Paper Proceedings of Second International Conference on Interdisciplinary Legal Studies 2015

ABSTRACTS

2015
Unique Conferences Canada Publication
Toronto, Canada
ICILS 2015

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Design and Implementation new Algorithm for Digital Investigation by using Images Metadata

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Security attacks on the digital environment can lead to loss of data integrity and inaccuracy and the difficulty substantiated by investigators, which might help intruders evade responsibility due to the lack of supporting evidence to convict them. Therefore, Analysis of image metadata in Digital Investigation considered important part to prove the offender and which allows investigators to understand the timeline of a crime and the interpretation of the events, which also it can be used to be protected from the threats and prove the authenticity of the images Metadata against attackers.

We propose a new algorithm to extract Exchangeable Image File Format (EXIF) of Image Metadata that can help to authenticate digital image files in forensic by distinguishing between the original images and after the processed. In this paper we effectively addressing and efficiency to one of the important step of a Digital Investigation to process a real time computation problem and to achieve clear view of events in digital investigations through the use and analysis of the image metadata.

Keywords: Intrusion Detection System, Cloud Computing, Attack

1. Introduction
Metadata is data that describes other data (data about data). More precisely, Metadata is the description of the data itself. To date, no mechanism has been effective in promoting the use of image metadata to detection forgery of digital image and the authenticity of these images, an image may include metadata that describes the original image ID, scene capture, Encoding Process, Color Components, Pixel Aspect Ratio, Color Components, Space Illuminant and focal Length when the original image was created, and many other data. Talmale and Jasutkar [1] described a passive approach to detect digital forgeries by techniques of image forgery. Dhevana and Jayasri [2] detected the forgeries in the image with the help of the GLCM (gray level co-occurrence matrix) to predict whether the given input image is forged or not and help of the Bayesian classifier to detect the forged part of the image. Huang and Fang [3] proposed a practical application for copyright protection of images with watermarking by using the EXIF metadata of images and error-control codes are integrated into the algorithm and corresponding applications, Huang and Fang focused on the copyright protection for images taken by ordinary cameras by use of robust watermarking, it generally alters selected coefficients of the contents to accomplish the embedding process for robust watermarking is one of the major branches in digital rights management (DRM) systems and digital forensics. Roussev and colleagues [4] formulated forensic triage as a real-time computation problem with specific technical requirements, and they use these requirements to evaluate the suitability of different forensic methods for triage purposes. They proposed and validated a new approach to target acquisition that enables file-centric processing without disrupting optimal data throughput from the raw device and evaluated core forensic processing functions with respect to processing rates and show their intrinsic limitations in both desktop and server scenarios. Levine and Liberatore [5] proposed a simple canonical description of digital
evidence provenance that explicitly states the set of tools and transformations that led from acquired raw data to the resulting product called Digital Evidence Exchange (DEX) is independent of the forensic tool that discovered the evidence, which has a number of advantages. Using a DEX description and the raw image file, evidence can be reproduced by other tools with the same functionality. Additionally, DEX descriptions can identify differences between two separate investigations of the same raw evidence. Dhevana and Jayasri [6] detected the forgeries in the image with the help of the GLCM (gray level co-occurrence matrix) by using the neural network training has to be done before the application of the GLCM features to predict whether the given input image is forged or not. Later, the processing on the image has to be done with the help of the Bayesian classifier to detect the forged part of the image. Al-Khanjari and Alani [8],[9] proposed steganography scheme as a new architecture to secure the data in cloud computing by exploiting text properties and described the implementation of the data steganography technique, which could provide more security to the cloud computing environment to achieve the trusted computing technology. Al-Khanjari and Alani [10] provided a full illustration of how to design and protect all files used to implement a secure e-Government websites. This should contain a self-audit of the file and represent a kind of processes that are used to protect data in different types of files including: image, sound, string or any file within e-Government website. Al-Khanjari and Alani [11],[12] spoke about the testability of leak information in source code and how to detect and protect it inside the ITO, presented a privacy preserving algorithm for the neural network learning to detect and protect the leak information in source code between two parties the programmer (source code) and Independent Test Organization (Sensor). We show that our algorithm is very secure and the sensor inside Independent Test Organization is able to detect and protect all leaks information inside the source code.

2. Digital Forensics Model

Standardized digital forensics process that consists of nine components [13]:
1. Identification – recognizing an incident from indicators and determining its type. This is not explicitly within the field of forensics, but significant because it impacts other steps.
2. Preparation – preparing tools, techniques, search warrants, and monitoring authorizations and management support.
3. Approach strategy – dynamically formulating an approach based on potential impact on bystanders and the specific technology in question. The goal of the strategy should be to maximize the collection of untainted evidence while minimizing impact to the victim.
4. Preservation – isolate, secure and preserve the state of physical and digital evidence. This includes preventing people from using the digital device or allowing other electromagnetic devices to be used within an affected radius.
5. Collection – record the physical scene and duplicate digital evidence using standardized and accepted procedures.
6. Examination – in-depth systematic search of evidence relating to the suspected crime. This focuses on identifying and locating potential evidence, possibly within unconventional locations. Construct detailed documentation for analysis.
7. Analysis – determine significance, reconstruct fragments of data and draw conclusions based on evidence found. It may take several iterations of examination and analysis to support a crime theory. The distinction of analysis is that it may not require high technical skills to perform and thus more people can work on this case.
8. Presentation – summarize and provide explanation of conclusions. This should be written in a layperson’s terms using abstracted terminology. All abstracted terminology should reference the specific details.

9. Returning evidence – ensuring physical and digital property is returned to proper owner as well as determining how and what criminal evidence must be removed.

3. Electronic Crime Stages
The U.S. Department of Justice published a process model in the Electronic Crime Scene Investigation that consists of four Stages [14] as shown in Figure 1.

4. The Proposed System
The proposed system provides techniques on how to extract Exchangeable Image File Format (EXIF) of Image Metadata which provide safety, dependability, performance, integrity and confidentiality to the digital investigations and help to authenticate the original digital image in forensic. It is based on extract the data with all EXIF when metadata is requested and displayed. This includes not only standard EXIF image metadata but also custom tags by the camera manufacture such as [15]: Lens, Exposure, Focus, Date and Time Zone Offset etc. The Basic Image Information as shown in Table 1.

There are three metadata formats widely used in the industry [7]:
- Exchangeable image file format (Exif)
- International Press Telecommunications Council-Information Interchange Model (IPTC-IIM)
- Extensible Metadata Platform (XMP)
### 4.1 The Proposed Image Metadata Scheme Architectural Model

We also propose Image Metadata Scheme Architectural Model as illustrated in Figure 2. It contains the following layers:

- **Physical Layer**: Network Infrastructure Layer represented by the general purpose internet infrastructure and dedicated network infrastructure.
- **Image Metadata Layer**: Images data center.
- **Metadata security Layer**: Metadata Date, Date/Time Original, Date/Time Digitized, IPTC Digest, Current IPTC Digest, Original Document ID, History Instance ID, History Software Agent, Exif Image Size, Exif Byte Order, Create Date, Modify Date and Orientation etc to thousands of image Metadata.
Figure 2: The Proposed Image Metadata Scheme Architectural Model

Figure 2 above illustrates the analysis process of image metadata and substantiated by investigators. The process consists of two files: the first file is called java class. It contains all the steps, which will be programmed and implemented as designed inside this (class). The second file is known as Hyper Text Markup Language (HTML). The first file is embedded within the second file. The HTML file can send any number of (parameters) to the Class file. This requires implementation to prove the authenticity of the images Metadata against attackers and prove the offender, as follows:

```
<PARAM NAME=Metadata_Date VALUE=2015:01:15 15:41:17+04:00>
<PARAM NAME=Date/Time_Original VALUE=2015:01:09 14:05:42+04:00>
<PARAM NAME=Date/Time_Digitized VALUE=2015:01:09 14:05:42+04:00>
<PARAM NAME=Exif Image_Size VALUE=4,928 × 3,280>
<PARAM NAME=Exif Byte_Order VALUE=Big-endian (Motorola, MM)>
<PARAM NAME=Create Date VALUE=2015:01:09 14:05:42.60>
<PARAM NAME=Modify Date VALUE=2015:01:15 15:41:17.60>
<PARAM NAME=IPTC_Digest VALUE=13ce1513b4940e48893e6ad36461b0f0>
<PARAM NAME=Current_IPTC_Digest VALUE=13ce1513b4940e48893e6ad36461b0f0>
<PARAM NAME=Original_Document_ID VALUE=xmp.did:B217400E182068119109C6F0FDB0BD2A>
<PARAM NAME=History_Instance_ID VALUE=xmp.iid:B217400E182068119109C6F0FDB0BD2A>
<PARAM NAME=History_Software_Agent VALUE=Adobe Photoshop CS4 Macintosh>
```
Figure 3: The Real User Used the Proposed Image Metadata Scheme

Figure 3 above illustrates the investigator used the Proposed image metadata when the transmission the data, which are needed to processing and substantiated by investigators. By using Metadata, the Image will provide safety, dependability, performance, integrity and confidentiality to the communication when exchanging data.

5. Conclusion

This paper discussed the important part to prove the offender and which allows investigators to understand the timeline of a crime and the interpretation of the events by using the exchangeable Image File Format (EXIF) of Image Metadata that can help to authenticate digital image files in forensic by distinguishing between the original images and after the processed, which can lead to loss of data integrity and inaccuracy and the difficulty substantiated by investigators, which might help intruders evade responsibility due to the lack of supporting evidence to convict them.

This is used to prove the authenticity of the images Metadata against attackers and prove the offender by using image Metadata including: Metadata Date, Date/Time Original, Date/Time Digitized, IPTC Digest, Current IPTC Digest, Original Document ID, History Instance ID, History Software Agent, Exif Image Size, Exif Byte Order, Create Date, Modify Date and Orientation and etc.

The following points are concluded from the proposed system.

- Show how to use image Metadata to authenticate digital image files in forensic,
- Provide adequate protection of public information through secure solutions for handling and exchanging the image Metadata,
- Detect previously unknown attacks, and
- Provide high reliability to investigators when using the image Metadata.

References:

2. S. Dhevana and C. Jayasri. A Bayesian Classifier Approach for GLCM Based


7- Guidelines for handling image metadata, Version 2.0, November 2010.


10- Al-Khanjari, Z.A. and Alani, A. 2014. Real Time Internal Intrusion Detection: A Case Study of Embedded Sensors and Detectors in E-Government Website. This chapter has been accepted for publication as a chapter in the Book entitled: Threat Detection and Countermeasures in Network Security, IGIBook series, Publisher: IGI Global (www.igi-global.com). Editors are: Prof. Dr. Alaa Hussein Al-Hamami & Dr. Ghossoon Al-Sadoon. Publisher: IGI Global.


The Political Economy of Court decision-making and International Commercial Arbitration in the developing world

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Governments are important in every economy. Just like the rules economics theorists use to predict the actions of consumers and firms, Anthony Downs is of the view that democratic governments act rationally to maximize political support. When governments engage in business with the private sector, disputes are resolved by the courts, domestic, foreign or international. But do the rules of rational behavior for vote seeking political office holders explain the means of non-elected but powerful justices of the courts? This enquiry is necessary to put into context recent developments in developing countries such as Ghana. The Supreme Court of Ghana has recently declared several contracts entered into with private multi-nationals as unconstitutional only for such decisions to be rendered nugatory by awards of international arbitral bodies. We rely on the rationality theory to explain the varying outcomes of commercial disputes involving states and private commercial entities. We conclude that the differing results on the same set of questions before the domestic and international adjudicating bodies are not as a result of the differing appreciation of the essential ingredients of the dispute but the reflection of the rationality of the adjudicating institutions. We conclude that the incentive structures for the decisions at the domestic level have to be re-oriented taking cognizance of the interests, powers and incentives of private international parties in such judicial pronouncements.

Keywords: arbitration, incentives, politics, institutions, governance.

Introduction

International commercial arbitration is a means by which disputes arising out of international trade could be resolved by voluntary agreement of the parties, through a process other than a regular court of competent jurisdiction.¹ The object of commercial arbitration is to obtain a fair resolution of disputes by an impartial tribunal without an unnecessary delay or expense. The parties are free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. International commercial arbitration produces a definitive and binding award which is capable of enforcement through national courts. Arbitration has become the dispute resolution method of choice in international commercial contracts. This is partly as a result of the success of the New York Convention,² the development of sophisticated arbitral institutions, and the passage of arbitration-friendly national legislation. These have contributed to making international arbitration an attractive option for commercial dispute resolution. However, tensions, criticisms and difficulties abound regarding international commercial arbitration. Part of these difficulties is around the question – whether arbitrators are political?

¹ See Redfern, Law and Practice of International Commercial Arbitration, at 11.
Some empirical analysis have shown that arbitrators appear to be influenced, in some cases, by their policy views and do not simply apply the law as it stands when deciding investment cases.\[^3\] Arbitrators repeatedly appointed by a party are more likely to make decision in favour of that party.\[^4\] Some research also show that arbitrators who share the same legal family as the host country are more deferential to the host state.\[^5\] Unlike arbitrators, it is widely believed that judges only apply the law, irrespective of their policy beliefs and backgrounds.\[^6\] The reality however is that there is always a gaps in the legal field, particularly, an evolving one filled by judges and / or arbitrators in specific cases. As human beings, they bring policy preferences to these arbitrations.

African states are rarely claimants in arbitration proceedings. They are usually respondents in arbitrations.\[^7\] Arbitrators have considerable and unchecked discretionary powers, unless limited from exercising it in case of an agreement to the contrary by the parties. An arbitration agreement can be the result of an unequal bargaining power. If this is coupled with a less favourable composition of an arbitration tribunal, the potential for work less charitable to the interest of the developing countries is real. In addition, controversies arising from large-scale international investment agreements are very complicated and therefore require arbitrators sufficiently familiar with technical and commercial background. The reality is that majority of arbitrators and witnesses are lawyers, law professors and judges who do not come from the developing world. The questions for this paper is whether developing countries are responding to the issues around international commercial arbitration through their domestic judges or the judges remain insulated from the potential politics capable of taking place within the arena of international commercial arbitration? The other aspect of the hypothesis is that the factors which predispose arbitrators to politics are not irrelevant when an arbitration involves a developing world host country such as Ghana. Hence, the conclusions of previous studies such as by Michael Waibel et al are apposite to explain the recent arbitral awards involving the Government of Ghana and a number of private investors. This paper is unable to exhaust the second aspect of the hypothesis, thus conflicting decisions of the Supreme Court of Ghana vis-à-vis certain recent arbitral awards are also as a result of rational choices. This aspect of the hypothesis is left for future research.

The question and Methodology

This paper is an introductory work for a future deeper study. It is therefore exploratory. It relies mainly on desk review and very limited field interviews. Statistical modeling expected to be helpful in analyzing the dataset for future work has not been relied on at this point.

Discussions

A. Legal regime for commercial arbitration in Ghana

The 1992 Constitution of Ghana enjoins the Government of Ghana in its dealings with other

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\[^3\] Id.
\[^4\] Id. at 39.
\[^5\] Id.
\[^6\] Michael Waibel & Yanhui Wu, Are arbitrators Political at 38.
nations to endeavour to promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means. The Government of Ghana is empowered under the Constitution to conduct its affairs in consonance with the accepted principles of public international law and diplomacy consistent with the national interest of Ghana. The Constitution permits the executive to execute or cause to be executed treaties, agreements or conventions in the name of Ghana, subject to ratification by Parliament. These provisions mandate the Government of Ghana, in its dealings with other nations and arguably investors to ensure total compliance with the terms and intendment of those agreements, treaties and conventions ratified by Ghana, subject to the national interest and the laws of Ghana.

There is a Commercial High Court in Accra, to be replicated in other Regions in Ghana for the purpose of resolving disputes of commercial nature. As part of the procedure at the Commercial Court, parties go through a compulsory mediation processes for the resolution of the dispute before the trial is reached if need be. In addition, the Alternative Dispute Resolution (ADR) Act, 2010 (Act 798) encourages settlement of disputes through alternative dispute resolution (ADR). There are some limited exceptions to the cases resolvable through ADR in Ghana. The exceptional matters include the national or public interest, the environment and interpretation of the Constitution. In effect, every dispute can be settled by ADR to achieve justice for all concerned. It is the concern of the non-amenability of the constitutional matters which have brought to the fore questions regarding the disposition of the Supreme Court of Ghana vis-à-vis adjudication of commercial matters by an international arbitral panel.

B. Constitutional requirement for ratification of international commercial agreements
There is peculiar problem with the compliance with constitutional provisions affecting international business transactions in Ghana. This situation occurs with respect to the non-compliance with article 181 (5) of the 1992 Constitution of Ghana requiring that international business or economic transactions with the Government of Ghana must be authorized by Parliament in order for it to be an effective contract. In the last couple of years, the Supreme Court has declared a number of international economic transactions unconstitutional. A case in point is Attorney General v Balkan Energy Co. Ltd. In that case, the Attorney General of Ghana sued Balkan Energy in the High Court of Ghana pursuant to an earlier decision obtained by the Attorney General to refer a constitutional matter which formed part of the matter before the arbitration body to the Supreme Court of Ghana. The Supreme Court held that a Power Purchase Agreement (PPA) signed between the Government of Ghana and the Balkan Energy Ghana and Balkan International PLC in July, 2007 for the rehabilitation of the “Osagyefo Barge”, was illegal as it did not receive

8 Article 40(c) of the 1992 Constitution of the Republic of Ghana.
9 Article 73. Emphasis mine.
10 Article 75 (1) and (2).
11 Order 58 High Court of Ghana Civil Procedure Rules CI 47.
12 See S. 1 of Act 798.
13 Ghana’s Alternative Dispute Resolution Act, 2010 (Act 798).
14 These contracts include the Balkan Case, Isofoton contract, and Waterville contracts.
Ghana’s parliamentary approval.

C. Ouster clauses and constitutional issues
There are other legal issues of concern regarding international economic transactions Ghana enters into with investors. Many, if not all of these agreements contain clauses which permit either party to the agreement to initiate international commercial arbitration even without invocation of the jurisdiction of the domestics. This is in accordance with the New York. The question is whether these contracts can legitimately oust constitutional provisions taking advantage of the severability principle in international commercial arbitration? The issues become even more tasking when it is considered that in some instances, it may the Attorney General acting on behalf of government who may advise the investor to go ahead with the execution of the contract without the necessary approval from Parliament. This is the case as it is not always clear what amounts to an international economic or business transaction. The Supreme Court has had occasion to implore parliament to enact the appropriate legislation to bring clarity to bear on this issue. In these circumstances, can the Supreme Court legitimately say payment cannot be done to the investors who may have committed so much resources into providing goods and services to Ghana? Should an investor be paid on the principles of quantum meruit in spite of the unconstitutional nature of the contracts? In this context, equity and fair-play may compel Arbitral Panel to be sympathetic to the plight of investors. But should arbitral panels ignore such constitutional injunctions to make such contracts valid in the country of the contract?

D. Previous work on the disposition of judges to politics
Research in the United States on judicial voting patterns to determine whether judges are “political” suggest that federal judges are not nearly as bad as politicians. Sunstein reveals that Judges are far from mere politicians. However, judicial predispositions matter, and they help explain why judges are divided on some of important issues. The research also indicates that even judges are subject to a phenomenon called “group polarization.” Judicial voting becomes a lot more ideological when judges sit on panels with two others appointed by presidents of the same political party.

E. The politics of adjudication
Arbitrators derive their authority from the parties who appoint them, and they are called up only to resolve the dispute between those parties. They are able to exercise that authority because of strong support by States who have committed to enforce their decisions and to ensure that parties fulfill their agreements to arbitrate. Both the investors and the host states expend a great deal of resources to influence the arbitration outcomes, raising an important question: is an arbitrator’s decision biased toward his or her appointing party? Studies carried out by Michael Waibel & Yanhui Wu on cases before the International Centre for the Settlement of Investment Disputes (ICSID) provide evidence on how the appointment of arbitrators and personal background influence arbitration outcomes. Michael Waibel & Wu found that arbitrators routinely appointed by the investor scrutinize the actions of host states more closely, as compared to arbitrators

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16 Felix Klomega v. Attorney General, Ghana Ports and Harbours Authority and 2 ors. Unreported Case No. J1/10/2012 dated 16/01/2013 (Supreme Court).
17 Available at http://freakonomics.com/2013/01/10/how-political-are-judges/ (accessed on 15th March 2015).
18 Michael Waibel & Yanhui Wu, Are arbitrators biased at 6.
typically appointed by host states. Arbitrators are more lenient to host countries from their own legal family. Other aspects of the arbitrators experience and training, such as the development status of their country of origin and full-time private practice, also play an important role in arbitration decisions. To some extent, these factors and resultant decisions of arbitrators may be supported with Anthony Down’s rationale choice theory. Is the finding of legal family, host country appointment and nationality bias explain the decisions of the Supreme Court of Ghana? In other words, could the Supreme Court be interested in protecting the normative order and respect for the domestic law irrespective of international obligations undertaken by the Ghana in its relationship with foreign investors?

Van Harten focused on career incentives for arbitrators. In his view, their interest to be re-appointed in future cases provides incentives to decide investment disputes in a way that enhances the overall attractiveness of investment arbitration as a forum for settling investment disputes. Arbitrators, “as merchants of adjudicative services, “have a financial stake in furthering [arbitration’s] appeal to claimants”, resulting in actual or potential bias against the host country. His thesis is that arbitrators apply investment treaties to ensure the future growth of the “investment arbitration industry. His argument shares some similarity with Stigler’s regulatory capture theory, where an industry over time comes capture the interests of the regulator. A possible counterweight is a reputational mechanism. Arbitrators” concern about their reputation of neutrality could outweigh other incentives. A third possibility is that law’s normative pull encourages arbitrators to apply law in a neutral fashion. Their commitment to apply the law without fear or favor outweighs incentives to vote strategically in order to secure appointments to future arbitral panels.

The results of the work of Michael Waibel reveal that ICSID investment arbitration outcomes are partly driven by non-legal factors, especially the personal characteristics of arbitrators. What drives judicial outcomes is judicial politics or ideology, not (just) the law. In the more controversial areas of international investment law, the views of arbitrators may diverge, depending on their background, life experience and ideology. It is expected that “conservative” arbitrators will tend to favor the protection of property rights without much reservation, whereas “progressive” arbitrators would tend to give greater weight to other societal values such as protection of the environment or public service delivery. The balancing may differ depending on the arbitrator’s view of the world. The double role of arbitrator and counsel is said to bias, consciously or unconsciously, arbitrators one way or the other, without necessarily rising to the level of a challengeable conflict of interest. Arbitrators may need to decide an issue that they – in their persona as counsel – are arguing in another case for the benefit of their client. Such role confusion could potentially undermine the integrity and neutrality of the arbitral process.

21 Michael Waibel & Yanhui Wu, Are arbitrators political at 4.
22 Michael Waibel & Yanhui Wu, Are arbitrators political at 6.
23 JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL, 65 (1993) (“The Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices”); ibid., 86 (“Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.”); DAVID ROHDE & HAROLD SPAETH, SUPREME COURT DECISIONS MAKING 72 (1976) (judges “base their decisions solely upon personal policy preferences);
Conclusion

International Commercial Arbitration has come to stay. Where the host State negotiators find it appropriate to consider arbitration mechanism instead of litigation in the domestic Court, then they ought to ensure that domestic instead of international arbitration is provided for in the agreement. Where arbitration ought to be resorted to as the most favourable mechanism, domestic arbitration tribunal ought to be the preferred seat of the arbitration in view of the empirical findings of arbitrators being political.

The differing results on the same set of questions before the domestic and international adjudicating bodies are not as a result of the differing appreciation of the essential ingredients of the dispute but the reflection of the rationality of the adjudicating institutions. We conclude that the incentive structures for the decisions at the domestic level have to be re-oriented taking cognizance of the interests, powers and incentives of private international parties in such judicial pronouncements.

Developing countries need to develop local international commercial arbitration expertise. Developing countries could do is to take steps to educate its business community the essential pitfalls in the international commercial arbitration. The international system has to consciously work towards a convergence of the rules regarding the alternative dispute resolution of commercial contracts whether such contracts are resolved in the domestic arena or in an international forum.
Laicity – philosophically, legally and politically constructed

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The aim of this paper is to show how the ambiguity of the concept of laicity (la laïcité) has been used by the French philosophers, judges and politicians. Ambiguity or even a kind of etymological irony accompanied laicity from the very beginning. French adjective laïc, laïque, that traditionally referred to people who believed in God but did not belong to the clergy, in the context of the late 19th-century France became synonymous with antireligious attitudes and practices embodied in the policy of laicization. Among many paradoxes related to laicity another one concerns its legal aspect. Surprisingly the 1905 Law, seen as the crowning of the process of laicization as well as the establishment of the legal framework of laicity, nowhere mentions laicity as such, nor defines it precisely. Based on the 1905 Law one can draw the conclusion that, similarly to the First Amendment to the U.S. Constitution, there is a constant tension between religious freedom and separation of church and state clauses within French laicity. Alike the American confrontation of the separationists and accommodationists the discussion over French model of laicity is still vivid, although the position so far occupied by the Catholic Church seems to be taken by another religious actor, that is, Islam. I argue that as each philosophical concept laicity is prone to different interpretations. It is not only the changing socio-political context that affects the debate, but the source of the division should be also situated within the concept itself. By analyzing the past and present conflicts over laicity in the public school in France, I distinguish between the proponents of the republican and pluralist visions of laicity.

Key words: laicity, public school, republicanism, headscarf

Laicity within school context – the past
One of the constant elements of the debate on laicity, in the past as well as today, has been its focus on school. It is worth noting that the first French theorist of laicity Ferdinand Buisson used it in order to describe the process of growing autonomy of the public schools from the control of the Catholic Church. The radical republicans who won the elections in 1876 decided to mark their rules with a complete reshaping of the national identity. They envisaged to eliminate the influence the Catholic Church wielded within the institutions of the public sphere. Thus starting from the eighties of the 19th century the Catholic clergy was expelled from schools and hospitals, civil marriages, funerals, even civil baptisms were introduced as alternatives to the Catholic ones, the divorces became legal and the public prayers were declared illegal (Cholvy, Hilaire 2000: 19). All in all over twenty laicization acts were implemented. Drastic legal changes led to the profound split in the French society whose large part was still attached to Catholicism mentally and institutionally. French scholars call that period “the war of two Frances” (Clark, Kaiser 2003: 77), because it resulted in the opposition between the partisans of secular France and their Catholic critics. The analogy can be drawn between the socio-religious split experienced by the French
people at the turn of the 19th and the 20th centuries and the clash provoked by the revolutionary demand of oath of loyalty to the state (cf. Gunn 2004: 434-439).

The arena of the most virulent battles became the public schools, because they were treated as the main means by which the integration into the state could operate. The radical republicans justified the laicization policy of the schools by making the clergy responsible for the defeat in the Franco-Prussian war (1871) – too much focus on religion within school curriculum was accused of leaving no room for patriotic education. The use of such an argumentation was to advocate the idea of transforming the school from the institution dedicated to making “good” Catholics into the one whose role was forging the citizens strongly attached to the French Republic. The paradoxes of the republicans’ project seem to me worth mentioning. They were fighting against any presence of Catholicism in schools, starting from the most evident and physical ones, such as the expulsion of the clergy, and ending with the suppression of all symbolic religious references, for example in the grammar textbook the sentence: “God is great” was replaced by a religiously neutral one: “Paris is great” (Cholvy, Hilaire 2000: 129). Although the secularists’ actions were motivated by anticatholic sentiments, it turned out very quickly that they were not able to get rid of all the references to religion, because it started to serve them as a symbolic framework. Thus within the rhetorics of the radical republicans the public school was turned into the “sanctuary of the Republic” (Bertossi 2012: 435) and the idea of pupils’ love toward Republic was modeled on the previous religious bond linking children with God. It shows clearly that the more the radical republicans were trying to secularize one of the key institutions of the state, the more they sacralized it. A new kind of transcendence embodied in the “Republic-God” provided the republicans with the counter-arguments against fears propagated by the critics of laicity who claimed that the deprivation of the public schools of religious morality would sooner or later bring negative social effects, such as anarchy.

One of the philosophical ideals the radical republicans intended to put into practice by the strategy of laicization was the strict separation of the public and private spheres. The secularists tried to convince people such a separation was not just another imaginary construction, but an important part of a new social reality they wanted to create in France. According to the republicans after having entered the public school the pupils were expected to transcend all the community bonds that linked them with: family, Church, regional or ethnic groups. The project, intellectually inspired by the philosophy of Enlightenment, served the universalistic goals – only by forgetting their particularistic attachments the students were supposed to become French citizens who possess equal rights. The confinement of one’s religion, culture or ethnicity into the private sphere was the condition of his/her emancipation understood as an acquisition of full citizenship. That is why separation should be seen as inherent part of the above-mentioned sacralization of Republic – public sphere was endowed with special symbolic functions within the process of civic integration.

From legal point of view the laicization of the public schools was carried out through the implementation of Ferry Laws (1881, 1882) and Goblet Law (1886). These laws constituted typical manifestations of republican laicity and they resulted in: the establishment of secular, free and mandatory education for children between six and thirteen years old, as well as strict division into public and private schools. The latter ones developed as a reaction at the secular schools and constituted a system of confessional schools that were not allowed to benefit from public aid. Financial restrictions continued by the fifties of the 20th century. Because of the extremely poor material conditions of the private schools (after World War II an average salary of a teacher working in private school was equivalent to one-third of the salary earned by the teacher hired in public school), new laws were enacted that decidedly changed the relations between state and
private schools. At first, in 1951 a system of scholarships was created and its novelty consisted of non-differentiation between the pupils from the public and private schools. Even a more radical change was inaugurated with Debré Law in 1959, because now not only children who were studying in private schools were allowed to receive public scholarships, but according to the new regulations also the schools themselves could benefit from the state’s subsidies. The private schools only had to meet two conditions. Firstly, they had to conclude the contracts with the state, which implicated the duty of financial and pedagogical controls. Secondly, the schools should be opened to all children without discrimination on religious grounds. These two laws were the most telling examples of the end of the „war of two Frances”. At that time laicity ceased to serve ideological purposes and started to be perceived mainly as a pragmatic instrument.

Appeasement within state-private schools relations lasted until the beginning of the eighties of the 20th century. The conflict which outbroke then had only one thing in common with the confrontations from the past, that is, the initiative of the anticlerical lobby recalled the republicans’ actions that dated back to the end of the 19th century. The lobby was formed by the teachers of the public schools whose aim was the enactment of a new law that would lead to the absorption of the private schools within the secular system of public education. The regulation predicted that any confessional school willing to keep its independence, would lose its rights to public aid. A front intended to protect the autonomy of the private schools was created, but interestingly enough the traditional divisions between the Catholics and anticlericals were not reactivated and the opposition toward the anticlerical lobby was set up by the French middle-class. Two million people took part in manifestations in June 1984 – they defended the existence of the private schools in the name of the civil liberties protection. Social protests brought effects and the works on the project of a new law were withdrawn.

**Islamic headscarf controversy and the laicity**

In contemporary France the Catholic Church seems to be no longer the main religious actor of the debates over laicity. During last twenty years its role has been taken by Islam. The changing attitudes toward the presence of Islamic headscarves in the public schools reflect the tensions within the concept of laicity. The first episode of the conflict, that took place in 1989 in Creil and related to the school principal’s decision about the expulsion of three Muslim girls covering their heads, ended up pragmatically. The Council of State – the French supreme court for the administrative justice – referred to the problem of wearing religious symbols in the public schools and its conformity with the principle of laicity in a legal opinion. The Council of State’s interpretation of French laicity was focused on the content of the first article of the 1905 law, that is, on religious freedom. Consequently, the Muslim girls were allowed to cover their heads with scarves in the public schools provided that they did not intend to proselytize anybody and that wearing Islamic scarf did not constitute any burden to the regular functioning of the schools. What is more, the judges of the Council of State suggested a case-by-case approach because of a wide variety of motives for wearing the scarf (cf. Joppke 2009: 37-41). The analysis of data shows that not only the number of Muslim girls wearing the scarves in the public schools was decreasing year by year, but also the number of the controversial cases investigated by the Council of State (cf. Gunn 2004: 457).

It might seem that as the judges found an effective solution no further legal regulations of this problem were needed. Surprisingly in March 2004 a law banning the conspicuous religious symbols in public schools was enacted and another one in 2010, banning the face veils in all public spaces – veiled women have been refused entry to university classes, banks or doctors’ offices. In
order to understand how such a radical change concerning the treatment of Muslims wearing headscarves operated, one should note that, because of the 1905 Law’s ambiguity, laicity can legitimize the ban or the permission of the scarves in the public schools. As it was already mentioned the Council of State chose a religious freedom-oriented version of laicity. Such a pluralist interpretation encountered opposition from the politicians (among them were the Prime Minister, Jean-Pierre Raffarin, and the President, Jacques Chirac), the school principals and some influential French philosophers (Elisabeth Badinter, Alain Finkielkraut, Régis Debray). According to them only the republican understanding of laicity was conform with the intentions of its “founding Fathers”, such as Émile Combes or Jules Ferry. In order to stress their disapproval toward the toleration of religious symbols in the public schools the contemporary philosophers used highly emotional rhetorics by claiming it was a: “Munich of the republican school” (Joppke 2009: 37). Such a comparison was to recall weakness of the appeasement policies of the French and British toward Hitler in 1938. The analysis of their arguments shows their will to reaffirm the 19th-century secularists’ vision of school as a sanctuary of the Republic, while the analogy with the European history accentuates republicans’ fears that this public institution in its present form could disappear. As one of the pillars of the public school and laicity as such was the strict separation between the public and private spheres, any attempt to blur these frontiers, for instance by recognizing ethnic or religious differences among students, would endanger French exceptionalism and make of school just an ordinary institution. In the contemporary republicans’ eyes the public school needs special protection, because this institution is responsible for the civic integration of the individuals, and not social groups, into Republic and thus the consolidation of the national bond. The proponents of republican version of laicity, contrary to the religious freedom-oriented interpretation, underline their attachment to the second article of the 1905 Law: “The Republic does not recognize, remunerate or subsidize any religion”.

