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Articles

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The current issue is the first of the seventh volume of the *Athens Journal of Law (AJL)*, published by the *Business and Law Division of ATINER*.

Gregory T. Papanikos
President
ATINER

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12-15 July 2021, Athens, Greece

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Important Dates

- Abstract Submission: **15 March 2020**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **14 June 2021**

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- Abstract Submission: **4 January 2021**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **5April 2021**

Academic Member Responsible for the Conference

- **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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Liability in Russian Corporate Law

By Vladimir Orlov[*]

Liability issues related to corporate activities are primarily regulated by general and special rules of the Civil Law in Russia that are mainly dispositive. The general liability rules consist of tort and contract liability provisions of the Civil Code. Special corporate norms are, in turn, included in the Civil Code provisions on juristic persons and legislation regulating corporate forms, and they concern liability of founders, shareholders and corporation as well as executives of corporation. The main form of civil liability is compensation for damages, the award for which generally requires that the illegal action and the caused damages as well as their causal relationship and the fault for causing the damages is proved in accordance with the rules on presumptions and burden of proof provided by the procedural rules. Traditionally, Russian civil liability rules have relied on the concept of illegality of an action (or breach of an obligation) that is to cause liability, which reflects the dominant role of legal supervision in the Russian legal system. However, in the event of liability of corporate executives, a breach of fiduciary duties could be regarded sufficient as a ground to qualify their actions as illegal without particular reference to concrete legal norms.

Keywords: *Civil liability; Corporation; Corporate executives; Illegality*

Introduction

The purpose of this paper is to present liability issues that are related to corporate activities in Russia. The terms "company" and "company law" are used here in the traditional sense to mean foundation and activities of the company, regardless the fact that, in Russia, the terms "corporation" and "corporate law", borrowed from the USA, are now in general use with the same meaning. In turn, the term "civil liability" is used in this article to cover the general civil law as well as the corporate law and obligation law norms that are to be applied where a company falls under liability.

In Russian law, liability issues related to corporate activities are primarily regulated by civil law norms, contained mainly in the first part of the Civil Code of 1994[1]. They include general civil law, corporate law[2] and obligation law rules.[3]

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[1]The law no 51-FZ/1994, as lastly amended by the law no 251-FZ of 2020.

[2]Corporate law norms together with the other enterprise and company norms as a part of the Russian civil law are specific due to their dispositive dimension where the will expression plays a decisive role. I am ready to call such norms dispositively initiative or latently effective norms, since an expression of will of the party (parties) is required to activate the rules of such a norm, otherwise, no legal relation will be emerged, even in the event the norm contains the clear text.

The purpose of corporate law[4] norms is to regulate the internal relations of a company or the legal relations between a company and persons who are in close relationship to it. The external obligations of a company that are based on a contract or some other civil law ground, like causing damages or unjust enrichment, are in turn regulated by obligation law norms, among which are distinguished the rules that regulate obligations related to corporate activities. Special civil law obligations connected with entrepreneurship are not, however, recognised in the corporate law relations; therefore, they are subject to the application of general civil law provisions, including general and contract law rules.[5]

Russian norms that regulate corporate activity are primarily legislative norms. However, value norms, due to which the discretionary power of judge has grown, have been generalised in present Russian civil law and, consequently, the significance of judicial practice as legal source has grown.

Civil Liability in General

In Russian civil law, the illegality of the breach of subjective civil law rights, causing damage and causal connection between the breach and damages as well as the fault of the violator are regarded as general requirements for the emergence of civil liability. These elements form an indispensable unity, or in other words, they are the constituent elements of civil law breach. The absence or incorrectness of any of these usually causes the exception of liability[6]. The general requirements for the emergence of civil liability correspond to the civil procedure law rules of Russian law. According to the provisions of the Russian Arbitration Procedure Code (2002) that regulate judicial proceedings for disputes between enterprises (companies),[7] the party to the dispute ought to prove the facts, to which he refers in his arguments for supporting his demands and allegations, As applied to civil liability, this means, that, in order to obtain compensation for damages, the injured person must prove 1) the breach of obligation by the defendant, 2) the amount of

[3]In general, the judicial proceedings of civil law disputes (in particular, of companies), except for the corporate law cases, require, in accordance with the law (the laws no 45-FZ/2016 and no 47-FZ/2016), that the plaintiff has presented his prejudicial settlement claim to the defendant. For more on the subject *see*, for instance, http://www.consultant.ru/document/cons_doc_LAW_358054/#dst0

[4]For more on the subject see Orlov (2015).

[5]Corporate activities are also subjected to the liability rules of the criminal and administrative law norms, and they concern company executives. Furthermore, corporate executives are subject to liability under the labour law norms. In general, the same act of the same person could be subject of different liabilities; thus, the civil law claims for damages are usually presented in criminal and administrative liability cases. For more on the subject see Tekutyev (2018) at 372–383 and Yarkovoy (2017).

[6]In present Russian civil law, there have been attempts to abolish the teachings on the constituent elements of the civil law breach, influenced by the teachings of criminal law, which was in a dominant position in the Soviet civil law.

[7]Russian Arbitration Procedure Code, art. 65.

the damages that he suffered (including real damages and lost profits) and 3) the causal connection between *the breach of obligation* and the damage incurred.[8]

Breach of Law or Illegality of Action

Illegal behaviour is regarded in Russian law as the objective requirement of civil liability; in turn, the damage caused by a lawful action is not compensable in Russia, except for the cases provided by the law[9]. Illegal behaviour or civil law breach comprehends the act that causes prohibited consequences or damages[10], provided that there is the causal connection between the breach and damage incurred by the fault of the violator.

Civil law breach comprehends both actions and omissions, and, in ordinary cases, they mean that the obligation is left unperformed improperly performed.[11] The Civil Code knows now also the liability for misrepresentations[12]; in the cases related to enterprise activities as well as corporate relations the party that has provided false presentations may be liable even if he did not know about the falsity of his presentations. The Civil Code contains now also the liability rules on fault in contracting[13].

Generally civil liability requires that behaviour violates the prescriptions that are contained in the legal norms. The question is, firstly, of the violation of prohibitions contained in the imperative legal norms. Important are also the dispositive legal norms that, although permit the deviations from their content, at the same make the provisions agreed by contractual parties obligatory. Also, the breach of the conditions of contract that are not contradictory to the prohibitions established by the law, or that are approved by the law, is regarded as illegal or as the breach of contract. Furthermore, attention is to be paid to that, according to the Civil Code,[14] the civil law rights and duties may arise also from contracts or

[8]According to the decision of the plenum of Russian supreme court no 7 of 24.March 2016, in order to obtain the compensation for damages, the following facts ought to be proven: 1) the act, action or decisions that has caused the compensation for damages liability, 2) the causal connection between *the breach of obligation* and the damage incurred, and 3) the amount of the compensatory damages. As to the fault, it is, in turn, impossible for the plaintiff to prove the fault of the obligation violator, since the question is of the mental attitude of the defendant to his action and its consequences. Therefore, the absence of fault belongs to the burden of proof of the defendant, thus, the fault of the obligation violator, the absence of which must be proven by the defendant, is presumed In Russian civil law. Moreover, the fact that the debtor has performed his obligations to lessen damages is also presumed, wherefore it is within the burden of proof of the creditor to prove that the debtor has not taken necessary measures to reduce damages. See http://www.consultant.ru/document/cons_doc_LAW_195783

[9]Russian Civil Code, art. 1064.3.

[10]Harm caused by lawful action is subject to compensation in Russia only in the cases provided by the law.

[11]In general, the act, by which the obligation had been left unperformed or improperly performed, and, consequently, caused damage, is regarded as the breach of right. In such case, the burden of proof lies on the violator of obligation, and he must prove (credibly) that he had acted in accordance with the law.

[12]Russian Civil Code, art. 431^2 as added by the law no 42-FZ of 2015.

[13]*Ibid.* at art, 434^1 as added by the law no 42-FZ of 2015.

[14]*Ibid.* at art. 8.1.

transactions that, although not provided by the law, do not contradict it, or in other words, the binding effect of which is based on the basic principles of civil legislation, and the breach of the contract that is not contradictory to the basic principles and content of civil legislation is regarded in Russian law as illegal behaviour. But in the event that the law or the terms of the contract does not contain concrete prescription on the illegality of the behaviour in question, the civil liability is not to be applied.

Compensatory Damages

In general, damages comprehend in Russian civil law any lessening of personal or economic benefit. Damages may be material or immaterial. Material damages stand for the material losses, like the reduced value of the damaged thing, lessening or loss of the income, new expenses etc. Although the law favours compensation in kind,[15] monetary compensation is quite common in corporate liability cases as well as in contractual and noncontractual relations. According to the general rules on damages of the Civil Code,[16] the person whose right was violated may demand compensation for the damages caused to him. Thus, the civil liability is by its nature compensatory, and compensation for damages must correspond to the damages incurred. The full compensation for damages is the basic principle related to the civil liability in Russian civil law. [17]

Causalty

The imposition of compensation for damages in Russian civil law requires without exceptions that, there is a causal connection between the act of the right violator and the damages caused by him. This implies from the provisions of the Civil Code, that regulate the compensation for damages[18], and the creditor's duty to compensate damages[19] as well as the general grounds of liability for causing damages (harm)[20]. In the event, that the establishing of causal connections is difficult, the general scientific concepts of causal connection are followed. Or the cause and consequence relation is regarded as a kind of the objectively existing interdependence of phenomena, characteristic for which is that one requires the other. In a specific situation, the question is of two interdependent phenomena, one of which (cause) precede the other and give rise to this whereas the other (consequence) is always the result of the first phenomena. [21] It is important, however, to notify that the jurisprudence deals with the social phenomena, where the cause and consequence connection is very difficult to simplify as one phenomenon being the mechanical or physical reaction to the other phenomenon,

[15]*Ibid*. at art. 1082.
[16]*Ibid.* at art. 15.1.
[17]The right to demand compensation for damages, as well the principle of full compensation, are presumed in Russian civil law.
[18]Russian Civil Code, art.15.1.
[19]*Ibid.* at art. 393.1.
[20]*Ibid.* at art. 1064.1.
[21]Grudtsyna (2008) at 560.

particularly, if the question is of the human behaviour. So, because it is difficult in respect of social phenomena to concretise the reason that results as the concrete consequence, the legal practice is important. Just in the legal practice it is possible to choose from the totality of causes the juridically relevant causal connections, when, for instance, the liability could follow not only from the breach of the right but also from the omission of duties[22]. Just in the examining of a concrete case, it is often possible and necessary to evaluate the causal connection with reasonable level of veracity on the base of the proofs presented by the plaintiff, and, consequently, if the plaintiff would not in succeed in his proofs, the reasonable result of it is that the defendant is not liable.[23]

Fault

In Russian law, fault is generally regarded as a requirement of liability. The question is of the subjective requirement of liability, and it shows how the violator of right considers his illegal behaviour and its consequences. Ordinarily, particularly, if the question is of the civil liability**,** fault means that the violator starts his action, though he forecast the negative consequences of it, and he also knows how to avoid these. As a requirement for civil liability, fault is related to the compensation and restoration function of the civil liability[24]. Contrary to the criminal liability, the form of fault has seldom any juridical significance in respect of the civil liability. Usually any form of fault is sufficient, and in some cases, fault is not even regarded as a requirement for civil liability. And so, according to the Civil Code[25], the law or a contract may require another liability ground (than fault).[26]

According to the general obligation law rule contained in the Article 401 of the Civil Code on liability, the liability for the violation of the obligation is grounded on fault (intent or negligence), unless other grounds are provided by the law or a contract. Generally, the guilt (fault) of the debtor is presumed, but in certain cases the burden of proof could be imposed on the creditor, as for instance, in the carriage. Furthermore, a condition (agreement) on eliminating or limiting

[22]However, in the event that the result of the behaviour, contradictory to the law, is only abstractly possible, the liability for such behaviour is accepted. Thus, the only concrete possibility and, in particular, the concrete consequence must be recognised as the causal relationship that causes liability,

[23]According to the Plenum decision of the Russian Supreme Court no 7 of 24 March .2016, the claim of the plaintiff ought to be rejected, if the court had not succeeded in establishing the causal relationships. *See* http://www.consultant.ru/document/cons_doc_LAW_195783/

[24]The purpose of fault in civil law is to serve as a condition for compensation of damages but not to be a measure of the amount of the compensatory damages.

[25]Russian Civil Code, art. 401.1.

[26]According to the general obligation law rule contained in the Article 401 of the Civil Code on liability, the liability for the violation of the obligation is grounded on fault (intent or negligence), unless other grounds are provided by the law or a contract. Generally, the guilt (fault) of the debtor is presumed, but in certain cases the burden of proof could be imposed on the creditor, as for instance, in the carriage. Furthermore, a condition (agreement) on eliminating or limiting the liability for an intentional violation of the obligation in advance is to be null and void.

the liability for an intentional violation of the obligation in advance is to be null and void.

The rules on compensation for damages that concern the contract obligations connected with enterprise activities are distinguished from the general rules. So, unless otherwise provided by the law or a contract, the person who has left his obligation unperformed or improperly performed it, is, according to the Civil Code[27], liable, unless he proves that the proper performance became impossible due to force majeure, that is to say, extraordinary circumstances unavoidable in the given situation. Such circumstances do not include, in particular, the violations of obligations by contract partners of the debtor, the absence on the market of goods necessary for performance, nor the absence of the necessary monetary assets at the debtor's disposal. Thus, the civil liability related to the contract obligations connected with enterprise activities does not require fault, and is based on the risk share. Furthermore, the obligation parties, who are practicing enterprise activities, may agree on the indemnity clause concerning the compensation for the losses that are defined in their agreement, which are not connected with the obligation violation[28].

Special Cases

Civil liability in Russian civil law may be represented as shared, solidary or subsidiary in accordance with the criteria of the division of liability between several persons. They all are known in contract liability cases. Shared liability comprehends the case, where two or more persons are liable, and each of them is liable in an equal share to the creditor, unless the law or a contract provides otherwise. This liability rule is applicable according to the Civil Code in the event that the joint subjects are not subject to the application of the other liability rules, established by the law or a contract.[29]

Solidary liability is stricter than shared liability, and it ought to be based on the law or a contract; such liability is applicable in the case where the object of the unperformed obligation is indivisible. In accordance with the Civil Code rules that establish the grounds of solidary liability[30], the solidary liability is, unless the law or a contract provides otherwise, presumed in respect of the breaches of the obligation that are related to enterprise activities. According to the Civil Code rules on the creditor's rights in the case of a solidary obligation,[31] the injured party has the right to demand the performance (compensation) both from all the debtors jointly and from any one of them separately, and for all or for part of the debt. Thus, the injured party is entitled to demand the full compensation from the party who is able to pay. Unless otherwise following from the relations between the joint liable parties, the principle liable party, who has paid the full compensation or a part of it that is more than his share, has, in turn, the right of recourse (regress) to

[27] *Ibid.* at art. 401.
[28] Russian Civil Code, art. 406[1].
[29] Russian Civil Code, arts. 321, 1080 and 1081.2.
[30] See, for instance, *Ibid.* at art. 322.2.
[31] *Ibid*. at art. 323.

the rest of the liable parties in equal shares, less his own share; in the event one of the liable parties becomes insolvent, his share is to be divided equally between the other liable parties.[32]

Subsidiary or additional liability comprehends that the person who is not the actual liability party is supplementarilly liable in accordance with the special provision of the Civil Code[33]. The person who is subject to the subsidiary liability is not necessarily the one who has participated in causing damage and usually he has not violated any obligation. The subsidiary liability becomes actualised in the case when the principle liable party refuses to satisfy the claims of the damages suffered party or this party has not received from the principle liable party in a reasonable time the answer to his claims.[34] However, the creditor does not have the right to demand the satisfaction of his claim against the principal liable party from the person, who is subsidiarily liable, if this claim may be satisfied by way of setoff of a counterclaim against the principal liable party or by an indisputable recovery of the damages from the principal liable party. The person, who is subsidiarily liable, is obliged, before satisfying the claim, presented against him by the creditor, to warn about this the principal liable party, and if the claim has been filed against such a person, involves the principal liable party in participation in the case. Otherwise, the principal liable party is entitled to present against the claim of recourse of the subsidiarily liable person the objections that he had against the creditor.

From the cases of the subsidiary liability, the debtor liability for the actions of a third person is too distinguished in Russian civil law. Such liability is in question, when the debtor, in accordance with the Civil Code rules[35], has imposed the performance of his obligation to a third party. In this case the third person is not in legal relation with the creditor, and, therefore, this is not entitled to present demands to him. According to the Civil Code rules[36] that regulate the debtor's liability for actions of third persons, the debtor is liable if the performance of his obligation imposed to a third party has been left unperformed or performed improperly, it is the third person as the direct performer who is liable in such a case. The debtor's liability for actions of third persons as for his own actions naturally extends to the cases where he imposed the performance to a third person contrary to the prohibition established by the law or a contract. In such a case even simple transfer of the obligation shows the intentional breach of contract. In some

[32]*Ibid.* at art. 325.2.

[33]*Ibid.* at art. 399. The rules are general by nature, wherefore the law may establish different order on the subsidiary liability.

[34]So, in the contract relations, the subsidiary liability ordinarily becomes actualised when the principle liable party has not satisfied the claims presented to him, regardless of the principle liable party's ability to pay. Contrary to the contract relations are noncontractual relations, for instance, in the case of bankruptcy of the juristic person, where the shareholder or other person in a dominant position in the company may become subsidiarity liable with the company for intentionally bringing the company into bankruptcy only in the event of insufficiency of its assets.

[35]Russian Civil Code, art. 313.1.

[36]*Ibid.* at art. 403.

cases, the liability for actions of third persons is constructed from the principle *culpa in eligendo*[37].

In the rules of the Civil Code on the debtor's liability for the actions of third person is recognised the possibility, that the third person, who is used by the creditor as the performer, is directly liable to the debtor[38]. This does not, however, mean that the creditor itself would be in that case released from the liability. In the event the creditor transfers the performance of his obligations to the third person, who is directly liable to the creditor, the contractual party (the debtor itself) and the third person (performer) are liable to the creditor, and it is up to him, to choose who the liability party is.

Recourse liability is related in Russian civil law to the cases regulated by the law, where the other person is liable for the actions of the other person[39]. The question is of cases of the vicarious liability and similar to it cases, like, for instance, recently presented the debtor's liability for actions of third persons. In the event, for instance, the employer or commercial organisation (enterprise) has become under the obligation to compensate damages caused by its employee or participant, it has the right to recourse to this person in the amount of the paid compensation, unless another amount is established by the law[40]. Recourse liability also concerns the solidary liability parties in respect of the debtor, who has performed the joint obligation in full. The Civil Code rules on the performance of a solidary obligation by one of the debtors provide[41] that the debtor, who has performed the solidary obligation, has the right of recourse (regress) to the rest of the debtors in equal shares, less his own share, unless otherwise following from the relations between the joint debtors.[42] Recourse claims are also in question in the rules on the rights of the surety, who has performed the obligation which provide that to the surety, who has performed the obligation, are to be transferred the creditor's rights related to the obligation[43]. The other Civil Code rules, where the recourse claims are mentioned, include the provisions on the repayment to the guarantor of the amounts paid under the independent guarantee[44]; they are to be paid in compliance with the terms of the independent guarantee, if not otherwise provided for by the agreement on the issuance of the guarantee.

The rules that concern joint liability in Russian civil law are closely related to the provisions of the Civil Code that regulate the creditor's fault (joint fault)[45]. According to the imperative rule of the provision, the court is to reduce the amount of liability of the debtor, if the obligation is left unperformed or performed improperly due to the fault of both parties. In this case, the question is not only of the intentional act of the debtor but also of his negligent omission, in the consequence of which the obligation became unperformed or performed

[37]For instance, the commission agent could be liable for choosing the third party as the performer.
[38]*Ibid.* at art. 403.
[39]Russian Civil Code, arts. 402 and 403.
[40]*Ibid.* at arts.1068 and 1081.1.
[41]*Ibid*. at art. 325.
[42]*Ibid*. at art. 325.2.
[43]*Ibid*. at art. 365.1.
[44]*Ibid.* at art. 379 as amended by the law no 42-FZ of 2015.
[45]*Ibid.* at art. 404.

improperly. But in the event the creditor contributed intentionally or by negligence to the increase of the amount of damages caused by nonperformance or improper performance, or did not take measures to reduce it, the court has, according to the Civil Code[46], only the right (but not duty) to reduce the amount of liability of the debtor. The rules of the Civil Code on joint liability are also applicable in the cases where the debtor, in accordance with the law or a contract, is liable for the nonperformance or improper performance regardless of his fault.[47] Such cases include the obligations that are related to enterprise activities.

The rules of the Civil Code on joint liability are also applicable in the cases where the debtor, in accordance with the law or a contract, is liable for the nonperformance or improper performance regardless of his fault.[48] Such cases include the obligations that are related to enterprise activities.

Corporate Law Liability

Corporate liability[49] is regulated in Russian law by the basic rules that are contained in the provisions of the Civil Code on juristic person[50]. Also, the main normative acts on the forms of company like the Joint Stock Company Law[51] and the Limited liability Company Law[52] contain corporate liability rules. In addition to the legislative acts, the internal bylaws of the companies are to be regarded as corporate law sources. Corporate liability norms, as corporate law norms in general, are mainly imperative or obligatory, but as being civil law norms, they contain a dispositive element in a sense that there is no body or person outside the corporation who may order to apply the corporate liability rules.

The concept of juristic person plays central role in the civil law regulation of enterprise activities, in particular, related to company liability in Russia. According to the Civil Code[53], the juristic person is an organisation that has separate property and is liable with it for its obligations, it may in its own name acquire and exercise civil rights and bear civil duties and may be a plaintiff and defendant in court.[54]

[46]*Ibid.* at art. 404.1.
[47]*Ibid.* at art. 404.2.
[48]*Ibid.* at art. 404.2.
[49]For more on the subject *see* Trofimov (2018); Borisov (2017); Popov, Popova (2012) at 70–73; Tekutyev (2018) at 332–354; Tselovalnikova (2018); and Stepanov (2018) at 2.
[50]Russian Civil Code, Chapter 4.
[51]Joint Stock Company Law (of 1995), arts.3, 6 and 71.
[52]Limited Lliability Company Law (of 1998), arts.3, 6 and 44.
[53]Russian Civil Code, art. 48.
[54]According to the Article 50 of the Civil Code, juristic persons in Russian law are distinguished into corporate and unitary entities as well as into commercial and non-commercial (non-profit) organizations. Commercial corporate entities include (general and limited) partnerships, business (limited liability) partnerships and companies as well as production cooperatives and farms. In turn, companies are distinguished into (public and non-public) joint stock companies and limited liability companies. The main purpose of commercial organizations is to practise enterprise activity, and their goal is deriving profits, whereas the enterprise activity of the non-profit organizations, such as consumer cooperatives, societal organizations, and foundations, must be connected with the objects of their primary activities.

The legal position of juristic person is determined in accordance with its legal capacity and legal act capacity as well as liability capacity, the rules on which are based on the provisions of the law.[55]

The subjects of the corporate law liability are, firstly, the company and its participants, including the founders, since the liability of the company and its participants is differentiated. The corporate law liability concerns also the corporate executives, the directors and the members of the executive bodies of the company, each of which acts within the limits of its competence and is liable for its acts. The list of persons who may present corporate liability demands is also exclusive: only the corporation itself and its participants, as well as in certain cases its debtors and the subsidiary company and its shareholders (participants) have the right to demand compensation for damages in corporate law cases. The corporate law liability plays a reparative function, and the norms on it are dispositively initiative or latently effective, their application requires the initiative or expression of will of the injured party[56].

Liability of the Founders and Participants

According to the Civil Code[57], the founder of (or a participant in) a juristic person (company) or the owner of its property is in general not liable for the obligations of the juristic person, as well as correspondingly juristic person is not liable for the obligations of the founder (participant) or the owner it, unless otherwise is provided by the law. However, the founders of the company are jointly and severally liable for obligations associated with the formation of the company and arising prior to its registration; this liability is based on the law, but those obligations may be transferred to the company on the approval of the general meeting of shareholders.[58] Moreover, the members of the (limited liability) company bear jointly (solidarily) subsidiary liability for the obligations of the company to the extent of the value of the unpaid contributions[59].[60]

[55] *Ibid.* at art. 48.

[56] Contrary to the corporate law liability rules, the rules on criminal and administrative liability that concern corporate activities are of public law nature and consequently imperative. In general, characteristic for criminal liability are strict requirements of legality which also means that the application of the criminal liability rules is obligatory for the state; obligatory for the administrative officials are the administrative liability provisions. Also, the Labour Code contains the corresponding imperative provision: it imposes on the employer the obligation to direct to the director disciplinary measures, if he has violated the labour law norms.

[57] *Ibid.* at art. 56.2.

[58] *Ibid.* at art. 98.2.

[59] *Ibid.* at art. 87.7.

[60] The participants (shareholders) of the company may conclude the corporate agreement on the execution of their corporate rights is simply a (general) civil law agreement. In accordance with the Civil Code 406^1.5, it may include the indemnity clause (on the compensation for the losses that are defined in their agreement).

Liability of the Corporation

In general, the juristic person (company), except for the institutions that are financed by the owner, are liable for their obligations with all their property[61], but it is not liable for the obligations of the other persons. According to the Civil Code, the company may, in certain cases, fall under liability for the activities of the other company. This is the case of the liability which may arise for the company (partnership) in the subsidiary and principal relation that is regulated by the Civil Code[62] as well as the Joint Stock Company Law[63] and Limited Liability Company Law[64]. In the subsidiary and principal relation, the principal company can bear liability on the one hand for the acts (transactions) of the subsidiary company and on the other hand in the case of the insolvency (bankruptcy) of the latter.

The liability for the transactions of the subsidiary company presupposes that

- the principal company may, due to its prevailing share in the charter capital of the subsidiary company or in accordance with a contract between it and the principal company or otherwise determine its decisions
- that concern the acts (transactions) of the subsidiary company made by following the binding orders of the principal company or on the consent of this, and
- these acts (transactions) cause damages;

This liability is solidary (joint and several) and strict.

Contrary to this, the liability of the principal company for the debts of the subsidiary company, if this is brought into bankruptcy through the fault of the principal company, is subsidiary[65] and presupposes that

- the principal company had the right or possibilities in accordance with its contract with and the charter of the subsidiary company to give binding orders to this,
- provided, however, that the principal company misused faulty his right or possibilities or it knew in advance that the consequence of its actions (the binding orders given to the subsidiary company) would be the bankruptcy of the subsidiary company.[66]

Besides the subsidiary company, its shareholders (participants) also have the right to demand that the principal company compensate the damages caused through its faults to the subsidiary company in accordance with the general rules of

[61]*Ibid.* at art. 56.
[62]*Ibid.* at art. 67.
[63]Joint Stock Company Law, arts. 3 and 6.
[64]Limited Liability Company Law, arts. 3 and 6.
[65]According to the Article 6.3 of the Joint Stock Company Law, the principal company shall be liable for bringing the subsidiary company into bankruptcy.
[66]Joint Stock Company Law, art. 6.3.

the Civil Code on liability[67], provided that the principal company knew in advance that the subsidiary company would incur losses as consequence of its actions. [68]

Liability of the Persons in a Dominant Position

With exception to the general corporate law rule on separate liability of the company and its participants (shareholders), the shareholder or other person in a dominant position in the company (including the controlling shareholders) may be subsidiarily liable with the company, however, only for bringing the company into bankruptcy and in the event of insufficiency of its assets provided that such a person has used his right or possibilities to give binding orders or otherwise determine the decisions of the company knowing in advance that the consequence of his actions would be the bankruptcy of the company. [69]

Liability of the Corporate Executives

According to the general provisions of the Civil Code on liability of the corporate executives, the person who by force of the law or of the juristic person's constituent document comes out on its behalf, or use the representative power in the name of the company is expected, according to the Civil Code[70], to act in the interests of the juristic person it represents in good faith and reasonably). In case of non-observance of these as well as the customary requirements the representative of the juristic person is obliged, upon the demand of the juristic person, or the founders (the participants) acting on behalf of this, to compensate the damages caused by his fault[71] taking into account ordinary business practices and risks, which ought to be proved[72].[73] The same liability is extended also to the persons who may determine the actions of the juristic person[74], as well as to the members of the collegiate executive body, except for those who voted against the adoption of the decision or did not take part in the voting concerning the issue[75]; in the event of jointly caused damages the liability is solidary[76]. The Civil Code[77]

[67]Russian Civil Code, art. 1064.
[68]Joint Stock Company Law, art. 6.3.
[69]*Ibid.* at art. 6.3.
[70]Russian Civil Code, art. 53.3.
[71]*Ibid.* at art. 53.
[72]*Ibid.* at art. 53.1.
[73]In Russian corporate law, the liability of the corporate executives is based on the concept of fiduciary duties developed at common law by following the rules on trust and agency institutions, and they comprehend *duty of care* and *duty of loyalty* that, in Russian legal practice, generally means a prohibition of the conflict between the personal interest of the company executive and the interest of the company, but sometimes also the bona fide behaviour or understanding of the meaning of own acts. Namely the behaviour that breaks personally imposed fiduciary duties may cause liability for damages. See for instance Stepanov (2018) at 2: and also https://www.litmir.me/bd/?b=628065
[74]Russian Civil Code, art. 53.3. Thus, the rule of piercing the corporate veil is applicable in Russian corporate law.
[75]*Ibid.* at art. 53.2.
[76]*Ibid.* at art. 53.4.
[77]*Ibid.* at art. 53.5.

expressly provides that an agreement on the restriction or elimination of the liability presented here is null and void. This concerns fraudulent acts and, in the event of public company, also unreasonable acts.

The liability of the members of the governing bodies of the company provided by the Joint Stock Company Law is also based on the general company law rules on liability of the Civil Code[78] and means in general the liability for negligence. Under the article 71 of the Joint Stock Company Law, the members of the governing bodies are presupposed to act in good faith and reasonably, but on the other hand, in determining the grounds and extend of their liability, ordinary business practices and other relevant considerations must be taken into account. This liability is personal as well as solidary (joint and several), but the persons who did not take part in the administration (or voted against) is not to bear liability; in this case the company or shareholders owning not less than 1 percent of the common shares of the company have the right to apply to a court with a suit.

Characteristic for the liability of executives and representatives of company is, that their liability is to be realised simply at the moment when their duty, determined through the value concepts[79], to act in good faith and reasonably is violated, provided that it has caused damages[80], in which case it is not necessary to prove the violation of the concrete legal norm that is traditionally regarded as belonging to the constituent elements of the civil law breach. Thus, in the cases of the liability of executives and representatives, the facts that are to be proven include that:

- (fiduciary) duty to act in good faith and reasonably for the benefit of the company is violated, and
- it has caused damages, as well as that
- there is the causal connection between the breach and the damages incurred; and that
- The breach has been occurred intentionally[81].

The person is regarded acted in good faith and reasonably, if he has not personal interests in respect of the decision to be made, if he has clarified exactly all the information that is necessary for the decision making, and if there are other circumstances that show the person acted for the benefit of the company. The director is regarded as acted in good faith and reasonably also, if he has executed all necessary and sufficient measures for the company achieve the aims imposed for the foundation of it, including the duties that are established by the public law. In turn, the director is not regarded acted in good faith, if there is a collision

[78]*Ibid.* at art. 53.3.

[79]The growing use of the value concepts and the value norms in Russian civil law indicates its development towards the growing role of the judicial discretion and consequently the approval of the significance of the judicial practice.

[80]The damages caused by the acts of the director are regarded as the requirement of the director's liability.

