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Articles

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The current issue of the Athens Journal of Law (AJL) is the second issue of the fifth volume (2019). The reader will notice some changes compared with the previous issues, which I hope is an improvement.

Gregory T. Papanikos, President
Athens Institute for Education and Research

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- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.

Important Dates

- Abstract Submission: **3 June 2019**
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- Submission of Paper: **17 June 2019**

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- **Dr. Gregory T. Papanikos**, President, ATINER.
- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.
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Regulation and Practice of Hungarian Cartel Law in the 20th Century[1]

By Norbert Varga[*]

The practical validation of the Cartel Law in Hungary can be reconstructed based on judicial practice. The existing memorials essentially only contain the verdicts of the courts of the first and second instances, and there are only a small number of archive sources that describe the factum in its entirety. Due to this, only the information found in the verdicts' dispositional and justification portions can aid us in the examination of the rules of Procedural Law. All in all, it can be stated, by taking archival sources into account, that the peremptory majority of cartel cases were jurisdictional legal actions. The specialized nature of the procedural rules can be viewed as unique in the history of legal action in Hungary, for the civil courts reached verdicts by mainly employing the rules of Bp., according to Statute 68400/1914. I. M. Apart from the problems in the field of Substantive Law, we can observe the process of the lawsuits and the procedural acts, especially the act of verification. We can observe what data and information the courthouses used in order to reach their resolutions. I would like to present the regulation of the Hungarian cartel law special attention to the legal cases.

Keywords: *Cartel law; Hungary; Procedure law; Legal cases; Archival sources*

Introduction

The rules and cases of the so-called legal actions of general interest in connection to the cartels were introduced by the 20th Act of 1931. According to the technical definition, the procedural law, as a specified aspect of Cartel Act, regulated the formal law so that the common good and the economy could benefit from it.[2] The methodology of the cartel supervision offices belonged to this area of law, and it was practiced by the government, the specific ministries, the Royal Hungarian Legal Board, the Cartel Committee, and the Price Analysing Committee from the executive branch, and the regular, elected, and Cartel Court from the judicial branch.[3] In this essay, I describe the dispositions in connection to the procedural law of the Cartel Court, and with that, to analyse the existing legal precedents.

The Cartel Court was introduced after the law came into effect, and it was reasoned by the statement of the Secretary of Agriculture: The "measures which

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[2]Harasztosi (1936) at 510.

[3]Kenes (1912); Perényi (1912).

must be taken against a cartel should be objected to the consideration of a judge most of the times, so […] the judicature of the Cartel Act could best be assured by a separate cartel court".[4]

Should an agreement or a statement fall under Paragraph No. 1 of the aforementioned Act, then, according to the statement of the assigned secretary, the Royal Hungarian Legal Board could file a case at the Cartel Court.[5] The problem of the definition of cartels by the courts arose in legal proceedings in connection to the agreements. To be more exact, the problem was what acts can be considered to be under the effects of Cartel Act.[6]

The aforementioned understanding of the act became interpretable by practice. The Cartel Court examined an agreement that considered the acquisition, resale, sale price, and conditions of firewood, coal, charcoal, and forge coal, and also contained rules on its accounts and mutual buyer protection. The Cartel Court interpreted Paragraph No. 1 of the Cartel Act, and determined that the intention of the respondent was not to regulate the actions on one occasion but "defined the respondents' behaviour in the terms of business for a longer time period". The point of the agreement was to regulate the economic competition "in connection to the commerce and formation of prices of these merchandises, between two subjects of free trade".[7] In its verdict, the Cartel Court stated that "such an agreement is under the effects of Paragraph No. 1 of the Cartel Act, with no consideration of its personal, economic or geographic field".[8]

The definition of common good and the interests of public economics was one of the most notable problems of the legal institutions that regulated cartels. The works of Ferenc Harasztosi Károly (among other literary sources) should be highlighted, which stated that "The state must establish a public law system for cartels, which ensures that the cartel disagreements of economic life are taking place within a framework which ensures that they do not endanger the interests of public economy and of common good".[9]

In this matter, we have to stress the first statement of principle of the Cartel Court (on the matter of business isolation, boycott, or exclusion).[10] This statement – by referring to Paragraph No. 6 of the Cartel Act – established that it is against the common good and economic conditions "exclusion not only gives a party economically reasoned disadvantages, but in fact capable of destroying its complete economic existence".[11] In connection to this, the Cartel Court also examined the cartel contracts containing the stipulations of isolation. The Cartel

[4]Magyar Nemzeti Levéltár (Hungarian National Archive) (hereafter MNL) K-184. 1933. 41. 30061/35309; Kelemen, S. (1931). 'A megalkotandó kartelbíróság szerepéről' in *Kereskedelmi Jog*. 28(2): 32-34; Anon. (1932); Stipta (2016) at 53-64.
[5]MNL. K-184. 1933. 41. 31960/92488; MNL. K-184. 1933. 41. 30061/35309.
[6]MNL. K-184. 1937. 41. 86293/86293; see: MNL. K-184. 1937. 41. 86293/86293.
[7]Cartel Court P. IV. 5261/1932; see Ranschburg (1935) at 35; MNL. K-184. 1933. 41. 31960/92488; Szabó (2016) at 64-81.
[8]Cartel Court P. IV. 5261/1932; In Ranschburg (1935) at 35; see: Curia P. IV. 3065/1933-22. Ibid. 36-37., P. IV. 920/1933/9. In: Ibid., 35.
[9]Harasztosi (1936) at 512.
[10]MNL. K-184. 1933. 41. 31960/92488.
[11]Ranschburg (1935) at 47; MNL. K-184. 1933. 41. 31960/92488.

Court only agreed to enforce this if it had "reasons especially significant and relevant to the public".[12] According to the Cartel Court, "The emphasis is not so much on private, but general interests".[13] The committee referred to the justification of the 5th act of 1923: "The categorical imperatives of morals must also be validated during conflicts in the fields of commerce and industry, if one does not want to set individual selfishness loose on the trade".[14] In connection to both fair competition and cartel regulations, one must always keep the interests of common good in mind.[15] The Curia also stated in Mandate No. IV. P. 4936/1927 that any contract which is against general interests and good morals shall be considered null and void.[16]

One could file a legal action to the Cartel Court if an agreement or an application of a regulation, or a cartel that was formed because of it, was against proper ethics or common good.[17] A secretary could ask for several things in such actions: the court should disband a cartel formed by such an application or regulation, and make a pecuniary offence if it keeps on functioning. The secretary could also ask for forbidding the execution of the agreement or the regulation, and for a fine if the participants continue to pursue their goals.[18] Filing a legal action introduced by the cartel court could be done by any office or individual by contacting the Secretary of Trade and providing ample evidence.[19] Before filing the legal action, the secretary could ask for a second opinion from the Cartel Committee, but it was not compulsory. However, if a public office or authority filed the claim, the secretary usually turned to the Cartel Committee for their opinion.

The administrative offices only practiced initiative rights during proceedings, and after this, taking measures were assigned to the court. The offices could participate in the legal action as a party to the dispute. All in all, it was in connection to the consideration of court independence and the guarantees of judicial proceedings, not to mention the respect of basic rights.[20]

In a lawsuit based on a legal action of general interest, the court could decree the disbanding of the cartel, to shut down its operations, to forbid the fulfilment of an agreement or a regulation, or force them to cease a certain action or behaviour. The Act clearly stated what legal arrangements were within the jurisdiction of the government. This meant that in order to enforce these decrees, one did not need a court order. The secretary could enact these measures if the agreement or regulation enforced upon the cartel endangered economic or general interests, especially if it regulated the circulation of goods production or price formation in such a way that the interests of the customers, the entrepreneurs, or the manufacturers were harmed.

[12]MNL. K-184. 1933. 41. 31960/92488.
[13]MNL. K-184. 1933. 41. 31960/92488.
[14]MNL. K-184. 1933. 41. 31960/92488.
[15]Szegő (1936) at 34-36.
[16]MNL. K-184. 1933. 41. 31960/92488.
[17]Dobrovics (1937) at 126; Szente (1931); Gavallér (1932) at 6.
[18]Ranschburg (1931) at 100.
[19]Ranschburg (1931) at 100; Harasztosi (1936) at 513.
[20]MNL. K-184. 1933. 41. 30061/35309.

It was within the jurisdiction of the ministry to examine the case, and, if was deemed necessary, it could propose to register the data, to make inquiries, and submit official documents. With the participation of a commissioned emissary, it could examine the business conductions and business management, and by looking at the business records and other documents of a cartel in question. It could also question the members and the employees. In case the ministry opted for the suspension of the operations of a cartel, then it could try to reach a peaceful solution by holding a hearing for the concerned parties. If this method was not fruitful, then it could propose to the government to withdraw tax and customs discounts, and the exclusion from public contracts. These arrangements fell under the topic of industrial codes and transport rates, and this is how the government intended to stop the cartel from continuing such actions that were against general interests.[21] Based on the suggestion of the Secretary of Commerce, the government could introduce these arrangements if none of the specified conditions dictated by the Act were present.[22]

In cases where the ministry filed for the cancellation of an official permit without which the cartel could not continue its intended activities, then they had to turn to the court. The ministry could make a suggestion to the government to modify or nullify the customs items written down in the customs tariff. There is an archived example for the latter. The Alkaloida Chemical Factory Inc. wrote an official letter to the Hungarian Royal Central Customs Directory on 12 December 1933, which stated that "For preparations, and in exchange for the exported amount of morphine intended for transformation, the morphine-derivates and their salts be imported customs-free".[23] Because of the emerged economic conditions, if everything else failed, the ministry could turn to the Cartel Court.[24] After briefly describing the rules of conduct, the procedural law – mostly civil law – rules in connection to the cartels will be described in a much detailed fashion, and the legal practice related to this and still available will also be presented.

The Lawsuits

The concept of a lawsuit of general interest was understood as a legal action started based on a claim filed by the Legal Board on the order of the secretary of commerce, with the possible purposes of disbanding a cartel or forbidding them to continue their operations; the suspension of the ongoing legal action, without taking into account whether it is held by an orderly or a court of arbitration; to determine whether or not the actions of a cartel are against the law; the annulment of the verdicts made by the specialized courts.[25]

The question arose regarding in which cases one can pass a lawsuit of general interest. It can be stated that the general opinion was that if there was a

[21]MNL. K-184. 1933. 41. 30061/35309.
[22]Harasztosi (1936) at 513.
[23]MNL. K-184. 1933. 41. 30061/92818.
[24]Ranschburg (1931) at 100-101.
[25]Harasztosi (1936) at 512; Dobrovics (1937) at 126.

chance of that, the state should intervene. The aforementioned Paragraph No. 6 of the Cartel Act determined these. This is not a taxative list, because the act mentioned above lists other cases for filing a statement in order to start a lawsuit of general interest in Paragraph No. 7. A statement could be claimed if the cartel's operations were against the law, public morals, or general decrees. Most of these types of cases were of private interest, and were held earlier by orderly courts or courts of arbitration of the chamber since they broke the law of fair trade. Among many others, some of these cases were lawsuits filed because of boycott or sale under price.[26] It is questionable whether these cases could become lawsuits of general interest since the law was broken, or the acts in question also harm general interests. This is a significant matter, for in cases where competition laws were broken and no general interests were harmed, orderly courts had the jurisdiction.

In my opinion – based on the understanding of the normative text, in order for a lawsuit of general interest to be filed to the Cartel Court, not only the law and public morals had to be broken, but also general interests.[27]

I agree with the statement of Nándor Raschburg, according to which even the name of the lawsuit of general interest excludes the opportunity for a private proposal. The legal action was proposed by the Secretary of Trade at the Royal Hungarian Legal Board. This also indicated that not only the law and public morals had to be harmed, but also the general interests. The statement had to be filed to the Legal Board based on this. In the conviction, the Cartel Court's verdict had to determine the harm that came not only to the law and public morals, but to the general interest, as well.[28]

The evasion of the Cartel Act was the purpose of the so-called "coal cartel", where the coal merchants and the mines, the coal merchants and the medium vendors, and the MÁK and the Salgó reached an agreement. This contract resulted in a monopolistic situation in the coal supplies of Budapest, for ten wholesale merchants took on the obligation to purchase 37.500 carriages of coal from two mines, which was almost the complete coal needs of Budapest for a whole year. The merchants were not allowed to sell any other coal. Because of this, any mines and merchants who were not involved in this contract got into a difficult position. Not to mention that if we look at the situation from the point of view of the consumers, they were forced to buy briquette. The purpose of the cartel was to sell the so-called powdered coal which was pent up.[29] According to the viewpoint of the Cartel Committee, several elements of the cartel contract endangered common good and the interests of public economy, and as such, it falls under the effect of Paragraph No. 6 of the Cartel Act, and because of this, they requested a rise in prices, the elimination of the uncertain economic situation, the decrease of unemployment, stopping the cartel from gaining any advantages in the field of

[26]MNL. K-184. 1933. 41. 31960/92488; Kelemen (1933).
[27]Ranschburg (1931) at 101-102.
[28]Ibid., 102.
[29]MNL. K-184. 1933. 41. 51140/88831

public services, and the annulment of the disadvantaged position of the mines outside the cartel.[30]

The Jurisdiction and Procedure of the Cartel Court

Lawsuits of general interest, temporary measures, laying on of pecuniary fines per orderly punishment, forbiddance, nullification of the verdicts of elected courts, and the suspension of execution of the regulations of elected courts were within the jurisdiction of the Cartel Court.[31]

The Cartel Court could only order the dissolution and the ban from ongoing operation of a cartel if a cartel's operations were against general interests and there was no other way of terminating it. The law gave the secretary the right to ask for a termination directly from the court, without authorizing any other means. However, the rights related to the termination could mean constraining basic rights, especially the right to fusion. But the constitutional rights could only be limited in special cases and with legal authority. Any other case would make the court's actions illegitimate, and it would have been measured by the arbitrary legal practice.

With the dissolution of the cartel, the court generally forbade the cartel and its members to continue their operation. The dissolution of the cartel did not mean that the members would not keep up its operation by acting in unison. This meant that the only way that the verdict would come into effect is if the court forbade the cartel to practice their operation.

There were cases where in spite of the fact that the cartel was dissolved, it kept on operating. The law did not forbid this per se, but in practice what this meant is as follows. The verdict of the court was only valid for the dissolution and the forbiddance of the operation of the cartel involved in the lawsuit. If a new cartel was formed based on a new treaty, then the former verdict did not come into effect there. A new legal action had to be taken against the operation of the new cartel, and new proof was needed that its operation is against general interests. However, in urgent cases, the secretary could place temporary solutions into effect.

In cases where the misconducts of the cartel could be nullified by the fulfilment of an agreement or a decree, then this became the court's order. This was also the decision where the nullification for the statement of claim was filed. In spite of all this, if the statement only asked for the nullification of the agreement or the decree, then the court could not state the dissolution in its verdict. In these cases, the court would have overruled the statement of claim, which is against the 1st Act of 1911 (Judicial Procedure Code, JPC from here on out). They only petitioned for the nullification of the operations or behaviour if the behaviour of the cartel could not be demonstrably correlated to an agreement.[32]

[30]MNL. K-184. 1933. 41. 51140/88831; MNL. K-184. 1932. 41. 51140/53726; MNL. K-184. 1932. 41. 51140/88298; Mária Homoki-Nagy (2017) at 4-14.
[31]Harasztosi (1936) at 528-529; see: anon. (1933).
[32] Ranschburg (1931) at 103-104.

The structure of the Cartel Court was regulated by the Cartel Act itself (Paragraph No. 8). This court was a separate institution, which was established, interestingly enough, within the Supreme Court, the topmost institution within the ordinary judicial system with a president, two appointed judges, and two lay judges. Its head was the president of the Supreme Court, or an individual appointed by the Supreme Court: the vice president or one of the presiding judges of the Supreme Court. The two judges were invited by the presiding judge appointed by the Supreme Court and the president of the acting council by the two appointed judges. The two lay judges were selected by the president of the acting council from those ten specialists that were selected every three years from the list assembled by the Secretary of Justice and the Secretary of Commerce, containing thirty names. The reason behind this was to ensure competency.[33]

Lawsuits of general interests had to be delivered for all participants concerned. In cases where representatives were announced or appointed, then the statements had to be delivered to this individual. In these legal actions, any participants could participate separately, and accompanied by their legal representatives.

In order to ensure a professional opinion, the court could meet with the Cartel Committee ex officio. If it proved to be necessary, the Cartel Committee could do the same with the Price Analysation Council.[34] For example, they followed this procedure in the case of the so-called tin box cartel, in order for the matter to be properly examined. The Cartel Committee called on the Price Analysation Council in order to proceed with the run-down of the prices of some "cartelised commodities". For example, hemp, string, and canvas belonged to this group. There were some agricultural tools on the list, as well, for example, spits, hacks, and shovels.[35] The Cartel Committee took the report of the Price Analysation Council into account in connection to the price of wool and cloth. They also elaborated on what business policies the concerned parties should follow in order to increase the price of Hungarian fleece. They collected their suggestions on appendix sheet 92157/1933, which, among others, listed suggestions such as increasing the influence of the state.[36]

The Cartel Court took the examination results of the Price Analysation Council into account in the suit of Alkaloida.[37] They wished to determine the price of narcotine by moderating.[38] The Committee formed a specialised group while determining the prices. This group reached a decision after the acquisition of the necessary data and conducting hearings for the concerned parties.[39] In the case of

[33]Ibid.,104; Harasztosi (1936) at 528.
[34]Harasztosi (1936) at 522-526. Kelemen (1933).
[35]MNL. K-184. 1933. 41. 31960/92488.
[36]MNL. K-184. 1933. 41. 31960/92157.
[37]MNL. K-184. 1936. 41. 50306/55755.
[38]MNL. K-184. 1936. 41. 55714/55714; MNL. K-184. 1936. 41. 50306/55594; MNL. K-184. 1935. 41. 62330/62330; MNL. K-184. 1933. 41. 51140/88831.
[39]MNL. K-184. 1935. 41. 62330/62330; MNL. K-184. 1934. 41. 28720./71729; MNL. K-184. 1934. 41. 26180/71732; *8 Órai Ujság*, 1934. Vol. 20. No. 246; MNL. K-184. 1932. 41. 51140/66312.

the so-called "oil cartel", they criticised the price and quality determined by the Committee. Quality assurance methods had to be established, as well.[40]

In connection to the work of the Price Analysation Committee, a registry can be found amongst the archived materials, with a short description of price reduction for each and every commodity. This report specifically mentions white oils (paraffin, gasoline, diesel oil), lubricating oil, agricultural tools (i.e., axles, horseshoes, shovels), ironmongeries, machine lubricants, textbooks, linseed oil, pesticides, textile, cement.[41]

As mentioned, the Secretary of Trade could give an order to the Legal Board to start a lawsuit of general interest. The plaintiff of these lawsuits was the Royal Legal Director, who always stood for the interests of the state and the general population. No single individual could become the plaintiff in such lawsuits.[42]

It is also noteworthy that the outline of the Cartel Act would have given an opportunity for a competitor outside the cartel (a so-called *outsider*) to file a claim for a lawsuit of general interest. However, the counterargument was brought forward that *outsiders* would most likely try to secure their private interests by a lawsuit of general interest, and it would be "a direct harassment of the cartel, would learn and publish their business secrets, and their ultimate goal would be to enforce a bigger and bigger contingent for themselves, and also to join the cartel, and after that, would nullify the lawsuit which was started by them being the plaintiff".[43] But there were reasons for the outsiders to become plaintiffs, stating that this would have helped the detection of cartel abuses. The lawsuits filed against cartels could have been much more successful if these were started by *outsider*s. However, private and general interests were separated within the law proposal, so in the proposition submitted to the parliament, outsiders were not granted the right to become plaintiffs. Legislation accepted this viewpoint.[44]

This meant that no interest of private law could be enforced in lawsuits of general interests. "The legal action of private law – public action – can only serve to protect and avoid the endangerment of the law, public morals, general interests, and by that, economy and the welfare of the public, and in order to do so, it shall not be used to serve personal interests".[45] In cases where individuals suffered private wrongs due to the operation of cartels, then a civil lawsuit, and not a lawsuit of general interest, was necessary. If, apart from his complaint, the operation of the cartel endangered general interests, the individual had the opportunity to draw the attention of the supervision and the ministry to this fact. After this, the ministry had to take the necessary legal actions.[46]

The respondent of a lawsuit of general interest could be all of the concerned parties. In a case when a cartel was operating as a legal entity, then the respondent mostly became the cartel itself via a representative. The members of a cartel could also be included in the lawsuit as concerned parties.

[40]MNL. K-184. 1932. 41. 51140/53726.
[41]MNL. K-184. 1932. 41. 51140/66312.
[42]Harasztosi (1936) at 533.
[43]Ranschburg (1931) 105.
[44]Ranschburg (1931) 105.
[45]Harasztosi (1936) at 532.
[46]Ranschburg (1931) at 105-106; MNL. K-184. 1937. 41. 86293/86293.

If a cartel did not have a separate legal entity on its own, the legal action was taken against its members. In cases where a cartel had a sales office or administrative organisation functioning as a legal entity, or all of its transactions were fulfilled by the cooperation of a bank, then it was practical to include these in the lawsuit, as well, for most of the debatable legal actions were made under the names of these legal entities. This is why it became justified that the enforcement to discard the ban or actions could be carried into effect directly against these, as well.[47]

There is a specific example for these in the contract in the case of the "bakery cartel", where Paragraph No. 30 elaborates on the legal entity's jurisdiction and tasks. A bank was delegated to fulfil these tasks, and it did so by using its own name but by keeping the interests of the members of the contract in mind, so it "is legally bound in their name, and in case of becoming a plaintiff or a respondent, could act on its own, and practice all rights that is present for all concerned parties as individuals".[48]

The large headcount of the cartels could significantly make summoning more difficult, and could slow down the legal action. So if a cartel had a registered legal representative, the statement of claim had to be delivered to that individual. If there was no such person, then the head of the Cartel Court appointed a representative. If the representative accepted the statement of claim, it meant that all of the cartel members received and noted it. It was the obligation of the representative to notify each member of the cartel of the contents, each of whom could participate in the lawsuit with separate legal advisors.

The proceedings of the Cartel Court were held with the basic principle that nobody with private interests can participate in them. As mentioned above, the concerned parties were represented by attorneys in the legal action. In cases of general interests, the action at law could only be filed against all participants, which, in these cases, meant all members of the cartel.[49]

Execution

In the verdict – in case of amerce – the court always forbade a cartel or one of its members from continuing their operation, or the enforcement of an agreement or regulation, by a pecuniary fine. This is how a cartel was forced to discontinue its operations. The verdict did not state the size of the fine, the executive branch was tasked to establish that. The execution was asked by the Legal Board. The application had to be filed to the Cartel Court, and certify that the cartel or its members fulfilled their obligations as stated in the verdict. The Cartel Court determined the fine after a hearing with the amerced participant. During this, they had to take the wealth intended to be gained from the action and the financial status of the participant into account. The warrant that enacted the fine was a legal document also carrying executive powers, which were obligated by a judicial

[47]Ranschburg (1931) at 106; Harasztosi (1936) at 534.
[48]MNL. K-184. 1934. 41. 26180/71732.
[49]Ranschburg (1931) at 106-107; Harasztosi (1936) at 534.

executive. Not obeying the interdiction could result in the repeated infliction of the fine.[50]

The Cartel Policy in the Cartel Case Law

A very specific area of Cartel Law was the Cartel Policy Law, which was closely connected to the state's power to oversee cartels, which meant nothing more or less than the protection of economy and public welfare. This procedure included the ordinary fining procedures.[51]

According to Act XX of 1931, only those who failed to introduce the Cartel Settlement or the order could be punished by ordinary fines, and did not provide ample reason for this omission for those who did not obey the appeal for the examination of the case by the Secretary of Economy, all in all, failure to fulfil the duty to provide data, or obstructed the fulfilment of the appeal.[52] Those who carry out appeals or settlements they were forbidden to do so by the Cartel Court, or manifest behaviour or carry out acts forbidden by the Cartel Court, are contained within the same framework.

In the first two cases, the assigned courthouses were required to see the case through, which started the procedure according to the request of the legal director of the treasury based on the proposal of the secretary. In the third case, the Cartel Court was privy to the case, for it could establish a fining ex officio. The Cartel Court was assigned to the case if the fine was established repeatedly but unsuccessfully for a second and third time according to the motion of the Secretary of Economy, or in another lawsuit of general interest according to the motion of the legal director, if they wished to suggest proscription from trade or industry permanently, or for a pre-established period of time.[53]

According to Harasztosi, none of his cases in fining procedures only the lawsuits concerning ordinary fines had any actual significance, especially if the presentation of a document was forgotten or was filed late; or in cases filed for omission of compulsory data presentation. In cases filed for the failure to oblige presentation duties, the matter of penalty fell under the rights of the assigned secretary. The confirmations filed to the secretary had no such effect, which vindicates the affair; the contestants could not achieve more with it than saving themselves from paying the ordinary fine.[54]

In fining procedures started at courts of justice, the court had to use the rules in cases of trade delinquencies. This order of 68,400/1914.I.M. had to be taken into account.[55]

In a case of ordinary fining procedures, no imprisonment could be ordered as a main rule, for the fine levied due to the failure to present a document could be

[50]Ranschburg (1931) at 108-109; Harasztosi (1936) at 536; Varga (2016) at 660-669.
[51]Harasztosi (1936) at 546-547; see Varga (2017) at 13, 46-56.
[52]Lőw (1935) at 350.
[53]Lőw (1935) at 351; Dobrovics (1934a) at 10; Anon. (1935).
[54]Harasztosi (1936) at 548; Lőw (1935a) at 352.
[55]1931:XX. tc. 15. §.

transformed into custodial sentences. There were specific cases where the fine could not be collected, but even then the Act had to specifically allow this transformation.[56]

The legal director asked for the actuation of the procedure, and presented the agreement Mihály Schwarz, Mihály Menzer, and Ignácz Ádler, timber merchants from Kiskunhalas, made in 1933 according to Paragraph No. 1 of the Cartel Procedural Law concerning timber, terracotta bricks, and pottery products. They introduced the cartel contract to the Secretary of Trade on 12th April, 1933; however, the list of pre-determined prices, which should have been one of the appendices of the contract, was only presented on the 4th May, 1933. In this case, the participants were late, and didn't even provide a justification for this. According to this, the Secretary of Trade ordered the legal directorate to actuate a case due to the failure to present a document. According to decree No. 68400/1914. I. M., the legal directorate asked the Royal Court of Kalocsa to actuate a case against the aforementioned companies.[57]

The fining procedure was heard by one of the orderly judges of the court of justice, who, as the presenter of the case, put the examination and trial aside to direct the attention of the complainants to the fact that the justifying statement had to be presented within 15 days after the appeal to do so was received. After this, the court decided on the appropriate penalty or the annulment of the case by taking into account the presented documents and the officially imparted information. The warrant established during the closed hearing was delivered to both the complainants and the royal legal directorate. According to this, the aforementioned decree presented role of public accuser to the royal prosecutor, but based on legal practices, this position was fulfilled by the legal director in such cases.[58]

In the aforementioned lawsuit actuated by the Court of Kalocsa, the participants were asked to provide a document in proof.[59] According to this, the complainants provided the document in proof, with which they wished to verify that they did not fail their duty to present documents, as established in the Act.[60] According to their document of proof, their opinion is that there was no sin of omission, for they didn't establish the appendix of the contract when they signed the contract, and after it was signed, they introduced it to the Secretary for inspection within the deadline.[61]

Within 8 days after the delivery, they could turn to the assigned High Court against the decision. This affected the decision by having a postponing effect. Any individual who was thwarted in validating his or her individual rights in a lawsuit of the first or second degree, could file a document of proof. However, one could not file a document of proof because of an omission; the application for the

[56]See: Act X of 1928 article 16.
[57]Cg. 187/1933. sz. BKML. VII. 2. c. See: P. VI. 9489/16/1934 BFL, 13. P. 46341/3/1933. In: 2746/1934 BFL, Cg. 35030/9. sz. In: 1158/1934 BFL., Cg. 33989/6/1932 In: 920/1933 BFL., Cg. 34592/4. sz. In: 4913/1933 BFL.
[58]Harasztosi (1936) at 549.
[59]Cg. 187/3/1933. sz. BKML. VII. 2. c; see: 13. P. 46341/3/1933. In: 2746/1934 BFL
[60]Cg. 187/1933. sz. BKML. VII. 2. c.
[61]Cg. 187/1933. sz. BKML. VII. 2. c; see: Cg. 187/4/1933. sz. BKML. VII. 2. c., Cg. 35030/9. sz. In: 1158/1934 BFL; Dobrovics (1934a) at 14.

document of proof had to be filed for the court of justice within 30 days of the established day of the trial or the expiration date of the failed legal remedy.[62]

The formulaic rules of the application were under the effect of Paragraphs 464-466 of the Criminal Code of Procedure. It had to be filed at the courthouse where the complainant failed to keep to the deadline. This application had to contain the reason for the delay and the justification information and data; the evidences that the court needed also had to be enclosed. If the matter was of the omission of an act of legal remedy, then the appointed court of the first degree turned the application over to the assigned higher court. In cases where the court made place for the document of proof, they, at the same time, also acted for the substitution of the omitted documents. The Court of Appeal had the power to come to an absolute decision in the case.[63]

In the lawsuit filed against the companies Nagykovácsi Lime Factory Corporation and the Lime and Grout Sales Corporation, the complainants presented in their document of proof that the debated agreement was not made on 20th March, 1933, for on this date, they only signed the draft of the contract. The court did not accept the statement presented in the document, and fined the complainants for breaking Paragraph No. 14 of the Cartel Procedural Law.[64]

To find the bearings of a case, the court could order an examination if deemed necessary. In this case, the court selected an investigator from its own apparatus of judges and notaries. The duty of the investigator was to describe the bearings of the case, and based on this, the court of justice could order the termination or the continuation of said legal action. In order to do so, the investigator interrogated the complainant, and acquired all documents and evidences necessary to clarify the bearings of the case.[65]

The rules of Bp. were deemed valid during the interrogation of witnesses and experts.[66] The court or the investigator could absolve any business associate from clarifying any circumstance which was not deemed vital to the examination or the case, yet would result in business secrets that are not necessary for the trial to come to light. If the investigator deemed it necessary, he could ask for a court order for an audit. This procedure was only valid if it was deemed necessary to ascertain the omission or act under investigation. If the procedural step could only be fulfilled by the means of writ, it was necessary to turn to the assigned County Court. The court of justice could order the investigator to continue or terminate the investigation.[67]

To uphold common welfare, the legal directorate could oversee the inspection, and because of this, it could examine the investigation documents, and could file a proposal to the investigator to continue or terminate the investigation, or could file a proposal to the court of justice to debate the investigator's regulations. The latter two were within the complainant's rights, as well, who

[62]Harasztosi (1936) at 549.
[63]Harasztosi (1936) at 549.
[64]Cg. 35537/3 in 5812/1934. BFL; Lőw (1935) at 354; Dobrovics (1935b) at 12; Dobrovics (1934b) at 13.
[65]Harasztosi (1936) at 550.
[66]Cg. 35030/9. sz. In: 1158/1934 BFL; Dobrovics (1934b) at 15.
[67]Harasztosi (1936) at 550.

could select a defence attorney even during the investigation, whose rights were also determined by the Bp. The defence attorney could only be one of the practicing legal experts, one who was registered at one of the Bar Associations.[68]

The complainant had no right to intervene or propose during the examination or the rest of the procedure, could not form a statement or get legal remedy. However, he or she was free to introduce any circumstance to the investigator, the court of justice, or Court of Appeal, which could move the examination of the omission or illegal activity forward or assist the verification. If he was not selected to appear as witness, he could press for this, and the court of justice and the Court of Appeal were obliged to enact this, with the added burden of nullifying.