The 2004 Law, that based on the final report of the Stasi commission, should be perceived in terms of political goal to achieve and finally achieved. Even though no controversial incident was noted over the Islamic headscarf in 2003, throughout that year the French politicians of the Left and the Right were opting for the ban by constantly evoking the necessity of protection of laicity. Instead of taking advantage of abundant empirical material concerning the practice of wearing the headscarf, that especially in France was researched from many perspectives, the members of the Stasi commission – among them there were numerous distinguished scholars – focused on the interpretation linking the headscarf with the oppression of Muslim women and the possibility of threat to public order. What is more, the commission’s report contained several recommendations dealing with the need of reconsideration of the attitude of the state towards religions, but the politicians chose only the headscarf issue as worth their involvement. The parliamentary works did not last long – in just a few weeks the project of the new law was ready and supported by a strong majority of deputies (out of 494 deputies only 36 voted against the law, while 31 – abstained).

Because of laicity’s ambiguity (tension between religious freedom and strict separation clause), it can legitimize contradictory claims as shown by the examples of the Council of State’s legal opinion from 1989 and the 2004 Law. Whereas the regulation from 1989 can be seen as the continuation of the pragmatism that characterized the decision to subsidize private education – both solutions represent a “pluralist laicity”. The philosophical and political proponents of the 2004 Law inscribed themselves in the republican tradition of the “laicity of war” that keeps on sacralizing the public school as an institution with a special mission to carry out. Alike the secularists who were fighting in the past against the Catholics to gain control over the public
schools and teach there the principles of Enlightenment instead of religious dogmas, the contemporary republicans continue the fight, but with a different “enemy”. This new confrontation arises from fear that the more French society becomes culturally, ethnically and religiously diverse, the more its national identity is endangered. Laicity is seen as one of the inherent elements of national identity, as a chance to protect French exceptionalism. Only the republicans tend to forget that there is no unanimous understanding of laicity.

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Path Dependence: Implications for Legal Transplantation

Guanghua YU

Institutions matter. For instance, institutional quality is closely correlated with infant mortality and adult literacy as well as income levels. Following the implications of this institutional theory, the World Bank has devoted around US2.9 billion dollars on more than 300 rule-of-law projects since 1990. Trebilcock and Daniels show, however, that rule of law projects around the world has a mixed to weak record of success even measured by the “thin” conception of rule of law. Tamanaha similarly observes that the rule of law appears mysteriously difficult to establish. In the area of corporate law and governance, following LLSV’s line that legal protection of capital suppliers is closely related to the development of the capital market, many countries or regions have carried out law reforms or legal transplantation. Introducing the institution of derivative action from the United States is one of the examples. So far, however, the transplanted institution has not always achieved the expected purpose. This article is intended to demonstrate that path dependence theory is able to explain the variation of relative use of the transplanted institution of derivative action in East Asia.
**The Phenomenon of Honour Killings: Turkish Legal Framework**

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So-called honour killing is a crime in which the family and the society take part. Murdering a daughter or wife within a family when a girl/woman is regarded to devastate the reputation or honour of family, is called as an honour killing. The victims are only women and girls because people have a strong belief that woman’s misbehaviours, comprising adultery, divorce, rape, and sexual violation, abuse the family dignity. The most extreme form of the honour-based violence is so-called honour killings that are widespread phenomenon throughout the world. Turkey has witnessed 1100 honour killings between the years 2003 and 2008 and over 200 people are murdered in the name of honour every year. Although there is a legal framework on honour killings in Turkish legal system, this does not prevent women and girls killings and protect their ‘right to life’.

**Key words:** shame, honour, honour killing, right to life.

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**The state responsibility for international humanitarian law violations and human rights abuses committed by private military and security companies**

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The primary concern of this paper is the scope of International Law to address the state responsibility and private contractors accountability for human rights violations, specially during conflict situations. The presence of Private Military and Security Companies (PMSCs), in armed conflicts motivated debate and research on the subject. PMSCs have a controversial position under International Law and on several occasions it has been said that companies and employees have no legal status and no obligations. However, PMSCs do have a legal status under International Humanitarian Law (IHL). Depending on their legal status, private contractors will have a relationship with a state and different international obligations will rise both for state and individual. When PMSCs’ employees breach an obligation under IHL they must face certain consequences, such as a trial on an *ad hoc* tribunal or on the International Criminal Court. The use

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of private contractors on the battlefield highlights the idea that states could outsource military and security functions to avoid and transfer international responsibilities arising from wrongful acts. Therefore, the issue of international responsibility must be addressed in order to spell out that this idea is in fact inaccurate. The discussion addresses the question of who can be responsible for human rights violations. This paper is divided in three parts: first, searches to discuss the state responsibility doctrine and the due diligence principle; second, focuses on individual criminal responsibility of PMSCs employees emphasizing the superior criminal responsibility and third, discusses the issue of corporations’ international responsibility.

**Keywords:** state responsibility, superior criminal responsibility, due diligence, Draft Articles on State Responsibility for Internationally Wrongful Acts.

1. **Introduction**

The primary concern of this chapter is the scope of international humanitarian law (IHL) to address the state responsibility and private contractors accountability for human rights violations, specially during armed conflict situations. The active presence of Private Military and Security Companies (PMSCs), in the armed conflicts motivated debate and research on the subject. Since the 1990s, the number of companies developing activities in armed conflicts increased considerably. In fact, the Afghanistan war and the Iraq war become notorious for the heavy reliance of the US government on PMSCs’ services.

Private military and security companies have a controversial position under international law and on several occasions it has been said that companies and employees have no legal status and therefore no obligations. In recent years, scholars have been discussing whether or not PMSCs operate on a “legal vacuum” and if there is a gap on international law. However, PMSCs do have a legal status under IHL with rights and obligations (CALAZANS, 2011).

Depending on their legal status, the private contractor will have a relationship with a state and different international obligations will rise both for state and individual. For instance, under the International Law Commission’s Draft Articles on State Responsibility for Internationally Wrongful Acts (DASR) Article 4, PMSCS incorporated among the armed forces will be considered state organs and therefore, states are responsible for their misconduct. PMSCs’ employees will be criminally responsible when committing war crimes or crimes against humanity. Nevertheless, enforcement of the existing law and oversight over PMSCs activities has been very limited. The discussion here will focus on the questions of who can be legally responsible for violations and abuses of human rights law and international humanitarian law.

This paper is divided in three parts. The first part searches to discuss the state responsibility doctrine. The second part focuses on individual criminal responsibility of PMSCs employees emphasizing the superior criminal responsibility. The third part addresses the issue of corporations’ international responsibility.

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26 The definition for PMSCs provided by the Montreux Document of 2009, item 9 (a) on the Preface seems to be more appropriate because it defines private contractors generically, without being tied to a strict delimitation between military and security companies: “PMSCs are business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guard and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”
2. State responsibility under the international law commission’s draft articles on state responsibility for internationally wrongful acts

Articles 4, 5, and 8 of the International Law Commission’s Draft Articles on Responsibility of State for Internationally Wrongful Acts (DASR) are specifically relevant when attributing the conduct of PMSCs employees to the hiring state (CLAPHAM, 2006, p. 241-244). Article 4 deals with the conduct of any state organ; Article 5 regards the persons or entities exercising elements of governmental authority and Article 8 handles with the conduct of persons or groups under the directions and control of a state (CRAWFORD, 2005).

2.1 PMSCs as state organs under Article 4

States are liable for the conduct of its organs and have been for more than a century. “State organ covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State” (CRAWFORD, 2005, p.94). Private contractor operating within the structure of the State or making up the state’s organization are state organs. Therefore, seems logical that PMSCs employees constituting the armed forces of a state, under the auspice of Article 4 A (1-2) of the Third Geneva Convention of 1949 are considered state organs for the purpose of state responsibility.

Furthermore, the state will be responsible for wrongful acts committed by PMSCs employees in their personal capacity, when they are officially incorporate on the armed forces, conforming with Article 91 of the First Additional Protocol of 1977 and Article 3 of the Hague Convention (IV). Under Article 5 of the DASR, states will be responsible for the conduct of PMSCs employees not constituting the armed forces, only during the exercise of their official capacity, this is the case of PMSCs employees under Article 4 A (4) of the Third Geneva Convention of 1949. Some authors defends that the state’s lack of accountably for off-duty conduct of private contractors not part of the armed forces is a gap of in the state responsibility doctrine. However, the provisions of IHL and HRL may fulfill this gap (HOPPE, 2010; LEHNARDT, 2009).

PMSCs employees categorized as states’ armed forces within the meaning of Article 43 of First Additional Protocol of 1977 might also be considered state organs under Article 4 of DASR. When they are not, the conduct of private contractors will be attributable to the state in accordance with article 5 of DASR, that is also the case of other militias and volunteer corps belonging to a party to the conflict of Article 4 A (2) of the Third Geneva Convention of 1949, because these entities are fighting an international armed conflict on behalf of state and that is one example of exercising elements of governmental authority. The Montreux Document reaffirms the position that violations committed by PMSCs employees exercising elements of governmental authority will be attributed to the state. The conduct of PMSCs employees falling under the civilians accompanying the armed forces category of Article 4A (4) of the Third Geneva Convention of 1949 may also trigger the state responsibility under Article 5 of DASR.

2.2 Exercising elements of governmental authority under Article 5

Article 5 brings two requirements to justify the application of attribution rules: (1) “exercise elements of governmental authority” and (2) the person or entity must be “empowered by the law of that state”. The text of Article 5 is vague and brings no explanation of what means “elements of governmental authority”. Crawford comments that the article address entities such as “public corporations, semi-public entities, public agencies of various kinds and even, in special
cases, private companies, provided that in each case the entity is empowered by the law of the state to exercise functions of a public character” (CRAWFORD, 2005, p. 13).

Some examples of intrinsic state functions that may be performed by private companies are the police functions, the power of detention and discipline when hired as prison guards and powers in relation to immigration control or quarantine (CRAWFORD, 2005, p. 100). The interpreters and interrogators of prisoners in Abu Ghraib performed by Titan Corp and CACI respectively constitute exercise of governmental authority. In this respect, an expert during the Expert Meeting on Private Military Contractors on August 2005, pointed out that States are under the obligations imposed by the Third Geneva Convention to run a prisoner of war camp, since this is an intrinsic State function, even if this task have been privatized.

There is neither a definition of governmental authority under international law nor an exhaustive list of what are all intrinsic state functions. Nevertheless, Professor Lehnardt defends the idea of “core functions” that could be considered as being governmental (LEHNARDT, 2009). In other words, military functions impose the exercise of governmental authority in the auspice of Article 5, even if the State privatize some of these functions, the state responsibility will be trigged by the conduct of private contractors.

2.3 The interpretations of Article 8: the effective control test and the overall control test

Article 8 is only relevant when there is no law empowering the entity to exercise governmental authority, but still exists a factual relationship between the state and the entity or person committing the wrongful act. The reading of Article 8 shows two circumstances under which a factual relationship between a State and a PMSC leads to state responsibility: (1) the entity or person must receive instructions from the state to commit the wrongful act; (2) the control or direction of the state over the entity or person must be established.

The first circumstance is only fulfilled if instructions are given to commit the wrongful act in a particular mission. The state will be responsible only if it directed the company to commit the violation, but if the state hired the PMSC to perform a lawful service, and while performing the contract the private contractors commits a violation, than the state will not be responsible (GILLARD, 2006).

The jurisprudence has different approaches of interpretation regarding the second circumstance of “control or direction”. On the one hand, the ICJ in the Nicaragua v. United States of America case defends the idea of “effective control” in order to establish the attribution. It must be clear that a state “had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” The court found that United States was not responsible for the conduct of the contras in Nicaragua and funding, organizing, training, supplying and equipping of the group was not sufficient evidence to trigger state responsibility. For instance, in the Ibrahim v. Titan case the judge considered that Titan employees that committed the wrongful acts in Abu Ghraib prison were under the exclusive direction and control of the military chain of command. In the case of CACI the control of military over the employees were not exclusive, but still would satisfy the “effective control” test.

On the other hand, the ICTY in the Prosecutor v. Dusko Tadić case states that an “overall control” is enough to establish the relationship between a state and a group in order to justify the

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responsibility of a state. According to the court hierarchically organized groups do not require supervision and the criterion of ICJ on Nicaragua case contradict the logic of the doctrine of state responsibility, state practice and *opinio juris*. The Appeals Chamber defended that the purpose of Article 8 was exactly to prevent states avoiding responsibility by hiring PMSC.

The comments on ILC’s Articles suggest that both approaches have equal authority (CRAWFORD, 2005, p.110-112) with two standards of control. The first, with a higher threshold is the effective control test of ICJ in Nicaragua case, which can be used for acts performed by individuals. The second standard is the overall control test of ICTY in Tadić case, which is relevant for organized armed groups and hierarchical groups, such as PMSCs, military or paramilitary units. Find state responsibility for the conduct of PMSCs personnel under the former is more difficult than the latter (CASSESE, 2007, p. 657).

### 2.4 The individual criminal responsibility of PMSCs employees

The increasing presence of private contractors performing services that were previously developed by state’s armed forces in conflict areas raises the question of their legal status, but also about their individual criminal responsibility for violations of international rules. Private Military and Security Companies employees in some occasions have been implicated in incidents, which violated IHL and constituted abuses of HRL. For instance, the widely known abuse of detainees in Abu Ghraib prison; the shooting of civilians without a apparent reason in Iraq and the participation in other war crimes and crimes against humanity during the cleansed of Serbs by Croat Troops (LEHNARDT, 2008).

The principle of individual criminal responsibility determinates that individuals can be held directly responsible for crimes committed under international law (O’SHEA, 2011, p.1-6). Under the customary law, piracy, crimes against peace and crimes against humanity are some example of crimes that raises the individual criminal responsibility. Under international treaty law, for instance, the individual criminal responsibility is attributed by the Convention on the Prevention and Punishment of the Crime of Genocide of 1948; International Convention on the Suppression and Punishment of the Crime of Apartheid; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Slavery Convention.

In the Tadić case, the ICTY established two elements triggering the individual criminal responsibility. First, a person cannot be held accountable for crimes committed by other persons, confirming that under the modern international criminal law the notion of collective responsibility is not recognized (CASSESE, 2008, p.33). Second, only a particular conduct, act or omission leading to a breach of criminal rules can raise individual liability. Therefore, if a person is somehow involved in a violation of a criminal rule, he or she is deemed accountable.

#### 2.5.1 Superior Criminal Responsibility

The principle of command or superior responsibility originally addressed the superior-subordinate relationship among the members of the armed forces. However, the ICTY and ICTR jurisprudence suggests that this rule evolved to include also commanders in civilian settings, i.e., the case of PMSCs managers and senior employees. According to this rule, the superiors are criminally responsible for the wrongful acts and violations committed by their subordinates (CASSESE, 2008). The superior responsibility is trigged when three elements are fulfilled: (i) superior-subordinate relationship, *de jure or de facto*; (ii), knowledge of the crime and, (iii) failure

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30 The principle of superior responsibility is a customary international law rule.

to take the necessary measures to avoid or punish the crime. These elements are relevant to find the criminal responsibility of PMSCs managers and senior employees for the wrongful acts of other private contractors; military commanders with private contractors under their control; and PMSCs employees supervising military personnel (FRULLI, 2010). PMSCs superiors exercising de facto control over military personnel or other private contractors can be criminally liable under the principle of superior responsibility. Additionally, military commanders with civilians under his/her authority will be also liable as if the subordinate was military.

2.6 The international criminal responsibility of Corporations

International law has not yet recognized the international responsibility of corporations for wrongful acts. However, there is no reason for PMSCs to avoid the consequences for human rights abuses and IHL violations (WHITE, 2009).

The classical approach under public international recognizes only states that fulfill the criteria of the Montevideo Convention as subjects of international law (CLAPHAM, 2008). The international society recognizes other entities as subjects of international law with associated objective legal personality, that is the case of international organizations. Nevertheless, legal persons such as corporations remain excluded.

Although corporations have not yet achieved the status as subjects of international law, historically corporations have been treated differently, for instance, the case of the English and Dutch East India Companies, which used to exercise elements of state power, i.e. standing armies and governing territories. This example illustrates that historically corporations have been accepted as important actors on the international society.

Furthermore, there are international conventions addressing corporations that recognize their obligations and responsibilities as participants of the international society. Therefore, in several situations the international law recognizes the international responsibility of corporations, but how about human rights law and international humanitarian law?

While there are number of competent tribunals, such as ad hoc tribunals and the ICC to try and convict individuals for international crimes, there is no international organ with competence to try corporations (CLAPHAM, 2008). The Rome statute does not provide jurisdiction to the ICC to try corporations for breaches of international criminal law. Nevertheless, where the national courts have jurisdiction over violations of international law committed by corporations, the gap is fulfilled.

It is clear that PMSCs can be held accountable under the United States Alien Tort Claims, if they are providing services, which constitutes violations of crimes such as genocide, slavery, crimes against humanity and war crimes. However, only in rare occasions a company has been sued before the US Courts for a direct action. In most cases, the corporation is accused to abet a state in the violation of international law.

3. FINAL REMARKS

The ILC Draft Articles have a key role to play on state responsibility related to PMSCs employees’ misconduct. Article 4, 5 and 8 of the ILC Draft Articles combined with the Geneva

32 See Article 86 and Article 87 of First Additional Protocol of 1977.
34 UN Convention on the Law of the Sea of 1982, 1833 UNTS 397, Article 137 (1); UN Convention against transnational organized crime of 2000, Article 10, 2225 UNTS 275, liability of legal persons.
Conventions of 1949 are specifically relevant to establish the relationship between companies’ employees and the state. PMSCs are considered a state organ under Article 4 when they have a formal relationship with the state, i.e. when private contractors are officially incorporated on the armed forces.

Article 5 is applied for private contractors exercising elements of governmental authority, empowered by a national law. The provision is vague and brings no explanation on the meaning of elements of governmental authority. In order to determine whether or not the conduct of PMSCs employees can be included under the article, is necessary first to question if the function indeed requires governmental authority to be carried out, and second if the internal law of the state empowered the corporation to perform such function. Article 8 addressing the companies exercising elements of governmental authority without the national law is the most controversial provision. It must be proved the instructions, directions and or control of the state over the company. Two different approaches have been developed on international level by international courts: the effective control test and the overall control test. According to the ICJ, it must be clear that a state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed, in other words, the state must have effective control over the actions of the employees. The ICTY defends the idea of “overall control”.

PMSCs they can be held directly responsible for crimes committed under international law. Some situations that can trigger individual criminal responsibility are: direct participation in hostilities without the status of combatants, assistance or encouraging a crime; a person that has the duty to supervise and control the actions of its subordinates fails on his/her duty. The principle of command or superior responsibility originally addressed the superior-subordinate relationship among the members of the armed forces. However, the ICTY and ICTR jurisprudence suggests that this rule evolved to include also commanders in civilian settings, i.e., the case of PMSC managers and senior employees.

Regarding the corporate accountability, while there are a number of competent tribunals to trial individuals for international crimes, there is no international organ with competence to trial corporations. The national law is a viable answer to address the issue of corporate criminal responsibility and to promote their accountability for misconduct.

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International law- between division (fragmentation) and unity (constitutionalisation) Law of divisions or law beyond boundaries?

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International public law is a legal system the scope of application of which is not determined by state borders. It is therefore a matter of fact that it is general in nature, which affects the fact that it is not conditioned by the legislation of individual states. In this perspective, one can say that this law is a law "beyond boundaries" within the meaning of national borders. This approach shows that international law goes beyond the boundaries of application of national law. This fact showing the absence of boundaries in the universal binding force of international law, however, does not preclude the existence of some divisions within it. They are related to the process of fragmentation which results in the separation of certain subsystems from this law. By this a division of international law into these subsystems, also called regimes is done. This, in turn, requires posing the question of whether the process of fragmentation threatens the unity of the international legal order. And whether the reverse process, referred to as constitutionalization of this law, may be a specific remedy for this, which at the present stage of development of the international community is rather a certain postulate. An attempt to answer the above questions was adopted as the main purpose of this study, which will seek to resolve the essential question of whether international law is a law of divisions or a law beyond boundaries?

Keywords: international law, fragmentation, constitutionalisation

Introduction

The subject matter scope of the publication defined by its title, "Law beyond boundaries", induces looking at law in a broad aspect of its validity, which - as can be assumed - should be "detached" from different legislations of individual states. And although "the awareness that law applies to a particular territory was formed a long time ago" and is dominated by thinking about law through the prism of national borders, it is safe to say that national law is not the only legal system functioning in the normative sphere.

Today, this sphere – apart from the international dimension signaled above, being realized within the borders of individual states - also has an external dimension, the emanation of which is public international law. Constituting a particular superstructure over individual states, it arises as a result of their law-making activity. Therefore, it does not cause controversy that in the simplest

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35 J. Nowacki, Z. Tobor, Wstęp do prawoznawstwa, Kraków 2000, p. 161. The Authors indicate that the term „territory” is of Roman origin. Territorium in Rome was a geographical sphere in which public authority was exercised. Ibidem, p. 161.

36 A precise definition of the term "national border" was expressed on the basis of Polish doctrine of the subject by W. Staszewski. In this perspective, national borders define an area over which its territorial sovereignty extends and are usually defined as surfaces perpendicular to the surface of the earth, separating the territory of one state from the territory of other states or from areas not subject to territorial sovereignty (e.g. the high seas). National borders also divide the underground and the airspace: W. Staszewski, Granice państwa [in:] Leksykon prawa międzynarodowego publicznego, (ed. A. Przyborowska-Klimczak, D. Pyć), Warszawa 2012, p. 73.
terms it is a legal system governing relations between the actors of this law. Taking into account the so-called "plural legislators" concept, it cannot stay unnoticed that states share the competence of an international legislator with international organizations, having no legislative monopoly in this regard.

In light of the foregoing, juxtaposing the international-law legal order with the title of the publication, one can indicate beyond doubt that the scope of application of public international law is not determined by state borders. In this perspective, it is a law "beyond boundaries" and, therefore, such that not having a solely territorial (state) scope of application specific to national law, has, in principle, a general, universal character. It manifests itself not only in the fact that norms of public international law bind (by establishing a rule) all countries forming the international community, but also in the fact that they bind the international community as a whole. General international law can be defined – invoking the words of R. Kwiecień - "as the law of and for the entire international community". While the "spatial sphere of application of domestic law is, in principle, the territory of a given state, including its sea-going vessels and aircraft, international law operates in a space defined as a community, and sometimes international community.

The above considerations presenting the discussed status of public international law as a law beyond boundaries do not, however, preclude the existence of some divisions within it. They are related to the process of fragmentation which results in the separation of certain subsystems from this law. By this, division of international law into said subsystems, also known as sections or regimes (which will, for instance, include international environmental law or international law of human rights, etc.) is done. This, in turn, requires posing the question of whether the process of fragmentation threatens the unity of the international legal order. And whether the reverse process, referred to as constitutionalisation of this law, may be a specific remedy for this, which at the present stage of development of the international community is rather a certain postulate.

An attempt to answer the above questions was adopted as the main purpose of this study, which will seek to resolve the essential - from the point of view of analyses carried out - question of whether international law is a law of divisions or a law beyond boundaries?

I. Division (fragmentation) of international law

Research on the fragmentation of international law – so as to fully reflect its essence - entitles to understanding it as a process which produces (and under the influence of which are developed) individual sections of international law. These are derived from general international law, according to the criterion of the subject of a regulation, thereby focusing on a specific topic. In practice, "the use of the criterion of the subject of a regulation means that groups of normative acts and groups of customary law norms are singled out according to the regulated circle of social relations". This perception of the process of fragmentation constitutes

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38 In the context of international law the concept of "universal law" can only be employed "in determining this part of international law which is potentially applicable across the international community." See: R. Kwiecień, Teoria i filozofia prawa międzynarodowego. Problemy wybrane, Warszawa 2011, p. 81. Whereas, a contrario, the term "regional law" will be identified with that part of international law which will potentially be applied in a particular area. Due to the nature of this study the latter will remain outside the sphere of the discussion.
39 R. Kwiecień, Teoria i filozofia prawa międzynarodowego. Problemy wybrane, Warszawa 2011, p. 82.
a dynamic approach to this issue. Fragmentation within it is a process that lasts and certainly will continue to do so, inscribing itself in the development of the international legal order.

The dynamic approach in question can be distinguished, a contrario, from a static approach. In it, fragmentation will be identified with the state (factual and legal) of often a transient nature, which was created as a result of the development of international law. Thus, the already progressive fragmentation of this law has contributed to it. Its assessment will be made each time at a particular stage of this development.

This indicates that as a result of the process of fragmentation of international law, recognized globally as a system of law, certain subsystems are being singled out, to which the doctrine assigns different names (from "specialist systems" 42, to "functionally defined issue-areas" 43, to sub-systems 44 and meta-systems 45, to, finally, regimes 46).

Therefore - as noted by J. Menkes – the natural cause and foundation of fragmentation is the discussed division into quasi-branches within the international law itself 47. This accurate observation, expressed by the cited Author, allows the perception of fragmentation of international law through its internal division happening as part of this normative order. This results in such sections, possible to be singled out today, as: international human rights law, international environmental law, international criminal law, international economic law, international investment law, international labor law, or even international sports law. The status of these sections is varied - ranging from those that have a well-established normative base, to those which are in statu nascendi. Their catalogue is not exhaustive, of course. Nor does it constitute depreciation of the classic "core" of international law in the form of international law of treaties, international humanitarian law, or international diplomatic and consular law. However, the development of contemporary international relations and in a way the need for specialized law results in the expansion of the material scope of international law, which is impossible not to notice.

For the sake of complementing and certain correctness of the argument, one needs to further note that the proposed way of understanding the concept of "fragmentation of international law" is not the only one on doctrinal grounds. The subject literature devoted to this subject, and, which is to some extent a derivative of reports of the International Law Commission 48, shows the diversity

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47 J. Menkes, op. cit., p. 56.
of the content. It is the result of not only a different approach to the topic, but above all the different understanding of the notion of "fragmentation of international law", which affects the way this phenomenon is interpreted. For example – is it legitimate to identify fragmentation with the diversification of international law? Is it not the case perhaps that fragmentation - understood as a division - contributes to greater diversification of international law and this differentiation is also one of the reasons (causes) of fragmentation? Responding positively to a question posed in this way will rule out the possibility of semantic equation of both concepts.

In the context of the on-going process of fragmentation of international law, it is impossible not to look at international law as a whole. Will the development of this process not threaten the unity of the international legal order? In order to be able to resolve this issue it seems necessary to look at international law through the prism of constitutionalisation thereof.

II. Unity (constitutionalisation) of international law

Fragmentation of international law, like its division, is often contrasted with its constitutionalisation49, serving to ensure the unity of international-law order, arousing probably no less controversy (than the former). They primarily involve the fact that the idea (concept) of international constitutionalism is closely related with the term "constitution"50. The latter, in turn,

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50 The term "constitution" is derived from the Latin word constituere meaning in the verb form "to arrange", "to order". Constitution involves the system of government, the form of the state; it determines how to organize political and social life. It can be defined as an act of the highest legal force regulating fundamental institutions of the political and socio-economic system. The following meanings of the concept of constitution can be distinguished: a) in the material (actual) sense as a real state system, regardless of whether it is recorded in the act of the highest legal force or not; b) in the formal (legal) sense as standards resulting from a legal act with a special name. See: R. Krawczyk,
being associated more often with the constitutional law of individual states (rather than international law), as a rule, remains restricted to acts of fundamental importance for states.

This does not mean, however, that international law does not use this term. The various international organizations functioning under statute attribute it the nature of their constitution. They do this by default, intuitively, referring this term to the instrument of incorporation, or sometimes explicitly, as exemplified by the Constitution of the International Labour Organization.51

Naturally, on the basis of academic debates, there is no shortage of arguments for assigning a constitutional status of the international community to the United Nations Charter of 26 June 194552 (hereinafter referred to as the UN Charter). And although due to its ubiquitous nature and the rule expressed by the provisions of Art. 103 of the UN Charter it is not devoid of legitimacy, one can find in the doctrine dissenting views indicating that the Charter is not a constitutional source of the original entire international law in accordance with the ideal of the constitution as the Grundnorm of a legal system, nor is the entire international law subject to law-making control of the United Nations.53 Especially the last argument is quite essential.

In the face of discrepancies regarding the status of the Charter, it seems reasonable to continue to explore the meaning of "constitutionalisation". It was pointed out by J. Zajadło who argued that the discussions accompanying it are not so much about "constitution in a formal meaning", but rather about a complex of phenomena evidencing certain constitutional processes in the international community.54 This is highlighted by the rather obvious distinction between such a reception of constitution (as an act of fundamental importance for the entire international community) and constitutionalisation understood as a phenomenon that allows for greater "conflictual unity"55 of international law. Thus, according to R. Deplano, the idea of constitutionalism (...) is (...) an autonomous concept of international law56, which allows for detachment of the discussed conceptual category from constitutional law and “inscribing” in contemporary international law.

Against the background of the above the first aspect of the issue in question emerges, in which constitutionalisation is a certain process, placed in general international law. At the current stage of its development, "it is necessary to base this law on a more formalized basis"57. Therefore, constitutionalisation will mean - as noted by W. Czapliński - "the development of certain standards of an ordering character, defining the relationship between its individual elements and the power structure (including legislative powers). The unity of the system would be based on a hierarchy of norms with the leading significance of the UN Charter"58.

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51 Journal of Laws of 1948, No. 43, item 308.
52 Journal of Laws of 1947, No. 23, item 90. This approach was favored by, for example: B. Fassbender, The United Nations Charter as the Constitution of the International Community, Leiden-Boston 2009.
58 Ibidem, p. 597.
The importance of this observation does not need to be emphasized. Speaking of progressive fragmentation of international law which results in the creation (singing out) of new sections of this law, particular attention must be directed to defining (determining) rules on the relationship between international law and its individual parts, or in other words, between the general law and the specialist law (if we assume by simplification that this character is borne by sections of international law generated as a result of fragmentation).

Thus understood constitutionalisation rejects the need for the adoption of constitution in the formal sense. Going further, it also rejects „the use of constitutional concepts as a means for interpreting international law in general, and restoring coherence and unity within international law in particular“ \(^{59}\). It does not, however, exempt from the need to develop rules to ensure the functioning of the various parts in a whole, so as to eliminate the potential for conflict situations. Of course, this must be done within the framework of international law understood systemically - so as to defend the thesis that it is one, though not uniform, legal order.

This observation corresponds to the second aspect of the analyzed issue, in which the process of constitutionalisation is positioned in the various sections of international law, not in the law as a whole. This in turn makes it necessary to refer to two important issues.

Firstly, despite the fact that at the level of general international law the legitimacy of analyzing the concept of "constitutionalisation" through the prism of constitution in the formal sense was rejected, this kind of constitution, in a certain simplification, can be found in the sections of international law that have arisen in connection with the legislative activity of international organizations. In order to describe this state of affairs, one can invoke the doctrinal term of "mini-constitutionalisation of individual legal regimes," \(^{60}\) where adopted statutes under which international organizations operate are assumed to be constitutions. The statutes are "generally semi-autonomous structures within the broader international legal order" \(^{61}\), and examples are provided even by the already invoked Constitution of the International Labour Organization and thus the section: international labor law \(^{62}\), which is the result of law-making activity of this organization.

Secondly, however, referring to the above where, after W. Czapliński, it was concluded appropriate to consider the notion of "constitutionalisation" as a process the aim of which is to "shape certain standards of a system-ordering nature" \(^{63}\), if we were to transpose it onto the ground of various sections of this law, we could paraphrase that the purpose of the constitutionalisation occurring in them is to shape certain standards of a nature ordering a specific sub-system (section of international law). This "ordering" should also (and perhaps primarily) be referred to the relationship between those sections and general international law. Each contains its own legal norms, rules, and sometimes a catalogue of sources and a system of authorities (including judicial authorities).

\(^{59}\) R. Deplano, op. cit., p. 68.


\(^{61}\) According to the Author, one of the most prominent international organizations, and at the same time regimes of international law, that are undergoing constitutionalisation is the World Trade Organization (WTO). Ibidem, p. 69.


\(^{63}\) W. Czapliński, op. cit., p. 597.
Stopping at this observation it can be seen that in this approach - which is particularly interesting – the constitutionalisation process couples with the process of fragmentation of international law. This is despite the fact that originally these concepts were treated as opposing each other. Since looking for a way to determine the relationship, not just between the whole and its parts, but also between those parts, in line with the assumptions of the category of constitutionalisation, we attempt to introduce rules that shape the system\(^64\). This forces the progressive process of fragmentation of the international-law order on the international community.

This makes it legitimate to talk about the so-called "fragmented constitutionalisation", which was pointed to by R. Kwiecień. In his opinion, this fragmentation means the process of constitutionalisation covering only certain areas of international legal relations, e.g. trade relations, marine relations, or humanitarian issues. Thus, it would only be divisionary constitutionalisation, associated with the intensive development of special regimes in international law (the so-called self-contained regimes). Constitutionalisation within these regimes results in - according to the referenced author - fragmentation of international law and may undermine the existence of the constitution of general international law, and thus may pose a threat to its normative unity\(^65\).

This view is important for at least two reasons. Firstly, it juxtaposes constitutionalisation with the fragmentation of international law. Secondly, it indicates the relationship existing between them. As a result of the fragmentation of international law its division follows. Constitutionalisation, in turn, will be an attempt to organize what arises as a result of that division, that is individual sections of international law, both in relation to general international law and in the mutual relationships between them.

### III. International law - law of divisions or law beyond boundaries? – conclusions on the discussion

A summary of the carried out discussion could somewhat perversely begin by saying that at the current stage of development of the international community, despite the fact that it is fragmentation that must be addressed, we quite unambiguously defend the thesis of the unity of the international legal order.

This order, as not determined by boundaries of individual states (as there is no Polish, French, or German public international law), is the law of the international community of a universal nature, in the system policies of which its normative unity is inscribed. In this perspective, it is certainly a law beyond boundaries.

Fragmentation of international law that is taking place within its framework requires posing the question of whether this unity is threatened. May the internal sections of international law lead to its disintegration? And, does this law, being a law of divisions, have a chance to survive in this shape?