[81]Thus, the company is liable for its entrepreneurial obligations regardless its fault, whereas its executives may be recognised liable for the damages caused to the company, only if they have acted intentionally.

between him and the company, if his acts have not been approved afterwards, or if he has concealed or falsified the information related to the made transaction, or left it unapproved, or has not submitted to the company the documents related to the transaction, or has made obviously disadvantageous or invalid transaction.[82]

In turn, the director is not regarded as acted reasonably, if he has not taken into account in his decision the essential information, or has not followed the approval procedure related to the transaction. Furthermore, attention must be paid to that in the case the action of the director has caused damages, the approval of it at the collective executive body of the company, or by the participants (shareholders) as well as the following the instructions of them does not release the director from the liability for damages, since the fiduciary duties concern him personally, and he bears the independent liability for damages.

The requirements to act reasonably that concern the company director follow in Russian legal as practice as criteria the model of behaviour of an average director, but in concrete cases the requirements could be higher of lower than such standard, taking, however, into account, that the commercial review of the director's acts is not under the court's competence. According to the opinion of the Russian Constitutional Court of 2004, the circle of control of the court includes to secure the protection of the rights and freedom of the shareholders but not to evaluate the economic expediency of the decisions of the governing bodies of the company that enjoy the independence and large discretionary power in their decision-making concerning the commercial activities of the company.

The plaintiff must prove the facts showing that the company body has acted (or unperformed its duties) fraudulently and/or unreasonably, and it has resulted in negative consequences for the company. In the event the plaintiff succeeds, through the reference to that the company body acted fraudulently and/or unreasonably, in proving that it caused damages to the company, the company body ought to, in order to avoid the liability, prove that the damages have been caused due to the reasons that are outside of his control. The court may order the company body that left its duties unperformed or performed them fraudulently to prove that it did not violated its duty to the company to act in good faith and reasonably.

Rights to Claim of the Participants

According to the Civil Code[83], the participant has the right to demand, on behalf of the company through using his representative power in accordance with the Civil Code,[84] compensation for the losses caused by the representative (the executive or the persons in a dominant position) to the corporation[85]. The

[82]As the cases when the director of the company has been condemned to compensate the damages, Russian legal practice knows the cases, where the payment has been executed in default of any contract or under the nonexistent contract, where the assets of the company has been used improperly, where the debt has been forgiven without a legal ground or where the trade mark has been violated by fault. For more on the subject *see*, for instance, Stepanov (2018) at 2.
[83]Russian Civil Code, art. 65.
[84]*Ibid.* at art.182.1.
[85]*Ibid.* at art. 53.1.

participant must take reasonable measures for notifying in advance the other participants and, if necessary, the corporation itself of his intend to challenge the decision of the company. The participants who have not joined the claim are not to have the right to present the same demand s, unless the court approves the grounds for this.[86].

Among the rights of a participant of the company (and partnership), there is, according to the Civil Code[87], the right to demand in judicial procedure another participant be expelled with the compensation of actual value of his share, if such a participant has caused by his actions (omissions) substantial harm to the company. Or otherwise substantially disturbs its activities and the attainment of the objectives for which it has been formed, including the gross violation of his duties established by the law or the constitutive documents of the company. The waiver of that right or restrictions on it is null and void.

Liability in the Case of Reorganisation

Compensation for damages issue may arise in respect of the reorganisation of company, where the claims of the debtor are left unperformed, and the sufficient security for the performance of the obligation has not been offered. In that case, in addition to the juristic persons formed as a result of the reorganisation, their collective bodies members and representatives as well as the persons who have real power to decide on the actions of the company are solitarily liable for the damages caused by their actions.[88]

Also, in the event that a court recognises, in accordance with the Civil Code[89], the decision on the company reorganisation as invalid, the question of compensation for damages may arise. In that case the reorganised juristic persons as well as the persons, who fraudulently promoted the invalidated decision, are solidarily liable to a participant of the reorganised company, who voted against such a decision or did not participate in voting, as well as to the debtors of the reorganised juristic person.

In respect of the cases where the partnership is transformed into a company, the Civil Code provides a special rule[90] that concerns the liability of general partners. According to it, each general partner, who has become the participant (the shareholder) of the company, is to be subsidiarily liable with his whole

[86]The participant has also the right to demand on behalf of the company (or join the joint claim), according to the Civil Code, that a transaction of the company is recognised as invalid, because of the breach of the conditions imposed upon the exercise of the representative power or on the grounds established in the corporate law provisions, as well as demand the application of the consequences of the invalidity of a transaction. The invalidity claim, provided by the article 174 of the Civil Code could be regarded as an alternative to the compensation demand s on the grounds established by the article 53^1 of the Civil Code. Taking, however, into account that, in the event the decision of the company is recognised as invalid, the restitution rules related to this are to be applied and they might have, in principle, the consequences even for third persons, the imposition of the compensation for damages on the executives seems for law politics reasons better solution.

[87]Russian Civil Code, art. 67.1.

[88]*Ibid.* at art.60.3.

[89]*Ibid.* at art. 60^1.

[90]*Ibid.* at art. 68.2.

property in the course of two years for the obligations that passed to the company from the partnership; this liability will remain in force even in the event of transfer of the shares.

Obligation Law Liability and its Forms

The civil regulation of the liability related to the company activities, in addition to the corporate law norms, includes the obligation law norms[91] where the contract law provisions that are to be applied to the contract that the company conclude with the other parties, as well as the provisions that regulate the non-contractual liability are important. Contract liability is usually grounded on the contract that is concluded between its parties and realises in the event of breach of its obligations. The definition of its conditions is not strictly bounded to the legal provisions, and contracting parties may establish liability also for the breaches that are not provided with legal consequences. Furthermore, in some cases the contractual parties may agree on the increase or reduce of the liability established by the law.

Contrary to that, the non-contractual liability is applicable only in the cases established by the law and in accordance with its imperative rules. Such liability or tort liability arises as the consequence of the illegal act of one person against another, and is applicable also in the cases where the breach of the obligation results in the damages to life and health of the injured person[92], for instance, if a traveller is injured in a road accident. [93]

In addition to the tort liability, the non-contractual liability covers other cases of civil law liability that are based on other grounds than contract, including the unjust enrichment. In Russian civil law, the liability forms are distinguished, and as a general rule, it is regarded that the injured person has no right to choose what claim he presents to the same person.

Compensation for Damages

Compensation for damages is a general form of liability related to contract obligations. According to the Civil Code[94], a debtor is obliged to compensate the creditor for the damages caused by nonperformance or improper performance of the obligations. In Russian law, compensation for damages may be used in any case of breach of law[95], unless otherwise provided by the law or a contract, and it is distinguished from the other forms of liability that these are applicable only in the cases expressly provided for by the law or a contract. Moreover, the right of

[91]For more on the subject see Orlov (2011) at 207–209.
[92]Russian Civil Code, art. 1084.
[93]In Russian civil law, the illegality of the act that caused the damages, the causal connection between the act and damages as well as the fault of the violator are regarded as general requirements for the emergence of civil liability also in the cases of tort liability.
[94]Russian Civil Code, art. 393.1.
[95]According to the general rule of the Article 15.1 of the Civil Code on compensation for damages, a person whose right has been violated may demand compensation for the damages caused to him.

the creditor for compensation for damages is established by the Civil Code as independent from other ways of protecting violated rights, provided by the law or a contract for the cases of nonperformance or improper performance of obligation, unless otherwise established by the law.

The general rule is, under the rules of the Civil Code on general liability for damages, that the damages are to be compensated in full[96]. Exceptionally, the law or a contract may provide limited liability or limit the right to full compensation for damages[97]. The application of the principle of full compensation to contract obligations means that, as a result of compensation for damages, the creditor shall be in the position that he would have, if an obligation had been property performed[98].

The damages to be compensated mean, firstly, covering the real, actual damages or the compensatory damages[99]. The expenses which the creditor must pay to restore the violated right are to be taken into account[100]. Secondly, the loss or harm to the property is to be compensated. Full compensation also includes covering the undeceived profits or the lost profit which the injured party would have received under the usual conditions of civil commerce, if his right had not been violated; in such a case also the measures taken by the creditor to receive the profit and the preparations made for this purpose are to be taken into account[101]. But if the violator has received income as a result of the violation, the injured party is entitled to demand compensation for lost profit in an amount not less than such income[102]. It is also possible that changes in prices shall be taken into account. According to the Civil Code, the prices shall be taken into account which existed at the place where the obligation was to be performed on the date of voluntary satisfaction by the debtor of the claim of the creditor, and in default of this, on the day of filing the suit, and proceeding from the circumstances, a court may satisfy a claim taking into account the prices existing on the day of making decision.[103]

The amount of losses to be compensated is to be established with a reasonable degree of certainty. A court may not deny satisfaction of the creditor's claim to compensate for the losses caused by failure to perform or improper performance of an obligation solely on the grounds that the amount of losses cannot be estimated with a reasonable degree of certainty. In such a case, the amount of the losses to be compensated ought to be estimated by a court taking into account all the facts related to a case and following the principles of equity and proportionality of

[96]*Ibid.* at arts. 15.1 and 1064.1.
[97]The cases when civil liability is restricted concern, for instance, the carrier's and insurer's obligations. Russian civil law knows also cases of enlarged liability; it is purposed, for instance, to protect consumers.
[98]*Ibid.* at art. 393.2.
[99]They include only direct damages which are the direct and unavoidable consequence of the violation of the obligation, but not consequential damages...
[100]Russian Civil Code, art. 15.2.
[101]*Ibid.* at art. 393.4.
[102]*Ibid.* at art. 15.2.
[103]*Ibid.* at art. 393.3.

liability to the occurred breach of obligation[104]. Also, abstract damages are compensable in accordance with the new provisions of the Civil Code[105].

An exception from the general obligation law rule on liability is provided for obligations connected with entrepreneurship. The specific feature of the liability for violation of contractual obligations connected with the entrepreneurial activities is that its task in cases of the disturbance in performance of the entrepreneur's obligations is to transfer the risks to the party violating the contract, which is reflected in the strict liability for this. Unless otherwise provided by the law or a contract[106], a person violating the obligation of performance connected with entrepreneurship is to bear liability, according to the special (exculpation) rule of the Civil Code on the grounds of obligation law liability[107], unless he proves that proper performance has been impossible because of force majeure, meaning extraordinary and unavoidable circumstances. To such circumstances shall not, however, be referred, for instance, violations of obligations on the part of the debtor's counter-agents, the absence on the market of goods indispensable for the performance or the absence of the necessary means at the debtor's disposal[108]. Thus, a contract violator must prove the absolute impossibility of contractual performance. It means also that he ought to prove that he had not contributed to the emergence of force majeure, that he had, with the degree of care and caution required by the nature of the obligation and commercial practice, taken all measures for the proper performance: otherwise he will not be released from liability[109]. In the event the impossibility of performance is caused faulty by the creditor or debtor, the rules on fault liability are to be applied.

Liquidated Damages

Liability for breach of contract in Russian law comprehends not only compensation for damages but also liquidated damages that a contract violator is to pay his counterparty in accordance with the law or a contract. Liquidated damages play a double role in Russian law: on the one hand, it is a security measure for performance of an obligation[110], and on the other hand, a form of contract liability that is to be realised in the case of breach of contract[111]. As a form of contract liability liquidated damages are subject to the provisions of the Civil Code on damages and liquidated damages.[112]

[104]Modern Russian civil law is also acquainted with the concept of foreseeability of damages in contract, in accordance to which the unforeseen damages are not subject to compensation.
[105]*See* Russian Civil Code, art. 393.5 as amended by the law no. 42-FZ of 2015.
[106]For instance, the liability of an agricultural producer for the breach of contract presupposes under the Article 53 of the Civil Code his fault. The similar liability is provided in the rules of the Article 547.2 of the Civil Code on supply of energy.
[107]Russian Civil Code, art. 401.3.
[108]*Ibid*.
[109]*Ibid.*
[110]*See Ibid.* at arts. 330–333.
[111]*See Ibid.* at arts. 394 and 396.
[112]*Ibid*. at art. 394.

As liquidated damages (penalty, fine) are recognised in the Civil Code the sum of money, defined by the law or contract, which the debtor is obliged to pay to the creditor in case if he will not perform his obligation in accordance with the contract[113], including nonperformance, improper performance and a delay in performance. Liquidated damages could be defined as a destined sum (single payment) or an interest that will be counted according to the duration of the violation of the contract (for instance, daily) or its value. By the claim for the liquidated damages, the creditor shall not be obliged to prove that the damage has actually been inflicted upon him; the fact of violation is a sufficient ground for compensation. And in respect of obligations connected with entrepreneurship, it is unnecessary to prove the fault of the debtor, since the liability in the form of liquidated damages is independent from the fault of the contract violator. Thus, in the use of the creditor, liquidated damages are simple measure to get compensation from the debtor for the damages caused by his failure to perform or improper performance of an obligation. The only ground for the application of liquidated damages is the breach of the rules concerning the obligations, provided by the law or a contract, or following from a custom. In general, the payment of the liquidated damages (as well as the compensation of the damages) shall absolve the debtor from the performance of the obligation in kind in the case of non-performance, contrary to case of the improper performance, unless otherwise provided by the law or a contract. However, the creditor shall not have the right to claim the payment of the damages if the debtor is not liable for the non-performance or improper performance of the obligation.[114]

Liquidated damages are clearly a form of civil liability. But, although liquidated damages as a form of contract law liability is related to the concept of compensation for damages, they are, however, significantly different. The compensation for damages is distinguished from the liquidated damages above all in that in the case of compensation for damages:

1) damages are to be compensated, only if they are really incurred,
2) the plaintiff must prove not only the amount of the compensatory damages but also that he has taken all possible measures to avoid damages, and that
3) it is impossible to uncover all damages at the moment of the contract breach, and the amount of the compensatory damages is usually clarified the court proceedings.

Contrary to that, it is characteristic for liquidated damages that:

a) The amount of the compensation for damages for the contract breach is defined in advance, wherefore the contracting parties know it since the conclusion of their contract,

b) Liquidated damages are compensable simply on the ground that the obligation breach has occurred, when it is not necessary for the debtor to prove

[113]*Ibid.* at arts. 330.1.
[114]*Ibid.* at art. 300.

that the damages has been caused to him, nor even indicate the amount of damages [115], and

c) The contracting parties may formulate freely the condition on liquidated damages (except for the statutory liquidated damages), which concerns the amount of the liquidated damages and the method of their calculating, as well as the proportion of the liquidated damages to the caused damage.

The liquidated damages and compensation for damages may be presented concurrently. According to the general rules, the liquidated damages cover the compensation for damages. In the provisions of the Civil Code that regulate the relation between the compensation for damages and the liquidated damages[116], it is expressly provided that if liquidated damages are provided for nonperformance or improper performance of an obligation, damages are to be compensated in the part not covered by the liquidated damages; those are so-called compensatory liquidated damages[117]. This rule is, however, dispositive, and the law or a contract may provide otherwise. Firstly, the law or a contract may provide, according to the Civil Code that only the liquidated damages but not the compensatory damages are to be recovered; the question is of so-called exclusive liquidated damages. Secondly, the law or a contract may provide penal liquidated damages, in which case the compensation for damages is covered in full amount above the liquidated damages. Thirdly, the law or a contract may contain the provision that either liquidated damages or compensation for damages are, at the choice of the debtor, recoverable.

The duty to pay liquidated damages is based in Russian law on the same grounds as in the case of compensation for damages liability, and this means that the debtor is not entitled to demand liquidated damages, if the creditor is not liable for the obligation breach. But in the event of the breach of the contract obligations connected with enterprise activities, the person who has left his obligation unperformed or improperly performed it, is, according to the Civil Code[118], liable, unless he proves that the proper performance became impossible due to force majeure, that is, extraordinary circumstances unavoidable in the given situation—unless the law or a contract provides otherwise.

According to the Civil Code[119], the reduction of liquidated damages is possible in Russia, and the rules on it concern not only the statutory but also the contractual liquidated damages. According to the rules, only a court has power to reduce liquidated damages, and only in the event, that liquidated damages subject to payment are clearly disproportional to the consequences of the obligation breach. But if the obligation violator is the person who is practicing enterprise activities, a court has the right to reduce liquidated damages only on the demand of the creditor[120]. Furthermore, if in that case the liquidated damages are determined

[115]On the contrary, it is within the interest of the creditor to prove the small amount of damages or even their absence for the court could reduce the amount of liquidated damages in accordance with the Article 333 of the Civil Code.
[116]*Ibid.* at art. 394.1.
[117]*Ibid.* at art. 394.1.
[118]*Ibid.* at art. 401.
[119]*Ibid.* at art. 333.
[120]*Ibid.* at art. 333.1.

by the contract, their reduction is possible only if it is proven, that their payment may result in the debtor's unjust enrichment. However, it is important that the rules on reduction of liquidated damages does not concern the cases, where the creditor has the right to reduce the amount of his liability under the rules on joint liability[121], and where the debtor has the right to demand compensation for damages in accordance with the rules of the Civil Code on the compensatory damages and liquidated damages[122].

Indemnity

The Civil Code contains at present the rules on the compensation for the losses resulting from the Occurrence of the Circumstances Defined in the Contract, that is, the indemnity clause. According to the rules, the obligation parties, who are practicing enterprise activities, may provide in their agreement the duty of either party to compensate for the property losses of the other party resulting from the occurrence of the circumstances determined in such agreement which are not connected with the obligation violation by this party, including the losses caused by the impossibility to perform the obligation, the claims raised by third persons or public authorities against the party or a third person indicated in the agreement etc.).[123] The agreement may define the amount of compensation, which may not be reduced by a court, except if it is proved that a party has contributed intentionally to the losses. The indemnity losses are recoverable even in the event that the contract is recognised as not concluded or invalid, unless otherwise provided by the agreement. In turn, if the losses have arisen due to the illegal acts of a third person, the creditor's claims against this third person are to be transferred to the party that has compensated for the losses.

Precontractual Liability (negative contract interest)

Russian contract law is also acquainted with precontractual liability and negative contract interest related to it, the general rules on which are introduced into the Civil Code in 2015[124]. The provisions of the Civil Code that regulate contracting negotiations[125], where precontractual liability may arise, include the rules on fault in contracting (*culpa in contrahendo*), according to which the party that fraudulently uses or interrupts contracting negotiations is obliged to compensate the caused damages or negative contract interest to the counterparty.[126] The negative contract interest stands primarily for the expenditures related to the contract negotiations, where also the lost opportunities to make a profitable contract may be compensated. The rules on fault in contracting are applicable regardless whether, as the result of negotiations, the contract has been concluded

[121]*Ibid.* at art. 404.
[122]*Ibid.* at art. 394.
[123]*Ibid.* at art. 406.1.
[124]By the law no. 42-FZ of 2015.
[125]*Ibid.* at art. 434.
[126]*Ibid.* at art. 434.3.

or not[127]. On the other hand, the application of the rules on fault in contracting does not prevent that the relations arisen in the contracting become subject to the rules on tort liability.

Conclusion

Russian law now contains well developed rules that regulate civil law liability and also corporate liability. In particular, the liability of the corporate executives to the company is subject to sophisticated rules, whereas the corporate liability to other persons than the company and especially the company's liability to its participants (shareholders) and outside persons as well as the liability of shareholder of the company to its debtors are not, however, recognised in Russian corporate law. The regulation of corporate activities has been executed in Russia primarily by legislative norms, and it shows their dominance in Russian law. On the other hand, the use of value concepts and value norms in modern Russian civil law indicates its development towards the increase of judicial discretion and consequently the recognition of the significance of judicial practice as a source of law.

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Plea Bargaining and Criminal Justice in India

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Crime, criminals and criminality have always been serious concern for society, state and individuals. Individuals formed society to have protection for his life, property and liberty. Society to bear such liabilities created state which ultimately developed criminal justice system. Hereby, criminal justice system is developed for providing protection to life, liberty and property of individual but in developmental process individual for whose protection criminal justice system was developed, became neglected. Traditionally criminal justice system attempts to protect accused and his interests. Recently demands are made for justice to individual victim who is actual sufferer of crime commission. Recently some measures are created for providing justice to individual victim. Such measures are in process of development, and thereby, for effective justice measure development to provide justice to victim there is a need to make continuous review. Plea bargaining is one such measure recently included in Indian criminal justice system to provide justice to victim. This paper analyses plea bargaining in reference to providing of justice to victim in India.

Keywords: *Compensation; Criminal justice; Habitual criminal; Plea bargaining; Restorative justice; Sentence; Victim.*

Introduction

Recently in Indian criminal justice system plight and injustice to individual victims has been emphasised and demands are made for providing actual, effective and sufficient justice to them. In recent years many provisions have been added to the Criminal Procedure Code (hereinafter CrPC) in order enable victims of crime to raise their grievances at appropriate forum, and further in justice imparting their sufferings should be taken care and accordingly decisions should be given. One of them is plea bargaining. In India the concept of plea bargaining has been accepted and included in the CrPC but it is not completely transplanted from other legal systems, like the American one, but adopted with some modifications. Provisions relating to plea bargaining in Indian criminal justice system are provided in Chapter XXI-A of CrPC which was added by Criminal Law (Amendment) Act 2005 (2 of 2006) which came into force on 5.7.2006. Plea bargaining is based on concept of restorative justice and in this regard many provisions have been added in the CrPCedure Code by some recent criminal law amendments. Previously, usually allegations were made that criminal justice system is favourable to the accused and in criminal procedures attempts are made to protect the interest of accused with complete neglect of victim and his problems. Restorative justice talks about justice to victim who is actually suffered of the criminal acts. Responsibility

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has been imposed on the state for compensating victims, for proper treatment of physical and psychological injury in cases of sexual or acid attacks. Cases amount of fine are determined according to the need of medical expenses to cover the full amount the victim had to spend. An appeal against the court's decision may be brought before the Supreme Court. Criminal justice now is emphasising the effective justice to victim and it is considered as one of the important objectives. In *National Human Rights Commission v. State of Gujarat*[128] Supreme Court observed:

> "*It needs to be emphasised that the rights of the accused have to be protected. At the same time the rights of the victim have to be protected and the rights of the victim cannot be marginalised. Accused persons are entitled to a fair trial where their guilt or innocence can be determined. But from the victims' perception the perpetrator of a crime should be punished. They stand poise equally in the scale of justice."*

Principles of Justice for Victims of Crimes and Abuse of Power

Criminal justice system makes all the attempts to tackle problem of crime and criminality and to protect society from the impacts of crime. Traditionally criminal justice system considers victim of crime is society and society is represented through State, thereby, traditionally concept crime even when widened, society and state are considered as victim of crime. Individual victim against whom crime is committed has always been neglected and traditionally been treated as mere informant and witness in criminal case. That is why real victim of crime who has suffered injuries of crime commission has always been a neglected and need of justice. Article 4 of Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1985, directs member states of United Nations for treating victims of crime with compassion and respect their dignity:

> "*Victim should be treated with compassion and respect for their dignity. They are entitled to access to the mechanism of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."*

For achieving these objectives, the United Nations directed in Article 5 of Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1985, to member nations to develop judicial and administrative mechanisms for victim redressal, and further, to provide effective communication with victim to inform him about the rights available to him:

> "*Judicial and administrative mechanism should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expedious, fair, inexpensive and accessible. Victim should be informed of their rights in seeking redress through such mechanisms."*

[128]AIR 2009 SC (Supp) 318

Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1985, puts emphasis on restitution of victims and for this purpose direction is given for imposition of responsibility on offenders. Offender has caused suffering to victim, thereby, for restitution also responsibility must be imposed on offender. This measure also reminds offenders that what they have done and the problems they caused. Imposition of responsibility on offender for restitution of victim functions in two parallel ways. It provides effective remedy to the victims who are restituted, and at the same time it teaches the offenders that their wrongful acts are completely unacceptable and proscribed which have caused a serious hardship to other member of society. The later aspect compels offenders for introspection and they may be reformed. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1985, directs member states to enact and develop measures for restitution and compensation to victim of wrongful acts and for this purpose responsibility has to be imposed on offender and when it is not sufficient then the State itself should compensate.[129] Article 8 of the Declaration directs implicitly for development of measure like plea bargaining through which responsibility is imposed on offender to compensate and restitute the victim. Article 8 of Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power 1985 provides:

> *"Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents, such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as result of the victimisation, the provision of services and the restoration of rights."*

Crimes are committed against individual victim but traditionally the victim has always been neglected. Criminal law evolved for providing protection to life, property and liberty of members of society but when acts are committed offending such protected subjected then in that situation the criminal traditionally does not care of such member of society. Criminal law in adversarial system tilted towards

[129]Three ways to compensate victim of crime are prescribed in Indian criminal justice system – 1. Fine is imposed on offender as punishment and from fine amount some amount is provided by court to victim as compensation. In India section 357 CrPC provides provisions in this reference. In this case compensation is directly not paid by offender, he is punished by imposition of fine. Now from fine amount court awards compensation. Fine goes in state fund, therefore here it means compensation is paid by state indirectly. 2. State has responsibility to protect persons from crime, criminals and criminality; on crime commission state has failed in bearing its responsibility, thereby state has to substantiate the injury caused to person due to crime commission. In Section 357-A CrPC liability is imposed on state to pay compensation to accused. Generally such compensation is paid, when fine imposed is not sufficient to compensate the victim or offender is not identified or accused is acquitted or immediate relief is needed to victim. 3. Traditionally, compensation to victim of crime is paid by state; compensation to victim is not directly paid by offender. Recently a new development has taken place in criminal justice by prescribing measure for payment of compensation directly by offender to victim of crime. For this purpose measure of plea bargaining is introduced in Chapter XXI-A of Criminal Procedure Code. In plea bargaining offender under mutual satisfactory disposition which a kind of agreement directly pays compensation to victim of crime and in return he is subjected to reduced punishment.

accused person and all cares and protections are provided to him, when justice concepts are developed in criminal law it is keeping in focus criminal not the victim. Victim is usually misconstrued as only society and state completely forgetting the person who in reality suffered offending act and incurred resultant injury. Criminal law has traditionally neglected the person individual victim for whose protection criminal law originated, developing and existing. Recently demands are made for shifting attention criminal law towards actual victim of crime. In India recently criminal justice system is continuously providing new and new measures for providing justice to victim of crime. It is claimed that one such measure is plea bargaining. Plea bargaining is American measure used for disposal of case and providing speedy and restorative justice to victim. Law is always society specific, therefore, in India plea bargaining measure is adopted but it is included in criminal justice with modifications. In India accused after plea bargaining is not completely exonerated from his penal liability under criminal law but only his penal liability is reduced on payment of compensation amount agreed between accused and victim in pursuance of plea bargaining procedure but at the same time concept of plea bargaining appears to be misfit in our criminal justice system.

Meaning and Concept of Plea Bargaining:

In plea bargaining the accused admits commission of crime and takes responsibility to compensate the victim for injury caused and in return to penal liability of accused is reduced. Plea bargaining has some references to confession, plea of guilt and compounding of offences. Plea bargaining is a kind of agreement between the accused and the prosecution regarding disposition of criminal allegations. It is a sort of compounding of case, in compounding of case parties to case settle the allegation of crime commission, similarly here in case of plea bargaining in compounding is made between parties to case making consequence of reduced punishment. Plea bargaining procedure initiates with plea of guilt and on this basis compromise (compounding) is made between parties to case. In plea bargaining disposition is prepared under supervision of Court and it becomes final only on acceptance and accordingly passing of order by court. Plea bargaining is a sort of contractual agreement and it becomes absolute only on accepting by court. Black's Law dictionary defines plea bargaining:

> *"The process whereby the accused and the prosecutor in a criminal case work out mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the grave charge."*

Plea bargaining is a process of preparation of mutually satisfactory disposition of the case subject to acceptance by court. Plea bargaining is made at pretrial stage and with successful plea bargaining by which mutually satisfactory disposition is prepared and accepted by court, first stage of trial which is used for identifying

criminal concludes; with acceptance of guilt by accused himself, there is no need of proceeding in the said regards. Now proceeding is directly takes place for determination of sentence and sentence is also decided in accordance with disposition prepared by accused and other parties to case. Hereby, plea bargaining is measure used at pre-trial stage at which by agreement between prosecution, accused and victim, accused pleads guilty for lenient and reduced sentence. Section 265-A of the CrPC mentions stage for plea bargaining and it shows that it is made before trial; in case investigated by police officer, on the submission of police report, and in complaint case, on issuance of process u/s 204 CrPC. Hereby, plea bargaining stage initiates at cognisance stage in case instituted on police report and in case instituted on complaint, after taking of cognisance. It indicates that plea bargaining has to make before initiation of trial, but it cannot make absolute limitation and even after initiation of trial, plea bargaining may made. 'Bargaining' word used is self explanatory that plea of guilt is bargained, accused bargains that he may accept guilt when lesser punishment is inflicted and prosecution and victim in case based police report, and victim in complaint case, bargains for compensation amount. Further prosecution is relieved from heavier responsibility of proving case beyond reasonable doubts (burden of proof). On successful bargain when disposition is prepared between parties to case under supervision of court, it takes form of agreement which indicated by expression 'mutually satisfactory disposition of the case' used in Section 265-B (4) (a) CrPC. On acceptance by court agreement arrived between party becomes absolute. Plea bargaining excludes need of trial and proving case by prosecution and case directly enters in sentencing stage which is also decided according to disposition prepared by parties to plea bargaining.

In reference to plea bargaining in various criminal justice systems, various measures of plea bargain are used. In plea bargaining any one of three bargaining is used, charge bargain, count bargain and sentence bargain. In charge bargain accused pleads guilty for lesser charge than originally framed charge. Count bargain measure is used when accused is originally charged for many charges and in plea bargaining accused pleads guilty for some charges and remaining charges are withdrawn. One another measure, sentence bargain is used in which accused pleads guilty for charges alleged against him but in mutual disposition agreement is made for reduced punishment. In India sentence bargain measure of plea bargaining is used and in this regard provisions are provided in Chapter XXI-A of CrPC.

Plea bargaining is an agreement by which prosecution and accused bargain and voluntarily settle case against accused through which accused agree to plead guilty in exchange of concession in penal liabilities.

Before 2006 Plea Bargaining was not permitted in India:

Plea bargaining is American concept and there it is much developed but in Indian Criminal Justice System it has never be considered as appropriate measure to tackle crime challenge. Plea bargaining is considered as challenging our whole

concepts of criminal justice system. For the first time in India by Criminal Law (Amendment) Act 2005 provisions relating to plea bargaining has been added. Law Commission in its 142nd report in 1991, 154th report in 1996 and 177th report in 2001 recommended for inclusion of measure of plea bargaining in CrOC. Law Commission recommended inclusion of plea bargaining for speedy disposal of case, thereby, as a measure to provide speedy justice to victim. Law Commission in 142nd Report observed:

> *"The need for introducing the scheme has become compulsive in a situation where trial of a criminal case culminating in an acquittal can take as many as 33 years in a relatively petty case (involving alleged misappropriation of Rs. 12000, Rs. 4000 and Rs. 2000) and result in expenditure of as much as a crore of rupees to the State exchequer, with no corresponding benefit to the community. And in a situation, as reported on 16.8.1989 in Indian Express, where the Courts in a city like Bombay in 1988 recorded 124 rape cases but could dispose of only one and in first six months in 1989 recorded 67 cases but could dispose of not a single case".*

There is more than ample justification for introducing the scheme in as much as:

(1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to community.
(2) It is desirable to infuse life in the reformative provisions embodied in Section 360 of the CrPC and in the Probation of Offenders Act which remain practically unutilised as of now.
(3) It will help the accused who have to remain as under-trial prisoner awaiting the trial as also other accused on whom the sword of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as
    (a) end of uncertainty,
    (b) saving the litigation cost,
    (c) saving the anxiety-cost,
    (d) being able to know his or her fate and to start a fresh life without fear of having to undergo a possible prison sentence at a future date disrupting his life or career,
    (e) saving avoidable visits to lawyer's office and to court on every date of adjournment.
(4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.
(5) It will reduce congestion in jails…"[130]

[130] 142nd Report of Law Commission p. 37.

