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TABEL OF CONTENTS

METHODOLOGIES AND PERCEPTIONS TO THEORISING MIGRATION.....	6
Mrs. Joyce Ayeni and Prof Sanjana Brijball Parumasur	6
ONCE A DEBTOR, ALWAYS A DEBTOR – LESSONS FROM BULGARIAN DEBT COLLECTION PRACTICES	13
Ms. Kristina Stefanova	13
ARBITRAL AWARDS UNDER THE NEW SAUDI LAWS AND INTERNATIONAL RULES, CHALLENGES AND POSSIBLE MODERNIZATION.....	25
Mr. Ahmed A Altawyan	25
CORPORATE GOVERNANCE IN SINGAPORE: EXPLORING THE CONCEPT OF DIRECTOR INDEPENDENCE IN LIGHT OF GLOBAL CORPORATE GOVERNANCE PRINCIPLES.....	36
Ms. Chen Meng Lam	36
MEDICOLEGAL ASPECT OF AUTOPSY IN INDONESIA: AN ETHICAL DILEMMA ON MEDICAL FORENSIC EXPERT’S AUTHORITY	47
Ms. Raania Amaani; Mr. Aristyo Rizka Darmawan; Ms. Sella Dwi Julian; Ms. Shaqina Said and Prof. Agus Purwadianto	47
EDUCATIONAL STATUS OF TRIBES IN JHARKHAND (INDIA): A COMPARATIVE STUDY OF ORAON AND SANTHAL	56
Dr. Sujit Kumar Choudhary	56
ISSUES PERTAINING TO INTERNATIONAL ARBITRATIONS UNDER THE PRIVATE INTERNATIONAL LAW	64
Dr. Hemant Garg and Dr. (Prof). Sushil Gupta	64
A CRITIQUE ON THE HUMAN RIGHTS PROTECTION MECHANISM BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THE CROATIAN PERSPECTIVE	70
Mr. Tunjica Petrusevic	70
INVESTMENT AGREEMENT UNDER THE FREE TRADE AREA OF THE ASIA-PACIFIC (FTAAP) AS THE BASIS OF GLOBAL INVESTMENT POLICY	79

Prof. Tomoko Ishikawa	79
SOCIAL PROTECTION IN SOUTH AFRICA, BRAZIL AND INDIA: FROM THE VIEWPOINT OF POVERTY REDUCTION AND BEYOND	80
Mr. Clarence Itumeleng Tshoose.....	80
THE EMERGENCE OF THE NEW EQUAL PAY PROVISIONS IN THE LABOUR RELATIONS ACT 66 OF 1995: BETTER PROTECTION FOR ATYPICAL EMPLOYEES IN SOUTH AFRICA?.....	80
Mr. Shamier Ebrahim.....	80
RECONSTRUCTING PROPERTY RULE AND LIABILITY RULE FOR COPYRIGHT HOLDERS, USERS AND INDIRECT SERVICE PROVIDERS: AN APPROACH TO REDUCE TRANSACTION COST.....	81
Prof. Han Zhang and Weijie Huang	81
CONTRACTING OUT OF NON-REFOULEMENT PROTECTIONS	82
Mr. William Worster	82
IS VOLUNTARY DISCLOSURE A TOOL FOR INCREASING TAX REVENUES OR AVOIDING TAX EVASION? ; A TAX ADMINISTRATION DILEMMA.....	83
Dr. Burcin Bozdoganoglu.....	83
SOCIO-CULTURAL COHESION IN THE SOUTH AFRICAN ETHICS GOVERNANCE SYSTEM: THE YEARS PAST AND YEARS AHEAD	84
Mr. Uhuru Dikgang Moiloa	84
THE NEW CONCEPT OF SEX-CRIMES IN CROATIAN CRIMINAL LAW.....	84
Dr. Igor Vuletic and Davor Simunic	84
ADAT LAW SOCIETY AND THE RIGHTS OVER NATURAL RESOURCES: INSTITUTION AND THE MANAGEMENT OF SASI IN MALUKU INDONESIA.....	85
Mr. Muhammad Yahdi Salampessy.....	85
POVERTY, INEQUALITY AND THE SOCIAL CAUSES OF CRIME.....	86
Dr. Salim Yaacoub.....	86

REFRAMING TRIBAL GOVERNANCE IN TRIPURA: TTAADC TO THE VILLAGE.....	86
Ms. H Theresa Darlong.....	86
LIST OF LISTENERS	87
Dr. Takuya Kajisa	87
Mr. Muziwenhlanhla Ntuli	87
Ms. Lindiwe Dzimba.....	87

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METHODOLOGIES AND PERCEPTIONS TO THEORISING MIGRATIONMRS. JOYCE AYENI¹ AND PROF SANJANA BRIJBALL PARUMASUR**ABSTRACT**

It has been widely circulated that migration received minimal attention from researchers before the 20th century but a great deal of attention thereafter, thus shedding light on several frameworks underpinning it. The end of the 20th century witnessed a shift from the state-centered framework to highlighting the diversity existing in migration categories such as race, eras, age, and gender. New models of migration have been established since the 1990s, confronting popular fallacies that have dominated migration studies. It is worth stating that migration has progressively evolved into an interdisciplinary subject, and continues to attract contributions from researchers in various fields (Brettell and Hollifield, 2000).

INTRODUCTION

The varied contribution on migration provides interesting perspectives on migration studies and a clearer understanding of the phenomenon, while tackling misconceptions and stereotypes. Fresh facts are emerging using previous studies on migration as a foundation for stronger research output. Widespread notions on migration have experienced a paradigm shift due to new and ongoing studies. Migration norms and models of internal and international migration have also been challenged based on evolving facts. The exclusive emphasis on ‘the west’ or European migration as a model for international migration has shifted to multifaceted global migration patterns and flows.

The significance of the theoretical framework of this study cannot be overemphasized. It enables the reality of a phenomenon to be established while exposing the misconceptions around it. Model building provides the opportunity to make new discoveries and generalize the results of the study to other situations, as well as forming the basis for future exploration. An adequate understanding of the subject can be gained by examining the cause and effects highlighted by previous models. Model building can also support the researcher in predicting future occurrences of the phenomenon and achieve the purpose of science: to cultivate descriptive theories. Models and theories depend on the use of research questions and hypotheses, which are approached through logical analysis to examine the connections between different variables. The result of logical analysis can be used to negate, support or reform the original theories and models.

OBJECTIVE

This study seeks to contribute to a clearer understanding of the internal migration of medical doctors in the South African public healthcare sector by revealing the main reasons behind their migration, its effect, and the means by which it can be reduced through the application of new theories and perceptions.

Gaps in Migration Theory

The perception of the neo-classical theory on migration is that a steady flow of rural migrants will exist as long as there is a high disparity in wages between the rural and urban areas to supersede the fear of temporary or permanent urban unemployment (Todaro 1969). Even though wage differential is crucial to the decision to migrate, the importance of the costs and risks associated with migration cannot be underestimated. Logically, it is pertinent to state that

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migration research with the focus solely on occupation and wage differential cannot do justice to the study.

The famous push-pull model continues to gain admiration in migration literature. There can hardly be any study on migration without mentioning it. The model has brought about the popular supposition that migration decisions can be swayed by economic, environmental and demographic factors, and this has been supported by several research studies which have applied it. The push-pull theory of migration involves several elements, and the push factor has been widely reported to play a far greater role in doctors' decisions to migrate than pull factors.

However, there are fundamental flaws in the push-pull model. In reality, the model has the tendency to create an infinite reservoir of migration determinants. The model also has the tendency to ignore the internal stratification of various cultures. Common background factors, consistently referred to as either push or pull factors may probably influence people differently, stimulating some to stay while inspiring others to leave. It is germane to state that personal aspirations, mission and vision significantly influence the tendency to migrate, and that this is a crucial factor often disregarded by the push-pull model and other models such as, the neoclassical and the structuralist models (Petersen, 1958).

The new economics of labor model affirms that understanding the various forms of migration and flow only comes from the examination of the broader social units along with individuals and their economic motivations. Todaro (1969) viewed the redistribution of labor from the rural (sending area) to the urban (receiving area) as a vital criterion for economic development. One cannot successfully separate the homes of migrants from migration if the proper understanding of migration study is to be gained; therefore, the household is part of the social entity that is essential for the understanding of migration. Some countries still views migration as a core instrument of domestic economic growth (Betram, 1999) regardless of various measures being put in place by policy makers to curtail movement around the world. The recent rise in terrorism has tampered greatly with the positivism of the development model.

The migration systems and network models center on the dynamics that generate, modify and preserve migration. The network theory essentially assumes that the economic, social, institutional and cultural conditions get modified by migration at the place of origin as well as the destination point. The network theory mostly emphasizes the importance of personal relationships between migrants and non-migrants, and how this social capital enables, maintains and alters migration mechanisms. The migration systems model goes deeper to accentuate the impact of migration in the reformation of the whole societal framework of the actual system in which migration occurs, both at the origin and destination points. Migration systems and network connections go a long way in determining subsequent migration flow from a particular sending area to a particular receiving area.

Nonetheless, the model is not without flaws. According to Massey (1998), the rounded logic of these models gives the impression that migration is perpetual, which gave the impression that migration systems and networks cannot crumble. The migration of labor has the tendency to decrease, or end, in the long run once the major reasons for migration wane. globular

The Bandwagon Theory

This theory took its root from the imitation theory of social psychology. People naturally lean towards a trend not necessarily because they know the rationale behind it or have properly thought it through; since others have done it or are doing it makes the action attractive (Ayeni, 2013). The theory of imitation is the most famous among several efforts at relating psychology to the understanding of social phenomena. The theory was first proposed by Gabriel Tarde (1890) and then autonomously by Prof Baldwin. Professor Baldwin (1895) concluded from his study on child mental development that the primary method of child's learning is by imitative

immersion of the expressions, actions and thoughts of others; hence, imitation is the technique for personal growth. An individual develops rationally and ethically by imitating the mental attitudes and actions of those around him or her. People want to do things the way others are doing it and most times will not do things outside of the societal norms and be seen as a misfit. The desire to have a sense of belonging is closely tied to the imitation theory.

Tarde (1890) approached the subject of imitation from the sociological angle; he affirmed that the fundamental element in the process of imitation could be generalized. Through the study on social phenomena such as crime, crowds, fashion and trends, Tarde (1890) asserts that imitation can be used as a source of a structure of social philosophy.

Inferences from the Bandwagon Theory

There are two key elements of the bandwagon theory: precedence and the thrill of adventure. Precedence assumes that the fact that others have successfully done something before means that act is possible regardless of the risks involved. Precedence presents an example to follow, what to do and what to avoid, how to go about it, and also how to learn from the mistakes of predecessors (Ayeni, 2013). Tarde (1890) claimed that society in itself is imitation, and assumed that the 'key to the social enigma' is the replication of an action previously performed by someone else due to a suggestion or feedback received (Tarde, 1890). The suggestion-imitation process clarifies the impact of one person's mind upon others, which subsequently explains all migrations and changes in the community (Tarde, 1890). Tarde also attributed the structural and functional harmony of a society to imitation. These assertions by Tarde suggest that, as people engage in actions performed by others before them, they encourage unity and brotherhood. In accordance with the position adopted above, Tarde affirms that all the actions of human beings, from the discovery of art and science to satisfying biological needs, are a result of the imitation process (Tarde, 1890).

The imitation theory formulated by Professor Baldwin is more systematic. The development of individual lives gives meaning to the development of social life, which reveals that imitation theory can also be applied to social progression. Baldwin (1899) affirmed that imitation is the process of a social group or association, and that every growth within the society occurs through the generalization of the invention of individuals by imitation (Baldwin, 1899). This kind of circular method ensures that people progress ethically and mentally by imitating the actions and intellectual outlook of people around them, while the modification of society also occurs through sustained imitation practices.

It is important to state that a reliable theory of social process was developed by Professor Baldwin, which was something Tarde could not achieve. Baldwin's theory hinges on practical facts and is often regarded as being more rational; he believed that the suitability of our choice for imitative replication and application is the origin of our choice (Baldwin, 1899). According to Baldwin (1899), people imitate solely what they have become habituated to imitate, and that one's personality becomes structured through this habituated imitation. This theory is in line with some current psychological philosophies on the learning process.

The imitation theory of Tarde and Baldwin was criticized on the grounds that people consciously choose who to imitate and do not just imitate everyone around them. People generally tend to imitate those who have been successful in their area of interest without considering the personal sacrifices, risks and other factors that were involved in that success. This assertion shows that there is selectivity in imitation, even if the person is perceived to be a subordinate or an enemy: so long as the imitator is able to establish the success factor, imitation can occur (Ayeni, 2015). Another major criticism of the imitation theory is that it is preposterous to conclude that a single nature or instinct (imitation) determines the whole process of all individual and societal development (Baldwin, 1894).

The thrill of adventure, the second element forming the bandwagon theory, holds that the excitement of trying something new can sometimes lead people to “join the bandwagon”. The quest for adventure can push people into action without weighing the pros and cons properly (Ayeni, 2013).

Migration has emerged as one of the solutions for assuaging tangible or alleged psychological and environmental threats against which societies have been defending themselves throughout history. Paradoxically, the number of adventure seekers is on the increase, the thrills of trying something new or engaging in something daring is not peculiar to the madcaps; more ordinary people are getting involved in adventure due to inquisitiveness.

Most adventure seekers are tired of hearsay and reading about other people’s experiences. They want firsthand experience of things, and to face the consequences of their action (or inaction). Even when some receive warnings or are exposed to information that could dissuade them from proceeding on migration as in the case of network theory, they will still not change their minds because of the thrill they derive. The thrill of adventure gives a sense of purpose that supplies their much-needed determination (Ayeni, 2015).

In his optimal arousal model on adventure, Duffy (1957) affirmed that people will pursue stages of arousal that are consistent with their expertise, circumstances and past experience. The levels of arousal differ from one person to another. To ensure optimal arousal, according to Berlyne (1960), the location or circumstance must consist of a proper blend of 3 factors: there must be a new task/quest, or an old task done differently; there must be some degree of insecurity with regard to the result; and there must be some level of self-confidence for succeeding in the task. Berlyne summarized these three factors as novelty, dissonance and complexity.

Optimal arousal shows that circumstances surrounding an individual can impact on a migration decision. Circumstances such as an unfavorable environment, poor working conditions, war, and gender inequality create a feeling of uncertainty about the present as well as the future, and can arouse the interest of an individual in moving to another location (thereby depicting the dissonance factor in Berlyne’s blend). Naturally, people experience a feeling of insecurity when their survival is threatened, or when they are exposed to something new. This feeling of insecurity usually compels a modification in behavioral patterns which provide information about the success of the modified behavior. Every situation comes with its own demands and, to be efficacious in meeting these requirements, it is necessary to learn new things and behaviors. In this way new inventions are developed, as well as precedence for future growth.

Conversely, the environment might be favorable, but the expertise of an individual and the self-confidence that he/she possesses the ability to succeed in any location might be the arousing factor to migrate. This makes up the complexity factor. The increase in proficiency tends to impact on one’s exposure and interest to explore, thereby fostering adventure. The effect of past experiences on arousing the thrill of adventure cannot be underestimated. In some cases, past failures have given people renewed zeal and interest to do things differently to achieve a better result: this is the novelty factor in Berlyne’s unique blend.

In his competence-effectance model, White (1959) affirmed that people engage in adventure to establish their capability to affect the environment. This assertion was also supported by Deci (1975), who argued that there is a human need to feel proficient. From the competence-effectance viewpoint, the migration of medical doctors from the public sector to the private may be due to fact that they feel they are capable enough to provide quality medical services on their own without government affiliation. These feelings of proficiency can optimally arouse an individual to delve into alternative courses of action or new terrain and effectively deal with the demands that might arise. Compatibly in proficiency and the demands

of the new situation will create a feeling of satisfaction which can boost the interest of an individual to seek more challenging quests as his competence increases.

The concept of specialization promoted by Bryan (1979) with regard to adventure can also be an important pointer for why doctors migrate from the public sector to the private sector. It is common knowledge that a medical specialist gets more financial reward in the private sector depending on the level of demand for his/her services. Could the exodus of doctors from the public sector as soon as they get qualified as a specialist be linked to financial gain? According to the concept of specialization, as people increase in specialty, the desire to try out their dexterity increases; there is an arousal to venture into something new no matter how risky it might seem.

Self-efficacy, as propounded by Bandura (1977), is a key component of the competence effectance model and refers to the self-perception of one's ability to handle tasks or situations, especially challenging ones. It is perhaps one of the most common models of human personality when investigating the impact of adventure. Self-efficacy accounts can be established or improved through individual achievements, verbal encouragement, stimulation levels and meditated experience. The personal perceived level of ability determines the involvement of an individual in adventure, but rational appraisal of one's level of capability in handling expected demands goes a long way in determining this self-perception. Is this theory of self-efficacy relevant to a study on the migration of doctors?

According to Bandura (1977), self-efficacy entails a personal evaluation of the following aspects:

- Self-perception of one's ability
- Extent of effort needed
- Expected task challenges
- Level of anticipated support
- Type of environmental conditions
- Prior forms of success or failure

All the aforementioned factors might be examined to ascertain the likelihood of success before entering into an adventure. Self-efficacy expectations differ depending on the size of the task at hand, the extent to which the perceived ability can be extended to other tasks and perseverance when faced with an unsuccessful venture. The effectiveness of performance accomplishment in influencing self-efficacy was emphasized by Harmon and Templin (1980) due to the fact that they are based on individual proficiency. It is natural for a feeling of proficiency to develop after achieving a remarkable personal feat. This feeling of proficiency is capable of propelling an individual to embark on more challenging tasks.

Nonetheless, self-efficacy does not entirely explain the participation of people in adventure or the desire to venture into a new terrain. With regards to the migration of doctors, many doctors, specialist and otherwise, have the capability to establish a private practice, but still decide to continue working with the government. The overwhelming assumption of self-efficacy is that success in one area of endeavor is an indication of success in other areas, and this is a fallacy. There are many factors involved in migration decisions that transcend the concept of self-efficacy.

People enter on an adventure with various expectations. While some expectations are sociological in nature, others are either somatic or psychosomatic. Challenge and interest were identified by Progen (1979) as the major expectations of adventure. Sociological expectations may involve conviction, concern and socializing, and the somatic expectations may involve well-being and freedom, while the psychosomatic may involve self-reliance and self-concept enrichment. Self-efficacy contributes in no small measure to our expectations. Self-perception makes people have either realistic or unrealistic expectations. Doctors, like every other

individual, have expectations that drive their decisions. These individual expectations can be affected, firstly, by personal belief in their capability to perform specific exercises effectively, secondly, by the degree to which actualizing the goal is difficult, and thirdly, the level of perceived control that an individual has over his/her accomplishment. Expected benefits are also a major influence on the thrill of adventure. Some of these benefits may include pleasure, the likelihood of realizing a goal, personal experimentation, and socializing.

Imitation, without a doubt, is a process of personal and societal growth. Even though it is a perpetual feature of individual lives and society, other phases of growth should not be ignored to ensure a thorough study. A proper process of development can be achieved through the collaboration of imitation with other factors. The controlled and restrictive nature of imitation, particularly by inherent urges, makes it incapable of sufficiently handling the process of both personal and societal growth.

CONCLUSION

Adventure has played a significant role in various fields of endeavor, bringing about inventions that have made the world a better place to live in. The thrill of adventure in swaying the migration decision might give a fresh clue to migration studies. The thrill of adventure is a complete deviation from the various models that have asserted their views on migration decision and is definitely a foundation for fresh conceptual framework on migration. People have different reasons for behaving in certain ways; therefore, it is time to look beyond the traditional models on migration and explore other factors that might provide us with the necessary solutions.

Despite public opinion, laying the burden of migration on an individual factor such as wages will not do justice to migration studies. A proper blend of both established and fresh models might just be a pointer to the missing clue behind the migration of medical doctors. As needs constantly change, so too do expectations which make individual factors incapable of revealing the main reason behind migration. People get motivated differently, and to ensure a study that can be generalized, there is a need to take cognizance of a combination of factors that will make the realization of the study goal possible. For an effective study devoid of bias, other elements within the wider health context in which the migration occurred will be examined apart from the migrants.

REFERENCES

- Ayeni, J.A. (2013) *Migration of Medical Practitioner from the Public Sector to the Private Sector*. PhD Thesis under Review. Durban: University of Kwazulu-Natal
- Ayeni, J.A. (2015) *Migration of Medical Practitioner from the Public Sector to the Private Sector*. PhD, University of Kwazulu-Natal.
- Bandura, A. (1977) Self-efficacy: Toward a Unifying Theory of Behavioral Change. *Psychological Review*, 84, 191–215.
- Baldwin, G.B. (1970) Brain Drain or Overflow? *Foreign Affairs*, 48, 358–372.
- Baldwin, J.M. (1894) *Mental Development in the Child and Race, Methods and Processes*. New York: Macmillan.
- Baldwin, J.M. (1895) Imitation: A Chapter in the Natural History of Consciousness. *Mind*, 3(9), 26–55.
- Baldwin, J.M. (1899) *Social and Ethical Interpretations in Mental Development: A Study in Social Psychology*. 2nd ed., New York: Macmillan.
- Berlyne, D. (1960) *Conflict, Arousal and Curiosity*. New York: McGraw-Hill.
- Bertram, G. (1999) The Mirab Model Twelve Years On. *Contemporary Pacific*, 11(1), 105–138.
- Bretell, C.B. and Hollifield, J.F. (2000) *Migration Theory: Talking Across Disciplines*. New York/London: Routledge.

- Bryan, H. (1979) *Conflict in the Great Outdoors: Toward Understanding and Managing for Diverse Sportsmen Preferences*. Bureau of public administration, 4. Birmingham, Alabama: University of Alabama.
- Deci, E. (1975) *Intrinsic Motivation*. New York: Plenum.
- Duffy, E. (1957) The Psychological Significance of the Concept of Arousal or Activation. *Psychological Review*, 64, 265–275.
- Harmon, P. and Templin, G. (1980) Conceptualizing Experiential Education. In Meier, J., Morash, T. and Welton, G. (eds.). *High Adventure Outdoor Pursuits*. Salt Lake City, UT: Brighton Publishing Company, 42–49.
- Massey, D.S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A. and Taylor, J.E. (1998) *Worlds in Motion: Understanding International Migration at the End of the Millennium*. Oxford: Clarendon Press.
- Petersen, W. (1958) A General Typology of Migration. *American Sociological Review*, 23, 256–266.
- Progen, J. (1979) Man, Nature and Sport. In: Gerber, E. and Niiian, M. (eds.) *Sports and the body: a philosophical symposium*. Philadelphia: Lea and Febiger, 237–242.
- Tarde, G. (1890) *les lois de l'imitation* (trans. Elsie clews parsons, 1903, as *the laws of imitation*). New york: H. Holt and Company.
- Todaro, M.P. (1969) A Model of Labor Migration and Urban Unemployment in Less-Developed Countries. *American Economic Review*, 59, 138–148.
- White, R. (1959) Motivation Reconsidered: The Concept of Competence. *Psychological Review*, 66, 297–333.

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ONCE A DEBTOR, ALWAYS A DEBTOR – LESSONS FROM BULGARIAN DEBT COLLECTION PRACTICESMS. KRISTINA STEFANOVA¹**ABSTRACT**

The paper aims to prove that, once a debt is in default, individual bankruptcy is in both creditors' and debtors' best interest. The most reasonable solution is individual bankruptcy proceedings and a second chance for the debtor. To persuade the reader, we depict the extreme consequences of household over-indebtedness: the reality of debt collection in Bulgaria - a country where individual bankruptcy is still a myth. We examine the legal framework of the executive proceedings to show that they usually lead to an increase in the debt rather than a decrease, as well as to the unequal distribution of the debtor's assets among the creditors. We present quantitative data regarding household debts and the number of executive proceedings in Bulgaria. We also discuss some of the malicious debt collection practices that develop when debtors are left at the mercy of debt collectors without any legal protection.

Key Words: Debt collection, Individual Bankruptcy, Consumer Over-indebtedness

INTRODUCTION

During the last few decades, most European countries have adopted a legal concept completely new to the civil law tradition on the continent: consumer bankruptcy. Across the Atlantic, individuals in the United States have long been able to benefit from the discharge of their debts and recover after financial difficulties.² The difference between consumer bankruptcy statutes in Europe and in the USA are substantial. While 11 U.S.C. provides both straight liquidation in no asset cases under Chapter 7, applicable to entities and individuals alike, and debt adjustment without debtors losing all or any of their property under Chapter 13, most EU countries have adopted only the second type of bankruptcy proceedings. Although there are substantial variations from state to state, the EU countries which allow consumer debt discharge require payment plans to be strictly followed, and at least partial payments of the debts must be made before a discharge is granted (McCormack et al., 2016).

Here “[i]t should be noted at this stage that only Bulgaria, Croatia, and Malta do not recognize Consumer Over-indebtedness in that they have no Bankruptcy or Debt Settlement Procedures that cater for Consumers” (McCormack et al., 2016, p. 316). Although a draft bill for individual bankruptcy was proposed to the Bulgarian Parliament in February 2015, legislators have not yet discussed it.³

In the light of the by far delayed statutory actions, the paper examines the necessity of the legal institute of consumer bankruptcy and compares the benefits it brings to the alternative. We present the current situation in Bulgaria regarding over-indebtedness, executive proceedings, and debt collection. Our aim is on the one hand to urge legal action in Bulgaria towards debt collection and consumer bankruptcy regulations, and on the other to depict the harsh consequences when consumers are held responsible for their debts without any protection or relief as a lesson for any person or legislative body not in favor of such provisions.

¹ Ms. Kristina Stefanova, PhD Candidate, University of National and World Economy.

² The US Bankruptcy Act of 1841 granted the right of discharge to every individual debtor, not only merchants, as had been the case before its enactment (Tabb, 1995).

³ Information and full Bulgarian text is available from <http://www.parliament.bg/bg/bills/ID/15220> [accessed November 7, 2016].

LEGAL FRAMEWORK

Enforcement agents

In Bulgaria, only legal persons can currently declare bankruptcy under Part Four of the Bulgarian Commercial Act. Natural persons do not have any legal recourse when they are in debt. In cases of default, creditors file claims, obtain writs of execution and enforce them through executive proceedings. Debtors' whole property and wages, except for a small, legally defined part,⁴ are used to satisfy the debts.

Until 2006, state enforcement agents were the only executive body that existed for the collection of debts. In 2006, the body of private enforcement agents was created to increase the effectiveness of the enforcement proceedings. Now there are 113 state⁵ enforcement agents and 193 private enforcement agents (Chamber of Private Enforcement Agents, 2015). Once creditors obtain the writ of execution, they can either initiate executive proceedings or join such proceedings against their debtors, choosing between state and private enforcement agents. The difference is that, in Bulgaria, private enforcement agents are self-employed professionals like attorneys and notaries, while state enforcement agents are state employees and their remuneration is not related to their effectiveness or the number of enforcement actions they initiate. The fact that private enforcement agents collect the fees of the proceedings for themselves was supposed to enhance their motivation and effectiveness, but this has been proven to hamper the debt collection process even more.

Executive proceedings

The first serious drawback is that there is no automatic stay on debts when an individual becomes insolvent. The enforcement on a debtor's property thus works on the principle of "first come, first served": creditors whose debts become delinquent first have the chance to be the first to obtain writs of execution and begin the execution proceedings, despite the debtor's imminent inability to pay other debts as well.⁶

The second serious problem comes as creditors file separate claims to court to obtain writs of execution for their claims. Usually the result is many separate claims and separate proceedings. One debtor thus could, and often does, end up with multiple enforcement procedures with different enforcement agents at the same time, and multiple creditors. The result is a huge number of open cases and no guarantee that debtors even know about the different pending procedures against them. Bankruptcy proceedings would prevent this complication by imposing an automatic stay on the debts and unifying them all into one single court and enforcement proceeding.

Probably the worse consequence of the lack of individual bankruptcy is the multiplication of costs due to the high number of executive proceedings. Court and attorney fees, as well as fees paid during the enforcement proceedings, are at the expense of the debtor.⁷ All the fees for every separate writ of execution, every open case, every enforcement action, therefore exacerbate the already indebted consumer's position. Such proceedings could hardly be called

⁴ The list of unseizable income and property is stated in Arts. 444–446 of the Civil Procedure Code.

⁵ Art. 264 (1) of the Judiciary System Act.

⁶ Secured creditors take priority over unsecured ones for money allocation.

⁷ According to Art. 34 of the Tariff of Fees and Costs of Private Enforcement Agents, costs of execution proceedings are paid by the creditor in advance and are at the expense of the debtor. However, it was explicitly recognized in Interpretative Decision 2/2013 of the Supreme Court of Cassation from June 2015 (pp. 25–26) that costs and fees are often directly collected from debtors, leading to an excessive increase of the debt. Although the Supreme Court declared such practices as grounds for disciplinary responsibility of the enforcement agent, we cannot know if this convenient practice exists or not.

efficient. The usual and logical result is the perpetual impossibility of the debtor to pay back the multiplied debts.

To illustrate the gravity of the matter, we would like to give the simplest possible example of how disproportionately high fees increase the whole debt once the executive proceedings begin. For a 1,000 lv. (1 lev = € 1.95) consumer debt, the absolute minimum possible court expenses would be:

- + 25 lv. for the writ of execution;
 - + 20 lv. for the initiation of enforcement proceedings;
 - + 10 lv. to invite the debtor to pay; and
 - + 100 lv. for the enforcement agent fee.⁸
- Total costs: 155 lv.