Looking for opportunities to resolve this extremely difficult issue, the process of constitutionalisation was resorted to, originally contrasting it with the process of fragmentation of international law and seeking in it a technical way to offset the effects of the latter. An assumption was adopted that since fragmentation constitutes division, ensuring unity can be accomplished through constitutionalisation of international law. In carrying out this discussion, the postulate of

\(^64\) The notion was suggested to me by professor St. Czepita (University of Szczecin) in the course of discussion on this subject, for which I would like to express particular gratitude to the professor.

\(^65\) R. Kwiecień, op. cit., p. 158.
creating a constitution within the general international law was rejected straight off, considering it as difficult to be carried out in practice, or even impossible. It was, therefore, agreed that the issue here is not constitution in the formal sense.

Therefore, we see in the constitutionalisation of general international law - understood as a postulate for the adoption of rules for developing a system (not the constitution) – certain security for the international-law system not to break apart and for the international law to be a law beyond boundaries (even now, not only in terms of national borders but also the boundaries that are defined by individual sections of international law).

Therefore, constitutionalisation should not be contrasted with the fragmentation of international law. It should provide (create framework for) the possibility of development of this law. In this sense we can say that constitutionalism (...) is (...) a methodological approach to fragmentation66.

If, however, we were to consider the opposing assumption and to conclude that various parts will begin to evolve from general international law by acquiring ever greater autonomy, this would result in the fact that next to international law there would be other systems stemming from sections of international law. This, in turn, would undermine its normative unity. The way to do this is to adopt in universal (general) international law the principles that order the system67 and therefore those that define the relationship between the general law and the special law.

If this is done through constitutionalisation it will be a remedy for fragmentation, and international law will be a law beyond boundaries (meaning: above divisions).

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66 R. Deplano, op. cit., p. 69.
67 The term after W. Czapliński, op. cit., p. 597.
Detecting Language Crime: Online libel in the Philippines

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With the recent passage of the Cybercrime Prevention Act in the Philippines, a lot has been said on its impact in the country. One of the most debatable provisions of the said law is online libel which many are still questioning despite being upheld by the Supreme Court of the Philippines as constitutional. Critics of the law, with regard to said provision, claim that it curtails the constitutional right of the Filipinos to freedom of speech and expression especially that Filipinos are amongst the world’s digital natives, particularly through the use of social media. Mostly, the threat on the rights of the Filipinos lies on the elements of the said crimes wherein most of these elements are subject to different interpretations which are supposedly the determining factors on whether they violated the law or not. For example, in this particular case, elements of online libel demands more than what the law depicts - the use of language plays a major part. It requires understanding beyond the law itself, the language use as highlighted in the study of semantics and pragmatics, and the society where it was uttered. Thus, this study explores on the need of interconnecting this academic and industrial revolution pertaining to the use of forensic linguistics in solving this language crime.

Keywords: Forensic Linguistics; Cyber-crime; Law, Language and Society

Precedent as a Framework for Resolving Disputes in the Jurisprudence of the High Court

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A dependence on precedent to make decisions in court should not be a definitive and sole means of determining the outcome of a case. Rather, precedent should simply establish a rough framework to guide the judges in interpreting the text and weighing the value of consistency of the set of cases revolving around the same issue. We can safely say that the justices who have overruled precedent have successfully decided to consider other legal aspects of the issues at hand (instead of merely relying on the justification of stare decisis) in order to accommodate the situation of the current time period. For example, the decision in Brown v. Board of Education overruled Plessy v. Ferguson, which had previously made the argument for the constitutionality of “separate but equal” facilities. Although this ruling entrenched a legal doctrine that remained in place for 50 years, the decision that was ultimately reached in the 1954 case overturned precedent and declared the unconstitutionality of establishing separate public schools for black and white students. Although precedent can serve as a guideline for subsequent justices to help in reaching a decision, it should not prevent the court from evolving towards a more satisfactory jurisprudence.

Keywords: Precedent, Stare Decisis, Supreme Court jurisprudence
Uncharted Waters: How Tampa Bay’s Nutrient Management Experience Can Add Clarity to Coastal Zone Management

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Nutrient pollution management in the Tampa Bay, Florida, USA watershed is an amalgamation of laws, jurisdictions, and stakeholder groups, and a predictable level of “regulatory cacophony” results from this complex regime. Federal and state laws interact, and are left for jurisdictions, including the State of Florida, its counties, municipalities, and administrative agencies, to apply. Competing interests and oft-contradictory mandates lead to confusion about nutrient pollution abatement in the Tampa Bay watershed. Despite jurisdictional and legal complexities, local watershed stakeholders, including industry, developed an innovative cooperative management strategy that achieves measurable results regarding the most damaging nutrients, nitrogen loads. After decades of losses, local stakeholders identified seagrass meadows as sentinel estuarine habitats, targeting them for restoration. The conceptual model for this study holds that the healthiest seagrass populations are located in open waters fed by rivers, streams, and runoff with the lowest levels of anthropogenic nutrient pollution. The Tampa Bay Nitrogen Management Consortium (NMC) demonstrates how one region addresses a serious environmental threat to an iconic natural feature: with a stakeholder coalition. This study distills regulatory cacophony into a manageable legal context for nutrient management in Tampa Bay by profiling the valuable role of the NMC and assessing legal developments that will impact water resource management in the watershed. It offers strategies for navigating the changing legal landscape, and builds upon the successes of coalition-based management.

I. Introduction

Seagrasses are an important marine resource, functioning as keystone species in healthy estuaries. Stationary submerged vegetation are effective integrators of water quality and function as sentinel species in estuarine and marine environments. The strong link between water quality and seagrass distribution makes seagrass a good indicator of ecosystem health. Healthy seagrass populations are critical resources that provide a multitude of benefits to estuarine ecosystems including: providing structural habitat for megafauna, recreationally and commercially important


fish and invertebrate species, stabilization of submerged shoreline sediments, and functioning as an important component of nutrient cycles.  

Due to their roles in providing habitat and food for invertebrates, small vertebrate marine organisms, and large grazing herbivores such as sea turtles and manatees, seagrass communities constitute highly productive and diverse ecosystems. A vast array of estuarine and marine organisms relies upon seagrass habitats for a portion or all of their life cycles. The canopy structure of a seagrass bed provides protection and cover for fish in their fry and juvenile stages, essentially serving as a nursery ground. Such nurseries have an integral function due to their regenerative capacity for many commercially and recreationally important species of fish. Primary production within seagrass beds also provides food for these fish species and serves as a trophic foundation for the ecosystem. The stability for these valuable habitats is provided by the hearty root systems of seagrasses. These root systems provide stability not only for the seagrass communities, but also for sediments and the benthic production that is found at the sea floor.

Nutrient cycling and assimilation is another of the many functions that seagrass communities provide. Seagrasses filter nutrients and contaminants, which helps improve water quality and support adjacent habitats and fisheries. They are hotspots for organic-matter accumulation and nutrient regeneration and recycling, which support primary production and sustain food webs. They can also serve as sinks for nitrogenous loads from watershed sources, which can aid attenuation of nutrient loads when seagrasses are found sufficiently abundant. While seagrasses are generally resilient, they are threatened by human activities. Anthropogenic nitrogen loads can lead to excessive algae growth in nitrogen-limited systems such as estuaries, which adversely affects light penetration to submerged seagrasses, thus stunting photosynthesis. Sediment deposition related to development of shorelines and the watershed also negatively impact seagrass growth. As seagrasses live in the shallow, protected coastal waters that are generally directly proximal to the shore and watershed, these systems are highly susceptible to nutrient and sediment inputs.

A common pattern in seagrass coverage has emerged in highly-perturbed, urban estuaries, in a process known as eutrophication. As the shorelines and watersheds proximal to seagrass beds have become more developed, anthropogenic loadings of nitrogen and sediments have increased.

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70 Dawes et al., supra n. 2.
72 Dawes et al., supra n. 2.
73 Dawes et al., supra n. 2.; Orth et al., supra n. 1.
75 Dawes et al., supra n. 2.
76 Id.
77 Id.
78 Id.
80 Moore et al., supra n. 2.
81 Orth et al., supra n. 1.
These increases in loadings have had detrimental effects on water quality; of particular importance to seagrass health are the resultant algal blooms from excessive nitrogenous loads and increased turbidity from sedimentation. Algal blooms and increased turbidity each negatively impact light attenuation in the water column above seagrass communities, which is devastating to green leafy plants. Seagrass populations have declined in response.

As researchers and managers within these systems began to identify this pattern, the notion of seagrass as an ecological bellwether developed. As sentinel species, due to the effectiveness of seagrasses to integrate water quality parameters, these communities were soon realized to be in situ indicators of estuarine health and thus employed as components of watershed-based management and planning tools. Harbor-wide water quality was inherently linked to seagrass health, which was then used as an indicator of the success of efforts to reduce watershed pollutant loads in estuaries throughout the United States, including Chesapeake Bay, and the focus of this study, Tampa Bay.

The Chesapeake Bay program was the first major estuarine program in the United States to make seagrass restoration and protection a vital component of their water pollution control framework. The 1987 Chesapeake Bay Agreement identified the "need to determine the essential elements of habitat quality and environmental quality necessary to support living resources and to see that these conditions are attained and maintained" as instrumental to overall bay health. In 2004, researchers in Chesapeake Bay estimated that only 15% of the bay’s historical seagrass distribution remained. Having reviewed aerial photography dating back to 1937, the researchers suggested that these declines in seagrass were linked to deteriorating water quality conditions in Chesapeake Bay. The Chesapeake Bay Program established seagrass restoration targets and defined water quality and habitat-based requirements for seagrasses in Chesapeake Bay.

After decades of losses, seagrass meadows were identified by the Tampa Bay Estuary Program (TBEP) as critical estuarine habitats for fish and wildlife targeted for protection and restoration. This approach is based on the premise that the healthiest seagrass populations are located in open waters fed by rivers, streams, and runoff with the lowest levels of anthropogenic nutrient pollution, which is a function of upstream land uses. As this premise has been embraced throughout the Tampa Bay watershed, seagrass numbers are on the rebound from the nadir observed in the 1980s. The use of seagrass health as an indicator of water quality is not, however, relegated to the realm of scientific inquiry. As will be explored in this report, seagrass has been chosen as a “biological barometer” to gauge the efficacy of pollution strategies by regulators and managers as well.

Nutrient pollution management in the Tampa Bay watershed is an amalgamation of laws, jurisdictions, and stakeholder groups, with a predictable level of "regulatory cacophony" resulting

82 Chesapeake Bay Program, supra n. 12.
83 Id.
84 Moore et al., supra n. 2.
85 Id.
86 Chesapeake Bay Program, supra n. 12.
87 Janicki et al., supra n. 7.
from this complex regime. Federal and state laws interact, sometimes on-point, sometimes not. The mandates of these laws are left for the various jurisdictions, which include the State of Florida, counties and municipalities, and the Southwest Florida Water Management District (SWFWMD), to apply. Needless to say, the complexity of competing interests and oftentimes contradictory mandates has led to confusion with respect to nutrient pollution abatement in the Tampa Bay watershed. Despite the so-called regulatory cacophony resulting from jurisdictional and legal complexities, stakeholders throughout the Tampa Bay watershed have developed an innovative cooperative management strategy to achieve measurable results with respect to the most-damaging of nutrients entering the estuary: nitrogen loads. The establishment of the Tampa Bay Nitrogen Management Consortium (NMC), which will be discussed at length, infra, in Section III., is a unique example of a region coming together to address a serious environmental threat to an iconic natural feature.

The goal of this research is to distill the aforementioned regulatory cacophony into a manageable legal context for nutrient management in Tampa Bay, culminating with a profile of the stakeholder coalition developed to address this mess, the NMC. The author believes that the emerging picture of seagrass health in Tampa Bay is an environmental success, and that discursive and data-driven resource management is a model that could serve international coastal communities, at any level of commitment to conservation.

II. Legal Background

With the scientific rationale for the use of seagrass as a proxy indicator of the health of Tampa Bay and its watershed firmly in tow, an overview of the complicated regulatory web that exists to protect these resources ensues. This section sets out to describe the jurisdictional boundaries within the Tampa Bay watershed and the federal and state legal regimes designed to protect water quality in the estuary. After a discussion of this convoluted legal milieu, the NMC will be introduced, with specific attention given to the failures of the pre-existing regime which necessitated the formation of the NMC in the first place.

A. Jurisdictions of the Tampa Bay Watershed

Tampa Bay is a large open-water estuary in Florida, USA, with a watershed encompassing approximately 6,051 km². Within its confines, the watershed contains all or part of five different counties, 65 municipalities, and even a large military installation, MacDill Air Force Base in Tampa. Applying watershed-based management approaches to a region with so many governmental stakeholders is extremely difficult, due to the inconsistencies between hydrological and geopolitical boundaries, but this only begins to paint the Tampa Bay jurisdictional picture. The State of Florida is further divided into five water management districts (WMD), including the SWFWMD, within which the entire Tampa Bay watershed is located. WMDs are charged with implementing many of the State of Florida’s water supply and quality initiatives, with authority to do so granted by the Florida Department of Environmental Protection (FDEP). In turn, going up the vertical federalism ladder, the State of Florida and FDEP implement key federal provisions for

89 “Regulatory cacophony” is a euphemism coined by the author in an attempt to characterize the “noise” associated with so many legal instruments and players not always “playing in tune.”

environmental protection. Therefore, the federal government, the State of Florida, regional agencies, and local and county municipalities are all conceivable governmental stakeholders in the management of pollution to Tampa Bay. Jurisdictional crowding is inevitable, with the implications even more readily apparent when assessed in the context of the regulatory schemes governing nutrient pollution in the region.

B. Key Federal and State Laws Governing Nutrient Pollution in Tampa Bay

The United States environmental statutory regime is a complex series of overlapping laws and regulations that are constantly evolving. While many statutes play a role in the protection of aquatic and marine resources, the Clean Water Act (CWA) is particularly pertinent to the discussion of nutrient pollution in Tampa Bay and its watershed. The CWA is the principal federal statute governing pollution discharged to water bodies in the United States. It is primarily implemented at the state level, including Florida. Using both technology-based limits and water quality standards-based effluent limitations (WQBELs), the CWA attempts to regulate pollution at both sources and sinks. Technology-based limits are imposed on dischargers via permits, and are based on the “best” type of pollution control technology required of an industry under the CWA. Of particular importance to the Tampa Bay nutrient pollution issue, due to its nonpoint source nature, are WQBELs.

WQBELs are standards for acceptable levels of pollutants in water bodies. The standards, or criteria, are set based on a “designated use” for a water body. Ranging from drinking water and recreational (“fishable/swimmable”) uses to industrial and agricultural uses, a water body’s classification dictates the standard against which it will be held. States are required to assess their waters for impairments against the adopted criteria for a particular water body’s designated use. When a water body is found to be impaired, the CWA requires that a Total Maximum Daily Load (TMDL) be calculated. The TMDL estimates the total amount of a pollutant that can enter a water body without exceeding existing water quality criteria. It is up to the state to negotiate a load allocation agreement among the responsible parties. Making reliable estimates as to who discharged how much of what pollutant, and how much each party must reduce their loads, is the unenviable role of managers in charge of the TMDL process.

Water quality criteria are generally numeric, meaning that quantitative thresholds on the concentration of a given pollutant represent the WQBELs. Numeric criteria leave little room for argument, for better or for worse. Until 2013, however, there were no numeric criteria for nutrient pollutants in Florida’s waters. The former standard was narrative: “In no case shall nutrient

91 Id.
92 See generally, Robin Kundis Craig, Valuing Coastal and Ocean Ecosystem Services: The Paradox of Scarcity for Marine Resources Commodities and the Potential Role of Lifestyle Value Competition, 22 J. Land Use & Envtl. L. 355 (Spring, 2007). Other significant federal statutes include the Coastal Zone Management Act, the National Marine Sanctuaries Act, the Marine Mammal Protection Act, and the Magnuson-Stevens Fisheries Conservation Act.
93 The CWA also regulates the permitting of wetland dredge and fill activities, 33 U.S.C. § 1344. Permitting is generally carried out by the U.S. Army Corps of Engineers, but it is further complicated in Florida by state-level permitting, and even county-level (e.g., Hillsborough County) of some projects. Due to the narrow scope of this paper, a more robust description of Florida’s wetlands program is excluded.
95 Id.
96 Id.
concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna. It was plainly evident that objectivity in determining whether a water body is impaired for nutrients was a difficult goal to achieve. Adding to the regulatory cacophony, Florida’s vague nutrient criteria posed difficulties to scientists assessing them and create the potential for litigation for those trying to interpret them. EPA has recently promulgated a rule imposing numeric nutrient criteria on Florida waters in an attempt to provide more measureable standards for addressing nitrogen and phosphorus pollution.

III. Coalition-Building and the Tampa Bay Nitrogen Management Consortium

The assessment of water bodies for impairments under the CWA, and the ensuing TMDL process for those waters identified as impaired, can be a trying process. TMDLs are inherently rife with conflict. The sink assessment approach of a TMDL can easily result in finger-pointing, especially towards point sources of pollution where an actual load can be calculated. The role of hard-to-measure (therefore, hard-to-regulate) nonpoint sources in nutrient loading is not easily elucidated. Coupled with the multi-jurisdictional, multi-faceted regulatory context within which they must operate, the Tampa Bay watershed’s nutrient stakeholders decided to use this framework in their favor. Under the leadership of the TBEP, itself a product of the CWA, the Tampa Bay Nitrogen Management Consortium (NMC) was born. Originating in 1996, the NMC is “an ad-hoc public-private partnership that includes federal and state regulators, local governments, and key-industry stakeholders focused on managing nutrient inputs to Tampa Bay.” The success of the NMC is undeniable. Nutrient limits have been developed for all major sources discharging within the Tampa Bay watershed, with nitrogen and phosphorus levels currently half of what they were in the 1970s. Rather than buckle under regulatory cacophony, the NMC has achieved measurable results through the collective voluntary actions of its constituents and state regulatory actions such as the SWIM program. The inclusion of local governments, the typical arbiters of land use planning, allows nonpoint source nutrient pollution originating from urban, residential, and agricultural land uses to be addressed, without focusing blame on industrial point sources. Employing a watershed-based approach, the NMC has brought all the major players to the table to minimize the conflict of the TMDL process.

Note that the efforts of TBEP and the NMC are directed at both phosphorus and nitrogen load reductions. However, acknowledging that the Tampa Bay estuary’s primary productivity (i.e., algal growth) is nitrogen-limited, the focus of their efforts is on nitrogen pollution.

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100 Credit should be given also to Florida’s Surface Water Improvement and Management (SWIM) Act of 1987, Fla Stat. § 373.451 et seq. (2009), which seemingly recognized the growing concerns of stakeholders deafened by regulatory cacophony. Recognizing the need for better scientific understanding of certain priority water bodies, including Tampa Bay, SWIM conferred authority on the WMDs to develop watershed-based plans for dealing with nutrient pollution and seagrass loss. Acknowledging the intricate relationship these two resource issues share, SWIM was the driver for our current focus on seagrass recovery as a management goal and the regulatory milieu needed for TBEP to form the NMC.
102 Id. at 3.
management. Thus, central to the NMC’s mission is the protection and restoration of seagrass as an indicator of its progress in achieving specific goals of nitrogen load reductions. In 1995, the TBEP set a proxy goal for nitrogen load reductions: a return to the year 1950 levels of seagrass coverage in Tampa Bay to indicate a “healthy” estuary.

In an environmental law context, the use of a particular species as a proxy for ecosystem health is not without precedent. The National Forest Management Act (NFMA), for example, contains provisions necessitating the creation of land and resource management plans. Regulations promulgated to shed light on the requirements of these plans include provisions demonstrating the need to acknowledge “ecological sustainability” and preserve “focal species.” Specifically, managers are to include in plans “[i]nformation about focal species that provide insights to the integrity of the larger ecological system to which they belong.” The logic behind this approach is that a thoughtfully-selected focal species (i.e., keystone species) can serve as a useful proxy for gauging ecosystem health as a whole. While somewhat limited in its scope, the use of focal species such as seagrasses can provide a biological management goal in addition to the WQBELs and total pollutant loadings assessments required by the CWA. The NMC’s embrace of this technique demonstrates an embrace of sound science.

IV. Conclusion

Scientific consensus among those affected by environmental regulations is difficult to achieve due to the tensions arising from incongruent conclusions. The science is rarely ever “settled” when significant incentives exist for many parties to keep a debate alive. What is unique about the Tampa Bay NMC is that it comes remarkably close to consensus regarding the sources of nutrient pollution and its relationship to water quality and seagrass coverage in the estuary. The structure of the NMC ensures a place at the proverbial table for disparate stakeholders who have come together to produce technical documents and load allocation agreements based on cooperative interaction, rather than independent analyses that simply “toe a company line.” The cooperative process is thus more than strange bedfellows singing Kumbaya around a campfire. Rather, three valuable by-products come from such a process, beyond the tangible manifestations of reduced nitrogen loads and seagrass protection and restoration.

First, scientific uncertainty, and its resulting tension, is muted when the parties come together to produce results. Scientific uncertainty arises when independent research comes to different conclusions. Casting idealism aside, scientific researchers are subject to the same biases as any journalist, lawyer, or politician. Coalitions such as the NMC internalize much of the peer-review process that is paramount to all scientific inquiries. Second, consensus-based dispute resolution leads to regulatory predictability. A significant transaction cost for industry relates to the forecasting of potential changes in the regulatory environment in which it operates. New water quality standards can have significant impacts on bottom lines. Adaptive measures taken by industry in a setting that has been created to foster open lines of communication between business and regulators can help mitigate potential impacts from new regulations by lessening the “surprise” factor. Third, collaborative decision-making leads to solutions that are more fair and equitable in the long-run. To the extent that a given party participates, nobody can claim that they were shut out of the process or that a particular result did not consider their viewpoint when it is all-inclusive.

106 Ltr. from Tampa Bay Nitrogen Management Consortium to EPA, supra n. 45, at 3.
Because of its unique, non-regulatory, coalition-based approach, and embrace of sound science as a driver of policy, the NMC should be lauded as a triumph over regulatory cacophony.

V. Epilogue

On May 13, 2015, the TBEP announced that 16,306 ha of seagrass is now observed in Tampa Bay, exceeding the restoration goal of approximately 15,400 ha set in 1995. This is a remarkable achievement . . . [t]his kind of environmental recovery is a living testament to the collective efforts of all of us working together - the cities and counties, the private sector and the citizens who treasure the bay," said TBEP Director Holly Greening.

Self-Determination Re-Configured: The Case of Anglophone Cameroon

Clovis Tendongfor Forlemu

The concept of self-determination emerged at the end of the Second World War following the Atlantic Charter Declaration in 1941 which among other things envisaged the right for colonised people to self-government. The concept has undergone several interpretations with regards to former British Southern Cameroons which constitutes present day Northwest and Southwest regions (Anglophone Cameroon) of the Republic of Cameroon. This study examines the birth of the above-mentioned territory and how it hitherto voted to become part of the Republic of Cameroon. It traces the adoption of the concept of self-determination by Southern Cameroon nationalists and how this term has been applied in the recent quest for minority rights and outright secession from the Republic of Cameroon. By relating self-determination to secession we re-contextualise the evolution of the concept in relations to Anglophone quest for a separate state. By examining the legal interpretation of self-determination in international law we redefine the role Anglophone movements especially the Southern Cameroons National Council (SCNC) play in the quest for a separate state. The central thesis of this paper is to underscore the strategies re-invented by the Anglophone elites and movements to vulgarise their right to self-government. By and large, the paper analyses the complexities and ramifications involved in internationalizing their quest for statehood, the study therefore makes a significant contribution on legal problems associated with the quest for sovereignty and statehood in emerging countries.

Keywords: self-determination, minority rights, Anglophone and secession

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108 Id.
Cleansing the Collective Soul: Lustration in Post-Transition Identity and Regime Construction

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Lustration and political vetting can play an important role in the transition from a repressive regime to an open, transparent, rule-of-law based government. However, without an adequate understanding of this mechanism, unmonitored or haphazard lustration or vetting can be, and indeed has been, used to consolidate power in the hands of a new authoritarian regime in post-conflict or post-transition states. It is the purpose of this study to understand and illustrate how to effectively use lustration as a vetting program that secures the rights of the people the new government seeks to protect before that new regime is co-opted by regressive actors. This study begins with the assumption that vetting happens in all transitional societies while ancient regime political elites and new political actors seek to establish spheres of influence. From here, I hypothesize that good lustration programming keeps new elites from consolidating political and economic power while keeping old political elites from co-opting the new regime and creating a new collective consciousness of the prior regime by fostering a balance of power between old and new political elites. This study tests this hypothesis by analyzing the use of vetting in the transition from the Soviet Union to the Russian Federation and lustration legislation in Czechoslovakian post-communist successor state.

Key words: lustration, vetting, rule of law

Perspectives in Human Rights Law and Peaceful Protest

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The protection of civil rights underpins democratic progress of government. The paper considers how citizens are protected by law and how right to peaceful protest is defined in the United Kingdom by examining the impact of the Human Rights Act 1998 and article 11 of the European Convention on Human Rights on freedom of assembly. The author discusses whether civil rights should be granted protection in terms of peaceful protests and if so the effective means and the level of protection of such rights. Disputes arise when views are not uniform as to whether the government should be given a power to decide and permit an assembly. The paper evaluates judiciary’s response concerning offence of assembly and the limitations to the right to peaceful protest. The author identifies and criticises the concepts of illegal assembly, and demonstrates how freedom of assembly is restricted to a certain extent in circumstances.

Keywords: Right to peaceful protest; Protection of civil rights in the UK; Human Rights

1. Introduction
The notion behind the adoption of Bills of Rights across the world is that ‘citizens can never be
fully assured of the safety of their fundamental civil and political rights’ unless those rights are afforded some constitutional protection from state interference.\textsuperscript{109} Democracies across countries that have adopted a Bill or Charter of Rights ‘have entrusted its application largely to the judiciary’ to ensure ‘the delivery of the rights to citizens’. Nonetheless, the judiciary could ‘invade liberties in developing the common law’. In the UK, the unwritten constitution, as maintained by Parliament and the judiciary, is thought to have recognised residual liberties.\textsuperscript{110} It has been argued that the British legal system ‘provided a sufficiently effective means of ensuring that power was not abused’.\textsuperscript{111} However, residual liberties were ‘vulnerable to invasion’. In particular, in the UK, the doctrine of parliamentary sovereignty means that Parliament could ‘legislate in an area of fundamental rights, thereby restricting or even destroying them’.\textsuperscript{112}

The Human Rights Act 1998 (known as the HRA) is regarded as a ‘means of receiving the European Convention on Human Rights into domestic law.\textsuperscript{113} Prior to the introduction of the HRA, the Convention had no domestic binding force in the UK.\textsuperscript{114} However, the Convention had an increasing influence in human rights-related rulings in UK courts as well as the European Court of Justice.\textsuperscript{115} The rights of the Convention received into the rights protected under the HRA such as Section 1(1) of the HRA and Articles 2 to 12 and 14 of the Convention.\textsuperscript{116}

1.1 Peaceful protest
Section 2 of the HRA gives effect to the rights set out in Articles 10 and 11 of the ECHR which provides that ‘everyone has the right to freedom of expression’ and ‘has the right to freedom of peaceful assembly’\textsuperscript{117} including freedom to hold opinions without interference by a public authority, subject to ‘restrictions or penalties as are prescribed by law’ and ‘are necessary in a democratic society’.\textsuperscript{118} Essentially, peaceful protest is a non-violent form of protest against a law or laws perceived to be unjust.\textsuperscript{119} Protesters affirm their belief in the injustice of a law of government action through direct action or peaceful march. It is suggested that the right to peaceful protest is a mark of a civilised community.\textsuperscript{120}

2. Freedom of expression and assembly
Articles 10 and 11 of the ECHR provide the right to freedom of expression and freedom of assembly respectively and collectively enshrine ‘a cornerstone of a democratic society’.\textsuperscript{121} In Steel\textsuperscript{122}, the European Court held that participation in protest or demonstration ‘constituted an act of expression which required protection under Article 10’.\textsuperscript{123} Therefore, the prosecution and

\textsuperscript{110} Ibid 115.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} Fenwick (n 2) 157.
\textsuperscript{114} Ibid 135.
\textsuperscript{115} Fenwick (n 2) 136.
\textsuperscript{116} Fenwick (n 2) 165.
\textsuperscript{117} ECHR, Art 11.
\textsuperscript{118} ECHR, Art 10(2).
\textsuperscript{119} Tom Wainwright, ‘Civil disobedience’ (Sweet & Maxell, 2014), para 1.
\textsuperscript{120} Ibid.
\textsuperscript{121} Carol Hawley, ‘Demonstrations and protests: harassment’ (Sweet & Maxell, 2014), para 1.
\textsuperscript{122} Steel v United Kingdom (24838/94) (1999) 28 EHRR 603.
\textsuperscript{123} Wainwright, (n 12) para 8.
conviction of a person for offences arising out of a peaceful protest would be amounted to an interference with their rights of expression and assembly unless they are justified as necessary by the State.\footnote{124} Moreover, it was held in Dehal\footnote{125} that the court had to be satisfied before convicting that the ‘proceeding had been brought in pursuit of a legitimate aim’\footnote{126}, namely the protection of society against violence and that ‘a criminal prosecution is the only method necessary to achieve that aim’\footnote{127}. As can be seen, the ECHR arguably guarantees, amongst other things, the right to freedom of peaceful protest and the right of freedom of expression.\footnote{128} However, the provision also allows states to restrict these rights for the protection of public order.

3. Limitations to the right to peaceful protest
The right to peaceful protest and expression are subject to necessary restrictions such as the need to maintain public order and the protection of individuals from harassment.\footnote{129} Therefore, these rights are not absolute.

3.1 Public order and peace
As mentioned, the right to demonstrate and protest is not absolute as it is restricted and subject to a variety of statutory provisions such as Article 11(2) of the ECHR that sets out restrictions to the right. In addition, the right to peaceful protest is subject to particular formalities and conditions under sections 11 and 14A of the Public Order Act 1986 (POA) which entails further restrictions when exercising the right to freedom of expression and assembly.

3.2 Granting of injunctions
In recent years, the courts have been increasing invited to grant injunctions in pursuance of the Protection from Harassment Act 1997 (PHA).\footnote{130} The PHA was initially introduced to provide protection to individuals who are subjected to stalking. However, it has been used by companies to prevent protest groups from conducting demonstrations. Consequently, the PHA is said to have been used contrary to its stated purpose and thus it could be argued whether the statute has been properly interpreted and applied in particular circumstances.

4. The power of the police
The police have certain powers available in situations of peaceful protest and demonstration. However, the exercise of the powers to restrict the rights of protesters is highly debatable. For example, the police are conferred power to prevent an imminent breach of the peace under common law. Moreover, Section 2 of the POA states more serious offence such as violent disorder. In the UK, the students arrested in connection with the protests against tuition fee increases were said to be exclusively charged with violent disorder, as opposed to charge under Sections 4A and 5 of the POA in respect of harassment.\footnote{131} Therefore, it is suggested that the police had been ‘heavy-handed in the policing of the demonstration’.\footnote{132} This change in the nature of protest may have an impact.

\footnotesize
\begin{itemize}
\item \textit{124} Ibid.
\item \textit{126} Ibid para 9.
\item \textit{127} Ibid.
\item \textit{128} Graeme Broadbent, ‘Unlawful assembly’ (Sweet & Maxell, 2015), para 8.
\item \textit{129} Hawley (n 14).
\item \textit{130} Hawley (n 14).
\item \textit{131} Ibid para 31.
\item \textit{132} Ibid.
\end{itemize}
on how peaceful protest is regulated.\textsuperscript{133}

5. Conclusion

In light of the current law of peaceful protest, it is arguable whether an appropriate balance has been struck between Articles 10 and 11 of the ECHR and the relevant restrictions in relation to the right to peaceful protest so as to ensure sufficient protection for freedom of expression and assembly that are embodied in the ECHR provisions and domestic law in the UK. Nevertheless, the scope of the restrictions seems to have widened as it is necessary to preserve a limited right to protest for the purpose of maintaining of peace and order in the public interests. If the aim of peaceful protest is to raise awareness of society to a particular cause and at the same time to apply pressure whilst those rights are preserved by broad restrictions, it is arguable whether the balance has properly been struck.

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Towards a Framework for analysing impediments to cyberlaw compliance in Africa

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The rise in the level of electronic abuse has led to the establishment of regulatory measures by governments. However, regulation of cyberspace has presented several challenges for IT users and legislators. Cyberlaw reforms are complicated and lengthy. Users of IT face abuse and often responses to cyber-law violations are fragmented and unsatisfactory. In addition, there have been very few studies investigating what motivates compliance with cyberlaws across Africa. Existing research consists of articles and anecdotes and the regulatory compliance theory is underdeveloped. Consequently, little guidance is available on how to measure and ensure compliance with cyberlaws. This paper examines the factors influencing cyber-law compliance in Africa. The author discusses various theoretical works that explain non-compliance. A framework for analysing factors contributing to non-compliance is developed. This framework is then used to identify impediments to cyberlaw compliance in selected African countries.

Keywords: Cyberlaw; Compliance; Impediments; Africa

Introduction
The developments in the use of information technology in Africa have contributed to the escalation of cybercrime and non-compliance with cyber laws (Mwaita and Owor, 2013). There have been very few studies investigating these challenges and their causes across Africa (Oluwo, 2009). Consequently, the determinants and consequences of non-compliance are not widely known and little guidance is available on how compliance with cyberlaws may be achieved in Africa. The present study examines cybercrime legislation and compliance issues in Africa with a view to identify the influencing factors which might also serve to measure compliance with cyberlaws. The researcher decided to focus on countries with high and low levels of cybercrime and also at different stages in their cyberlaw reforms. These are South Africa, Kenya, Uganda, Rwanda and Nigeria. South Africa has more established cyber laws than other countries. Kenya and Uganda have recently developed their cyber laws but are increasingly threatened by cybercrime due to high mobile technology usage, high transactions rates and poor security awareness (ITU, 2014). South Africa has more established cyber laws than other countries. Kenya and Uganda have recently developed their cyber laws but are increasingly threatened by cybercrime due to high mobile technology usage, high transactions rates and poor security awareness (ITU, 2014).