Further, *Malimath Committee* (2001-2003) recommended for prescribing of plea bargaining as measure for disposal of criminal cases. *Malimath Committee* recommended that offences which do not affect the society, it is desirable to encourage settlement of case without trial. Plea bargaining was included in Criminal Procedure Code by addition of new Chapter XXI-A of Code But considering difference of our societal considerations and crime problem, the concept of plea bargaining has been completely modified as it is not applicable for serious crimes, crimes against women and children, crimes affecting socio-economic condition of country and habitual criminals, and further, criminal is not exonerated from his penal liability but he will have reduced penal liability. Usually plea bargaining is rationalised on the basis of speedy justice; it is usually observed that delayed justice is denial of justice. Day by day piling of cases is increasing causing great hardships before victims, ultimately before the society. it is considered that disposal of cases by use of plea bargaining may be helpful for disposal of cases and thereby in providing speedy justice to common mass. In case plea bargaining, need for trial of case does not arise, only on the basis of mutually agreeable disposition case enters in Second phase of proceeding that is sentencing stage, at which court takes evidences for determination of punishment decided on the basis of disposition prepared during plea bargaining, plea bargaining is preferred on the basis that it is less time and money consuming. Further, appeal under statutory provision is not permitted, only it is permissible under Constitutional provisions. Plea bargaining is beneficial for accused also that on the basis of his pleading of guilt and payment of compensation, he may be liable for lesser punishment. Whenever accused offered for accepting guilt but ultimately negotiations between accuse, prosecution officer and victim fails, then protection is available to accused u/s 265-K of Code that his statement cannot be used for any purpose except the purpose mentioned in Chapter XXI-A CrPC; such protection is necessary otherwise accuse will never offer for plea bargaining, thereby provision relating to plea bargain may become ineffective. Section 265-K CrPC is given with non-obstant clause which prevails over all other related provisions, it is major protection provided to accused who offers plea bargaining. Section 265-K CrPC provides:

> *"Notwithstanding anything contained in any law for the time being in force, the statements or facts stated by an accused in an application for plea bargaining filed under Section 265 B shall not be used for any other purpose except for the purpose of this Chapter."*

Pleading of guilt and plea bargaining are related but different aspects in criminal trial. Pleading of guilt has always been permitted and further, it is necessary stage in criminal trial. Pleading of guilt is acceptance of guilt without any excuse or justification. After framing charge, reading and explaining the charge trial court ask for pleading of guilt, and when court finds that pleading of guilt was voluntary, only on this basis accused may be convicted and then after evidences are taken for sentence infliction. Such pleading of guilt is generally made because of penitence and remorse felt by accused due to crime commission. Plea bargaining is bargain of pleading of guilt. In plea bargaining accused makes

pleading of guilt but it is bargained for no punishment or lesser punishment. In India it is later situation means accused makes pleading of guilt and offer compensation to victim and bargains it for reduced sentence. Thereby, in plea bargaining pleading of guilt is made subject to reduction of punishment. Pleading of guilt is very important and inclusive part of plea bargaining but plea bargaining and pleading of guilt are two different things.

The whole concept of plea bargaining is exception to general and basic rules of criminal justice. In confession and pleading of guilt accused accepts crime commission and in it is implicit that accused has accepted the penal liability but on this basis never concept is advanced in criminal justice to reduce the penal liability but concept is well laid down that only on the basis of acceptance of guilt accused may be convicted and he has to bear his liability as provided by law. When plea bargaining is seen at its face, it appears it is selling of conviction and some compensation by the criminal to the prosecution for reduced sentence. In *Kasambhai Ardul Rehmanbhai Shaikh v. State of Gujarat*[131] SLP was filed under Article 136 of Constitution before Supreme Court against the decision of Gujarat High Court passed in *suo moto* revision of order passed by the Judicial Magistrate first class, *Balasinor* convicting accused appellant for offence u/s 16 (1) (a) (i) r/w 7 Prevention of Food adulteration Act 1954 and sentencing with much minimal punishment that is with simple imprisonment till rising of court and fine of Rs. 125/= or in default of payment of fine to undergo imprisonment for 30 days. Accused committed adulteration in turmeric powder, thereby, he was liable u/s 16 (1) (a) (i) r/w 7 PFA Act 1954. In this case after taking some prosecution evidences, plea bargaining took place between accused, prosecutor and Magistrate. Magistrate on this basis convicted and sentenced. High Court made revision *suo moto* and enhanced punishment to three months imprisonment and fine Rs 500/= and in case of default of fine imprisonment of 30 days. Decision of High Court was challenged before Supreme Court through filing of SLP. At that time plea bargaining was not incorporated in Indian law but from the decision it was appearing that assurance was given to accused person that on plea of guilt negligible punishment may be inflicted. The Supreme Court observed that food adulteration dangerous acts which affect the common mass and in such kind of cases there should not be any lenient punishment. Supreme Court set aside the order of High Court and remanded case to Judicial Magistrate to proceed from stage of plea of guilt. Justice *P N Bhagwati* thought that plea bargaining might act as allurement and it might not do justice imparting and violative to norms settled in *Maneka Gandhi case*. Plea bargaining may cause corruption and collusion and ultimately lower the standard of justice. Justice *P N Bhagwati* observed in this case:

> *"[…] It is obvious that such conviction based on the plea of guilt entered by the appellant as a result of plea bargaining cannot be sustained. It is our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilt, he will be let off very lightly. Such a procedure would be clearly*

[131](1980) 3 SCC 120

> *unreasonable, unfair and unjust and would be violative of the new activist dimension of art. 21 of the Constitution unfolded in Maneka Gandhi's Case. it would have effect of polluting pure fount of justice, because it might induce an innocent accused to plead guilty to suffer a light and inconsequential punishment rather than go through a long and arduous criminal trial…or let off a guilty accused with a light sentence, thus, subverting the process of law and frustrating the social objective and purpose of anti-adulteration statute. This practice would also tend to encourage corruption and collusion and as a direct consequence, contribute to the lowering of the standard of justice. There is no doubt in our mind that the conviction of an accused based on a plea of guilty entered by him as a result of plea bargaining with the prosecution and the magistrate must be held to be unconstitutional and illegal…"*

In *Kasambhai Ardul Rehmanbhai Shaikh v. State of Gujarat* case Supreme Court observed that plea bargaining was violative rule laid down in *Maneka Gandhi case* dictum, thereby it was observed that plea bargaining was unconstitutional. Court further observed that plea bargaining was unreasonable, unjust and unfair thereby violative to Article 21 of Constitution. Crime is not only committed against individual victim but committed against the whole society. Crime and criminals pose a serious problem before the society at large. In such situation private bargain between criminal and victim with participation of instrumentality, having heavier responsibility to tackle problem of crime and protect individuals from fear of victimisation and save the society from crime, criminal and criminality, does not seem to be just and proper. In *State of UP v. Chandrika*[132] Supreme Court observed that plea bargaining is against the public policy. In this case appellant state filed SLP under Article 136 of Constitution against judgment of Allahabad High Court. In this case accused was alleged for commission of homicide; in Session Trial he was convicted under first part of section 304 IPC and sentenced for imprisonment for eight years. Appeal was filed before Allahabad High Court where plea bargaining was made regarding not challenging of conviction order and on this basis High Court reduced sentence for imprisonment which convict has already undergone as under-trial prisoner and as convict after conviction by the trial Court. Decision of High Court was challenged by State of UP before the Supreme Court. Supreme Court decided that case cannot be decided on the basis of plea bargaining but it should be decided on the basis of merit. Sentence should commensurate to crime committed and there should not be lenient imposing of sentence for crime commission; order of High Court was set aside. Supreme Court observed in this case:

> *"Hence, it is settled law that on the basis of plea bargaining Court cannot dispose of the criminal cases. The Court has to decide it on merits. If accused confesses his guilt, appropriate sentence is required to be imposed. Further, the approach of the Court in appeal or revision should be to find out whether the accused is guilty or not on the basis of evidence on record. If he is guilty, appropriate sentence is required to be imposed or maintained. If the appellant or his counsel submits that he is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime, then also the Court's conscious must be satisfied before*

[132]AIR 2000 SC 164

> *passing final order that the said concession is based on the evidence on record. In such cases, sentence commensurating with the crime committed by the accused is required to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the Court that as he is pleading guilty sentence is reduced."*

From 2006 Plea Bargaining is Permitted Procedure of Criminal Justice in India

Recommendations of Law Commission and *Malimath Committee* were accepted by legislature and by Criminal Law (Amendment) Act 2005 provisions relating to plea bargaining were included in Criminal Procedure Code by adding one new Chapter XXI-A in which Sections 265 A to 265 L deal with this aspect of criminal justice administration. Section 265-A CrPC clearly specifies that plea bargaining shall not be applicable in case of offences affecting socio-economic conditions of country. Central Government by issuance of notification on 11th July 2006 declared offences punishable under nineteen Acts as offences affecting socio-economic conditions of country and in case of such offences plea bargaining is not applicable. Such aforesaid Acts are Dowry Prohibition Act 1961, The Commission of Sati Act 1987, Indecent Representation of Women (Prohibition) Act 1986, Immoral Traffic (Prevention) Act 1956, Protection of Women from Domestic Violence Act 2005, SC-ST (Prevention of Atrocities) Act 1989, Cinematograph Act 1952 etc. Protection of socio-economic condition of country is necessary responsibilities imposed on state, it can never be jeopardised by act committed by any person. Now days many offences are committed which challenge well-being of society which can never be permitted and in such case no lenient reaction can be permitted, therefore explicitly it is provided in Section 265-A CrPC for non-applicability of plea bargaining in case of socio-economic offences to be specifically notified in this regard. The list of Acts forming this category is inclusive and from time to time other Acts may be added in this category.

Furthermore, Section 265-A CrPC declares for non-applicability of plea bargaining in respect of offences against women. In list of Acts notified by Central Government as penalizing offences affecting socio-economic conditions of country many Acts deal solely with offences against women. In addition to that general provision is given declaring inapplicability of plea bargaining in reference to any offence against women. Security and protection of women are considered prime responsibility of society, thereby, stern punishments are prescribed for offences against women because of that deterrence may be created and potential criminals shall not dare to commit crime against women. In recent years crimes against women are posing a serious challenge before society at large due to commission of such offences in brutal manner and further nature and rate of such crime commission is becoming more and more serious and alarming. Thereby, in case of offences against women, it is explicitly declared for inapplicability of plea bargaining for such offences. Furthermore, Section 265-A CrPC declares that plea bargaining is not applicable for commission of offences against children below the age of fourteen years. Children are future of society needed to be protected. They

are in constructive phase, thereby, wrongful acts may badly affect their socialisation, personality building and ultimately whole perception about society; children are always needed to be protected. In this regard never lenient punishment can be inflicted on offender endangering well-being of children; such offender cannot be given any benefit of plea bargaining. In Section 265-L CrPC protects children one another very important aspect. For reformation and rehabilitation of children a very enlightened enactment has been made. When any offence is committed by child, he cannot be deprived from reformative and rehabilitative procedures provided in Juvenile Justice (Care and Protection of Children) Act in the name of plea bargaining. But confusion arises after amendment in Juvenile Justice (Care and Protection of Children) Act 2000 in 2015 and a new Act was passed Juvenile Justice (Care and Protection of Children) Act 2015 by which some children for commission of some offences are treated as adult criminals and penalised, and in such case whether provisions relating to plea bargaining will be applicable for such children or not. Such children are not reformed by reformative and rehabilitative measures given in Juvenile Act but tried and punished like adult, therefore they should not be deprived of benefit of plea bargaining in same manner as it is available to adult criminals. Section 265-L CrPC provides:

> "*Nothing in this Chapter shall apply to any Juvenile or Child as defined in sub-clause (k) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act 2000 (56 of 2000).*"

Plea bargaining is not permitted for habitual criminals. Habitual criminals by repeated commission of crime particularly same or similar kind of crime clearly shows that that accused has developed criminal mentality and maturity in criminal culture, such person is hardened criminal difficult to be reformed and always he may pose problem for society at large by his repeated crime commission. With such hardened criminal measure is provided in criminal law that he may be liable for more stern punishment in comparison to first offender. Recidivist person cannot be subjected to reformative action for which he is never amenable and lenient punishment which he may be indicative to him as the criminal justice is favourable is for crime commission. In case of habitual criminal, always need is felt to give stern message that whenever he will manifest his criminal mentality in the form of crime commission he shall be subjected to severe punishment. Plea bargaining can never be suitable measure for dealing with habitual criminal. Section 265-B (4) (b) CrPC explicitly provides that when court finds that the accused offering for plea bargaining has previously convicted by court for same offence for which now he is charged then plea bargaining shall not be permitted and he shall be tried in the case.

Serious crime create grave impact over the society at large, usually such crimes create fear of victimisation in members of society. Generally, for effective tackling of serious crimes criminal law prescribes stern, severe and longer extent of punishment. *Malimath Committee* recommended that for serious crimes plea bargaining has not to be permitted. In case of serious crime need is felt to create deterrence in criminal elements to prevent commission of such crimes. Lenient reaction to serious crime and criminals committing such crime cannot be effective

measure to deal with crime and criminality in the society. Thereby, Section 265 A CrPC clears that plea bargaining is not permitted in case of serious crimes. Section 265 A permits plea bargaining only for offences which are not punishable by death penalty, life imprisonment or imprisonment exceeding seven years. The provisions contained in Section 265-A CrPC clearly specifies that for serious crimes plea bargaining cannot be permitted; it is permitted only for offences punishable with fine or imprisonment for a term extending up to seven years or both. Section 265-A (1) CrPC provides:

> "*This Chapter shall apply in respect of an accused against whom-*
>
> *(a) the report has been forwarded by the officer in charge of the police station under Section 173 alleging therein that an offence appears to have been committed by him other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years has been provided under the law for the time being in force; or*
>
> (b) *a Magistrate has taken cognisance of an offence on complaint, other than an offence for which the punishment of death or of imprisonment for life or of imprisonment for a term exceeding seven years, has been provided under the law for the time being in force, and after examining complainant and witnesses under Section 200, issued the process under Section 204, but does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman, or a child below the age of fourteen years."*

Hereby, plea bargaining is not permissible in cases when:

1. Age of offender is below 18 years of age.[133]
2. Accused is previous convict for the same kind of offence for which person is accused and have applied for plea bargaining.
3. Offence for which person is accused affects socio-economic conditions of country.
4. Offence is committed against woman or child below 14 years of age.
5. Offence comes in category of serious crime. Generally, such offences are identified by prescription of severe punishments. When offence is punishable by death penalty, life imprisonment, or imprisonment exceeding seven years.
6. Application for plea bargaining moved by accused is not voluntary.
7. Parties participating in meeting for working out mutual satisfactory disposition failed to make such disposition.

Plea bargaining is made at pre-trial stage generally before the framing of charge. Section 265-A CrPC mentions stages in the case for moving of application for plea bargaining:

[133]Section 265-L CrPC provides that Chapter XXI A is not applicable for juvenile or child defined in Section 2 Juvenile Justice Act 2000. JJ Act 2000 has been repealed and substituted by JJ Act 2015. Though Section 265 L has not been amended to mention JJ Act 2015 but it will be applicable as the objective of Act of 2ooo and Act 2015 are same. Section 2 of JJ Act 2015 defines similarly that child or juvenile is person below 18 years age.

1. In case in which police lodged FIR and investigation is made; in such case plea bargaining is permissible only after submission of police report. On conclusion of trial u/s 173 CrPC police officer submits police report on which Magistrate takes cognisance u/s 190 CrPC. Section 265-A (1) (a) CrPC directs that after submission of police report, at any stage accused may voluntarily give proposal for plea bargaining. Thereby, in case based on police report application for plea bargaining may be moved at any time during cognisance and afterward.
2. In case based on complaint, accused may voluntarily move application for plea bargaining after completion of examination of complainant and witness u/s 200 CrPC and issuance of process u/s 204 CrPC. Thereby, in complaint case accused may give offer for plea bargaining at any time after completion of cognisance.

For plea bargaining establishing of case is also a necessary requisite; when case is investigated by police officer through detailed investigation with submission of police report case is prima facie established while in complaint case the complainant directly files case before the Magistrate, thereby, case is prima facie established only after examination of complainant and witnesses u/s 200 CrPC and such establishing of case is indicated by issuance of process. Because of it, in police case accused may offer for plea bargaining after submission of police report means during cognisance and afterwards while in complaint case such offer may be given after taking of cognisance and afterwards.

Main provision relating to plea bargaining is given in Section 265-B CrPC, it clears that proposal for plea bargaining is moved by accused by filing of application before the trial court. Accused person does not give proposal for bargain directly to prosecution or victim but it is given to court. Court after receiving application from the accused for plea bargaining, issues notice to Public Prosecutor in case instituted on police report or complainant in case instituted on complaint and accused to appear in the court on fixed date. First most responsibility imposed on court is to find out whether such proposal for plea bargaining moved by accused is voluntary, for this purpose court on fixed date examines accused in camera, in absence of other party to case. On examination of accused person court may have any one of the three situations:

1. Court is satisfied that accused voluntarily offering for plea bargaining. In this situation plea bargaining is permitted and court provides time and opportunity to accused and public prosecutor or complainant, as the case may be, to work out mutually satisfactory disposition. Or
2. Court finds that accused involuntarily applied for plea bargaining. Accused may be pressurised or due to some other reason he has no willingness for plea bargaining. On identifying this type of situation court shall not permit plea bargaining; court shall initiate trial proceeding. Or

3. Court finds that accused is previous convict for same kind of offence, in this situation plea bargaining shall not be permitted and court initiates trial proceeding.

In second and third situations plea bargaining is not permissible; as soon as Court identifies these situations proposal for plea bargaining is rejected by court and proceeding for trial is continued again. In first situation, it means when accused person is not a habitual criminal committing same kind of offence and offer for plea bargaining is moved voluntarily, court permits and facilitates for proceedings relating to plea bargaining. Further for plea bargaining due to provisions contained in Section 265-A CrPC it is necessary that offence for which accused is charged should be punishable with fine or imprisonment for term not exceeding seven years or with both. Hereby, plea bargaining is permissible when offer for it is moved by accused voluntarily, accused is not a habitual criminal and offence for which accused is charged is not punishable with death punishment, life imprisonment or imprisonment exceeding seven years.

When court finds out that the accused was not previously convicted for same kind of offence, offence for which the accused is charged does not come in prohibited category and the accused has offered for plea bargaining voluntarily, court may direct for the conduct of proceeding for plea bargaining. In case instituted on police report for proceeding of plea bargaining court issues notice to Public Prosecutor, investigating officer who made investigation of the case and the victim of the case or when case is instituted on complaint court issues notice to the accused and the victim of the case, these persons make meetings to work out mutually satisfactory disposition of case. Court has responsibility to supervise and control the meeting to ensure that the entire process is completed voluntarily by parties participating in the meeting to prepare mutually satisfactory disposition of case. If they desire, accused and victim are permitted to participate in meeting along with their respective pleaders. In disposition prepared during proceeding main component is amount of compensation to be paid by accused to the victim.

Plea bargaining as claimed is based on restorative justice there by attempt is made to provide speedy justice and further, his injury suffered is taken care of and attempted to satisfy by providing compensation to him. In plea bargaining victim gets compensation and response to that accused becomes liable for reduced punishment. In criminal law compensation providing is not new thing; it has been traditionally available in criminal proceeding in India. But always in criminal justice system in India compensation is awarded out of fine collected from the criminal. Traditionally criminal is punished by imposition of fine or other punishments or both; when fine is imposed as punishment, either whole amount of fine or some part of realised amount of fine is given as compensation to victim. Such traditional measure to compensate victim is provided in Section 357 CrPC. One more development has taken in recent past that compensation may be given by state to victim of crime commission. In this regard now provisions are given in section 357-A CrPC. State has responsibility to protect citizenry against crime commission and State has failed, thereby it has to compensate aggrieved person. State has failed in tackling crime problem, thereby, responsibility to compensate

victim. Under Section 357-A CrPC compensation is given by State. In Section 357 CrPC compensation is given from fine amount collected from criminal; fine forms part of public exchequer, thereby, from another perspective this compensation may also be taken as paid by state. In criminal justice system in India traditionally criminal is punished but never compensation is directly paid by the criminal to victim. In civil law such compensation payments are made which is paid by wrongdoer to injured person. Plea bargaining is exception to aforesaid well established rule of criminal law and in pursuance of it compensation is directly paid by offender to victim of offence. Further, compensation amount is decided by offender and victim by mutual bargain. This aspect of proceeding of plea bargaining brings the criminal proceeding similar to contract making. In Law of Tort also such sort of proceeding is not permitted; in Law of Tort amount of compensation is always determined by court and never parties to dispute are permitted to decide the remedy themselves.

Section 265-E (a) CrPC specifically clears that main purpose of plea bargaining is determination of compensation amount payable by offender to victim of crime. For payment of compensation and determination of compensation amount voluntary bargains are made amongst offender, Prosecution officer, investigating officer and victim in case based on police report and between offender and victim in case based on complaint. Court during bargain keeps vigil on whole bargain and settling of matter which is called disposition should take place voluntarily, in this regard specific duty is imposed on court u/s 265-C CrPC. When in persons participating in the meeting for plea bargaining failed to work out mutually satisfactory disposition, Court has to record its observation and proceed in trial from the stage the application under Section 265-A (1) CrPC was filed in the case. When in bargain parties have succeeded in arriving at mutually satisfactory disposition, the Court has now the responsibility to prepare report of such disposition which is signed by presiding officer of court and all the persons participating in the meeting. Section 265-D CrPC provides:

> *"Where in a meeting under section 265 C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Court and all other persons who participated in the meeting and if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265-B has been filed in such case."*

On successfully working out mutually satisfactory disposition, it is accepted by court through preparation of report on it which is signed by presiding officer of the court and persons participating in meeting. Now after it there is no need of trial; on the basis of pleading of guilt in disposition of case accused is convicted. Now case enters in sentencing stage; court passes compensation order in accordance with disposition prepared u/s 265-D CrPC. further court takes evidences and Court considers whether convict has prospect of reformation; on identifying such situation with him, he may be released after due admonition or probation of good conduct u/s 360 CrPC or Probation of Offenders Act 1958, as the case may be.

When court identifies that accused has no prospect of reformation but he has to be sentenced then court takes evidences for determination of nature and extent of punishment. In plea bargaining offender is not completely exonerated from his liability, he is still liable for punishment but on the basis of payment of compensation and acceptance of crime commission (pleading of guilt) he is treated leniently and his penal liability is reduced. When offence is punishable with maximum imposable punishment, Section 265-E (d) CrPC prescribes that court may sentence the accused to one fourth of the punishment provided for the offence or extendable punishment. In some cases minimum sentence is also provided for the offence particularly offences under special penal statute are punishable by minimum and maximum punishment. In case of maximum punishment court has discretion, no doubt it is judicial discretion but court is empowered to determine any extent of punishment extending up to maximum prescribed punishment. In some cases minimum punishment is also prescribed; minimum sentence is mandatory sentence court has no discretion for minimum imposed sentence, court is bound to impose minimum sentence and then court has discretion to extend it up to maximum sentence. But in case of plea bargaining minimum sentence is also reduced and in Section 265-E (c) CrPC provides that when for offence minimum punishment is provided in penal statute, court in case of plea bargaining may sentence the accused to half of minimum sentence provided for offence. In case of plea bargaining sentence to be imposed on accused is determined that when offence is punishable by maximum sentence only, sentence to be imposed on accused shall be one-fourth of maximum sentence, and when offence is punishable by minimum and maximum sentence both, sentence to be imposed shall be half of minimum sentence provided for the offence. Minimum and maximum sentence may be imprisonment or fine or both, and hereby, accordingly one half and one fourth of punishments may be calculated. Court passes judgment in open court. In beginning when proposal for plea bargaining was moved by accused, court examines accused in camera to find out whether such offer was made voluntary. At the stage of pronouncement of judgment, Section 265-F CrPC declares that judgment shall be pronounced in open court.

Section 265-G CrPC declares that judgment passed by court on plea bargaining is final and it cannot be challenged by any party to case except under Constitutional provisions. In plea bargaining every party to case voluntary prepare mutually satisfactory disposition, therefore later on they cannot be permitted to challenge disposition prepared and accepted by them and accordingly judgment passed by court. Due to it Section 265-G CrPC declares orders passed by Court as unappeasable order under provisions of Criminal Procedure Code but it shall remain subject for challenge under Constitutional provisions contained in Article 136, 226 and 227 of Constitution. Section 265-G CrPC provides:

> *"The judgment delivered by the Court under Section 265 G shall be final and no appeal (except the special leave petition under article 136 and writ petition under articles 226 and 227 of the Constitution) shall lie in any Court against such Judgment."*

Only pendency of cases against accused does not debar the accused from getting benefit of plea bargaining. In Chapter XXI-A some prohibitions are given like offence with which accused is charged affects socio-economic conditions, offence is against woman or child under fourteen years age, or accused is previous convict; in these case accused is prohibited from making plea bargaining. Further, court may reject application for plea bargaining when such application is not voluntary moved. But court cannot reject the application for plea bargaining on any other ground which is not mentioned in Chapter XXI-A of Criminal Procedure Code. When aforesaid situations are not present then court will not deny to facilitate the plea bargaining. Now it is only for prosecution or victim to reject the offer for plea bargaining. In *Rahul Kumpawat v. Union of India Through CBI*[134] Rajasthan High Court decided this case on 4th November 2016 and observed that trial court can reject the application for plea bargaining only on those grounds which are mentioned in Chapter XXI-A of Code. In this case application for plea bargaining was moved accused but it was rejected by court on the ground that many cases were pending against the accused. Appeal was made before the High Court u/s 482 CrPC. High Court observed that plea bargaining is American concept developed since 19th Century. In India it has been included in Criminal Procedure Code from Section 265-A to 265-L, and now any issue relating to it should be decided according to these provisions. Court can reject application for plea bargaining only on those grounds mentioned in the provisions; rejection on any other ground, which is not mentioned in the provisions, is not proper. For this case High Court found that ground of rejection of plea bargaining application is not mentioned in the provisions, therefore, set aside order of rejection order and case was remanded to trial court for reconsider according to legal provisions. *Rahul Kumpawat v. Union of India Through CBI* High Court observed:

> *"A bare perusal of Section 265-A CrPC makes it explicitly clear that mere pendency of criminal cases against an accused cannot be cited as an embargo for entertaining plea bargaining under Chapter XXI A CrPC. Moreover, in the instant case, accused-petitioner as volunteer to enter into plea bargaining and therefore, it was expected of the learned trial Court to consider the same as per mandate of Chapter XXI A CrPC.While it is true that plea bargaining in Indian Legal System is infancy but its recognition is clearly discernible in CrPC after introduction of Chapter XXI A w.e.f. 05.07.2006. Broadly in the system of pre-trial negotiations where the accused pleads guilty in return, he can fructify concessional treatment from the prosecution. The underline object is to shorten the litigation and, therefore, in adherence of legislative intent, the Courts are also expected to accede to the prayer of the accused person in appropriate cases to ensure speedy disposal."*

Rajinder Kumar Sharma v. The State[135] case was decided by Delhi High Court on 26 February 2007. In this case petitioner accused opened a fake account in Bank in the name of complainant and got encashed a cheque worth Rs 17640/- belonging to complainant sent by Unit Trust of India. Complainant filed FIR, case was investigated by police officer and on completion of investigation, and he

[134]http://indiankanoon.org/doc/48688195/8.20.2020
[135]http://indiankanoon.org/doc/311930/8.20.2020

submitted charge-sheet. Complainant and petitioner accused were close relatives, some relatives mediated and accused returned the amount of cheque and they made settlement out of court. Now petitioner accused filed petition u/s 482 requesting for quashing of FIR. High Court refused and petition was dismissed. Court decided that offences which affect society compromise cannot be permitted. Those offences which are of trivial nature, compounding may be permitted but offences which are graver and serious are not against individual but against society, in such case compounding cannot be permitted. Plea bargaining and compounding of case has some difference. Court observed plea bargaining is permitted and lenient punishment is inflicted in such case as criminal is repenting for crime commission and he is prepared for some punishment. Criminal mentality may not create problem in future in case of plea bargaining as the person is repenting. Further he is going to suffer some punishment. In case of compounding repent is not shown and further any punishment even lesser extent is not going to be inflicted. Delhi High Court observed:

> "A Crime under IPC or any other penal law is not a crime against an *individual, it is crime against the society and the State and that is the reason that State or any of its agencies is the prosecutor in criminal cases. The suppression of crime is the most important function of State. The maintenance of law and order and compliance of laws by the citizen is the responsibility of the State. Criminal law has been mainly concerned with protection of elementary social interest in the integrity of life, liberty and property. The legislature in its wisdom considered some offence as trivial offence and some offence more serious and of graver nature. Those offences which did not affect the society at large have been made compoundable under Section 320 CrPC. However, all offence under IPC or under other Acts have not been made compoundable because the legislature considered that some offence cannot be compoundable and the perpetuator of such offence must be punished according to the law, so that the criminal tendency is curbed. Recently, the legislature has introduced plea bargaining under law so as to benefit such accused persons who repent upon their criminal act and are prepared to suffer some punishment for the act. The purpose of plea bargaining is also to see that the criminals who admit their guilt and repent upon, a lenient view should be taken while awarding punishment to them"*

Concluding Remarks

In Indian Criminal Justice System plea bargaining is a new measure for providing justice to victim of crime. Plea bargaining is prescribed to compensate victim for loss caused to him due to crime commission; it is based on consideration that monetary amount may help in restitution of victim. Traditionally, in Indian society emphasis is given for retribution and deterrence for victim satisfaction whether it is individual victim or society at large, and further, for protection of society by tackling crime, criminal and criminality. Compensation by criminal to victim of crime and payment under mutual satisfactory disposition which is a kind of agreement arrived between criminal and victim of crime and in return criminal becoming liable for reduced punishment is considered in Indian society completely different concept in Indian criminal justice system and Indian societal

considerations. Plea bargaining is always much criticised in India. Crime problem day by becoming more and more serious even the existence of society is challenged by increased rate of crime commission, need is to cope problem effectively and for this purpose need is to reform the criminal or deter the criminal from crime commission. Whenever any act is declared as crime, certainly act may be serious otherwise it would have not been declared as a crime but declared as a civil wrong. Only due to certain reasons for some crimes, procedure applicable may have been changed, thereby, it should not be taken as crime is only against individual, but it should be taken that the crime is always serious, only due to some rational reasons different procedure may have been provided. Differentiation that particular crime is against the individual and particular crime is against society, may not be appropriate way of application of criminal justice. Whenever any act is declared as crime always it should be taken that act is dangerous one and only because of it act may have been declared as crime. Crime problem can be tackled by infliction of effective and appropriate punishment or reformative measures. It may reform the criminal or create deterrence and thereby reform the criminal and he may not commit crime. Such actions against criminal may cause and strengthen social solidarity, increase assurance in victim that he is protected against crime and criminals, thereby, save the individuals and ultimately members of society from fear of victimisation. But plea bargaining provides a completely opposite considerations. In penal statutes minimum and maximum punishments are prescribed to inflict effective sentence after detailed analysis. But in plea bargaining neither consideration is given for deterrence creation nor for reformation of accused. Whole criminal justice considers reformation and deterrence of criminal and potential criminals as main objectives; and further, criminal justice ultimately focus on protection of victim and society; these are ultimate objectives of criminal justice system. Plea bargaining is not based on aforesaid basic considerations of criminal justice. Already for petty offences provisions were provided in Criminal Procedure Code permitting compounding[136] and for some other offences complainant is permitted to withdraw the case[137]. Effect of inclusion of provisions of plea bargaining is extension and widening of compoundable offence for covering those offences also which have traditionally been considered more serious. Plea bargaining is claimed for having victim centric and victim restorative focus but detailed analysis shows that plea bargaining actually provide protections to accused, It is soft and favourable to accused. Minimum punishment is always taken as mandatory sentence and on conviction it is mandatory to inflict minimum sentence but on plea bargaining even minimum sentence is reduced and half of minimum sentence is inflicted. Bargaining between the accused and the victim in which ultimately there is exchange of reduction of punishment and compensation

[136]In Section 320 CrPC compounding of offences is permitted; for some offences accused and victim may make compounding without permission of court and after compounding they inform the court and accordingly case is dismissed; for remaining offences mentioned in Section 320 CrPC accused and victim may make compounding with permission of court.