After the examination was finished, the investigator sent the documents to the court of justice. Based on these documents, the court could order the termination or the continuation of the legal action. The court stated the termination of a legal procedure in a warrant. In any other case, a term had to be set in order to continue the case orally. In cases when the act or malpractice fell under the effect of criminal law, the legal action had to be transferred to a Criminal Court.[69]

A case was filed against the Chinoin Pharmaceutical and Chemical Factory Corporation for breaking Paragraphs No. 2 and 14 of the Cartel Procedural Law, and thus committing cartel malpractice; it took place at the court of justice of Budapest, where the court of the second degree reached a warrant, specified as No. 35779/2, but was turned to a higher court by the legal directorate, yet it was rejected by the Court of Appeal, and in their warrant, they pointed out Paragraph No. 1 of the 5th Act of 1878, according to which an act can only be considered a crime or a delinquency if the Act considers it as such.[70] In such cases, Criminal Courts should proceed.

The court could order the legal action to move forward, if the bearings of the case were clear. Before this, the complainant was asked to make a statement with a 15-day deadline.[71]

In the warrant ordaining the trial, the act or malpractice encumbering the complainant had to be stated, with the exact place of a specific provision under the law.

At the same time, the court of law was assigned with the task to provide a warrant to appear to all contestants, witnesses, and experts. They could even issue a warrant to appear for those participants who were announced after the beginning of the trial by any of the contestants. The complainant had to be warned that if he or she chooses not to appear, this non-attendance does not obstruct the continuation and discussion of the case; he was free to hire a legal representative to take place in the case.[72] The arrival of the subpoena and the beginning of the trial had to be at least 15 days apart. During trials, if the complainant was a natural person, he or she could not be apprehended, committed into custody, or put in

[68]Harasztosi (1936) at 551.
[69]Harasztosi (1936) at 551.
[70]P. VI. 8146/4/1934. BFL.
[71]Harasztosi (1936) at 551.
[72]Cg. 187/2/1933. sz. BKML. VII. 2. c.

detention awaiting trial. This was a significant difference between this and a criminal legal action.[73]

The beginning of the trial was marked by reading out the warrant that ordained it, and after that, the judge summarized the case. The trial could be held even if the contestants failed to appear. The witnesses and experts could be ordered to step forward, and, in order for them to do so, the trial could be interrupted for a few hours.

After this, the president could interrogate the present complainant in connection to the act or malpractice, and the members of the judicial board, the president of the legal department, and the defence attorney could ask their questions.[74] After these, verification was recorded.

After verification was finished, the president of the legal department introduced his proposal to the court, followed by the defence attorney and, finally, the complainant. There was no place for any other discussion in this section of the legal action. In cases where the contestants failed to appear, the judge introduced and described the evidence.[75]

The publicity of the trial was under the rules written down in Bp. The court could order the exclusion of the public in order to preserve business secrets. The rules written down in Bp. were also valid in connection to the development of the trial and maintaining order.[76]

During the fining procedure filed against the Textile Factory of Győr Corporation, the Textile Industry of Soroksár Corporation, and Mózes Freudinger and Sons Corporation, the royal court of Budapest considered the minutes of 18th February, 1931 as evidence, and according to this, they determined that the complainants were present in the general assembly on the raw material agreement, and these individuals "report their inclusion to the raw material agreement, since up to that point, their inclusion was based on gentlemen's agreement".[77] The court considered this unwritten gentlemen's agreement to fall under Act No. 1 of the Cartel Procedural Law.

The court judged the circular letter on the same merit, when it stated that it is a regulation in itself that should have been presented to the Secretary of Trade, "for it obviously serves the purpose that the individuals who wrote it down and signed it could sell their merchandise at a higher price, and thus limit the economic competition in connection to the formation of prices".[78]

The court considered the fact that the agreement formed by Rezső Vágó Corporation and the Hungarian Timber Corporation was not presented to the court in time, for it only fell under the effect of Paragraph No. 1 of the Cartel Procedural Law after the P. IV. 5261/1932 verdict of the Cartel Court as an extenuating circumstance. The court stated that "The decrees of the Cartel Procedural Law are not only valid for cartel contracts, but also establish the duty to present any sort of

[73]Harasztosi (1936) at 551.
[74]Harasztosi (1936) at 552.
[75]Harasztosi (1936) at 552.
[76]Lőw (1935) at 354.
[77]Cg. 35504/6. sz. In: 4681/1934 BFL.
[78]Cg. 33989/6/1932 In: 920/1933 BFL.

agreement which, in connection to merchandise, establishes any sort of limitation or regulation duty to the economic competition, both in the matters of circulation or price formation, so, even a delivery contract can fall under the regulations of Act No. 20 of 1931".[79]

After the trial was finished, the court of justice could either terminate the proceedings or could determine that the complainant was guilty and describe the appropriate punishment in its warrant. In both cases, the order needed reasoning. The proposal of the legal director did not bind the court in any way. The fine had to be executed with a 15-day deadline.[80]

The legal director established a similar procedure against the Sándor Angyalfi Asphalt and Tar Industry Corporation, János Biehn, Grozit Asphalt and Tar Chemical Products Corporation, Tivadar Helvey, DSc, Manó Kallós Ferenc Kollár and Co., Hungarian Asphalt Corporation, Posnánszky and Strelitz, and Hungarian Cover Panel Factory purchaser and sales cooperative due to cartel elision.[81] The royal court of Budapest stated in its warrant that the complainants are guilty, for the agreement which elongated the contract that expired on the 28th February, 1934, was only presented after the deadline, so, belatedly.[82] The court stated that "According to Paragraph No. 2 of the 20th Act of 1931, any agreement which modifies or regulates the economic competition, modifies and elongates he original, or any necessarily written agreement that falls under Paragraph No. 1 of the Cartel Procedural Law should be presented within 15 days after the establishment of the agreement. According to this mandate, it is not enough to just report the agreement, but a written form of the agreement had to be filed for the Royal Secretary of Trade of Hungary for registration."[83]

In another case, the court of justice of Budapest terminated the procedure against the complainants, for it turned out that the agreement was presented before the deadline, since the court established that the formation of a cartel agreement is, by definition, the moment when every participant signed the contract.[84]

Summary

To sum it all up, according to the sources available in archives, most cartel cases were judicial proceedings. It can be stated that the special nature of the rules of these proceedings was unique in the Hungarian Code of Civil Procedures, for the civil courthouses made their decisions in a case of civil law by using the rules of the Code of Criminal Action. After the turn of the century, the economic changes started processes in both the field of legal life and legal sciences, and as a result of this, a demand arose to legally codify any rules in connection to cartels. The foundations of these were found in private law, especially in the regulations of

[79]Cg. 34592/4 In: 4913/1933 BFL; Lőw, 1935. 355
[80]Harasztosi (1936) at 552; see: 13. P. 46341/3/1933. In: 2746/1934 BFL; Lőw, 1935. 353.
[81]Cg. 35891/3. sz. BFL. 11543/1934.
[82]Cg. 35891/3. sz. BFL. 11543/1934.
[83]Cg. 35891/3. sz. BFL. 11543/1934; Dobrovics (1934c) at14.
[84]Cg. 35547/12/1934 BFL; Szabó (1931) at 35-46

the commercial law, which could be further elaborated upon and lead to development of the regulations on the annulment of contracts in connection to dishonourable business competition. Beyond the creation of the technical legal regulations, the establishment of certain judicatory institutions was inevitable in order to enforce these. This is how the Cartel Court and the Cartel Committee became one of the most decisive legal institutions in economic life up until the middle of the 20th century.

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Legal Sources and Interpretation in Russian Civil Law

By Vladimir Orlov[*]

Russian civil law shares the continental law tradition. Continental law is characterized as a normative legal system, basically emerged in the antique world due to the emergence of alphabetic writing and dialogic communication, that functions through the jurisprudence, where legal sources and interpretation are applied. The French la dictature de la loi and the German Begriffsjurisprudenz still form the conceptual basis of the Russian civil law. The dominance of the legal positivist approach, and consequently, the overemphasized role of the statutory law and dogmatic interpretation of the legal material are, in general, specific for Russian law, whereas the efforts towards the internalization and globalization of law in Russia are still more declarative than real. Nevertheless, the pragmatic approach, enforced in the judicial practice, and the recognition of this and custom as legal sources as well as the equity consideration in the legislation, have been introduced by the recent novelties to the Civil Code. But these changes seem to form a challenge for the Russian legal system and particularly for the doctrine, the position of which has become even weaker than before. And as foreign languages are generally ignored in the country, the Russian legal discourse seems to have remained domestic, strongly bounded to the traditional legal positivism.

Keywords: *Legal positivism; Statutory law; Dogmatic Interpretation Doctrine; Equity consideration*

Introduction

Comparative Realistic Approach

Methodologically this paper is based on the application of the comparative realistic approach that corresponds to my foreign law expertise—Russian law for foreigners and foreign law for Russians.The realistic approach and—in the studies concerning foreign law—comparative realistic approach is that I share; it is characteristic for lawyers of Nordic countries. My boundedness to the realistic thought particularly means that I am critical to different kinds of metaphysical legal thought including theological law, natural law, liberal law, and socialist law.[2] For me, they represent an ideological (legal reality value) part of legal discourse, often being simply rhetoric. The ideas stay outside of the creation of the legal reality, which occurs through establishing, changing or abolishing the legal relations. The foreign legal reality is national culture bound, wherefore a study of

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[2]My attitude is particularly critical towards the universal legal metaphysics with its attempts to find the final truth about the law.

foreign law, particularly Russian law, though its similarities to western law, requires an internal approach[3]—that is, if not sympathy, at least empathy to the subject—in order to be productive[4]. Therefore, in presenting Russian law, important are not only legal norms but also the Russian legal thought and rules on the interpretation of law and also of contracts.

Origin of Russian Modern Law

Russian civil law shares the continental law tradition. Continental law is characterized as a normative legal system[5] concerning the a priori fixed social behavioural rules that are applicable to concrete cases of social collision through the dogmatic, originally exegetic[6], interpretation[7]. Continental law has emerged in the antique world due to the emergence of alphabetic writing and institutionalization of dialogic (dialectic) communication[8]. Modern development of Russia started through the Greek alphabet[9], modified into Cyrillic to correspond to the phonetics of Slavic languages, including Russian; letters of the (Russian) Cyrillic alphabet rather exactly correspond to the sounds of the Russian spoken language, and it has offered possibilities of the exact fixation of legal text. Due to the influence of Byzanthine culture, including Orthodoxy[10] and Roman law, Russia has joined the European civilization.

As a normative legal system, Russian law functions through jurisprudence, where legal sources and interpretation are applied. The French *la dictature de la*

[3]Usually it requires the internalization (through description) of the positive (normative) legal material, texts of laws (or precedents) of the legal system at issue.

[4]Law deals generally with the phenomena that are subject of the social and behavioural sciences requiring an intentional comprehension where at least empathy is important. Furthermore, in respect of comparative legal studies, attention ought to be paid to the teleological dimension of legal phenomena.

[5]Originally normativistic was the Jewish law that, in addition to the Pentateuch, basically existed in the oral form before its written fixation in the *Mishnah*, the earliest compendium of Jewish law.

[6]In general, the exegetic approach stands for the interpretation grounded on the material a priori existing as religious dogmas and canons, political doctrines, authority's teachings or legal normative texts.

[7]The modern normative legal system must correspond generally to the the principle (trilogy) of juridicity, containing the requirements on legality, legitimacy and ethicality that concern particularly legal decision-making. *See* de Oliveira Costa (2017) at 116, 118–19.

[8]For more on the subject *see* Frolov (2004) at 140 and Yunis (2003) at 2, 4, 8 and 78.

[9]The origin of the difference in Western thinking comes from the rise of literacy, namely completely abstract phonetic, alphabet-based writing system in Greece in ancient times; it processed in acquiring the mental habits of individualism, abstract thinking and internalization – all characteristics of the Western mind. *See* Ong (2002) at 27, 86; and Havelock (1976).

[10] However, Orthodox Christianity was adopted in Russia at the time when the period of its dogmatic pursuits in Byzantine had ended. Therefore, the Russian religious consciousness has understood the Christian doctrine as being complete and not subject to analysis. Thus, openness to the problematisation of fundamental religious questions had not rooted in Russia. Non-critical attitude to the a priori knowledge has also been (and still is) characteristic for the Russian traditional societal, particularly social scientific, thought that has been oriented towards the exploration and elaboration of the (in the first instance universal) truth composing the system of linearly accumulated knowledge. For more on this subject *see*, for instance, Zenkovsky (1989) at 3; Mamzin (2008) at 136; Kourany (1998) at 254–257 and Chestnov (2004) at 16–19.

loi—that represents the ideas of the exegetical school[11] and the German *Begriffsjurisprudenz*—that is the product of the pandectistic legal science[12]—still form the conceptual basis of Russian civil law. Thus, the legislative norms stand for the content of the law, whereas the legal-dogmatic conclusions must correspond with the legislative norms for securing the coherency[13] and consistency[14] of the legal system[15] in Russia. Moreover, the idea of 'the only one proper solution' still dominates the Russian legal thought. It also promotes legal stability and predictability that are to be regarded as benefits of the Russian legal system. The situation has not radically changed even in respect of the business law in Russia, which has been under strong influence of common law during the last decades.

Russian law has, though its similarities with continental law are obvious, specific features. For instance, traditionally in Russian culture, law is associated with *pravda* (often meaning positive law codification) that is also identified with right and justice implying equity and even truth (*veritas*). The absence of strict differentiation of these concepts, adopted in the Russian Orthodoxy, is still characteristic for Russian legal culture in general.

Basis of Russian Civil Law

Legal Sources and System of Civil Legislation[16]

The primary legal source of Russian law is a written law or statutory law. The majority of the civil law norms are contained in the Civil Code[17]. In recent years, the Civil Code has been subject to changes, the purpose of which was to show that Russia intends to participate in the internationalization and globalization of law.

[11]According to the exegetical school that prevailed in France throughout the XIX century, the only true law is deemed to be positive law, namely, the codified text of the law, and this is to be applied directly without making any recourse to natural reason or equity; otherwise, judges have no power to make any general rules. See Chiassoni (2016) at 1631-1666.

[12]Pandectistic legal science, and particularly the doctrine of conceptual jurisprudence (*Begriffsjurisprudenz*), that emerged in the German historical school, represents the dogmatic jurisprudence to the utmost. Originally, the concept of *Begriffsjurisprudenz* is based on the notions (1) that the given law contains no gaps, (2) that the given law can be traced back to a logically organized system of concepts ("pyramid of concepts"), (3) that new law can be logically deduced from superordinate legal concepts, which themselves are found inductively ("method of inversion"). *See* Haferkamp (2011) and also Chiassoni (2016) at 1631-1666.

[13]It means that legal rules are logical in content and reflect the value basis of the legal order.

[14]It means that legal norms are not logically, formally, dogmatically contradictory between each other.

[15]Niemi (2000) at 104.

[16]For more on the subject *see* Orlov (2011) at 8–15.

[17]The Civil Code is the product of a transition era in Russian law. It drew upon the pre-revolutionary Russian civil law tradition and upon models of continental Europe and gives occasional evidence of influence of the common law system. The Civil Code also retains many elements of the Soviet civil law. It is particularly important for the common law lawyer to comprehend that the Civil Code is not merely a compilation of particular rules. It rests upon principles and definitions developed in the legal doctrine, wherefore the Code constitutes a system of interrelated norms.

Some of the amendments to the Civil Code are important and taken into account in this presentation.

In addition to the Civil Code, civil law norms are contained in other civil laws. In certain cases, international law is also applied, particularly to entrepreneurship relations. Civil (business) law rules can be included into other normative acts, which in Russian law are called normative acts subordinated to laws (substatutory acts). Customs are recognized as legal sources, while the use of standard contract conditions and analogy application are also known in Russian civil law[18]. However, judicial practice is not regarded (at least traditionally) as a proper legal source, although the decrees of supreme judicial bodies are recognized as having precedent value in Russia. On the other hand, by its decisions the Constitution Court changes and even rescinds normative acts which are in contradiction with the Constitution. Therefore, such decisions could be seen as having legislative effect. In Russia, civil law regulation is also realised on nonnormative level, for instance, by single law-application acts and usage, course of dealing and course of performance.

Legal theory (doctrine) has been and is still excluded from legal sources in Russian law. Legal doctrine mainly belongs to the theoretical jurisprudence, and, in respect of practical jurisprudence, it still mainly plays a commentary role[19] taking into account that the Russian Civil Code contains almost all necessary legal rules as such, including doctrinal norms. This means that legal doctrine is at least partly comprehended in the legal norms (of the Civil Code).

The term `legislation` is used in Russian law in both the large and narrow senses. In the narrow sense, legislation means only statutory laws (statutes), whereas, in the large sense, it also includes other legal acts. In the narrow sense, the Russian civil legislation contains the Civil Code and federal laws issued in accordance with it. But in the large sense, it comprises, in addition to the Civil Code and federal laws issued in accordance with it, also of other normative acts containing civil law norms. These include other law and normative acts subordinated to the law (substatutory acts), such as ukases (edicts) of the President and decrees of the Government, called other legal acts, and normative acts which ministries and other executive authorities issue. The names of the legal acts are used rather consistently in the Civil Code and other law. In case the civil-law rule refers to a law, it means the Civil Code and other laws. The reference to the law and other legal acts directs to the application of the law as well as the ukase and decree. Sometimes also normative acts are mentioned in the civil-law rules, which mean any legal act issued by any state body.

The Constitution of the Russian Federation is used to be included into civil-law sources. By it, the property rights of citizens are protected. It also protects everyone's right for a free use of his abilities and property for enterprise and other activities not prohibited by law on condition that it is not aimed at monopolization

[18]In a large sense, civil law sources include also contractual terms, for, in accordance with the Civil Code (Art. 8.1), a contract or another transaction gives rise to the rights and duties of its parties.

[19]Regularly published commentaries of the Civil Code are important tools for practicing lawyers in Russia.

and unfair competition. Additionally, the Constitution determines what forms the civil legislation and the hierarchy of its norms.

The normative acts, containing civil-law norms, must be published in Russia. According to the Constitution, federal laws are adopted by the State Duma, and so they are regarded as approved from the moment the State Duma has adopted the decision.

The hierarchy of civil legislative acts is determined directly by the Civil Code (Art. 3). Following the provisions of the Constitution, the federal statutory law takes absolute priority. Federal law may be used to regulate any issue, unless otherwise indicated in the Constitution. According to the Civil Code, civil legislation falls under the Constitution within the jurisdiction of the Russian Federation, and it consists of the Civil Code and other federal laws adopted in accordance with it. In respect of all other laws, the Civil Code requires in principle that the norms they include must be consistent with it. This means that, in order to impose a new rule, the corresponding amendment is to be made in the Civil Code. Furthermore, many norms of the Civil Code contain references only to law, and consequently prohibitions to enact or apply a normative act subordinated to the law.

Other normative acts still form a significant part of the Russian civil legislation. However, although the legal acts of the President, Government, ministries, and other executive authorities of Russia are regarded as civil-law sources, they do not belong to the proper civil legislation.

In respect of the ukases of the President, it is provided under the Civil Code that civil-law relation may be regulated by them, but only on condition that such ukases are not contradictory with the Civil Code and other laws. An ukase of the President may contain guidelines or rules on the application of the civil law norms, the purpose of which is to govern relations unregulated by law.

The legal grounds for the power of the Government to issue decrees containing civil law norms can be, according to the Civil Code, only Civil Code and other laws as well as the ukases of the President, and it restricted only to the implementation of these. The Civil Code and other laws contain sometimes direct provisions on the enactment of decrees of the Government. In certain cases the Civil Code refers directly to the possibility to issue a law or other legal act, and it also means that the decree of the Government may be applied to the legal relation in question.

In respect of the legal acts of the federal executive bodies or substatutory acts, the Civil Code provides that these bodies may issue acts containing civil law norms, in the cases and within the limits provided by the Civil Code, other laws and legal acts (ukases and decrees). Thus, the issuance of any administrative normative act must be grounded by the provision of the law or other legal acts.

The priority of the statutory law over the normative acts subordinated to the law is directly enforced in the Civil Code. According to it, in the event of a conflict between an ukase of the President or a decree of the Government and the Civil Code or other law, the provisions of the Civil Code or respective law must be applied. Thus, the ukases and decrees clearly differ by their legal force from the laws and, consequently, in the event a court finds a contradiction between an ukase

or decree and the Civil Code or other law, it is not only its right but also obligation to leave the contradictory normative acts subordinated to the law inapplicable. As to the administrative acts contrary to law, it may be left inapplicable or recognized as invalid by the court.

The rules on horizontal hierarchy of legal norms are purported to clarify which one of the norms placed at the same level in the vertical hierarchy must be applied first, and they have usually concerned the question of priority of different laws in Russian law. Traditionally these rules have covered two standards: 1) *lex posterior derogat priori* or the latter rule must prevail over the previous one and 2) *lex specialis derogat legi generali* or the special rule must prevail over the general rule. The enactment of the Civil Code has additionally presented to the horizontal hierarchy the third dimension, in which the question is of the relationship between the Civil Code and other federal laws.

The standard giving priority to the latter rule is general. Ordinarily, a new law comes into force in Russia in ten days after the date of its publication, and other new legal acts in seven days after the date of their publication or on the same date. In some cases, a new law or other legal act may contain a provision that it comes into force on a certain day.

The principle of giving priority to the latter rule is also clearly present in the rules of the Civil Code on the scope of application of civil law norms in time (Art. 4).

The standard prioritization of a special rule is not directly provided in the Civil Code as a general rule, but it is definitely recognized as a general principle in Russian Civil law. As a matter of fact, the Civil Code is constructed by using division of its norms into general and special ones. So, the General part of the Civil Code, divided itself into general rules regulating obligations and contracts, is placed into the first part of the Civil Code, whereas norms regulating different types of obligations or contracts form the most part of the second part of the Civil Code. The structure of the second part also represents the division into general and special rules. For instance, the norms regulating (purchase and) sale, lease and work contain, besides the general rules, also the specific rules on the modifications of these types, such as supply (of goods), hire and construction work, which are regarded in Russian law as even single types of contract.

The enactment of the Civil Code has brought along, as stated above, the third dimension to the horizontal hierarchy of legal norms. It comes down to the fact that the Civil Code includes the provision, according to which the civil law norms contained in other laws must be consistent with the Civil Code (Art. 3.2). According to the Civil Code (Art. 3.2.1), the rules that comprise the norms deviating from the Civil Code may not be included in amendments of other (than the Civil Code) laws or laws that concern an independent subject of regulation.

Civil law rules, which form norm-based regulation, are in general applied voluntarily. Parties to civil law relations comply with them in the first instance. However, the application of legal norms also belongs to the tasks of authorities, and judicial bodies are to apply legal norms particularly in case the parties are, for instance, in dispute. The answer to the question of how obligatory is the

application of the norm is to be found in clarifying its applicative nature. The main part of the Russian civil law norms form imperative and dispositive norms.

The concepts of imperative and dispositive norms are well-established in Russian law, and they are used in the Civil Code. According to the rules enforcing the principle of freedom of contract, in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the dispositive norm (Art. 421.4). In turn, the rules on imperative norms are included in the norm of the Civil Code concerning relation between contract and law, according to which a contract must comply with rules obligatory for the parties established by a law and other legal acts (imperative norms), which are in effect at the time of its conclusion. The dispositiveness of a legal norm is determined in Russian law in a traditional way, which means that the norm itself expresses the application of it, unless otherwise provided by a contract. Such a provision could also cover a number of rules. Therefore, it is clear that in Russian law imperativeness rather than dispositiveness still continues to be presumed.

Civil law regulation is performed in Russia also by facultative norms. These mean norms, the application of which requires that parties have agreed on their application, and such an agreement must be expressed in a positive way. Furthermore, also reference norms are known in Russian civil law. By using them generally in contract regulation, the rules regulating certain legal relation (contract) is to be applied to the other, usually similar ones.

Universally recognised principles and norms of international law as well as the international treaties of the Russian Federation are, according to the Russian Constitution an integral part of its legal system. Furthermore, the Constitution provides that, if an international treaty of the Russian Federation establishes rules which differ from those provided by law, then the rules of the international treaty are to be applied. These rules are repeated in the general part of the Civil Code (Art. 7). Thus, the Russian law is subordinated to the general rule that if Russia joins some international treaty, the provisions of it must prevail in Russian law over its civil law norms applicable to the case. However, international treaties contradictory to the Constitution are not be applicable.

General Principles of Civil Law

The general principles of Russian civil law, which form its bases, are fixed in the Civil Code. These are understood as civil law bases or its principal general rules. They are included directly in the law and are, therefore, normative by nature. Thus, the law requires the general principles to be followed in any legal practice activities. In general, the regulation of civil law in Russia is based on the private law premise which requires a legal system whereby a private person has the right to dispose independently, according to his will, of the legally relevant conditions regarding his behaviour. The other starting point of Russian civil law is the rule enforced in the Civil Code according to which goods, services and financial assets

shall move freely throughout the whole territory of the Russian Federation. The aim of this rule is to strengthen the unity of the Russian economic region and reflects the orientation toward the market economy enshrined in the Civil Code.

The general (basic) principles of Russian civil law, as presented in the literature on Russian civil law[20] and grounded in the respective rules of the Civil Code (Art. 1) are:

- civil law equality,
- impermissibility of arbitrary interference in private affairs,
- inviolability of ownership,
- freedom of contract,
- dispositiveness,
- unhindered exercise of civil rights,
- prohibition of abuse of rights and fairness requirements,
- prohibition to benefit from unlawful or unfair behaviour, as well as
- restoration of violated rights and judicial protection of civil rights.

In respect of the application of general principles, exceptions to them are known and are provided by the law.

In Russian law, the principle of civil law equality is considered the criterion constituting civil law relations in accordance with which the status of the parties of the civil law relations is determined. This states that no subject of Russian civil law, including physical and juristic persons, as well as state and municipal bodies, has priority over any other: the parties in the civil law relation are equal. Thus, a party to a contract, including a public law subject, has no coercive power in respect of another party. On the contrary, their relations are regulated by the same civil law norms. This, however, does not concern issues in which the public law subjects exercise their powers as public authorities (Art. 2.3).

According to the Civil Code, the civil legislation rules shall also be applied to relations in whom foreign physical and juristic persons as well as stateless persons participate: under the Constitution (Art. 62), the national regime is extended to foreign persons, not including the exemptions that are provided by the (federal) law or by international agreement (Art. 2.1).

Legal equality does not, however, purport that subjective civil rights are equal, and the Civil Code includes exceptions to it. The most important exception concerns entrepreneurs who are subject to more than ordinary strict requirements. Moreover, as to the relations between entrepreneurs and consumers, the legal status of a consumer is protected, among others, by the rules of the Civil Code on public contracting (Art. 426). Especially noteworthy exceptions are (state and municipal) Treasury enterprises, the legal capacity of which may be restricted very strictly. Other restrictions known in Russian law include the creditor order in bankruptcy. Restrictions are imposed also in respect to foreign entrepreneurs.

The impermissibility of arbitrary interference in private affairs is directly enforced in the Civil Code (Art. 1.1) and it reflects the private law nature of the

[20] *See*, for instance, Stepanov (2016a) at 25–27; and Stepanov (2016b) at 9–10.

civil law. In the first instance, it is addressed to public power. According to this principle, the ability to interfere in private affairs, including the economic activities of civil law subjects, is restricted to cases provided by the law. To secure their obedience to the prohibition, the Civil Code contains the rule according to which a court may, in hearing of the dispute, declare an unlawful act of a state or municipal body invalid or leave it unapplied (Art. 12 and 13).

The principle of inviolability of ownership concerns both private and public property, and purports that the owner may use his property in his interests. No one can be deprived, according to the Constitution (Art. 35.3) of his property otherwise than by a court decision and on legal grounds. And, according to the Civil Code (Art. 12), the owner has the right, in the event his ownership disturbed or restrained, to demand that the activities which violated his rights or created a threat of their violation to be ceased.

The principle of freedom of contract is characteristic of the exchange relations between independent economic entities and is particularly essential for the regulation of contract law. The principle is directly enforced in the Civil Code rules concerning the basic principles of the civil law legislation and in those regulating contracts. According to it, the subjects of civil law have free power to conclude a contract or choose the contracting party and determine the conditions of the contract (Art. 421). A general exception to the principle of freedom of contract are the rules on compulsory (public) contracting, by virtue of which contract relations are regulated (Art. 426); the Civil Code also provides the possibilities of exemption for the purpose of price control, but this requires the enactment of a law (Art. 424.1).