So, 15.5% of the debt is the minimal debt increase during the enforcement proceedings, possible only if the debtor pays voluntarily and no attorney fees were charged. This hardly happens. Usually what follows is that interest, numerous fees for property investigations, seizures, wage garnishments, etc. increase throughout the whole proceedings. What is more, even a 15% debt increase is significant for an over-indebted person.

Here we should mention that there is no guarantee the creditors and private enforcement agents act in good faith toward the debtor's difficult situation. Usually multiple attorney fees are added to the final balance of the debt. In fact, the actual scale of unfair and encumbering practices in the debt collection and executive proceedings is so big, that the urgent need for change in the statutes governing the enforcement proceedings has been among the priorities of both the current and the former ombudsman.⁹ We found another example of the common way a debt increases multiple times during the enforcement proceedings in the current ombudsman M. Manolova's Annual Report (2015):

- 100 lv. initial debt;
 - + 25 lv. for the court fee;
 - + (at least) 300 lv. attorney fee for the court proceedings;
 - + 350 lv. attorney fee for the executive proceedings;
 - + interests or liquidation damages, which could be more than the main debt; and
 - + 108 lv. for the private enforcement agent fee.
- Total: 883 lv. in the best-case scenario.

If, however, we add + 300 lv. for court proceedings in case the debtor makes an objection, and + 2 x 150 lv. for expert witness reports, the total debt equals 1,483 lv.¹⁰

A stunning example of a real case (Тази сутрин, 2012)¹¹ concerning debt for an unpaid bill to a mobile provider amounting to 37 lv. involved adding the following costs:

- + Executive order and writ of execution: 25 lv.;
 - + Attorney 1's fee: 120 lv.;
 - + Attorney 2's fee: 360 lv.;
 - + Garnishment costs: 144 lv.;
 - + Enforcement Agent fee: ~300 lv.;
- In total: debt of 986 lv.

⁸ According to the Tariff of Fees and Costs of Private Enforcement Agents.

⁹ Despite their efforts and the actions they have undertaken within their powers, there have not been any changes in the legal framework regarding executive procedure.

¹⁰ The report presents these calculations as the common case with unpaid bills owed to the only Heating Supply Company in Sofia. The ombudsman's annual report reveals a spate of complaints against the company, and presents another case where for a debt of 29 lv. the debtor must pay 794 lv (27 times more), although the due amount has been paid before the beginning of the proceedings and due objections made under Bulgarian legislation (p. 23).

¹¹ The case was presented in the report of one of the national TV channels and included an explanation of the costs by the private enforcement agent who was responsible for collecting the debt.

This equals a 2665% increase of the debt.

To make matters worse, according to Art. 136 of the Obligations and Contracts Act, the costs of the executive proceedings and debts towards the State (such as taxes) must be collected first. Hence, debtors pay for years before they actually start paying their own debts. Once individuals fall into the trap of insolvency, they can hardly cope with it.

The logical question that arises is: until when could the executive proceedings, and consequently the debt increase, be prolonged?

Statutory limitations

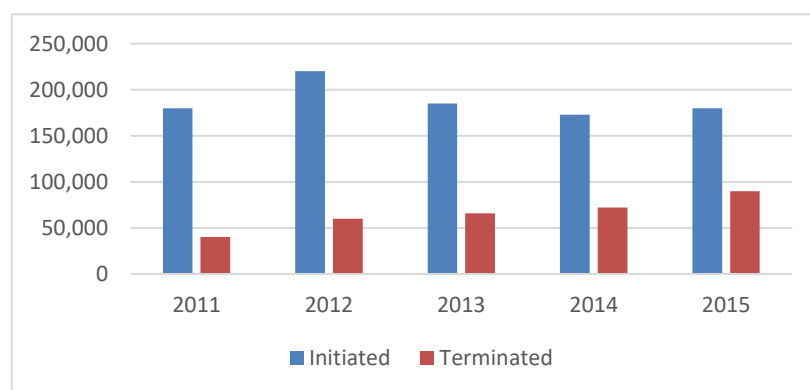
In theory, executive proceedings can continue forever. Statutory limitations for court claims is three years (for default in periodic payments) or five years from the default. The writ of execution's prescription is then five years (Art. 110 and Art. 111 of Obligations and Contracts Act). The enforcement proceedings are terminated, except for payment or the creditor's waiver of claim if no enforcement action is taken for two consecutive years (Art. 433 (1), item 8 of the Civil Procedure Code). This means that the absolute minimum timespan during which the debtor could be asked to pay is at least 10 years. This rough estimation does not include court and enforcement proceedings, which enforcement actions often prolong for years.

Mere logic leads us to the conclusion that executive cases would only increase in number, especially in times of economic crisis like the recent one. Cases would continue for years. This conclusion is supported by the empirical data.

EMPIRICAL DATA FOR EXECUTIVE PROCEEDINGS IN BULGARIA

As stated above, private enforcement agents are considered a more efficient option for executive proceedings. According to their own data (Chamber of Private Enforcement agents, 2015), their effectiveness is shown in Figure 1 below. Unfortunately, there is no available data to show us the total number of open cases, including the overlapping ones from previous years. Nevertheless, the data demonstrates the increasing number of enforcement proceedings against debtors.

Figure 1. Private enforcement proceedings

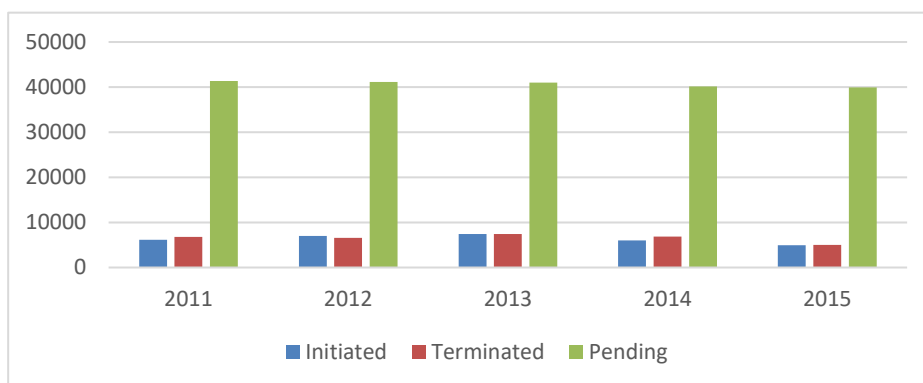


The data above presents only the private enforcement agents' cases. Similar data about state enforcement agents is found only as part of district courts' annual reports. However, most of this data, however, is very limited. Nevertheless, we analyzed the available data for six¹² of the

¹² The cities are Varna, Plovdiv, Burgas, Pleven, Stara Zagora and Shumen (Annual Reports, 2011–2015). Unfortunately, data about Sofia's District Court – the court serving the capital, which is the most populated city in Bulgaria – was not sufficient to be included.

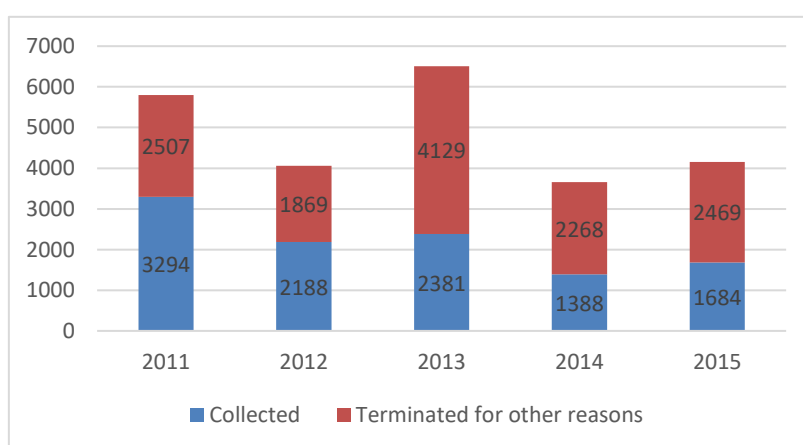
biggest Bulgarian cities. As seen from Figure 2, the decrease in the number of pending cases is insignificant. The slight decrease in open proceedings can be explained by the creditors' preference of private enforcement agents to public ones. Despite that, the number of pending cases is remarkably stable. This, combined with the much higher number of open cases in comparison to the closed ones in the private enforcement agents' statistics, gives us reasonable ground to suspect that the pending cases of private enforcement agents are not decreasing in number either.

Figure 2. State Enforcement Agent proceedings



A terminated case does not, however, necessarily mean a collected debt. In fact, the creditor has received the debt in only a small percent of the terminated cases. Figure 3 presents the number of terminated cases in four cities.¹³ As we see, at least half the cases are terminated due to the expiration of statutory limitations, amicable settlements between debtors and creditors, the lack of creditor action for more than two years, etc. The data presented includes numbers from only four of the largest cities in Bulgaria due to the lack of more data, but it is enough to depict the current ineffectiveness of the enforcement proceedings.

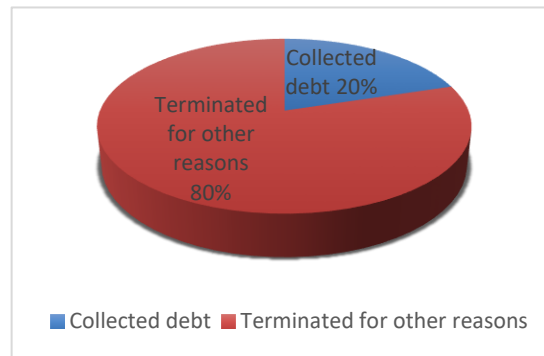
Figure 3. Terminated state executive proceedings



A striking example is the Sofia Regional Court's statistics for 2015 (Annual Report).¹⁴ Out of the 6881 terminated cases, the debt was only collected in 1388 (Figure 4).

¹³ The four cities are Varna, Burgas, Stara Zagora and Shumen (Annual Reports, 2011–2015).

¹⁴ Unfortunately, there is no available data for previous years.

Figure 4. Terminated executive proceedings in Sofia's District Court

One of the biggest concerns of individual bankruptcy is that creditors will not receive their claims. As we have seen, even now, when no debt relief is possible, only a small fraction of the enforcement proceedings end with the debtor paying the creditor. Cases usually stay pending for years, leading to the accumulation of higher debts due to fees, and debts eventually become impossible to collect. Debtors end up with no property, no income and increased debts. This prevents them from being viable members of the social and economic world. Moreover, it is an equally unfeasible situation for the creditors. Alternative solutions are thus gaining popularity: debt purchase and debt collection agencies.

THE DEBT COLLECTION ECOSYSTEM

Jiménez (2015, p. 106) calls creditors, debt buyers, collection agencies, and collection law firms “the entire collection ecosystem.” It is an ecosystem indeed. The debt collection agencies provide easy disposal of non-performing loans for the credit institutions. They can not only charge the debts off their accounts but also receive a price for them. In fact, credit institutions already release their debtors after receiving only whatever proceeds are available at the beginning of the execution process.

Creditors' expectations and attempts to recover debts are over after their assignment. However, debtors' struggles are just beginning. Debt collection agencies may not be the original creditors who extended these loans, but their employees nevertheless pursue the payments as if this were the case. This often leads to unfair or malicious practices and intrusion into debtors' time and life. It is not surprising as the incentives¹⁵ used to encourage the collectors are well chosen to encourage collectors to employ all kinds of measures.

Examples of common debt collection methods¹⁶

The easiest and most widely used method of collecting the assigned debts is through phone calls. Debtors are usually called on the phone, and at first informed politely that they must pay immediately. When they pay voluntarily, they are not disturbed more than once a month. If they do not pay, they are disturbed countless times. The polite tone is then replaced by more effective means. Harassment is the very first cruel but extremely effective weapon a debt collector uses. Multiple phone calls, arrogant behavior, all kinds of threats and insults are the

¹⁵ As in many other industries, including banks and other credit institutions, the incentive is the target bonus. Collectors are usually given a relatively low salary, but each month a certain target of a collected amount of money is given. If collectors reach their targets, they receive a decent bonus in addition to their salary – a simple and effective method.

¹⁶ The author bases the following exposition on her own professional experience in the field of debt collection, her research on the decisions of the Commission for Personal Data Protection (infra.), the interviews and annual reports of both former and current Bulgarian ombudsman (as they, as representatives of the citizens of the State, have addressed these issues numerous times), and various other media sources.

usual “arsenal”. “Debt collection companies use extremely aggressive, even coercive methods of debt collection. Citizens complain of psychological harassment and threats for their health and life, or the health and lives of their relatives, even employers” (Penchev, 2013). As a result of the persistent calls and threats many people pay voluntarily, often just to make the calls stop.¹⁷

Collectors commonly threaten to order immediate wage garnishments or public auctions of debtors’ property. Of course, such action is beyond their capacity.

A trick to obtain more information about a debtor is through disturbing neighbors and relatives. Either because debtors have changed their phone numbers or addresses to prevent collectors to get in touch with them, or just because more information might be helpful, a collector will often call the neighbors to gather more information about the debtor. They ask questions about the debtor’s residence, job, current affairs, etc. Some are quite ingenious, for example, claiming that the debtor has won something so that a neighbor or relative will provide information about them. “Debt collection companies, by unclear and dubious ways, acquire information about mobile phone numbers of relatives, colleagues, employers of debtors, through whom they exercise duress” (Penchev, 2014). Another practice is visiting the debtors’ home addresses to scare or at least disturb them enough to make them pay (Penchev, 2014).

Many times, the information about the initial creditor is provided only if the debtor pays the obligation or signs an agreement with the new one. Sometimes such information is not even available or is incorrect.¹⁸ Sobol (2014) uses a very suitable metaphor: “Aggressive collectors can resurrect ‘dead’ debts into live or zombie debts. Collectors can achieve this transformation when they persuade consumers to pay some amount against their debts, acknowledge the debts, or enter into new agreements.” Usually these amicable agreements have serious legal consequences: acceptance of the debt and renewal of the debt’s statutory limitations. Another common practice is to propose a discount on the debt to lure debtors to sign settlements or pay any amount possible. Debtors are offered to pay only up to 50% less if they pay the other part in one or several installments. Collectors usually use such tactics when there are no securities and enforcement proceedings have been unsuccessful. In other words, even new creditors are ready to give up a significant amount of their claim to receive whatever payment is possible. When concluding such agreements, it is entirely a matter of bargaining skills and having a better position. It is curious to remark that if the debtor has a wage garnishment or makes voluntary payments, no good agreement conditions will be offered. It is an unfair game where collectors take advantage of conscious and honest debtors and make the most of the unscrupulous ones. It is a world where the more insolent a party is, the better!

¹⁷ A client of mine was contacted multiple times by debt collectors for a supposedly unpaid bill to a mobile provider. He was threatened that unless he paid by the end of the week, the collector would impose a garnishment on his pension. As the debt collection agency was acting as a representative of the creditor, it had neither the documents, nor the authorization to file a petition for such an enforcement measure. Although the client was paying his bills every month, he was so stressed that he wanted to pay immediately regardless of the fact that he did not owe anything. It took me more time to convince him not to pay than to verify the total lack of legal grounds for such threats.

¹⁸ Although complaints on the Internet and other media abound, court practice on debt collection practices is scarce, as most of the victims of harassment rarely search for legal help. However, one particular case (Decision No. 1913, 5/14/2012, on civil case No. 14576/2011 in Plovdiv’s Regional Court, illustrates the problems victims face quite well. The claimant was alleged to be delinquent in the payment of a debt, which was later assigned to a debt collection agency. The collectors refused to present the contract which was supposed to prove the existence of the debt unless the claimant paid the full amount first despite his objections that he had never signed any contract with the initial creditor. In the course of the trial, it was proven that the initial creditor made a mistake in the personal data of the party and the claimant had been disturbed without any fault on his part. Nevertheless, his claim for indemnity for the caused suffering was dismissed as the legal ground for the claim was not applicable to representation between legal entities.

Protection from Debt Collection Practices

Criminal code

Difficult conditions for indebted citizens are worsened by the lack of any regulative body to protect them and control debt collection activities. Unlike in the USA, where the Fair Debt Collection Practices Act is in force, there are no administrative regulations to provide legal grounds for state interference and sanctions in Bulgaria. The only possible grounds for sanctions are when the debt collector has committed a crime. Under the Bulgarian Criminal Code the possible crimes could be insult, threat, coercion or blackmail. However, as the disturbing conversations are usually carried out over the phone, without witnesses and without the cooperation of the collection agencies, such complaints are very difficult to investigate. Charges are rarely pressed due to lack of evidence (Penchev, 2013).¹⁹ Moreover, calling someone repeatedly is not considered a crime, nor is it a misdemeanor under Bulgarian laws.

Despite the scale on which these practices are happening, despite the attention of the ombudsmen and the media, there is still no legal ground on which a debtor can be protected from the harassment they endure. So far, the only successful claims have been on the grounds of protection of personal data.

Commission for Personal Data Protection

The only control exercised over debt collectors is with regard to the protection of individual personal data.²⁰ Debt collection agencies register as personal data controllers²¹ in the register²² kept by the Commission. Except for the police, this Commission is the only state authority where people can file their complaints against debt collection practices. We thus analyzed all its available decisions²³ concerning debt collection practices.

We identified 198 decisions on individual complaints claiming personal data infringements, committed either by creditors or debt collectors when transferring personal data in debt assignments. Our analysis (Figure 5) shows that only 31 complaints (16%) were upheld. 109 (55%) of all the complaints were rejected. In 15 cases (7.5%), the Commission issued a stay of proceedings due to the concurrent investigation on a related matter by another administrative body. In fact, in all of these cases the individual who filed the complaint also filed one to the police claiming that he or she had never signed any agreement with the creditor and that his/her signature must have been forged or his/her data stolen. In 13 cases (6.5%) the appellants came to amicable settlements with the creditors and withdrew the complaints. The proceedings were thus terminated. In these cases, the creditor admitted there had been a mistake and the debt had been discharged. This is the easier escape for the creditor as otherwise they would most probably have been sanctioned by the Commission. Faults in 30 complaints (15%) led to their termination and they were never investigated.

Only 16% of all claims were well-founded because debt assignments and debt collection by third parties are mentioned neither in the text of the agreement, nor during the negotiations. Only a reference to the application of the General Terms and Condition of the creditors is made in the agreements. The creditors' right to distribute personal data is explicitly stated only in the

¹⁹ Despite making efforts to do so, the author was not able to identify a single case where an indictment was brought to court in any of the available legal databases.

²⁰ According to Art. 2 of the Law for the Protection of Personal Data, personal data is defined as "any information relating to an individual who is identified or identifiable, directly or indirectly, by reference to an identification number or to one or more specific features".

²¹ In compliance with Art 17.

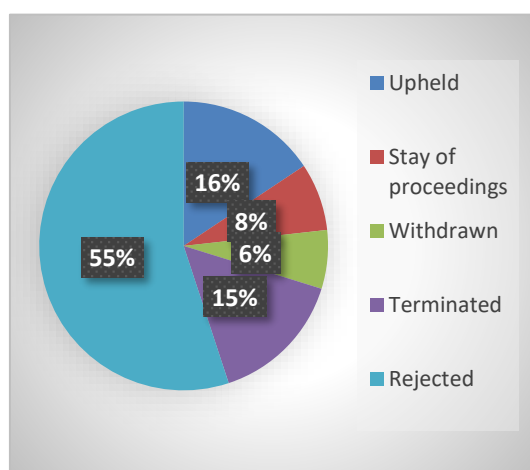
²² Art. 10, para. 1, item 2.

²³ The decisions of the Commission are available at <https://www.cpdp.bg/?p=search> [accessed November 6, 2016].

General Terms and Conditions. Debtors hardly even know about the existence of such terms. This common practice was observed in the cases of our study. Fair or not, this is a perfectly legal practice from a legal standpoint.

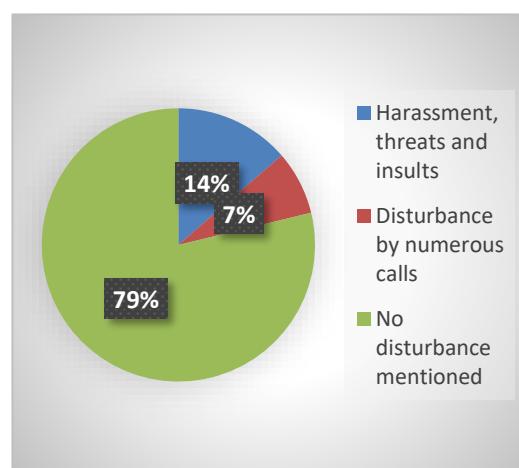
Our analysis also confirmed that debtors not only express concerns about their personal data, but also complain of the debt collection practices of the creditors. In 25 of all the claims (13%), the claimants explicitly stated that they were threatened, harassed or both. Insults and rude behavior by the debt collections were mentioned in two of the complaints, and 15 more claimants stated they were disturbed multiple times or even constantly. Together, the cases where claimants reported being disturbed numbered 42 (21%), which is more than the ones upheld by the Commission (Figure 6).

Figure 5. Commission for Personal



Personal Data Protection: Decisions

Figure 6. Commission for



Data Protection:

This happens because the Commission's competency is limited to, among few other things, protecting individuals' data protection rights²⁴, executing control over personal data controllers,²⁵ and investigating complaints by individuals.²⁶ However, the Commission only has the authority to investigate infringements regarding the use and distribution of personal data. Every other infringement is beyond its scope and power. This limit obliges the Commission to ignore every other complaint that does not directly concern the distribution of personal data. Weak as this protection may be, people still file their complaints to the Commission, seeking protection from the relentless debt collectors.

Sub-conclusion

There is no legal ground for this Commission, or for any other state body, to intervene in debt collection methods. We must therefore insist that, along with new regulations to limit debt collection malpractices, a state body must be appointed to monitor the debt collection industry and investigate every complaint filed by a consumer. As the creation of a new state body may be difficult, the Consumer Protection Agency may assume these functions, since in most cases the victims are consumers.

²⁴ Art. 5, para. 1, item 1 of the Rules on the activity of the commission for personal data protection and its administration.

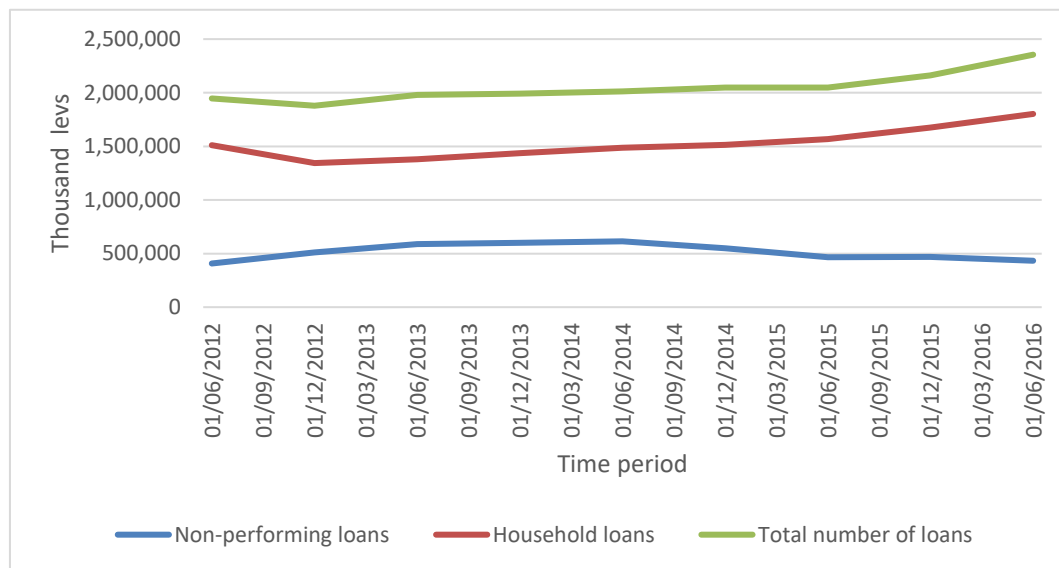
²⁵ Art. 10, para. 1, item 3; and Art. 5, para. 1, item 12.

²⁶ Art. 10, para. 2, item 7; Art. 38 of the Act; and Art. 5, para. 1, item 11.

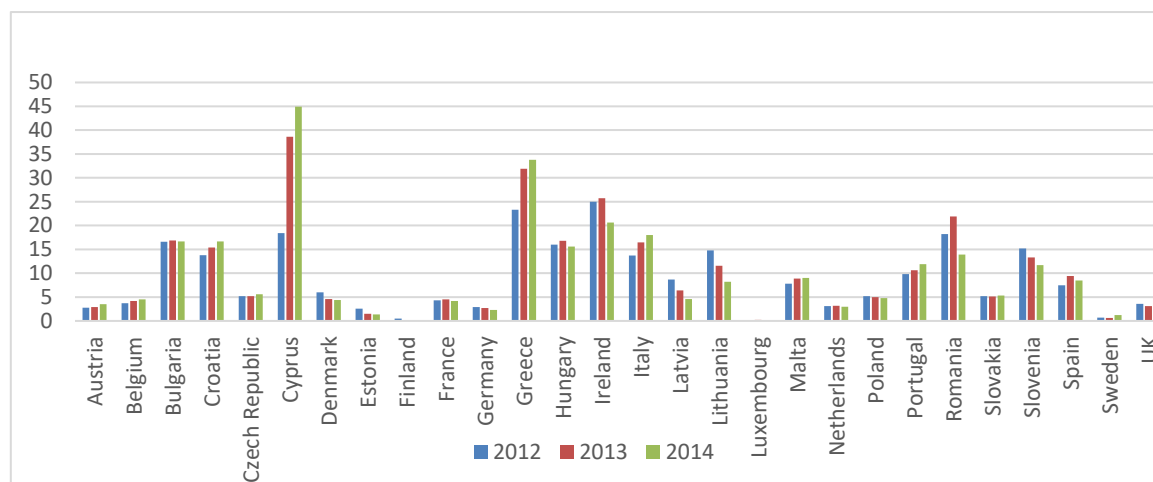
CURRENT TRENDS

In conclusion, we would like to give the reader a more general perspective of the reason we have focused on individual debts. At present, only legal entities in Bulgaria can turn to court when they are over-indebted. In contrast, most of the extended loans are household loans. Consequently, most of the non-performing loans are also household. Diagram 7 (Bulgarian National Bank, 2016) shows us that the steady level of non-performing loans, most of which belong to households, are approximately 25% of all loans. This is a very significant amount. Also, the increase in loans in 2016 can only indicate that an increase in delinquent debts should be expected.

Figure 7. Loans in Bulgaria



The picture does not improve in comparison with the other member states in the EU. Figure 8 (International Monetary Fund, 2015) indicates that Bulgaria is among the countries with the highest percentage of nonperforming loans to total gross loans in the EU. As seen from both Figures 7 and 8, non-performing loans and over-indebtedness is not a temporary difficulty, but rather a constant state for many Bulgarian citizens.

Figure 8. Bank Non-Performing Loans to Total Gross loans (%)

CONCLUSION

We could provide more examples and statistics, but we believe our point is clear: the current statutory regulation, or more precisely the lack of it, results in permanent consumer over-indebtedness. Debtors reach an impasse: they end up without any remaining assets, with wage garnishments and constantly increasing debts which “haunt” them for years through constant phone calls, harassment and threats.

In conclusion, we remind our readers that individual bankruptcy was introduced with the aim of serving justice for creditors rather than for debtors, ensuring the equal and fair distribution of debtors’ property. Since at present neither creditors nor debtors are satisfied with the legal framework, it is high time Bulgarian legislators adopted individual bankruptcy law and finally brought the country into line with other European nations.

REFERENCES

- Bulgarian National Bank (2016) *Statistics on Companies, specialised in crediting* (Press release, August 16, 2016, Appendix 1). [Online]. Available from: <http://www.bnb.bg/PressOffice/POStatisticalPressReleases/POPRSLendingCorporations/index.htm?forYear=2016> [Accessed 6 November 2016].
- Chamber of Private Enforcement Agents (2015) *Annual Report*. [Online]. Available from: http://www.bcpea.org/articles.php?cat_id=2 [Accessed 6 November 2016].
- Dalié Jiménez, D. (2015) Dirty Debts Sold Dirt Cheap. *Harvard Journal on Legislation*, 52, 41–124.
- International Monetary Fund (2015) *Global Financial Stability Report*. [Online]. Available from: <http://data.worldbank.org/indicator/FB.AST.NPER.ZS?end=2015&start=1999> [Accessed 6 November 2016].
- Interpretative Decision 2/2013 of the Supreme Court of Cassation* (June 26, 2015). [Online]. Available from: <http://www.vks.bg/Dela/2013-02-%D0%9E%D0%A1%D0%93%D0%A2%D0%9A-%D0%A2%D1%8A%D0%BB%D0%BA%D1%83%D0%B2%D0%B0%D1%82%D0%B5%D0%BB%D0%BD%D0%BE%20%D1%80%D0%B5%D1%88%D0%B5%D0%BD%D0%B8%D0%B5.pdf> [Accessed 6 November 2016].