[137]In Section 257 CrPC complainant is permitted to withdraw summon case with permission of court at any time before the permission of court. When number of accused is more than one, in such case complainant may withdraw case in the aforesaid manner against all the accused persons or any of them.

create situation in which it appears that there is selling of crime; one person committed crime and now on payment of money, he becomes lesser liable, another person suffered injury due to crime commission but now by taking of money, he is selling his injuries. This whole procedure of plea bargaining appears to legalise the crime commission. Proposal for plea bargain is given by accused; whenever accused may find in the case that evidences available against him in the case are direct, sufficient and substantial as it appears that ultimately he may be convicted and sentenced, he may give such offer and on successful plea bargain, accused may become liable for much lesser punishment only on expending some money giving it as compensation to the victim. No doubt two checks are created and thereby tried to check such loopholes and drawbacks, firstly, offer has to be accepted by victim, when he is not interested in reducing liability of accused by taking compensation then he may refuse and in such case criminal will have effective liability for crime as prescribed by substantive law, and secondly, court has final say in the case, whole proceeding takes place in supervision of court, it is responsibility of court to see whether plea bargaining is voluntary, and ultimately, disposition prepared by party becomes absolute only on passing order by court in accordance with disposition prepared by prosecution, victim and accused in case based on police report and in accordance with disposition prepared by accused and victim in complaint case. The victim is the person for whose protection criminal law originated and has continued existence. Criminal justice has ultimate objective to protect life, property and liberty of individuals and ultimately to protect the whole society. Every measure prescribed in criminal justice should have focus for justice to individual victim and ultimately justice to society at large, thereby, there is continuous need for reviewing of measures used for justice imparting.

Cases

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National Human Rights Commission v. State of Gujarat AIR 2009 SC (Supp) 318

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Rajinder Kumar Sharma v. The State http://indiankanoon.org/doc/311930/8.20.2020 *State of UP v. Chandrika* AIR 2000 SC 164

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Provisions on Arbitration Proceedings Set Down in Cartel Agreements Based on the First Hungarian Cartel Act

By Norbert Varga [*]

The characteristics of the twentieth century cartel movement deemed it contradictory to free trade, because the measures that limited fair trade were the direct results of free trade itself, and thus the only way to oppose it and protect the consumers' interests was to guarantee free competition, i.e. the fundamental enforcement of public well-being, public economy and public morals. In this study, I wish to describe the regulations that address the stipulations of arbitration courts by analysing archival sources. Specifically, this paper will examine the role arbitration courts played during dispute settlements between concerned parties before the first Cartel Act of Hungary came into effect in 1931.

Keywords: *Cartel; Arbitration process; Juries and arbitral tribunals; Hungary*

Introduction

Procedural rules pertaining to cartels were significant among the arbitration requirements laid down in cartel agreements. Pursuant to these rules, the parties to an agreement determined how and within what framework any potential disputes would be decided. In the case of rules on the arbitral tribunal, we need to review the relevant provisions of Act I of 1911. By analysing individual cartel agreements, we will also gain insight into the terms and conditions under which parties to various cartel agreements wished to set up their respective tribunals to deal with problem cases, and the manner in which they attempted to pre-empt court proceedings.[1]

Procedural Rules of the Arbitration

One unique feature of the arbitration proceedings was that they were based upon an agreement entered into by the parties. The raison d'être of these proceedings was the principle of disposal; the proceedings were thus a consequence

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[1] Supported by János Bolyai Research Scholarship (BO/00198/18/9). A Budapesti Kereskedelmi és Iparkamara mellett működő zsűrik és választott bíróságok működése [The functioning of the juries and arbitral tribunals operating in conjunction with the Budapest Chamber of Commerce and Industry]. *Ujság*, 12 and 14 February 1930; on antecedents to civil procedure law, see Meszlény (1911) at 393–402.

of this principle. A precondition of the proceedings was that an arbitration agreement or an agreement with pertinent provisions had been made between the parties. This agreement was only valid if it was in writing and pertained to a specified case or a dispute arising out of a legal relationship. While the parties were free to agree on the scope of the agreement, this meant that the arbitral tribunal could not proceed in every matter, even if the parties had the right of disposal over that matter.[2]

First, a decision had to be made regarding the identity of the arbitrators. The parties could agree on the arbitrators or designate them in the agreement. If there was no clause addressing this subject in the agreement, each party could select an arbitrator, or they could select arbitrators jointly. However, if they could not agree on the identity of the arbitrators, then the matter was decided by majority vote. In the event of a tied vote, they would draw straws to decide who the arbitrators might be. In addition to an indication of each arbitrator's occupation and address, their choice of arbitrators had to be put in writing, as well as indicating whether the persons chosen as arbitrators had accepted the office. When arbitration was to be implemented, one party could call on the opposing party to exercise the right of choice, for which that party had a period of fifteen days. The identity of the arbitrator had to be communicated to the opposing party by a notary public or the district court.

In the event that an arbitrator could not fill the office for some reason (e.g. death or unwillingness to participate in the proceedings), the party could then exercise the right of choice again. If the party waived this right, they could then withdraw from the arbitration agreement or request that an arbitrator be appointed by a court. In the latter case, the court would decide without hearing from that party.[3] For the subject under discussion in this paper, the term *court* should be understood to mean "a court of justice which would have had jurisdiction and competence in the absence of an arbitration agreement." This court could order enforcement based on the judgement or pact. If several courts were competent in the matter, the court to which one of the parties or the tribunal had turned was the one that proceeded with the case.[4]

Once the person selected as arbitrator agreed to the appointment, he had to declare in writing that he had undertaken this duty. This declaration thus qualified as a contract between the parties and the arbitrator. After having been selected, if the arbitrator failed to perform his duty without due cause or did not fulfil his duty in a timely fashion, either party could then submit a petition to the court requesting that the arbitrator be fined. An appeal could be lodged against the decision, and the incurred costs and damages had to be paid.[5]

The grounds for excluding judges were germane for arbitrators as well. In addition to the applicable general rules, the following groups were excluded: women, minors, persons in care or undergoing bankruptcy proceedings, and the

[2]Bacsó (1917) at 323.
[3]Kamarai választott bíróság bírája nem kamara köteles perében [An arbitrator on the chamber's arbitral tribunal in a trial not required by the chamber]. *Közgazdasági Értesítő* (30), 1935/8, at 2.
[4]Gaár (1911) at 385–411; Bacsó (1917) at 328; Magyary (n.d.) at 736–737.
[5]Bacsó (1917) at 324–325; Magyary, (n.d.) at 733–735; Falcsik, (1908) at 376–377.

blind, deaf and mute, as well as persons who had lost office or were suspended from exercising their political rights as an ancillary penalty. The court would decide on the petition for exclusion in an oral hearing after hearing the arbitrator in question, if necessary, and the court's decision could be appealed.

The arbitration agreement ceased to take effect in the following cases: if any of the arbitrators specified in the agreement failed to undertake the arbitration proceedings, died, could not engage in the arbitration proceedings for some reason, or refused to fulfil their duty.

The parties themselves set down the type of proceedings to be used. They could appoint counsel to represent them, and jointly determine the remuneration made to members of the arbitral tribunal. If they could not make that determination, the tribunal then decided on the matter, and decisions on this matter could be appealed at the court that would have acted as a court of appeal in the absence of an arbitration agreement. The tribunal could hear witnesses and experts, but could not have trial participants and parties swear an oath. In the event that the tribunal was expected to engage in trial proceedings or actions for which it had no powers, the competent district court was to be approached.

Arbitration proceedings could not be stopped by a claim made by any of the parties that the arbitration agreement was invalid, that it did not cover the matter to be decided, or that one of the members of the tribunal could not proceed on the matter, provided that a binding court decision had not been handed down following a review of these disputes. If the tribunal was delayed in making a judgement, either party could request that the court set a deadline. If the deadline was missed, the arbitration agreement expired for that particular matter. In this case, the court decided after hearing the members of the tribunal. If the tribunal was comprised of more than two members, decisions were taken by a majority voice vote, each and every member confirming its judgement with their signature. While the parties could enter into a pact with one another during the proceedings, the judgement or the pact also had to be forwarded to the competent court.

Once a judgement was passed down by an arbitral tribunal, redress by trial was not an option. The judgement could only be invalidated by lodging a petition with a court in the following cases: (a) if there was no arbitration agreement, if such an agreement was not valid, if it did not pertain to the matter in question and if it expired before the judgement was made, even if the rules on the formation of the tribunal or its adjudication were infringed; (b) if a person who had been excluded by a court took part in the adjudication; (c) if a party was not given a hearing during the proceedings; (e) if rules governing the judgement signing were not observed; (f) if a judgement obliged a party to take illegal action or if the section that provided for this was incomprehensible; and, finally, (g) even if there were grounds for a retrial pursuant to the Act on civil procedure, Sec. 563(5–9).

A pact entered into before an arbitral tribunal could be challenged with a petition before a court. An annulment case could be initiated within 90 days after a judgement was passed down by the tribunal. Once the proceedings were initiated, the court could then suspend the execution of the judgment by the tribunal, even

without hearing the party. The court could also withdraw its own decision to suspend the execution of the tribunal's judgement.[6]

Bakers Protection Pact

Next, I wish to describe arbitration rules in practice, based on archival sources on cartels. Among the Cartel Committee's materials is the Bakers Protection Pact, containing the provision on arbitration proceedings described below.

Decisions on any disputes and judgement on any claims arising from the legal relationship regulated by the pact were left to the arbitral tribunal. Adjudicating appeals that were referred to the competence of the tribunal in the pact also fell within the jurisdiction of the tribunal.

The pact included information on the composition of the arbitral tribunal, as follows: The president of the tribunal, Adolf Trutzl, was permanent, and his co-presidents were Béla Neumann, Ferenc Holndonner Jr, Gyula Czittler and Sándor Fürst. If the president was indisposed, the first co-president appointed acted in his place. If he was also indisposed, the person who was next in line filled the office of president. If either the president or one of the co-presidents of the tribunal could not undertake this office, then the meeting of members chose their replacement.

The parties set down the following general rules on the proceedings before the arbitral tribunal. For example, if a person wished to lodge some dispute or other claim before the tribunal, the relevant petition, action or appeal was to be submitted to the tribunal. The president of the arbitral tribunal himself undertook the presidency of the tribunal to be formed for a particular case or designated one of his co-presidents as president. If there were no grounds for exclusion against the president or if the president-to-be or co-presidents were indisposed, the president and the co-presidents of the new tribunal set in place to hear the particular case would be appointed by the president of the arbitral tribunal. However, failure to maintain this sequence was not grounds for challenging the legality of the formation of the tribunal.

The president or appointed president notified the claimant and the respondent in writing without delay that they should designate their own arbitrators within 48 hours of the notification and that the arbitrators' statements accepting this appointment should be simultaneously attached. The parties could only designate a member of the pact or a representative as an arbitrator. If one of the parties did not designate an arbitrator by the set deadline or did not attach a statement of acceptance, or if the designated arbitrator withdrew, the arbitrator was then appointed by the president of the tribunal. Members of the board of directors could not be presidents or members of the tribunal. Persons who were members of a committee against which an action or appeal was directed, or that officially dealt with the matter at issue in the case, could not act as arbitrators. Persons involved in an investigative or auditory action were also excluded from the proceedings. An arbitrator was also prohibited from taking on this role if any party raised serious doubts as to that person's impartiality.

[6]Bacsó (1917) at 326–328; Zoltán, (1986) at 472; Dobrovics (1933) at 14.

In the event that an appeal had been lodged against a decision in a case involving opposing parties, the arbitrator could then only be designated by these opposing parties. If there were more than two opposing parties, each of them could appoint an arbitrator. Several parties on the same side could designate an arbitrator jointly. If parties on the same side could not agree, the president of the tribunal designated their arbitrator.

The arbitral tribunal proceeded with the case in a hearing, where it presented its statements and was free to set the manner of the proceedings. Evidentiary material registered by the audit committee or the consumer protection committee could be used and supplemented by the arbitral tribunal, and it could order that evidence be presented again. A judgement by the tribunal had to be justified, and delivered to the director of legal affairs at the Hungarian Royal Treasury, with a waiting period of at least fifteen days before it could be executed. The tribunal could require the losing party to pay its costs, and appealing against a judgement by the tribunal was not possible.[7]

Sugar Cartel

The Alföld Sugar Company materials contain a draft cartel agreement from 1942, which likewise regulated the arbitral tribunal. According to the draft agreement, the firms signed on to the agreement consented to the exclusive power and competence of a three-member tribunal regulated by Act 1 of 1911, Title XVIII, to decide all disputes and matters of litigation arising from the cartel agreement, with the exception of specific matters expressly referred to another forum. The tribunal could also decide on the validity of the arbitration agreement.

One member of the arbitral tribunal was selected by the party acting as the claimant or, if several parties took part, the selection was made jointly. The same process was undertaken by the respondent party. Both parties declared that the "tribunal will not merely explain the operation of established law. It will also be authorised to take constitutive decisions on all questions rendered necessary by the inadequacy of the present agreement or for other important reasons. That is, the tribunal will also be authorised to issue judgements regarding the legal relations between the parties to the agreement, which remain valid until such time as the cartel is terminated and which could otherwise only be established based on a statement of will on the part of the parties to the agreement."[8]

The third member of the arbitral tribunal was the president, agreed upon by the arbitrators. If the parties were unable to agree on a third member of the tribunal within fifteen days, the president of the tribunal was then appointed by the chairman of the board of the Budapest Stock and Commodities Exchange.[9] If the

[7]Cartel committee materials: MNL. K-148. 1934. 41. tétel. 28720. alapszám, 71729. [National Archives of Hungary. Lot K-148. 1934. 41 No. 28720, 71729]; Szentpáli (1933) at 16.

[8]MNL. (Gazdasági Levéltár) 256-V. 181. tétel 56. csomó. [National Archives of Hungary (Business Archives). Lot 256-V. 181 Batch 56.]

[9]Fifteen points in the Austro-Hungarian iron cartel agreement refer disputes to the arbitral tribunal for the Budapest Stock and Commodities Exchange. MNL. (Gazdasági Levéltár). Osztrák-Magyar Vas- és acélkartell Z 372. 43–44. tétel. A tőzsdebíróságról, mint választott bíróság szabályozásáról.

president of the tribunal could not fulfil his duties, the vice-president would then proceed to act.

If it was established during the arbitration proceedings that one of the parties' actions or failure to act was in breach of an essential provision of the agreement or was "contrary to the spirit of the cartel", the relevant person could then be issued a fine of 100,000 gold pengős on a case-by-case basis. A performance obligation and compensation could also be ordered in addition to the payment of the fine, which had to be divided between the parties in proportion to the size of their participation. A fine could be imposed several times, if necessary. The sugar companies also agreed that, except in cases of termination, the cartel had to be maintained. "In this regard, the parties shall grant the most far-reaching powers to the arbitral tribunal, supported by the principle that the tribunal, by the shared will of the parties, shall first and foremost bear in mind the continued validity and inviolability of the cartel and the obligation to compel all the contracting parties to adhere to the present agreement."[10]

Sodium Silicate Cartel

Among the material found at Viktória Chemical Works is a cartel agreement that regulates the structure and proceedings of the arbitral tribunal. This agreement stands out because the parties set down detailed rules regarding the tribunal in a separate arbitration agreement.

The parties to the cartel agreement (Drucker Dezső Pallas Chemical Plant, United Light Bulb and Electric Company, Dr Helvey Tivadar Chemical Plant, Rosenberg Miklós Chemical Plant, Rudas Ernő Concordia Chemical Company, Soroksár First Sand Lime Brick Company and Viktória Chemical Works) stipulated that they recognise and agree that "in excluding the court, [we] submit to the exclusive competence and unappealable judgement of a three-member arbitral tribunal"[11] to settle all disputes arising from the agreement and adjudicate and collect all claims. The tribunal was assembled in cases of dispute pertaining to escrow agreements and in adjudicating and collecting related claims.[12]

The cartel agreement entered into by the firms listed above decreed that the parties and the Hungarian Industry and Trade Monitoring Bank had entered into an agreement regarding the exclusive sale of sodium silicate on commission as well as on providing control and escrow services, based on which the bank undertook an order to make such sales on commission and to provide such control and escrow services. The bank's powers included deciding disputes arising from or

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[National Archives of Hungary (Business Archives). Austro-Hungarian iron and steel cartel. Lots Z 372. 43–44. On regulating the stock exchange tribunal as an arbitral tribunal.] Róth (1901) at 200–202.

[10]MNL. (Gazdasági Levéltár) 256-V. 181. tétel 56. csomó. [National Archives of Hungary (Business Archives). Lot 256-V. 181 Batch 56.]

[11]MNL.(Gazdasági Levéltár) Viktória Vegyészeti Művek Rt. Z 341 Ügyvezetői-igazgatóság iratai 2. raktári szám, Kartell ügyek. [National Archives of Hungary (Business Archives). Viktória Chemical Works. Z 341. Managing director's documents, Stock No. 2, Cartel cases.]

[12]Ibid.

pertaining to legal relations, especially compensation claims, and to setting fines. The parties to the agreement likewise left the decision to the arbitral tribunal to appeal decisions taken at cartel sessions regulated in the cartel agreement. In this case, the tribunal was comprised of three members. The claimant or claimants before the tribunal notified the respondent by registered mail, while simultaneously designating the arbitrator on the tribunal and forwarding the statement of acceptance from the arbitrator. The respondent had to designate their choice for the arbitration tribunal within eight days of receiving the notification and send a statement of acceptance by registered mail. In the event that several parties entered the lawsuit on the side of the claimant or the respondent, an arbitrator could then be selected by a simple voice majority. The president would be jointly selected by the two arbitrators appointed by the claimant(s) and respondents(s). If the respondent did not designate an arbitrator within eight days or if no agreement could be reached regarding the identity of the tribunal president, these decisions would be made by the president of the National Association of Hungarian Industrialists or, if he was indisposed, by his deputy.

A judgement by the arbitral tribunal had to be justified, and no appeal could be lodged against this judgement. Provisions of Act XX of 1931 had to be observed during the arbitration proceedings, with the judgement to be delivered to the director of legal affairs at the Hungarian Royal Treasury. The claimant had to place the sum of the costs set by the tribunal on deposit. The provisions of the Act on Civil Procedure were to be applied to the formation of the tribunal and the arbitration proceedings, provided that the parties had not regulated these areas in the agreement.[13]

Ice Cartel

Not every cartel agreement contained an arbitration clause. The Budapest Ice Sales Company and the Huszár József István Ice Company, situated in what was then the separate town of Újpest, entered into an agreement to regulate the ice trade in Budapest, Újpest and Rákospalota, wishing to lay down a unified and joint regulation in the agreement. They specified the terms of ice distribution, the maximum distribution amount and the fine to be paid in the case of overproduction, and dictated the prices and procedure that was to be followed against resellers. They also set down that any disputes arising from the agreement should be settled by the Budapest Central Royal District Court or the Budapest Royal Court of Justice, depending on the court's jurisdiction based upon the value of the lawsuit.[14]

It becomes clear from the provisions on the arbitral tribunal that the structure was regulated in an essentially identical manner. The parties wished first and foremost to settle legal disputes among themselves. This is why they attempted to lay down the rules of procedure in the cartel agreements in as much detail as

[13]Ibid.

[14]NL Budapest Főváros Levéltára XI. 1105 1. kisdoboz 1 Kartell jegyzőkönyvek, megállapodások 1927–1943 [Budapest City Archives, National Archives of Hungary, Folder XI. 1105 1, Cartel minutes of meetings and agreements 1927–1943].

possible, with an eye to Act I of 1911 on the civil trial process as a background law.

A judgement passed down by the arbitral tribunal could only be overturned by the Cartel Court.[15] For this reason, the manner in which the effect of the judgements by the tribunal was regulated was particularly significant. "There would be no purpose for the provisions of the Act on cartels if one could manage to enforce judgements by ignoring the intention of the Act on cartels and stipulating involvement by the arbitral tribunal."[16]

The Cartel Court had jurisdiction over lawsuits of public interest, impositions of temporary measures, impositions of fines as penalty, disqualification, the annulment of any arbitration award and the suspension of the execution of any arbitration decision.[17] This Court could only order the dissolution of a cartel and prohibit its further operation if the cartel had engaged in conduct that was detrimental to the public interest and if that conduct could not otherwise be terminated.

The Act gave the minister the right to request the dissolution directly from the court without recourse to other means. However, exercising the rights of dissolution could also constitute a restriction of fundamental rights. Specifically, it could restrict the exercise of the freedom of association. Yet, constitutional rights could only be restricted by way of exception and only if the act was authorized by a statute. In any other case, the judicial measure would have been unlawful, as it would have been determined by an arbitrary exercise of law.

With the dissolution of the cartel, the court usually prohibited the cartel and its members from continuing to operate. The dissolution of the cartel did not preclude the members from keeping up the cartel's operation by acting in unison. This meant that the sentence could only be enforced if the court also prohibited the cartel from operating.

It was possible for a cartel that had been dissolved, to later be re-established. This was not explicitly prohibited by the law, and so, in practice, the court's decision concerned only the dissolution and prohibition of the operation of the cartel involved in the action. The new cartel, if it was formed as the result of a new agreement, was not covered by the previous decision. New legal action had to be initiated against the operation of the new cartel, and new evidence was needed to demonstrate that its operation was against the public interest. However, in urgent cases, the minister could consider taking provisional measures.

If the abuse committed by the cartel could be terminated by enforcing an agreement or a decision, then the court ordered the enforcement of the relevant agreement or decision. A similar decision was taken when the claim was filed for the dissolution of the cartel. On the other hand, if a claim was made for the prohibition of an agreement or a decision, the court could not pronounce the

[15]A kartelbíróság első ügye [The first case before the Cartel Court]. *A kartel (2),* 1933/4, at 31. A Kartelbíróság megsemmisít egy választott bírósági ítéletet [The Cartel Court annuls a judgement by an arbitral tribunal]. *A kartel (2),* 1933/5, at 39–40. Ranschburg (1931) at 119–124; Magyary (n.d.) at 743–744; Kovács (1930) at 1700; Szabó (2016) at 79.

[16]Kelemen (1933) at 17.

[17]Harasztosi (1936) at 546-547. See more on this topic: *A Kartelbíróság újabb ítélete.* [*The Cartel Court's new ruling*], A Kartel [The Cartel] (3) 1933/1. at 8.

dissolution of the cartel in its ruling. Otherwise, the court would have gone beyond the scope of the claim, which would have been incompatible with Act I. of 1911 on the Code of Civil Procedure. The termination of the operations or the conduct of the cartel was only requested if the cartel's conduct could not be demonstrably linked to an agreement.

In the following case, legal action was brought to the Cartel Court because of the invalidity of the cartel contract and of the arbitration clause contained therein, and because of a failure to present the cartel contract to the minister. The contract, including an arbitration clause, established commitments regarding goods in a manner that restricted competition in terms of turnover and price formation; therefore, it fell within Sections 1 and 2 of Act XX of 1931. Commercial associations also participated in the formation of the agreement, which, according to the Cartel Act, had to be recorded in writing and presented to the responsible minister in office for registration. The presentation was regulated by special rules, because the contract in question had been drawn up before the Cartel Act came into effect (October 15, 1931); therefore, according to Section 16 of the Cartel Act, its presentation should have been performed within 45 days after it came into effect, namely until November 29, 1931.[18]

The Cartel Court found that the presentation had not taken place, and for this reason, pursuant to Section 2 of the Cartel Act, the agreement was annulled, and the arbitration clause included therein, "as an additional part of ancillary nature of the main agreement, sharing the fate of the main agreement, also became invalidated; therefore, the arbitral tribunal that gathered on the 9th of February in the year 1932 based on this invalidated contract could not have been instituted in a legal sense."[19]

Enforcing the performance of obligations based on invalid agreements through decisions of arbitral tribunals was unquestionably against the law; as a result, the legal directorate of the Treasury, acting upon the order of the minister, could ask for the invalidation of the decision of the arbitral tribunal pursuant to Section 13 of the Cartel Act. The co-defendant's reasoning that the claim in question would fall under the jurisdiction of an ordinary court instead of the Cartel Court was unfounded because Section 2 of Section 13 of the Cartel Act stated that the legal claim could be filed at the Cartel Court exclusively. Based on the aforementioned grounds, the Cartel Court dismissed the judgement of the arbitral tribunal.

In another case, the Cartel Court reached a similar decision when, due to the failure to present the agreement, the arbitration clause, which formed part of the annulled agreement, "sharing the fate of the main agreement, also became invalidated."[20] The Cartel Court declared that the Cartel Act did not contain any

[18]A kartelltörvény hatálybaléptetésről szóló 5381/1931. M. E. rendelet. [Prime Minister Decree 5381 of 1931 on The Enforcement of the Cartel Act. P. IV.] 3013/1932. In: Nizsalovszky, Petrovay, Térfy, Zehery, (1931-1932) at 577.

[19]P. IV. 3013/1932. In: GDt. vol. XXV, at 577.

[20]P. IV. 5261/1932. GDt. vol. XXVI, at 740-741. In the same decision, the Cartel Court also stated that an action of public interest can be brought "even if public interests are not threatened but one of the other criteria set out in the Act is violated." Egy elvi jelentőségű ítélet, [A Principled Decision] *Pesti Napló*, 18 August 1932, at 7.

provisions that would have allowed the minister to decide on appeals attempting to justify the failure to present the required documents.

In the case at hand, the co-defendants of the second and third degrees concluded an agreement on December 28, 1928, and January 1, 1929, for the period between January 1, 1929, and January 30, 1932. The agreement contained mutually binding provisions regulating the acquisition of firewood, coal, coke and smithy coal; their sale in and around the town of P. (Pápa), the determination of sales prices and sales conditions of products, the handling of the turnover of goods and the related accounting, and mutual customer protection. The aim of this agreement between the co-defendants of the second and third degrees was to determine the actions of the parties for a longer period of time, rather than to regulate the occasional conduct of their transactions. The obvious purpose of the mutual commitments included in the agreement was to regulate economic competition in terms of the said products in connection to turnover and price formation. In its decision, the Cartel Court ruled that "such an agreement, regardless of its personal, economic or geographical scope, falls within Section 1 of the 20th Act of 1931."[21] Some commercial associations were contracting parties of the agreement; therefore, because of the reasons set out in the aforementioned case, the agreement should have been presented to the minister, but this had never happened. The agreement was set aside pursuant to Section 2 of the Cartel Act, and it was not altered by the fact that, after the invitation of the minister, the secondary co-defendant fulfilled its obligation to present the agreement on September 1, 1932. "For a case that was invalidated due to the failure to adhere to a legally pre-established deadline, cannot be made valid again by belated compliance."[22]

The arguments of the defence claiming that the validity and scope of the arbitration clause did not necessarily coincide with those of the main contract were also deemed invalid, "because the 'public interest' nature and the special (law enforcement) nature of the regulation of the legal relationship under discussion, and also, the purpose of the adoption of Act 20 of 1931 warrant equal evaluation of the substantive law and the procedural law effect of the cartel agreement."[23]

In this case, too, the arbitration clause of the agreement was invalidated after the deadline for presentation had passed, therefore, based on the invalidated clause, the arbitral tribunal could not have been formed legally. As a result, the arbitral tribunal could not even have reached a conclusion that affected the rights and commitments of the parties originating in the period of time when the cartel agreement was (lawfully) in effect. The Cartel Court held that "both those provisions of the main agreement that are closely linked to each other and the 'inseverable amendments' […] added later constitute a unified, single legislative act (document), which has no clauses that could be valid on their own, without a (cartel) agreement drafted in accordance with Section 1 of Act XX of the year

[21]A szénkartel vesszőfutása a kartelbíróság előtt, [The Ordeal of the Coal Cartel in Front of the Cartel Court] *Pesti Napló*, 21 December 1932, p. 6. Kőházi (1934) at 8-9.
[22]The Cartel Court quoted the following case: P. IV. 3013/1932. In: P. IV. 5261/1932. GDt. Vol. XXVI. pp. 740-741.
[23]P. IV 5261/1932. In: GDt. vol. XXVI, p. 741.

1931. As a result, although the defendant argued that, under Section 11 of the Act, the arbitral tribunal had legal rights to adjudicate […] on claims that were related to the contract and that could be judged as valid despite the fact that the cartel agreement itself was invalidated, this argument was declared to be without merit."[24] Based on all of these, the Cartel Court dismissed the judgement of the arbitral tribunal.

Conclusions

Act XX of 1931 considered the assertion of the public interest key in judgements by the arbitral tribunal. In the event that one of the parties protested the cartel agreement as being contrary to the public interest during a proceeding, the tribunal then had to suspend the proceedings and transfer the matter to the competent minister. In the event of a breach of the public interest, at the minister's request and with a petition from the director of legal affairs, a public interest trial could be initiated, which then terminated the arbitration proceedings.[25] The protection of the public interest against private interests was powerfully asserted through the cartel agreements. This kind of intervention in private law on the part of the state stemmed from the altered economic conditions of the twentieth century.

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[24]P. IV 5261/1932. In: GDt. vol. XXVI, p. 741. Co-defendants had to pay the litigation costs according to Section 9 of Act XX of 1931. and Section 425. of Act I. of 1911.

[25]Ibid. at 18.

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WTO, A Multilateral Trade Institution or a Parallel Organisation: Reform Initiatives Addressing the WTO Agricultural Trade Distortions to Developing Countries

By Isaac O. C. Igwe[*]

The World Trade Organisation (WTO) process and its ethos are fast losing their development objectives. The crisis, challenges and complexities in the implementation of WTO policies on agriculture and market access has not abated. Intellectuals, researchers and academics opine that the implementation of WTO policies have not only encouraged power and development divide between the Industrialised nations and the developing nations, it has worsened the rate of global economic inequality. Although the inclusion of agriculture in the Uruguay Round was taken as a major achievement, the commitment to minimum market access for most protected products, reducing export subsidies and a considerable measure of support, did not do much to lower agricultural protection. The promises made to the developing countries under the Doha Development Agenda (DDA) on agriculture, market access, reduction of subsidies/tariffs and implementation issues were limited and not fulfilled. Can the emerging WTO market capacities and alliances lead to a change in the decision-making process? This writing aims to critically analyse the existing WTO legal problems hindering market flows and the incidence of barriers to trade in agriculture being much higher than protection of developing countries farmers which has impacted their development.