The principle of dispositiveness, or independence and free will in acquisition, exercise and protection of civil law rights, is closely related to the principle of freedom of contract, and in Russian law is taken to mean above all that the subject of civil law relations is free to form his own will (independently from another subject). According to the Civil Code (Art. 1.2 and 9.1), the subjects of civil law relations acquire and exercise their rights of their own will and in their own interests (and at their own discretion). Thus, no one can be obliged by the law to use his rights. Also, a contract which restricts the use of civil rights is invalid and the refusal of a physical or juristic person to exercise his rights shall not entail the termination of these rights, unless otherwise provided by the law (Art. 9.2).

The principle of dispositiveness is reflected in that the main parts of the civil law norms are dispositive. Their application is dependent on the will of the parties. The application of a dispositive legal norm may be excluded or it may be deviated by them.

On the other hand, the principle of dispositiveness also includes restrictions. The general restrictions are firstly the imperative (compulsory) norms of the law—for instance, the norms by which the legal status of the civil law subjects, including the legal (act) capacity, and the content of real rights are to be defined. The basics of the legal order and morality also limit the principle of dispositiveness in Russian law. The Civil Code provides directly, based on the Constitution (Art. 55.3), that civil law rights may be limited by the (federal) law to the extent to which it is necessary to protect the constitutional order and public

morality, defend the rights and legal interests of citizens and other persons, as well as human life and health, and to ensure the national defence and security (Art. 1.2). Additionally, the Civil Code (Art. 10) directly obliges civil law subjects to act reasonably and fairly and prohibits the abuse of civil rights. The Civil Code also includes cases where the state is empowered to intervene into contract relations.

The principle of unhindered exercise of civil rights reflects the market economy orientation of Russian civil law and the territorial unity of Russia. It is grounded on the Russian constitutional norms (Art. 8) in which the unity of the Russian (federation) economic region and the free circulation of goods, services and financial assets, as well as the promotion of competition and freedom to practise economic activities are guaranteed. Moreover, in accordance with the Civil Code (Art. 1.3), goods, services and financial assets are to move freely throughout the whole territory of the Russian Federation. In turn, the right to practise enterprise activities is enforced in the Civil Code rule regulating such activities by physical persons. Furthermore, in the Civil Code rules on the legal capacity of the juristic person, it is provided in respect of commercial organisations that they should enjoy the civil rights indispensable for the performance of any kinds of activity not prohibited by the law (Art. 49.1). On the other hand, the same norm provides that some kinds of activity listed in the law could require a special permit (license). In order to protect public interests, other restrictions can also be imposed by law; such restrictions are included, for instance, in the Competition law. As to the restrictions in respect of the free circulation of goods, services and financial assets, they may be imposed, according to the Civil Code (Art. 1.3), only by the federal law if this is necessary to ensure safety, the defence of human life and health, or the protection of nature and cultural values.

The prohibition of abuse of rights and fairness requirements can be regarded as a general exception to the basic principles of Russian civil law. In accordance with it, the unrestricted freedom of civil law subjects to exercise civil rights is precluded. The rights granted under Russian law are subject to restrictions in respect of their content and mode of exercise of them, and their violations are sanctioned. As a general rule, it is regarded in Russian civil law that in exercising rights the other's rights and legal interests shall not be violated. The Civil Code expressly provides that in establishing, exercising and protecting civil rights and in performing civil obligations, the participants of civil law relations must act in good faith *(bona fide)* and that nobody is entitled to use his benefit from illegal or unfair behaviour (Art. 1). The Civil Code contains the general presumption of fairness of the participants of civil law relations and of reasonability of their actions (Art. 10.5).

Prohibition of abuse of rights is also expressed directly in the rule of the Civil Code on limits of exercise of civil law rights (Art. 10), according to which the exercise of civil rights exclusively with the intention to cause harm to another person nor the circumvention of the law with unlawful purposes are not allowed, nor is any other exercise of civil rights deliberately in bad faith allowed; furthermore, the exercise of civil rights for the purpose of restricting competition and the abuse of a dominant position in the market is not allowed.

Restrictions and prohibitions to use rights are also imposed by other civil law norms. For instance, in the rules on the content of the right of ownership, it is provided that the owner shall have the right at his own discretion to perform with respect to the property in his ownership any actions, not contradicting the law and the other legal acts, and not violating the rights and the law-protected interests of the other persons (Art. 209.2). In turn, the owner of land and of other natural resources may dispose, under the Civil Code (Art. 209.3), his rights freely, unless this causes harm to the environment or violates the rights and the legal interests of the other persons. The obligation law norms of the Civil Code also contain restrictions and prohibitions to use rights. The most important of these are the rules on public contracting and competition. Furthermore, the rules on invalidity of certain transactions found in the Civil Code (Art. 169 and 179) can be regarded as reflecting the prohibition of abuse of rights. This applies to transactions that are purposefully contrary to the bases of the legal order or morality; those made under the influence of fraud, duress, threat or an agreement made in bad faith, or those made as the result of the coincidence of grave circumstances.

The obligation law norms of the Civil Code also contain the rules where the fairness requirements are concretized. They are applicable to the establishment and fulfilment of an obligation and after the termination of it (Art. 307), to the acquisition of right of pledge and pledged assets (Art. 352), and to the pre-contractual relations (Art. 434^1), as well as to the change and rescission of a contract (Art. 450 and 450^1). Moreover, the principle of fairness concerns transactions (Art. 166) and securities (Art. 147^1).

As a legal consequence of the abuse of rights, the court may, taking into consideration the nature and consequences of the committed abuse, refuse the person protection of the right he possesses, partly or in full, or apply other legal measures (Art. 10.2). In the event the abuse of a right is revealed in the circumvention of the law with unlawful purposes, such measures are to be subsidiary (Art. 10.3). Moreover, the Civil Code provides that personal damage due to the abuse of rights ought to be compensated (Art. 10.4).

Judicial protection of civil rights and restoration of violated rights as a legal principle refers in Russian law to the possibilities for subjects of civil law relations to defend their rights and legal interests in court procedure, including demands to revoke the meeting's decision. Civil law subjects may also use self-defence and other lawful protection means. In general, the purpose of the protection means established in the civil law is to restore violated rights, but the Civil Code also contains the rules on the means of security for the performance of obligations (Art. 329–381) which are particularly important in contract law.

Main Concepts of Law[21]

The post-Soviet classical legal theory is at present represented by V. Lazarev, M. Marchenko, and L. Morozova, among others. In principle, Russian law

[21]For more on the subject *see* Butler (2009) at 38–85; and Davydova (2017) at 260–275. *See* also http://www.grandars.ru/college/pravovedenie/teorii-prava.html

recognizes only textually formalized legal reality established by the state; law is the entity of legal norms, the implementation of which is secured by the coercive power of the state. On the other side, natural law ideas have been reflected in Russian law. The ideas of the libertaran theories of law built upon classical liberal and individualist doctrines have also spread into Russia.

Among the scholars, who are concerned with the post-classical problematic in Russian legal doctrine, are I. Chestnov and A. Polyakov. Some young Russian scholars are acquainted with the new approaches in legal theory, including phenomenological hermeneutics. They are also familiar with the complexity, discreteness, and openness of legal phenomena and pluralistic legal understanding.

As to the realistic theories, they have been regarded as alien in Russian legal doctrine. The realistic approach has been even alleged of being insufficient in respect of the scientific (obviously scientist) productivity.[22]

The basic idea of Russian (post-Soviet) law is that it (law, legal reality, legal substance exists as (a) a legal consciousness, idea, concept of law (b) legal norms, and (c) social relations. In correspondence with it, the main Russian theories of law are grouped. The legal consciousness, idea, concept of law is represented by such theories as the natural law theory and the psychological theory of law. In turn, the legal norms are the subject of the positivistic and normativistic theories, whereas the social relations (as the source of legal norms and their realization) are subjected to theories of sociology of law. Almost all these concepts pretend to be dominant, even exclusive.[23]

Positivist (normativist) Theory

Russian (including Soviet) legal doctrine has always recognized more or less directly the positivist and normativist theories of law, according to which the only legitimate sources of law are the written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by the state.

In the legal positivist theory, law is generally defined as the entity of (only) the (written) norms that have been enacted by the state and supported, if necessary, by its coercive power. It is a closed, logical system in which correct decisions can be deduced from predetermined legal rules without reference to social and moral considerations. According to positivist teachings, legal norms are specific by nature, for they contain prescriptions that belong to the sphere of "ought", where they are subject to the application of deontic logic. They may not be subjects of normal scientific descriptions.

[22]On the contrary, philosophical realism—that has tried to avoid the strict opposition between 'materialism' and 'idealism', and that is based on the idea that reality, containing physical world and artefacts (including law), is originally independent from consciousness—was very popular with Russian natural scientists, including D. Mendeleev and I. Pavlov. *See*, for instance, Korobkova (2016).

[23]The concept of integrative jurisprudence is known as modified in Russia. Integrative jurisprudence is understood in Russia as a theory that combines legal norms (normativism), legal relations (sociology), and legal consciousness (natural law). In the western legal literature, integrative jurisprudence is presented as a legal philosophy that combines the three classical schools: legal positivism, natural-law theory, and the historical school. *See* Berman (1988) at 779.

In turn, in the theory of legal normativism that is the successor to the legal positivist theory, law is regarded as a hierarchical system of the normative acts, where each norm of the legal system is validated by being posited in accordance with a higher-level norm of the system.

According to the Marxist theory of law that dominated in Soviet Union and is still influential in Russia, law represents the will of the ruling class; it is a system (or procedure) of social relations corresponding to the interests of the ruling class and protected by the organized power thereof. Soviet law was otherwise strongly influenced by the positivistic approach that has been supported, as stated above, by the possibilities of the exact fixation offered by the Russian language. The position of the state is still strong in Russia, although its direct participation in enterprise activity is formally minimal. It is still expected that the task of the state is still to set the legal norms and that citizens should obey them strictly.[24]

Natural Law Approach

Natural law theories, the acquaintance of which has grown at present in Russia, are often contrasted with the theories of legal positivism. Natural law approach requires that all laws must be informed by, or made to comport with, universal principles of morality, or religion, and justice, such that a law that is not fair and just may not rightly be called 'law'. Natural law approach underlining the supremacy of the imaginary ideals of perfect law over the existing positive law could be characterized as a metaphysics or a secularized version of theology, which is open to all kinds of ideocracy, including enlightened monarchy, Polizeistaat, Nazism, communist state, revolutionary legal consciousness, and globalization. The reincarnation of the traditional natural law thought in present Russia, which the interest to the ideas of the libertarian theories of law has shown, could be interpreted as an ideological support for the return to the 'brilliant' past of the development of Russian law with the Hegelian ideas at the top or for the attempts to build the new free market economy society. Russian law still has a tendency for the use of revolutionary consciousness.

Psychological Theory of Law

Psychological theory of law is well known in Russia. It is also, like the natural law theory, metaphysical by nature and is based on the distinction between officially existing positive law and "true" intuitive law implemented in the legal consciousness that is the product of the psychology. Consciousness of legal rules motivates peoples' behaviour that they act in accordance with them.

Sociological Concept of Law

Sociological concept of law, the position of which is rather strong in Russian legal doctrine, postulates that law stands for the aggregate of social relations, of people's behaviour in the sphere of law.

[24]*See* Orlov (2010) at 5.

Interpretation Rules

Rules on interpretation of civil law norms are missing from the Russian civil legislation. These questions are of general nature and explored in Russia in the general legal science or the law and state theory. As to the interpretation of contract, the situation is different, and the rules on interpretation of contract are contained in the Civil Code.

Interpretation of Civil Law Norms[25]

The Russian legal science is familiar with the generally traditionally known linguistic[26], logic[27], systematic[28], historical and political[29], and teleological[30] interpretation. Special legal interpretation, which focuses on analysis of the special terms, as well as legal techniques and modes of expression of will of the legislator, is also distinguished in Russia.

Authentic interpretation based on the literal meaning of the text is the main rule in Russian law. Only in the case of actual content being different from the text of the norm, the application of extensive or restrictive interpretation is allowed. In these cases, for instance, logic or systematic are taken place.

The official interpretation of the legal norms is the most important one. It is implemented in the form of an official document and obligatory to administration of justice bodies. It may be passed as a normative or *in casu* explanation. The official interpretation is an authentic, if it is given by the same body which has issued the legal act, or a legal, if the interpretator is the body empowered to it. Legal interpretation acts may be given in Russia by the Government, ministries and by other executive bodies.

The official interpretation of legal norms gets its form also in judicial interpretation. The question is of the interpretive explanations of the Russian supreme judicial bodies. In certain cases these judicial bodies—to be precise, their plenums—give interpretive instructions concerning the legislation in force based on the generalized practice, which are obligatory for the lower courts and the aim of which is to secure adequate observance of the law. Owing to the fact that the legal interpretation of the supreme judicial bodies is obligatory, in reality they create new legal norms, which have a retroactive effect. Particularly important in Russian law are the normative explanations of the Constitutional Court concerning constitutional issues. According to the Russian Constitution, the Constitutional Court must interpret the Constitution of the Russian Federation on request of the supreme state bodies (including the President of the Russian Federation, the Federation Council, State Duma, and the Government as well as legislative bodies of the subjects of the Russian Federation). In giving its normative explanations

[25]For more on the subject *see* Orlov (2011) at 15–18.
[26]by using the grammar rules.
[27]by using the logic grammar rules.
[28]by identifying the place of the norm in the respective legal act.
[29]by clarifying the historical and political background to the issuance of the respective norm.
[30]by clarifying the aims of the legislator set out in the norm.

concerning constitutional issues the Constitutional Court is empowered, as stated above, to deviate from the text-bound interpretation of the legal norms.

The *in casu* interpretation which a court gives in its decision of a concrete case is legally obligatory only for that case. Court decisions are not precedents binding on other courts in Russia, although the decisions of the supreme judicial bodies may in fact serve as a kind of a model for application of the norms, particularly in the case of explanatory instructions.

The unofficial interpretation, which comprehends legally non-obligatory explanations and comments, plays a relatively minor role in Russian law. Their significance is dependent first and foremost on who has given them, as well as on the correctness and credibility of the interpretation itself. The unofficial interpretation figures as doctrinal, special expertise and ordinary interpretation. The doctrinal interpretation occurs through legal research and expert opinions, the subject matter of which is practical jurisprudence, and they are important in the legislative work as well in the administration of justice. Significant are also uninitiated opinions on legal issues which the ordinary interpretation represents, particularly, of the lay members of the court who participate in proceedings of certain cases in Russia.

Discretionary norms have become known in Russian law after the enactment of the Civil Code, in which international practice was taken into account. The ratification of the Vienna Convention (on International Sale of Goods 1980) especially necessitated the application of discretionary norms and consequently use the *in casu* discretion in courts. This has not, however, been confined only to the regulation of international contracts, but has become general also in the regulation of internal civil law relations.

Among the discretionary norms known in the Civil Code is one containing the requirements of fairness, reasonableness and equity. They are purported to be used generally in the analogy application as a frame for decisions based on the general principles and substantive content of the civil legislation. The obligation law norms of the Civil Code contain a number of references to the considerations of reasonableness and equity—for instance, to reasonable time, price and expenses, sensible management of affairs, disproportional penalty. Also references to 'the usual' are used widely in the Civil Code, an example of which is the usual price. The other expressions largely used in the Civil Code, referring to discretion include the 'necessary', 'essential', and 'obvious'.

The Russian legislator is not used to disclosing the content of the discretionary standards imposed by him with some exceptions. One of them is the concept of good faith (*bona fide)*, which is a general rule of the Civil Code and defined directly in the rules on vindication. In accordance with it, the acquirer in good faith (*bona fide* acquirer) is a person, who did not know and could not have known that the assignor did not have the right to alienate the property. This concept may also be used also in other cases when the legislator refers to good faith or fairness[31]. Another example of the legislator's attempt to define the

[31]The obligation of a party to act in a good faith in course of exercising its rights to unilateral alteration and/or repudiation of a contract is now directly specified in the Civil Code. In case a party goes beyond the bounds of a good faith, a court, state commercial court and arbitration may refuse

discretionary standard imposed by him is the concept of the essential breach of contract included in the rules on change and rescission of a contract. A violation (breach) of a contract is to be, under it, considered essential (fundamental), if it entails for another party such damage that he is deprived to a significant degree of that which he had the right to expect in concluding the contract. This concept may also be used in other cases when the law refers to essential breach (violation) of contract. However, in cases where the legislator has left the used discretionary standard undefined, the discretionary power of the judicial authority is enlarged. However, it does not mean that it is unnecessary to ensure the uniformity of interpretation of the discretionary rules, and this is the task in which the role of doctrinal interpretation is considered important in Russia. Moreover, in cases where the legislator has clearly expressed his will, the interpretation corresponding to this requires following the golden rule, according to which the words and expressions contained in the law are to be used in general (ordinary) sense.

The use of discretionary norms is often connected with the question of burden of proof or the question of who must prove whether the actions under dispute correspond or not with the discretionary standard. Usually a court follows the division of the burden of proof required by the contradictory procedure. In certain cases, however, the rules of the Civil Code concerning the burden of proof is to be applied. Thus, for instance, in the rules of the Civil Code (Art. 10) on the limits of exercise of civil law rights, the behaviour corresponding to the requirements of fairness and good faith is presumed, and it means that the other party must prove the unreasonableness and unfairness of the actions of the other party.

It seems clear that the significance of the judicial practice grows and the possibilities to adopt decisions by using *in casu* discretion are enlarged otherwise, as stated above, in Russian law. Significant in this respect is the rule of the Joint Stock Company Law on the rights of shareholders to appeal the decision of the general meeting of the company. It provides that the appealed decision may remain in force, if the vote of the shareholder who appealed would not affect the voting results, the violations are not essential and the decision has not incurred losses to the appellant. Such a rule can be regarded as referring to the consequential approach which belongs to the argumentation theory, and, consequently, shows that the dogmatic (interpretation) approach is giving way to more free legal thinking in the interpretation of civil law in Russia.

Interpretation of Contract[32]

The rules on interpretation of contract are included in the Civil Code (Art. 431) as the rules guiding the consideration of a court. Their starting point or the basic stage of interpretation is the literal meaning of the words and expressions contained in the contract or strictly dogmatic interpretation. Only in the case where the literal meaning of a condition of a contract is not clear is this be established by comparison with other conditions and the sense of the contract as a whole. Where

to protect rights and interests of such dishonest party in full or in part, or to assume other protective measures. The dishonest party may also be bound to compensate damages of counterparty.

[32]For more on the subject *see* Orlov (2011) at 204.

the content of a contract may not be determined in accordance with the above rules, in accordance with the supplementary rule the real common will of the parties must be clarified, taking into account the purpose of the contract. In such a case all surrounding circumstances are to be taken into account, including negotiations and correspondence preceding the contract, the practice established in the relations of the parties[33], the commercial customs and the subsequent conduct of the parties, which play ancillary role[34]. Additionally, it is regarded in Russian legal doctrine that the rule *contra proferentum* must be applied in the interpretation of a contract containing ambiguous terms which must be construed against the person who prepared such a contract.

Interpretation Rules and Concepts of Law

With respect to the civil law interpretation, the above presentation leads to the conclusion that only the positivist(-normativist) theory and (subsidiarily) natural law theory are relevant. The reason to the dominance of positivistic or dogmatic interpretation dominance is the fact that the content of directly applicable law is nearly totally textualized. Particularly, Russian civil law is codified to such an extent that the norms of Russian civil code contain actual legal principles. Thus, objective interpretation is the main rule in Russian law. In principle, only the Constitutional Court is empowered to deviate from the text-bound interpretation of the legal norms. Also, according to the rules on interpretation of contract, the starting point of interpretation is the literal meaning of the words and expressions contained in the contract.

As to the impact of natural law to the legal interpretation, it is important to understand that natural law notions are not legal rules. Their only purpose is to ensure the value orientation of law and to be implemented as principles or standards for legal considerations. Ordinarily, they represent equity considerations, the positive role of which is (or ought to be) to promote pragmatic legal solution. In Russian law, references to the natural law considerations are in fact subject to the competence of the high judicial bodies, the Constitutional Court and Supreme Court. However, even the discretionary power of the Constitutional Court is subject to constitutionality requirements.

The dominance of the legal positivist approach, and consequently, the overemphasized role of the statutory law and dogmatic interpretation of the legal material are, in general, specific for Russian law, whereas the efforts towards the internalization and globalization of law in Russia are still more declarative than real. Nevertheless, the pragmatic approach, enforced in the judicial practice, and the recognition of this and custom as legal sources as well as the equity consideration in the legislation, have been introduced by the recent novelties to the Civil Code.

[33]Thus, in the Russian civil law, the established (habitual) practice is legally significant concerning interpretation of contract.
[34]Thus, the real will of the parties is placed at the third stage of interpretation.

These changes, however, seem to form a challenge for the Russian legal system and particularly for the doctrine, the position of which has become even weaker than before. And as foreign languages are generally ignored in the country, the Russian legal discourse seems to have remained domestic, strongly bounded to the traditional legal positivism.

Endnotes

In the end of this presentation, I pay particular attention to the interplay between the positivist and sociologic approaches as it implied in the Russian legal doctrine. The sociology of law approach seems not to be generally distinguished from the jurisprudence (law in proper sense). It obviously means the (deontic) prescriptions (of the positive law) are dealt together with the normal scientific descriptions that are characteristic for sociology. Furthermore, it seems, taking into account that many Russian legal scholars are still occupied with seeking the truth, that the only factor linking the normative prescriptions of law and their real implementation is the illusion that the whole legal world is subjected to the truth (verity). This must be a real methodological problem from the point of view of the realistic approach that I prefer. Particularly disputable I see the application of scientism to the legal science. I regard scientism as a kind of a theoretical conquest of reality, which is not totally applicable to the legal science dealing with the (at least) relative unpredictability of its subjects. However, finding truth (verity)[35] concerning unpredictable phenomena is, by definition, an impossible mission. Besides, it is also impossible to scientifically verify legal issues, due to the artefactual nature of law.

Thus, diversity of legal phenomena and, consequently, methodological pluralism in legal studies are to be recognized as characteristic of modern legal thought. However, more important than that is to secure the reproduction of the legal system that is aimed at effective solving, and also preventing social and political collisions in accordance with the juridicity principle. It requires the adequate legislation and its implementation (according to the legality principle), as well as the upholding of the system of the legal decision making that corresponds to the ethical and moral standards prevalent in society (according to the ethicality principle) and are otherwise legitimate or acceptable by society (according to the legitimacy principle).

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[35]In particular, following the idea of 'the only one proper solution'.

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India and the European Union: A Quick Look at their Legal Relations and their Strategic Partnership

By Harry Stamelos[*] *& Konstantinos Tsimaras*[‡]

This short introductory overview of the bilateral relations between India and the EU purports to draw the attention of researchers regarding the framework of the legal relations and the Strategic Partnership of India and the EU, two of the most significant global players. In the Appendices the Cooperation Agreement of 1993/1994 and the Strategic Partnership of 2004 are copied to facilitate the full access to the relevant texts. This quick look at the framework of the relations between India and the EU obviously proves that in the next years their relations are expected to be even broader and their laws and policies shall be interrelated and affected both ways in a wide range of areas at various economic and social levels.

Keywords: *India-EU bilateral relations; India-EU Cooperation Agreement; India-EU Strategic Partnership.*

Introduction

In 2017, India and the European Union celebrated fifty-five years of bilateral relations. Since 1962, India and the European Union ('EU') relations have been deeply changed, including commerce, policies regarding safety and security, transport, environmental issues, climate change, energy, education, research and innovation, as well as contacts of their citizens.

The Cooperation Agreement between India and the EU concluded in 1993/ 1994 (*see Appendix A*) sets the basis for the bilateral relations of these two important legal orders. Indeed, regular summits between the two parties have improved the India-EU cooperation in all fields since 2000 leading to the Strategic Partnership of 2004 (*see Appendix B*)

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Areas of Cooperation between India and the EU

In early October 2017 the fourteenth India-EU Summit took place in the capital of India. That Summit issued a Joint Statement and three joint declarations added to the previous year Summit adopted the India-EU Agenda for Action 2020.

The first joint declaration of India and the EU was on counter-terrorism. Terrorism is a significant threat nowadays in an era of global instability and violations of the laws[1].

The second joint declaration of India and the EU was on clean energy and on climate change[2]. Even Donald Trump, the President of the United States of America, recognised the fact that climate change is a global problem by hiring a University Professor as his personal advisor on this matter[3]. Technology and industries improve daily life, but simultaneously they establish circumstances under which pollution significantly alter the natural environment which causes climate change.

The third joint of India and the EU was on a partnership for smart and sustainable urbanisation. For the first time in human history, in 2018 half of the population of the planet now resides in cities making the living standards and conditions harder to cope with. Sustainable urbanisation will be one the biggest problems in the future given the fact that more people abandon a farmland to start their lives in the promising metropolis hoping to pursue happiness in an artificial environment.

Regular parliamentary exchanges help to promote understanding and deepen the India-EU partnership. In February 2017 a visit of three different committees from the European Parliament to India took place and in spring 2018 the Indian Parliament re-established the India-European Union Parliamentary Friendship Group[4].

Foreign Policy and Security

In the sector of foreign policy and security cooperation, India and the EU discuss such matters in a number of fora and at various levels, including at the Summits. Regular ministerial-level meetings help to move forward the implementation of the Summit conclusions and steer the cooperation.

[1]Zahid (2017): 'Perhaps no other country is as diverse as the Indian society, having a plethora of ethnic, communal, religious and sectarian groups including some who have indeed resorted to violence because of a wide range of issues. Considering the demographics of India, a highly diverse society divided on religious, communal, caste, sectarian, and ethnic lines, the majoritarianism policy of BJP would likely to be a blowback for the Indian State. As prominent terrorism scholar Jessica Stern has pointed out, the major root causes of terrorism are humiliations, alienation and revenge. Hence, it could be projected that the growing alienation coupled with humiliation of minority groups may bring waves of communal violence'. See also NDTV (2018).
[2]Rattani (2017).
[3]Lavelle (2018).
[4]European Union External Action (2018).

Regular foreign policy and security consultations represent a useful platform to exchange views on the full spectrum of bilateral, regional and global foreign policy issues. Security dialogues or consultations are regularly held on counterterrorism, counter-piracy, cyber-security, and non-proliferation/ disarmament[5].

Commerce

In the field of commerce, it must be noted that India's largest trading partner is the European Union[6]. India is the EU's ninth largest[7] partner. Bilateral trade in commercial services has almost tripled over the past decade. Overall, the EU is the second largest investor in India[8].

Given the potential in India-EU trade, the two parties have been negotiating a Free Trade Agreement since 2007, covering, inter alia, effective market access in goods, services and public procurement, as well as a framework for investment including investment protection and rules that frame trade, such as intellectual property and competition. In 2013 the negotiations were put on hold as there was not sufficient progress on key outstanding issues that include improved market access for some goods and services, government procurement, geographical indications, sound investment protection rules and sustainable development. Since the India-EU Summit in October 2017, both sides have engaged actively in technical discussions on key issues in order to assess whether to relaunch the negotiations.

Agriculture, Environment, Climate Change, and Energy

Besides, India and the EU share a number of interests across a range of policy areas, including, as aforementioned, energy and climate change; environment. This is reflected in the breadth and depth of India-EU bilateral contacts, which take place in a number of fora and at various levels, including decentralised cooperation between EU and Indian cities. Policy cooperation and dialogue

[5]To support these, a series of events are held, for example a Workshop on Countering Online Radicalisation in May 2018 to exchange best practices. European Union External Action (2018).

[6]Accounting for 13.2% of India's overall trade, ahead of China (11.6%) and the United States (9.6%).

[7]The value of EU exports of goods to India amounting to €41.7 billion in 2017. The total value of India-EU trade in goods stood at €85.8 billion in 2017. Major EU exports to India include engineering goods (37%), gems and jewellery (16.8%) and chemical and allied products (10.4%). The primary EU imports include textiles and clothing (17.8%), chemical and allied products (14.1%) and engineering goods (15.2%).

[8]With €70 billion of cumulative FDI from April 2000 to March 2017, accounting for almost one-quarter of all investments flows into India. The EU is also key destination for Indian foreign investments. The EU was the third largest recipient (€3.2 billion) of Indian FDIs, after Singapore and Mauritius, in 2016-17.

between India and EU in these areas are further enriched and translated into operational cooperation with the help of EU's Partnership Instrument.

As regards environment, article 17 of the 1994 India-EC Cooperation Agreement provides for the following:

> '*1. The Contracting Parties recognize the need to take account of environmental protection as an integral part of economic and development cooperation. Moreover, they underline the importance of environmental issues and their will to establish cooperation in protecting and improving the environment with particular emphasis on water, soil and air pollution, erosion, deforestation and sustainable management of natural resources, taking into account the work done in international fora.*
>
> *Particular attention will be paid to:*
>
> *(a) the sustainable management of forest eco-systems;*
> *(b) protection and conservation of natural forests;*
> *(c) the strengthening of forestry institutes;*
> *(d) the finding of practical solutions to rural energy problems;*
> *(e) prevention of industrial pollution;*
> *(f) protection of the urban environment.*
>
> *2. Cooperation in this area will centre on:*
>
> *(a) reinforcing and improving environmental protection institutions;*
> *(b) developing legislation and upgrading standards;*
> *(c) research, training and information;*
> *(d) executing studies and pilot programmes and providing technical assistance.*'

Both parties realise that the problems relating to the environment are global and the solutions of such problems should be the outcome of an extensive cooperation both at the bilateral and the multilateral levels. Thus, the EU and India accept the work done in international fora. Moreover, the prevention of industrial pollution draws the particular attention of EU and India. Industrial pollution is one of the most significant problems relating to the environment and its protection. Although it is now very difficult to forecast the exact steps of the next ten years, the fact that both the EU and India pay particular attention to the prevention of industrial pollution is extremely important. More specific, this problem can only be dealt with the necessary cooperation and the clean energy projects should affect in a positive way the attempts of the contracting parties to eliminate the industrial pollution for the benefit of all citizens of both contracting parties. To live in a healthy environment would foster a healthy economic growth. This is why the parties agree to cooperate in research, training and information, in order to encourage more natural and legal persons to develop new ideas for industries to consume clean energy. Of course, all such measures should be based on updated and new legislation. Legislators of both parties shall take into account the new

trends to provide for improved solutions for the protection of the environment and to establish clean energy not only for the industries but for all consumers. In this framework, the protection and conservation of natural forests is crucial, as global warming leads to more fires in the forests causing enormous disasters in the eco systems of forests. The EU and India are well aware of all the important issues regarding the environment and its protection and they are willing to establish a permanent cooperation between them to deal with all these problems in an effective way.