Rwanda on the other hand is in early developmental stages (Mwaita and Owor, 2013). Google scholar and various online databases were used to identify papers on cyberlaw in Africa and the theoretical works on regulatory compliance. In the following sections, this paper presents national efforts toward cyberlaw reforms in the selected countries. The concept of regulatory compliance is then introduced and the theoretical works explaining why entities fail to comply are discussed. A framework for identifying influencers of regulatory compliance is developed and used to examine the factors contributing to non-compliance with cyber-laws in the selected African countries.

Literature review
Cyberlaw reforms in selected African countries: South Africa has a number of laws regulating cybercrime. Prior to the enactment of the Electronic Communications and Transactions - ECT Act
(2002) in South Africa, common law regulated crimes of defamation, indecency (online child pornography), crimen injuria (cyber-smearing) and cyber fraud (Madziwa and Sizwe, 2015). However, the applicability of the common law to certain crimes e.g. crimes of assault, theft and extortion was found to be limiting by courts and prosecutors. In 2002, the ECT Act was enacted. The problems relating to cyber crime are addressed in Chapter XIII of the ECT Act, 2002. According to Michalson and Hughes (2005), this chapter introduces statutory criminal offenses relating to unauthorized access to data, interception of data, interference with data, and computer related extortions, fraud and forgery. The ECT Act does not exclude the application of other statutory or common law. Other legislations include the Regulation on Interception of communication related information Act 70, 2002, which regulates the interception of any communication in the course of its currency or transmission. The Financial Intelligence Centre Act (FICA) which provides that an accountable entity, may not conclude a business transaction with a client without having complied with certain information gathering and reporting duties. The Protection of Personal Information (POPI) Act is the first all encompassing law that addresses information privacy and data protection in South Africa (POPI, 2013). Other countries in Africa have also developed cyber laws similar to those of South Africa. Presently, Kenya has a cyber law framework articulated under the Kenya Information and Communication Act (KICA) – 2009 and the Kenya Communications (Electronic Transactions) Regulations passed in 2010 (UNCTAD, 2012). Cybercrime legislation in Uganda is mandated through the Electronic Transactions Act 2010; the Electronic Signatures Act 2010; and the Computer Misuse Act 2010 (UNCTAD, 2012). Rwanda is in early stages of cyberlaw development. Specific legislation on cybercrime has been enacted through the law on Electronic Message, Signature and Transaction; and the draft ICT bill (ITU, 2014). In Nigeria, cybercrime is regulated through the Money laundering (prohibition) Act 2011; Advance Free Fraud & other related Offences Act 2006; Evidence Act 2001 and the Cybercrime Bill 2013 (ITU, 2014).

Compliance with cyberlaws
While governments acknowledge the importance of cyberlaw reforms, adopting existing laws and compliance with them continue to be a major challenge for Africa (Quarshie, 2014; Olowu, 2009). Compliance is a state in which someone or an entity (e.g. an organisation or a nation) is in accordance with established guidelines, specifications, or legislation. Theories about compliance provide accounts of why institutions and individuals comply with or do not comply with laws and according to Grossman et al (2005), rationalist and normative models have been widely used to explain compliance.

Rationalist Theories: The rationalist model of domestic compliance posits that regulated individuals act rationally to maximize their economic self-interest (Jenny, Fuentes & Mosler, 2006). It assumes that an individual weighs the perceived probability of being detected and the severity of the expected sanctions (Jenny, Fuentes & Mosler, 2006). Rationalist argue that by increasing surveillance and sanctioning severity, compliance behaviour can be enforced. However, this model has several limitations. For instance, it does not consider social action based on values, beliefs or emotions. The assumption that self-interested actors calculate the costs and benefits of alternatives does not consider peoples’ inability to calculate probabilities of compound and conditional events. In addition, reported failures by law enforcement agencies indicate the difficulties in enforcing deterrence (Olowu, 2009; Omeje and Githigaro, 2010).
Normative theories: The assumption that people obey the law because it is in their interest to do so fails to account for factors such as social influence, moral values and perceived legitimacy of the regulations (Tyler, 1990; Grossman et al., 2005). The normative perspective on compliance held by the sociology literature is that laws that are developed and implemented fairly should be followed and that individuals and firms will comply if they believe the rules are legitimate and fairly applied. Similar views have been expressed in the public choice literature and psychological theories (Tyler, 1990).

Psychological and Sociological Theories: Psychological and sociological theories of rule compliance integrate individual and social factors (Jenny, Fuentes & Mosler, 2006). Individuals would comply because of a moral obligation to do the right thing. Social norms may exert pressure on an individual to comply in order to avoid being sanctioned by others. The perception of the legitimacy of rules is another factor influencing compliance. Rules that are compatible with local conditions, adequate and not interfering strongly with livelihood strategies are likely to be obeyed (Jenny, Fuentes & Mosler, 2006). Social learning theories emphasise the importance of learning through symbolic interaction with others (Jenny, Fuentes & Mosler, 2006). It is claimed that non-offenders learn the values and norms that conform to convention, whereas offenders learn what is contrary to convention. Research in psychology and sociology therefore recognises the importance of cognitive and social learning processes, individual capabilities, group influence, cooperation, increased awareness and ability to address environmental influences, (Jenny, Fuentes & Mosler, 2006). Researchers maintain that non-compliance will occur mainly in situations where the regulated entity lacks capacity and commitment.

Biological and Biosocial Theories: Biological and biosocial theories argue that humans inherit a set of biological and genetically determined attributes that differentiate them across a continuum, whereby some will have greater propensity to break the law than others in certain conditions. Biosocial theories suggest that there is something inherently defective in the individual who fail to comply or who commit crimes. Researchers have established that the traits of conscientiousness and agreeableness may be strongly linked with an individual’s intention to comply with cybersecurity policies (Major et al., 2006).

Research in the business and strategic management fields also shows that structural and organizational components of the firm influence compliance behavior (Malloy, 2003). Large firms have many characteristics that encourage compliance e.g. size, resources, skills, public image, while small sized firms are constrained by poor allocation of resources and limited capital to invest in appropriate technology. Organizations are also realizing the importance of enforcing compliance through good practices, e.g. by using professional and international standards such as ISO 27000 and BS7799-1, SOX and others.

Towards a framework for examining compliance with cyber-laws in Africa
The literature suggests that compliance with legislation is influenced by various factors. For instance, economic, psychological, sociological, professional, technological factors and biological factors, to mention but a few. There is however lack of consensus on whether these factors or motivations operate exclusively or in combination. Nielsen and Parker (2012) argue that lumping social and economic motivations does not adequately recognise the distinctive power of the individual motivations. They maintain that understanding these distinctive powers is crucial to
determining the appropriate regulatory policy. They state that “any theory for explaining regulatory compliance behavior – and especially for suggesting policy responses to non-compliance – should be able to distinguish between situations where an individual or firm is intrinsically and individually motivated to voluntary comply and situations where some sort of social pressure (whether from an official regulator or third parties) is necessary to motivate compliance”. While Nielsen and Parker’s (2012) argument is valid, motivations are however complex and often do not operate exclusively, e.g. self-interest, duty, fear and trust may combine to influence response to regulation (Etienne, 2010). Etienne argues that if considered individually, one may overlook or fail to account for this complexity. How then does one capture the distinctive powers of the individual motivations without overlooking the complexities of compliance behaviours? In the present study, the researcher proposes a framework (see Figure 1 below), that blends various cyberlaw compliance influences. It recognises the significance of the individual motivating factors but also acknowledges the potential interaction between them, represented here by the circle. The combined effect of these factors (or prioritised factors) then determines compliance with cyberlaws.

![Figure 1. Factors influencing compliance with cyber-laws in Africa](image)

**Analysis of Compliance issues in Africa using the proposed framework**

The researcher will now use the above framework to examine the factors influencing compliance with cyberlaws and the interactions between them in the selected African countries.

**1. Political and Legal factors:** Political and legal factors (at national or international) level may influence law reforms in a country or region resulting in compliance or non-compliance with the laws. Several political and legal challenges East African countries have experienced in their cyberlaw reforms have been reported. These include difficulties in drafting the reforms, unwillingness of political leaders to drive the process, commitment of limited resources to these projects, business attitudes and practices (Mwaita and Owor, 2013; UNCTAD, 2012; East African Internet Governance Forum, 2011). In Uganda, the bureaucratic set up has made cyber law reforms lengthy while in Kenya, delays in combating cybercrime were attributed to the failure to develop...
an all-inclusive legislation which is also compatible with international standards (Omeje and Githigaro, 2012; EA Internet governance forum, 2011). Cassim (2010) identified ambiguities and inconsistencies in South African cyberlaws. For instance, he reports that while section 15 of the ECT Act facilitates the admission of information in electronic format, the criminal sanctions in the Act are inadequate. He observed that such limitations have led the courts and prosecutors to adopt a cautious approach towards cybercrime cases. Snail (2008) asserts that section 90 of the ECT Act presents many jurisdictional challenges pertaining to cybercrime. In Rwanda, the lack of expertise in cyber-law threatens the reforms (EA Internet governance forum, 2011). In Nigeria, the absence of a legal and regulatory framework that clearly recognises the pervasiveness of cybercrime and one that prescribes strong penalties escalates cybercrime (Maitanmi et al., 2013).

2. **Technological:** The developments in technology in many African countries have lead to higher risk, rampant corruption and escalation of cybercrime (UNCTAD, 2012; Olowu, 2009; Maitanmi et al., 2013). Kshetri (2010) argues that most ICT products targeted for developing countries are low-cost versions. These lack advanced security features and are vulnerable to cyber violations. Cyber vulnerability in Nigeria has been attributed to weak technical and business practices, use of outdated anti-virus software and unsecured networks (Maitanmi et al., 2013). Rwanda also identified lack of technical expertise to handle cyber and legal related aspects of law reforms (EA Internet governance forum, 2011; Mwaita and Owor, 2013). Lack of Internet connections especially in the rural areas of Africa and clear ICT policies impact on IT education and risk awareness which subsequently affect compliance with cyberlaws (Grobler and van Vuuren, 2010).

3. **Good practices:** Compliance can be achieved through good practices, standardisation, benchmarking and other quality assurance processes. The current lack of standardized procedures in Africa have influenced the effectiveness of cybercrime investigation techniques and court decisions (Grobler and van Vuuren, 2010; Olowu, 2009). Reports suggest that many countries in Africa have not ensured good IT management practices. The cyberwellness reports (ITU, 2014) indicate that the countries examined in this study do not have officially recognized benchmarking mechanisms to measure cybersecurity development and the effectiveness of cyberlaw reforms. They also do not have officially recognized national or sector-specific research and development (R&D) programs for cybersecurity (ITU, 2014).

4. **Economic:** Guerra (2009) argues that crime can be extremely profitable, has low overhead and a little risk of being prosecuted. He shows how the global recession has affected security through job loss resulting in disgruntled workers, the rise in available computer talent with no jobs, increase in demand for counterfeit products and the diminishing ability to prosecute. Youth involvement in cybercrime in Nigeria has been attributed to urbanization, the high unemployment rate, harsh economic conditions, greed, and the uncontrollable desire for massive wealth (Olayemi, 2014). In East Africa, similar factors accounting for insecurity and subsequent non-compliance with the laws have been identified. These include unemployment among the youth, poverty, police collusion with criminals, drugs and peer influence, corruption and the collapse of the family institution (Omeje and Githiagaro, 2012:5).

5. **Biological factors:** Aransiola and Asindemade (2011) studied young cybercrime perpetrators in Nigeria. They found that they make use of voodoo, i.e., traditional supernatural power to commit crime. In another study involving 199 males and 198 females in Nigeria, Ojedokun and Idemudia (2013) observed that emotional intelligence moderated the relationship between cyberbullying and
personality factors like psychoticism, extroversion and neuroticism. Olapegba and Idemudia (2012) also found that while dispositional factors such as openness to experience, agreeableness, and conscientiousness did not independently predict smuggling behaviour in Nigeria, extraversion and neuroticism did so.

6. Psychological and (7) sociological factors: Researchers have also found that users, law enforcement agents and policy makers in many African countries still lack legal expertise, awareness of the adverse impact of cyber crime and measures to prevent it (EA Internet governance forum, 2011; UNCTAD, 2012). While online gambling is permitted in Kenya, it is perceived to be immoral in Nigeria and South Africa, although South Africa appears to be moving towards legalising it. Pornography is immoral in Uganda and has been prohibited by the Anti-Pornography Act of 2014. The National Media Monitoring Committee has called on the Communications Commission of Kenya (CCK) to regulate pornography (Mbote, 2013). Lack of trust in e-commerce and in the law enforcement agents are major issues in most of the countries studied and this contributes to non-compliance (Omeje and Githigaro, 2012; African Minds for the African Police Oversight Forum, 2008). In Uganda, the police was ranked the highest corrupt public service provider, while in Nigeria the police has been accused of corruption and brutality, arbitrary arrest and detention and impunity (African Minds for the African Police Oversight Forum, 2008). In Kenya, there is a lack of confidence in the ability of law enforcement agencies to handle cybercrime incidents (Omeje and Githigaro, 2012).

Conclusion
This study confirms that African countries are still struggling to ensure compliance with cyberlaws. Major challenges are experienced at the developmental and implementation stages of cyberlaw reforms. In most countries there are concerns relating to ambiguity in the laws, lack of commitment by legislators and lack of awareness of law and severity of cybercrime. The study highlights the importance of cyberlaw harmonisation and the need to consider biological influences which are often ignored in compliance models. This study contributes to the development of the under-developed regulatory compliance theory (Etienne, 2010). The proposed compliance framework can be used to understand the effects of the major factors influencing compliance and the complexities in their interactions. It also provides a basis to measure cyberlaw compliance. Since combination of multiple motives (or selected motives) are perceived to explain compliance behaviour more effectively, future studies can adopt a configurational approach to measure this combined effect. Used with cluster analysis, combinations of factors or motivations that influence compliance the most can be determined.

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The Paralegal and the Right to Access to Justice in South Africa

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Increasing access to justice has been an imperative in South Africa since before 1994. The post-apartheid government has introduced various measures to enhance access to justice for the most vulnerable communities. However, serious barriers to access still remain in the country as poverty, unemployment and inequality remain the biggest threats to South Africa’s democracy, and the devastating effects of the apartheid era continue to hamper the social and economic advancement of the majority of citizens. The efforts of the current South African government to improve access to justice has to be acknowledged, yet labour unrest remains a thorny issue, the poor have resorted to public mass demonstrations as the preferred mode of communication and the ‘not so poor’ to class actions, the backlog of cases in the courts has not been eradicated, the gap between the rich and the poor has become a chasm, legal costs have escalated, access to legal services in the rural areas remains a challenge, vulnerable members of society remains legally illiterate and the paralegal is still battling for recognition as a law professional in the country. This paper argues that the failure to recognise the role of the paralegal in South Africa places an unreasonable restriction on the constitutional right of citizens to access justice.

Keywords: Paralegal, justice, barriers

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The Crimes Act 1961, New Zealand’s principal criminal law statute, contains a number of defence of property provisions including s 56 which states that a person in peaceable possession of any land is justified in using reasonable force to prevent trespassing or to remove a trespasser. The leading Commonwealth authority on the defence is a Canadian decision, R v Born with a Tooth. The defence was recently raised by a New Zealand indigenous person (Maori) who had been charged with an assault which took place on Maori ancestral land of which he was a legal owner along with other tribal members. This ancestral area includes a lake which although legally owned by his tribe, had long been in the public domain, and poor management by locals and its statutory management board meant the water quality had become increasingly degraded. The defendant, a self-appointed kaitiaki (guardian) of the lake assaulted the complainant whom he considered was about to misuse and further pollute the lake. In response to the charge, the defendant argued the s 56 defence. Article Two of the Treaty of Waitangi 1840 between the Crown and indigenous tribes, a foundational constitutional document, guarantees Maori the unqualified exercise of their chieftainship over their lands, villages and all their treasures. This paper examines the Supreme Court of New Zealand’s treatment of the defence in this context.

Keywords: Criminal law; Cultural values; Defence of Property

Introduction

New Zealand has a relatively short human history. The original Polynesian settlers (tangata whenua), known as Maori, are generally thought to have arrived in the 13th century. European settlement, mainly by the English, commenced some five hundred years later. Within New Zealand’s 175 years of constitutional history there are two especially significant occurrences: the signing of the Treaty of Waitangi on 6 February 1840 and the establishment of the Supreme Court of New Zealand as the country’s court of final appeal on 1 January 2004.134 The Treaty of Waitangi, an agreement between the English Crown and many Maori tribes, established English colonisation in New Zealand; while the creation of the Supreme Court severed New Zealand’s last legal connection with Britain. This paper, through the analysis of one case, Police v Taueki,135 examines these two constitutional entities: the Treaty of Waitangi – generally considered to be New Zealand’s founding constitutional document; and the Supreme Court of New Zealand – the country’s highest court established just over a decade ago. The paper considers the modern treatment of the Treaty by the Supreme Court in the context of this country’s history, asserting that the court has an obligation to engage with the nation’s history in its deliberations. While this should not be determinative in the development of the law, it is an essential element in the maintenance of the rule of law.

Discussion

134 Supreme Court Act 2004, s 2.
The Treaty of Waitangi / Tiriti o Waitangi 1840

The Treaty of Waitangi / Tiriti o Waitangi 1840, signed by representatives of the British Crown and by over 500 Maori chiefs, comprises just three short articles. Originally drafted in English, it was then translated by a missionary into the Maori language (te reo) for the Maori signatories. Dame Claudia Orange, a renowned expert on the Treaty has identified the difficulties in this translation of the Treaty, not the least due to the absence of exact equivalents of the concepts used in the English version. Article 1 of the Treaty recognises the Crown’s “sovereignty” over New Zealand – a wider concept than the “governance” agreed to in the Maori version. Under art 2, the Crown agreed to Maori having “exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties”; while the Maori version guaranteed Maori chiefs their unqualified chieftainship (tino rangitiratanga) over their lands and all the things they valued (taonga). Article 3 is closely translated and acknowledges that Maori are citizens with equal rights.

The difficulties presented by the Treaty as a source of law stem from the differences in the English and Maori versions and the different meanings and nuances attributable to the words used in them. These issues have since been formally recognised, and a statutory body, the Waitangi Tribunal, was created in 1975 to be the sole arbiter of the meaning of the Treaty, as well as a forum to deal with claims for alleged breaches of the Treaty. Each year, on 6 February, New Zealand celebrates Waitangi Day in commemoration of the signing of the Treaty in 1840. Although this is a public holiday, it is often the focus of controversy as Maori protest their Treaty grievances. Forty years after the establishment of the Waitangi Tribunal, the Treaty claim and settlement process is ongoing.

In New Zealand law, the Treaty occupies an anomalous place. Matthew Palmer QC, who has written extensively on the Treaty, insightfully opines “The Treaty has been held up as a sacred compact and put down as a simple nullity”. While it is recognised as a treaty creating ethical obligations on the State, under our dualist constitutional system it has no formal legal status in national law as it has not been incorporated into New Zealand domestic law. Despite the Treaty having no direct legal effect, the courts have recognised it is “part of the fabric of New Zealand society” and may be used as an aid to statutory interpretation and the application of certain legislative provisions.

Treaty of Waitangi jurisprudence achieved its high point in 1987 in the decision of the New Zealand Maori Council v Attorney-General where the Court held that it was the principles or “mutual obligations and responsibilities” underlying the Treaty rather than the words themselves

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137 Treaty of Waitangi Act 1975, s 5(2).
138 Section 5(1).
140 A feature of the Westminster system, international obligations are the prerogative of the Executive, while the making of domestic law is the province of Parliament.
141 Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590 (PC). This is the most recent decision that has directly ruled on the legal status of the Treaty.
142 Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC) at 210 per Chilwell J. The High Court held the Maori tribe’s relationship with the Waikato River, an aspect of taonga, was protected by art 2 of the Treaty.
which were of importance.\(^\text{144}\) The Court distilled these principles to include: the Treaty is a relationship akin to a partnership and the parties must act reasonably and in good faith with each other; the Crown must actively protect “Maori people in the use of their land and waters to the fullest extent practicable”\(^\text{145}\) the Crown has a duty to redress breaches of the Treaty. Since this decision, the courts have taken a rather more conservative approach to identifying and implementing the Treaty principles,\(^\text{146}\) notwithstanding Cooke P’s assertion in \textit{Te Runanga o Muriwhenua Inc v Attorney-General} that “the Treaty is a living instrument and has to be applied in the light of developing national circumstances.”\(^\text{147}\)

The principles of the Treaty are also the vehicle through which Parliament provides some recognition to the Treaty, with a number of statutes stating that in achieving the purposes of the Act, the principles of the Treaty must be taken into account.\(^\text{148}\) In statutes of special significance to Maori, such as the \\textit{Te Ture Whenua (Maori Land) Act 1993} and the \\textit{Maori Fisheries Act 2004}, the Treaty is expressly referred to as of direct relevance to the purpose of the Act and therefore crucial in the interpretation of the Act.

One aspect of protected taonga under art 2 is tikanga Maori (the Maori way of doing things),\(^\text{149}\) broadly understood as Maori custom law and tikanga as an expression of cultural values and ideals remains valid and relevant today.\(^\text{150}\) These intrinsic values include: mana (authority or influence), tapu (sacredness), utu (reciprocity), and kaitiakitanga (stewardship, guardianship and protection). Kaitiakitanga assumes some importance in this paper, as a cultural issue that arose in the \\textit{Taueki} case. Within the statutory lexicon, kaitiakitanga is generally defined as guardianship of resources\(^\text{151}\) however, Maori attribute a more expansive meaning to the concept, to include “[consideration of] the relevance of ancestral association with lands and resources, and … the rights and responsibilities descendants today now find themselves upholding.”\(^\text{152}\)

**The New Zealand Supreme Court**

Until 2004, the Judicial Committee of the Privy Council was the legislated final arbiter of New Zealand appeals. One difficulty with a geographically distant second tier appellate court was the potential for lack of knowledge of, or an inadvertence to, local mores and conditions, which could result in incoherent decisions. One of the rationales put forward in support of New Zealand having its own final court of appeal was that, as a local court, it should improve “the understanding by judges of local conditions and the special features of New Zealand society”.\(^\text{153}\) Indeed, the Select Committee deliberating on submissions concerning the New Zealand Supreme Court Bill

\(^{144}\) At 517 per Cooke J.

\(^{145}\) At 664.

\(^{146}\) For example in \textit{New Zealand Maori Council v Attorney-General} [2008] 1 NZLR 318 (CA) the court explicitly said the duty owed by the Crown to Maori was not a fiduciary duty, nor was there any contractual or statutory duty owing. This contrasts starkly with the Canadian position where the relationship between the Crown and the indigenous groups is recognised as a fiduciary one; \textit{R v Guerin} [1984] 2 SCR 335 at 385.

\(^{147}\) \textit{Te Runanga o Muriwhenua Inc v Attorney-General} [1990] 2 NZLR 641 (CA) at 655.


\(^{149}\) Law Commission, Maori Custom and Values in New Zealand Law Wellington, New Zealand: 2001, at [71].

\(^{150}\) See [116]-[126].


\(^{153}\) Terence Arnold Replacing the Privy Council: A New Supreme Court (Office of the Attorney-General, April 2002) at [34.3].
acknowledged that the Ministerial Advisory Group\textsuperscript{154} went further and recommended that there should be a convention that at least one member of the Supreme Court should be well versed in tikanga Maori, making it likely that at least one member of the Court would be Maori. The bill did not in fact require appointment of a member either knowledgeable in tikanga or of Maori descent.\textsuperscript{155}

Section 3 of the Supreme Court Act 2003 does go some way in addressing these issues. Stated purposes of the establishment of the Court include: the recognition of New Zealand as an independent nation with its own history and traditions; and the resolution of legal matters relating to the Treaty of Waitangi with an understanding of New Zealand conditions, history, and traditions. In addition, s 13 of the Act, which sets out the grounds for leave to appeal to the Court, states “a significant issue relating to the Treaty of Waitangi is a matter of general or public importance” in determining whether or not the requisite grounds have been met.

\textit{Police v Taueki}

To date, the only criminal case involving Treaty of Waitangi issues to come before the Supreme Court is \textit{Taueki v Police}.\textsuperscript{156} The case concerned a claim by the appellant that he could invoke the defence of property defence contained in s 56 of the Crimes Act 1961 to counter a common assault charge he faced. The Crimes Act, New Zealand’s principal criminal law statute, contains a number of defence of property provisions including s 56 which provides that a person in peaceable possession of land may use reasonable force against a trespasser. The Supreme Court had to decide whether Mr Taueki could avail himself of this defence in the context of the particular status of the land involved in the case.

Section 56 of the Act states:

\begin{quote}
Every one in peaceable possession of any land or building, and every one lawfully assisting him or her or acting by his or her authority, is justified in using reasonable force to prevent any person from trespassing on the land or building or to remove him or her therefrom, if he or she does not strike or do bodily harm to that person.
\end{quote}

There is very little New Zealand case authority on s 56 or indeed on any of the defence of property provisions in the Crimes Act. One of the most cited cases in New Zealand has been the leading Canadian decision of \textit{re Born with a Tooth}.\textsuperscript{157} The Supreme Court’s decision in \textit{Taueki} was therefore anticipated as a welcomed addition to the jurisprudence.

The appellant, Mr Taueki, was a member of Muaupoko iwi (tribe) whose traditional area in New Zealand includes Lake Horowhenua and its surrounding land. Lake Horowhenua has been described as “the lake of shame” and is regarded by many as an environmental disgrace.\textsuperscript{158} Sewage, weed pollution, and runoff from dairy farms and market gardens have been attributed as causative to the contaminated state of the water. The National Institute of Water and Atmospheric Research (NIWA) has reported the water quality of Lake Horowhenua to be very poor and the Ministry of the Environment has rated the lake’s water quality as 107th out of New Zealand’s 114

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\textsuperscript{154} A Ministerial Advisory group had been set up to advise the Attorney-General on the establishment of the New Zealand Supreme Court.
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\textsuperscript{155} Supreme Court Bill 2003 (16-2) (select committee report) at 31.
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\textsuperscript{156} \textit{Taueki v R} [2013] NZSC 146, [2014] 1 NZLR 235.
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\textsuperscript{157} \textit{R v Born with a Tooth} (1992) 76 CCC (3d) 169.
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\textsuperscript{158} Karl du Fresne, Lake of Shame; New Zealand Listener, 2 March 2014.
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It was against this background that Mr Taueki was permitted to install himself as kaitiaki of the lake, occupying premises on the lakeside.

The lake bed and its surrounding area are Maori freehold property, held by trustees for the beneficial owners – Mr Taueki’s iwi. Although ownership of the lake area is vested in iwi, it has also been declared a statutory public reserve, and as such is controlled by an administering body which must include members appointed on the recommendation of iwi. The statutory administering board has power to make bylaws for various statutory purposes including the management, safety and preservation of the public reserve. As well as being a beneficial owner as a member of Muaupoko, Mr Taueki, with the agreement of the trustees, lived on a property near the lake and undertook a caretaking role. In this way, he could ensure that the interests of the Maori owners of the lake were observed and that bylaws to the public reserve were being complied with. One such bylaw provided that boats using the lake had to be first washed down so as not to cause contamination, such as through the introduction of lake weed from another site. The Horowhenua Sailing Club had used the lake for many decades and it is fair to say that Mr Taueki had ongoing concerns about the Club’s use of the lake including the use of prohibited speed boats and unwashed craft. This set the scene for the assault with which Mr Taueki would be charged.

On the day in question, members of the sailing club had arrived at the lake. They were observed by Mr Taueki who became concerned about potential breaches of bylaws. In frustration, he confronted the complainant, a member of the sailing club, taking him by the shoulders and trying to remove him from the lake area. As a result of these actions, Mr Taueki was charged with a minor assault. When the matter came to trial, the judge considered that the defendant had been genuinely motivated by concern for the lake and for the rights of its Maori owners. Mr Taueki conceded that he had intentionally applied force to the complainant but defended his actions on the basis of the s 56 defence. His argument was that he was in peaceable possession of the land and that he was justified in using reasonable force to remove the complainant who was, he believed, breaching the bylaws. It was this issue that reached New Zealand’s highest court.

Of course, Mr Taueki saw the case from a Maori world view: the lake and surrounding area were taonga protected by the Treaty of Waitangi and he, as tangata whenua (a person of the land), could take action against any trespasser. In Re Te Whata, Judge Ambler explained the Maori attitude to property in this way:

[39] Māori land [is identified] as a “taonga tuku iho”, an inheritance. That is not only a statement of aspiration but invariably a statement of fact. It points to three important characteristics of Māori land. First, Māori land is not seen as a commodity but a cultural heritage. Second, Māori land is expected to be passed from generation to generation; the current generation is merely a custodian for the next. Third, Māori land is almost always received by the current generation without payment.”

In the Supreme Court, this dicta of Judge Ambler was cited in argument by Mr Taueki’s counsel, Mr McCoy, along with various references to the Treaty of Waitangi. Mr McCoy submitted that, as a beneficial owner, the appellant had the right to possession of the land and that this was significant as: “… consistent with the aspirations of Maori and indeed attuned to the promise of the Treaty of Waitangi. It would give affirmative and reconciling meaning to the promise of the

159 Karl du Fresne, Lake of Shame; New Zealand Listener, 2 March 2014.
160 The current legislation is the Reserves Act 1977.
161 Re Te Whata 125 Whangarei MB 294 A20070003363, 8 July 2008, at [39].
Treaty of Waitangi. And unless Maori is able to defend its own land then the value of ownership has been reduced to an absurdity.”

He also asserted the relevance of the principles of the Treaty of Waitangi via the Conservation Act 1987 on the basis that the Director of Conservation represented the statutory management board of the lake area in its capacity as a public reserve. Section 4 of the Conservation Act requires that the Act “be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. Mr McCoy also cited the Court of Appeal’s dicta in Valuer-General v Mangatu Inc where Richardson P, delivering the judgment of the Court, and referring to Te Ture Whenua Maori Act 1993 stated: “Drawing on the Treaty of Waitangi and the special significance of land to Maori people, the 1993 Act reflects as the primary objective to be applied throughout the legislation and by the Maori Land Court the retention of Maori land by Maori and the use, development and control of Maori land by Maori.”

Ultimately, the Supreme Court in Taukei held that the appellant could not avail himself of the defence as he was not in possession of the land where the assault took place. The Court found that while the appellant and all the other Maori beneficial owners had unrestricted access, this did not amount to possession particularly given the public reserve status of the land. The sailing club and the complainant were held to be actively using the area and Mr Taukei did not have actual control of the land. The Court re-interpreted the concept of peaceable possession by applying a more expansive definition than the meaning that had been applied in the earlier New Zealand case law which had followed R v Born with a Tooth. The Court in Taukei also referred to other Canadian authority and various Australian cases where defences of property based on peaceable possession had been in issue. It concluded that these overseas authorities had resulted in the understanding that “peaceable possession” had to be “possession that previously has not been seriously questioned, such as by demonstrated opposition or legal attempts to recover exclusive possession, at the time of the exercise of the defensive force”. But the Court analysed this “not seriously challenged” meaning as both too narrow and not fitting with the statutory context of the Crimes Act. The Court encapsulated its wider interpretation of peaceable possession in this way: “[i]t is simply possession that has been achieved other than in the context of an immediate or ongoing dispute. In brief, it is possession obtained and maintained before the employment of the physical force the use of which the person seeks to justify.” But the utility of the Supreme Court’s expanded interpretation did not assist Mr Taukei and will, instead, lie with future cases.

While Taukei contains careful analysis in terms of the application of orthodox principles of the criminal law and the law of property, the great disappointment of the Supreme Court decision is that there is absolutely no analysis of the Treaty of Waitangi issues raised by counsel for the appellant. Indeed there is no mention at all of the Treaty arguments raised. The Court ought to have addressed these arguments for a number of reasons. The Treaty has great significance for Maori and represents not only a partnership between them and the Crown but also a sacred compact with promises made by Queen Victoria to the indigenous tribes of New Zealand. A court established with a stated purpose of resolving Treaty of Waitangi issues must deal with such arguments made, even if to dismiss their applicability.

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162 Taukei v R [2013] NZSC Trans 5 at 44.
163 At 60.
165 R v Born with a Tooth (1992) 76 CCC (3d) 169.
Despite New Zealand’s unique historical background and the acknowledged significance of the Treaty of Waitangi, New Zealand’s highest court failed to engage with any aspects of the Treaty that were raised and the authorities cited in support. It failed to put Maori land issues in the legal context. Even if peripheral, if raised they are deserving of consideration given the status of the Treaty and the ethical and legal commitments to it.

The courts have an obligation to engage with the history of the nation and to decide cases with reference to the cultural assessments and values of its peoples. Failure to do so undermines the administration of justice and the rule of law - not having one’s voice heard denies one’s access to justice.

Postscript: In 2014 the New Zealand Government announced its investment in a project specifically targeted at the restoration of Lake Horowhenua.168

### The Juvenile Justice System in Poland

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The Act on Juvenile Delinquency Proceedings in force since 13th May 1983 is the primary legal framework for juvenile justice in Poland. The Act provides for a special approach towards the treatment of juvenile delinquency. The juvenile justice system in Poland is an example of a paternalistic and welfare approach to juvenile justice. Special measures of exclusively educational and care character are possible for younger juveniles. Indeterminate measures are child welfare oriented without any justice considerations. This includes the correctional center imposed in cases of most serious misbehavior. Waiver of juvenile jurisdiction is never automatic and happens very seldom. Jurisdiction over all juvenile cases have special courts, and juvenile judges enjoy broad discretionary powers. The juvenile cases procedure constitutes a mix of criminal and civil procedure. One of the most hotly debated issues constitutes lack of sufficient procedural safeguards enjoyed by adult offenders. Despite this, recent amendments retain basic features of the system, although they also attempt to regulate better procedural guarantees of juveniles.

**Keywords:** juvenile jurisdiction, juvenile responsibility, juvenile measures

**Introduction.**

According to current statistics, Poland’s population as of 30 October 2014 numbered 38,483,957. The number of population, who had not attained the age of 18, amounted to 69664.51. Both the number and share of children in the general population is decreasing continuously since the mid-80s of the last century - then they accounted for over a quarter of the population; and at the beginning of this century, it has less than 20%.169. Is is observed from year to year an increasing number of offences committed by juveniles, and negative changes to the structure of the crimes committed. This article focuses on basic legal provisions concerning juveniles in the context of recent legislative changes.