- Manolova, M. (2015) *Annual report of the Ombudsman*. [Online]. Available from: http://www.ombudsman.bg/pictures/REPORT%20OMB%202015g_.pdf [Accessed 6 November 2016].
- McCormack, G., et al. (2016) Study on a new approach to business failure and insolvency: comparative legal analysis of the Member States' relevant provisions and practices. [Online]. University of Leeds. Available from: http://ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf [Accessed 6 November 2016].
- Penchev, K. (2013) *Annual Report of the Ombudsman*. [Online]. Available from: <http://www.ombudsman.bg/reports/2531?page=4> [Accessed 6 November 2016]
- Penchev, K. (2014) *Annual Report of the Ombudsman*. [Online]. Available from: <http://www.ombudsman.bg/reports/3349> [Accessed 6 November 2016].
- Regional Court, Burgas (2011–2015) *Annual Reports*. [Online]. Available from: <http://bourgasrc.court-bg.org/index.php?im=131> [Accessed 6 November 2016].
- Regional Court, Plovdiv (2015) *Annual Report*. [Online]. Available from http://www.rs-plovdiv.com/Documents/Uploads/2/14_04_2016_17_30_24.pdf [Accessed 6 November 2016].
- Regional Court, Shumen (2011–2015) *Annual Reports*. [Online]. Available from: <http://shumen.court-bg.org/index.php?im=35> [Accessed 6 November 2016].
- Regional Court, Sofia (2015) *Annual Report*. [Online]. Available from: http://www.srs.justice.bg/66-%D0%93%D0%BE%D0%B4%D0%B8%D1%88%D0%BD%D0%B8_%D0%BE%D1%82%D1%87%D0%B5%D1%82%D0%BD%D0%B8_%D0%B4%D0%BE%D0%BA%D0%BB%D0%B0%D0%B4%D0%B8 [Accessed 6 November 2016].
- Regional Court, Stara Zagora (2011–2015) *Annual Reports*. [Online]. Available from: <http://www.rs-sz.com/otchet.html> [Accessed 6 November 2016].
- Regional Court, Varna (2011–2015) *Annual Reports*. [Online]. Available from: http://www.vrc.bg/index.php?option=com_content&view=article&id=85&Itemid=61 [Accessed 6 November 2016].
- Sobol, N. (2014) Protecting Consumers from Zombie Debt Collectors. *New Mexico Law Review*, 44, 330.
- Tabb, C. (1995) The History of the Bankruptcy Laws in the United States. *American Bankruptcy Institute Law Review* 3, 17.
- Тази сутрин (2012) 21st January [video]. Available from: http://www.btv.bg/video/1012758041-Kak_dalg_ot_37_leva_nababna_do_1000_leva.html [Accessed 6 November 2016].

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ARBITRAL AWARDS UNDER THE NEW SAUDI LAWS AND INTERNATIONAL RULES, CHALLENGES AND POSSIBLE MODERNIZATION

MR. AHMED A ALTAWYAN¹

ABSTRACT

Arbitrating parties expect that the arbitration process will result in final and binding awards. The Kingdom signed the New York Convention in 1994 to reassure foreign investors to invest in the country. Despite such acceding to a stated convention, Saudi Arabia has been described as hostile toward the recognition of arbitration agreements and enforcing foreign awards, and many international awards have been rejected (Saleem, 2012). The Kingdom has thus tried to reform its arbitration regime. A new Enforcement Law came into effect in 2012 by Royal Decree No. M/53. The new law replaced relevant provisions, and its possible impact on the enforcement of arbitral awards should be examined in the context of domestic and international arbitration. How will the new enforcement law and the new arbitration law impact arbitral awards and avoid the flaws of the previous legislation in practice? This study will address the arbitral award under Saudi law by comparing it with the modern trends in international commercial arbitration practice.

Key Words: enforcement law, arbitral award, Saudi court, enforcement, public policy

INTRODUCTION

The Saudi ruler tried to change the past enforcement practice in the Kingdom by reassuring investors through Article 52 of the new Arbitration Law (2012) that the arbitration award issued in accordance with the new law will be authentic, authoritative, and enforceable. The legislation confirmed that arbitral awards would be enforced if they comply with the new Saudi law. In addition, the new law stated that the competent court does not have the authority to examine the facts and subject of dispute, unlike the old law, which was a major obstacle to arbitration in the Kingdom (Saudi Arbitration Law, 2012, Article 50(4)).

SUBMISSION TO THE COMPETENT COURT

The new Arbitration Law requires that, to be executed, the arbitral award be submitted to the competent court after the expiration of the time permitted to challenge the validity of the award (Arbitration Law, 2012, Article 55(1)), with some attachments such as a translation of the arbitration award into Arabic certified by an accredited authority if it was issued in another language (Arbitration Law, 2012, Articles 43, 44, 53).²After satisfying these legal requirements, the competent court must verify the following points:

1. The arbitral award does not conflict with an award or decision issued by a court, committee or authority that has jurisdiction over the subject of the dispute in Saudi Arabia (Arbitration Law, 2012, Article 55(2)). This requirement is logical, because it is impossible to enforce an award that conflicts with another award already issued by other judicial bodies in the kingdom.
2. The arbitral award does not include anything that contradicts the provisions of Islamic Sharia and public order in the Kingdom. The law provides more flexibility on this point,

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²Note: parties should be aware that depositing the arbitral award with the competent court after issuance, even if there is no need to enforce it, does not comply with international commercial practice as shown earlier. However, the most important point of which foreign parties should be aware is that the award must be translated into Arabic if it was issued in a foreign language within 15 days after it was issued. Hence, it is better to make the translation a priority, especially if the case is long and the right translator may be hard to obtain in time.

because it allows the competent court to enforce those portions of the award that do not violate Islamic Sharia and to dismiss those portions that do violate Islamic Sharia (Arbitration Law, 2012).

3. The arbitral award as been well and truly notified to the convicted (Arbitration Law, 2012).

These conditions set up by Saudi law to allow enforcement of an arbitral award, whether domestic or international, are similar to those required by the New York Convention, so that they will be explained extensively later in this section. Saudi law does not allow appeal against the order issued to execute the arbitration award, but the order rejecting the execution may be appealed to the competent court within thirty days of the date of issuance of the award (Arbitration Law, 2012, Article 55(3)).

SUBMISSION TO THE ENFORCEMENT COURT

If an arbitral award meets the requirement of the new Arbitration Law as stated above, the arbitral award will be enforced by the competent court, which completes the first stage of enforcing the award in the Kingdom. The second step needs to follow the rules set up in the new enforcement law for taking enforcement to the award.

According to the Royal Decree No M/53, 2012, the Saudi judiciary authority must customize enforcement circuits in the public courts in the main cities and provinces (Saudi Enforcement Law, 2012). These circuits undertake the implementation of decisions or orders of the competent quasi-judicial committee, such as banking dispute committees, according to the system of implementation (Roy, 1994). In addition to judgments, decisions, and orders issued by the courts, the enforcement court is responsible for executing arbitral awards that have obtained an executive order from the competent court in accordance with the arbitration (Enforcement Law, 2012, Article 9(2)).

An arbitral award in the implementation law stage is also at risk if the implementing court reviews the award to ensure that it is not contrary to the provisions of the public order in the Kingdom (Enforcement Law, 2012, Article 11). The arbitral award will therefore be reviewed to make sure that it complies with Islamic Sharia and public order twice, at the competent court level and again at the implementing court level. The enforcement law could be a significant step to ensure that the arbitral award is executed. However, the absence of specifying the meaning of Islamic Sharia as applied in the state and public order of in the Kingdom could make the enforcement of such awards less certain in the country and could subject their enforcement to past practice. Although all decisions of an enforcement judge are final, decisions regarding enforcement disputes and claims of insolvency are subject to appeal, and the determination of the appellate court shall be final (Enforcement Law, 2012, Article 6). This is the last stage of implementing the domestic arbitral award.

The enforcement law requires that international arbitration comply with all previous requirements in arbitration and implementation law, with additional requirements (Enforcement Law, 2012, Article 11, 12). The law also states that the application of this system must not conflict with any international treaties or conventions associated with states, bodies, and organizations (Enforcement Law, 2012, Article 94). As a result, the study should customize a separate section to analyse such requirements through such international conventions and treaties and their practice in the Kingdom.

INTERNATIONAL ARBITRATION AND ENFORCEMENT IN THE KINGDOM

Background

During the 1950s, Saudi courts refused to enforce many international arbitral awards, because they thought that the awards were degrading and disrespectful to Islamic Sharia (the primary system of law in the Kingdom) (Roy, 1994, , p. 920–924). However, the Kingdom of Saudi

Arabia entered into the New York Convention on 19 April 1994.³ Upon adoption, Saudi Arabia became the 94th party to the Convention, which requires all signatories to recognize the arbitration agreements and awards issued by other member nations. As a result, it was supposed that the Kingdom would become more attractive to investment in the modern global community. This study will examine whether the Kingdom's adoption of the New York Convention has advanced the successful application of international commercial arbitration by foreign investors in the state by analysing the following points.

Principles Governing Recognition and Enforcement

According to Article III of the New York Convention, each contracting state must recognize international arbitral awards as binding and enforce them by the rules of procedure of the state through which the award is issued and also under the conditions stated in the articles of the Convention (The New York Convention, 1958). The Convention thus distinguishes between recognizing and enforcing arbitration awards. Recognizing the award means acknowledging that it is valid and binding (Moses, 2012, p. 212–213). The award will thus have an official legal status, as the result of which the award cannot be re-litigated or arbitrated (Moses, 2012). Saudi Arabia recognizes international arbitral awards under the new Arbitration Law and Enforcement Law as long as such awards comply with its rules (Arbitration Law, 2012, Articles 3, 8(2)). To accept the arbitral award, however, Saudi law requires that the arbitral tribunal deposit the original copy of the award or a signed copy in the language in which it was delivered by the competent court within 15 days, with a translation into Arabic certified by an accredited authority if it was performed in a foreign language as stated earlier (Arbitration Law, 2012, Articles 43, 44). The terms of enforcement frequently used for the purpose of execution, which is obtained under the legal process of the authorizing jurisdiction, is explained in the following points.

Requirements for Enforcement

Scope

The New York Convention applies to international awards, as provided explicitly in Article I(1) of the Convention, which refers to two types of awards:

- A. Arbitral awards made in the territory of a State other than the State in which the recognition and enforcement of such arbitral awards are sought;
- B. Arbitral awards that are not considered domestic awards in the State in which their recognition and enforcement are sought (The New York Convention, 1958).

The nature of the first type as international awards issued between states is clear, but the definition of a domestic award is not provided in the Convention, which leads to different determinations between states about the second type. Many countries thus enforce only the first type of award, such as Japan and Netherlands. Other states, like the United States, apply this Convention even if the arbitration involves citizens of the United States as non-domestic awards, for example if the relationship involves property located abroad, envisages performance of enforcement abroad, or has some other reasonable relation with one or more foreign states (Moses, 2012, p. 213). Like the United States, Saudi law considers some awards as non-domestic, even if they take place between Saudis. For example:

- A. If the headquarters of both parties to the arbitration lie in more than one country at the time of the arbitration agreement, and if one party has more than one business centre, this depends mainly on the centre that is most relevant to the subject of the dispute, and

³ See the list of contracting states at New York Arbitration Convention at <http://www.newyorkconvention.org/list+of+contracting+states>.

if one or both arbitrating parties do not have a certain business centre, it depends mainly on their usual residential address.

- B. If the headquarters of both arbitrating parties lie in the same country at the time of the arbitration agreement, and one of the following places lies outside of that country:
 - 1- The venue of the arbitration procedures as assigned in the arbitration agreement or the agreement refers to how to assign the venue;
 - 2- The place of executing an essential part of the obligations arising from the trading affairs between both parties; or
 - 3- The place most relevant to the subject of the dispute.
- C. If both parties agree to resort to an organization or a permanent arbitration authority, or an arbitration centre lying outside the Kingdom.
- D. If the arbitration subject included in the arbitration agreement is related to more than one country (Arbitration Law, 2012, Article 3).

The Convention thus applies for one type of international awards that all contracting states are bound to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. The arbitral awards that are not considered domestic awards have different determination between laws, which leads to differences in their recognition and enforcement.

In addition to defining its scope, the Convention allows states to make two reservations (New York Convention, 1958, Article I(3)). The first is allowing any contracting state on the basis of the reciprocity principle to declare that applying the Convention to the recognition and enforcement of awards will be only in the territory of another contracting State (New York Convention, 1958, Article I(3)). That reservation is adopted by many contracting states, one of which is the Kingdom of Saudi Arabia, which has declared: ‘On the basis of reciprocity, the Kingdom declares that it shall restrict the application of the Convention to the recognition and enforcement of arbitral awards made in the territory of a Contracting State’.⁴ In addition to this reservation, the Saudi Ruler states in the enforcement law that the enforcement judge must not enforce an international award except on the basis of reciprocity (Enforcement Law, 2012, Article 11, 12). The only difference between the new enforcement law and the new rules is that the party seeking enforcement under the old law must show that the jurisdiction that issued the international award will, as a matter of reciprocity, enforce an award of the Kingdom, and the new law states clearly that it is the enforcement judge who must find such reciprocity (Al-Ammari and Martin, 2014, p. 404). For example, in one case, a Saudi court requested a specific example of an enforcement of a Saudi judgment in an American court from a party seeking enforcement of an arbitral award in the Kingdom. The party was unable to provide such an example but instead provided the Saudi court with an opinion from the legal office of the United States Department of State, which confirmed that American courts recognize and enforce Saudi judgments. The Saudi court was not, however, satisfied by such proof and refused to recognize and enforce the international arbitration award issued in the United States (Al-Ammari and Martin, 2014). It is not clear how a Saudi court will handle this matter under the new law, because the new law is a good step toward saving the arbitrating parties time and energy by leaving this responsibility of proving a matter of reciprocity to the court. As a result, according to the limitation of reciprocity that Saudi Arabia has adopted, arbitrating parties who aim to enforce an award in the Kingdom should consider the place of arbitration and where it occurs to avoid encountering obstacles at the enforcement stage.

The second reservation allowed under the New York Convention is that a contracting state may declare that the Convention will apply only to differences arising out of legal

⁴ Such reservations are available at New York Convention website at: <http://www.newyorkconvention.org/list+of+contracting+states>.

relationships, whether contractual or not, that are considered commercial under the national law of the state making such a declaration (New York Convention, 1958, Article I(3)). Saudi Arabia is not among the 44 countries that have accepted this reservation. However, since the term 'commercial' is not defined, the practice will be different from country to country, with the result that international arbitration between states will not be uniform in practice. This may cause the Convention to fail in one of its goals (Moses, 2012, p. 214).

Requirements for Enforcement

The New York Convention does not provide specific guidance about the procedure for enforcement, but leaves this matter to the contracting states in accordance with their own rules (New York Convention, 1958, Article III), except for some requirements stated in Article IV:

1. The party applying for recognition and enforcement of the arbitral award must, at the time of the application, provide:
 - a) The duly authenticated original arbitral award or a duly certified copy thereof;
 - b) The original agreement or a duly certified copy thereof.
2. If the arbitral award or agreement is not made in an official language of the state in which the award is relied upon, the arbitrating party applying for recognition and enforcement of the award must produce a translation of these documents into that language. The translation must be certified by an official or sworn translator or by a diplomatic or consular agent (New York Convention, 1958, Article IV).

Article 53 of the new Saudi Arbitration Law gives the same requirements as the Convention, as explained earlier (Arbitration Law, 2012).

In addition to the above-stated requirements, the Convention requires that contracting states not impose more onerous terms or higher services fees or charges on the recognition or enforcement of arbitration awards to which this Convention applies than are imposed on the recognition or enforcement of domestic awards (New York Convention, 1958, Article III). The Saudi law does not differentiate between domestic and international awards in the conditions or fees in the course of enforcing arbitration awards, and most of the conditions imposed by Saudi laws are similar to those that stated in the Convention. However, Saudi enforcement law distinguished between local and international awards issued from the Kingdom, and international awards from a foreign state in the enforcement and recognition stage. The international awards that have come from another country do not need to go to the competent court of appeal like other arbitral awards for ratification but can be enforced directly through enforcement courts (Enforcement Law, 2012, Article 9). Hence, enforcement of international awards issued from a foreign state will face only one stage, while other awards will face two stages, one before the competent court and another at an enforcement court, which make them harder to enforce than the first type.

Grounds for Non-enforcement Under the Convention

Grounds for not enforcing an arbitral award under the New York Convention are the same as the grounds set forth in Saudi law and the UNCITRAL Model Law (Enforcement Law, 2012, Article 11; New York Convention Articles V; UNCITRAL Model Law on International Commercial Arbitration, 2006, Article 35, 36; Arbitration Law, 2012, Article 55). The Convention provides specific grounds for not enforcing an arbitral award, which means that the award must be enforced completely, unless there exists one of the stated grounds (New York Convention, 1958, Article V). Such grounds are not based on the merits, so the facts and the law in the case cannot be reviewed under the Convention. However, the grounds for not enforcing an award is based on the arbitrating parties' will as stated in the arbitration agreement and on the integrity of the arbitration process, such as fairness and taking a chance at a

reasonable hearing (American Arbitration Association, 2006, p. 157–175; Moses, 2012, p. 217).

Incapacity and Invalidity

The first defence that an arbitrating party can assert is comprised of the following:

- a. Incapacity of the party or;
- b. The arbitration agreement is not valid.

The determination of incapacity or invalidity will be in accordance with the law that was chosen by the arbitrating parties, or, if no law was chosen, it will be in accordance with the law of the country in which the award was made (New York Convention, 1958, Article V(1)). Under the Saudi Arbitration Law, there is no determined age of legal capacity. However, in returning to other Saudi laws that handle such a matter, such as the Child Protection Law, the study found that 18 years old is deemed to be the age of legal capacity (The Saudi Child Protection Law, 2014; Saudi Labour Law, 2005, Article 2). In legal entities, however, the legal capacity will fall to the person who is authorized to sign the arbitration contract for legal entities according to the type of company. For instance, in the joint stock company, the Chairman of the Board of Directors represents the company before the courts, tribunals and third parties (Saudi Corporate Law, 2015, Article 82(1)). Hence, every legal entity has a different form of legal capacity depending on the Saudi law of companies. Although the Convention refers the rules of incapacity and invalidity to the applicable law, it provides the standard that the arbitration agreement must meet to be valid. In the arbitration agreement, which must be in writing, the arbitrating parties undertake to submit to arbitration all or any differences that arise or that may arise between them with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (The New York Convention, 1958, Article II). The Convention also states that the term ‘agreement in writing’ under the Convention must include an arbitration clause in a contract or an arbitration agreement, and it must be signed by the arbitrating parties or contained in an exchange of letters or telegrams (The New York Convention, 1958).

Lack of Notice or Fairness

The second ground for not enforcing an arbitral award under the New York Convention is not giving an arbitrating party full opportunity to present his side of the disputed case (New York Convention, 1958, Article V(1)(b)). This defence can be based on a lack of notice of the appointment of the arbitration tribunal or of the arbitration proceedings or on the basis that the party was unable to present his case (The New York Convention, 1958). One of the famous examples of this ground is *Iran Aircraft Industries v. Avco Corp*⁵. Avco Corporation (Avco) entered into a contract with Iran Aircraft Industries for the repair and replacement of helicopter engines. A dispute between the parties arose, and an arbitral tribunal denied Avco’s claims. The United States Court of Appeals for the Second Circuit denied enforcement of the award. In so ruling, it found that the tribunal’s award was subject to the defences to enforcement provided in the New York Convention, because Avco had been ‘unable to present its case’ within the meaning of Article V(b) of the Convention. In other words, Avco did not have the chance to present its case in a meaningful manner. One of the judges had approved a method of proof, proposed by Avco, which was a submission of Avco’s audited accounts receivable ledgers. However, another judge later asked for the actual invoices to substantiate Avco’s claim. The Court thus concluded on appeal that Avco was misled regarding the evidence that it was required to submit and was thus deprived of the opportunity of presenting its case.

⁵ (1992) 980 F. 2d 141 - Court of Appeals, 2nd Circuit.

Arbitrator Acting in Excess of Authority

The third defence that an arbitrating party can assert is actions by the arbitral tribunal that exceed its authority (The New York Convention, 1958, Article V(1)(c)). This can take different forms, such as that the arbitration award deals with matters not within the scope of the arbitration agreement, or that it contains decisions on issues beyond the framework of the arbitration agreement (The New York Convention, 1958). However, if decisions on matters submitted to arbitration can be separated from those that were not, those parts of the arbitration award that contain decisions on matters submitted to arbitration can be recognized and enforced (The New York Convention, 1958). In international commercial arbitration, the defence based on the ground of exceeding authority non-enforcement has rarely succeeded (Moses, 2012, p. 221), and the study did not find a case in the Saudi courts has addressed this issue.

The Tribunal or the Procedure Is Not in Accord with the Arbitration Agreement

Article V(d) of the New York Convention provides that the grounds for not enforcing an arbitration award include the composition of the arbitration tribunal or the arbitration procedure did not comply with the arbitration agreement. Also, the arbitration was not in accordance with the law of the state in which the arbitration took place (New York Convention, 1958). The defence on these grounds is not often successful in international commercial arbitration (Moses, 2012, p. 222).

The Award Is Not Yet Binding or Has Been Set Aside

The fifth defence is that the arbitration award is not yet binding on the arbitrating parties, or that it has been set aside or suspended, whether by the competent authority or under the law of the country in which the award was made (The New York Convention, 1958, Article V(1)(e)). The award must thus be binding and unappealable so as to be fully enforceable; this process was explained under Saudi law earlier in the article. The municipal courts, however, have discretion to enforce an arbitral award even if the award was vacated in another jurisdiction, because the Convention uses the word ‘may’ instead of ‘must’ if defences arise that could create a loophole in applying the Convention between contracted states. At the same time it provides an advantage for enforcing the vacated award in the countries that can enforce such awards, such as France, and unlike the Kingdom of Saudi Arabia (Moses, 2012, p. 222–226).

The last two defences under the New York Convention are those that permit the court to refuse recognition and enforcement of an arbitral award by itself without a request from an arbitrating party (The New York Convention, 1958, Article V(2)).

Subject Matter Not Arbitrable

Not all subject matters are capable of arbitration, and some matters can be arbitrated in one country but not in another (Moses, 2012, p. 226–228). The New York Convention refers to the law of arbitrability only from the perspective of enforcing the award. It requires the competent court to look to its own rules to determine whether the subject of dispute is arbitrable (New York Convention, 1958, Article V). Determination of the law governing arbitrability is thus significant and crucial.

Under Saudi law, the issue of the arbitrability of the subject matter is vague. The provisions of the Saudi law provide two types of disputes that cannot be arbitrated:

- a. Personal status, and
- b. Issues that cannot be reconciled (Arbitration Law, 2012, Article 2).

The first type is stated, but the second one is not. However, the implementing regulations of the old arbitration law mention the second type by provided three instances of disputes that cannot be reconciled (Implementing Regulations of the Saudi Arbitration Law, 1983, Article 1):

1. Hadd (plural: Hudud), which refers in Islamic Sharia to unchangeable punishments prescribed by primary sources of Islamic Sharia, considered as the right of God (Allah) (Hossain, 2013, p. 7–8). Hudud are specified both in their quantity and quality and as being the right of Allah to prescribe for public and individual interest. In addition, Muslims cannot annul them. According to the majority of the Muslim scholars, Hudud crimes are as follows:
 - a. Zina (unlawful sexual intercourse);
 - b. Theft;
 - c. Qazf (false accusation of Zina);
 - d. Drinking intoxicants;
 - e. Hirabah (highway robbery);
 - f. Baghy (rebellion); and
 - g. Riddah (apostasy) (Hossain, 2013).

Once the offender is convicted of a Hadd crime, the judge has no choice but to impose the prescribed punishments, neither more nor less, even if the victim consents to mitigation or removal of the offence (Hossain, 2013).

2. Lian

This dispute involves a husband who accuses his wife of adultery without supplying witnesses (Nasir, 1990, p. 159–161).

Such a dispute is explicitly addressed in the Quran, which states that the husband must swear four times that his accusation of the wife is real, followed by a fifth oath in which he invokes the wrath of God (Allah) upon himself if he is lying. The wife may then neutralize the claim by responding to it with four oaths of her own, and a fifth calling upon her the wrath of God (Allah) if her husband is telling the truth. If she refuses to take the oath, she is presumed guilty and subject to the punishment for adultery. However, if she takes the oath, she is declared innocent and permanently divorced from her husband. As a result, her husband forfeits any paternity claims over children born after their sworn oaths (Nasir, 1990, p. 159–161).

3. Any subject related to the public policy

The third instance provides a broad loophole, because ‘public policy’ is a general term in meaning and vague in practice, as will be shown in the last defence of the New York Convention. Because of this, in addition to the generality of the last instance stated in the implementing regulations of the old arbitration law, all previous situations given as examples, which means that there are other subjects, cannot be reconciled and thus cannot be arbitrated, which leads to a kind of risk at the enforcement stage in the Saudi court.

Public Policy

Article V(b) of the New York Convention authorizes the competent court to refuse to enforce or recognize the arbitral award if doing so would be contrary to the public policy of that state (New York Convention, 1958). This defence should arise if enforcing such an award would violate the forum country’s most basic notions of morality and justice (Moses, 2012, p. 228–229). The term ‘public policy’ is not defined in the Convention, so that the states apply it differently. Some narrow its scope to achieve the Convention’s goal of enforcing international awards in a uniform way among states. Other countries interpret this defence broadly to protect national political interests (Moses, 2012). For example, the United States Second Circuit Court of Appeals affirmed the enforcement of an arbitral award against an American company:

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be refused on this basis only where enforcement of such an award would violate the forum country’s most

basic notions of morality and justice. (*Parsons & Whittmore Overseas Co., Inc. v. Société General de L'industrie du Papier*⁶)

In 1995, however, a Turkish court refused to enforce an ICC award that was based on Turkish substantive law, because the tribunal did not use both Turkish substantive law and Turkish procedural law. This violates Turkish public policy, even though there is no material difference in the procedural law of Turkey and the procedural law that applied (Moses, 2012, p. 228). Hence, the absence of a specific definition of 'public policy' in the Convention creates a broad loophole in practice between contracting states, which can lead to unjust and improper results.

The issue of public policy is different under Saudi law. Islamic Sharia as applied in Saudi courts is considered part of the public policy in the Kingdom (Al-Ammari and Martin, 2014, p. 402–405). However, public policy principles cannot be specified in the Saudi courts for two main reasons. First, there are not enough published cases. Saudi Arabia has begun to release a few of the cases, but there are still not enough to establish a clear picture of the meaning of public policy in the Kingdom.⁷

Even if the Kingdom had enough published cases, the principle of *stare decisis* is not recognized in the Saudi courts, which makes it hard to predict future decisions even if the facts are the same as or very close to the facts of the previous case (Al-Ammari and Martin, 2014, p. 405). The Ijtihad (Bhala, 2011, p. 334–335)⁸ as applied in the Saudi court without binding precedents thus provides the court with the power to refuse any award if the court considers the award to be against public policy or Islamic Sharia, even if the subject is not settled among Muslim jurists. For example, in Case Number: 3375/1 / ق of the year 1424 h,⁹ the Saudi court refused to enforce a foreign judgment for the amount of 50.69338 USD. The court based its decision on the fact that the judgment involved singing and music, and the Kingdom of Saudi Arabia derives its authority from the Book of Allah and the Sunnah, which forbid these. The court also confirmed that, although there is a debate between Muslim jurists about whether singing is forbidden, it would not change the decision, because it had arrived at the judgment based on faith. This case provides a clear picture of how the Ijtihad as applied in the Saudi court leads to an unpredictable decision about refusing to recognize and enforce an international award.

Thus, Article V(2)(b) of the New York Convention provides a safe harbour in which the Kingdom can refuse to recognize or enforce an international arbitral award contrary to public policy or Islamic Sharia while maintaining its history and religious beliefs. However, this creates a problem for foreign investors and contractors who choose to do business in the Kingdom. The Kingdom's adoption of the New York Convention was intended to give the international community security in commercial contracts with Saudi Arabia, and to confirm that disputes will be adjudicated fairly. On the contrary, Saudi courts will find it easy to reject international arbitral awards under New York Convention Article V (b), as shown earlier, and it may not be required to enforce any more international arbitral awards than was the case prior to the Kingdom's 1994 accession to the New York Convention (Roy, 1994, p. 953–955).

For a loophole in the Convention, there are different proposals to resolve the public policy matter in the Convention, such as a proposal to establish a new international court, a new convention, a new organization, or even define an international framework of public policy with which all contracting states must comply. Such proposals are explained extensively in the

⁶ (1974), 508 F. 2d 969 - Court of Appeals, 2nd Circuit.

⁷ The Saudi courts have begun to publish some of cases at its website at <http://www.bog.gov.sa/ScientificContent/JudicialBlogs>.

⁸ The process of legal reasoning through which the jurist derives the law from the Quran and the Sunnah of the Prophet Muhammad by independent reasoning.

⁹ ق is the Arabic letter and 1424 h is the Muslim calendar. The case is available at the Diwan Almazalim website at: <http://www.bog.gov.sa/ScientificContent/JudicialBlogs/1430/Documents/>.

different sources (American Arbitration Association, 2006, p. 50–52). However, this study found that the Kingdom of Saudi Arabia must review its handling of the public policy question to achieve the aim of the New York Convention.

The Kingdom can give the New York Convention greater effect if it chooses to give Article V(b) a narrow reading. For example, American courts have held that all New York Convention defences should be given a narrow reading so that they are effective only when enforcement of an award would violate the most fundamental notions of justice (Roy, 1994, p. 953–955). The Kingdom of Saudi Arabia, with its need to gain the confidence of the international commercial community, may choose to give the public policy defence set forth in Article V(2)(b) of the New York Convention a narrow reading, which will undoubtedly require a review of the Ijtihad as it is applied in Saudi courts and which could conflict with the predictability of decisions and obstruct efforts to bring the Kingdom into step with the rest of the international community.

CONCLUSION

The new Saudi Enforcement Law is a significant step toward harmonizing Saudi law with the international community and its standards. This new law also facilitates enforcement of international and domestic arbitral awards with the creation of a specific authority and specific procedures applicable to such enforcement, which was absent in the past. In theory, the enforcement court will not review the merit of the dispute. In practice, however, the public policy addressed by the new Enforcement Law could be obstructive, especially towards awards issued by foreign arbitrators who are not versed in Saudi law or Islamic Sharia as applied in the Saudi courts.