India and the EU remain close partners in the G20 context and have developed a regular macroeconomic dialogue to exchange experience on economic policies and structural reforms[9]. India has rapidly growing energy needs due to a growing GDP and population and a huge energy infrastructure deficit. India is focussing on domestic production, including renewables and nuclear, and on energy efficiency. India-EU energy cooperation was considerably strengthened over the past years, which led to the launch of an India-EU Clean Energy and Climate Partnership. The partnership brings together, in a joined-up approach, the EU and its Member States, EU and Indian institutions, businesses and civil society. The aim is to jointly implement concrete projects, to promote access to and disseminate clean energy and climate friendly technologies and encourage research and development. An Energy Panel meets annually at senior officials' level and an energy security working group was launched in 2016[10].

India, recognising the importance of fusion energy research in its long-term energy security, participates (with the EU, US, China, Russia, Japan and South Korea) in the international ITER fusion project. ITER is a pioneering project to build and operate an experimental facility to demonstrate the scientific viability of fusion as a future sustainable energy source. Bilaterally the EU and India cooperate under a Euratom Cooperation Agreement on Fusion Energy Research, focussing on projects (20 are ongoing) supporting the success of ITER and the future construction of a fusion electricity demonstration facility (DEMO)[11].

ITER ("The Way" in Latin) is one of the most ambitious energy projects in the world today. In southern France, 35 nations are collaborating to build the world's largest tokamak, a magnetic fusion device that has been designed to prove the feasibility of fusion as a large-scale and carbon-free source of energy based on the same principle that powers our Sun and stars. The experimental campaign that will be carried out at ITER is crucial to advancing fusion science and preparing the way for the fusion power plants of tomorrow. ITER will be the first fusion device to produce net energy. ITER will be the first fusion device to maintain fusion for long periods of time. And ITER will be the first fusion device to test the integrated technologies, materials, and physics regimes necessary for the commercial production of fusion-based electricity[12].

[9]European Union External Action (2018).

[10]Working groups on various energy sectors are active, including on renewable and energy efficiency. Energy cooperation is thus ongoing on a broad range of energy issues, like smart grids, energy efficiency, offshore wind and solar infrastructure, and research and innovation. India was a key player in achieving a global climate agreement in Paris in December 2015.

[11]See www.iter.org.

[12]European Union External Action (2018).

Regarding environment and water, the 2016 Summit launched an India-EU Water Partnership, which was followed by a Memorandum of Understanding. The EU and India also cooperate closely on the Indian Clean Ganga initiative and deal with other water-related challenges in coordinated manner[13].

The EU has provided longstanding support to Indian cities to develop plans for sustainable development, transport, industry, water and waste management, and more recently established city-to-city cooperation between European and Indian cities such as Mumbai, Pune and Chandigarh in a first phase and twelve more cities involved in the current phase. The EU is also providing support to Indian cities to join the Global Covenant of Mayors on climate and clean energy. This cooperation is being formalised in an India-EU Partnership for Smart and Sustainable urbanisation, which will support the Indian 'Smart cities' and 'AMRUT' initiatives and will involve EU Member States for policy cooperation, business solutions and joint research & innovation[14].

The EU supports sectoral cooperation through an ever-increasing number of loans of the European Investment Bank (EIB), which on 31 March 2017 opened a regional office in New Delhi[15]. EIB loans support, for example, urban development projects (Lucknow and Bangalore Metro) and clean energy projects (renewable energy - solar power plants)[16].

[13]The EU works in a 'joined-up' approach, involving Member States, water authorities, business and NGO's. Discussions also take place in a Joint Working Group on Environment and an India-EU Environment Forum, along with business, academia and civil society. The dialogue focuses increasingly on global environmental issues including the transition to a green economy as well as emerging issues such as air quality. European Union External Action (2018).

[14]European Union External Action (2018).

[15]"The significant new European Investment Bank support signed today will strengthen expansion of clean energy generation across India. I welcome the continued cooperation between IREDA and the European Investment Bank that builds the clear success of new renewable energy and energy efficiency investment over the last four years," said R.K. Singh, Minister of State responsible for New and Renewable Energy. Agreements for the new loan for renewable energy investment was signed in New Delhi earlier today by Kuljit Singh Popli, Chairman and Managing Director of IREDA and Dr. Werner Hoyer, President of the European Investment Bank, in the presence of R.K. Singh, Minister of State responsible for New and Renewable Energy. "India is the world's third largest electricity consumer. The expansion of solar power generation alongside cutting energy use through energy efficiency measures is crucial to supporting sustainable economic development and reducing carbon emissions. The strengthened partnership between IREDA and the European Investment Bank reflects the joint commitment of India and the European Union to implement the Paris climate agreement. Investment in new solar energy and wind power schemes will improve access to clean energy for millions of Indians and create many new jobs. I am pleased that this flagship initiative could be highlighted to world leaders attending the International Solar Alliance summit here in New Delhi and showcased as a model to tackle energy challenges around the world," said Werner Hoyer, President of the European Investment Bank. European Investment Bank (2018).

[16]*Ibid.*

Research and Innovation

India and the EU enjoy strong cooperation in the areas of research and innovation[17]. Both the EU and India are also looking at ways to enhance the innovation partnership by creating, amongst others, network events where start-ups from India and Europe can meet. An Implementing Arrangement (IA) between the EC and the Indian Science and Engineering Research Board (SERB) was signed allowing for short term cooperation between SERB grantees and ERC teams in Europe[18].

Digital India and Digital Single Market

India and the EU aim to link the 'Digital Single Market' with the 'Digital India'. Regular dialogue on economic and regulatory matters is held in the Joint ICT Working Group and ICT Business Dialogue. Cooperation covers ICT market access issues, standardisation, Internet governance and research and innovation. A Partnership Instrument project supports cooperation on ICT standardisation on crucial topics of mutual interest (5G, machine-to-machine communications/ Intelligent Transport Systems, software defined and virtualised networks, and security), and a new "Start-up Europe India Network" initiative was launched in 2016. Further, an India-EU Cyber Security Dialogue has been set up that focusses on exchange of best practice on addressing cybercrime and strengthening cyber security and resilience, as well as an open cyber space. Dialogue with Indian partners on cyberspace is being further strengthened through the ongoing Partnership Instrument project on Cyber Diplomacy[19].

Biotechnology

India and the EU hold regular dialogues at the Joint Working Group on Pharmaceuticals, Biotechnology and Medical Devices, covering economic and

[17]Regarding academic collaboration in particular, the EU is India's leading partner in terms of joint publications. Following the conclusion of the EU-India Science & Technology Cooperation Agreement in 2001 (renewed in 2015 until 2020), India became a very active participant in the EC Framework Programmes for Research and Innovation. Participation in research and innovation funding programme 'Horizon 2020' (2014-2020) benefits from a co-funding mechanism agreed with the Indian Department of Science and Technology (DST), the Department of Biotechnology (DBT) in 2016 and most recently with Ministry of Earth Sciences (MoES) in 2018. Individual Indian researchers can receive grants from the European Research Council (ERC) or the Marie Skłodowska-Curie Actions (MSCA). At the India-EU Joint Steering Committee (June 2017, Brussels) and confirmed at the EU-India Summit in October 2017, it was agreed to upscale the collaborative research through joint calls. For example, see European Union (2017).

[18]European Union External Action (2018).

[19]European Union External Action (2018).

regulatory matters. It must be stressed that India and the EU are very important partners in these areas[20].

Free Competition

There is scope and interest on both the EU and Indian sides to strengthen cooperation on competition policy, in particular following the signature, in the margins of a visit of former European Commission Vice-President Almunia, of the India-EU Memorandum of Understanding on Competition Policy (November 2013, New Delhi)[21].

On 21 November 2013, the European Commission signed a Memorandum of Understanding ('MoU') with the Competition Commission of India. A copy has just been published on the European Commission's website. The aim of the MoU is to further strengthen cooperation between the two parties in the area of antitrust enforcement. This MoU forms part of a wider and ever-increasing web of international agreements between antitrust authorities. India already has in place a MoU with the US Department of Justice (DoJ) and the Federal Trade Commission (FTC). The EU has concluded bilateral cooperation agreements/ MoUs on antitrust matters with an extensive list of countries, including China, US, Canada, Japan, India, South Korea, and Switzerland. Key provisions of the MoU are as follows: Exchange of information. Both parties acknowledge that it will be in "their mutual interest" to exchange non-confidential information with regard to competition policy, operational issues, multilateral competition initiatives (such as interaction with the ICN and OECD), competition advocacy, and technical cooperation activities. Coordination of enforcement activities. The MoU states that:

> "*Should the Sides pursue enforcement activities concerning the same or related cases they will endeavour to coordinate their enforcement activities, where this is possible*".

Mutual Assistance

There are a number of provisions which deal with the possibility to request the other party to take enforcement action in its jurisdiction. These are as follows:

[20]Around 30% of active pharmaceutical ingredients sold in the EU are manufactured in India, while 75% of India's total demand for medical devices is currently met by imports, with nearly 30% of it being supplied by the EU alone. Strengthening cooperation contributes to patients' safety, addresses non-tariff trade barriers, and facilitates access of innovative EU industry to the growing Indian market. European Union External Action (2018).

[21]Cooperation between the EU and India on competition policy is being further strengthened through the ongoing Partnership Instrument on Competition Cooperation. See also Lovells (2013) and also Stamelos (2012).

"6. If one of the Sides believes that anti-competitive actions carried out on the territory of the other Side adversely affect competition on the territory of the first Side, it may request that the other Side initiates appropriate enforcement activities as per their applicable competition law.
7. The requested Side will consider the possibility of initiating enforcement activities or expanding on-going enforcement activities with respect to the anti-competitive actions, identified by the requesting Side, in accordance with the requirements of its legislation and will inform the other Side about the results of such consideration.
8. Nothing in this Memorandum of Understanding will limit the discretion of the requested Side to decide whether to undertake enforcement activities with respect to the anti-competitive actions identified in the request, or will preclude the requesting Side from withdrawing its request."

Avoidance of Conflicts

The MoU provides a mechanism to avoid conflicts if one authority's enforcement activity may affect the other in its own enforcement activity. It is too early to tell how the key clauses of the MoU will be applied in practice and whether it will be a "game changer". However, the MoU certainly signals a clear intent for increased cooperation on antitrust matters between the EU and India.[22]

Migration and Mobility

India and the EU strengthened cooperation on migration and mobility through the endorsement, at the 2016 Summit of the India-EU Common Agenda on Migration and Mobility (CAMM). An India-EU High Level Dialogue on Migration and Mobility was held on 4 April 2017[23].

Each year, there are almost fifty thousand Indian students in over four thousand universities across Europe. Since the opening of the Erasmus programmes on higher education to third countries, India has been its largest beneficiary, with more than five thousand Indian students having received European scholarships to study in Europe. In the last 3 years alone, since Erasmus mundus transformed into Erasmus+, about one thousand five hundred students

[22]Lovells (2013).
[23]The CAMM addresses four priority areas in a balanced manner: better organised regular migration and the fostering of well-managed mobility; prevention of irregular migration and trafficking in human beings; maximising the development impact of migration and mobility; and the promotion of international protection. The four priority areas of CAMM are being jointly addressed through a 3-year project on EU-India Cooperation and Dialogue on Migration and Mobility, supported under the Partnership Instrument. The CAMM, as a framework for cooperation, is the start of a longer-term process which will lead to deeper cooperation and solid mutual engagement on migration, a key global policy area. European Union External Action (2018).

have received full scholarships, one hundred twenty Indian universities have been involved in active exchange programmes, and around a hundred in joint master programmes or capacity-building projects. Nine eminent Indian professors are now teaching EU studies under the Jean Monnet programme[24].

India's development cooperation with the EU has a successful track record, spanning several decades. Major focus areas include education, health, water and sanitation. Following India's developmental progress, since 2014 we are progressively moving beyond a traditional assistance-type agenda towards a partnership approach, including blending initiatives combining grants with loans from international financial institutions to leverage additional funding for specific development needs. In addition, the EU supports institutional capacity-building in key strategic areas such as renewable energies, trade and environment. India remains eligible for EU thematic and regional co-operation aid programmes. Over one hundred fifty million Euros worth of projects are currently ongoing in India. At the 2017 EU-India Summit, leaders decided to strengthen cooperation on the implementation of the 2030 Agenda[25].

The strategic partnership between the EU and India is being furthermore supported by the EU's Partnership Instrument which already plays an important role in providing new avenues for continued India-EU engagement. Projects are ongoing to support the implementation of the India-EU Agenda for Action-2020 in areas such as ICT, energy, water, climate change, urban development, resource efficiency, migration and mobility, competition cooperation, cyber security, and public diplomacy, among others[26].

Conclusion

If Brexit may weaken the EU in the coming years, India and the EU shall get the benefits out of their strategic partnership which both parties shall continuously pursue to develop and deepen. Such partnership may not be limited to trade and investment, but it should cover all economic, social and humanistic sectors. After all, the ultimate goal shall be the joint prosperity of all citizens of India and the EU in our common future. In that regard, rules, regulations, laws and further bilateral agreements, treaties, joint sessions and summits shall facilitate a holistic partnership of the EU and India.

[24]European Union External Action (2018).
[25]European Union External Action (2018).
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Appendix A - India-EC Cooperation Agreement 1993/1994

Cooperation Agreement between the European Community and the Republic of India on partnership and development, *OJ L 223, 27.8.1994.* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21994A0827(01)&from=EN, *at 24-34.*

Appendix B - India-EU Strategic Partnership 2004

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - An EU-India Strategic Partnership {SEC(2004) 768, COM/2004/0430final}. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0430&from=EN

The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case

By Angelo Nicolaides[*] *& Stella Vettori*[†]

The purpose of this article is to present a philosophical argument about legal ethics and to describe why lawyers have an ethical duty not to take on a hopeless case that has no prospects of success. This is despite the principle that everyone should have the right to be heard in a court of law when that person's rights are at risk. In order to understand the underlying policy behind this ethical rule it is important to understand the meaning of the underlying principle that everyone should have access to justice. In this context the function and purpose of a nation's courts are relevant. Although the ethical rules for lawyers in South Africa do not directly prohibit the pursuance of a hopeless case, there is no escaping the fact that the foundational premise of these rules is to further the purpose of the courts. The South African Rules of Court, it will be demonstrated, also aim to further the basic functions of the court, namely access to justice. Lawyers should however, be guided by a moral compass, which is largely based on Aristotelian virtue theory. Popular culture dictates that virtuous lawyers should expose their evil clients to ensure that truth prevails. This stance in which there is a lack of adversarialism is however not popular with lawyers. Is it ever likely that a lawyer will know beyond any doubt that a client is in fact truthful in what hey utter? The article contributes to the preponderance of literature on legal ethics by emphasising the virtues which are needed for sound ethical legal conduct, which are distinct from law and legal codes of conduct.

Keywords: *Legal ethics; Law; Virtue; Morality*

Introduction

When we speak of ethics we refer to lawyers knowing what they ought to do, and their ethical decision-making then consists of essentially doing what they know ought to be done in any particular situation. However, there is a distinction between ethical law and human law. The former is basically the essence of humanity which is imprinted on people who are rational beings, while the latter is a morally-based earthly law which is what guides the functioning of societies.

A number of ethical ideas we invariably espouse are notions such as moral realism, natural law ethics, divine command theory and relativism, and each of these fundamentally sit under the banner of virtue ethics which is itself based on philosophical themes dating back to Aristotle. Ethics is not a new concept. Indeed in ancient civilizations such as Classical Greece in about 350 BC, the notion of *arête* loosely translated to mean excellence, was taught by Aristotle (384 – 322 BC).

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In Aristotle's view, ethics was a highly practical rather than theoretical study. Virtues are considered to be the building blocks of truly moral individuals.[1]

Virtue ethics originated in ancient Greece and was initially driven by both Socrates and then Plato, but advanced by Aristotle. Aristotle highlighted the importance of developing excellence or virtue of character (Greek *aretē*), as the means to achieve what is ultimately excellent conduct (Greek *energeia*).

Aristotle maintained that one should strive to become respectable and wrote various treatises on ethics, including the mega-work, Nicomachean Ethics[2] upon which he bases his teaching on human character. For example, Aristotle taught his students, including Alexander the Great, that virtue includes the proper function (*ergon*) of a thing. He also articulated the notion that humans have a purpose which is specific to them. This purpose must be an activity of the *psychē* (usually translated as soul) in accordance with reason (*logos*). Aristotle also identified this most advantageous activity of the soul to be the aspiration of all human conscious action, eudaimonia, generally translated as "happiness" or "wellbeing". If humans wish to be happy in their lives they require a good character (*ēthikē)* and must also possess virtue (*aretē*) in their dealings with others. *Aretē* is generally translated as being moral, ethical and virtuous.[3] Blackburn maintains that a virtue is a character trait that is to be revered and is one which makes its possessor a better person, either morally, or intellectually, or in the conduct of specific affairs. Virtues will help a lawyer in deciding between what is right and wrong. Virtue ethics can thus support lawyers when facing moral dilemmas. Aristotle encouraged people to live in a state of well-being (*eudaimonia*) or prosperity which focussed on virtues and evils. Virtues are those aspects which relate to a person's character strengths which encourage flourishing and well-being.[4] Contrariwise, vices are character defects that obstruct flourishing and limit one's well-being.

In Socrates *Republic,* the "Guardians" are leaders who interpret their high office in terms of their social responsibility. It is incumbent upon lawyers as legal justice leaders to serve society by endorsing ethical practices.[5] Jean-Paul Sartre states that we are by definition morally bound for the reason that we share the planet with others whom we need to contemplate in the choices that we make.[6] The primary paradigm of evaluation is always the self in relation to others. We should be basically always acting on the behalf of the interests of others.[7] Sadly, many people do not do this.

Aristotle contends in Book II of his *Nicomachean Ethics,* that the person who possesses character excellence always does the right thing[8] , at the right time, and always behaves in what society considers being the right way[9].

[1]Boone (2017).
[2]Burger (2008).
[3]Aristotle (Bartlett and Collins) (2011).
[4]Hinman (2013).
[5]Gini (1997).
[6]Sartre (1960).
[7]Gini (1996).
[8]Aristotle (Irwin) (1999).
[9]May (2010).

Aristotle advocates in his *Nicomachean Ethics* that morality is not simply learned by reading about it, but by witnessing the behaviour of a morally sensitive person who serves as a role-model. From a philosophical perspective, role-modelling is not enough to satisfy the basic needs of an ethical legal practice at either the normative or descriptive levels

However he also highlighted that virtue is applied, and that the purpose of ethics is to become moral, not just to have knowledge. He also asserts that the right course of action depends upon the fine particulars of a specific situation, rather than being generated purely by applying whatever law is deemed to be suitable.[10] The type of wisdom which is then mandatory for this is called "practical wisdom" (*phronesis*), as against the wisdom of a theoretical philosopher's understanding or insight.[11]

Thunder[12] ponders on the issue as to whether the practice of law is indeed compatible with the wholehearted pursuit of a good human life? The predominant purpose of one assuming a career in law is to further the aims of justice, and to vigorously promote public order and the common good, by arraigning those who act unlawfully or unjustly and by ensuring the accused a fair trial.[13] Constitutionally everyone should be equal before the law and as such be fully entitled to equal protection under the law, even criminals.[14] This value is only truly of material importance if everyone is treated on an equal footing to start with. Fairness must prevail in all transactions with clients. The notion of beneficence necessitates that all should be done for the benefit of a client with no underhanded intentions on the part of the lawyer. Ethical practice is not an optional possibility in legal practice but rather an indispensable and integral part of the justice system. Society through its organizations has obligations and responsibilities for all its citizens and non-citizens, and every individual's rights need to be respected.

The Complexity of Moral Decision-making in Legal Practice

For the purposes of legal issues, virtue ethics suggests that if one is a virtuous person, you will strive do good things, and if you wish to be good, you must always do moral things[15]. Lawyers require executive virtues such as inter alia a strong resolve, courage and determination. Their moral virtues must be evident in their moral demonstration of seeking to uphold truth, empathy, kindness, honesty, and good nature. As professionals they should consider their options carefully before embarking on a legal venture with a client who is clearly of ill-repute and who has confessed in private that he or she is guilty of infringing the laws of the land, but nonetheless wants to be absolved from any and

[10]Kraut (1989).
[11]S*ophia,* Bostock (2000).
[12]Thunder (2014).
[13]Thunder (2014).
[14]Groarke (2011)
[15]Pollock (2010).

all accountability or liability thereto. This is where the legal practitioner requires deep understanding and wisdom.

Lawyers require wisdom and an excellent knowledge of legal jurisprudence and other related theory. They need to use basic common sense when interacting with stakeholders and must be courageous, persevere, exercise temperance or moderation, be self-reliant and above all, truly seek justice.[16]

The attorney-client relationship may at times be adversely affected if the latter fails to understand the moral advice meted out by the former. It is then a lawyer's core function to provide legal advice and guide a client in terms of the law. The lawyer is still at liberty to comment and advise on how a client has acted in the ethical realm and to question whether or not a client has considered the ethical ramifications of actions they have taken. Such descriptive ethics concerns the motivation for one's actions and how a client may have reasoned through ethics at the point of the decision to perpetrate a crime, given the standards of society. Having said this, a lawyer's primary is to offer legal advice and support a client to make legal decisions.

While legal advice can be sought from existing laws and other resources, moral guidance for clients comes from within the lawyer's person. In cases where the prosecutors fail, the defence lawyer cannot be morally responsible even when he or she knows their client was prosecutable.

One's religious beliefs may serve as a foundation of morality and it is useful that virtually all religions embrace what is termed the 'Golden Rule' about one doing to others what you would have them do to you.[17]

Luban states that "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[18] Nonetheless, attorneys often find it tricky to determine the moral choices for their clients. Moral analysis into lawyers' ethics has customarily focused on how legal professional rules and regulations relate to or conflict with basic moral principles that are commonly applied and considered to be universally binding on both individuals and their communities and also in essence important, and which necessarily address basic questions.[19]

The nature of humanity includes the fact that it is very often the case that bad things happen to good people and good things happen to bad people and so prescription becomes difficult. This is also the case when a client has been devoid of moral upbringing by virtue of their social position. The world is complex and often unfair.[20] Lawyer's need to be vigilant and not impose their religious morals on a client who possibly has different religious morals. It is advisable to then

[16]Van Zyl & Visser (2016).
[17]Duxbury (2009).
[18]Luban (1988).
[19]Wasserman (1990).
[20]Boone (2017).

consider other sources which offer moral guidance to which a client may better relate.

Slabbert asserts that in South Africa it is generally accepted that to be considered to be a fit and proper legal practitioner, one should exhibit integrity, reliability and honesty.[21] In essence, a lawyer should do good things not based on his or her analysis of the end result or of an calculation to choose what to do in any given case but rather instinctively do the right thing, or the good thing, because of their good character. But once faced with intricate ethical dilemmas, they should demonstrate good character, by using sobriety of thought and their understanding. A lawyer should thus consider what type of person they should be, as opposed to what do I do in this tricky situation I am facing. Lawyers should use their discretion in an ethical manner[22] and practise virtue as this will empower them to be routinely virtuous in the difficult situations that they face.

Where there is legal malpractice there is negligence, breach of fiduciary duty, breach of contract or all of these by an attorney during the delivery of legal services that ultimately results in injury to a client.[23] The test of public trust is that lawyers "walk the talk" or "practise what they preach," and that they do not participate in behaviour that would be considered to be breaking the law.[24]

The Dilemma

Lawyers are generally highly respected and are a fundamental necessity to the application of the law and the Rule of Law itself which is instituted on principles of justice, fairness and equity. Once lawyers fail to follow and indorse ethical principles, the law itself is seen to fall into disrepute and it is likely that The Rule of Law will fail.

While granting that rules of professional conduct are significant to legal practice, this importance should not be overestimated because legal practitioners make daily decisions about what ethical conduct is and whether or not they will conduct themselves in an ethical manner. Thus formal rules of conduct have very little to do with their decision-making.[25]

It is incumbent on lawyers to act within the scope of ethical responsibility and duty and they should thus at all times enhance their reputations by doing what is right. It is often the case that a criminal defence lawyer knows that his or her client is factually guilty and may have even admitted as such to him in private conversation. The client nonetheless demands a response that will likely free him or her from imprisonment. Such a scenario is ethically troublesome and poses a moral predicament for the lawyer. A morally upright lawyer must seriously contend with such ethical dilemmas which arise from the representation of clients they recognize as being guilty.

[21]Van Zyl & Visser (2016).
[22]McLaughlin (2009).
[23]Byrne (2016).
[24]Pollok (2010).
[25]Van Zyl & Visser (2016).

Strauss Daly Attorneys[26] assert that

> *"…lawyers have a duty to contribute to the fairness of a trial. It must be emphasised that the mandate of any lawyer is to represent the client. In criminal trials, this fairness translates not into securing an acquittal of the client, but rather in fulfilling one's mandate, namely to represent the client to the best of one's ability and as honestly as one possibly can. In civil trials, this fairness translates into ensuring that the purpose of adjudication, judging, and proceedings are aimed at achieving a fair result… placing emphasis on ethics in the workplace and ethical behaviour ultimately enhances the reputation of lawyers as honest persons who act with both integrity and dignity. This reputation of the individual translates to the reputation of the firm and finally to the reputation of the fraternity as a whole."*

Invariably, lawyers are often torn between divided loyalties to the court and also to the client. It is often the case that such duties conflict with one another. Nonetheless, the lawyer is duty bound to fulfil his or her obligation to the court. Lawyers are thus required to be fit and proper as legal practitioners. This is a fundamental statutory requirement for admittance, and it is thus an indispensable aspect in evading disbarment from the legal profession.[27] Many clients do not necessarily understand this 'conflict of interest' facing their lawyer while some lawyers become involved in legal practices that are unprincipled and that often aim at defeating the interests of justice for their guilty clients.

Lawyers should have the option to select between taking either strong or weak positions, depending on the dictates of their consciences. However, both popular culture and academic legal literature offer thought-provoking viewpoints on the strong versus the weak confrontational and adversarial impasse. Lawyers should be guided by a moral compass,[28] which is largely based on Aristotelian virtue theory. Popular culture dictates that virtuous lawyers should expose their evil defendants so as to insure that truth prevails. This stance in which there is a lack of adversarialism is however not popular with lawyers. Is it ever likely that a lawyer will know beyond any doubt that a client is in fact truthful in what they utter?

If a client's dilemma places moral weight on a lawyer there is a danger that the attorney's own problem will affect the assistance given to the client. Most lawyers no doubt feel tainted by innocent persons being sentenced to prison and in such situations may encourage a guilty client to confess because the confession would make the lawyer feel better about the outcome of a case.[29]

A strong approach distinguishes that in several circumstances a lawyer cannot always be entirely certain whether to take his client's confession at face-value. Neither can a lawyer be confident whether the client's direct evidence will be fabricated or even if the testimony of any witness is in fact truthful. Those in favour of a strong adversarialist approach argue that a sagacious approach requires

[26]Strauss Daly Attorneys (2017).
[27]Sections 3 and 7(1)(d) of the South African Admission of Advocates Act 74 of 1964 -as amended.
[28]Souryal (2011).
[29]Asimow & Weisberg (2008).

them to go all out to defend a client even when they are essentially certain that the client is guilty.[30]

The normative argument for weak adversarialism, by contrast, tends to focus on values such as truth-seeking in trials, and upon a responsibility of truthfulness towards the court, and also includes the need to protect the repute of truthful witnesses and the interests of third parties who may be damaged by the lawsuit.[31] A weak adversarialist is more concerned with the pursuit of utilitarian justice implying the reaching of a truthful result rather than just using the correct legal procedures and formalities (Farrow, 2008). A weak approach "honours the individual lawyer's conscience by allowing the lawyer to do less than the lawyer's adversarial best when the lawyer is certain that the client is factually guilty of the crime."[32]

If a lawyer opts to take a weak adversarial decision this must be communicated to the client as soon as the decision is made. A lawyer should display effective leadership and conduct a conversation with a client that cautions the client of the choice made and why.[33] For example, fabricated testimony will not be endured. On the other hand, defendants who have perpetrated criminal acts, often reflect on whether they should in fact inform their lawyers of their guilt and disclose all material facts, or if they should keep on being silent. They may be afraid that their lawyers will be certain of their guilt, and thus fail to represent them at all or perhaps represent them less efficiently. Either way, a defendant generally perceives the lawyer to be the way to justice and freedom. Once a lawyer loses a case, it is the lawyer and 'the system' that bear the brunt of blame. Ethics in their workplace and ethical behaviour enhances the reputation of lawyers as honest and virtuous individuals who act with integrity and possess self-esteem.[34] There are various ethical responsibilities as far as the practice of law is concerned in South Africa. There are ethical obligations and duties due to a client and duties due to a court. Breaches of either ethical obligation by a lawyer may lead to civil proceedings by the client, for example a breach of confidence or an action based on negligence. In such circumstances, a lawyer may be held accountable under disciplinary proceedings related to legal practitioners legislation. For a lawyer to act ethically, one inevitably needs to act honestly in all one's transactions and such honesty is only ever qualified by the client's privilege. It is important then to strike a balance between honesty to the court on the one hand, which necessarily involves fair trial reflections and privilege to the client on the other hand.