As far as juveniles are concerned Poland has been generally far in advance with a long tradition of legal guarantees and separate proceedings for children and youth. After having

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regained independence in 1918 while work on a new penal code was stressed that children who had broken the law should not receive the same penalties as adult offenders. The Penal Code of 1932 contained a separate chapter on juveniles which introduced a separate system of juvenile justice.\(^\text{170}\)

According to s. 69 (1) of the 1932 Penal Code a juvenile was a person who had committed an offence before having reached 17 years of age. Juveniles who had committed an offence prior her or his 13\(^{\text{th}}\) birthday could not be accountable for their illegal actions. In fact, only educational measures might be imposed on them that ranged from a reprimand through the supervision of parents, guardians or probation officer to placement in an educational institution. The same measures were imposed on juveniles who had committed an offence after the 13th birthday, but prior to the 17th, provided that they were not competent to understand the nature of the act and direct their behaviour. Under s. 70 of the 1932 Penal Code, juveniles aged 13 to 17 who had committed an offence while having been able to understand the nature of the act and direct their behaviour should be sentenced to the placement in a house of correction. It was possible, however, to impose educational measures on such juveniles as well, if the court found placing them in a house of correction useless on a basis of the circumstances of the offence, the juveniles character or conditions of his or her life and environment.\(^\text{171}\)

At the beginning of the last century there was a shift towards a discretionary welfare-oriented model of juvenile justice. Juveniles placed in a house of correction under the Penal Code of 1932 could be institutionalized until the age of twenty-one. However, they might be granted conditional release earlier. The nature of the placement of a juvenile in a house of correction under the Penal Code of 1932 was a matter of a great controversy. According to some lawyers placing a juvenile in a house of correction constituted a special educational-preventive measure, different from other educational measures provided by the Code. In the opinion of others, placing a juvenile in a house of correction for an indeterminate term was a specific penalty or quasi-penalty that combined some retributive elements and a predominant rehabilitative goal.\(^\text{172}\)

After Poland having regained independence, separate juvenile courts were set up in some of the biggest cities. The Code of Penal Procedure enacted in 1928 introduced also separate proceedings in juvenile cases. In fact, however, there were only a few juvenile courts in Poland before World War II. It was only in the 1960s that the number of separate juvenile courts started to grow significantly.\(^\text{173}\)

The Penal Code as well as the Code of Penal Procedure of 1969 did not contain any provisions on juveniles with one exception; the 1969 Penal Code introduced the possibility to transfer a juvenile aged 16 who had committed a very serious offences to an adult court. Generally, however, the provisions of the 1932 Penal Code and the 1928 Code of Penal Procedure concerning juveniles were still valid after the Codes of 1969 had come into force.

**The Juvenile Act of 1982.**

The 1982 Act on Juvenile Delinquency Proceedings broke the still existing links between provisions concering criminal law and provisions concering juveniles. The Act came into force on

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\(^{171}\) Ibidem, p. 351-352.


13th May 1983 and it determines the primary legal framework for juvenile justice in Poland\textsuperscript{174}. The main principle of this act and the guideline for any intervention made under this law is the Welfare of the Juvenile. Strong educational and social rehabilitation elements of the Act are evident from its provisions concerning the notion of a juvenile, measures applied to juveniles and the central role of family judges and family courts in all stages of the proceedings in juvenile cases.

In the Preamble of the Act on proceedings in juveniles cases, emphasis is laid on: the desire to prevent demoralization and juvenile delinquency and creating conditions for the return to normal life to juveniles who have fallen in conflict with the law or the principles of conduct in the community, and the desire to strengthening the functions of care and education and the responsibility of families for the unbringing of juveniles.

The Act provides two reasons for intervention. The first means that the juvenile committed a criminal act (as defined in penal law provisions), the other one means that the juvenile show symptoms of demoralisation. Although, in practice, most cases of demoralization among its symptoms have the criminal act committed by a juvenile it is necessarily needed in order to start intervention. Indeed, The Juvenile Act which contains some procedural as well as substantive provisions, concerns all children under 18 who show symptoms of demoralization. The Act does not define the notion of demoralization and in s. 4 gives examples of symptoms of what is called „demoralization“, namely, committing criminal deeds, truancy, use of alcohol or drugs, prostitution, taking part in criminal groups, running away from home etc.

This uniform treatment of juvenile offenders and juvenile offences exhibiting this or other signs of demoralization on the basis of the same act makes the Polish system of dealing with juveniles is classified as single-track systems. Two-track systems separately regulate the procedure of minors violating criminal law standards, and separately with minors exhibiting other symptoms demoralizing. It should be noted that in the modern world system of measures for these two categories of juveniles is similar - in fact, educational, not punitive\textsuperscript{175}.

The notion of juvenile.

The Act does not contain the typical notion of a juvenile. The notion of a juvenile is diverse both in terms of age of persons covered by the program, as well as the reasons for using against them such determination. Under the legal provisions of Juvenile Act of 1982 there are three different scopes of the notion of juvenile.

First group of juveniles are children under 18 who show symptoms of the described above demoralization. In such cases the family court deals under civil law proceedings adapted to the juvenile matters by the Juvenile Act. It should be noted, that there is no minimum age limit for juveniles displaying signs of demoralisation. The practice shows that the courts do not start and intervention on the basis of the Juvenile Act in cases of children who are 9 or 10 years old. The intervention in cases of very young children is based on article 109 of Family Code and its justification is the failure of legal guardians (in most cases parents) to secure the proper care for children.

The juvenile under the legal provisions of Juvenile Act of 1982 is also a child between 13 and 17 who committed a criminal deed. A criminal deed is an offence of Penal Code and some selected provisions of the code of administrative petty offences mentioned in the Juvenile Act. The

\textsuperscript{174} Dz. U. 2014, no. 382.

family court deals either under civil law proceedings or under the criminal proceedings adapted by the Juvenile Act if after the preliminary stage the court considers the use of correctional measures. In the criminal proceedings juvenile has been granted the right to defence (to examine witnesses, to be present at the court room) and to the legal adviser and other typical guarantees of penal procedure (the right to keep silence, for instance). The rule is that only educational, medical and corrective measures may be imposed on juveniles. All educational and medical measures may be applied both to juveniles who have committed punishable act (criminal deeds or administrative petty offences) whilst between 13 and 17 years of age and to juveniles less than 18 years of age displaying serious problem behavior. As far as corrective measures are concerned, they may be imposed only on juveniles who have committed offences between the age of 13 and 17 years provided that a high degree of the perpetrator’s demoralization and the circumstances and the nature of the act warrant that, and especially when educational measures have proved or are not likely to lead to rehabilitation of the offender. Corrective measures in the meaning of the 1982 Act are the suspended and immediate placement of a juvenile in a house of correction. Similarly to the 1932 Penal Code, the placement in a house of correction under the 1982 Act is imposed on juveniles for an indeterminate term; they could be institutionalized until the age of twentyone.

The general rule of non liability of juveniles knows exceptions. The first relates to juvenile who after attaining the age of 15 committed a serious, enumerated in the penal code as murder or aggravated rape etc. may be liable under the provisions specified in the Polish Penal Code, under certain conditions – if the circumstances of the case and the mental state of development of the perpetrator, his characteristics and personal situation warrant it, and especially when previously applied educational or corrective measures, have proved ineffective. The second exception concerns the situation in which the correctional or educational measures ordered by the family court were not executed till the juvenile reached 18 and the personality of juvenile suggests that they would fail. The recent amendments to the Act has removed the third exception which allowed punishable juvenile under 17 who committed a criminal deed but at the time of conviction is over 18 and taking into account his or her personality the use of educational or correctional measures would not work. This provision was modeled on s. 76 of the Criminal Code of 1932 and as rightly pointed out by V. Konarska - Wrzosek was a relic repressive approach to juvenile perpetrators of criminal acts. Resignation from the norm s. 13 of the Juvenile Act of 1982 will make the final break with the special status of a correction measure and its binding to criminal punishment.

In all exceptional situations only diminished penalties may be applied. In some western publications it is often stated that in Poland the criminal liability starts with 13, which is a simplification. For the juveniles of this age no penalty can be applied, only educational and correctional measures which neither in doctrine nor in practice should be confused with any kind of penalty, although the genesis of correctional institutions is comparable to borstal schools and other institutions considered in other systems as a kind of special punishment for juveniles. The family court in case of juvenile delinquency should establish the true nature of the act, but when deciding about the educational and correctional measures is concerned with the personality and social situation of the juvenile and the deed itself is not more than the very symptom of maladjustment. Its importance is judged mostly on the basis of psychological and educational

\[176\] V. Konarska – Wrzosek, The legal system dealing with juveniles in Poland, Warsaw 2013, p. 291. This author has rightly pointed out that pursuant to art. 13 u.p.n. for each and every type of crime until there is a limitation of criminality, issued annually approx. 900-1200 criminal convictions, see. Adults validly sentenced for crimes committed under the age of 17 years by age, tabl. II.13, p. 50 Statistical analysis of records of cases and case law in cases involving minors for years 1999-2009, Department of Statistics DO-II-0350-003/2010.
diagnosis of the juvenile and there is no fixed measure which is foreseen for any type of criminal deed.

The third category are juveniles under 21 both treated because of showing the symptoms of demoralisation and those who committed criminal deeds to whom the educational or correctional measures of the Juvenile Act are applied. The educational and correctional measures provided by the Juvenile Act may be applied as a rule for the indeterminate period of time but no longer than till the juvenile reaches the age of 21. It is a deadline even for the perpetrators of the most brutal and atrocious deeds.

**The educational and medical measures. Houses of correction.**

The Juvenile Act of 1982 provides for a wide range of educational measures. The educational measures which are at the disposal of the family court are warning, obligation of the juvenile to specific conduct. The juvenile should be made to restore the damage, apologise to the injured person, start to study or to work, avoid specific places, refrain from the use of alcohol or drugs, do unpaid job for the benefit of the victim or local community. The court may also establish the parents’ or guardian’s responsible supervision, a youth or other social organization, a workplace, a trustworthy person or a probation officer. The court may also direct the juvenile to the probation officer’s centre for juveniles, forbid to drive mechanical vehicles, decide about the loss of things gained due to the criminal deed, decide about the placement in an institution providing professional training for juveniles, in a foster family, rehabilitative centre or in another institution providing care and education. The court may also at every stage of the proceedings agree to divert the case to the mediation and the mediator after reaching an agreement between the juvenile and the victim sends the case to the court to accept the agreement and stop the proceedings. The court may also use correctional measures if a juvenile is between 13 and 17 and committed a criminal act (an offence) and shows a high level of demoralisation (maladjustment) and the circumstances and character of the act are serious especially when the earlier used educational measures did not work out. The correctional measures are: suspension of the stay at the correctional institution (in that situation the court decides about applying one of the educational measures during the probation period), or the placement at the correctional institution. The court may also oblige parents of juveniles to certain behaviour and may punish them with fines if they do not obey family court’s orders.

The medical measures may be applied to juveniles suffering from mental deficiency, mental disease, some kind of mental disorder or from alcohol and drug addiction. These measures consist in placing juveniles in a psychiatric hospital or other suitable health care institution. According to s. 12 of the 1982 Act, if there is a need to ensure only care and protection, the juvenile may be placed in a social welfare institution or in a suitable educational center. In practice, however, the possibility to place a juvenile in a health care or social welfare institution is used only in very exceptional cases.

Educational and medical measures are applied to juveniles for an indeterminate period of time. As a rule these measures terminates on the 18th birthday of a juvenile and in some rare cases cannot be applied longer than till the age of 21. Correctional measures are till now under the auspices of the Ministry of Justice but since 1948 have been completely separated from the penitentiary system in terms of organisation, training of staff, the whole ideology and the principles applied.

Last, the family court may also oblige parents of juveniles to certain behaviour and may punish them with fines if they do not obey family court’s orders.

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of some of them on his/her 21st birthday (s. 73 of the 1982 Act). The family court that execute the measures, may revise or repeal them at any time if that is advisable on educational grounds.

All educational and medical measures may also be applied to juveniles who have committed offences whilst aged 13 to 17. Additionally, in such cases corrective measures may be used, such as placing them in a house of correction for an indeterminate period. However, in terms of s. 73(1) of the Juveniles Act, a juvenile placed in a house of correction cannot stay there not longer than up to 21 years of age, although he may be granted conditional release earlier. Section 3 of the Act states that placement of a juvenile in a house of correction may be conditionally suspended if the personal and environmental circumstances and the nature of the act give grounds for supposing that, despite the waiving of custodial treatment, educative aims will be achieved. Conditional suspension of placing a juvenile in a house of correction may be applied for a period of probation of from one to three years; while the court imposes educational measures during the period of probation.

Houses of correction are administered by the Ministry of Justice. The Minister of Justice Ordinance of 2000 provides for separate houses of correction for juveniles with mental disorders and personality disorders, for alcohol and drug addicted juveniles, and for those that are HIV-positive. Juveniles without such problems are referred to common houses of correction, which are divided into open, semi-open and closed establishments.

**Recent amendments to the Juvenile Act of 1982.**

The need for a thorough reform of the procedure in cases involving minors were written in the doctrine for many years. Indeed applicable from 13 May 1983 in Poland, the law on juvenile justice aroused various qualifications and in practical terms its use caused a number of doubts and uncertainties. This was especially true for rules on the conduct of the proceedings and the guarantees of the rights of juveniles.

Despite repeated over the years interference by the legislature by statute contained deficiencies requiring correction, and the doctrine of reported numerous proposals de lege ferenda. Ongoing since 2003, working on a detailed and comprehensive amendment resulted in up to four draft laws, including the draft Code minors in 2005, two projects in 2007 - Code of juvenile delinquency and juvenile law and the draft amendment to the Juvenile Act of 1982 in 2010. The last one was considered optimal and therefore sent him to the legislative work. Finally, the amendment was adopted by Parliament on 30th August 2013 and had come into force on January the 2nd 2014. With pragmatic reasons not taken into account in this regard demands of the new law regulating both substantive standards and procedural related to the liability of minors in Poland. According to the explanatory memorandum accompanying this amendment, its aim is to introduce necessary changes to the Juvenile Act in order to adjust legal provisions to judgments of both the Constitutional Tribunal and the European Court of Human Rights as well as to international standards concerning procedural safeguards in proceedings in juvenile cases.

In the case of *Adamkiewicz v. Poland* the European Court of Human Rights found among others the violation of Article 6 section 1 of the European Human Rights Convention in situation in which the same family judge conducted the evidence-gathering procedure during the preparatory stage of the proceeding, at the end of that stage decided to commit the applicant for trial and then had ruled in the same case as president of the trial bench. As a matter of fact, this

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179 ECtHR 2 March 2010, Adamkiewicz v. Poland, no. 54729/00.
judgment of the European Court of Human Rights challenged fundamental assumptions of the Polish protective and paternalistic juvenile justice system, based on the dominant role of the family judge during the whole course of proceedings in juvenile cases.

In order to implement this judgment the legislator abandoned the division of juvenile proceedings into explanatory (preparatory) and court proceedings. Under the amended Juvenile Act there is a unified court proceeding in juvenile cases which does not distinguish the preparatory stage. As a rule, the proceeding is regulated by the Code of Civil Procedure, but there are many exceptions when provisions of the Code of Criminal Procedure shall apply, for example: in matters related to the collection and preservation of evidence by the police as well as the appointment and functions of a defence lawyer.

The Tribunal also stated that there was a violation of article 6 § 3 (c) in connection with 6 § 1 of the Convention and stressed that in instances of repressive proceedings, when the suspect is under age, the state is obliged to guarantee that they have access to a lawyer. The Tribunal also pointed to the fact that in such cases the state should follow the principle of protection of minor's interests. Another premise is the principle of individualization, which requires adjusting the proceedings to the age, health conditions and stage of intellectual and psychological development.

In this regard, the legal status of a juvenile has been improved by stating clearly that he/she has a right to be silent during questioning by the family court as well as by broadening the access to a defence lawyer for those juveniles whose parents are not able to appoint one paid by them. From the other hand, the dominant role of the family judge remains. It is still possible that the same family judge at first gathers and preserves evidence of a ‘punishable act’ (an act defined as an offence or a selected contravention when committed by an adult) and then, on a basis of evidence gathered by himself/herself, adjudicates the case. This solution makes the court's impartiality may be still questioned.

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**Counter Terrorist Measures and Legislation in the UK; “control order”**

**Reaching to the Destiny or Punishing Innocents?**

*Mohammed Shahjalalal*

This research will be specifically focusing on implemented UK legislation for eliminating terrorism. There is no need to mention exclusively again that it began many years ago but after the 9/11 and London bombing, it raised mostly. The most controversial issue would be the “*control order*” measure. Here, in this research it will mostly, be focused on whether this so called “effective measures” against preventing terrorism really working or just making it going back to Barbarian times by opting out some core human rights and simply penalizing the innocents. It will also be scrutinized that, whether major legislations on terrorism like “prevention of terrorism act 2005”, also “counter-terrorism act 2008” and many more relevant provisions are compatible with ECHR or not. Finally there will be some exploring of what the experts opinion regarding this worldwide.
The Momtchil DObrev’ “Theory of corruption” and “Theory of the mafia” and its manifestations in Europa and in Bulgaria in examples

Momtchil Dobrev¹; Mariola Garibova²

1. Prof. PhD in law PhD in economic, 2. Prof PhD in law

The developed by Lord Prof. PhD P|HD Momtchil Dobrev “Theory of corruption” and “Theory of the mafia” and its appearances – unsta|ility factor in the social systems. In the paper is described the developed from Prof. the author Theory of corruption with all its elements and parameters. In the paper is described the company security under the point of view of the appearances of the Theory of corruption.

**Key words:** Theory of Corruption, Theory of the Mafia, Society.

**Ukungena unions: An urgent need for law reform**

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Ukungena union is a custom practiced by both Nguni and Sesotho speaking groups according to which a widow cohabitate with the brother or any male relative of the deceased husband. According to this custom, death of one of the spouses in a customary marriage does not dissolve the marriage because marriage is between to family groups. Ukungena union is still recognized in South Africa and is not statutorily regulated. This poses some problems, firstly, CEDAW has grouped ukungena as one of the harmful traditional practices and recommended for its abolition because it promotes the inferiority and discrimination against women. South Africa is a signatory to CEDAW and if CEDAW’s recommendation is taken seriously by South Africa, ukungena union would be against the right to equality. Secondly, ukungena union is one of the reasons that led Africans to practice polygyny. Some people refer to ukungena as wife or widow inheritance. If a male person is already married and then practice the custom of ukungena, automatically that person would be a polygamist in reality. This is so despite the fact that ukungena union is not treated as marriage in the true sense of the word. This is exacerbated by the fact that the rights of the first wife are not taken into consideration as it normally happen on the regulation of polygyny. In view of the latter problems posed by the continuation of ukungena union in its current legal position, the writer attempts to argue for an urgent need for law reform that would align the custom with the Constitution.

**Key words:** Ukungena unions, freedom of expression, economic exploitation & HIV/AIDS

**Introduction**

Ukungena union is a custom practiced by both Nguni and Sesotho speaking groups according to which a widow cohabitate with the brother, half-brother or any male relative of the deceased (Olivier 1995; Gwarinda 2009). This custom is referred to as ukungena in Zulu, as kenela in Sotho and as levirate union or wife inheritance in English. It is usually practiced when the husband died without leaving a male heir that would inherit his estate or to increase the nominal offspring of the deceased (Natal Code 1987; Kwazulu Act 1985).
Despite the definition of *ukungena* unions in terms of the Natal Codes, the latter codes prohibited the practice of *ukungena* unions by stipulating that a customary marriage is dissolved by the death of one of the spouses in a marriage. This is in sharp contrast with the position in customary law because in customary law a marriage is between two family groups and therefore customary marriage is not automatically dissolved by death of one of the spouses (Koyana 1980; Rautenbach 2010). This is reaffirmed by the recent legislation regulating customary marriages in South Africa, that is, the Recognition of Customary Marriages Act (hereinafter referred to as Recognition Act). Section 8 of the Recognition Act does not include death of one of the spouses in a customary marriage as a ground for the dissolution of a marriage. The reading and interpretation of section 8 of the Recognition Act leads to an inference that it permits the continuation of *ukungena* unions in South Africa. In addition to this, recent enquiries about *ukungena* unions in South Africa proved that these unions still persist (Bekker & Koyana 2012).

This poses some problems, namely:
Firstly, the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) has grouped *ukungena* unions as one of the harmful traditional practices that promote inferiority and discrimination against women. As a result of this, CEDAW made a recommendation in its concluding observations that *ukungena* unions ought to be discouraged and abolished. South Africa is a signatory of CEDAW and if the latter recommendation is taken seriously by South Africa, *ukungena* unions would be against the right of women to equality as entrenched in section 9 of the Constitution.

Secondly, *ukungena* union is one of the reasons that drove Africans to practice the custom of polygyny (Maillu 1988). Some people refer to *ukungena* union as wife or widow inheritance. If a male person has a wife already and then practice the custom of *ukungena*, automatically that person would be a polygamist in reality. This is so despite the fact that according to South African customary law, *ukungena* unions are not treated as marriages in the true sense of the word. This is exacerbated by the fact that *ukungena* unions are not regulated in South Africa and the rights of the first wife are not taken into consideration as it normally happen on the regulation of polygyny. According to South African law a male person who wants to marry the second wife or other wives is expected to start by seeking consent from the existing wife or wives.

In view of the latter problems posed by the continuation of *ukungena* unions in their current legal position, the writer attempts to argue for an urgent need for law reform in order to align the custom with the Bill of Rights.

In view of the persisting ethnocentrism, this article will begin by attempting to make a serious and in depth analysis of the historical reasons that led Africans to practice *ukungena* unions. The second part will discuss criticisms levelled against *ukungena* unions and the third part will attempt to make recommendations for law reform.

The following section will discuss the historical reasons for the practice of *ukungena* unions.

**Historical reasons for the continuation of *ukungena* unions**

It is noted that the birth of a child, especially the male child, is of great significance in African society. Childlessness is not merely regarded as unfavorable occurrence but it is regarded as a great misfortune (Maillu 1988). This is so in the context of a society that had no life insurance policies and old age homes to take care of the elderly people. They believed that adults take care of children while they are still powerless and helpless with the hope that during old age children would be fully grown up to take care of their elderly parents.
Owing to the communitarian ethic, customary law attempted to protect those who were disadvantaged by providing social security system. Therefore widows and the aged are protected and provided for (Dlamini 2002). In an African society the integrity of the homestead depended on the preparedness of its owners to take responsibility when crisis arise. In catering for the psychological, physical and well-being of the widow, African society through its morals, tries its maximum best to provide for either replacement or a helper to the widow. If there is a brother of the deceased whom the widow likes and if he is married, arrangements can be made that he will take care of her as an additional wife. This is because Africans regard leaving the widow and her children in the cold as lack of love for the family.

In the traditional society a widow could easily fall prey to unscrupulous men. On the other hand, the custom of ukungena provided the widow with security, companionship, sexual satisfaction and the right to procreate legitimate child (Simons, 1968). These are important considerations if one bears in mind that in traditional society if the widow left after the death of her deceased husband she would forfeit her children, house property and support. Moreover, she would not be in a position to earn a living on her own as there were no employment opportunities for women.

**Criticisms against Ukungena unions**

** Freedoms of expression**

The widow is not forced to enter into an Ukungena union with one of her deceased husband’s brothers. This shows that she has a freedom of choice, that is, the choice to avoid remarriage or to re-marry after her husband’s death (Nyarwath, 2012; Braadvedt, 1940). However, the fact that the death of one of the spouses in a customary marriage does not dissolve the marriage and that the dissolution of a customary marriage will be complete when the woman is returned to her family group and when ilobolo is refunded back to her husband’s family, might cause pressure to the widow and affect her private independence when choosing to re-marry or not to do so (Werner, 1928). Therefore if remarriage of the widow would lead to the return of lobolo from the widow’s family to the deceased husband’s family, so it would mean that the widow’s apparent freedom of choice would be an iron hand in a velvet glove. It is submitted that lobolo should not be returnable should the widow re-marry. This is because in some cultural groups such as Zulus, the bride has to buy marriage gifts and furniture for her parents in law. In doing so, she utilizes money that was obtained through lobolo (Rautenbach, 2010).

**Economic exploitation**

It appears that in our contemporary society that is highly influenced by capitalism and greed, wife inheritance becomes more attractive when there is property involved. No one is interested in the inheritance of a poor woman (Nyarwath, 2012). It may be argued that some people in our modern society may not be aware of the religious and moral principles on which the custom of ukungena was based on. This ignorance may lead to serious abuses of the custom of ukungena to the detriment of widows (Nyarwath, 2012). Traditionally, the custom of ukungena is not necessarily aimed at economic exploitation of the widow. However, it is aimed at the protection and security of the childless widow. In addition to this, ukungena is based on the spirit of brotherly affection and involves an act of pity whereby a man might forego inheritance to provide an heir for his deceased brother (Dlamini, 1984).

**Spread of HIV/AIDS**
The practice of the custom of *ukungena* has a strong possibility to enhance the spread of HIV/AIDS among those who continue to practice it. The whole family is at risk if the inherited wife is HIV positive and the infected wife might not be aware of her HIV positive status when marrying the brother of her deceased husband (Mswela, 2009).

**Recommendations for law reform**

As argued before, CEDAW recommended that ukungena or wife inheritance promotes the inferiority and discrimination against women. It is a reality that the custom of ukungena belongs to the patriarchal, patrilineal family system which is on the decline. This raises a question whether ukungena union constitutes discrimination against women in the true sense or not. This can be answered by referring to the equality jurisprudence of the Constitutional Court of South Africa. The court held that discrimination in South Africa means ‘treating people differently in a way which impairs their fundamental dignity as human beings’ (Prinsloo v Van der Linde, 1997 & Ferreira v Levin, 1996). Inner worth and autonomy are core components of human dignity and autonomy can be equated to freedom of choice (Bhana and Pieterse, 2005). A widow who ends up entering into an ukungena union with one of her deceased husband’s brothers is not forced to do so. Therefore it is hard to believe that a woman who decided freely to be involved in an ukungena union after taking all factors into account could be regarded as being discriminated against unfairly and it is unlikely for South Africa to follow CEDAW’s recommendations on the issue of wife inheritance. It submitted that ukungena custom is gradually losing popularity and is bound to disappear in the long run and it would be better to allow it to die a natural death.

As argued before, ukungena unions continue to be recognized in South Africa but without any form of statutory recognition. This creates some problems because a woman entering into an ukungena union does so out of her own free will and volition while the wife of a male who intends to practice ukungena is not given the same opportunity. Traditionally, if a male person is married in terms of customary law and decides to enter into an ukungena relationship with the widow of his deceased brother, widow is expected to consent in order for the relationship to be valid while the consent of the existing wife is not expected. This may infringe the right of an existing wife to human dignity because her consent is not taken into consideration.

**Conclusion**

This paper concludes by arguing that there is no justifiable evidence supporting the recommendations of CEDAW when they concluded that ukungena perpetuates the inferiority and discrimination against women. It is argued that law reform is necessary to give an existing wife a right to agree or disagree with a prospective ukungena union in order for the custom of ukungena to be in line with the Constitution. However, this does not necessarily mean that everything would be perfect about an ukungena relationship because it may perpetuate economic exploitation of women and spread of HIV/AIDS.

In view of the fact that historically the practice ukungena union is aimed at catering for the psychological, physical and well-being of the widow, it is better to develop the custom in order for it to be in line with the Constitution. It is suggested that the abolition of ukungena unions should be left to other forces and die its natural death as changing socio-economic conditions shows that the practice of the custom of ukungena has a strong possibility to enhance the spread of HIV/AIDS among those who continue to practice it.
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Reconsidering a case for community policing as a panacea for Nigeria’s current internal security challenge

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This paper reveals the increasing internal security challenge in Nigeria that are largely attributed to so many inadequacies of the formal police structure; and shows that informal police structure, in the form of vigilante groups, community guards and neighbor watchers, has been a strong tool for overcoming insecurity threats in various communities in Nigeria that it has become imperative to reconsider a case for informal police structure that will aid the Nigerian Police Force in overcoming the problem of insecurity threats in Nigeria. The paper reveals that this position has become imperative not only in view of the increasing rate of crime, inadequate funding, poor training and general incompetence of the formal police structure but also because of the complexity of Nigerian society as a multi ethnic state. The paper concludes that a legal framework for a community policing or informal structure will give recognition to the groups and will harmonize their current half-hazard operations.
Keywords: Internal security, community policing, police structure, vigilante group, crime, neighbourhood guards.

Enforcement of the right to environment protection through public interest litigation

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"A small group of thoughtful people could change the world. Indeed, it’s the only thing that ever has."

-Margaret Meade

This paper aims to discuss the background of right to environment and the different ways for its implementation. It illustrates that Indian citizens constitutional right to a clean, healthy life and the liability of pollution damage on polluters have encouraged community action through Public Interest Litigation (PIL). The right to environment requires States to refrain from activities harmful to the environment, and to adopt and enforce policies promoting conservation and improvement of the quality of the environment. This paper makes a comparative analysis of the development of the concept of PIL in India with respect to various other countries. A comprehensive approach has been adopted to find out the solutions to the various environmental issues. Preliminary research suggests that the existing system of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Problem being that economic growth is seen as the first element in the relationship between development and environment and that the human rights dimension is left aside, although human rights should constitute an essential means and end of development. This research indicates that the enforcement of laws can be enhanced if the governments become more diligent in fulfilling their obligations. The findings and conclusions of this research raise serious issues which need to be discussed, formulated and implemented.

Keywords: environmental issues – conservation -development.

Introduction

Human being has been able to become the master of the universe due to his control over technology and has acted in total disregard of other organisms which inhabit this planet. This arrogance of technological power has led to severe ecological disturbances and destruction and has created dangerous portents for the survival of human beings themselves. In order to tackle this problem it is important that we develop strategies for modifying human behavior towards environmentally benign practices and away from environmentally damaging ones. At the Stockholm Conference on the Human Environment (UNCHE) 1972, the participants proclaimed that:

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights; even the
right to life itself. Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.  

Environmental protection is a pre-condition to the enjoyment of internationally guaranteed human rights, especially the rights to life and health. Those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well. 

In the almost thirty five years since the Stockholm Conference, the links that were established by these first declaratory statements have been reformulated and elaborated in various ways in international legal instruments and the decisions of human rights bodies. The Stockholm Declaration established a foundation for linking human rights, health and environmental protection. 

Preservation, conservation and restoration of the environment are a necessary and integral part of the enjoyment of the rights to health, to food and to life including a decent quality of life. The linkage between environmental and human rights concerns has been seen in terms of the protection or conservation of a clean or healthy environment for the benefit of individuals whose conditions of life are threatened. 

A report from the Office of the High Commissioner on Human Rights emphasizes the key point that:

While the Universal Human Right's Treaties do not refer to a specific right to a safe and healthy environment, the United Nation's Human Right's treaty bodies all recognize the intrinsic link between the environment and the realization of a range of Human Rights, such as the right to life, to health, to food, to water and to housing. 

A matter of grave concern

"We could view the environment- the oceans, the atmosphere- as global common property (public good), and then the problem would be to prevent excessive use or misuse of the global common, which would once again require international cooperation."  

Our society, and our world, have largely emphasised short-term gains, especially in a capitalistic economy in which we emphasise profit and keeping costs to a minimum (and hence not wanting to include the costs of pollution and waste storage) rather than considering long-term costs such as climate change and ozone depletion. In considering the environmental problem, we need to think in long-term ways rather than short-term ways. 

In addition to agreeing on goals, agreements need to be negotiated among nations as to what they want to do and how they want to accomplish their goals. This is not an easy task. Usually the national vested interests collide with international environmental policy. For example, President George W. Bush backed out of the Kyoto Protocol, an agreement among nations to decrease carbon dioxide emissions. So, for international agreements to work, rich and powerful nations will need to be part of these agreements.

182 Id. at 215. 
183 Id. at 217. (The reason being, the United States of America produces 20% of all the carbon dioxide and is the wealthiest and most powerful nation in the world, when it backs out of an agreement, the original agreement can be hurt considerably. Proceeding without the USA has been very difficult, not only because it produces around one-
Comparative Study

The judiciary has contributed to environmental protection in India in two ways. It has introduced procedural innovations to provide much wider access to justice. And it has, by a positive and expansive interpretation of the 'right to life' enshrined in Article 21 of the Constitution, included within its ambit a 'right to a healthy environment'. The right to environment was given judicial recognition in the Dehradun Lime Quarries Case\textsuperscript{184}, where the Supreme Court prohibited the continuance of mining operations terming it to be adversely affecting the environment, and reaffirmed in the Sriram Gas Leak Case.\textsuperscript{185} The ability to invoke the original jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution is a remarkable step in providing protection to the environment. The writ procedure is preferred over the conventional suit because it is speedy, relatively inexpensive and offers direct access to the highest courts of the land.

Hon’ble Supreme Court while taking cognizance on the petitions has further relaxed the requirement of a formal writ to seek redressal before the Court. Any citizen can invoke the jurisdiction of the Court, especially in human rights and environmental matters even by writing a simple postcard.

The basic ideology behind adopting PIL is that access to justice ought not to be denied to the needy for the lack of knowledge or finances. It has been used as a tool for great social change in India and other countries on such diverse issues as the environment, health and land issues. PIL is not in the nature of adversary litigation but a challenge and an opportunity to the government and it's officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice.

United States of America can be said to be the originator of the concept of Public Interest Litigation. In 1876, the first legal aid office was established in New York City in connection with the famous Gideon's case\textsuperscript{186} of USA.

The case of Mayagna (Sumo) AwasTingni Community v. Nicaragua\textsuperscript{187} is of major significance because it is the first time that the Inter-American Court issued a judgment in favour of the rights of indigenous people to their ancestral land. It is a key precedent for defending indigenous rights in Latin America. Further the European Court ruled that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."\textsuperscript{188} The case reveals a successful strategy to claim economic, social and cultural rights through civil and political rights where the regional human rights system does not provide an effective protection of economic, social and cultural rights.

