] Unfortunately, Tun Salleh's plan backfired and resulted in his suspension and subsequent removal from office.[57] Noteworthy is the fact that Tun Salleh's request for a public trial was denied.[58] With the proceedings shrouded in mystery, the public cannot form an informed opinion on the sufficiency of the charges and fairness of his trial.

Judges do not command media attention,[59] and are discouraged from responding to media reports or inquiries except in instances where their personal response will avert irreparable damages.[60] Perhaps Tun Salleh should have countered Mahathir earlier. However, Malaysia's restrictive laws on expression precluded him from availing of the exception. The Federal Constitution of Malaysia protects the right to free expression but limits their exercise "in the interest of the security of the Federation".[61] Accordingly, the Internal Security Act 1960 (ISA) authorises the Minister of Home Affairs to issue *motu proprio* detention orders in the presence of satisfactory evidence that detaining a person is necessary to prevent him or her "from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof".[62] Moreover, the law expressly disallows judicial review of these orders.[63] Moreover, Mahathir was the Minister of Home Affairs. Perhaps Tun Salleh foresaw that if he openly defended judicial independence, the ISA may be used against him. Such a scenario would have created trouble not only for judiciary, but the state in general. Because of the ISA too, no one defended the court against Mahathir's criticisms.[64]

Prior to the 1988 constitutional crisis, the Malaysian Supreme Court was considered among the most independent of third world states.[65] However, the attack resulted in the evident capture of the judiciary.[66] Not only did the Malaysian Supreme Court play a pivotal role in discrediting opposition leader Anwar Ibrahim,[67] but it also disregarded the orthodox approach to constitutional interpretation in interpreting Article 121(1) of the Malaysian Federal Constitution.[68] In the *Koh Wah Kuan* decision,[69] the Malaysian Supreme Court held that the amendment stripped the two High Courts of their constitutional jurisdiction and their respective jurisdictions and powers shall be determined by federal laws enacted by the concerned

[55] Harding (n 38) 62
[56] ibid 80
[57] ibid; UN Basic Principles para 18 and 19, UNHRC 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy' UN Doc A/HRC/11/41 (24 March 2009) para 59
[58] ibid 401; UN Basic Principles para 17-19, New Delhi Standards para 28, Mt. Scopus Revised Standards para 5.2, 5.4
[59] Bright (n 16) 327
[60] Mt. Scopus Revised Standards para 6.2 in relation to 7.7
[61] Mohd Azizuddin Mohd Sani, 'Media Freedom in Malaysia' (2005) 35 3 J Contemp Asia 341, 345-346 citing FED CONST (Malaysia) art 10, s 2
[62] ibid 347 (cited ISA s 8)
[63] ibid
[64] Bright (n 16) 327
[65] Lee (n 39) 414
[66] International Bar Association, ICJ Centre for the Independence of Judges and Lawyers, Union International des Advocats, Commonwealth Lawyer's Association 'Justice in Jeopardy: Malaysia in 2000 (Report of a Mission, 17-27 April 1999)'
[67] ibid 45-54
[68] Richard SK Foo, 'Malaysia— Death of a Separate Constitutional Judicial Power' (2010) Sing J Legal Stud 227, 239
[69] [2001] 1 MLJ 1 (as cited in Foo (n 68)).

legislatures.[70] This interpretation confined itself to the text of the amendment. Consequently, it rejected the separation of powers doctrine.

Clearly, the Malaysian judiciary was captured by the executive[71] and the foregoing decisions prove that they will likely remain to be so.

The Constitutional Court of Russia

Former law professor Valerii Zorkin was the first president of the Russian Constitutional Court.[72] A popular and controversial figure in Russian politics, Zorkin openly and habitually discussed judicial business in media.[73] For this reason, he was criticised for engaging in politics and displaying prejudice.

Zorkin's notoriety began in 1992 when the Constitutional Court was asked to resolve the nature of the Communist Party of the Soviet Union's personality and its properties.[74] The controversial case sought to determine whether the party was an alter ego of the former Soviet Union which used public funds to finance its businesses and purchase property.[75] Zorkin believed that the testimony of the last Soviet president, Mikhail Gorbachev, was integral to the issue.[76] Thus, he issued a subpoena requesting the former president to testify in court. Gorbachev refused.[77] Consequently, a heated and public exchange of polemics between the two ensued.[78] Zorkin's statements were criticised as "not juridical by any standard".[79]

Meanwhile, relations between the president and parliament degenerated due to Russian president Boris Yeltsin's persistent efforts to amend the constitution to consolidate power in the executive.[80] Zorkin volunteered to mediate a compromise and this suggestion was well received by the two other branches.[81] Yeltsin and Congress of the Peoples' deputies chairperson Ruslan Khusbalatov agreed to maintain status quo.[82] Zorkin was praised for averting a constitutional crisis but was criticised for "bending some lesser laws in the name of greater legality".[83] Zorkin countered that he only did what was necessary to defend the constitutional system.[84]

A few months later, Yeltsin declared a state of emergency and called for a referendum.[85] He did not dissolve parliament but he warned its members against disobeying his decrees.[86] Zorkin publicly denounced Yeltsin's actions,[87] and prejudged the constitutionality of the presidential declarations[88]. He commented in a media interview that Yeltsin's decrees "contained several

[70] ibid 239; IBA and others (n 66) 24
[71] IBA and others (n 66) 63
[72] Ginsburg (n 14) 1185-1216/4023; Knecthle (n 13) 111-117; Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 U Pa L Rev 1759, 1793-1795
[73] Scheppele (n 72) 1798-1800
[74] ibid
[75] ibid
[76] ibid
[77] ibid
[78] ibid 1800
[79] ibid
[80] ibid 1803
[81] ibid 1806-1807
[82] ibid 1807-1808
[83] ibid 1807, 1811
[84] ibid 1811
[85] ibid 1812
[86] ibid
[87] ibid 1812-1813
[88] ibid 1813

items, which to put it mildly are not in the constitution and that law on constitutional court".[89] The constitutional court, albeit a divided one, eventually nullified Yeltsin's declarations.[90] Because Zorkin was deemed to have overstepped his authority,[91] the public lost confidence on the Constitutional Court for it had "descended to cheap politics".[92]

Russia, like the former Soviet Union, respected free expression and the people's right to information, and welcomed the presence of foreign press.[93] This liberal framework allowed Zorkin to access media freely which in turn allowed the public to witness personally his behaviour and judge it according to societal norms. Unfortunately, Zorkin failed to "preserve the dignity of his office and the impartiality and independence of the judiciary"[94] in several occasions. Exchanging invectives with a potential witness in a case and commenting on the merits of a pending case knowing that he would eventually among the judges who will decide the controversy are blatant transgressions of the judicial ethics, and not merely societal expectations. Consequently, the public did not question the suspension of the Constitutional Court's operation shortly after declaring a state of emergency[95], thus, guaranteeing the lack of opposition.

Clearly, Zorkin was judged based solely on his actions, and independent of Yeltsin's own transgressions.[96]

The Constitutional Court eventually reopened but was faced with the challenge of becoming "a bastion against authoritarianism".[97] Interestingly, the Russian Constitutional Court is said to be gradually recovering social relevance by issuing strategic decisions consistent with norms of international law thereby consolidating its political and social influence.[98] Russia also amended laws to balance independence with accountability: government committed to increase budgetary allocations to the judiciary and gave courts greater control over proceedings while imposing term limits on judges and allowing criminal and administrative prosecution.[99] Therefore, judicialization of politics may take place in Russia despite the presence of a strong presidency.[100]

COULD MEDIA BALANCE INTER-BRANCH RELATIONS?

The freedom of expression enables society to realise "the principles of transparency and accountability".[101] A "free, uncensored and unhindered press or media[102]" enables "free communication of information and ideas about public and political issues between citizens,

[89] ibid
[90] ibid 1814-1815
[91] ibid; Mt. Scopus Revised Standards para 16.2, 16.3
[92] ibid 1818
[93] Nicholas Daniloff, 'Will Russia's Free Press Survive?' (1993) 17 Fletcher F World Aff 35, 38-40 (The 1991 Russian Law on the Press prohibited censorship of mass media.)
[94] New Delhi Standards para 41
[95] Scheppele (n 72) 1833; Ginsburg (n 14) 1196/4023
[96] UN Basic Principles para 2 & 4, Beijing Principles para 38
[97] Scheppele (n 72) 681
[98] Knecthle (n 13) 126, Marie-Elisabetta Baudoin, 'Is the Constitutional Courtthe Last Bastion in Russia Against the Threat of Authoritarianism?' (2006) 58 5 Europe-Asia Studies 679
[99] Peter H. Solomon, 'Putin's Judicial Reform: Making Judges Accountable as well as Independent' (2002) 11 E Eur Const Rev 117
[100] ibid 693-697
[101] GC 34 para 3
[102] ibid para 13

candidates and elected representatives".[103] For this reason, media is recognised as an informal enforcement mechanism for judicial accountability.[104] But in performing this function, it must respect to judicial independence and exercise restraint in criticising courts.[105]

Media shapes public opinion through "the choices of information and format, in the shape and style of programming and in the effects its diffusion— in agenda setting or the priming and framing of issues".[106] Because it facilitates the dissemination of information and exchange of public opinions, media should be independent of political and social pressures.[107] For this reason, governments which impose excessively restrictive regulatory requirements not only ensure the uniformity of information disseminated to the public, they also inhibit the diversity of considered public opinion.[108] They therefore guarantee the lack of opposition, and prevent the realisation of accountability and transparency in governance. Corollary to this, government can easily silence an uncooperative judiciary.

Public opinion is constructed by filtering various ideas formed at the periphery of society towards the centre of the policy determination.[109] Society builds a unitary, instead of a polarised, public opinion by discussing "various levels of information and broader perspectives based on clearer and more specific definition of issues".[110] Since even a free and diverse media cannot be thoroughly objective,[111] the exchange of information is best facilitated by an independent and diverse media presenting different views.[112] Because entities will cater to different audiences, the presence of several market players would provide choices to the public.[113] Thus, barring other factors, more people would be able to form an informed public opinion regarding the legitimacy of a demand for judicial accountability.

The current regulatory frameworks of Malaysia and Russia are restrictive. The Malaysian legislature has repealed the ISA in 2012, but enacted the Security Offences (Special Measures) Act (SOSM) which limits the allowable detention period to 28 days, and requires either the filing of criminal case against or the release of the person after the expiration of such period.[114] The legality of the detention within the statutory period is not subject to judicial review.[115] Furthermore, newspaper publication and television networks are subject to strict regulation, and are controlled either by government or the majority political party Barisan.[116] Similarly, in Russia, either state-owned companies or entities friendly with Kremlin operate television and

[103] ibid
[104] Volcansek et al (n 2) 41
[105] Mt. Scopus Revised Standard para 6.1.
[106] Habermas (n 15) 373-378; Jurgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' (2006) Communication Theory <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2885.2006.00280.x/pdf> accessed 15 June 2015
[107] Habermas (n 106) 415, 419; UNCHR 'Report of the Special Rapporteur on the Independence of the Judges and Lawyers, Leandro Despouy' UN Doc E/CN.4/2004 (31 December 2003) para 64
[108] Habermas (n 15) 378; Habermas (n 106) 416
[109] Habermas (n 15) 356
[110] Habermas (n 106) 414
[111] Raphael Cohen-Almagor, 'The Limits of Objective Reporting' (2008) 7 1 Journal of Language and Politics 138, 140
[112] ibid 145, GC 34 para 14
[113] Cohen-Almagor ibid
[114] 'Malaysia: Countries at the Crossroad 2012' (Freedom House, 2013) <https://freedomhouse.org/report/countries-crossroads/2012/malaysia#.VXu0jGDNYdV> accessed 15 June 2015
[115] ibid
[116] ibid

radio networks as well as print outlets.[117] Furthermore, "vague laws on extremism grant the authorities great discretion to crack down on any speech, organisation, or activity that lacks official support".[118] Clearly, the strict regulatory regimes of Malaysia and Russia propagate only pro-government information and silences criticism against the administration.

US studies show that few people are familiar with what courts do, and some sectors remain to question the propriety of judicial participation in policy determination. [119] The debate on whether courts should be allowed to construe (or interpret) the law rather than apply it continues.[120] Courts confront greater trouble with the judicialization of politics. Adopting the doctrine of constitutional supremacy inevitably requires judges to engage in or influence policy determination.

It must be noted that judges become victims of politics when courts engage in policy determination.[121] Proponents of the agency theory believe that judges are accountable as policy agents[122] for their "decisions in individual cases or at least those involving issues of high salience".[123] For instance, they equate imposing the minimum sentence in criminal cases with tolerance for criminal activity and failure to empathise with victims.[124] Criticisms such as this are designed to "attack a judge for the purpose of removing [him] so that a different political party may appoint a replacement".[125]

When the executive and legislature criticise courts, the judiciary is left without recourse. Courts face systemic limitations when accountability is enforced through media. Not only do judges fail to command media attention,[126] but they are also prohibited from discussing or commenting on their pending and resolved cases.[127] Courts therefore need a champion: someone who can "explain the story of the decision in a particular case, put a single ruling a by a judge in a broader perspective of a career and point out the difference between the role of a judge and a legislator or an executive".[128] But, if media is controlled by state or is rigidly regulated, appointing a spokesperson[129] for the judiciary has no value. The spokesperson would either be given limited exposure in media or none at all.

At present, neither the Malaysian Supreme Court nor the Russian Constitutional Court enjoy judicial independence. In Malaysia, "judicial independence is compromised by extensive executive influence".[130] Executive officials do not even need to call judges to let them know their desired outcome of cases is as they already express it in media or through actions taken by the police or the attorney general.[131] Meanwhile, the case of *Kurdeshina v Russia*,[132] which

---

[117] 'Russia: Freedom in the World 2014' (Freedom House 2015) <https://freedomhouse.org/report/freedom-world/2014/russia#.VXu1w2DNau4> accessed 15 June 2015
[118] ibid
[119] Peretti (n 22) 167-170
[120] Kapiweski et al (eds) (n 5) 4-7; Jipping (n 13)
[121] Burbank (n 1) 917
[122] ibid
[123] ibid 913
[124] Bright (n 16) 312-313
[125] ibid, UN Basic Principles para 18 and 19, UNHRC 'Report of the Special Rapporteur on the the independence of judges and lawyers, Leandro Despouy' UN Doc A/HRC/11/41 (24 March 2009) para 59
[126] ibid 327
[127] Mt. Scopus Revised Standard para 16.2, 16. 3
[128] Bright (n 16) 327
[129] Mt. Scopus Revised Standards para 6.2
[130] 'Malaysia: Freedom in World 2014' (Freedom House, 2015) <https://freedomhouse.org/report/freedom-world/2014/malaysia#.VXvOnmDNau4> accessed 13 June 2015
[131] IBA and others (n 66) 64
[132] App No 29492/05 (ECtHR, 14 September 2009) cited in 'Freedom of Expression in Russia as it Relates to Criticism of the Government' (2013) 27 Emory Intl Law Rev 1105

involves a judge who was removed from office for questioning the independence of the Russian judiciary, best illustrates the state of the Russian judiciary.[133] Despite judicial reform, the Russian judiciary "lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences".[134]

Circumstances precluded Tun Salleh from fighting for judicial independence while Zorkin compromised the integrity of the constitution court when he violated societal expectations. Despite this difference, it is clear that the executive had the public on its side when they undertook the political counterattacks. Meanwhile, the present regulatory frameworks of Malaysia and Russia preclude the formation of any sentiment antagonistic to prevailing situation. Without free expression, the public cannot easily question the existing regime or ask for change.

CONCLUSION

This paper examined how demands for judicial accountability could compromise judicial independence in light of the judicialization of politics, and how such calls may result in an imbalance of inter-branch relations. Proceeding from the premise that society remains reluctant to accept judicial participation in policy determination, it was argued that demands for judicial accountability obtain legitimacy through public support. For this reason, free expression is pivotal in facilitating the formation of public opinion based on accurate information and free exchange of ideas, which in turn is necessary to safeguard the balance of power in inter-governmental relations.

The constitutional crises in Malaysia and Russia were examined to illustrate the systemic limitations preventing the judiciary from protecting itself in a battle of publicity, and highlight inadequacy of appointing spokespersons when confronted with a restrictive regulatory framework for media. Moreover, the paper recognised the natural tendency of media to be biased and its ability to influence public opinion. Thus, it highlighted the the importance of the free exchange of information and opinions among individuals to create an enlightened public opinion.

Noting that it remains unclear what judges or courts should be accountable for, the paper asserts the importance of free expression in maintaining equilibrium of inter-branch relations. Public opinion translated into the political power through consent, tolerance or ignorance ultimate determines the balance of power.

[133] ibid

[134] Freedom House on Russia (n 117); Todd Foglesong 'The Dynamics of Judicial Independence in Russia' in Russell and another (n 22) 63-81

ENERGY DEVELOPMENT AND THE CLASH OF SECURITIES

Angelica P Rutherford*

ABSTRACT

This work analyses the relationship between global security concerns and policies that prioritise unsustainable energy developments over those of green energy. This paper argues that the growing securitisation of energy, the environment, climate, and water brings about two main problems closely linked to the energy discourse: (i) a conflict between securities and the legal uncertainty of determining which security issue prevails, and (ii) securitisation being devised in order to achieve certain policy gains. Firstly, this work explores the conceptual issues and the evolution of the various dimensions of security. Secondly, as a case study, the exploration of unconventional reserves and the use of fracking in Brazil are analysed and aim to demonstrate: (i) how energy security was used to push forward the approval of an unsustainable energy policy, and (ii) how strategically energy security can prevail over environmental, climate and water securities in the promotion of unsustainable energy developments.

Keywords: energy law, energy security, climate change, sustainability, fracking

INTRODUCTION

The various concepts of security have been developed in the literature for decades to include threats to security arising from the relationship between man and nature. However, little is known about the role of these multifaceted notions of security within national and international policies relating to energy development. Thus, this work seeks to partially redress this lack of analysis by examining the relationship between global security concerns and policies that prioritise unsustainable energy developments over those of green energy.

This paper argues that the growing securitisation of energy, the environment, climate and water brings about two main problems closely linked to the energy development discourse: (i) a conflict between securities as well as the legal uncertainty of determining which security issue prevails, and (ii) securitisation being devised in order to achieve certain policy gains since policy makers can place a specific matter of interest within the security umbrella to prioritise and push forward the approval of preferred energy policies.

Firstly, this work explores the conceptual issues by describing the various dimensions of security as well as briefly reviewing the evolution of the different notions of security. Secondly, as a specific case example, the exploration of unconventional reserves and the use of hydraulic fracking in Brazil are analysed. A general background to the Brazilian legal framework for the exploration of unconventional reserves is explained as well as depictions of the events surrounding the approval of the use of hydraulic fracking in Brazil. This case study aims to demonstrate: (i) how energy security was used to push forward the approval of an unsustainable energy policy, and (ii) how strategically energy security can prevail over environmental, climate and water securities in the promotion of unsustainable energy developments.

* **Angelica P Rutherford**, PhD Researcher in International Energy Law at the Liverpool Law School, University of Liverpool; Qualified Lawyer (Brazil). The author would like to thank Dr Mavluda Sattorova, Lecturer in Law, University of Liverpool for her helpful comments. The standard disclaimers about errors and omissions apply. This work was supported by the Economic and Social Research Council [grant number ES/J500094/1]. Email: a.p.rutherford@liverpool.ac.uk .

DIFFERENT NOTIONS OF SECURITY

The securitisation of energy has arisen from a combination of various factors. In the 1970s and 1980s, the world economy struggled to overcome the damaging effects of the oil crises of 1973–74 and 1979–80 which ultimately led to economic recessions and high unemployment.[1] The term energy security was coined to denote concerns relating to oil and potential costs of supply disruption, associated with an over-dependence on oil imports.[2] Nowadays, besides higher energy prices and the increased reliance of most developed and many developing countries on imported oil from geopolitically unstable regions of the world, uncertainty over future fossil fuel reserves and the rising demand for energy in emerging economies like China and India are factors which reignite policy concerns over energy supply and the securitisation of energy.

Scholars have debated the notion of "energy security" and a consensual definition has not been reached yet. Ciută has already highlighted the terminological profusion and ambiguity of the concept of energy security which in the literature acquires meaning through the linkage between growth, sustenance and the environment.[3] These three constituent dimensions of energy security do not appear concomitant in all definitions of energy security.

The International Energy Agency (IEA)´s mainstream definition of energy security as "the uninterrupted availability of energy sources at an affordable price"[4] has been generally repeated in the literature. However, in the later decades of the 20th century the energy security discourse was expanded to include the environment. Cherp and Jewell describe the change in the perception of energy security as 'robustness perspective' which was influenced by the idea of globally limited resources.[5] The IEA´s own definition of energy security has evolved to "the uninterrupted physical availability at a price which is affordable, while respecting environmental concerns".[6] The 4 A's of energy security: availability (geological), accessibility (geopolitical), acceptability (environmental and social) and affordability (economic) introduced by the Asia Pacific Energy Research Centre (APERC) has also been the focus of recent literature.[7] Under these definitions, environmental sustainability becomes a condition for energy security to be met, endorsing as such the idea that energy security and environmental sustainability are indivisible.

Various factors contributed to this change in concept. Environmental disasters, such as the large Gulf War oil spill in 1991, the hurricanes Katrina and Rita in the US in 2005 and the oil spill in the Gulf of Mexico in 2010 demonstrated how energy and the environment are linked, with the pursuit of energy security causing growing threats to the environment. In addition, climate change has also shown to disrupt energy systems.[8] In 2011, the world witnessed the

---

[1] Janusz Bielecki, 'Energy Security: Is the Wolf at the Door?' (2002) 42(2) The Quarterly Review of Economics and Finance 235, 236.

[2] Frank Umbach, 'Global Energy Security and the Implications for the EU' (2010) 38(3) Energy Policy 1229, 1230; Aleh Cherp and Jessica Jewell, 'The Three Perspectives on Energy Security: Intellectual History, Disciplinary Roots and the Potential for Integration' (2011) 3(4) Current Opinion in Environmental Sustainability 202, 203; Sandu-Daniel Kopp, *Politics, Markets and EU Gas Supply Security: Case Studies of the UK and Germany* (Springer VS 2015) 41-47.

[3] Felix Ciută, 'Conceptual Notes on Energy Security: Total or Banal Security?' (2010) 41(2) Security Dialogue 123, 127.

[4] IEA, 'Energy Security'(2014) <http://www.iea.org/topics/energysecurity/> accessed 26 March 2015.

[5] Cherp and Jewell (n 2) 204, 207.

[6] Jessica Jewell, 'The IEA Model of Short-term Energy Security (MOSES): Primary Energy Sources and Secondary Fuel' (2011) IEA Working Paper, 9.

[7] Aleh Cherpa and Jessica Jewell, 'The Concept of Energy Security: Beyond the Four As' (2014) 75 Energy Policy 415; Kopp (n 2).

[8] Marcus King and Jay Gulledge, 'Climate Change and Energy Security: An Analysis of Policy Research' (2014) 132(1) Climate Change 57.

catastrophic earthquake and tsunami damage to the Fukushima nuclear power plant in Japan. Recent drought in Brazil has depleted reserves at its hydroelectric plants, leaving power generation at precariously low levels.[9] The record storms and floods in the Midwest of the United States in June 2008 struck at the heart of America's grain belt at a time when the USA has become more reliant on corn-based ethanol for its fuel supply.[10]

The problem of greenhouse gas emissions and the international commitments of governments under the Kyoto Protocol prompted some countries to emphasise the environmental aspects of their energy policies[11] and brought about the Post-Kyoto emission targets as well as actions and debates regarding low carbon energy transition and geopolitics of climate change. As a result, another concept of energy security has been promoted to include climate change. The European Commission, for example, substituted "environmental concerns" from its 2000 energy security definition[12] with climate change: "the uninterrupted physical availability of energy products and services on the market, at a price which is affordable for all consumers (private and industrial), while contributing to the EU's wider social and climate goals."[13]

Nevertheless, although some scholars have included the environment and climate change within the concept of energy security, an analysis of academic writings and political debates shows the environment, climate change and energy as independent aspects, therefore creating clashes between the concept of energy security with environment protection and climate change policies.

Similarly to energy, the last decades have witnessed the proliferation of theories examining a growing securitisation of the environment.[14] Scholars of environmental security have looked at the connections between environmental degradation and conflict and envisaged growing conflict over resources as demand for some essential commodities increases and supplies appear more precarious.

Although environmental security research in the 1990s focused more on local resource scarcity, threats to climate change or also referred as "global environmental change" appeared as well by means of a prominent environmental problem within the debate regarding the redefinition of security.[15] Albeit contested,[16] the growth in consciousness about climate change

---

[9] Jonathan Watts, 'Brazil's Worst Drought in History Prompts Protests and Blackouts' *The Guardian* (23 January 2015).

[10] Frank Umbach, 'The Intersection of Climate Protection Policies and Energy Security' (2012) 10(4) Journal of Transatlantic Studies 374, 377.

[11] Luise Röpke, 'The Development of Renewable Energies and Supply Security: A Trade-off Analysis' (2013) 61 Energy Policy 1011, 1011.

[12] See EC, Green Paper - Towards a European Strategy for the Security of Energy Supply, COM(2000) 769 final.

[13] EC, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Energy 2020: A Strategy For Competitive, Sustainable And Secure Energy, COM(2010) 639 final.

[14] See, for example, Lester Russell Brown, *Redefining National Security* (Worldwatch Institute 1977); Norman Myers, 'Environment and Security' (Spring 1989) 74 Foreign Policy 23; Helga Haftendorn, 'The Security Puzzle: Theory-Building and Discipline-Building in International Security' (1991) 35(1) International Studies Quarterly 3; Keith Krause and Michael C. Williams, 'Broadening the Agenda of Security Studies: Politics and Methods' (1996) 40(2) Mershon International Studies Review 229; Hans Günter Brauch and others (eds), *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concepts* (Springer 2009); Simon Dalby, *Security and Environmental Change* (Wiley 2013).

[15] See, for example, Jessica Tuchman Mathews, 'Redefining Security' (Spring 1989) 68(2) Foreign Affairs 162, 168-171; David A Wirth, 'Climate Caos' (1989) 74 Foreign Policy 3; Bruce A Byers, 'Peace and the Planet: Linking Ecology and Security' (1991) 8(3) International Journal of Humanities & Peace 17; Marvin S Soroos, 'Global Change, Environmental Security, and The Prisoner's Dilemma' (1994) 31(3) J Peace Res 317.

[16] Raleigh and Urdal and Gleditsch, for instance, contest the view that climate change is a driver of violent conflict. See Clionadh Raleigh and Henrik Urdal, 'Climate Change, Environmental Degradation and Armed Conflict'

effects has intensified the move towards framing climate change within the security dimension.[17]

The literature is unclear about the differences and similarities of environmental and climate securities. While some consider climate change with focus not only on the reduction of carbon emissions but also on a sustainable system in general,[18] others make a distinction by considering climate change as one aspect of the environment. In line with this latter view, whilst environmental security involves the interests of humans, animals and whole ecosystems in general, climate security is limited to global warming resulting from emission of greenhouse gases in the atmosphere, the physical changes in climate and its deterioration.[19]

The use of nuclear energy helps to clarify this divergent position in relation to climate and environmental securities. The split is between those who would recommend nuclear as a clean and low-carbon energy to tackle climate change[20] despite its unsustainability issues, such as the radioactive wastes, the potential to damage the environment and humans as experienced by the Chernobyl and the Fukushima Daiichi nuclear disasters, as well as the threat of nuclear catastrophe, and those who would not.[21] Scholars who place sustainability at the centre of the climate change narrative do not support nuclear energy.

Water encompasses another aspect of the broadening of the security concept closely linked to energy security discourse. The concept of water security was originally defined in terms of adequate supply of usable water and was initially debated as a result of the five year drought in the Southwest of the US.[22] The debate has evolved to the links between water and conflict as scholars envisage that water and water-supply systems are increasingly likely to be objectives of armed conflicts as human population grows, demand for fresh water increases and as water supply and demand become more problematic and uncertain as a result of climate change.[23] Water security has been central to the debate regarding the production of

(2007) 26 Political Geography 67; N P Gleditsch, 'Whither the Weather? Climate Change and Conflict' (2012) 49(1) Journal of Peace Research 3.

[17] The United Nations Secretary-General Ban Ki-moon stated that "climate change not only exacerbates threats to peace and security, it is a threat to international peace and security." UN Security Council SC/10332, 6587th Meeting, 20 July 2011.

[18] Rogers-Hayden, Hatton and Lorenzoni define this discourse of climate change, which involves sustainability as a societal issue resulting from unsustainable use of the Earth's resources. See T Rogers-Hayden, F Hatton and I Lorenzoni, ''Energy Security' and 'Climate Change': Constructing UK Energy Discursive Realities' (2011) 21(1) Global Environmental Change 134, 140. For the use of climate change as a sustainable system see also Catherine Mitchell, *The Political Economy of Sustainable Energy* (Palgrave Macmillan 2008); Jürgen Scheffran and Antonella Battaglini. 'Climate and Conflicts: The Security Risks of Global Warming' (2011) 11 Regional Environmental Change 27; Caroline Kuzemko, *The Energy Security-Climate Nexus* (Palgrave MacMillan 2013).

[19] Maximilian Mayer and Peer Schouten, 'Energy Security and Climate Security under Conditions of the Anthropocene' in Jonathan Symons Luca Anceschi (ed), *Energy security in the era of climate change: The Asia-Pacific experience* (Palgrave Macmillan 2011) 13; Donald J Wuebbles, Aman Chitkara, Clay Matheny, 'Potential Effects of Climate Change on Global Security' (2014) 34(4) Environment Systems and Decisions 564.

[20] Anthony Giddens, *The Politics of Climate Change* (Polity Press 2009); Adam Corner and others, 'Nuclear Power, Climate Change and Energy Security: Exploring British Public Attitudes` (2011) 39(9) Energy Policy 4823; Frank Umbach, 'The Intersection of Climate Protection Policies and Energy Security' (2012) 10(4) Journal of Transatlantic Studies 374.

[21] Catherine Mitchell, *The Political Economy of Sustainable Energy* (Palgrave Macmillan 2008); T Rogers-Hayden, F Hatton and I Lorenzoni, ''Energy Security' and 'Climate Change': Constructing UK Energy Discursive Realities' (2011) 21(1) Global Environmental Change 134.

[22] Frances Stone, 'Water and Securities' (1957) 13(4) The Analysts Journal 59.

[23]Claudia Ringler, Asit K. Biswas and Sarah A. Cline (eds), *Global Change: Impacts on Water and Food Security* (Springer-Verlag 2010); United Nations World Water Assessment Programme (WWAP), T*he United Nations World Water Development Report 2015: Water for a Sustainable World* (UNESCO 2015).

unconventional gas through hydraulic fracturing, commonly referred to as fracking, due to concerns about the risks of polluting groundwater.[24]

PROBLEMS WITH SECURITISATION OF DIFFERENT INTERESTS

Increasing securitisation of energy and related policies – and the rise of different notions of security – bring about two main problems. Firstly, different security interests can compete with each other. Placing energy, the environment, climate and water under the security umbrella causes the problem of determining which security issue prevails when there are two or more security issues at stake. An example of conflict can be observed between the pursuit of energy security via the development of unconventional reserves and the use of fracking and its impact on climate, environmental and water securities. The development of any non-low carbon energy conflicts with climate security. Fracking, a technique used to unlock oil and gas from deposits of shale via the injection of high-pressure streams of sand, water, and chemicals into underground shale,[25]is generally associated with spills, risk of air pollution, contamination of surface and groundwater by chemical constituents, and harm to people's health and welfare.[26] Fracking has raised significant concerns which impact on water security, for example: (i) concerns over water withdrawals associated with shale gas development, and the extent to which they may deplete local water supplies or adversely impact local watersheds; (ii) the issue regarding managing wastewater as wastewater treatment facilities are not equipped to process such wastewater; and (iii) water contamination.[27]

Secondly, securitisation can be devised in order to achieve certain policy gains. Policy makers can place a specific matter of interest within the security umbrella to prioritise and push forward the approval of preferred policies. Linking a specific matter to security creates a sense of urgency required to resolve the problem. As Barry Buzan and others note, 'issues acknowledged to be inside the security box—by virtue of their seriousness—warrant priority and may allow decision makers to pursue emergency measures outside the realm of normal politics.'[28]

FRACKING: A CASE EXAMPLE

Following the analysis of the different notions of securities and its issues, this work focuses on the recent experience in Brazil in exploring unconventional reserves and allowing the use of fracking. The examination of this case example aims to reveal: (i) how energy security was used to push forward the approval of an unsustainable energy policy, and (ii) how strategically energy security can prevail over environmental, climate and water securities in the promotion of unsustainable energy developments.

---

[24] In the UK, see House of Commons Environmental Audit Committee, *Environmental Risks of Fracking* (The Stationery Office Limited 2015). In Brazil, see Interinstitutional Working Group of Exploration and Production of Oil and Gas (GTPEG) Report 03/2013.

[25] Jason Schumacher and Jennifer Morrissey, 'The Legal Landscape of "Fracking": the Oil and Gas Industry's Game-Changing Technique is its Biggest Hurdle' (2013) 17(2) Texas Review of Law & Politics 239, 241.

[26]Fred Krupp, 'Don't Just Drill, Baby--Drill Carefully: How to Make Fracking Safer for the Environment' (2014) 93(3) Foreign Affairs 15; Daniel Twomey and others, 'Fracking: Blasting the Bedrock of Business' (2014) 12(1) Competition Forum 204.

[27] LeRoy C Paddock and Jessica Anne Wentz, 'Emerging Regulatory Frameworks for Hydraulic Fracturing and Shale Gas Development in the United States' in Donald N. Zillman and others (eds), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (OUP 2014) 147, 153.

[28] Barry Buzan, Ole Wæver, and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner 1998) 3.

The exploration of unconventional reserves in Brazil: general background

The exploration of unconventional oil and gas is not prohibited in Brazil. Law 9,478/1997 (the Petroleum Law)[29] defines blocks as "a part of a sedimentary basin formed by a vertical prism of an indefinite depth",[30] as such, authorising concessionaries to work within a vertical prism of an indefinite depth allows for the exploration of unconventional reserves. The same law also expressly authorises the exploration of "oil from wells, shale and other rocks, its derivatives, natural gas and other fluid hydrocarbons".[31] In fact, policies to explore oil from shale have been employed in Brazil since the 1950´s and today shale oil is explored in São Mateus do Sul in the State of Paraná although fracking has not been used as a technique for exploration.[32]

The institutional and legal frameworks for the promotion and development of unconventional reservoirs are based on the same structure that governs conventional reserves. The prospecting and exploitation of deposits of petroleum and natural gas and of other fluid hydrocarbons are monopoly of the Federal Union. However, the Union can contract with state-owned or with private enterprises for the execution of these activities.[33] The Petroleum Law created the National Council for Energy Policy (CNPE) and the National Agency of Petroleum, Natural Gas and Biofuels (ANP). The former is linked to the Presidency of the Republic, presided over by the Minister of Mines and Energy (MME), and has the attribution of proposing national energy policies to the President of the Republic.[34] The latter was created as a special autarchic linked to MME and has the authority to regulate, hire and supervise the economic activities of the oil, natural gas and biofuel industry, as well as elaborate the bidding announcements and promote the bidding for the concession of exploration, development and production activities, amongst other responsibilities.[35]

Accordingly, the CNPE Resolution 6 of 25 June 2013 (Resolution 6), approved by the President of the Republic on 6 August 2013, authorised the auction of 240 onshore gas blocks by the ANP for the development of conventional and unconventional oil and gas reserves (the 12th bidding round). The ANP Ordinance 181 of 22 August 2013 set out the Special Licensing Committee to lead the bidding procedures.[36]

The reasons for exploring unconventional reserves are as follow:

(i) Energy security

Although the term 'energy security' did not appear in Resolution 6, providing for the continuity of exploration and production of natural gas from conventional and unconventional petroleum resources was expressly stated as an aim.[37] Another important linked legislation is the CNPE Resolution 8 of 21 July 2003, which established as a national energy policy the expansion of oil and gas production in order to achieve a sustainable auto sufficiency.[38] These objectives are related directly to the Brazilian dependency on Bolivian gas and the unstable situation in Bolivia. In 2013, Brazil imported 59% of its natural gas from which Bolivia

[29] Lei nº 9.748, de 6 de agosto de 1997, DOU 07/08/1997.
[30] Article 6, XIII.
[31] Article 61.
[32] For a study regarding shale oil in Brazil, see Marilin Mariano dos Santos, 'Xisto: Um Estudo de Viabilidade Econômica para o Brasil' (PhD Thesis, Universidade de São Paulo 2010).
[33] Article 177, I and paragraph 1, Brazilian Federal Constitution.
[34] Article 2 Law 9,748/1997.
[35] Articles 7 and 8 Law 9,748/1997.
[36] Portaria ANP nº 181, de 22 de agosto de 2013, DOU 23/8/2013.
[37] Article 2, CNPE Resolution 6 of 25 June 2013.
[38] Resolução CNPE nº 8, de 21 de julho de 2003, DOU 7/8/2003.

accounted for 67% of the total Brazilian gas imports.[39] The impact of this dependency and the uncertainty regarding the security of natural gas from Bolivia were evidenced in 2006 when the Bolivian President Evo Morales nationalised the hydrocarbons industry in Bolivia and increased royalties from 50 per cent to 82 per cent in their two largest fields.[40]

Affordability was another important driver within energy security. When rejecting the Project of Law 1409/13 which sought the suspension of Resolution 6, ANP Ordinance 181/2013 and the 12th bidding round, the Brazilian Mines and Energy Commission expressly advocated the exploration of shale gas as a public interest. Presenting shale gas as a cheap and clean energy source, the Commission supported the view that shale gas had the potential to supply a great part of the Brazilian energy demand for decades and its exploration would positively impact the gas for cooking and electric energy as the supply shock would reduce the gas price as well as the operation costs of thermoelectric power benefiting, as such, society, in particular the ones on low income.[41] Thus, the notion of energy security – understood as a reduction of external energy dependency and affordable prices – was used to push forward the approval of the policy.

(ii) Economic development and knowledge acquisition

Another aim which expressly appeared in Resolution 6 was the attraction of investments to regions lacking in geological knowledge or with technological barriers to overcome, allowing the emergence of new producing basins of conventional and unconventional natural gas and petroleum resources.[42] The exploration of unconventional reserves was also seen as an opportunity to improve the local/regional economy due to the creation of job opportunities as well as an increase in public revenue via the payment of royalty and taxes.

In relation to knowledge acquisition, the ANP has added to the concession contract the requirement to drill the first well in the Exploration Phase aiming at the source rock and stablished as mandatory that the concessionaire performs well profiles, sampling and specific analysis,[43] leaving, as such to the private sector the acquisition of geological knowledge of the basins and taking the 12th round as an opportunity to generate knowledge.[44]

(iii) Other reasons

Although not stated in legislation, according to the view expressed by a politician in session 191.2.54.O in the Chamber of Deputies on 5 July 2012, the exploration of shale gas in Brazil would be an opportunity for the Brazilian oil company PETROBRAS to recover in a very short period from the damage caused by the delay in the oil refineries under construction and from the enormous costs of trying to enable the exploration of oil below the pre-salt layer, rescuing as such the company's image on the stock exchange whose shares values are decreasing.[45] The extent to which this view acted as a driver for the exploration of unconventional reserves under the 12th bidding round is subject to debate and further research. If this reason is found to have weight on the government's decision it may serve as an example where the government used

[39] Ministério de Minas e Energia (MME), 'Boletim Anual de Exploração e Produção de Petróleo e Gás Natural – 2014' (2014).
[40] 'Now it's the People's Gas', *The Economist* (Caracas, La Paz and São Paulo, 4 May 2006).
[41] Rapporteur Opinion of the Mines and Energy Commision on the Project of Law 1409/13.
[42] Article 2 of CNPE Resolution 6 of 25 June 2013.
[43] Clause 5.11 of the 12th round concession contract between ANP and Petra Energia S.A., Bayar Empreendimentos e Participações Ltda, Companhia Paranaense de Energia and Tucumann Engenharia e Empreendimentos Ltda (PART-T-300_R12 N. 48610.000099/2014-00).
[44] Public Federal Ministry Technical Opinion 242/2013-4ªCCR of 14 November 2013, 15.
[45] Câmara dos Deputados, Sessão 191.2.54.O.

the rhetoric of energy security as a banner to garner political support for the promotion of unsustainable energy development in prevalence over the promotion of green energy projects.

The prevalence of energy over environmental, climate and water securities

Although the protection of the environment and the mitigation of greenhouse gas emissions are safeguarded in the Brazilian legislation,[46] the way the 12th bidding round was carried out shows signs of derogation from environmental obligations as well as lack of debate in relation to climate change.

Firstly, Resolution 6 authorised the auction of 240 exploration blocks that are located in seven sedimentary basins close to environmentally protected areas, indigenous land and given the case of the Parana basin located below one of the largest aquifers in Brazil.[47] As standard procedure, areas offered in the bidding rounds held by ANP must be previously analysed as for the environmental sensitivity by the Brazilian Institute of Environment and Renewable Natural Resources (Ibama) and by the state competent environmental organisations.[48] After restructuring of Ibama, the technical group responsible for prior analysis of the areas to be bid on includes representatives of the Environment Ministry (MMA), Ibama and Chico Mendes Institute for the Conservation of Biodiversity (ICMBio), and it is called Inter-institutional Working Group of Exploration and Production of Oil and Gas (GTPEG).[49] Nonetheless, Resolution 6 was fully drafted before an Environmental Analysis Preview by the CTPEG. The GTPEG only received the final updated information about the blocks to be auctioned which would allow them to carry out an Environmental Analysis Preview on 11 July 2013.[50] In addition, the GTPEG Report was only completed on 3 October 2013 although the 12th bidding round had already been approved by the President of the Republic and published almost two months earlier in August 2013 and the ANP had started the bidding procedures on 23 August 2013. The GTPEG even expressed its surprise with the publication of Resolution 6 as the auction had been approved before the findings of the analyses of the environmental body.[51]

Secondly, the ANP may not have observed fully the requests from the GTPEG and the State Environmental Agency to exclude from the blocks to be auctioned certain environmentally protected areas. As illustration, in a lawsuit filed by the Public Federal Ministry against the 12th bidding round,[52] there is the argument that, according to the State Environmental Agency, block PART-T-285 was covering a conservation area. However, according to the maps published by ANP in its website this area does not seem to have been excluded.

Thirdly, the CTPEG concluded in its report that there were not enough elements to make an informed decision about fracking and recommended the intensification of the debate with the society and an environmental evaluation of the sedimentary area to be undertaken. The ANP has pointed out that an environmental evaluation of the sedimentary area is not a precondition for auction[53] and as such has not carried it out before the signature of the concession contracts. This means that the concessionaires could start the first exploration phase without an

[46] The protection of the environment and the mitigation of greenhouse gas emissions are aims and objectives of the national energy policy under article 1, IV and XVIII of the Petroleum Law which also further specifies under article 8, IX, that the ANP shall 'enforce the good practices for conservation and rational use of oil, its products, of natural gas, and the preservation of the environment.'

[47] GTPEG Report 03/2013 (Parecer Técnico GTPEG nº 03/2013).

[48] CNPE Ordinance nº 08/03.

[49] MMA Ordinance nº 119/08 and nº 218/12.

[50] GTPEG Report 03/2013.

[51] Ibid.

[52] Public Civil Action nº 5005509-18.2014.404.7005 filed by Parana Public Federal Ministry on 22 May 2014.

[53] Argument used by the ANP in its interlocutory appeal against Public Civil Action nº 5005509-18.2014.404.7005. See Agravo de Instrumento nº 5012993-50.2014.404.0000/PR.

environmental evaluation as this phase started on the date that the contract was signed.[54] Therefore, this unwillingness to follow the environmental body advice could demonstrate in this initial phase the avoidance of environmental matters constraining energy activities.

Fourthly, the auction was authorised without the existence of any substantive environmental standards applicable to fracking. The ANP only regulated its use in Brazil after the auction which took place in November 2013.[55]

Whilst one can observe some discussion concerning environmental obligations, the debate regarding climate change was almost absent. The only official record relating to climate change before the auction took place was in the public consultation beginning on 23 August 2013 when Greenpeace requested the exploration of unconventional reserves under the concession contract to be removed from the tender arguing that emissions from exploitation of unconventional sources has the potential to exacerbate the greenhouse effect, impairing the Brazilian commitments. Nevertheless, the ANP did not provide a specific reply in relation to climate change and limited itself to reject Greenpeace proposal to remove from the tender the exploration of unconventional reserves on the grounds that it had been allowed by the CNPE resolution. Even though the Technical-Environmental Seminar and the public audience in November 2013 were opportunities to debate environmental as well as climate change matters, no further discussion regarding climate change took place.

Despite having ratified the Kyoto Protocol in 2002, Brazil was not obliged to assume goals on the reduction of emissions. Therefore, no emissions reduction commitments may be one of the reasons behind this lack of debate. The lack of debate demonstrates that climate change is not a priority in the governmental agenda or in the public opinion concerning energy development in Brazil. On this account, the answer to the problem of determining which security issue prevails when there are two or more security issues at stake is that energy security has gained prominence over climate security on this occasion.

After the auction took place, recourse to the judiciary system was the mechanism of environmental protection left to challenge the ANP´s decision. According to article 129, III of the Brazilian Federal Constitution, it is an institutional function of the Public Prosecution to institute civil investigation and public civil lawsuit to protect public and social property, the environment and other diffuse and collective interests. Thus, the 12th bidding round has been subject to civil lawsuits by the Federal Public Ministry on the basis that fracking conveys a high degree of irreversible threat to the environment, human health and regional economic activity.[56] The concession contracts in dispute have been suspended by a temporary restraining order. This demonstrates that in terms of policy making in Brazil, energy security prevailed over environmental security. However, there was the mechanism of judicial review to confront this hierarchy. The way in which the Court will decide this matter is to be seen. The decision will certainly shed some light on the normative disputes regarding the hierarchy of energy and environmental securities.

CONCLUSION

Following an analysis of the evolution of the different notions of securities, this work has demonstrated two issues brought about with the rise of different aspects within the security

[54] Clause 5.1.1 of the 12th round concession contract between ANP and Petra Energia S.A., Bayar Empreendimentos e Participações Ltda, Companhia Paranaense de Energia and Tucumann Engenharia e Empreendimentos Ltda (PART-T-300_R12 N. 48610.000099/2014-00).

[55] See ANP Resolution 21, 10 April 2014 (Resolução ANP nº 21, de 10 de abril de 2014, DOU 11/04/2014).

[56] Public Civil Action n. 5005509-18.2014.404.7005 filed by Parana Federal Public Ministry on 22 May 2014; Public Civil Action n. 0006519.75.2014.403.6112 filed by Sao Paulo Federal Public Ministry on 17 December 2014.

sphere, namely the conflict between different notions of security and its normative hierarchy as well as securitisation being devised in order to achieve certain policy gains.

An investigation of the recent experience in Brazil in exploring unconventional reserves and allowing the use of fracking has revealed that (i) energy security was used to push forward the approval of unsustainable energy policy in prevalence over the promotion of green energy projects, albeit further research is necessary to determine whether there was genuine or mere rhetoric use of energy security; (ii) energy policy making has prioritised energy over environmental, climate and water securities. Nevertheless, while the debate has demonstrated an unclear hierarchy between energy and environmental securities, the lack of discussion concerning climate change by the government and the public points to the conclusion that energy security prevailed over climate security in this energy development case study in Brazil.