Keywords: *WTO; Legal; Agriculture; Implementation; Inequality; Developing Countries; Doha Development Agenda; Decision-marking; Market Access; Development.*

Introduction

The past Sixty years have witnessed opportunities and challenges to attempts to structure coherent international economic relations. The developing countries have perceived the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) as failing in its promise to improve on United States unilateralism.[1]

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The devolution of multilateralism to regional and bilateral bases, precipitated by the US in the Uruguay Round dispute settlement rules, has led to a parallel organisational structure in the WTO, such that parties exploit the legal loopholes in the system and used it to block consensus on contentious aspects of the organisation.[2] Originally this structure existed as a neoliberal regime in Britain and the United States with the emergence of 'Washington Consensus', which shrouded the aim of developmentalism and substituted it with globalisation informed by tireless increase of the asymmetrical part played by WTO, IMF and the World Bank in global economy.[3] The GATT was mainly a creation of the United States and its western allies, structured mostly for trade profit against economic development which was the ultimate concern of the developing countries of Africa, Asia and South America.[4] Potentially, less attention has been given to the WTO's role in promoting trade and trade-related policy to favour developing countries' development by reducing tariff and non-tariff import barriers or eliminating protectionism in export markets.[5] More barriers were created for products potentially frequently exported by developing countries, compared to the reduced tariff barriers on goods of export interest to the developed countries.[6] This practice obliterated the market access obligation enshrined in the WTO Agreement as the outcome benefits shared were not balanced.[7] After the Uruguay Round Agreement, the interests of the developing countries were not fully protected but worsened, as the export interests of the developing countries still faced numerous barriers which discouraged the manufacture of domestic products and prevented the development of their infant industries. Coincidentally, they were faced with the option of allowing imports from the industrialised countries which ultimately led to a flood of unwarranted products that often triggered anti-dumping legislation.[8] By and large, high tariffs were often concentrated around agriculture, textiles and clothing, which effectively generated foreign currencies to the

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[1]See Bello, Cunningham & Rau. (1994). n relation to TRIPs, the developing countries demanded that the unilateral or bilateral application of intellectual property disputes must be put to an end. Brazil thought that the multilateral trade rules of GATT was structured to shield weak to stronger exporters from 'unilateral discrimination and harassment'. The US special legislation Section 301 did nothing less than frustrate trade negotiations in the GATT. See Stewart (1999) at 157-574.

[2]See Barton, Goldstein, Josling & Steinberg (2006).

[3]See Igwe (2019).

[4]See Bergsten (1998).

[5]See Milner (2006).

[6]The post-war multilateral trading system did not contemplate the interest of the developing countries. It was instituted as the basis of power relationships between the rich countries, most especially the EU and US. For this reason, it was more interested in the developed countries' markets than the developing countries. Thus the hallmark of the European Common Market towards the end of 1950s strengthened the American admittance to entertain the Kennedy Round of the 1960s; See Bergsten (1998).. This was informed by the idea to reduce the existing discrimination against US exports and as well build the 'new Atlantic partnership' articulated by President Kennedy. At this time, there was a monetary crisis in the US which led to balance-of-payment problems and President Kennedy clinched on access to foreign markets for American exports as a way out; See also Stiglitz & Charlton (2005)..

[7]See Watal (2000). For the asymmetrical benefits in the market access obligation in the WTO Agreement see Bhagirath (1998).

[8]See WTO (1994a).

developing countries through their exports. As a result, the developing countries pursued a trade policy of Import Substitution Industrialisation (ISI), which used high protective tariffs to compel consumers to buy domestically made products at the expense of imports. Besides, the tariff peak influenced the governments of the developing countries to create trade policies aimed at self-sufficiency and to ask for 'Special and Differential Treatment' (SDT),[9] in the GATT negotiation instead of accepting the multilateral rules of the GATT based on reciprocity.[10]

Although the GATT system progressed, it turned out that the major threat to that system was its lack of relevance to traders and governments in the developing world. With the focus of the Uruguay Round and its agenda in mind, the developing countries argued that the developed countries did not honour their traditional goods such as textiles and agriculture and seeking for further liberalisation in those areas would be a precondition to any new negotiation.[11] However, in the 1980s, there was a major surge in the developing countries' active engagement in the Uruguay Round. This was as a result of market-based economic reforms in many developing countries in the 1980s which encouraged their governments to pursue more positively the market–based principles and objectives of GATT.[12]

It is obvious that these changes were as a result of pressure from both the developed countries and international institutions for developing countries to liberalise their economies. In addition, the collapse of communism and the clear success of free market activities in countries such as Singapore and Taiwan resulted in a revolution in internal policy in a number of countries.[13] For instance, the deep financial crisis of India in 1991 led to its economic reforms structured to deregulate the national economy and enhance its economic efficiency.[14] India, like most developing countries, revised its opposition stance to the Uruguay Round and supported the multilateral agreement[15]. The Uruguay Round trade negotiations changed the face of international dispute settlement by creating the WTO[16], which

[9]See for the reasons why the SDT was opted for: The developing countries felt that there was need for special and differential treatment to enhance their terms of trade, curb their dependence on exports of primary commodities, and foster industrialisation through the protection of infant industries. See Gibbs (1998). They were later provided with differential treatment under Article XVIII of the GATT rules inter- alia it exempted economies 'which can only support low standards of living and are in the early stages of development…implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports'. This status allows the developing countries to be members of the GATT and also avoid the obligations imposed on the developed nations. Moreover Article XVII gives them the liberty to choose a development policy of their choice but limits their power within the actual GATT negotiations.

[10]See for a demonstration of the advantages of protectionist measures which have been previously tested by the industrialised countries during their development stage of the 19th and 20th century. See Khor (2001) at 16-38.

[11]See Finger (2007).

[12]See Winham (1998).

[13]See Bello, Cunnigham & Rau (1994).

[14]Ibid.

[15]Ibid.

[16]See Hudec (1999).

took the place of the flawed GATT regime.[17] The WTO created a more rule based dispute resolution process[18], which sought to reduce the prolonged delay or absence of compliance for which the 1947 GATT dispute settlement mechanism was noted.[19] The aim of instituting the WTO was to liberalise international trade and ensure economic growth and development, mostly for the developing countries. This had been the intent of the 1947 GATT preamble which provided that:

> *"trade and economic endeavour should be conducted with a view to raising standards of living , ensuring full employment and a large and steadily growing volume of real income[…]"*[20]

The organisation was originally set up to be a democratic institution, but it is controlled by the industrialised nations or their corporations. WTO is focused towards a jet-speed trade liberalisation, apparently in the areas and products of interest to the most powerful in the institution. Third World countries are conspicuously marginalised when it comes to the implementation of WTO rules, which has obviously been a point of discussion and perplexity.[21]

Developing countries accepted the Uruguay round agreement, believing that they would benefit from agricultural liberalisation and subsidy reduction in the Organisation of Economic Cooperation and Development (OECD) countries under the Agreement on Agriculture. Instead, they faced unfair trade as dumped and subsidised products flooded their local markets. Trade liberalisation created problems rather than eliminating them.[22] The Doha round commenced with a ministerial meeting in Doha, Qatar, in 2001. This was followed by the ministerial meeting in Cancun, Mexico in 2003. In 2005 the Hong Kong ministerial was held. Similar negotiations were held in Geneva, Switzerland in 2004, 2006 and 2008; in Paris France, in 2005, and in Potsdam, Germany in 2007. Doha, since launched, has not achieved a remarkable development impact in the rural development circle. This, no doubt, has worsened the extent of poverty in the developing countries. After more than half a century of trade liberalization, negotiations are often based on complex issues.[23] To date, the WTO has not achieved a coherent agreement in its negotiations, satisfactory to the developing countries (DCs) and Least Developed Countries (LDCs) members. The WTO Doha Development Agenda's negotiation of July 23-29, 2008 broke down after it failed to reach an agreement on agricultural import rules,[24] such as tariffs, non-tariff barriers, services and trade remedies. [25] As a result of the breakdown, it was argued that no

[17]Ibid.
[18]See GATT (1994b) and See WTO (1996).
[19]See Khansari (1996) at 189.
[20]See GATT (1947).
[21]See Igwe (2019).
[22]See FAO (2000).
[23]See Miller & Markheim (2008).
[24]See BBC (2009).
[25]See Fergusson & Ian (2008).

substantive negotiations could be held in the near future.[26] Although emergency negotiations were held by the USA, India and China towards the end of 2008 to agree on negotiation principles, they did not result in any progress.[27] Paradoxically, in trade negotiations, countries can eliminate their tariffs, only if others take the same step.[28] The WTO members, especially the developed nations, can open their markets only as a concession. It is clear that the Doha development Agenda (DDA) is not working and should be reformed. It will be argued in this treatise that the WTO principle should include mutually gainful transactions and a non-coercive trade regime of negotiations. Democracy in the WTO process is like a skilful and prolonged public relations exercise by the developed countries and the WTO Secretariat. Recent reflections on the nature of WTO methods of decision-making leave the DCs marginalised and call for an institutional reform. Scepticisms are rife as to whom the WTO is really accountable and the deep rooted democratic deficit of the organisation. The writing will focus on the legal aspects of some problematic and essential agreements of the WTO in connection with development as applied to developing countries. The central argument here is that the standard operating procedures of the WTO are a reflection of power imbalance between the industrialised nations and developing nations which worsens the rate of inequality and demands justice. This writing will critically analyse the results of the Uruguay round and evaluate its effect on such issues as agriculture, and decision making. The writing will look into the implementation problems that developing countries face in the GATT/WTO. This will entail an examination of implementation theory and linking it to issues of legitimacy. It will explore the issues of negotiating plans, evolution of decision making and the role of collective action among the developing countries. The treatise will conclude by advocating that the developing countries should join together and stand up to the bullying of the developed nations. Finally, a development based approach will be advocated, aiming to respect national sovereignty but not to be used as a factor for economic domination.

Policy Implementation

The WTO implementation of policies presents a deeply embedded obstruction to the means by which developing countries can improve their economic situation. History has it that Agricultural trade liberalisation began in 1947 with 23 major trading nations meeting in Geneva followed by formation of GATT. This led to successive initiative to liberalize world trade but agricultural products liberalization excluded temperate-zone of developing countries using Industrialised countries as the mainstream of liberalisation. The first attempt to set right global agricultural trade production policies was carried out in the Uruguay Round (1986-94), which formed the Marrakesh Agreement establishing the World Trade Organisation with Agreement on Agriculture as an integral part. Serious deficiencies and imbalances

[26]See Beattie (2008).
[27]Ibid.
[28]See Deardoff (2007).

in the implementation of WTO agreements have resulted in grave problems for developing countries who are subjected to the decisions of the Industrialised countries reached in the Ministerial Conferences. Agriculture is very important to the DCs, especially the LDCs as their livelihood depends on farming. The DCs/LDCs are highly dependent on agriculture as they have large population and does not have financial resources to subsidize agriculture as most of them are outside the OECD countries. The Industrialized countries receive policies with some level of support and protection against the developing countries counterparts and this leads to economic distortions. Specific attention was devoted to these issues during the WTO 1998-1999 Ministerial Conference in Seattle.[29] About a hundred proposals were registered and presented, but the participants did not come to a unanimous conclusion.[30] Some of the suggestions were for changes in practice whereas others were for improvements in the rules themselves. Two years later, WTO members launched Doha negotiations in September 2001 which met some difficulties where the developing countries made a concerted effort for the implementation of agricultural policies in the Doha Ministerial Conference. They argued that the issues introduced were within the existing agreement; hence their resolution deserved higher priority over the introduction of new issues. In the end, on seeing the stubborn stand taken by the developing countries on these issues, the developed countries conceded to the pressure, but treated these issues in the most cavalier manner such that they were not treated at all.[31] Hence, the Doha Ministerial Declaration says:

> *"We attach the utmost importance to the implementation-related issues […] and are determined to find appropriate solutions to them".*[32]

In some developing countries, mostly in Africa, liberalisation in the industrial sector by reducing tariffs and removing non-tariff measures proceeded under concerted pressure from International Financial Institutions (IFI). When countries reduced their tariffs as a result of these structural adjustment programmes, they would be encouraged to bind themselves to the reduced tariff in the WTO. By doing so, they would be prevented from raising the tariff in future even if they ceased to need assistance from the IFIs.[33] The right structures in the WTO with trade liberalisation as its ethos means a successful realisation of its goals enshrined in the GATT 1947 agreement and amplified in the WTO Marrakech Agreement that relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living.[34] The preamble recognised that international trade regulation represents competing interests. The power of the multilateral trading system relies upon this constitutional structure and procedure. There are complexities in these provisions as they are of a constitutional nature and raise institutional problems relating to international and domestic law. The

[29]See Bhagirath (2003) at 105.
[30]See WTO (2001a).
[31]See Bhagirath (2003) at 105.
[32]See WTO (2001b)
[33]Ibid.
[34]WTO (1994). [hereinafter Marrakesh Agreement].

WTO lacks mutual relationships in both political and judicial processes. Some of the issues at stake are the actual role of the secretariat which entails its involvement in decision-making, the function of stakeholders, the relationship of trade rounds and law making. There are horizontal problems such as marginalisation and clarity in dealing with other international organisations and application of international law. Whilst vertically, the connections between WTO law and domestic law, the effect of WTO law in trade policy formulation, implementation and enforcement within members are at stake. This includes the connections between WTO law, regionalism and preferential trade that operate under the multilateral structure but often experience non-compliance with WTO rules.

There have been numerous underlying institutional issues in the WTO which members have not thoroughly addressed. These include 'how can we achieve better policy coordination in addressing borderline issues among trade and other fields governed by other institutions such as culture, human rights, investment protection, finance, monetary affairs and development assistance; 'how do we make sure that WTO rules are taken seriously at home by legislators and domestic courts alike?' and 'how can we, in turn, assure that rule-making responds to the needs for transparency, accountability and legitimacy?'[35] Despite the challenges militating against progress, the WTO's contracting members are reluctant to address them. Although there have been some studies responding to such problems, they have not been taken seriously. Besides, the proposal to create a committee or working group to deal with institutional issues at the WTO has not been accepted.[36] Since 2001, within the Doha development agenda, the only area of institutional issues discussed has been the reform of dispute settlement in the context of preferential agreements to improve transparency.[37] The main essence of the Uruguay round agreement was agreed by the US and the EU and thereafter given a multilateral scope. Other member states played an important but non-decisive role.

With the advent of rising economies, the WTO faces a multi-polar world. Since the Cancun conference, major WTO decisions require the consent of emerging economies such as Brazil and India. Although China prefers a discrete voice in negotiations, no major multilateral trade decision takes place without its consent. The recent shift in WTO multilateral trade decision-making processes was as a result of the increased participation of medium-sized and small countries in negotiations, operating in a context of interest-driven coalition building.[38] Nonetheless, information technology to some extent has noticeably enhanced the transparency of WTO activities and documentation: unlike under GATT, WTO activities are easily accessible through the Web and this encourages better participation by NGOs in the goings-on of the organisation.[39] The change in the WTO is only in the area of substance and context, while the structure of the

[35]See Cottier (2009).
[36]See International Law Association (2006).
[37]See WTO (2006).
[38]For information on WTO coalition building see Wolf (2007).
[39]See Steger (2008).

organisation remains as in the GATT 1947 era. The WTO remains unchanged in the area of modes of daily business by committees and the general council. It is still a member driven organisation, a process of negotiation opposed to a multilateral group and scarcely framed by international agreements.[40] The WTO is far from a proper legislative process of deliberation and decision making comparable to the process of sovereign law-making. The substantial reform of the dispute settlement system operates without effect and entails the working condition of the political process and at best a new relationship of political and judicial processes. The weakness and handicaps of developing countries' production firms make them very vulnerable in an environment of international competition. The implementation of WTO policies in the developing countries is a continuous problem, demonstrated in the later WTO Doha Rounds ministerial meeting of July, 2008 in Geneva, Switzerland, Bali 3-7 December 2013, Nairobi 2015 and even the 12th Ministerial meeting held in Buenos Aires, Argentina, December 2017.[41]

Agriculture

In the area of agriculture, enhancement of market access depended on developing countries removing protectionist measures for their own economic growth. This would then generate more income to the farming population in the developed countries, already supported by massive subsidies from their governments. The overwhelmingly agricultural character of most of the less developed countries is a major determinant of the problems they face; especially in the underdeveloped countries of Africa and Asia, where the bulk of the population continues to find its livelihood in agriculture.[42] Enhancing market access in agriculture is contingent on the reduction of protectionist measures by the developed countries and increasing production in developing nations who are presently dependent on agriculture.[43]

Apart from self-centred political control by some developed countries, the objective of the GATT from its inception was to broker concessions by national governments in the broader interests of free trade[44] The GATT provided rules reflecting multilateralism and non-discrimination that would enable contracting parties to reap gains from commerce interrelationship in line with principles of comparative advantage.[45] No doubt, the GATT had been aware that right from 1958, the domain of agriculture was swayed by protectionist practices such as

[40]For some examples of literatures that acknowledge the political functioning of GATT and WTO at Gathi (2006), reviewing Jawara & Kwa (2004); Wolf (2004).
[41]See WTO (2017).
[42]Ibid.
[43]For example, the agriculture sector, including forestry and fishing, accounts for about 29 percent of India's GDP, and provides direct employment to about 314 million people. Agricultural products formed about 17 percent of India's total merchandise exports in 1996-97. See WTO (1998).
[44]See Aseem & Hart (2000). .
[45]See Bhagwati (1998). '

tariffs and export subsidies.[46] This was the fundamental point for the international market failure in agriculture as a result of excessive manufacturing leading to dumping in international trade. In preparation for the Uruguay round, the newly formed Cains Group[47] brought fresh attention to the agricultural sector by focusing on eliminating local production subsidies in developed economies. This included minimising export subsidies and volumes of subsidised exports regulating market access. The Uruguay round led to an Agreement on Agriculture (AOA), a provision that tended to reduce agricultural protectionism through two instruments: the conversion of all import restrictions to tariffs and the guarantees of minimum market access.

This AOA was designed to come into force six years after 1995 and was deferred for a ten year period in the case of developing countries. The implication of the duration was to enable the WTO to modify the subdivisions of agriculture to make tariffs the only system for monitoring market flow. Agriculture has on the whole been exempted from GATT's discipline.[48] The greatest debacle in the WTO relates to the matters of agriculture, intellectual property rights, general trade in services (GATS) and trade-related investment measures (TRIMS). These matters were not contained in the GATT's earliest provision on trade in goods. There was hardly any support for the inclusion of agriculture in the liberalisation programme, because the United States and major developed countries of Europe were generally captive to strong protectionist lobbies that had constructed elaborate mechanisms of agricultural income support.[49]

The collapse of the Seattle Ministerial conference created a forum to re-evaluate the record and remodel what would stand as correct procedure to trade policy and the future of WTO.[50] The Punta Del Este Declaration called for liberalisation of trade in agriculture and for application of GATT rules and disciplines to export and import measures affecting agricultural trade.[51] The Dunkel Draft constituted the basis for an agreement that incorporated the major principles set forth at Punta Del Este. The Draft marshalled specific methods of reducing market access barriers, export subsidies and market-perverting internal assistance. With respect to market access, the draft agreement called for a reduction in customs duties including those resulting from ratification by thirty-six percent in the aggregate from 1993 to 1999, with mandatory minimum reductions of fifteen percent for each tariff line item. The draft noted that all reductions in agricultural tariffs and any expansion of market access would be accomplished in equal instalments. The draft recognised that the developing countries needed special and

[46]See Sander & Inotai (1996).
[47]The Cains Group was formed prior to the Uruguay Round in 1986. This Group argues in favour of agricultural liberalization as they are main exporters of agricultural products. They consist of 17 members mostly from high and middle income with Indonesia as the only low-income country. The Cains Group includes: Canada, Brazil,, Chile, Columbia, Argentina, Australia, Costa Rica, Malaysia, Indonesia, New Zealand, Guatemala, Hungary, Paraguay, the Philippines, South Africa, Thailand and Uruguay. See Financial Times (1992).
[48]See GATT (1994b).
[49]See Bhagwati (1998).
[50]See Khor, M. (2000). '
[51]See WTO (2002).

differential treatment relating to market access, domestic assistance and export rivalry. Such policies would be exempt when applied as part of agricultural and rural development programmes.

They included:

- Investment subsidies generally available to agriculture
- Domestic support to producers to encourage diversification from the growing of illicit narcotic crops, and
- Agricultural input subsidies, whether in cash or kind, provided to low-income or resource poor producers, defined using clear and objective criteria, and which are available to all producers meeting these criteria.

Before the Uruguay round, agricultural exporting countries encountered increasing trade friction, as the industrialised nations increased the level of support they provided to the agricultural sector. Export subsidies, market access barriers, state trading enterprises, health and sanitary regulations, and other measures were used to assist domestic farmers, often at the expense of exploiting countries.[52] Stewart argued that the Third World agreement in the agricultural area is a prerequisite for a positive overall result in the round. For others, he said that agricultural reform must be tempered by the ability to deal responsibly with an important sector of the economy. Every inch of ground between the differing interests has been identified, measured and evaluated.[53] The overwhelmingly agricultural character of most of the less developed countries is a major determinant of the problems they face; especially in the underdeveloped countries of Africa and Asia where the bulk of the population continues to find its livelihood in agriculture.[54] It bears directly on the central question of how interests and ideology influence the present and the future course of protectionism in the world economy. The GATT did not completely purge itself of trade restriction, it is embedded with such protectionist measures as tariffs and subsidies.[55]

The WTO market access negotiation in agricultural policies had been affected by a good number of deadlocks. For example, the round of trade negotiations was launched in Doha, Qatar in November 2001 in a bid to arrange the next decade of free trade. The Doha round came two years after efforts to launch a round of negotiations in Seattle collapsed amid mass protests.[56] By the same token, the Doha round of world trade talks of September 2003 in Cancun, Mexico, ended in disarray after rich and poor nations failed to bridge deep divisions over agriculture and investment rules.[57] The clash in Cancun came after a Group of 20 (G20) important developing countries, including Brazil, China, India and South Africa mounted an extraordinary challenge to the United States, the EU and Japan.[58]

[52]See Stewart (1992).
[53]Ibid.
[54]Ibid.
[55]See Bhagwati (1987).
[56]See Sage (2004).
[57]Ibid.
[58]Ibid.

Third World leaders said that Western agricultural policies drove their farmers out of business, exacerbating poverty and famine.[59] Sage argues that the Western authorities' refusal to yield to negotiations faded hopes for a global trade agreement, which according to the World Bank estimates would lift 140 million people out of poverty by 2015.[60] The deadlock incident of the September 2003 Cancun Ministerial Conference paved the way for WTO members to convene in Geneva in 2004. They began to make attempts to organise the negotiations by putting the entire action plan back on track. In the final hours of the long and drawn out meeting in Geneva in 2004, negotiators representing 147 WTO countries tried to end years of deadlock by reaching a consensus that would empower discussions focused on eliminating trade barriers. In the meeting, a group of countries referred to as 'Five Interested Parties' (FIP) was chosen, meant to resolve the earlier deadlocks. This group consisted of important political and economic technocrats in world trade; the United States, EC, Australia, Brazil and India. The entire world's poor countries were represented by only two nations. The WTO's agriculture propositions concentrated on three pillars; boosting export subsidies and the elements of other export support that might distort trade; driving down tariffs to increase market access; and reducing domestic support in some areas.[61]

Supachai Panitchapkdi, the then WTO Director General, described the WTO July 2004 Package[62] on agricultural reform, which put farm subsidies at the top of the agenda as 'a triumph'. Robert Zoellick, the U.S. Trade Representative, said it was 'historic,' while Brazil hailed it as 'the end of subsidies'.[63] Accordingly, Celine Charveriat of Oxfam said:

> *"negotiations may trumpet breakthroughs on export subsidies and cotton, but there are no cast-iron commitments here and no clear timeline for reform. We need a far more ambitious and radical approach. If rich countries do not immediately put their promises into action, this declaration will become just one more stage in a long journey of disappointment and deception".*[64]

The WTO July package report unleashed reaction and criticism from many quarters who suggested that it was guilty of disproportionate handling of implementation matters. Such reactions came from the developing countries that were not happy with the package proposed by the US-EU. As a result, a coalition was formed by the developing countries led by Brazil, India and China (BRICs), as the G20 on agriculture to match against the USA and EU.[65] Oxfam argues that a little success has been realised by the developing countries in the form of stronger language to agricultural export subsidies and export credits and success in

[59]See Jawara & Kwa (2003).
[60]See Sage (2004).
[61]See Mortished (2004).
[62]See WTO (2004a) and WTO (2005).
[63]See Mortished (2004).
[64]See Charveriat (2004).
[65]See Clapp (2006).

negating three out of four 'Singapore Issues',[66] as negotiations were launched on trade facilitation. However, the final text remained disappointing and did not do much to improve the round of negotiations. Economists estimated subsequent deals to cost beyond $500 billion per annum to the volume of global economy. Moreover, some trade negotiators and development groups criticised the draft on grounds that it benefits the West and requires much work to attain a deal in favour of the poor nations.[67]

In line with this critique, some non-governmental organisations (NGOs) and developing nations had doubts about the western countries' preferred commitments because their promises were not fulfilled in the past.[68] Contributing, Celine Charveriat of Oxfam International Geneva said in the July 30, 2007 draft.

> *"After days of closed door negotiations, rich countries have delivered a deeply unbalanced text as a take or leave it option. This puts developing countries in the unfair position of having to accept a bad deal or reject and get blamed by the U.S. and EU for failure".*[69]

Ideally, the developed countries could cut their subsidies with no compromise to reciprocate by allowing their manufactured goods influx which would enable them to retain an unfair competitive position. Walden Bello, a critic, presented a simple description of July 2004's supporting structure:

> *The developing countries have waited nearly 10 years for the trade superpowers that dominate the WTO to show sensitivity to their efforts to change global trade from being an instrument of their domination to serving as a mechanism to advance their economic development. For this patience, they have been rewarded with a succession of anti- development negotiating frameworks and texts culminating in the July framework.*[70]

The developed countries appear to have ignored consideration of such objects which militated against the progress in the WTO rounds. For instance, 'the Common Agriculture Policy' (CAP) process of reform which produced a moderate package by June 2003 and the reverse description by the U.S Farm Act decreed after the Doha Ministerial conference.[71] In line with the above, Action Aid commented on EU and United States 'bullying and arm-twisting tactics'.[72] This means that whenever developing countries engage in hard bargaining against western preferences, as occurred prior to Doha, a number of tactics are adopted to discourage them. These usually come in the form of combinations of inducements to pertinent countries or their governments deeming them 'unfriendly blacklisted

[66]Trade facilitation, trade and investment, trade and competition policy and transparency in government procurement.
[67]See Elliot (2004).
[68]See Goh, Hormeku & Khor (2004).
[69]Charveriat (2004).
[70] See Bello (2004).
[71] Charveriat (2004).
[72] See Kanaga (2004).

nations.' The suggestion is that their preferential trade agreement must be suspended, employing mounting pressure on capitals that usually go with blocking information or threatening to discontinue the jobs of the countries' representatives as well as those of their Ambassadors.[73] Moreover, they may indulge in the deployment of middle-income economies to convince low income economies to reconsider their stance.[74] Arguably, the EU/U.S. 'arm-twisting and bullying relationship' could be likened to an effort to move the developing countries backward into the period of colonial economic interdependence. This was designed to invoke the economic dependence theory that existed during the colonial period that left the colonial masters dictate the pace of every government policy. The problem here seems to be about power sharing between the North/ South and 'power' remains a contestable nomenclature. There is a level of difficulty in ascertaining how power works. It is 'puzzling given that the dispute over the function of capabilities and other facets of power enjoys a long and distinguished tradition in the history of international relations theory'.[75] In international politics, realist and neo-realist scholars are inclined to hard or coercive power that 'compel another to do something it does not want to do'.[76] The liberal school builds on the understanding of power in an international cooperation angle that rejects the neo-realists' claim that relative gains are the motivating factor behind cooperation.[77] In power negotiations, the liberals take into consideration that it is between sovereign unequal states and preferences are to be born in mind while bargaining. Apparently the weaker developing states that are in need of certain agreements often give in and carry minimal influence in negotiations.[78] The interaction in the display of power in WTO negotiations has led to asymmetrical outcomes. The rationalisation of power goes beyond typical "resource perspective" to how these powers was structurally accepted by member states in deliberative manner.[79] Power in the WTO is focused on the dispute settlement system. It is a concept that is often defined in opposition to law in International Economic Law literature. Ordinarily, it is associated with politics, whilst law is visualised as non-political.

In contemporary WTO negotiations, the DCs, in a bid to minimise their structural positions join resources with other participating nations through coordination with NGOs such as Third World Network and Oxfam. One way in which developing countries pool their resources together is through coalition building.[80] The focal points in the DDA were special and differential treatment issues, textiles and clothing, agriculture, industrial and manufactured goods, services and development.[81] The Doha conference in 2001 set the agenda whereas the Cancun ministerial conference of 2003 was to amplify the aim and to achieve

[73]See Jawara & Kwa at 275-6.
[74]Ibid.
[75]See Schneider (2005) at 667.
[76]See Barnett & Duvall (2005) at 40.
[77]See Powell (1991).
[78]See Schneider (2005). For a general overview of 'Power' see Guzzini (2005).
[79]See Lake (2004).
[80]See Amrita (2003).
[81]See Doha Ministerial Declaration (2001).

the boost the negotiation deserved. Instead, the ministerial collapsed amidst disagreements. Additionally, the US-EU joint proposal on agriculture was blocked and the G20 (Cains group) under the leadership of Brazil, India and South Africa lobbied against three of the four Singapore issues being included in the negotiating table.[82] Nonetheless, the July package was agreed upon, yet overall negotiation procedures remained virtually the same, with no change in negotiation context until July 2006. The agreement on a date for phasing out export subsidies coupled with the proclamation of an 'aid for trade' package was the only tangible outcome to demonstrate to the developing countries that these rounds were actually for development issues. The power interaction in the WTO negotiations which are characterised by law-based bargaining has witnessed under current negotiations power-based bargaining.[83] WTO DDA negotiations of 9th Ministerial meeting held in Bali 3-7 December 2013 settled on deals with limited relevance to global trade and such deals reached are of greater importance to Industrialised nations as against their counterparts in DCs/LDCs.[84] Recently, the traditional global economic governance is challenged by the new rising powers called the BRICs' such as China, India and Brazil. Coincidentally, these rising powers have taken veritable pathways to power. Whilst Brazil and India created and spearheaded the organisation of developing countries coalitions, which has kept them at the limelight in the WTO negotiations, China's rise to power is associated with its sporadic economic growth.[85] The global economic order has been dominated by the US power and the US has led in the leadership of globalisation and neoliberalism. The trajectory of the rising powers of the BRICs' in global economic governance could affect the global economic dominance of the US. This has been exemplified in the recent successful WTO trade disputes brought by Brazil against US and EU which has given the developing countries (G20), a paramount attention in Doha Rounds trade policies.[86] The Brazil's leadership position in the developing countries Coalition and activism in the WTO meetings has received praise from many quarters. Brazil has become the main protagonists of free trade agenda and advocated for liberalisation of global markets. It could be argued that Brazil's wide advocate of global free market is motivated by its growing export oriented agribusiness sector. This on the other hand could be a strong weapon driven by Brazil against the developed nations and MNCs who have used the WTO neoliberal agenda to milk the DCs/LDCs ailing economy. Nonetheless, Brazil's interest could be informed by development and economic equality strategized to balance the over orchestrated politics of global economic imbalance. By and large, the WTO December 2015 Nairobi Ministerial Conference

[82]The Singapore Issues are competition, Investment, Public Procurement and Trade Facilitation.