\textsuperscript{185}M.C. Mehta vs. Union of India, 1987 SCR (1) 819.
\textsuperscript{188}Lopez Ostra vs. Spain, 20 EHRR 277, (1994).
"The minors assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."

In the Pascua Lama Case, a project under construction involving investments for more than 5 billion dollars was stopped until certain conditions related to preventing water pollution and other human rights violations are met. It is also significant that the Court of Appeals based its decision on the failure to comply with the Environmental Assessment Resolution and the “threat” posed by such failure to comply on the environment and the health of the population, without seeing the need for verifying the actual existence of pollution. The Court adopted a broader view of the environment and acknowledged the fact that the impact goes beyond a specific community and covers future generations, stating the need to ensure sustainable development.

**Other Landmark Cases in India:**
Justice Krishna Iyer in Mumbai KamgarSabha v. Abdullahai observed: Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker.

In P.V. Kapoor v. Union of India 1992, the Delhi High Court observed that PIL is meant to be a cooperative and collaborative effort of the parties and the court to secure justice for the poor and the weaker sections of the community.

In the Ganges water pollution case, a bench of the Supreme Court, while directing that several tanneries be closed down for discharging untreated effluents into the Ganges river, held that “we are conscious that closure of tanneries may bring unemployment (and) loss of revenue, but life, health and ecology have greater importance to the people.”

**Conclusion**
It is not enough simply to enact laws and regulations. They must also be effectively implemented, administered, and enforced. However, compliance sometimes turns out to be politically, technically, administratively, or financially impossible, even if a government remains committed to the regime. The scientific complexity of environmental issues can challenge the capacity of government bureaucracies to understand the problem or implement proper solutions. A reason for inadequate compliance is insufficient state capacity to implement, administer, or enforce the relevant domestic policies and regulations. Weak legislative and bureaucratic infrastructures or a lack of expertise on the issue can also prevent compliance. Public Interest Litigation by individual enthusiasts and the NGOs has helped to a great extent in protection of the environment. It is a comparatively new concept and every innovation takes time to get into proper shape.

Environmental issues do not wait for the policy process. As the process of regime creation and expansion drags on, environmental problems become worse, not better, making it even more difficult to create and implement effective regimes. One of the most important factors in improving compliance is elevating awareness, concern, and knowledge among government elites and the

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190 M. C. Mehta v. Union of India (Kanpur Tanneries), 1987 (4) SCC 463.
general public regarding environmental issues. There must be sufficient concern within the government, and perhaps among the public at large, so that states decide to devote resources to examining and addressing the problem and implementing potential solutions. Awakening the public towards their right to live in a pollution free environment is more essential. Public awareness alone can achieve desired results. Solution to environmental problems lies in our hands. A feeling of responsibility needs to be generated among the citizens for preserving and creating a liveable environment.

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Every business exists to achieve specific goals of the owners, regulatory authorities, capital providers and other parties. In most of the business, owners usually employ managers to manage it for them. And for the performance of managers to be assessed stewardship reports have to be rendered on regular or periodic basis. Therefore, there is a need for the report to follow required standard in line with the local and international reporting principles, laws and standards for it to be acceptable. Before now in Nigeria, the major rules of reporting business entity is found in the Statement of Accounting Standards (SAS), Company and Allied Matters Act(2004) and guidelines set by organizations and other regulatory authorities. However, since the Federal Government of Nigeria set 2012-2015 as the years for the full implementation of the International Financial Reporting Standards (IFRS) in the country, there have been changes to the existing laws on business reporting in the country. As part of the government efforts towards implementation of IFRS, the defunct Nigerian Accounting Standard Board was disbanded and Financial Reporting Council of Nigeria was established among other reforms to the country business reporting laws. In the light of this, there have been other changes to the law on the contents of annual reports and accounts of companies, the conditions for signing accounts and reports and some other major changes. It is in view of this, that the paper seeks to bring into fore how IFRS implementation has affected law relating to business reporting in the country so as to bring into light the changes IFRS has brought to Nigerian economic sphere.

Key words:- Domestication, IFRS, Financial Reporting Council of Nigeria

Introduction

Nigerian banks and other significant public interest entities (i.e. entities that are required by law to file returns to regulators) in the financial services industry are required to adopt IFRS for accounting years beginning on or after January 1, 2012. Other non-listed entities and public interest entities in the financial services industry were to start adoption of IFRS in 2013. **International Financial Reporting Standards (IFRS)** are designed as a common global language for business affairs so that company accounts are understandable and comparable across international boundaries. They are a consequence of growing international shareholding and trade and are particularly important for companies that have dealings in several countries. They are progressively replacing the many different national accounting standards. The rules to be followed by accountants to maintain books of accounts which is comparable, understandable, reliable and relevant as per the users internal or external. IFRS began as an attempt to harmonize accounting across the European Union but the value of harmonization quickly made the concept attractive around the world. They are sometimes still called by the original name of **International Accounting Standards** (IAS). IAS were issued between 1973 and 2001 by the Board of the International Accounting Standards Committee (IASC). On 1 April 2001, the new International Accounting Standards Board (IASB) took over from the IASC the responsibility for setting
International Accounting Standards. During its first meeting the new Board adopted existing IAS and Standing Interpretations Committee standards (SICs). The IASB has continued to develop standards calling the new standards "International Financial Reporting Standards". Numerous exposure drafts demonstrate that IFRSs will continue to change. Nigerian financial services entities need to think carefully about the implications of the changes as well as changes that occurred after their 2012 and 2013 change over to IFRS. As there are recognition, measurement, and classification of differences between Nigerian SAS and IFRS, adoption of IFRS by Nigerian business and financial services entities have regulatory implications. In fact, changes to implement IFRS affect areas of the business other than financial reporting (e.g., debt covenants and other legal contracts that have something to do with reference to accounting information and metrics). Bonuses and compensation arrangements were also affected, and IT systems modifications were also necessary (KPMG, 2013).

As of 1st January 2012 all listed companies in Nigeria were directed to start adopting IAS/IFRS in order to prepare their financial statements. This decision was issued by the Nigerian government through the Minister of trade and investment dated 28th July, 2008. It was aimed at enhancing the competitiveness of the Nigerian capital markets by a way of establishing a single set of globalised and homogeneous, "investor friendly, oriented" and internationally recognized accounting standards. The decision to adopt IAS/IFRS in a wide and important economic area such as Nigeria cannot be over – emphasized (Ayuba, 2012). The introduction of the IAS/IFRS has however changed some legal framework on financial reporting and related matters in Nigeria. Therefore, this paper seeks to examine the key changes IFRS has brought to financial reporting in Nigeria.

**Literature review**

Internationalization and globalization of business has given reason for harmonized financial statement preparation and presentations. Companies compete globally for limited resources, shareholders, potential investor and creditors as well as multinational enterprises are required to bear the cost of adopting financial statement that are prepared using national standards. It is expected that the move towards IFRS convergence will enhance capital market performance and ginger global business expansion in Nigeria. In the view of this development all corporate organizations are expected to adopt and comply with IFRS in preparation and presentation of their financial statement.

There is wide spread adoption and compliance by other country of the world. In a survey conducted on Spanish stock market, on how to hedge disclosures, today firms face several financial risks in their daily business activities due to global, international trading and transactions. One way to cope with this kind of risk is to use hedging because of its lower cost and good solution to solving risks in business entity. Additionally, a study conducted on reclassifications of financial instruments in Nordic countries on the effect of reclassification amendments on Nordic banks financial statement. Quantitative survey was conducted on these Nordic banks and the results are as follows. 47% of sampled Nordic banks reclassified financial instrument in 2008 and 12% in 2009. All the banks increased their net profit as a result of reclassifying their financial instrument in 2008 and 2009. On the influence of IFRS implementation on business management, the finding of the study shows that there are positive effects from the adoption of the IFRS by Finnish companies. IFRS are seen as a comprehensive information package where the management gets improved financial information easier for their decision making and judgement. In another research conducted mandatory IFRS contributes and improve business environment. The study was a survey report.
He also found out that after mandatory IFRS adoption, the quality of information in accounting and business environment increased significantly more for mandatory adopters. The impact of inclusion of IFRS in schools and colleges curriculum, this will enable the potential accountants to be well trained before joining the accounting and auditing profession (Adejor & Kamardin, 2014). International financial reporting standards were adopted in 2005 in many countries and the world. The IASB issued several news, revised and amended standards and the (IFRIC) issued a number of new interpretations. In Nigeria companies have been complying with standards issued by the NASB for a number of years. These standards represent NG-GAAP ("Nigerian GAAP"). The NASB announced its roadmap to convergence with IFRS in September, 2010. Based on this roadmap Nigerian listed companies & significant Public Interest Entities (PIES) were required to comply with IFRS for periods ending after 1st January, 2012. Other PIES were also required to comply for periods ending after 1st January, 2013, and small and medium sized entities would need to comply for periods ending after 1st January, 2014. Therefore entities will need to understand the similarities and differences between IFRS and NG-GAAP. The development of IFRS is ongoing and it is therefore needed to take into account changes that occur on the reporting standards. This study will be beneficial not only to companies changing over to IFRS, but also to the users of financial statement prepared in this manner (Ayuba, 2012).

**IFRS Journey In Nigeria**

NASB was established in 1982 as a private sector initiative closely associated with the Institute of Chartered Accountants of Nigeria (ICAN). NASB became a government agency in 1992, reporting to the Federal Minister of Commerce. The Nigerian Accounting Standards Board Act of 2003 provided the legal framework under which NASB set accounting standards. Membership includes representatives of government and other interest groups. Both ICAN and the Association of National Accountants of Nigeria (ANAN) nominate two members to the board. The primary functions as defined in the act of 10 July 2003 were to develop, publish and update Statements of Accounting Standards to be followed by companies when they prepare their financial statement, and to promote and enforce compliance with the standards. IASB had published many of the earlier standards prepared by the International Accounting Standards Committee and its successor the International Accounting Standards Board, but was more involved in enforcement than in updating to the more modern International Financial Reporting Standards (IFRS).

A 2010 report commissioned by the International Monetary Fund said that the NASB did not have adequate funding to achieve its statutory role, NASB urgently needed to hire new staff, retrain existing staff and offer more attractive pay. In June 2010 Mr. Godson Nnadi, Executive Secretary of Nigeria Accounting Standards Board, spoke in favor of a new body to set accounting and auditing standards for Nigeria and other African nations. The new body would be independent of both ANAN and ICAN. As well as ensuring consistency between countries, costs to each country would be lower due to sharing of the effort (Wikipedia, 2014).

On 18 May 2011 the Senate passed the Financial Reporting Council of Nigeria Bill, which repealed the Nigerian Accounting Standards Board Act and replaced it with a new set of rules. The decision was in line with a report submitted by Senator Ahmed Makarfi, Chairman of the Senate committee on Finance. The Executive Secretary of NASB, Jim Osayande Obazee, had strongly supported this bill, which he said would align Nigeria with other countries and improve investor confidence. In June 2011 the Governor of the Central Bank of Nigeria, Sanusi Lamido Sanusi spoke at a fundraising dinner organized by the NASB for the IFRS academy. Sanusi said that the move to
adopt the IFRS would help attract foreign direct investments to Nigeria. At the same event, the NASB Chairman, Michael Adebisi Popoola, called for abrogation of regulations and laws that are incompatible with IFRS.

The Financial Reporting Council Bill was signed into law on 20 July 2011. According to Olusegun Aganga, minister of Trade and Investment, "More meaningful and decision enhancing information can now be arrived at from financial statements issued in Nigeria because accounting, actuarial, valuation and auditing standards, used in the preparation of these statements, shall be issued and regulated by this Financial Reporting Council. The FRC is a unified independent regulatory body for accounting, auditing, actuarial, valuation and corporate governance. As such, compliance monitoring in these areas will hence be addressed from the platform of professionalism and legislation" (Wikipedia, 2014).

**Major Legal Reforms brought into the Nigerian Financial Reporting by the adoption of IFRS**

Following the decision of the Federal Government of Nigeria to adopt International Financial Reporting Standards (IFRS), the existing business laws of the country were then affected especially those relating to standards setting on reporting financial records. Before now, the standards governing preparation of account and financial report are formulated, supervised and enforced by Nigerian Accounting Standard Board (NASB) established by NASB ACT.No 22 of 2003. However, following the decision of the federal government of Nigeria to adopt and enforce IFRS on all entities in the country, the new Financial Reporting Council of Nigeria (FRCN) ACT,2011 was enacted to replace the defunct Nigerian Accounting Standard Board and ensure development, implementation and enforcement of standards in the country. The basic changes brought by the new FRCN ACT and their implications on financial reports are stated below:

**Establishment of Financial Reporting Council of Nigeria and its Board Composition**

In order to ensure smooth implementation of IFRS federal government repealed the defunct NASB ACT with FRCN ACT 2011 whose board composition only differs slightly from the defunct NASB Board. In the new FRCN Board, Chartered institute of bankers was removed whereas it was in the NASB council. However, the FRCN ACT in its Section 2 brought in new members from Chartered Institute of Stockbrokers, Federal Ministry of Commerce, Nigerian Institute of Estate Surveyors and Valuers, National Insurance Commission and National Pension Commission in addition to the existing members from Association of National Accountants of Nigeria (ANAN), Institute of Chartered Accountants of Nigeria, office of the Accountant General of the Federation,Office of the Auditor-General of the federation, Central Bank of Nigeria, Chartered Institute of taxation of Nigeria, Corporate Affairs Commission, Federal Inland Revenue Service, Federal Ministry of finance, Nigerian Accounting Teachers Association, Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture, Nigerian Deposit Insurance Commission, Securities and Exchange Commission and Nigerian Stock Exchange. The Board is led by the Chairman, appointed by the President on the recommendation of the Minister, who shall be a professional accountant with considerable experience in accounting practice and the Executive secretary of the Council. All of the members are for a term of four (4)years and may be re-appointed for second and final term.

**New Reforms brought into the Financial Reporting of the Country**

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In line with the Section 30(1) of FRCN Act 2011 which empowers the Council to make and issue such rules or ethical codes of practice to establish its procedures and policies for the purpose of monitoring registered auditors and other professionals rendering services to public interest, the Board has thus made following reforms to accounting reporting in Nigeria:

1. All auditors (new or old) must register with the FRCN and get their registration number which they must quote in any account they audit for their clients. This is in line with section 41 of the Act which provides that (1) “the Council shall maintain a register of professionals,

2. A person shall not hold any appointment or offer any service for remuneration as a professional for public interest entities, unless he is registered under the Act (3) A person who wishes to be registered shall make a written application to the Council in a prescribed form;

3. According to Section 41(6), anyone who contravenes S41 (2) above commits an offence and is liable on conviction, to a fine not exceeding N500,000 or to imprisonment for a term not exceeding 6months or both. Thus, this particular provision has laid to rest the argument of whether anyone can just act as a professional so far he is certified by a professional body. Therefore, even a licensed professional commits an offence if practice as a professional but is not registered by the Council;

4. All signatories to accounts now must belong to a professional body on whose platform they would be able to apply to and register with the FRCN;

5. No person can be a signatory to account of public company except he is registered with the FRCN;

6. Every registration of a professional shall be valid only for 2 years and must be renewed if such a person is interested in continuing practicing the profession S42(1);

7. Now the FRCN guidelines only empower finance officer, managing Director and Chairman of a company to sign audited account and indicate their registration number;

8. According to Section 33(1a) of the Act, every registered professional must pay at least N5,000 annually to the Council;

9. Even according to section 40 (1&2)of the Act, the council shall be exempted from the payment of income tax on any income accruing from investments made by the Council and that the provisions of any enactment relating to the taxation of companies or trust fund shall not apply to the Council;


11. As indicated in S64(1), anyone who fails to comply with the standards or the directives of the Council shall be liable on conviction to a fine of not exceeding N10,000,000

In the light of the above provisions, the Financial Reporting Council of Nigeria (FRCN) Act has made significant improvement to the financial reporting mechanisms in Nigeria through a robust guidelines on compliance and adoption of accounting standards which now make the local reporting standards competitive with the others in the world.
Conclusion

The fact is that the current provisions of the FRCN Act 2011 has brought changes to the old GAAP (Generally Accepted Accounting Practice) which hitherto was unable to cover the diversity of business activities financial reports which often needs elaborate and detail information to really understand the meaning of the reports. As a result of the new laws, more information that will safeguard the resources of entities are now available. As it is now, the FRCN Act has made Nigeria a global market whose manner of financial reporting through adoption of IFRS could be compared favourably with other entities in the world. In line with this, the law has been able to reduce risks associated with hitherto mostly based reports on creative accounting. Therefore, the new laws has made it mandatory for professionals to register with it and be more careful in getting detail information and facts on the accounts they present to the public and are now exercising caution in signing the accounts. However, as a result of poor sensitization of the people by the Council, there is inadequate preparation in the business community in Nigeria, especially the small and medium businesses, towards the deadline (2015) set by the government for full adoption and implementation of the policy. The knowledge and understanding of IFRS adoption is therefore only popular among the professionals in the Publicly quoted companies, academics and the Consulting firms.

Recommendations

Despite the fact the FRCN Act has made some significant changes to the nature and contents of financial reporting in Nigeria, it is yet to adequately cover all essential areas such as comprehensive compliance monitoring. Therefore, the Council should be strict at ensuring professionals comply with the provisions of the Act. Besides, there is need for sincerity of purpose in implementing the contents of the laws so that the essence of adopting IFRS would not be defeated. An online mechanism or platform such as e-mail should be created by FRCN for professionals to send copy of accounts they prepare for the council to examine whether it complies with the standard or not. Similarly, the Council should organize regular seminar for the professionals whenever it decides to launch new standards or implement new policies so as to involve the professionals and seek their input for easy and wider acceptability. The Council should intensify its publicity of the adoption deadline, the advantages of having globally compatible standards to prepare accounts and reports for local businesses and penalty likely to be imposed on companies that fail to comply with the Council directives. The domestication of the IFRS in Nigeria should be made to really make business reporting more competitive by making sure all companies present their accounts and financial reports in accordance with the international financial reporting standards. Besides, the IFRS adoption should be made flexible so as to incorporate the changes as being updated by the International Accounting Standard Board.

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Compliance Mechanisms under Multilateral Environmental Agreements: Signs of Fragmentation or Legal Pluralism?

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This paper aims to analyze whether new institutions, namely, compliance mechanisms (CMs), created under multilateral environmental agreements (MEAs), yield fragmentation or global legal pluralism in transnational law. In this respect, it firstly draws a background information on fragmentation and pluralism discussion in the literature. Then, it applies this discussion to the issue of compliance mechanisms. In this section, it firstly questions whether CMs are characterized under international regimes, produce flexibility and pluralism, or complexity and conflicts stemming from fragmentation. Secondly, it analyzes which insights can be gathered from analyzing the extent of fragmentation across CMs in different MEAs. Thirdly, it examines the advantages and drawbacks of legal and institutional fragmentation with regard to CMs. Finally, on the basis of its analysis, it discusses the options for and limits to the management of fragmentation in terms of CMs, in two dimensions: decreasing the weaknesses of the current system, and to improve it; considering alternatives to CMs, such as creating a World Environment Organization (WEO) or World Environment Court (WEC).

Keywords: compliance mechanisms, fragmentation, legal pluralism.
"International obligation and the protection of Refugee in Bangladesh"

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The concept of refugee is exists since long time in the history but the main problem was the absence of awareness to protect the refugees. An awareness of the responsibility of the international community to provide protection and find solutions for refugees mainly started from the time of League of Nations(1921). General Assembly adopted the 1951 Refugee convention. After that the 1967 protocol of the 1951 Convention also adopted. Bangladesh is a host country of Refugees. According to the UNHCR, till July 2014, there are 232,584 refugees among them 200,000 are Rohingya though Bangladesh claims 300,00 to 500,00. In 2013 and 2014, many Rohingya are refused to ingress in Bangladesh and "push back" them. There are many reasons for that refusal (such as, socio-economic, political problem). Now the question is whether a state (e.g. Bangladesh) can do that. Bangladesh cannot push back the refugees under customary international law though it's not the party to both the 1951 Refugee convention and its 1967 protocol. Bangladesh is party to both the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the convention against torture,1984. Apart from this Bangladesh has obligation to refugees to protect and promote human rights because of the membership of the United Nations. So, Bangladesh can’t "push back" the rohinga refugees.

Keywords- Refugee, Non-refoulement, International Obligation

Corporate Social Responsibility in human rights law perspective: Corporate Social Responsibility as a mean for protection of human rights laws.

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Standards or the Ideals of human rights laws stand hand in hand with conformity of such concepts which is the ultimate objective of endeavor of the civilized nations. Embodying such standards or the ideals regarded as the tool of measurement or values of ranking the nations. Especially the extent of existing visibility of these noble characters or higher standards are necessary key points to bargain, compromise and dealing with members of international community, international business with states, business community or any other party for a road map towards ensuring human rights laws. Within this scenario influential factors such as Corporate Social Responsibility (CSR) has a vital importance, an extensive scope and a viable option that could play a better role for inviolable rights. International recognition deepens based on the commitments for pledges of treaty obligations by states parties especially for respect, promotion and protection of human rights laws. Noticeably, CSR is lesser known factor, has not taken into proper attention and consideration in shaping policies and structural adjustments ensuring human rights laws within existing mechanisms and strategies though it has strong and wider potential to address international ramifications in relation to the violations of international human rights laws in comparison to governmental and non-governmental actors. Therefore, this paper addresses, how CSR could play a better role for the protection of human rights laws.

Key words: Corporate Social Responsibility
Mass Media as Societal Influence on Legal System

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The role of the mass media in the mechanism of legal system represents significant theme of contemporary public discussions. The topic contains not only knowledge of legal theory but also of mass media system and sociology. The paper is based on the hypothesis of admitting mass media impact on the legal sphere. On the theoretical and practical cases it is shown how media with their topics connect necessary elements for creating their factual influence on law as well as society. As provided further, media affect different elements of the legal system: they influence both legislation and judiciary, too. Media cooperate with the regulatory system on everyday basis as they systematically inform about the news from particular country which includes topics also from the legal framework. This means that in cases of media informing about particular case frequently enough, they can influence public opinion which can have great further consequences. These can be both good (keeping public updated, well-informed and educated) and bad (wrongly mediated information can cause unforeseen consequences or damages). The other part of the paper describes the media influence on judiciary and demonstrates why judges are not and even cannot be separated from the society. It is because their work has a tremendous impact on society and media play a key role as intermediary between judiciary and the interest (and understanding) of the public.

Keywords: influence of media, legal system, societal values

Basic human needs of transgender inmates in segregation: an analysis of the eight amendment of the U.S.A.

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Incarceration places people in inadequate conditions. Especially for transgender inmates, these conditions get worse since transgenders face discrimination and humiliation in prison. One of the reasons causing the victimhood of transgenders is placing them in prison according to their perceived genital rather than their self-expressed gender identity. This means that transwomen and trans-men are held in women’s facilities are often held in men’s facilities and transgender prisoners mostly experience maltreating. Therefore the prison officials sometimes put them in segregation on the grounds of ‘security’, ‘protective custody’ or ‘punishment’ as a solution. However the segregation effectively causes transgenders to treat as a problem and prevents them from accessing basic needs, health and sanitary care and to use the facility's opportunities. Therefore in this paper the cruel and unusual punishment shall be defined and whether or not the segregation shall violate the Eighth Amendment of the U.S.A by referring to the Court decisions. Afterwards, how the

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Courts clarify the basic human needs in segregation shall be explained. Consequently, the question of whether the segregation of transgender inmates from the general population is the best and proper solution rather than addressing the underlying issues of transphobia in prison or rethinking existing policies around sex-segregation shall be discussed.

Keywords: human rights, prison, lgbti, incarceration.

Several courts have recognized the vulnerability in prison of people who do not conform to traditional gender norms. Even though the data on the experiences of transgenders in prison and jail is limited, the National Center for Transgender Equality and the National Gay and Lesbian Task Force undertook a study called Injustice at Every Turn to bring the full extent of discrimination against transgenders and gender non-conforming people. This recent data from the report Injustice at Every Turn found that the incarceration of transgenders at higher rates than the general population is clear. As a consequence of incarceration, transgenders might be mistreated and discriminated, the prison officials sometimes put them in segregation on the grounds of ‘security’, ‘protective custody’ or ‘punishment’. Most people assume that transgender inmates are voluntarily placed in segregation due to the dangerousness of general population. However the number of transgender prisoners placing in some form of segregation against their will and seeking assistance to get out of it is significant. A recent study from 2005 of the 44 inmates who committed suicide in the California prison system showed that 70% were housed in solitary confinement. Thusly, the segregation causing the psychological stress on the transgender inmates while violating their access to basic needs, health and sanitary care and to use the facility’s opportunities such as outside activities led the way of this research. In this sense, the basic human needs in segregation of transgenders shall be the subject after the Eighth Amendment and the concept of the cruel and unusual punishment shall be explained.

I. The Eighth Amendment and Segregation

Although placement in segregation where an abusive staff member does not work or a dangerous prisoner does not stay reduces certain forms of violence in some cases, the said placements are worse than general population. The lack of the rights of recreational activities, healthcare/hygienic supplies and diet are included in the main reasons caused worse conditions. These lacks shall be a matter of the Eighth Amendment due to the fact that it apparently refers to cruelty and unusualness. However the Eighth Amendment does not actually outlaw the cruel and

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197 U.S. Const. Amend. XIII.
198 See supra note 6.
unusual conditions, but it outlaws cruel and unusual punishments\(^{199}\) and this issue is subject to an extensive litigation especially on prison conditions. Initially the question of which punishment might be raised in order to clarify the Eighth Amendment violations in the prison should be pointed out. An official’s treatment of a convicted offender constitutes a punishment so long as it is inflicted in the course of administering a penalty pronounced by a duly authorized sentencing court\(^{200}\) and in this sense, the prison official treats as a pion of the State. Then a punishment must be deemed as cruel and unusual; albeit it is also problematic. Therefore instead of giving an exact definition, the Supreme Court preferred to implement standards for whether the punishment can be upheld under the meaning of the Eighth Amendment.

In \textit{Estelle v. Gamble}\(^{201}\), the Court established two doctrinal components having to be satisfied the Eighth Amendment. First, the objective standard indicating that sufficiently serious deprivations have been suffered by the prisoner or that the prisoner has to be subjected to a substantial risk of serious harm while he is incarcerated.\(^{202}\) These serious harms may be serious medical needs\(^{203}\) and identifiable human needs such as food, warmth or exercise.\(^{204}\) The harms mentioned might be “grossly disproportionate” to the crime\(^{205}\) as a punishment that “involve the unnecessary and wanton infliction of pain”\(^{206}\) and that are inconsistent with “evolving standards of decency.”\(^{207}\) Second standard is the subjective standard requiring “official acted with a sufficiently culpable state of mind”.\(^{208}\) In \textit{Estelle}\(^{209}\) while the Supreme Court acknowledged that the Eighth Amendment could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment, it rejected that prison doctors had inflicted cruel and unusual punishment because the plaintiff had failed to establish that the doctors possessed a sufficiently culpable state of mind. It was also underlined that the punishment received from the prison official or doctor did not include a deliberate act intended to chastise or deter.\(^{210}\)

On the one hand, it appears that the Supreme Court avoided articulating a definition of deliberate indifference until he urged that prison officials cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement, unless the officials know of and disregard an excessive risk to inmate health and safety. The officials must both be aware of the facts from which inference could be drawn that substantial risk of serious harm exists, and they must also draw that inference.\(^{211}\)

\(^{199}\) Farmer v. Brennan , 511 U.S. 1970, 1974 (1994) (A transsexual prisoner brought Bivens suit against prison officials, claiming that officials showed “deliberate indifference” by placing prisoner in general prison population, thus failing to keep him from harm allegedly inflicted by other inmates).


\(^{201}\) Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (claiming that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of a back injury assertedly sustained while he was engaged in prison work).


\(^{203}\) \textit{Estelle}, supra note 12, at 104.

\(^{204}\) \textit{Id.}, at 304.


\(^{207}\) \textit{Id.} at. 173.

\(^{208}\) \textit{Estelle}, supra note 12, at 298.

\(^{209}\) \textit{Id.}


\(^{211}\) \textit{Id.} at 837.
In this framework, the two standards above may fall to satisfy in some circumstances. A staff providing inadequate nutrition to a prisoner might act without deliberate indifference. It means that the conditions cannot be defined as cruel when prison officials fail to notice any risks. Especially, recklessness of staffs is a usual issue in the cases of transgender prisoners since staffs are more careless and blind to transgenders’ needs. Moreover the term of substantial risk of harm and serious harm seems unclear. The harm actually depends on the person and on the conditions hence establishment of an physical harm or a pain degree particularly might not be characterized enough. The harms persuading the Court should also include physiological harms due to the fact that transgenders suffer from ill treatment and humiliation in the prison. Thus, two standards above mentioned should be interpreted in a larger concept and the issue of harm should be held a case by case.

In accordance with the Eighth Amendment, punishment and the segregation, the Courts have held whereof solitary confinement is not per se unconstitutional212, and confinement in maximum security facilities, as such, is not cruel or unusual treatment, punishment, or practice.213 However the conditions of the solitary confinement which are accompanied by a reduced diet and limited access to reading materials and other diversions are deemed to be subject to constitutional scrutiny214 and confinement in an isolation cell is a type of punishment, and therefore Eighth Amendment standards must be applicable.215 Furthermore the supermax prison216 in which the visitation is rare and prisoners are deprived of any environmental or sensory stimuli and of almost all human contact for an indefinite period217, is a violation of the Eighth Amendment.

The first interpretation of the totality of the conditions was occurred in Rhodes v. Chapman218 that double-celling may not be an ideal environment but “the Constitution does not mandate comfortable prisons.”219 Administrative segregation’s validity was also legitimatized as depending upon the relative humaneness of the conditions of the segregated confinement and in individual cases upon the existence of a valid and subsisting reasons for the segregation, such as protection of the segregated inmates from other inmates, protection of other inmates and prison personnel from the segregated inmates, prevention of escapes and similar reasons.220 Therefore it is argued that it does not satisfy the element of the purpose of penalizing the affected person. However transgender inmates refer administrative segregation as “prison,” viewing it as “punishment” because it is more restrictive.221 A pre-operative transgendered woman complained that she was denied adequate “recreation, living space, educational and occupational rehabilitation opportunities for non-punitive reasons,” because she was placed in administrative segregation for her own protection.222 However the proof of the inadequate conditions shall be tough since several conditions are interpreted as comfortable by the Court. On the other side, the conditions in the

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212 Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970).
213 Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967).
215 Id.
216 Supermax Prisons are maximum-security facilities with highly restrictive conditions which are designed to segregate the most dangerous prisoners from the general prison population.
220 Kelly v. Brewer, 525 F.2d 394 (Eighth Cir. 1975).
222 Meriwether v. Faulkner, 821 F.2d 408, 416 (7th Cir. 1987).
administrative segregation might not be a subject of the Eighth Amendment unless it is a prolonged confinement because the administrative segregation is inherently identified protective or disciplined segregation. However the permanentness of segregation shall not be discussed in this paper since it is another issue.

II. Basic Human Needs in Segregation
The Supreme Court noted the State must provide prisoners with the minimum necessities of life; “When the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter—it transgresses… the Eighth Amendment…”. Besides, he clarified that the prison conditions may be “restrictive and even harsh” but they may not deprive inmates of “the minimal civilized measure of life’s necessities.” In this sense, the failure to properly prepare and serve nutritionally adequate food to inmates who are unable to seek alternative sources of nutrition constitutes a violation of the inmates’ Eighth Amendment rights. However interestingly, a lower Court have held that the prisoners can be deprived of food for limited periods by the prison officials as a punishment. Johnathan Johnson alleged that punishing him with a restricted diet consisting of a “food loaf” for seven days violated his Eighth Amendment rights and the 2nd Circuit dismissed the Eighth Amendment claim on the grounds that Johnson’s allegations failed to demonstrate either that the restricted diet posed a threat to Johnson’s health or well-being or that the defendants acted with sufficiently culpable states of mind. The Report by the New York Civil Liberties Union shows us another sample of violation; “Correction officers (COs) also use food to punish Adrian informally. His meals have arrived covered with hair or spoiled. Sometimes meals don’t come at all, an occurrence that happens so often that prisoners have a name for it: a “drive-by...” However it seems clear that each inmate should be entitled to three wholesome and nutritious meals per day and food must be handled and prepared under conditions which meet the minimum public health standards. The Constitution requires officers provide “reasonably adequate food” and “a well-balanced meal, containing sufficient nutritional value to preserve health.” The hygienic supplies and showers are another need of which inmates suffer. For instance, transgender inmates may be entitled to have less shower or may particularly denied to have adequate shower as Tates and Espinoza experienced in the Sacramento Main Jail. According to the unrefuted testimony Tates, Espinoza and other transgender inmates are permitted to have shower less often than other inmates in addition to the requirement of transgender inmates’ obligation to file a grievance each time they need a shower. Further, the Court found that the cells of transgender inmates are cleaned far less often than the cells of other inmates

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224 Id. at 299 (citing Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392 69 L.Ed. 2d 59 (1981)).
226 Johnson v. Gummerson, 198 F.3d 233 (2d Cir. 1999).
227 Id.
230 Jones, 636 F.2d at 1378; Newman, 559 F.2d at 286.
231 Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977).
233 Id.
234 Id.
therefore he decided that two transgender inmates’ cells should be cleaned at least as often as those of other inmates in the same pod in the Sacramento County Jail. Besides, if other inmates are provided cleaning supplies, transgender inmates should be similarly treated. The most impressive order is that if, for safety reasons, the cells of transgender inmates must be cleaned by a Jail employee or by a trustee with a guard present, then transgender inmates must see that it is done. These above orders clearly show that transgender inmates must be entitled to have same opportunities and be treated with the same respect as other prisoners. The near-total deprivation of the opportunity to exercise may also violate the Eighth Amendment, unless the restriction is related to a legitimate penological purpose. The placement of the transgender prisoners in segregation may prevent the aim of rehabilitation. The Court stated that transgender inmates must be allowed reasonable use of the dayroom, outdoor recreational facilities and telephones during normal hours, not just very late at night, after considering that Tate was forbidden to participate in recreational activities with other inmates or to exercise or interact with them and was repeatedly denied permission to use the dayroom with other transgender inmates. In Tate, it was not decided whether or not there is a violation of the Eighth Amendment. Instead, Judge Panner directed defendants to file a proposed plan for correcting the deficiencies noted and the defendants’ proposed plan was adopted on May 19, 2003. Not only Tate, moreover according to the some inmates reporting, transgender inmates are allowed at most an hour outside of their cell per day as little as five to ten minutes each day. A transgender detainee Mayra Soto declared in her testimony at the National Prison Rape Elimination Commission: “Because of my gender identity, I was placed in an administrative segregation cell with 10 to 12 other transgender women. The cell was overcrowded and we were denied the basic rights that other (non-transgender) detainees exercised. We were locked up for 23 hours a day and spent much of that time shackled and humiliated.”