LEGAL PRACTICE IN APPLYING THE EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS FROM POLAND'S JUDICIARY PERSPECTIVE

Mr. Dariusz Szawurski-Radetz[1]

ABSTRACT

Regulation (EC) No 805/2004[2] of the European Parliament and of the Council of 21 April 2004 has brought to life a European Enforcement Order (EEO) for uncontested claims[3]. This general method of enforcing foreign judgments – in this case judgements coming from European Union Member States – within the EU without the need of any intermediate proceedings, for example exequatur, offered significant advantages. This regulation has laid down minimum standards to ensure that judgments, court settlements and authentic instruments on uncontested claims can circulate freely. Article 3 of the regulation has established what shall be regarded as an uncontested claim and Article 6 settled requirements for certification as a EEO. These two articles form the backbone of the regulation and also caused most of the problems. As the regulation became immediately enforceable in all Member States[4] Polish civil procedure had to be accordingly changed simultaneously. It caused some perturbations but also enhanced the Code of Civil Procedure.

KEYWORDS: European Enforcement Order, judicial co-operation in civil matters, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004, Polish Code of Civil Procedure.

INTRODUCTION

The European Union's area of freedom, security and justice (AFSJ) was created to ensure the free movement of persons and to offer a high level of protection to its citizens. It covers policy areas that range from the management of the European Union's external borders to judicial cooperation in civil and criminal matters. It includes immigration policies, asylum, police cooperation, and the fight against crime (organised crime, terrorism, drugs smuggling, trafficking in human beings, etc.). The creation of the area of freedom, security and justice is mainly based on the Tampere[5] (1999 – 2004), Hague (2004 – 2009) and Stockholm (2010 – 2014) programmes.

Judicial cooperation[6] in civil matters aims to establish closer cooperation between the authorities of Member States. It seeks to eliminate obstacles deriving from incompatibilities

[1] PhD Student at the University of Warsaw (Poland), Judge's assistant at the Regional Court in Warsaw, Poland, e-mail: dszrtz@gmail.com.

[2] This regulation entered into force on 21 January 2005 and became applicable as from 21 October 2005 – this means that, for example, a judgment which has been given by a Polish court on 24 January 2005, can be certified as an EEO after 21 October 2005. The same applies to the court settlements concluded after the date of entry into force or to the authentic instruments drawn up and registered after this date.

[3] Here this regulation will be referred to as the EEO regulation.

[4] In this article a Member States shall mean a Member State of the European Union with the exception of Denmark.

[5] Due to the differences in the law of civil procedure of the Member States the acceleration of the recognition and enforcement of judgments was and is – as it is stated in the conclusions of Tampere – necessary for proper functioning of the internal European market.

[6] Judicial cooperation in civil matters contributes to the area of justice, freedom and security, as governed by the Treaty on the Functioning of the European Union (Title V) "Area of freedom, security and justice". The General Framework of the Judicial Cooperation includes: the Stockholm Programme; action plan on the Stockholm

between the various legal and administrative systems, and thus facilitate access to justice. Its cornerstone is the principle of mutual recognition and enforcement of judgements and of decisions resulting from extrajudicial cases.

In order to enhance mutual trust, help to develop better judicial cooperation between Member States and assist them with the enforcement of judgements, different instruments and procedures were adopted within the EU. For example: mutual recognition of protection measures in civil matters (proposal); maintenance obligations; European small claims procedure; European order for payment procedure; European enforcement order for uncontested claims; jurisdiction, recognition and enforcement of judgments in civil and commercial matters ("Brussels I"); jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels II"); insolvency proceedings; alternative dispute resolution: mediation, strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention (2007).

Firstly I would like to present some general information about EEOs. Secondly I intend to present the decision matrix for courts that was developed by the European Commission. Finally I would like to present where the EEO is placed in terms of the Polish Code of Civil Procedure and what the main obstacles for issuing the certificate of EEO are.

EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS

According to recital 8 of the Preamble of the EEO regulation: the European Council in its Tampere conclusions considered that access to enforcement in a Member State other than that in which the judgment has been given should be accelerated and simplified by dispensing with any intermediate measures to be taken prior to enforcement in the Member State in which enforcement is sought. A judgment that has been certified as an EEO by the court of origin should, for enforcement purposes, be treated as if it had been delivered in the Member State in which enforcement is sought. In Poland, for example, the registration of a certified foreign judgment will therefore follow the same rules as the registration of a judgment from another part of Poland and does not imply a review as to the substance of the foreign judgment. Arrangements for the enforcement of judgments should continue to be governed by national law.[7]

The EEO is a certificate which accompanies a judgment, a court settlement or an authentic instrument and which allows this judgment, settlement or instrument to freely circulate in the European Union. As such, this certificate constitutes a "European judicial passport" for decisions, settlements, and authentic instruments.[8] The EEO is a very useful device for cross-border enforcement. It allows a creditor to enforce a judgment in another EU state without needing to undertake any other court proceedings.[9] It is however worth noticing that the EEO

Programme; the Hague Programme: ten priorities for the next five years; facilitating judicial cooperation in civil matters; Civil Justice specific programme (2007 – 2013); accession to the Hague Conference on Private International Law (HCCH); the Convention on Choice of Court Agreements; the Convention on Parental Responsibility and Protection of Children; European and international courts; Justice Forum; applying the co-decision procedure to maintenance obligations; and European contract law.

[7] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.

[8] European Commission Directorate-General Justice, Freedom and Security, European Judicial Network in civil and commercial matters, Practice Guide for the Application of the Regulation on the European Enforcement Order, <http://ec.europa.eu/civiljustice/publications/docs/guide_european_enforcement_order_en.pdf> accessed 10 June 2015

[9] David Carter, European enforcement orders (12 November 2012), <http://thesheriffsoffice.com/articles/european-enforcement-orders> accessed 10 June 2015.

is only one of a few tools available to creditors looking for protection of their claims in other Member States[10] so-called state of EEO execution.[11]

Article 2 of EEO regulation has determined its scope by pointing out that it shall apply in civil and commercial matters[12] whatever the nature of the court or tribunal. In particular, it shall not extend, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii). The mentioned article also provides exceptions by stating that this regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; and (d) arbitration.

Clarification on what "civil and commercial matters"[13] mean according to EEO regulation may be required.

The European Court of Justice (ECJ) has consistently held that the term "civil and commercial matters" must be given an autonomous meaning derived from the objectives and scheme of the Community legislation concerned and the general principles underlying the national legal systems as a whole.[14] The ECJ pointed out that two elements are relevant for deciding whether or not a dispute is of a civil and commercial nature:

- the subject matter of the dispute; and
- the nature of the relationship between the parties involved.

From the ECJ decisions we may conclude that generally:

- a matter is not "civil or commercial" when it concerns a dispute between a public authority and a private person when the first acted in the exercise of public power;[15]
- the concept of "civil matters" encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations;[16]
- loss or damage caused in wartime by government troops is not encompassed by "civil matters".[17]

One could argue, to some extent that by the certification of a judgment as an EEO the judgment becomes equal to the judgment of a court of the Member State of enforcement. But in order to ensure full respect of the right to a fair trial principle the EEO regulation takes into account the fundamental rights with regard to civil procedure, especially the principle of fair trial. This is realized by the introduction of a system of minimum standards for uncontested claims procedures.

---

[10] A judgment on an uncontested claim may be obtained through the civil procedures foreseen in national law.

[11] E Marszałkowska-Krześ and I Gil, *Code of civil procedure*, (1st edn, Wolters Kluwers 2011) 203.

[12] Although family law matters are excluded from the scope of the EEO regulation, it is to be mentioned that maintenance matters do fall within the scope of it.

[13] In general the term 'civil and commercial matters' is to be interpreted in the same way as under the Brussels I Regulation; P Stone, *EU Private International Law* (3rd edn, Elgar European Law 2014) 29-32.

[14] Case C-29/76 *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol* [1976] ECR 1541; ECJ distinguishes between acta iure imperii, which are excluded from the notion of 'civil or commercial matters', and acta iure gestionis, which are, a contrario, included in such notion.

[15] Case C–172/91 *Sonntag v Waidmann* [1993] ECR I–1963.

[16] Case C-271/00 *Gemeente Steenbergen v Luc Baten Case* [2002] ECR I-10489.

[17] Case C-292/05 *Lechouritou and others v Germany* [2007] ECR I-1519.

In certain cases a judgment can only be certified if the procedure in which the judgment has been rendered, fulfils these standards. According to the 19 recital of the preamble to the EEO regulation, the regulation does not imply the obligation for the Member States to adopt the minimum standards in their national laws of civil procedure. However, the Member States are recommended to do so as to make available a more efficient and rapid enforcement of judgments in other Member States. If the national law of a Member State will not comply with the standards set out in the Regulation, the judgments rendered in that Member State cannot be certified as an EEO.[18]

It is important to underline the fact that the EEO regulation does not require the debtor to be a resident in any Member State of the EU. Every judgment of a court of a Member State can be certified as an EEO if the requirements laid down in the Regulation are met. This means that a judgment rendered by a Polish court against a Russian company can be certified by a Polish court as an EEO. If this company has assets in Germany or France, the certified judgment can be easily enforced in those countries under the EEO regulation.[19]

The certification procedure under the EEO regulation is an *ex parte* procedure. This means that the debtor is not heard on the application for the EEO certificate. According to Article 10 of the EEO regulation the debtor is given a possibility to challenge the certificate. However, these possibilities are strictly limited.

UNCONTESTED CLAIM

Eligible judgments are those made on or after 21 January 2005 and which arise from uncontested civil or commercial claims. 'Uncontested'[20] means a claim in which, during the course of the court proceedings, the debtor has:[21]

(a) expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or

(b) never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or

(c) not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or

(d) expressly agreed to it in an authentic instrument.[22]

---

[18] Marek Zilinsky, 'Abolishing Exequatur in the European Union: The European Enforcement Order' (2006) 53 Netherlands International Law Review 475 < http://link.springer.com/article/10.1017%2FS0165070X06004712> accessed 28 June 2015.

[19] ibid 478.

[20] The concept of 'uncontested claims' should cover all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent, be it a court settlement or an authentic instrument.
The absence of objections from the debtor as stipulated in Article 3(1)(b) can take the shape of default of appearance at a court hearing or of failure to comply with an invitation by the court to give written notice of an intention to defend the case (see: recital 6 of the Preamble of the EEO regulation).

[21] M Zilinsky, 477.

[22] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15, Article 1.

DECISION MATRIX FOR THE COURTS[23]

The below presented matrix was created by the Commission Services in consultation with the European Judicial Network in Civil and Commercial Matters and it is a very well-adjusted tool not only for courts. It helps to follow necessary steps and assists the judge's with the overview of the EEO procedure.

In ten steps the matrix presents a seemingly obstacle-free way of issuing the EEO certificate:

1. Does the request for an EEO concern an enforceable judgment given on or after 21 January 2005 (for Romania and Bulgaria: 1 January 2007)?

YES

NO
refuse issue of EEO because judgment dates from before the entry into force of the Regulation

2. Does the request concern a civil and commercial matter?

YES

NO
refuse issue of EEO because judgment does not fall into scope of the Regulation

3. Does the judgment concern an uncontested claim for the payment of a specific sum of money that has fallen due?

YES

NO
refuse issue of EEO because judgment does not fall into scope of the Regulation

4. Does the judgment respect the jurisdiction rules laid down in Sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001?

[23] European Judicial Network in civil and commercial matters, *Practice Guide for the Application of the Regulation on the European Enforcement Order,* p. 52-53, <http://ec.europa.eu/civiljustice/publications/docs/guide_european_enforcement_order_en.pdf> accessed 10 June 2015.

YES

NO
refuse issue of EEO for violation of jurisdiction rules

5. Does the request concern a judgment where the claim was not expressly agreed by the debtor (e.g. default judgment, payment order)?

YES

NO
defendant has expressly agreed: issue EEO

defendant has not expressly agreed

6. Does the claim concern a contract concluded by a consumer and the consumer is the debtor?

YES

NO
(move to point no 8)

7. Was the debtor domiciled in the Member State of origin at the time of the institution of proceedings?

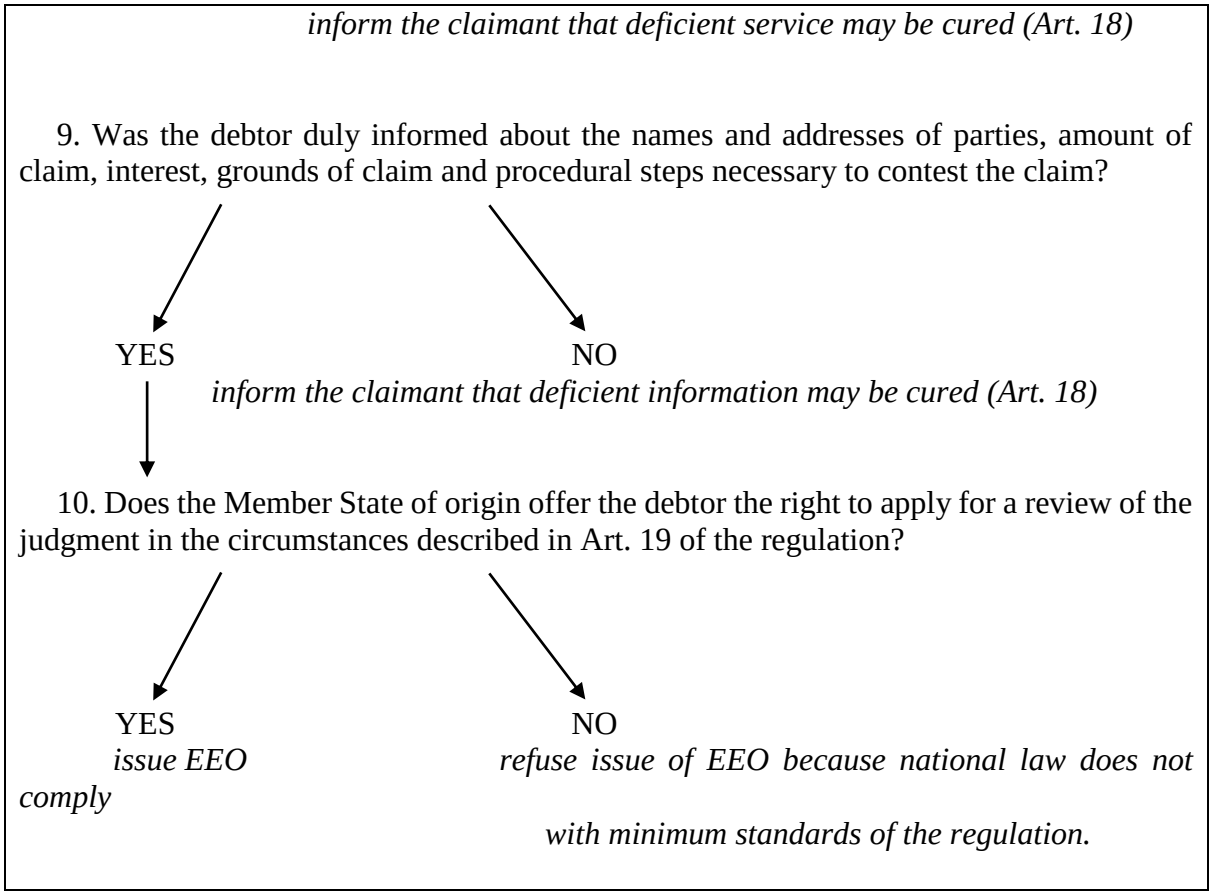
YES

NO
refuse issue of EEO because a judgment against a consumer may only be certified as an EEO if it was given in the Member State of the consumer's domicile

8. Has the document instituting the proceedings or any summons to a court hearing been served on the debtor in accordance with Articles 13 or 14 of the regulation?

YES

NO



POLISH PERSPECTIVE[24]

First of all, it is important to mention that the Polish legal system and civil procedure differ significantly from the procedures in countries whose legal systems follow common law patterns. If one were looking for similarities with foreign legal systems, the German and Austrian civil procedures would need to be indicated as influencing Polish law in this regard, both in the past and nowadays.

The main body of law related to the civil procedure is included in a single statute – the Code of Civil Procedure[25] of 1964 that was subsequently amended. It is a voluminous book with slightly over 1200 articles regulating contentious and non-contentious procedures, enforcement proceedings and domestic rules regarding arbitration.

After joining the EU in 2004, the Polish courts began forming a part of the European Court network in civil matters and began applying the respective provisions of the EU laws related to civil procedure that have priority over the domestic C.o.C.P.

What is important from an EEO perspective is that Polish civil procedure also recognises a collection of simplified proceedings related to claims documented by 'official' documents or documents in which the debtor recognised the claim. Court verdicts are enforceable after they are affixed with the so-called enforcement clause (an official statement that the verdict is final, binding and may be enforced). Enforcement proceedings are conducted by bailiffs under the supervision of the judges of District Courts. The effectiveness of the enforcement, as in any

[24] J Horobiowski and G Karaś, *Examples of Polish judgments with EEO certificate* <www.wroclaw.so.gov.pl/grant2007/data/Claim-Poland-EN.ppt> accessed 3 June 2015.
[25] Kodeks postępowania cywilnego [Code of Civil Procedure - C.o.C.P.].

other country, depends mainly on the financial standing of the debtor and the presence of easily accessible assets.

The EEO is regulated in articles 795^1 – 795^5 C.o.C.P. Polish civil procedure also provides minimum standards that are required to issue an EEO and as it is required by Chapter III of the EEO regulation. According to Polish law it should be considered that judgments including the uncontested claims and authentic instruments in which the debtor has recognised the claim within the meaning of the EEO regulation are:[26]

1) judgments concerning recognised claims (Art. 213 § 2 & Art. 333 § 1.2 C.o.C.P.);
2) judicial decisions by default (Art. 339 C.o.C.P. and Art. 333 § 1 point 2 C.o.C.P.);
3) settlements concluded in the course of the judicial settlement proceedings (Art. 223 C.o.C.P.);
4) settlements concluded within the settlement proceedings conducted prior to the institution of the disputable proceedings (Art. 184 C.o.C.P.);
5) settlements concluded through mediation and subsequently approved by the court;
6) writs of payment issued in order proceedings (Art. 485 C.o.C.P.);
7) writs of payment issued in warning proceedings (Art. 498 C.o.C.P.);
8) notarial deeds, in which the debtor submitted himself to enforcement;
9) banking execution titles (however this one quite recently was held as unconstitutional).

In connection to the EEO regulation new provisions implementing the above regulation have been introduced into the C.o.C.P.. The Act of 17 February 2006 has amended the C.o.C.P. the new provisions entered into force on 5 May 2006.[27]

Provisions of the C.o.C.P. concerning procedure of issuing an EEO certificate introduced by the Act of 17 February 2006: Art. 206 § 2 C.o.C.P., Art. 795^1 – 759^2 C.o.C.P., Art. 820^1 and 820^2 C.o.C.P., Art. 825 point 5 C.o.C.P., Art. 840^3 C.o.C.P., Art. 1153^1 and 1153^2 C.o.C.P.[28]

The EEO regulation establishes two fundamental principles of enforcement in the state in which enforcement is sought:

1) abolition of *exequatur* – Art. 5 "A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition."

2) a judgment that has been certified as an EEO by the court of origin should, for enforcement purposes, be treated as if it had been delivered in the Member State in which enforcement is sought – Art. 20.2 and recital 8 of the Preamble to the EEO regulation.

In Poland according to Article 776 C.o.C.P.[29] an execution document shall be the basis for the execution. The execution document is an enforceable title complete with the execution formula. Giving the enforceability clause is necessary for the possibility of enforcement procedure in Poland. In Poland the executive body is a court executive officer who can start the enforcement upon the application of a creditor after submitting the enforcement title with enforceability clause by the creditor. Procedure of giving the enforceability clause to enforceable titles with EEO certificate from the state of origin is specified in Article 1153^1 and 1153^2 C.o.C.P.

Court judgments from EU Member States, settlements concluded before these courts or approved by these courts and authentic instruments made in EU Member States, provided in

[26] G Karaś, *Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims – applying it in the Polish court practice*, <www.wroclaw.so.gov.pl/grant2007/data/App805-Poland-EN.ppt> accessed 1 June 2015.
[27] ibid.
[28] ibid.
[29] ibid.

these countries with an EEO certificate, are execution titles and are subject to enforcement in Poland after providing enforceability clause. An enforceability clause is given to the execution titles from Art. 1153^1 C.o.C.P. by a District Court of a debtor's general jurisdiction and if this jurisdiction cannot be determined, – a District Court in which circuit the enforcement must start.

In Poland quite a few difficulties have been encountered with the procedure. The first one is that the measure is relatively new for some judges especially those without any EU law training or practice. So broadly speaking, in legal terms, there is a certain lack of familiarity with the provisions of the EEO regulation and reluctance to certify a judgment as enforceable against a debtor where the debtor has not defended the proceedings. Furthermore when a judgment has been certified as an EEO, difficulties are encountered in the jurisdiction of enforcement where local agencies are equally unfamiliar with the procedure and can be reluctant to enforce the certificate as against the debtor. These difficulties have operated, to some extent, to undermine the "spirit" behind the EEO certificate regime.

Another issue is the delays in having the EEO issued. As an example of one of the causes of delay is when figures in the original judgment do not correspond to those in the EEO certificate of the originating court. For example, the accrued interest up to a certain date may be calculated differently in each document so that the receiving court does not really know what sum is to be "enforced". Even though Article 21 (2) of the EEO regulation states that neither the original judgment nor the certification as EEO may under any circumstances be reviewed as to their substance by the enforcing Member State.

An interesting legal dispute arose in France, where on 6 January 2012, the French Supreme Court for Private and Commercial Matters (*Cour de cassation*) ruled for the first time on the EEO. The issue before the court was whether an EEO certificate could stand and justify enforcement measures after the certified decision had been set aside in its legal order of origin. The true legal issue could be put into a question: is the EEO certificate autonomous or not?

The French court held that it could not despite the fact that the certificate had not been withdrawn in its legal order of origin (Germany). The court also pointed out that in many of its provisions, the EEO Regulation provides that certificates wrongly issued must be withdrawn by the court of origin (see: Article 10). Article 6 of the EEO regulation even provides so for cases when the certified decision has ceased to be enforceable. The French Court observed that a possible interpretation of these provisions could be that certificates only stop producing their effects when they are withdrawn, and that they stand autonomously until this happens. However, another interpretation is that EEO certificates only facilitate the circulation of judgments, and they are therefore not autonomous. If such judgments disappear, they cannot stand anymore. This interpretation was seemingly endorsed by the *Cour de cassation*, which relies on the provision of Article 11 of the EEO regulation, which states that: the EEO certificate shall take effect only within the limits of the enforceability of the judgment.

That was the reason why the French court ruled that the EEO certificate could not find enforcement measures in France after the German court of appeal had ruled that the German certified judgment was not enforceable anymore and existing enforcement measures had to be lifted.[30]

The French decision was interesting from a Polish perspective, because in Poland, like in France, creditors seeking to enforce EEO certificates after the underlying judgment has been finally set aside are thus committing a wrong.

[30] Gilles Cuniberti, *French Supreme Court Rules on European Enforcement Order* (26 March 2012) <http://conflictoflaws.net/2012/french-supreme-court-rules-on-european-enforcement-order/> accessed 20 June 2015.

CONCLUSIONS

The question must be stated as follows: is it possible to tell how popular these orders have been since they were introduced? Definitely not in Poland (from research conducted in recent weeks, I must also say that there is no hard data about it in other EU countries as well). First of all because there are no official or even unofficial numbers about how many EEO certificates have been issued. So unfortunately hard and fast figures on this are difficult to find. However it is to be hoped that this situation will change in due course.

In my opinion EEOs are not widely popular, not only in Poland, and the reason for that is probably the relative lack of EEOs being applied for by judgment creditors in Member States. It can be put down to a reluctance – general reluctance to get involved in cross-border litigation or just a general lack of knowledge about the existence of the EEO process. When it comes to general reluctance the reason for that might be the uncertainty as to how much it would cost to pursue execution procedure in the country of enforcement.

It could be assumed that the existence of the EEO would be a great boon to those who are owed money as the result of foreign purchases or trade deals that have gone wrong. Sadly because there is no statistical data available, it is hard to say if that's the case or not. Perhaps the legal authorities in Poland and other Member States need to do a bit more to raise awareness of this very useful tool and start collecting and presenting data about its use.

OLD WORLDS FOR NEW: HISTORIANS, "USEABLE' HISTORY AND POLITICAL REDRESS IN POST-APARTHEID SOUTH AFRICA

Craig Paterson[1]

ABSTRACT

History defines the injustices of the past and, through this, establishes a programme of action for justice. This paper deals with the roles of historians in South Africa. From a position of being perceived as re-enforcing apartheid mythologizing of history, history has become instrumental in legal and political attempts to redress the injustices of the past. This has opened up a position for historians to directly engage with the present and future of the country through the application of their skills and training to policy and legislation aimed at redress, such as land reform and policies dealing with indigenous culture and associated practices. This paper explores this idea through the example of a policy dealing with the traditional sport, *umdyarho wamahashe*.

Keywords: Historiography, Political Redress, Cultural History, Policy Development

THE POLITICS OF HISTORY IN SOUTH AFRICA

Over the 21 years since the transition from the apartheid to the ANC government in South Africa, the ANC-led government has sought to actively undo the socio-economic inequalities which have developed over three centuries under colonialism and apartheid law. Amongst the major issues that have been the focus of polices and legislation aimed at redress are those around the distribution of wealth in the white-owned economy, land reform, and programmes aimed at legitimising indigenous African cultures which had been denigrated by successive oppressive administrations.

The late colonial and apartheid governments, through its policies of separate development, created a situation in which the vast majority of South Africans were alienated from both land and the economy, and faced subjugation under white rule. This subjugation was initially justified on the basis of lay understandings of social Darwinism and outdated racist science by a politically powerful population. The design of the process through which this subjugation was carried out was justified by invoking history. This process is described by Bank and Southall:

Separate development was promoted by the National Party government as a strategy to head off demands for enfranchisement by the increasingly politically assertive African majority. South Africa, it was now said, was a multi-national state, and each of these diverse nations wanted to retain their particular identity and to determine their own future. In particular, each of the (variously) eight to ten Bantu peoples were connected to a particular territory or 'homeland', the basis for which had been provided by 'history' (in reality, past conquest), as ratified by the 1913 and 1936 Land Acts, which allocated 87% of the total land area of South Africa to whites. Eventually the South African Government was to devolve increased constitutional responsibilities upon these diverse ethnic nations under a programme of internal decolonisation, with a view to awarding citizenship to blacks in their homelands as a substitute for their laying claim to political rights in 'white' South Africa.[2]

---

[1] Craig Paterson is a PhD Candidate at Rhodes University, Grahamstown, South Africa. His PhD research is focused on the history of *umdyarho wamahashe*, a traditional horse racing sport found in South Africa.

[2] Leslie Bank & Roger Southall, 'Traditional Leaders in South Africa' (1996) 37 Journal of Legal Pluralism 412.

The understanding of history spoken of above was borne from the way that people argued and framed the past. By looking at South African historiography, we can find clues that hint how the past was understood and interpreted at a given time by a group of people. For the sake of this paper I will divide South African historiography into two broad and overlapping stages. The first stage included histories which contained a number of elements used to justify colonialism and apartheid. The themes of 'progress' and 'civilisation' run strongly throughout the earliest histories, as do the positive effects which European presence had on South Africa through the civilising mission. Indigenous culture was seen as a historicism. These two ideas which informed the histories of that time – civilisation and historicity – were based on the racial science of the time, but the implications inherent in these histories lingered long after social scientists had abandoned the social Darwinist paradigms.

Alongside these early histories we see a rise in what Visser describes as "committed" historiography in the form of the Afrikaner Nationalist School of history.[3] It is "committed" in the sense that it is committed to an ideology and identity, it is written with a specific political cause or goal in mind. This committed historiography was a mythologizing of the past for political purposes, perhaps not deliberately, but uncritically. This first stage predominated until the 1960s. It is the histories of this first stage which were used as justification for the "grand apartheid" plan of separate development.

But history, while powerful, is never homogenous. From the 1920s we see the slow emergence of a different approach in South African history which took a more inclusive view of South African history and culminated in the Revisionist or Radical School of the 1970s and 1980s. Again we saw a committed historiography in South Africa, this time in opposition to the Afrikaner Nationalist School. This new historiography had a focus on migrant labour, the Bantustan system, the struggle for freedom and the injustice of the apartheid system in general. The policies of the apartheid government which had been legitimised by history were no longer considered historically defensible through a reframing of that history.

It was the focal points of these new histories, the specific kinds of structural injustice which had been established by the colonial and apartheid governments, which informed the policies of the ANC government. An examination of the past – the new history – told them what they needed to undo upon coming to power in 1994: undo the white domination of the economy, end the Bantustan system and institute land reforms, and give African cultures and belief systems the recognition removed from them by colonialism and apartheid through the civilising mission.

History legitimised the apartheid government's actions, and the reinterpretation of history made undoing the effects of those actions a priority for the post-apartheid government. In this way, the past (history) was understood from the present (the present of the colonial and apartheid era, and the present of the post-apartheid era) and was used to determine future action (the "grand-apartheid" economic and land system, and the programmes of redress for the effect of those systems).

It is how we understand our history that determines our future action. In the case of South Africa, a certain understanding of history determined what just policy was. A different understanding of the same history found those policies and their effects to be a gross injustice which demanded redress. However, by looking at the whole of South Africa, rather than any specific situation, the nuance of a given situation is often missed. It is in dealing with the differences between the more general history and the local contexts in South Africa that this paper argues the role of the historian becomes important.

---

[3] Wessel Visser, 'Trends in South African Historiography and the Present State of Historical research' (2004) paper presented at the Nordic Africa Institute, Uppsala, Sweden 14.

John Lewis Gaddis in his *Landscapes of History* says that a part of the role of the historian in Society "is to interpret the past for the purposes of the present with a view to managing the future, but to do so without suspending the capacity to assess the particular circumstances in which one might have to act, or the relevance of past actions to them."[4] I take this as a guiding principle for historians. History is always made use of by those outside the profession. This is particularly true of politics and the law. In the political and legal realm, historians are required to ensure that the histories informing the policies and legislation of the country are adequately illuminated for policymakers and legislators to understand the context they are working in. To illustrate the implications of neglecting an adequately informed view of local contexts, I will turn to an example from my own work: The history of *umdyarho wamahashe* in the Eastern Cape Province of South Africa.

AN INTRODUCTION TO *UMDYARHO WAMAHASHE*[5]

Umdyarho wamahashe (hereafter referred to as *umdyarho*) is the isiXhosa name for a traditional horse racing sport which is found across the former homelands of the Eastern Cape, the rural areas of the KwaZulu-Natal Province to the north and Lesotho to the east. It can be found in pockets of the Free State Province and Mpumalanga Province too, as well as parts of southern Swaziland. It is most popular in the former Ciskei and Transkei areas, both apartheid Bantustans used as labour reservoirs on the margins of the economy. These areas have been administered by the colonial and apartheid governments through various mutated and state-sanctioned forms of traditional leadership since their independence was lost in the last twenty years of the 19th Century.

Umdyarho is derived from a pre-colonial sport found in the pre-colonial kingdoms of the amaXhosa, abaThembu, amaMpondo and amaMpondomise (all areas now in the Eastern Cape) called *uleqo*, cattle racing, which predates the introduction of horses to the area. It was initially, like *uleqo*, a form of entertainment at social gatherings of various kinds, but has become a competitive sport over the course of the 20th century.

The word *umdyarho* refers to a horse racing event and is derived from the Afrikaans word *jag* meaning to hunt or chase down. A horse is *-hashe* in isiXhosa. There are three forms of the sport. *Umkhwelo* is an endurance race which takes place separately from other races. On a normal race day you will find two forms of racing: *umphalo* and *umhambo*. *Umphalo* – from the English word 'pole' – is an all-out gallop, in the sense of 'first to the pole'. It is mainly run by children on younger horses. *Umhambo* – meaning travelling or going is derived from the word *-hamba*. This is a kind of alternating trot derived from the tripling riding style of Boer riders who initially sold horses to these polities with guns as technologies of war. It is usually run by older men on older horses.

Currently, *umdyarho* in the Eastern Cape occurs across the former homelands every weekend and every public holiday. Its largest race, the Bajodini Race, occurs annually on the 26th of December in a field near the town of Qumbu. This race, originally organised by an Irish trading store owner called L P Moore, has been hosted on December 26th in the same field of Bajodini since 1919. In 2014 this race drew 30 000 people to Bajodini field.

My estimation is that the races are experiencing annual growth of about 50% in attendance and participation, making *umdyarho* the fastest growing sport in South Africa. In certain areas of the former Transkei it is more popular than football.

---

[4] John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (OUP 2002) 10-11

[5] This section consists of preliminary findings from fieldwork observations and interviews. Fieldwork is still ongoing.

This means that there is a community of people which is spread across the large area from the Fish River in the South to the Kwazulu-Natal Border in the North. This community gathers every weekend at races across the province and spends a large portion of their expendable income on horse care, transporting horses and entering the races. Little money is earned in *umdyarho*. Winning a race will likely only cover the costs of transport and entering the race. So the races, while allowing a relatively large amount of money to be spent internally, are usually a drain on the participant's finances. The sport is about prestige, not financial gain.

The race tracks in the Province are only found on communal land administered by traditional leaders in the former homelands. Despite this the institution of traditional leadership has no role in the sport. It is seen as a traditional form of entertainment and of no particular significance by the majority of traditional leaders. Yet it is did have strong cultural ties to the rites of passage associated with the stages of life such as manhood, womanhood and marriage.

This is particularly true amongst the amaMpondomise where certain social functions of the practices marking the transition from girlhood into womanhood, *intonjane*, began to be transferred on to the Bajodini Race. A girl, in the Mpondomise tradition, cannot have a romantic relationship, so the *intonjane* ceremony was an indication of a woman's eligibility for marriage. Following a girl's *intonjane* it was a common practice for her to be fetched on horseback by her hitherto secret lover (so long as this partner had been through the relevant ceremonies and had "become a man") and taken publicly around the area in a manner akin to the Victorian tradition of "walking out." This was an indication to family members to initiate marriage negotiations which, in turn, was indicated by the negotiating party arriving at the woman's parent's home on horseback. After *intonjane* became less popular in the middle of the 20th Century, it became common for young men to make their relationships public by fetching their lovers who had "turned 21" (i.e. were deemed adults) on horseback on the 26th of December each year and riding with them to the race at Bajodini.

TRADITIONAL LEADERS,[6] LAND AND THE POLICY ON *UMDYARHO*

You will notice from the above that *umdyarho* contains facets of each of the three major programmes of redress (i.e. programmes which rely on appeals to history) outlined in the first section of this paper. Here I will focus on two: land reform and the recognition of indigenous cultures. *Umdyarho* is practiced in former Bantustans established by the apartheid government on the margins of the economy, a position the areas still hold. The majority of *umdyarho* participants also live on land administered by traditional leaders. Furthermore, *umdyarho* is a traditional sport with a strong cultural relevance and a connection to cultural identity for those involved.

The legitimacy of both appeals to culture and land are historically defined. In the case of land reform it is well documented that in the Transvaal, Orange Free State and large tracts of the Cape Province almost all land was lost to white settlements and the local populations were either displaced or formed labourer populations on white owned farms. This alienation from the land was the basis of the land reform policies which have been implemented over the last 21 years in South Africa and is addressed in the South African Constitution, Section 25 (6), which says "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."[7]

---

[6] In my experience, local traditional leaders are committed to local development and can earn a large amount of respect from their constituencies. When I refer to traditional leaders here I refer to the institution of traditional leadership, particularly through the Houses of Traditional Leaders in the Provinces who lobby for greater recognition of 'traditional affairs' and indigenous law more generally.

[7] *The Constitution of the Republic of South Africa* (1996)

In the eastern parts of the Cape Province, however, large areas were designated as 'Native Reserves' which, despite being under Cape rule following the annexation of Pondoland in 1894 and having fairly extensive missionary and trader settlement, was land allocated for 'Native use'. There the politics of land is made far more complex than in other parts of the country because of the policy of "communal land tenure" which vested large amounts of power in the traditional leadership, particularly in terms of land allocation. This made the traditional leadership, in some respects, more, not less, powerful than they had been prior to conquest. Beinart explains how prior to conquest "Once a homestead had been established, the immediate control over allocation of land and the breaking of new land lay in the senior men of the homestead [i.e. not the chiefs], though the local political authority was probably consulted."[8] From the 1920s, however, the traditional authorities began to play a far more authoritative role in the allocation of land.

During the initial years of conquest from the 1870s, the power of chiefs was strongly curtailed. But from the 1920s onwards, and particularly after the passing of the Bantu Authorities Act of 1951, more and more power was invested in the traditional authorities. This amounted to "greater authority than they had previously enjoyed under 'traditional' forms of government."[9]

The main sphere of influence of traditional leaders continues to be in the management of rural, communal lands. The majority of land in the former Bantustans is communal land held in trust by the state and administered by traditional councils, through which chiefs can exercise their powers. This is particularly through the controversial Communal Land Tenure Policy of 2013. This policy was a second attempt at dealing with the issue of communal land tenure after the 2004 Communal Lands Rights Act was struck down as unconstitutional by the Constitutional Court in 2010.

More than two decades after the end of the Bantustan system, it is still unclear where traditional leaders sit in the 'New South Africa'. Many perceive traditional leaders as inherently undemocratic, with no place in a democratic society.[10] Others argue that a lack of acknowledgement for Traditional leaders in a new dispensation is undemocratic because "the political values and customs of the ethnic population remain marginalised by the post-apartheid system."[11] The position of traditional leaders remains contested and is in a constant state of intense negotiation. In the former Bantustans of the Eastern Cape, not only do the attempts to recognise indigenous culture and the politics of land meet in these negotiations, but it is in the former Bantustans that they clash. Though the degree of authority which should be invested in traditional leaders is contested, they do have less contested roles in South Africa. This is particularly true of their position as 'custodians of culture'.

In early 2013, Rhodes University was awarded a tender by the Eastern Cape Gambling and Betting Board to "undertake research to determine the status of traditional horse racing ['*umdyarho*'] in the Eastern Cape." I was hired as the senior researcher on this project, which assessed the popularity and distribution of *umdyarho*, as well as the management and organisation of the sport and the horses involved. It was the first ever investigation into the sport, but narrow in scope, because it dealt only with the status of horse racing as it stands

[8] William Beinart as cited in Bank and Southall (n 2) 411
[9] Bank and Southall (n 2) 413
[10] Lungisile Ntsebeza, *Democracy Compromised: Chiefs and the Politics of the Land in South Africa* (Koninklijke Brill NV 2005)
[11] Talia Meer & Craig Campbell, 'Traditional Leadership in Democratic South Africa' (2007) < http://ddp.org.za/information-material/articles/Traditional%20Leadership%20in%20Democratic%20South%20Africa.pdf> accessed 15 August 2015

today in the Eastern Cape with a view towards developing government policy. This policy process is still ongoing.

In this policy design process, *umdyarho* finds itself in a complex position. Firstly, all the land on which the race tracks are found are administered by traditional leaders. This gives traditional leaders a large amount of power over the direction the sport takes if they chose to exercise that power as a bloc. Secondly, traditional leaders have begun to assert themselves with regard to the horse racing over which they have hitherto had very little interest in a professional capacity. The dramatic increase in the sport's popularity, combined with the policy design process, has meant that *umdyarho* is a point of leverage for traditional leaders and government as both continue to negotiate their respective powers and roles in the rural, former-homeland areas where *umdyarho* is practiced.

I am not arguing here that the traditional leaders have no role, either in a democratic dispensation or in *umdyarho*. I am highlighting the way in which the grand histories may discount the local contexts and lead to a misunderstandings in policy or legislation. When history is viewed from a national level will be taken for granted that the traditional leaders are custodians and directors of *umdyarho*. They are custodians of culture and this is a cultural practice. They administer the land on which the sport occurs and have for centuries. Despite this, any traditional leadership claims to the management of the sport or administration of the track is historically questionable. It is a cultural practice on traditionally administered land, but one in which the institution of the traditional leadership has not played a part. The local context in which the policy is implemented needs to be taken into account to ensure that it does not fail as a result, and the local context is counter-intuitive to the discourse of history and redress in South Africa.

It is generally acknowledged by historians in South Africa that the discipline saw a large slump at the end of apartheid. The focal point of our work as historians – the critique of apartheid – fell away. But the role of historians in politics did not disappear. There was no longer a need to address the past in the manner which it was, rather the historians role shifted to an advocacy and oversight role for better interpretation and application of historical work in the policies and legislation which rely so heavily on it, that is, the undoing of the legacies of apartheid. The discipline of history has a great deal to offer policymakers and legislators in this regard, but this can only happen when policymakers, legislators and historians alike recognise that history and the historical method is "useable," and directly applicable to producing more effective policy and legislation. The case of *umdyarho* is an example of the relevance of a proper understanding of history in policy aimed at redress in South Africa.

THE PRACTICAL CHALLENGES OF FACILITATING ENVIRONMENTAL LAWS: THE ROLE OF RURAL ORGANISATIONS IN QUEENSLAND AUSTRALIA

Jo Kehoe[1]

ABSTRACT

Agriculture and the State of Queensland are inextricably linked. Agriculture contributes in a significant way to the economy and, at the same time, impacts extensively and often detrimentally upon the environment. Past land management practices within Queensland promoted broadscale land clearing primarily of native vegetation. In the wake of an environmental problem there is a tendency to make and implement a law to address the problem. The Vegetation Management Act 1999 (Qld) (VMA), was a specific law created to address the repercussions of extensive land clearing. This Act was part of the solution to widespread land degradation; but it proved to be one of the most controversial statues enacted within the Queensland Parliament. With a return in March 2015 to a State Labor Government the management of vegetation, and land clearing, is once again a matter of controversy.

Keywords: Queensland, Agriculture, environmental laws, rural bodies.

ENVIRONMENTAL LAWS AND AGRICULTURE

The many and varied pieces of environmental legislation introduced during Labor's[2] administration were generally regarded as excessive and an imposition by those on the land. Part of the solution to widespread land degradation was the Vegetation Management Act 1999 (Qld) (VMA), the Act proved to be one of the most controversial pieces of legislation enacted within the Queensland parliament. Association between the regulators and rural landholders became increasingly strained and was far from conducive to a practical working relationship. As a consequence, rural organizations, such as Agforce and the Queensland Farmer's Federation (QFF), undertook an essential function in facilitating the transition to an increasingly regulated environment. If legislation is to be implemented effectively the role of education and support for landholders is crucial, not least during periods of transition.

For the VMA, legislative restrictions have proved complex: amendments were often hastily introduced, frequently retrospective and, in areas such as mapping, confusing. Agforce and the QFF filled the communication void between the regulators and the regulated. A further rural association, Property Rights Australia (PRA), was formed primarily in response to discontent with the regulatory environment. The function of these three rural organisations will be examined in this chapter as the position of Agforce and QFF differs from that of PRA.

The environmental laws that potentially affect a rural landholder, in relation to the management of vegetation, are examined in this chapter. There is an abundance of laws: in the event of an environmental issue there is a tendency to make and implement a law to address the issue. For Queensland, the degradation of rural land as a result of broadscale land clearing was a cause for concern. The VMA was a specific law created to address this issue

[1] Jo Kehoe PhD (ANU) is a solicitor of the Supreme Court of England and Wales and a law lecturer at Central Queensland University, Queensland, Australia. Contact details: j.kehoe@cqu.edu.au.

[2] Labor is spelt this way in Australia.

THE ENVIRONMENTAL IMPACT OF AGRICULTURE

Agriculture is one of the world's oldest industries. It is basic to human civilisation, fundamental to human survival, and a major contributor to the economy of many nations. Yet it is also one of the principal causes of environmental degradation.[3]

Agriculture is important to Queensland. Compared to other Australian States, Queensland has the largest area of agricultural land, which is around 141.4 million hectares,[4] and the highest proportion of land dedicated to agriculture.[5] In economic terms, the contribution of agriculture is significant: the total value of Queensland's primary industry commodities for 2011-2012 was forecast at $14.69 billion, with cattle being one of the highest value industries.[6] As most agricultural land is primarily used for livestock grazing,[7] the rural sector, particularly the rural livestock sector, is one of the major contributors to greenhouse gas emissions.[8] Approximately 40 per cent of Queensland's greenhouse gas emissions come from agriculture.[9]

Agricultural practices within Queensland mean the State has cleared, and continues to clear, more land than the rest of Australia combined.[10] Inevitably the land has degraded. Broadscale land clearing has primarily been of native vegetation. What constitutes native vegetation varies between jurisdictions in statutory terms. The VMA defines vegetation as a native tree or plant other than grass or non-woody herbage; or plants within grassland regional ecosystems and mangroves.[11]

The management of native vegetation by rural landholders is of critical importance to the environment. Vegetation maintains biodiversity. It also sustains ecological processes critical to delivering the ecosystem services that provide the life support systems for our planet. These processes and services include: forming the basis of food chains; purifying air and supplying

---

[3] N Gunningham, P Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 267.

[4] Australian Bureau of Statistics, <http://www.abs.gov.au/Ausstats/abs@.nsf/46d1bc47ac9d0c7bca256c470025ff87/F7635B38F792374BCA256DEA000539DA?opendocument> accessed 19 August 2014.

[5] Queensland government, *Economic Development and Innovation: Forecasting, Analysis and Trends, Prospects for Queensland's Primary Industries* (Department of Employment,2011-2012) 4.

[6] ibid 2.

[7] Australian Natural Resource Atlas <http://audit.deh.gov.au/anra/agriculture/gifs/ag_report/section_1/figure1_2.gif> accessed 19 August 2014.

[8] See, Australian Bureau of Statistics, Climate Change in Australia, Australia's Greenhouse Gas Emissions, Agriculture <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4613.0Feature+Article1Jan+2010#AusGHG> accessed 19 August 2014; Australian government, Australian Bureau of Agriculture and Resources Economics and Science, Climate Change and Variability, Issue 3-2011, 6 <http://adl.brs.gov.au/.../SEI.2011.03_onfarmMitigation_HR_rev1.0.1.0.pdf> accessed 19 August 2014.

[9] Queensland government, *Capturing Carbon in the Rural landscape: Opportunities for Queensland* (2009) 3.

[10] Australia Institute, *Land-use change and Australia's Kyoto target* (1999); Submission to Senate Environment References Committee Inquiry into Australia's response to global warming. Auspoll research report prepared for the World Wildlife Fund, *Attitudes towards Land Clearing and Environmental Issues in Queensland* (2009).

[11] Vegetation Management Act 1999 (Qld) s8. The NSW vegetation legislation has a wider definition: Native Vegetation Act 2003 s6(1) (NSW) defines native vegetation as means any of the following types of indigenous vegetation:(a) trees (including any sapling or shrub, or any scrub), (b) understorey plants, (c)groundcover (being any type of herbaceous vegetation),(d) plants occurring in a wetland. (2) Vegetation is 'indigenous' if it is of a species of vegetation, or if it comprises species of vegetation, that existed in the State before European settlement. (3) For the purposes of this Act, 'native vegetation' does not include any mangroves, sea grasses or any other type of marine vegetation to which s 205 of the Fisheries Management Act 1994 (NSW) applies. There is no definition of native vegetation in the EPBC Act but the Commonwealth government's Native Vegetation Framework provides a definition, which again is wider than the Queensland meaning.

oxygen; protecting water quality and yield; supporting forestry, agriculture and aquaculture; maintaining soil fertility and stability upon which many productive enterprises rely.[12]

Biodiversity includes the 'variability among living organisms from all sources including terrestrial, aquatic, marine and other ecosystems and the ecological complexities of which they are part'.[13] Typically biodiversity has three levels:

> Genetic diversity refers to the variation in genes enabling organisms to evolve and adapt to new conditions. Species diversity refers to the number, types and distribution of species within an ecosystem. Ecosystem diversity refers to the variety of habitats and communities of different species that interact in a complex web of interdependent relationships.[14]

The 2001 Commonwealth State of the Environment report observed that clearance of native vegetation continued to be the single most significant threat to terrestrial biodiversity, the next report in 2006 noted:

The most visible indicator of land condition is the extent and quality of vegetation cover. Nationally the picture is deceptive — about 87 per cent of Australia's original native vegetation cover remains, but its condition is variable and masks an underlying issue of the decline of many ecological communities. Some ecological communities occupy less than 1 per cent of their original extent as a result of clearing for agriculture, and many others are highly fragmented.[15]

Because habitats are fragmented, isolated pockets of native remnant vegetation remain. As a consequence, rare and endangered species are limited to these remaining areas of vegetation. The 2011 Commonwealth State of the Environment report found that the condition of native vegetation is deteriorating and the rate of land clearing 'is slowing, but still averaged around one million hectares each year over the decade to 2010.[16] The extensive degradation of rural land within Queensland meant that regulation was inevitable and a significant means by which long-term and widespread changes to environmentally sustainable land management practices might be obtained. There are, however, inherent problems in regulating agriculture.