[83]In the context of GATT/WTO bargaining, Steinberg has defined law –based bargaining as where "States take procedural rules seriously, attempting to build a consensus that is pareto- improving, yielding market-opening contracts that are roughly symmetrical". Whereas in power-based bargaining, "states bring to bear instruments of power that are extrinsic to rules(instruments based primarily on market size), invisibly weighting the decision-making process and generating outcomes that are asymmetrical and may not be pareto – improving". See Steinberg (2002) at 341.

[84]See Wilkinson, Erin & Scott. (2014).

[85]Hopewell (2015).

[86]Veiga (2005). See also Hopewell (2013).

agreed on a new negotiating mode whereby participation and consensus were brought into WTO trade talks to serve as a way of ensuring trade benefits for DCs and LDCs. However, the trade deals agreed in the Nairobi Ministerial Conference is in tandem with asymmetrical trade deals leaning in favour of developed countries against DCs and LDCs. Although the Nairobi Ministerial Conference has reshaped the future of WTO trade deals to enable trade gains for DCs /LDCs, but the implementation of the Nairobi Ministerial Conference deals to DCs/ LDCs may be a different approach as before.[87].

The reduction of Industrialised Countries trade distorting domestic support is very important to enable DCs get access to not only Industrialised Countries market, likewise to DCs markets. West African Cotton-producing countries suffered extreme poverty because of trade distorting domestic support in the developed Countries.[88] The WTO should implement uniform agriculture policies to all countries and ensure exemptions for low-income countries available investments and import subsidies. The WTO end date agreements of 2013 on parallel elimination of all forms of exemption subsidies should be taking advantage of by the DCs on firmer negotiations in International food aid, exports trading, export financing support. If the impasse on the reform of agriculture continues, the DCs should change their negotiation strategies in the Doha Round or ask for free tariffs like United Kingdom in the BREXIT trade deals with the European Union (EU).[89] The DCs will not be blamed for asking for Special and Differential treatment or reduction of tariffs equating the same level of agriculture subsidies provided for the Industrialised Countries.[90] The DCs should not accept anything lower than the level of tariff reduction accorded to the Industrialised countries. They should not lower their guards and should continue indefinitely asking for reduction commitment on the freight subsidies and marketing costs on export shipments.[91] The DCs must maintain common front insisting on the same level of domestic support of the Industrialised Countries in order to end the present agricultural trade distortions.[92] They should be bold and courageous in WTO negotiations to achieve a world agricultural reform. It will be legitimate if DCs/LDCs take advantage of GATT Article XXIV to negotiate for zero tariffs and zero quota in imports and exports in order to achieve balanced global economic development.[93]

Decision making

In the past, the US, the EU and the Quad were the main decision-makers in the WTO, but new market capacities and new alliances have led to a change in the decision-making process. Thus the emergence of the recent proliferation of

[87]Wilkinson, Erin & Scott (2016).
[88]Igwe (2011).
[89]See Leroux (2017).
[90]See Irwin (2007
[91]Hoda & Gulati (2008).
[92]See Wood (2019).
[93]See Morris (2019).

coalition building[94] and informal meetings of small groups changed the decision-making process[95]. The new negotiation process has changed from July 2004's package; the inner circle are the G6, then the creation of the "Green Room",[96] and lastly the head of delegations (trade negotiation committees). The need to reach consensus on issues of agriculture and non-agricultural market access (NAMA), prompted the creation of the G6.[97] Thus the G6 has become the current inner circle of decision-making of the WTO. The G6 is not an official WTO institution. The meetings have no clear administrative procedure to determine who calls or presides over the meetings, neither does it take minutes. Although the Director General of the WTO could be invited to the meeting, it is not mandatory. In the meetings, the US represent their positions, other participating countries represent themselves or speak on behalf of a coalition: Australia represents the Cains group, Japan the G10, India the G20 and G33, and Brazil the G20.[98] Apart from the G6 or FIPs position as inner–circle decision–makers in WTO, other groups are the 'green room' which are like 'FIPs extended' or the so-called S-12 process.[99] This forum meets either at ministerial or ambassadorial level and committed to a general level or specific matters commonly known as "Room-F-Meetings". This arrangement had been criticised even in Seattle for lacking transparency and segregative. The incidence of Seattle led to intense meetings to create a 'code of conduct' to deal with issues of effective participation and internal transparency which has not been settled. Hitherto, representations in the 'green room' were made by the advanced economies, representatives of coalitions and a few medium sized developed countries. On the other hand, the third group in decision making is made up of groups that are open to all the parties such as the trade negotiation committee and heads of delegations. These groups are so large that they cannot attain the practical negotiation stage. They organise proposals and clarify issues but they cannot engage successfully in complex or contentious issues which ordinarily move to the general membership; whereas negotiations decided on the power economies' level are hardly reversible, with few exceptions.[100]

The incidence can lead to limited contributions by individual members and lack of cohesion between the members. Parties need to be aligned, homogenous and focused on specific interests. Structural power through the evolution of the

[94]See Wolf (2006).
[95]See Croome (1995).
[96]Green Room means a representation of up to 30 WTO member countries invited by the WTO Director General to form a consensus on critical issues of negotiation brought to the WTO as an institution.
[97]The July package agreement was virtually negotiated between the FIPs (Five interested parties: US, EU, Brazil, India, Australia), plus Japan which made up the G6
[98]G10 group are net importers of agricultural products who defend high levels of domestic support and market access protection for a number of products. Key members include the Republic of Korea, Japan, Norway and Switzerland. The G33 are a group of developing countries asking for differential treatment related to food security, sustainable livelihoods and rural development needs
[99]G6 and Norway, Canada, China, Malaysia, Kenya, and Egypt that share information which concerns agricultural subsidies.
[100]Such exceptions are like India's success in Doha ministerial conference to obtain clarification on a decision-making issue in connection with the Singapore Issues and Norways credible argument that granted it chance to introduce a sentence into the July package at a late stage.

WTO into the DDA is the critical element that determines the negotiating position of contracting parties. The negotiating positions are based on market capacities and 'sense of balance' in order to qualify to be invited into the negotiating table.[101] The presence of this kind of forum increasingly results in developing countries adopting a defensive approach to negotiation as they have come to terms with occupying a weak negotiating position in the WTO. Nonetheless, to counter the structural power of the advanced countries in the DDA the building of coalitions between DCs and middle sized developed economies becomes essential. Engaging in coalition building enables contracting parties to improve their bargaining position through alliance building; gain diplomatic clout, acquire expertise through knowledge and resource sharing or simply use coalitions to close the information gap. If they succeeded in doing so, it might strengthen their negotiating power and create better chances of success in achieving their agendas in WTO negotiations. This alliance requires the creation of regional networks: African, East Asian, Eastern and Central European, South American and South Asian networks.[102] Coalitions like in the case of the BRICs can help the DCs strengthen their collective bargaining position, influence negotiation outcomes, and promote effective and democratic decision making in the WTO. To form a successful alliance, the parties require distinctive goals, willingness and readiness of common purpose, and an understanding of one another. Low-income DCs use International Government Organisations (IGOs) such as South Centre, the Commonwealth Secretariat, or NGOs like Oxfam, Third World Network, and Action Aid to support them in negotiations. Generally, countries use coalitions in different ways. For example, a country such as Brazil uses coalition as a matter of having a large constituency to get diplomatic weight, but weaker developing countries enter coalition as a way to exchange information and enhance their level of technical/ legal knowledge. While other DCs use coalitions to put across their message more forcefully, the US and the EU can use, but do not really depend on coalitions as they follow the normal GATT/WTO system. In order to increase political clout, some developing countries may enter into coalitions with a developed country. Coalitions based on political grounds often lack flexibility, homogeneity and the acceptance needed by other parties to engage in negotiations. This arrangement can easily lead to bilateral arm – twisting.[103] Strong coalitions must have uninterrupted systems of information exchange, smooth debriefing, a quasi-legitimised representation, high participating numbers and a proven level of trust. There have been divergent views between African groups on several issues in the DDA except on issues of cotton and trade facilitation. The question is why have the 'development needs' of the DCs failed to be addressed by the WTO? It is argued that the African coalitions and/or DCs are mainly engaged in blocking tactics rather than effectively shaping the WTO agenda. Academic literature on GATT has characterised the role of the DCs in the GATT as potentially defensive and unprepared to make tariff concessions but more interested in getting special

[101]Australia did not qualify to be in the negotiation in Doha for its market access but for its sense of balance as the chair of the cains group to participate.
[102]See Rolland (2007) at 524.
[103]See Amrita (2004) at 424.

and differential treatment concessions.[104] This is far from accurate of the ITO and GATT evolution because the DCs have played a notably active role in shaping the agenda of the GATT/WTO.[105] A conventional academic literature approach is that the WTO has not been able to aid the DCs on three points: (a) that the DCs have played a passive and defensive role in the GATT, (b) that the DCs lack participation in the exchange of concessions and (c) that the DCs have unusually focused on the implementation of special and differential treatment in the GATT.[106] This perspective of reasoning has clouded the understanding of many but is far from the truth. The role of the developing countries in the GATT is neither passive nor defensive, as was emphasised by Michael Finger when he stated that 'through GATT's Tokyo Round that ended in 1978, DCs participation in multilateral trade negotiations was either passive or defensive. Developing countries that had joined the GATT had in large part remained bystanders; many had acceded under Article XXXVI-r(c), which exempted them from having to negotiate concessions in order to enter'[107]. Along this line of argument, other academic writers recognize that the Uruguay Round Agreement was not balanced and that 'developing countries had given more than they got – a concern that the basic GATT/WTO ethic of reciprocity had been violated' The result of this was 'lack of assessment of the impacts of the agreement […]' and that the agreements were 'poorly understood and certainly not quantified'.[108] On the other hand, some DCs' writers have taken a gloomy perspective by saying that the developing countries' majority membership in the GATT/WTO did not help them; rather, it was a weakness.[109] It has also been argued that the DCs in negotiations do choose to remain silent because of their lack of knowledge on the issues or because they feel intimidated by the reactions of the developed nations and their opposition have been described as 'stiff resistance and sudden collapse'.[110] The point is that the DCs lack the technical facilities and organisational negotiating capacity to succeed in multilateral bargains but it does not necessarily mean that they were passive participants in the GATT. This was clearly shown in the active role played by the DCs in formulating formidable coalitions for their development interests that echoed in the beginning of the Doha Round. Nonetheless, the Uruguayan case against 15 OECD members of the GATT in 1961 clearly demonstrated the active participation of the DCs in the GATT.[111] The second reason that prevented GATT addressing DCs' development needs is highlighted above as a lack of participation in the exchange of concessions. Under this premise, Will Martin and Patrick Messerlin asserted that:

> *"the fact that developing countries were not actively participating in the Kennedy and Tokyo Rounds made it much easier for the Industrialised Countries to create*

[104]See Faizel (2008).
[105]See Faizel I. (2007).
[106]See Ismail (2008).
[107]See Finger (2007).
[108]See Ostry (2002).
[109]See Bhagirath (2003).
[110]See Jawara & Kwa (2003).
[111]See Wilkinson & Scott (2008).

> *mechanisms such as the multi-fibre agreement (MFA) targeted against exports from developing countries, to exclude other labour-intensive products from full formula-based liberalisation, and to offer tariff preferences only at the discretion of the importer'.*[112]

This is a misleading assertion since from the early rounds of the GATT, the US and the EC maintained that the DCs be excluded from participation on the principal supplier rule, internal taxes and quotas which invariably excluded negotiations on tropical products and reciprocity.[113] The third point focused on Special and Differential Treatment, Martin and Messerlin stated that:

> *"prior to the Uruguay Round, most DCs had sought to achieve their objectives primarily through Special and Differential Treatment provisions. This was partly as a result of the power of the interest groups in import substituting firms in developing countries' and that 'many of these countries resisted the use of key GATT approaches, such as reciprocal liberalisation and the principle of non-discrimination."*[114]

However, these writers have failed to recognise the concept of MFN- Article 1 of GATT 1947 [115] and Reciprocity argued by the DCs for the conditions of development and interests of DCs to be taken into consideration.[116] Moreover, Part IV of the GATT (1965) and the 1979 Enabling clause formed the background for the Special and Differential Treatment rules of the Tokyo Round which were partially informed by the developed nations' neglect of the special needs of DCs shown by protectionist measures against the latter's exports, mostly of agriculture and textiles. History shows that the DCs participated adequately in the GATT from its inception; of its 23 original members, 10 were DCs.[117] In 1960, GATT had 37 contracting parties, of which 21 were developed nations and 16 were DCs. In 1970, GATT had 77 contracting parties, of which 27 were developed nations and 52 were DCs. In 1987, GATT had 95 contracting parties, of which 29 were developed nations while 66 were DCs. The participation of DCs took a progressive turn as 25 DCs participated in Kennedy Round, 68 in the Tokyo Round, 76 in Uruguay Round while 107 members were representatives of DCs out of the 153 members of the WTO.[118] It has to be appreciated that as at the beginning of the GATT, the majority of the DCs were still under colonial rule or newly independent and in most cases still under the influence of their colonisers or

[112]See Martin & Messerlin (2007).
[113]See Wilkinson & Scott (2008).
[114]See Martin & Messerlin (2007).
[115]Provides that*:"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."* This provision prohibits members from discriminating on products based on source. Joseph Stiglitz described this provision as ineffective and characterised WTO rules as unbalanced, unfair or prejudicial to the development needs of the DCs. See Stiglitz (2000).
[116]See Bagwell, Staiger & Yurukoglu (2020).
[117]See Hudec (1987).
[118]See WTO (2001c).

represented by them, as in the case of Southern Rhodesia (Zimbabwe) and South Africa. Moreover, the framework of the GATT was structured in such a way that it was an 'exclusive club' of westerners with minimal interest in the non-western world.[119] The developing countries were vehemently opposed to the inclusion of services, intellectual property and investment in the GATT and opted for a round that would address industrial products and agriculture.[120]

It is admitted that the developing countries are divided on many issues in the negotiations ranging from Singapore, preference erosion, the use of food aid, the role of Dispute Settlement Body (DSB) and South – South trade. The developing countries have huge reservations about the design of the WTO structure and decision-making in the negotiating committees. Jonas Tallberg has examined this development, stressing the capture of the more important committees lies in the monopolisation of the chair by advanced countries. It is evident that trade negotiations from Kennedy Round in 1960s to Doha Round in 2001 reflected the overpowering influence of the advanced countries through the chair.[121] These rounds have witnessed the brokerage services of the supranational chairman of the Trade Negotiation Committee (TNC). The committee chairman is the director general of the WTO secretariat who plays the role of a central coordinating body of the international trade rounds with the power to 'function as package-deal engineer' and who is responsible for 'Stitching together the package agreements that can secure unanimous adoption by the parties'.[122] The multilateral problem of bargaining further ranges from communicating preferences to exchanging information with large members of the organisation.[123] Nonetheless, Hampson with Hart observed that:

> *"The chief obstacles to multilateral negotiations are complexity and uncertainty: complexity created by the large number of parties to the negotiation and issues on the table, uncertainty heightened by the difficulties of communicating preferences and exchanging information among a large number of participants".*[124]

The system is skewed against developing countries for the protection of the whims of the powerful nations. This situation does not portray the pursuit of common trade policy agenda that would increase growth in the individual countries. The term 'development round' has not helped the developing countries' bargaining power as the notion of 'development' has not been reflected in the rounds: rather it unfolds into contestations. A development oriented round must be based on reciprocity without the logic of conflicts that is deeply embedded in trade negotiations. Whereas, the interpretative framework of the 'development' paradigm should stand as a tower of strength to developing countries' coalitions, such as the G20, G33 and G90.

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[119]See Hudec (1990).
[120]See Croome (1999).
[121]For Kennedy Round, see Preeg (1970); For Tokyo Round, see Winham (1986); For Uruguay Round, see Sjostedt (1986); For Doha Round, see Odell (2005).
[122]See Tallberg (2006).
[123]See Zartman (1994).
[124]See Hampson & Hart (1994) at 23.

Conclusion

It is argued in this writing that the intent of the WTO as an institution is to liberalise international trade, but the question remains to whose advantage? The WTO as an institution is challenged by possible contradictions between its neo-liberal ideology of trade liberalisation or deregulation and its awakening to the realisation that its market policies will be based on strict impartial implementation of trade regulation, keeping in mind its laudable provisions especially as it affects the developing countries[125] This writing has demonstrated grave inequality in WTO implementation policies towards the DCs/LDCs especially as it relates to agriculture which gives the DCs/LDCs comparative advantage over the Industrialised Countries. The WTO restrictive trade system in agriculture should be reformed to ensure sustainable development in the DCs/LDCs and to combat market distortions which breeds global economic imbalance. The WTO global trade liberalisation development approach should be based on objective conjecture of just and equitable global income distribution. This can be achieved through the axiom of 'non-discrimination', 'reciprocity' provided in the GATT agreement, and crystallised in the WTO agreement.

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[125]See Bhagwati & Hudec (1996).

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Towards a Metatheoretical Postmodern Approach to Legal Reasoning

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This paper focuses on legal reasoning, arguing that although methodological theories are important, they are not enough to explain how to reason in law. In fact, because the different philosophical perspectives vary so significantly in their ability to resolve legal conflicts, when a less "adapted" perspective decides a legal question, the results can be disastrous. Thus, this paper inaugurates a new attitude, stating that a general philosophical perspective is the only way out. Relying on a metatheoretical postmodern approach, it argues that logic, analysis, argumentation and hermeneutics are complementary theories that offer a unique perception of law. It concludes that the approach proposed makes possible not only a comprehensive view of the way legal reasoning behaves, but more than this, a proportionate flexibility to both civil and common law systems.

Keywords: *Paraconsistent Logic; Metatheoretical Postmodern Approach; Metatheoretical Perspective; Paraconsistent Deontic Logic; Ontological Hermeneutics*

Introduction

Although legal scholars have devoted much attention to legal decisions, no approach seems to offer a definite answer. Especially when discussing methodology, legal theorists have focused on norms and interpretation of precedents.

In this context, this paper has two main purposes. First, it argues that although methods of legal reasoning are important, they are not a definite answer to the problem. The proposal to reconsider the problem of rationality of judicial decisions through a metatheoretical postmodern approach is very useful for a deeper understanding of the way courts should decide. Second, this paper shows that despite their very dissimilar natures, legislators and judges deal with legal reasoning in similar ways. Relying on a perspective that brings together lawmaking with decision-making, I argue that these two different spheres should converge in their perspectives to reach the best answer possible.

The discussion proceeds in seven parts. Part I concentrates on the reasons to adopt a metatheoretical perspective. Parts II to VI provide a critical presentation of the role that logic, analysis, argumentation and hermeneutics play in the approach. Finally, Part VII proposes a unified approach to lawmaking and legal reasoning.

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Why a Metatheoretical Postmodern approach?

Legal theorists have focused on many perspectives when discussing legal reasoning, such as logic (deontic logic, defeasibility logic, etc.), analysis (linguistic analysis, economic analysis, etc.), argumentation (topical–rhetorical conception, procedural conception, etc.) and hermeneutics (epistemological hermeneutics, ontological hermeneutics, etc.). However, no methodological theory has achieved massive acceptance among legal scholars, because usually methods of legal reasoning, in combination with substantive law, determine the outcome of legal cases. The discussion about the proper method is often an implicit discussion about the desired outcome of a case. Therefore, I propose in this article a look "from the outside". Striving for a neutral approach is useless when based in the outcome of a case. Thus, the interpreter has to avoid using methods to pursue a specific outcome. Furthermore, methodological theories have not been sufficient. I believe a general philosophical perspective is the only way out. Thus, this work intends to build a broad perspective of legal reasoning as a metatheoretical postmodern[2] approach that adopts a plurality of viewpoints, avoiding the thesis that the process of legal cognition is purely creative and hence completely undetermined.[3]

One should observe that the perspectives chosen to compose the approach, although subjective to some extent, are not arbitrary. If one were to compose a list of the main philosophical conceptions of reasoning, it would include logic (the formal use of statements in order to determine whether arguments are coherent and can yield adequate results), analysis ("[…] *the process of breaking up a concept, proposition, linguistic complex, or fact into its simple or ultimate constituents.*"[4]), argumentation (a rational activity aiming to convince an audience about the acceptability or refutability of propositions), and hermeneutics (a general theory of interpretation). My claim is based on the search for a coherent theory of legal reasoning that can be "universal", and since single methodologies have not been sufficient, I believe a combination of the perspectives is a possible way out. Logic, analysis, argumentation and hermeneutics are complementary theories of legal reasoning that offer unique perceptions to both civil and common law systems, avoiding the problem of different legal cultures.

Therefore, in the metatheoretical approach the different perspectives (logic, analysis, argumentation and hermeneutics) should be applied in distinct phases (so-called "layers") of legal reasoning. There is no hierarchy between them. For instance, a case could be first seen though logical methods, which is "the nearest to the facts"; next, one could try to solve the controversy with analysis; then, if they previous layers were not enough, one could adopt an argumentative perspective; finally, if the previous perspectives have failed, the interpreter can act "hermeneutically". Thus, the first layer usually solves the case with logical methods, guaranteeing predictability and juridical security. However, as the

[2]Postmodernism means here a reaction to modernism, an attempt to deconstruct all paradigms that ignore the fusion of ontological-epistemological perspectives of legal reasoning.
[3]See Kutz (1994) at 1030.
[4]Audi (1999).

interpretative task is infinite, a new moment will ask for a different perspective – analysis. This dialectical-spiral perception reaches, in the next layers, argumentation or hermeneutics without ignoring the historicity of understanding and, more importantly, constructs the meaning of norms from a fusion of horizons.

Note that I am not arguing that the simplest cases could be always solved with logical and analytic methods, that more difficult cases usually demand argumentation techniques and the hardest require hermeneutic intuition. Moreover, I am not adopting Alexy´s theory either, which combines logic, analysis and argumentation.[5] I propose, instead, the combination of different perspectives in a concrete conception of legal reasoning that should be, at least, coherent and rational, since *"it is impossible to separate completely legal epistemology and ontology."*[6]

These preliminary considerations allow concluding that there is no unique, universally acceptable methodology of legal reasoning. Nevertheless, my scheme is still important because it is able to adapt itself to evolution of law over time. Additionally, the metatheoretical approach does not establish any hierarchy among the different perspectives (logic, analysis, argumentation and hermeneutics), since the order in which they are applied is determined by the individual case - although it suggests a most-common way to search for the correct decision.

The debates among legal scholars about legal reasoning have reached high complexity levels, incorporating the hermeneutical turn and argumentative theory achievements, but they still demand a new approach that is no longer limited to methods, but to the foundation and legitimacy of law and philosophy themselves.

Paraconsistent Logic as the first layer

First, there is no agreement over what the logic of legal reasoning really is. Legal scholars have adopted many different systems, such as deontic logic, defeasibility logic, etc. None of these offer a definite answer to jurists. I do not intend here to develop a general analysis of what the role of logic should be in legal reasoning, which would lead to vagueness and unpredictability. Although formalistic systems are usually incompatible (e.g., classic logic and defeasibility logic), there is a type of logic that has been ignored by most jurists and could "fit" law's special features, named paraconsistent logic. Differently from other logical systems, paraconsistent logic formalises juridical dilemmas or conflicts that arise in "real" law. The importance is easily seem because it does not adopt the principle of non-contradiction, which holds that contradictory propositions cannot both be true at the same time (e.g., the statements "*B is C*" and "*B is not C*" are mutually exclusive). In other words, it is possible to reason with inconsistent "information" (e.g., one court decides in one direction, whereas another decides differently) in a controlled way, since "contradiction" in paraconsistent logic is not really contradiction; it is merely a subcontrary-forming operator.[7] As a result,

[5]Alexy (2005).
[6]Stelmach & Brozek (2006) at 217.
[7]See Slater (1969).

paraconsistent logic makes it possible to formalise inconsistent but non-trivial theories. It allows one to distinguish between inconsistent theories and to reason with them, allowing a close dialogue among analysis, argumentation and phenomenological hermeneutics. Contradiction between judicial decisions is then philosophically challenged, precisely because paraconsistent logic accepts different forms of inconsistency.

For the purposes of this study, one should realize that Godoy[8] adopts a DL paraconsistent calculus that discharges the disjunctive syllogism - $(\phi \vee \psi) \wedge \neg\phi \Rightarrow \psi$. He departs from a propositional calculus named C1, based on the positive logic of Hilbert-Bernays, and changes some of its basic axioms. Godoy structures the DL paraconsistent, especially the Cn hierarchy[9], adding the postulate $\alpha \vee (\alpha \rightarrow \beta)$ and "De Morgan Laws", $\neg(\alpha \wedge \beta) \leftrightarrow (\neg \alpha \vee \neg \beta)$ and $\neg(\alpha \vee \beta) \leftrightarrow (\neg \alpha \wedge \neg \beta)$. The dialectical original about the definition of unity of contraries also assumes a dynamic character, because juridical norms are not static, but always subject to change. Finally, Godoy shows how the formalization of law problems is compatible with analysis and hermeneutics.[10] As an example, one could take the case of anencephaly abortion. Abortion is a crime against the "potential life" of the foetus and, in Brazil, it is only authorised in cases of rape or to save the mother's life. During four months, a preliminary injunction was granted by Supreme Court Justice Marco Aurélio Mello, authorizing a woman to decide whether to keep a foetus with anencephaly.[11] After various months, the court held that mothers have the right to decide. Anencephaly allows the political debate between unconditional foetal right to life and women's rights to health, dignity and to decide what to do with their bodies. Most countries allow women to abort in case of an unviable foetus. Brazil, however, does not. When it comes to abortion, the predominant view in the political arena is conservative.[12] In this complex context, paraconsistent logic can play an important role, by enabling one to reason over propositions that are in direct contradiction, without trivialisation of the system. Thus, by adopting an L1 system, Queiroz[13] developed the formula $((g \wedge f) \Rightarrow (F_j\ a)) \wedge ((g \wedge f \wedge a) \Rightarrow O_j s)$ to represent the structure of a norm that prohibits abortion and the formula $((g \wedge f \wedge m) \Rightarrow O_j t) \wedge (g \wedge f \wedge m \wedge \neg t \Rightarrow s)$ to represent women's right to life. The propositional symbols have the following meanings: 1) "g": there is pregnancy; 2) "f": the foetus is alive; 3) "a": intentional termination of pregnancy; and 4) "s": there is sanction. Queiroz also systematises the whole system as $((g \wedge n) \Rightarrow O_j v) \wedge (g \wedge n \wedge \neg v \Rightarrow s)$, balancing the deontic commands $O_j t$[14] and $O_j v$[15] in the simplified formula $(d \Rightarrow t) \wedge (w \Rightarrow v)$.

[8]Godoy (2009).
[9]See Costa (1993).
[10]Godoy (2009).
[11]See Diniz & Velez (2008).
[12]Diniz & Velez (2008).
[13]Lacerda e Silva (2012).
[14]The right to life of the fetus imposes an obligation to prevent threats, which is represented by Ojt.
[15]Ojv means the right to end the fetus' life.

I do not intend to go deeper into Queiroz's analysis[16]. I merely stress that complex cases can be represented in a logical system. In other words, it is possible to identify and isolate the most important arguments used in a certain case through a logical system and reason about the subject matter. Paraconsistent logic provides an in-depth understanding of the case and could be used to decide accordantly with the rules and principles that regulate a legal system.

It is not the aim of this work, however, to go further into paraconsistent deontic logic[17]. One has to realise, however, that syllogism, analogy and other types of logic are not enough to understand the complexity of legal reasoning. More importantly, paraconsistent deontic logic is compatible with analysis, argumentation[18] and hermeneutics. In addition, Perelman's new rhetoric holds that the arguments used do not have to be logically correct – although logic could be used as a *topoi* –, since even invalid arguments could be rhetorically effective.[19] Thus, logic does not occupy a special position; it is a *topoi* adopted as the first layer in the metatheoretical approach to understand the textual meaning. It could be insufficient to reach a final decision. Logic somehow formalises legal reasoning, although it is not able to guarantee the right answer. It does not consider vagueness of textual propositions, the peculiarities of the case and social values (justice, predictability and policies).