Thus, there is a difference between factual guilt or in other words what a defendant may have done and actual legal guilt based on what a prosecutor can effectively demonstrate through solid evidence. Therefore it is in the nature of the legal professional to ask whether a prosecutor can prove charges irrespective of what a lawyer knows his client may have done. The defendant's legal guilt can

[30]Asimow & Weisberg (2008).
[31]Asimow & Weisberg (2008).
[32]Asimow & Weisberg (2008 citing Simon (1993).
[33]Frisch & Huppenbauer (2014).
[34]Sections 15 and 22(1)(d) of the Attorneys Act 53 of 1979.

only be proved once a judge is convinced that the available evidence is sufficient to enforce a conviction.[35]

Just as in the United States of America, a South African lawyer needs to seek to preserve and defend rules necessitating honesty, trustworthiness, allegiance, diligence, competence and impassivity in the service of his clients. This also needs to be above the notion of self-interest and definitely above commercial self-advancement. A lawyer needs to circumvent conduct that weakens the integrity of the adjudicative procedure at all times. The client's case must also be presented with believable force but with total candour towards the court of law.[36]

Thus while a lawyer in an adversary proceeding is not obligated to present a neutral exposition of the law or to assure that the evidence submitted in a case is true, he or she must not permit a court to be misled by false statements of law or fact or even evidence that the lawyer knows to be false either partially or in entirety. Lawyers are generally respected but are required to demonstrate their moral character which reflects the ideals, principles and values upon which the legal profession was founded. A lawyer then does not need to seek to evaluate the consequences or the morality of an action they are contemplating but rather be good role models and undertake good acts in a virtuous way.

Unfortunately, the nature of the legal profession is such that a lawyer often tries to act for both parties and then places himself in an invidious position in which he must be liable to either one or the other party no matter what he does. He may wish to promote the law and ethical practice but simultaneously strive to defend wrongdoing for gain.

Lawyers cannot fail to exercise competence and care as this may give rise to an action against them for damages by their client. If a court is misled by a lawyer, the latter has then acted unvirtuously and failed in his or her duty to assist the court in legal proceedings. Equally without virtue and also lacking in professionalism, are lawyers who are obstructionist and delay proceedings of a court.

While the role of a defence lawyer in the legal system generally requires that he or she should not advise clients to confess to crimes, what should a lawyer do when they know that it is likely that an innocent person will be punished for their clients crime? Should they even take on a case they know they will surely lose? How will this dilemma ultimately impact all parties concerned? As in the case of police officers, lawyers should hold positive ethical and moral values, which are a reflection of society's expectations.[37]

For many lawyers the task is simply to reconcile their moral or religious considerations with the legal profession's range of ethical norms. This is due to the fact that professional norms consistently accommodate moral and religious considerations. In any event, all people have a right to access of legal justice.

[35]Souryal (2011).
[36]ABA (2018).
[37]Ellwanger (2012).

The Right of Access to Justice

Rawls asserts that "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[38] Lawyers should exhibit a sense of justice in which all entities are treated fairly in a spirit of justice which means that all people are treated equally and fairly irrespective of race, gender, cultural background, social position, intelligence, or power. Rawls highlights that social institutions must act with justice as the primary objective.

The right of access to justice is considered to be a fundamental right in many countries. It is a right that is protected in terms of international instruments, for example, article 10 of the UN Declaration of Human Rights declares the right of an individual to a hearing by an "independent and impartial tribunal". The African Charter provides in art 7 for a right to an "impartial tribunal". This guarantee also appears in the Covenant on Civil and Political Rights, the European Convention and the American Convention. Similarly section 34 of the South Africa Constitution provides:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

The right of access to justice is considered worthy of fierce protection. This sentiment was expressed by the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and another*[39] as follows:

> *"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation reasonable and justifiable."*

Recently Lord Hughes stated:

> *"In advancing notices of appeal, as in the conduct of trials, the professional duty of counsel lies both to his client and to the court. There ought to be no conflict between these duties, but it is axiomatic that the duty to the court is the overriding one. Part of the duty to the court is the duty not to advance grounds of appeal unless the point is properly arguable…The importance of this duty lies in enabling the court to deal efficiently with the very large number of applications made to it, and to concentrate on those which raise properly arguable points. If the court is pre-occupied with hopeless points,*

[38]Rauls (1999).
[39]At par. 22.

> *possibly meritorious cases where there are properly arguable issues will be delayed at best and may not receive the time which they deserve. An appellate court needs to rely on the professional duty of counsel to avoid this[…] Happily the confidence in counsel which courts are able to repose is a major factor in the delivery of justice at all levels.*"[40]

As seen from the court decisions quoted above, the meaning ascribed to 'justice' for purposes of this article is a narrow one. It does not refer to a universal kind of justice. It is simply the kind of man- made justice that one should expect from a civil justice system. It is the 'justice' that Constitutions refer to when they protect, as a fundamental right, the right of "access to justice". It is noted that access to a court or access to a dispute resolution process does not necessarily mean justice. Many legal systems are plagued by high costs, delays, complexity and uncertainty. As stated by Lord Hughes the result of these factors, is at best, a retardation of access to justice and at worst a denial of the right of access to justice. In any event, law is a claim which people make upon one another which rests on duty, and it is a moral claim. In this sense, it is a conversation about rights and duties of lawyers and thus a moral argument.[41]

This brand of justice can be called 'civil justice'. In order to ascertain how a civil justice system delivers this particular brand of justice, the starting point is that a civil justice system is a 'public good'.[42] As such, a civil justice system, in putting into practice the attainment of its ultimate goal, namely justice, produces certain bi-products, such as social order, certainty of the law and economic prosperity. In the words of Hazel Genn:

> *"My starting point is that the civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action. They promote social order and facilitate the peaceful resolution of disputes. In publishing their decisions, the courts communicate and reinforce civic values and norms. Most important, the civil courts support economic activity. Law is pivotal to the functioning of markets. Contracts between strangers are possible because rights are fairly allocated within a known legal framework and are enforceable through the courts if they are breached. Thriving economies depend on a strong state that will secure property rights -and investments."*

[40] *Sumodhee v State of Mauritius* at pars. 22-23.
[41] Shaffer (1979).
[42] Genn (2012).

In providing civil justice, a civil justice system also settles disputes. Dispute resolution however, is not its primary objective or focus. It is merely a bi-product of the main objective, namely justice. As explained by Genn:[43]

> *"The public courts and judiciary may not be a public service like health or transport systems, but the judicial system serves the public and the rule of law in a way that transcends private interests."*

This is why the duty on the part of counsel to the court should take precedence over counsel's duty towards his client.

Processes are Designed Discourage Wasted Time and Costs

In terms of the common law the high courts have the power to stay vexatious, frivolous or oppressive proceedings.[44] This power is also provided for in terms of the Vexatious Proceedings Act.[45] Since everyone has the right of access to justice proceedings will be stayed sparingly. A claim that is not likely to succeed is not considered vexatious. The case must be hopeless in the sense that the elements of the case cannot be proved and therefore the case cannot conceivably succeed.[46] This must be proved with certainty and not merely on a balance of probability.[47] If a litigant is unable to prove with certainty that his opponent's case cannot conceivably succeed, the courts can order the litigant to provide security for the costs of the other side.[48]

Litigants are expected to deliver pleadings within the time set by the Rules of Court. Rule 26 of the High Court Rules provides:

> *"Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleadings within 5 days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties shall be in default of filing such pleading, and ipso facto barred […]"*

Rule 27 provides for extension of time and condonation. It provides that a court can on "good cause shown" make an order extending or abridging the time prescribed by the rules.

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[43]Genn (2012)
[44]*Western Assurance Co v Caldwell's Trustee*; *Hudson v Hudson*; Ecker v Dean; *Absa Bank Ltd v Dlamini***.**
[45]3 of 1956.
[46]*Western Assurance Co v Caldwell's Trustee*; *Hudson v Hudson*.
[47]*African Farms and Townships v Cape Town Municipality*.
[48] *Ecker v Dean*.

In the case of *Collett* [49] Musi AJA stated:

> *"There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules court condonation may be refused without considering the prospects of success."*

The courts also have the right to mulct a practitioner that pursues a hopeless case in costs. In a recent decision of the Labour Court[50] Van Niekerk J stated:

> *"In my view, in respect of all those who enjoy right of appearance in the Labour Court, the same obligation (i.e. to refrain from pursuing hopeless case) applies. The same penalties in the form of punitive costs orders and orders that practitioners forfeit their fees) ought also to apply. The obligation owed by those who have the privilege of right of appearance in this court requires them in return to respect this institution and the statutory purposes of expeditious dispute resolution that is statutorily mandated to uphold. Section 162, which regulates orders for costs in this court, confers a discretion to make orders for costs, based on the requirements of the law and fairness. Those requirements, as I have stated above, compel practitioners and other representatives, to refrain from referring hopeless cases to this court, and to place the interests of justice and of the court before the parochial interests of their clients and what might be seen to be a principle of partisanship that requires representatives to advance their clients' partisan interests with the maximum zeal permitted by law; and the principle of non-accountability , which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends."*

Furthermore as pointed out by Rogers:[51]

> *"Before a person may litigate as a pauper an advocate must submit a certificate of probable cause. If a lawyer acting in such a matter concludes that the pauper's case is hopeless, her duty is to seek judicial permission to withdraw. In order to obtain legal aid in civil cases or in criminal or civil appeals, there must be good or reasonable prospects of success. Why should the affluent litigant and his lawyer have a better right to exploit the judicial process?"*

It is also noteworthy that it is a delict to pursue litigation that is unfounded be it laying a criminal charge or a civil claim. An aggrieved party can sue for

[49] *Collett v Commission for Conciliation, Mediation and Arbitration*.
[50] *Peter Marutwane Mashishi v Zodwa Mdladla & Others.*
[51] Rogers (2018).

damages.[52] The aggrieved party can pursue an action in delict against the litigant and against his lawyer jointly.

While empathy towards clients is important in the overall service provided by a lawyer in a humanistic approach, it is equally important to afford people their human right in defence. The ancient Greek philosophers clearly understood too well what is required in humans. Socrates for one believed that virtue was a matter of understanding. When one grasps what is good and what is evil, they are cautious, self-controlled, are brave and possess a spirit of justice. Aristotle on the other hand argued that while virtue has an intellectual component, it also encapsulates a virtue of character that is progressively developed and is what one expects lawyers to have.

From an ethical perspective, lawyers should put virtue ahead of the demands of their profession. Whatever they undertake in legal practice should be interpreted considering the necessity of their role in conformity with its predominant determination to promote justice.[53] Lawyers need to be courageous and moderate enough to integrate their professional doings into a good or well-lived life while maintaining a continuity and "[…] interdependence between the virtues required for good lawyering on the one hand, and the virtues necessary for a good human life on the other."[54] He continues "Ethical integrity[…] is a constant work in progress. But it is one worth persevering in, both for the sake of living a good life, and for the sake of professional excellence. Good lawyers should possess what Aristotle labelled 'true virtue' which is inherent in every individual".

Today more than ever we require lawyers to be experts in one or other area of legal jurisprudence, but we should be seeking virtuous lawyers first and foremost. Credible lawyers are to an extent undermined by legal systems, processes and expectations, but it is time for ethical and competent lawyers to prevail in a spirit in which they become co-creators of a virtuous society and make efforts to drive the sustainability of morality and credibility in all practices and in all their dealings with all stakeholders. A lawyer's moral receptivity is often difficult, as is that of police officers, given complex situations, and to attempt to reconcile professional and moral responsibilities remains an extremely challenging notion in practice.[55] Law and morality are invariably woven together so that moral issues become unavoidable in criminal cases. A lawyer's moral compass has a viable and essential interface with the notion of legal ethics and the legal profession and its modus operandi in general. While there are innumerable rules of professional conduct in place in all legal systems, one needs to comprehend this interface and allow lawyers to consider moral issues when advising their clients, however attorneys must be careful when doing so since a moral context may differ from one person to another and also between diverse cultures.

Given that moral issues touch on legal issues in a big way and especially because a client may not have any other ethical support base, it is necessary in

[52]*Specialised Edible Oils and Fats (Pty) Ltd v Eezi Food Imports and Exports (Pty) Ltd* at pars 19-21.
[53]Banks (2013).
[54]Thunder (2014).
[55]Braswell, McCarthy & McCarthy (2012).

many cases, for a lawyer to be willing to discuss ethics with a client. Within this context, the moral choices and dilemmas of a client must of necessity remain theirs to ultimately make.

Conclusion

Law is a critical profession in which lawyers have numerous obligations to the court and especially to their clients, one of which is to be candid and ethical in utterances and actions. Lawyers, in efforts to be ethical, must not subordinate their service and professionalism to their profit motives, and ambitious personal aims and desires.

Quality service provision is the idyllic issue, and thus any remuneration must constantly be subservient to this determination. A lawyer who is virtuous adheres to ingrained and objective moral norms or character traits which impact and direct his or her capacity to judge between what action is right or wrong and to then act accordingly.

There are those who assume a strong adversarial position in dealing with clients cases in which they fervently defend their clients as if they did not know (which they do) that their clients were guilty. By means of contrast, others assume a weak adversarial position and they consider their acquaintance with the truth that they know when making strategic trial decisions. They are generally trustworthy and can be expected to state the truth, and when challenged in difficult situations, remain calm and endure pressure to react adversely.

People must have confidence in the legal profession and the administration of justice. Lawyers need to be totally honest with their clients about the likelihood and significance of their likely conviction when there is a preponderance of evidence against them. Lawyers also need to be careful not to coerce innocent defendants to plead to crimes that they played no part in. Where lawyers face conflicts of interest such as for example, when they represent a client but are in effect materially limited by their loyalty to another client, or some or other a personal relationship, they should be forthright with their clients and state the hopelessness of one or other sides case.

Lawyers in especially civil cases ought to have an ethical choice available to either agree or refuse to support a potential client after careful consideration presented facts and likely taking into account both the facts of the client's position, and the probable significance intended for a third party. Whether guilty or innocent, an accused person must have a fair trial which implies that lawyers are ethically bound to provide competent representation for clients and not abuse their position of trust. The reality is that the legal profession can only be as ethical, as its integral parts and ethical lawyers' important contributors to a desired ethical legal system that adequately protects individuals and entities.

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WTO and the Dynamics of Free Trade: The Challenges of International Trade Law in a Divided Economic World

By Isaac O. C. Igwe[*]

The relationship between free trade, globalisation, global poverty and global inequality for the past decades has generated interests from academics, free trade activists, public financial institutions like the WTO, the World Bank, the IMF, and the Organisation for Economic Cooperation and Development (OECD). Consequently, there has being divergent views and conclusions on whether free trade and globalisation actually benefit all countries of the world especially the developing world. This paper will examine the intent of global free trade agenda and how it affects the contemporary International market interaction between developed and developing economies. The paper will explore International trade obstacles, articulate policies that will maximize developing countries competitiveness, increased connectivity, improved trade access to markets and advocate ways to facilitate their participation in the global economy.

Keywords: *WTO; World Bank; IMF; Free Trade; Globalisation; Global Poverty; Inequality; Developing Countries.*

Introduction

The American new economic order was introduced after the Cold War to revamp the economy of other countries, but was intrinsically geared towards creating a western economic empire. The introduction of a free market philosophy, termed 'the great transformation', brought changes to the economic activities of many countries, including Great Britain.[1] It influenced the structural frameworks and policies of transnational organisations like the WTO, the IMF and the OECD. The WTO liberalisation ethos and the IMF 'open market system' meant that the developing countries must comply to benefit economically from the industrialised world.

Academics, lawyers and economists view the popularity of 'free trade' as fundamentally challenging or threatening to today's international trade order[2]. Great thinkers such as Karl Marx, Thomas Jefferson and John S. Mill had no doubt that in time to come, all countries of the earth would be bullied into accepting western institutions and values, although Gray argues that the inclination to western institutions and values is only a prelude to universal civilisation.[3] He further argues that liberal thought and practice was introduced by the United

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[1]See Polanyi (1994) at 140.

[2]See generally- Bhagwati (1993); Hudec (1990).

[3]See Gray (1998).

States.[4] Transnational corporations employ liberal principles and try to force free markets onto every nation of the world. Their ultimate objective is to encourage policies to combine various economies into units of a world free market system.[5] Gray argues that 'this is a utopia that can never be realised; its pursuit has already produced social displacement, economic and political instability on a large scale'.[6] The question now is what is the actual intent of this global free trade agenda and how has it reflected on the contemporary market interaction between developed and developing economies; is it likely to increase the economic conflict between the North and the South?[7]

This writing will look at these questions by considering first, the classical and intellectual origins of free trade, particularly the intellectual contributions of erudite scholars such as Adam Smith and David Ricardo. The paper will also investigate the WTO context of free trade and fair trade, and will juxtapose it with the developing countries' position. The treatise will use this to articulate the trade liberalisation debate and the perversion of free trade by the powerful against the weak through protectionism. The writing will explore Regional Trade Agreements (RTA) as a collaborative strengthening mechanism for developing countries markets in the light of developed countries market dominance. Finally it will advocate for a more subtle legal and institutional approach and argue for a mutually competitive interplay or formation of rules that are within the international trade system.

Classical Theory of Free Trade

A new, industrialist government regime backed up by an elegant scholarly sect, eroded the era of mercantilism[8] and brought in considerable economic freedom. It reached its peak when Britain's Corn Laws were repealed in 1846.[9] The impact of the widely accepted 'classical school' led to the immediate modification of economic activities in some advanced worlds.[10] Among the intellectual advocates of free trade, none are more globally accredited than Adam Smith and David Ricardo. Adam Smith's *Wealth of Nations* could be said to be the starting point for any study of free trade in Britain.[11] What is free trade becomes an issue of rhetoric. It simply means the right of passage of goods between nations without impediments and attachments such as tariffs or taxes.

[4]See Gray (1995).
[5]See Schumpeter (1928) at 368.
[6]Ibid.
[7]See Economists (1994) at 32.
[8]Mercantilism is economic nationalism for the purpose of building a wealthy and powerful state. Adam Smith formed the "mercantile system" to describe the system of political economy that sought to enrich the country by restraining imports and discouraging exports. See LaHaye (1999-2004).
[9]The Corn Laws was in force between 1815 and 1846 when import tariffs were designed to support and protect domestic British corn prices against competition from less expensive foreign – grain imports. See Schonhardt-Bailey (2006).
[10]See Keynes (1936).
[11]See McCord (1970).

Adam Smith's economic free market theory was intended to enhance the world standard of living. It may be that the same spirit motivated the GATT 1947 preamble which provided that 'the contracting parties shall commit themselves to the objectives of […] raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods'.[12] The language of the GATT preamble simply states the setting up of rules and policies to engender trade liberalisation by substantially eliminating trade restrictions such as tariffs and other discriminatory practices. The GATT is a treaty organisation whose role is to expedite international trade with its basic principles of liberalisation, stability and transparency or more generally the principles of non-discrimination and reciprocity.[13]

The World Trade Organisation (WTO) which superseded the GATT has in recent times clearly shown evidence of being a free trade crusader. After the Uruguay round agreements, Renato Ruggiero, the WTO's director general stated as follows:

> *"We live in a world which is already launched on a path towards global free trade. It is a process which cannot be reversed or rolled back without unimaginable costs to our future growth and our future progress. The challenge now is to come to grips with a world of free trade and deeper integration, and to realise its immense benefits. It is a choice between building a global architecture which is open, universal and rules-based, or living in a system which is anarchic in the most literal sense of the word. If one chapter of world economic history ended with the technological revolution of the last decade and with the mammoth liberalising efforts symbolised by the Uruguay Round, another is about to begin. How it is written will depend on the decisions we make in coming months and years."*[14]

Ruggiero further in his address likened the WTO to the 'global architecture' which will prepare the structural background for the realisation of free trade and said:

> *"Fortunately some of the global answers are already at hand. The WTO was the first major international institution to be created in the post-Cold War, post Uruguay Round era. This is significant because I believe the WTO offers a promise of the kind of global architecture we need in the coming decades. It grew out of bottom-up pressure for free trade and deeper integration."*[15]

Though the WTO Agreement has not expressly included free trade as one of its objectives, it has become an intrinsic laudable objective of the institution.

[12]See also GATT (1947).
[13]Ibid.
[14]See Ruggiero (1996).
[15]Ibid.

Free trade assists in the elimination of poverty,[16] and non restriction of trade enables developing countries to meet up with developed countries while enhanced economic growth assists in poverty elimination.[17] In line with this, Mike Moore (former WTO Director General) said:

> "*this report confirms that although trade alone may not be enough to redirect poverty, it is essential if poor people are to have any hope of a brighter future. For example, 30 years ago, South Korea was as poor as Ghana. Today, thanks to trade led growth, it is as rich as Portugal".*[18]

Today, Adam Smith's insights in *Wealth of Nations* on free trade still echo, though his influence waned over the generations with the emergence of free market capitalism. Capitalism was criticised heavily in the 19th century for misusing trade practices. Notwithstanding the Marxist view that capitalism meant exploitation of the labour force, or monopoly of the market, Karl Marx maintained that:

> "[…] *there will always be class which exploits and a class which is exploited."*[19]

Adam Smith

Smith was known for his classic contribution to capitalist economics. He supported arguments based on the theory that the less governments interfere with trade, the more wealth the nation will accumulate.[20] Although Smith did recognise the necessity of imposing some tariffs, he potentially argued against attachment of restrictions in global trade. In his view of the operation of the economic world, he argued that everybody competes to be rich, 'intending only his own gain', but to this end he must exchange what he owns or produces with others who sufficiently value what he has to offer; in this way by division of labour and a free market, public interest is advanced.[21]

Smith in his illustration visualised an 'invisible hand' operating as the tool of a gracious god who moves man's self-centredness to maintain a global status quo of happiness. The way to enrichment requires interdependence with others and in the process others are bound to benefit from it. He argued that society must have a moral conscience to prevent stealing and deceit before the invisible hand mechanism could work efficiently. He conceded that there was no harm in the poor emulating the rich but it was government's responsibility to defend the rich against the poor. From the foregoing argument, the importance of Smith's 'moral

[16]See WTO (2000b).
[17]Ibid.
[18]See WTO (2000a).
[19]See Marx (1976) at 463.
[20]These arguments have been repeated in recent years in the United States in regard to such Japanese imports as automobiles and in the context of debates over the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT).
[21] See Smith (1776) [1976].

norms' cannot be over emphasised. Thus for a trading system to work properly, agreement must be actionable, the parties concerned should have adequate information readily available to them, and it must be guided by the rule of law.

The industrialised nations' attitude towards the developing world is inseparable from capitalism. Smith articulated this when he began the thesis of a business empire that retains the inconsistency of 'private enrichment and public interest'.[22] The capitalist intends only his own self-enrichment but is 'led by an invisible hand to promote an end which was no part of his intention'.[23] Hardt and Negri, agreeing with Smith, argue that the 'invisible hand' of the market must be understood as a product of political economy itself which is directed toward constructing the conditions of market autonomy.[24]

In the 18th century economics was considered a branch of philosophy and Smith's *Wealth of Nations* was an exploration of the human psyche.[25] Smith advocated that to progress, economic systems should not rely on principles of living and acting for the interest of others, but on the self-interested motivation of individuals. He argued that 'the collective pursuit of self-interest, if done in the right way, could generate enormous collective wealth and it was that which should hold societies together'.[26] He further argued that the two best ways of generating collective wealth, were to respect the allocative efficiency of the free market and to have a high degree of specialisation in the workforce.

In Smith's view, in a free market, producers are motivated by virtuous self-interest that sees them strive to make the most desirable goods at the most competitive prices – led by 'an invisible hand'.[27] Smith argues that free trade would encourage efficient distribution of resources, raise productivity and enhance everybody's purchasing power.[28] This would be termed the foundation of free trade based on the principles of mutual gains from trading with one another, exchanging goods and benefiting from specialised lines of production.

David Ricardo

David Ricardo was a strong advocate of free trade, but moved beyond Smith's thesis in 1817 by propounding the theory of 'Comparative Advantage'.[29] Essentially, the theory held that when one country produces goods more efficiently and cheaply than another it is advantageous for both for the more efficient one to specialise.[30]

Ricardian comparative advantage applies internally in trading nations, not externally between them. It denotes that in a system of unrestricted free trade, the

[22]Ibid, at.456.
[23]Ibid.
[24]See Hardt & Negri (2001).
[25]See Buckman (2005).
[26]Ibid.
[27]See s Rohmann (2002) at 362.
[28]See Kennedy (1988) at 462.
[29]See Ricardo (1817). See also De Vivo (1987).
[30]See Ricardo 1817).

allocation of resources will be maximally productive within each trading nation, and thereby, by inference, throughout the world. Insofar as the world becomes a single market, efficiency and productivity in every country will be maximised.[31] Ricardo's theories were influenced by his time. They were developed when Britain was suffering from high food prices, apparently due to the Napoleonic Wars, and Ricardo suggested that the country could lower this cost by specialising in manufacturing and importing all its food.[32] Ricardo does not follow Smith's investigation of human passions or the desire to improve material wellbeing. Ricardo's approaches to free trade are from an economic angle and focus on the advantages deriving from the international division of labour.

Smith's theory of specialisation poses that nations can mutually benefit from trade by specialising in the production of goods when countries differ in their ability to produce them. Instead, Ricardo went further using Portugal and England to demonstrate that countries can still gain from specialisation despite one of the countries possessing absolute advantage in producing two products. Ricardo explained that if the yardstick was the difference in the costs of production between the two goods, they could still specialise in manufacturing the one with the lowest cost. It is similar to the abolition ideals of the Corn Laws which encouraged protectionist trade practices.[33]

This brings us to Ricardo's opportunity cost in terms of forgone alternative in determining the convenience of trade.[34] For a more compendious reading, Ricardo's explanation of the concept of comparative advantage would play a vital role here:

> *"The quantity of wine which she (Portugal) shall give in exchange for the cloth of England is not determined by the respective quantities of labour devoted to the production of each, as it would be if both commodities were manufactured in England, or both in Portugal. England may be also circumstanced that to produce the cloth may require the labour of 100 men for one year; and if she attempted to make the wine it may require the labour of 120 men for the same time. England would therefore find it her interest to import wine, and to purchase it by the exportation of cloth. To produce the wine in Portugal might require only the labour of 80 men for one year, and to produce the cloth in the same country might require the labour of 90 men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place notwithstanding that*

[31]Ibid, at 155.
[32]See Backhouse (2002) at 137 – 139.
[33]Ricardo favoured an end to the Corn Laws, arguing that Britain ought to import corn from countries better equipped to produce it at lower cost. He hated the rising rents he attributed to the laws, since they came in his view, at the expense of the driving force of the economy – profits. Twenty-three years after his death, the laws were repealed and Ricardo's international free trade agenda became one with British public policy. Ricardo had provided an answer to Britain's long-term growth problems, and Britain became the 'workshop of the world', importing most of its food and 'outsourcing' most of its agricultural employment. Ricardo's ideas became the 'foundation of all nineteenth century free trade doctrine', see Blaug (1986) at 201.
[34]See the general discussion in Ekelund & Hebert (1997).

> *the commodity imported by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labour of 90 men, she would import it from a country where it required the labour of 100 men to produce it, because it would be advantageous to her rather than employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of wines to the manufacture of cloth."*[35]

In Ricardo's discourse, it is clear that though every nation possesses a 'comparative advantage' in the goods they produce, no two countries can arrive at the same comparative costs. In order to show how international free trade could benefit every country and maximise world output, Ricardo used a two-countries, two products and one-factor of production analysis. By the same token, he posited the assumption of the international immobility of capital and labour. However, Ricardo's comparative advantage had been underpinned by several assumptions of the day. James Mill[36] and Robert Torrens[37] touched on the issue of comparative advantage or issues relating to it before Ricardo but were inclined to criticise Ricardo's account as limited in scope or inaccurate.[38] A shift in economic thought occurred in this divide when other economists defended Ricardo's theory.[39] The defence here may not be water-tight in the ongoing academic debate, as it seems doubtful that these great economists could turn around their stand on Ricardo being the originator of this idea.

According to Ricardo's theory, factors of production cannot cross national boundaries and once a country holds a competitive edge in the production of a product, it will never lose it. In the nineteenth century, this argument was valid because even though goods had become more mobile, global capital had not. Ricardo's assertion will be true so long as capital is not internationally mobile. The implication of universal capital movement is to undermine the Ricardian model of 'comparative advantage'. Ironically, that is the foundation of unmanageable world free trade. Michael Porter noted that 'the standard theory of comparative advantage assumes that there are no economies of scale, that technologies everywhere are identical, that products are undifferentiated, and that the pool of national factors is fixed. The theory also assumes that factors, such as skilled labour and capital, do not move among nations. All these assumptions bear little relation, in most industries to actual competition.'[40]

Conversely, today, capital can move very freely around the world and factors of production can easily move between countries. If Ricardo's writings were to be in this contemporary era of transnational corporations and upsurge of foreign direct investments, his assumptions would have been otherwise.[41] This simply

[35]See Ricardo (1817) at Chapter VII.
[36]See Mill (1848) at 21.
[37]See Torrens (1844).
[38]See Rothbard (1995) at 96-98.
[39]Ibid.
[40]See Porter (1990) at 12 and Dornbusch, Fischer &Samuelson (1977) at 823-839.
[41]Both in pursuit of transnational corporations and foreign direct investment both capital and labour would move freely across the borders of nations.

means that comparative advantage has been replaced by competitive advantage and has thus relaxed Ricardo's theory.

Regional Trade Agreements (RTAs)

Some controversies have dogged the WTO since its inception and other problems continue to develop as the organisation evolves. Growing discontent targeted the GATT in the first decade of the WTO. The Uruguay round is perceived to have failed developing countries with the collapse of two of the five WTO ministerial conferences. Uncertainties about the organisation have grown to such a crescendo that countries resorted to a proliferation of bilateral and regional trade agreements that puts the role of WTO in doubt as it undermines the position of the Developing Countries (DCs) and the Least Developing Countries (LDCs). The emergence of RTAs in the WTO started with the GATT 1947 under Article XXIV. The Uruguay Round negotiation provided the legal framework for RTAs in the area of trade in goods, GATs Article V, the Enabling Clause for the mutual reduction of tariffs on trade in goods among developing countries. The WTO fourth ministerial conference in Doha discovered that RTAs would be of importance in promoting trade liberalisation and enhancing economic development and encourage a mutual coexistence between the multilateral and regional processes. Thus the verification of RTAs compliance in the WTO was entrusted to the Committee on Regional Trade Agreements (CRTAs)[42] which has met some challenges.[43] The Doha Development Agenda, created to correct the problems of the DCs, has proven remarkably ambitious with limited success.[44] Regional Trade Agreements (RTAs) are traditionally created for liberalisation of trade among members but later includes services. The Chile, Singapore Free Trade Agreements (FTAs) with the USA, and the North American Free Trade Agreements (NAFTA), are examples of RTAs that allow professionals into member states to promote trade in services.