INHERENT PROBLEMS OF REGULATING AGRICULTURE

There are potential advantages inherent to environmental regulation. For the VMA the eventual cessation of broadscale land clearing within Queensland is long-term and widespread. It took a number of years for this effect to come to fruition: the introduction of the legislation was in 1999, but broadscale clearing did not end until 2006.

---

[12] Australian government, *Australia's Native Vegetation Framework, Consultation Draft* (Department of the Environment, Water, Heritage and the Arts, Native Vegetation Framework Review Task Group,2009).

[13] Australian government, *Australia's Biodiversity Conservation Strategy* 2010-2030 (Department of Sustainability, Environment, Water, Population and Communities,).<http://www.environment.gov.au/biodiversity/publications/strategy-2010-30/ > accessed 19 March 2014.

[14] N Gunningham, P Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 269.

[15] R J S Beeton, K I Buckley, G J Jones, D Morgan, R E Reichelt, and D Trewin: *Australian State of the Environment Committee 2006* (Independent report to the Australian government Minister for the Environment and Heritage, Department of the Environment and Heritage, Canberra) 8.1 <http://www.environment.gov.au/State of the Environment /2006/publications/report/index.html> accessed 1May 2014.

[16] J Hatton, S Cork, P Harper, R Joy, P Kanowski , R Mackay , N McKenzie, T and Ward ,*Australian State of the Environment Committee* 2011 (Independent report to the Australian government Minister for Sustainability, Environments, Water, Population and Communities) <http://www.environment.gov.au/soe/2011/report/index.html> accessed 2 May 2014.

There remain intrinsic difficulties with environmental legislation. As noted by Gunningham et al, one of the disadvantages of command and control regulation lies in its vulnerability to political manipulation.[17] This raises the attendant issue of the availability of public funds to meet financial adjustment costs; and ultimately leads into issues of social justice insofar as regulation inevitably places a burden on those regulated. Moreover:

Solving the inequity problem for one group would mean either reducing resources applied to other needs of society, or the community accepting the need for an increase in overall taxes to achieve social justice and environmental protection goals.[18]

Tensions are inevitable when the price is perceived by the rural community to be borne by their sector for the benefit of society generally; and a public benefit perceived to be borne by a private cost. These tensions are exacerbated within the realms of agriculture, not least because traditionally the regulation

... of agriculture has been informal, based upon the provision of information and persuasion by government authorities, whose fundamental role has been not to police agricultural producers, but to assist them to do the right thing....[19]

And further, as noted by Martin and Gunningham, it is arguable that the regulation of agriculture remains distinct with the result that:

...in Australia, as elsewhere, political power and the tyranny of distance have ensured that agricultural enterprises have rarely been subject to the same degree of detailed regulatory scrutiny and control as have come to be accepted for other large-scale resource-consuming or polluting industries.[20]

The history of the agricultural community within Queensland has a unique set of circumstances and political power was at the crux of tensions between the rural community and the Queensland Labor government's decision to regulate vegetation management.

In the past, under successive conservative governments, the rural community in Queensland had considerable political power and an influential role within the State. Under a Labor government the rural community became a marginalised group and struggled to find a voice and a place in policy decision-making on rural land. Agricultural land policy has been dominated and shaped by the protracted political cycles and ideologies of successive governments. The political environment in Queensland has been characterised by long periods of dominant one party government. For 32 years, the State had various combinations of conservative Liberal and National Party administrations. During this time rural landholders engaged with an empathetic power whose interests by and large aligned with their own. This was a period relatively unfettered by regulatory control on rural land. The Queensland Labor Party returned to power in 1989 and, aside from a two-year interlude, held office until March 2012. This Labor period marked a significant shift and increase in regulation for agriculture.

FACILITATING REGULATION: THE ROLE OF RURAL ORGANISATIONS

As noted by Martin and Gunningham, natural resource management legislation is 'fundamentally behavioural' and as such requires, in addition to the imposition of controls, a

[17] N Gunningham, P Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 267.

[18] P Martin P, R Bartel , J Sinden , N Gunningham and I Hannam, *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers* (Research Report, Australian Farm Institute and Commonwealth government, Land and Water Australia.2007) 39.

[19] Gunningham, at al (n 17) 278-279.

[20] P Martin and N Gunningham, 'Leading reform of natural resource management law: core principles' (2011) 28 *Environmental and Planning Law Journal* 137.

wider and 'comprehensive approach involving communication and education'.[21] Facilitating the transition to regulation requires a sound working relationship between the regulated community and the regulators. As the relationship between the agricultural community and government regulators has been problematic – particularly for the management of vegetation – the role of rural bodies has been critical.

Agforce is the primary rural organisation within Queensland and is one of the many State and territory rural bodies which collectively make up the National Farmers Federation (NFF). Agforce was formed in 1997 by an amalgamation of the Cattleman's Union of Australia, the Queensland Graingrowers' Association and the United Grazier's Association. Members of these three bodies supported the need for a unifying representative voice on matters of most concern to rural landholders; such matters were expressed to include, inter alia, resource management, land tenure and environmental issues.[22]

The management of vegetation on rural land is recognised by Agforce as a significant policy issue. According to this organisation, long-term certainty in natural resource management is necessary, but they generally do not support regulation. Rather they advocate voluntary measures.[23] Agforce has played, and continues to play, an important role in assisting rural landholders to understand vegetation management legislation. It has been assisted financially by the Queensland government to undertake this work. Agforce also provides assistance to rural landholders affected by the Rural Leasehold Land Strategy. Government investment in the strategy began in 2006 with $19 million being allocated over a four-year period to 2010 and a further $5 million in ongoing funds.[24] The assistance provided by Agforce ranges from one-to-one guidance to the opportunity to attend a field day.[25] These initiatives are available to all rural landholders but if they are not members of Agforce, it seems unlikely they would attend.[26]

The Queensland Farmers Federation (QFF) is a relatively small organisation compared to Agforce. This body represents intensive agriculture in Queensland such as dairy, cotton, grains and horticulture. The members predominantly own freehold land.[27] Of the 14 listed priorities for the QFF, one is the management of native vegetation.[28] Like Agforce, the QFF conducts workshops and seminars on vegetation management legislation in addition to providing a vegetation hotline and property visits. It works collaboratively with Agforce on some workshops and receives funding from the State government.[29] It also works alongside Agforce and the regulators in promoting education and communication on vegetation management regulations. The question was asked of QFF if the degree of support had lessened over time. The reply said: 'no not really, we are still providing the same level of support, however it is getting harder to get some farmers or farm groups to attend due to the daily pressures on-

[21] ibid 144.

[22] Agforce, History of Agforce <http://www.agforceqld.org.au/index.php?tgtPage=about&page_id=101> accessed 2 September 2014.

[23] ibid.

[24] Queensland government, Sustainability of primary production <http://www.regions.qld.gov.au/dsdweb/v4/apps/web/content.cfm?id=16703> accessed 2 September 2014.

[25] Agforce, Leasehold Land, Leasehold Land project–providing assistance with Delbessie lease agreements <http://www.agforceqld.org.au/index.php?tgtPage=&page_id=226> accessed 22 September 2014.

[26] Agforce did not respond to a request for clarification regarding the status of those who attended such days.

[27] Queensland Farmers Federation, *Submission to the Productivity Commission* (2004) 6.

[28] Queensland Farmers Federation, 'Vegetation management' <http://www.qff.org.au/policy-projects/our-work/vegetation-management/> accessed10 May 2014.

[29] Email correspondence in reply from the Project Officer, Vegetation Management, Queensland Farmers Federation, dated 23 May 2012.

farm.'[30] It appears the legislation remains complex and that landholders may experience difficulties in devoting sufficient time to regulatory requirements.

Property Rights Australia (PRA) was formed in 2003 in response to increasing natural resource management legislation.[31] PRA's primary role is to assist landholders involved in land clearing litigation. This organisation is a non-profit group of rural landholders, that operates at the smaller end of agricultural production in representing individual and family operated businesses rather than larger pastoral companies. According to PRA the alliance

...was formed to seek recognition and protection of the right of private property owners in the development, introduction and administration of policies and legislation relating to the management of land, water and other natural resources.[32]

PRA originated with a fighting fund to support the prosecuted Central Queensland grazier Ashley McKay. The majority of PRA members are Queensland based, but membership does extend beyond the State.[33] The management of vegetation has remained an issue, but there have been other equally pressing concerns for rural landholders such as the advance of mining and coal seam gas companies on rural land.[34].The implication of this for PRA is that monetary support from members is not as substantial as when the organisation was initially formed. PRA emerged because of increasing regulation and the enforcement of that regulation; its existence suggests that Agforce does not meet the representational needs of all rural landholders. Supporting members in litigation proceedings remains the domain of the Australian Farmers' Fighting Fund and the National Farmers Federation (NFF).[35]

As rural organisations, Agforce, QFF and PRA occupy different roles: Agforce and QFF are larger, more financially secure bodies; and government funding facilitates their communication and education role in assisting rural landholders to understand and comply with regulatory requirements. PRA does not appear to have sufficient funding to take on an educative role and it is unlikely it would chose to do so, being steadfastly opposed to what it regards as regulatory intrusion. Unlike the other rural bodies, PRA does not work alongside the regulators. Agforce reluctantly tolerates legislation, lobbies against some aspects of it and continues to take government funding. The instructional and communication role of Agforce and the QFF has remained significant throughout the period of this research because of the volume of environmental legislation.

THE EMERGENCE AND VOLUME OF ENVIRONMENTAL LEGISLATION

Most jurisdictions in Australia draft a new piece of legislation for every environmental issue.[36] Queensland adopted this approach during the last Labor administration. The VMA was typical of environmental legislation generally in being a 'product of crisis'.[37] In this instance, the crisis concerned the widespread extent of land clearing and resultant devastation of rural land. The irony is that it was earlier government policy which brought about this degradation

[30] ibid.

[31] Property Rights Australia, 'Why was PRA set up?' http://www.propertyrightsaustralia.org/about/about-us/ accessed 5 October 2014.

[32] Property Rights Australia, *Submission no 171, to the Productivity Commission Inquiry: Impacts of Native Vegetation and Biodiversity Regulations,* (2003) 45-46.

[33] Email correspondence in reply from Joanne Rae then current Chairman of PRA dated 27 November 2012.

[34] ibid.

[35] An example of the NFF supporting a NSW rural landholder from their fighting fund is the case of *Peter Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010), this case gained a lot of media coverage as the landholder camped outside on his property and refused to eat for a long time – he was an elderly man.

[36] Martin and Gunningham (n 20) 148.

[37] T Bonyhady, 'The Disappointment of the Law' in S Dovers and S Wild River (eds), *Managing Australia's Environment* (The Federation Press 2003) 463.

of land; in the past, governments encouraged land clearing as part of basic land management practices. Landholders who cleared were rewarded with taxation incentives. For rural freeholders, a freehold title generally meant an unfettered title to clear; for rural leaseholders, past lease conditions required the leaseholder to obtain a permit to destroy trees. Typically a lease would require the leaseholder to clear trees and sow pasture within a given period of the lease commencing.[38]

The most marked effect of the introduction of the VMA was the imposition of legislative clearing controls on the owners of freehold land; this was a new and significant legal restriction to apply to such landholders in Queensland. Before the VMA, legislative clearing restrictions on freehold land were piecemeal and limited to very specific types of land, for example: under the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld);[39] or on State watercourses which potentially required statutory approval under the *Water Act 2000* (Qld). Rural freeholders in Queensland were unused to statutory controls on what they could do on their land: a freehold title had generally meant an unregulated title. For rural leaseholders, initial and limited controls on land clearing emerged in the early 1990s and increased as the decade wore on.

Within Queensland there has at times been a manifest regulatory failure to engage with rural landholders. This failure to engage has been apparent at the most difficult periods of vegetation management legislation: when the laws were particularly controversial and, arguably, when engagement should have been paramount. These contentious periods included the introduction of the law, the 2004 amendments, which led to the phasing out of broadscale land clearing, and the 2009 amendments which brought in controls on some regrowth. This engendered controversy within the parliamentary process. This paper contends that the more controversial a law is, the less likely it will go through a parliamentary process as set down in State legislation and procedure. It also shows that the implementation of vegetation management regulations, especially in compliance and enforcement, has at times led to the 'inefficient, ineffective and inequitable outcomes'[40] noted by the Productivity Commission. This has not led, as predicted by the Commission, to policy failure. The policy became law and was implemented. Instead it has generated, in some rural landholders, irrevocable harm to the regulatory relationship, a relationship that should be based upon trust and cooperation.

Rural land management policy and practices in Queensland have led to extensive degradation of land. This has been aggravated by the extent and predominance of agriculture within the State. Environmental regulation was inevitable and a significant means by which long-term and widespread change might be obtained.. The move to a statutory regime has been made easier by rural organisations such as Agforce and the QFF: both bodies act as paid agents of the government to facilitate the transition to regulation. The position of these two bodies

[38] See, for example, the standard lease condition M 80, employed by then Department of Natural Resources and Mines in the mid seventies which required: The lessee shall within five years from the date of commencement of the lease, and to the satisfaction of the Minister, develop an area of not less than...(the number of hectares would be applicable to the area of the leased land) hectares of brigalow, gidyea and associated scrubs on the holding by: a) destroying by ringbarking or otherwise in accordance with a permit granted by the Land Commissioner, such scrub in equal proportions during each year of such period and thereafter maintaining such area free from all regrowth, suckers and undergrowth; and b)burning all scrub destroyed in performance of this condition as soon as it shall be practicable and prudent to do so; and c) sowing such cleared areas to improve pasture with such grass or grasses as may be approved by the Minister. The lessee shall, within one month from the commencement of the term of the lease, apply to the Land Commissioner for a permit to destroy trees on the holding so that the performance of this condition can be undertaken.

[39] Wet Tropics World Heritage Protection and Management Act 1993, s56 (1) (Qld) prohibits acts such as the destruction of a forest product (defined as a native plant) without a licence or permit.

[40] Australian government, *Impacts of Native Vegetation and Biodiversity Regulations* (Productivity Commission Inquiry, 2004) XLVI.

differs from that of PRA. This alliance was formed amidst a groundswell of opposition against ever-increasing legislation: it fills a void within Queensland that is not met by either Agforce or the QFF.

Political change once again came to Queensland with the March 2015 State election. In a surprise result the conservative Liberal National Party were ousted after one term and a hastily convened Labor Party replaced them. As a consequence vegetation management - and the extensive land clearing the State has undergone during the conservative period – has resurfaced on the agenda. The innate and continuing complexities of regulating agriculture, will once again challenge the Labor government, the regulators and those regulated.

CULTURAL AND RELIGIOUS RELATIVISM AS OPPOSITION TO THE AIMS OF INTERNATIONAL HUMAN RIGHTS LAW: REVISITING THE UNIVERSALISM VS. REGIONALISM DEBATE

Musa Njabulo Shongwe*

ABSTRACT

International human rights law is a fragmented system. This universally conceived branch of international law is challenged by cultural and religious relativism emanating from regional human rights systems. Regional divergence is manifested through unique human rights conventions and through reservations to treaties. The paper argues that even though cultural and religious relativism may have legitimacy, they can constitute an opposition to the fundamental aims of international human rights law, and exacerbate fragmentation. The study analyses the universal conception of human rights, and then explores regional conceptions of human rights with particular reference to cultural and religious relativism. The paper analyses how reservations to human rights treaties enable states to make superficial commitments to human rights, while retaining their cultural and religious values which may be in conflict with the universal catalogue of human rights. Finally, the paper proposes ways in which human rights systems of the world may be balanced.

Key Words: Universalism, regionalism, international human rights law, fragmentation, relativism.

INTRODUCTION

In contemporary international law, there is great concern about the most effective way of ensuring the efficacy of international human rights law (IHRL). This concern is with regard to the appropriateness of either a universal approach orchestrated by the United Nations (UN), or a regional approach whereby regional organizations are the main initiators and implementers of systems of human rights protection. Regionalists generally argue and believe that a regional handling of human rights problems is most effective because it is based upon a better understanding of issues in the particular region. Universalists, on the other hand, argue that a more homogenous and uniform approach to the protection of human rights is more effective. Academic works on this subject shows a lack of consensus as to which approach is more effective. This study has, however, found problems arising in respect of both arguments. A universal approach to human rights protection has been seen as being normatively irrelevant for some state communities, and not being a true reflection of common or shared ideals of all states of the world. The rise of regionalism on the other hand has caused the fragmentation of the international human rights system[1] in that regional human rights treaty systems have developed human rights norms and standards reflecting a strong cultural and religious variance, a variance that can constitute an opposition to the aims of IHRL.

* Dr. Musa Njabulo Shongwe LLB (University of Swaziland); LLM, LLD (International Law- University of Johannesburg; Researcher: South African Research Chair in International Law) Email: musanjabuloshongwe@yahoo.com.

[1] Christoph Schreuer, 'Regionalism v Universalism' (1995) 6 European Journal of International Law 477.

IHRL seeks to provide a normative beacon of commonly agreed standards of humanity and dignity that all states should respect and be held accountable to.[2] This study examines the universalist conception of IHRL, and regional approaches to human rights. In analysing the normative aspects of fragmentation in IHRL, this paper argues that IHRL was originally conceived as a universal doctrine and to apply to all human beings without distinction. The paper then assesses the normative and practical impact of the regionalisation of IHRL, with specific reference to cultural and religious relativism.

IHRL has become fragmented due to its endless proliferation: multiple conventions are elaborated at UN, AU and even sub-regional levels in Africa[3] and the rest of the world. Institutional proliferation also subsists due to the creation of multiple treaty bodies and other institutional mechanisms.[4] There is a real apprehension that international law is at risk of disintegration because of fragmentation. This has forced international lawyers to justify the existence, relevance and impact of international law.[5] In that regard, the existence of regional interpretations of human rights appears to be a threat to the credibility and the efficiency of IHRL.[6]

IHRL is perhaps the one branch of international law that is the most susceptible to fragmentation because there is a lack of homogeneity regarding understanding the notion of human rights, and regarding interpretations of the Universal Declaration of Human Rights (UDHR)[7] mainly, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and other universal human rights instruments.

It is worth noting that the concerns about the fragmentation of IHRL surfaced from the very beginning. For example, at the first session of the UN Commission on Human Rights in 1947, there were considerable debates over whether human rights could be "universally claimed by all people without distinctions as members of the larger human family, or in a fragmented world with many different forms of government and value systems ... restricted to membership within a given state, culture or stages of development".[8] These concerns reveal that there existed differing ideologies of the normative concept of human rights and the proposed institutional design. This is when the debate on universalism and relativism began.

THE UNIVERSAL CONCEPTION OF HUMAN RIGHTS

IHRL is a body of substantive and procedural rules that deals with the protection of internationally guaranteed rights of individuals against violations by governments and other individuals.[9] Human rights are the inalienable rights one has simply because one is a human

[2] Frans Viljoen, 'Contemporary Challenges to International Human Rights Law and the Role of Human Rights Education' (2011) 15 De Jure 1, 3.

[3] Examples are the 2003 Southern African Development Community (SADC) Social Charter, the 2008 Protocol on Gender and Development; and the 2006 Protocol on the Protection and Assistance of Internally Displaced Persons to the Pact on Security, Stability and Development in the Great Lakes Region (of the International Conference on the Great Lakes Region).

[4] Frans Viljoen (n 2) 4.

[5] Thomas Franck, *Fairness in International Law and Institutions* (Claredon Press 1995) 6.

[6] Gerhard Hafner, 'Pros and Cons ensuing from Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 849, 856.

[7] AniceeVan Engeland 'Human Rights Strategies to Avoid Fragmentation of International Law as a Threat to Peace' (2011) Inter-Disciplinary Journal of Human Rights Law 25, 28.

[8] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press 1998) 221.

[9] Monica Pinto, 'Fragmentation or Unification among International Institutions: Human Rights Tribunals' (1999) Journal of International Law and Politics 833.

being; therefore they are held "universally" by all human beings. They also hold universally against all other persons and institutions.[10] Human rights are also universal in the sense that they are almost universally accepted as ideal standards[11], they are incorporated into domestic legal systems and they are translated into international legal obligations. Human rights are thus conceived as egalitarian and applicable everywhere. The doctrine of human rights in international law and practice of states has been the cornerstone of public policy around the world.[12]

Classic international law (that is, international law prior to 1945) was largely conceived of norms regulating interstate relations exclusively. Only states were subjects of international law and subject to the rules of international law. But after the creation of the League of Nations the definition of subjects of international law was expanded to recognise legal persons such as international organisations and individuals (who, however, had no rights as subjects of international law, but as its objects).[13]

The year 1945, after the end of the Second World War and the creation of the UN, is the key moment on which we can base our understanding of the internationalisation of human rights. The UN and the provisions of its Charter provided a basis for a comprehensive system of international law and practice for the protection of human rights. IHRL under the UN system is characterized by a linked system of conventions, treaties and political institutions, rather than a single entity or set of laws.[14]

The UN commitment to human rights was made clear in the Preamble of the Charter which reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women".[15] The Charter contains numerous references to human rights, most important are articles 55 and 56: Article 55 obliges the UN to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"[16], and in article 56 "all members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in article 55".[17]

The espousal of human rights in the UN Charter is of great significance. This is the framework from which we trace the global importance of human rights, the development of a broad array of declarations and treaties, implementation and enforcement mechanisms, committees, and reports on the protection of human rights.[18] The rights espoused in the UN Charter are supplemented and defined in the International Bill of Human Rights comprising the 1948 UDHR, the 1966 ICCPR, and the 1966 ICESCR.

Some provisions of the UDHR are now considered to have acquired the force of customary international law[19] even though it was born out of a non-binding resolution.[20] Many

[10] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 1.

[11] All states generally proclaim their acceptance of and adherence to international human rights norms and undertake international obligations to respect and ensure the realization of human rights by acceding to international human rights instruments, such as the UDHR 1948.

[12] Wikipedia <http://en.wikipedia.org/wiki/Portal:Human_rights> accessed 2 March 2015.

[13] Christoph Heyns, 'The African Regional Human Rights System' in Isa Gomez and Felipe De Feyter (eds), *International protection of human rights: Achievements and challenges* (University of Deusto,2006) 195.

[14] Ian Brownlie, *Principles of Public International Law* (OUP, 2008) 532.

[15] United Nations Charter Preamble, paragraph 2.

[16] United Nations Charter article 55.

[17] United Nations Charter article 56.

[18] Malcom Shaw, *International Law* (Cambridge University Press 2008) 277.

[19] Olivia Ball and Paul Gready, *The no-nonsense Guide to Human Rights* (New Internationalist Publications 2006) 42.

[20] A Resolution of the General Assembly of the United Nations; such resolutions are only recommendations for Member States, and not legally binding obligations. See Ashlid Samnoy, *Human Rights as International*

international scholars believe that the UDHR forms part of customary international law.[21] According to Smith, "the provisions of the UDHR can bind states on the basis of custom … whether because they constituted a codification of customary law… or because they have acquired the force of custom through general practice accepted as law".[22]

The UDHR plays a central role in establishing the contours of the contemporary consensus on internationally recognized human rights.[23] According to its Preamble, the UDHR is to serve as a common standard of achievement for all peoples and Nations.[24]

The UN General Assembly adopted the UDHR by a vote of 48-0 (with eight abstentions[25]), and has been endorsed regularly and repeatedly by all states.[26] In the initial stages of its drafting process, the UDHR was known as the "International Declaration of Human Rights".[27] Only later, and as a result of a French proposal, was its title changed to the Universal Declaration of Human Rights. Cassin explained this change by stating that the Declaration comes from the legally organized community of all the peoples of the world and expresses the common aspirations of all men.[28] The use of the term "universal" rather than "international" purposefully cemented the extension of rights to all individual members of the international community regardless of circumstance. The significant difference between the two terms is that the term "universal" confirms the application of the Declaration to every individual without distinction, and this goes beyond a simple international instrument which has been agreed and adopted by representatives of each state.[29] The Declaration therefore has a clear purpose for universality as it aims to award human rights to everybody, without distinction of any kind. The text of the UDHR does not make any allowance for cultural relativism or cultural variation of the rights enshrined.

The UDHR recognizes the "inherent dignity" and inalienable rights of all humanity and provides for the universal respect for human rights. Article 1(3) of the UN Charter also calls upon all nations to promote and encourage respect for human rights and fundamental freedoms for all.[30] The use of the language of inherent dignity and universal respect in both the UN Charter and the UDHR is a language that intrinsically presumes the universality of human rights.[31]

Consensus: The Making of the Universal Declaration of Human Rights: 1945-1948 (CHR Michelsen Institute 1993) 23.

[21]See Rhona Smith, *Textbook on International Human Rights* (OUP 2014) 38; John Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Juridical Character' in Bertrand Ramcharan (ed), *Human Rights: Thirty Years After the Universal Declaration* (Martinus Nijhoff 1979) 2l, 37; and Anthony D'Amato, *International Law: Process and Prospect* (Transnational Publishers1986) 123-147.

[22] Smith (n 21) 38 (paraphrasing the separate opinion of Judge Ammoun from the *Namibia Advisory Opinion* (1971) ICJ Reports 64).

[23] The UDHR has also guided the political organs of the UN in their interpretation and application of the human rights clauses in the UN Charter. See in this regard the dissenting opinion of Judge Tanaka in the *South West Africa Cases, Second Phase* (1966) ICJ Reports 6, 293.

[24] Universal Declaration of Human Rights, Preamble paragraph V.

[25] The eight abstaining states were South Africa, Yugoslavia, Saudi Arabia, Ukraine, the USSR, Poland, Byelorussia and Czechoslovakia.

[26] Jack Donnelly (n 10) at 22.

[27] Isa and Feyter (n 13) 114.

[28] Rene Cassin was one of the most influential persons concerning the final draft and ideological profile of the Declaration. See Rene Provost and Colleen Sheppard, *Dialogues on Human Rights and Legal Pluralism* (Springer 2012) 3.

[29] Hector Gros Espiell, 'Universality of Human Rights and Cultural Diversity' (1998) 50 International Social Science Journal 525, 526.

[30] UN Charter, Article 1(3).

[31] Mark Kielsgard, 'Universal Human Rights and Cultural Relativism: A Fresh View from the New Haven School of Jurisprudence' (2011) <http://ssrn.com/abstract=1778124> accessed 12 March 2015.

The UDHR has had an immense impact on the development of human rights: it has inspired the creation of the ICCPR, and the ICESCR. It has served as a model for national Bills of Rights. It has been used by the organs of the United Nations as a standard by which to measure the conduct of states, and consequently it is argued that the UDHR now forms part of customary international law[32], meaning that it is applicable to every state.

The international Bill of Rights is supplemented by several other conventions including the International Convention on the Elimination of All Forms of Racial Discrimination[33], the Convention on the Elimination of All forms of Discrimination against Women (CEDAW)[34] and the Convention on the Rights of the Child.[35]

The multilateral treaties described above constitute the principal universal human rights treaties. There are, however, many other human rights treaties relating to specific human rights issues, such as Conventions aimed at the protection of refugees and stateless persons,[36] on discrimination against women,[37] on the rights of people with disabilities[38] and many more. The UN has continued to expand its network of multilateral human rights treaties over the years, and there is today a great number of instruments dealing with a vast array of different human rights. It is not essential to consider every human rights instrument in the present analysis. This does not suggest, however, that other human rights instruments are any less important. The corpus of international human rights law extends beyond treaties to include declarations[39] of the General Assembly and of other political organs of the UN, and standards formulated by such bodies.[40]

On 25 June 1993, a World Conference on Human Rights sponsored by the UN adopted the Vienna Declaration on Human Rights and Programme of Action which proclaims the universality of human rights and reaffirms the obligation on all states to promote and respect human rights.

The 1968 Tehran Proclamation affirmed the universality of the UDHR in the proclamation that:

> "The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community".[41]

In the *Barcelona Traction case*, the ICJ noted that human rights are obligations *erga omnes* and their obligations therefore are towards the international community as a whole.[42] It is well established that some universal human rights norms have the status of customary international

[32] John Dugard *International Law: A South African Perspective* (Juta & Co, 2011) 325.
[33] Patrick Mtshaulana, John Dugard and Neville Botha, *Documents on International Law* (International Legal Materials 1996) 209.
[34] ibid 219.
[35] ibid.
[36] Convention Relating to the Status of Refugees of 1951, 189 *UNTS* 137; and the Convention Relating to the Status of Stateless Persons of 1954, 360 *UNTS* 117.
[37] Convention on the Elimination of All Forms of Discrimination against Women adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981, in accordance with Article 27 (hereafter CEDAW).
[38] Convention on the Rights of Persons with Disabilities adopted and opened for signature and ratification by General Assembly Resolution 61/106 of 13 December 2006, entered into force on 3 May 2008.
[39] For example, the Declaration on the Right to Development Resolution 41/128 of 4 December 1986.
[40] Dugard (n 32) 340.
[41] See the Vienna Declaration and Programme of Action, 1993 (1993) ILM 1661. This Declaration also endorsed and underlined that the UDHR "constitutes a common standard of achievement for all peoples and all nations".
[42] *Case Concerning the Barcelona Traction, Light and Power Company LTD* (1970) ICJ Reports, 32.

law, and the customary international law nature of human rights can be derived from the number of states that have signed and ratified the relevant treaties. Therefore, even though a state may not have signed up to a treaty, it will be bound by virtue of customary international law.[43]

When one examines the UN human rights system, it is clear that it has been designed as a universalist doctrine, as it ascribes a single set of core values to all of humanity.[44] Under this system, human rights are viewed as rights that every human being is entitled to on account of his or her place in the global community. For if human rights were anything other than applicable to all without distinction, they would be merely context-specific rights, that is, rights which a person may achieve by virtue of residence in a particular territory, or by allegiance to a certain group. The important legal obligation is for states to promote universal respect for, and observance and protection of all human rights and fundamental freedoms for all. Not selective, not relative, but universal respect, observance and protection.

The numerous influential and widely respected conventions discussed above reflect a high degree of consensus about their content. They boast of high ratification rates,[45] and many provisions of the non-binding UDHR are now considered to be customary international law.[46] The above concepts of universality, which are so fundamental to the UN human rights system, are the aims of IHRL. But these concepts face significant challenges when applied at the regional and national level due to some conflicting normative ideologies, differing cultural views, historical backgrounds and other factors which are explored in the following sections. The important question in this discussion is: how universal is international human rights law? This question is important because international human rights law is sometimes seen as western-biased, a neo-colonial imposition, and as un-African.[47]

REGIONAL APPROACHES TO HUMAN RIGHTS

It has been widely recognized that with the adoption of the UDHR in 1948, the global community became united in a coherent expression of shared fundamental values.[48] But the predominance of this view has overlooked the contentious ideological battlefield which existed between the East and the West during the time of adoption, and has excluded a consideration of the significant portion of the world's population living in the shadow of colonialism during that time.[49] So even though today the UDHR may optimistically be characterized as having achieved some normative unity, at the time of its adoption it was a discordant compromise.[50]

---

[43] Article 38 (1) (b) of the Vienna Convention on the Law of Treaties provides for customary international law as a source of international law. Chapter XV specifically deals with human rights as customary international law. See also Oscar Schachter, *International Law in Theory and Practice* (Brill Academic Publishers 1991) 85.

[44] Peter Jones, 'Human Rights and Diverse Cultures: Continuity of Discontinuity?' in Simon Caney and Peter Jones (eds), *Human Rights and Global Diversity* (Frank Cass Publishers 2001) 27.

[45] See Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 41.

[46] Francois Gianviti, 'Economic, Social and Cultural Human Rights and the International Monetary Fund' in *Non-State Actors and Human Rights* (OUP 2005) 113, 121.

[47] Frans Viljoen, *International Human Rights Law in Africa* (2012) 7, citing Makau Wa Mutua 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42 Harvard Journal of International Law 201.

[48] See Rene Provost and Colleen Sheppard, *Dialogues on Human Rights and Legal Pluralism* (Springer 2013) 39; and Christine Schwobel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011) 118.

[49] Carlos Fuentes, Rene Provost and Samuel Walker, 'Universal Human Rights and the Fragmentation of International Law' (2012) Social Science Research Network 2.

[50] John Humphrey, author of the original draft of the UDHR, has recounted the debate that took place in the UN General Assembly in 1948 as "something of a miracle" given that the political atmosphere in which the committee had to work was charged to the point of explosion by the Cold War with irrelevant recriminations coming from

And that compromise is reflected in the fact that shortly after the UDHR's adoption, regional human rights systems began to develop, partly from the desire to impute specific demands of local culture on otherwise universal norms.[51] Significant parts of the UDHR borne out of political compromise were left deliberately ambiguous, foreshadowing future claims of relativism.[52]

The regions of Africa, Europe, the Americas and Arabia have adopted regional human rights conventions which complement and reinforce universal human rights conventions.[53] Regional human rights systems were created in the effort to strengthen the respect for human rights.[54] Beginning with the adoption of the European Convention on Human Rights and Fundamental Freedoms in 1950[55], the trend to elaborate regional standards continued with the adoption of the American Declaration of Human Rights (1948) and the American Convention on Human Rights in 1969[56], which was subsequently followed by the African Charter on Human and Peoples Rights, adopted in 1983.[57] Various other regional treaties have been elaborated in an effort to render the protection of not only civil and political rights, but also of economic, social and cultural rights more efficient. It is well settled that regional human rights treaties are a valuable addition to global human rights treaties, precisely because they echo cultural pluralism among regions and states.[58]

A review of the drafting history of the regional human rights regimes in Europe, the Americas and Africa reveals that each regime acknowledged the transcendent principles enshrined in the UDHR and other fundamental treaties, but nevertheless sought to infuse their systems with local and specific understandings of human rights.[59]

There are different approaches to human rights emanating at the regional level which contribute significantly to the fragmentation of international law. The regional human rights charters have expressed concepts of human rights in a way that is owned by each specific region. This paper will show examples of how various regional human rights documents differ as to the understanding of human rights and fundamental freedoms.

While regional human rights treaties may mirror the global ones to a certain extent, they also reflect the specific historical and cultural particularities of each region, as well as different religious backgrounds.[60] Regional human rights treaties may therefore include norms that are not, or are differently formulated in the universal treaties.[61]

---

both sides. The Eastern bloc suspected that the UDHR was a Trojan Horse for Western individualism and market capitalism, and delegates argued over everything including the philosophical underpinnings of human rights. See John Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers, 1984) 64.

[51] Fuentes, Provost and Walker (n 49) 2.

[52] Ibid at 4, also citing Alfredsson Gudmundur and Eide Asbjorn, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International 1999) 14.

[53] Dugard (n 32) 341

[54] Martin Janku, 'Universal and Regional Conventions for Human Rights: Co-Existence and/or Confrontation' in Dyn Prava, *Days of Law* (2010) 2 <http://www.law.muni.cz/content/cs/proceedings/> accessed 13 March 2015.

[55] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

[56] American Convention on Human Rights (Pact of San Jose, Costa Rica), adopted on 22 November 1969, entered into force on 18 July 1978.

[57] African (Banjul) Charter on Human and Peoples Rights, adopted on 27 June 1981, entered into force on 21 October 1986.

[58]Yvonne Donders, 'Human Rights: Eye for Cultural Diversity' Inaugural Lecture (2012) 13, available at <http://dare.uva.nl/en/record/431916> accessed 20 March 2015.

[59] Fuentes, Provost and Walker (n 49) 7.

[60] Frans Viljoen (n 47) 7. See also the Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 (12 July 1993) [5].

[61] Donders (n 58) 14.

The level of protection of rights within regions varies according to political, religious, moral and cultural traditions and concepts that underlie the philosophy of the individual documents.[62] These variations also have a bearing on compliance.

The UDHR recognizes the reality that regional approaches to human rights exist. As it proclaims universality, the UDHR also acknowledges that rights must be understood in the context of national and regional peculiarities as well as in the light of the various cultural and religious backgrounds.[63] This shows that the consideration for regional diversity has always been part of the human rights discourse. In this regard, Viljoen states that "the principle of universality of human rights does not mean global uniformity"[64].

The underlying diversity of nations and the tendency towards greater regionalism in human rights potentially places universal values at risk. This state of affairs raises significant tensions for international law and may even call in question international human rights law's claim to "universality".[65] Different challenges to the universality of human rights arise in each of the regional arrangements because of differing understandings, cultures, and even economic factors.

The independent development of regional regimes is in itself reflective of the fractured emergence of human rights. It is interesting to recall that the UN General Assembly explicitly encouraged the creation of regional human rights regimes in 1977,[66] thus making a direct contribution to the formal fragmentation of IHRL. The analysis that follows below demonstrates several factors that have the potential to significantly reduce the impact of universal human rights norms or conventions, as well as factors which enable states to selectively choose the norms by which they are bound.

A regional understanding of human rights

There has been a steady development of regional human rights systems since the adoption of the UDHR. Numerous regional instruments have been adopted to address concerns of particular importance in the regional context. The three major world regions that have established comprehensive regional human rights systems are the Americas, Africa, and Europe.[67]

The Arab human rights protection mechanism has been regarded as not constituting a proper regional mechanism in the strict sense because the countries concerned are geographically located in both Africa and Asia. The system is established on the underlying principles of the distinctive nature, heritage, and unity of the Arab nation, strongly linked to Islam as its dominant religion.[68] Even though the adoption of the Arab Charter of Human Rights in 2004 and the establishment of the Arab Committee of Human Rights in 2009 are important steps

---

[62] Janku (n 54) 2.
[63] See article 2, article 22, and article 27 thereof.
[64] Viljoen (n 47) 8.
[65] James Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission' (2012) <www.un.org/law/books/IntlLawOnEveOf21stCentury.pdf> accessed 20 March 2012.
[66] The General Assembly passed a resolution entitled 'Regional Arrangements for the Promotion and Protection of Human Rights' UN Doc. A/RES/32/127, (1977). In terms of this resolution the UN invited "States in areas where regional arrangements in the field of human rights do not yet exist to consider concluding agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights".
[67] This includes the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1969 American Convention on Human Rights, and the 1981 African Charter on Human and People's Rights.
[68] European Parliament Directorate-General for External Policies "The Role of Regional Human Rights Mechanisms" (2010) 5 <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> accessed 2 March 2015.

towards the comprehensive protection and promotion of human rights in the region, these developments have to be assessed with caution. The Arab Charter is in some parts inconsistent with international human rights standards,[69] a step back for human rights protection, and it is doubtful whether the members of the Arab Committee on Human Rights are sufficiently independent to address human rights issues effectively.

The Asia-Pacific region is the last UN defined region without a comprehensive regional human rights mechanism. Cultural and political diversity, together with a lack of political will, are the main factors that explain why no human rights mechanisms have really flourished in this region. For the above reasons, therefore, references are made to these two regions (Arabia and Asia-Pacific) only in a limited sense.[70]

There is a significant development according to which regional human rights instruments have expressed a regional understanding to rights embodied in similar works of universal instruments. The African Charter on Human and People's Rights, for example, reflects the unique human rights situation in Africa which has emanated from African history, tradition, values, and the eradication of colonialism.[71] This document is exceptional to other international instruments as it sets out rights of peoples and a catalogue of duties for the individual or groups to the state as well as duties for the state. At the universal level, civil and political rights and social, cultural, and economic rights are contained in two separate covenants, while the African Charter incorporates both generations of human rights.[72] These categories of rights which are unique to the African region are a departure from the universal conception of human rights since they are region-specific (not of universal application).

The African Charter does not contain a special derogation clause allowing a state in emergency situations to suspend the rights in the Charter. Article 27(2) states that rights may only be limited by the rights of others for purposes of collective security, morality or common interest. The Charter also contains claw-back clauses which effectively limit the reach of some rights set out in the Charter.[73]

[69] Shortly after the Arab Charter had been ratified by the seventh member state of the LAS – which is needed for the Charter to enter into force – the UN High Commissioner for Human Rights Louise Arbour expressed her reservations concerning some inconsistencies of this document with international human rights standards. See <http://www.un.org/apps/news/story.asp?NewsID=25447#.UZn5eWFwtos> accessed 22 February 2015.

[70] These regions are studied only where relevant for the present inquiry, specifically in the cultural relativism analysis.

[71] See for example provisions relating to the preservation of African values and traditions in Chapter II of the African Charter (articles 27 to 29) which incorporates duties of the individual towards his family, towards society, towards the state and towards the international community.

[72] The first chapter of the African Charter deals with civil and political rights in articles 3 to 14, Socio-economic rights in articles 15-17, and peoples' rights in articles 19 to 24.

[73] For example, article 9 (2) of the African Charter provides that "every individual shall have the right to express and disseminate his opinions within the law". The phrase 'within the law' has presented some difficulty in the past in the sense that rights could be interpreted as being subject to municipal law. This problem has required the African Commission to ameliorate the effect of claw-back clauses in the Charter by interpreting them in a way that they should be understood to refer to international law, not municipal law. This was pronounced in the case of *Amnesty International v Zambia* (2000) 7 IHRR 286, and the case of *Media Rights Agenda and Constitutional Rights Project v Nigeria* (2000) 7 IHRR 265.

Further examples of provisions that make the African Charter unique are provisions relating to the equality of men and women (also enshrined in the UN Charter,[74] the UDHR,[75] and CEDAW[76]). Similar provisions in the African Charter are combined with a referral to the protection of "the family" or the traditional values of the family.[77] Such clauses are a door through which differing regional and cultural values creep into the international human rights system. The African Charter provides for collective rights for peoples, rights to development and to peace and security.[78] It emphasizes the enjoyment of group rights as opposed to individual rights, hence reflecting the cultural aspect of the African people who view themselves as a society, as opposed to individuals. The combination of specific values of African cultures and universal human rights standards has resulted in some distinctive features which set apart the African human rights perception.

In the Inter-American human rights system, it is interesting to note that the American Declaration of the Rights and Duties of Man[79] provides for exceptional or unique duties of the individual such as the duty of every person to acquire at least an elementary education,[80] the duty to vote,[81] and the mitigated duty to work.[82] When we compare the catalogue of duties in the African Charter, we can see the regional variance of ideals or priorities. The American Convention on Human Rights has adopted an evolutionary approach to the development of economic, social, educational, scientific and cultural standards.[83]

Within regions, there are also treaties adopted on issues of specific relevance to a particular region. These include for example, the American Convention on Violence against Women,[84] the American Convention on Forced Disappearance of Persons,[85] the Protocol to the African Charter on the Rights of Women in Africa,[86] and the Council of Europe Framework Convention for the Protection of National Minorities.[87]

These are just preliminary examples which show that regional peculiarities give rise to international norms and practices that may deviate from the general international law catalogue of rights. Regional human rights conventions have expressed concepts of human rights reflecting the shared ideals of states within each region.

---

[74] Among the purposes of the UN declared in article 1 of its Charter is "To achieve international co-operation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." See article 1 of the UN Charter.

[75] The UDHR reaffirms that "All human beings are born free and equal in dignity and rights" and that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion … birth or other status."

[76] The Convention on the Elimination of All Forms of Discrimination against Women, 1979.

[77] See generally Chapter 2 of the African Charter on Human and Peoples Rights.

[78] See articles 19 to 24 of the African Charter on Human and Peoples Rights.

[79] American Declaration on the Rights and Duties of Man 30 April 1948 (hereafter the American Declaration).

[80] Article 31 of the American Declaration.

[81] Article 32 of the American Declaration.

[82] Article 37 of the American Declaration.

[83] See article 26 of the American Convention on Human Rights, 1969.

[84] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted on 9 June 1994, entered into force on 5 March 1995.

[85] The Inter-American Convention on Forced Disappearance of Persons, 1994.

[86] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo (September 13, 2000), entered into force on 25 November 2005.

[87] Council of Europe Framework Convention for the Protection of National Minorities (1 February 1995) entered into force 1 February 1998. See also the European Charter on Regional and Minority Languages, adopted 5 November 1992, entered into force 1 March 1998 <http://www.refworld.org/docid/3ae6b3b04.html> accessed 20 March 2015.

Cultural Relativism

Cultural relativism is a fundamental exception to the concept of universality of human rights. Cultural relativism is the assertion that human values are far from being universal, and thus vary a great deal according to different cultural perspectives. The term "culture" is often used in a broad and protracted context to include indigenous traditions, customary practices, political and religious ideologies.[88] Some members of the international community apply cultural relativism to the promotion, protection, interpretation and application of human rights. This means that human rights can be interpreted differently within different cultural, ethnic and religious traditions. According to this view, human rights are culturally relative rather than universal.[89]

Cultural relativists view universal rights as being insensitive to cultural differences and as instruments of oppression: Some Asian developing states for example refer to the human rights doctrine as a new form of Western Imperialism.[90] It is often argued that human rights should be more "culture relative" rather than universal.[91]

By disregarding their legal obligation to protect universal human rights, states advocating cultural relativism could raise their own cultural norms above general international law standards.[92] The relativists' position goes beyond the basic notion of diversity by arguing that "no transcultural ideas of right can be agreed on, and hence no culture or state is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly within it".[93] This is how cultural relativism negates international human rights law's claim to universality. Culture and religion can be used as a justification for harmful practices that violate or limit the enjoyment of rights.[94]

The universality of human rights can be challenged by cultural relativists on three differing premises. The first premise is the substance of the list of human rights to be protected. The theory of cultural relativism holds that different societies have different perceptions of right and wrong, so human rights substances should also be different.[95] The second premise, where cultural differences may challenge the universality of the human rights doctrine, is the interpretation of specific rights. According to cultural relativists, interpretation of human rights is also relevant with regard to cultural perspectives.[96] Thirdly, there may be differences of "form" or procedure in how human rights are implemented in different cultures.[97]

In the Arab and Asia-Pacific regions we have seen a strong resistance to the United Nations concepts of human rights, and this resistance has been based heavily upon culture. In this regard, Ignatieff points out that "the cultural provocation to the universality of human rights arises from three distinct sources: from resurgent Islam, from East Asia, and from within the West itself".[98]

---

[88] Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2013) 531.
[89] Dianah Ayton-Shenker, 'Challenge of Human Rights and Cultural Diversity' (1995) United Nations Background Note published by the United Nations Department of Public Information DPI/1627/HR-March, 2.
[90] Hossain Shanawez, 'Human Security in Asia: By Universal Human Right or Cultural Relativism' (2007) 8 <http://humansecurityconf.polsci.chula.ac.th/Documents/Presentations/Shanawez.pd> accessed 10 April 2015.
[91] Ibid.
[92] Ayton-Shenker (n 89) 3.
[93] Alston and Goodman (n 88) 532.
[94] Donders (n 58) 22.
[95] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' in Jack Donnely (ed), *Universal Human Rights in Theory and Practice* (Cornell University Press 1989) 109.
[96] Lukman Harees, *The Mirage of Dignity on the Highways of Human Progress: The Bystanders' Perspective* (Author House 2012) 195.
[97] ibid.
[98] Michael Ignatieff, 'The Attack on Human Rights' (2001) 80 (6) Foreign Affairs 29.

Some scholars have advanced arguments rejecting the relativist position. Higgins suggests that cultural relativism is "advanced mostly by states, and by liberal scholars anxious not to impose the Western way of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standard".[99] This statement is of some value to the relativist position as it concedes or reveals that human rights are western cultural products.