Second Layer: Linguistic Analysis

Linguistic analysis is an anti-formal method that plays an important role, holding the importance of language examination to make serious philosophy. Thus, the second layer of the metatheoretical approach takes into account linguistic analysis, since it is concerned with the pragmatic dimension of language, allowing one to understand the rules that govern everyday experience and construct a system of interconnected meanings.[20]

In fact, the linguistic-analytical perspective adopted here reduces a case to ordinary language. This "conceptual scheme" makes the approach strong by easily estimating results and avoiding arbitrariness. In this context, the Speech Acts Theory explores the ways certain concepts "function" in language.[21] A speech act is an utterance that has a specific function in language, i.e., "*the performance of several acts at once, distinguished by different aspects of the speaker's intention: there is the act of saying something, what one does in saying it, such as requesting or promising, and how one is trying to affect one's audience.*"[22] Conventional procedures (including in law) determine the necessary conditions of a successful action (e.g., "I do" as an answer to "Do you take this

[16]For further details, see Lacerda e Silva (2012).
[17]See Costa & Wolf (1989); Costa & Wolf (1985).
[18]It is important to say that logic has a close connection with argumentative theories. See MacCormick (1992), and also MacCormick (2005).
[19]See Perelman & Olbrechts-Tyteca (1969).
[20]See Stelmach & Brozek (2006).
[21]Austin (1975) at 1962b.
[22]Bach (1998).

woman as your wife?").[23] In some cases, however, performatives turn out to be unfortunate.[24] Austin differentiates performative acts *("an expression reducible, or expandable, or analysable into a form or reproducible in a form, with a verb in the first person singular present indicative active"*[25]) and constative acts (*"realty description"*), proposing a "paraphrase criterion" that differentiates them.[26] After a careful analysis, he concludes that his attempts to formulate a criterion do not succeed, since every typology of infelicities acts underlies vagueness.[27]

Thus, Austin develops a more complex conception of so-called speech acts as "a basic unit of communication". In this new approach, speech acts are classified in three different categories. A locutionary act reflects the performance of an utterance. It is the act of saying something and also its verbal, syntactic and semantic aspects. An illocutionary act means the socially valid verbal action of an utterance, such as ordering, apologizing, etc. Finally, a perlocutionary act reflects effects and consequences, such as enlightening, inspiring, etc.[28] The method is a good example of linguistic analysis, although Searle criticises the differentiation between locutionary and illocutionary acts, arguing that meaning is an illocutionary force.[29] He introduced the notion of an "indirect speech act", when *"the speaker communicates to the hearer more than he actually says by way of relying on their mutually shared background information, both linguistic and nonlinguistic, together with the general powers of rationality and inference on the part of the hearer."*[30] In other words, the subject intended to be communicated might be different from the real meaning. In connection with indirect speech acts, Searle presents two categories of illocutionary acts: primary and secondary. The primary illocutionary act is the "indirect one", which is not *"literally performed"*. The secondary illocutionary act is the "direct one", performed in the literal meaning of the sentence.[31] Consequently, one has to put "*forward hypotheses concerning the problem […], and test them on examples motivated by intuitions regarding the use of ordinary language."*[32]

In my "framework", one should not disregard presuppositions that allow the interpreter to reconstruct the system of values and institutions assumed by lawmakers.[33] An analysis of shared linguistic conventions becomes indispensable to understand what the law is and what it ought to be.[34] Turning to the example of anencephalic foetuses, one has to realise the principles and rules involved in the case and the locutionary acts that reflect the performance of the utterances. First, I

[23]Austin (1975) at 607-608.
[24]Austin (1975) at 607-608
[25]Austin (1975) at 607-608.
[26]Austin (1975) at 607-608.
[27]See Stelmach & Brozek (2006).
[28]Austin (1975) at 607-608.
[29]John R. Searle, A Taxonomy of Illocutionary Acts, in Günderson, K. (ed.), *Language, Mind, and Knowledge*, (*Minneapolis Studies in the Philosophy of Science*, vol. 7), 344-69 (1975).
[30]Searle (1975).
[31]Searle & Vandervecken (1985) at 184.
[32]Stelmach & Brozek (2006) at 70.
[33]See Sarkowicz (1995).
[34]Grabowski (1999).

should mention article 128 of the Brazilian Penal Code: *"There shall be no punishment of abortion practiced by a doctor: I - If there is no other way of saving the mother's life; II - If the pregnancy results from rape and abortion is preceded by the mother's consent or, if incapable, that of her legal representative."* It is clear that the Penal Code does not expressly allow the abortion of anencephalic foetuses. However, one should not ignore the constitution and illocutionary acts. In fact, the issue is deeply related with the influence of religious lobbying (illocutionary act) and the concept of the beginning of life.[35] Thus, the Brazilian Supreme Court held there is no absolute right to life, mentioning article 5, XLVIII, of the Constitution, which allows the death penalty during war. The court stated, to balance rights, that the foetus's right to life would cede to human dignity, sexual freedom, autonomy, privacy, physical, psychological and moral integrity, and health, according to article 1, numeral III; 5, main section and numerals II, III and X; and article 6, of the Constitution. In other the words, the court adequately adopted an "analytic approach", paying attention "[…] *to the mutually shared background information, both linguistic and nonlinguistic, together with the general powers of rationality and inference […]"* [36], to avoid any influence of religious aspects and adequately "*setting-up of a linguistic system and the placing of [the] expression[s] in the system."*[37] Therefore, the importance is quite clear of the second layer in analysing the language of statutes and the statements of witnesses, defendants, plaintiffs and other evidence presented to the court as linguistic resources to establish coherence in judicial decision-making, because it combines rhetorical and dialectical aspects that allow one to evaluate legal argumentation from the perspective of a rational critical discussion.[38]

Although linguistic analysis is strong and says something about how language is used, it might be insufficient to solve hard cases. It is difficult to accept that a single conceptual scheme would "fit" all legal reasoning. When constructing arguments, one should take advantage of ordinary language, rhetoric and hermeneutics. Thus, linguistic analysis should be a layer to construct the text's meaning, a second level approach that takes place when paraconsistent logic is not enough. Moreover, it dialogues with phenomenological hermeneutics, since the latter proposes an alternative ontology that does not contradict analysis. In sum, *"[a]nalysis without hermeneutics is empty, while hermeneutics without analysis is blind."*[39]

Rhetorical Conception of Argumentation and Legal Discourse: The Third Layer

Argumentation gives an unequivocal status to practical discourse, aiming at an epistemological equilibrium between both logic and analysis. When one faces a

[35]See Diniz & Vekez (2008).
[36]Searle (1975).
[37]Rudolph Carnap *apud* Stelmach & Brozek (2006).
[38]See Stelmach & Brozek (2006).
[39]Arthur Kaufmann *apud* Stelmach & Brozek (2006) at 14.

hard case and logic/analysis is not sufficient, the third layer in the search for the correct answer is argumentation. Undoubtedly, argumentation does not ignore logic or analysis. It aims to make possible a practical discourse, through *"logical, analytical and rational justification."*[40] The main ambition is to describe conditions that must be satisfied by each practical rational discourse.[41]

Perelman[42], as one of the main representatives of argumentation theories, holds that judges' discourses are models to other practical discourses and considers topic an essential method. In his chief work, the Polish law-philosopher differentiates "common places" (*loci communes*) – values that allow a speaker to formulate maxims and general rules for a given discourse – and "special places" (*loci specifici*) – linked with specific disciplines, such as law's general principles – resulting in a theory of argumentation called "the new rhetoric".[43] Its goal is to convince a universal audience, composed of all well-informed and reasonable people, according to the criterion of persuasiveness.[44] Perelman ties topic and rhetoric to form a coherent legal reasoning, emphasizing that the arguments must be in accordance with Kant's categorical imperative and the reason must be valid for the whole society.[45] In the metatheoretical perspective, the judge has the important role of bringing common places to the consciousness of the ones who are going to be submitted to the decision without using formal logic. In other words, the rationality of the argumentation stems from the agreement for an abstract and ideal institution, a so-called universal audience. The audience, in terms of judicial decision-making, is always universal, because it is not enough for judges to convince the parties involved (particular audience). They also have the duty to convince the entire human community affected by the decision.

Back to the case of anencephalic foetuses, Brazil's Supreme Court constructed ethical and juridical arguments in accordance with Perelman's approach and considering medical particularities of anencephaly. Aiming to convince a universal audience composed of all well-informed and reasonable people, the court stated that the decision was taken considering that Brazil is a secular federation (i.e., a State that separates religion and government). By adopting this argument, the justices – in accordance with Kant's categorical imperative – aimed to confer the idea of "moral neutrality" to the judgment, avoid criticisms based on ethics and oppose Catholic values related to the beginning of life. Furthermore, the Supreme Court promoted public hearings and collected scientific data to support women's right to decide, arguing that the perpetuation of pregnancy against their will is "cruel treatment of the State". The decision also tried to bring common sense to the consciousness of society by asserting arguments that could be expressed in public terms and based on constitutional principles/rules.[46]

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[40]Stelmach & Brozek (2006) at 70.
[41]This explains why argumentation theories usually are based on logic and analytical schemes, avoiding the absolutes of both positivism and relativism.
[42]See Perelman & Olbrechts-Tyteca (1969).
[43]Perelman & Olbrechts-Tyteca (1969).
[44]Perelman & Olbrechts-Tyteca (1969).
[45]See Stelmach & Brozek (2006).
[46]See Diniz & Velez (2008).

However, the complexity and openness of legal discourse can make the third layer insufficient, so one may also need to use a hermeneutical approach. That is, the logic-analytic-argumentation perspective could demand, in specific cases, a broader view to produce an adequate theory of legal reasoning, since it would be too narrow and hermeneutics would be too wide if detached from the previous perspectives.

The Fourth Layer in Legal Reasoning: Ontological Hermeneutics

In hard cases, one might be unable to reach a final answer – even though with no method to assert its correctness – through the approaches previously suggested, so hermeneutics has an important role in the process of legal reasoning. As I have already demonstrated, the perspective (e.g., logic, analysis, argumentation and hermeneutics) depends on the circumstances of the case and the habits of the interpreter. In most common cases, however, it should be adequate first to use logic; secondly, analysis; thirdly, argumentation; and finally, to adopt hermeneutics, although the order is not pre-determined in the spiral of comprehension. What the jurist cannot ignore is the metatheoretical view, since separately these perspectives lead nowhere.

Universalism in legal reasoning is intimately connected with the fundamental problem of understanding and the need for this approach arises especially in hard cases, where the standard perspectives do not suffice to search for the correct decision. In this context, ontological hermeneutics sees understanding as the universal point of departure for all cognitive human activity, i.e., *"the existence of being"* (*Dasein*), without discharging logic, analysis and argumentation in previous/later stages. Understanding is no longer a method and the cognitive "subject-object" relation is left behind, since phenomenological hermeneutics enables the junction of both objective and individual experiences.[47] By abandoning the quest for truth and method, Gadamer asserts that hermeneutics is a philosophy (more specifically, a mode of being) since the *"only being that can be understood is language."*[48] He describes the conditions under which understanding is possible and embraces three inextricably and usually divided aspects: understanding, explanation and application.[49] Understanding is realised through interpretation and the essence of interpretation is expressed in the application of law. In other words, Gadamer demonstrates that interpretation and application are parts of the process of understanding and all of them constitute the hermeneutical experience of the being.[50] Furthermore, any understanding is historically situated (*historicity of comprehension*), allowing one to be open not only to the past (*tradition*), but also to the present and to the future.[51] Tradition is central in Gadamer's approach, because understanding a subject is not a subjective event,

[47]See Streck (2010) at 699.
[48]Gadamer (1990).
[49]See Gadamer (1990).
[50]See Gadamer (1990).
[51]See Gadamer (1990).

since it is always influenced by time. Comprehension does not consist merely of a psychological state, but a shared institutional fact with unity of sense. When reading a text, one anticipates that it is perfectly meaningful. However, interpreting is a historical phenomenon rooted in an ever-changing tradition, which makes the hermeneutical process infinite.[52] Thus, with phenomenology, transcendental consciousness detaches itself from objects of the empirical world, despite not ignoring them in the task of understanding. That is the great contribution of philosophical hermeneutics: a critical and analytical thinking, *"previously excluding any imaginable doubt as meaningless.*"[53] It allows the interpreter to make an analysis of the case as a pure phenomenon, inquiring about the very foundation of the norm and its rationale.[54]

Thus, the phenomenological approach abandons the hermeneutic circle and moves to a new universal perspective, a so-called *spiral hermeneutic*, which considers the importance of historicity, the concept of pre-judgment (*Vorurteil*) and the link between the elements in the process of understanding (*linguistic character of understanding*).[55] When one enters in *interpretative situations*, one does so with all legal knowledge and the legal pre-understanding of institutions. Hermeneutics is universal not only because of the problem of language, but also due to the infinite task of hermeneutical experience in the search for cognitive unity and the correct legal decision. In sum, it is present at all levels of cognitive activity of jurists and deeply related with logic, analysis and argumentation.[56]

In this context, legal reasoning is the search for the correct answer through the hermeneutical experience of understanding (*concretisation*), applying an understood legal context to a concrete case that steams directly from being.[57] The essence of law is concrete/historical and can only be found in *applicatio*, since ontological hermeneutics has replaced objectivity with the historicity of understanding.[58] Unlike legal positivism, the metatheoretical approach sees legal reasoning as a spiral construction of the historical act of understanding. It adopts a postmodern perspective by deconstructing all paradigms that ignore the fusion of ontological-epistemological perspectives. Legal reasoning, thus, is the understanding

[52]Gadamer (1990).
[53]Husserl (1908) at 13.
[54]Accordingly, Streck (2010) asserts that *"The common understanding of day-to-day legal hermeneutics has its roots in the discussion that led Gadamer to make an incisive criticism of classic hermeneutics, in which interpretation is understood to be the product of an operation performed in parts (subtilitas intelligendi, subtilitas explicandi, subtilitas applicandi, that is, first know/understand, later interpret, and then apply). The impossibility of separating these elements results from the impossibility of the interpreter first to "extract" from the text "something that the text contains within itself," a species of Auslegung,3 as if it were possible to reproduce meanings. In contrast, Gadamer's philosophical hermeneutics insists that the interpreter always attributes meaning (Sinngebung). The event of interpretation occurs as a result of a fusion of horizons (Horizontenverschmelzung), because understanding is always the process of fusion of the supposed distinct horizons of the interpreter and the rule."*-
[55]See Gadamer (1990.
[56]See Stelmach & Brozek (2006).
[57]See Kaufmann (2010).
[58]See Streck (2010) at 699.

of the human person, historical influences and his/her openness horizons to the future.[59]

Turning to anencephalic foetuses, one has to consider that hermeneutics was immersed in the previous "layers". Well, as I have already emphasised, interpretation and application are parts of the process of understanding and all of them are part of the hermeneutical experience of being. Thus, to apply norms through logic and analysis, one has to simultaneously interpret and understand them. Furthermore, the phenomenological approach adopts a *spiral hermeneutic*, which considers the importance of historicity, and consequently the task of understanding is infinite. In other words, even though the court could have held previously, in a different context, that the abortion of an anencephalic foetus was unconstitutional, the new hermeneutical experience allows a shift from the unconditional foetal right to life to women's rights to health, dignity and autonomy. In sum, although it is impossible to assess if one has reached a definite and correct decision, historical influences and society's openness to the future allowed a decision that challenged the religious paradigm that was prevailing in Brazil.

Legisprudence and *Applicatio:* Unifying Lawmaking and Legal Reasoning

Not only do judicial decisions have to be rational, lawmakers have a duty to reflect about the consequences of statutes and laws enacted. More than simply following the rules of the constitution, many legal scholars have tried to establish principles to measure the quality of legislation (e.g., duty to establish the facts, to achieve balance, prospective evaluation, to consider future circumstances and retrospective evaluation).[60] Nonetheless, legislation and legal reasoning inherently involve choices, so both reflect decision-making processes. In other words, rationality in legislating affects legal decisions. Thus, poorly reflected statutes and laws can generate unreasonable judicial decisions.

To avoid such "undesired decisions", I argue that legislators must adopt a logic-analytic-argumentative-hermeneutical point of view.[61] The legislative power cannot be exercised under purely volitional aspects. Rationality in legislating should be an informed choice about the effects on legal reasoning.[62] Lawmaking and judicial decisions are processes in which the same reasoning has to be adopted to guarantee predictability and rationality. Courts adopt a logic-analytic-argumentative-hermeneutical approach shared with legislators, which allows coherence in and between both decision-making processes. In short, judges and legislators have to reason in a similar vein to reach integrity, which is only possible though a unified approach to lawmaking-legal-reasoning.

[59]See Stelmach & Brozek (2006).
[60]Gusy (1985) at 292-295.
[61]See Wintgens (2000).
[62]See Wintgens (2000).

Conclusions

The fact there is no method guaranteeing that interpreters will reach the correct answer does not mean they are free to choose norms' meanings.[63] Judges should aim for the correct answer; otherwise law would lack legitimacy and one could question its autonomy over arbitrariness.

In this paper, I do not propose a method. Gadamer has shown that methods are not able to achieve truth by themselves. However, one should realise that by adopting a single philosophical approach to legal reasoning (logic, analysis, argumentation or hermeneutics) is not enough, as practice has demonstrated so far. A serious perspective requires a strong framework and the challenge is to implement it in a functional manner. Thus, I propose a pluralistic approach, a so-called logic-analytic-argumentative-hermeneutical process, weighing the priority of norms and precedents as a metatheoretical postmodern philosophy, not only due to its simplicity, but also because of the versatility of the model. An increasing challenge is brought to the functioning and integrity of legal reasoning that magnifies the importance of this approach.

The four layers do not ignore the principles of coherence (the final decision must be the most coherent in itself and with the previous decisions, although, as paraconsistent logic has shown, this is not a condition of the existence of law), "living reasoning" (the decision is not limited to itself, but part of humans' historical condition), adequacy (the decision should take into account all relevant circumstances to the case), normative density and functionality (a decision must justify itself in a reflective and rational way).

I do not intend to give a final answer about the subject in this short work. However, ignoring a metatheoretical postmodern approach means assuming inferior legal reasoning. In fact, because the different philosophical perspectives vary so significantly in their ability to resolve legal conflicts, when a less "adapted" approach is applied to decide a legal question, the results can be disastrous. The goal, however, is to provide a new perspective that might change this panorama.

It is not only a methodology, but also a new perspective that accomplishes legal reasoning. Single philosophical approaches are not enough. A metatheoretical postmodern perspective makes possible not only a comprehensive view of the way legal reasoning behaves, but more than this, proportionate flexibility to both civil and common law systems.

The discussion, from now on, is not whether a logic-analytic-argumentative-hermeneutical approach can change the way legal reasoning sees itself, but to implement its contributions. Risks do exist. However, it is necessary to see how far the approach can contribute so that sound legal reasoning triumphs.

[63]See Streck (2000) at 685-688.

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Hypothesizing a New Standard for Environmental Injunctions

By Kalpana S. Murari[*]

Environmental litigation expands into economic activities that contribute to global warming and promotes inequitable distribution of natural resources. In the context of climate change litigation, international courts have consistently held that governments need to act on climate change and strive towards sustainable development. Courts are expected to act proactively and provide long-term solutions to environmental problems and address climate change impacts by ensuring compliance of legislative norms. Courts exercise discretionary powers when granting injunctive relief that provide a threshold for courts to intervene and guide economic activities of a nation towards sustainable development. Courts need to protect the legislative intent of the executive, preserve fundamental rights of parties not present before the court while preventing any injury to the defending party by protecting their rights under law or in equity. In the absence of statutory prescriptions for testing environmental harm, courts have established standards for granting interim relief, to ensure there is no abuse of powers to grant injunctions and that such orders are not set aside on grounds of abuse of judicial discretion. This paper prescribes a single, uniform and sufficient standard that calls for 'Natural Capital' accounting by federal agencies and private businesses that exploit natural resources for commercial purposes.

Keywords: *Environmental injunctions; Natural capital; Natural Capital accounting; Injunctive relief; Precautionary principle*

Introduction

Environmental litigation was a movement started by socially conscious citizens, who, with increasing knowledge and awareness on environmental issues, believed that economic development of a nation should be intrinsically linked to sustainable and optimal allocation of its natural resources. The movement was meant to serve citizens in the most economically efficient manner that minimises negative impacts of business activities, reduces waste generation and increases resource efficiency. Any form of imbalance in the management and distribution of natural resources can be set right by environmental litigation that complement existing state actions to enforce compliance by private and public entities of statutory mandates. The recent phenomenon of expanding environmental litigation into climate change is essentially a call for action by governments on climate change, a contentious topic that political question doctrine could well insulate. Political question doctrine disables courts' authority on deciding issues that are

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within the purview of the Executive and the Legislature that are not entirely justiciable. There are no judicial grounds to dismiss cases on natural resource management and climate change on grounds of the political question doctrine. Environmental litigation propels economic growth at the micro-level by forcing businesses to adopt business practices that are sustainable. Courts are expected to provide long-term solutions to environmental problems that eventually tackle climate change impacts by enforcing legislative norms.

This paper discusses at length the various standards applied by the courts in the United States in deciding preliminary injunction pleas under the National Environmental Policy Act (NEPA) and related laws. It discusses the reasoning behind the call for a uniform federal standard that may be applied to preliminary injunctions pleas under laws relating to the environment. The paper embarks upon a discussion on pioneering research work on the jurisprudence of environmental injunctions, taking up extensive discussion on standards applied by federal and state courts. The judicial review of some of the landmark cases in the United States explains the inconsistency and ambiguity evident in the application of standards by the courts. This paper hypothesises the usage of a universal standard in preliminary injunction pleas. It, further expounds the theory as to how the suggested standard can serve as a tool for courts to ultimately address climate change impacts.

Injunctions

Injunctions as court orders command the nonmovant or the defendant to do or abstain from doing a particular action, primarily to impede the incidence of a threatened wrong and prevent future violations. Injunctions are issued by courts exercising their discretionary powers under equity jurisdiction. As such, injunctive relief protects the legislative intent of the Executive and preserves the fundamental rights of those parties that are not present before the court, which effectively takes care of the public interest factor. The first principle of injunction law is that one does not obtain injunction to restrain actionable wrong for which an award of damages is the proper remedy. Similarly, injunctions shall not be granted in case of non-existence of a legal injury or when the plaintiff alleges a mere inconvenience, harassment on a frivolous note and when the remedy lies in the hands of the plaintiff. "The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to preserve the property in dispute in status quo until the final hearing or further orders are issued."[1]

Preliminary injunctions are equitable remedies issued after an initial hearing by giving notice to the defending party and are effective *pendente lite.* Such orders prevent injury to the defending party and protect the parties' rights under prevailing law or equity. It is issued on the premise that the plaintiff has established a *prima facie* case against the defendant and concluding that matter in dispute requires a detailed enquiry for a permanent injunction. Preliminary

[1]Kerr (1889).

injunction orders preserve the *status quo* on the relative positions of the parties until a full trial is conducted on the merits of the case to determine the existence of a right by hearing at length on substantial questions of fact or law.

A preliminary injunction is available in the absence of an adequate legal remedy. The adequate remedy test has been expounded in forms that differ as to what burden the plaintiff must meet: it must be shown that he has exhausted his remedies at law; that "the refusal of a court of equity to interpose would, from the insufficiency of legal relief, or the imperfection of the legal procedure, work a substantial injustice to the litigant party under all the facts of the case", or merely that the remedy at law is not as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."[2]

Preliminary orders seek to preserve the *status quo* that equity would not disturb; balancing of the hardships and the probabilities of success on merits will dictate that the *status quo* should not be disturbed by the preliminary injunctions.[3] The concept of *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to the either party at the conclusion of the trial.[4]

Law relating to interlocutory injunctive relief is common law based on procedural rules that are presently insufficient to deal with the complexity in protecting the environment and tackling climate change. A motion for a preliminary injunction is a common recourse taken by environmental plaintiffs to prevent imminent and irreparable injury to the plaintiff and the environment due to actions of the defendants. Presently, courts are moving away from issuing automatic injunctions except on proof of blatant violations of statutory provisions.

In the absence of statutory prescriptions for testing environmental harm, courts have established standards for granting interlocutory injunctive relief, as a means to ensure that there is no abuse of discretionary power. The courts apply these standards for granting interlocutory relief in the belief that valid and speaking orders cannot be set aside on the grounds of abuse of judicial discretion, although there is no clarity on the standard for exercise of that discretion. When these standards are applied on a case to case basis, there emerges varying degrees of risk to parties and varying levels of urgency demonstrated by the parties during the hearing that indicates discordance among courts on applying unclear standards. The courts generally ascertain if the plaintiff has an adequate remedy at law and has a reasonable chance of succeeding on merits, whether the plaintiff will suffer irreparable harm if the injunction is denied, whether the defendant will suffer irreparable injury and legal rights violated if injunction is actually granted. Finally, the court makes a finding on the impact of injunction on the public interest factor by taking into account the interests of non-parties to the injunction plea. In any case, the courts do not expect to establish all factors during the preliminary hearing but adopt a sliding scale approach by weighing in the potential harm to the parties taking into consideration the public interest factor.

[2]Developments in the Law: Injunctions (1965) at 997, 998.
[3]Ibid. at 1057.
[4]Ibid.

Under the Federal Rule of Civil Procedure 65 of the United States neither lists out the circumstances in which a preliminary injunction may be granted nor guidelines for obtaining an injunction. The rules do not confer subject-matter or personal jurisdiction on the court. Therefore the decision falls entirely within the discretionary power exercised by the Court. Courts grant a preliminary injunction to maintain the *status quo* on the relative positions of the parties, emphasising on the court's authority to render a speaking order and minimising the risk of error that may jeopardise the legal rights of the parties. The Supreme Court of the United States is yet to articulate a consistent standard for granting or denying preliminary injunction. This has led to adoption of and varying standards by the lower courts. It further cautions district court to apply a stringent standard in deciding in favour of the plaintiff's motion for preliminary injunction by weighing carefully the interests of both the parties concerned. Since there is no standardised formula, a party seeking a preliminary injunction in the federal courts must demonstrate irreparable injury and insufficient legal remedies available otherwise.

In such situations, several Circuit Courts apply a traditional four-part standard:

a) Whether the plaintiff will probably succeed on the merits;
b) Whether irreparable harm to the plaintiff would result if the injunction is not granted;
c) The balance of harms between the plaintiff and defendant if the injunction is allowed; and
d) Whether the injunction will have an impact on the public interest.[5]

The Factors of Inconsistency and Ambiguity

Professor *Leubsdorf* in his article[6] states that the absence of rationale for the standard governing interlocutory injunctions has created confusion in formulations of the standard among the contemporary courts. He finds the rationale for the standard in the need to minimise irreparable loss of legal rights during the pendency of litigation. He calls for application of a test that balances the irreparable harm to a party against the possibility of a judicial error in either granting or denying an injunction. According to him, the court need not consider every harm resulting from judicial error, but should prevent the harm that a final relief cannot redress. His suggestion that courts can minimise the probable loss by "making two inquiries". First of which calls for appraisal by the court on the likelihood of various views of the facts and the law that may prevail at the trial and an assessment of probable loss of rights to each party if it acts on any particular view that may ultimately prove to be erroneous. His proposed model for preliminary injunction calls the due process standard defining the procedures to be followed when a defendant is deprived of a right prior to a full hearing on the matter. He takes into account the Supreme Court's view that the defendant should not be subjected to unwarranted deprivations or there must be no indefinite postponement

[5]Denlow (2003) at 497-498.
[6]Leubsdorf (1978).

of his rights. His model aims to minimise the irreparable injury or loss of rights to the parties but lays emphasis on the assessment that if the plaintiff's injury can be prevented only by risking injury to the defendant, the standard then turns to the plaintiff's probability of success on the merits.

He centres his arguments on the idea that environmental statutes are meant to protect the public from the cascading effects of statutory violations and therefore it is imminent on the part of the court to conclude that a violator is causing irreparable injury. He furthers his argument by stating that enjoining a party on the basis of an irrefutable presumption of irreparable injury without a full hearing may deprive a defendant of his legal rights and can violate the due process clause.[7]

In deciding pleas brought in by the government under environmental law statutes, courts tend to apply completely variant forms of standards on the presumption that such suits may involve public interest or public policy and that eventually there may be a likelihood of mass injury. In such cases, the judiciary tends to defer to governmental agencies. The author states "*Without a clear statutory warrant, however, deference should not extend to the assessment of irreparable injury*."[8] Since the agency's decision to sue is most likely based on harms that must be weighed by the court, judicial deference to the agency's decision would lead to a double counting of those harms. As a litigant, agencies should make a complete disclosure of facts and reasons that prompted the motion for preliminary injunction and the courts are expected to extend substantial deference to the same. Courts need to distinguish between the preliminary injunction standard and the substantive rights of the plaintiff emanating from a statutory rule that ultimately implements policies underlying substantive law.[9]

According to Professor *Leubsdorf*

> "*Plaintiffs could be given a right to immediate relief in a class of cases where (1) the denial of relief is much more likely to undermine relevant policies than the injunction, (2) a special preliminary test is more likely to avoid this danger than the usual standard and easier to apply, and (3) that test will not unduly stimulate strike suits and delaying tactics.*"[10]

In conclusion the author states that the current standard validates the need to prevent irreparable injury to legal rights which may erupt at the time of the final hearing. As a result, the relationship between the elements of the standard remains obscure and inconsistent in its application by the courts.[11]

Professor *Leubsdorf*'s model posits the purpose of a preliminary injunction as a means to minimise probable irreparable loss of rights of parties caused by judicial errors. The serious flaw in application of standards by courts granting injunctive relief is the obvious "*lack of well-articulated rationale*."[12] Fundamentally, if the courts do not grant prompt relief, the plaintiff may suffer a

[7]Leubsdorf (1978) at 562.
[8]Leubsdorf (1978) at 563.
[9]Leubsdorf (1978) at 564.
[10]Leubsdorf (1978) at 565.
[11]Leubsdorf (1978) at 565, 566.
[12]Leubsdorf (1978).

loss of lawful rights that no future remedy can possibly restore. But if the court does grant immediate relief, the defendant may similarly sustain equivalent loss of rights.[13] Professor *Leubsdorf* opines that the source of this dilemma is the element of uncertainty that sets in while courts hear injunction pleas and that

> "*the court's interlocutory assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached. […] The court need not consider all irreparable harm that may be inflicted upon the parties, but only irreparable harm to their legal rights*."[14]

The aim is to isolate such cases where granting or denying relief under specified tests will minimise harm to public policies and prevent irreparable injury to parties' legal rights.[15]

Judge Richard Posner who was then the Chief Judge of the Seventh Circuit Court amplified *Leubsdorf's* model by expanding its scope in his decision for *American Hospital Supply v. Hospital Products Limited.*[16] Judge *Posner* explains that "a district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimise the costs of being mistaken." *Posner* formalised *Leubsdorf* model by addressing the trial court's decision as follows:

> *"Grant the preliminary injunction if but only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denied would be an error, exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error."*

As in *Roland Machinery Co. v. Dresser Industries, Inc*.[17] Judge Posner states that the scope for judicial review of a district court's order to grant or deny preliminary injunction is limited and is reversed only if there is a latent 'abuse of discretion.

Authors *Richard Brooks and Warren Schwartz*, in their Article[18] stated that preliminary injunction orders needed to promote efficient conduct by the parties. The authors discuss what is called as "*Leubsdorf-Posner*"[19] formulation for preliminary injunctions as described by Professor *Leubsdorf.*[20] According to them courts, conventionally consider preliminary awards only if adequate compensatory remedies are unavailable under circumstances of uncertain legal entitlements.[21]

They state

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[13]Leubsdorf (1978).
[14]Leubsdorf (1978).
[15]Leubsdorf (1978) at 565.
[16]780 F.2d 589 (7th Cir.1986).
[17]at 382-388.
[18]Brooks & Schwartz (2005).
[19]See Judge Richard Posner's opinion in *American Hospital Supply Corp. v. Hospital products Ltd* and from Leubsdorf (1978).
[20]See Brooks & Schwartz (2005).
[21]See Brooks & Schwartz (2005) and Leubsdorf (1978) at 565.

> "*When rights are uncertain, parties appreciate the full benefits of their conduct, but they discount harm to others of this conduct by the likelihood that they possess a legal entitlement to so act. Hence individual incentives to behave efficiently are distorted by uncertain legal entitlements*"[…] Preliminary injunctions "*correct this distortion" by awarding in terrorem damages that the defendant will be required to pay if an injunction is granted and violates it, and reimbursement of compliance costs if defendant prevails at the end of litigation when the plaintiff decides to pursue the injunction [….]preliminary injunction doctrine takes the conduct decision out of the hands of the biased defendant and places it in the hands of plaintiff who, by design, faces the marginal costs and benefits of the decision."*[22]

According to the proponents of the preliminary injunction doctrine, legal entitlements and their assignments need to be protected before an order concluding the litigation on merits is issued. Any award of adequate damages at the conclusion of the case makes the entitlement holder whole and encourages efficient allocation of resources. The most prominent expression of this claim is the so-called "*efficient breach hypothe*ses." [23] This effectively means "*The duty to keep a contract at common law means […] you must pay damages if you do not keep it, - and nothing else*."[24] The doctrine recognises the code that we cannot postpone protecting legal entitlements until the conclusion of the litigation concerning the assignment of those entitlements and efficient allocation of resources.