It is worthy of note that NAFTA began with unilateral track and bilateral liberalisation between the USA, Canada and Mexico in 1980 which in 1989 culminated in the Canada- USA Free Trade Agreement (CUFTA) and in 1992, NAFTA. By 1994, NAFTA was deemed a model free trade agreement, the most comprehensive free trade treaty of its kind with a combination of first and third world countries that comprises about 360 million people, making it the largest free trade zone.[45] The rationale for NAFTA ranges from such motives such as 'lock in Mexican liberalising reforms and the promotion of growth and industrialisation south of the border to prevent inflow of illegal immigrants from Mexico to USA. Moreover, the motive has been linked to market access to Latin America as well as

[42]WTO CRTAs terms of reference can be located in WT/L/127.

[43]There has been complexities of problems ranging from political or legal, most of which inherited from the institution of the GATT; interpreted of WTO rules against the RTAs or institutional problems as a result of the absence of WTO rules (rules of origin) or from discrepancies between WTO rules and RTAs rules.

[44]See Froman (2015). For further reading see Lester (2016).

[45]See Dunkley (2000) at 89.

the US agenda for western economic leadership.[46] However critics perceive NAFTA as a leading force of the new world order that emerged to privatise and de-regulate economies, largely shifting power to the multinational companies, tearing apart welfare states and weakening democracy.[47] The controversy surrounding NAFTA led to the advice that the Clinton government should abandon it.[48] Nonetheless, the NAFTA still remains the most comprehensive free trade treaty ever signed.

RTAs are embraced by many WTO members as trade policy instrument and complementary to Most Favoured Nations (MFN). The Committee on Regional Trade Agreements (CRTA) for the multilateral Conference was forced by WTO members in the 10th Ministerial Conference in Nairobi in 2015 to continue looking into the outcome of RTAs and as of 1 May 2018, 287 RTAs were operational.[49]

This in turn would benefit the multilateral trading system (MTS) by enabling unforced openness that could balance competitive liberalisation in global trade relations. No doubt, the proliferation of RTAs among WTO members and MTS could mean a challenge or an opportunity. It could become an opportunity for the DCs to push for implementation of domestic reforms into the WTO liberalisation agenda to promote their integration in the world economy. Nonetheless, it could become a challenge when it undermines the transparency and predictability in global trade relations which is at par with multilateral trade objectives. Traditionally, the formation of RTAs happens between geographically close countries with existing formed trading patterns. The NAFTA countries, the European Community (EC), Australia and New Zealand, EFTA and CEFTA are good examples.[50] Other regional patterns may be formed as a result of regional proximity, such as South-east Asian countries' participation in ASEAN, western Hemisphere partners of CARICOM, the CACM, the MERCOSUR[51] or the sub-Saharan African groups such as CEMAC or SACU[52] are all good examples. The existing agreements may be supplemented towards expansion, in many cases beyond neighbouring countries and entering into free trade agreements (FTAs). India has signed the South Asian Free Trade Agreement (SAFTA) which includes such countries as India, Bangladesh, Sri-Lanka, Thailand and Myanmar. Also, India has signed an agreement with the Southern Common Market (MERCOSUR) as a prelude to Free Trade Areas (FTA) and concluded an FTA with Chile and SACU in 2007. In line with this, sub-Saharan Africa has engaged in initiatives such as WAEMU, CEMAC, COMESA and the SADC[53], created to promote free

[46]See Clark (1994); GAO (1993).
[47]NAFTA on free trade views, see Hufbauer & Schott (1992). For critiques, see Cohen (1994). See WTO (2009).
[48]See Dryden (1995) at 381.
[49]See WTO (2017).
[50]EFTA: European Free Trade Association; CEFTA: Central European Free Trade Agreement.
[51]CARICOM: Caribbean Community and Common Market; CACM: Central American Common Market; MERCOSUR: Southern Common Market.
[52]CEMAC: Economic and Monetary Community of Central Africa; SACU: Southern African Customs Union
[53]WAEMU: West African Economic and Monetary Union; COMESA: Common Market for Eastern and Southern Africa; SADC: Southern African Development Community.

trade areas or customs unions. Regional integration comes with such problems as complex webs of overlapping membership but it is nonetheless a vital alternative to the Uruguay Round multilateral free trade arrangement. Indeed, the Economic Partnership Agreements (EPAs) between the EU and the African Caribbean and Pacific group of countries (ACP) and their existing regional groupings is a move in the right direction. The wide spread of RTAs was encouraged for access to larger markets at the regional or bilateral level since there is unwillingness among WTO DCs members to multilaterally liberalise their markets further. RTAs can be seen as a defensive mechanism for smaller countries maintaining market access options without a liberalisation driven by MFN.

RTAs can also be a mechanism for promoting stronger economic integration, especially in connection with multilateral issues such as investment, competition, environment and labour standards. They enable countries to engage in discriminatory liberalisation in order to gain from trade in products with which they cannot ordinarily compete internationally. Membership in RTA is believed to enhance getting foreign direct investment among low labour cost countries that has preferential access to a larger developed markets. The inflow of Foreign Direct Investment (FDI) into Mexico was at the beginning of its membership to NAFTA. Instead of DCs continuing with a General System of Preferences (GSP) programme, they can sign into RTAs with developed countries and obtain access to their markets, which in effect will draw foreign investment into DCs. This strategy will present a dual locking function to RTAs; locking out competition and locking in foreign investment. However, some developed countries' membership of RTAs may be driven by political security concerns, new geographical alliances or cementing diplomatic ties with other countries. In such a case, the economic rationale for signing into RTAs will be undermined or depreciated. RTAs are dynamics for economies of scale, competition and attraction of FDI. Liberalisation through RTAs may appear to be second-best to a multilateral system, but could nonetheless be the best option available for opposing a regime of multilateral liberalisation. Such a regional agreement could create harmonized tariff treatment on imports of all goods to avoid the undermining of preferential margins such as rules of origin that makes international trade more complex and costly.[54]

Ordinarily, there are four notable likely avenues of trade liberalisation: unilateral (one country alone removing protective barriers), bilateral (two countries negotiating mutual protection reductions), regional (countries within a region developing liberalisation arrangements), and multilateral (universal negotiations for liberalisation and trading rules) trade liberalisation. However, free traders are concerned with GATT and RTAs because their trade negotiations take time, resources and as well put political agreements of the bodies at risk. In order to do away with 'unfair' trade practices which free traders such as Bhagwati criticised[55], regional and multilateral trade principles for reciprocal liberalisation had been proposed by governments and international bodies to ensure negotiation compromise among members.[56]

[54]See UNCTAD (2011).
[55]See Bhagwati (1989) at 125.
[56]See Bhagwati (1994).

Unilateralism or 'liberalism from below' is an ideal principle against the alternative slow track policy of reciprocity or 'liberalism from above'. This means the use of intergovernmental negotiations to secure trade liberalisation, which are most often politicised, time consuming and difficult. Trade negotiators' interests are centred on a power game as against economic benefits. If other parties engage in 'unfair trade' or not making enough concessions on market access, the game of reciprocity invokes threats of retaliation, whereas unilateral liberalisation takes a direct route to freer trade, avoiding reciprocity, government failure or retaliation. The ideal step will be a combination of unilateralism and multilateralism to strengthen private property rights in international negotiations. The combination of unilateralism and multilateralism will advance trade and liberalisation of investment as long as there is no discrimination against third parties.

The RTAs should be seen as a stepping stone to multilateralism and global free trade. This writing advocates 'more open regionalism' for the DCs as a means whereby the DCs RTAs would progressively embrace more and more countries in a manner similar to the development of CUFTA into NAFTA and the possibility of it becoming the free trade area of the DCs. The DCs engagement into RTAs will be subject to a comprehensive service agreement such as: national treatment; right of investment and establishment; market access for service professionals including the right to cross-border service sales; transparency of government regulations and harmonisation of professional service standards.[57] Regional Economic Communities (RECs) of the DCs though will hamper their participation in the WTO, would facilitate regional co-operation and coordination among DCs and create synergies. Examples of such regional integration could be seen in Mauritius and Zambia. Both belong to two regional communities of common market for Eastern and Southern Africa (COMESA) and the Southern Africa Development Community (SADC). The consolidation of RTAs among the DCs with non-contiguous countries will help to combat the problem of multilateral liberalisation in a manner similar to the development of CUFTA into the NAFTA. Some literature has suggested that regional economic integration such as the NAFTA, EU, MERCOSUR, and the organisation of Asia-pacific Economic Cooperation (APEC) could encourage protectionism or erode the multilateral system created at the end of World War II; whereas others argue that regional economic institutions will enhance economic openness and promote a multilateral system. These debates have not been settled among researchers or economists.[58] Nonetheless, the combination of the RTAs involving the DCs as a front against the multilateral system of the WTO will position them better in the global economic system. The proliferation of RTAs among the DCs without a symmetrical interest and common purpose will dilute the strength in the DCs economic cooperation and coordination. The ideal RTAs will constitute the conglomeration of all the RTAs that currently operate to unify together with a common trade agenda in order to serve the purpose of economic development for all DCs and LDCs.

[57]See Dunkley (2000) at 91-92.
[58]See Cohen (1997) at 50-76. See also Duina (2016).

Free Trade and Sustainable Development

Liberalisation of trade and reformation of the WTO could be perceived as the pillars of lasting economic growth, which could lead to the reduction of global poverty. The WTO preamble to its agreement enshrined 'sustainable development' as the ethos of its institution. Accordingly, this was demonstrated at the Doha ministerial conference of November 2001 which formulated a framework of trade liberalisation steps basically envisaged to result in a 'development round' of discussions with an emphasis on responding to developing countries' needs.[59]

The short-lived optimism of the Doha Declaration on development was followed by the failure of the WTO Cancun meeting in 2003, caused by the debacle concerning the 'Singapore Issues'[60] and the disagreement between United States and European Union over trade liberalisation within agriculture. These incidents drew suspicion from the developing countries members over the readiness of the developed world to step forward ahead of the rhetoric of their international trade promises[61]. The failure of Cancun Ministerial Meeting attracted debates between the member states of the WTO based on economic globalisation and focussed on the international debate on trade and development. These debates were divisive; on one hand further strengthening of global trade would be visualised as an important part of 'sustainable development'[62] on the other as destructive, especially as it related to the interests of poor countries.[63]

Nonetheless, most member states favour strengthening WTO trade rules although with apprehension that they might not be sustainable, could be inappropriately established or poorly implemented and defeat their aims.[64] Needs varies from one country to another. However, the definition of sustainable development came out of the report from the World Commission on Environment and Development as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'.[65] In keeping with this definition, the Johannesburg 2002 World Summit on Sustainable Development stated that 'these agreements cover both present needs and key factors in the ability to meet future ones'. Accordingly, one of the essential

[59]WTO (2001).

[60]The "Singapore issues" is a term which came after the Singapore Ministerial Conference in 1996 where Ministers from WTO Member-countries decided to set up four working groups namely investment protection, competition policy, transparency in government procurement and trade facilitation. There was a split between developed and developing economies which led to no conclusion on these issues even when they were revisited during the Cancun, Mexico Ministerial Conference in 2003, see Stiglitz & Charlton (2005).

[61]See Oxfam (2000) argues that "Agriculture is the key to unlocking the Doha development agenda, and without constructive steps on this issue, the broader negotiations cannot really restart." Cited by Stiglitz & Charlton, "A Development Round of Trade Negotiations in the Aftermath of Cancun." A report for the Commonwealth Secretariat, Published by Commonwealth Secretariat United Kingdom, 2004, note 23, p. 17.

[62]WTO (2003).

[63]See Khor (2003).

[64]See. Hoekman, Mattoo & English (2002).

[65]The report of the World Commission on Environment and Development, (WCED or Brundtland Commission), 1987.

objectives of Millennium Development Goals (MDGs) is to halve between 1990 and 2015 the proportion of people living in abject poverty on incomes less than one dollar a day.[66] It is now 2018, 3years after the MDGs target, and the right question now is, has the goals been achieved. The MDGs 2001 targeted halve issues on eight key areas – poverty, education, gender equality, child mortality, maternal health, disease, the environment and global partnership. Records show that although significant improvement has been made in achieving some goals, it is not completely a success.[67]

The David and Kraay's free trade analysis concluded that an open market place is a necessary prerequisite for economic growth and poverty reduction.[68] Thus OECD says 'more open and outward orientated economies consistently outperform countries with restrictive trade and foreign investment regimes'.[69] Additionally, the IMF says 'policies towards foreign trade are among the more important factors promoting economic growth and convergence in emerging countries'.[70] The IMF further argues that

> *"globalisation influences economic growth and leads to greater incomes and that the countries that practice restrictive policies do not benefit; while the countries that achieve greater wealth are the ones that practice globalisation and committed to its principles"*.[71]

These views led to their report of 2002 titled 'Globalisation, Growth and Poverty' which supported Dollar and Kraay's discoveries and arrangements and therefore concluded that 'the more globalised countries have made very significant gains in basic education while the less globalised had made less progress and now lag behind in primary attainment'.[72] The economic history of some countries has confounded Dollar and Kraay's analysis. The high economic growth of China in the late 1970s was not because of the reduction of its trade impediments which was left until second half of the 1980s.[73] In the same vein, India did not undertake substantial trade reform until 1991-93 but its economic growth rate started to increase significantly in the early 1980s.[74] Argentina in the early 20th century before the Great Depression had a very strong economic growth rate without engaging in trade liberalisation, but followed import substitution to attain industrial self-sufficiency.[75] Conversely, Vietnam experienced economic growth take-off in the mid-1980s when it cut its tariffs, but Haiti which liberalised its trade barriers in the mid-1990s experienced no pick-up in economic growth.[76] At this

[66]See George & Kirkpatrick (2004) at 441-469.
[67]See McArthur & Rasmussen (2018).
[68]See Dollar & Kraay (2001).
[69]See OECD (1998) at 36.
[70]See IMF (1997) at 84.
[71]See IMF (2000). See also Woodin & Lucas (2004) at 17.
[72]See Dollar & Kraay (2002) at 35.
[73]See Malhotra (2003) at 31.
[74]Ibid.
[75]See Beattie (2009).
[76]See Malhotra (2003) at 28.

point, we can say that there is no uniform factor that leads to economic growth. The United Nations Development Programme in 2003 concluded that there is 'no systemic relationship between countries' average levels of tariffs and non-tariff barriers and their subsequent economic growth.'

WTO, World Bank, IMF policies are formed by the same interest stake holders (the hegemons) and their policies have underlining regressive economic agenda against the DCs. It will be oblivious to believe that the western world is genuinely interested in making the DCs economy to enjoy rapid growth. The policies are formulated to subjugate the DCs into perpetual dependants of developed country's assistance. Thomas Hobbes stated that man's natural tendency is violence, to rule, to lead and overpower others unless there is a law to check their brutishness.[77] Free trade is absolutely free movement of goods from developed countries to developing countries, but not absolutely free movement of goods from developing countries to developed countries where barriers and tariffs are impediments to free flow of goods. In every policy of the developed countries, there is a sublime agenda to impoverish the poor like the recent dumping of toxic and substandard goods from China to African countries.[78] There is no restriction of trade from the countries that are trying to endanger the lives of other countries all in the name of free trade. The actual reason why the WTO, World Bank and the IMF opined that free trade leads to rapid economic growth is to enable the Transnational Corporations (TNCs) who are part and parcel of the International financial institutions to have uninterrupted exit to push their manufactured goods and markets to the rest of the world. Otherwise, they will experience market glut to the extent that their companies can cease to exist.

The merits of free trade, a doctrine that touches on the basis of WTO instrument is the logic of fundamental virtuous of universal reciprocity that has profound moral foundation.[79] Suffice to say that every country has a duty to protect itself economically, but the WTO MFN and Reciprocity principles must be observed. Most-Favoured Nations (MFN) Status-essentially states that the best treatment you grant to one of your trading partners should be accorded to all. This was arrived at as a matter of good governance, and represents 'centre of operations' of the WTO.[80] But the concept predates the creation of nation-states.

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[77]See Hobbes [1651] at 266.

[78]See Punch News (2017). See also McLaughlin (2012).

[79]See Moore (2003).

[80]The WTO in principle treats all members alike, whether rich or poor, strong or weak. At the centre of these rules is:

(1) The 'Most-Favoured Nations' (MFN), rules which prevents WTO members from discriminating between foreign goods or treating products from one WTO member as better than those from another one; and

(2) The 'National Treatment' (NT), rule which obliges governments to treat foreign and domestically - produced products equally.

MFN obligation is embodied in Article 1 of the GATT, Article II of the General Agreement on Trade in Services (GATS), and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994. However, there are some exceptions allowed to MFN, but the agreement permits these exceptions under strict conditions. For example under GATT Article XXII countries within a region can set up a free trade agreement that does not apply to goods from outside

What is good for an individual provides a principle of moral behaviour that extends beyond any one faith. It is the basis of civilised behaviour.

Behind the Scenes of Global Free Trade

One can arguably say that the truth behind the encouragement for global free trade is hinged on the creation of a western empire or hegemony though plausibly presented as an ideal framework for the poor economy of the developing nations, but in reality hidden by capitalist undertones to economically rule the entire world. The global free trade campaign is clandestinely geared towards long-term northern economic security.

There is basically no harm in a country protecting its economy. An unbalanced policy of asking the developing countries to open access to their raw materials without reciprocal obligation could be termed uncaring treatment of others for one's own selfish gains. This defies morality and acceptable ethical behaviour. It is apparent that the pursuit of self-gain echoed by Adam Smith[81] or Albert Hirschman[82], has underpinned the principles of reciprocity provided in the WTO policies to ensure sustainable development.

Free trade, which has been professed by many as the ideal system for balanced development in the 'two worlds', exists only in principle; the debacles of tariffs and subsidies in agriculture have not been properly addressed. Gordon Brown, then chancellor of Great Britain, once recommended "ending the hypocrisy of developed country protectionism" through the removal of trade-destabilising subsidies and like impediments to trade transactions.[83] The Group of Seven (G7) has been criticised for not having done enough towards opening their markets for the inflow of African export products such as cotton and sugar. It has been blamed for the collapse of the WTO 2003 Cancun Summit because of its refusal to take away US and EU agricultural subsidies, making competition difficult for the poor countries whose agriculture is not subsidised.[84]

However, in the WTO July 2004 'framework'[85] for negotiations on reduction of subsidies and other trade impediments,[86] the issue of subsidy reduction attracted an ongoing debate in Doha conference on removing the developed countries' domestic farm assistance programme to reduce trade obstructions and eliminate export subvention.[87] In lieu of lowering of subsidies, United States representatives sought for more third world access for US finished products and services.[88] By implication, greater access to African markets will encourage developed countries

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the group. Also, a country can raise barriers against products from specific countries that are considered to be traded unfairly.

[81]See Smith 1976 (1776).
[82]See Hirschman (1987).
[83]See Brown (2005).
[84]See Buckman (2005).
[85]See WTO (2004).
[86]See Fergusson (2004).
[87]See Hanrahan (2005).
[88]See Copson (2005).

to dump their manufactured goods, which will ultimately discourage developing countries' infant industries or even put them out of production as they would face competitive prices from similar manufactured goods from the developed countries.[89] Nonetheless, record has shown that since 2000 the United States has done more than other countries to remove trade barriers through a programme termed the African Growth and Opportunity Act (AGOA). This programme allowed 37 sub- Saharan African nations the duty-free access to America of a variety of products, among which 24 were authorised to export textiles and clothing.[90]

The underpinning factor could be the attachment of concessionary measures in return and the United Kingdom and European Community (though noted to have negotiated 'Economic Partnership Agreements of African Caribbean and Pacific countries') have not followed American footsteps despite professing the desire for development, economic growth and the eradication of poverty for these regions of the world. These unilateral actions by poor WTO members to improve their trade policy space ranging from structural adjustment loans and bilateral arrangements though not imposed or required for WTO membership are potentially subject to WTO rules and regulations which are imbalanced.[91]

More Trade Liberalisation

The vexed issue in trade policy is whether a greater flow of trade or liberalisation of trade would make the system fairer. The 'fair trade school' argues that greater access by developing countries to developed countries' markets would unequivocally make the developing countries wealthier. That is to say, that greater trade would reduce world poverty and inequality. On the other hand, the 'localisation school' argues that sustainability would come through less trade and national self-reliance.[92]

Oxfam one of the 'fair trade schools' in 2002 set in motion a campaign to 'Make Trade Fair' with a report in which it clearly argued that 'the increasing integration of developing countries into the global trading system offers the promise of more rapid progress towards poverty reduction and improved standards of living.'[93] The report stated that 'if Africa, East Asia, South Asia and Latin America were to increase their share of world export by 1 per cent 128 million people could be lifted out of poverty'.[94] George Monbiot argues that, 'rich countries […] would be required to pull down their barriers to trade. They would

[89]It is not clear whether this development would lead to reduction of the trade barrier sought by Tony Blair and Gordon Brown in Gleneagles July, 2005. But one thing is clear; the Summit did take action on specific reduction.
[90] See Fergusson & Langton (2005).
[91]See Milner (2006) at 1409-1422; see also Milner & Zgovu (2006) at 251-268.
[92]See Buckman (2005).
[93]Oxfam International (2002) at 239; Neil (2007).
[94]Oxfam International (2002) at 3.

be permitted neither to subsidise their industries nor to impose tariffs or other restraints upon imports from poorer countries.'[95]

There has been a shift in the argument that increasing liberalisation and market access would end the problems of poverty. On the contrary, it could worsen the situation especially trade liberalisation in important areas such as agriculture and textiles.[96] A reasonable apprehension abounds that if developing countries had greater access to developed world markets, developed countries would demand greater access to low-income countries' markets in return. This would drastically affect the developing countries, especially their agricultural and manufacturing industries. As the majority of developing countries are heavily dependent on agricultural products, lifting restrictions to agricultural imports too soon could dislodge local populations.[97]

By and large, greater access to developed countries' markets by developing countries, especially the agricultural sector, would increase their dependency on food imports. Thus Action Aid said in reaction:

> *"Many developing country governments see increased access to developed Country markets as extremely important, but Action Aid is more cautious because of concerns that this could fuel an explosion of export – orientated agriculture in developing countries at the expanse of small – scale producers and the environment. This trend has been seen in Brazil with a rapid expansion in soybean production and in Indonesia and Malaysia in relation to oil palm production for export. Also, typically, produce from low-income farms is sold on local and national markets and so for small-scale farmers, increases in export markets are to a large extent irrelevant."*[98]

Opposed to the 'fair trade school' is the 'localisation school' which believes that true trade sustainability will only come through restricting trade to its bare essentials, and the regions and countries should become more self- reliant. Hines, the standard bearer of localisation as the new protectionism says, 'we look to less trade […] every effort should be made to meet requirements from local sources first, then nationally, then regionally, and only after that internationally.'[99]

He encourages the use of tariffs to bring about localisation and advocates that all exporters need to re-orientate production towards more local markets.[100] Hines' advocacy of localisation had been accepted by both the International Forum

[95]See Monbiot (2003) at 218; see also Fisher & Ponniah (2001) at 76; Parris (1999) at IV., 'Trade for Development – Making the WTO Work for the Poor', World Vision, East Burwood (Australia), 1999, p. IV.
[96]See Wiesbort & Baker (2002) at 1. On the issue of trade liberalisation being part of the problems of developing countries trade system and not a solution to problems of growth and poverty see Christian Aid (2004).
[97]See Weisbrot & Baker (2002) at 2.
[98]See Action Aid (2003) at 11.
[99]See Hines & Lang (1993) at 128.
[100]See Hines (2000) at 65.

on Globalisation[101] and Friends of the Earth International.[102] However, opposing localisation, Oxfam says that 'a retreat into isolationism would deprive the poor of the opportunities offered by trade',[103] and that 'national sovereignty without a systematic strategy for poverty reduction is little more than a one-way street leading to self-sufficient misery'.[104]

The issue of more trade liberalisation, right from the failure of the WTO Seattle Ministerial Meeting in 1999, has been viewed as complicated. The unsuccessful result of Seattle provided a cause to review and rethink the ideal steps for trade procedure.[105] Paradoxically, the views of both developing countries and academics on the subject-matter are ambivalent. On one hand, trade liberalisation has been advocated as necessary to economic expansion and development. However, the UNCTAD findings demonstrate that there is no automatic correlation between trade liberalisation and expansion.[106] In another view, some developing countries have criticised trade liberalisation as the main source of their economic retardation, making them outcasts in the economic global arena.[107]

It has often been asserted by some scholars that liberalisation has benefited 'the world', that 'we are all gainers, there are no losers'[108] This generalisation is untrue; some countries, especially the poorest, have gained virtually nothing. The truth is that only a few have experienced moderate growth in the last 20 years while the majority has suffered a reduction in living standards per capita income measurement.[109] The question here is whether global free trade has been intended as a universal benefit or a social form of contemporary mercantilism, designed to dominate the South.[110] Some like-minded scholars have associated free trade with colonialism and the perpetuation of economic inequalities.[111] These assertions were informed by the international trade system pre-dating GATT which proposed a code creating a set of rules for an 'open international market'[112], but the syndrome of some western countries alternating protectionism with free trade has not been wiped out.[113] The 'trade taxes' must be eradicated, before the developing world's export strength can be appreciated. Essentially, trade in agriculture for

[101]The International Forum on Globalisation (IFG), 'Alternative to Economic Globalisation: A Better World is Possible',2002, p.12, available at http://www.ifg.org 11/09/2018
[102]Friends of the Earth International (2000) at 8, 10. L, 'Towards Sustainable Economies: Challenging Neoliberal Economic Globalisation', 2003at 8, 10.
[103]See Watkins & Fowler (2002) at 16.
[104]Ibid, at 24.
[105]WTO Meeting held in Seattle Washington Nov/Dec. 1999 failed to launch proposed new 'Millennium Round' of global trade. 50,000 people took to the streets of Seattle in an unprecedented show of public protest against the talks. See Bhagirath (2003) at 15; Khor (2000) at 11-15.
[106]See UNCTAD (1999).See also Hatchard & Perry-Kessaris (2003).
[107]Ibid.
[108]See Khor (2000).
[109]See UNDP (1999) at 31.
[110]See Lowenfeld (2002) at 9.
[111]See Gearey (2005) at 6.
[112]See Hudec (1987) at 8.
[113]See Gearey (2005).

African countries cannot be overemphasised and they should be allowed to determine the rate of their liberalisation.[114]

Ironically, African agricultural markets are liberalized far and above their western trading counterparts. Liberalisation was imposed on African governments more than 20 years ago through the Structural Adjustment Programme (SAP)[115], bilateral aid[116] and trade measures to reduce manufacturers' subsidies and eliminate tariffs quickly as against the Uruguay Round principles.[117] The policies of the Uruguay Round of trade agreements are imbalanced with a plethora of tariff and non-tariff measures for African exports and highly subsidised European and United States food products, mostly marketed below manufacturing price to outcompete African farmers in local and international markets. This will lead to impoverishment of rural Africa, urban migration, and the displacement of minority people. Trade liberalisation, if imposed on countries not yet ready, could lead to financial instability and debt, deteriorate balance of payments, cause poverty or result in economic recession.

A more realistic approach should be taken towards trade liberalisation. There should be no more hassles on third world to open their markets more. A slowdown approach should be adopted just as more time was given to the developed countries to hold a huge protection in agriculture, textiles and other industrial goods for the reason that they needed ample time to adapt.[118] The developing nations should be allowed to determine when they are ready, free and amenable to strategise their financial choices, trade and investment policies in order to be able to decide on the rate and scope of liberalisation that would fit and/or benefit their ailing domestic industries and products.[119] They should not be bullied into further opening up their markets;[120] rather the developed world should find a solution to stop trade inequality.

On the other hand, the notion of embedded liberalism, articulated by John Ruggie[121] is a vital instrument to developing countries' economic prosperity. Embedded liberalism prevailed before the rise of the neo-liberal agenda; it entails

[114]See Igwe (2011).

[115]Structural adjustment is a policy of reducing government expenditures, lowering inflation, limiting imports, devaluing currency, and increasing economic efficiency, required by IMF of countries in debt as condition for debt restructuring.

[116]Bilateral aid is money given from one government to another. Bilateral aid may have strings which tie it to the country giving the money. This means for example, that if the UK government pays to build a dam, UK builders will do the work.

[117]See GATT (1994).

[118]See Lim (2005). On the same note, the Multi-Fibre Agreement (MFA) protection for developed countries' textiles and clothing industries is a case in point. More than three decades of protection from imports-and ten years advance warning that this protection would end on 1 January, 2005. Also Doha WTO Ministerial Conference, 9-13 November 2001, adopted on 14 November 2001. See www.wto.org S & D – Article XXXVII of GATT, 1994. "The WTO agreements contain special provisions which give developing countries special rights. These special provisions include for example longer time period for implementing agreement and commitments or measures to increase trading opportunities for developing countries", https://www.wto.org/english/tratope/dda_e/dohaexplained_e.htm

[119]Igwe (2011).

[120]See Khor (2000).

[121]Ruggie (1982) at 379-415.

embracing open international markets, with states retaining the right to engage in protectionism at national level.[122] GATT/WTO mandated neo-liberalism seeks to distort policy options from the hands of states. The contention whether states can maintain equality and benefits for their citizens fades away and is overcome by the new occident market liberalisation ideology. The aftermath is a paradigm shift in the pursuit of western economic hegemony followed by uncertainty about the realisation of social justice, especially for the poor in the world. The market is held as a vehicle of growth and prosperity even if it is incompatible with the goals of equity and economic redistribution.[123] International financial institutions such as the WTO, IMF and World Bank and the logic of 'globalisation' impose the path of the open market as a compelling principle, yet they maintain trade restrictions, protectionism and trade barriers. In tandem with the advancement and prevalence of the free market is the overshadowing and reduction of the power of states to development.