Manifestations of cultural relativism are most glaring when we examine the practice of states making reservations to human rights treaties. For instance, when Libya acceded to the CEDAW, it attached the following reservation:

> "The accession is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Sharia".[100]

This is a typical example of the common practice of states within the human rights-resistant regions. Their underlying arguments remain unsettled.

Islamic challenges to the universality of human rights have a long history. For example, Saudi Arabia's objection to article 16 of the UDHR relating to free marriage choice is an example of an unsettled matter to date. Some scholars from Islamic countries argue that the human rights discourse is not universal but a product of the European Enlightenment and its particular cultural development.[101] In fact, Saudi Arabia ended up abstaining from the vote for passing the UDHR in 1948, raising objection to the rights of persons to change their religion. This was because the right contradicted the Koran. Saudi Arabia claimed that the UDHR reflected Western culture and was "at variance with patterns of culture of Eastern States".[102] These facts show how relativism brings about exceptions to universalism. It may be argued from this example that the freedoms articulated in the UDHR are difficult to reconcile with the theocratic basis of Islamic thought.[103]

The intersection of human rights, culture and religion in respect of women's rights is an important debate in the universalism versus regionalism debate. Differences in world cultures and religions leave room for practices that may lead to the discrimination of women. Such practices include for example the issue of polygamy, and issues of inheritance or property rights. The CEDAW clearly states that it is important for the human rights corpus to eliminate the biases between men and women by modifying the social and cultural patterns of men and women.[104] For example there is a huge disparity between Muslim women and other women who proclaim other faiths in respect to equal rights. Sharia law is problematic because Islamic jurisprudence does not accord rights to individuals. Many rights are given in accordance to the specification based on gender and faith that leads to inconsistencies between the standards of human rights law.[105] This is problematic since some states give preference to religion and use it as a yardstick for any other laws. An example is article 21 of the Iran Constitution, which enacts that the government shall ensure the rights of women in conformity with Islamic laws.[106] The difficulty here is how to reconcile Islamic law with universal standards, and in attempting

---

[99] Rosalyn Higgins, *Problems and Processes* (OUP1994) 96.

[100] Konstantin Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) 13 European Journal of International Law 437.

[101] See, Mashood Baderin, *International Human Rights and Islamic Law* (OUP 2003) 9.

[102] Ann Mayer, *Islam and Human Rights: Tradition and Politics* (Westview Press 1999) 10-11.

[103] Millica Subotic, *Cultural Relativism for Universality of Human Rights: The Case of Reservations to Human Rights Treaties* (University of Bologna 2005) 6.

[104] Article 5 of the Convention on the Elimination of All forms of Discrimination Against Women.

[105] Abdullahi An-Na'im, *Islam and Human Rights* (Ashgate 2010) 22.

[106] The Constitution of Iran, 1979 (amended) <http://en.wikipedia.org/wiki/Constitution_of_the_Islamic_Republic_of_Iran> accessed 21 May 2015.

to achieve this reconciliation we are faced with the preliminary question: how can Islamic states address the issue of reconciliation without losing their cultural and religious heritage?

Many Asian societies reject outright the globalization of human rights. They claim that Asia has a unique set of Asian values which provide the basis for Asia`s different understanding of human rights, and justify the "exceptional" handling of rights by Asian governments.[107] As the concepts of human rights emerge in this region, the true universality of the concepts represented by the UN-Covenants has been contested in some aspects. In the 1990s, for example, some representatives of the Asian countries argued that Asian values were significantly different from Western values and included a sense of loyalty and forgoing personal freedoms for the sake of social stability and prosperity.[108]

There have been many other attempts to temper the content of "universal" rights with the specific cultural experiences of various societies. In the case of Africa, this desire has led to calls for a regime of human rights founded on the basic universal human rights standards, but also enriched by the African cultural experience.[109] The challenge, therefore, is how to achieve a balance of values. Each of the legal questions raised at regional level may be independent of each other, but when considered together, they raise important questions about the legitimacy of universal human rights.

Notwithstanding the views based upon the above cultural considerations, it remains that everyone is entitled to human rights without discrimination of any kind. The non-discrimination principle is a fundamental rule of international law. It means that human rights are for all human beings, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The principle of non-discrimination protects individuals and groups against the denial and violation of their human rights. To deny human rights on the grounds of cultural distinction is discriminatory. Human rights are intended for everyone, in every culture. Human rights are the birth right of every person. The denial or abuse of human rights is wrong, regardless of the violator's culture[110] or religious belief.

Reservations to Human Rights Treaties

The practice of reservations to human rights treaties is a notable development within regional arrangements. In terms of this practice there comes about a regionalization of human rights norms by way of reservations to treaties. This practice comes about as a consequence of different conceptions of human rights and cultural relativism. According to Lijnzad, reservations to human rights treaties are a relatively new problem in international law.[111]

States make reservations to human rights treaties for a variety of reasons, such as domestic law compulsions, cultural constraints, and ideological dissent. In classic international law, a reservation made subsequent to the conclusion of a treaty required the unanimous acceptance of all other parties to the treaty, unless the treaty itself provided differently. On this basis, a reservation constituted a counter-offer that required a new acceptance, failing which the state

[107] Xiaorong Li, 'Asian Values and the Universality of Human Rights' (1999) 102 Business and Society Review 81, 87.
[108] Olvia Ball Paul Gready, *The No-nonsense Guide to Human Rights* (New Internationalist Publications 2007) 34.
[109] See Bonny Iblawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of human Rights in the African State' (2000) 22 Human Rights Quarterly 1.
[110] Ayton-Shenker (n 89) 5.
[111] Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995) 16.

making the counter-offer would not become party to the treaty.[112] The position in modern international law has changed. The change has been caused by the move towards advancing the importance of widespread participation in human rights treaties.

The current position creates a flexible system whereby consent of all contracting states to reservations is not considered essential.[113] The departure from the unanimity rule was enunciated by the ICJ in an advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[114] In this case, several states had entered reservations to article 9 of the Genocide Convention.[115] This was a provision empowering the ICJ to consider disputes arising out of the Convention. The states entering the reservations claimed that they might make such reservations in the exercise of their sovereignty. The Court held that "a state which has made and maintained a reservation which has been objected to by one or more of the parties to the convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention".[116] The ICJ ruled that the object and purpose of the Convention limits the freedom of making reservation and that of objecting to them.

This rule was subsequently codified in the Vienna Convention on the Law of Treaties (VCLT) along with other legal principles concerning the effect of reservations. The VCLT has established the regime dealing with reservations to treaties under international law. A reservation is defined in article 2 (1) of the VCLT as follows:

> "Reservation means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization".[117]

Reservations to human rights treaties reflect an unwillingness to give up certain cultural beliefs, or non-support of particular international human rights obligations. Reservations allow a country to become a state party to an international treaty in a qualified and contingent manner, exempting itself from certain obligations with which state parties are normally expected to comply. A state may, for example, find a particular provision incompatible with certain cultural, religious or historical specificities or rules that are applicable in that state. Such cultural reservations reflect cultural differences between and within states that the state party intends to keep.[118] Shaw explains reservations in a more understandable way:

> "Where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement. By the device of excluding certain provisions, states may agree to be bound by a treaty which otherwise they might reject entirely".[119]

---

[112] Subotic (n 104) 7.
[113] ibid 2.
[114] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide 1951 ICJ Reports 51.
[115] See Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 UNTS 277.
[116] 1951 ICJ Reports 15 at 29.
[117] Article 2 of the Vienna Convention on the Law of Treaties between States and International Organizations 1969.
[118] Donders (n 58) 10.
[119] Shaw (n 18) 914.

In view of the importance attached to cultural relativism and state sovereignty, reservations to the provisions of a treaty are seen as an effective tool to encourage states to submit to the terms of a treaty. Goodman explains this factor by stating that:

> "Reservations are essential to obtaining the universal ratification of treaties ... Without the ability to enter a reservation, many states would be unwilling to assent to all terms of a particular treaty and thus would never submit to ratification".[120]

Article 19 of the VCLT states the general liberty to formulate a reservation which is subject to three exceptions, namely: "(a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".[121]

The flexible regulation of reservations under the VCLT has undoubtedly led to more states becoming parties to multilateral treaties, hence furthering the quest for universalism.[122] But the flexibility of the VCLT regime on reservations sacrifices the integrity of human rights treaties. This, according to Dugard, is because in this field states enter a wide range of reservations, some of which are difficult to reconcile with the object and purpose of the treaty. For example, when the United States ratified the ICCPR, it entered a reservation to article 6(5) which prohibits the imposition of the death sentence for crimes committed by persons below eighteen years of age. The reservation stated that:

> "the United States reserve the right, subject to its Constitutional constraints, to impose capital punishment to any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age".[123]

This presents problems especially to human rights monitoring bodies. The European Court of Human Rights faced the question of "object and purpose" when determining the effects of reservations to the ECHR in the cases of *Lozidou v Turkey*[124] and the case of *Belilos v Switzerland*.[125] The European Court rejected reservations that it considered to be incompatible with the object and purpose of the European Convention on Human Rights by effectively eliminating the reservation from the state's accession, thereby holding the state bound by the treaty without the offensive reservation.[126]

Reservations to human rights treaties have become controversial because it is believed that they undermine the universal legitimacy of human rights law.[127] There is a controversy regarding reservations to human rights treaties, especially those based on cultural arguments particularly in relation to article 19(c) on the "object and purpose". The object and purpose are not easy to define, which makes it difficult to assess whether certain cultural reservations are compatible or not. In the ICCPR, for instance, there are consistent patterns of reservations made by Arab states relating for example to the civil status of women in Arab countries.[128]

---

[120] Ryan Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96 (3) The American Journal of International Law 531, 537.
[121] See article 19 of the Vienna Convention on the Law of Treaties.
[122] Dugard (n 32) 429.
[123] See (1995) 89 *AJIL* 109.
[124] *Lozidou v Turkey* ECHR Series A, vol. 310 (1995).
[125] *Belilos v Switzerrland* ECHR Series A, vol. 132 (1988).
[126] Dugard (n 32) 420.
[127] Ahmed Ali Sawad, 'Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations' (DPhil Thesis, University of Otago 2008) 2.
[128] See the United Nations Treaty Collection: *United Nations Treaty Series* vol. 999 at 171; and vol. 1057 at 407.

There are examples which show that state parties to human rights treaties may make reservations to certain provisions with reference to their specific cultural or religious background, such as the types of reservations that have been made to the Convention on the Rights of the Child (CRC).[129] This Convention is ratified by 193 states, and has the most reservations. The ratification statistics are encouraging in terms of universality as they indicate that it is possible to elaborate legal binding norms on which there is general consensus and which have been accepted by the wider international community.[130] However, the state of Djibouti ratified the CRC and submitted the following reservation:

> "The Government of Djibouti shall not consider itself bound by any provision or articles that are incompatible with its religion and traditional values".[131]

Saudi Arabia also entered a reservation to the CRC "with respect to all such articles as are in conflict with the provisions of Islamic law".[132] By making these reservations, these states considered themselves only bound by the CRC insofar as its provisions do not conflict with their religion or Islamic law. This kind of general reservation has a very broad scope, and is identical to reservations made to the CRC by other Islamic states including Iran, the Syrian Arab Republic, Mauritania, Qatar, Oman and Brunei Darussalam.[133] The problem is that these states have not specified the religious aspects or traditional values that may be incompatible with the CRC.[134] The supervisory body of the CRC, the Committee on the Rights of the Child, considers such general and broad reservations to be contrary to the object and purpose of the CRC, and successfully urged Djibouti and Qatar to withdraw their general reservation in 2009.[135]

The examples above illustrate that reservations have the potential to significantly reduce the impact of human rights treaties because they enable member states to effectively pick out the norms by which they are bound. The furtherance of this practice of reservations to human rights treaties is a problem because it allows states to formally ratify treaties without ever making a genuine commitment to its terms.

Reservations are inherently contradictory and may constitute an opposition to the aims of IHRL. Even though their existence may facilitate the ratification of treaties by a large numbers of states, their operation results in an intractable obstacle to truly universal human rights. One major difficulty that must be overcome is how to accommodate respect for cultural differences and state sovereignty[136] while still ensuring that states accede to international human rights treaties. In attempting to bridge the gap between these competing premises, reservations may be seen as "a necessary evil".[137] Ratification through reservations, however, comes at the

---

[129] Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3.

[130] International Law Association *Report on the Treaty System* (1996) 1 <http://www.bayefsky.com/reform/ila.php/pfriendly/1> accessed 30 March 2015.

[131] The text of the reservations <http://www.treaties.un.org> accessed 20 February 2015.

[132] Chapter IV (11) Status of Multilateral Treaties Deposited with the Secretary General, *United Nations Treaty Collection* <http://untreaty.un.org> accessed 21 April 2015.

[133] See the United Nations Website <http://www.un.org> accessed 13 March 2015.

[134] Donders (n 58) 11.

[135] See Committee on the Rights of the Child, Concluding Observations Djibouti, 7 October 2008, UN Doc CRC/C/DJI/CO/2, par. 8-9; and on the Rights of the Child, Concluding Observations Qatar, 14 October 2009, UN Doc CRC/C/QAT/CO/2, par. 9-10 <*www2.ohchr.org/english/bodies/crc/docs/.../CRC.C.DJI.CO.2.pdf*> accessed 23 March 2015.

[136] The principle of State Sovereignty is the foundation of reservations. It is a basic principle of international law that a state cannot be held to account for anything it has not expressly accepted.

[137] Susan Marks, 'Three Regional Human Rights Treaties and Their Experience of Reservations' In Gardiner (ed), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (British Institute of International and Comparative Law, 1997) 35. See also the OHCHR General

expense of universal human rights protection and promotion. It is thus fair to conclude that the issue of reservations to multilateral human rights treaties has been (and continues to be) a controversial subject of contemporary international law.

According to Nuenmeyer[138], reservations are a legitimate, perhaps even desirable, means of accounting for cultural, religious, or political value diversity across nations. This is because of the universal character of human rights, which is seen as being undermined if countries can opt out of their obligations. The widespread use of reservations which exempt state parties from (almost) any obligation is regarded as devaluing and undermining the entire project of codifying human rights norms in international treaties.[139]

Multilateral international treaties are the results of a crucial need to regulate the relations between states, provide stability on their relations as well as setting minimum standards. In this context it can be said that treaties may lose their effectiveness if states are unwilling to enforce them, in other words, if they make reservations to exclude or to modify the legal effect of certain provisions of the treaty.[140]

Reservations significantly destabilize the fundamental principles of universalism in human rights. This is because "a legally binding statement which has the effect of exonerating a state from liability under a particular part of a treaty"[141] has significant implications for the integrity of international human rights treaty norms. Therefore, the legal effect of a reservation severely impairs or diminishes the scope of protection intended by the treaty.[142] When each state is free to effectively determine its own human rights treaty through the entering of reservations, it means that they will be bound by unique, rather than universal treaty obligations. In support of these submissions, Cameron and Horn argue that:

> "The rights guaranteed … should be seen as a unity, thus a significant reservation to one article weakens not simply that right but the totality of rights enjoyed by individuals in the reserving state".[143]

Reservations may appear to be facilitating universal ratification of UN treaties, but universal ratification does not mean universal acceptance especially when states are effectively allowed to pick and choose what standards they are willing to adhere to. Reservations frustrate the attempt of the international community to establish a universally accepted human rights regime, and they enable states to escape accountability for human rights violations.[144] That is how reservations may contribute to the fragmentation of international human rights law, and may act as an opposition to the aim of international human rights law.

Comment No. 24 on Issues Relating to Reservations made upon Ratification or Accession to the CCPR: *CCPR/C/21/Rev.1/Add.6*, par 4.

[138] Eric Nuenmeyer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36 (2) Journal of Legal Studies 397-430.

[139] ibid 400.

[140] Shaw (n 18) 915.

[141] This definition of "reservation" is offered by Rhona Smith, *Textbook on International Human Rights* (OUP 2005) 176.

[142] Konstantin Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) European Journal of International Law 437, 448.

[143] Iain Cameron and Frank Horn, 'Reservations to the European Convention on Human Rights: The *Belilos* Case' (1990) German Yearbook of International Law 69, 98.

[144] Anel Ferreira-Snyman, 'The Erosion of State Sovereignty in Public International Law: Towards a World Law' (LLD Thesis, University of Johannesburg 2009) 192.

CONCLUSION AND RECOMMENDATIONS

The rise of regionalism has indeed caused the fragmentation of IHRL. Regional human rights systems complement and reinforce the UN human rights system. But owing to region-specific historical and cultural context of each region, regional human rights conventions reflect a different understanding of the concept of rights. Thus, regional systems are established on the underlying principles of the distinctive nature, heritage, history, tradition, cultural values, and ideals of each region. Human rights treaties may lose their effectiveness if states are unwilling to enforce them: that is, if they make reservations to exclude or to modify the legal effect of certain provisions of the treaty.[145] What becomes clear from this study is that the universal human rights doctrine does not have to be abandoned on the grounds of cultural and religious relativism. At the same time, human rights regionalism should not be negated, but should instead be studied carefully to find ways of building bridges between differences among civilisations.

The analysis in this paper begs the question as to whether it is desirable, or even possible, that the universal human rights regime be unfragmented. It is submitted that the regionalization of human rights norms is both desirable and essential not only for the advancement of human rights, but also for the effective protection and realization of human rights worldwide. It must be accepted that all norms represent value choices which will not necessarily be embraced by all. By making use of the strengths of both universal and regional approaches, the possibility of creating a system of protection able to identify and respond to the crucial human rights issues at hand appears much stronger. It is therefore important to find a balance between the need for unity under international law and the diverse world in which we live.

This part suggests ways to bridge the gap between universalism and relativism. The ultimate goal of the recommendation that follows is to properly integrate universal values into states that embrace values that are inconsistent with the generally accepted universal catalogue of human rights. The goal is also to enrich universal human rights standards with some unique regional human rights values.

I suggest an approach that transcends the primacy debate between universalism and relativism. That approach is legal pluralism. According to this approach universalism and relativity are not viewed as adversaries. Instead, this approach takes a path of *conciliation* that leads towards a new kind of universalism that recognizes and incorporates the varying regional approaches to the body of international human rights law. Instead of repressing regional variations to human rights, the proper course of action is to make reforms to the effect that the two sets of laws coexist without tension.

How can this be achieved? Education on universal human rights can equip delinquent states (and their actors) with the necessary knowledge to interpret their own human rights norms in a compatible manner. Divergent laws such as the Islamic Sharia law must go through a process of adaptation and modification to conform with universal human rights values. To this end, criminal acts based on religious belief and other religiously based conduct that violates human rights must be proscribed by all national laws. Through informed interpretations of rights, national courts can integrate international human rights standards into national legislation without totally compromising the cultural or religious integrity of their peoples. In this process, states will formulate their own versions of human rights, that is, what constitutes human rights for them. National and regional human rights values can then be presented at the UN General Assembly. The gathering of nations can commence a new dialogue, the purpose of which will be to assemble *a new or improved universal catalogue of human rights* that will reflect a margin of appreciation or acceptable levels difference based on the diversity of cultures and religions.

[145] Shaw (n 18) 915.

This is what the international community would have agreed or confirmed as being universal (shared or common) values. This is a process or an approach that will ultimately endow IHRL with cross-cultural legitimacy, as would come from the body of the international community as a whole. The UN Conventions can then be reformed to accommodate human rights norms or values emanating from all regions and states. In this way, harmony could be achieved, as regional human rights norms will complement the aspirations of the UN.

Applying this approach will diminish the current "artificial uniformity"[146] and ensure reciprocity, meaning that future international human rights law will be more tolerant to human beings whose identities are based on their cultural, religious and historical backgrounds. The end result of this legal pluralism approach will be an inherently fragmented but *truly universal* international human rights regime. By providing a platform for a dialogue about conceptions of a just society, the UN can ensure that IHRL claims universality. The supremacy of international law will be sustainable only when the global community develops a common set of values.[147] It must be accepted that fragmentation is an "irreversible"[148] but manageable feature of international law. The central argument advocate here is that of *unity in diversity*: it is through a properly managed fragmentation that international human rights law can aspire to universalism.

[146] It can be recalled that during the time of adoption of the UDHR there were ideological differences between the East and the West as to what the catalogue of human rights should be. The ultimate adoption of the UDHR (which has inspired most subsequent human rights treaties) was a discordant compromise. See John Peters Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers, 1984) 64.

[147] Peter Spiro, 'Treaties, International Law and Constitutional Rights' (2003) 55 Stanford Law Review 1999, 2027.

[148] Jonathan Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1996) 90 American Journal of International Law 69.

DEATH PENALTY: IS IT EVER JUSTIFIED?

Apala Chaturvedi & Shanu Jain[1]

ABSTRACT:

This article seeks to examine and formulate the terms of our capital punishment dialogue by approaching death penalty jurisprudence as a problem which not only raises questions of law but also of morality, fairness and rights of the individual *vis-a-vis* rights of the state. The questions raised in various jurisprudential theories of punishment, i.e., retribution theory, deterrence theory, restorative justice theory have all been examined in detail to answer the question: Is death penalty ever justified*?*

The moral standpoint, the political approach and the causes that lead to such crimes that deserve death penalty are significant issues that need to be answered before we can determine our stance on the death penalty debate.

H.L.A. Hart asked, "What is the weight and character of the evidence that the death penalty is required for the protection of society?"[2] This question, in authors' opinion, is the most salient one in any discussion of the utility of capital punishment. From the very genesis of the imposition of death penalty to the stand of various countries on the lines of abolition or retention of death penalty and the provisions in the various international treaties and conventions and more specifically, the safeguards for checking arbitrariness in the Indian law have been analyzed to draw a conclusion that might provide a plausible answer on the death penalty debate.

Key words – Death penalty, judiciary.

INTRODUCTION:

There is a heightened need for fairness in the administration of death. This unique level of fairness is born out of the appreciation that death truly is different from all other forms of punishment, a society afflicts on its citizens.

Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism.[3]

There have been several ongoing debates not only in this country but on an international forum as to whether the state has a right to put an end to an individual's life *vis-à-vis* punishing the particular individual for the crime he has committed. The quotes stated as below bear testimony to this sentiment:

The struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century.[4] This has been the case with almost all countries in recent times where humanity and morality have become subjects of utmost importance.

---

[1] BBA LLB, 4th year, Symbiosis Law School, Pune

[2] H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 2008).

[3]Krishna Iyer, 'Death Sentence on Death Sentence' (1978) JBAI 37, 28

[4] Gregg v Georgia, 428 U.S. 153

HISTORICAL BACKGROUND:

The time when this concept was first used as a deterrent dates back to as back as Eighteenth Century B.C. in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes, it faced its share of criticism as early as the 1760's where the abolitionist movement started and further gained momentum during the 19th century. The first recorded execution in the British American Colonies was for Treason where in the Jamestown colony of Virginia in 1608, Captain George Kendall was hanged. Other serious capital crimes in colonial times were murder, rape, heresy and witchcraft.

Abolitionist Movement in Brief

The modern movement to abolish the death penalty has its roots in the liberal utilitarian and humanistic ideas spawned by the enlightenment in Europe at the end of the 18th century. Later it was William Penn[5] who limited the crimes punishable by death to only premeditated murder and treason.

In the latter half of the 17th century when Cesare Beccaria *(*Italian jurist, philosopher and politician best known for his treatise *On Crimes and Punishments* (1764), which condemned torture and the death penalty, and was a founding work in the field of penology and the Classical School of criminology), who is considered to be the founder of the modern abolition movement, wrote and published a series of articles on Crimes and Punishments, one result of which was the abolition of the death penalty in Austria and Tuscany.

In the US, Dr. Benjamin Rush (one of the founding fathers of United States of America), a signatory to the Declaration of Independence, went against the notion that death penalty served as a deterrent. He was of the opinion that death penalty and criminal conduct have a positive relation, which ultimately has been proved in the latest statistical report of Amnesty International. In 1846, the American state of Michigan became the first jurisdiction in modern times to abolish capital punishment for murder.

Several others followed, and by the end of the first quarter of the 20th century several European countries- Portugal, San Marino, Netherlands, Norway, Sweden, as well as Italy, Romania, Austria, and Switzerland. Venezuela in 1863 was the first country to abolish capital punishment for all crimes, whether committed in peace time or wartime. By 1965, however, according to a report submitted to the United Nations on the worldwide status of Capital Punishment there were only 25 abolitionist states out of which 11 had completely abolished it. As time progressed, many positive changes were seen as more and more retentionist countries became abolitionist.

Then came the phase where several International treaties stressed on moral and human rights aspects of crimes. The International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations in 1966, in Section 6 affirmed that "every human being has the right to life" and that "no one shall be arbitrarily deprived of his life." This did not bar Capital Punishment; however it restricted the punishment of death penalty to "the most serious of crimes" under Article 6(2).[6] It was in 1971[7] and again in 1977[8] that the United Nations took the first step towards declaring abolition of Death Penalty as a universal goal when it called for 'the progressive restriction of the number of offences for which the death penalty might be imposed, with a view to its abolition.' In 1990 again the General Assembly of the Organization

[5]Jim Powell, *William Penn: America's First Great Champion for Liberty and Peace* (Quaker 2008) <http://www.quaker.org/wmpenn.html> accessed 10 October 2013

[6] International Covenant on Civil and Political Rights, 1966

[7] General Assembly Resolution, 2857

[8] General Assembly Resolution, 32/61

of American States adopted the protocol to the American Convention on Human Rights to abolish death penalty.

In such an atmosphere, the significance of the judgment of the European Court of Human Rights in 1989 in the case of Soering v. United Kingdom and Germany[9] cannot be overlooked**.** In this case the court prohibited the extradition of an offender charged with a capital offence to the state of Virginia on grounds that in facing death penalty he would suffer from the 'the death row phenomenon', which would amount to 'inhuman or degrading treatment or punishment', which is contrary to Article 3 of the European Convention on Human Rights. Since then, this has developed into a firm policy.

Death penalty in India has always been deeply embedded in the judicial system. It was incorporated in the Indian Penal Code since its very inception in 1860 and also in the Code of Criminal Procedure under Section 367. There has always been a strict opposition in India right from the days of British rule. Gaya Prasad Singh, member of Legislative Assembly introduced a bill in the Parliament in 1931, for abolishing Death Penalty, which got rejected.

However things have now improved with more and more human rights activists voicing their opinion against capital punishment. Since 1950 about 80 people have been executed as compared to 242 in Pakistan, 106+ in Thailand and 153+ in Algeria.[10] This marked improvement owes its genesis to *Bachan Singh vs. State Of Punjab*[11] where the 'rarest of the rare' case principle was evolved by the Supreme Court.

Since there is no statutory definition of what rarest of rare means it is left to the discretion of the judges in individual cases to decide whether the facts warrant the case to be put into the 'rarest of the rare' category.

According to the National Legal Research Desk[12], merely the death of the victim or murder charges does not qualify a case as rarest of the rare. The court takes into consideration both aggravating and mitigating circumstances, a line of thought that has developed over the years in various judicial pronouncements.

SCOPE OF DEATH PENALTY:

International Covenant on Civil and Political Rights are common law guidelines on the subject, Article 6(2) of which states that "sentence of death may only be imposed for the most serious crimes in accordance with the law in force at the time of commission of the crime".

"Most serious crimes" can be interpreted in different ways depending upon the social, cultural, religious and political contexts. Therefore, the Human Rights Committee, established under the ICCPR, has laid down under Article 6 the concept of 'most serious crimes' employed in the Covenant[13] must be read restrictively to mean that the death penalty should be quite an exceptional measure. Several attempts have been made to define more precisely what does constitute 'most serious crimes', usually by stating what should be excluded. E.g. stipulates that 'in no case shall capital punishment be inflicted for political offences or related common crimes'.[14]

Also the UN Commission on Human Rights at its 1999 session urged all states not to maintain death penalty for 'non-violent financial crimes, or non-violent religious practice or

[9] 161 Eur. Ct. H.R. (ser. A) 34 (1989)

[10]Amnesty International, 'Death Penalty statistics country by country' *The Guardian* (29 March 2011, UK)

[11]AIR 1980 SC 898

[12]Rajul Jain, 'Death penalty -"rarest of rarest"- Supreme Court in 2012' (nlrd, 2012) <http://nlrd.org/womens-rights-initiative/news-from-supreme-court/death-penalty-rarest-of-rare-supreme-court-in-2012> accessed 10 October 2014

[13]International Covenant on Civil and Political Rights, 1996

[14]American Convention on Human Rights, 1969

expression of conscience.' Later in 2002, the commission added 'sexual relations between consenting adults' to this list. Several other offences have been added to this list later such as evading military service several times (Iraq), abetting suicide and drug related offences (Sri-Lanka) etc. This is no doubt a step in the right direction, but at the same time it also cannot be denied that retention of vague phrases such as 'most serious crimes' or 'other extreme grave offences' has left this safeguard open to interpretation by a number of countries. The objective of this safeguard has been to lead retentionist countries along the path taken by many abolitionist states: namely to prescribe capital punishment only for the most serious offences of murder and culpable homicide.

Offences against State and Public Order:

At present, capital punishment is available in 77 of the 105 retentionist countries and in some of them it is limited to offences of waging or attempting to wage war against the state, but in many others it can be imposed for a wide range of actions which can be best described as 'political offences' which including treason, espionage, acts of terrorism or sabotage, attempting to illegally seize power etc. For e.g. Death penalty is mandatory for treason in Singapore.

With regards to offences against public order, there are minimum of 14 countries that have made the use of firearms as a capital offence or explosives, especially but not necessarily when its use results to death or hurt.

Trading in Illicit drugs:

Many countries, responding to the international concern of drug trafficking, have introduced death penalty death penalty for both importation and possession of drugs for consumption or sale. In 1985, according to a survey of the United Nations, in 1985 such offences were capital offences in 22 countries.[15] By the end of 1985, it increased to 34. In a few other countries, their statute specifically says that death penalty will apply only if trafficking results in death of others. E.g. Guatemala and Guyana.

In all of these countries, it has been argued that death penalty is a deterrent to trafficking, this however is without any statistical data to back it up. Nor is it likely that such evidence will be gathered.

Economic and Property Offences:

Economic crimes are a capital offences in at least 25 countries at present. They include offences like bribery, corruption of public officials, embezzlement of public funds or theft of public property etc. eg. Persons have been executed for offences of theft and embezzlement in North Korea.[16]

Death penalty is also available for offences against property with violence, in particular banditry and 'gangsterism' and robbery with violence.

Sexual Offences:

A minimum of 30 countries retain death penalty for sexual offences, mostly for rape. Also countries in the Middle East and North Africa have made adultery and sodomy capital offences. Cuba has made homosexual acts with violence a capital offence. Iran has made a variety of sexual crimes, capital offences: incest, sex between a Muslim and a non-Muslim, adultery, sodomy etc.

---

[15]Slawomir M. Redo, 'United Nations Position on Drugs Crimes' (1985) UNAFEI 27

[16]Clagmic Cairo, 'Democratic People's Republic of Korea: Public Executions: Converging Testimonies' 1997 ASA 24, 11

In the US however things took a sharp turn with the Supreme Court judgment in the case of Coker v Georgia[17] where it was observed by the court that capital punishment was a disproportionate and excessive punishment for the offence of rape. There was a lot of hue and cry regarding this view of the court which was massively criticized in the case of State v. Wilson[18] where it was held by the Supreme Court that death penalty for such a crime would not be unconstitutional.

BIASES IN THE JUSTICE SYSTEM:

A justice system that is free of prejudices is not easy to come by and its existence in today's society is an extreme rarity. A renowned example of racism infecting a capital-sentencing scheme is documented in the case of *McCleskey v. Kemp*.[19] Despite the staggering evidence of racial prejudice infecting Georgia's capital-sentencing scheme, the majority turned its back on McCleskey's claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other states since Furman[20] but was still unable to stamp out the virus of racism.

In the years since *McCleskey,* it has been debated whether there is any truth in the majority's suggestion that discrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness-individualized sentencing. Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the authority's discretion to such an extent that the sentence would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offence. By the same token, any statute or procedure that would provide the sentence with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "throw open the back door to arbitrary and irrational sentencing." All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.

> Death in its finality differs more from life imprisonments. Because of the qualitative difference of the death penalty, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[21]

Thus, we need to ask ourselves: Are we entitled to award the death penalty when we ourselves cannot irrevocably place faith in the fairness of the justice system? The question of death penalty is not restricted merely to the administration of justice: issues ranging from the race and socioeconomic status of the offender and the possibility of closure for the victim's families are questions that we often overlook and are the ones that are most difficult to address.

Aside from the legality of the death penalty, execution of a convict in India is a long, time consuming process. According to the Indian Apex Court ruling of 1983[22], the death penalty should be imposed only in the "rarest of the rare cases, but without defining or explaining which cases are "rarest of the rare," leaving the decision solely to the discretion of the trial court.

---

[17](1977) 433 U.S. 584
[18] (La. 1996) 685 So. 2d 1063
[19] (1987) 481 U.S. 279
[20] (1972) 408 U.S. 238
[21]Evan J. Mandery, *'*Capital Punishment: A Balanced Examination*'* (2005) JBLJ 34
[22]*Bachan Singh & Ors. V. State Of Punjab & Ors* (1982) AIR 1325

To justify death penalty; we need to consider all the aspects that it essentially entails: its deterrent effect, its morality and the motive behind imposing the death penalty.

RETRIBUTION AND DEATH PENALTY:

If we are to punish murderers as they deserve, we will inflict on them what they inflicted on their victims, namely death.[23] This association between a desert-based theory of punishment, known as retributivism, and the death penalty appears in almost all the popular views of punishment. Traditionally, the core of the retributivist's argument for any specific penalty is the argument of *lex talionis*, the idea that a person deserves to experience the suffering or moral evil he has inflicted on his victim. Taken literally, *lex talionis* is an absurd doctrine- no one thinks that we should rape rapists or assault the assailants.

Hence, most retributivists attempt to justify death penalty by abandoning *lex talionis* in favour of a similar idea that a criminal deserves to suffer some approximate match for what he inflicted on his victim. There are two possible strategies to accomplish this end. The first distributes punishments proportionately, so that the worst crimes are matched with the worst penalties, this is also known as the "proportionate penalty theory". The second and more promising strategy is to attempt to establish a moral equivalence between crimes and permissible punishments. This suggests that a perpetrator should suffer an amount equivalent to the harm or moral evil inflicted on his victim, known as "moral equivalence theory of justified punishment".

However, both these approaches cannot justify death penalty as:

1) The proportionate penalty theory does not provide an argument to include death penalty on the list of acceptable penalties. It merely insists on taking punishments we are willing to inflict and impose them on perpetrators in order of severity.
2) Even if we consider moral equivalence theory, there are some penalties we consider as morally unacceptable but which are less severe than death. If we wish to rule out those penalties, we will be compelled to rule out death from our list. E.g. torture- if we rank penalties the way we rank crimes, then murder is a more heinous crime than any non-lethal assault, so in that case, torture should be a less severe penalty than death. But it is here that we reach crossroads in our assumptions, if torture is an unacceptable penalty, it should follow that death is unacceptable as well.
3) If we go by the severity argument, stating that torture is more severe than death as it is more uncivilized and brutal, then there are many penalties that we say are impermissible to impose even though they are less severe than death or torture, for example, there has been a great resistance to shame sanctions, such as forcing a convicted sex offender to display a sign outside of his dwelling revealing his crimes.

The major problem in justifying a retributivist's stance on enforcement of death penalty is that they are motivated by the burden of proof claim, i.e., by killing a person the offender incurs a tremendous moral debt, repayable only by his own life. If we go by this logic, it would seem to follow that the society who takes a person's life must incur the same moral debt unless his act is morally justified.

THE QUESTION OF DETERRENCE:

Whether or not the death penalty deters the crimes it punishes more than any other alternative penalties has been the most widely debated issue ever since Isaac Ehrlich broke the abolitionists ranks by finding that from 1933-65, "an additional execution per year may have

[23] Bohm Robert M, 'The Death Penalty Today' (CRC Press Taylor and Francis 2008)

resulted on the average in seven or eight fewer murders."[24] Even so, the results are inconclusive as statistics have not accurately or conclusively proved that the death penalty does or does not deter crime more effectively than other penalties.[25]

Deterrence is a term that has two meanings- "special deterrence" and "general deterrence":

Special deterrence refers to an intervention that prevents an offender from committing crimes. Many people favour death penalty for this very reason – they want to make sure that the offender can never again threaten public safety in the future.

General deterrence refers to the broadcast message of the death penalty that the would-be killers would think twice if they are aware of the fact that they could be executed. The well-publicized execution of one is a lesson for others.[26]

The deterrence argument is not about morality or justice, it is an argument about crime control and prevention. It suggests that the death penalty can be a rational strategy to lower the crime rate. In this way, it moves the debate from ethics to science, offering a hypothesis that can be verified through empirical research which has been examined below.

In April 2012, The National Research Council concluded that studies claiming that the death penalty affects murder rates were "fundamentally flawed" because they did not consider the effects of noncapital punishments and used "incomplete or implausible models. A 2009 survey of criminologists revealed that over 88% believed the death penalty was NOT a deterrent to murder[27].

Moreover, the threat of execution at some future date is unlikely to enter the minds of those acting under the influence of drugs and/or alcohol, those who are in the grip of fear or rage, those who are panicking while committing another crime (such as a robbery), or those who suffer from mental illness or mental retardation and do not fully understand the gravity of their crime.

Some scholars have examined the possibility that the execution not only is ineffective as a deterrent but may even increase crime rates. This is called the "*brutalization hypothesis*". This theory suggest that some citizens learn that they live in a brutal society in which killing is normative, even endorsed by the state. As such, when citizens learn of executions, such as with highly publicized cases, some may be more inclined to commit homicides themselves. Murder rates, according to brutalization theory, will increase soon after an execution. Recent studies in the U.S., have found evidence to support this claim:

Cochran, Chamlin and Seth[28] looked at homicide rates in Oklahoma one year prior to and one year following the execution of Charles Troy Coleman, the state's first execution in 25 years. This study was replicated twice and in all three studies, the researchers noticed that homicide rates increased after the executions. Although we will definitely need more statistics to fully support the brutalization theory, the findings are not to be treated lightly. What if the death penalty not only fails to deter murders but actually encourages it?[29]

Moreover, many murders are "crimes of passion", that perhaps, cannot be deterred by any threat. Whatever the motive be, some prospective offenders are not deterrable at all, others are easily deterred, and most are in between. "Is it really worthwhile to take a life by imposing

---

[24]Ehrlich, 'The Deterrent Effect of Capital Punishment: A Question of Life or Death*'* (1975) AMERJ 397, 414

[25] (1976) 428 U.S. 153, 185

[26]Beau Breslin and R Karp David, Debating Death: Critical Issues in Capital Punishment'(2nd edn, Albert R. Roberts 2003)

[27]'The Death Penalty and Deterrence'(Amnesty International 2010) <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/the-death-penalty-and-deterrence> accessed 4 October 2014

[28]Cochran Chamlin, and M Seth, 'Deterrence or Brutalization? An Impact Assessment of Oklohoma's return to Capital Punishment*'* (1999) CILJ 107,134

[29]Bailey and Peterson, 'Murder, Capital Punishment and Deterrence: A review of the evidence and an examination of police killings*'* (1997) JSI 25, 53

death penalty if there is an option of an alternative remedy?" That is a question we need to consider before imposing it as an absolute law for a certain class of cases. Even more than severity of the punishment, it is the swiftness of the justice system that acts as an effective deterrent[30].

In Cesare Beccaria's classical essay on criminology[31], published in 1764, he wrote,

> One of the greatest curbs on crimes is not the cruelty of the punishments, but their infallibility… The certainty of punishments, even if moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity.

In our country, the rarity, uncertainty and fallibility combine to undermine any possible deterrent benefit that can be gained by its severity.

THE MORAL DEBATE: HOW JUSTIFIED IS JUSTICE SERVED BY TAKING A HUMAN LIFE?

After examining the instrumental logic of death penalty – the real question is moral. Is capital punishment the right thing to do, even if it has some unfortunate side effects?

For majority of the people who support the death penalty, the reason given most frequently is retribution. They believe that death is what the offender deserved; they believe that it is a way to honour the victims as was noted in the current much- publicized Nirbhaya case where the Indian judiciary ultimately awarded the death penalty to four of the accused.[32]
According to legal philosopher Ernest Van den Haag:

Human beings are human because they can be held responsible for their wrongs, as animals cannot be. In that Kantian sense the death penalty is a symbolic affirmation of the humanity of both victim and murderer.[33]

The focus of justice is not practical or instrumental; it is moral. We do what is necessary to affirm society's standards, even if it is costly, even if we make occasional errors.

RESTORATIVE JUSTICE

Recently, another punishment philosophy has gained attention. It is called as restorative justice and provides a different moral perspective on the problem of accountability. In restorative justice, unlike retributive justice, the debt incurred by the offender by committing a heinous crime is not paid through passive submission to punishment. The offender does not receive a proportional harm to equate with the harm caused. Accountability is defined as an active responsibility on the part of the offender to make amends for what they have done.

From a restorative perspective, offender should engage in a variety of tasks that make amends. Earning money to pay restitution is the most basic task. Victims shouldn't pay for their offender's incarceration; offenders should be paying back for the harm they caused. Advocates of restorative justice believe that the death penalty is not a good way to hold murderers accountable. Instead, they argue that justice is best served when offenders make amends in whatever way they can, for the rest of their lives. By focusing on the offender's obligations, restorative justice prioritizes the needs of the victims. What victims' researchers

[30]Hashem Dezh Bakhsh, 'Does Capital Punishment Have a Deterrent Effect? New Evidence from Post moratorium Data' (2003) 5 AMJLE 344
[31] Beccaria and Voltaire, ' An Essay On Crimes and Punishment', 1764
[32]Anand Teltumbde, 'Delhi Gang Rape Case: Some Uncomfortable Questions' (epw 06 February 2013) <http://www.epw.in/margin-speak/delhi-gang-rape-case.html> accessed 17 September 2014
[33] Den Haag Ernest and Conrad John, *The Death Penalty: A Debate* (Library of Congress Publication 1983)

have discovered is that the victims have many needs; much could be done to help in their healing process, and surprisingly, that offenders themselves can sometimes play a positive role in the healing process.

MEANS OF GETTING CLOSURE

The debate on capital punishment is deeply emotional as well; when we justify it as a means of getting closure from a horrible tragedy that simply cannot be undone: whether it is a gruesome murder or a terrorist attack.

Consider this response of victims' families to the execution of Timothy McVeigh on June 11, 2011, for his bombing of the Alfred P. Murrah Federal building, Oklahoma City in 1995[34]:

Bud Welch, whose daughter was killed in the bombing, had this to say, "… I knew that death penalty was not going to bring her back and that's when I realized it was about revenge and hate. And the reason Julie and 167 others were killed was because of the very same thing…"[35] For Welch, the execution did not aid in his healing; what helped was overcoming his own impulses towards revenge and hate.

Most homicide victims experience post-traumatic stress disorder, and it typically takes years before the worst symptoms disappear. Unfortunately, the criminal justice system often gets in the way of victim's recovery. Part of the problem is that victims do not receive the services they need and expect. Capital cases are particularly onerous because the proceedings last for years. We have two unanswered questions here:

First, given that 68% of initial death penalty sentences are overturned at a later date[36], does this "roller coaster" ride for family members prolong their sufferings*?*

Second, do family members for whom the offender received death penalty at the outset recover more quickly than those in life sentence cases? These are questions that should be considered.

The lesson of McVeigh's execution is that the death penalty cannot always be imposed on behalf of the victims or their surviving relatives.

SOCIETAL INJUSTICE AS A CAUSE OF MURDER: THE DISADVANTAGED AND THE OPPRESSED

Many retentionist fail to observe social injustice as a cause of murder, particularly with regard to the disadvantaged and oppressed minorities, among whom the murder rate is by far the highest, leads them to reject what is likely to be a more effective and is in any event a morally mandated response to murder- namely, societal reform.

One reason that definitely goes against death penalty is that if humans cannot restore life they don't have a right to take it.

More than vociferously supporting death penalty, the government should create socio-economic environment to reduce crime. It can be done by reducing gender inequality, making gender sensitivity part of school curriculum, having people friendly policing and by bridging income disparities.

Without taking these steps, the crimes of passion like Delhi gang rape will continue to happen irrespective of quantum of punishment — life imprisonment, death or anything else. Only sure solution to reduce crime is economic empowerment of the deprived.

---

[34] Andrew Cohen, 'Timothy McVeigh and the Myth of Closure' *The Atlantic* (New York, 11 June 2012)

[35] Ibid.

[36] Bill Peterson, 'Statistics and Error Rates in Death Penalty Cases (Carleton 2009) <http://serc.carleton.edu/sp/cause/cooperative/examples/18170.html> accessed 4 October 2014

While it may be difficult to prove conclusively a link between societal injustice and murder, the fact that the murder rates are so much higher among the disadvantaged lends credence to such a conclusion[37]. If that conclusion is correct, then it follows that, but for social injustice there would be less murder. Indeed, it seems likely that in a truly just society murder would be highly uncommon. If so, then one way to deter murder is to reform society. If reforming society in accordance with Rawls principles of justice[38] could prevent murder, then to opt instead for capital punishment might in the long run produce more innocent deaths than would reforming the society. The moral choice then must be to opt for societal reform.

From a pragmatic perspective, that this society is grossly unjust and that its injustices are largely responsible for the murder rate is highly undeniable, what is not known and cannot be until attempted is how fast societal reform is possible and what impact it would have on murder rates. Since the answers to these questions are so uncertain, it is morally appropriate to oppose capital punishment until vigorous social reform is undertaken. Only then can the viability of capital punishment be considered.

It is certainly arguable that the political process is tilted in favour of monied interests[39]. Consequently, in response to public demands to address the high murder rate in disadvantaged communities the monied elite might well prefer capital punishment over equalizing educational and employment opportunities through measures that distribute wealth.[40]

Capital punishment may save lives but so might other less draconian means of addressing crimes in the form of social reform measures that move this society in a more just direction, equalize opportunity and preserve life in other respects as well. There is no way for sure which approach or combination of approaches will sustain life. Under those conditions, justice requires a decision-making process in which all of society's members have proportionate input. Since such a process does not exist today, we need to rethink our stand on justifying capital punishment.

CONCLUDING REMARKS:

To capture an accurate sense of the frustration felt by both the supporters and opponents of death penalty, consider the career of the late Harry A. Blackmun, former Associate Justice of the U.S. Supreme Court. One of the first cases Blackmun heard as a member of the High Court was *Furman vs Georgia*[41]. He had voted in favour of upholding Georgia's death penalty statute. However, years later Blackmun's faith in the democratic process had all but eroded. He wrote in *Callins vs Collins*[42]*:*

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored-indeed, I have struggled- along with the majority of the Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's desired level of fairness has been achieved and the need for

[37]Craig Albert, 'Challenging Deterrence: New Insights on Capital Punishment derived from Panel Data' (1999) UP LJR 321,60

[38] Rawls John, *A Theory of Justice*, (2nd edn, Harvard University Press 1999)

[39]Andrew Carson, 'Poverty, Crime and Criminal Justice, From Social Justice to Criminal Justice' (2005) AJLP, 56

[40]Philip Harvey, *Securing the Right to Employment; social welfare policy and the unemployed in United States* (Princeton University Press, 1989)

[41] 408 U.S. 238 (1972)

[42] 1994 510 U.S. 1141

> regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[43]

Death is different and we must approach the ultimate punishment with the degree of humility and respect it demands. Perhaps one day, the Courts will develop procedural rules or verbal formulas that actually will provide consistency, fairness and reliability in a capital sentencing scheme. However, since that day is still far away, we can only hope that the governments' and the society in general will rethink its stand on death penalty.

[43] Ibid.