Even thought the aim of prisons is the rehabilitation as the American Correctional Association has stated that “prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation and recreation should be recognized as a wholesome element of normal life.”, we are able to observe that the prisoners are not encouraged to participate in prison programs including jobs, education and etc. Besides several judicial decisions support five-hour minimum per week for exercise, showing only a physical injury cannot satisfy an Eighth Amendment claim. Therefore the whole proves that physiological harms or the unsatisfied injuries do not provide to make a claim against the violations of the Eighth Amendment.

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235 Id.
236 Id.
237 Id.
239 See supra note 43.
241 Id.
244 Palmer, supra note 28, at 221.
245 Delaney v. DeTella, 256 F.3d 679 (2001). (Glen Delaney brought action against warden and other prison officials alleging that denial of exercise opportunities during six-month lockdown violated his Eighth Amendment rights to be free of cruel and unusual punishment).
Conclusion
Although the classification of transgender inmates in segregated cells is an errant classification by the administration in the Jail and the segregation is not always required, ‘prison within the prison’ implementation is usual. Because on the one side, placing a transgender inmate in segregation may provide a greater protection than being housed in the general population, on the other side it is an unfortunate that such exclusion may violate the constitutional rights of prisoners. However, the subjective component of violation of the Eighth Amendment is not satisfied solely by the recklessness of the prison staffs and proving the cruel and unusual punishment in the segregation is usually tough issue before the Courts. In case of determination of minimal human necessities, it is also significant to compare the treatment to the general population because cruel and unusual punishment might be imposed simply by treating transgender inmates differently. Additionally the perception of incarceration has a negative influence on the Courts that the prison does not have to provide comfortable conditions to the inmates. Therefore in some cases this perception justifies the inadequate conditions in the prison.

Consequently, considering the dilemma between segregating transgender inmates from general population for security and the conditions of segregation conduced us to find a better policy. In so far as the transphobia in every stage of our lives, the training and educating the guards and officials might be an initial solution. Secondly, housing the transgender inmates with whom do not pose a violence risk seems more proper. Then, alternatives might include relocating a perpetrator of abuse and providing heightened supervision or placement in a single occupancy cell within the general population by obtaining adequate opportunities. Providing transgender inmates the opportunities of being transferred from a men’s to a women’s facility or vice versa and being placed in a special prison facility for LGBT people such as K6G at the Los Angeles County Jail\(^{247}\) might be an alternative.

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Thompson D. Convict Suicides in State Prison Hit Record High; Associated Press. 2006.

\(^{247}\) For more information see e.g. http://www.centerforsexualjustice.org/2014/11/20/can-a-jail-be-fabulous-queer-responses-to-la-weeklys-article-on-k6g-gay-and-trans-inmate-classification-in-la-county-jails/ (last visited March 11,2014).
Hate Crime Legislation in Football Context: The Cases of Turkey and the UK

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Hate crime legislations, which have originated in the US, serve to cope with the offenders motivated by hostility or bias towards the perceived membership of victim to an identifiable group. In the UK, football has emerged as a context-specific field of application for such crimes, and a number of criminal offences have been introduced via a range of legal instruments such as Football Spectators Act 1989, Football Offences Act 1991 and Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. Moreover, tackling hate crime has been adopted as a long-term governmental project. In Turkey, on the other hand, hate crime is an unfamiliar concept. Both general and specific criminal provisions refer to 'discrimination' rather than hatred as an aggravating circumstance. Although the discourse of the Law can be interpreted as if the term 'discrimination' covers hate crimes, the introduction of a separate crime category would make some notable differences in practical terms. The paper thus will question the legislative lenience of the Turkish state on the issue by analysing the official attitudes towards hate crime and hate speech witnessed in the daily life and in particular at football stadiums. At this juncture, British legislative response will be utilised as a template to evaluate the Turkish State's social control policies.

Keywords: hate crime, criminal law, football
Law and the Effects of the 2008 Global Financial Crisis- The Law and Finance Inter-Disciplinary Challenge

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Due to the Credit Crunch and the consequent 2008 Global Financial Crisis today nobody seriously questions that finance cannot be kept within national borders anymore. This paper posits that two additional, so far largely unexplored inter-linked corollaries of the Crisis should be provided equal attention as well. On the one hand, the increasingly complex and multi-dimensional financial crises to come require mobilization of the resources of more disciplines. In other words, the looming crises should be perceived as multi-disciplinary phenomena that as such require as well multi-disciplinary panacea. On the other hand, law as a discipline has meaningful roles to play in tackling the yet-to-come financial calamities, from those of regulators (ex ante and ex post panacea), courts (predominantly ex post remedies) through counseling and thus protection of clients of various sorts. The constantly mutating multi-disciplinary phenomena, however, require a novel kind of inter-disciplinarity from law as well. This paper is a reflection on the trans-national achievements and on the unfulfilled agendas focusing on the interplay of law and finance. In fact, it vouches for deliberate rather than ad hoc answers brought to the surface by inter-disciplinarity inherent to the field of law and finance or more precisely law-economics and finance.

An empirical study on the contractual risk allocation provisions and indemnity and hold harmless clauses in the oilfield service contracts in Malaysia

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Oil and gas projects are risky undertakings, which may cause severe damage to property and the environment, not to mention, personal injury and death to personnel. Contractual provision such as an indemnity and mutual hold harmless clause is used as a tool in allocating the risks. Most oil companies, in their task to manage the risks, seek to depart from the traditional form of risk allocation e.g. knock-for-knock indemnity regime. In this respect, there is a tendency that the oil companies will pass a greater share of the risks onto contractors. This problem could lead to financial impairment and unfairness to the contractors. An empirical study was conducted to investigate the issues and problems with regard to risk allocation provisions and indemnity and hold harmless clauses of oilfield service contracts in Malaysia. The data for the empirical study was drawn from the intensive semi-structured interviews of ten respondents from oil companies, contractors and one legal practitioner. The finding of this empirical study indicates that contractors are concerned about the one-way adversarial style of operator-contractor relationship and also that

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they are being allocated more contractual risks. The methodology employed in this paper will essentially be a combination of literature review and semi-structured interview, which will be carried out in an aprescriptive and analytic manner.

Keywords: contract law, oil and gas, Malaysia.

1.0 Introduction

An empirical study was conducted in Malaysia during the period of February until April 2014 to elicit the opinion of the key players in the oil and gas industry regarding the issue of risk allocation provisions, their attitudes towards the current trends of indemnity clauses under oilfield service contracts in Malaysia as well as their perspective on how to addressing this problem. Korobkin suggests that the study of actual contracting practice is useful ‘to describe in-depth the contracting patterns and norms generally followed by a particular type or group of contracting party.’ Eigen suggests that empirical study of contracts have a significant tradition in legal scholarship because it helps ‘to understand the diversity of disciplinary approaches and framings of questions about contracts raised in modern empirical explorations’ and it is valuable to articulate concisely the inter-relationship between contract doctrine, theory and empirics. The following discussion will be rooted in three major theories, i.e. the concept of contractual risk allocation and indemnity clause, the theory of freedom of contract, the doctrine of inequality of bargaining power and fairness, have become the underlying principles in the whole processes of this study.

2.0 Research Design

The semi-structured interviews were conducted with five companies representing the contractor, as well as, one company and one legal firm representing the operator. The respondents are the legal manager, the contract managers, the procurement managers, the principal technical officer, the project manager of the companies, as well as the legal practitioner who handles litigation for the operator in court. The contractors were selected from three different ranges of size i.e. big, medium and small companies. The respondents were chosen due to their prominence and experience in contractual matters. The big companies were usually equipped with complete legal and contract departments. Whereas, the medium size company might have a legal department, but would not necessarily have a contract department because the contractual matters would be managed by an engineer who would also be the principal technical officer. On the other hand, most of the small companies neither had a legal department nor a contract department. Therefore, the procurement manager who came from a technical background would manage the contractual matters. There were some difficulties in getting appointments with the respondents, especially the operators, who were quite reluctant and not easily accessible. The summary of the respondents is tabled as follows:

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3.0 Result and Analysis

In general, ranges of risk allocation clauses are commonly seen in contracts used in the oil and gas industry including indemnity and hold harmless clauses, clauses excluding liability for ‘consequential loses’ and clauses limiting overall liability.\textsuperscript{251} The actual sharing of risk, indemnities and provisions for supporting insurance is usually determined by the wording of the relevant contract documents.\textsuperscript{252} Semi-structured interviews were conducted in order to ascertain the industry’s perception of risk allocation of its current practice in Malaysia. Many contractors consider such non-negotiable contracts to be problematic, primarily because they often contain onerous provisions in important areas such as allocation of risk.\textsuperscript{253} This can create significant risk exposures.\textsuperscript{254} In distributing the risk between the operator and contractor, one of the respondents claimed that the contractors usually gained the least benefit and expressed their dissatisfaction at being made to indemnify the operators’ negligence. This can be seen in the following remark made by one of the respondents,

\begin{quote}
“Supposedly, anything that are risky to us, then we need to take steps to mitigate such risks or deviate from such terms and conditions. However, most of the time, the contractor always be at the losing end, this is because in order to secure a big job, whether the contractors like it or not, the contractors have to meet the operator’s demand and must get ready to take those risks... The problem with the indemnity clause is that, when the operator transfers their liabilities to us by asking us indemnify it and even though it was happened due to their negligence.”\textsuperscript{255}
\end{quote}

The respondent also claimed that the indemnity clauses were one-sided. This was because, the bulk of contractual liability, in respect of the indemnity clauses, was placed on the contractors. The general practice is that responsibility for such risk should rest with the party best able to manage it, e.g. the party with the relevant insurance coverage.\textsuperscript{256} It is suggested that insuring or

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Categories of Units of Analysis & No & Units of Analysis & No. of Respondents \\
\hline
Contractor & 1 & Contractor A & 1 Legal Manager + 1 Contract Manager & 2 \\
 & 2 & Contractor B & 1 Legal Manager + 1 Contract Manager & 2 \\
 & 3 & Contractor C & 1 Legal Manager + 1 Principal Technical & 2 \\
 & 4 & Contractor D & 1 Procurement Manager & 1 \\
 & 5 & Contractor E & 1 Procurement Manager & 1 \\
Operator & 6 & Operator A & 1 Project Manager & 1 \\
 & 7 & Legal Firm Z & 1 Legal Practitioner & 1 \\
\hline
Total Number of Respondents & & & 10 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{251} Greg Gordon, 'Risk Allocation in Oil and Gas Contracts' in Greg Gordon, John Paterson and Emre Usenmez (eds), \textit{Oil and Gas Law: Current Practice & Emerging Trends} (2nd edn Dundee University, 2011) p.443
\textsuperscript{252} Leslie Edwards, \textit{Practical risk management in the construction industry} (Thomas Telford, 1995)
\textsuperscript{253} Wan Zulhafiz. 'Unfair Contract Terms Act 1977: does it provide a good model in regulating risk allocation provisions in oilfield contracts in Malaysia?’ (2015) 8 Int J Trade and Global Markets 3
\textsuperscript{255} Respondent 5 from Contractor C
\textsuperscript{256} Leslie Edwards, 'Practical risk management in the construction industry' in (Thomas Telford, 1995)
contractually transferring the risk to the insurer and leaving the premium to settle any charges to
the other party could mitigate risk exposure; it is in fact the most economically beneficial and
practical way for the risk to be dealt with.\textsuperscript{257} Insurance is used by the indemnitee
as a risk cushion in a situation when he is responsible for his own employees and equipment.
The insurance in fact is the underlying driver in this case rather than the ancillary tool for risk management.\textsuperscript{258} This is
common for super-majors, who tempt to self-insure and minimize transaction costs.\textsuperscript{259} But this
reason is not applicable to some contractors, as they cannot afford self-insurance. On this point
one respondent commented,

“The indemnity clauses mostly are one sided. The contractors would be made to be liable
for most of the liabilities, for example the indemnity with regards to property and
equipment of the operators, the third party liability, not to mention pollution. Usually we
try to keep it and make it consistent with the insurance coverage, for example per
occurrence how much we'll be liable. Usually it is always unlimited liability and most of
the time the clients refuse to negotiate on that as well.”\textsuperscript{260}

It is argued that the practicalities of risk allocation should be limited by certain basic requirements
for those to whom risk is being transferred. These requirements would be, for example, the ability
to undertake a hazardous task, willingness to take the risk, financial capability of the company to
deal with the risk in the event that a disaster occurs, continued existence and adequate finance
during the period of liability.\textsuperscript{261} It is also argued that the responsibility for indemnifying the
consequences of a risk event resulting from the activities of one of the contracting parties should
ideally rest with the party who has control over that risk.\textsuperscript{262} The Operator is always in the best
position to control the risk. Operators have confirmed that both quantified risk and unquantified
risk including indemnity would be transferred to contractors. They maintained that it is the
responsibility of the contractor to understand and convert the risk into monitorys. On this point,
one of the respondents said,

“As operator, all the quantified risk will be transferred to contractor and stated in contract.
The contractors are to put the price of each risk identified in contract. It is responsibility of
contractor to understand and convert the risk into monitorys... The risks are made clear to
contractor. Contractor will put the prices for those scope specified in the contract. Any risk
is to be priced by contractor... Uncounted quantity will use reimbursable cost plus...
Indemnity scope is to be taken by contractor; cost of premium for indemnity will be claim
to operator.”

However, the contractor would end up having to take up the risk and cost the risk into the price.
On this matter, one of the respondents commented

“Let say, there are some conditions that we could not afford to accept them in the event the
operators attempt to shift greater risks to the us – now the operators go for competitive bids
so our chances to be awarded is lesser if we stick to our qualification.”\textsuperscript{263}

\textsuperscript{257}Max Abrahamson. ‘Risk Management’ (1984) 2 ICLR 241
\textsuperscript{258}Caledonia North Sea Ltd. v British Telecommunications Plc same v Kelvin International Services Ltd. same v London
Bridge Engineering Ltd. same v Norton (No. 2) Ltd. (In Liquidation) same v Pickup No. 7 Ltd. same v Stena Offshore
Ltd. same v Wood Group Engineering Contractors Ltd. - [2002] 1 Lloyd’s Rep 553
\textsuperscript{259}BP Annual Report and Accounts 2007, p.39
\textsuperscript{260}Respondent 3 from Contractor B
\textsuperscript{261}Leslie Edwards, ‘Practical risk management in the construction industry’ in (Thomas Telford, 1995)
\textsuperscript{262}ibid
\textsuperscript{263}Respondent 3 from Contractor B
Another commented that,

“However, we are not in the position to change the conditions, so what we normally do is, we will take note on that and accordingly advise to our technical people, “*please calculate this risk into your cost*”. Well, the thing is that, the operators would not entertain if we put so much qualification in the contracts. Sometimes, the operator is just going say, “*if you can’t comply and you have a lot of exceptions to the clauses, then you will be disqualified*”. As a result, we are not going to get the job.”

The contractor would be facing a problem to set an ideal price after absorbing the risk,

“…We need to set the price. The price should be an ideal one. Not too high as there is possibility our submission would be rejected, but not too low to the extent that it might jeopardies our profit.”

Nevertheless, due to the high competitive bid, the contractor faces a dilemma in relation to setting the price. On one hand the contractor is afraid of not getting the job if the price is too high after converting the risk into monitorys. On the other hand he fears financial difficulty if the price he sets is too low. On this point, one of the respondents observed,

“Usually, in order to mitigate the risks, we have to cost in the impact into pricing. Whatever the risks involved, the cost has to be reflected in the pricing. Sometimes, this would be a problem, when we were trying to cost in everything, the cost will be too high and we afraid that we are not going to get the job. But, if we neglect the risks now, then if anything happen in future, the risks would be at our own cost. So, it is real challenge for us to draw a middle line between these two.”

A contract could be regarded as a trade-off between the contractor’s price for undertaking the work and his willingness to accept both the controllable and uncontrollable risks. However, contractual agreements should be concluded taking into account who should bear the burden of risk and also how much risk each party would take. It is imperative to note that an improper tender style and unreasonable risk burden could be the primary reason of contractual disputes between the parties. It is claimed that the main factor for increase of overall cost is due to the usage of disclaimer clauses such as indemnity clauses, in allocating risk. This is because, once the risk is transferred to the contractor and ‘the contractor has no means by which to control the occurrence or outcome of the risk, the contractor must either insure against it or add a contingency to the bid price.’ The cost of transferring risk to the contractor through such clauses carries hidden costs such as 'restricted bid competition, increased potential for claims and disputes and above all, more adversarial owner–contractor relationships.' One of the respondents who is a practicing lawyer

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264 Respondent 1 from Contractor A
265 Respondent 4 from Contractor B
266 Respondent 3 from Contractor B
267 Ka Chi Lam and others. 'Modelling risk allocation decision in construction contracts' (2007) 25(5) Int J Project Manage 485
268 Latif Onur Uğur. 'İnşaat Sektöründe Riskler ve Risk Yönetimi' (2006) Türkiye Müteahhitler Birliği Yayını, Ankara p.120
270 GF Jergeas and FT Hartman. 'Contractors' Protection Against Construction Claims' (Annual Meeting-American Association of Cost Engineers American Association of Cost Engineers (AACE), 1994) 8
271 D. Becker. 'The cost of general conditions' (1993) (September) Am Assoc Cost Eng Trans 7
and used to litigate on behalf of the operator shared her perspective on this issue. She commented that,

“I assume when the contractors signed the contract, the contractors were fully aware of those liabilities that they will be carrying on. So, if anything happen in future, I think it is their obligation to get protection for those liabilities by way of insurance. Plus, the parties are able to practice contractual freedom. I don’t see any problem with regard to this matter, unless, there is issue with regard to fairness, but such allegation should be proven by separate cause of action and proper hearing in court.”

It is true that as a matter of contractual freedom, the parties may freely decide the terms of the contract including the risk allocation provisions. However, the lawyer might not be aware that, in the industry, during the contract formation process, there exists inequality of bargaining power between the parties, which means that contractual freedom has not been exercised properly. As a result, the contract is one-sided and the risk is not shared fairly between the parties. The contractors are actually aware of the situation, but they are neither in the position to change or qualify any of the terms nor given opportunity to discuss or negotiate on the allocation of the risk. One of the respondents gave the following remark, to describe the situation,

“The most we can do is to voice our dissatisfaction to the clients. Sometimes they may listen to us, unfortunately most of the time they are not. How would we mitigate? Basically it is good to have both parties to sit down and explain and discuss about the risks involved in each project. But I suppose they are going to say that, it is them who invest money, thus they will not accept any of our qualification with regard to the risks.”

In some occasion, the contractor may have to indemnify the operator for the operator’s negligence in respect of operator’s personnel and property, or vice versa. The adjustment of the indemnity clause would undermine the traditional risk allocation of a “knock-for-knock” indemnity regime. As a result, it is likely that the existence of negligence may first have to be proved in the courts for an indemnity to operate, which defeats one of the primary objectives of the knock-for-knock regime. Moreover, such adjustment may also represent uninsurable risk to the contractor. Furthermore, this would give rise to the possibility of increased costs since the contractor attempts to insure a risk where he does not have a real insurable interest. One of the respondents discussed on this scenario,

“We always have problem when it comes to indemnity clause. We are expected to bear most of the liabilities. The worst part is that, sometimes they (operators) expect us to be liable for something which is due to their faults. Could you imagine that? But, what can we say; we have no choice but to agree with such clause. It is always be the case, either that we take or leave it…The risks have to be covered by insurance. We do not afford to take the risks without any financial back up from the insurance company… This is the problem.

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272 Privy Council in Ooi Boon Leong v. Citibank N.A. [1984] 1 MLJ 222, confirmed that “parties to an agreement have much scope to negotiate and incorporate terms acceptable to them”


274 ibid
275 ibid
276 ibid
277 ibid
Sometimes, we have to absorb all risk regardless whether such risk is being covered by the insurance company."²⁷⁸

From the contractors’ point of view, more often than not, the risk is not one that can be passed on to the subcontractors.²⁷⁹ Where offshore exploitation is concerned, the contractor would usually cap his liability by stating that he has little to no control of the catastrophic risks, such as blowout, explosion and pollution emanating from the reservoir.²⁸⁰ This is because, without the liability cap the contractor maybe made responsible to bear most of the uninsured risk. In that event, such risk may be disproportionate to the scope, size and profit margin on the contract.²⁸¹ Nevertheless, the quid pro quo for insurance coverage by the operator is that, the contractor should be willing to expose his insurance to the benefit of the operator. It was argued that, ‘it is not reasonable to expect limitation of, and/or indemnity from, catastrophic and third party risks to the extent that the contractor’s own insurance would in fact respond.’²⁸² On this issue, one of the respondents commented,

“Again, the indemnity clauses mostly are one sided. The contractors would be made to be liable for most of the liabilities, for example the indemnity with regards to property and equipment of the operators, the third party liability, not to mention pollution. Usually we try to keep it and make it consistent with the insurance coverage, for example per occurrence how much we’ll be liable. Usually it is always unlimited liability and most of the time the clients refuse to negotiate on that as well.”²⁸³

In order to combat this problem, some of the respondents suggested that fairness could be achieved if the legislator passes a law to protect the contractors’ affairs²⁸⁴ while another respondent suggested that legal protection should come from an anti-indemnity law. Building on this suggestion, one responded commented,

“I know that in US, they have oilfield anti-indemnity law, but I am not quite sure how far does the law really efficient to address this issue. What I can confirm, we have nothing yet in Malaysia to that effect. To certain extent, I think yes, we need rules by the government to solve the problem with regards to indemnity clauses.”²⁸⁵

While, another commented that the legislator in Malaysia should issue guidelines in order to monitor this problem which would work back-to-back with the Petroleum Act.²⁸⁶

4.0 Conclusion

In conclusion, the fact that there is no law to regulate the current imbalance of risk allocation and unfair indemnity clauses in oilfield service contracts should be perceived as a serious problem. This problem is caused by inequality of bargaining power between operators and contractors, which itself arises from the dominant position held by the operators over the contractors. It is observed that these alarming problems deserve attention from the authorities. It is crucial that the

²⁷⁸ Respondent 1 from Contractor A
²⁷⁹ Franklin (n26)
²⁸⁰ ibid
²⁸¹ ibid
²⁸² ibid
²⁸³ Respondent 3 from Contractor B
²⁸⁴ Respondent 5 from Contractor C
²⁸⁵ Respondent 3 from Contractor B
²⁸⁶ Respondent 7 from Contractor E
authorities act because this problem could potentially threaten the commercial development of the oil and gas industry in Malaysia. Even though insurance provisions are sometimes provided in the contract, there are no guidelines available for the parties. Moreover, the insurance requirements have not been made mandatory to the parties. This could cause the contractor to assume uninsured risks, which could lead to detrimental financial exposure in the event of a catastrophic incident. This problem could be made worse if the contractors have to assume double jeopardy contractual risk, whereby the contractors not only need to assume the risk from the operators but also from the sub-contractors. In order to solve this problem, it is argued that a specific legal mechanism should be adopted in Malaysia to protect and limit the liability of the contractors under the oilfield service contracts.

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The effects of societal values and law on the birth of “representative democracy” and “governance” and their reflections on fiscal law

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The aim of this paper is to observe the effects of the changes in societal values on law. With this study, the possible outcomes of democratic evolutions on fiscal law can be revealed. When the law texts and systems are reviewed, mostly it can be seen that these rules reflect the processes in societal values. Mentioned argument is researched through the birth process of representative democracy in 13th century and governance in 21st century, and the role of the societal values and events in these periods. Stated concepts remark that such values and events have a deep impact on law systems.

Keywords: societal values, democracy, governance

Introduction

It is almost always possible to talk about the existence of law wherever people form communities and societies in large. The term of law, means the plural of right. Therefore, it can be said that, when there is the common will of living together, there are legal principles. Individuals, coming together with the will of living together, establishing the common life rules depending on their societal values and perceptions and their expectations from law are shaped by these values. When the law system of a country is viewed, many specific characteristics of it can be understood, such as its structure, the way of living, perception of rights and freedoms, experienced social events etc. On this account, by its nature, law reflects the societal values of the individuals forming a community. Although it is possible to say that law has been in our lives since the first communities in history at any rate, not all the branches of it were born at the same time. The developments in community and daily life, provided advancement in law and caused new branches to form. Fiscal law is one of the oldest branches of law in history. When will or need of living together was occurred, monarchs and states started levying financial obligations on people depending on their sovereignties. Therefore, concepts of fiscal law and fiscal authority exist for ages. Correspondingly, fiscal law and its components contain societal values, justice perceptions and seekings and many other dynamics of communities. Since levying tax can be described as a legitimate way of “getting hands on citizens’ wallet”, almost every social evolution or unrest is generally connected to fiscal issues. Consequently, when we consider the history of fiscal law, it is possible to say that it reflects the perceptions of societal values, democracy, rights, freedoms and expectations of individuals or communities.
In the paper, mirroring societal values character of law is being considered with regard to the concept of democracy and among many milestones of democracy, two basic examples are being analyzed. Firstly, effects of Magna Carta on the birth of representative democracy and fiscal law are being reviewed. Afterwards, inception of governance with regard to the current change in the perception of democracy and its reflections on fiscal law are going to be surveyed. Finally, a short analysis on Turkey is held according to similarities and differences between these two concepts.

**Birth of representative democracy**

England has been one of the leading countries that experienced milestone societal evolutions which affected tax law, constitutional law and many other law branches. Definitely, Magna Carta Libertatum is one of the leading examples of that. Magna Carta, dated 1215, is executed between the king and barons and based on the oath to respect for rights and liabilities mutually. Naturally, a document which has the nature to change the history cannot only be rested on just a singular reason but affected by many societal dynamics as well. However, financial obligations can be pointed as the main reason lying beneath. The king’s unlimited power on taxation and the unfair taxes caused displeasure among barons and society. In addition to that defeat in the war against France and anathema of the king by the church raised a civil commotion and this commotion ended up with Magna Carta. The text, composed of sixty three clauses and including provisions about rights and freedoms, cannot be defined as a constitution, nonetheless it has a great importance since it is the first document to constrain the unlimited power of the king. Such constrain promoted the emergence of the parliament in history.

As regards to increasing population in the world and its inhibiting direct democracy implementations, establishment of parliaments, the main instrument of representative democracy, can be accepted as a milestone in the development of democracy. Although, there had been various formations in the past, parliaments in the literal sense were established upon Magna Carta. The reactions grounded on heavy and unfair taxes levied on barons and community vitalized great influence on democracy, furthermore the law systems of the countries which adopt these developments changed drastically.

Although the main powers and duties of the parliaments are accepted to be legislation; one can see that the first power parliaments gained was taxation\(^{(287)}\). Thus, Magna Carta provided the birth of parliaments which are the warranty of democracy by performing their such functions firstly through taxation power, and also the emergence of “no taxation without representation” principal.

These enhancements experienced in England spread to France and centuries after the signing of Magna Carta, French Revolution is arisen. This Revolution too was grounded on heavy and unfair taxes. As an outcome of revolution among many other rights and concepts, no taxation without representation principle sanctified in France as well. Mentioned processes affected many other countries and reactions over heavy taxes brought limitation to unlimited powers of the kings and gave birth to parliaments.

When history is considered, it is possible to see that societal values and events effected law, the thought of being abused caused uprising against kings or governments and these reactions determined the changes in public managements, administrative structures and many other fields. Since law occurred in every place where people live together, interaction between mass actions and law is unavoidable. Almost every evolution forms a reflection on law system and legal provisions are uniformed according to new conditions. Consequently, law is an instrument to provide legitimacy to innovations and affected drastically from these changes. Correspondingly, it is possible to say that, law reflects societal values and phenomenon throughout the history.

Notwithstanding the fact that law regulates many areas of life, provisions of fiscal law is one of branches that is mainly and initially affecting the lives of people because of the elements it embraces like taxation, public expenditure and debt. Therefore, fiscal law functions as a mirror of societal dissatisfactions and thought of iniquities. Formerly, although sovereigns caused many unfair and reproachable executions, the grossly reactions were against heavy and unfair taxes. These reactions gave birth to representative democracy, provided limitations to powers of the sovereigns and delegation of powers to parliaments, and enhanced advancement in fiscal law provisions.

**Birth of governance**

Ascending population does not allow almost any direct democracy tools, therefore, for centuries, representative democracy has been the main method for individuals to be represented in the public management. Parliaments are the basic instruments of representative democracy and provide people to take part in the public decisions by means of elected representatives. In various countries, representative democracy system operates through the parliaments which consist of elected representatives, and use the legislative powers and perform its tasks. Therefore, the efficient use of functions, legitimate use of powers, effective accomplishment of duties are compulsory clauses of parliaments.

Parliaments, which are born to be the main instruments of representative democracy and saddled with this responsibility, are criticized in recent years for failing in the use of powers and fulfilling their duties. Many factors such as loss of confidence in elections emanating from the experienced unlawfulness; affects of lobby groups on member of parliaments; the long and ineffective decision making mechanisms in the parliaments; inefficient auditing procedures on government lead to the criticism of the performances of parliaments. Whereupon, frequently, it is argued that a representative democracy crisis occurs.

In modern daily life, democracy demands and thoughts are widely different from the 13th century and stated loss of credibility in parliaments have caused a new way of participation perception in the public decisions. The change in the perceptions of democracy and protection of rights and freedoms caused search for new models of public management. These searches brought along many alternatives, nevertheless, governance is definitely one of the most popular and favored options among them.

Concept of governance is a method of public management in which governing bodies and governed are at equal level and exclusive power of administrator is shared with individuals. Governance aims to achieve direct democracy implementations as possible and brings people into the decision making mechanism and by this way, fill the so-called gaps of representative
democracy crisis with ‘good-governance’. Mentioned transition includes commercialization of public finance management and its management upon open market rules and running free competition opportunities. Governance also transforms citizens into customers and moves them up to a level that they can be a partner in the public service decisions. As can be understood, this new structure leads to variations in the roles of persons in the state and community life. Also the expectations of citizens from state increase in this new way of public management. The process of governance, which demands active participation of individuals in the decision making mechanisms, aims to create awareness by using communication technologies and media, and spread non-governmental organizations (NGOs) to inform communities and promote democracy\(^{288}\). In governance, it is being planned to accept local responsibility instead of centralization and to end bureaucratic confidentiality and provide transparency and accountability\(^{289}\). Since 1970s, the changes in the perception of democracy and birth of governance have affected almost every branch of law when the necessary implementations regarding governance are decided to be applied. Since there are radical differences between representative democracy and governance, implementing governance principles would need wide changes in legislation. Accordingly, the partly withdrawal of the powers that have been transferred to state bodies and more effective participation of individuals into the decision making mechanisms require law system which lets interactive procedures. Obviously, gaining such a structure would require numerous amendments. Thus, the mentioned process, through which law systems are expected to go, will probably reflect the changes in societal values again.

When people target more participation in public decision making mechanisms, it can be argued that fiscal issues may have priority compared to many other areas because of the direct effect of components of fiscal law on individuals. For instance, taxation is the most frequently applied instrument by states to finance public services and every little increase or decrease in tax liability is felt by taxpayers. Similarly, every variation in quantity of public services is followed closely by the society at large in the country. Thence, more participation demands in the public decisions, instantly constitutes desire to take part in fiscal decisions\(^{290}\). According to the research, it is observed that budget deficits of OECD countries in which governance is applied as the public management method are decreased from four percent to one.


percent. But one should always keep in mind that applications would probably have different results from each other in different countries. World Bank sets three particular items that have influence on governance: type of the political regime; social and economic resources management; the capacity of administration about establishing, formulating and exercising. As can be understood from the criteria, governance can be reached at different levels in different countries according to their social, economic and political structures. Moreover, not all the countries ‘have to’ apply governance procedures but the ones which adopt them can perform it in different levels and times. Consequently, law systems of such countries can be affected differently according to the position of the country. Circumstantially, the similarities or differences will reflect the democracy perceptions, demand of communities and the public management structures of countries.

A short analysis on turkey: similarities and differences

As observed in many other countries, one can say that it is possible to see the changes in societal values and democracy perceptions in Turkey by analyzing the law system. Since the differences in social, economic and political dynamics of the countries, the undergone processes about democratic development are different in almost every country. Turkey renders a good example in terms of the similarities and differences in the birth of representative democracy and governance.

The limitations on the power of sovereign, which was gained in England in 13th century, was prevailed in the Ottoman Empire in the 19th century with The Charter of Alliance of 1808 (Sened-i İttifak) signed by the Sultan and landed proprietor (ayan). The Charter of Alliance of 1808 and Magna Carta include some common points since they both restrained the powers of the sovereign and are signed between “the throne” and a particular economic group. Both of the documents emerged in times when heavy and unfair taxes were levied on citizens and subjects. Besides this, they did not provide democratic acquisitions for the society but for a particular economic group. Although both texts cannot be defined as a modern constitution, they determine some particular rights and freedoms. Main differences between The Charter of Alliance of 1808 and Magna Carta are the time of occurrence and their relation to representative democracy. When the dates are considered, it can be observed that it took centuries for Ottomans to limit the powers of sultans compared to England. The effect of Magna Carta on the foundation of parliaments and birth the of representative democracy was not the purpose nor the outcome of the Charter. Although the

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Charter brings limitations on the powers of the Sultan on behalf of landed proprietor, it does not maintain representative democracy and parliaments.