Critics and analysts have opined that the era of the state (a Golden Age from the end of World War II until the mid-1970s) which witnessed and recorded huge economic growth and a redistributive welfare state is decisively over.[124] It has been alleged that the state can no more guarantee the basic standard of living of its citizens, instead individuals must look towards the chances and the uncertainties of global markets to fulfil their collective desires.[125]

Thus embedded liberalism is a tool to be considered as a response to the problems associated with the new global regime. This will articulate an unrestricted rebuilding exercise of the developing countries as a vehicle for lasting economic distribution through its private sectors.

Conclusion

Although the MDGs target was not met at the end of 2015, a significant achievement was reached by 2018 and more efforts are be intensified to improve global living standards. This writing has demonstrated a serious need for balanced fair trade rules that would work between the costs, benefits, interests and values of both developed and developing countries with appropriate flexibilities for the developing countries to implement development policies. The importance of the argument in this writing is the ability to manage trade properly to lead to sustainable development as an undirected restrictive trade system can be as bad as an undirected free trade system.[126] This paper has not seen free trade system as a healthy option to revamp the low-income countries' economies considering the long term slide in the export prices of raw materials from DCs; short term protectionism becomes the best option for the DCs' economic growth. Thus, there

[122]See Igwe (2019).
[123]See Rittich (2001) at 95-108.
[124]Boyer & Drache (1996).
[125]World Bank (1997).
[126]See Melamed (2002) at 1-7.

should be a reintroduction of embedded liberalism in the global market to respond to global economic asymmetries.

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Current Issues of Czech Road Traffic Law in the Context of Jurisprudence and Road Safety

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This paper focuses on the road traffic legislation of the Czech Republic from the perspective of the road safety. It will demonstrate how the road safety is approached by the Czech legislator, the administrative authorities and by the Czech courts. Correct and effective legal regulation of sanctions for traffic offences, the possibility of individualization by the administrative authorities and judicial control, those are the factors that influence the preventive effect (general and individual) of the punishment can help to improve road safety. This paper will bring up selected recent legal questions of Czech road traffic law, such as consequences of material aspect of the offence; constitutionality of the owners/drivers liability and legal relevance of the case-law.

Keywords: *Administrative offence; Administrative sanction; General prevention; Road safety; Traffic law; Regulation; Proportionality; Human rights; Administrative punishment; Czech law.*

Introduction

The main aim of the following pages is partly descriptive and partly analytic. We would like to demonstrate some of the current issues of Czech road traffic law and contribute into general discussion about the issues of road traffic law on interstate level. With the use of relevant case law, we would also like to analyse the importance of the road safety within the Czech road traffic law. We will also examine question of the legal relevance of the case law in Czech Republic as it has a direct connection to our topic.

Road safety is complex global issue and as such, it should concern the society as a whole. Every road accident may cause considerable socio-economic losses in addition to the impact on the lives and health of its direct victims. In Czech Republic according to the calculation for the year 2016 the socio-economic losses caused by road accidents were approximately 2.7 billion euro and cost of human life was calculated on 750 000 euro[1]. Those data can be used to support the argument about clear social demand for improvement of road safety.

Considering the measures for improvement of road safety the attention should be focused on all three key elements, which are usually defined as *infrastructure*, *vehicle* and *road user*[2]. Technical and safety standards of roads and vehicles will

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[1]Calculation for the year 2017 is not yet available. Original amount is in CZK. Press release is available in Czech language on the website of Transport Research Centre (2016).
[2]*Global Status Report on Road Safety 2015*.

not be dealt in this paper. We will focus solely on the road user because the law represents one of the most significant measures that can influence road user's safe behaviour on the public roads. Set of rules can be preventive depending on the variety of sanctions which can be imposed for the unlawful behaviour. However, in order to achieve the maximum level of road user's acceptance the legislation should be accompanied by effective enforcement of road traffic rules.

Level of enforcement is the result of both - the legislation and application of its provisions in practice.

General Relation between Czech Road Traffic Law and Road Safety

The rules of road traffic in Czech Republic are set by a group of principal legal statutes, but mainly by the Road Traffic Code (Act No. 361/2000 Coll.) which came into effect on 1st January 2001. It regulates general conditions under which *anyone* can become a user of the public road and some specific conditions for certain types of road users (drivers, cyclists, etc.). It also contains a set of rules for safe and smooth road traffic. Its last part deals with punishments for infringements of the rules.

If we search for the source of some sort which deals with road safety it is important to point out, that in many countries, where the care for road safety is among the priorities, usually the main strategic material which addresses road safety exists[3]. It is not uncommon that these documents incorporate the leading philosophical idea of "Vision Zero"[4], which states that the ultimate goal is to reduce the number of deaths and serious injuries caused by road accidents to zero. In Czech Republic the National Road Safety Strategy[5] which was revised and updated in 2017 can be considered as a main strategic material of government for the domain of road safety. In its analytic part there is a description of statistics and long-term development of road safety in Czech Republic, and this is followed by a strategic part. Concerning legislation National Road Safety Strategy mentions few general points should be addressed including better enforcement and legislative amendments like more effective sanctions. Those parts are accompanied by Action Plan that formulates more specific measures which should be taken in the legislative area.

From the description given it is possible to assume that explicit general relation between road safety and road traffic legislation exists at least *on the strategic level*. Moreover, some of the specific measures in Action Plan have purely legislative nature (e.g. examination of the possibility of enactment of probation driving period; examination of the possibility of extension of the obligation to wear a helmet; enacting stricter approach to unexperienced drivers; enacting alcohol interlock) some of them are of the socio-legal nature (evaluation of effectiveness of the Road Traffic Code in the context of specific targets of the National Road Safety Strategy). If we look closer at the Road Traffic Code we can

[3]Specific national road safety strategies can be on mobility and transport road safety.
[4]Belin, Johansson, Lindberg & Tingvall (1997).
[5]Available online in Czech language: http://bit.ly/2G5zxhk.

see that since it came into effect it has been amended more than 45 times, sometimes with the intent just to improve insufficient enforcement of road traffic rules or the rules themselves. Often those amendments were introduced because of the specific demand for their adoption from the road safety position – because it appeared in the previous versions of Action Plan (this was, for example, the case of introduction of demerit point system in Czech Republic or introduction of owner's liability regime).

Both systems are interconnected because the rules of Road Traffic Code should have certain impact on the reality which is usually examined with the help of using statistics. Evaluation of those statistics gives an insight on the state of road safety in the country and on the impact of Road Traffic Code. If the results are not satisfactory enough, the legislative amendment or strengthening of enforcement should be one of the measures considered by the government.

We will demonstrate a few practical examples of the approach of jurisprudence to the traffic law and we will try to analyse its theoretical effect on road safety.[6]

Current Issues of Road Traffic Law in Czech Republic

Material Aspect of Traffic Offence

In this subsection we would like to demonstrate the implications of the current interpretation of "material aspect of traffic offence" on the road safety.

Criminal or administrative liability is basically one's liability for fulfilling the conditions of the definitions of crimes or administrative/minor offences. Structure of those definitions is composed from formal aspects which are the 1) characteristics of the offender; 2) thread or disturbance of protected interest; 3) characteristics of the act itself; 4) characteristics of the culpability (intention, negligence). Material aspect of the administrative offence (crime) represents the social dangerousness of the infringement.

Law in some cases does not consider "formal" unlawful behaviour illegal. It is the case when the circumstances excluding illegality are present (for example when victim of an attack protect him/herself and hurts the attacker – it would be the case of necessary defence and victim should not be liable). It is possible to assume that the reason why the law excludes criminal or administrative liability in certain cases is the lack of material aspect.[7] Legislator stipulates that he does not find these cases dangerous for society.

In Czech Republic the Supreme Administrative Court (SAC) ruled in a case of a driver who exceeded the speed limit by 2 km/h (after the correction of measured speed +/- 3 km/h) that he should not be held liable because his action

[6]This paper is not based on empirical research.

[7]*"Retreating into formalistic administrative-law based reasoning in such cases is not the answer to this challenge. The resolution is also not a simple matter of preferring substance over form, since baseless and one-sided substantive reasoning is as devoid of justification as sterile formalism"* in Quinot (2010) at 114.

lacked material aspect (social dangerousness)[8]. Generally, the reasoning of the SAC has been that the act which fulfils the formal aspects of administrative offence also fulfils material aspect in most of the cases because it usually violates certain protected public interest. But if there are other certain facts present, they can exclude this violation. The SAC stated that it was not a correct opinion to assume that every (minor) excess over the speed limit would be automatically administrative offence. On the other hand, it is not possible to give an exact speed limit when the excessive speed becomes also an administrative offence. In this case it was concluded that the driver did not commit a traffic offence because there were other circumstances such as low traffic density area, it was near the exit from the village and others, and based on those circumstances the court said that he could not violate public interest on safe and smooth road traffic. Similar conclusions were made for example in other judgement of SAC[9] where the court considered the situation of driving without driving license.

In our opinion this interpretation has certain defects in the context of jurisprudence and it also has a few negative implications for the road safety.

In the first place we consider the above mentioned opinion as problematic because so-called speed offenses in road traffic law are typically *formal* offenses so there should not be relevant whether there has been any a specific harmful consequence. Exceeding the *formal* legal limit allowed speed should be considered as an offence. While *material* offences require that the conduct will manifest some harmful effect in a reality, formal offenses on the other hand are considered to be harmful in the conduct itself.

There is also a question of perceiving the concept of division of power. If we recognise the existence of formal or absolute offenses, we also recognise the legislator's competence to *really effectively determine* what is socially harmful; if we deny that competence in favour of the executive power (in Czech Republic the administrative liability is realised by administrative authorities) or judicial power (criminal liability), then we basically deny the existence of formal offenses.

In our opinion, formal offenses are justified elements in legal order. Their introduction into the legal systems of a modern democratic states is most probably a reaction of the state policy to certain acts which are (from the point of view of the legislator) generally socially dangerous and therefore it is not necessary to deal with the specific details of each case separately and examine whether the violation of protected interest was present in the specific case. They might be also understood as a manifestation of the principle of process economics. In other words, if the interest in safe and smooth road traffic is considered to be worthy of protection and specific speed limits are *set for its protection*, they should be respected on their own. This applies even more when inappropriate (excessive) speed is a frequent cause of traffic accidents with grave consequences for health and life[10]. Our question is why it should be necessary to consider every particular case from all perspectives and "re-search" social dangerousness once again after it was already established by the legislator?

[8]Case 104/2008-45.
[9]Case 137/2011-52.
[10]*Speed and Crash Risk*. IRTAD, 29 March 2018.

Other argument to support our thesis would be that the legislator represents the will of the people (of the society) through the institute of direct elections, so the determination of what is and what is not socially dangerous should be logically in his competence. Additionally, the legislator is only "one" body opposite to administrative authorities (or judges) so the legal certainty of what is socially dangerous would be achieved also through the competence of legislator. If we deny that competence, we might face the fragmentation of legal certainty. In above mentioned case of excessive speed – every administrative body (judge) might have a different opinion if the material aspect is present and which speed is "socially dangerous" in particular situation.

Formalistic approach might be accompanied with a risk of injustice but in our opinion, it should be avoided by a precise assessment of legal circumstances excluding illegality. It should also be noted that the legislator should not be absolutely uncontrolled in his competence to constitute *formal* definitions of acts which are socially dangerous (crimes, administrative offences). If the legislator abused his power and created *formal offence* which would forbid behaviour generally considered as socially beneficial, the constitutional control of legal norms performed by Czech Constitutional Court[11] should apply (which is in accordance with the principle of division of powers and the concept of checks and balances).

If we consider the above mention opinion of Czech Supreme Administrative Court in the context of road safety, we can point out at some negative implications. Assessment of material aspect in every particular case on one hand comes with more comfort for the offenders of formal offences but on the other hand it also comes with legal uncertainty. If we allow the speed over the legal maximum the driver cannot be sure whether his speed is already illegal or still within the formal wrong-doing but without material aspect. Moreover, the assessment of material aspect is rather subjective matter, from the point of road safety it can create absurd and lawless road traffic where every driver will drive his vehicle in a (subjectively) safe way.

Another implication would be that the preventive effect of the rules of road traffic would be eliminated. If the personal conviction of unlawful behaviour is missing (driver knows that he can exceed speed limit) the legal rules does not fulfil its role.

Other arguments against this interpretation would be based solely on the arguments of road safety. Every increase in km/h means also an increase of safe breaking distance it narrows the field of view of the driver etc. Even though the road seems "safe" at the particular moment and "nothing happens" the offence was committed in our opinion. Only the indicated approach helps to better enforcement of road traffic rules, fulfils the preventive role and educates the road users to behave safely on the public roads.

[11]In Czech Republic there is specific proceedings which reviews constitutionality (or legality) of legal norms. As an outcome Constitutional Court can derogate the contested provision. These proceedings can be launched only on a proposal of certain entities. Act No. 182/1993 Coll.

Conclusion from above mentioned case-law would be that "slightly" excessive speed (e. g. speed slightly above legal limit) is not always administrative offence. Influence of this case-law on road safety is noticeable because the objection "absence of material aspect" is regularly used by speeding offenders as a part of their defence – it is a proof that preventive effect of speed limit is relativised. The courts may have discretion regarding the punishment but no discretion regarding the offence.

Also, we must highlight that sometimes judicial power excludes the use of material aspect in certain type of cases – as it was for example for the drink-driving offences. SAP ruled[12] that it does not matter what was the level of influence of alcohol of the driver because the very presence of alcohol is enough for committing an administrative offence. This case-law clearly stated the position of the judicial power which supports *zero tolerance* policy in Czech Republic. In our opinion the more tolerant approach to speeding offences is not justified by road safety arguments. Specific rate of speeding should be considered in order to impose reasonable sanction.

Owners/drivers Liability Regime

Another current road safety issue in Czech Republic is the question of constitutionality of the owner's liability regime which was introduced in the year 2013. It stipulates the strict owner's liability for the actions of the driver of the vehicle if the driver commits road traffic offence which was recorded by automatic enforcement measure without human operator (or it is the case of unlawful parking). The owner of the vehicle has a possibility to identify the actual driver (and driver himself would be prosecuted for the actual road traffic offence) and if not, he will be held liable for different offence which rests in allowance to use his vehicle in unlawful way.

This mechanism has been criticised from the constitutional point of view[13] and that was the reason for addressing the Constitutional court with the proposition to derogate this legal mechanism.

Constitutional court after more than two years gave his verdict[14] and declared that owner's liability regime is not unconstitutional. This judgement has a very significant effect on the road safety as the owner's liability regime is one of the measures introduced in order to improve insufficient enforcement of road traffic rules. We will describe some parts of the reasoning of the court which will demonstrate that road safety was considered as the important public interest.

Constitutional court recognised that the owner's liability regime has a clear purpose to act preventively and discourage from the actions which can lead to severe damages on health or lives. Therefore, it represents reasonable limitation to property rights. Another argument that Constitutional court

[12] Case 173/2015-32.
[13]The main arguments were based on the right to deny denunciation and presumption of innocence.
[14]Case Pl. ÚS 15/16.

recognised was that before introduction of owner's liability there was large number of offences (committed "by car") without any punishment because the evidence (usually photograph) did not identified specific driver. This situation clearly lacked preventive effect for road users to follow road traffic rules. Moreover, government in its statement provided statistics from National Road Safety Strategy which lead to the conclusion that after the introduction of this measure there was a decrease in severe damages caused by speeding

This case-law clearly demonstrates the importance of road safety arguments for constitutionality of measures which should strengthen enforcement of road traffic rules.

The Importance of Case Law in the Lack of Legislation of Minor Offences

We have demonstrated that the case law can have clear (but in-direct) effect on the road safety (improving/impairing). In this following chapter we will explore the more general question about the legal relevance of the case law in Czech Republic.

Czech law comes from the traditional continental system, where law making is the domain of legislation. It furthermore applies that public authorities (executive power) decide on imposing penalties, and their decision may then be reviewed in judicial proceedings (judicial power) in terms of their legality.[15] The lack of procedural rules for punishing administrative torts has remained a persistent issue since 1989. The current state is unsatisfactory and requires reform. It is possible, inter alia, to criticise existing legislation of procedural aspects of hearing administrative torts for the fact that it is very austere and chaotic. This appears in the legislation having a haphazard and fragmented effect, and not even respecting the basic link to criminal liability, especially in terms of (not) covering the imposing of penalties. *"The role of the courts in the review of administrative rulemaking raises profound questions as to the legitimate interference of courts in the exercise of administrative activities, which are often carried out in the pursuance of a legislative mandate."*[16]

Today one may state that Czech law contains comprehensive procedural rules for hearing only one type of administrative torts - offences. Hearing the remaining types of administrative torts stipulates a procedure following special regulations, and in the rest, subsidiary application of the Code of Administrative Procedure (CAP). One example (probably the most egregious) is illustrated below, whereas the CAP is not a regulation determined (or even adequate) for hearing administrative torts. So practice has only ever had (and still does have) available a procedural regulation which is not prepared for the specifics of administrative torts, and the procedures of administrative authorities thus frequently reminded

[15]There should be interesting to focus on a famous adage: *"To judge the administration is still administer. It recognizes the difficulty, if not impossibility of separating the process of legal control from the underlying process of administration."* In Rose-Ackerman, Lindseth & Emerson (2017) at 13.
[16]Türk (2013) at 126.

one (and still do) of the method of "trial and error", within which administrative authorities "tried" to apply their interpretation to individual cases, whereas the "continuity" of the outlined solution was not always found to be legal in proceedings before administrative courts. Thus to a certain extent, administrative authorities anticipated that the court would complete the imperfect legislation. Exasperating the deficiency of procedural rules in hearing administrative torts is the fact that Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms relates to administrative tort proceedings, including relating entitlement to justification of decisions. Administrative authorities do not always fully reflect this fact; nonetheless, it is now anchored in case law of the SAC. For introduction, premises may therefore arise that case law of both Czech and European courts held significant meaning for the procedure of administrative courts in administrative tort proceedings. On the other hand, one may not attribute the failures in judicial proceedings exclusively to administrative authorities, because mainly deficiencies in the work of lawmakers caused the current situation.

Justification of individual meaningful decisions thus became a key communication means between administrative authorities and the courts on their ideas for closing gaps in procedural regulations, so in this situation, justification of the decisions of judicial bodies and administrative authorities became very important.[17] As described below, especially justification of certain verdicts nearly became a source of law in the formal sense of the word. Since however the constitutional order of the Czech Republic does not stipulate that courts could pass legislation, the question arises of whether or not the procedure of the SAC outlined below has disrupted the balance between individual state powers.

Regarding the very anchoring of the institution of justification, one can say that along with the statement and instructions, it is an essential part of every administrative and judicial decision (excluding certain legal exceptions). The justification is the focus of persuasiveness, so high demands are placed on its formality and content.

However, the general and primary task of justification of a judicial and administrative decision is not to be a source of law. On the contrary, justification should be a part of an individual decision in specific cases and is not primarily determined for regulating a large number of cases (with the exception of the specific institution of measures of a general nature). Justification should thus serve primary for controlling the decision-making process and protecting the rights of the parties. In consequence of inconsistent work however, justification (in Czech law) has assumed unanticipated functions.

That is because due to its imperfection, current legislation on administrative torts was often complemented or even changed by case law. The most meaningful case when the SAC intervened directly into legislation stated in the CAP and completely changed the procedural rules mentioned here by its own interpretation is the case where the SAC explicitly stated that the provisions of Sec 82(4) of the CAP were not to be applied in administrative torts proceedings. This provision states the general principle that in administrative proceedings (thus also in

[17]Similar situation is also in Germany. See Halberstam (2017) at 149-152.

administrative torts proceedings, since there is no special legislation here), concentration of proceedings applies, thus it is not possible to state any new facts in appeal proceedings if they were already applied in first-instance proceedings. However, the SAC determined that this rule (despite the explicit wording of the law) does not apply in administrative tort proceedings. So once the SAC chose a solution that can be considered correct and just (and coming from the principle of punishment), we believe that it interfered inadmissibly in the explicit text of the law and decided on its general lack of applicability in administrative tort proceedings, to which it is not entitled in light of constitutional order. Its primary task, as already emphasised, is provision of protection to public subjective rights of parties in specific proceedings. However, in consequence of the lack of procedural rules, the SAC chose a procedure which (though appearing correct and just) made this decision a binding rule for the future, because the SAC will consider possible breach of the opinion stated in this decision as illegality of the decision. Though the SAC referred in the given decision to principles of punishment, from which it deduced justifiability of its procedure and in which one may see the material source of "legal regulation", the mentioned decision became something of a "formal source of law", because just here the mentioned rule was anchored, though inferred from general principals, and administrative authorities started applying it during hearings in administrative tort cases, because this decision has been referred to often. On the other hand, the question may emerge of how the SAC could be so sure that the legislature truly had no intentions of disallowing innovations in appeals proceedings, and whether by its procedure, the SAC replaced the will of the legislature with judicial "will". Despite all this, the SAC should not bear the primary brunt of criticism for this interference in the balance of individual powers in the state. This situation arose in consequence of the haphazard work by lawmakers, and the SAC thus did everything to produce a just outcome of the case, though it apparently did so outside of its authority. It is then rather a rhetorical question as to why the legislature reacted to this decision of the SAC so much later and resigned to the wording of the CAP, especially if in the newly enacted Act No. 250/2016 Coll. on responsibility for administrative torts and their procedure of 01 July 2017, it enables introduction of innovation in appeals proceedings, and in the justification report it explicitly points out that this concerns one of the fundamental rules for administrative punishment. May we therefore infer that the legislature is willing to respect interferences in legislation even by a general (and not a constitutional) court? There is no clear answer to this question.

It was already mentioned that the legislature adopted new legislation, but the path to it was not an easy one. The beginnings of work on a new government bill on minor offences designed to remedy the given situation date back to the 1990s. Preparatory work did not occur in ideal fashion, but the aforementioned Act No. 250/2016 Coll. was ultimately enacted, which, effective 01 July 2017, will introduce unified procedural rules for the vast majority of administrative torts. The legislation contained in this act then shows the other important aspect of mutual powers and influencing of legislation and the judiciary, thus the positive or negative reactions of the legislature on judicial decision-making. This aspect is

desirable in a democratic legal state and is a due expression of how influencing of one power in the state by the other should possibly occur, in other words consideration of whether the legislature will follow the interpretation assumed by the courts or will possibly shift the legislation in a different direction intended by the legislature. In drafting the new legislation, the legislature partially respected case law and partially selected different solutions from conclusions of case law as well. One must stress however that these very questions are key to defining the relationship between the judiciary and legislation, because it concerns procedural institutions not entirely explicitly stated in the current legislation, and still regulated to a certain extent by case law alone. Nevertheless, in these further indicted cases, the courts did not interpret the CAP explicitly against the wording of the act as it was with the example of concentration of proceedings. However, the legislature did not approach its role within the framework of this "debate" on new legislation altogether thoroughly and may therefore reap criticism that certain procedural aspects in the new act are also absent, so the question arises of how public administration and the courts are to proceed under the new legislation. Neither does the justification report lend any sufficient answer to this question. One may therefore ask whether it will be possible to use original case law, or if the aim of the legislature not to regulate certain procedural institutions was intentional, and thus led to use of a less than adequate legal system intentionally, or whether the legislature forgot and expects use of case law, which would then again to a certain extent become a source of law. These too are questions that will have to be considered upon application of the law.

Thus the new government act on minor offences does not resolve certain unclear aspects, and even forms new doubts about further interpretation in certain controversial points resolved by case law, whereas in such a situation, it is hard to speak of the principle of legal certainty.[18] In terms of the issue of rights to justification of the decision on imposing fines, the starting point once again is the subsidiary regulation of the CAP, which complements partial requirements for justification scattered in the drafted act on offences.[19] In consequence, the new act on minor offences appears in this as a squandered opportunity to create comprehensive and clear codification. For example, the Criminal Code contains much more indicative regulation, providing a quicker and more certain overview about what the justification should contain. In relation to this, we lean towards the opinion that the legislature intends for continued application of requirements placed on the justification by administrative courts. However, it could make clearer instructions available to administrative authorities on how to approach the justification and what all it should contain. If it directed its intentions to ignoring case law, it would be unclear in certain contexts as to how the justification should

[18]Other very important principles are proportionality, which means *„relation between legitimate ends that a public authority pursues, and the means by which it pursues them. Ordinarily, it means not imposing a burden on a person that is out of proportion to the value of the public authority's action.";* and reasonableness, which means that "*decision be unreasonable on judicial review when it is inconsistent with the reasons that it is right for judges to impose on other decision makers."* Endicott (2011) at 632; Bayne (1993) at 449-452.

[19]*"Every "formality", "condition", "restriction" or penalty imposed in this sphere must be proportionate to the legitimate aim pursued."* In Handyside v United Kingdom, para 49.

look. In any case, case law itself provides us with no clear answer concerning matters of content.

Regarding the question outlined above on how to bridge new (or persisting) deficiencies in the regulation, one may probably expect that administrative authorities will continue to refer to the conclusions determined by judicial case law, which has so far complemented and often even replaced the insufficient legislation regulating justification of a decision on administrative torts. Meanwhile however, administrative authorities have been calling for quite some time for "instructions" on how to justify their decisions properly. It is therefore a question whether, due to legal certainty in "minor criminal law" and "major criminal law", in order to preserve unity in access to criminal charges under Article 6 of the ECHR, procedural institutions should be clearly and comprehensively regulated *expressis verbis* in adequate measure in the new act on minor offences, instead of relying on (sometimes even normatively binding) texts of certain decisions of the SAC.

As indicated, the new act can be considered a squandered opportunity in certain aspects, and it speaks of the less than fully functioning work of the legislature in its effort to make legislation clearer. In such a situation, it is hard to speak of the principle of legal certainty. In terms of justification, where the starting point again is the subsidiary legal regulation of the CAP, which complements partial requirements for justification scattered in the new act on minor offences, the new act on minor offences appears in certain areas to be a squandered opportunity to create clear and comprehensive codification - something practice has been calling for over many years.

Conclusions

In our article at first, we considered whether and how road safety can affect legislation. We discovered that there is clear connection between road safety materials (e. g. vision zero strategies) and enacted legislation (often measures which aims to improve insufficient enforcement). Therefore, public interest on road safety is one of the reasons why certain legislation was adopted.

Following this introduction, we demonstrated how road safety is affected by case-law in Czech Republic. Case-law can have rather indirect influence but depending on its position it can clearly influence level of road safety (improvement or impairment). We also demonstrated that road safety arguments are essential for assessment of constitutionality of legal measures improvement of road safety.

A strong connection exists between law and road safety. Road safety arguments should be considered by administrative authorities as well as by courts as their decisions also affect road safety.

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Marine Economics, Employment and Employability: Profiles, Professional Figures and Skills in the Reform of the Italian Code of Recreational Shipping (Code of Yachting)

By Roberta Caragnano[*] & Giuseppe Danese[‡]

The Legislative Decree of 3 November 2017, n. 229 on Code of Yachting, whose discipline is included in the legislative decree 18 July 2005, n. 171 came into force on 13 February 2018. The legislative text, which attributes equal dignity to the commercial non-profit navigation, is the result of an intense work started in 2015 when with the law delegated n. 167 the Government was delegated to adopt within twenty-four months (from the date of entry into force of the law) one or more of the legislative decrees for the revision and integration of the current Code (of 2005). The object of the new legislation is the competitiveness of Italian sector in the European and International context. The reference context in which the new regulatory provision is placed is, in fact, the globalised economy on which both the European Institutions and the Commission have intervened with synergic actions on the assumption of the great potentialities deriving from the economy of the sea, in its variations from the blue economy, to the blue sea to the blue growth. In this sense is central the wellbeing and prosperity of the Europe, in line with the European maritime contribution to contribute to the implementation of joint actions in the direction of international governance. The Italian Legislator has intervened in the mesh of the legal text and in the various forecasts also regarding new titles and professional profiles for boating. In the essay presented, the news on the subject will be illustrated, which impacts both on the contents and on the structure of the Code and, indirectly, likely to produce effects on the labour market both at the employment and training level. A focus will also be given to the role of education and training systems, professional qualifications and skills development in the European scenario as well as to the Italian prospects for the maritime and nautical sector and through apprenticeships, skills certification and cluster investments. The essay closes with the actions and perspectives de iure condendo on the nautical district of the Apulia Region.

Keywords: *Code; Yachting; Labour market; Training; Apprenticeship*

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Introduction

The Position of the Problem: The Extent of the Code and the European Economic and Legal Framework of Reference

The legislative decree, n.229 of 3 November 2017 renewed significantly the Italian Code of Recreational Shipping (Yacht Code) whose regulations are contained in decree n.171 of 18 July 2005 – which implements the 2003/44/CE directive subsequently modified by the 94/25/CE directive – creating an independent regulating body.

The text, applying Article 1 of the law n.167 dated 7 October 2015, with which the Government was delegated to adopt within twenty-four months (from the date the law was passed) one or more of the revised and integrated decrees included in the above-mentioned code (n.171/2005), represents an important dowel within the legislative action (and not only) supporting the entire nautical chain including the development of shipbuilding and refitting.

In fact, the decree in its entirety, establishes greater protection of the public interest in general, specifically the protection of the marine environment, shipping safety, the safeguarding of human life at sea, the promotion among the new generations of marine culture, and respect and the inclusion of the disabled.

The extent of the legislative novelty – which encompasses the various requests for integration and modification made by Ucina Confindustria Nautica together with Assomarinas and Assonat Confcommercio (tourist ports) and Confarca (nautical schools), Assilea (leasing), and Federazione Vela – is aimed at rendering the Italian sector more competitive in the European and International market. With this in mind, it is important to consider the forecasts for the telematic registration of boats and digital information for boaters including ways to simplify the administrative procedures.

The new regulatory provisions fall in the context of a globalised economy in which many European institutions and indeed the Commission itself have introduced coordinated actions based on the enormous potential of the marine economy. The declinations *blue economy* [1]*, blue sea or blue growth* illustrate that the marine economy is regarded as a *driver* in the well-being and prosperity of Europe and the decree falls in line with the integrated European maritime policy dedicated to the realisation of coordinated efforts working towards the idea of an international *governance.*

In 2010 the Commission[2] had already anticipated a strategy for sustainable maritime and coastal tourism, highlighting on the one hand the need for a concerted effort in favour of a coordinated approach to initiatives on the theme of tourism, and on the other hand, the need for a definition of a new framework for action to reinforce competition and the capacity for sustainable growth in the sector. This strategy was subsequently promoted in the 2012 communication,

[1]This also includes the alignment between blue growth and green growth as also indicated, in the seventh program of environmental action. European Parliament and Council of the Eureopean Union (2013).