The meaning of ‘public policy’ is not clear in the Saudi courts, and Islamic Sharia applies it through the Ijtihad, which is not bound by any precedent decisions. This makes an arbitral award that violates Saudi public policy undefined. However, enforcement judges may refuse to enforce only that part of the award that conflicts with public policy instead of the entire award, unless that part is not severable from the rest of the arbitral award. The new Saudi Enforcement Law remains a significant step toward international legal principles, but it needs to review public policy matters to be more predictable at the enforcement stage of the arbitration process.

REFERENCES

- Al-Ammari, S. and Martin, A. T. (2014) Arbitration in the Kingdom of Saudi Arabia. *Arbitration International*, 30(2), 387-408.
- American Arbitration Association (2006) *AAA/ICR handbook on international arbitration and ADR*. The United States: JurisNet.
- Bhala, R. (2011) *Understanding Islamic law*. Durham: Carolina Academic Press.
- Hossain M. S. (2013) Arbitration in Islamic law for the treatment of civil and criminal cases: An analytical overview. [Online]. *Journal of Philosophy, Culture and Religion*, 15 December. Available from <https://www.mysciencework.com/publication/show/d2d495211d38f5bbdb93968b77e27fad> [Accessed 15 Aug, 2015].
- Implementing Regulations of the Saudi Arbitration Law (1983) Regulations issued by the Royal Decree No. (7/2021/M) of (09/08/1405H) May 27, 1985
- Moses, M. L. (2012) *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press.
- Nasir, J. J. (1990) *The Islamic law of personal status*. London: Graham and Trotman.
- Roy, K. T. (1994) The New York Convention and Saudi Arabia: Can a country use the public policy defense to refuse enforcement of non-domestic arbitral awards? *Fordham International Law Journal*, 18(3), 920.

- Saleem A. M. (2012) A critical study on how the Saudi Arbitration Code could be improved and on overcoming the issues of enforcing foreign awards in the country as a signatory state to the New York convention [Online]. Available from: <https://ssrn.com/abstract=2315728> or <http://dx.doi.org/10.2139/ssrn.2315728> [Accessed 20 December 2016].
- Saudi Arbitration Law (2012). Issued by Royal Decree No. M/34 Dated 24/5/1433H – 16/4/2012
- Saudi Child Protection Law (2014). Issued by Royal Decree No. M/14, dated 03/02/1436 H (corresponding to 25 November 2014). Available from (in Arabic): http://mosa.gov.sa/portal/uploads/smartsection/13_NHT.pdf [Accessed 20 December 2016].
- Saudi Corporate Law Royal Decree (2015). Enacted by Royal Decree No M3 dated 28/1/1437H (i.e. 10/11/2015G). It was published in the Official Gazette on 22/2/1437H (4/12/2015G) and came into force on 2 May 2016
- Saudi Enforcement Law (2012). Issued through Royal Decree No. M/53, 3 July 2012.
- Saudi Labour Law (2005). Issued by Royal Decree No. M/51, 23 Sha'ban 1426 / 27 September 2005.
- The Case Number is ق/1/3375 of the year 1424 h, The Saudi Court of Grievances. This case is available at The Saudi Court of Grievances website at: <http://www.bog.gov.sa/ScientificContent/JudicialBlogs/Pages/default.aspx>
- The Case Number is ق/1/2496, 1425H, The Saudi Court of Grievances. This case is available at The Saudi Court of Grievances website at: <http://www.bog.gov.sa/ScientificContent/JudicialBlogs/Pages/default.aspx>
- The Case Number is ق/3/637 in 2009, The Saudi Court of Grievances. This case is available at The Saudi Court of Grievances website at: <http://www.bog.gov.sa/ScientificContent/JudicialBlogs/Pages/default.aspx>
- The New York Convention 10 June 1958; Entered into force, 7 June 1959 330 U.N.T.S. 38(1959)
- UNCITRAL Model Law on International Commercial Arbitration (2006). As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006.

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CORPORATE GOVERNANCE IN SINGAPORE: EXPLORING THE CONCEPT OF DIRECTOR INDEPENDENCE IN LIGHT OF GLOBAL CORPORATE GOVERNANCE PRINCIPLES

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ABSTRACT

Director independence is a major institutional element of corporate governance. In Singapore, the Code of Corporate Governance 2012 (“Singapore Code”) has introduced several major changes to the concept of independent directors. The expanded definition of independence, which requires independent directors to be independent from both management and shareholders holding 10% of the company’s shares, could affect the availability of independent directors in Singapore. While the definition of independence is well-elaborated, the rules in Singapore do not provide clarity on the role of independent directors, and neither have the expectations of the role appeared to have changed to take into account the expanded definition. This paper suggests that the Singapore Code should advocate that independent directors exercise vigilance on behalf of minority shareholders and play a proactive role in risk management. Relevant comparisons are made with the requirements in the United States and United Kingdom, and other global corporate governance principles.

Keywords: Corporate governance, Independent directors, Code of Corporate Governance

INTRODUCTION

In a recent study analysing corporate governance requirements and degrees of enforceability across 25 global markets, Singapore ranked first in the Asia-Pacific region, and third overall behind the United States and United Kingdom (KPMG and ACCA, 2014). Singapore first implemented the Code of Corporate Governance in 2001. The concept of independent directors was introduced therein as a mechanism to improve board accountability and objectivity, and has since been widely embraced by listed companies in Singapore. In 2012, the corporate governance framework in Singapore underwent extensive review, which resulted in key amendments in the revised Code of Corporate Governance 2012 (“Singapore Code”) relating to various aspects including director independence, board composition, directors’ training, remuneration matters, risk management, and shareholders’ rights and responsibilities. The changes to the concept of director independence in the Singapore Code were implemented with the aim to bring an objective and independent element to board decision-making relating to corporate affairs.

Against the backdrop of Singapore’s reputation for good corporate governance, a recent slew of corporate governance issues arising in Singapore Post Limited, a major listed company that provides postal services, is a good reminder that perhaps the safeguards against board governance in Singapore may not be sufficient. The director at the centre of Singapore Post Limited’s corporate governance problems was its then lead independent director, who misbehaved under the watch of its then independent board chairman (Tan, 2016). The events stirred up corporate governance concerns in the business community and media, and resulted in the scrutiny of Singapore’s independent directors. This suggests the need to re-examine the concept of director independence in Singapore.

This paper focuses on the definition and role of an independent director in Singapore. It is widely recognised that director independence in the context of corporate governance has long been a subjective trait that is not easy to measure. The approach towards director

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independence generally depends on several factors including board structures, company ownership structure, and corporate culture. It is therefore no surprise that the concept of director independence varies from jurisdiction to jurisdiction. Relevant comparisons are made with the corporate governance regime in the United States and United Kingdom, with the possible rationale and consequences of major differences discussed. The concept of director independence in the G20/OECD Principles of Corporate Governance (“OECD Principles”) and the ICGN Global Governance Principles (“ICGN Principles”) is also examined.

Under the expanded definition of director independence in Singapore, independent directors are required to not only be independent from management, but also from shareholders with an interest in 10% or more of the total voting shares in the company (Code of Corporate Governance, 2012). The expansion brings the definition of independence closer to that of the United Kingdom, but departing from the definition in the United States. The modification is crucial because it presumably means that the independent director is changing its core function from monitoring management on behalf of dispersed shareholders to monitoring controlling shareholders on behalf of minority shareholders (Puchniak and Lan, 2016). Although the expanded definition of independence purports to improve board objectivity and effectiveness, it results in potential implications and obstacles for listed companies in Singapore, which shall be examined in this paper.

Independent directors in Singapore have generally been seen as having an oversight role to act as a check and balance on the acts of the board and management of the company. Despite the clarity provided on the expanded definition of independence, the rules in Singapore have yet to prescribe the role of independent directors, and neither have the expectations of the role appeared to have been changed to take into account the expanded definition of independence. This paper suggests that in light of the expanded definition of independence, as well as the unique corporate culture and the predominance of concentrated ownership structure in local companies, the Singapore Code should advocate that independent directors exercise vigilance on behalf of minority shareholders in contexts such as self-dealing transactions and other conflict-of-interests situations, and play a proactive role in risk management to mitigate the risk of fraud, bribery and corruption.

CORPORATE GOVERNANCE CONCERNS

It is widely recognised that the structure of corporate ownership within an economy is a primary determinant of a country’s corporate governance system (Solomon, 2013). Ownership structures are diverse across countries, with dispersed ownership being more common in listed firms in the United States and the United Kingdom, compared to countries in Asia where concentrated ownership is more prevalent (see Hopt, 2011; Stijn et al., 2000; La Porta et al., 1999). The varying governance approaches based on ownership structures across different jurisdictions are expressly acknowledged in the OECD Principles, which state that “[t]he variety of board structures, ownership patterns and practices in different countries will thus require different approaches to the issue of board objectivity” (OECD, 2015, p. 58). Among the various approaches to bolster board objectivity is the use of independent directors, which has become a cornerstone of modern corporate governance landscape. Generally, independent directors are crucial for enhancing board effectiveness and providing a source of confidence to investors in the strength of the governance of the company (Clarke, 2007). Independent directors have increasingly been crucial in helping to attain a balance of power within the company board and providing an independent view on corporate strategy and affairs (Solomon, 2013).

Governance Concerns Arising From a Dispersed Ownership Structure

The defining characteristic of a dispersed ownership structure is the separation of ownership and control (Berle and Means, 1932). Under the agency theory, managers, as agents, make the

day-to-day business decisions on behalf of the dispersed shareholders and are responsible for advancing the shareholders' best interests (Jensen and Meckling, 1976). Jensen and Meckling (1976) asserted that the underlying assumption under the agency theory is that in the absence of oversight, management could, however, be tempted to use corporate resources in its own perceived self-interest. The central governance concern in a dispersed ownership structure is therefore the significant agency problems between management and shareholders arising from the shareholders' lack of incentives to supervise management due to their dispersed ownership (Solomon, 2013). This agency problem presents shareholders with a need to monitor company management.

There are various approaches towards corporate governance which improve accountability, thereby allowing shareholders to monitor management and resolve agency problems in a dispersed ownership structure. Such approaches include the board of directors, disclosure and transparency, internal controls and risk management, audit function, institutional investors, regulations, and market for corporate control (Solomon, 2013). The board of directors, in the context of agency concerns, is an intermediary representing "shareholder interests' vis-à-vis management, curtailing management's ability to extract private benefits or act in a suboptimal way with respect to shareholder interests" (Nili, 2016, p.6). The board of directors serves as a check on management, and it would presumably perform its role more effectively if its members are independent from management and are not financially beholden in some way to management. The concept of independent directors thus originated in dispersed ownership structure in order to strengthen the monitoring role of the board (Gordon, 2007).

Corporate Governance in the United States

The American economy has traditionally been dominated by publicly-held companies with widely dispersed shareholders (Hopt, 2011). The principal governance concern is the potential for overreaching by management, and independent directors serve to strengthen the control over the management and to address the conflicts of interests between managers and shareholders (Solomon, 2013). The concept of independent directors had originated from the notion of disinterested directors, whereby at common law directors who have an interest in any transaction or proposed transaction are barred from voting on such matters (Karmel, 2013). In the aftermath of the financial scandals in 2001, the United States Securities and Exchange Commission incorporated the requirements of independent directors into the Sarbanes-Oxley Act of 2002. The subsequent 2008 financial crisis led to further legislative requirements on independent directors in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under the stock exchange regulations, domestic listed companies, except for controlled companies (i.e. those where a single shareholder or a group of shareholders holds 50% or more of voting shares), are required to have a majority of independent directors (Weil, Gotshal & Manges LLP, 2014; NYSE Listed Company Manual, Section 303A.01; NASDAQ Stock Market, Rule 5605(b)).

Corporate Governance in the United Kingdom

The typical ownership structure in the United Kingdom is similarly dispersed ownership (Hopt, 2011). The concept of independent directors was taken first to the United Kingdom via the Cadbury Report in 1992. After the reporting scandals in 2001, the requirements on independent directors were strengthened via the Higgs Report in 2003. Under the UK Corporate Governance Code (2012), the board should include an appropriate combination of executive and non-executive directors (and in particular, independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision-taking. Except for smaller companies (i.e. below the FTSE 350 throughout the year immediately prior to the

reporting year), at least half the board, excluding the chairman, should comprise non-executive directors determined by the board to be independent (UK Corporate Governance Code, 2012). Pursuant to the UK Corporate Governance Code (2012), a smaller company should have at least two independent non-executive directors.

Governance Concerns Arising from a Concentrated Ownership Structure

In a concentrated ownership structure, the presence of controlling shareholders gives rise to different corporate governance issues (Bebchuk and Hamdani, 2009). Urtiaga and Saez (2012) reported that controlling shareholders generally have both incentives and power to exert monitoring over management, and they usually hold wield control over the board. As a result of the low level of separation of ownership and control, there can be abuses of power. The problem in a concentrated ownership structure is the potential expropriation of the minority shareholders by the controlling shareholders through self-dealing and related party transactions (Urtiaga and Saez, 2012). Minority shareholders also may not be able to obtain requisite information on the company's operations. Opaque financial transactions and misuse of corporate funds are potential problems in a concentrated ownership structure (Solomon, 2013). The goal of corporate governance is therefore to monitor the corporate behaviour of the controlling shareholders and reduce the potential expropriation of minority shareholders. In a concentrated ownership structure, the independent director could similarly perform a monitoring role, but focusing on the controlling shareholders rather than on the management (Bebchuk and Hamdani, 2009).

Corporate Governance in Singapore

The landscape in Singapore is vastly different, with concentrated-ownership companies being prevalent among listed companies in Singapore. Tan (2011, p. 29) reported that “corporate ownership is highly concentrated, and mainly owned by families, groups of families or interest groups and the Singapore government”. According to a recent empirical study, up to 60.8% of listed companies in Singapore can be classified as family-controlled companies (Dieleman et al., 2013). Empirical evidence suggested that family members collectively hold large controlling blocks of shares in family-controlled companies, which results in such companies having extremely concentrated shareholder structures (Dieleman et. al., 2013). The highly concentrated-ownership structure among family-controlled companies can give rise to the agency problem of expropriation of minority shareholders by the controlling shareholders.

In Singapore, the concept of independent directors was introduced in 2001 with the aim to improve board accountability and objectivity, and as a check and balance to prevent corporate mismanagement. Principle 2 of the Singapore Code provides that “[t]here should be a strong and independent element on the board that is able to exercise objective judgement on corporate affairs independently”. To demonstrate this, independent directors should make up at least one-third of the board, but this percentage is increased to at least half of the board where the chairman of the board and the chief executive officer is the same person or are immediate family members, or the chairman is part of the management team or not independent (Code of Corporate Governance, 2012, Principle 2; see Yip and Tan, 2013). Furthermore, the issuer's board must have at least two non-executive directors who are independent and free from any material business or financial connection with the issuer (SGX Listing Mainboard Rules, Rule 210(5)(c)).

DEFINITION OF DIRECTOR INDEPENDENCE

Different countries define independence differently. The OECD Principles do not provide an exact definition of independence and recognise varying approaches towards defining independence for board members. According to the OECD Principles, “in many instances, objectivity requires that a sufficient number of board members not be employed by the

company or its affiliates and not be closely related to the company or its management through significant economic, family or other ties” (OECD, 2015, p. 58). Under this definition of independence, shareholding would not bar a director from attaining an independent status. The OECD Principles further provide that “in other instances, independence from controlling shareholders will need to be emphasised, in particular if the ex-ante rights of minority shareholders are weak and opportunities to obtain redress are limited” (OECD, 2015, p. 58). This definition would prevent an independent director from having connection to shareholders. In addition, the ICGN Principles set forth a list of criteria that would compromise independence of a director (ICGN, 2014). Importantly, a director’s independence is compromised if he is a “significant shareholder of the company, or an officer of, or otherwise associated with, a significant shareholder of the company” (ICGN, 2014, p. 10). No further elaboration is provided on what constitutes a “significant shareholder”.

United States

The definition of independence in the United States requires the independent directors to be independent from the management. Specifically, the definition focuses on the absence of financial and family ties between directors and the company. The rules in the NYSE Listed Company Manual and NASDAQ Stock Market contain specific prerequisites for director independence, explicitly prohibiting directors from being considered independent if they were employees of the company, received compensation over a certain threshold that is not a director fee, had ties to the company’s auditor, or had business or compensation interlocks with the company above a certain threshold. Importantly, the definition of independence does not consider the relationship with controlling and significant shareholders. As the governance concern is independence from management, ownership of even a significant amount of the company’s shares, by itself, is not a bar to a finding of director independence (NYSE Listed Company Manual, Section 303A.01; NASDAQ Stock Market, Rule 5605(b)).

The definition of independence currently does not consider social and professional ties with the company and its management, although those ties links may in reality affect the independence of directors. There are, however, case law developments in the United States suggesting that the definition of independence may become broader in future (Khanna and Mathew, 2010). In *re Oracle Corp. Derivative Litigation*², it was held that personal and social relationships are relevant to determining director independence. Although the decision was made within the context of claims of independence for a special litigation committee at issue, it begs the question of whether a workable definition of independence could exist that would possibly capture social and personal relationships (Tung, 2011). Currently, the requirements for independence described in *Oracle* have yet to be incorporated into the stock exchange regulations which have mainly focused on directors’ financial and family ties to the company. However, in light of *Oracle*, it remains to be seen as to whether formal independence without social independence is indeed adequate under the current definition of independence to assure effectiveness of independent directors.

United Kingdom

The definition of independence in the United Kingdom is more comprehensive than that in the United States, as it requires independent directors to be independent from both management and significant shareholders. The 1992 Cadbury Report, which first introduced the notion of independent directors in the United Kingdom, required independence from only management. In the wake of the financial scandals in 2001, the Higgs Report in 2003 thereafter recommended the expansion of the definition of independence, which were subsequently reflected in the

² (2003) 824 A.2d 917 (Del. Ch.).

revised UK Corporate Governance Code. The impetus for the expanded definition of independence was to address “not just relationships or circumstances that would affect the director’s objectivity, but also those that could appear to do so” (Higgs Report, 2003, p. 36). The expanded definition of independence also makes clear that “receiving additional remuneration beyond the director’s fee compromises an individual’s independence” (Higgs Report, 2003, p. 36). Non-executive directors should also not allow the objectivity of their judgment be affected by the income derived from their role or shareholding (Higgs Report, 2003).

Singapore

In 2012, the Singapore Code was revised to require³, among other changes, independent directors to have independence from shareholders holding 10%⁴ or more of the company’s shares, and not only management as under the previous definition. Under the expanded definition, a director is deemed to not be independent if he is “a director who is a 10% shareholder or an immediate family member of a 10% shareholder of the company, or a director who is or has been directly associated with a 10% shareholder of the company, in the current or immediate past financial year” (Code of Corporate Governance, 2012, p. 5). A director will be considered “directly associated” with a 10% shareholder only “when the director is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the 10% shareholder in relation to the corporate affairs of the corporation” (Code of Corporate Governance, 2012, p. 5). The expanded definition of independence appears to be in line with the concentrated ownership structure that predominates listed companies in Singapore, as it now covers relationships with controlling shareholders.

While the expansion brings the definition in Singapore closer to that of the United Kingdom, it leads to potential implications and obstacles faced by listed companies as a result of the requirements linking shareholding and director independence. Firstly, the expanded definition of independence could reduce the availability of independent directors for listed companies in Singapore. Given the relatively close-knit business community and the prevalence of family-controlled firms in Singapore, major shareholders are generally disinclined to select directors who would challenge management, albeit constructively, preferring instead to bring in independent directors who would work harmoniously with them. It is therefore common to have friends of the major shareholders sitting on the board of such companies as independent directors, to minimise excessive challenging from outsiders. Under the expanded definition, these individuals may lose their independent status if they are considered directly associated with the major shareholders. Moreover, the requirement of linking “10% shareholders” and director independence could be somewhat unduly conservative. It raises the question of whether a shareholder holding 10% of the company’s shares could sufficiently influence the governance of the company concerned.

³ The revised Singapore Code took effect in respect of annual reports relating to financial years commencing from 1 November 2012, with the exception for changes needed to comply with the requirement for independent directors to make up at least half of the boards in specified circumstances. Such changes are to be made at the annual general meetings following the end of financial years commencing on or after 1 May 2016.

⁴ An “independent” director is “one who has no relationship with the company, its related corporations, its 10% shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director’s independent business judgement with a view to the best interests of the company”; a “10% shareholder” is defined as “a person who has an interest ... in not less than 10% of the total votes attached to all the voting shares in the company”; and “voting shares” exclude treasury shares (Code of Corporate Governance, 2012, p. 4-5).

ROLE OF INDEPENDENT DIRECTORS

The OECD Principles provide that “independent directors can contribute significantly to the decision-making of the board and bring an objective view to the evaluation of the performance of the board and management” (OECD, 2015, p. 58). Independent directors can also play an important role in areas “where the interests of management, the company and its shareholders may diverge, such as executive remuneration, succession planning, changes of corporate control, take-over defences, large acquisitions and the audit function” (OECD, 2015, p. 58). The OECD Principles also recognise the importance of having independent directors review and monitor related party transactions. For significant transactions, a committee of independent directors should be established to vet and approve the transaction. The committee should review significant related party transactions to ensure fairness and reasonableness (OECD, 2015).

United States

The primary role of independent directors in the United States is to monitor management on behalf of dispersed shareholders who are hindered by collective action problems from monitoring management themselves (Gordon, 2007). This is consistent with the definition of independence which requires an independent director to be independent from management. To facilitate oversight of the management, the independent directors have relevant powers in the audit committee, including the hiring, overseeing and firing of outside auditors (Clarke, 2007). They also have a role in the vetting of conflict-of-interest transactions, which are reviewed by the courts under the heightened standard of the entire fairness test unless the transactions are approved by independent directors (Ferrarini and Filippelli, 2014; Fairfax, 2010). Furthermore, the independent directors have a role as to shareholders’ derivative actions since they may prevent shareholders from bringing those actions or may terminate such derivative actions (Fairfax, 2010).

United Kingdom

Similarly, independent directors in the United Kingdom plays an important monitoring role to overcome the agency problems inherent in companies with dispersed ownership structure. The Walker Review (2009) also highlighted the need for independent directors to constructively challenge executives more substantially before strategic decisions are made. Independent directors, particularly in the banking sector, need to challenge executives on issues of risk, risk management and related strategy. They also should play a crucial role in monitoring excess risks taken on by the company.

Singapore

Existing Role of Independent Directors

Theoretically, the role of independent directors in concentrated ownership companies is to a large extent different from that in dispersed ownership companies. In a concentrated ownership structure, independent directors are not needed to monitor management since the former is already actively monitored by the controlling shareholders. The role of independent directors is therefore to reduce potential expropriation of the minority and address conflicts among controlling and minority shareholders.

Independent directors in Singapore are generally regarded as crucial to provide an oversight role to monitor the board and management (SID, 2007). SID (2007) elaborated that the primary role of an independent director is “not to protect the interest of minority shareholders, but to act as a check and balance on the acts of the board and management of the company”. Furthermore, SID (2007) recognises that “the independent director is not merely

the guardian of the minority shareholders, nor is he only to focus on related party transactions involving a listed company, its management or major shareholder”. SID (2007) acknowledges that indirectly the role the independent director plays has the impression that it is promoting the best interest of minority shareholders, but in fact the reality is that he is promoting the interest of all shareholders as a whole. In essence, the primary role of independent directors in Singapore is not to monitor the controlling shareholders but rather to exert monitoring on the board and management. This appears to be a mismatch to the governance concerns arising from concentrated-ownership companies predominant in Singapore, as well as the expanded definition of independence in the Singapore which requires independence from both management and 10% shareholders.

Redefining the Role of Independent Directors

To address the mismatch explained above, this Paper suggests that in light of the expanded definition of independence, as well as the unique corporate culture and the predominance of concentrated ownership structure, the Singapore Code⁵ should advocate that independent directors exercise vigilance on behalf of minority shareholders and play a proactive role in risk management.

The Singapore Code should explicitly make clear that independent directors play a role in exercising vigilance on behalf of minority shareholders in contexts such as self-dealing transactions involving the controlling shareholder and the company, as well as other conflict-of-interest situations. One might initially question the need for such enhanced monitoring function. It has been argued that the family-controlled companies in Singapore are indirectly prevented from extracting private benefits of control because the effectiveness of Singapore’s corporate regulators and the strong emphasis in Singapore family corporate culture appear to be important substitutes for monitoring of controlling shareholders by independent directors in Singapore (Puchniak and Lan, 2016). However, there had been specific local cases of expropriation of minority shareholders in Singapore including *Raffles Town Club Pte Ltd v Lim Eng Hock Peter*⁶ and *Lim Swee Khiong v Borden Co (Pte) Ltd*⁷, and an empirical study has shown that self-dealing transactions are in fact common in family-controlled companies (Tan, 2011). These circumstances make clear that enhancing the monitoring role of independent directors to exercise vigilance on behalf of minority shareholders can provide a useful additional check on private benefits of control, and this role ought to be made explicit in the Singapore Code. Moreover, having enhanced monitoring function assigned to independent directors to align with the expanded definition of independence in Singapore could boost Singapore’s reputation as a corporate governance beacon.

In particular, the role of independent directors should focus on vetting and approving self-dealing transactions and other conflict-of-interest situations. Currently, Rule 917 of SGX Listing Mainboard Rules requires a statement by the audit committee as to whether it is of the view that the self-dealing transaction at issue (which is called an “interested person transaction” under the SGX Listing Mainboard Rules) is on normal commercial terms, and is not prejudicial to the interests of the issuer and its minority shareholders. Under the Singapore Code, Guideline 12.1, the audit committee should comprise at least three directors, the majority of whom should be independent. Importantly, the audit committee is able to discharge its obligation by obtaining an opinion from an independent financial adviser and relying on the value assessment

⁵ While compliance with the Singapore Code is not mandatory under the “comply-or-explain” regime adopted in Singapore, listed companies are required to disclose in their annual report any deviation from the Singapore Code and also provide an appropriate explanation for such deviation. This effectively provides an impetus for listed companies to redefine the role of their independent directors.

⁶ (2010) SGHC 163.

⁷ (2006) 4 SLR(R) 745.

made by such adviser (SGX Listing Mainboard Rules, Rule 917(4)(ii)). It is submitted that these current requirements do not rise to a level that is sufficient for an independent director to effectively monitor controlling shareholders to prevent potential expropriation of minority shareholders. Tasking independent directors with the vetting of self-dealing and other conflict-of-interest transactions could be effective in deterring private benefits of control and expropriation of minority.

Increasingly, shareholders are also demanding higher expectations of how companies undertake risk management so as to keep risks at an acceptable level. In this regard, the Singapore Code should explicitly provide that independent directors also play a role in reviewing risk management framework put in place by the company to mitigate the risk of fraud, bribery and corruption. They are expected to engage in proactive steps rather than assuming that no corporate misconduct can happen, and such steps can include conducting the necessary due diligence and background on entities transacting with the company, stepping up awareness of risk management within the company, and ensuring compliance with the applicable laws. The independent directors are expected to constructively challenge and ask questions, and raise the appropriate red flags at the right time.

CONCLUSION

The concept of independent directors in Singapore is both a challenging and controversial area. While the definition of independence in Singapore is now well-elaborated, there are potential implications and obstacles faced by listed companies as a result of the expanded definition. Notwithstanding the clearer definition of independence, the rules in Singapore have yet to prescribe the role of independent directors. Independent directors are generally regarded as crucial to provide an oversight role to monitor the acts of the board and management for the company. But such a role appears to be a mismatch with the governance concerns arising from concentrated-ownership companies predominant in Singapore, and the expanded definition of independence in the Singapore which requires independence from both management and 10% shareholders. To address the agency problems of expropriation of minority shareholders that could be prevalent in a concentrated ownership structure, the Singapore Code should advocate that independent directors exercise vigilance on behalf of minority shareholders and also play a proactive role in risk management.

REFERENCES

- Berle, A. and Means, G. (1932) *The modern corporation and private property*. New York: Transaction Publishers.
- Bebchuk L. and Hamdani A. (2009) The elusive quest for global governance standards. *University of Pennsylvania Law Review*, 157(5), 1263-1317.
- Cadbury Report (1992) *Report of the committee on the financial aspects of corporate governance: the code of best practice*. London: Gee Professional Publishing.
- Clarke, T. (2007) *International corporate governance*. New York: Routledge.
- Code of Corporate Governance (2012) Singapore: Monetary Authority of Singapore.
- Dieleman, M. et al. (2013) *Success and succession: a study of SGX-listed family firms*. [Online]. Available from: <https://bschool.nus.edu.sg/Portals/0/images/CGIO/Report/Asian%20Family%20Business%20Report.pdf> [Accessed 2 November 2016]
- Fairfax, L. (2011) The uneasy case for the inside director. *Iowa Law Review*, 96, 127-193.
- Ferrari, G. and Filippelli, M. (2013) Independent directors and controlling shareholders around the world. In: Thomas, R. and Hill, J. (eds.). *Research Handbook on Shareholder Power*. Edward Elgar Publishing.