INTER-JURISDICTIONAL GOVERNANCE COORDINATION, COMMUNITY SUPPORT AND COMPLIANCE WITH THE ILO 169 CONVENTION ON INDIGENOUS RIGHTS: FINDINGS OF A CROSS-SECTIONAL STUDY OF THE INDIGENOUS PEOPLE OF THE KALASH VALLEY IN PAKISTAN

Syed Toqueer Akhter[1] **&** Mahina Ghalib[2]

ABSTRACT

This study primarily focuses on the compliance/non-compliance with the ILO 169 Convention, in relation to inter-jurisdictional governance coordination and internal community support. The Convention allows for identity preservation for indigenous communities. Keeping in view the micro-foundation of the proposed framework-of-analysis, a cross-sectional study was carried out on indigenous people from Bumburet Valley of the Kalash region in the form of personal interviews, while sampling units were selected using convenience sampling. Over the past decades, the Kalashi have faced both internal and external threats with regards to exercising their right to self-determination and identity preservation in the society. For modelling purposes Robust Regression, Quantile Regression and the Tobit Model were estimated, all of which rendered coherent results. Estimates of competing econometric models imply that inter-jurisdictional governance coordination, appearing in the form of consultation and functional autonomy, and community support, result in a positive-sum game for the indigenous Kalash, with regards to compliance with the Convention.

Keywords: Inter-jurisdictional Governance coordination, Community support, International Labor Organization 169 Convention, Cultural absorption capacity, Robust Regression, Interaction Model

INTRODUCTION TO THE SOCIO-ECONOMIC PROFILE OF THE INDIGENOUS PEOPLE OF KALASH VALLEY

Indigenous people of any country are a precious part of its cultural heritage. The cultural and social preservation of these people is an integral responsibility of that country. With a unique religion and rich culture, the people of Kalash are distinct from their fellow countrymen in all social aspects. They are found living in the remote valleys of Bumburet, Ramboor and Birir situated in the Chitral District. Their reputation as a distinct civilisation can be traced back long before the birth of Pakistan. While some believe in the local myth of them being the descendants of the great Alexander's army, others think of them as remnants of the ancient civilisation known as Nysaeans.[3] During the 1800s it was estimated that the Kalashi ranged from 200,000 to 600,000 in population; however, this number has reduced drastically over the years with only 2500 Kalashi reported today. Earlier, they were looked down upon as an image of servitude until 1972 when slavery was abolished and they were entitled to a set of rights under the Pakistani Constitution. With only 2500 Kalashi remaining, Pakistan faces the issue (though not the obligation) to not only secure their survival but also to preserve their identity

[1] Syed Toqueer Akhter, Assistant Professor at Lahore School of Economics, Pakistan, Syedtoqueer.research@gmail.com
[2] Mahina Ghalib, Student at Lahore School of Economics, Pakistan, Mahinaghalib@gmail.com
[3] Feisal Hussain Naqvi, 'People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law' (1996) 71 (3) Article 4 Indiana Law Journal 674, 677

as a distinct religious and ethnic group. Legally, they should enjoy privileges and rights like any other citizen of Pakistan; however, in reality their interests are far from protected.

ILO CONVENTIONS 107 & 169: ASPECTS OF SOCIO-POLITICAL IDENTITY AND POSITIONALITY

Subsequent to its initiation in 1919, ILO has been addressing the issue regarding the welfare and development of indigenous communities[4] around the world. Its first major contribution to the field was in 1957 in the form of Convention No. 107, also known as the Indigenous and Tribal Populations Convention. However, the Convention was criticised as an instrument that would slowly integrate indigenous interests into national interests, legitimising the gradual elimination of indigenous identity and culture.[5] Because of the criticism it faced, the Convention was revised extensively and in 1989, was renamed to the Indigenous and Tribal Peoples Convention (Convention 169). Today, only 20 countries have ratified the new Convention (excluding Pakistan). The 169 Convention not only incorporates the drawbacks of the 107 Convention, but has also taken a major step in redefining indigenous rights.[6] The essence of the Convention lies in the two fundamental concepts: consultation and participation. Together, they provide the basis for the provision of right to determination.

However, the 169 Convention is far from perfect. Although it recognises their right to self-determination, it does not give them the power to veto any government decisions (for example, a development project or extraction of resources). Moreover, the Convention acts as a compromise between the government, indigenous people and the society. Governments might not be entirely pleased with indigenous autonomy undermining their governance, especially if they are not aligned with national interests. Similarly, Pakistan is not a signatory of the new Convention (169) as basing its policies on this Convention would undermine the autonomy of the government in terms of the legal, social, and economical structure pertaining to the Kalash region. For example, the current regime is more inclined towards industrial and region-specific infrastructural development as opposed to the protection and preservation of an indigenous community. Furthermore, being an Islamic state, the level of openness in the people of Pakistan towards a pagan religion and culture is particularly low which is why accepting the cultural identity of such an ethnicity is a somewhat gradual process. As a result, providing the right to self-determination to them is not on the government's top priority list.

OUTSIDE COMMUNITY PROVOCATION, VICTIMISATION AND COMPLIANCE WITH ILO 169 CONVENTION

The rich cultural heritage of Kalash attracts a lot of local and international tourism in that region. Ironically, it is not the indigenous population that benefits economically from this influx of tourists. The hotels, jeeps and shops are owned by the non-Kalashi Muslim population. Hence the Kalashi, despite being the reason for bringing tourism to that region, do not benefit

[4] Although the term, 'indigenous people', has been described in various ways across literature, ILO identifies it is a group of people or community living in historical continuity with their own unique and traditional lifestyles, distinct culture and customary ways of life. Alongside they have their own social association and political foundations regardless of their legal status in the society.

[5] Naqvi (n 1) 707 (as cited in Howard Berman, 'The International Labor Organization and Indigenous Peoples: Revision of ILO Convention No.107 at the 75th Session of the International Labor Conference' (1988) Rev.int'l comi'n of jurists 41,48).

[6] It addresses a wide range of issues such as defining land and property rights, access to basic needs such as food, shelter, education, health, sanitation etc., preservation of natural resources, access to employment opportunities and vocational training.

from it.[7] Also, increased tourism is actually leading to more subtle social issues. For example, many Kalashi women are photographed and perform ceremonial dances for tourists in exchange for monetary compensation thus serving as a source of income. But since these ceremonial dances have a deeply-rooted religious significance for the Kalashi people, the elderly Kalashi have denounced it as a "form of prostitution".[8]

The cultural and religious values and practices[9] of Kalash also make them a target of Muslim missionaries coming to the region for the purpose of coercing the local Kalash to convert to the Muslim faith. Recently, militant Muslims have posed a more blatant threat to the already dwindling population of Kalash in the form of unconcealed coercions to convert to Islam. Furthermore, owing to the contrasting nature of the Kalash customs and values with those of Pakistan in general, the Kalash do not openly celebrate their festivals with ardent passion, in fear of retribution by Muslim extremists. In light of the Conventions 107[10] and 169, Pakistan still has a lot of ground to cover when it comes to giving rights to the Kalash people. Article 4 of the 169 Convention talks about safeguarding the people and their institutions, while Article 5 states that policies, which aim for alleviating difficulties faced by the indigenous people, should be implemented with their consent and involvement. However, in reality, the situation is much grimmer. The Kalash have little protection against outside forces, while consultation in policy and decision-making to counter such forces is minimal.

COLLABORATION OF COMMUNITY WITH STATE INSTITUTIONS FOR NEEDS ASSESSMENT OF DEVELOPMENTAL PROJECTS

State institutions play a vital role in the development and policy-implementation of a country. Participation and collaboration are crucial if state institutions mean to effectively cater to the needs of the indigenous population. The current state of Pakistani institutions has deteriorated over the years owing to factors such as corruption, illiteracy and overpopulation. State institutional failure has rendered them incapable of providing the Kalash people with adequate facilities and development in the region. For example, in 2013 Mahmood Khan[11] collaborated with the members of the Kalash community to discuss their problems and even allocated Rs.10 million in an Annual Development Program for carrying out developmental projects in the region. However, to this day, no signs of such developmental projects have been seen. Unfortunately, the contributions made by foreign institutions towards infrastructural and social development in the Kalash Valley surpass those made by the state institutions. For example, the sole hospital in the Bumburet Valley exists due to efforts made by the German Red Cross Foundation. Out of the local contributions, non-state actors such as Non-Governmental Organisations (NGOs) make the majority of them. In the 1980s, the Agha Khan Rural Support Programme (AKRSP) carried out infrastructural development projects that included laying out irrigation channels throughout the Valley. The success of developmental projects relies on a mutually dependent symbiotic relationship between the indigenous community's collaboration with state institutions rather than one entity benefitting the other.

[7] Naqvi (n 1) 692 (as cited in Alauddin, 'Kalash, the paradise lost' (Progressive Publishers 1992) 283).
[8] Naqvi (n 1) 691-692 (as cited in R. Adams, 'Princess Flies into Tribal Row' (Sunday Telegraph London 1991).
[9] Particularly in terms of relaxed extramarital affairs, consumption of wine and idolatry.
[10] Article 2(3) of the Convention 107 excludes the option of use of force and coercion to stimulate integration of the indigenous population into the national community while Article 7 allows for them to hold their own customs and institutions if they are not discordant with the legal system of the nation.
[11] Khyber Pakhtunkhuwa (KPK) minister of sports, culture, tourism and museums.

In case of Malaysia, it was found that the indigenous community should be given vocational education as well as financial support in order to attract more tourism.[12]

RESEARCH CONCERNS AND STUDY OBJECTIVES

The study aims to find out how state institutions can play a role in preserving and protecting the people of the Kalash Valley, in accordance with the rights put forward by the 169 Convention. Moreover, it aims to find out how community participation, both within and outside the indigenous boundaries, can play a vital role towards the development and better standard of living for the people of Kalash. The objective is to highlight the factors that are in compliance with the Convention and point out those that show non-compliance. Most studies in Pakistan, regarding the Kalash Valley, have emphasised their rights using qualitative measures, whereas this study looks at both qualitative and quantitative aspects by using different econometric models (an area which lacks in-depth research pertaining to the topic). Hence, the study aims at testing the proposition that whether inter-jurisdictional governance coordination and community support affects compliance with the 169 Convention, in a cross-sectional setting for the Kalash Valley in Pakistan, significantly or insignificantly.

COMMUNITY INTERNALISATION, CULTURAL ABSORPTION CAPACITY AND COMPLIANCE WITH ILO 169 CONVENTION

Globally, indigenous people in most countries are relatively deprived of economic resources. This might directly shape perceptions of the community regarding the strength of their cultural and religious identity, thus affecting their cultural absorption capacity. By having a low cultural absorption capacity, the indigenous population might not be receptive to changes in their social and physical environment. The level of cultural absorption capacity also has a significant impact on the extent of community internalisation within the people as a means of integrating with other communities. Having a high level of community internalisation, the indigenous people would be more open to outside cultures and societies. Thus cultural absorption capacity reflects how amenable the local population is towards any outside changes that directly affect their distinctiveness which in turn plays a vital role in determining the extent of community internalisation in the people. For example, in Northeast Arnhem Land in Australia, the indigenous community discussed the vitality of using traditional practices to deal with their troubles in order to maintain cultural, physical as well as emotional health.[13]

A high level of cultural absorption capacity and community internalisation would thus certainly depict fulfilment of rights to religious, cultural, and social security. The 169 Convention clearly describes the rights of indigenous people to preservation of their religious identity and cultural heritage. Therefore, a high degree of cultural absorption capacity and community internalisation illustrates high level of compliance with the ILO 169 Convention.

NEEDS ASSESSMENT OF DEVELOPMENT PROJECTS WITH INSTITUTION: INTER-JURISDICTIONAL GOVERNANCE COORDINATION

The effectiveness of the developmental projects in any region depends heavily on the level of inter-jurisdictional governance coordination present in decision-making. Compliance with interests of the indigenous people will result in better social and economic prospects. In Malaysia, it was found that the indigenous population is ready to be more involved in the

[12] Mohd Yusop Ab.Hadi et al., 'Poverty Eradication Through Vocational Education (Tourism) Among Indigenous People Communities In Malaysia: Pro-Poor Tourism Approach (PPT)' (2013) 93 Procedia 1840, 1843

[13] L. Petheram et al., ''Strange Changes': Indigenous Perspectives Of Climate Change And Adaptation In NE Arnhem Land (Australia)' (2010) 20 Global Environmental Change 681, 686

tourism sector given that the tourism activities serve its best interests, viz.: employment, infrastructural development, maintenance of health, and contribution to additional revenue.[14]

It is crucial that consultation be used to mutually outline the benefits of developmental projects to be gained by both the government and the indigenous people. If any project serves national interests but proves to be detrimental for the local community, the local people may not accept that the projects to be carried out. For example, in 1989 landowners on Bougainville Island in Papua New Guinea launched a rebellion owing to the immense impact of mine pollution on their livelihoods and inadequate compensation. The rebellion caused one of the largest copper mines in the world to be completely closed down.[15]

Involvement of indigenous people in the needs assessment and decision-making of developmental projects is critical if governments want to ensure successful commencement of their activities. Involving the local community not only employs the use of local expertise, thus boosting the efficiency and effectiveness of activities, but also helps keep at bay obstacles raised by local communities due to a lack of consultation and involvement. In the case of Australia, the indigenous people have been able to develop governance activities like developing a partnership with government and non-government institutions that work on environmental and natural resource management.[16]

COMMUNITY SUPPORT, COMMUNITY PARTICIPATION AND COMPLIANCE WITH 169 CONVENTION

Community support characterises participation within as well as outside of a society. The members of any indigenous population depend heavily on the support that they receive from other members within their community. According to Richmond et al., Social support behaviour can be classified into four different classifications. Positive interaction refers to the care a person gets from spending time with other individuals in the society. Support can also be emotional, which refers to guidance and feedback that might aid a person in finding solutions to their problems. Another form of support is tangible support that refers to material aid, such as having somebody to take care of you when you are ill. Support can also be through fondness, warmth and intimacy, which relate to love, care, and empathy.[17]

Community support might even come from outside communities in the form of acceptance of the religion and culture of the indigenous people. The need for participation in indigenous communities is necessary for development. Participation helps decrease or even overcome the effect of bounded rationality; individuals may wish to amalgamate their inadequate capacities by engaging in a dialogue and proliferate the chances of effective decision-making. Community participation must also include the involvement of women so that they actively contribute towards community development. In Guatemala, a country with a largely young, poor and indigenous population, decisions that the marginalised Mayan girls make largely involve their partners, family, community, as well as health providers. The key method to address problems of sexual and reproductive health pertaining to these indigenous girls is to use a participatory

[14] Ab.Hadi et al. (n 10) 1842

[15] Ciaran O'Faircheallaigh, 'Extractive Industries And Indigenous Peoples: A Changing Dynamic?' (2013) 30 Journal of Rural Studies 20, 22 (as cited in Donald Denoon, 'Getting under the skin: The Bougainville Copper Agreement and the Creation of the Panguna Mine' (Melbourne University Press 2000))

[16] Kirsten Maclean, 'Crossing cultural boundaries: Integrating Indigenous water knowledge into water governance through co-research in the Queensland Wet Tropics, Australia' (2015) 59 Geoforum 142, 143 (as cited in Kirsten Maclean and Emma Woodward, 'Photovoice Evaluated: An Appropriate Visual Methodology For Aboriginal Water Resource Research' (2013) 51 (1) Geographical Research 94)

[17] Chantelle A.M. Richmond et al., 'Social Support and Thriving Health: A New Approach to Understanding the Health of Indigenous Canadians' (2007) 97 Am J Public Health 1827, 1827-1828

approach.[18] In light of Article 2(1) of the ILO 169 Convention, governments are responsible for developing actions for the protection of the indigenous people with the participation of the people concerned. Therefore, community support is essential for the fulfilment of the rights of indigenous people.

NATURE AND DIVERSITY OF EXTERNAL THREATS AND RISKS: ASPECTS OF NON-COMPLIANCE WITH ILO 169 CONVENTION

Across the globe, indigenous people are known for being victims of various external and internal risks that threaten the sanctity of these civilizations. One of these threats is that of oppression from external communities. Indigenous populations face a lot of persecution if they follow a different religion than the outside communities. In extreme cases, powerful non-secular communities might even coerce the native population into converting to their own religion.[19] External communities also pose threats in the forms of deforestation and the draining of local resources. Most indigenous communities live in areas abundant in natural resources, which serve as a basis for their sustenance. Literature has documented the economic and social marginalisation of the indigenous people of these areas, which are affected by extractive industries.[20]

Even internal threats, like violence patterns among indigenous men that are apparently manifestations of a certain culture located where non-indigenous and indigenous societies intersect are defined as products of external factors such as alienation, poverty, discrimination, stress, and dispossession.[21] When considering the rights of indigenous people as given by the ILO Convention 169, Article 5 requires social, cultural and religious values to be preserved and protected and that due account should be taken of the problems faced by local people as a group and as individuals.

INSTRUMENT DEVELOPMENT FOR ASSESSING COMPLIANCE/NON-COMPLIANCE WITH 169 CONVENTION

The ILO 169 Convention is an instrument that recognises indigenous peoples' right to self-determination on an international platform. It acts as a guideline for different institutions such as the government, community, and NGOs, as well as individuals as to how they can play a role in the provision of the Convention. For this research, the dependent variable, ILO,[22] is measured with the help of the articles provided in the 169 Convention. Questions were derived using these articles and measured on a Likert scale from 1 to 5, where 1 indicates non-compliance and 5 indicates compliance towards the Convention. Hence, a total of 35 items were used to assess the variable "ILO".

In order to measure the degree of fundamental freedom enjoyed by indigenous people without any hindrance (Article 3-1), the respondents were asked to rank a series of questions on a scale of 1 to 5; where 1="strongly disagree", 2="disagree", 3="neutral", 4="agree" and 5="strongly agree". For example, to check for the degree of freedom, they were asked if they

[18] Heather Wehr and Silvia Ester Tum, 'When a girl's decision involves the community: the realities of adolescent Maya girls' lives in rural indigenous Guatemala' (2013) 21 Reproductive Health Matters 136, 141

[19] Brenda Elias et al., 'Trauma and suicide behaviour histories among a Canadian indigenous population: An empirical exploration of the potential role of Canada's residential school system' (2012) 74 Social Science & Medicine 1560, 1561

[20] O'Faircheallaigh (n 13) 23

[21] Peter Sutton, 'The politics of suffering: Indigenous policy in Australia since the 1970s' (2001) 11 Anthropological Forum 125, 134

[22] ILO is the name used to measure the dependent variable that shows the extent of compliance with the Convention.

were given the right to freely celebrate their cultural festivals; whereas for the hindrance component, they were asked if they are able to freely celebrate these festivals even if they are contradictory to the Islamic and cultural values of the country. Likewise, they were asked to rank the different types of festivals celebrated without any element of fear. Similarly, a series of questions were used to measure their legal status, economic well-being, the discrimination component, and other articles pertaining to land rights, resource protection, job opportunities and skills enhancement, and healthcare. Responses were summed up and an average was taken. Respondents, whose averages were equal to or greater than 3, were treated as individuals moving towards the compliance side of the Convention. All others, whose averages were less than 3, were considered as individuals moving towards the non-compliance side. In the end, the variable ILO was taken as a dummy, where 1 represents all those respondents whose averages were 3 or above (hence, 1 indicates compliance), whereas 0 represents the ones whose averages were below 3 (indicating non-compliance).

QUESTIONNAIRE DESIGN, SAMPLING AND DATA COLLECTION DETAILS

In order to see the impact of inter-jurisdictional governance coordination and community support towards the compliance/non-compliance of the ILO 169 Convention, a cross-sectional study was carried out on the indigenous people of the Kalash Valley in Pakistan. As a result, primary data was collected with the help of questionnaires. These questionnaires were floated between 44 Kalashi residing in the Bumburet Valley, where the respondents were selected through convenience sampling. In order to get accurate answers, the questions were translated in either Urdu or Kalashi for a better understanding. Coming to the designing of the questionnaire, each respondent was asked a total of 178 questions which were divided into nine sections.[23] The variable inter-jurisdictional governance coordination was measured using the following statement: the locals are consulted by the government before embarking on any project in your area. Again, all such statements were ranked on a scale of 1 to 5 (the interpretation of the scale is the same as above). Community support was measured using two variables: community participation and legal autonomy, where community participation is estimated through a series of questions as opposed to using a single question for measuring legal autonomy. Legal autonomy was measured through the following statement: the government gives you full autonomy in implementing your own legal system. For the variable community participation, different statements were used which covered a range of topics such as women participation, role of locals in community development, acceptance of religion by society, freedom to follow and practice religion, local Muslim community respecting culture, dispute settlement, participation so on and so forth. Other variables such as knowledge outreach and victimisation were measured using single statements, whereas the individual profile was measured using a series of questions such as one's education status, sense of security and cultural absorption capacity.

SPECIFICATIONS AND ESTIMATION OF ECONOMETRIC MODELS

Three models have been used to study the impact of inter-jurisdictional government coordination and community support towards the compliance/non-compliance with the ILO 169 Convention. The dependent variable (ILO), denoted by Y, is taken as a dummy variable and is a function of the following independent variables: community participation, legal

[23] These sections include: (A) Demographics, (B) the ILO 169 Convention, (C) Culturally-Appropriate Education, (D) Cultural Absorption Capacity, (E) Respect for Identity and Non-Discrimination, (F) Interprovincial Resource Conflict, (G) Political Aspect: Vulnerability and Victimisation, (H) Access to Infrastructure and Other Services, and (I) Life Expectancy Gap.

autonomy, knowledge outreach, inter-jurisdictional governance coordination, victimisation and individual profile. These are denoted by X_1, X_2, X_3, X_4, X_5 and X_6 respectively. The coefficients with the positive sign show a direct relationship with the dependent variable (compliance with the Convention), whereas a negative sign shows an inverse relationship (non-compliance with the Convention). The models used are as follows:

Robust Regression

On apprehension of hetroskedasticity, as caused by cross-section studies, Robust Regression was preferred. It can be used as an alternative to least squares regression. In this method, different weights are assigned to observations based on how well behaved the observations are. Hence, it may be used to detect influential observations. In order to see how different independent variables have an impact on the dependent variable (ILO), the following econometric model is used:

Compliance with ILO convention 169 = community participation + legal autonomy + knowledge outreach + inter-jurisdictional governance coordination + victimisation + individual profile + e

Quantile Regression Model

Quantile Regression has been estimated keeping in mind that this model gives relatively more weight age to not too extreme observations. This model is used as a competing model and might be used as an alternative to robust regression. The coefficients are estimated by reducing the absolute deviations from the median instead of the mean. In other words, this model reduces the aggregate value of absolute residual terms. The model estimated the values at quantile 0.5.

Compliance with ILO convention 169 = community participation + legal autonomy + knowledge outreach + inter-jurisdictional governance coordination + victimisation + ε_i

Tobit Model

The Tobit Model has been used due to the ordinal nature of the data. It is estimated by transmitting the ordinal scale of compliance/non-compliance with the ILO 169 Convention into the form of high/low compliance, where 1 shows high compliance and 0 shows low compliance. This model is also used as a competing model in order to estimate the linear relationship between variables after censoring the dependent variable. The function for the following model is the same as mentioned in Robust regression specification.

Profile of Survey Respondents

The respondents were the indigenous people residing in the Bumburet Valley. 44 respondents were interviewed ranging from the ages of 17 to 52. The majority of them had farming or managing livestock as their main source of livelihood, whereas their incomes ranged from around 5,000 rupees to up to 40,000 rupees only. The family size of these households was large, with the highest comprising 16 members living under one roof. In order to find a decent job, the majority of the men work outside the cultural boundaries. Females were mostly involved in either making handicrafts or doing household chores.

ESTIMATES OF COMPETING MODELS, GOODNESS-TO-FIT AND MODEL CONSOLIDATION TESTS

Dependent variable	Compliance with ILO 169 Convention (Taken as dummy, 1=compliance; 0=non-compliance

Independent Variables	**Robust Regression**	**Quantile Regression**	**Tobit Model**
Community Participation (Average was taken of 9 items measured on a scale of 1 to 5; 1 for non-compliance, 5 for high compliance)	0.3155798 (1.84) [0.074]	0.3496504 (1.89) [0.067]	0.4058148 (1.87) [0.069]
Legal Autonomy (Measured on a scale of 1 to 5; 1 for non-compliance, 5 for high compliance)	0.155964 (3.40) [0.002]	0.1923077 (4.00) [0.000]	0.195387 (3.28) [0.002]
Knowledge Outreach (Measured same as above)	0.0767815 (2.20) [0.034]	0.0384615 (0.99) [0.327]	0.0965749 (2.21) [0.033]
Inter-jurisdictional Governance Coordination (Measured same as above)	0.1606746 (3.72) [0.001]	0.2307692 (4.93) [0.000]	0.193124 (3.27) [0.002]
Victimization (Measured same as above)	-0.1054169 (-3.14) [0.003]	-0.1153846 (-3.23) [0.003]	-0.1447947 (-3.35) [0.002]
Individual Profile (Measured same as above)	0.102302 (2.10) [0.043]	-	0.1566858 (2.57) [0.014]
Constant	-1.53454 (-2.64) [0.012]	-1.625874 (-2.62) [0.013]	-2.214686 (-2.99) [0.005]
Number of observations	44	44	44
Goodness-to-fit and Model Consolidation Tests			
Adjusted R-square	0.6492	-	-
Pseudo R-square	-	0.3429	0.5578
Prob> F	0.0000	-	-
Prob> Chi2	-	-	0.0000
Breusch-Pegan test	Prob>chi2= 0.0712	Prob>chi2=0. 0167	Prob>chi2=0. 0712
Variance Inflation Factor	Mean-VIF=1.11	Mean-VIF=1.06	Mean-VIF=1.11
Likelihood-ratio test	Prob> chi2=0.0000	Prob> chi2=0.0000	Prob> chi2 =0.0000

Note: Below the coefficient value, we report t-statistic in ( ) and p-value in [ ]

The data collected in cross-sectional studies often contains the problem of hetroskedasticity in them. Hence, consolidation tests were carried out on the results. To check for hetroskedasticity, a Breusch-Pagan test was conducted. The p-value in the Robust Regression and the Tobit Model was greater than 0.05 so we do not reject the null hypothesis, i.e. variance is constant and there is no indication of hetroskedasticity. However, for the Quantile Regression model, the p-value was less than 0.05 so we reject the null hypothesis, i.e. variance is not constant and there is a problem of hetroskedasticity in the data set. Moreover, to check for multi-collinearity the Variance Inflation Factor (VIF) test was carried out. In all three models, the VIF was closer to 1, which indicates no problem of multi-collinearity. A likelihood-ratio test was also conducted. The prob>chi2 value was less than 0.05, which shows that the main independent variables such as inter-jurisdictional governance coordination and legal autonomy have an important impact on the model.

Lastly, the adjusted r-square is equal to 64.92% in the Robust Regression Model, which indicates that moderate amount of variations in the dependent variable, ILO, have been explained through the independent variables. Moreover, according to McFadden, psuedo r-square in the range of 1 to 4 indicates goodness-to-fit, which in this case it is.

ANALYSIS OF FINDINGS

Inter-jurisdictional Governance Coordination and Compliance with 169 Convention

The results in the above table show a positive relationship between the dependent variable, ILO, and the independent variable, inter-jurisdictional governance coordination. The variables are highly significant at 1%, which implies that the higher the degree of inter-jurisdictional governance coordination, there will be more compliance with the Convention. As mentioned earlier, the essence of the Convention lies in the consultation and participation between the state and the indigenous community. If the state consults these people (keeping their interests in mind) before initiating any project or implementing any policy in the area, it will mutually benefit both parties. For example, if the government of Pakistan takes more pride in preserving the Kalashi language and culture, it will result in more domestic as well as international tourism. The income earned from increased tourism will not only have a positive impact on local livelihood, but will also result in capital inflow for Pakistan.

The majority of the Kalashi were in agreement that government officials, institutions, and NGOs do consult with them before embarking on a new project, though the implementation of these projects is an entirely separate issue. Recently, the district police as well as the army have started providing security to the Kalashi people during their religious festivals. The main purpose behind this security detail is to ensure that they carry out these festivals in peace and harmony without any fear (due to local or external threats), which again demonstrates compliance towards the ILO 169 Convention.

Community Support and Compliance with 169 Convention

According to the results shown in the table above, there is a positive relationship between community participation and ILO. The variable, community participation, is significant at 5%, which implies that the higher the community participation, the higher will be the compliance with the ILO 169 Convention. Community participation can be defined both in terms of participation and perception.

High community participation will result in indigenous people enjoying more autonomy and engagement in the decision-making process. In Kalash, the locals are given the freedom to exercise their own legal system.[24] According to the respondents, they settle their disputes through a Kazi or the elders of their community with minimum intervention from the government. Moreover, they are also given the option of settling disputes through the national legal system. The results found also show a similar trend. The variable legal autonomy, which measures the freedom given to locals to implement their own legal system, is highly significant at 1% and shows a positive relationship between legal autonomy and ILO.

Community Risk Factors and Compliance with 169 Convention

For a long time, the Kalash have been a victim of both internal and external threats. Living in an Islamic state, the distinct religious and cultural practices of Kalash are not easily and openly accepted in the society. As a result, Muslim missionaries and extremists are playing their role in influencing Islam into the Kalash Valleys. Different forms of victimisation were measured with respect to their intensity and frequency. Among others, the variable abduction (denoted by the name "victimisation" in the model) was the most significant at 1%. It showed a negative relationship with the dependent variable ILO, which means that as incidences of abduction from within the community rise, there will be non-compliance with the ILO 169

[24] Jirga system.

Convention. The variable showed significance due to a recent incident reported in the Valley. According to the respondents, a foreign NGO worker was abducted from their community by the Taliban, in order to send the tribe a message to stop their non-Islamic practices.

Other Potential Factors Explaining Compliance/Non-Compliance with 169 Convention

Individual profiles of Kalashi people (including one's education status, sense of security and capacity to absorb other cultures) were also measured in order to show compliance with the Convention. The literature shows that there should be a positive relationship between the two, which also corresponds with the results found in this study. The independent variable came out to be significant at 5%. This means that as an individual's profile improves, there will be more compliance towards the ILO 169 Convention. Although the education available to the people of Kalash is only till secondary level,[25] the tribe has a strong sense of security from within their own community (if not from communities outside the tribal boundaries). This is due to the fact that the Kalashi have a high context culture, where emphasis is more on interpersonal relationships. As a result of this sense of security, their cultural absorption capacity will also be high.

Lastly, a separate variable (knowledge outreach) was used to measure how easily the Kalashi can apply external knowledge to their community. The variable showed a positive relationship with ILO, meaning that there would be more compliance with the Convention if the Kalashi can easily apply external knowledge in their community. Unfortunately, in the case of Kalash the variable appeared to be insignificant. This is due to the fact that the tribe is geographically isolated with limited access to literature and technology such as high-speed internet, network coverage, technical machinery, etc., which prohibits them from applying external knowledge effectively.

CONCLUSION

Although Pakistan is not a signatory of the ILO 169 Convention, appropriate steps need to be taken in order to protect and preserve the culturally unique and rich Kalashi tribe, as it is an integral part of the country's heritage. The findings of this study show how state institutions play a vital role in terms of not only economic development, but also in cultural and identity development of these indigenous people. Two major factors that show high compliance with the ILO 169 Convention include inter-jurisdictional governance coordination and community support, which are also the essence of the Convention. Even though the findings suggest that consultation and participation is necessary in order to comply with the Convention, it is equally important that these mutual agreements are implemented effectively by the State. In Pakistan, however, the situation is somewhat different.

LIMITATIONS OF THE STUDY

There were several constraints faced by the researcher while conducting this study. First and foremost, the researcher faced time constraints while conducting the surveys. The fact that each question had to be translated into either Urdu or Kalashi, only 44 respondents could be interviewed. Moreover, we used non-probability sampling design, keeping in view different cross-sectional people in the Kalash Valley, so the sampling design is convenience sampling. Furthermore, due to geographical constraints, only the indigenous people of Bumburet Valley could be interviewed leaving out two other Valleys (Birir and Rumboor). Apart from that, some of the respondents took the survey not as an academic study but some sort of needs assessment

[25] Majority of the respondents received only primary level education

for a developmental project in their community. As a result the researcher felt an apprehension while reporting vulnerability or state of deprivation. In some situations the language barrier was also an issue. Lastly, as it is student-based research, the researcher also faced some financial constraints.

UNDERSTANDING THE IMPACT OF SMART CITIES AND THE NEED FOR SMART REGULATIONS

Manick Wadhwa[1]

ABSTRACT

There is a pressing need for cities to get smarter, as to handle large-scale urbanization and finding new ways to manage complexity, increase efficiency, and improve quality of life. According to Smart Cities Council, "A smart city is one that has digital technology embedded across all city functions". These futuristic cities need to address issues of data management, including intellectual property rights, proper data handling, and physical storage and distribution requirements. The policy makers need to explore new strategies that will allow them to anticipate and adapt more quickly to changes that the technological advancement brings.

In this paper, I explore some of the most recognized and accepted definitions of "smart cities", and how this concept proposes to change various domains of our everyday life, such as governance, economy, and infrastructure, and also shed a light upon some of the challenges faced by the current legal and regulatory framework in promoting technological advancement and the need for "smart regulations" to enable IoT and smart cities.

Keywords: Smart cities, Smart Regulations, Urbanization, IoT

INTRODUCTION

The rapid urbanization has been unprecedented. According to a UN report[2], 180,000 people move in and out of the cities every day. The number of urban cities has also increased significantly over the last few decades. Till the 1950s, New York City was the only city with a population of over 10 million inhabitants. Now, the list includes twenty-three cities. This rush to the cities has left cities all over the world facing similar problems. Poor housing, alarming rate of pollution, daily traffic jams, increasing crime rate, to name a few.

At the same time, there has also been a remarkable evolution in the field technological innovation. The world is increasingly getting connected day by day. A summary statistic shows that the world population in 2003 was approximately 6.3 billion and the number of devices connected to the internet was around 500 million, which translates to 0.08 devices for every person on this planet. By 2010, world population grew to 6.8 billion and connected devices population to 12.5 billion making the ratio of connected devices per person more than 1 (1.84 to be precise).[3] It is estimated by Cisco that this ration of connected devices per person would increase to 6.58 by 2020 which translates to around 50 billion connected devices for a population of around 7.6 billion[4]. Thus, it is evident that the world is increasingly getting connected and informed day by day, and the benefits of promoting connectivity are going to be profound.

---

[1] Mr. Manick Wadhwa is a LL.B. candidate at Campus Law Centre, Faculty of Law, University of Delhi, New Delhi

[2]UNCHS (Habitat), Istanbul + 5: The United Nations Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Habitat Agenda (2001), <www.un.org/ga/Istanbul+5/brochure.pdf> accessed 14 May 2015

[3] Dave Evans, The Internet of Things (2011) <www.cisco.com/web/about/ac79/docs/innov/IoT_IBSG_0411FINAL.pdf> accessed 15 May 2015

[4] ibid

This increase in the rate of urbanization and technological innovation provides some exciting opportunities for growth and revitalization. Thus, the competition between urban cities will continue to grow economically, socially, and environmentally. The cities that will embrace technology will surface as the winners. There is, therefore, a pressing need for these cities to get smarter, as to handle this large-scale urbanization and finding new ways to manage complexity, increase efficiency, reduce expenses, and improve quality of life

DEFINING SMART CITIES

"**Smart Cities"** has been defined differently by different people. Although, one thing remains constant in all these definitions, the idea of using information and communications technology (ICT) and the Internet to tackle growing urban challenges.

- According to International Telecommunication Union-Focus Group on Smart Sustainable Cities (FG-SSC), "A smart sustainable city is an innovative city that uses ICTs and other means to improve the quality of life, efficiency of urban operation and services, and competitiveness, while ensuring that it meets the needs of present and future generations with respect to economic, social and environmental aspects."[5]
- According to IEEE, "A smart city brings together technology, government and society to enable the following characteristics: smart cities, a smart economy, smart mobility, a smart environment, smart people, smart living, and smart governance."[6]
- Rios defines smart city as a city that gives inspiration, shares culture, knowledge, and life, a city that motivates its inhabitants to create and flourish in their own lives. A smart city is an admired city, a vessel to intelligence, but ultimately an incubator of empowered spaces.[7]
- Frost & Sullivan, a global growth consulting firm, has identified eight key aspects that define a Smart City: smart governance, smart energy, smart building, smart mobility, smart infrastructure, smart technology, smart healthcare and smart citizen.[8]
- The Government of India has proposed to set up a hundred smart cities in India by 2020.[9] In its draft concept note, The Ministry of Urban Development of India has defined smart cities as "Smart Cities are those cities which have smart (intelligent) physical, social, institutional and economic infrastructure while ensuring centrality of citizens in a sustainable environment."[10]

Thus, looking at above-mentioned definitions, it can be inferred that there is no absolute definition of a smart city. Smart cities is rather a vision, a gradual process, to virtually connect cities infrastructure, its citizens, the government, and all other stakeholders, using Information and Communication Technology (ICT), so urban cities become more livable and are able to respond quicker to new challenges.

---

[5] ITU-T Focus Group on Smart Sustainable Cities, Smart sustainable cities(2014) <www.itu.int/en/ITU-T/focusgroups/ssc/Documents/Approved_Deliverables/TR-Definitions.docx> accessed 15 May 2015

[6] IEEE Smart Cities, <http://smartcities.ieee.org> accessed 9 May 2015.

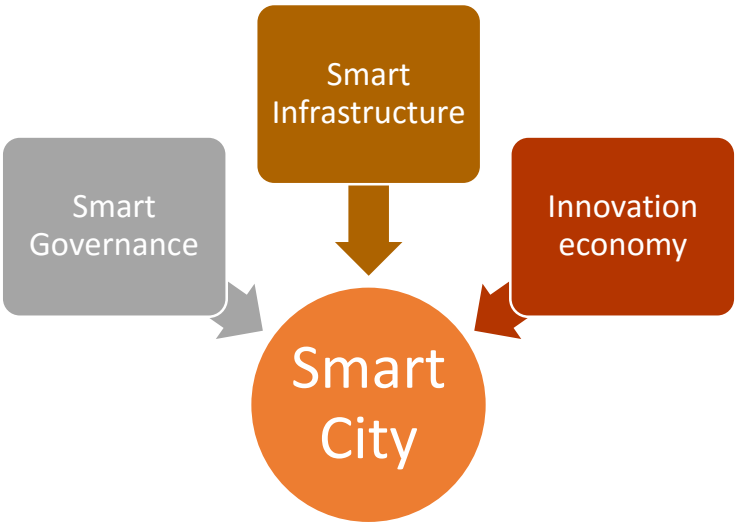
[7] Patrice Rios, Creating "The Smart City" (2008) <http://hdl.handle.net/10429/393> accessed 9 May 2015.

[8] Frost & Sullivan, Urbanization Trends in 2020 (2014) <www.frost.com> accessed 9 May 2015.

[9] The Ministry of Urban Development of India, *Draft Concept Note on Smart City Scheme* (Reference notes, Lok Sabha Secretariat, No.28 /RN/Ref./November/2014)

[10] ibid 4

SMART INGREDIENTS OF A SMART CITY



Smart Governance

Several cities have benefited from the emergence of ICTs that improve their governance. This ICT-based governance is known as smart governance.[11] According to Forrester, smart governance is the core of smart cities initiatives.[12] Smart governance involves use of ICT to improve performance of public sector. It is about changing how governments function, share information, and deliver services. It uses ICT to transform relationships with citizens, businesses, and between arms of government.[13] Smart governance includes an active participation and interaction between government and citizens, and a smart use of concepts such as "e-government" and "e-democracy."

Delivering services to citizens

Smart governance can benefit citizens by reducing delays, consolidating multiple services under one roof, eliminating the need for frequent visits to government offices, and curtailing corruption.

> *For example*, The Department of Revenue, of the Government of Karnataka, has set up computerized land record kiosks (Bhoomi centres) in sub-district offices. These kiosks provide farmers with the Record of Rights, Tenancy and Cultivation (RTC) - a document needed for obtaining bank loans, giving proof of ownership, etc.[14]

[11] Hafedh Chourabi, et al., Understanding Smart Cities: An Integrative Framework (45th Hawaii International Conference on System Sciences, 2012)

[12] Belissent, J, The Key To Being A Smart City Is Good Governance: "Smart Governance" (15 May 2011) <http://blogs.forrester.com/jennifer_belissent_phd/11-05-15-the_key_to_being_a_smart_city_is_good_governance_smart_governance> accessed May 2015

[13] The World Bank, Building blocks of e-government: lessons from developing countries (PREM notes number 91, 2004) <www1.worldbank.org/prem/PREMNotes/premnote91.pdf> accessed 13 April 2015

[14] Albert Lobo and Suresh Balakrishnan, Report Card on Service of Bhoomi Kiosks: An assessment of benefits by users of the computerized land records system in Karnataka (November 2002) <www1.worldbank.org/publicsector/bnpp/Bhoomi.pdf> accessed 15 May 2015

Seven million farmers in Karnataka, now obtain printed copies of land titles in 10 minutes at 177 government-run departmental kiosks or at privately operated Internet kiosks. The fee is 15 rupees (about 33 cents). Under the previous titling system, two-thirds of users report paying bribes.[15]

Delivering services to businesses

For businesses, Smart governance often means less governing, not less governance. Businesses often face significant administrative roadblocks when interacting with government. Electronic delivery can shorten the turnaround on license applications from several weeks to a few days. Rules can be made transparent and consistent across departments. Transaction costs for both businesses and government can be reduced, and government can benefit from more efficient revenue collection.[16]

E-Democracy

E-democracy can broadly be described as the use of ICT to increase and enhance citizens' engagement in democratic processes. The Institute for Public Policy Research says that e-Democracy is about "encouraging people to interact on a neighborhood level to solve their problems."[17]

For example, http://petitions.number10.gov.uk was built to allow members of the public to petition the Prime Minister about whatever issues they see fit. Since its launch, over 29,000 petitions have been submitted, containing 5.8 million signatures from over 3.9 million email addresses. The most popular petition, on road-pricing, received in excess of 1.8 million signatures.[18]

Smart Infrastructure

Infrastructure services make a city "livable." These fundamental services, both necessities and comforts for citizens and businesses, include utilities such as water and energy, as well as transportation and environmental areas.[19]

Smart Energy

Demand for energy is increasing around the world, induced by increasing economic and population growth, particularly in emerging economies. As their standard of living and GDP has grown, countries like China and India have witnessed a massive growth in per capita energy use.[20] Concerns about climate change, surging urbanization, and the trend towards automobile dependency have posted environmental, health, and security concerns.

[15] Chorabi (n11).
[16] ibid
[17] David P. Racine, 'People and Their Problems' (DPhil thesis, Virginia Polytechnic Institute and State University 2001)
[18] POST, eDemocracy (2009) <www.parliament.uk/parliamentary_offices/post/pubs2009.cfm> accessed 15 May 2015
[19] IBM, Smarter Cities <www.ibm.com/smarterplanet/in/en/smarter_cities/overview/> accessed 15 May 2015
[20] Department for Business, Innovation and Skills UK, The Smart City Market: Opportunities for the UK (BIS research paper No. 136, BIS/13/1217, 2013)

Cities, therefore, have an inevitable role in improving energy efficiency and reducing carbon emissions, while promoting energy resilience in terms of security of supply and prices.[21] Governments worldwide are investing in the new Smart Grid and Smart Energy Management Structure (SEMS) with an objective of creating an energy distribution and management system that responds to human mobility and behavior patterns, which in turn increases energy efficiency, promotes energy conservation and improves energy management. It can help countries to better adjust to fluctuations in demand, reduce the need for capacity expansion, and decrease greenhouse gas emissions, while providing valuable savings to customers.

Some examples of SEMS are: Home Energy Management Systems (HEMS), Smart Appliances, Advanced Metering Infrastructure (AMI), Building Energy Management Systems (BEMS), Smart grids, Real-time/Dynamic pricing infrastructure, Micro generation management. [22]

Smart mobility

Transport has a major impact on the quality of life in a city, its environment and the economy. An astonishing 1.24 million people die, and as many as 20-50 million people are injured in road accidents each year around the world.[23] Drivers and passengers spend around 90 billion hours in traffic jams each year. In some car-choked cities, as much as a third of the petrol used is burned by people looking for a space to park.[24]

The standard approaches to develop solutions to the pertaining problems no longer seem to be adequate. Emergence of an Intelligent Transportation Systems (ITS) holds potential solutions to a number of these problems. ITS improve capacity; enhance travel experiences and make transportation safer, more efficient and more secure.[25] Traffic managers gain citywide visibility to help alleviate congestion and rapidly respond to incidents using smart systems such as traffic monitoring and management, congestion management, road user charging, emergency response, public information systems, smart parking, and integrated traffic light management[26]

Smart water management

As cities grow, it is essential to provide clean and affordable water for consumption, as well as for industries and irrigation. Today, 750 million people - about 1 in 9 - lack access to safe water.[27] Smart Water Systems (SWS) present a new approach to promote water security, and intensifying water allocation demands across water supply, agriculture, industry and ecosystems.[28] With advances in technology—sophisticated sensor networks, smart meters, deep computing and analytics—we can be smarter about how we manage our planet's water. We can monitor measure and analyze entire water ecosystems, from rivers and reservoirs to the pumps and pipes in our homes.[29]

---

[21] ibid

[22] New Zealand Smart Grid Forum (2014) <www.med.govt.nz/sectors-industries/energy/electricity/new-zealand-smart-grid-forum/meeting-4/workstream-a.pdf> accessed 15 May 2015

[23] WHO, Road traffic injuries fact sheet <www.who.int/mediacentre/factsheets/fs358/en> accessed 15 May 2015

[24] The Economist, "Wireless Wheels", Sept 6, 2014

[25] IBM, Smarter Cities <www.ibm.com/smarterplanet/in/en/smarter_cities/overview/> accessed 15 May 2015

[26] BIS (n 20)

[27] WHO/UNICEF, Joint Monitoring Programme (JMP) for Water Supply and Sanitation (2010) <www.unicef.org/eapro/JMP-2010Final.pdf> accessed 14 May 2015

[28] Hope, R., Foster, T and Thomas, M., Smart Water Systems. (Project report to UK DFID, Oxford University, Oxford April 2011)

[29] ibid

Smart buildings

A "Smart Building" integrates major building systems on a common network and shares information and functionality between systems to improve energy efficiency, operational effectiveness, and occupant satisfaction.[30]

It uses intelligent-sensing technology and ICT during operation to connect a variety of subsystems, which typically operate independently, so that these systems can share information to optimize total building performance. Smart buildings look beyond the building equipment within their four walls. They are connected and responsive to the smart power grid, and they interact with building operators and occupants to empower them with new levels of visibility and actionable information.[31]

The design and prototyping of personalized, transformable urban housing will maximize the functionality of a building, thereby improving livability and convenience. Time-shifted, shared space-on-demand for collaborative work will allow for face to face meetings while giving businesses the opportunity to reduce their office space requirements and reduce net energy consumption.

Innovation Economy

Innovation economics was introduced in 1942 by Joseph Schumpeter in his book Capitalism, Socialism and Democracy.[32] Innovation economics holds that it is innovation that drives growth and that the most important economic task for government is to promote productivity growth and innovation.

When it comes to spurring innovation and productivity, the theory of innovation economics holds that markets and price signals alone often are not enough.[33] Therefore, policies to help stakeholders, such as entrepreneurs, firms, industries, universities, and governments, to act in ways to increase innovation and productivity, should be at the center of economic policy, accompanied by an array of public-private partnerships (PPP) and public investments promoting technological development and innovation. A vibrant innovation economy starts with entrepreneurs – people with ideas and the passion to turn those ideas into breakout businesses. In turn, those entrepreneurs benefit from the resources available in a vibrant innovation economy – talent, capital and a supportive business environment.[34]

For cities to become smarter, an innovation economy must be backed and innovation in industries, clusters, and districts of a city must be encouraged. Innovation thrives when scientific progress and discovery is encouraged. Therefore, our leaders must do their part in strengthening the image of science and technology in society and help create the spark that awakens our national aspirations, and in turn empower citizens to find and build their own solutions dynamically to urban problems.