Since the Charter was not adequate to dissolve the social, economic, political complications and as it was not applied, dissatisfactions about these problems continued. Eventually, in order to meet the demands of the society, The Edict of Gülhane of 1839 (Tanzimat Fermanı) and The Edict of Reform of 1856 (İslahat Fermanı) were constituted. These two documents comprise the main steps to coordinate the problems and include taxation provisions in addition to some other rights of freedoms. These documents have the similarities with Magna Carta in terms of limiting the powers of sultan. As a distinguishing feature from Magna Carta, which was based on the uprising of society at large, these two documents were solely the product of efforts of some intellectuals and statesman. The main purpose of the renewals was seeking to gain favor of western governments instead of democracy.

On the way of representative democracy and parliaments, Magna Carta was the milestone in western. For Ottaman Empire, Basic Law of 1876 (Kanuni Esasi) was the first attempt to found parliaments. Even there are centuries between these two developments, the effects of them are similar. Also they can be both considered as not being implemented as they should be. Since Basic Law of 1876 was withheld after a year it was conducted and was not put into effect until 1908, 2nd Constitutional Monarchy. With the declaration of 2nd Constitutional Monarchy, acquisitions like parliaments, principle of legitimacy of taxation have again started to be exercised. Comparing to the Charter, the 1st and the 2nd Constitutional Monarchy can be more defined as a mass movement. That can be considered as another similarity between Magna Carta and Basic Law of 1876.

As can be understood from this short synopsis of history, the societal values and influences lying beneath the developments in England and Ottoman Empire include some similarities and differences. Yet, in most of the countries, demanded and undergone changes have direct reflections on legal provisions and they can be followed through the legal documents even if they emanate from community of some groups like economic groups, rulers of intellectuals.

Although there are differences in the birth process of representative democracy between Turkey and the West, the current argument about the failure of parliaments is also observed in Turkey too. The decrease in the loss of credibility in elections, the long and procedural decision mechanism of parliament, parliamentarians’ being under effect of lobby groups are present in the perceptions of community. According to these observations, efficiency and success of parliaments to maintain representative democracy seem to fail.

In order to obtain solution for this representative democracy crisis, propositions are generally suggested and one of the most proposed suggestion is governance. Like in many other countries, there are pro and against arguments about governance in Turkey as well. Especially participation and localization have been demanded commonly. These demands are mostly structuring the legal procedures and public management policies. NGOs, function as the sound of the representative of groups, and work almost like an instrument of direct democracy. By this way they raise participation in decision making mechanisms. Since localization is considered to be a more effective form of democracy instead of centralization, legal amendments are conducted to increase localization. It is claimed that community participation and collective need establishments are realized more effectively. In terms of these considerations, localization is requested to quicken the process and meet the necessities. The amendment implemented in 2005, in the Municipality Law
No 5393, conferring some definite taxation power to municipalities and localization initiatives can be an example of localization steps.

Briefly, the problems in parliament mechanisms cause new searches in public management and Turkey is one of the examples that develop participation and localization strategies according to the change in democracy perception, even if the word ‘governance’ is not uttered. Law system and legal procedures are the signals of these modifications and especially fiscal law provisions are the main indications of the changes and demands emanating from societal values.

**Conclusion**

Law and societal values have influenced one another for centuries. Law has always undertaken a role to lead the communities forward and has always been a mirror to societal values. Throughout the history, sovereigns and states amended many regulations depending on their sovereignties. Among these amendments, fiscal powers have always been one of the main areas that showed their reflections and effects directly on people. Since most of the societal values and social events arose from or affected fiscal policies, the use of fiscal powers and changes in fiscal policies can be followed and interpreted by analyzing fiscal law systems of countries.

Among many examples of this cycle, birth of representative democracy and governance concepts are studied in the paper according to their close relationship between societal values and fiscal law.

The societal values, which played a deep role in the birth of representative democracies and parliaments led to long lasting and vast struggles. Reactions to the unlimited powers of kings broke out owing to fiscal obligations and changed the course of the history. Today, democracy perception has changed again and parliaments, which have been considered to be the most effective instrument of democracy, are now criticized for not being that effective. One of the common solutions of this representative democracy crisis is conception of governance and it requires restructuring in law systems. Governance seeks to implement direct democracy instruments as much as possible and leads to participation and localization in public managements. Fiscal powers and decision mechanism are the top of the list when participation and localization is discussed. As fiscal powers are the determining branch of law that set the amount of the financial obligations of people and level of public services that will be provided, the people subject to these regulations would like to be a part of the decision making process.

Consequently, societal values are able to influence even the oldest and settled perceptions and these changes in such perceptions can be easily followed through law systems. Since law is the totality of provisions that regulate the relationships between people and states, it is the cornerstone to realize the changes in the societal values legitimately. Therefore, in almost every period of history, law and societal values have been mirroring one and another and the changes in societal values have shown their effects in law systems directly. Since fiscal law includes the policies that are felt by the citizens instantly such as the amount of financial obligations and public services, it is one of the most affected branches of law from the changes in societal values. As can be seen in the analyzed examples, fiscal powers are one of the foremost targets when there are movements among social dynamics. Claiming that every change in societal value can be followed in law systems can be considered as generalization and it is possible to say and observe that most of the radical changes in law procedures especially in fiscal law, generate upon the changes in societal values.
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Tax and Ban the Sin: Turkish Sin Taxes

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The basic function of taxation is generating the revenue needed to finance government expenditures. Since all taxes discourage taxed activities, politicians can use them not only as a fiscal tool but also as a political tool for social engineering. Indeed, tax policy may shape the life course by affecting consumption decisions of products deemed “undesirable” such as alcohol, tobacco, fuel and mineral oil. Sin taxes - are useful government’s tools for social engineering especially in Turkey of 2000s. More conservative government elected in 2002, in power since then, seems to prioritize the tax tool for deterring any activities or goods considered as iniquities Turkish excise duties on alcoholic beverages and tobacco have been significantly increased as a result of change-in public policies using taxes as a tool for designing society seems to be another main stimulus. Other taxes related to social media which is highly related to civil rights are also sometimes considered as a way of social life interventions, which is in the case of Turkish twitter taxation. Social media is also defined as “a worst menace to the society” by the politicians, thus the social media is a sin to be taxed and/or banned accordingly. This paper takes into account the direct tax interventions to design society but not the other governmental fiscal policies such as income redistribution, employment or inflation. This paper aims to analyse government’s tax interventions shaping society in Turkey.

Key Words: Taxation, sin taxes, social engineering
State Of The Art of Disruptive Technologies and Their Impact on Legal Profession

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The first century of the third millennium is indorsing the information revolution instigated by the genesis and convergence of numerous disruptive technologies. These Futuristic vicissitudes are superseding the services of medical, legal, academic professionals, law enforcement officers, legislators, auditors, teachers, and other customary jobs. It is sweeping the feet of every facet of law—legal practice, jurisprudence, and legal education. The techniques to search for the law by combing through instances, legal analytics, legal Software as a Service (or "SaaS") are seeing a surge. This paper discusses the surfacing issues and the opportunities like ethics, security, cost, functionality, usability, availability, access. The recompenses of the technology are countless vacillating from creating and providing online services available to a broader spectators, vigilant hewing of arguments and documents, persuasive advocacy, concocting lawyers and legal professionals enhance their prospects.

A Study of Legitimate Data Protection in Cloud Computing

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Information technology is the day-to-day growing field in the present scientific world. Currently the large number of Information technology platforms are shifted to cloud computing. The main good characteristics of cloud computing are pay-as-you go service, memory storage is very large, recovery of storage information, easy access of data. The threats and attacks are also linearly proportional to these characteristics. Information security, privacy, data protection, contracting issue accountability of illegal data are still main legal issues due to various attacks. Lot of research areas are integrated to cloud computing technology for solving the security and privacy issues. One of the most recent research area is quantum theory. Despite a secure cloud computing and data protection is accomplished by the integration of quantum theory concept, but still there are many threats, attacks, vulnerabilities and issues impinges the cloud computing environment. This paper will focus on overview of security and privacy issues.

Keywords: quantum computer, qubit, CIA security model
Research Challenges and Prospective Impacts of Quantum Forensics Computing

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The developments in digital technology in the current version of digital computers has led to the creation of quantum computers, which will harness the power of atoms and molecules to perform and process tasks at a high computational speed and these quantum computing device perform certain calculations significantly faster than any silicon-based computer. Today with the spread of Internet access around the world we have entered into the era of Big Data and cloud computing. These technological advances has created an impact on the global economy due to its hyper-connectivity. With the developing trends and challenges of Big Data, quantum computers are designed to help to handle Big Data in a number of ways. Moreover, in a cloud computing environment the user or the client has limited control over the data as everything is outsourced to the cloud service provider. Thus, it has become an attractive field for the attackers to perform malicious activities. Researchers are looking forward to work with this high-power quantum computing machines, so as the cyber criminals who are finding ways to exploit these high-power machines by cracking passwords, decrypting secret messages by computational brute-force attack and manipulating data. This paper speaks about the impact of these emerging trends and technological advances on globalization and the legal issues pertaining to the latest forensic evidence that are collected from the quantum computers.

Keywords – quantum forensics, quantum computing, digital forensics, cloud computing, big data, legal issues.
The Representation of Women in Television Series

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With the advent of cable television and the changes that have occurred regarding the dissemination of digital and mobile technologies, television has become an effective vehicle for intercultural exchange. Within this framework, fictional narrative television, through its stories, settings and characters plays a key role. Whereas nowadays TV series has been gaining the status of, as it were, works of art, becoming identified as the "future of cinema". This paper aims to bring to the discussion the contemporary woman, based on three series of success - Sex and the City, Homeland and The Fall - where the main characters are women to understand their representations in the culture and media, and the reflection in production of Brazilian television series.

Key words: women in culture and media, pay television, television series.

1. Introduction  
In contemporary times, television has been presented as an effective vehicle to convey cultural expressions of a country. Among television programs, one can say that fictional narratives, through their stories, their dialogues, scenarios and characters, offer a portray of the authentic mode of expression of certain population. Every work of fiction - literary narrative, film, theater, television narrative - appropriates elements of reality in the construction of their fictional universes, acting as a mediator between the subject and the existential world. As Umberto Eco says, "the fictional assertions are true within the framework of a possible world of a particular history" (Eco, 1994, p. 94).

2. About television  
Since its inception in the mid-twentieth century, television has earned numerous aesthetic and sociological theories, from the model of Adorn, who considered its nature "bad", to the mchulaniano model that considered its nature "good".  
Nowadays, passed on these conjectures, we must consider it as an audiovisual device through which a civilization expressed itself.  
In fact, television has undergone transformations not only in terms of its technological support, as well as their role in contemporary society. With the development of satellite transmission facilities, television came to be seen as a mean of democratic communication, given more people access to information, culture and fun.  
With the advent of Pay TV, emission technology which allows the movement of a large number of channels from different countries, dedicated channels to specific subjects and in the face of digital distribution to smartphones, tablets and computers combined with the service system video on demand, which offers programs to be viewed at any time and any place, it opens an unlimited universe of distribution of television material. So, the pay TV space has been therefore the space of visibility of the issues experienced in contemporary times.  
What interests us about the investigations of the historical processes of training and TV identity is that, without any doubt, it has contributed to legitimize it as an audiovisual device, equipped with
the latest technology in sound field and image, with a significant penetration in the people daily life in many countries, through which a civilization is expressed in its various modalities. In the case of television fictional production must consider that it is a rich material of analysis of interests, customs and relevant question of certain society.

3. Television fictional narrative
In contemporary times, television products exert the function of transmitting the cultural expression of a people. Unlike news programs, television news, auditorium program, the television fictional narratives, through their stories, their dialogues, settings and characters, show the everyday life of their country. The German philosopher Jürgen Habermas would review the concepts of the effects of media as producers of symbolic codes, admitting that cultural products allow the individual to make a reflection on what he is receiving. Following that thought, Leonardo Avritzer proposed the concept of reflexivity caused by cultural production (Avritzer, 1999, p.168). Introduction of this concept, in the case of television fictional narratives, would bring the idea of no longer passive reception, but endowed with possibility of interpretation and experimentation. Among the various aspects that exist on the subject, for our study it is worth mentioning the conception of Thompson when he said:

A guy reading a novel or watching a soap opera is not just consuming a fantasy; he is exploring possibilities, imagining alternatives, new experiences with himself. (Thompson, 1998, p. 202).

The reflexivity studied by Antony Giddens, in his book Modernity and Identity (Giddens, 2002), is understood as susceptible to most aspects of social activity and highlights the importance of the media in this process. In the case of television fictional narratives, in mediated contact with realities and different experiences, individuals are urged to reassess their own life, helping creatively in the construction of identity.

(…) Images of other ways of life are a resource that individuals have to critically judge their own living conditions. (…) The mediated experience is an experience of the other, she cultivates the imagination of the individual, which becomes increasingly able to see over the other person in a new situation. (Thompson, 1998, p.157 - 167).

Thus, we would be assuming that the narrative fictions, whether literary, audiovisual or media, by the device of narrating a story, to entertain, would be helping the receivers in the production of new meanings for their conception of the world and about themselves.

3.1 Television Series
In the United States, from the 80s, there was a boom in the production of series directed to TV. Television networks, such as Universal Channel, AXN, HBO, Fox, Warner and Sony offer a huge range of options ranging from realistic drama to sitcoms, criminal, action, supernatural approach serving a diverse audience, and following the different age groups. There are series that achieved an audience of over 10 million viewers, as was the case of Friends (1996), Sex and the City (1998), The Sopranos (1999), House (2004), Heroes (2006), Breaking Bad (2013).
Believing in this niche market, the production of series in the U.S. has become more sophisticated, winning new ranges of audience to the point of calling the attention of scholars in the field of communication.

Considered as a popular fun television, the American series acquired status of work of art. They have deep characters, challenge procedures, and address social issues. The majority of the intellectual public approves these series. In turn, the audience is now seen as "intellectual public ".

"Hollywood is no longer the source of creative vigor of American entertainment. Intelligent life is now on TV," as mentioned in the article presented in Veja magazine, December 15, 2010, signed by Marcelo Marthe and Isabela Boscov.

No wonder that filmmakers of works of wide recognition came to recognize the importance of the television market, freeing it from the stigma of "mass culture," and considering it as a means to reach a wider audience than the film disseminating their work, as is the case of the series Boardwalk Empire (HBO) by Martin Scorsese, and Terra Nova (Fox) and Falling Skies (FXUK), both by Steven Spielberg.

Bernardo Bertolucci’s, the Italian director, in statement published in Veja magazine, Editora Abril, on 1/06/2013, said: "American movies that I like now are not Hollywood, but the television series as Mad Men, Breaking Bad and The Americans."

And in this scenario, the contents provided by the television series assist creatively in identity construction process of questioning and structuring of social and individual conflicts. In a series format can be treated in more depth specific issues, such as: contemporary female sexuality, Sex and the City; Big C, on character with cancer; Looking, which debuted in January 2014, displayed by the American channel HBO, addressing the gay male world.

3.2 The representation of women in television series
Since the 1950s when the I Love Lucy series, was a huge success bringing TV screen social issues experienced by the woman of the time, female gender has been gradually gaining space in TV series, occupying the central leadership role not only in sitcoms and drama genre, as well as in adventure and criminal drama. With the advent of cable TV, whose business model allows the introduction of issues before censored in public TV, this universe has been expanding audience with over million viewers.

In 1998, the North American TV launched the series Sex and the City on HBO channel, based on the book by Candace Bushnell. They live in Manhattan, in New York City, an icon in terms of social behavior of the Western world, the series is to plot the lives of four single women aged 30-40 years, their daily lives and their conflicts.

Sex and the City was a huge success, with over 10 million viewers, strengthening present in the television fictional narrative to seek expose female behavior on issues in society.

Carrie, the protagonist works in a column of a newspaper reporting stories about interpersonal and sexual relationships. Three friends are the companions with whom will share your questions: Samantha Jones works as a public relations and cultivate relationships without compromise; Charlotte York works in an art gallery, is the romantic and sensitive is looking for a lasting relationship; and Miranda Hobbes, lawyer, rational, oscillates between the two situations.

In the first episode, already outlines the universe that the viewer will find: the first scenes, appears on a billboard by bus, Carrie's program announcement with the following sentence: "Carrie Bradshaw knows what good sex is (and is not ashamed to ask) ".
And in her voice in *off*, Carrie begins to tell about an English woman who arriving in Manhattan, she met a man who for a few weeks demonstrate to be completely in love with her and suddenly disappears. Carrie then says the following phrases:

“She had not realized that there was no love in Manhattan. Welcome to the time of “non-innocence”; there is no "luxury dolls" (…). Instead, the dolls work and have relationships that try to forget quickly. Self-preservation and make good business are more important. How did this happen? There are thousands of women in the same situation in this city. They travel, pay taxes, pay $ 400 for for sandals by Manolo Blahnik and are solitary. It's like the riddle of the Sphinx”.

The series had six seasons, made between the years 1998 to 2004 and generated feature film in 2007. The four women living situations of work, love relationships, portraying the anxieties and conflicts of contemporary women. Worldwide success, the series would enhance the effectiveness of television fiction as space for female public better understand their conflicts. Throughout the history of the West, trying to understand the differences between the nature of feminine and masculine, the idea that "men only want sex" while "women only want love," takes another form in contemporary as a result of the changes since women's emancipation in the mid-1960s. Feminist movements of the 1960s and 1970s, who had intended to dismantle the phallic registry by society in the political, economic and behavioral framework managed to open the field to the fight for women's rights, for their sexual freedom and its entry into the field of work. The *Sexy and the City* series shows this woman with good economic situation, independent, free for sex, questioning all the time if this woman would be happy in that model. "Women in Manhattan are giving up on love and climbing power?" Asks Carrie character. Regardless of the given approach the end, what matters is the fact of using a television series to explore the issues of the contemporary female universe.

In criminal drama series, many have woman as detective. In the case of this article, we analyze the British series *The Fall*, produced by BBC with Netflix and *Homeland*, produced by the North American channel HBO.

In *The Fall*, Stella Gibson is a detective called by the Police of Ireland, to lead the investigation into the murder of young women. Blonde, with a slender body, the character is strong and secure woman working with a group formed basically by men. Intelligent, shows that she has a different way of analyzing the problem, the result of a different sensitivity of the male. She does not stifle your sensuality, wearing high heels, skirt and silk shirt. It is shown comfortable with her loneliness, fulfilling their wishes with "casual sex". In a board of her workroom have pictures of Chinese women where she tells:

“They're Mosuo women. They're a small ethnic group, living in China on the border with Tibet. They're a matriarchal society. They practice what's called "Walking Marriage". The partners live in different households. "Sweet night" is what the Mosuo woman call secret visits when woman asks the man to spend the night and then leave in the morning”.

Phrases spoken by the character transmits the concern on questioning the inequalities still exists in the XXI century between men and women.
For example, in dialogue with one delegate man, when she felt that he is surprise when she claims to have spent the night with a man just for sex, she says:

"That's what really bothers you. Is not it? One night stand. Man fucks woman, man Subject, verb, fuck, object woman. That is okay. Woman fucks man. Subject woman, object man. That is not comfortable for you, is it? ".

And an important point about her investigation is the fact that the characteristic of the serial killer's crimes is: they are young women with careers, found naked and strangled, i.e. involving violent and sex with women.

Stella Gibson would be representing the liberated woman more interested in your professional life than build a family life. Cold, calculating, nevertheless, in the second season of the series, we will see her cry sometimes with situations involving the investigations, with the suffering of women.

In Homeland series will have the character Carrie, an official CIA operation. Her purpose is to find out if Sergeant Brody, who she believed to be dead for eight years ago in Iraq would have gone over to Al-Qaeda group and planned to return to his country in order to promote terrorist attacks.

Woman in her forties, independent, living alone in a good house, she doesn’t have interest on having a relationship. A night out to have fun with a guy who asks him: "You're married?" “No". She said. "But you wear the ring." "Oh! Weeds out the guys looking for a relationship".

Her profile follows the line of independent woman, obsessed with her work. However, during investigations, as she engages with Sergeant Brody she suddenly falls in love with him. In these two series where women play detectives the question that will emerge is whether women are, or are not, able to keep a standoffish attitude (“sweet night”) likes a man or they are more fragile and susceptible than men?

In the case of Brazilian television series that address the feminine universe, there is a tendency to portray divorced women and their situation in face of new life. As an example, Divan, Dilemmas of Irene, Three phases of Teresa. In 2015, TV Globo, the largest open TV network in Brazil, produced Double Identity, policies series where the detective is an independent woman within the profile analyzed in The Fall and Homeland.

4. Final considerations

Focusing on the fictional narrative television, recognizing its importance as a representation of the culture and customs of a certain society, the objective of this article was to analyze some series whose main character is a woman, checking the issues concerning the contemporary feminine universe.

We could also provide new examples, but the point here is to understand the importance to analyze television series as means to understand the messages that are being passed on the profile of the contemporary woman.

What we can see in the examples presented is that women are still seeking a balance between the rights gained - as their academic education, financial independence, sexuality - and some female characteristics, like the sensitivity, vulnerability, and the maternal sentiments, aware that the differences are complementary features to the construction of a society without prejudice, without discrimination and without violence against women.

Bibliography:
Collaborative Poetry and Gender

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Gender has always been regarded as one of the influential and important factors in literary creativities. The present study aims to explore an Iranian poetry book which is a new phenomenon not only in the Iranian contemporary poetry but also in the world’s poetry. “Atr Az Naam” (The perfume from Name) is a collaborative poetry book written by two poets, one male and the other female. One is Mohammad Azarm, an Iranian contemporary poet who has published 3 poetry collections, has written many critiques in the press and is the theorizer of a type of differance poetry based on Jacques Derrida’s theory. The other is a female poet who writes under the pseudonym “Eve Lilith”. Interestingly, while writing the book, the two poets did not know each other and the female poet’s identity was unknown to the male. The collection was extemporized by the two poets and it is by no means clear which parts of it were written by which poet. Hence, its poems challenge the poet’s gender, making the collection unique in the world’s poetry. It can be said that the gender apparent in the collection’s poems does not necessarily match the poet’s. Due to the way in which the book is extemporized, the female language in the book can be attributed to Mohmmad Azarm and the male language in other parts to Eve Lilith. The majority of the book’s poems deal with woman’s status in Iran’s history, Persian poetry, religious beliefs and ritual traditions, society and the mutual relationships of man and woman and the woman’s hidden
voice is apparent in the poems. Due to the way in which the collection’s poems were written, their form is generative, unfocused, quick and pluralistic and closely matches the properties some theorizes attribute to female language.

**Keywords:** Collaborative Poetry, Gender, Atr Az Naam

1. **Introduction**
From the time immemorial and based on classic views, poetry has been known as the product of the relationship between one’s viewpoint and the universe, hence it is believed to be inspired by the human spirit, which in its purest form is bestowed as a gift from gods. Therefore, poets could be purported to search for such a gift within themselves. As an individual practice, poetry is where a man makes a dialogue with his surrounding world. In viewing poetry as such, there is no room for the dialogue between two human beings. However, collaborative poetry is an experience that shows the relationship between man and the universe is multidirectional and variable, molded out of the dialogue between two or more men. Collaborative poetry is no so much of a novel experience, and a few poets have already used this form of poetry. The goal of this article is to analyze one of the unique collaborative poetry books, which is also important from the viewpoint of feminist criticism.

2. **Literature review of world’s collaborative poetry**
In their unconscious writings, surrealists used to write impromptu individually or collaboratively in their ecstasy. Under Freud’s influence, they believed in a superior truth in a dream world. The realm of the dream world shows the unconscious, untold orientations of human beings, which is removed from their everyday lives for any probable reason. This superior truth should be allowed to emerge in unconscious writing. All of couple and collaborative poetry written by surrealists are quite considerable. They all have a psychoanalytic behavior with delivery terms, conforming to the form of one’s talk while hypnotism.

For example:

Where is the sea? / Andrea Burton: behind the statue. / Rene Char: any place in between two characters’ dialogue. / Paul Eluard: in porches / Alberto Giacometti: So close, behind the first passages. / Murice Henry: towards the audience / Benjamin Pare: toward us but we shall turn our backs to it./ Tristan Tezara: Ten miles further, behind the chimneys.

3. **Literature review of collaborative poetry in Iran**
The most notable collaborative poems were written by Forough Farrokhzad and Yadollah Royayi in 1966. These poems were published posthumously in Farrokhzad’s ‘Nostalagia’ and Royayi’s ‘from I love You’. Royayi has also collaborated with Ahmad Reza Ahmadi. The common feature of all these works is the frequency of the complete phrases of the poems. Each poet starts a phrase and ends it, and then the next poet’s turn will come. To put it in other terms, the phrases of each poet and what he/she writes is determined and uninterrupted from the beginning to the end. As an example:

Royayi: since in the sky, / The binding of my logbook / I make out of the sun, / In the armless alleys, / In womanless times, / I burnt with the sun,
Farrokhzad: The image of this fracture is yet heavy / The image of this fracture, you the kind one
/You the kindest / The balance will displace smoothness of mirrors / Invite me to my childhood
garden! (Royayi, 1967, Nostalgia, p23-25)

This poem was published in Royayi’s book where in the notes a reference has been made to
collaboration with Farrokhzad. Later the binds of each poet was clarified separately in note space.
In these poems, the poets had possession over their lines, and they could put the same lines in their
other poems.

3.1 Atr Az Naam
The form of a poem does not conform to line; in other words the poetry unit is not line. When a
line is made and if it is consistent with the form of the poem, then it can be kept or otherwise
removed. Mohammad Azarm say that “. All of Atr Az Naam poems are written through online
conversations. I and Eve Lilith quickly recorded a few phrases with the goal of writing a poem.
We were not supposed to write individual lines which could separate after. The purpose was to
create in one moment and to form a conventional universe brimful with nothing but poetry.”
(Husseini Nejad, 2013, p. 9)

One of the characteristics of aroma-of-name poetry is the complete collaboration between the two
poets to create the form of a poem. “In the book “Atr Az Naam ”, each line might contain two or
more quick lines by two poets; in other words, even with the separation of the lines, no one is able
to guess who has written a certain line. As an audience of such poems, I am always in doubt which
lines I have composed. Keep in mind that a poem lining does not conform to the order of writers
but to the form” (ibid).

Mohammad Azarm speaks of another feature of his book “Atr Az Naam ”, namely its transgender
nature. ” Atr Az Naam has feminine outlooks; our interactive writing shaped the book as
collaborative work. Our collaboration was so much that we could approach the poetic language
and play the role of the poem characters, which made the segregation of the poets impossible. This
is an important book because sexual segregation of the poets forms one of its semantic layers. No
interpretation of a poem could be ascribed to one specific poet (ibid).

In a novel dialogue¹, Eve Lilith refers to another unique characteristic of the book: For example,
one I had a tentative design for one of my poems, and after a few lines, the male poet wrote a line
in front of me. I was silent for a while; he asked me if he should continue. I said no. He waited for
me to say something yet I was still silent. He asked me again if he should continue. I answered
‘no’. He asked if there was a problem. Then I started to write the poem; I said I could give him a
proper response by only one word, phrase or line, and that I could not present all of my life history.
I meant I could not handle what I said. I said I even could not finish that poem on my own. He was
dealing with poetic language and form playing the role of an actor. That day I had this
overwhelming feeling that besides the form, there is also something else, my femininity. What he
had written was quite hard for me to answer. This silence was kept intact in the book, and later we
completed the poem. In editing the poem, I had the same silence as well.” (Jadiri, 2013)

3-2. Mohammad Azarm was born in Tehran. His poem books are “unpublished photos” (poems
72-76) and “his name is this, Mohammad Azarm” (poems 76-81) and “Hum” (poems 84-86).
Several articles on literary theory has been written by him during the recent years such as
Differance poetry theory as a new status in written poetry and also the explanation of the concept of performance in writing. He has held numerous workshops on impromptu writing of poetry.

Mohammad Azarm has experienced three periods of writing collaborative poetry.; first between 1992 and 1996 with his poet friends in university where the products of their collaboration was amateur. Second it was between 2002 and 2005 with some of his friends who are now very famous poets. He published some of his poems of the second period in periodicals and internet. The third period is the workshop of poetry impromptu writing held with the purpose of teaching students in different cities; this period was concurrent with the second period. In these two recent periods, the strategy used for writing poetry is entirely different from ‘Atr Az Naam ’; distinct identity of poets and the manifestation of style were visible all through the lines of the poem. (Jadiri, ibid)

3-3. Eve Lilith was an unknown lady with two names. In Atr Az Naam , she is only an Anima and a voice; a lost voice. Eve Lilith is the nickname of poet. Her real name is not disclosed in official media; it should be noted that she has been interviewed with the same name, which is quite new on its own (Naseri, 2014, 7). The mythic nature of this name gives the book a number of implicatures. In other words, this nickname forms numerous atmospheres of the book; therefore without them, we would face some other type of atmospheres. The metaphoric nature of her name gives her a secret power, but the semantic horizon of this name lays the foundation of Atr Az Naam . Eve Lilith is made before writing the book; as a matter of fact, this name was not made for the sake of the book in question. On the contrary, the book was inspired by this name, and in the near future the very name could lead to the emergence of other literary works as well. (Ibid)

4. The analysis of poetic concepts of Atr Az Naam with a feministic approach:

4-1. The creation of World narratives

There is a poem named dummies’ in the book with elements such as wheat, dummy, falling, nakedness, three and soil; they remind one of descent of Adam to the Earth. The story of Descent and the role of women in it are among the very challenging subjects in feminism theory. In this poem, however, we will not face structural and semantic stereotypes. More importantly, we do not know that what the role of men and women is in it. Overall, viewpoint of a human beings in this type of poetry is beyond their gender.

I write from wheat to your dummies / While running, it lightens them up / And they fall from the ceiling / So that I give the umbrella my arm / Half of them have no dress on their body

Half with no body at all / I write from my the body to shirt (Atr Az Naam , 21)

“Unnamed” is a poem entirely devoted to a dialogue between man and woman in the moment of creation when two human beings reach each other between light and darkness to form the biggest event of all the times. The poem, revelation in pepper, is a feminine narration of creation which happens during cooking food process.

4-2. Language and their inseparability

Genesis is another poem of the book starting with undiscernible sounds. Sound that reminds of the first moments of the world. The language of the poem is under the process of production and as the objects and things in this world take shape, sentences are constructed little by little. The language of this poem does not contain gender-based stereotypes. It is not clear which poem is
written by whom. This poem is an ideal world where two human beings have devolved into their primary state of being, thus are constructing a new world.

Co / Whe / Cm / en / Co Cm fr when / Come from / Sa from / Sa come sa / Beyond / When I am surprised from the mouth / Beyond / I arrange and it becomes perfect in hand… (Atr Az Naam , p 67)

. 4-4 Different directions of feminine myth

Another challenging subject before feminists is the creation of women on earth. In Lilith, these stories are challenged. The audience does not know that whether this narration is feminine or masculine. This is only a human voice:

No narration but human / Was awakened from this point / There was no heaven / No big name that is untold / Waters joined / Names conjoined / Light escaped the shade / It dispersed the narration / Eve sat down / Lilith sat down / But Adam was stand still (Atr Az Naam , 62-64)

4-5 The status of females in an imagined history intertextually related to historical/literary realities.

The historical and geographical conditions created in the book through which transgender human beings is crossing where females sometimes show their discontent:

I left the world to congregate / To throw out of my throat / I went to emit myself with no sound

To open my lips sealed by history / To pry open the fold of lady’s dress / To dress the burnt women / From the wedding chamber to the school / To the words under the dress / To the words of children behind the door / From Jamshid to Bed, I shall / To pour wine in bone throat / To get a fever between the pages / To let out a cry through the graves’ throat / To burn from throat to my belly / … / To deal with all of the books of history / To become a burning book in the revolution / I left to make the curtains filled with women / With my lips burnt with bread

I left and my shoulders burnt as they touched your shoulders / My eyes are not waiting for the fear of your steps / Limit confined my revolution (44-46)

4-5 The criticism of culture, history and everyday life as masculine action

In ‘the way of hatred’ poem, the poets (in this poem both of the composers write from the viewpoint of females) complain about the past male poets. In the history of Persia poetry, Persian male poets always talk about the body organs of their beloved ones rather than their thinking. In their serenades, they worship women with fixed stereotypes such as hair, beauty spots and their cypress-like height. In this poem, the writer as an individual person believes that this is not love but a kind of hatred. Therefore, the poet points his finger at Persian sonnets. He states that sonnet has risen to take back its real popularity.

From the poets that lived before you / I escape / I have been awakened from the grave
To cut the moon of the cypress / You poet! / The ear escaped you / The fingers condemned the sonnet / And this is the way of hatred / Not the way of friendship (79-80)

In “not everything starts from blockade”…. The narrators complain about the dominant masculine discourse:

I am filled with interpretations / Which forges women rights / Under the teeth / Its pieces are collected / Blood clots that come back to me / Sometimes body to body / Only pain swells / And women descend down to one (47-49)

Or in ‘freedom’ poem:

They don’t let me enter to a few wisps of hair / The journey of entrance is obscure in another book (11)

4-6 new sonnets

In the poems of this book, there is no conformity to sonnet stereotypes:

A type from with / Poem starts with blood / To blend it with lips from beyond / To search in my body fold / To speak in order not to say / In a way that fish swims out of water in words (Atr Az Naam , 81-82)

‘Farapachino’ is also a dialogue between an amateur female poet and famous male poet. In this poem, an ethical-cultural issue is challenged. The female poet approaches the male with the purpose of getting popularity. However, the male poet intends to abuse her body. This poem stands against such a condition with sarcasm and irony.

5. Conclusion

As could be observed, collaborative writing is way out of a dominant discourse. Atr Az Naam is unique in that it is not clear who has composed the different parts of the poem where the gender of writer is obscure. In this poem, the presence of two poets has led to a transgender world. The specific condition of Eve Lilith as feminine expert has given a special sort of feeling to the atmosphere of the poems. The presence of myths and her name has embedded the feminine concepts in the poems by using different narratives. The poets in this book do not conform to the existing stereotypes to create serenades. Language is another feature of collaborative poems in this book. The language is multiple and multidirectional. There is also polyvocality in the dialogues. It is necessary to analyze the English translations of these poems, so that more examples are selected and the hidden layers are exposed.

Notes

1. From an interview between Behnam Naseri and Mohammad Azarm, Ghanun newspaper, no 417, year 2, May 5, p. 7, capital should be under the control of the art of poetry (a conversation with Mohammad Azarm).

2. The translation of these poems has been only done for this article

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