- Gordon, J. (2007) The rise of independent directors in the United States 1950-2005: of shareholder value and stock market prices. *Stanford Law Review*, 59, 1465-568.
- Higgs Report (2003) *Review of the role and effectiveness of non-executive directors*. London: Department of Trade and Industry.
- Hopt, K. (2011) Comparative Corporate Governance: The State of the Art and International Regulations. *The American Journal of Comparative Law*, 1, 1-73.
- ICGN (2014) *ICGN global corporate governance principles*. London: International Corporate Governance Network.
- Jensen, M. and Meckling, W. (1976) Theory of the firm: managerial behaviour, agency costs and ownership structure. *Journal of Financial Economics*, 3, 305-60.
- OECD (2015) *G20/OECD Corporate Governance Principles*, Turkey: OECD.
- La Porta et al. (1999) Corporate ownership around the world, *Journal of Finance*, 54, 471–517.
- Karmel, R. (2013) Is the independent director model broken? [Online]. *Brooklyn Law School Legal Studies*, Legal Studies Paper No. 348. Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302777 [Accessed 20 December 2016].
- Khanna, V. and Mathew, S. (2010) The role of independent directors in controlled firms in India: preliminary interview evidence. *National Law School of India*, 22(1), 35-66.
- KPMG and ACCA (2014) *Report: balancing rules and flexibility*. Singapore: KPMG International Cooperative and Association of Chartered Certified Accountants.
- Nili, Y. (2016) The ‘new insiders’: rethinking independent directors’ tenure. [Online]. Harvard Law School Forum on Corporate Governance and Financial Regulation. Available from: <https://corpgov.law.harvard.edu/2016/02/16/the-new-insiders-rethinking-independent-directors-tenure/> [Accessed 20 December 2016].
- Puchniak, D. and Lan L. (2016) Independent directors in Singapore puzzling compliance requiring explanation, *NUS Law Working Paper Series*, 2015/006 [Online]. Available from: http://law.nus.edu.sg/wps/pdfs/006_2015_Dan%20Puchniak-LanLuhLuh.pdf [Accessed 2 November 2016]
- Solomon, J. (2013) *Corporate Governance and Accountability*. 4th ed., New York: Wiley.
- SID, *Statement of good practices SGP No. 7/2007 on the role, duties and responsibilities of the independent director*. Singapore: Singapore Institute of Directors. [Online]. Available from: http://www.sid.org.sg/system/application/views/pdf/SGP_No_7.pdf [Accessed 2 November 2016]
- Stijn, C. et al. (2000) The separation of ownership and control in east Asian corporations. *Journal of Financial Economics*, 58, 81-112.
- Tan, L. H. (2011) Exploring the question of the separation of ownership from control: an empirical study of the structure of corporate ownership in Singapore’s top 100 listed companies. *N.Z. Governance Center Working Paper*. [Online]. Available from: <http://docs.business.auckland.ac.nz/Doc/exploring-the-question-of-ownership-from-control.pdf> [Accessed on 2 November 2016]
- Tan, L. H. (2011) Family-owned firms in Singapore: legal strategies for constraining self-dealing in concentrated ownership structures. *Singapore Academy of Law Journal*, 23, 890-931.
- Tan, M. (2016) SingPost director Keith Tay brings forward exit from board. *The Business Times*, 4 May. [Online]. Available from: <http://business.asiaone.com/news/singpost-director-keith-tay-brings-forward-exit-board> [Accessed 2 November 2016]
- Tung, F. (2011) The puzzle of the independent directors: new learning. *Boston University Law Review*, 91, 1175-1190.
- UK Corporate Governance Code (2012) London: Financial Reporting Council.

- Urtiaga, M. and Saez, M. (2012) Deconstructing independent directors. *Journal of Corporate Law Studies*, 13(1), 63-94
- Walker Review (2009) *A review of corporate governance in UK banks and other financial industry entities*. London: The Walker Review Secretariat.
- Weil, Gotshal & Manges LLP (2012) *International comparison of selected corporate governance guidelines and codes of best practices*. [Online]. Available from: http://www.weil.com/~media/files/pdfs/us_active_international%20matrix%20june%202014_44503343_2.pdf [Accessed 2 November 2016]
- Yip A. and Tan J. (2013) *Chapter 21: Singapore*. In: Calkoen W. (ed.). *The corporate governance review: Singapore*. [Online] 3rd ed., London: Law Business Research Ltd, 290-303. Available from: <http://www.wongpartnership.com/files/download/761> [Accessed 1 November 2016]

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MEDICOLEGAL ASPECT OF AUTOPSY IN INDONESIA: AN ETHICAL DILEMMA ON MEDICAL FORENSIC EXPERT'S AUTHORITYMS. RAANIA AMAANI¹; MR. ARISTYO RIZKA DARMAWAN²; MS. SELLA DWI JULIAN³; MS. SHAQINA SAID⁴ AND PROF. AGUS PURWADIANTO**ABSTRACT**

Regulations regarding the division of authority between a medical forensic expert and an investigator for doing an autopsy in Indonesia remain unclear. There is a high profile case in which the victim, Wayan Mirna Salihin, didn't go through an autopsy. It became an ethical dilemma for the medical forensic experts, as their authority in Indonesian Doctor's Code of Conduct contradicts with the article 216 of the Penal Code. Taking a case study of Salihin's case, this paper aims to present the implication of ethical dilemma of autopsy in Indonesia and the proposed solutions. Firstly, Indonesia should have a strong legal basis for regulating a clear division of authority between a doctor and an investigator. Secondly, the Indonesian doctor's ethical code shall be in line with any autopsy legal basis. Lastly, a doctor should be able to explain to the investigator regarding the best procedure to present evidence in the court.

Keywords: autopsy, ethical dilemma, investigator, forensic, medicolegal.

INTRODUCTION

Clear regulations governing the division of authority between a medical forensic expert and an investigator in the autopsy procedure is indispensable. The existence of a medical forensic doctor to examine victim or criminal suspects must be important, absolute, and cannot be ignored because every investigation process should be based on the principle of scientific investigation (Susanti, 2013). In Indonesia, the authority of medical forensic doctor to conduct an autopsy remains unclear. A medical forensic doctor's action as the executor of autopsy is depended on the order of investigator, whereas in court, as an expert witness, they are in charge to take the responsibility of their action (KUHAP).

The impacts of the absence of regulation on medical forensic expert's authority for doing an autopsy are proven in a high-profile case, Salihin's death case, in Indonesia. In Jakarta, the capital city of Indonesia, this is the first case of death allegedly caused by cyanide. On the 6th of January 2016, Wayan Mirna Salihin died after drinking a Vietnamese iced coffee in a café. Before, at 5 PM, Salihin was invited to meet her friends, Jessica Kumala Wongso and Hani at Olivier Cafe, Grand Indonesia Mall, Jakarta. (footnote: live broadcasted trial of Salihin's Case)

Jessica Kumala Wongso first arrived at 2 PM to make a reservation then she went for shopping and returned at 4 PM. From 4 to 5 PM, Jessica's behavior cannot be seen clearly as CCTV vision covered by the trees near her seat. Soon after arriving, Salihin, who came with Hani, sipped her coffee served at the table. Shortly thereafter, Salihin suffered convulsions, foaming mouth, and instantly went unconscious. She was immediately rushed to Abdi Waluyo Hospital, Central Jakarta but died on the way. From observation, the coffee drunk by her had an unusual color and a peculiar smell. After inspection, it turned out that the coffee contains cyanide ions and high amount of natrium ion and caffeine, with a pH of 13. Therefore, the victim was allegedly killed by drinking cyanide in coffee. (footnote: live broadcasted trial of Salihin's Case)

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In Abdi Waluyo Hospital, the emergency physician handed out a death certificate for Wayan Mirna Salihin, even though in a case of unnatural death, a death certificate is not allowed to be given out (Waters, 2009). Supposedly, the death of Salihin must be immediately reported to the police and the emergency physician must make a recommendation letter for autopsy. The emergency physician claimed that they had offered the victim's family to refer the victim's body to Cipto Mangunkusumo Hospital for having an autopsy performed. However, the victim's family refused the autopsy procedure. (footnote: live broadcasted trial of Salihin's Case)

Due to the peculiarities of Salihin's cause of death, the case was reported to the police. The investigator ordered to transfer the victim's body to the Kramat Jati Police Hospital on January the 9th. In that hospital, dr. Slamet Purnomo as the medical forensic doctor did not conduct an autopsy because the investigator did not order to do that due to the refusal of Salihin's family. In addition, the body of the victim had been embalmed and dressed for funeral. Medical forensic examiner was only asked to take samples of the stomach, liver, and urine. From the sample of the stomach, forensic doctor found 0,2 mg/liter cyanide and from pathological anatomy examination it showed that Salihin's stomach were damaged by a corrosive substance. (footnote: live broadcasted trial of Salihin's Case)

On the 30th January 2016, Wongso, a former resident of Australia, was declared as a suspect on premeditated murder of Wayan Mirna Salihin. The trial was broadcasted live throughout Indonesia. Wongso's lawyer denied his client's involvement and expressed reservations over the accusation. He questioned whether victim died of cyanide poisoning in light of information that the forensic doctor did not conduct an autopsy on her body. The defense lawyer blamed the doctor and investigators who were deemed to act not in accordance with proper procedure. (footnote: live broadcasted trial of Salihin's Case)

The absence of complete autopsy had yielded confusion on expert witnesses' interpretation in the trial of this case. Professor Budi Sampurna, a forensic doctor, presented as an expert, explained that 0,2 mg/liter cyanide found in Salihin's stomach is sufficient to prove that the cause of death was cyanide. Cyanide is a volatile compound and thus the findings of cyanide in the stomach examined 4 days after she died means Salihin must have consumed plenty of cyanide. This statement strengthened the testimony of previous experts, such as dr. Slamet Purnomo and toxicologists I Made Agus Gelgel Wirasuta and Nursamran Subandi. On the other hand, dr. Djaja Surya Atmadja as a forensic expert insisted that the cause of death could not be ascertained in the absence of a complete autopsy in this case. He believed that there were many other possible causes of Salihin's death. This opinion was in line with the testimony of a forensic pathologist, Professor Beng Beng Ong, and toxicologists, Budiawan. The ambiguity of those interpretations impede the process for obtaining the highest material truth of criminal law that leads to justice (Duff, 2011).

Performing an autopsy in Indonesia is not an easy task. Necropsy is still considered an unusual procedure and gets contradictions in society even though the purpose is to prove the truth. (Dahlan, 2000). This became the reason why the investigator did not ask for a complete autopsy on the victim's body. On the contrary, regarding to the ethics, physicians are required to carry out every procedure according to the highest standard and make a decision independently so that every action can be accounted for (Ikatan Dokter Indonesia, 2012). At this point, an ethical dilemma of medical forensic expert often occurs. Therefore, both law and physical protection are required for the medical forensic expert. For this reason, the division of authority between a doctor and an investigator needs to be discussed to clarify the roles and duties of each party in running the autopsy procedure.

DISCUSSION

The Procedure of Autopsy in Indonesia

The law concerning permission for autopsy varies widely in different jurisdictions, but basically there are two types: *clinical* or *medicolegal*. The *clinical autopsy* is aimed to investigate the extent of a disease and the effectiveness of treatment and often to utilise the results in medical audit or research (Knight, 1998). This type of autopsy almost invariably requires some form of consent, either antemortem from the deceased or postmortem from the relatives (Human Tissue Act, 1961). The *medicolegal* or forensic autopsy is performed at the behest of law enforcement authorities when the cause of death is unnatural, suspicious, or unknown to know the manner of death. Here, permission is not required in most jurisdictions. The autopsy is being ordered by legal authority. In Indonesia, this authority is contained in the various Acts and Rules. Moreover, *medicolegal* becoming more important due to the concept as the rights of every free-born person to an identity after death, which has been implied from the United Nations Declaration of Human Rights, Identification of a dead body is needed, in the first place, in the field of criminal investigation; the chances of apprehending a criminal are generally increased once the identity of the victim has been established. Many important procedures in the civil field grant of probate, resolving of partnership and general administration of estates depend upon accurate identification (Mason, 1998).

As it stated before, even though there is already an Autopsy Protocol which is accepted internationally, procedure for autopsy still varies widely in different jurisdictions. In Indonesia, basically, there are no specific and rigid regulations regarding autopsy, but mostly, many hospitals apply the same standard operational procedure which is accepted broadly. A police might request a doctor to help an ongoing case especially as an expert witness and to make *Visum et Repertum*. Under Indonesian law, a doctor might be requested by the police for; (a) first examination in the crime scene; (b) examination to victim; (c) examination to cadaver; (d) examination to buried cadaver; and (e) as an expert witness at court.

Under Indonesian Penal Code article 133, an investigator, for the sake of an investigation of an injured or a dead victim which is suspected a crime, have the authority to request an expert examination to a forensic doctor with such procedure: (1) Request for an autopsy from the investigator must be in written form; (2) *Visum et Repertum* shall not be done for the past tragedy, because the doctor shall keep the patient secret; (3) in the request form the identity of the victim and the person who request for the autopsy shall be written; (4) The letter of request shall be signed by the investigator which have the authority based on the national regulation; (7) the letter shall be addressed to a doctor, in which under the Indonesia regulation the government doctor shall be prioritised; (8) when requesting for an examination or an autopsy to the hospital, a victim, whether injured or dead, must be accompanied by the police or investigator along with the letter; (9) it is better for the investigator who request for the autopsy to see the process also examine the body along with the doctor, so that he might see the material evidence.

Sociocultural Perspective of Autopsy in Indonesia

In many conditions, when the hospital authority or the investigator told the family that the autopsy must be done, victim's family usually reject the autopsy with religious reasons. Basically, in Indonesia, there are no religions that prohibit autopsy, including Islam as the largest religion in Indonesia, as stipulated in the assembly's consideration of health and sharia Ministry of Health Republic of Indonesia No. 4/1995, which states that autopsy is legal for the sake of knowledge development, education, medical forensic and in revealing justice. But, still, many Indonesians thought that opening the body of their family would be unnatural and against the will of the victim itself.

In respecting sociocultural differences regarding autopsy, the value of the body after death expressed by thinkers like Drayton and Jones and that a deceased person's wishes can be preserved through living relatives, it follows that family members consent should be taken into consideration to proceed to an autopsy. As an extension of family members' connections to the patient, the patient's perceived desires, wishes and sociocultural beliefs should be incorporated into the family's decision about whether to perform an autopsy, analogous to surrogate decision making, in which next-of-kin must rely on an incapacitated patient's past attitudes, actions, and values to make healthcare decisions (Lane and Vercler, 2016).

The doctor should discuss the family's views and values in a consent process to autopsy, similar to all other aspects of clinical care of the patient. In the case presented, it would fall to Dr. Slamet Purnomo to obtain consent from Mr. Salihin, father of Wayan Mirna Salihin, and try to understand their sociocultural background to best accommodate Mr. Salihin perceived wishes. By taking a sociocultural approach, the doctor can try to honor the autonomy of the deceased person by allowing the next-of-kin to communicate their perceptions of that person's wishes and desires and by respecting the deceased's spiritual and cultural perceptions of death.

Autopsy under Indonesian Law

Article 133 Indonesian Law of Criminal Procedure clearly stipulates that an investigator, for the sake of justice, handles a victim, whether he is injured, poisoned, or dead presumably because of an event constituting an offense, he shall have the authority to submit a request for expert testimony from a doctor of forensic medicine or other expert. This become the legal basis for the investigator to be able to ask a doctor for a medical forensic examination. Under Indonesian law, a doctor is obliged to do what the investigator asks for. This article become the legal basis of an autopsy in Indonesia and a doctor which is asked to do an autopsy shall not refuse to do so; the article 216 of the Indonesian Penal Code stipulates that a person who, with deliberate intent, does not obey a command or a demand issued under statutory provision by an official charged with the exercise of a supervision or by an official charged with or declared. The contradiction between the Indonesian Penal Code and the Indonesian Doctor's Code of Conduct often rising an ethical dilemma: which should be the strongest regulation that the doctor should obey. In many practices, doctors often follow the instruction of the investigator to do what the investigator told them to do, this is because under the Indonesian Penal Code have more strict regulation and even there is a sanction for not following the instruction of the investigator. Therefore, it might be concluded that in practical the Indonesian Penal Code.

From the juridical perspective, a doctor is an expert, therefore a doctor might be asked to assist an ongoing criminal case. But, in order to obtain a maximal assistance, requests for assistance need to be submitted to the doctor who has expertise in accordance with the object to be examined. In a criminal trial examination case, if a judge conducting the proceedings in the absence of evidence, the judge will not be able to know and understand whether a criminal offense has been proved; whether the defendant actually has committed a criminal act and is responsible for the incident. Thus, the evidence is absolutely needed to file in the proceedings in order to find the material truth. The role of the doctor to find the material truth in the case of criminal law in particular plays an important and decisive role. Law and medicine cannot be separated for law enforcement, especially in the context of proving guilty, only the doctor is able to help reveal the mysteries on the state of the evidence that can be either the body or part of human body (Kakusni, 2016).

Impact of the Current Autopsy Regulations

The lack of clear regulations regarding a medical forensic expert's authority in performing autopsy has resulted in "naming, blaming and shaming" of the medical forensic experts and, most importantly, influenced the evidence and the interpretations of expert witnesses.

"Naming, blaming and shaming" is a traditional medical approach to errors with individual seen as responsible for the error (Heard, 2005) and (Amsiejute, 2015). Hence, when there are problems and mistakes, the focus is on the individual who made a mistake and deserves a blame. Attention is shifted from the root cause of individual errors: the systemic problems Waller, 2011). The "big picture" is lost (Heard, 2005).

In healthcare, "naming, blaming and shaming" happened because there is a medical error and an unsatisfied party, usually the patient or the patient's family (Runciman, Merry and Walton 2007). However, in forensic medicine, the "naming, blaming and shaming" is different. In Salihin's case, "naming, blaming and shaming" happened because the autopsy was not performed. This was seen as an error done solely by the medical forensic experts.

The media play a significant role in the "naming, blaming and shaming" of the medical forensic experts in Salihin's case. The trials of Salihin's case were broadcasted live across Indonesia, showing the medical forensic experts pushed by the defense attorney on why the autopsy was not performed, making the "naming, blaming and shaming" nationwide. The public remains oblivious to the systemic problems that made a complete autopsy not possible to be performed.

The absence of a complete autopsy, most importantly, makes the victim's cause of death not evident. Through partial autopsy, only samples from stomach, liver, gallbladder and urine are collected. Thus, the evidences were not complete. Because of this, the interpretations of the expert witnesses were highly affected. The expert witnesses, coming from different backgrounds, gave interpretations from various perspectives. Hence, the interpretations were differed and it was hard to make a conclusion.

Without a complete autopsy, the exact cause of Salihin's death remains unknown. The verdict of guilty was decided without knowing the exact cause of death of the victim. The defendant was sentenced 20 years in prison for homicide. This situation gave rise to an ethical dilemma for a medical forensic expert.

Ethical Dilemma of Medical Forensic Expert

In Indonesia, a medical forensic expert, as a physician, follows the biomedical ethics, the World Medical Association International Code of Medical Ethics and Indonesian Doctor's Code of Conduct. Ethical dilemma, or moral conflict, appears when many values are entangled within one fact or situation (Maeda, 2012). In Salihin's case, the ethics that the medical forensic experts follow are conflicted with the Indonesian Penal Code.

Ethics is a branch of philosophy dealing with reflections and methods on the duty of a human to find moral values or translating those values into norms (basic ethics) and applying those values in real life concrete situation (applied ethics) (Maertens et al, 1990). Ethics prescribe behavior but do not describe actual behavior. Ethics deals with what is morally right and wrong, good and bad. Right and wrong discusses about behaviors, while good and bad discusses about consequences of behaviors. To protect the rights and needs of professions is the goal of ethics (Bowen, 2010).

Biomedical ethics, or bioethics, is consisted of four basic principles: autonomy, beneficence, non-maleficence, and justice (Beauchamp and Childress, 2013) and (Gillon, 1994). This basic prima facie moral commitments provide a simple, accessible and culturally neutral approach on ethical issues in health care (Gillon, 1994).

Autonomy, derived from the Greek *autos* ("self") and *nomos* ("rule", "governance", or "law"), literally means self-rule or self-governance (Beauchamp and Childress 2013) and

(Gillon, 1994). Autonomy is better described as deliberated self-rule, meaning that the decisions made are on the basis of deliberation (Gillon, 1994).

Non-maleficence is the principle that obligates not to cause harm to others. Non-maleficence is grouped into the norm “one ought not to inflict evil or harm”. Examples of more specific rules in the principle of non-maleficence is “do not kill”, “do not cause pain or suffering”, “do not incapacitate”, “do not cause offense”, and “do not deprive others of the goods of life” (Beauchamp and Childress, 2013).

Beneficence means contributing to the patient’s welfare. The principles of beneficence demand more than non-maleficence, because one must actively take positive steps to help others, not only avoiding harmful acts. Beneficence is grouped into the norms “one ought to prevent evil or harm”, “one ought to remove evil or harm” and “one ought to do or promote good” (Beauchamp and Childress, 2013).

The fourth *prima facie* bioethics is justice. Justice, often regarded as being synonymous with fairness, can be defined as the moral obligation to act fairly (Gillon, 1994). The roots of the justice paradigm are in the criminal jurisprudence and the practice of criminal law (Adshead and Sarkar, 2005). Justice can be subdivided into three categories: (1) distributive justice; (2) rights-based justice; and (3) legal justice (Gillon, 1994).

Respect for justice is an important principle in medical ethics. Though justice in the traditional four basic principles of bioethics is viewed as fairness in terms of access to services or resources, when the courts call for a medical forensic expert, there is a duty on the doctor to respect justice by contributing to the legal process. The contribution can be done by providing good quality information, enabling the court to perform its task on behalf of the public (Adshead and Sarkar, 2005).

Besides the biomedical ethics, Indonesian doctors follows the World Medical Association (WMA) International Code of Medical Ethics and the Indonesian Doctor’s Code of Conduct. The WMA International Code of Medical Ethics states that “a physician shall be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity” and “a physician shall respect the local and national codes of ethics” which are in line with the Indonesian Doctor’s Code of Conduct (World Medical Association, 2006). The article 2 of the Indonesian Doctor’s Code of Conduct states that a medical doctor has to make a decision independently. According to the same article, a medical doctor also has to give performance according to the highest professional standard (Ikatan Dokter Indonesia, 2012).

The medical forensic experts owe a duty to the deceased and the community at large. Every doctor has to be accountable for the quality, quantity, timeliness and costs of its services (El-Nageh et al, 1999). It means that when a medical forensic expert knows that a victim’s cause of death has to be determined from a complete autopsy, he or she has to perform a complete autopsy. But, this was not possible in Salihin’s case.

In Indonesia, according to the article 216 of the Penal Code, the medical forensic expert’s decision to perform an autopsy is dependent to the investigator. With this article, the independency of the medical forensic experts as a physician is lost. A complete autopsy could not be performed when the investigator orders only a partial autopsy, as in Salihin’s case.

With the article 216 of the Penal Code, it is hard to uphold justice as a medical forensic expert. The principles of bioethics, the WMA International Code of Medical Ethics and The Indonesian Doctor’s Code of Conduct are conflicted with the article 216 of the Indonesian Penal Code.

CONCLUSION

There are two known truths which should be considered by a judge to make a judgement: the material truth and the procedural truth. Material truth is the actual truth, in the real meaning of

the word (Peregrin, 1999). It is the concept of idea about things the way they really are (Hickman and Alexander, 1998). On the other hand, procedural truth is the truth which is the result of the proper judicial process. In Indonesia, in which a civil law system is applied, the judge's objective is the procedural truth rather than the material truth because the procedural truth is perceived as the best approximation of the absolute truth (Dondi and Hazard Jr, 2004). This means the whole autopsy process is a crucial step in making the final judgement of the judge since it takes a big part in the judicial process. For that reason, a problem in the autopsy process will arise difficulties in making the final judgement.

The key solution to the problem is to make the medical forensic expert and the investigator completely understand their authority in doing an autopsy procedure; what he or she can and cannot do. A full understanding of the authority division on both sides will hopefully reduce disagreements and conflicts over the "right" autopsy procedure thus also reducing procedural-defective evidences. With the procedural truth no longer in question, it is easier to pursue the highest material truth and thus upholding justice.

RECOMMENDATIONS

Considering the analysis of the data which have been gathered, the key solution mentioned above can be achieved by three points.

1. Indonesia should have a strong legal basis for autopsy which regulates a clear division of authority between a medical forensic expert and an investigator regarding who to decide the means to prove one's cause of death. The decision-maker should be stated explicitly, whether it is the medical forensic expert, the investigator, or both. In addition, the considerations (e.g. family consent) and the process to reach the final decision should also be regulated. When the decision has been made, there should also be a legal document which states that the decision is agreed on both sides so that the decision has a stronger legal support. Therefore, if the decision is considered inappropriate by the judge or the public when it is presented in the court, there will not be blaming, naming, and shaming of the medical forensic expert for it will be understood that he did not make an undiscussed decision.
2. The ethical code which is made by the Doctor Council of Indonesia shall be in line with any legal basis which regulates the autopsy procedure to prevent any contradiction between both regulations. A single contradiction between two regulations can trigger conflicts because then people must choose which regulation to follow, placing one regulation higher than the other. This is not ideal, since both regulations have to be regarded as equals.
3. A medical forensic expert should be able to explain to the investigator which procedure that the medical forensic expert thinks would be the best to present the evidence in the court. Medicolegal world is extraordinary because it combines two remarkably different fields: medical and law, which have different norms and cultures. One cannot expect the investigator to bear the medical knowledge and vice versa. The expertise in exploring one's cause of death lies in the medical forensic expert's hand therefore it is wise to let the medical forensic expert be the decision-maker. However, the medical forensic expert should inform the investigator as to why certain procedure is favored over the others. The given information should be delivered with a good communication skill. This form of communication between both sides can build a healthy relationship and prevent misunderstandings if not reduce them.

Furthermore, being a decision-maker and communicator is not an unusual role for a medical doctor (in this case the medical forensic expert), as they are considered as two of five sets of attributes every medical doctor should possess - the so called five stars doctor. Aiming to set an ideal profile of a medical doctor who gives excellent health service, World Health

Organisation (WHO) introduces this concept (Boelen, C). Therefore, it should not be troubling for a medical forensic expert to carry out both roles.

REFERENCES

- Adshead, G. and Sarkar, S. P. (2005) Justice and Welfare: Two Ethical Paradigms in Forensic Psychiatry. *Australian and New Zealand Journal of Psychiatry*, 39, 1011-7.
- Amsiejute, A. (2015) Medication Errors: Is It More Important to Find and Punish the Guilty One, or to Reduce the Likelihood of Recurrence of an Error? [Online]. *European Scientific Journal*, Special Edition, 58-62. Available from: <http://ejournal.org/index.php/esj/article/view/5498/5288> [Accessed 20 December 2016].
- Beaucham, T. L. and Childress, J. F. (2013) *Principles of Biomedical Ethics*. 7th ed., Oxford: Oxford University Press.
- Boelen, C. (n.d.) *The Five-Stars Doctor: an Asset to Health Care Reform?* Geneva: World Health Organization. [Online]. Available from: http://www.who.int/hrh/en/HRDJ_1_1_02.pdf [Accessed 20 December 2016].
- Bowen, R. T. (2010) *Ethics and the Practice of Forensic Science*. USA: CRC Press, Taylor & Francis Group.
- Dahlan, S. (2000) *Ilmu Kedokteran Forensik: Pedoman bagi Dokter dan Penegak Hukum*. Semarang: Penerbit Universitas Diponegoro.
- Duff, R. A. and Green, S. P. (2011). *Philosophical Foundation of Criminal Law*. Oxford: Oxford University Press.
- El-Nageh, M. M., et al (1999) *Ethical Practice in Laboratory Medicine and Forensic Pathology*. Egypt: World Health Organisation. [Online]. Available from: <http://applications.emro.who.int/dsaf/dsa38.pdf> [Accessed 20 December 2016].
- Gillon, R. (1994) Medical Ethics: Four Principles plus Attention to Scope. *BMJ*, 309, 184-8.
- Hazard Jr., G. C. and Dondi, A. (eds.) (2004) *Legal Ethics: A Comparative Study*. Stanford: Stanford University Press.
- Heard, G. (2005) Errors in medicine: a human factors perspective. [Online]. *Australian Anaesthesia*. Available from: http://www.anzca.edu.au/documents/05_heard.pdf [Accessed 20 December 2016].
- Hickman, L. A. and Alexander, T. M. (eds.) (1998) *Ethics, logic, psychology*. Bloomington: Indiana University Press.
- Human Tissue Act, 1961
- Ikatan Dokter Indonesia (2012) *Kode Etik Kedokteran Indonesia*. Jakarta: Ikatan Dokter Indonesia.
- Kakusni, S. (2016) Perlindungan Hukum Terhadap Dokter Sebagai Saksi Ahli Menurut Undang-undang Nomor 31 Tahun 2014. [Online]. *Lex Crimen*, 1(1), 5-14. Available from: <http://download.portalgaruda.org/article.php?article=377805&val=1030&title=PERLINDUNGAN%20HUKUM%20TERHADAP%20DOKTER%20SEBAGAI%20SAKSI%20AHLI%20MENURUT%20UNDANG-UNDANG%20NOMOR%2031%20TAHUN%202014> [Accessed 15 December 2016].
- Indonesia, (1985) *Kitab Undang-undang Hukum Acara Pidana (KUHAP)*. Jakarta: Republik Indonesia.
- Knight, B. (1998) *Lawyer's Guide to Forensic Medicine: Second Edition*. London: Cavendish Publishing Limited.
- Lane. M. (2016) Is Consent to Autopsy Necessary? Cartesian Dualism in Medicine and its Limitations. *AMA Journal of Ethics*, 18 (8), 771-8.
- Maeda, Y. (2012) A method to solve ethical dilemmas in medicine. *Journal of Philosophy*

- and Ethics in Health Care and Medicine*, 6, 9-28.
- Maertens, M. et al., (1990) *Bioetika: refleksi atas masalah etika biomedis*. Jakarta: PT Gramedia.
- Mason, J.K. (1998) *Forensic Medicine for Lawyers: Second Edition*. London: Butterworths Publishing.
- Peregrin, J. (ed.) (1999) *Truth and its nature (if any)*. Dordrecht: Kluwer Academic Publishers.
- Runciman, B., Merry, A. and Walton, M. (2007) *Safety and ethics in healthcare: a guide to getting it right*. Ashgate Publishing Limited.
- Susanti, R. (2013) Peran dokter sebagai saksi ahli di persidangan. [Online]. *Jurnal Kesehatan Andalas*. 2(2), 101-104. Available from: <http://jurnal.fk.unand.ac.id/index.php/jka/article/view/133/128> [Accessed 16 December 2016].
- Waller, B. N. (2011) *Against moral responsibility*. Massachusetts: Massachusetts Institute of Technology.
- Waters, B. L. (2009) *Handbook of autopsy practice*. 4th ed.,. USA: Humana Press.
- World Medical Association (2006) *WMA International Code of Medical Ethics*. Pilanesburg: World Medical Association.