SMARTER REGULATIONS. WHY DO WE NEED IT?

"Smart cities" is a phenomenon that is inevitably taking shape by the day. But it has to be made sure that smart cities don't just happen, but happen in the right way. Proposition for smart

---

[30] Patty Anderson & Jesse Sycuro, Next generation building (2011) <http://www.bcxa.org/ncbc/2011/documents/presentations/11_ncbc-2011-next_gen_bldg-mckinstry.pdf> accessed 15 May 2015

[31] Institute for building efficiency, "What is a Smart Building?" <www.institutebe.com/smart-grid-smart-building/What-is-a-Smart-Building.aspx> accessed 15 May 2015

[32] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Harper & Brothers 1942)

[33] ibid.

[34] Silicon Valley Bank, Innovation Economy Outlook 2014 UK Report (2014) <www.lincscot.co.uk/media/47664/svb_ieo_uk_report_2014.pdf> accessed 14 May 2015

cities won't attract the necessary investment to become a reality unless legal and regulatory systems keep pace with technological innovations.

Our current regulations – intended to ensure trust, safety, and security in an unsure world – were designed for the industrial era, where change happened over decades and information was expensive. This mode, took an "up-front permission" approach, based on central licensing and permitting as a prerequisite for acting.[35]

Too often, these regulations are too expensive or too rigid, hurting both innovation and competitiveness. The overall regulatory environment, especially in light of many regulations' heavy compliance burdens, too often fails to produce the certainty that business need to invest and create jobs.[36] Competition is prohibited, even criminalized. Since innovative technologies are a particularly ruthless kind of competitor, they are directly or indirectly banned.[37]

For Example, Uber, which was launched in 2009, allows users to arrange for taxicabs, using a smartphone app. Uber doesn't provide its own vehicles or operators, but works with existing licensed drivers to help keep already-rolling vehicles busy transporting customers. Riders can track the location of their dispatched drivers using GPS, and pay directly on their phones.

In addition to improving mobility within the city by providing safe, reliable, hassle-free rides through the use of ICT, Uber is also working in partnership with cities to provide data that will provide new insights to help manage urban growth, relieve traffic congestion, expand public transportation, and reduce greenhouse gas emissions.[38]

Instead of responding to a new kind of virtual competitor with better products and services, the highly-regulated taxi companies in most cities, have instead gone the route of trying to ban Uber's existence. They've called on state and local regulators to declare the service in violation of decades-old laws outlawing unlicensed ride services, often based on technical definitions of "meters," "dispatch," and "taxi."[39]

A range of standards and regulations are needed to help the smart city meet its potential. These "Smart Regulations" will help address issues at various levels, from the decision-making at the city level to the interoperability of devices,[40] creating an environment that promotes public confidence and ensures stability, transparency, competition, investment, innovation, and growth in the city.

[35] Nick Grossman, White Paper: Regulation, the Internet Way<http://datasmart.ash.harvard.edu/news/article/white-paper-regulation-the-internet-way-660> accessed 15 May 2015

[36] Business Roundtable, Achieving Smarter Regulation (2011) <http://businessroundtable.org/sites/default/files/Regulation_1.pdf> accessed 15 May 2015

[37] Larry Downes, Lessons From Uber: Why Innovation And Regulation Don't Mix <www.forbes.com/sites/larrydownes/2013/02/06/lessons-from-uber-why-innovation-and-regulation-dont-mix> accessed 15 May 2015

[38] Justin Kintz , Driving Solutions To Build Smarter Cities <http://newsroom.uber.com/boston/2015/01/driving-solutions-to-build-smarter-cities> accessed May 2015

[39] ibid

[40] BSI Group, Role of standards in smart cities (Issue 2, 2014) <www.bsigroup.com/LocalFiles/en-GB/smart-cities/resources/The-Role-of-Standards-in-Smart-Cities-Issue-2-August-2014.pdf> accessed 14 May 2015

It is imperative that the regulatory process be improved to avoid problems of the past while ensuring that our limited resources are targeted prudently. Cities should understand the purpose of regulation. To do this, the City planners and the policy makers should ask themselves:[41]

- How and why is a restriction on a transaction or a business imposed?
- How can regulations be as simple, fair and enforceable as possible?
- Is the cost of regulation greater than the benefit it creates for the community?
- How are existing regulations assessed or evaluated for continued relevance?
- Is existing regulation lacking or excessive in some manner?
- Do regulations increase quality of life and provide public value?

As a first step, an overall "fitness-check" should be conducted, identifying those parts of the policy framework that are promoting innovation and those parts of the policy framework that are hampering innovation. Addressing these hurdles would allow new business models, such as buildings, on active collaboration between municipalities and private investors or overcoming the gap between those investing and those benefitting from innovative, energy-efficient, green technology.

In order to transition to an effective competitive environment, regulators must establish a regulatory framework that can resolve disputes, address anticompetitive abuses, protect consumers, and attain national goals such as universal access, industrial competitiveness or economic productivity and growth.[42]

In order to realize the full potential of Smart cities in the era of the IoT, a strong public-private partnership (PPP) approach is necessary, which is beyond the silos of existing city infrastructure providers. Asset-bundling and new partnership models will enable the creation of a connected public infrastructure that delivers value to both city administrators and citizens, enhancing the livability of a city.[43]

Some of the examples of actions that could help create and shape an enabling policy and regulatory framework for Smart cities are presented in the table below.[44]

Innovation zones	Create spaces in cities to test and evaluate the effect of new innovation models, revised policies and regulations, as well as consider different or reduced forms of regulation, where feasible.
Innovative funding models	Intelligent combination of funding instruments and funding commitments will enable to bypass any credit crunch and better

[41] Regulatory reform team, Origination of a Regulation (2015) <http://datasmart.ash.harvard.edu/news/article/origination-of-a-regulation-598> accessed 12 May 2015

[42] International Telecommunication Union, Trends in Telecommunication Reform: Effective Regulation (2002) <http://www.itu.int/ITU-D/treg> accessed April 2015

[43] Shane Mitchell, Nicola Villa & et al., The Internet of Everything for Cities (2013) <www.cisco.com/web/strategy/docs/gov/everything-for-cities.pdf> accessed 13 April 2015

[44] European Innovation Partnership on Smart Cities and Communities, Operational Implementation Plan: First Public Draft (2014) <http://ec.europa.eu/eip/smartcities/files/operational-implementation-plan-oip-v2_en.pdf> accessed 12 May 2015

	plan project-bundles / infrastructure investments
Smart city networks	Bringing together stakeholders on different aspects of smart cities (i.e. energy, ICT, transport) will generate new ideas and wider buy-in
Fitness checks	Systematic evaluation of which parts of the existing regulatory/policy framework foster or hamper innovation, and would need adequate action.
Improving regulatory processes	Developing an approach on how new and/or unified regulations (legal, financial, etc.) can be introduced for cities in a better way, including clear targets.
Smart City Strategy and implementation plan	Strategic vision backed by all stakeholders and supported by long-term policies and respective regulatory frameworks as the basis for an effective and efficient implementation process.
Streamlining regulation	Developing new approaches to create incentives for cities to align specific policy regulations and technical standards.

CONCLUSION

As the world continues to urbanize, with close to 180,000 people moving into cities every day, the competition between urban cities will continue to grow economically, socially, and environmentally. The cities that will embrace technology will surface as the winners. That is why, governments across the world are keen on setting up smart cities, where technology can help citizens access, in real time, infrastructure services like traffic, lighting, water, healthcare, and education, and thereby improving quality of life.

Smart cities is a vision, a gradual process, to virtually connect cities infrastructure, its citizens, the government, and all other stakeholders, using Information and Communication Technology (ICT), so urban cities become more livable and are able to respond quicker to new challenges.

To achieve this, cities need an adequate and innovative set of policies and regulations. New governance concepts are required to coordinate and integrate smart city stakeholders – cities, businesses, and research organizations – so as to identify strengths, weaknesses, opportunities and threats these advancements bring about. Stakeholders need to jointly experience and learn

with new forms of governance, policy and regulatory concepts to accelerate the process of becoming a sustainable, smart city.

FOREIGN INVESTMENT, TECHNOLOGICAL DIFFUSIONAND COMPETIVENESS OF EXPORTS: A CASE FOR TEXTILE INDUSTRY IN PAKISTAN

Syed Toqueer Akhter[1] and Muhammad Awais[2]

ABSTRACT

This research paper would determine the impact of Foreign Direct Investment as well as that of Technological Diffusion upon Export Performance of Pakistan, in a time series setting. The research has been carried out for the reference period 1995 to 2013 and the results have been estimated by using competing Econometric models such as Robust regression and Generalized least squares as well using the Distributed lag models, so that to consolidate the impact of the Foreign Investments & the Technological Diffusion upon Export competitiveness comprehensively while Distributed Lag model has been used to encompass the lagged effect of policy tools variables used by the government. Model estimates entail that FDI and Technological Diffusion does have a significant impact on the competitiveness of the exports of Pakistan. It may also be inferred that the competitiveness of Textile sector requires an integrated policy framework, primarily including a reduction in interest rates, providing subsidies, and manufacturing of high value-added products.

Key Words: High Technology Export, Robust Regression, Patents, Technological Diffusion, Export Competitiveness

INTRODUCTION

This part discusses some concerns regarding the export performance & competitiveness in relation to the inflow of Foreign Investments as well as the process of diffusion of technology.

Evolution of the Textile Industry Efficiency and Competitiveness in Pakistan

One of the major participants of industrial development in Pakistan is the Textile sector. This industry contributes about 8.5% of the GDP of the country. Currently, the situation of Pakistan is such that it is at 4th largest manufacturer of Cotton in the world and with third biggest spinning capacity in the Asia following China and India. It also contributes about 5% of global Spinning capacity. The Textile sector provides 40% of employment to the Industrial Labour force.[3]

According to the All Pakistan textile association (APTMA)[4] most of the ready-made garments have been exported to the USA and U.K. Apart from employment Textile industry also contributes about 52% of the exports of the country. The efficiency of Textile sector is showing a downward trend from past years as raw material prices are going up and output is going down. Machinery requires technological up gradation and in order to run at full capacity they need to have a continuous power supply [5] (electricity, gas). Table 1 shows the current

[1] Syed Toqueer Akhter, Assistant Professor at Lahore School of Economics, Pakistan, syedtoqueer.research@gmail.com
[2] Muhammad Awais, Student at Lahore School of Economics, Pakistan, a_awais28@yahoo.com
[3] Economic Contribution of Textile Industry 2011-12 (Source: APTMA)
[4] APTMA: All Pakistan Textile Mills Association is national trade association of Textile sector.
[3] Energy crisis is among one of the major challenges which the Textile industry is facing in Pakistan from many years.
[4] Research and development expenditure percent of GDP (Source: Global Economy)
[5] Innovations index data collected from Global Economy database

scenario of the Textile Industry. Both the spindles and looms had shown a fall in their working capacity and they are not running at their full level. The underutilisation of the machinery shows concern about the industry's performance. As shown in Table 1 apart from underutilisation of these machines, there hasn't been any notable increase in the addition of new machinery.

In recent years, the country has been facing tough competition in the international market with countries such as China, Bangladesh and India. There are different factors which are hindering the growth prospects of Textile sector and are acting as a barrier for competing in the international market. Some of the factors include lack of research and Development. R&D spending of Pakistan has been lowest as compare to India and China.[6] The energy crisis in the country is also one of the challenging problems which the industry is facing, Lack of foreign Direct investment in Textile sector is also leading towards low productivity and fall in growth. Due to lack of innovation and scientific development in the country technology has been becoming obsolete China is leading innovator among Asian countries while Pakistan is the least innovating[7].

State of Technology & the Technological Diffusion processes

Pakistan holds a significance position in global Textile industry. In last four decades the Textile industry has worked very hard to be kept up to date, by using state of the art technology from China, Japan and Europe. These machineries help to develop natural raw material cotton, and it further processes it. The advantage of using these machineries is reduction in cost of production and improvement in efficiency.

Overall technological configuration of the industry needs major up gradation for replacing machineries that has been worn out and outlived its economic life. Pakistan has a natural advantage of home grown fibres[8] and availability of cheap labour, which could be useful to gain competitive advantage with the help of correct policy interventions. Ministry of Textile is trying to collude with various international organizations like ILO, UN and KOICA[9] for setting up their development programmes for value addition of the Textile industry. For infrastructure projects Lahore Garment city and Faisalabad Garment city were initiated in 2005 they were completed[10] and rented out to value added manufacturing units. Government would focus on spending more on research and development for promotion of Technical Textile[11] in the country.

There are different stages in technological diffusion process as the Textile sector has export orientated demand, the transfer of technology could result from FDI, patenting, licensing, joint ventures, technical education, spending more on R&D by the government. There exists a positive correlation between R&D expenditure on high-tech exports.[12] R&D expenditure by government would boost up high-tech exports and increase the competitiveness.

---

[8] Pakistan has competitive advantage of home grown cotton as it has played significant roles in growth of Textile industry.

[9] KOICA: Korea International Cooperation Agency is an institute which is helping in providing technical training for workers in Pakistan. Its missions is to corporate with other developing countries for better training of its workers.

[10] These Projects have been initiated by the ministry of textile for value addition of finished textile products to compete in international market.

[11] Technical textile is a high and advance level of textile products which are manufactured for non-aesthetic purpose for e.g. use in conveyer belts, sports textile and other high technology items.

[12] Steliana Sandu,'Impact of R&D and Innovation on High-tech Export' (2014) 15 Procedia Economics and Finance 80.

Through collaboration of local firms and multinational company, transfer of technology could take place; however, this process can be subject to limitations as there are increased costs of transfer of technology. Technology can become out dated as it is rapidly changed by advance countries and there is an increased cost of intellectual property rights.

Small and medium size industries also play a role in transfer of technology in the country as they would try to rely heavily on local R&D institutions and technical institutions.[13] This kind of technology transfer has advantage of new product development at a low cost.[14] Some studies show that the new small firms entering in the industry invest more heavily on R&D than some existing firms in industry, hence improving the sales of innovative products. The collaboration between the existing large firms and new small firms can also lead towards technologically based expansion.

A strategic alliance between large firms and small firms would mean that large firms would not have to be dependent on government support, availability of cheap loans, low cost labour, and favourable exchange rate. Large firms would provide technical assistance to small firms and in return small firms could be very resourceful for large firms as they would be well equipped and competitive enough in providing low priced quality components to them, which would lead to competitiveness in global market.

Textile vision and Public sector Initiatives for Textile Exports

According to the Government of Pakistan New Textile policy (2014-19) it would be focusing on to double the of value addition to $2 billion per million bales as compare to $1 billion per million bales in the upcoming five years. It would try to increase the Textile sector exports from $13 billion to $ 26 billion with the help of offering RS 64.15 billion cash subsidy. For technological up gradation and brand development the finance division would provide Rs40.6billion over the five years. Rs23.5billion would be spent on skill development, establishment of World Textile sector and weaving city. Government would further invest $5 billion in improvement of machinery and technology. It would also try to facilitate and encourage new investment opportunities in the country. Value added sector in the industry would be provided long-term financing facility (LTFF)[15] with the help from State Bank of Pakistan at a rate of 9 % for the next three to ten years for up-gradation of technology. Government would continue to uphold the previous year's Textile policy; as it would be providing facility of duty free import of machineries. To increase efficiency of the Textile sector the use new modern management techniques would be encouraged. As Pakistan has been awarded GSP plus status[16] in 2014 to attain maximum benefit from this status, a new committee would be set up to evaluate and analyse international trends and the demand of new textile products.[17]

Technology Up-gradation fund scheme would be used to improve overall technological configuration of sector, and achieve compliance with international standard Ministry of Textile would set up PAK Korea Garment Technology institute with contribution of KOICA of US$ 1.28 million.

---

[13] 'Textile Institute of Pakistan' is one example of technical institution established by APTMA for supporting the industry by creating new professionals. In these kinds of institutions students are provided education about recent development of new technology.

[14] Nadide Sevil Tülüce, 'The Impact of Foreign Direct Investments on SMEs' Development' (2014) 150 Procedia - Social and Behavioral Sciences 107

[15] LTFF: Long term financing facility is a program initiated by government to attract investors.

[16] The European Union Granted generalized system of preference (GSP) plus status to Pakistan this would allow almost 20% of exports of Pakistan to enter into EU markets at zero tariff rates.

[17] For further insight refer to (Textile Policy 2014-19, 2015)

To attract Foreign Direct Investment board of investment have laid down several plans, as Pakistan is perceived as high risks investment proposition. A pro-active campaign would be launch under FDI strategy to improve country's image. Special programmes would be launched to promote linkages between domestically and foreign-owned private enterprises.

The country would focus more on the exports of major high value added products such as children wear, beach wears, lingerie, technical geo and medical textile.[18] The Ministry of Finance would try to overcome the problem of energy crisis to reap the full benefit of GSP plus status. Government is planning to develop a new strategy for promoting and advertising technical textile. In addition to these, government would try to give training to different workers to furnish and develop new technical skills. In National Textile University Faisalabad new research facilities would be established. In Karachi, Faisalabad and Lahore new training facilities would be set up by Ministry of Textile to fulfil the international requirement and reduce the gap between manufacturing and production of high quality value added textile products.

Research Concerns and Study objectives

This study aims at testing the proposition that the inflow of foreign investment and technological diffusion via patents or property rights affects export competitiveness of Pakistan significantly or insignificantly for referred time period (1995-2013)

Apart from these variables some other variables such as 'Interest rate' and 'Subsidies' have also been added in the study which could be used as a policy tools to determine that whether they are affecting significantly or insignificantly on export competitiveness.

FRAMEWORK OF ANALYSIS AND METHODOLOGICAL CHOICES

In this part of paper we would see how technological diffusion and industrial competitiveness have been quantified. What set of available pool of data we had, and why were they chosen?? We would see that how the research is carried out by using different econometric modelling techniques and why were they preferred. A theoretical framework would be established where model specification would describe the relationship between independent variable and dependent variables.

The Nexus between Foreign Investment and Transfer of Technology

Despite the fact that capital investment leads to elimination of saving and investment gap FDI helps to introduce new technology and entrepreneurial skills in the country. FDI would exert positive impact on the growth if domestic system has been developed at a certain minimum level. Better domestic financial conditions would attract more FDI. Foreign countries which would be working in host countries would diffuse new ideas and technology in host country which would help to improve competiveness of the country. FDI contributes towards accumulation of knowledge and exhibits externalities in the host country which improves its productivity and competitiveness.[19] FDI over the time would have positive affect on industrial performance.[20]

---

[18] A growing field in technical textile which include materials for health care and medical products e.g. bandages and surgeons wear.

[19] Hasnain Ahmad, 'Foreign Firect Investment, Exports, and Domestic Output in Pakistan' (2003) 42(4) The Pakistan Development Review 715.

[20] K H Zhang, 'How does foreign direct investment affect industrial competitiveness? Evidence from China' (2014) 30(1) China Economic Review 530.

The role of FDI in manufacturing sector is very important. For industrial development and value addition of the commodities, it is the channel through which transfer for technology takes place. Technology absorption and exports have a direct relationship the more the transfer of technology in industrial sector would be the greater would be the growth of industry.[21]

Technological diffusion with the help of transfer of FDI helps in improvement of labour productivity which would lead to better export performance. Countries with high level of FDI inflows, exhibits increase in its export productivity as compare to those countries with low level of FDI inflows.[22] Spill over effects of MNCs operating in host country also plays imperative role in development of these countries.

Joint ventures between domestic and foreign companies also play a very important role in technological diffusion. For instance if a domestic company starts to invest in technological development without the collaboration of a foreign company it would need a lot of effort to adapt to those capabilities, and to achieve more know-how that how technology works. Joint ventures between different countries is one of the way for technology transfer where MNCs would invest in developing countries as cost of inputs is low, and they can yield higher output.[23] This would result in domestic company investing more in technological acquisition. In these types of cases additional investment is always needed to keep up with the technological progress and a decline in investment would be directing to fall in exports. In case of Czech Republic FDI and Joint Ventures led to an increase in industrial output.[24]

The linkage between FDI and technological diffusion is also attributed to the formation of human capital; in form of engineer and scientist, who had played a key role in developing technology, can be hired from foreign firms to work in a new company where they could transfer the developed technology.[25] Through external financing a lot of investment could be done in R&D expenditures, technological skill creation, and technological education; by enrolling more students in science technology and also providing more facilities to the R&D department of different universities which would be leading towards technical education.

One of the significant and most leading factors for driving FDI into the country is the 'competitive environment' of the target country.[26] If there are some fears about technological imitation and whether the host country do not have suitable environment and poses a country risk for investment, then it would affect negatively on FDI.[27] A healthy environment should be provided to foreign investors; to attract more foreign inflows, gain maximum benefits from foreign capital spill over and for better industrial upgrading structure.[28]

FDI would have different spill overs for e.g. 'productivity spill over' where investment by foreign companies would lead to increase in efficiency and productivity. Another effect of FDI

---

[21] The relationship between FDI and technology is established with acquiring of new skills and technological know-how, which arises with patent licensing and intellectual property right.

[22] Zeb Aurangzeb, 'The role of Foreign Direct Investment (FDI) in a dualistic growth framework: A smooth coefficient semi-parametric approach' (2014) 14 (3) Borsa Istanbul Review 133.

[23] Khalil Hamdani, 'Benefiting from Foreign Direct Investment' (Lahore School of Economics BlogSpot, 2 January 2014) <<http://lahoreschoolofeconomics.blogspot.com/2014/01/benefiting-from-foreign-direct.htm>l> accessed September 2014

[24] HOEKMAN AND S DJANKOV,'FOREIGN INVESTMENT AND PRODUCTIVITY GROWTH IN CZECH ENTERPRISES' (2000) 14(1) WORLD BANK ECONOMIC REVIEW 49..

[25] V Soemon Takakuwa and I Veza, 'Technology transfer and World Competitiveness' (2014) 69 Procedia Engineering,121.

[26] M N Iikay Yilmaz, 'Host country marketing culture and foreign direct investment' (2014) 148 Procedia Social and Behavioral Sciences 299.

[27] Judy Hsu, 'Patent rights protection and foreign direct investment in Asian countries' (2015) 44 Economic Modelling1.

[28] Zhao Qiong, 'Influence analysis of FDI on China's Industrial Structure optimization' (2013) 17 Procedia Computer Science 1015.

is 'market access spill over' with the help of multinational companies, domestic firms would be benefiting by having access to export markets.[29] The greater the technological gap would be among the foreign and domestic firm, the larger would be spill overs effect of technological diffusion

Multinational companies would be seeking ways to control the rising cost of production in home countries, so they would start to invest in other countries where the inputs costs are low. This FDI would result in improving the country's economy. Positive spill overs from MNCs would help to improve labour productivity. Turkey is one of a developing country where technology was being transferred by means of FDI through multinational companies.[30] FDI can also help in technological diffusion by management contracts, licensing agreements. Transmission of technology in developing economies would take place most efficiently when FDI would be in its pure form.

Technological Diffusion, Property Rights and Comparative advantage

Technological advancement would help to increase the value addition and it would also lead to greater productivity and output. Technology transfer would be faster when it would be less costly to transfer the spill overs from the parent to subsidiary company. Technological transfer would lead to product innovation and with the passage of time and by 'learning by doing' the industry would be able to increase the production skills and reduce per unit labour cost.

If a developed country has Intellectual property rights (IPRs) it means that the developing country would have to transfer the technology with the means of licensing or FDI.[31] The developing country would then try to spend more on innovation and research. Stronger IPRs protection would lead to growth of the country with the help of innovation and technological diffusion which would result in the developing countries competitive advantage. Innovation and patent activities are precondition for development of the industry. Countries which would have more innovation capacity, the stronger the IPRs protection would lead to greater innovation. Innovation performance of the country is generally considered as one crucial component for the country to achieve long term competitiveness.[32]

Some of the developed countries with the stronger IPRs could restrict the transfer of technology to the low developing countries. In a case when developed countries would have strong IPRs, transfer of technology in host country would become difficult and it would be in from different means like patent and licensing. It would also depend on the development and imitation capacity of the host country. Stronger IPRs protection from developed countries would be guiding the country toward growth and development hence providing a competitive edge over its competitors.

In a situation where developing countries are capable of new innovations then these country should have a stronger hold on IPRs. Stronger IPRs protection would mean a great market power for patent holders through which they could reduce the sales and increase the prices. Countries with a strong hold on IPRs protection and an increase in FDI would enjoy technological advantage over the other countries.[33] Stronger IPRs in developing country, in a

[29] Tülüce (n 12)

[30] Harun Demirkaya Nimet Eryigt, 'Multinational Firms as technology determinants in the new era of developing countries : Survey in Turkey' (2012) 58 Procedia Social and Behavioral Sciences 1239.

[31] R F Neil Foster, *The role of intellectual property rights In Technology Transfer And Economic Growth: Theory and Evidence* (UNIDO 2006).

[32] Zaneta Rylkova,'Protection of intellectual property as a means of evaluating innovation performance' (2014) 14 Procedia Economics and Finance544.

[33] Saurav Pathak, 'Influence of intellectual property, foreign investment, and technological adoption on technology entrepreneurship' (2013) 66 Journal of Business Research 2090.

situation when there would be high cost of imitation would lead to diffusion of technology through FDI or spending more on local R&D.[34] Those countries with a stronghold on property rights can expand their productive frontier and hence would induce innovation in the country.[35] Those countries which have a strong property rights they have a direct relationship with FDI.[36]

FDI inflows in a country lead towards transfer of technology. Technological gain for a country could be very vital for achieving growth and competitive advantage among other competitors. FDI inflows effect greatly on GDP growth and economic growth, it was an active factor in development and competitiveness of Romania.[37] It also benefits the host country by spending more on R&D activities. Strong Property rights would also help the countries to charge prices above the marginal cost and temporarily granting exclusive rights on their inventions.

Data Instruments and Quantifications of Technological Diffusion and Industrial Competiveness

For the research secondary data was used. Time series data of different variables was collected from 1995 to 2013. Most of the data was collected from World Development Index. For dependent variable 'High Tech Exports' has been used as a proxy for competitiveness of exports. There are different indicators of science, innovation and technology.[38]

In this research paper technological diffusion has been quantified in the following way:

- **Applications of patents by residents:** these are files and application filed with national patent office to provide protection for the innovation for the owner of patent.
- **Research and Development expenditure as percentage of GDP:** is amount of money spent by the government on the research and development of the project.
- **Researchers in R&D:** are the professional people who are engaged in creating new products or they are creating new knowledge. FDI stock[39] is another mean of technological diffusion.
- **Scientists & engineers in R&D:** are all those people who are working together for development of new technology.
- Charges for the use of intellectual property payments: these are the payments paid for acquiring and having authorisation to use proprietary rights such as licensing, patents and trademarks.

Industrial competitiveness has been quantified in the following way:

- **Labour Productivity:** this is the amount of output produced in a certain period of time.
- **Innovation sales as percentage of total sales:** Sales of High-tech commodities of a country which have been resulted due to innovation in input of those commodities, as compare to the total sales.
- **Lead time to export:** it is the median time taken from shipment point of exporter till the time the item has been received by the importer.

[34] Hitoshi Tanaka, 'Intellectual property rights and foreign direct investment: A welfare analysis' (2014) 67 European Economic Review 107.

[35] C M Sweet, Dalibor Sacha and Maggio Eterovic, 'Do Stronger Intellectual Property Rights Increase Innovation?' (2015) 66 World Development 66

[36] Judy Hsu (n 25).

[37] Paula Nistor, 'FDI and Economic growth, the case of Romania' (2014) 15 Procedia Economics and Finance 577.

[38] F Gault, 'Science, Technology and Innovation Indicators: The Context of Change. In Science, Technology and Innovation Indicators in a Changing World: Responding to Policy Needs' in OECD, *Science, Technology and Innovation Indicators in a Changing World: Responding to Policy Needs* (OECD 2007) .

[39] The total value of Share capital and reserves in a country that are attributable to some foreign enterprise.

- **Logistics Performance Index:** is the score that measures the logistic capabilities[40] of that country, its efficiency is based on custom clearance process, quality of infrastructure and transportation.
- **Global Innovations Index[41]:** Ranks the country according to their innovations outputs and innovation capabilities.
- **The Global Competitiveness Index[42]**: provides the insight of global competitiveness of economies, the level of productivity and prosperity earned by that economy.
- **Ease of doing business index[43]:** reflects the rules and regulation in the country which affects the performance of any firm operating in that country.

Data Needs and Data choice

To measure the competitiveness of high tech exports and the factors which were affecting them, different variables were being selected and they were quantified in their respected way. There were different choices available for selecting a dependent variable which could have been used as a proxy for 'export competiveness' for e.g. 'Index of Textile sector Export prices' and 'Export Quantum Index'. Data availability of these variables was an issue so 'High tech Exports' was chosen as dependent variable

Variables		Definition	Source
Dependent	**Y**		
High-technology exports (% of manufactured exports)		High quality export products with intensive R&D and innovative capability	**WDI**
Independent	**X**		
Patent applications by residents	**X_1**	Patents applications is the process through which different firm in an industry can get hold to new innovation and technology which offers technical solution for their problems	**World Bank Data**
Exchange rate: Units of domestic currency per U.S $	**X_2**	Local currency showed in per unit U.S dollar	**World Bank Data**
FDI stock (US Dollar at current prices and current exchange rates in million)	**X_3**	The total value of Share capital and reserves in a country that are attributable to some foreign enterprise	**UNCTAD Online database**
Subsidies and other transfers (% of expense)	**X_4**	Grants and other non-payable spending by government on public in for of cash or in kind transfer	**World Bank Data**

[40] Logistics performance index: The index range is from 1 to 5, a higher score would be representing a better performance.

[41] S Dutta, B Lanvin and S Wunsch- Vincent (eds), *The Global Innovation Index: The Human Factor in Innovation* (Cornell University, INSEAD, and WIPO 2014)

[42] For further detail about other countries, See K Schwab, *The Global Competitveness Report 2014-2015 (*World Economic Forum 2014).

[43] (A high ranking country would have low numerical value for e.g. '1'). See The World Bank Group, *Doing Business 2015: Comparing Business Regulations for Domestic Firms in 189 Economies* (World Bank 2014).

Labour productivity growth (%)	**X_5**	Labour efficiency measured in output per worker	**EIU calculation**
Total factor productivity growth (%)	**X_6**	It is measure of efficiency of all inputs, and increase in production usually resulting from technological gains	**EIU calculation**
Taxes on goods and services U.K (% value added of industry and services)	**X_7**	Taxes on trade, good and services, excise duty. Taxes on value addition and services including sales and turnover	**World Bank Data**
Weighted average lending rate (%)	**X_8**	Average lending rates with assigned weights	**State Bank of Pakistan**

Model Specification and Econometric Choices

This section would develop a framework of analysis, different Econometric techniques have been used in the research paper; 'Robust regression', 'Generalized least squares' and 'Distributed lag'. In this section we would examine the relationship between independent variables and dependent variable. Robust regression is the primary model used in the study and the results which we get after using this model are also supported by using other competing models; Generalized least squares and Distributed lag model.

Robust Regression Model Specification

Robust regression has been used instead of OLS because estimated results from OLS have endogeneity[44] problem and it provides misleading results. To check multicollinearity VIF test[45] has been performed. In our pre estimation tests a low p-value of Breusch-Pagan heteroskedasticity test appeared which indicated the presence of for heteroskedasticity[46] in our model. This modelling technique has been preferred because with the help of Robust regression the problem of heteroskedasticity is eliminated. The estimated results which we get by using are not biased. It is also used to eliminate any effect of outliers which are present in our data and are affecting on model.

Functional form of Model:

High Tech Exports = f (Patents, Exchange rate, FDI, Subsidies, Labour Productivity, Taxes on goods and services (UK), Interest Rate)

Algebraic formation of equation:

High tech exports = B_0+ B_1Patent applications $_{t-1}$ + B_2Exchange rate + B_3FDIStock $_{t-1}$ + B_4Subsidies and other transfers + B_5Labour Productivity + B_6 Taxes on goods and services (UK) $_{t-1}$ + B_7Intrest Rate $_{t-1}$ + e_t

In Robust regression model we have included seven variables and we are trying to determine the effect of these independent variables on 'high tech exports' which is used as a proxy for

[44] This is the case where independent variables are correlated with the error term due to this problem OLS would provide bias results.

[45] Variance inflation factor test is used to identify the problem of multicollinearity in the analysis of OLS regression.

[46] Heteroskedasticity is a problem which develops when standard deviations of variables do not remain constant over a particular time period.

export competitiveness of Pakistan. A positive sign is expected for 'Patent applications' and 'FDI' both of these are used to quantify technological diffusion and they have been lagged by one time period *(t-1)*. We expect a positive sign of 'exchange rate' because as the currency would depreciate there would be an increase in demand for high tech exports. As government would provide more subsidies exports would also increase and an increase in productivity of labour would also improve export competitiveness, so a positive sign is expected for both these variables. 'Interest rate (Weighted average lending rate)' should have a negative coefficient because to boost up investors' confidence lending rates should be kept low. As most of the textile items are exported to United Kingdom so a negative coefficient of 'Taxes on goods and services (UK)' would imply that as import duties on Pakistan's products would fall we would hope to see an increase in exports.

Specification of Generalized Least Squares Model

Generalized least squares (GLS) is our second preferred model which has been used as a competing model to support the finding of our primary model. Generalized Least Squares is being used because it is very helpful for the findings of time series analysis using secondary data. It allows us to eliminate the problem of serial correlation. After using the Ordinary least squares regression Durbin Watson test was used to test for serial correlation which was giving inconclusive value of 0.5423 at 5% significance level which lies between du and dl, so to avoid from any possibility of having serial correlation Generalized least squares model was used.

Algebraic formation of equation:

High tech exports = B_0+ B_1Patent applications $_{t-1}$ + B_2Exchange rate + B_3FDIStock $_{t-1}$ + B_4Subsidies and other transfers + B_5Labour Productivity + B_6 Taxes on goods and services (UK) $_{t-1}$ + B_7Intrest Rate $_{t-1}$ +e_t

'High tech exports' has been used as a proxy for export competitiveness; we expect that our finding would include a positive significant impact of technological diffusion and Foreign Direct Investment on high tech exports. In our estimation we expect a positive sign of the exchange rate .Coefficient of 'Interest rate' and 'Taxes on goods and services (UK)' are expected to be negative as the increase in interest rate would result in expected decline of high tech exports.

Experimental Econometrics Modelling and other Key regressors

As discussed previously we would use 'Robust regression' as our preferred model for estimation, 'Generalized least squares' and 'Distributed lag' would be used as competing model. Distributed lag model has been used to incorporate the lagged effects[47] of our independent variables as their effects are not immediate in nature. In this model we have added 'Total factor productivity growth' instead of 'Labour productivity'. Some Pre estimation tests were done prior to using this model for VIF test. Breusch-Godfrey autocorrelation test value appeared to be 0.0158 which means that we would accept null hypothesis; and reject any possibility for presence of serial correlation. In addition there wasn't any sign of heteroskedasticity, Result of these tests showed that this model was fit for the estimation.

Distributed Lag Model Specification:

High tech exports = B_0+ B_1Patent applications $_{t-1}$ + B_2Exchange rate + B_3FDIStock $_{t-1}$ + B_4Subsidies and other transfers$_{t-2}$ + B_5Total factor productivity growth $_{t-2}$+ B_6 Taxes on goods and services (UK) $_{t-1}$ + B_7Intrest Rate + e_t

For further examining and grasping the effect of other various variables on export competiveness of the country. Different regressors have been added in the Econometric modelling. Variables which act as a policy tools used by the government are also added in the

[47] The time it would take for an independent variable to have an impact on dependent variable.

regression 'Interest rate' and another 'Subsidies' which is lagged by (*t-2*) as shown in estimated equation. These variables are also included because the in the 'Textile policy of 2015-2019' government of Pakistan has focused on boosting up the investment by decreasing the Interest rates and they are also planning on providing cash subsidy to improve the Textile sector performance. Our estimated result would show that if these variables have significant or insignificant relationship making exports more competitiveness.

ESTIMATES, ANALYSIS AND POLICY CHOICES

This section of the paper would provide an insight about the estimated results of Robust regression, Generalized least squares and Distributed lag. It would display the major findings of the study, that how important some of the factors are and their relation with high tech exports of the country.

Estimates of Robust Regression, Generalized Least Squares and Distributed Lag

The table shows the estimates of Robust regression, Generalized Least Squares and Distributed lag model. Mathematical form of these models has been explained earlier.

	Robust Regression	**Generalized Least Squares Model**	**Distributed Lag Model**
Regressors	**Regressand:** High-technology exports (% of Manufactured exports)		
Patents $_{t-1}$ (applications by residents)	0.0035*** (5.21)	0.0033* (1.91)	0.0033** (2.43)
Exchange rate (LCU per US$, period average)	0.0130*** (5.35)	0.0132** (2.10)	0.0119*** (3.44)
FDI stock $_{t-1}$ (US Dollar at current prices and current exchange rates in million)	0.00004*** (11.18)	0.000037*** (4.05)	0.000034*** (4.54)
Subsidies and other transfer (% of expense)	0.0037* (2.11)	0.0074 (1.62)	-
Subsidies and other transfers $_{t-2}$ (% of expense)		-	0.1146** (2.61)
Labour productivity growth (%)	0.0085 (1.79)	0.012 (0.99)	-
Total factor productivity growth $_{t-2}$ (%)	-	-	0.0065 (0.65)
Taxes on goods and services (UK) $_{t-1}$ (% value added of industry and services)	-0.0530 (-1.03)	-0.0915 (-0.69)	-0.1176 (-1.29)
Weighted average lending rate (%)	-	-	-0.0459** (-2.46)
Weighted average lending rate (%) $_{t-1}$	-0.0638*** (-11.17)	-0.0587*** (-3.98)	-
Constant	0.8356 (1.38)	1.1817 (0.76)	1.3985 (1.29)
Observations	16: From(1995-2013)	16:From(1995-2013)	16: From(1995-2013)
Missing years	3	3	3
Goodness of Fit Estimates			
R-squared	0.763		0.990
Adjusted R^2			0.981
Model Consolidation Tests			
Breusch-Pagan heteroskedasticity test	Chi^2=27.19 Prob>Chi^2=0.0003	Chi^2=27.19 Prob>Chi^2=0.0003	Chi^2=6.18 Prob>Chi^2=0.5191
Breusch-Godfrey autocorrelation test	0.5423**	0.5423**	0.0158**

Variance Inflation Factor	4.29	4.29	4.68

Note: Below the coefficient value, in ( ) parentheses, we report t-statistic/z-statistics. * denotes significance at 10 % level, ** denotes significance at 5 % level while * denotes significance at 1 % level.**

Estimated results of Robust regression and other two competing models showed consistent signs as we expected in our model specification 'Patents', 'Exchange Rate', 'FDI' and 'Subsidies' has a positive direct relationship on 'High Tech exports'. All of these variables including 'Interest rate' were significantly affecting on High tech exports.

'Interest rate' and 'Taxes on goods and services (UK)' have negative coefficient as we expected earlier. Only 'Labour Productivity' and 'Taxes on goods and services (UK)' were two variables found to be statistically insignificant. Goodness of fit of Distributed lag model has a value of 99% which describes that how much of our dependent variable is correlated with independent variable. Presence of heteroskedasticity and serial autocorrelation was addressed by using Robust Regression and Generalized Least Squares. Model consolidation test revealed no presence of heteroskedasticity or serial autocorrelation in Distributed lag model which means estimated results are not biased.

Analysis of Findings

In this section we would see that if technological diffusion and FDI have any kind of impact on industrial competiveness of Pakistan .What are some of the options for government of Pakistan to enhance the export competency of the country.

Foreign Investment inflows & Stocks and the Export Competiveness

The estimated results provide substantial evidence that foreign investment inflows would have an impact on industrial competiveness. FDI is not only a mean of transfer of technology but it also opens up country for foreign trade and global market and would also help to improve the management skills. An increase in FDI would also develop inter industry competition. With more friendly investment policies in the country the government should try to attract investors. As more and more investment would be carried out in textile sector, there would be an increase in demand for export commodities. A positive sign of coefficient of 'FDI stock' indicates that it has a direct relationship with dependent variable. The p-value in all models was less than 1% indicating this variable was highly statistically significant. The lag effect of FDI would mean that an increase in the stock would have a lagged impact on our dependent variable of at least one year. Textile Ministry has been consistently trying to attract foreign investors to invest in our country, but due to various factors FDI in Textile sector had shown a downward trend in past years. In 2007-08 FDI inflows were $30.1 Million but in 2013-2014 it were ($0.2) Million.[48]

Textile industry should focus on manufacturing of value added items such as ready-made garments. An increase in FDI would mean more and more technological advancement which would be required to attain the manufacturing of value added commodities. As Pakistan would export more value added goods FDI would help to make Textile industry further competitive in global market. FDI could also be used to spend on formation and development of human resource, and improving managerial and technical skills. This would create awareness in the country among the quality of international standards. Labour productivity can also be improved by investing more on 'on- job training this' could be done with the help of government's efforts and large industrial firms.

[48] FDI Inflows Sector Wise (Source: Board of Investment)

Technological Diffusion, Property Rights and Export Performance

The industry should be up to date with the international market requirements. Transfer of technology could be with the means of licensing, patent, and through property rights. Patent application by resident had showed a mix trend in past years they were highest in 2008 but after that it started to decline. Charges for the use of intellectual property showed an upward trend in the country but it started to decline after 2012. In Robust regression model, estimated result also showed the expected positive sign of the 'Patent applications by residents' which was significant at 1% significance level in Robust regression and in competing models it was significant at 10% in Generalized Least squares and 5% significance level in Distributed Lag model illustrating that a strong relationship exists between high tech exports and technological diffusion. Through analysing our data we could also rationalise the positive relationship between patents and high tech exports; as patents application have increased over the past years subsequently high tech exports have also increased. Distributed lag model shows that patent had lagged effect on dependent variable of at least one year. A greater investment for developing new institutes where the skills of workers would be polished is required by the government. As machineries is being up dated throughout the year. Labour should also be trained so they would get to know how about the latest technology. Pakistan should try to develop strategic alliance with the countries for investment in Pakistan, this strategic partnership could work by acquiring patents and intellectual property rights, and this would aid the industry to reach toward technological improvement.

CONCLUSION AND PUBLIC POLICY CHOICES

To become more competitive in global market some policy recommendations, as suggested and supported by estimated models, are mentioned below:

- Technological transfer should be made through patents and licensing. Domestic firms which are innovating and providing solutions to the technical problems protection should be provided to them through strong Intellectual property rights (IPRs). Establishing joint ventures with different countries such as Turkey, China could also lead to technological diffusion.
- Lending rates should be decreased as it is established by our model estimation; interest rate and high tech exports have a strong relationship.
- Government expenditure in R&D as compare to other countries is quite low by spending more on R&D worker skills could be improved. There should be an additional amount in the budget which should be set aside this could be in form of providing subsidies, for spending on research and development of institution where technical education should be promoted. Government should provide technological interaction between public sector and industry.
- Different R&D projects should be established within universities where graduates should be given training of science and technology. Development of export markets should be made where vocational training should be provided to workers and farmers and also financing should be provided for medium and small enterprises.
- Improving export competitiveness of country by refining infrastructure facilities, shortening the long delays at cargo shipment, port handling etc.
- Necessary steps are required to ensure compliance with international codes, environmental standards, and safe working environment for labour where genders are being treated equally.

LIMITATIONS OF STUDY

Some variables had a missing data such as 'Innovations index', 'Competitiveness index', 'R&D spending as percentage of GDP', 'Charges for the use of intellectual property'. Industrial competitiveness could also be quantified by using 'Per unit Labour cost'. Time period of 1995 to 2013 was selected because it was only a time span where we had very few missing values of all variables. Numbers of observations were reduced to 16 years due to unavailability of data of 'High-technology exports (% of manufactured exports)', 'Patent applications by residents' and 'Taxes on goods and services (UK)'.

TABLES AND FIGURES

Table 1: Installed and working capacity

	(July-March) 2011-2012	(July-March) 2012-013	% Change
Total No. of Units	10	10	-
Spindles installed	36087	36172	0.24
Spindles Worked	24729	21836	-10.06
Looms Installed	1852	1856	0.22
Looms Worked	1021	940	-7

Source: Ministry of Textile

RECIPROCITY AND INTERDEPENDENCE IN BILATERAL TIES BETWEEN PAKISTAN AND INDIA: A GAME THEORETIC EXPLANATION.

Ali Ahmed Aamir Mirza[1] and Syed Toqueer Akhter[2]

ABSTRACT

The study aims to restate the reasons for conflict between India and Pakistan for almost seven decades as well as the likelihood of options and preferences with regards to the direction of the foreign policy. The current episodic composite dialogues are unstable and do not promote regional integration to the extent of improving relations, rather act as temporary glue to the concept of achieving peace. The Confidence Building Measures being used in the dispute settlement mechanism have the propensity to change with time and inconsistencies in regards with cooperation and non-cooperation for respective regimes both in India and Pakistan. Thus, intrastate matters build up to become interstate problems. For this reason, the model of game theory is being employed to reshape and restructure the level of importance given to problems according to their magnitude, and strategic approaches to resolving disputes through different mediums like bilateral dialogues.

Key Words: Indo-Pak Relations, Foreign Relations, Nuclear Deterrence, Regional Integration, Two-Person Zero-Sum Game.

INTRODUCTION TO PAKISTAN-INDIA RELATIONS

Since its inception, Pakistan has been on the receiving end of a range of diverse issues akin to social, political and economic intricacies primarily, along with a series of civil conflicts, some leading to full-scale wars. One of the most dominant and persistent issues, that may be singled-out in the state of affairs of these nation-states, is the case of conflicting claims of the riparian states for international waters post-partition.[3] Water is regarded as a natural resource with no international property rights[4] and so has been a catalyst for periodic clashes between Pakistan and India. Seen by a few as an attempt by India to claim the three eastern rivers in order to gain access to Kashmir, another significant element in the relationship of the neighbouring countries, the disagreement remains at present. Trade is another most significant factor which governs the relations between any two countries, and visa liberalisation is a significant CBM for both states.

Both countries retain their nuclear positions that force to destabilise the conventional balance of power. Evidently, a series of events throughout the 68 years (2015), post-independence, including the Kashmir, Siachen and Sir Creek disputes, alongside the key *Water Wars*, and sporadic scuffles on the Line of Control, have been the grounds for such acrimonious perceptions as adversaries amid both states, and thus the foundation for thoughts of being a 'regional hegemony' for India, to an extent.

The complexity of the Indo-Pak relations can be categorised into different internal and external dynamics, challenges and threats including economics disparities and geographic vulnerabilities. The direction of the Pak-India foreign policy demonstrates optimistic short term relations in the setting of past memories hoping to shape future prospects of long-term bilateral

[1] **Ali Ahmed Aamir Mirza**, Student at the Lahore School of Economics, Pakistan, aliahmedaamir92@gmail.com
[2] **Syed Toqueer Akhter**, Assistant Professor of Economics at the Lahore School of Economics, Pakistan, syedtoqueer.research@gmail.com

3 The outcome was the Indus Water Treaty penned in 1960

4 S N Roshni Chakraborty, 'Indus Basin Treaty: Its Relevance to Indo-Pak Relations' (2002) Pakistan Institute of International Affairs 53.

relations. The need for sustained dialogue at this moment in time is far imperative for both countries and delaying the process would cause an impediment in tackling issues of regional security.