[2]See European Commission (2010).

Crescita blu opportunità per una crescita sostenibile dei settori marino e marittimo. (Blue Growth opportunities for marine and maritime sustainable growth)[3]. According to this communication, the sea and the coast represent engines for economic growth where coastal communities, due to their geographic conformation open to the outside and their tradition become hotbeds for new ideas and sources of inspiration for innovation encompassed in an ample vision of the direction of the so-called *Blue Growth.* Within the European Strategy 2020 this growth can increase international competitiveness within the EU, not only developing new sources of growth respecting and protecting biodiversity and the marine environment, but also creating new jobs whilst maintaining marine ecosystems and healthy coastal areas.

In the Commission Communication, *A European Strategy for more Growth and Jobs in Coastal and Maritime Tourism,* COM(2014) 86 final [4] – in the wake of the Parliament's report on *blue growth* of 2013 [5] – a series of actions were outlined in order to breathe life into the sector and help the development of a sustainable tourism in coastal destinations focusing on the involvement of the Commission, member states, local and regional authorities, private operators and other stakeholders, taking into account the presupposition and the knowledge that the demand for tourism is exposed to great fluctuations determined by changing economic, financial and political circumstances which affect the whole chain including the nautical sector.

Similarly, the *Report on the Blue Growth Strategy: Towards more sustainable growth and jobs in the blue economy* SWD (2017)128 final of 31 March 2017[6] outlines a new European strategic approach that includes eco- sustainability and the profitability of the production processes as a possibility for the development of a whole series of activities connected to the sea, including tourism by means of cruises, pleasure boats and maritime traffic.

Findings/Results

The Economy of the Sea and Employability: The Studies and European Data

The job market as a whole is changing and in recent years, in part due to the effect of an acceleration determined by the Crisis as well as a globalised economy, it has undergone transformations that have redrawn the reference markers. As Casino has concisely observed, "In a certain sense, the breaking down of special and temporal confines in the organisation of the workplace, the intensification of occupational and geographical mobility; the diffusion of a more agile way of working without the necessity of a physical presence in a workplace, implies the

[3]See European Commission (2012).
[4]European Commission (2014b).
[5]European Parliament (2013).
[6]European Commission (2017a).

rejection of the idea of a company as a closed system and introduces the diffusion of work processes within the territory"[7].

According to data from Cede fop (European Centre for the Development of Vocational training), in 2025, 44.1% of employees will perform a highly qualified job, compared to 41.9% in 2010 and 36.5% in 2000. The elementary professions will register a constant increase from 9.8% in 2000, 10.2% in 2010 to 11.2% in 2025.

To be more exact 'between now and 2025, more often than not, the available jobs at all levels of expertise will be those not easily substituted by technology, by changes in the workplace and by outsourcing. These are jobs which require thinking, communication, organisation and decision-making'[8]

Nevertheless the marine economy is significant in terms of the growth of "jobs", taking into account that an analysis of of potential employment patterns in Europe[9] has revealed five areas of value as possible sources of sustainable and occupational growth in the blue economy sector: Blue energy, aquaculture, coastal and cruise ship maritime tourism, marine mineral resources and blue biotechnology. It is also possible to add further to these areas, based on the systems already in place. The opinion of the writer is that recreational shipping is one such possibility which would create a new job rush allowing the blue economy to increase its potential as a sustainable growth area based on the supposed need and possibility to put in place policies and actions which can be shared by the various levels of authority and the stakeholders, in order to activate drivers of change capable of creating the just conditions to ensure a rapid expansion of the economy within the context of a globalised Europe.

According to estimates (data and research), however, the scenario could change before 2010 due to presence of new sectors capable of influencing the number of jobs being created which would imply further investment to ensure sustainable growth.

According to the theory of intersectional interdependence[10] – which determines how much productive *input* is bought by each sector of the economic system – statistically measured using *input-output* tables, elaborated nationally by ISTAT, an estimate regarding the activation capacity of the sea has revealed that for every euro produced in this area, another euro is activated in the general economy. The data released by the European Commission in its report on Blue Growth Economy[11] indicates that the blue economy generates a gross added value of about 500 billion euro per year employing 5.4 million people in the European Union; 97% of whom are employed in 5 important sectors: navigation, *non-living resources (*petroleum and gas), *living resources* (fishing and aquaculture), and coastal tourism. Of particular importance is the assessment of feasibility and added value of the *Iniziativa sulla blue economy nel Mediterraneo occidentale* dated

[7]Casano (2017b)
[8]Cedefop (2013).
[9]See the quoted communication of the European Commission (2012).
[10]See Eurostat (2001) and ISTAT (2006) for a methodical description of the mentioned input-output tables.
[11]European Commission (2017a).

January 2017, which upholds maritime transportation, maritime tourism, recreational activities and fishing as being currently the most important economic activities in Western Europe acting as an employment engine.

The OECD estimates that from 2030 onwards, the sea or so-called "ocean" industries will have the potential to overtake the global economy as a whole, both in terms of added value and employment, providing a global output of 1.3 trillion euros. The prospective for doubling this figure before 2030 is possible.

To this macroeconomic scenario, the actions supporting small and medium-sized businesses should be mentioned. These actions are connected to the local context both geographically and in sector-specific terms, producing a positive domino effect on energy policies (green businesses and green jobs) and equally on employment both in terms of human capital (especially young people) and an exchange of good practice emerging from the new sustainable economies.

Innovation and the sharing of knowledge are two such *drivers* which help to manage the generational changes in the workplace and increase its ability to face crises and short-term shocks.

The European Commission sees the creation of jobs as an essential element of research and development for a sustainable Blue Growth, as in the Bluemed project[12]. This conclusion is born from the belief that the double challenge is represented by the key sectors of tourism, transport and fishing, which require innovation and diversification in order to be competitive and sustainable whilst ensuring the creation of quality employment in areas where activity and the emerging value system requires more support to attract investment and, consequently, potential development.

Discussion

News from the Recreational Shipping Code on Professional Titles

The legislative decree no. 229 of 3 November 2017 contains various predictions concerning new professional titles and profiles within recreational shipping which affect both the content and structure of the Code and, indirectly may also have an effect on the labour market both in terms of employment and constitution.

The legislator primarily intervened in Article 27 with the introduction of the simplified title of second-class recreational sailing officer in the role of recreational shipping cover services. In doing so a link was created between the IMO certificate, the STCW 78/95 standard (Standards of Training, Certification and Watchkeeping for Seafarers) and introductory school education, creating a

[12]Bluemed – which aims to update Bluemed Sria, the strategic agenda on research and innovation, as well as the development of an operational project for the activation of joint initiatives together with the gradual and systematic involvement of the non-EU states of the Mediterranean and the realisation of pilot projects – is an important initiative of the European Commission within the Quadro Horizon 2020 Program. This has seen an investment of 3MEuro and reenters in actions of support for the same political initiative for research and innovation in the marine-maritime sector of the Mediterranean Region.

simplified title for recreational shipping and recognizing that prior to the changes there had been little communication between this title and other professional titles. The endeavour was to align the national regulations with those in Europe, following the initiative started in 2005.

The new order will in itself have an effect on the decree of the Ministry of Transport and Infrastructure dated 10 May 2005, that is no. 121 which determines the institution and the organisation of professional titles [13] in recreational shipping, that is the determining of the professional figures that work on the units and ships used in rental activities, exclusive and not. The area covered by the Regulation covers, in fact, all personnel boarded on recreational ships for rental use, on ships destined exclusively for tourist rentals as described in article 3.1 of law no. 172 of 8 July 2003 and the personnel who carry out paid activity on recreational vessels.

All of this does not change the legislation regarding the issue of ship licenses for the use of recreational vessels, covered by article 4 of decree no. 431 issued by the President of the Republic dated 9 October 1997. Likewise it is for the current legislation that requires all shipping personnel involved in recreational shipping to be enrolled on the register of First Class Seafarers as well requiring the navigation license. The general provisions for the registration of seafarers are applied as described in Book 1, Title IV, Chapter 1 and 2 of the Regulation for the carrying out of the Navigation Code, approved by decree no. 328 of the President of the Republic dated 15 February 1952. It states that those who work aboard commercial units must be enrolled and protected by the necessary forms of insurance and social security.

With regard to the simplified title another decree should be noted: comma 2 of article 27 refers the modification of article 2, comma 3 of law no.17 dated 8 July 2003 to a decree by the Ministry of Transport and Infrastructure together with the Ministry of Education, Higher Education and Research in order to individuate the requirements for the carrying out of cover services in recreational shipping and ensure full compatibility between the various professional profiles of the sector regarding the newly- introduced changes to the law.

The legislative decree no.229 dated 3 November 2017, therefore realises the contents of the delegated law, in line with European provisions with the aim of improving the conditions of effective competition within the scope of the European Strategy for greater growth and employment in coastal and maritime tourism as identified in Communication COM (2014) 86.

This serves as valuable support for a sector, that of recreational shipping, that has had to face up to a number of difficulties throughout the years related to differences between member states with respect to mandatory qualifications and on-board safety equipment. These have acted as a limit on mobility and access to the job market, which has frequently conditioned the trans boundary development of the nautical sector and as a consequence due to a domino effect has also had a negative effect on the employment situation in the nautical field.

[13]The regulation is quoted in article 3 of the quoted law 8 July 2003, no.173, and explains the use of ships exclusively rented for tourist purposes.

The New Professional Figures: Recreational Mediator and Sailing Instructor

Article 33 of Legislative Degree no.229 of 3 November 2017 introduces the Capo II- bis regarding professional figures into the recreational shipping code (legislative decree no. 171/2005), creating the professional roles of recreational mediator and sailing instructor as outlined in the following articles: 49-III, 49-IV, 49-V and 49-VI.

The first, separate from that of Maritime Mediator, will perform advisory functions for the conclusion of contracts regarding construction, trade, leasing, renting, loans, mooring and the financial leasing of recreational craft. The second description regards the professional teaching of sailing techniques, also in a non-exclusive and non-continuous way in all their specialisations and practised in all masses of water whether the sea, lakes or inland.

With regards to the specific aspects of the professional figure of the recreational mediator, it is the writer's opinion that his is a hybrid position, borrowed in part from the civil code both in its definition and for some applied profiles. The legislator himself mentions this in subsection 6 of article 49-III in the part, "subject to the provisions of this article and article 49-IV of this code, recreational mediators adhere to the measures outlined in article 1754 and following the civil code." In part the job description is borrowed from the legislation relating to the profession of maritime advisor in particular decree no. 135 dated 4 April 1977, without prejudice to the exclusive development of the activity as provided by subsection 2 of article 49-III and therefore following the rules of recreational shipping code.

The mediator can perform related or instrumental activities and carry out his professional activity without being bound to any other parties by collaboration, full-time employment, representation or any other work relationship which could limit independence.

The activity must be reported to the Chamber of Commerce, Industry, Artisanship and Agriculture via a "start of activity" certificate (SCIA) which must be presented to the single front office of the municipality responsible for the territory, which after verifying that the necessary criteria are met, will register the activity either in the business register if it is a commercial venture or in the appropriate section of the list of economic and administrative news (REA) if it is otherwise defined.

The criteria required to carry out the profile of recreational mediator are as follows: citizenship of the European Community; minimum age of 18; honour ability requirements as cited for maritime mediators contained in act no. 478 of 12 March 1968, having fulfilled the obligation of education, as described in Article 1, subsection 622 of Act no. 296 of 27 December 2006; having attended a suitable theoretical and practical course and passed the relative examination (apart from maritime mediators indicated in legislation no.478 of 12 March 1968); being in possession of an insurance policy covering civil liability for damages caused during activity by own or third party conduct, according to the law. Other requirements include not having been declared a habitual, professional or treacherous offender, not having been subjected to personal safety or preventative

measures, not having been sentenced to imprisonment except in the case where rehabilitation measures have been introduced as cited in legislative decree no. 159 of September 6, 2011.

The course required to become a mediator is organised every year by the regional authority, under payment by the participant of a fee commensurate with the costs incurred by the local authorities in organizing the said course. The fee is communicated every three years by way of a decree of the Ministry of Transport and Infrastructure, in communication with the Ministry of Finance, and with the prior agreement of the unified state-region conference. In fact, the statutory provision is of an orderly nature and does not involve minors entering and new or greater charges for public finance.

Subsection 6 of Article 49-IV regards disciplinary measures (annotated and registered for extract in the REA) for the violation of professional ethics, or to be more precise, the behavioural norms locally established and recorded by the Chamber of Commerce, Industry, Artisanship and Agriculture. Subsections 7, 8, 9 and 10 define cases for suspension and subsection 11 defines expulsion from the profession.

The professional figure of the sailing instructor, is regulated by articles 49-V and 49-VI of the legislative decree no. 171 of 18 July 2005 (Recreational Shipping Code) introduced by Article 33 of legislative decree no. 229 of 3 November 2017. The profile is defined as " he who teaches professionally the techniques of sailing in all its specialisations also in a non-exclusive and non-continuative manner, individuals or groups of people, in any type of vessel, in the sea, lakes or internal waterways."

Professional practice is reserved for candidates registered on a special list maintained by the Ministry of Transport and Infrastructure. The fees both for the fulfilment of the administrative obligations and the inclusion on the list will be charged to the individual at a cost which allows the adequate maintenance of the said list by the Ministry.

The collection of the aforementioned fees (as foreseen in Subsection 5, Article 49-V) is similar to that applied to the profession of recreational mediator, but in this case rather than be collected by regional authorities, the revenue "enters into the balance of the State where it is re-assigned, under decree of the Ministry of Finance, to the relevant workings of the Ministry of Transport and Infrastructure in order to cover the costs of the management of the said list".

The sailing instructor is subject to similar legislative criteria: citizenship of the European Union; minimum age of 18; having fulfilled the obligation of education, Article 1; subsection 622 of Act no. 296 of 27 December 2006; not having been declared a habitual, professional or treacherous offender; not having been subject to personal safety or preventative measures; not having been sentenced to imprisonment except in the case where rehabilitation measures have been introduced as cited in legislative decree no. 159 of September 6, 2011; having residence or domicile or a fixed address in a municipality of the Italian Republic. Other requirements are: a license for teaching the basic techniques of sailing issued by the Navy, the Italian Yachting Federation or by the Italian Naval League which follows the guidelines laid down by the national system of sporting

instructors by CONI (Italian Olympic Committee) and the European Qualification Framework; a certificate of psychophysical fitness on the basis of the requirements stated in Article 5 of the decree-law no.663 of 30 December 1979. The sailing instructor should also be in possession of an insurance policy covering civil liability for damages caused during activity by own or third party conduct, according to the law.

The enrolment on the said list is valid for six years and must be renewed every three years under the condition of psychophysical fitness and the attendance of professional refresher courses organised by the Navy, the Italian Yachting Federation or by the Italian Naval League. Such courses will be at the expense of the individual concerned and are equal to the costs incurred for the management of the aforementioned parameters regarding the recreational mediator.

The disciplinary procedure for the sailing instructor is similar to that for the recreational mediator even if they differ in terms of profile and job requirements. The only inherent difference is that an eventual exclusion is considered definitive in severe cases where an individual is unable to complete the activity for "extremely serious violations that create a situation of non- compatibility with the professional activity in case" and where " the individual's behaviour has seriously undermined his own reputation and that of his profession". Sub-section 9 of Article 49-VI covers the cases where the Legislator has deemed that mandatory exclusion should be applied.

Labour Law Perspectives under Iure Condendo

The theme of labour law and the job market is even more delicate if we take into consideration the new profiles introduced by the Legislator of the reforms (recreational mediator and sailing instructor) within the context of a more wide-ranging regulatory-economic scenario which encourages legal reflection on the current contractual situation regarding professional profiles within recreational shipping and the more appropriate viewpoint of *iure Condendo*[14] which takes into consideration the specific characteristics of the nautical sector.

The legislator of the reform seems to outline this concept with regards to the recreational mediator, by applying a definition which represents a hybrid between the norms of the civil code ("the disciplines laid out in Article 1754 and onwards of the civil Code should be applied to the profile of recreational mediator apart from the provisions of this article and article 49-IV of the present article", as also in subsection 6 of Article 49-III), the provisions laid down for maritime consignor in law no. 135 of 4 April 1977 not withstanding the separate activity laid down in subsection 2 of Article 49-III, and the norms of the Recreational Nautical Code.

This last consideration with the discipline contained within the Code, appears to lead in the direction outlined taking into consideration a special legislation (that

[14]Regarding the application of legal requirements for shipping personnel and the new professional figures of mediator and sailing instructor and profiles connected to health and safety at work, see Caragnano &.Danese (2018)

of recreational shipping) within the context of already specialised legislation (that of rights of navigation), recognizing its strong interdisciplinary character with regards to private, commercial and labour laws and not only. In the light of new economic scenarios this reflects the aim of the Legislator to evaluate a new and essential path together with the stakeholders in creating a starting point for a concrete intervention which could render the Italian sector more competitive in the European and International scene. From the perspective of *de Iure condendo* the new norms considered by the Legislator with regards the aforementioned professional figures together with the simplified job descriptions with reference to the cited regulations, require the evaluation of a labour contract that takes into consideration the specific needs of the nautical and recreational shipping sectors.

It is my view that a starting point in balanced governance has been recognised in the agreement signed on the 28 February 2018 between Confindustria and Cgil, CISL, Uil (Italian trade unions) covering the content and direction of industrial relations and collective bargaining which concentrate on the firm action needed to " strengthen measures to support an independent, innovative and participatory trade union model, which upholds the competitiveness of the sector and of the production chains, as well as its values and quality of work, and favours also via the spread of second-level bargaining, the ongoing transformation processes and the virtuous connection between innovation, productivity and wages."

Conclusion

Instruction and Training Systems, Professional Qualifications and Skills Development in the European Scenario

The recent provisions regarding professional profiles in recreational shipping lead us to a more general reflection than focusing only on employment prospects, in particular regarding young people. The study carried out by EASME/DG Maritime Affairs and Fisheries, entitled *Study supporting a possible network of maritime training academies and institutes in the Mediterranean Sea Basin* [15] [14] – which supports the idea of integrated action and networking between maritime academies and training institutions in the Mediterranean area, has demonstrated how complicated and fragmented the current situation is. Its main message is that the maritime industry should be more active in demonstrating to young people the diversity of careers available within the maritime economy above all by collaborating with schools on the subject of professional training.

The employment situation in the maritime sector of the western Mediterranean area is particular. An example of this: whilst on the one hand youth unemployment is between 14% and 58%, on the other hand the companies working within the maritime sector are not always able to fill the professional roles or cover the skills required [16].This shows that there is a gap between supply and demand which is often determined by a lack of communication between the

[15]The study EASME/DG Maritime Affairs and Fisheries (2016).
[16]Consult the European Commission (2017b).

businesses concerned and the educational system including schools, universities and also ITS and post-degree training.

The commission in collaboration with training institutions within the maritime sector, intends therefore to face this situation of imbalance within the framework of *Sviluppo e della circolazione delle competenze* to realise the following ideas: promotion and creation of networks and exchanges between maritime, port and logistic academies and institutes; the sensitisation towards the maritime professions by making them more appealing to young people; the creation of initiatives to favour the balance between demand and job offers for multimodal transport of goods, in supply chains and in infrastructure; harmonisation of the functions and existing skills for the management of questions regarding movement within the region and promotion of the most efficient way to achieve circular migration.

Potential sources of funding to consider include: the European fund for maritime affairs and fishing (FEAMP) [17] the initiative promoted by the FAO in favour of Blue Growth which aims to assist small insular and developing states to use their water resources in a sustainable manner, projects financed by the European Social Fund (FSE), l'Erasmus+ for university students and funds released by the various member states [18].The priority should be the coordination of the various programs and the concrete initiatives both realised and those still in course within the Mediterranean region including the action plan for the Atlantic and the EU Strategy for the Adriatic and Ionian region as well as the quoted initiatives BLUEMED and PRIMA [19].

The concept of a sustainable economy is to be considered in a systematic way in relation to the politics of employment which acknowledges a development that enables an occupational growth above all for young people favouring politics and measures which create both growth and competitiveness.

This concept is reaffirmed by the European Commission in its annual report on employment and social development (ESDE), published in the summer of 2017, which highlights the importance of investment in people and the need to

[17]This fund id one of five European structural and investment funds (SIE funds) which integrate with each other, with the aim of promoting a recovery based on growth and employment in Europe. FEAMP is one of the main sources of support for the new common politic on fishing (PCP) and according to the objectives defined in the program for 2014-2020, the aim is to improve the social, economic and environmental sustainability of the seas and coasts in Europe by supporting local projects, companies and the community in loco. With this in mind the fund finances projects that create new jobs and improve the quality of life in European coastal regions, helping the coastal communities to diversify their economies and support the fishing community in a transition towards sustainable fishing.

[18]See Camera dei Deputati XVII, Legislation (2017).

[19]The program PRIMA, an acronym for *Partnership for Research and Innovation in the Mediterranean Area*, sees an ample partnership between member states of the European Union (France, Spain, Italy, Portugal, Greece, Malta, Cyprus, Germany) and non EU countries of the Mediterranean (Egypt, Jordan, Lebanon, Turkey, Morocco, Tunisia, Algeria and Israel) with the aim of improving the health and well-being of the populations of the Mediterranean area encouraging economic growth and long-term stability. The MUIR, for Italy, will actively participate in an operational direction that will see 2018 as a Launchpad for the first tenders financing partnerships of research and innovation between institutions and companies from the two sides of the Mediterranean.

give them the opportunity to take advantage of quality work opportunities, which in turn represents the central theme of the *Nuova agenda per le competenze per l'Europa,* with the aim of sustaining the skills of the citizens in order to prepare them for an ever-changing workplace.

The invitation included in the report made by the European Commission [20] to "work in close contact with Cedefop to estimate more accurately to anticipate the future needs in terms of skills and adapt them to the marketplace" is highly relevant, as is the need to improve the understanding and comparability of the different qualifications that exist in the different member states. With this in mind the proposal to review and further develop the EQF (European Qualifications Framework) [21] has been received favourably, acknowledging the cooperation between the member states and all interested parties and encouraging increased coherence between the examining bodies of the EU, that is, EQF, ECVET (European Credit System for Vocational Education and Training) [22] and EQAVET (European Quality Assurance in Vocational Education and Training). Similarly important is point 151 of the aforementioned report in which the Commission " favourably receives the initiative created to introduce a system of traceability of graduates in order to offer a more pertinent approach based on solid data to elaborate study programs and job offers and asks for a similar system to regroup high school graduates" [23].

The invitation is to proceed with an analysis of qualification systems in order to propose an adaptation to satisfy the needs of emerging professional titles including the organisation on an annual basis of a "European Forum of Skills" which would allow the authorities concerned, the training institutions, professionals, students, employers and workers to exchange the best practices in terms of forecast, development and convalidation of skills" [24].

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[20]European Parliament (2017).

[21]Following the recommendations of the European Parliament and Council on the constitution of a European Framework for Qualifications (EQF) for permanent learning (Gazzetta ufficiale dell'Unione Europea 2008/C 111/01) regarding the constitution of the EQP the member states are invited to "bring their national systems of qualifications to the same level as the EQF, and where it is opportune to develop national frameworks for qualifications in accordance with with national laws and procedures."

[22]Following the recommendations of the European Parliament and Council of 18 June 2009 on the creation of a European Framework for the guarantee of quality of instruction and professional formation which acts as a system of transferal of credits to facilitate the acknowledgement and transfer of results and abilities by way of certification. This covers all non-academic qualifications whilst for academic titles the ECTS (European credit transfer and accumulation system). The ECVET system is not mandatory for the different systems but is more of a gradual development to be implemented on a voluntary level by the various European countries, taking into account local and national, as well as sectorial regulations (definition of ISFOL). ECVET integrates and completes existing systems developed within the EU in favor of mobility of those gaining qualifications, such as EUROPASS, the European Card of Quality for Mobility (EQCM) and the European System of Accumulation and Transfer of Credits (ECTS, hereby connecting instruction and professional formation in secondary schools. See Liguoro (2012).

[23]Point 151 of the *Resolution of 14 September 2017 on a new skills agenda for Europe (2017/2002(INI)).*

[24]Point 155 of the *Resolution of 14 September 2017 on a new skills agenda for Europe (2017/2002(INI)).*

The growth of the Blue Economy, in fact, requires personnel who are ever more qualified with remarkable skills capable of applying the latest technology in engineering also in other disciplines, "with reference to the Leadership 2020 report for operators in the naval construction industry of the EU, the growing complexity of products has brought about the demand for highly qualified personnel. A large part of the sector is affected by a lack of qualified personnel, a fact which obstructs growth"[25].

The Italian Forecast for the Maritime and Nautical Sector: Apprenticeship, Skills Certification and Investment in Clusters

With the aim of realizing a community for knowledge and innovation (KICs)[26] for the Blue Economy [27] that unites the main parties interested from the world of institutions, public authorities, research, business and instruction around a triangle of knowledge (training, research and innovation), there is a strategic need to invest in young people, creating a network which includes the world of business to create fertile ground also in terms of employment.

As observed in the doctrine, it all comes down to " the sudden outdating of technical-professional skills, the birth of new crafts and the changes in the skills profiles needed to control technology that confirm the crucial role played by the development of skills in a modern system of protection [28]. For this reason the focus is on a new theoretical approach to the " transitional work places" [29].

The recourse to apprenticeship [30], an instrument of great potential and opportunity as well as being a strategic means to create a dialogue between schools and work [31], in the current Italian economic-legislative scenario, is something to be valued and implemented in a sector such as the nautical sector

[25]See European Commission (2014a).

[26]The Community of Knowledge and Innovation (KICs) introduced via a European regulation of 2008, represents the main working medium of the European Institute of Technology (EIT), created with the idea of contributing to competitiveness and a sustainable economic growth, by way of strengthening the capacity of the EU and member states within the context of the 'triangle of knowledge'.

[27]So far three KICs have been launched on the themes of Energy, Climate Change, and Technology of Information and Communication (ICT) and via the Communication COM (2014) 254 final/2 "Innovation in the Blue Economy: realizing the potential of our seas and oceans for jobs and growth, COM (2014) 254 of 8 May 2014, the Commission announced that it will evaluate the creation of a CCI on Blue Economy in 2020.

[28]See Casano (2017b). The theme is developed in the assay by the same author Casano (2017c)

[29]Consult also Schmid (2011) whose analysis of the transitional workplace, and in particular institutional agreements on the theme of "active politics of safety" in which legally guaranteed social rights favor the participation at a decision-making level in terms of work and employment as well as to share equally results and risks; Rogowski (2008) at *200;* Auer & Gazier (2008); Schmid & Gazier (2002); Schmid (1998).

[30]The Apprenticeship Institute has been recently modified by the Legislator and there is ample literature on this topic. For a general overview of the institute through its various changes, see Carinci (2002), for a more recent view Luciani (2016); Tiraboschi (2011); S. Fagnoni &Varesi (2016); Fagnoni & Varesi (2015); Ciucciovino (2012).

[31]To compare the situation with other European countries where the apprenticeship is a favored channel for employment, see: Ryzha (2015).

where skills are often learnt outside of the coded and systematic circuits of standard training systems. This leads to a need to integrate levels of higher education with forms of knowledge acquired via periods of apprenticeship [32].

To this aim, it is necessary to activate initiatives, sometimes also experimental, of promotion and support that allow the development of valid models for and "bridges" between schools and businesses. Investment in young people and their education through school, university and professional development, that valorises the skills obtained, represent an asset in which to invest in order to create polyhedral professional figures capable of working, adapting and moving in an ever more fluid workplace [33].

Apulia, with the draft law n. 167 of 13 September 2016[34], which modifies the regional law no. 131 dated 22 October 2012 (Norme in materia di formazione per il lavoro), has introduced an ad hoc regulation that realises the promotion of apprenticeship contracts in the fields of excellence within the economic and entrepreneurial system of Apulian production and technology districts, with the aim of valorizing the human worth of young people. The nautical industry is one such area. This innovative provision found in Article 2 of the draft law, consents the opening of the way for a series of initiatives included in territorial pilot schemes which based on a survey of professional and training requirements, taking into account the anticipated needs and skills required by the workplace and the nautical business sector, allows the structuring of a series of initiatives aimed at employment implementation via apprenticeship contracts and/or valid programs of school/work experience [35].

The transferability and skills certification, acquired in formal contexts take on a central importance and a turning point in our labor market.

Another important point in a prospect of development, competitiveness and employment, are the investments in the *cluster* of the *Blue Tech Nautica* area, where companies, suppliers and closely interconnected institutions able to accompany and guide the development of various branches of nautical technology uniting with technological innovations, the so-called *know-how* Made in Italy with which many Italian regions are already working.

The study of maritime clusters dated 2015, *Study on Maritime Clusters in the Mediterranean and Black Sea* [36] , has revealed that a third and a half of all economic marine activity in the Mediterranean and Black Sea is found precisely in these formal and informal clusters. This confirms that such platforms of intersect oral and multi-level cooperation can be a powerful means to stimulate innovation, growth and employment.

[32] On apprenticeships and the opportunity to create valid programs of instruction and training see Cedefop (2017),

[33]On the topic of "fluid" workplaces consult Brollo (2012); Canavesi (2017), *Mercati del lavoro e operatori private,* Giappichelli, 2017. For a European overview, see: De Backer, Desnoyers-James & Moussiegt (2015).

[34]At the moment of print the draft law has been approved by the competent board commission and isawaiting discussion in court.

[35]On this theme the most recent view is Massagli (2016); Massagli (2017).

[36]European Commission (2015).

The approach centered on the role of maritime clusters together with technological clusters and scientific research as used in Friuli Venezia Giulia, which provides an important contribution also in terms of transferal of technology to the nautical and naval sectors, represents in a systematic view of the situation, a method of development at both a local and national level taking advantage of the structural funds 2014-2020, bringing together trans frontal countries and Mediterranean partners in a logical network.

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