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EDUCATIONAL STATUS OF TRIBES IN JHARKHAND (INDIA): A COMPARATIVE STUDY OF ORAON AND SANTHAL

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ABSTRACT

The Government of India has taken a number of steps to provide equality of educational opportunity to the scheduled tribes (STs) at all levels of education. Despite these, tribals have still been facing educational deprivation in one way or the other. However, this educational deprivation is not constant; it varies from place to place and it's also tribal specific. The major reasons are that the nature of exposure that a particular tribe had in the past with the outer world and also the role of the government in educating these people. The study is comparative in nature which comprises two tribal groups; Oraon from Ranchi and Santhal from Deoghar districts. The paper looks into the educational status of tribals in Jharkhand in general and the comparison between the two tribal groups in particular.

Key Words: *Educational Status, Tribals, Jharkhand, Santhal, Oraon*

HISTORICITY OF TRIBAL EDUCATION

The education of tribes has been changing with space and time. In the traditional period, the elderly persons of the tribals in India imparted education to the young ones through the dormitories, their own indigenous ways. Some of the Indian tribes still practice this method. The dormitories, for instance, dhumkurias of Oraons, Ghotal of Mariyas, Morung of Nagas, etc., were either unisexual or bisexual in nature. These dormitories were primarily meant to educate the boys and girls of the adolescent age. These were also of residential type. The primary objectives of dormitories were to build unity, we-feelings, dignity of labour and social consciousness among members of the younger generation before their entering into the marital life.

The beginning of modern education among the tribals can be traced back to as early as 1813. But due to various problems for several years, very little was done to educate them. For instance, most of the tribal communities lived in inaccessible forest areas, the poverty among them was extreme, and the villages they lived in were widely separated from one another. None of the tribal was educated to be appointed as teacher and had no knowledge of his/her dialect. Teachers from outside were reluctant to live in the tribal areas. The immense variety of tribal dialects was another obstacle. As a result of these unfavourable conditions, the tribal education had not been given proper attention for fairly long period. It was at the coming of the missionaries to India that the tribal education was started in somewhat systematic way. The missionaries, through their interaction with tribal people, studying their language, and by way of preparing dictionaries and literatures in a number of tribal dialects, have been able to carrying on educational programmes for tribal development, including educational development of the tribals in India.

The Indian Education Commission in 1882 also voiced that the missionaries were the most significant agents for spreading education among STs. A study conducted on enrolment of tribal students in all the classes, during the same period, indicates that the educational achievement among the tribals was disastrous as in the Mumbai Residency the total enrolment of the tribal students in all classes was only 2733, in Bengal and Assam it was 13,078 (out of which 464 in secondary schools, 195 in normal schools and 26 in professional schools), and in Central Provinces it was only 1055. In other provinces, no beginning of tribal education was

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reported. Thus, it can be said that Government had failed to provide them education. However, while examining the problems of education of STs, the Commission had made some recommendations such as exemption of fees and also advised the government to give more grants to private schools which were providing boarding facilities to them. It had also recommended for assisting private agencies to cope with the problems of tribal education (Adivasi, 1980-81). The study has stated further that it is difficult to trace, at this stage, the then development of tribal education in the various other provinces of India as statistics are not easily and systematically available. The latest statistics (pre-Independence) available is that of the year 1936-37 during which the enrolment was quite insignificant. Even during 1947, very little was done for them except in Assam because of the missionary effort (Ibid.).

It is not only after Independence that the proportionate development activities focused on the tribal so as to ensure that they got a fair deal. The Constitution of India made special provisions on matters pertaining to education and welfare of the STs for development of the area and improvement of the quality of life of the tribals. Consequently, Government started implementing various socio-economic development programmes through education and other agencies from the beginning of the First Five Year Plan. Numerous developmental schemes, under the Tribal Sub-Plan are being implemented at present. Any amount of efforts for the economic and educational upliftment of tribal, however, will not yield desired results unless various methods of exploitation adopted by unscrupulous elements are eliminated effectively and promptly. With a view to preventing exploitation and for protecting their interest, the Governor of state has been vested with powers to modify the State and Central laws in their application to the Scheduled Areas and to frame regulations for peace and good governance of the Areas.

POLICIES AND PROGRAMMES FOR THE TRIBAL EDUCATION

Dr. Ambedkar expressed a concern for the underprivileged lower castes and adivasis, which was drafted in the Constitution in Clause 4 of Article 15 of the Fundamental Rights. It "prohibits discrimination on grounds of religion, race, caste, sex or birthplace". In addition, Jawaharlal Nehru had developed tribal policies that originated from Article 46 of the Constitution. It declared "The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the scheduled castes and scheduled tribes and shall protect them from social injustice and all forms of exploitation" (Singh, 1989, p. 56). Tribal policy, developed in the 1950s, was based on a community development model and it outlined the issues of development from within, and the use of one's own genius as opposed to the imposed ideologies; tribal rights to land and forest; training and skills development with the aid of outside experts (which tends to contradict the first point).

However, results of such policies and programmes for the tribals seemed to be ineffective, for quite sometimes, and the government was criticised for the implementation methods, which still remain a current problem of contemporary tribal development. In other words, Nehru's tribal policy contradicts centralisation, both in policy and in implementation. Singh (1989, p. 9) critiques this model by stating,

It is one thing to lay down policy; it is another to implement it. Implementation is a matter of participation by the beneficiaries in the process of development. Thus, the story of the allotted funds not being spent, physical targets unfulfilled, inadequate coverage of programmes, etc., became gradually painfully familiar. The community development model collapsed as the issues concerning poverty and inequality came to the fore from the mid sixties onwards.

Another critique of the tribal policy and failure of the community development can be associated with Nehru's ideology of "centralisation." The result has been not only centralised state but an interventionist one in which "reservations" (a form of affirmative actions) are

promised to "backward" castes and communities. The forward or upper castes have often felt threatened and at times have responded with violence (Blackwell, 2004, p. 80).

Recognising that the STs count among the most deprived and marginalised sections of Indian society, a host of welfare and development measures have been initiated for their social and economic development. In this regard, particular reference has to be made to the Tribal Sub-Plan Approach, which came into existence as a main strategy from the Fifth Five Year. Along with core economic sectors, elementary education has been accorded priority. Elementary education is considered important, not only because of constitutional obligation, but as a crucial input, particularly to build confidence among the tribals to deal with outsiders on equal terms for comprehensive development of the tribal communities. Since primacy was accorded to the elementary education, a broad policy frame-work for education was adopted in the Tribal Sub-Plans, by according equal importance to both quantitative and qualitative aspects of education (Sujatha, 2002: 87).

NPE (1986) and Programme of Action (1992) have recognized the heterogeneity and diversity of the tribal areas, besides underlining the importance of instruction through the mother tongue and the need for preparing teaching/learning material in the tribal languages. The Working Group on Elementary and Adult Education for the Tenth Five Year Plan (2002-07) emphasized the need to improve the quality of education of tribal children and ensure equity, besides further improving their access to such education. The unique feature of the policy is its recognition of the heterogeneity and diversity of tribal areas. The policy also proposed the transformation of the structure of primary education with special emphasis on improving access in the tribal areas. It underlined the importance of instruction through the mother tongue for effective teaching and encouraged incorporating locally relevant content and curriculum, besides emphasizing the localised production of textbooks in local dialects. Based on these considerations, the norms for establishing primary schools were relaxed to suit tribal areas in order to improve access of tribal children to education. However, in spite of such relaxation of norms many tribal localities are still without school, as they do not meet even the relaxed criteria (Ibid: 87-88).

In addition, the Sarva Shiksha Abhiyan (SSA), a government of India's flagship programme, makes the free and compulsory education to the children, including the tribal children, of 6-14 years age group as a Fundamental Right. There is also another goal to bridge social, regional and gender gaps, with the active participation of the community in the management of schools. The programme seeks to open new schools in those habitations which do not have schooling facilities. It is also to strengthen the existing school infrastructure through the provision of additional class rooms, toilets, drinking water, maintenance grant and school improvement grants. The existing schools with inadequate teachers' strength are to be provided with additional teachers, while the skill of the existing teachers is to be strengthened by the extensive training. The adequate grants are to be provided for developing teaching-learning materials and strengthening the academic support structure at a cluster, block and district levels. It seeks to provide quality elementary education, including life skills and has a special focus on the girl's education and children with special needs (SSA, 2006).

ORAON AND SANTHAL TRIBES

Tribals in India constitute around 8% of the total population. Oraon is one of the tribal communities found in India, which mainly depends on agriculture. They are also known as Kurukh tribes. They are mainly found in the states of Jharkhand, Bihar, West Bengal and Orissa. In the ancient days, Oraons used to make their living by chopping timber and selling forest products. Majority of the population of Oraons can be found in Northeastern states engaged in the occupation of tea cultivation.

Oraons are considered to have the second largest population of tribes in Bihar and Jharkhand. Efficient, particularly in tea garden works, Oraons are believed to have settled in the Chotanagpur Plateau centuries ago. Oraons speak Kurukh language related to Dravidian family. Majority of the Oraon tribes are Hindus and are religious minded people. They worship Gods and Goddesses but a great number of these tribes have adopted Christianity. In the ancient days, this community used to follow Sarna religion.

Oraons are further divided into sub-castes like Kudas and Kisans, who follow Patrilineal family customs. There are total 14 clans in Oraon tribal community like, Gari, Lakra, Kispotta, Runda, Tirky, Toppo, Linda, Ekka, Kujur, Beck, Kerketta, Bandi, Minz and Khalkho. This tribal community in India is also known worldwide as they still believe in following age old custom of human sacrifice. These sacrifices are carried out during the famous Sarhul festival celebrated before cultivation of crops, as a mark of respect to please the local deity. Festivals have been a part of their life since ancient time. Sarhul and Karma are the two important festivals and they are also very fond of music and dance. Karma, Jadur, Dassai and Kagha Parva are their most favorite dances. Traditional instruments like Nagara, Kartal and Mandar are still used by these people.

With a population of more than 49000, Santhal tribe is the third largest tribes in India. Belonging to pre-Aryan period, they are found in regions of West Bengal, Bihar, Orissa and Jharkhand. Many calls them as “the tribes at extreme”, a visit to their place will surely get your money worth. Santhali is the prime language spoken by the Santhal Tribe. They have their own script called Olchiki. Apart from Santhali, they also speak Bengali, Oriya and Hindi. They have a typical tribal lifestyle. Basic needs are fulfilled by forest trees and plants and are also engaged in fishing and cultivation. They also pose a magnificent skill of making musical equipments, mats and baskets out of the plants. Dancing and music are part of their life and they play mind soothing music with instruments like Tirio, Dhodro banam, Phet banam, Tumdak, Tamak, Junko and Singa. They follow the Sarna religion, with Marangburu, Jaheraera, and Manjhi as their god and goddess. Santhals pay respect to the ghosts and spirits like Kal Sing, Lakchera, Beudarang etc. Animal sacrifices in order to appease the Gods are a common practice. Karma is their major festival.

AREA PROFILE OF THE STUDIED VILLAGES

The study was carried out on the basis of empirical investigation of 2 tribal groups from two villages of Ranchi and Deoghar districts of Jharkhand. The selection of the villages - Itkithakurgaon (Itki) and Bhagwanpur was based on the Oraon and Santhal tribals respectively. The Itki village of the Ranchi district has the largest number of schools of both Government and NGOs including missionary run schools. But the Bhagwanpur village of Deoghar district does not have any single Missionary or NGOs run school. Then, the respondents, i.e., the tribal children of age group 6 to 14 years, currently enrolled in the classes in different types of schools were sampled from both the villages. According to the Census of India, 2001, the ST population of Itki and Bhagwanpur villages were 2096 and 426 respectively. Out of this, the representative samples of Oraon and Santhal tribes from of Itki and Bhagwanpur villages respectively were taken as 166 and 34 (approximately 12.63 %). The data was collected from door-to-door, i.e., through household visits from the children in the presence of household members. In addition, the data also collected through some personal interview from the local people, government officials, civil society representatives, politicians and school teachers and headmasters. The most important and interesting fact of this study is that we found literacy gaps between the two villages are very high (36.70 %) as the literacy rates of the Itki and Bhagwanpur villages are 79.30 per cent and 42.60 per cent respectively.

DISCUSSION & ANALYSIS

There are many issues and points related to education of the tribals in India, as we have discussed earlier. Here, we shall focus on the role of the government schools in educating the tribal students and its various issues on the studied villages.

The first issue is the religious status of the tribal children which is closely related with the education of tribal students. In this regard, we have found that the tribals from both the villages follow *religion* but their orientation towards religious values is different. In fact, Oraon of the Itki village are divided into two groups — one those who follow Sarna and the two, who follow Christianity. But maximum number of the Oraons is oriented towards Christianity as our data reveals as that 23.49 and 76.51 per cent tribals belong to Sarna and Christian religions respectively. On the other hand, in the Bhagwanpur village, 100 per cent Santhals follow the Hindu religion. The basic difference between the two is the impact of missionary, which has been more on the tribals of former but not in the case of latter. The Santhals of Bhagwanpur, therefore, still follow the Hindu way of life. Another fact related to the Santhals of Bhagwanpur is that they have always been in contact with Hindu people of the adjoining areas, especially from Chulihia, Bardahiya and Mohanpur villages. Sarna religion is, basically, considered as the mixed way of both the Hindu and Christian religions. Therefore, it can be said that the networks of social relationship is important here as they follow the religious identities in these villages and so is the religious orientations of the tribals. It is one of the reasons that the Oraon has the more education than the Santhal.

In fact, the notion of religious identity goes into the historicity of their educational development. At this point, what Robinson discussed seems to be relevant here. In her words, “Attempts at conversion of the Santhals by the Baptists had commenced during the first half of the nineteenth century and a few schools had been opened. The Santhal rebellion of 1855-56 drew attention to the problems of the tribe and increased conversion efforts. The British commissioner at Bhagalpur noted that the Santhals who had attended the missionary schools were not among those who participated in the rebellion. Therefore, the government cooperated with the missionaries in the establishment of more schools in the area and gave grants-in-aid to those already existing” (Robinson, 2006:807-8). Hence, the missionary efforts have always been in the forefront of development of the deprived sections, especially tribals of the most backward places.

Likeness Towards Educational Institution

Another interesting fact is the likeness of tribal children to the educational institutions. It is mainly referred to the types of school they are attended or the options, if any, they have to get admitted. In this context, it can be said that the availability of different types of schools, i.e., government, NGOs run including missionary run schools, provide education to the children of the particular area; hence, their likeness is the result of the respective educational institutions in which they are admitted. In the Itki village, tribal children like both the types of schools — the government and the NGO run schools, where they had been enrolled there. However, a few children have felt otherwise as they had attended earlier the other type of school. Here, out of 166 children respondents, 82 (49.39%), 3 (1.8%) and 81 (48.79%) liked schools run by the government, NGO and missionary run schools respectively. However, we have found that more number of children still have inclination towards government school because of incentives provided by the government school. Enquiring about why the tribal children go to the government school, a tribal leader, from the Itki village said, “The Oraons of this village are still poor, except some, which are in government services. But majority of tribals and their children are still labourer and they prefer to attend government schools rather than other types of schools as they have also to get scholarship” (based on interview conducted on 6 September, 2006).

In the Bhagwanpur village, 100 per cent Santhal children liked the government school because they either didn't know about or didn't have any experience of or exposure to the other types of school. Therefore, the lack of knowledge and experience among Santhal children about the other type(s) of school has resulted into their likeness of the government school. However, they have accepted the likeness of the government school also, because of provisions of scholarship, textbooks and mid-day meals available there. This is evident from the fact that 31 Santhal children have accepted availability of scholarship and textbooks, 16 mid-day meals, and 13 all the three—scholarship, textbooks and mid-day meals available in the government schools. Here, the point of consideration is that despite having all the provisions, all the Santhal children were not getting all the three facilities, mentioned above. In addition, the amount of scholarship provided to the STs and SCs children in the school is also very less. Hence, it can only be said that the administration has failed in implementing these provisions properly, as it was also discussed by the sociologist Nandu Ram. More precisely, in his words, "The other facilities like stipend, exemption from tuition and other fees, free board and lodging, etc. are also not much effective in absence of their proper administration well in time. The amount of stipend, scholarship and fellowship needs to be enhanced at the present inflationary rate to meet the essential expenses of the SC/ST students" (Ram, 1995, p. 122). At this point, it is necessary to implement all provisions whole-heartedly and enhancement of amount of stipend/scholarship is needed urgently. In spite of having different problems in the government schools, the tribal children have likeness towards such schools because of other factors, such as the location of these schools near to their home, availability of adequate infra-structures like building, black board, furniture, etc. Here, they also do not have to pay any fees like the other private schools.

Regularity of Teachers and Headmaster/Headmistress

The regularity of teachers and headmaster/headmistress has been a serious issue. The punctuality or regularity of teachers and school headmaster/headmistress also determine the regularity or punctuality of students in attending the school and performing in their study. The study reveals that the teachers as well as headmaster/headmistress in most of the schools in villages, either they attend their school late or they engage themselves in other activities in the name of school works/government duties. It particularly happens as the villagers are not conscious about theirs' children education. However, teachers have claimed that different government programmes have compelled them to engage themselves in activities like the Census Enumeration and the Pulse Polio Abhiyan. In both studied villages, we have found that the regularity of teachers is the major problem as in the Itki village, 52 per cent of the Oraon students had experienced irregularity of their teachers in the school as well as in the class contrary to only 15 per cent Santhal students in the Bhagwanpur village who had experienced so. The basic reason behind such a vast difference may be the lack of awareness, interest and irregularity of the students themselves in the school from the Bhagwanpur village. On the other hand, the Itki village was more aware about what was happening in and around their school. At this point, it can be said that the teachers are somewhat irregular in the government school, whatever reason may be. In fact, a few studies (Kundu, 1984; Ambasht, 1970 and 1977; Toppo, 1979) have also confirmed that the teachers' irregularity in the schools is one of the important causes of the educational backwardness of the tribals. Another important fact related to it is that the literacy rates. Therefore, it may be said that the Itki village have much higher literacy rates than the Bhagwanpur village, and hence the tribals of former is more aware about the different issues related to their education than the tribals of latter.

In addition to regularity of the teachers in schools, their engagement in the class everyday has also been an important issue of school education. The problem of absenteeism of teachers in class has ever existed though in the recent time, there has been some improvement

in this regard. In this study also, we have found teachers engaging classes in the schools located in both the studied villages. In the Itki village, 62 per cent students from our sample have accepted that their teachers were engaging class everyday, while 38 per cent denied that. On the other, in the Bhagwanpur village, 67 per cent of the sampled students found their teachers engaging the class everyday. It is interesting to note here that the engagement of classes depends on the number of teachers' availability in the school. In this regard, students-teachers ratio has always been countable when we analyze about the situation of the institution and its education level. We have found in both the villages that the number of teachers available in the schools was inadequate; even one teacher per class was not there; hence, it was difficult to maintain the quality of teaching. In the Itki village, for instance, we found that 46 per cent of the sampled students had disagreed that their teachers were enough in number for teaching. Even, 54 per cent of the tribal students in our sample had accepted that the number of teachers in their respective schools was adequate. In the Bhagwanpur village, our findings were somewhat closer to what we found in the Itki village. 47 per cent of the sampled students from the Bhagwanpur village had agreed that the available teachers in the schools for teaching were enough in number against 53 per cent who disagreed to it. Moreover, the problem of lack of teachers in schools in both the villages is still there and due to this, the government has recruited temporary teachers, such as Para teachers, contract based teachers, etc., instead of appointing permanent teachers in the schools, especially the government run schools.

Getting Benefit from SSA

As stated earlier, the SSA has come into effect to fulfill a long-cherished goal of universalisation of elementary education (UEE) in almost all the States of India. More than 90 per cent of tribal children of these two villages have also accepted about getting benefit from the SSA. In the Itki village, 97.59 per cent of the Oraon children have accepted that they were getting benefit from the SSA in the form of scholarship, mid-day meals and textbooks. Similarly, in the Bhagwanpur village, 91.18 per cent of the Santhal children have got benefit from this scheme. Contrarily, a few tribal children were still unaware of this programme in the schools in these villages. In this regard, Kuddu Manjhi, a Santhal from the Bhagwanpur village, rightly points out, "Last two-three years, our children have been getting many things from the schools. They get money, textbooks and also meals from the schools" (based on interview, conducted on September 29, 2006). The NCERT, a number of studies conducted during 2005-06, have also confirmed that the SSA has made good impact in the enrolment and retention of children in the schools.

CONCLUSION

On the basis of above discussion, it may be concluded that the role of government provisions in imparting education to the tribal children, is basically implemented through schools, as is evident from the situations present in schools in the Itki and Bhagwanpur villages. The government has always been active in the formulation of policies and programmes for the upliftment of the deprived people, especially the SCs and STs. But these policies and programmes have never been implemented fully as the socio-economic and educational problems of the deprived people are still existed. They still remain at the periphery of society. The analysis of the data also shows that various Government policies and programmes have contributed little for progress of tribal education. In this regard, most of the tribals have still been facing deprivation in all walks of life. It may be said that the government has not been able to work more efficiently with the real sense of commitment. However, in the recent times, the SSA scheme has made a contribution in their enrollment, retention, and completion of their school education in general and also has attempted for the drop outs tribal children to get back into the stream of education, though the scheme itself with its consequent results, is not free

from many faults or drawbacks and so is its implementation as mentioned above. If the collaborative help from the civil society organizations are taken, then the task would be easier to solve the basic problems, particularly the educational one of the tribal people.

REFERENCES

- Adivasi. Volume XX, No. 10, 1.4.1980-81.
- Ambasht, N.K. (1977) *A Brief Note on Educational Problems of Tribal Population in India*. New Delhi: NCERT (Mimeo).
- Ambasht, N.K. (1970) *A Critical Study of Tribal Education with Special Reference to Ranchi District*. New Delhi: S. Chand and Company.
- Blackwell, F. (2004) *India: A Global Studies Handbook*. ABC-CL 10, Inc: California.
- Government of India (1992) *Programme of Action (POA) 1992*. New Delhi: Ministry of Human Resource Development.
- Government of India (1986) *National Policy on Education 1986*. New Delhi: Ministry of Human Resource Development.
- Government of India (2006) *Sarva Shiksha Abhiyan*. New Delhi: Ministry of Human Resource Development.
- Kundu, M. (1984) Tribal Education in India: Some Problems. *Journal of Indian Education*, 10 (2), 1-7.
- Ram, N. (1995) *Beyond Ambedkar: Essays on Dalits in India*. New Delhi: Har-Anand Publications.
- Robinson, R. (2006) Sociological Issues Regarding Conversion to Christianity in India. In: Puniyani, R. (ed.). *The Politics Behind Anti-Christian Violence*. Delhi: Media House, 799-816.
- Singh, K.S (1989) *Jawaharlal Nehru, Tribes and Tribal Policy*. Kolkata: Anthropological Survey of India.
- Sujatha, K. (2002) Education among Scheduled Tribes. In: Govinda, R. (ed.). *India Education Report*. New Delhi: Oxford University Press, 87-95.
- Toppo, S. (1979) *Dynamics of Educational Development in Tribal India*. Delhi: Classical.

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ISSUES PERTAINING TO INTERNATIONAL ARBITRATIONS UNDER THE PRIVATE INTERNATIONAL LAW

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ABSTRACT

The paper is aimed at exploring core issues under the private international law that may arise during international arbitrations. Private International Law is the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context. International contracts and disputes also fall within the ambit of Private International Law. When a dispute arises out of an international contract, the parties may resolve it through different modes. The three principal modes to resolve international disputes are litigation (judicial proceedings), conciliation (mediation), and arbitration (settlement of disputes by third party pursuant to agreement of the parties). Arbitration is one of the modes through which a dispute is resolved by appointing one or more neutral third parties as arbitrators, who are usually agreed to by the disputing parties. However, there are certain kinds of issues under the Private International Law, which are involved in international arbitrations. The first major issue is that there are so many major independent arbitral organizations having their own international arbitration rules, which are modified at a frequent rate. These changes massively affect the overall structure of international arbitrations due to their impact on uniformity and predictability of rules of arbitration under the Private International Law. The second issue is relating to the domination of arbitration institutions which formulate arbitration rules according to their own internal policies. Resultantly, such administered arbitrations become interdependent upon the institutions which administer these arbitrations. Third issue is with regard to the cross-cultural differences, which may affect various aspects of arbitral proceedings. Fourth issue is related to choice of law in international arbitration agreements, which emanates while drafting an international arbitration contract.

Keywords: Arbitration, Public International Law, disputes, international contracts, law

INTRODUCTION TO INTERNATIONAL ARBITRATION UNDER PRIVATE INTERNATIONAL LAW:

Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. It is a private and voluntary dispute resolution process that invests in private individuals the authority to hear a dispute, simultaneously divesting courts of such authority. (Levy and Park, 1986) The arbitration process is contractual in nature and as such the autonomy of the parties' will is extensive. (*Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*³). The intent of the parties is a fundamental element of arbitration. The embodiment of the parties' intentions in an arbitration clause is essential for the existence of arbitration proceedings and is a source of procedural and substantive arbitration law. The expression of the parties' intent in the arbitration clause renders the arbitration process adaptable to varying circumstances. (Rubino-Sammartano, 1990) Parties may, for example, draft a broad or narrow arbitration clause, effectively determining which issues are arbitrable. (Bagwell, 1992)

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³ [1989] U.S. Supreme Court 489 U.S. 468, 474.

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL ARBITRATION:

Private International law regulates international arbitrations. Parties to international contracts may utilize one of the three principal methods used to resolve disputes namely litigation (judicial proceedings), conciliation (mediation), and arbitration (settlement of disputes by third party pursuant to agreement of the parties). (Dore, 1986) Arbitration proceedings involve the parties to the arbitration agreement as well as one or more arbitrators. Arbitrators may be lawyers (trained in civil or common law), professors of law, judges, diplomats, or businessmen. An arbitration clause in an international contract may contain provisions delineating the arbitrable issues, the governing law, the situs of arbitration, the procedures by which arbitrators are appointed and the number of arbitrators, the language to be used in arbitral proceedings, and the applicable time limits.

ISSUES INVOLVED IN ARBITRATION UNDER THE PRIVATE INTERNATIONAL LAW

Frequent emendation in International Arbitration Rules

Most of the major independent arbitral organizations, including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA), have frequently redrafted their international arbitration rules. These changes massively affect the overall structure of international arbitrations due to their impact on uniformity and predictability of the both substantive as well as procedural rules of arbitration under the Private International Law. (Gwyn and Tayloe, 1999)

Another issue relating to the recurring amendments in the international arbitration rules subsides with the domination of arbitration institutions which formulate these rules according to their own internal policies. Such administered arbitrations become interdependent upon the institutions which administer these arbitrations. This practice is in contrast to ad hoc arbitration, where the individual parties operate the arbitration under procedures fashioned by individual negotiation and agreement on programs, or by adoption of an established set of arbitration rules by agreement of the parties. There is always a choice available to the parties in selecting an established set of rules for their ad hoc arbitration, for example, the UNCITRAL Model Rules (which are not administered), or the parties might choose the rules of an arbitral institution without also choosing to have their arbitration administered by the arbitral institution. Consequently, the arbitration rules of institutions like the ICC, the AAA, and the LCIA put a great deal of influence on such ad hoc and individually borrowed rules of arbitration.

Although most of the alteration to the ICC, AAA and LCIA rules are small technical changes to the operational provisions. However, these changes affects the overall procedural flow and harmony among rules of various institutions. Christopher Drahozal pointed out: "competition among countries to serve as arbitral sites has accelerated. Increasingly, countries are adopting specialized international arbitration statutes to replace ...previous statutes that [were] ... designed principally for domestic arbitrations". (Drahozal, 2000) These changes in the arbitration rules under the Private International Law demonstrate the contrast among fundamental institutional policies.

The Confrontation between National and International Laws and the issue of Delocalization of Arbitral Practice

The *situs* is often a significant principle applied or the procedure followed, as a practical matter. As international arbitration continues to gain in popularity as a commercial dispute resolution device, the utility of such "localization" principles as "*lex loci arbitrineed*" to be examined. Localized public policy defenses against arbitration may include, for example, European Union (EU) industrial competition policy, community environmental community energy policy, transport policy, employment and social policy, internal market and economic policies, and the

like. In fact, many European nations have adopted or are in the process of adopting arbitration laws that tend to favor a "de-localized," autonomous approach to arbitral proceedings, without regard to such localized policy defenses.