Preferences for Defence, Deterrence and Dispute Settlement

Deterrence theory infers 'survival' as the basis for any nuclear response for deterring potential assaults. This theory encompasses six key elements; the possibility of severe conflict, of rationality, retaliatory threat, the concept of unacceptable damage, the acuity of credibility and the notion of deterrence stability.[5]

The Indo-Pak independence (August 1947) was *'a separatist struggle'* and explained as *'a conflict between the nation's elites.'* In light of the insistent antagonistic relations between Pakistan and India, expenditure on defence activities keeps rising. There have been different revisions on its research and all advocate that defence spending has magnified the accumulation of external debt for both nations.[6] Countries with less foreign exchange reserves have to rely on external debt to finance arms imports military expenditure.[7] Alternatively, the local production of arms points toward trade in of modern automated technology and intermediary equipment. Hence, it becomes forceful to finance either by foreign borrowing or by lessening their foreign exchange reserves, which will destroy the economies of these countries if they keep going like such.[8] Since after the World War II and the clash of the superpowers, the nuclear technology has become an underpinning for national security in the World politics and has cleared paths for nuclear warheads as a deterrent weapon today.[9]

A promising gain from UN's involvement in this conflict resolution is the Hague Code of Conduct against Ballistic Missile Proliferation, substantiated by the United Nations Disarmament Committee, concerned with decreasing security challenges caused by enduring manufacture of ballistic missiles. For this matter, an encouraging sign is Pakistan and India being signatories and sponsors of draft resolutions on the subject of prevention measures, pertinent to the reconcilliation of the dispute. Any advancement in regional disarmament requires an even-handed solution of problems and with confidence-building measures at that level that may possibly relax tension at the global level subsequently.

Another very unique contributor to the dispute settlement of these nations is the World Trade Organisation[10] (WTO). It prioritises on settling trade disputes between countries based on rule-based system and procedures involving panel consultations and timetables for settlement of the disagreement. What dispute settlement requires is a *resolution of ideological and regional disagreement.*

Diplomacy and the Direction of Foreign Policy

We can take a very significant paradigm of the European Union and its model of *regionalism* for international relations and sustainability of the institutional structure. Hence, integration is

5 E Sridharan, 'International Relations Theory and the India-Pakistan Conflict' (2005) 4 India Review 103.

6 I S Muhammad Ramzan Sheikh, 'Defence Expenditures and External Debt: Evidence from Pakistan and India '(2013) 33 Pakistan Economic and Social Review 159.

7 J P Dunne, 'The making of arms in South Africa' (2003) 1 Economists Allied for Arms Reduction (ECAAR) Review 1; E Karagol, 'Defence Expenditures and External Debt in Turkey' (2005) 51 Defence and Peace Economics 117; P K Narayan, 'Does military expenditure determine Fiji's exploding debt levels?' (2008) 19 Defence and Peace Economics 77; Y Wolde-Rufael, 'The Defence Spending–External Debt Nexus in Ethiopia' (2009) 20 Defence and Peace Economics 423.

8 P K Narayan, ‹Does military expenditure determine Fiji's exploding debt levels?' (2008) Defence and Peace Economics 77; G Günlük-Senesen, 'The Role of Defence on External Indebtedness: An Assessment of Turkey' (2004) 15 Defence and Peace Economics 145.

9 M J Muhammad Mushtaq, 'Regional Hegemonic Aspirations of India: A Review of Indian Nuclear Program' (2012) 32 Pakistan Journal of Social Sciences 251.

10 The WTO is a multilateral organisation that operates as a forum for global trade negotiations and supports developing countries in trade policy issues and Pakistan are a founder-member

identified by standards of membership, inter-dependence, political agreement and common regional nationality. Observably, it has ascertained extensive peace-building effects[11].

Domestic politics, in general, is important in justifying states' foreign policies[12]; if for one it embodies the rights of minorities with an arrangement of power-sharing between regions. This can be one solution given the importance of perceptions in influencing the direction of foreign policy and cooperative behaviour.

Economic Ties, Preferential Treatment and Gain for Regional Peace

South Asia is constantly inconvenienced with numerous intra state disagreements on the basis of topographic boundaries, economic relations, trade routes, ethnicity and history.[13] The essential aspect of the integration process in South Asia is confidence-building and promoting trust between countries. Strategic and Economic interests via interaction in global governance and enhancing trade are means to connecting South Asian countries to pursue regional integration.

The success of regional integration, preferential treatment, and free trade area is reliant upon comparative advantage and the trade-complementarity within a regional trading bloc.[14] Preferential Treatment comes in the form of decreased import duty on a country's exports. They accelerate the progress of considerable reduction in trade barriers, particularly agriculture, nontariff barriers, and dispute settlement procedures; hence stimulate economic growth and development. Preferential Trading Arrangements lead to increased trade within the bloc, not outside the bloc. In a nutshell, one can envisage deterrence in three partly covered sets of policies; nuclear deterrence, regional and domestic political regimes. State preferences will converge, producing regional zones of peace[15]. For sustainable development, three sectors gain; energy, environment, and transportation. Energy and transportation are two of the most important components of development; they also have immense implications for the environment.[16]

Identifying Foreign Policy choices for Pakistan and India

Pakistan's internal and external political problems and economic limitations have become an incentive for foreign players and non-state actors to pursue their own agendas. So accordingly and indubitably, the primary concern for Pakistan would be security and safeguard of its territory and all within, hence, eradication of terrorism from the state. Pakistan's new political attitude favours seeking regional integration with Afghanistan and India, establish a relationship on the base of self respect with the U.S, peaceful negotiation on outstanding issues with India, including the Kashmir dispute, and stabilsing relations with India by means of improved trade.

The behaviour in foreign affairs of the new leadership in the Indian bureaucracy shows that it would try to intensify the policy of integration of the Indian economy with worldwide monopolies. Assumingly, a balanced cooperation with the US and China, along with Russia, and creating vital links with East Asian countries, like Japan is important. The primary solution to the conflict with Pakistan and associated moves towards greater non-hegemonic South Asian

11 B Stefanova, 'Regional Integration as a System of Conflict Resolution: The European Experience' (2006) 169 World Affairs 81.

12 J D Fearon, 'Domestic Politics, Foreign Policy, And Theories of International Relations' (1998) 1 Annual Review of Political Science 289.

13 I A Shabbir, 'The Changing Face of Pakistan's Economic Relations with India and Bangladesh: Prospects and Challenges' (2014) 103 The Commonwealth Journal of International Affairs 311.

14 A R Kemal, 'Exploring Pakistan's Regional Economic Cooperation Potential' (2004) 43 The Pakistan Development Review 313.

15 Q L Erik Gartzke, 'Investing in the Peace: Economic Interdependence and International Conflict' (2001) 2 International Organisation 391.

16 T A Siddiqi, 'An India-Pakistan Détente: What It Could Mean for Sustainable Development in South Asia and Beyond' (2004) 75 Asia Pacific Issues 1.

integration in the European Union or ASEAN will surely improve the status of India and each of its neighbours globally.[17]

Game Theoretic Payoff Matrix and Solution

A game theory setting is opted to predict issues of national security viewed as 'zero-sum', gains of one player (nation) means loss for another. The decisive factor with regards to the format of the game structure is the application of the *fair game solution* in the payoff matrix to assign probabilities and rankings. The game configuration involves a selected set of strategies for each player and a payoff in terms of a probabilistic assumption on the current foreign relations between the two states.

Construct of Game Theoretic Payoff Matrix and Likelihood of Strategic Games and Strategies

The conceptual side of game theory presents a constructive illustration of a perspective on mathematics as well as associated concepts based on value judgements.[18] The materialisation of cooperative behaviour in this game embodies self-interest. Solutions to the game are inspected using payoffs from all possible strategies and strategy combinations.

The purpose of this study is to reiterate the historical significance of the Indo-Pak dispute and narrate it from the viewpoints of various authors from both countries as well as foreign to get a bona fide illustration of their perspectives on the situation. International relations in this formulation may transform and adapt a nationalistic bias and research is on the basis of study of journals, articles, newspapers and various websites that give perspectives of both nations' political as well as military representatives.

The table below shows the game-theoretic payoff matrix for the game in play, Column 1 shows the devised strategies for Player 1, PAKISTAN while Row 1 shows the formulated policies for Player 2, INDIA. The dominant player in this game is Pakistan (on the basis of making the first move) and India reciprocates in view of the chosen strategy of Player 1.

The chosen strategies are developed on the groundwork of significance of the matter and in light of the current foreign relations between the neighbours. The payoffs in the matrix are assigned probabilities reflective of the nature of the issues existing and their correlation (Row to column). A negative payoff in the matrix signifies an involuntary positive for the other player, according to the rules of the *fair game solution*. A zero signifies no relationship or gains/loss for both states mutually.

Solution of Game Theoretic Payoff Matrix and Critical Review of Foreign Policy Choices for Dispute settlement

Please see Table 1 for the Game Theoretic Payoff Matrix. All secondary correlations of strategies are classified in the table.

The chosen set of strategies for both players has been divided into heads to better understand the nature of each policy. Game theory has been adopted to give reasonable and practical solutions for dispute settlement.

In Row 1, we negotiate the Nuclear Policy of 'N-Deterrence'. The proposed solution to this scenario is Minimum Credible Deterrence (MCD). Both nations should adopt the goal for seeking uniformity to ensure national security and economic development. There are no secondary correlations.

---

17 E Sridharan, 'International Relations Theory and the India-Pakistan Conflict' (July 2005) India Review 103.

18 B Martin, 'The Selective Usefulness of Game Theory' (1978) 8 Social Studies of Science 85.

In Row 2, we discuss the interconnection of the Kashmir dispute and all other variables. The proposed solution to this scenario is 'arbitration through the United Nations Security Council and tracking the United Nations Security Council Resolution of 1949 to call for a referendum for Kashmir'.

In Row 3, we observe the relation of the Siachen issue with all other variables. The proposed solution to this scenario is 'settlement through United Nations Organisation mediation'. Decisively, this third-actor intervention could bring a glimmer of hope.

In Row 4, we scrutinise the association of the Sir Creek matter and all other variables. The proposed solution to this scenario is 'arrangement of bilateral talks'. Resumption of the joint dialogue on the issue is considered necessary to call for the process to a mutually beneficial way out.

In Row 5, we monitor the link of the Indus Water Treaty to all other variables. The proposed solution to this scenario is 'International Court of Arbitration for 5 hydropower projects and bilateral dialogue'. It is important for Pakistan to take the matter to the International Court of Arbitration and the five projects that would stop flow of water to its lands.

In Row 6, we examine the trade relations of both states and to all other variables. The proposed solution to this scenario is 'a bilateral cooperation package'. Pakistan has to look at alternate options like a bilateral cooperation package that includes transportation, energy collaboration, intra-industry trade to promote regional integration, trade liberalisation based on the framework of SAARC and SAFTA rates. A political dialogue in its entirety would be a considerable to boost to trade relations.

In Row 7, we talk about the role of media and all other variables. The proposed solution to this scenario is 'Joint projects'. The element of mistrust should be removed from the public's minds and educate them on the issue rather than brainwash them with false inferences.

In Row 8 and 9, we view the eco-political situation of both nations with all other variables. The proposed solution to this scenario is 'revival of the TAPI Gas Pipeline'. The second proposition to this scenario is 'revision of the tariff regime for farmers and the business community'. The TAPI Gas Pipeline project will not only help better relations with both India and Afghanistan but also help the energy shortage problems.

In Row 10, we inspect the Track II Diplomacy and to all other variables. The proposed solution to this scenario is 'repatriation of prisoners on humanitarian base'. The Dubai Dialogue Group in response is important for Track II peacekeeping with the present war on terrorism being equally difficult for both.

CONCLUSION

Table 2 exhibits the simulation of the two-player zero-sum game which essentially shows the expected gain for both players and computes optimal probabilities for each player, according to the odds in the game-theoretic payoff matrix. In my view, the optimal choice for Pakistan would be to clear the water dispute hence take the matter to International Court of Arbitration for intervention as there hasn't been any encouraging variation in the dispute. Pakistan has a better chance to play this tactic.

Table 3 shows the optimal probability of each strategy's success for both players and how the policy is dominated by other approaches in the payoff matrix. Evidently, for Pakistan, The United Nations Security Council Res. 1949; Plebiscite and Joint projects are dominated by UNO mediation which informs us that it may be give more positive expected payoffs if UNO intervenes to solve the issues, and foreign mediation for the sake of Siachen is more practical, given the sensitivity of the Kashmir issue right now. The revival of TAPI project; and tariff regime revision are dominated by bilateral cooperation package which demonstrates that

working on endorsement of intra-industry trade for regional cooperation is more important for success in better relations between the neighbours.

For India, Authentication of AGPL; Revival of TAPI Project; Demands OIC Membership; and Dubai Dialogue Group are dominated by Nuclear Deterrence MCD which clarifies that India's desire to be a regional hegemony surpasses these strategies and that this stance would not be right for dispute settlement and conflict resolution, in addition actually worsen it. The optimal probabilities are high for UNO mediation, Bilateral dialogue for Sir Creek, Bilateral cooperation package at 0.29, 0.21 and 0.14 for Pakistan, whereas, Claim on Kashmir, Joint projects, and NDMARB, Liberalised visa pact and Allowed FDI are significant for India.

The expected payoff for player 1 is zero, and according to Table 4, its average gain is -1.68. This tells us that overall the situation for Pakistan is not encouraging but Pakistan must educate its people and the political scenario in the country should improve, adopting CBMs that it can efficiently implement. Conversely, India may hold on to its desire of being a super-power but it can only achieve that if it changes its nationalistic stance to all issues. Adopting the strategies in the foreign policy framework is mathematically more advantageous of conflict resolution.

LIMITATIONS OF THE STUDY

The game theoretic model being applied is enclosed with frequent problems in interpreting the results of the analysis and likelihood of strategies ranked, according to importance of the issue at hand. There are more than one equilibrium positions that arise in the zero-sum game, in the case of Pakistan and India, where both gain/lose. Interpretation and assessment of the probabilities is based on value judgment and assigned positive and negative numbers are therefore based on information from journals and articles relevant to the topic.

Another, restraint to the study was the chosen software only permitted a range of only 10 strategies per player and so other notable policies and approaches could not be included. Other than that, as the matters are assigned probabilities it is difficult to rationalize the simulation and zero sum game analysis, however, I have tried my best to ascertain that it remains intact with the foreign policies of both countries, integral to achieving success in bilateral relations.

TABLES AND FIGURES

Table 1: Game Theoretic Payoff Matrix

Player1 \ Player2	Nuclear Deterrence MCD	Claim on Kashmir	Authenticate AGPL	Floating fence	Expert-level dialogue	NDMARB, Liberalized Visa, FDI	Joint projects	Revive TAPI Project	Demands OIC Membership	DDG
Nuclear Deterrence MCD	-60	0	0	0	0	0	0	0	0	0
UNSC Res. 1949; Pleb.	0	-40	-15	-25	0	0	-35	0	-50	0
UNO mediation	0	0	25	25	0	0	-5	0	0	0
Bi-lateral dialogue	0	0	0	-40	0	0	0	0	0	0
ICA and bi-lateral dialogue	0	0	0	0	-30	0	0	0	0	0
Bi-lateral cooperation package	0	0	0	0	0	-10	0	0	0	0
Joint projects	0	-20	-10	-20	-5	0	-50	0	0	0
Revive TAPI Project	0	0	0	0	-5	-10	0	0	-15	0
Tariff regime revise	0	0	0	0	-10	-10	0	0	0	0
Prisoner release	0	-5	0	0	0	0	0	0	0	0

Table 2: Simulation for Zero-Sum Game

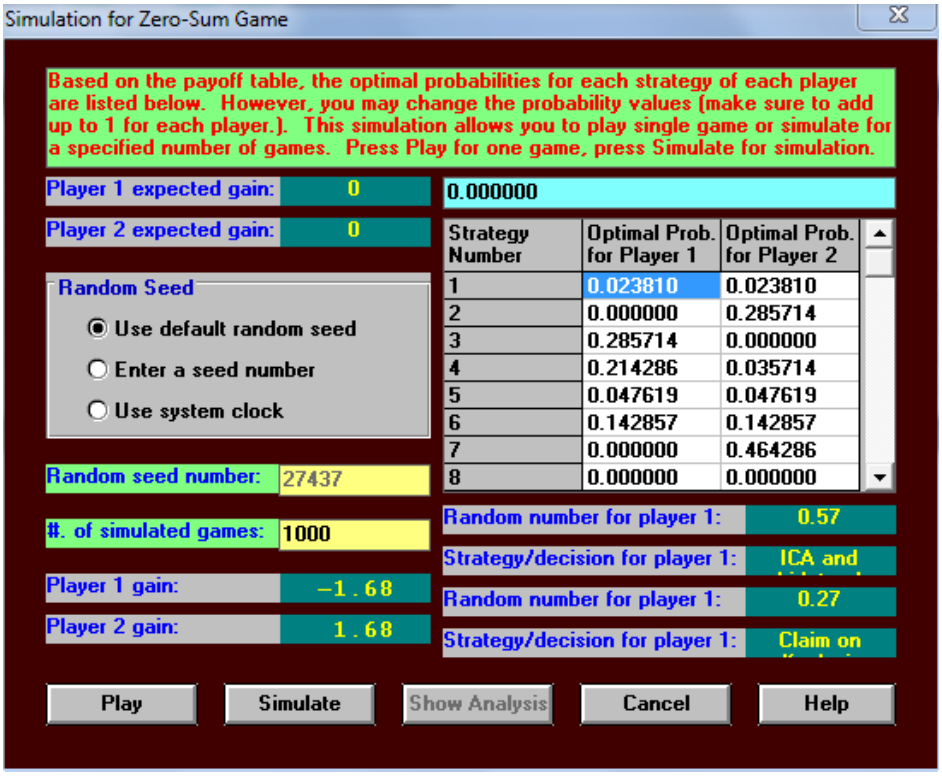


Table 3: Zero-Sum Game Analysis

05-04-2015	Player	Strategy	Dominance	Elimination Sequence
1	1	Nuclear Deterrence MCD	Not Dominated	
2	1	UNSC Res. 1949; Pleb.	Dominated by UNO mediation	
3	1	UNO mediation	Not Dominated	
4	1	Bi-lateral dialogue	Not Dominated	
5	1	ICA and bi-lateral dialogue	Not Dominated	
6	1	Bi-lateral cooperation package	Not Dominated	
7	1	Joint projects	Dominated by UNO mediation	
8	1	Revive TAPI Project	Dominated by Bi-lateral cooperation package	
9	1	Tariff regime revise	Dominated by Bi-lateral cooperation package	
10	1	Prisoner release	Not Dominated	
11	2	Nuclear Deterrence MCD	Not Dominated	
12	2	Claim on Kashmir	Not Dominated	
13	2	Authenticate AGPL	Dominated by Nuclear Deterrence MCD	
14	2	Floating fence	Not Dominated	
15	2	Expert-level dialogue	Not Dominated	
16	2	NDMARB, Liberalized Visa, FDI	Not Dominated	
17	2	Joint projects	Not Dominated	
18	2	Revive TAPI Project	Dominated by Nuclear Deterrence MCD	
19	2	Demands OIC Membership	Dominated by Nuclear Deterrence MCD	
20	2	DDG	Dominated by Nuclear Deterrence MCD	

	Player	Strategy	Optimal Probability	
1	1	Nuclear Deterrence MCD	0.02	
2	1	UNSC Res. 1949; Pleb.	0	
3	1	UNO mediation	0.29	
4	1	Bi-lateral dialogue	0.21	
5	1	ICA and bi-lateral dialogue	0.05	
6	1	Bi-lateral cooperation package	0.14	
7	1	Joint projects	0	
8	1	Revive TAPI Project	0	
9	1	Tariff regime revise	0	
10	1	Prisoner release	0.29	
1	2	Nuclear Deterrence MCD	0.02	
2	2	Claim on Kashmir	0.29	
3	2	Authenticate AGPL	0	
4	2	Floating fence	0.04	
5	2	Expert-level dialogue	0.05	
6	2	NDMARB, Liberalized Visa, FDI	0.14	
7	2	Joint projects	0.46	
8	2	Revive TAPI Project	0	
9	2	Demands OIC Membership	0	
10	2	DDG	0	
	Expected	Payoff	for Player 1 =	0

Table 4: Decision Analysis

05-04-2015	Player	Strategy	Frequency	%	Optiamal Prob.	Average Gain
1	1	Nuclear Deterrence MCD	24	2.40%	2.38%	0
2	1	UNSC Res. 1949; Pleb.	0	0.00%	0.00%	0
3	1	UNO mediation	300	30.00%	28.57%	-1.48
4	1	Bi-lateral dialogue	206	20.60%	21.43%	-2.72
5	1	ICA and bi-lateral dialogue	43	4.30%	4.76%	-1.40
6	1	Bi-lateral cooperation package	148	14.80%	14.29%	-1.42
7	1	Joint projects	0	0.00%	0.00%	0
8	1	Revive TAPI Project	0	0.00%	0.00%	0
9	1	Tariff regime revise	0	0.00%	0.00%	0
10	1	Prisoner release	279	27.90%	28.57%	-1.47
11	2	Nuclear Deterrence MCD	29	2.90%	2.38%	0
12	2	Claim on Kashmir	300	30.00%	28.57%	1.37
13	2	Authenticate AGPL	0	0.00%	0.00%	0
14	2	Floating fence	46	4.60%	3.57%	6.74
15	2	Expert-level dialogue	48	4.80%	4.76%	1.25
16	2	NDMARB, Liberalized Visa, FDI	141	14.10%	14.29%	1.49
17	2	Joint projects	436	43.60%	46.43%	1.59
18	2	Revive TAPI Project	0	0.00%	0.00%	0
19	2	Demands OIC Membership	0	0.00%	0.00%	0
20	2	DDG	0	0.00%	0.00%	0
Total	Number	of Games =	1000	Player 1	Av. Gain =	-1.68

TORTUOUS LIABILITY OF GOVERNMENT IN INDIA

Vaibhav Kartikeya Agrawal [1]:

ABSTRACT

India is a welfare country run by the rule of "law". Law of torts is based on the judicial precedents which make government vicariously liable for the torts committed by public officers, in case of infringement of rights or Fundamental Rights. But in the absence of any codified law, the liability and compensation both are uncertain.

This paper recommends the codification of law in the line of recommendations by the Law Commission of India in its first Report on "*Liability of the State in Tort"* and judicial precedents. It recommends strict liability of the State in case of infringement of Fundamental Rights even in exercise of a Sovereign function, unless justification satisfies the Court of Law.

Keynotes: Tortuous liability, rights, damages, sovereign function, non-sovereign function.

INTRODUCTION

India is a welfare country run by the rule of "law". If an individual commits tort, he is liable on the basis of precedents but the law regarding tortuous liability of Government is still evolving.

Jurist Salmond defined the term 'tort' as:

Tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of trust or other merely equitable obligations.[2] "It thus encompasses **all wrongs** for which a legal remedy is considered appropriate."[3]

Jurist Winfield defined the term 'tort' as:

Tortuous liability arises from the breach of a duty primarily fixed by law, such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.[4]

If a member of legislature commits tort in drafting the law, the law after enactment can be judicially reviewed. Section 77 of the Indian Penal Code, 1860 exempts a presiding officer from liability for acts done in good faith, when acting judicially. Nearly all statutes exempt an adjudicator (other than the presiding officer of a Court of law) from liability for acts done in good faith. But the liability of executives is ambiguous and based on the discretion of a presiding officer. Such a stand is untenable if it leads to infringement of rights of the citizens. The law regarding tortuous liability of the Government is enshrined in Article 300 of the Constitution of India.

CLAUSE (1) OF ARTICLE 300 TO THE CONSTITUTION OF INDIA STATES THAT:

The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces

---

[1] Vaibhav Kartikeya Agrawal, student of B.A.LL.B. VII Semester in School of Law, Guru Ghasidas Vishwavidyalaya, Bilaspur, Chhattisgarh, India.

[2] N D Kapoor and R Abbi, *General Laws and Procedures* (3rd edn, Sultan Chand and Sons 1994)

[3] Law Commission, *'National Commission to Review the working of the Constitution'* (Law Com CP 2001) <http://lawmin.nic.in/ncrwc/finalreport/v2b1-13.htm > accessed 14 November 2014.

[4] Justice G P Singh, *Ratanlal & Dhirajlal The Law of Torts (24th edn, Wadhwa and Company 2002)*

or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

Before the enactment of Constitution of India, the then Dominion of India and the corresponding Provinces or the corresponding Indian States can sue and can be sued according to the Common Law. Clause (1) of Article 372 to the Constitution of India states that:

Notwithstanding the repeal by this Constitution, of the enactments referred to in Article 395[5] but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

This article sanctions the operation of COMMON LAW in independent India and thus the judicial precedents of pre-1947 period in colonial India are also binding, to the extent they confirm clause (2) of Article 13 to the Constitution of India. Article 13(2) of the Constitution of India states that: The State shall not make any law which takes away or abridges the rights conferred by this Part[6] and any law made in contravention of this Part shall to the extent of the contravention, be void.

The Common Law is based on the judicial precedents of England. Thus, the law regarding tortuous liability of government in India is continuing in its uncodified form.

JUDICIAL TREND OF DETERMINATION OF THE TORTUOUS LIABILITY OF GOVERNMENT OF INDIA:

Peninsular & Oriental Steam Navigation Corporation v Secretary of State [7] is the first case wherein the tortuous liability of the Government was determined by distinguishing functions as sovereign and non-sovereign. In this case, Government workmen were carrying a piece of iron funnel to repair a government steamer. Due to their negligence, one of the horses of Peninsular & Oriental got injured. The Peninsular & Oriental made a claim for damages against the Secretary of State.

The Supreme Court of Calcutta adjudicated that the Secretary of State is liable for damages caused by the workman. The sovereign powers were defined as: "powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them."[8] Court stated that "where an act was done in the exercise of sovereign powers, no action would lie against it."[9]

In *Secretary of State v Hari Bhanji*[10], the Madras High Court observed that if the government does any commercial or private transactions, the doctrine of immunity is not applicable to it. It is liable as an ordinary citizen.

The judicial precedents of pre-1947 period in colonial India state following functions of the Government to be SOVEREIGN, viz. maintaining a public path[11], maintenance of a military

[5] Article 395 to the Constitution of India states that "the Indian Independence Act, 1947 and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949 are hereby repealed".

[6] The term 'this Part' in Article 13(2) of the Constitution of India refers to Part III of the Constitution, i.e. Fundamental Rights.

[7] 5 Bom. H.C.R. App. 1

[8] M P Jain and S N Jain, *Principles of Administrative Law (4th edn, Wadhwa and Company 1999)*

[9] ibid 764.

[10] (1882) 5 I.L.R. Mad. 273

[11] *McInerny v State* (1911) 38 I.L.R. Cal. 797

road[12], taking cognizance of offences[13], duty performed by courts[14], maintenance of a public hospital[15].

The Calcutta High Court adjudicated in *McInerny v State*[16] that "the government was not carrying on any commercial operations in maintaining a public path and, therefore, the government was not liable for damages for the injury sustained by the plaintiff through coming into contact with a post set up by the government on a public road."[17] In *Etti v Secretary of State*[18], the Madras High Court ruled that "in maintaining a hospital for the benefit of the public at the expense of the public revenues, the Government was discharging a proper governmental function, and, therefore, the Secretary of State was not liable for the torts of his servants employed in the hospital under the P & O principle"[19]

The Courts in independent India also have made the distinction between sovereign and non-sovereign functions to determine liability.

The facts in *State of Rajasthan v Vidhyavati*[20] state that the driver of a jeep, drove it rashly and negligently while taking it back from the workshop to the residence of the collector, after repairs, and fatally injured a pedestrian. The pedestrian sued the State for damages. The State claimed immunity on the ground that the jeep was maintained "in exercise of sovereign powers". The Supreme Court held the State vicariously liable for negligence of the driver and stated that "….Now that we have, by our Constitution established a Republican form of Government, and one of its objectives is to establish a socialistic state with varied industrial and other activities, employing a large army of servants, there is no justification, in principle or in public interest, that the State should not be held vicariously liable for the tortuous acts of its servants."[21]

The facts in *Kasturi Lal Ralia Ram Jain v Uttar Pradesh*[22] state that the police arrested Ralia Ram and seized some gold from him on the suspicion that it was stolen property. The gold was kept in the government malkhana. The chief constable of that malkhana misappropriated the gold and fled to Pakistan. Later Ralia Ram was set free. The Supreme Court held that the State is not liable to pay the amount of gold and observed that if a tortuous act is committed by a public servant in discharge of statutory functions which are ultimately the exercise of sovereign powers of the state, then the public servant is not liable for any tort committed in exercise of that function. "The judiciary has not laid down any clear test to determine the character of a function as sovereign or non-sovereign. The test evolved so far, whether the activity could have been carried on by a private individual or not, may not be of much help in a particular factual situation. For instance, can it not be argued that the specific activity involved in the Kasturilal's case was that of bailment, i.e. keeping the goods of another safely for a period- an activity capable of being undertaken by a private individual?"[23] Therefore the state ought to be liable. This shows that the law was uncertain even in independent India. The case of Kasturilal has been over-ruled by *Common Cause v Union of India*.[24]

---

[12] *Secretary of State v Cockraft* AIR 1915 Mad. 993
[13] *Kessoram Poddar & Co. v Secretary of State* (1927) 54 ILR 909
[14] *Secretary of state v Srigobinda Chaudhari* AIR 1932 Cal. 834
[15] *Etti v Secretary of State* AIR 1939 Mad. 663
[16] (1911) 38 I.L.R. Cal. 797
[17] Jain and Jain (n 2) 766
[18] AIR 1939 Mad. 663
[19] Jain and Jain (n 3) 766
[20] AIR 1962 SC 933
[21] ibid 940.
[22] AIR 1965 SC 1039
[23] Jain and Jain (n 4) 771
[24] AIR 1999 SC 297

Honorable Supreme Court in *N. Nagendra Rao v State of A.P.*[25] stated that "The demarcating line between sovereign and non-sovereign powers, for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime, etc. which are among the primary and inalienable functions of a Constitutional Government, the State cannot claim any immunity."[26]

The judicial precedents of post-1947 period in colonial India state following functions of the Government to be SOVEREIGN, viz. getting license from the ganja shops[27], purchase of munitions kept in the building and commandeering of a building [28], wrongful confinement of the plaintiff[29], running the treasury[30], military duty[31], constructing and maintaining highways, collecting the land revenue[32].

The facts in *K. Krishnamurthy v Andhra Pradesh*[33] state that a boy got injured due to the rash and negligent driving of a road roller in a busy locality. "Still the government was held not liable for paying any damages on the ground that the roller belonged to the PWD (Public Works Department) which was entrusted with the work of constructing and maintaining highways which was a sovereign function."[34]

The judicial precedents of post-1947 period in independent India have held following acts to be NON-SOVEREIGN, viz.

the activities carried on by a Public Works Department like driving a vehicle carrying police trainees[35], construction of a reservoir[36], construction of a dam[37],; transporting a patient to the hospital in a fire service ambulance[38], case of custodial death[39].

The Supreme Court adjudicated in *Bombay v Hospital Mazdoor Sabha*[40] that "The activities carried on by the State to comply with the directive principles or in pursuit of its welfare policies cannot be regarded as regal activities as they cannot be said to be 'primary and inalienable functions of a constitutional government' and they are not such that 'no private citizen can undertake the same'"[41].

PRESENT LEGISLATIVE POSITION:

Section 110 of the Motor Vehicles Amendment Act, 1956 states that "while driving a motor vehicle (**which includes a vehicle owned by the State Government or by the Government of India),** the owner of the vehicle is liable to pay compensation to the persons who are entitled to claim damages".

The Karnataka High Court adjudicated in *T.R. Ramaih v Deputy Commissioner*[42] that "a writ petition was maintainable to challenge the order even without exhausting the statutory

---

[25] AIR 1994 SC 2663
[26] Law Commission (n 2) 15
[27] *Nobin Chander Dey v Secretary of State for India* I.L.R. 1 Cal. 11 (1875)
[28] *Kessoram Poddar & Co. v Secretary of State* (1927) 54 I.L.R. 909
[29] *Gurucharan Kaur v Madras Province* AIR 1942 Mad. 539
[30] *District Board, Bhagalpur v Bihar* AIR 1954 Pat. 259
[31] *India v Harbans Singh* AIR 1959 Punj. 39
[32] *Andhra Pradesh v Ankanna* AIR 1967 A.P. 41
[33] AIR 1961 A.P. 283
[34] Jain and Jain (n 5) 768
[35] *State v Ram Pratap* AIR 1972 M.P. 219
[36] *Maysore v Ramchandra* AIR 1976 M.P. 164
[37] *Andhra Pradesh v K. Padma Rani* AIR 1976 A.P. 122
[38] *Tamilnadu v M.N. Shamsudeen* (1981) 1 M.L.J. 17
[39] *State of A.P. v Challa Ramkrishna Reddy* (2000) 5 SCC 712
[40] AIR 1970 SC 1407
[41] Jain and Jain (n 6) 781
[42] AIR 1975 Kar. 77

remedy because of denial of natural justice to the petitioner"[43]. This purports that denial of natural justice would cause infringement of the Fundamental Rights.

The Supreme Court in *Sheela Barse v State of Maharashtra*[44] interpreted "right against custodial violence" to be a Fundamental Right under Article 21 of the Constitution of India. Therefore in *Challa Ramkonda Reddy v State of Andhra Pradesh*[45], the Andhra Pradesh High Court held that "where the fundamental rights of the citizens are violated, the plea of sovereign immunity, which is (assumed to be) continued by Article 300 of the Constitution, cannot be put forward"[46]. This judgment has been approved by the Supreme Court in *State of A.P. v Chella Ramkrishna Reddy*[47]. So it has become settled that the State is liable for the violation of 'interpreted Fundamental Rights' like the right against solitary confinement, held in *Sunil Batra v Delhi Administration*[48]*;* the right against bar fetters, held in *Sobraj v Supt. Central Jail*[49] the right against handcuffing, held in *Prem Shankar v Delhi Administration*[50]*;* the right against delayed execution, held in *T.V. Vatheeswaran v State of Tamil Nadu*[51]*;* the right against custodial violence, held in *Sheela Barse v State of Maharashtra*[52], etc, even though the act in question was done in the exercise of a sovereign function.

The Supreme Court in *Rudul Shah v State of Bihar*[53] awarded damages **by applying judicial activism,** to the petitioner, who was kept in jail for 14 years after his acquittal by the criminal Court. The court awarded damages worth 35,000 Indian National Rupees and it was also not claimed but awarded by the Court. The court felt that if it refused to pass an order of compensation in favour of the petitioner, "it will be doing merely lip service to the fundamental right to liberty to which the State Government has so grossly violated."[54] In *Nil bati Behra v State of Orissa*[55], a question arose as to the legality of such awards. Court held that "it is always open to the Supreme Court and to the High Court to award compensation in the exercise of its constitutional power. It was clarified that such an award did not finally specify, or put an end to, the claim for damages and that such an award is only a provisional award which shall be taken into account by the civil court, while awarding the damages according to law"[56].

In *Mohd. Shafi Suleman Kazi v Dr. Villas Dhondu Kavishwar*[57], the question before the Bombay High Court was "whether the State would be liable for acts of negligence committed by hospital employees in course of their employment in the state run hospitals?

The High Court ruled that the running of hospitals was not a sovereign function of the State as it was neither a 'primary and inalienable' function of a constitutional government nor it was such that 'no private citizen can undertake the same'. So, the state would be liable for negligence of the hospital staff"[58]. This case was followed in *State of Haryana v Smt. Santra*[59].

[43] Jain and Jain (n 7) 436
[44] AIR 1983 SC 378
[45] AIR 1989 AP 235
[46] Law Commission (n 3) 22
[47] AIR 2000 SC 2083
[48] AIR 1978 SC 1675
[49] AIR 1978 SC 1514
[50] AIR 1980 SC 1535
[51] AIR 1983 SC 3612
[52] AIR 1983 SC 378
[53] AIR 1983 SC 1086
[54] Jain and Jain (n 8) 780
[55] (1993) 2 SCC 746
[56] Law Commission (n 4) 22
[57] AIR 1982 Bom. 27.
[58]Jain and Jain (n 9) 781
[59] 2000 (1) CPJ 53 (SC)

The facts in *India v Satpal*[60] state that the "Goods belonging to the plaintiff were seized by the land customs authorities maliciously and without sufficient cause. The goods so seized, were converted into money and the sale proceeds were lying with the Union of India. The plaintiffs were held entitled to the refund of this amount."[61] The exception to the rule in aforesaid case is: Defence or War Situations, but this exception is also not in absolute. For example, in *Rooplal v India*[62], military jawans took away the wood belonging to the plaintiff for the purposes of camp fire. The plaintiff was held entitled to recover the price of the wood.

The aforementioned judgments indicate that the Courts are curtailing exemption of vicarious liability of Government (in cases of commission of tortuous acts) on the name of "sovereign function".

One of the defences in an action of tort is "statutory authority". This defence is defined as "Where an act is done under a statutory authority, the damage resulting from such act (which would otherwise have been wrongful and actionable) is not actionable in tort as statutory authority affords a valid defence".[63]

The judgment of the Honorable Court of law in *Geddis v Proprietors of Bonn Reservoir*[64] is the authority that sets the liability of the government for tort committed by public officers at par with a private person. Blackburn J. stated in the aforementioned case that "It is now thoroughly well-established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one: but an action does lie for doing that which the Legislature has authorized, if it be done negligently."

Article 141 to the Constitution of India states that: The law declared by the Supreme Court shall be binding on all the courts within the territory of India. Thus the interpretation of law by the Supreme Court becomes law and this is valid under Article 141 of the Constitution of India. This is requisite in certain cases but its major defect is that, it contains an element of ambiguity because the rule adjudicated today, can be amended even tomorrow but that is not possible in case of Parliamentary legislation. Hence I think that law-making by judiciary hits the abstract that "everyone is presumed to know the law of the land." The legal maxim *ubi jus incertum, ibi jus nullum* which means "where the law is uncertain, there is no law" justifies the contemporary position of tortuous liability of Government in India. The said legal maxim is also ratified by the maxim of jurist Jeremy Bentham that: "to be without a code, is to be without justice". [65]

The Supreme Court stated in *Martin Burn Ltd. v Calcutta Corporation*[66] that "A result flowing from a statutory provision is never an evil".[67] A legislative enactment on the subject of "liability of Government in Torts" would ratify the contention of the Court in Martin's case. This judgment of Martin's case also purports that even if the State commits a tort in exercise of "political functions" for which it is exempted by the Law Commission of India in its First Report, 1956 at point (iii) of Page 35, the State should provide damages to the affected individual.

In *Keshavananda Bharti v State of Kerala*[68], the Supreme court held "fundamental rights" to be the basic structure of the Constitution. So, in *Nilbati Behra v State of Orissa*[69], Court held

---

[60] AIR 1969 J & K 128
[61] Jain and Jain (n 10) 782
[62] AIR 1972 J & K 23
[63] Kapoor and, Abbi (n 2). 43
[64] (1878) 3 A.C. 430
[65] M P Jain, *Outlines of Indian Legal and Constitutional History* (6th edn, Lexis Nexis Butterworths 2009) 420
[66] AIR 1966 SC 529
[67] ibid 535.
[68] AIR 1973 SC 1461
[69] AIR 1993 SC 1960

that "If no other practicable mode of redress is available, the Court would award monetary compensation for the breach of fundamental rights by the State or its employees based on the principle of strict liability."[70]

FIRST REPORT OF THE LAW COMMISSION OF INDIA:

The Law Commission of India on its first report on liability of the State in Tort stated that "in the context of a welfare State, it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State."[71]. It stated in respect of the duties of care imposed by a statute in sub-paragraph (v) that: "the State should be subject to the same duties and should have the same rights as a private employer under a statute, whether it is specifically binding on the State or not."[72] Accordingly, the Commission recommended the enactment of a suitable law to define the position of governmental tortuous liability in the new changed context. The commission argued: "It is necessary that the law should, as far as possible, be made certain and definite…The citizen must be in a position to know the law definitely".[73]

INITIATIVES TAKEN BY THE LEGISLATURE:

The Government (Liability in Tort) Bill, drafted on the lines recommended by the Law Commission, was first introduced in the Parliament in the year 1965, but it could not be enacted into law. It was reintroduced in the year 1967, and certain modifications in the Bill were suggested in the year 1969 by the Joint Select Committee of Parliament, but the Bill has not been enacted into law so far.[74]

POSITION IN OTHER COUNTRIES AND CONCLUSION:

The law on the subject of tortuous liability of Government in England, United States of America, Australia and France is similar to that recommended by the Law Commission of India in its first report on the *Liability of the State in Tort.* I, therefore, request to the Parliament of India to make a law according to the recommendations made by the Honourable Law Commission of India in its First Report dated 11 May, 1956. I also request that: firstly,the law should fix an exemplary amount of compensation in cases of death; secondly, the law must not only ratify the recommendations of Law Commission of India in its First Report of 1956 as stated in Appendix V, it must also provide damages to the individuals who are affected by acts deemed to be done in good faith by the public officials under the respective statutes. The report of the Law Commission of India on *Liability of the State in Tort* states in paragraph 66 that "N.B. - Appendix V shows some of the Acts which contain protection clauses. But, under the General Clauses Act, a thing is deemed to be done in good faith, even if it is done negligently. Therefore, by suitable legislation, the protection should be made not to extend to negligent acts, however honestly done and, for this purpose, the relevant clauses in such enactments should be examined."[75] Thirdly, in cases like *Rudul Shah* v State of Bihar[76], where it seems that the petitioner is illiterate or so dominated that it had not *suo motu* claimed damages, the provision of Right to Education to the citizens of India should be implemented precisely so as to reduce the disparity of income and wealth and non-awareness about one's Fundamental Rights;

[70] Justice U.C. Srivastava, 'Tortuous Liability of State under the Constitution' (1997) IJTR <http://ijtr.nic.in/articles/art68.pdf> accessed 20 June 2015
[71] Law Commission (n 5)
[72] Law Commission, *Liability of State in Tort* (Law Com No 1, 1956) 34
[73] Jain and Jain (n 11) 783
[74] ibid 784.
[75] Law Commission, *Liability of State in Tort* (Law Com No 1, 1956) 33-34 [
[76] AIR 1973 SC 1461

fourthly, in the manner stated in *N. Nagendra Rao*'s[77] case, the law must demarcate important sovereign functions. Thus, as per the authorities mentioned in this research paper, the Government should be made vicariously liable in every tort committed by a public officer because both Preamble[78] and Article 38[79] to the Constitution of India impose obligation on the State to provide social, economic and political justice to all the citizens of India.

[77] *N. Nagendra Rao v State of A.P. AIR 1994 SC 2663*

[78] Preamble to the Constitution of India: WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

[79] Article 38 to the Constitution of India: **State to secure a social order for the promotion of welfare of the people-**
(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

COMPULSORY LICENSING: A TOOL FOR BALANCING TECHNOLOGY TRANSFER AND SOCIAL WELFARE

Vinita Krishna[1] and Sudhir. K. Jain[2]

ABSTRACT

Patents as a policy tool facilitate innovation and technology /transfer. Their use however, varies markedly across technology sectors and in different context. One such use of patent is the controversial mechanism-compulsory licensing (CL). In this paper, the existing legal standards of CL are revisited through Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement of World Trade Organization, with reference to cases and status of CL in BRICS nations and their implications. Some confirmatory findings through survey on the barriers to patent commercialization in Indian pharma sector prompts the author to take up this idea of using "CL as a tool to balance technology transfer and social welfare"-the very objective of TRIPS and the twin role of patents from legal and economic angle. The methodology is a mix of theoretical discourse on CL, supplemented by empirical findings. Analysis of the pros and cons of CL allows for exploration of possible removal of some of the barricades to technology transfer in pharmaceutical sector, an important management issue in optimal utilization of patents.

Keywords: Compulsory licensing, Economics of patents, Indian Patent Act, Patent commercialization, Pharmaceutical patents, TRIPS

INTRODUCTION

Patent law is a primary policy tool which aims to foster innovation, technological development and add to knowledge corpus. A general set of legal rules as per the patent law applies to all kinds of technologies with minor differences in the application of legal standards[3].In this paper an attempt is made to discuss the legal standards for "compulsory licensing (CL)"in the pharmaceutical industry and the issues therein. CL sticks out like a sore thumb among all the patent-related issues. Most of the complexities of CL are woven around its ambiguities in the international framework for intellectual property rights (IPR). The recent highlights in discourse on CL emphasize the tension between two competing aspirations of the patent system: Encouraging the labors that lead to innovation on one hand and placing the fruits of those labors before the public (economic theory of patents) on the other hand[4]. Extending this line of thought, this paper takes into consideration the poor rate of commercialization of patents and two-fold purpose of patents as means of technology transfer and social welfare (as envisioned in Trade-Related Related Intellectual Property Rights (TRIPS) Agreement) to bring out a multidimensional approach to CL.[5]

The methodology in this paper is a mix of theoretical discourse on CL, supplemented by empirical findings in the Indian context. The paper seeks to explore CL as a possible solution

[1] Vinita Krishna, Doctoral Scholar, Department of Management Studies, Indian Institute of Technology Delhi, Hauz Khas, New Delhi-110016; E mail:vinita2krishna@gmail.com

[2] Sudhir K. Jain; Professor, IIT Delhi (on leave), Vice Chancellor, Shri Mata Vaishno Devi University, Kakryal, Katra – 182320 (J&K) Email id: skjain51@hotmail.com

[3]Dan Burk and Mark Lemley, 'Policy Levers in Patent Law' (2003) 80 Virginia Law Review 1575.

[4]John Thomas, 'Compulsory Licensing of Patented Inventions, Congressional Research Service' (2014) Informing the Legislative Debate since 1914.

[5]WIPO Report (2010); Edwin Mansfield, 'Patents and Innovation: An Empirical Study'(1986) 32 Management Science 173. See also Alfred Radauer and Tobias Dudenbostel, *Patent Licensing Survey of the Patenting Firm*s (Technopolis Group Vienna, PATLICE Survey 2013).

to removing some of the barricades to technology transfer and commercialization of pharmaceutical patents, an important management issue in optimal utilization of patents.

Given the controversial nature of CL and rhetoric on it in recent times, the author has been motivated to take up this topic. The discussion is framed around global, regional (emerging nations' group) Brazil, Russia, India, China and South Africa (BRICS) and India-specific situation. With an overview of commercialization of patents and the issues involved in the pharmaceutical sector in India, the paper addresses the following: a) comparison of effectiveness of CL as legal provisions vis-a-vis its practical advantages b) the myriad perspectives on instances of CL across countries and c) use of CL of patents to balance innovation and social welfare. This attempt is an add-on to the insights on flexibility requirement in legal provisions of patent laws as well as it suggests possible recommendations for the policy makers.

A pilot study on the commercialization of patents by pharmaceutical firms in India is the empirical input to this paper. The findings/output highlights the major modes of and challenges in licensing of patents in this sector. The responses elicited through online survey of Intellectual property (IP) managers and the Research scientists of the selected firms corroborate some of the existing licensing issues streamlined in the extant literature. For example demand for technology, nature and the field of invention has been found to be major barriers to commercialization while participation in patent pools and using patents to start spin-offs are found to be difficult modes for the commercialization of technology in pharmaceutical firms in India. To cope up with these challenges and keeping in view various scholarly arguments in favour of CL, it is proposed that this CL can be a possible tool to expedite the commercialization of patents/ technology in India. This would facilitate the technology transfer process as well as add to the social welfare function of the patents. But the calculation of adequate/reasonable remuneration for the patentee is a daunting task which tilts rather than balances the twin objectives of TRIPS agreement.

PATENTS AT THE CONFLUENCE OF ECONOMICS AND LAW

Patents are legal documents, the grant of which confers an exclusive right to the owner for disclosure of his invention. With a life of fixed term of 20 years in most cases, patent right allows patentees to produce utilize, offer for sale or sell both the patented product itself, as well as the product that may be produced from a patented process.at the same time it offers limited exceptions to the exclusive rights conferred by a patent without any conflict with the interest of the patentee. Disclosure of the invention helps technological progress by technology dissemination and transfer. After a period, the protection expires; the invention becomes available in the public domain (accessible to others for free use).