As with the confrontation between national laws and international institutions' harmonization and competition policies, the primary question confronting delocalized arbitration is whether there are policy objectives—such as competition policy—that will preempt the desire of states to respect complete party autonomy in international commercial arbitration. Facing similar policy questions, the U.S. Supreme Court has definitively vindicated delocalized arbitration despite public policy arguments based on antitrust or securities regulatory policy.

Cross-Cultural Problems

Another pertinent issue in international arbitration is with regard to the cross-cultural differences, which may affect various aspects of arbitral proceedings including examination of witnesses; the active or passive role of the tribunal; use of written pleadings and oral submissions; use of expert evidence; and, proof and application of foreign law and transnational commercial law.

Drafting of Arbitration Contracts – Problems and Implications

Choice of law issues in international arbitration agreements emanates while drafting an international arbitration contract, when making broad generalizations is difficult because, of course, the individual language and specific commercial context of each contract gives it a particularized quality that is difficult to apply broadly to other contracts in other contexts. Nevertheless, few generally applicable principles can be useful in construing and applying the language of specific contracts.

First, the nature of an arbitration is consensual. This principle is called party autonomy. Second, the consensual characteristic extends itself to the realm of choice of law. Third, arbitration clause is an entirely separate agreement, distinct from any other contractual obligations between the parties, which remains intact even if the whole contract is illegal. This third principle is usually referred to as the separability doctrine. The doctrine of separability, or autonomy, of the arbitration clause provides that an arbitration clause embedded in a contract is considered separate from the main contract. The arbitration clause and the main contract comprise two separate sets of contractual relations. Where a dispute arises concerning the initial validity or continued existence of the main contract, the arbitration clause, being independent, continues to be valid and binding on the parties even if the main contract is void. The doctrine of separability has been justified on four theoretical grounds: that it conforms to the parties' intentions, that it furthers the integrity of the arbitral process, that there is a legal presumption of the existence of two agreements, and that courts usually review only the arbitral award, not the merits, of the dispute. One consequence that is related to this doctrine, and which is articulated in arbitration rules themselves, (American Association of Arbitration, 1997) is the so-called *Kompetenz-Kompetenz* doctrine. (Gwyn and Tayloe, 1999) (*Booth v. Hume Pub., Inc.*⁴1990) (Park, 1997) That is, once a determination is made that parties have undertaken an obligation to arbitrate, a national court should respect the exclusive authority of the arbitral panel to determine the extent of its own jurisdiction, as well as the merits of any claims based on the underlying contract between the parties.

These principles, at one level, seem straightforward and almost unremarkable. Yet much ambiguity and controversy result from the interplay of these three concepts. If arbitration is fundamentally consensual in nature, does this mean that the parties completely control the choice of law, even to the extent of dictating the essential public policy of how and when a

⁴ [1990] 11th Circuit 902 F. 2d 925.

court should refer them to arbitration? Can consensual party autonomy control the exercise of Kompetenz by the arbitral process that the parties have chosen? Two areas of controversy may illustrate ways in which these principles interact. These areas share a common theme: sometimes, the complexity or uncertainty of contract drafting itself creates ambiguity about the choices that the parties have actually made. This ambiguity may then call into question the appropriate way in which these three principles should be applied in a particular case.

CHOICE OF LAW

The foremost issue in determining the international arbitration agreements is the choice-of-law. Usually an international arbitration agreement includes a choice of law clause as. Does the law chosen by the parties to an international contract govern the procedural rules of arbitration, or is it limited to the substantive contract rights of the parties? Recent international arbitral practice favors inclusion of an express choice of law clause that establishes the law governing the parties' contractual agreement as a whole. However, when the parties interpret this arbitration agreement differently, resort to judicial assistance may be necessary to resolve the pre-arbitration dispute. If the parties have chosen a specific law to govern their contractual agreement, a court is usually required to respect that decision.

In a famous case (*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 1995), the U.S. Supreme Court upheld the supremacy of the autonomous decision of the parties to incorporate specific rules of arbitration procedure through the express choice of law clause. For example, assume a contract with a general choice of law clause and a general arbitration clause. In the course of a dispute, an argument arises that under the law chosen, certain issues in dispute are non-arbitrable. The historical position, relying on the separability doctrine, dictated that the arbitration clause had to be analyzed as an agreement separate from the substantive agreement between the parties. In light of the FAA, the general arbitration clause would be interpreted as binding and enforceable. The parties would be required to present their arguments with respect to arbitrability of the specific dispute to the arbitral panel, not the court.

However, in one of its 1989 decision the U.S. Supreme Court readjusted this analysis, giving emphasis to the consensual nature of arbitration. Thus, the principle of party autonomy, rather than the separability doctrine, became the key to analysis. (*Volt Information Sciences, Inc. v. Board of Trustees, Leland Stanford Junior University*⁵). In light of party autonomy, the parties were free to choose a body of applicable law that excluded certain issues from arbitration as a matter of public policy. Applying that law as the applicable choice of law of the arbitration clause increased the likelihood that the dispute might be viewed by the court as non-arbitrable, and the dispute would never reach arbitration.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,⁶ the United States Supreme Court returned to the issue and attempted to reconcile the principle of party autonomy and the separability doctrine. The parties' contract wishes remain important, but the separability doctrine requires separate examination of the arbitration clause. Because of the separability doctrine, there are actually four choice of law issues in drafting the contract language. These are: (1) choice of the substantive law applicable to the underlying contract-the typical subject of a choice of law clause; (2) choice of law applicable to the separable arbitration agreement or clause; (3) choice of *lex arbitri*, the law governing the conduct of the arbitral proceedings; and, (4) the logically distinct choice of the conflict of law rules to be used in determining the first three choices.

⁵ [1989] U.S. Supreme Court 489 U.S. 468.

⁶ [1995] The US Supreme Court 514 U.S. 52.

MAKING "TRADE NORMS" PART OF THE CONTRACT

Most commercial codes, including the Uniform Commercial Code (UCC), regard common business practices (or "trade usages") as important interpretive sources for courts to consider when resolving contract disputes. (The US Congress, 1952) Yet some scholars criticize this incorporation strategy, arguing that reliance on commercial norms is often inappropriate and may distort the true nature of the parties' agreement. (Drahozal, 2000) Reliance on commercial norms does restrict the ability of contracting parties to allocate part of their agreement to extra-legal means of enforcement, but the costs may be outweighed by the benefits of incorporating commercial norms into commercial codes. In drafting contract provisions and obligations, considering to what extent trade usages should be consulted, and whether the availability of this interpretive source should be expressly addressed in the contract is important. Conversely, in the absence of express language, is it safe to assume that trade usages will be consulted and applied in any subsequent dispute? Is it safe-or even practical to ignore usage and try to draft party obligations exhaustively? Likewise, is it safe or practical to identify relevant usage and explicitly try to pick and choose, which will apply?

The UCC looks to trade usage as part of the "agreement," unless clearly contradicted by prior dealings, course of performance, of the express language of the contract." There are parallels under the Convention on the International Sale of Goods. Under article 9(1), parties are bound by usages to which may have agreed and by practices established by them. (United Nations Commission on International Law, 2011) Under article 9(2), in addition to uses to which they have agreed, the parties are "considered ... to have impliedly made applicable to their contract" any usage that they knew or should have known, and which is widely known and regularly observed by parties in the particular trade concerned.⁹ In the context of arbitration of a contract dispute, however, what is the relevance of trade usage? Under ICC Rule 17(2), the arbitrators must "take account of provisions of the contract and relevant trade usages." (International Chamber of Commerce, 2012) By contrast, AAA Rule 28(2) requires arbitrators to "decide in accordance with terms of the contract and take into account usages of trade applicable to the contract. (American Arbitration Association, 2000)

Similar language appears in UNCITRAL Rule 33(3). The LCIA rules have no rule specifically dealing with this issue. In a close case, where evidence of trade usage might make a critical difference to the construction of the contract, the varied formulations of the pertinent arbitration rules could make a material difference to the outcome of the dispute. The ICC rule appears to tip slightly more in favor of usage, but none of the rules bar reference to usage completely. However, the arbitration statute of the situs of the arbitration may further complicate the matter. The trend seems to favor including some statutory reference to trade usage. For example, the UNCITRAL model law-the principal model followed by national legislatures since 1985-adopts the "in accordance with terms of the contract" and "take into account usages" formulation. (United Nations Commission on International Trade Law, 1985) This approach has been followed by many countries in updating their arbitration laws, including France and the Netherlands. The ICC's "provisions of the contract and relevant trade usages" formulation has been followed by a minority of states addressing this issue in the past two decades, including Egypt and Italy.

Consider a situation in which the language of the contract concerning delivery of goods is somewhat uncertain, but is susceptible to an interpretation that is inconsistent with usage in the subject trade. Assume the contract provides for ICC arbitration of disputes, with situs in France, and choice of New York law (and hence, the UCC) as the law governing the contract. Presumably, the UCC would seek an interpretation of the contract that reconciled the express terms of the contract with the relevant usage. Such an approach would certainly be consistent with the approach of ICC Rule 17(2), but is the approach consistent with the French-

UNCITRAL law requiring decision "in accordance with" the contract terms? I would argue that this apparent conflict might be resolved by reference to the fact that the UCC does hierarchize the interpretive sources so that, in principle at least, the interpretation of the contract must still focus primarily on the express language of the contract. However, the parties might well be advised to address this issue explicitly in the contract language, perhaps by explicitly including recognized trade usage as part of the law of the contract.

CONCLUSION

International arbitral rules have become increasingly time-sensitive and practical. Several now also provide explicitly for multiparty-arbitration. These rules remain extremely flexible and discretionary on such issues as conduct of proceedings, evidence, hearsay, and the like. Moreover, the choice of law remains an essential issue in international arbitration. If anything, it is becoming even more important as a result of the trend towards de-localization. Also pertinent to note is that the use of trade norms, generally recognized by major commercial law and arbitral rules, adds uncertainty and ambiguity.

REFERENCES

- Levy, L. and Park, W.W. (1986) The French Law of Arbitration by Jean Robert and Thomas E. Carbonneau. *Arbitration International*, 2(3), 266-270.
- Rubino-Sammartano, M. (ed.) (1990) *International arbitration law*. Deventer: Kluwer Law and Taxation Publishers.
- Bagwell, J. (1992) Enforcement of Arbitration Agreements: The Severability Doctrine in the International Arena - Republic of Nicaragua v. Standard Fruit Co., 927 F.2d 469 (9th Cir. 1991). *Ga. J. Int'l & Comp. L.*, 22, 487-514.
- Dore, I.I. (1986) *Arbitration and Conciliation under the U.N.C.I.T.R.A.L.Rules: A textual analysis*. Dordrecht: Kluwer Academic Publishers.
- Gwyn, A.H. and Tayloe, B.O. (1999) Comparison of the Major International Arbitration Rules. *Constr. Law*, 19, 23.
- Drahozal, C.R. (2000) Commercial norms, commercial codes, and international commercial arbitration. *Vand. J. Transnat'l L.*, 33, 79-134.
- Park, W.W. (1997) Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators. *American Review of International Arbitration*, 8, 133-143.
- Uniform Commercial Code 1952*.
- United Nations Commission on International Law (2011) *United Nations convention on contracts for the international sale of goods*. Available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> [Accessed 16 November 2016].
- ICC Rules of Arbitration 2012*. [Online]. Available from: <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> [Accessed 14 November 2016].
- International Arbitration Rules, 2000*. [Online]. Available from: <http://www.jus.uio.no/lm/american.arbitration.association.international.arbitration.rules.2000/doc.html> [Accessed 14 November 2016].
- United Nations Commission on International Trade Law (1985) *UNCITRAL model law on international commercial arbitration 1985*. [Online]. Available from: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (Accessed 20 December 2016).

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A CRITIQUE ON THE HUMAN RIGHTS PROTECTION MECHANISM BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THE CROATIAN PERSPECTIVEMR. TUNJICA PETRASEVIC¹

The paper gives a critical review of the working methods of the European Court of Human Rights (hereinafter: ECtHR), primarily the filtering mechanism. The first part provides an overview of the development of the human rights protection mechanism before the ECtHR with special reference to Protocols No. 11 and 14. Protocol No. 14 saw the introduction of new offices: a single judge, and so-called rapporteurs who assist the single judge. Many have criticized the work of single judges and non-judicial rapporteurs. The critiques come mostly from attorneys. Such criticism is the subject of analysis in the second, central part of the paper. Does the ECtHR itself violate some of the rights guaranteed by the Convention? The third part of the paper tries to answer this question by analyzing the viewpoints of researchers, but also of legal practitioners, principally Croatian attorneys. The fourth part discusses whether there are further legal means following an inadmissibility decision, after which concluding remarks and recommendations are made on how to resolve complaints and remedy shortcomings of the mechanisms of human rights protection as guaranteed by the Convention.

Keywords: European Court of Human Rights, Protocol No. 14, filtering mechanism, individual application

INTRODUCTION

This paper is inspired by the more and more frequent criticism of the mechanisms of human rights protection before the European Court of Human Rights (hereinafter ECtHR, or Court). The criticism comes mainly from the professional community, namely prominent Croatian attorneys with years of experience prior to and following the institution of the filtering mechanism introduced by Protocol No. 14 (2010). Several Croatian independent journalists recognized this problem by organizing a round table on May 29, 2013 entitled "A Critique of the Practices of the European Court in Strasbourg", held May 29, 2013 in Novinarski dom, Zagreb). Serious objections and "charges" against the Court were presented on this occasion. There was certainly no lack of criticism for the ECtHR's work from the scientific community (Gerards, 2014) or the UN Human Rights Committee either.

The aim of this paper is to give a critical review of the working methods of the ECtHR, primarily the filtering mechanism.

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR or Convention) was opened for signature in Rome on November 4, 1950 and took effect in 1953. Ratification of the Convention by the Member States of Council of Europe (hereinafter: CoE) is overseen by the ECtHR, which was established in 1959. The mechanism for the protection of human rights before the ECtHR was significantly changed by Protocol No. 11, which entered into force in 1998. Protocol No. 11 enabled the direct access of individuals to the Court, which resulted in a substantial increase in the number of applications. The accession of transitional countries in eastern and southeastern Europe further led to the Court's overload. It was necessary to make modifications in the mechanism to prevent the collapse of the entire system. To this end, the CoE adopted Protocol No. 14, which entered into force in 2010. Among other things, Protocol No. 14 saw the introduction of certain new

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offices: firstly, a single judge who may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, which decision can be taken without further examination and is considered to be final. The second office involves the so-called rapporteurs who assist the single judge (Convention, art. 25). Both offices have been established with a view to filtering cases before they reach the Court. Many have criticized the work of single judges and non-judicial rapporteurs. The criticism comes mostly from attorneys, and will be the subject of analysis in this paper.

The paper is structured into four parts. The first will provide an overview of the development of the human rights protection mechanism before the ECtHR, with special reference to Protocol No. 11, which enabled the direct access of individuals to the Court and resulted in a substantial increase in the number of applications. The second, central part of the paper will deal with the filtering mechanism as established by Protocol No. 14. The third part of the paper will try to answer the question of whether the ECtHR itself is in breach of the Convention by analyzing the viewpoints of both researchers and legal practitioners (principally Croatian attorneys). The fourth part will discuss whether there are further legal means following an inadmissibility decision, after which concluding remarks and recommendations will be made on how to resolve complaints and remedy shortcomings of the mechanism of human rights protection as guaranteed by the Convention.

THE DEVELOPMENT OF THE MECHANISM FOR THE PROTECTION OF HUMAN RIGHTS BEFORE THE ECtHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) was one of the first fruits of the European integration following World War II. The Convention was adopted under the auspices of the Council of Europe, at the time a newly established international organization seated in Strasbourg. It was created as a result of efforts to regulate the protection of human rights and fundamental freedoms at the European level, and to establish a system of shared values as a basis for future European unity. When it came to adopting the text of the Convention, a battle was fought over its contents. The resulting compromise consisted of ten fundamental rights and freedoms, which were the acceptable minimum to all signatory states. From the start, there was also the idea of establishing a supranational court that would oversee the compliance of Member States (MSs) of the Council of Europe with the Convention. The problem was the question of what powers that body would have and whether individual applications should be allowed or not. Compromise was reached by giving the MSs the option to choose whether they want to accept the jurisdiction of the ECtHR for individual applications or not. However, if the states opted to allow individual applications, individuals were not allowed immediate access to the Court, but given the option to address the European Commission of Human Rights, which would then review the application and forward the cases they deemed to be well founded. The immediate right to institute proceedings before the ECtHR was thus assigned to the European Commission of Human Rights and MSs. The Commission began its work in 1954 and the ECHR in 1959 (Omejec, 2010).

The Convention is amended by way of protocols. There are two types of protocols: substantive and procedural (Omejec, 2010). Substantive protocols are used for supplementing the catalog of fundamental rights and freedoms, and procedural protocols are used for changing the very mechanism for the protection of rights guaranteed by the Convention. The protocols that are relevant for this paper are procedural, Protocols No. 11 and No. 14, which will be analyzed in detail. The precondition for their entry into force is general ratification from all MSs of the Council of Europe.

Protocol No. 11 was adopted in 1994 and entered into force in 1998. It substantially altered the human rights protection mechanism (Omejec, 2010). The key, but not the only,

changes that the Protocol introduced included the possibility of submitting individual applications and the abolition of the Commission of Human Rights. By allowing individuals direct access to the Court, the number of applications increased year after year. The statistical data is interesting. Between 1954 and 1998 there were a total of 121,161 individual applications, and in the years between 1998 and 2003 there were 175,397. It is also interesting that between 1959 and 1997 the Court issued 33,012 decisions, compared to 62,475 between 1998 and 2003 (Annual Report, 2004). In other words, within just five years, both the number of applications and the number of cases on which the Court issued a decision increased significantly.

In the meantime, after 1998, a number of eastern and southeastern European countries acceded to the Convention. Individuals from those countries “flooded” the Court with numerous applications. A large portion of the applications from said countries were a consequence of an unregulated judiciary and frequent human rights violations.

The Court became overburdened and the effectiveness of its work was brought into question. To avoid the collapse of the entire system, it was necessary to make certain changes in the Court’s procedure. To this end, the CoE adopted Protocol No. 14, which took effect in 2010 and which, among other things, introduced new offices that are relevant for the topic of this paper. The first was the single judge. The second office were the (non-judicial) rapporteurs who prepare the case for the single judge. The two offices were introduced with the aim of filtering out the inadmissible cases from the mass.

A new admissibility criterion was introduced that referred to the degree of the disadvantage suffered by the applicant, aiming to dissuade those who did not suffer significant disadvantage from applying (Convention, Art. 35(3)b). The introduction of this criterion was deemed necessary due to a growing number of cases before the Court. It serves as an additional tool for focusing on cases for which an examination of the merits is required. In other words, it allows the Court to reject cases that are considered “lighter” based on the principle that judges should not have to decide such cases (*de minimis non curat praetor*). Although there are two related protective provisions, this new admissibility criterion is subject to numerous criticisms. The debate thereon would go beyond the scope of this paper and will therefore be omitted. The filtering mechanism and the role of the single judge is examined below.

THE FILTERING MECHANISM FOR INDIVIDUAL APPLICATIONS

As previously mentioned, due to a large number of cases and the threat of congestion of the entire mechanism of protection before the ECtHR, it was necessary to implement certain reforms. Protocol No. 14 was adopted to that end, but its entry into force was stalled by Russia until 2010. The Protocol introduced a mechanism for filtering individual applications by the single judge (Convention, Art. 27), assisted by so-called (non-judicial) rapporteurs.

While the inadmissibility of individual applications used to be decided by a Committee of three judges, nowadays it is decided by the single judge.

The Court may thus examine applications that have been referred to it as a single judge, as a Committee of three judges, as a Chamber of seven judges or a Grand Chamber of seventeen judges (Convention, Art. 26(1)). When sitting as a single judge, the specific judge cannot examine the cases coming from the state on whose behalf he was elected (Convention, Art. 26(3)).

The single judge decides on the admissibility or inadmissibility of individual applications. The decision of the judge on inadmissibility is final and has the effect of striking out cases from the Court’s case list. However, even if the single judge declares a case admissible, all other instances, i.e. councils, are also authorized to declare a case inadmissible at any later stage if inadmissibility is established during the proceedings (Convention, Art. 27).

Based on the conclusions of the 2010 Interlaken Conference, the Court set up a Filtering Section at the Court's Registry (Interlaken Declaration, 2010). The Section oversees the filtering of cases coming from Russia, Turkey, Romania, Ukraine and Poland, the countries accounting for 50% of the total number of cases before the Court. The Section began its work in 2011 and has proved to be very successful:

The Court itself confirms that the measures introduced by Protocol No. 14 have been successful in dealing with the backlog. On September 1, 2011, the backlog consisted of over 100,000 cases, whereas on October 1, 2013, the backlog was 38,200 what is evident from the Press release issued by the Registrar of the Court (2013). This means that 61,850 cases were resolved in two years. Assuming that a month has 22 working days, if multiplied by 24 months, the number of working days in two years is 528. If we divide 61,580 cases with 528, it may be construed that the Court dealt with 117 cases every day. At that time, there were 36 appointed single judges. It follows that each judge examined an average of 3.25 cases per day. This begs the question: is this realistic, and were certain standards adhered to?

Certain countries support the existing filtering mechanism and even advocate more stringent criteria. In our opinion, this proves that the countries that are far ahead in terms of the protection of fundamental human rights and freedoms do not comprehend the problems faced by countries in transition. These countries mostly advocate very stringent filtering criteria without considering why there are so many applications from certain countries in the first place. We will give an interesting example. In 2011, the Dutch Justice Minister proposed three bizarre solutions to prevent the submission of ill-prepared and *manifestly unfounded applications*. The first measure he proposed involved fines for submitting multiple manifestly unfounded applications; the second called for disciplinary measures against an attorney if the application could be considered an abuse of rights; and thirdly, he advocated the introduction of fees for submitting an application. The Dutch "Adviesraad Internationale Vraagstukken" (AIV) strongly criticized these proposals. The AIV is an independent body consisting of experts who advise the Dutch government and parliament on foreign policy. The first proposal of AIV posed a serious threat to the submitting of individual applications in general, as it is very hard for an individual, if not impossible, to estimate whether their application is founded or not. After submitting the application, the individual cannot influence the outcome of the proceedings and the only way to safely avoid the fine is not to submit the application at all. The second measure could discourage attorneys from representing parties, even when there is high confidence that rights have been violated. The AIV believed that Dutch law already provided for disciplinary measures against attorneys and that new sanctions were not necessary. Lastly, the third measure would hit the most vulnerable categories of citizens the hardest (Advisory letter, 2011).

The above proposals of the Dutch Justice Minister were contrary to the Court's decision in the case *Airey v. Ireland* (1979), wherein the Court defined the right of access and said that the purpose of the Convention is to guarantee rights that are practical and effective, not theoretical or illusory.

ON THE POTENTIAL VIOLATION OF CERTAIN RIGHTS GUARANTEED BY THE CONVENTION BY THE ECTHR ITSELF

The first question is whether the filtering of applications by the single judge represents a step back to the old "dual track" system. Has the single judge assumed the earlier role of the Commission for Human Rights, which was abolished in 1998?

In terms of the number of rejected applications from countries in transition, the statistics are alarming. Around 90% of applications are rejected. This raises the question of whether there are two categories of citizens: those from regulated countries (e.g. Switzerland), who submit up to five applications a year, all of which are examined, and those from countries in transition,

whose applications are rejected in 90% of cases (Grčar, 2014). Should the citizens suffer the consequences of unregulated judicial systems?

Representatives of the MSs of the Council of Europe met in 2010 in Interlaken (Switzerland) to discuss the future of the Court and the large case backlog it had amassed due to the large number of inadmissible applications. In a solemn declaration, they reaffirmed the central role of the Court in the European system of protection of fundamental rights and freedoms and undertook to increase its effectiveness while preserving the principle of individual applications.

Emphasis was thus put on the importance of preserving individual applications. An agreement was reached under which applicants were given comprehensive and objective information on the application process and the admissibility criteria. For this purpose, the Court published the so-called *Practical Guide on Admissibility Criteria* (2011).

The Court thereby demanded that countries refrain from impeding access to the Court in any way. But could it be that the Court had done this itself? Does the Court enjoy too much discretion in assessing admissibility of applications? Are the admissibility criteria objective and transparent? Are the criteria the same for everyone? All these questions are open for discussion.

Furthermore, when the single judge rules on inadmissibility, the applicant is notified thereof in the form of a “letter”.

The letter states the following: *“Having taken into account the submitted documents and to the extent that the said documents fall under the jurisdiction of this Court, the Court has found that admissibility requirements pursuant to Articles 34 and 35 to the Convention have not been met”* (Grčar, 2014, p. 9).

There is no formal, reasoned court decision. The letter only states that formal admissibility requirements have not been met in accordance with Articles 34 and 35 to the Convention, but it does not specify the exact requirement(s). We are of the opinion that including the reasoning behind the decision would serve as an additional guideline for cases in which applications need not be submitted simply because they will be rejected as inadmissible. This would prevent the submitting of unfounded applications.

In this regard, it should be noted that Article 45 to the Convention expressly provides the following: *“Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.”* The Court thus delivers judgments on merit, and issues decisions on the admissibility or inadmissibility of an application. Both instruments should be reasoned. The absence of reasons represents a potential violation of Article 45.

Next, some Croatian attorneys claim that, in practice, the “filtering” process is carried out by non-judicial rapporteurs who are not judges and who do not have the legitimacy to decide admissibility, which in turn directly violates Article 6 to the Convention. Article 6 guarantees that “[...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]”. This “fairness” is a standard that has been imposed on the MSs, and is one that definitely applies to the Court itself (Uzelac, 2010). It is indisputable. However, the above claim of the Croatian attorneys is incorrect. Non-judicial rapporteurs only prepare the basis for the decision of the single judge and do not issue decisions themselves.

Certain attorneys go as far as to claim that the admissibility of an application is decided upon by officials who were sent by the Croatian Government, which calls their independence and impartiality into question. So, Prodanović said:

I believe that it is contradictory that the officials sent to Strasbourg by the Croatian state arbitrarily examine complaints of Croatian citizens who were violated by the Croatian state. Guided by these regulations as well as by simple logic, the officials will represent

the interests of those who provided them with good employment in Strasbourg and not of those whom they should be pro forma protecting.” (Grčar, 2014, p. 54)

The author cannot agree with these allegations because it is necessary to be familiar with the method of appointing of non-judicial rapporteurs. They are appointed by the President of the Court on the proposal of the Court Registrar and they form part of the Court's Registry. They are appointed from among the most experienced Registry lawyers, who are in turn appointed and employed by the Court itself, and not the MSs. This hypothesis should hence be dismissed. Furthermore, certain attorneys remind us of the need to distinguish between formal and substantive preconditions of access to the Court. Legal doctrine teaches us that applications are dismissed for formal deficiencies and rejected for substantive ones. When a single judge decides that an application is inadmissible for being manifestly unfounded, it *de facto* implies a substantive deficiency. Even though the decision on inadmissibility and the decision that there is no violation has the same effect on an individual, they are very different from a legal point of view. Review by the Grand Chamber is possible only for Court judgments and not for inadmissibility decisions. Although it is not probable that the Grand Chamber will accept a request for review, the possibility exists in case of decisions on the merits. Here we can agree that dismissal on grounds of substantive deficiency is disputable.

Certain applicants also claim that the Court did not allow access to the case file. That was the situation in case *Bačoka v. Croatia* (2013). If this is true, we believe that it violates Article 40 to the Convention, which guarantees that hearings will be public and documents accessible.

Lastly, the attorneys see much controversy in the fact that the letter delivered to the applicant is not even signed by the single judge, but rather the advisor, i.e. the non-judicial rapporteur (Grčar, 2014).

Considering all the above, the question is does the ECtHR itself seriously violate the rights under the Convention? This argument was presented at the previously mentioned Roundtable held on May 29, 2013 at Novinarski dom in Zagreb.

We believe that certain attorneys' arguments are justified and reasonable and others exaggerated, and that there is no gross violation of the Court to speak of. Despite certain justified arguments, we are of the opinion that such a conclusion is overblown.

FURTHER REMEDIES FOLLOWING AN INADMISSIBILITY DECISION

As already pointed out, the decision of the single judge on the inadmissibility of an individual application is final and has the effect of deleting the application from the case list. A request for review by the Grand Chamber is not possible. As far as Strasbourg goes, individuals thus have no other options. The question is: can the individual seek “justice” before a different international court or body?

The individual may address the United Nations Human Rights Committee (HRC). The HRC is a body of 18 experts who are elected for a term of four years and who oversee the implementation of the International Covenant on Civil and Political Rights by the signatory states. The Republic of Croatia is a signatory of the Covenant, as well as of the First Optional Protocol to the Covenant of 1976. The signatory states must submit periodic reports on the implementation of the Covenant, and the HRC examines the reports and adopts recommendations in the form of concluding observations. The HRC meets in Geneva three times a year. The HRC may consider inter-State complaints, and the First Protocol provides for the possibility of submitting individual complaints as well. Without going into the details of the proceeding before the HRC, we shall focus on the opinion/decision of the HRC in the case *Achabal Puertas v. Spain* (2013) which is relevant for this paper.

In *Achabal*, the HRC concluded that the case that the ECtHR declared inadmissible for being manifestly unfounded was in fact (or should have been declared) both admissible and founded. The decision of the HRC was a big “slap” to the Court. This is the first case in which

the HRC examined the working method of the Court by reviewing the reasoning of its decisions on the inadmissibility of individual applications when the reasoning had not been given in the first place. Even though this case was rejected by the Committee of three judges before the entry into force of Protocol No. 14, it is of relevance to us. All other critiques given by the HRC are also applicable in relation to the single judge.