From the economists' perspective patents are seen as incentive for innovation but once the monopoly is conferred, they restrict access to knowledge with a negative impact on social welfare.[6] Implied the other way, when knowledge gets free from the patentee's possession (which is the case in CL where public interest is one of the reasons to use this provision), the economic aspect of patent takes precedence on its legal aspect[7]. So, while on one side it benefits the inventor in the form of private right (legal role) and economic returns for the inventor, it deprives the common public/society from enjoying the fruits of labor/intellect contrary to the principle of economics. Nelson and Mazzoleni in their paper discuss the review of economic theory of patents as suggested by economists. The various theories on the cost and benefit

[6] Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention in R. R. Nelson The Rate and Direction of Inventive Activity* (Princeton University Press 1962) 609.

[7] The Law Teacher <www.lawteacher.com> accessed on 13 June 2015.

analysis are-inducement of invention, prospect theory, and development and commercialization theory[8]. Of all these, incentive and profit/commercialization theory aptly justify the motive of patenting in the pharmaceutical sector.

Article 27 of TRIPS agreement states "patents must be made available for all inventions, whether products or processes with a full term duration of twenty year from the date of the filing of the patent application.[9]One of the main reasons set for patent protection under TRIPS is to promote innovation and technology transfer (Article 7) between developed and developing and least developed countries[10].Unfortunately, this does not happen, keeping in view the prices of technology which the developing countries cannot always afford. This creates a conflict between the between the desire of the developed world to promote and encourage innovation, and the strong need of the developing countries to acquire important technology such as pharmaceuticals. Patents are once again at the confluence of economic and law.

COMPULSORY LICENSING

Legal Standards

The conflict and inadequate transfer of technology for social welfare keeps back the full actualization of TRIPS provisions-the long-term social objective of providing incentives for future inventions and the short-term objective of allowing people to use existing inventions. In fact, TRIPS allows governments to make conditional exceptions to patent holders' rights: national emergencies, anti-competitive practices, or if the patentee does not supply the invention. Under this provision, compulsory licensing practice is used with a lot of ambiguity and restricted provisions further complicated by The Doha Declaration for Public Health restrictions on the "gravity of the public health problems.[11] afflicting many developing and least developed countries, especially those problems resulting from HIV/AIDS, tuberculosis, malaria and other epidemics. "Later, this flexibility was clarified by the 2001 Doha Declaration and the August 2003 decision enabling countries that lack drug manufacturing capacity to import pharmaceuticals under the compulsory license[12]. Patents in pharmaceutical sector are rewarded the most through profits and often they impinge upon the social welfare aspect of innovation (IP in healthcare) where the goods are not easily accessible to the common people.[13] Hence, the idea of taking the route to CL to keep a check on these limitations of pharmaceutical patents.

The term "Compulsory License" is used to describe a number of mechanisms for non-voluntary authorization to use patents. This concept is as old as 1600 with their use mentioned in Paris Convention of Industrial Property, 1883.Though a common feature of most patent system by then, it was not before early 1990s that about 100 countries has some or the other form of CL provision especially US and UK who have wide provision of government use for public benefit. So, CL is a procedure when a government allows someone else to produce the

[8]Richard Nelson and Roberto Mazzoleni, '*Intellectual Property Rights and Research Tools in Molecular Biology'* (Summary of the Workshop held at National Academy of Sciences,1997).

[9] See Trade Relate Aspects of Intellectual Property Rights (TRIPS).

[10] See Article 27 and Article 7 of TRIPS.

[11]Harshita Mathur, 'Compulsory Licensing under Section 92A: Issues and Concerns' (2008) 13 Journal of Intellectual Property Law 464.

[12]Ellen Hoen, 'TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond' (2003) < http://www.who.int/intellectualproperty/topics/ip/tHoen.pdf> accessed 14 June 2015.

[13]Rakesh Basant and Shuchi Srinivasan, 'Intellectual Property Protection in India and Implications for Health Innovation: Emerging Perspectives' (2015) W.P.No.2015-04 01 <http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/12875275012015-04-01.pdf> accessed 14 June 2015.

patented product or process without the consent of the patent owner. The most important global norm for the use of compulsory licenses is Article 31 of the WTO-TRIPS Agreement, which addresses uses "of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government".[14]But the term compulsory licensing does not appear in the TRIPS agreement. Instead, the phrase "other use" without authorization of the right holder appears in the title of Article 31 of TRIPS agreement. Compulsory licensing is only part of this since other use includes use by governments for their own purposes. In the TRIPS agreement, the legal framework for CL is found in Articles 27-34.In the TRIPS negotiations the research-based pharmaceutical industry emerged as one of the biggest winners and the countries[15] with emerging markets in pharmaceuticals (India, Brazil, China) were given greater access to developed markets for traditional manufactured goods plus a commitment of the developed countries to stop imposing unilateral trade sanctions for allegedly inadequate protection of foreign intellectual property rights (IPRs).Moreover, a loss in reverse engineering of drugs by the generic firms in developing countries was compensated in a way by CL.

This particular discussion focuses on CL in pharmaceuticals sector though it could also apply to patents in any field. For this sector, TRIPS Agreement attempts to strike a balance between promoting access to existing drugs and promoting research and development into new drugs.

Loopholes in the Compulsory Licensing Requirements

Despite the WTO's tremendous efforts to create a diplomatic CL system that improve access to prescription medicine, the latest TRIPS amendment instead of solving existing issues created some new concerns.[16]Particularly troublesome are the lack of specific requirements in determining eligibility for CL, risks of arbitrage and production of counterfeit drugs, faulty distribution system of drugs which prevents the target consumers' access to essential drugs.

The exact definition on CL is missing, rather it is implied in the phrase of Article 31 of TRIPS (other use or without authorization of the right holder)[17].The scope of eligible diseases, drugs, and nations are undefined though the intention for lack of specificity was intended to give least developed countries flexibility to decide for themselves what constitutes a public health emergency and minimize delay in accessing essential drugs. However, this provision has become a reason for other nations to use at their prerogative (Thailand and Brazil).Furthermore, TRIPS requires countries utilizing CL to pay "adequate remuneration" without specifying a method of calculation. Doha declaration implied a right to WTO members to grant CL "decides on the grounds" therefore. And with this CL came to be viewed as an acceptable tool for making pharmaceuticals more accessible in developing countries.

[14]**James Love, 'Recent Examples of the Use of Compulsory Licenses on Patents' (KEI Research Note 2, 2007) <** http://www.keionline.org/misc-docs/recent_cls_8mar07.pdf**> accessed 14 June 2015**

[15]**Jerome Reichman Comment: 'Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options' (2015) 37** The Journal of Law, Medicine & Ethics **247.**

[16]Vishal Gupta, 'A Mathematical Approach To Benefit-Detriment Analysis as a Solution to Compulsory Licensing of Pharmaceuticals Under the TRIPS Agreement' (2005) 13 Cardozo Journal of International and Competition Law 631.

[17] ibid 6.

DISCUSSION

Multidimensional Perspective on Compulsory Licensing

Multinational companies have been reluctant to lower prices of patented drugs in order to recoup their heavy investments in R &D. This has led to criticism that multinationals exploit patent law to pursue corporate profits at the expense of human health. When this happens, a government declares that a once-patented drug is now available for manufacture and will issue the compulsory license to private or state-run firms. The government issuing the license then compensates the patent owner with what it believes to be reasonable compensation. Regardless of who uses the license, the result is the same for the patent holder: manufacture and sale of its drug without permission[18]. In other words, a legal impediment (patents on drugs) has brought up a legal solution- the compulsory license.

A discussion on CL assumes a multidimensional perspective-from the patentee's and consumer's angle; from the developed, developing and least-developed countries; from the flexibility norms exercised by different countries and from the various instances/manners' perspective in which it is invoked or used. The use of CL either as a call, for settlement reasons (US, EU), as a threat (Brazil), as an amendment to its law (China, France and Belgium) or actually granted for practical purpose (South Africa, India), is extensively discussed in literature. The cases span across the globe from USA, to Europe to UK and Asia[19].Such a wide discussion is beyond the scope of this paper rather it has been limited to cases from BRICS nations with an exclusive focus on CL in context to pharmaceuticals. Regarding the nature of use of CL in US and EU, it has been mainly used to curb the anti-competitive practices. Under very limited circumstances, the jurisprudence in both UK and EU suggest that CL can be an appropriate remedy in antitrust areas.[20]A limited and efficacious use ensures a delicate balance between innovation and competition.

Compulsory Licensing in BRICS Nations

As per the TRIPS provision, India has adapted its Patent law of 1970 in compliance with international and national requirements both, with patent amendments in 2000, 2002 and the latest in 2005 in the wake of product patent regime. (See CL provisions from Table).India's issue of CL in case of Novartis patent was ridden with controversies over the IP protection, the exercise of section 3(d)in Indian Patent Act[21] and a challenge to innovate in the Indian markets with its existing IP policies for patented drugs. Since all countries differ in their patent system,

CL cases are very contextual differing in the mode of implementation of CL standards[22],a comparison would be more apt than merely drawing parallel in these cases.

For combating the controversial use of CL, it has been observed through case studies of BRICS nations that price control is well established in Brazil with Russia and China following the same pattern but India has still to bring it in place. Though CL dependent price control may take care of affordability of drugs but can CL help in technology transfer between developed and developing countries with the reluctance or non-use of the patent on the part of the patentees from developed countries?

---

[14] ibid 4.
[19] ibid 9.
[20]See, the Legal Service India website <www.legalserviceindia.com> accessed on 15 June 2016
[21]See The Patent (Amendment) Act 2005
[22] Niranjan Calindi 'A Comparative Analysis of the Patent Systems of BRICS Countries' (2012)

From the case studies of CL in BRICS nations it appears that in most of the cases, it has been matter of settlement of price, discount and less of issue/grant of CL. Regarding the disease type, AIDS has been predominantly at the core of CL issues. Patentees on their part in most cases have settled for compromises in price/manufacturing rather than totally giving up their exclusive ownership/market share in specific markets where their drugs are patented.

Table1. Provisions for CL in the Law of BRICS country

Country	Provisions of Compulsory License(CL)	Status of Compulsory Licensing (CL)
Brazil	Brazil has a comprehensive provision on CL in its Patent law, covering all the conditions of grant (as in TRIPS and similar to that in Indian Patent law) as well as some additional circumstances.	A series of CL threats by brazil resulted in large discounts on the prices for HIV/AIDS drugs. These threats and negotiations continued till 2007 when Brazil's demand for further discount became futile. And a CL was granted.
Russia	As a late entrant to WTO, CL provision of TRIPS is now applicable in Russia. Still, it has had its own CL provisions for some time. Non-exclusive license in Russia can be granted either when the invention is not used or is or is insufficiently used by a patentee during the four years from the issue date or when the invention, cannot be used without infringing	So far, perhaps no case of compulsory licensing cases has been found in Russia.
India	**Sec 84 and Sec 92** of the Indian Patent Act (2005) contains very broad CL provisions. Under Sec82, the Controller of Patents can issue a compulsory license three years after the issuance of a patent under the given conditions: The reasonable requirements of the public with respect to the patented invention have not been satisfied; the patented invention is not available to the public at a reasonable price; the patented invention is not worked in India. Under Sec92 of the Act, CL can be granted on notification by Central Government a) in a case of a national emergency(including a public health crisis), extreme urgency b) in the event of public non-	The grant for CL is very popular in India with filings from a number of generic manufacturers. Indian government has identified several patented medicines against which it wishes a compulsory license application to be filed in the near future.
China	In 2012, China has amended its intellectual property laws in order to allow the government to issue compulsory licenses for local generics in cases of state emergencies, unusual circumstances or in the interests of the public. The licensees are also entitled to export their produce for reasons of public health.	So far, perhaps no compulsory license has been granted in India.
South Africa	Has a formal provision of CL in its Patent Act.	Cases of CL are fairly common but not so publicized.

Table2.Compulsory License in Practice in BRICS countries

	Year	Grounds for threat/ issue of CL	Drug(Company)	Remuneration deal
Brazil	2001-2007	No proper CL issue but a series of threat for required discount on price of different drugs, local working provisions when patentee does not manufacture drugs locally.	ARVs-nelfinavir and efavirenz. (Merck) GSK,BI Viracept (Roche)	Variable on case by case basis (from65%discount on Gleevec to 50% price reduction in case of Gilead.
Russia	Till date	No issue of CL		-
India		Insufficient use of the patent in India by Bayer, high price and accessible to only 2 % of the patients.	Natco vs Bayer	
China	Till date	No issue of CL	-	-
South Africa	2000-2003	Excess pricing, denial of access and exclusionary practice.	ritonavir, lamivudine, ritonavir+ lamivudine and nevirapine, (GSK and BI)	Not more than 5% of the net sales of relevant Anti-Retroviral (ARV).

Debate on Compulsory License

The member nation has complete discretion in choosing the grounds on which these licenses are granted. For example in Indonesia, it is issued as a President's decree, in Malaysia the Minister of Domestic Trade and Consumer affairs has the authority to do so while in case of Thailand, any ministry bureau or "department of the government" can issue a CL.[23]But the point is often missed that this term of CL does not contradict or supersede the explicit textual command of TRIPS Article 31, which still requires these licenses to be issued on commercially reasonable terms and conditions.[24] The government taking of the license is, in theory at least, supposed to provide just compensation to the person who has been deprived of his property. At the very least, these exchanges raise the question: which patents should be subject to these licenses and how just compensation should be computed. This raises immense tactical and public choice issues in case where several similar patents are subject to such use. From an economic point of view (except providing adequate incentive), there is more or less unanimity

[23]ibid 6.

[24]Richard Epstein and Scott Kieff, 'Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents' (2011) 78 University of Chicago Law Review 71.

in opinion that issue of compulsory license will lead to net social benefit as it will reduce the price of the medicines and make it more affordable for the consumers. The only point that needs to be addressed is how the issue of compulsory license affects the incentive to invent and the ways to address the health issue with least effect on such incentive.

The rationale behind patent laws is to provide incentive to the inventor to invent. Compulsory license on the other hand reduces that incentive by granting the license to the licensee at a price lower than what the inventor would have charged. In case of pharmaceuticals the argument that is raised is that pharmaceutical firms invest significant funds into the development of new medicines. Only a small fraction of the medicines created actually reaches the consumer. Even drugs that receive regulatory approval often are not profitable. Only 2 or 3 in 10 drugs that pass the regulatory stage actually recoup their development costs. Hence, the developed countries and pharmaceutical companies would push for stricter patent regimes.

Risks of Compulsory Licenses

CL may be a giant barrier to commercialization of patent, the moment exclusive power of the inventor is divested through imposition of CL.[25]Further, it is argued that broadening the Article 31 of TRIPS compulsory licensing exception to allow import of licensed drugs may instead encourage further dependence by least developed countries on outside assistance to combat public health crises within their borders. Their motivation for R&D or strengthening their IPR regime could slow down.

Use of CL will discourage R&D for medicines for tropical diseases for fear of the innovator companies in getting adequate remuneration for their work in the countries to which they would sell these products for potentially large health gains. In some cases, the loss of revenue will result in a delay of new drugs and abandonment of unprofitable projects. These losses will be felt in the country that imposes CL as well as impact elsewhere.[26]Critics fear that CL may have negative implications for the distribution of drugs due to lack of infrastructure (supply chain) and other effects (as counterfeit drugs) despite the availability of the drugs.

Benefits of Compulsory License

Due to the pressing needs for technology transfer in the developing world, compulsory licensing has become an option offered by both national laws and the TRIPS Agreements. A recent thesis evaluates the role of CL in technology transfer to emphasize that compulsory licensing under the TRIPS agreement is indeed a useful tool for technology transfer to the developing world[27]. There are cases of delay in development of important technology due to deadlocks between the inventor and the" improver". For example, "holdup problems" occurred in the Wright Brothers and Marconi cases. Similarly, the broad Edison lamp patent slowed down progress in the incandescent lighting field.[28]On the other hand, researchers point out no adverse impact on the innovation has been seen in case of the companies affected by compulsory licenses.[29] In fact, in such exclusive rights- based patent system, compulsory licensing may be more broadly justified to create open access to patents on needed medicines in such countries.

---

[25]ibid 16.

[26] ibid 16.

[27]Sylvia Fodor, 'Compulsory Licensing under the TRIPS Agreement: A Tool for Developing Countries' Access to Technology Transfer' (Bachelor thesis, Lunds University 2011)

[28]Zaheer Abbas, 'Pros and Cons of Compulsory Licensing: An Analysis of Arguments' (2013) 3 International Journal of Social Science and Humanity 254.

[29] Chin Chen Chien, 'Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?'(2003) 18 Berkeley Technology Law Journal 853.

Proponents of CL consider it as a demotivating factor for the inventors who actually need incentive (money and effort) to commercialize their new ideas. Besides, the amount of royalty through CL grant is hardly an incentive for further research; it is no way near the potential financial benefit which the patentee would have enjoyed on an exclusive basis.[30]

Scholars argue for CL as an obvious remedy to problems created by the indiscriminate enforcement of patent law in cases which do not increase social welfare. Converting the property rule to a liability rule through a CL allows a country to change most of the deadweight loss into consumer surplus by using competition to achieve the lowest possible price. royalty payment on the other hand provide a measured contribution to the R & D. Economists in favour of issuing CL argue that despite CL and lowering of prices in poor countries, people are not potential customers of the inventor for reasons of affordability and that the licensee would not affect the market of the inventor. From an economic point of view (except providing adequate incentive), there is more or less unanimity in opinion that issue of compulsory license will lead to net social benefit as it will reduce the price of the medicines and make it more affordable for the consumers. A scholarly discourse by Tandon concludes on the basis of some preliminary calculations that CL may lead to probable social welfare though his assumptions are based on optimal patent length for optimal compulsory licensing[31].

Compulsory licensing becomes inevitable in case of nonuse of patents. The government can judiciously apply this provision to patent holders to work the patent to maximum national advantage[32]or allow the others with capacity to scale up the invention and commercialize it. The refusal by the patentee may prevent utilization of another important invention which can be significant for technological advancement or economic growth.

ISSUES IN COMMERCIALIZATION OF PATENTS: THE SCENARIO FROM INDIA

Commercialization of patents is technology and industry specific. However, since pharmaceutical patents cover single chemical entities or well-defined compounds in composition, they are free from the twin objections (blurred boundaries between patents and acute fragmentation of patent rights) which exist in patents of other technological areas.[33]Apart from the need to recoup their investment in time and money in bringing out a new product (drug) to the market, pharma patents qualify for commercialization studies. Patent protection is therefore accepted as a necessary evil despite its conflict with the competitions laws and human rights law (in case of pharmaceutical patents).[34]

A recent pilot survey done by the author for the top 25 pharma firms on modes of and barriers to commercialization of patents in India has brought important issues of concern. Building strategic alliances and licensing revenues are the major modes for exploitation of patents by pharma firms vis-a vis participating in patent pools and use of patents to start spin-offs.[35] Demand for technology, nature and the field of invention are the major barriers while cost of drafting and ownership issues seem to be less of a barrier in commercialization of the patents, perhaps due to the patents owned by the firms despite the invention being worked by inventor//inventors. Since, these barriers block the commercial use of patents either for technology transfer or revenue generation they also deprive the consumers from getting access to the required resources which otherwise does not contribute to social welfare. In such

[30] ibid 20.
[31]Pankaj Tandon,'Optimal Patents with Compulsory Licensing' (1982) 90 Journal of Political Economy 470.
[32] ibid 20.
[33]ibid 20.
[34]ibid 20.
[35]ibid 3.

circumstances, whether the use of CL in very exceptional cases can expedite these two hampered processes of commercialization and social welfare but with of course keeping in mind the other ramifications of such a step (price control, inventor's motivation to innovate, adequate remuneration and the market power of the patentee).This is the main idea which has been proposed in this paper.

CONCLUSION

The discussion in this paper has focus on compulsory licensing: a contentious issue at the national and international level both. Though applicable to a wide area of technology, its use in the pharmaceutical sector seems well justified on grounds of public health and social welfare. The discourse in this paper on the cases of CL globally or on a regional level shows that it is being used as a "threat" tool to do business and this is more of an acceptable situation for the patentees vis a vis losing their exclusivity over their invention. How much to compensate and in what way to calculate is a pricking question in this domain for which solutions and more research is needed. In the case of BRICS nations, occurrence of issue of CL is less frequent despite the spreading awareness about this mechanism. As for the technology transfer in developing countries it is possible through CL but not in the least developed countries who actually lack the manufacturing capacity for drugs. Indirectly, the export of required drugs by developing countries (who act as intermediaries) to these poor countries facilitates social welfare role of the patents. Sandwiched between economic and legal function, patents' use has become more of a dilemma from the opposed perspective of developed and developing countries. Another aspect which has been looked into is the patent commercialization process in pharmaceutical sector in India. It is fraught with challenges and hence toying with the remote idea of CL in facilitating this process could be given a thought. Maybe, CL can be experimented as a tool for commercializing exclusive patents for which there is dire need in the public health and innovation domain. This is an area which can be researched further. Inputs for the policy makers stems from the existing legislative gaps in unanimity/standardization of the application of CL, defining the scope of CL, clarification of the vague terms in the law, differentiating between what is a limited and judicious use from what is actually an arbitrary use of CL.

THE INTERSECTIONS OF 3D PRINTING TECHNOLOGY WITH INTELLECTUAL PROPERTY LAW

Dr. Tesh Dagne[1]

3D printing has emerged as one of the most significantly disruptive technologies in the digital economy. From the manufacturing of guns to food preparation, it has the potential to revolutionize (and improve) many aspects of our lives, in much the same way the Internet has revolutionized communication. The process of 3D printing involves the preparation of a computer-assisted digital (CAD) file, which may be derived from pictures or drawings, scanned from goods using a 3D scanner, or made using 3D modeling software. Such a file can easily be distributed, copied, modified and then 'printed' by a printer device, using fine strands of molten plastic, ceramic, or even metal powder. This makes it possible to turn digital content into physical objects at the press of a button. The technology's potential as a game changer, in this respect, presents challenging legal questions.

This paper explores diverse questions that arise in relation to consumers' use of 3D printing in day-to-day activities. For example, questions arise as to whether a CAD file incorporating a picture or a drawing, which is then customized using a software program, infringes the copyright on the underlying image. Questions also arose as to whether copyright subsists on the shape, configuration, pattern, or aesthetic aspects of a physical good depicted in a CAD file. Based on trends in the wake of other disruptive technologies, such as the Internet, photocopiers, and peer-to-peer file sharing technologies, it can be anticipated that legislatures, judges and policy-makers will be pressurized to regulate aspects of 3D printing activities. Would consumers' act of creating, modifying, and remixing a manufactured good's CAD file and distributing it over the Internet infringe on the rights of manufacturers? To what extent can manufacturers control the shape, configuration, pattern and aesthetic aspect of their goods' CAD files using various technological protection measures (TPMs)?

The paper attempts to give answers as to how existing IP law affects the rights of consumers who embrace 3D printing, by examining such questions at the intersection between IP law and the technology. After exploring how the different activities in 3D printing intersect with IP laws in the light of recent jurisprudential developments regarding use of other technologies, the paper offers recommendations as to possible approach on how best to balance the rights of consumers, innovators, and other stakeholders in dealing with conflict of rights that relate to 3D printing. In this respect, it is proposed that realizing the full potential of 3D printing technology requires an express recognition of user's rights in a similar fashion to Canada's unique approach to regulating the activities of individuals over the Internet as balanced against a number of user's rights integrated in copyright law.

A CRITICAL REVIEW OF THE MERITS FACTOR IN CIVIL MEDIATION

Mr. Masood Ahmed[2]

The English courts' reluctance in embracing compulsory mediation was reinforced by the controversial decision in Halsey v Milton Keynes General NHS in which the Court of Appeal made a number of significant pronouncements regarding the nature of ADR (in particular mediation), the 'encouragement' of mediation and the approach to be taken by the courts when

[1] Dr. Tesh Dagne, Assistant Professor, Thomson Rivers University Faculty of Law.
[2] Mr. Masood Ahmed, Lecturer, University of Leicester.

dealing with a successful party who was found to have unreasonably refused to mediate. In Halsey Lord Dyson (as he then was) held that the general rule that costs follow the event (i.e. the loser pays the winner's costs) should not be departed from unless it is shown that the successful party acted unreasonably in refusing to engage with mediation. In assessing unreasonableness, Lord Dyson promulgated six non-exhaustive factors which would determine whether to penalise the refusing party by making an adverse costs order. One of those factors is whether the successful party reasonably believes that he has a strong case (the 'merits factor'). Where the successful party can demonstrate that he had a strong case then that party will not be found to have behaved unreasonably in refusing mediation and, as a consequence, will escape being penalised in costs. In this regard, the key consideration for the court is whether the successful party's assessment of the merits of his case is reasonable. The justification for the existence of the merits factor is that one party to litigation could use the threat of costs sanctions to obtain a nuisance-value offer and force a settlement in respect of a case lacking merit.

This paper takes as its focus the Halsey merits factor. It will be argued that judicial and extra judicial interpretation and application of the merits principle is in need of qualification, especially because it has created inconsistent and, at times, contradictory jurisprudence. One of the principle reasons for this, it will be argued, is the flawed policy rationale which underpins the merits factor which undermines the role and the powers of the courts in exercising its discretion on costs. The author will argue for a fundamental change in judicial approaches to the merits factor and for the adoption of a narrower interpretation and application of the principle so that a successful party should only be found to have acted reasonably in refusing mediation in cases which were obviously and completely without merit.

LEARNERS WITHOUT EYESIGHT BUT VISION : HOWEVER DOES THE INDIAN EDUCATIONAL LAW HAVE THE SPECTACLE? A STUDY

Dr. Ashish Virk[3] and Dr. Aman A. Cheema (Co-Author)

It was in 1990's that the Indian Disabled population saw a dawn of their rights when India finally shed it's traditional largesse approach. The culmination of a long, tenacious struggle for rights could be witnessed from the series of laws that were passed by the Indian government for them from time to time. The excitement about this change went off after a few years when the laws passed were never translated in terms of real enforceable rights. The disability rights movement of India thus took another turn when they brought this into the notice of the Judiciary and demanded for actualization of these laws by filing various cases. The ignorance, insensitivity and resistance of the non-disabled population were exposed by the Judiciary. The disability rights jurisprudence has thus been gradually unfolding in India now.

India has become the first country in the world to ratify the Marrakesh Convention that codifies exemptions to copyrights to benefit blind and vision impared readers. Blindness, a common form of physical disability has been recognized as an important public health problem in India, a country that is home to a more than a billion blind inhabitants. The various rights legally bestowed to this blessed population includes right to equal opportunity, rehabilitation, participation and most importantly right to education. The present work will target their right to primary education in the country. the analysis shall be drawn on the basis of an empirical work conducted by the researchers by visiting blind children schools, interviewing these students and making the scrutiny between the law and the ground realities. The paper will also

[3] Dr. Ashish Virk, Assistant Professor, University Institute of Laws.

make a comparative study of educational laws of India and UK on the primary schooling to visually disabled students. The work will conclude with certain sub-monitions to enhance their educational system in the country for the overall emancipation of this population as we all need to know that just because they are born without eyesight doesnot mean they don't have a vision.

NEW INSTITUTIONALISM AND SHARIA LAW IN THE WEST

Ms. Amira Aftab[4]

The Sharia Law debate in the West often centres on the question of whether it is desirable or undesirable, examining associated questions of the role of law and possibility of legal pluralism in providing for religious freedom and gender equality. This discussion more often than not looks to the multiculturalism-feminism debate presented by theorists such as Susan Okin. Whilst providing an important lens through which to view and understand the potential scope for Sharia Law in Western liberal democracies, this approach fails to account for why Sharia Law has been more easily "accommodated" in some countries, and completely excluded in others. For instance, within the United Kingdom (UK) over the last decade, there has been an increasing number of Sharia courts and tribunals established. Most notably, in 2007 there was the establishment of the Muslim Arbitration Tribunal, which claims to have jurisdiction as an alternative dispute resolution mechanism under the UK's Arbitration Act 1996. This differs immensely to the experience of Sharia Law in Australia, where there are no such Sharia Law bodies, and the debate of whether Sharia should be accommodated is largely undeveloped - predominantly confined to political debates and social commentary in the media.

Exploring the Sharia Law experience in both countries within the theory of New Institutionalism (NI) can offer a new insight into why both countries have taken different paths. NI focuses on institutions, such as courts and legislatures, as well as the rules administered by state bodies – i.e. constitutions, laws and regulations. However, this focus is not just limited to formal institutions of the state, it looks at the influence informal institutions, such as religion, culture and ideology, have on shaping these formal institutions. By adopting an NI approach to analyse the multicultural policies and legal systems of both the UK and Australia, it may be possible to better account for the vastly different experiences with Sharia Law in each country.

A CONTENT ANALYSIS OF MEDIA COVERAGE OF MEDICAL MALPRACTICE DISPUTES IN TAIWAN

Prof. Shu-Yu Lyu[5]

Background: Medical malpractice claims in Taiwan can result in both civil and criminal litigation. The three most frequently accused specialties were surgery, obstetrics and gynecology, and internal medicine. Purpose: The major purpose of this study was to investigate the nature and volume of the print media reporting of medical malpractice disputes. Method: Data were collected from the databases of four major newspapers, the United Daily News, China Times, Apple Daily, and Liberty Times Net by using key word searches. A content analysis was conducted to examine news articles including any of the following three key words: medical litigation, medical disputes, or medical malpractice. The study period was from January 1st, 2008, to December 31st, 2013. Results: A total of 2,489 news articles matching

[4] Ms. Amira Aftab, PhD Student, Macquarie Univeristy.
[5] Prof. Shu-Yu Lyu, Professor, School of Public Health, Taipei Medical University.

the above-mentioned criteria were identified to have been published between 2008 and 2013. It indicated that at least one medical dispute news article was reported each day during the study period. The most common reported specialty was surgery, which accounted for 58.7% of total medical dispute news articles, followed by the emergency medicine (12.5%), obstetrics and gynecology (9.1%), pediatrics (7.3%), dentistry (6.4%), and Chinese medicine (4.8%). Among these, 269 news articles (10.8%) revealed personal patient information while 568 (22.8%) revealed personal information of the medical staff. On average, 2.68 sound bites per news report tended to support the medical staff while 3.07 sound bites per news report tended to blame the medical staff. While analyzing the standpoints of the media reporting, only 13.5% of the news reporting was neutral and non-judgmental. It was noted that 30.3% tended to support the medical staff, while 56.2% tended to support the patients. Conclusion: Most of news reporting was not friendly to the medical staff involved in the disputes. Better transparency in the communication between physicians and journalists could help to avoid misunderstandings related to medical disputes and the portrayal of physicians involved.

COURTING SOCIAL CHANGE IN DEVELOPING COUNTRIES - EXPLORING MEANS TO IMPROVE THE COURT'S CAPACITY IN LAW AND POLICY MAKING

Ms. Harsimran Kalra[6]

Scholars have identified various reasons for the limited impact of constitutional courts in effecting socio-economic rights. These include the incompetence of courts to address policy questions (Horowitz 1978); the court's tendency to secure symbolic but intangible gains (Baxi 1985; Koonan 2010); the polycentric and complex nature of these disputes (Menkel-Meadow 2004) and the politically embedded nature of courts (Rajamani 2007; Cullet 2010; Rosenberg 1991).

This article goes a step further by identifying means to overcome these limitations by focusing on the activities of civil society actors and the procedures that govern their interactions with the court to influence policy making. The Article would rely on international comparison of litigation procedures to contribute to advancing the capacity of the Courts as a space for policy making, a role that courts were not envisioned performing. In order to engage with this analysis, the western conception of constitutionalism is unhinged to give way to tenets of good governance.

The Article is based on the premise that the debate surrounding the propriety of judicial intervention in policy decisions is anachronistic today and in need of reconfiguration. Courts in developing countries, such as India and South Africa, have relied upon judicial review and Constitutionalisation of socio-economic and environmental rights as a means to consolidate their socio-political status and popularity. This judicial review of human rights has resulted in the spread of indigenous forms of constitutionalism and governance in developing countries, where separation of powers is often compromised. This trend is unlikely to roll back, even though research suggests that the courts' impact on effecting social change is not easily discernible (Yamin & Gloppen: 2011).

To further the analysis, the Article focuses on the judicial system in India which is examined with the help of the CNG Case of 1998, where the Supreme Court ordered a change in fuel choice by all public transport vehicles in Delhi to deal with rising air pollution in the city. The

[6] Ms. Harsimran Kalra, Asst. Professor, Jindal School of Government and Public Policy.

CNG case is particularly relevant to the discussion as it involves both institutional limitations of the judicial process, and what Rosenberg points out is the oft-repeated failure of the environmental movements to adopt political methods to bring social change. The peculiar facts of the case – the lack of interest of the political class; the non-alignment of the market; limited support of the executive; the court's failure to deliver meaningful change in lived realities despite a decision in favour of the civil society organisations – highlight the limitations of the strategy of social movements, which take refuge from economic analysis and political choices in law.

The Article's first section gives introduces the CNG Case. The second section follows the interaction between different interest groups and their interactions with the Court. The following section analyses the interaction to identify inadequately represented interest groups and reasons for the lack of recognition received by these interests. The last section develops best practices for law and policy makers that address the limitation of the judicial system in providing access and recognition to neglected stakeholders.

GENDER JUSTICE AND UNIFORM CIVIL CODE - A STUDY OF INDIA

Ms. Aastha Agnihotri[7] and Professor Simmi, Himachal Pradesh University, Professor Dept. of Public Administration (Co-Author)

India is the world's largest democracy and boasts of a diverse multicultural society. The Constitution of India is based on the principles of equality, freedom and secularism and it aims to empower the women and other weaker sections. It is from the religious freedoms enshrined under Articles 25 to 30 that religious communities derive the right to be governed by their own 'Personal Laws'. Thus, India has pluralistic laws governing family matters and application of these laws depends on the religion and gender. One common feature of all the religious personal laws is that women are given far fewer rights and lower status in comparison to men. In a country where on one hand women are worshipped as Shakti on the other hand in name of religion we deprive them of their human rights. These personal laws are not only in violation of certain constitutional provisions but also human rights. Therefore, these laws have started a debate on gender equality and justice in India. Endless debates on issues of women empowerment are not enough in a country where the law itself is unjust and cause of their agony. Thus, there is another debate on the desirability of enacting a Uniform civil code as envisaged in the Article 44 of the Indian Constitution which is connected with the issue of gender justice. By having different personal laws for different. The biggest problem in absence of Uniform Civil Code is that it goes against the concept of equality which is one of basic tenets of the Constitution. By having different personal laws for different religions we are in a sense undermining the credibility of the secularism as enshrined in the Preamble of the Constitution of India. A Uniform civil code is also desired to simplify the clumsy legal processes involved for deciding matters relating to personal laws. The honorable Supreme Court of India has opined in the landmark cases of Shah Bano (1985), Sarla Mudgal (1995), and in Vallamattam (2003) that Legislation for a common civil code as envisaged by Article 44 of the Constitution should be enacted. However no law can itself bring change till the time the citizens agree to accept it and the problem with enacting a Uniform Civil Code is that the majority of the population is still unwilling to accept a law separated from religious customs. The population in INDIA is very sensitive to their religious identity and enacting a uniform code may lead to riots and turbulence in this country. The Uniform civil code can only be successfully introduced after achieving improved levels of literacy, awareness on various social political issues,

[7] Ms. Aastha Agnihotri, Student, Guru Gobind Singh Indraprastha University.

enlightened discussions and increased social mobility. However, steps towards uniform law should start to bring a social change in this diverse land. The actual challenge for the Legislature however lies in formulating a uniform code that is able to strike a balance between principles of justice and religious sentiments.

In this paper I shall focus on the issue of Gender justice, the tension between Personal laws and the Constitution ,desirability of a Uniform Civil CODE that is laid down under directive principles(a goal that state should achieve) and problems with enacting it.

RETHINKING LEGITIMACY OF CRIMINAL JUSTICE : BRIDGING THE CRIMINAL LAW – CRIMINOLOGY DIVIDE.

Mr. Lucas Noyon[8] and Dr. Jan de Keijser, Professor of Criminology (Co-Author)

The concept of 'legitimacy' is of crucial importance to both criminal law scholars and criminologists. Yet, both disciplines have taken different paths examining the subject. Within the discourse of criminal law, legitimacy is usually considered as a quality of a system that is dependant on its congruency with moral rules, which are to be 'discovered' by the criminal law scholar by rational reasoning. This could be labelled a 'doctrinal' approach. Criminological research, on the other hand, usually inquires after subjective social indicators related to criminal justice, e.g. 'trust', 'acceptance' and 'satisfaction' (Tyler), assuming that these constructs - in sum - constitute empirical legitimacy. This, on a Weberian value free based approach could be termed 'constructivist'.

The emerging paradigmatic division of labour between criminal law and criminology does not only limit the opportunities of knowledge exchange between these potential scientific siblings, but also seems rather unsatisfactory since the scope of each of these approaches seems either too narrow or (partially) off the mark. While legal scholars seemingly overlook the (perhaps increasing, see Rosanvallon) relevance of societal endorsement, criminologists like Tyler obscure the inherently normative character of judgement. Moreover, since any Criminal Law system can by 'legitimate' in criminological terms, due to the value-free moral emptiness, the classical empirical approach provides no answers to the question how to optimize legitimacy of criminal law systems while upholding fundamental moral principles that lie at the root of post-enlightment criminal law.

The present research endeavours to overcome this criminal law - criminology schism by deploying an understanding of legitimacy of criminal law that is not impaired by the aforementioned shortcomings. First, previous theories in which similar deficiencies are acknowledged or remedied are reviewed. Among the latter are attempts to accommodate societal events or opinions within moral approaches to legitimacy, such as proposing a 'pragmatic turn' in political philosophy (Fossen), or advocating a closer attention to 'sociological legitimacy' in American constitutional law doctrine (Fallon). Vice versa, empirical approaches of legitimacy that renounce the dogma of radically value free research (Beetham, Habermas) are assessed as well. It will be argued that these different perspectives, viewed in conjunction, can be helpful in reducing the conceptual distance between doctrinal and constructivist perspectives on legitimacy, but lack in specificity for the purpose of understanding legitimacy of criminal law. Most notably, the dual task of criminal law – being both an expression of the common will but at the same time an institutionalized shelter for individual suspects against the ad hoc featured common will – remains relatively

[8] Mr. Lucas Noyon, PhD Candidate, Leiden Law School.

underexposed. Therefore, it is argued that there is need for a coherent understanding of legitimacy of criminal law systems. This approach, then, should be based on three premises. At first it should be empirically testable. Secondly, the normative features of judgement should be visible in this empirical investigation. Thirdly, the dual task of the criminal law system should be taken into account. Some first thoughts on how this could be operationalized are tentatively explored.

PROGRAMS IN NIGERIAN HIGHER INSTITUTIONS AND GRADUATES UNEMPLOYMENT

Abolo Evuarherhe Veronica[9] and Sola Niyi Ayeomoni[10]

ABSTRACT

The study investigated the programs in Nigerian higher institutions and how they influence unemployment of graduates in the country. The study employed the survey design. The population of the study includes two universities, two polytechnics and two colleges of education in Lagos State. A total of 350 participants, which include graduates and students were sampled for the study. A structured interview schedule and direct observation were used to collect data on the three research questions drawn for the study. The data were analyzed using rating of the structured interview in tables and percentages. The results of the study revealed that Nigerian graduates are not only unemployed but can hardly meet the requirements of available job vacancies due to the stereotype nature in scope, content and methods of the programs in the institutions. Recommendations such as collaboration of companies (end-users) and institutions in the training of students, restructuring of the content and methodology of programs and providing soft loans and other facilities to the young graduates were proffered to reduce the rate of graduates' unemployment in Nigeria.

Keywords: Graduates Unemployment,Nigerian Higher Institution, Programs

DEFEATING HUMANITY? *(*AN ETHICO-LEGAL DISCOURSE)

Madhu Kapoor[11]

ABSTRACT

The paper opens up with a brief case study of Aruna Shanbaug, a nurse in the Mumbai hospital, who died very recently after living 42 years in comatose stage, taken care of by her co-staff. The tragic incident occurred after she was chained brutally and cruelly raped. She damaged all her senses and brain function, remained in a vegetative stage for a long 42 years. The paper sought an answer for the fate of the woman which was sealed by law. The euthanasia was denied to her. The culprit escaped with light punishment. The concerned hospital did not register foolproof FIR against the culprit because the case was beyond the definitional form of 'rape'. I must say that the righteousness of law in this case is questionable. The morality too maintains silence here which is focused with special reference to Kant's concept of 'Humanity Formulation'. **Key words**: Humanity Formulation, dignity, justice.

[9] Abolo Evuarherhe Veronica, Lecturer Department of Educational Administration, University of Lagos (evuarheb@yahoo.com)

[10] Sola Niyi Ayeomoni, Doctoral Graduate Department of Educational Administration, University of Lagos (ayeomonisola@yahoo.com)

[11] Madhu Kapoor, Former associate prof. of Philosophy,Vivekananda College, Thakurpukur, Kolkata, India, mattoo_k@yahoo.co.uk

RARITY OF LAW: ĀPAD DHARMA

Kakali Ghoshal[12]

ABSTRACT

Law has been defined as the universal binding force that brings order to the human conduct. But in certain exceptional cases the law demands their deviations that are discussed in Indian ethics as *Âpad dharma.* This paper addresses the philosophical rootedness of law from the Indian ethical perspective which equates law with *dharma* and defines its rarity. The space between the conscience and infidelity gets diffused and the law acts as an anchor which balances the two sides at par. However, when saving one's existence becomes priority and law becomes secondary, the rule of *Âpad dharma* becomes the part of the ethical framework.

This paper tries to highlight the relative nature of law and brings out the rarity involved in exceptional cases where the prevailing structural law has to go beyond the prevailing jurisdiction. It substantiates such rarity of law with life-experiences and characters from Indian Epics like the *Mahābhārata*. In the course of discussion, it appears that Law though necessary yet is not sufficient for protecting individual and societal values.

Key words: *Âpad dharma*, Ethical framework, *Mahābhārata*

COMPULSORY LICENSING: A TOOL FOR BALANCING TECHNOLOGY TRANSFER AND SOCIAL WELFARE

Vinita Krishna[13] **and Sudhir. K. Jain**[14]

ABSTRACT

Patents as a policy tool facilitate innovation and technology /transfer. Their use however, varies markedly across technology sectors and in different context. One such use of patent is the controversial mechanism-compulsory licensing (CL). In this paper, the existing legal standards of CL are revisited through Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement of World Trade Organization, with reference to cases and status of CL in BRICS nations and their implications. Some confirmatory findings through survey on the barriers to patent commercialization in Indian pharma sector prompts the author to take up this idea of using "CL as a tool to balance technology transfer and social welfare"-the very objective of TRIPS and the twin role of patents from legal and economic angle. The methodology is a mix of theoretical discourse on CL, supplemented by empirical findings. Analysis of the pros and cons of CL allows for exploration of possible removal of some of the barricades to technology transfer in pharmaceutical sector, an important management issue in optimal utilization of patents.

Keywords: Compulsory licensing, Economics of patents, Indian Patent Act, Patent commercialization, Pharmaceutical patents, TRIPS

[12] Kakali Ghoshal, Assistant Professor of Philosophy, Budge Budge College, Kolkata India, ghoshanamika62@yahoo.in

[13] Vinita Krishna, Doctoral Scholar, Department of Management Studies, Indian Institute of Technology Delhi, Hauz Khas, New Delhi-110016; E mail:vinita2krishna@gmail.com

[14] Sudhir K. Jain; Professor, IIT Delhi (on leave), Vice Chancellor, Shri Mata Vaishno Devi University, Kakryal, Katra – 182320 (J&K) Email id: skjain51@hotmail.com

EROSION OF CENSORSHIP IN CLINICAL SETTING

Sarala Kapoor[15]

ABSTRACT

The paper unfolds the dilemma of practicing psychoanalysis in clinical set-up, when the 'confidentiality and trust' on which the practice is based, is violated. Therapeutic-obligation does not allow the therapist to report to the appropriate authority any criminal act or social reported in the analytical sessions. If so done, it will be called 'Boundary violation' and 'Breach of trust'. But the Structural law of the state demands it.

Moreover, as a rule of therapy these information cannot be used as a legal source material, because that might be the mental representation (Phantasy) of the patient. As such, it is also difficult to provide proof against such cases which may expose some other people (as reported by the patient) who are not known to the therapist.

Here, cases will be exemplified to show the inadequacy of the structural law that is insensitive to human factors. The boundary gets blurred!!

I will attempt to explain this dilemma in the background of the erosion of censoring agency of the mind--- the super ego, with special reference to Dynamic psychology. The flip side of the problem is when authority itself falls prey to boundary violation in therapeutic sessions. The paper searches for the solution.

Key words: Ethics, censorship, super ego, boundary violation.

UNIVERSAL BASIC EDUCATION ACT IN NIGERIA: A REALITY OR PLACEBO?

JACOB ADEYANJU[16]

ABSTRACT

The focus of this paper was a critical examination of the implementation of Universal Basic Education (UBE) Act of 2004. It took a step-by-step appraisal of this Act in comparison with what obtains at the Primary and Junior Secondary School (JSS) levels in Nigeria. Expo-facto research design was used. The respondents consisted of 20 members of senior staff of Kwara State Universal Basic Education Board (KWSUBEB) and 109 Chairmen of Parents Teachers Association drawn from 76 and 33 Primary Schools and Junior JSS respectively. These samples were chosen using simple random and purposive sampling techniques. A questionnaire and interview (structured and unstructured) were used to collect data. The data collected were analysed with descriptive statistics and the two research questions raised in the study were answered. The study found among others, that the primary and junior secondary education in Nigeria were neither free nor compulsory. This negates the UBE Act which stipulates that basic education in Nigeria should be universal, free and compulsory. It was recommended that an institutional framework for the implementation of the Act should be put in place to make it a reality.

Key Words: Free, Compulsory, Institutional Framework, Literacy and Placebo

[15] **Sarala Kapoor,** Formerly associated with Bangur Institute of Neuroscience, Kolkata. India.Saralakapoor@gmail.com

[16] Dr. Jacob Adeyanju, B.Ed., M.Ed., PhD. (Lagos). Lecturer, University of Lagos, Nigeria

LISTENER DELEGATES LIST

- Dr. Hava Mustigman, Director of the library, Open University of Israel, *Listener* (Delegate Number: Mustigman 153 - I1)
- Dr. Ahmad Alhusban, Assistant Professor - Senior Lecturer, Jerash University, *Listener* (Delegate Number: Alhusban 155 - H4)
- Dr. Imad Rabeh, Associate Professor - Dean (Faculty of Law), Jerash University, *Listener* (Delegate Number: Rabeh 156 - H5)
- Mr. Muhammad Shaaban, Directing Staff, Nigeria Police Academy, *Listener* (Delegate Number: Shaaban 160 - H8)
- Prof. Claes Sandgren, Professor of Law, Faculty of Law, Stockholm University, *Listener* (Delegate Number: Sandgren 161 - J14)
- Mrs. Julna Christabel Nimpar, Legal Officer, National Open University of Nigeria, *Listener* (Delegate Number: Nimpar 164 - J17)
- Mr. Shaganpreet Singh Sooch, Student, Panjab University, *Listener* (Delegate Number: Sooch Rejected - J1)

EVENT SPONSOR

Edinburgh University Press: Mr. John Watson, Commissioning Editor for Law representing EUP.

FLE Learning Ltd
Conference Division
T: 0044 131 463 7007 F: 0044 131 608 0239
E: submit@flelearning.co.uk W: www.flelearning.co.uk