We have pointed out earlier that we find the absence of reasons for the decision to reject applications disputable, and believe making such reasons public would be very useful in the sense of serving as additional guidance to applicants for when not to submit applications. Reasons for decisions on inadmissibility are important for both the internal and the external control of Court decisions; they are the only assurance that the decision has not been issued “illegally” and arbitrarily and that all facts have been taken into account. Reasons are also very important from the viewpoint of fairness for both parties.

The opinion of the HRC is important in terms of criticism of the Court’s case law. In *Achabal*, the HRC said that the reasons for the Court’s decision were insufficient and scant. Furthermore, the HRC harshly criticized the application of the “manifestly ill-founded” standard. Most criteria for rejection are largely formal or procedural in nature. The problem is the condition set out in Article 35(3)(b), which is not a formal but a substantive criterion requiring prima facie engagement in the assessment of facts, i.e. merits. From the efficiency viewpoint, this criterion is very important. The implementation is very useful when, for instance, an individual submits an application concerning facts, which have already been established as not constituting a violation by the ECtHR. When there is previous practice of the Court, therefore, it is not disputed. However, in item no. 370 of the Practical Guide on Admissibility Criteria, the Court itself states: “The reasons given for the inadmissibility decision in such a case will be identical or similar to those which the Court would adopt in a judgment on the merits concluding that there had been no violation (*Mentzen v. Latvia* (2004)). The Guide does not elaborate on this criterion, but rather the Court itself openly admitted that the single judge is guided by the same criteria as the Council of judges in terms of a decision on merits. It would be good to know in what situations the Court applies Article 35(3)(b), and which standards it is guided by.

What we too find debatable is the fact that the single judge may enter into the merits and dismiss an application as manifestly ill-founded without having to provide reasons. The application of this criterion by the single judge is an enigma.

CONCLUSION

The aim of this paper was to give a critical overview of the working methods of the ECtHR, with special reference to the filtering mechanism of individual complaints.

Regardless of the facts and problems presented herein, we believe that to claim that the Court is intentionally violating human rights under the Convention is an exaggeration. We do not wish to criticize individual judges either. We are of the opinion that these posts are held by highly competent people who are independent in their work.

We have agreed with certain justified criticism from attorney circles and dismissed other arguments. What we do see as problematic is the absence of reasons for the decision to reject an application. The citizens must have an independent and supranational body impartially examining whether there is indeed a violation or not. We do not wish to assert that the rejected applications should have been accepted and ultimately resolved in favor of the applicant. We did not have access to the records of those cases and it would be frivolous to draw such a conclusion. However, even if we assume that all decisions of single judges were correct, the very *modus operandi* is a concern that in turn raises doubts, especially in those who feel violated. This unfortunately creates a negative image of the Court as a violator of human rights.

We personally believe that such a conclusion is overstated, but, due to the high rate of rejection of requests coming from countries in transition, citizens might lose confidence in “Strasbourg”.

We believe that by submitting applications, individuals have contributed to raising the level of human rights protection in certain MSs. This is the case in the Republic of Croatia. Since acceding to the Convention, the level of protection has rapidly increased, but it is safe to say it has not yet reached the level of some more advanced democratic countries. Excessively limiting the access of the individual to the Court does not contribute to the strengthening of human rights protection. It might be that the filtering mechanism is too strict. Had this mechanism existed before, some important cases against Croatia might never have come before the Court.

BIBLIOGRAPHY

- Caffish, L. (2006) ‘The reform of the European Court of Human Rights: Protocol No. 14 and Beyond’, *Human Rights Law Review* 2(2006), 403–415.
- Council of Europe/European Court of Human Rights (2014) Practical Guide on Admissibility Criteria. Strasbourg.
- Egli, P. (2007) ‘Protocol No. 14 to the European Convention for the protection of the human rights and fundamental freedoms: towards a more effective control mechanism’, *Journal of Transnational Law and Policy* 1(2007), 1–31.
- Gerards, J. (2014) ‘Inadmissibility decisions of the European Court of Human Rights: A critique of the lack of the reasoning’, *Human Rights Law Review* 1(2014), 148–158.
- Grčar, I. (2013) ‘Uzalud vam Međunarodni sud u Strasbourgu’, *Lider*.
- Grčar, I. (2013), ‘Pad standarda suđenja Međunarodnog suda u Strasbourgu’, *Lider*.
- Grčar, I. (2014) *Kritika prakse Europskog suda za ljudska prava u Strasbourgu*, Zagreb, available from http://ivicagrcar.weebly.com/uploads/4/8/2/1/48211791/kritika_prakse_europskog_suda_za_ljudska_prava_u_strasbourggu.pdf
- Ovey, C., Write, R.C.A.: Jacobs and White (2006) *The European Convention on Human Rights*, Oxford: Oxford University Press.
- Keller, H., Fischer, A., and Kühne, D. (2011) ‘Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals’, *European Journal of International Law* 21(4), 1025–1048.
- O’Boyle, M. (2011) ‘The Future of The European Court of Human Rights’, *German Law Journal* 10 (2011), pp. 1862–1877.
- Omejec, J. (2008) *Vijeće Europe i Europska unija – institucionalni i pravni okvir*. Zagreb: Novi informator.
- Omejec, J. (2010) *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava - Strasbourški acquis*. Zagreb: Novi informator.
- Pavišić, B. (2006) *Kazneno pravo Vijeća Europe*. Zagreb: Golden marketing.
- Uzelac, A. (2010) ‘Pravo na pošteno suđenje: opći i građanskopravni aspekti čl. 6. st. 1. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda (Right to a Fair Trial: General and Civil Aspects of Art. 6/1 ECHR)’, in Ivana Radačić (ed.) *Usklađenost hrvatskog zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih Sloboda*. Zagreb: Centar za mirovne studije.
- Uzelac, A. (2010) ‘Pravo na pravično suđenje u građanskim predmetima: Nova praksa Europskoga suda za ljudska prava i njen utjecaj na hrvatsko pravo i praksu (The right to a fair trial in civil cases: New case law of the European Court of Human Rights and its impact on Croatian law and practice)’, *Zbornik Pravnog Fakulteta u Zagrebu* 1(2010), 101–148.

- Van Dijk, P., and Hoof, G. (1998) *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer Law International.
- Adviesraad Internationale Vraagstukken, Advisory letter No. 18, November 2011, 1-10, available from <http://aiv-advies.nl/download/1f91a4d0-27d6-44d5-a5b3-0201017d4d14.pdf> [accessed 2 November 2016]
- European Law Institute (ELI), *Statement of case-overload at the European Court of Human Rights*, Vienna, July 6, 2012, available from https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-1-2012_Statement_on_Case_Overload_at_the_European_Court_of_Human_Rights.pdf.
- Sud za ljudska prava više nije 'dragulj' nego ; 'smokvin list'*, T-portal, available from <http://www.tportal.hr/vijesti/hrvatska/358442/Sud-za-ljudska-prava-vise-nije-dragulj-nego-smokvin-list.html> [accessed 2 November 2016]
- Annual Report (2004), which is available at the official webpage of the ECtHR: http://www.echr.coe.int/Documents/Annual_report_2004_ENG.pdf
- European Court of Human Rights (2013) 'Reform of the Court: Filtering of cases successful in reducing backlog' (Press release issued by the Registrar of the Court), ECHR 312(2013), 10/24/2013.

7-AD42-4323

INVESTMENT AGREEMENT UNDER THE FREE TRADE AREA OF THE ASIA-PACIFIC (FTAAP) AS THE BASIS OF GLOBAL INVESTMENT POLICYPROF. TOMOKO ISHIKAWA¹

While harmonization of international trade and investment rules has been the universal agenda for years, at the global level, there is little prospect of it being achieved in the near future. This has resulted in the proliferation of regional trade agreements (RTAs), and the recent phenomenon is the growth of ‘mega’ RTAs such as the Trans-pacific Partnership Agreement (TPPA).

As its preamble explicitly recognizes, the TPPA is also expected to form the basis of the FTAAP, the membership of which would extend to the 21 Asia Pacific Economic Cooperation (APEC) member states and certain non-APEC states including India. The TPPA and the Regional Comprehensive Economic Partnership (RCEP) which comprises 16 countries including all the members of the Association of South-East Asian Nations (ASEAN), are considered to be the pathways to reach the FTAAP. However, given the existence of predicted gaps in the areas such as state-owned enterprises as well as the protection of intellectual property rights between the TPPA and RCEP, the prospect of concluding the FTAAP as a high-level, or ‘TPPA-level’, RTA is not high.

On the other hand, for the following reasons it would be feasible to agree on rules limited to investment promotion and protection on the basis of the texts of the TPPA. There are already extensive international investment agreements (IIAs) – investment chapters of RTAs and bilateral (or trilateral) investment treaties – amongst the potential FTAAP members. For example, Japan has concluded IIAs with all the potential FTAAP members except for Chinese Taipei. Most of these IIAs include: (a) commitments on investment liberalization; and (b) investor-state arbitration, which covers a wide range of investment disputes. Both of these are considered to be important obstacles to IIA negotiations. The TPPA investment chapter also overcomes the obstacles by, for example, the flexible use of the reservation lists and the exchange of letters, tailored exception clauses and detailed investor-state arbitration provisions. It is argued that they have contributed to the successful conclusion of negotiations.

However, there is also room for improvement in TPPA investment and relevant chapters. Concerns over the legitimacy of investor-state arbitration tribunals might well be further addressed by, for example, incorporating the interpretative approaches adopted by the WTO Appellate Body.

Against this background, this study first proposes that the FTAAP members should start fast-track negotiations of an IIA, i.e. the ‘FTAAP Investment Agreement’, which can later be incorporated into the mega Economic Partnership Agreement. The TPPA may well serve as the starting point of the negotiations, but this study also examines the elements for improvement in the TPPA. Given its scale, scope and significance in all areas, a well-balanced and carefully drafted FTAAP Investment Agreement would serve as the foundation of global investment policy, and this study aims to provide both practical and theoretical guidance for negotiations.

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2-AD34-4416

SOCIAL PROTECTION IN SOUTH AFRICA, BRAZIL AND INDIA: FROM THE VIEWPOINT OF POVERTY REDUCTION AND BEYONDMR. CLARENCE ITUMELENG TSHOOSE²

The underlying normative commitment of social protection is the improvement of the quality of life of the population by promoting economic or material equality. Social protection ensures that all citizens have a stake in society and that each individual has an incentive to contribute to the community at large. The social protection system provides social transfers which form the key instruments offering a vehicle for the abolition and prevention of poverty.

This paper analysis the following issues. First it examines the system of social protection in South Africa in the context of poverty reduction and beyond. Second, it evaluates the impact of cash transfers in Brazil, and it also looks at the role of bolsa família, that is the largest conditional cash transfer programme in the world in as far as poverty alleviation and the improvement of the lives of the poor people in Brazil are concerned. It also examines other programmes aimed at poverty alleviation in Brazil. Third, it looks at how the India Courts have interpreted, protected, and promoted the economic and social rights entrenched in the Indian Constitution.

3-AD33-4417

THE EMERGENCE OF THE NEW EQUAL PAY PROVISIONS IN THE LABOUR RELATIONS ACT 66 OF 1995: BETTER PROTECTION FOR ATYPICAL EMPLOYEES IN SOUTH AFRICA?MR. SHAMIER EBRAHIM³

Equal pay for equal work and work of equal value is recognised as a basic human right in international law. The Employment Equity Act 55 of 1998 (EEA) is the main piece of legislation which seeks to achieve equity in the workplace by redressing unfair discrimination. Unequal pay for equal work and work of equal value are specific forms of discrimination which are dealt with in the EEA. The EEA provisions dealing with pay discrimination applies to all employees in the workplace. An employee experiencing pay discrimination in the workplace would thus use the EEA to institute an equal pay claim. This, however, has changed since the introduction of sections 198A-198D of the Labour Relations Act 66 of 1995 (LRA) which provides equal pay protection for atypical employees earning below the threshold of R205 433.30. While the EEA and the LRA both provide protection with regard to equal pay for the same or similar work for atypical employees, the LRA unlike the EEA does not provide protection with regard to equal pay for work of equal value. This equal pay protection in the LRA is unique as the redress of unfair discrimination is not one of the purposes of the LRA and the Act does not contain provisions related to unfair discrimination.

The purpose of this paper is to analyse the equal pay provisions as set out in sections 198A-198D of the LRA in order to ascertain the ambit of the protection offered by the sections, the limitations thereof and the dispute resolution procedure which should be followed. The EEA,

² Mr. Clarence Itumeleng Tshoose, Senior lecturer, University of South Africa.

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European Union law and the law of the United Kingdom dealing with equal pay will be referred to where necessary.

13-AD49-1014

RECONSTRUCTING PROPERTY RULE AND LIABILITY RULE FOR COPYRIGHT HOLDERS, USERS AND INDIRECT SERVICE PROVIDERS: AN APPROACH TO REDUCE TRANSACTION COST

PROF. HAN ZHANG⁴ AND WEIJIE HUANG

When users upload their remix, parody and other user-generated content (UGC), the copyright holder of the original work can notice video website, on-line forum and other Indirect Service Providers (ISPs) to take down the UGC. This “notice and takedown” regime which is commonly used in the USA, China and other countries, authorizes copyright holders to stop possible infringements by removing UGC without a judicial injunction. Copyright holders’ takedown notices substantially supersede the injunctions known as property rules in law & economic scholars Calabresi and Melamed’s well-known formulation. The problem is that this practice of “notice and takedown” increases transaction costs for possible negotiations among copyright holders, users and ISPs. Moreover, when transaction costs go up, liability rules providing compensation through “judicial pricing” take effect in an unbalanced way. Although copyright holders can be relatively well compensated for copyright infringements, compensation for wrongful removal of UGC is strictly limited due to the subjective good-faith standard for copyright holders’ misrepresentation and the narrow scope of recoverable damages under the economic loss rule.

The current regime is based on the assumption that users can be copyright pirates and also that piracy damages the market for original work. Therefore, the emphasis of the current regime is on protecting copyright holders’ entitlements. However, in this new age of UGC wherein users are more likely to be re-creators rather than copiers, UGC has become a major source of creativity and ISPs have become the platform for creativity. A more balanced reconstruction of property rule and liability rule for copyright holders, users and ISPs is needed. Replacing “notice and takedown” regime with property rules based on the decisions of courts or other authorities can promote future transaction and cooperation among copyright holders, users and ISPs. This replacement of regulations also contributes to possible industry chains that are based on the negotiation and collaboration among copyright holders as original creators, users as re-creators and ISPs as re-creative mediums. Strengthening liability rules in protection of users’ and ISPs’ entitlements can also bring back the balance among copyright holders, users and ISPs. Specifically, objective standard in good faith test for copyright holders’ misrepresentation causing removal of UGC and applicable economic loss liability for copyright holders in tortious interference cases should be implemented.

⁴ Prof. Han Zhang, Associate Professor, South China University of Technology, School of Law.

15-AD55-1024

CONTRACTING OUT OF NON-REFOULEMENT PROTECTIONSMR. WILLIAM WORSTER⁵

Recently several cases applying the European Convention on Human Rights (ECHR) have identified strategies within existing jurisprudence of the European Court of Human Rights (ECtHR) for avoiding the ECHR's non-refoulement human rights obligations. Various regional human rights systems have jurisdiction to ensure non-refoulement for at risk persons. However, recent trends show that the protection of these systems, and the ECHR in particular, can be avoided, not only by direct conflict of norms, but by constructing separate legal regimes that impact the facts and jurisdiction inherent in ECHR non-refoulement cases.

The UK proposed to expel the alleged terrorist Abu Qatada to Jordan, even though he had successfully received asylum. The UK repeatedly failed before the ECtHR, since that human rights system generally classifies diplomatic assurances against mistreatment as facts, pertaining to the risk of mistreatment. Thus assurances are scrutinized for credibility and reliability. However, the UK was able to overcome this bar when it agreed to a treaty with Jordan in which Jordan with same content at the assurances. While the ECtHR generally views assurances as facts, it views a treaty as law. This treaty is an example of an international agreement that establishes certain facts. This is the first way that parties might contract out of non-refoulement by agreeing that the facts that trigger the obligation do not exist.

The International Criminal Court (ICC) called several witnesses who claimed asylum upon arrival in the Netherlands. Their applications were refused, but not on the merits. In this case, the agreement at issue is the ICC-Netherlands Headquarters Agreement which obliges the Netherlands not to interfere with the ICC and more importantly prohibit its exercise of jurisdiction within its territory. The Dutch Supreme Court permitted their expulsion by analyzing the ECHR jurisdiction. ECtHR practice on jurisdiction is rather unusual, focusing on control, and for that reason, the Dutch Supreme Court held that the Netherlands did not have jurisdiction in the ECHR sense, so the ECHR did not apply. This is the second way that parties might contract out of non-refoulement by invoking the unusual practice on jurisdiction and agreeing to limit their jurisdiction, thus not incurring the non-refoulement obligation in the first place.

Both of these two cases expose weaknesses in the ECHR non-refoulement protection regime and present a problem for migration issues. While a human rights court such as the ECtHR might normally hold in favor of the human rights norm *lex specialis* where there is a direct conflict of legal norms, these cases avoid direct confrontation. The US Court of Appeals has been challenged with the direct conflict between asylum non-refoulement and the obligation to immediately return an abducted child under the Hague Convention on Child Abduction. The Court sided with the Hague Convention and refused to give effect to non-refoulement. It is unlikely that the ECtHR would reach the same result. However, there are other ways, that are increasingly being exploited, to use the ECtHR's practice on facts and jurisdiction to avoid the non-refoulement obligation.

⁵ Mr. William Worster, Assistant Professor, The Hague University of Applied Sciences.

16-AD19-4329

IS VOLUNTARY DISCLOSURE A TOOL FOR INCREASING TAX REVENUES OR AVOIDING TAX EVASION? ; A TAX ADMINISTRATION DILEMMADR. BURCIN BOZDOGANUGLU⁶

Tax administrations aim to increase tax revenues quickly, but at the same time try to avoid or minimize tax evasion. This two aims can be struggle each other at some points. In general terms; voluntary disclosure programmes define; opportunities offered by tax administrations to allow previously non-compliant tax payers to correct their tax affairs under specified terms. How can voluntary disclosure programme effects individuals' tax compliance level? The factors influencing tax payer behaviour are complex but a tax administration will have more influence over future behaviour if its compliance strategy is responsive to the taxpayer's attitude to compliance. If it is drafted carefully, voluntary disclosure programmes benefit everyone including taxpayers making the disclosure, complaint taxpayers and governments.

Many countries tax administration have different voluntary disclosure programmes in their system. Countries which have only "voluntary disclosure programmes" provide an opportunity to facilitate compliance in a timely and cost effective manner, saving costly and contentious audits, litigation and criminal proceedings. Another kind of programmes is "offshore voluntary compliance programmes" which offer the opportunity to maximize the benefits of improvements in transparency and exchange of information for tax purposes to increase short-term tax revenues and improve longer term tax compliance.

In addition several countries have put in place a temporary voluntary disclosure programme in order to take advantage of the momentum given by, for example the availability of information about financial accounts held abroad and increased cooperation between tax administration while many countries were using voluntary disclosure programmes in their general law or administrative practice permanently thus provide certain incentives to taxpayers who have not complied with their tax obligations to come forward.

In this study some country examples will examine briefly and try to perform the comparison of programmes generally. Especially tax evasion crimes and its penalties will be discussed in different countries and what offer voluntary disclosure programmes as advantages e.g. exemption from criminal prosecution or imprisonment or both of them. But does it create more compliance taxpayers or more willing individuals to tax evasion?

A voluntary disclosure programme seems to be an indispensable tool for tax administration because it is an important way to increase tax revenues, to learn methodologies used by tax evaders and determine what information and records are likely to be available to an investigator, to end a tax dispute before court level. But in another way this programme shouldn't be encourage individuals to tax evasion

This study aims to explain how to design a successful and optimal voluntary disclosure programme in line with the standard and recommendations of OECD.

⁶ Dr. Burcin Bozdoganoglu, Associate Professor, Siirt University Faculty of Economics and Administrative Sciences.

17-AD52-1012

SOCIO-CULTURAL COHESION IN THE SOUTH AFRICAN ETHICS GOVERNANCE SYSTEM: THE YEARS PAST AND YEARS AHEADMR. UHURU DIKGANG MOILOA⁷

Marked by its embeddedness to the country's historical past, the South African ethics governance system is shaped by a perpetual relational interplay between social, cultural, economic, and political spaces of cohesion. The country's three arms of government (i.e. the Executive, the Judiciary, and the Legislature) all form the essence, applications, and validity of the nature in which ethical decisions are taken. The role of social cohesion (as a policy outcome from such an essence) is manifested in the manner through which popular decisions and policies that influence the whole of society are taken.

The years of apartheid structural formations, and the years ahead remain dissimilar in that the current institutions of governance are democratic, inclusive, and warrant innovative thought in their operational mandates. These should find semblance in how they consider the manner in which internal cultural diversity and law-making behaviour are affected by social cohesion.

Furthermore, the changing nature of the South African governance culture where ultra-democratic transparency seems to deter effective and prompt decision-making, resembles a culture of divergent views in how society should interpret quality service delivery. Arguably, the mushrooming of new and break-away political parties seems to have an immense impact on how culture diversifies governance.

Conversely, deadlock between these divergent cultures in governance has seen both interest groups and various political parties resorting to courts in attempting to achieve any form of decisional progress. As significant interventions and steps geared towards affirming the independence and effectiveness of institutions supporting democracy, the 'cultural intelligence' aspects of ethical governance are fast gaining strategic momentum in ensuring the well-being of the people of South Africa, the discipline in the separation of powers plays a pivotal role in South Africa today as it will in the years ahead.

19-AD20-4132

THE NEW CONCEPT OF SEX-CRIMES IN CROATIAN CRIMINAL LAWDR. IGOR VULETIC⁸ AND DAVOR SIMUNIC

On the 1st Jan 2013 the new Croatian Criminal Code has entered into force, introducing reformed concept of sexual crimes into Croatian criminal law. The reform was, before all, motivated by the effort of the legislator to follow international standards, especially the ones within the European Union and Council of Europe. However, it is very interesting that creators of the new Criminal Code in the case of sex-crimes did not follow usual German model. Instead, they have chosen to roll-model sex-crimes more similar to English concept. Such solution is very untypical for Croatian legal tradition. The new concept significantly expands criminal liability for sexual crimes in several aspects. Typical examples for such claim can be found in criminalization of negligent form of rape and incrimination of rape by deception. These types of sexual offence are atypical for

⁷ Mr. Uhuru Dikgang Moiloa, Deputy Speaker, Gauteng Provincial Legislature.

⁸ Dr. Igor Vuletic, Assistant Professor, Josip Juraj Strossmayer University of Osijek.

continental law tradition. Until now, they have not been characteristic for Croatian criminal law and it will be interested to see how courts will accept and apply new model. In this paper, author discusses these changes not only from theoretical, but also from practical point of view. He gives critical analysis of the new concept of sex crimes in Croatian CC and comments some interesting cases from recent court practice in Croatia. Based on the example of case-law, the author points main problems of new concept.

21-AD16-4062

ADAT LAW SOCIETY AND THE RIGHTS OVER NATURAL RESOURCES: INSTITUTION AND THE MANAGEMENT OF SASI IN MALUKU INDONESIA

MR. MUHAMMAD YAHDI SALAMPESSY⁹

This research aims at observing and analysing Maluku's Sasi institution as an instrument to protect and preserve the rights of adat society over natural resources. Sasi is the term used for a body of laws established by Maluku's adat society that stipulates the guidelines for the people in managing their environment, including the utilization of natural resources. Sasi can also be defined as a restriction to collect or cultivate certain natural resources product in certain period within certain areas. Almost every adat village in Maluku applies Sasi as the main mechanism to manage natural resources in their localities. The general objectives of Sasi institution is to protect the tradition of local people, creating a balance between the nature and the people.

Sasi plays an imporant role for the sustainability of adat society and the management natural resources in Maluku. As law instrument, Sasi plays an important role not only to protect the rights of adat society over natural resources but also to preserve the nature. Such instrument can be a refference for policy making pertaining to the management of natural resources at the national level. The government, thus, not only protect the rights of adat society over natural resources, but also establish a environmental sustainable developmental based on local knowledge.

This research, thus, aims to conduct a throughout and comprehensive analysis of Sasi with regard to its institution, form, and management. The research further analyses the impact of Sasi for natural resources management based on sustainable development in Maluku. The research also analyses the position of Maluku's adat law within the national legal system regarding the protection of the rights of adat society over natural resources. The research applies juridical normative method to analyse regulations, both at the national and regional levels, pertaining to the recognition and the implementation of Sasi law in ensuring the rights of adat society over natural resourses. Maluku is chosen as the research location because Maluku is an area where adat law is strongly rooted in the society. To this date, the people of Maluku still maintain and preserve the culture values and tradition from their ancestors. Adat law become the main instrument to govern

⁹ Mr. Muhammad Yahdi Salampeppy, Lecturer, University of Indonesia.

the life of the local people, including to set the relationship between the people and the nature. Furthermore, there is no research specifically and comprehensively address adat law in Maluku, particularly with regard to Sasi that become the subject in this research.

22-AD51-4295

POVERTY, INEQUALITY AND THE SOCIAL CAUSES OF CRIME

DR. SALIM YAACOUB¹⁰

Crime can be defined in many ways, most simply as the breach of the rules that govern society. There are numerous variables related to crime. These include: poverty levels; family stability; individual and societal health; social and cultural background; along with geographic, demographic and political considerations. It is further argued that there exists a clear correlation between crime rates and inequality. This paper will examine and explain the main reasons behind the current trends in increasing crime rates in the United States and Europe and explore possible solutions to combat these trends.

23-AD37-4291

REFRAMING TRIBAL GOVERNANCE IN TRIPURA: TTAADC TO THE VILLAGE

MS. H THERESA DARLONG¹¹

The Tripura Tribal Areas Autonomous District Council (TTAADC) was initially set-up under the TTAADC Act, 1979. With effect from April 1, 1985 the TTAADC came under the purview of the Sixth Schedule of the Constitution of India. Tripura along with Assam, Meghalaya and Mizoram are the four states in the north-east of the country which have autonomous district councils functioning under the purview of the Sixth Schedule of the Constitution. The objective of Sixth Schedule is to protect the interest of the tribals by providing a framework of governance and administration in areas that are largely inhabited by them. The provisions of the Sixth Schedule allow the tribals to protect their customs, culture and identity including rights to land, natural resources and traditional beliefs. The TTAADC was also created with the objective to preserve and protect the interest of the tribals of Tripura who constitute about one third the population of the state (2001 Census).

There are 19 tribes and about 17-sub-tribes residing in Tripura. Unlike states like Meghalaya, Assam and Mizoram which have tribes or tribal majorities living in geographically compact areas, the tribal population in Tripura are scattered among a number of areas and are a culturally and linguistically heterogeneous minority in the state. Under the TTAADC, the most basic unit of governance is constituted by the Village Committee, which though an ideal of decentralised governance also means that the 527 different village committees makes it challenging for the TTAADC to formulate a common mandate for the tribal populace of the state.

Further, the Sixth Schedule provides for the administration of legislative, executive and judicial functions. The TTAADC consists of 28 elected members and 2 tribal members nominated by the Governor of the State out of which 25 constituencies are reserved for tribals. While the TTAADC has legislative and executive functions, it has not yet framed any legislation regarding

¹⁰ Dr. Salim Yaacoub, Assistant professor, Prince Mohammed Bin Fahed University.

¹¹ Ms. H Theresa Darlong, Assistant Professor, Women's College.

the setting up of village courts to try cases that are exclusively between tribals. Para 4 of the Sixth Schedule entitles the Council to constitute Village and District Council Courts in the autonomous areas to adjudicate or try cases according to customary laws in which both the parties are tribals. This has not been done in Tripura. This implies that the customary practices of the tribals living in the area are not fully within the ambit of Constitutional law, making for confusion and defeating the empowering purpose of the Sixth Schedule for autonomy and self-governance. Concurrently, there are also cases where tribal customary practice may renege against legal rights because of the lack of clear-cut laws regarding the authority and legality of decision-making at the village level.

A list of legislations enacted by the TTAADC shows that the legislations mainly deal with the regulation of markets, establishment of village committees, allotment of land, etc. While these are mainly regulatory in nature, a cursory glance at the list of legislations shows that an important aspect of protecting tribal culture and identity is the codification of customs and customary laws and practices, which has not been done yet. Social legislations protecting tribal interest in the spheres of personal laws in marriage, divorce, succession to property, inheritance, etc. need to also be looked into. In the context of Tripura, since there are many tribes this has to be done in active consultation with them. Since many of the tribes are not able to find a voice as they lack a majority to elect a representative from their tribe, hence an alternative mechanism of consultation has to be found out to ensure that the voice of all the 19 tribal groups also reaches the council.

As far as Village level autonomy is concerned the TTAADC has enacted the Tripura Tribal Areas Autonomous District (Establishment of Village Committee) Act, 1994 and framed rules under this Act. A criticism was that for a long time elections were not held to these village committees. In 2006 election to the 527 village committees was conducted that has resulted in democracy reaching the grassroots. Since many tribal villages are also predominantly inhabited by one tribe or sub-tribe this mechanism has ensured that each tribe, which may not be able to elect its own member to the TTAADC at least is able to elect the members of the village committee which in turn are recognized by the TTAADC. This mechanism needs to be strengthened if the TTAADC has to ensure true tribal autonomy and financial inclusion. This paper attempts to lay out the issues that exist in the current political structure of the tribal people of the state and also look for solutions to these longstanding problems, such that they are inclusive and meaningful for all concerned stakeholders.

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