Judge Posner argues that the availability of an adequate final remedy is not sufficient justification for denying preliminary injunctions and that an adequate award of monetary compensation at the end of the trial does not provide sufficient incentive for parties to engage in efficient conduct pending litigation.[25]

"*Liability rules encourage parties to weigh the costs of avoiding liability – through performance or non-performance – against the costs of facing liability."*[26] Essentially, the Judge Posner's view is that when a party is expected to compensate the injured party by its conduct, that party internalises the cost of paying the injured party and estimates that the benefits of engaging in such a conduct far exceed the aggregate costs.[27] Liability rules often do not preserve parties' incentives to engage in efficient conduct when there is an element of legal uncertainty with regard to the rights of the parties.[28]

Posner adopted *Leubsdorf's* formulation for standards which clarify the objective in issuing such interim orders. The authors elucidate *Leubsdorf*'s postulate "the preliminary injunction should be granted if the product of the probability that plaintiff will prevail and the amount of uncompensated harm the plaintiff will suffer during the pendency of the litigation is greater than the product

[22]Brooks & Schwartz (2005).
[23]Brooks & Schwartz (2005) and Leubsdorf (1978) at 565.
[24]Leubsdorf (1978) at 565.
[25]Brooks & Schwartz (2005) at 385.
[26]Brooks & Schwartz (2005) at 385.
[27]Brooks & Schwartz (2005) at 385.
[28]Brooks & Schwartz (2005) at 385.

of the probability that defendant will prevail and defendant's uncompensated costs of complying with the injunction."[29]

The Authors illustrate *Leubsdorf's* rule in a more lucid manner by providing a simple numerical example:

> *"If plaintiff has a 60% chance of prevailing at the conclusion of the case and will suffer $1000 in damages during the pendency of the case which cannot be remedied by an eventual award of damages, plaintiff's expected irreparable loss from not being granted the injunction is $600. If the plaintiff has a 60% chance of prevailing, then the defendant has a 40% chance of prevailing. If defendant's costs of complying with the injunction are $2000 and defendant will not be compensated for any of these costs at the end of litigation, defendant's expected irreparable loss if the injunction is granted exceeds the $600 expected irreparable loss that plaintiff will suffer if the injunction is not granted, the injunction should not be granted under this framework."*

Judge *Richard Posner* while adopting the *Leubsdorf* framework,[30] concluded that underlying the apparently inconsistent formulations is an effort to minimise judicial errors including the error of denying an injunction to one who will prevail on merits, and the error of granting an injunction to one who will not be able to establish his legal right. These "error costs" can be minimised, as explained by Professor *Leubsdorf* that by comparing the product of the probability of plaintiff's success and the would-be uncompensated harm to plaintiff with the product of the probability of defendant's success and defendants would be uncompensated costs of complying with the injunction.[31]

The *Leubsdorf-Posner* view is not settled law but is followed by the state of Massachusetts. The *Leubsdorf-Posner* rule governing the issuance of a preliminary injunction is designed to minimise the expected costs resulting from an erroneous grant of the entitlement. "*From an incentive-oriented view, the relevance of uncertainty is that it may make it impossible for the grant of damages at the conclusion of the case to ensure efficient conduct by the defendant. Further, the rule governing the issuance of a preliminary injunction is "designed to minimize the expected costs resulting from an erroneous grant of the entitlement*."[32] The authors claim that the "grant or denial of a preliminary injunction induces inefficient behaviour, and then a social loss occurs – a loss which cannot be undone by a subsequent transfer of money from one party to another.[33] They suggest, "*ex post compensation is never adequate by itself because it cannot eliminate the social loss resulting from the inefficient conduct.*" The authors state that courts can issue a preliminary injunction if the plaintiff is prepared to assume liability for defendant's compliance costs if defendant prevails at the conclusion of the case.[34]

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[29]Brooks & Schwartz (2005) at 385-390.
[30]Leubsdorf (1978).
[31]Brooks & Schwartz (2005) at 391.
[32]Brooks & Schwartz (2005) at 392.
[33]Brooks & Schwartz (2005) at 393.
[34]Brooks & Schwartz (2005) at 394.

The authors discuss what is known as 'the interim-efficiency' rule in which the courts address the question whether the plaintiff seeks to compel efficient conduct of the defendant without giving any consideration to any irreparable harm to legal rights or the distribution of costs of performance. Under the rule, the plaintiff can compel the defendant if she is able to demonstrate that it is allocative efficient for the defendant to do so. While applying this rule, the court does not compare irreparable injuries, but rather decides whether the plaintiff's payoff from interlocutory relief exceeds the defendant's payoff from the court's denial to grant the relief.[35] The authors claim that the costs of implementing the interim-efficiency rule are almost the same as implementing the *Leubsdorf-Posner* rule.

Subsequent to the analysis offered by authors *Richard Brooks and Warren Schwartz* in the article[36] Professor *Leubsdorf* counters their articulation in his rejoinder of an article[37] by defending a more traditional approach requiring consideration of the merits of the plaintiff's case and the irreparable injury to the rights of the parties that granting or denying preliminary relief would inflict. [38] In his article, Professor *Leubsdorf* concludes that courts have rarely applied the *Leubsdorf-Posner* rule and invariably do not attempt to make a comparison of the ability of parties to profit from the resources in dispute during the pendency of litigation. Further, the courts do not issue an injunction to any "no frivolous" plaintiff who is willing to post a bond and have more often denied any interlocutory relief.[39] He concludes that despite suggestions for new standards for preliminary injunctions, it remains unclear if they would aid in promoting efficient use of resources during pendency of litigation.[40] It would be ideal to protect the legal rights of the parties by designing injunction orders in a manner that minimises the likelihood of irreparable harm to such rights.[41] Injunctions based on statutory violations most often are denied on the technical plea that the violation is only technical rather than substantial and injunctive relief is not remedy for merely procedural non-compliance.[42] In his conclusion the author reminds us that Congress' mandate prevents the courts from balancing equities in the absence of substantial procedural violation and proceeds to grant a preliminary injunction and if the courts ignore the mandate, they would step into the shoes of the federal agency violating the separation of powers doctrine.[43] If the party demonstrates substantial statutory violation and irreparable harm is established, the public interest factor as embedded in the statute needs to be protected by granting injunctive relief.[44]

The Supreme Court has opined that courts exercising equity jurisdiction should "*go much farther both to give and withhold relief in furtherance of the*

[35]Brooks & Schwartz (2005) at 403.
[36]Leubsdorf (1978).
[37]Leubsdorf (2007) at 76.
[38]Ibid at 33.
[39]Ibid. at 47.
[40]Ibid.
[41]Ibid.
[42]Frost (1987) at 108.
[43]Ibid. at 147.
[44]Leubsdorf (2007) at 48.

public interest than when only private interests are involved."[45] Generally, courts hearing environmental cases have been consistent on the finding that statutes on environmental protection have a strong and inherent public interest factor although it is most often difficult to isolate and evaluate the irreparable harms that are of public concern. Environmental protection is statutory in practice and environmental enforcement is rigid and clear in its dealing with offenders and violators. Yet courts have often been confused on the reconciliation of tradition of equitable discretion with such stringent statutory norms that call for substantial violation of statutory provisions and enforcement regulations.

Contemporary Jurisprudence

The Supreme Court of the United States held the premise that a federal judge "is not mechanically obligated to grant an injunction for every violation of law." The Court, although held that an injunction was mandatory to enforce the provisions of the Endangered Species Act and has established that the judicial role in environmental injunction cases is to implement the congressional objective.

The Supreme Court of the United States in *Tennessee Valley Authority v. Hill*[46] ruled that courts must issue injunctions for every violation of Section 7 of the Endangered Species Act, without any inquiry into the "wisdom or unwisdom" of doing so. There the Court held that the right to an injunction was an extraordinary remedy that is not absolute and that it may be issued immediately on the notice of a statutory violation and would be made available to parties who have been successful in establishing a *prima facie* case of an irreparable injury that cannot be compensated by award of damages. When courts find that an award of damages is sufficient and meets the redressability requirement, injunctions are invariably never granted. In the absence of specific statutory violation or on failure to prove irremediable harm as per the balancing of harms test, courts deny injunctive relief.

On several occasions, the Supreme Court has denied injunctive relief entirely on equity considerations. In *Weinberger v. Romero-Barcelo*[47] the Court noted the limits Congress may place on a court's equitable discretion but cautioned that the Court should not "*lightly assume that Congress has intended to depart from established principles*," including the principle that a court not "mechanically obligated to grant an injunction for every violation of law." It further stated "an injunction should issue only where the intervention of a court of equity is essential in order to effectively protect property rights against injuries otherwise irremediable. The Court further described the requested remedy, a preliminary injunction, in terms of "*commonplace considerations*."[48] Courts in United States when dealing with statutory violations, similar to NEPA violations, issue automatic injunctions using a three-pronged test; a) whether the statute expressly

[45]*Yakus v. United States* (1944).
[46]437 U.S. 153 (1982).
[47]456 U.S.305 at 307 (1982).
[48]Ibid. at 312, 313.

prohibits certain conduct that would allow a violation to continue unabated absent an injunction; b) whether the purpose of a statute aims to prevent that conduct; and c) whether the statute lacks other remedies for curing improper conduct.[49] In dealing with statutory violations the court[50] relied on the "plain intention of the Congress to halt species extinction, at whatever cost, since the value of this "genetic heritage is quite literally, incalculable and irreparable damage."[51]

Similarly, under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA) authorising all relief "necessary to abate" a danger or threat or release of a hazardous substance has been found broad enough to authorise issuance of an injunction to prevent the operator of a hazardous waste facility from interfering with an EPA approved remedy without a showing of irreparable harm.[52]Courts also have rejected the argument that all statutory violations predetermine the issue of injunctions as seen in *Weinberger*, where the Supreme Court held that when the Clean Water Act provides civil and criminal penalties to remedy violations, it is not necessary to interpret the statute as requiring injunctive relief. NEPA lacked the kind of penalty provisions unlike other environmental statutes and therefore violations under the statute warranted injunctive relief. In *Monsanto v. Geerston Seed Farms*,[53] The Supreme Court refused a plea for permanent injunction on the ground that there was no irreparable injury to the environment, dismissing the application on that factor alone without getting into the merits of the other three factors. The court deterred from granting automatic injunctions for environmental harms by requiring judges to, instead, follow a balancing test to determine whether an injunction should remedy a statutory violation like that of a NEPA violation. The *Monsanto* four-part test requires a plaintiff to demonstrate:

a) That it has suffered an irreparable injury;
b) That remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
c) That, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted and
d) That the public interest would not be disserved by a permanent injunction.[54]

Environmental cases require courts to determine the presence of "irreparable injury" factor by distinguishing injury to environment and injury to the plaintiff's interests like protecting his aesthetic, recreational, or conservationist interest. Courts need to analyse irreparable and irremediable harm caused to the environment by activities of the defendant who stood to profit by continuing with business activities that could have a long lasting debilitating impact on the environment. In *New York v. Nuclear Regulatory Commission*,[55] the court stated

[49]Rubenstein (1998) at 7.
[50]See *Yakus v. United States (1944).*
[51]Ibid. at 173.
[52]*B.F.Goodrich Co. v. Murtha* (1988).
[53]130 S.Ct.2743 (2010).
[54]Ibid. at 2756.
[55]550 F.2d 745, 753 (2d Cir.1977).

that the plaintiff has a great difficulty in demonstrating irreparable harm, which is often referred to as the "*sine qua non*" of interlocutory relief.[56] The court declared that the "alleged threats of irreparable harm" must be "actual and imminent, and not remote or speculative."[57] The court further indicated two bases for "determining irreparable harm:

a) The action sought to be enjoined would have produced an irreversible and irretrievable commitment of resources that would have made it virtually certain that a missing […] environmental impact statement, even if eventually completed, would never serve the purpose it was intended to serve […]
b) The action sought to be enjoined necessarily would have caused immediate, demonstrable and irreparable damage to the environment.[58]

The Supreme Court as a final verdict on the issues surrounding environmental injunctions declared that "*attention must be shifted away from the "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence*".[59]

When the government make an "irreversible commitment of resources" without appropriate and adequate preparation of environmental impact assessment, such an action constitutes irreparable injury.[60] In granting injunctive relief on the basis of economic injury constituting irreparable harm, the court needs to determine whether an injunction order affects an entire industry or just one single unit of an industry. The court also makes an assessment whether complying with the injunction order reduces the competitive advantage of the defendant against other similarly placed parties. With regard to harm to the defendant factor, the Supreme Court cited "*evidence of harm to defendants' business ventures in denying a permanent injunction*."[61]

The following extract provides an insight into what constitutes irreparable harm:

> *"A man, who seeks the aid of the court by way of interlocutory injunction, must, as a rule be able to satisfy the court that its interference is necessary to protect him from the species of injury which the Court calls irreparable, before the legal right can be established upon trial. By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a material one, and one which could not be adequately remedied by damages and by the term "the inadequacy of the remedy by damages" is meant that the remedy by damages is not such a compensation as will in effect, though not in species, place the parties in the position in which they formerly stood. If the act complained of threatens to destroy the subject-matter in question, the case may come within the principle, even though the damages may be capable of being accurately*

[56]Ibid.
[57]Ibid. at 755.
[58]Ibid. at 756.
[59]*City of Milwaukee v. Illinois* (1981).
[60]*New York v. Kleppe* (1976).
[61]*Kleppe v. Sierra Club* (1976).

> *measured. The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage; but although the amount of damage may be difficult to ascertain, a man who has on a previous occasion compromised his rights against other parties by accepting a sum of money, may preclude himself from saying that the damage is irreparable and cannot be compensated by money.""*[62]

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favour the issuance of an injunction to protect the environment.[63] The Supreme Court has held that even where there is a strong likelihood of prevailing on the merits, the plaintiff must demonstrate at least a likelihood of irreparable harm.

The public interest factor plays a critical role in determining the outcome of certain environmental cases and dealing with applications for injunctive relief. The court while hearing *The Lands Council v. McNair*[64], in keeping with the decision of *Amoco Production Company,* held that "*the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim.*" Courts have recognised the public interest in consideration of environmental impacts of major federal projects and have held that suspending such large-scale infrastructure projects until that consideration occurs "comports with public interest".[65] The public interest standard can be two fold. The first aspect of the factor relates to protecting the environment against industry practices and the other aspect relates to the economic value the industry itself generates for the benefit of the society.[66]

When time is of the essence and the litigation relates to an infrastructure project commissioned to promote economic development, courts cannot afford to restrain a party and defer interminably, the final hearing on merits. When plaintiffs seek to enjoin future investments in an environmentally harmful project on the plea that the project would destroy a distinct, finite and tangible resource, the courts may be willing to grant an injunction solely on the basis of irreparable injury to the environment. The court's dilemma begins when the plaintiff approaches the court after substantial investments have been infused into a project. In such cases, courts seek to enjoin only such activities which have a direct impact on the environment and direct the party to seek alternatives and minimise such negative outcomes. In the absence of such direct impact the court tends to monitor the entire conduct which "may significantly or irreparably alter the natural environment" in the project area.[67]

[62]See Kerr (1889) at17-18.
[63]*Amoco Production v. Village of Gambell* (1987).
[64]537 F.3d 981 (9th Circuit 2008).
[65]*South Fork Band Council v. U.S. Dept. of Interior* (2009).
[66]*Minnesota PIRG v. Butz* 358 (1973).
[67]*Ohio v. Callaway* (1974).

Debating a Uniform Standard

The problems due to lack of a uniform standard for granting environmental injunctions include inconsistent and inequitable decisions. A uniform standard should define the elements necessary for obtaining a preliminary injunction that is beyond blatant violation of statutes or regulations and provide guidance as to how the standard should apply when courts exercise their discretionary power and balance the equities.

One of the most convincing arguments in favour of establishing a uniform standard in deciding preliminary injunctions applications started with the following question: "What is the critical component of the case that requires the grant of injunction between the time the preliminary injunction can be decided and the time an actual trial on the merits can take place that cannot be satisfied by proceeding to a trial on the merits? Unless the critical component is just that - irreparable harm that cannot be remedied following a trial on the merits – the court should not proceed with the preliminary injunction hearing. Courts should actively discourage preliminary injunction notions and encourage parties to proceed expeditiously to trial on crucial issues."[68]

In applying a uniform standard for preliminary injunctions and expediting the trial on merits, parties can save costs and obtain better and timely feasible solutions for environment protection. Many scholars have highlighted the need for a uniform standard to be adopted in granting preliminary injunctions in environmental litigation. Establishing a uniform standard requires stretching the discretionary powers of courts empowering them to:

a) order multiple injunctions, including freezing injunctions against defendants who fail to comply with statutory norms or earlier court orders;
b) design an order that works as a continuing mandamus;
c) call for an evidentiary hearing and consolidation of the hearing of trial on the merits of the case; and finally,
d) pass a speaking order that lists out all conclusions on facts and law making any further review or appeal difficult.

A workable standard should embody at least four features. First, it should encourage purposeful argument and deliberation by the court and the parties [...] Second; the standard should attempt to equalise power between the parties, allowing them to present their best case. Third, the standard should promote clarity and candour, both in arguments and decisions. Finally, it should be easy to use […]. A good standard, however, should focus argument on the facts and law of the case rather than on the choice of a particular standard or the meaning of terms within it […] In short, a standard should generate the maximum amount of relevant information possible and focus the attention of the court and the parties.[69]

The Precautionary Principle is the fulcrum on which the present new standard evolves. The Rio Declaration on Environment and Development principle states

[68]See Developments in the Law: Injunctions (1965) at 537.
[69]Vaughn (1989) at 842-843.

"*Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*." In this case, courts need not attempt to understand the irreparable harm factor in the most scientific manner possible before issuing an preliminary injunction. It would suffice to show that preliminary consequences of an activity touches upon the basic principles of environment protection and natural resources management and can ultimately cause environmental degradation and irremediable harm to the environment. Essentially, the precautionary principle stands for the proposition that when there is a threat of environmental harm, lack of scientific certainty regarding the risk should not be used as a reason to justify failure to take cost-effective precautionary measures.

The Precautionary Principle is fundamental to implementing sustainability as a matter or protection and preservation of natural resources. Essentially, the court examining a plea for injunction should examine application of the precautionary principle by the defendant. Precautionary approach is a reliable and viable response to the factor of legal and scientific uncertainty. An element common to various formulations of the precautionary principle is the recognition that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert that threat[70]. Courts, therefore, need not explore the uncertainty factor of environmental damage by attempting to establish a causal link between an activity and environmental damage. It can assess whether the defendant has initiated precautionary measures that are sufficiently preventive to avoid irreversible harm. The Earth Charter, para 6, on Ecological harm states

> "*Prevent harm is the best method of environmental protection and, when knowledge is limited, apply a precautionary approach*".

It further calls for "action to avoid the possibility of serious or irreversible environmental harm even when scientific knowledge is incomplete or inconclusive. It places the burden of proof on the party claiming absence of significant harm and applying the standard of Precautionary Principle, the Charter calls for decision making that addresses the cumulative, long-term, indirect, long distance, and global consequences of human activities.

The application of the principle by the courts calls for best information being made available for consideration including scientific information that includes traditional and indigenous knowledge and practices that may be relevant. "Such information should be independent, free of any bias and assimilated in the most transparent manner by publicly accountable institutions without any conflict of interest"[71].

The application of principle helps consideration of social and economic costs and benefits of an existing or proposed threatening activity that can accrue only to a few, or only to the already powerful and economically advantaged, or are only short-term and potential costs are borne by the public and communities, by poorer

[70]ICUN (2014).
[71]ICUN (2014).

or vulnerable groups, or over the long-term calling for increased precaution by project proponents.

The Precautionary Principle recognises that delaying action until there is compelling evidence of harm will often mean that it could lead to irremediable damage or could become impossible to avert irreparable harm to the resource. The Principle is based on the recognition that a false prediction that a human activity will not result in significant environmental harm will typically be more harmful to society than a false prediction that it will result in significant environmental harm (IUCN). Its presence in all major international agreements including the United Nations Framework Convention for Climate Change (UNFCCC) in one form or another is proof of its efficacy as a major tool in tackling climate change.

When the precautionary principle is applied, the result could be strict prohibition of such activities that pose a threat to environmental integrity of a region, which means granting injunctive relief to the movant may be easier in the face of legal and scientific uncertainty, thus calling for strict liability that serves as a deterrent to harmful activities.

The principle includes three elements: "fully assessing possible impacts; of an action, shifting the burden of proof to those whose activities pose a threat to the environment, and not acting if there is significant uncertainty or risk of irreversible harm". The first two elements are procedural, and the third is a substantive one. The first element, environmental impact assessment, enables but does not guarantee protection or caution.[72] The second element of the precautionary principle, the burden of proof, to affect the level of precaution in environmental decision-making: (1) mandating which party has the burden of proof, and (2) establishing what level of proof is required. The least precautionary rule would be one that placed the burden of proof on the party opposed to a proposed action and required scientific certainty in order to satisfy that burden. The most protective rule would require the same level of proof but place the burden on the party proposing the action.[73] The third element of the precautionary principle requires a proposed action to be blocked if there is significant uncertainty or risk of irreversible harm. This element represents the normative judgement that the role of the government is to protect against future harms in addition to those established by scientific certainty.[74]

The precautionary principle, which is a substantive policy, can be implemented primarily through either substantive or procedural requirements or both. The precautionary principle may be included within a domestic legal regime "through specific statutes, regulations, or policies that either by their express terms or as interpreted by court decisions impose a precautionary approach for the particular conduct that is the subject of the statute."[75]

The precautionary principle standard could entail the court posing following questions to the defendant:

[72]Kannan (2007) at 422-423.
[73]Kannan (2007) at 424.
[74]Kannan (2007) at 426.
[75]Kannan (2007) at 426.

a) Whether the non-movant has taken up statutory and non-statutory risk assessment (irreversible and irretrievable commitments of natural resources)
b) Whether precautionary steps were initiated while implementing the proposed project (including identifying viable and newer alternatives)
c) Whether the project proponent can submit proof of ability (risk management) to prevent irreversible environmental harms that are likely to arise during the implementation of the project.

Risk assessment is a 'formal appraisal' of two elements (a) the likelihood of an event occurring and (2) the magnitude of the consequences should that event occur. Risk management is the process of weighing the assessed risks against the expected benefits to make the best decision.

The failure to evaluate as deemed by the court is essentially a failure to apply precautionary principle in projecting and mitigating the risk of irreparable environmental harm caused by a proposed action. Such failure to assess and evaluate risks in proceeding with the project entails a preliminary injunction. NEPA imposes a mandate on agencies to assimilate requisite information surrounding a project, although silent on how such collated information needs to be used in preventing a risk of irreparable environmental harm. When courts order calls for "maintaining the status quo" it effectively means that when precautionary steps are not taken immediately on notification of threats of serious or irreversible harm to the environment, the results may be irreversible or difficult to reverse.

"Concerned about the problem of irreversibility, sensible legal systems might want to adopt a distinctive principle for handling certain kinds of risk: the *Irreversible Harm Precautionary Principle*".[76] The principle takes the form of an insistence on paying a premium to freeze the *status quo* and maintain flexibility for the future, while new information is acquired.[77] The 'Irreversible *Harm Precautionary Principle'* assumes all environmental harms are irreversible in the relevant sense, and requires a strong showing by those who seek to proceed in the face of that harm.[78]

The Supreme Court endorsed the principle through its explicit recognition that environmental injury is often permanent and long-term. In *Winter v. Natural Resources Defense Council*, Justice *Breyer* noted "NEPA seeks to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations. It follows that "when a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place." That means that the "absence of an injunction thereby threatens to cause the very environmental harm" against which NEPA was designed to guard.[79]

[76]Sunstein (2018).
[77]Ibid.
[78]Ibid. at 15.
[79]*Winter v. Natural Resources Defense Council* (2008) at 35.

Environmental Accounting

The hypothesis and suggestion of a new standard is based entirely on the application of the Precautionary Principle. For the purpose of this paper, the new standard is termed as '*The Natural Capital Standard*'. It can be treated as an uniform federal standard applicable to preliminary injunction pleas in environmental cases. *Natural Capital* is defined as the whole endowment of land and resources available to us, including air, water, fertile soil, forests, fisheries, mineral resources, and the ecological life-support systems that make economic activity, and indeed life itself, possible. The *Natural Capital Coalition*,[80] during the development of the *Natural Capital Protocol*, formally established a single harmonised definition of *'Natural Capital'* from several forms of working definitions.

a) Natural capital is another term for the stock of renewable and non-renewable resources (e.g. plants, animals, air, water, soils, and minerals) that combine to yield a flow of benefits to people.
b) All this means is that any part of the natural world that benefits people, or that underpins the provision of benefits to people, is a form of natural capital.
c) Natural capital is a stock, and from it flows ecosystem services or benefits. These services (where service is defined as 'a system supplying a public need') can provide economic, social, environmental, cultural, spiritual or eudemonic benefits, and the value of these benefits be understood in qualitative or quantitative (including economic) terms, depending on context.
d) Biodiversity is an essential component of natural capital stocks and an indicator of their condition and resilience. Biodiversity itself provides benefits directly to people."

The Coalition and its partners designed a framework known as the *'The Natural Capital Protocol*' which allows businesses to measure, value and integrate natural capital impacts and dependencies into existing business processes such as risk mitigation, sourcing, supply chain management and product design. The *Protocol* aims to support better decisions by including how we interact with nature or '*natural capital' i*n decision making.

The Coalition emphasises on the principle that every business depends on natural capital and it invariably impacts natural capital, creating costs and benefits for both businesses and society. It also creates opportunities for growth. Such impacts can arise directly from business operations or indirectly from the use of products and services. All biophysical goods and services have an economic value. When ecologists and natural scientists coordinate with economists, together they are able to a) describe the production of ecosystem goods and services in

[80]https://naturalcapitalcoalition.org

biophysical terms, and 2) translate that biophysical production into estimates of economic value.[81]

Economists are typically concerned with the exploitation of land and its productivity as a fundamental determinant of economic production. It simply highlights the need to curb activities that decrease the productive capacity of land and diminish its value for the future that can produce sustainable yields and retain soil fertility. To state an example, when a nation cuts down its forests for domestic consumption of timber or export, the abstract value that enters the national income accounts as a positive contribution to income, equal to the value of timber. No accounting is made for the loss of standing forest, either as an economic resource or in terms of its ecological value, which sums up to the fact that national income accounting systems do not provide for *'natural capital depreciation'*. Economists have suggested accounting of the state of natural capital and of its deterioration or replenishment that reflects in national income accounting. Yet, business practices do not account for the loss of standing forest, either as an economic resource or in terms of its ecological value. This is a fundamental premise in Ecological Economics, a branch of economics that aims to improve and expand economic theory to integrate the earth's natural systems, human values, human health and well-being.

This is crucial in the sense that most of the ecosystem services and natural resources are not being paid or accounted for in business accounting. The state holds the natural resources in trust for its citizens and it is important that courts help the states to preserve the value of such capital that manifests itself in an abstract form in almost all business processes. The absence of natural capital accounting can justify an injunction against a defendant whose flow chart on business practices and processes is opaque with regard to its contribution to 'circular economy'. There exists several forms of defining the term circular economy. Essentially, it is a model of production and consumption that extends the life cycle of products by designing out waste and pollution, by reducing generation of waste and regenerating natural systems. Economic exploitation of natural resources often exceeds ecologically sustainable levels. An ecological evaluation, a crucial assessment as part of the EIA prepared for a project, can help determine sustainable yield levels at which the system can continue to operate.

Techniques advocated for natural capital accounting including: a) physical accounting for pollutant build-up, water quality, soil fertility and other environmental conditions. b) determination of sustainable yields as discussed above; c) determination of absorptive capacity of the environment for human-generated wastes that include industrial and agricultural wastes. Application of these techniques within a business process will help achieve 'natural capital sustainability' where nations conserve their natural capital by limiting its degradation and investing in its renewal.[82]

Natural Capital accounting helps attain resource efficiency when earth's natural resources are exploited in the most sustainable manner without any

[81]Boyd (2012).

[82]Geneletti (2002).

negative impact on the sources itself. A major indicator of resource efficiency that is crucial to assessing the state of natural capital, is *'sustainable yield levels'* that call for well-balanced exploitation of natural resources within ecologically sustainable levels. Natural capital accounting can be achieved by conducting ecological evaluation, which essentially means' assessing the significance of an area for nature conservation that assimilates criteria and information that be used to support decision-making in nature conservation by all stakeholders. The most crucial components of the environment protection relates to land-use change and soil fertility that impacts food security and subsistence livelihoods across the globe. It would be interesting to note that the United Nations Environment Programme- World Conservation and Monitoring Centre has actually developed a global map of key ecosystem services.[83] The International Standards Organisation has developed a methodological framework for environmental impacts and related environmental aspects which, according to ISO, follows the norms of welfare economics. The term environmental aspects in this context is deemed to refer to that "element of a business activity, product or service which interacts or likely to interact with the environment."

Courts, when hearing a plea for preliminary injunction, need to question from the perspective of complying with principles of ecological economics:

a) If the defendants have presented substantial information on the use of ecosystem services within the business activity, including groundwater exploitation, impact on land and soil by the proposed activity;
b) details relating to offsetting of carbon emissions from the activity;
c) If the defendants have placed before the court the projected investments in the replenishment and conservation of natural resources and ecological recovery;
d) If the defendant is following a certification model for sustainability of all of its products.

The questions may seem redundant in the light of the fact that the party presents a detailed EIS in respect of the proposed activity. But, the finer aspect of it is that it calls for information on the value of dependencies by the businesses on ecosystem services and their encroachment upon habitats for their business activities that may be indirect.

Referred to as '*Net Positive Impact*' that can be defined as "putting back more into society, the environment and global economy that you take out". This effectively means that Courts when using the 'natural capital' standard are entitled to call for those details as indicated in the *National Capital Protocol* to get a clear picture on the impact of businesses on natural resources and their valid dependencies on natural capital.

Natural Capital Accounting needs to be an integral part of the preparation of Environmental Impact Assessment, in the absence of which the impact assessment document or EIS be rendered incomplete. The need for meeting *Protocol* requirements within an EIA is a topic for an independent discussion that calls for

[83]Global map of key ecosystem services - UNEP WCMC

amending the nature of information required to be provided in an EIA. The *Protocol* is exhaustive and is a good reference point for courts when applying the 'natural capital' standard in deciding injunction pleas relating to environment and natural resource management.

Courts need to intervene to ensure businesses account for depletion of forest cover, sustainability of the business activity, its contribution to ecology of the region and the economic and social impact of losing value and the extent of natural resources in the region and accounting for the *'natural capital depreciation'*. Questions relating to application of ecological principles in process mechanisms, physical accounting of natural capital using inventories that reflect either the abundance or scarcity of natural resources within a particular region, indicators on soil fertility, level and quality of groundwater in the region, air and water pollution levels, accounting systems that specify resource depletion or environmental degradation that the region may eventually sustain. An injunction is due when the defendant is unable to present basic and necessary information as required under the *Protocol* that helps determine if the defendant has taken sufficient steps to conserve resources by incorporating precautionary measures within his business processes and if its contribution to the circular economy is indeterminable.

Ultimately, the entire discussion on natural capital and sustainability is based on the principle of *'natural capital sustainability*' where nations aim to conserve their resources by limiting their depletion or degradation and investing in its renewal or replenishment. Extensive and unsustainable exploitation of natural resources permanently alters the ecological balance that can change the natural landscape of a region leading to unpredictable results. The most disastrous form of ecological imbalance is when a species goes extinct causing damage that is irreversible and imposes an unknown and incalculable economic and ecological cost in the future. Ecological economists favour the application of precautionary principle prior to commencing any business activity so as to ensure human interference with natural systems and ecosystem services is restricted to the minimum. Finally, economic systems must achieve a sustainable scale of economic activity at which the planet's ecosystems are not subjected to undue stress.

The Natural Capital standard when applied will rule out any award of damages as compensation for exploitation of resources that are no longer available for use by posterity and rendered irretrievable by irrevocable actions of a business entity. Damages or any form of offsetting will no longer be a compensation for specific things lost by the plaintiffs, emphasising on replenishment and restoration of finite resources. When soil loses its fertility, its ability to keep nourished the flora and fauna dependent on it and the land is degraded, an award of damages seems farcical without an order restoring intangible rights of citizens. Natural Capital standard will be a beacon to aid courts in enjoining illegal activities such as removal of timber, extraction of minerals and other mining activities using unsustainable methods, violation of zoning laws, illegal forms of land use change without exploring economic hardship caused to business entities. Courts can enjoin activities that do not comply with natural capital accounting that aims to promote low-carbon economy. Ultimately, under the Natural Capital Standard,

Precautionary Principle, irreparable harm and public interest factors will come to the fore when injunction pleas are taken up for hearing. The primary objective of environmental law statutes may be fulfilled by the courts as they avoid a long winding examination on the infringement of legal rights of parties, presence or absence of statutory violations as requisites for grant of preliminary injunction. The Natural Capital Standard ensures efficient conduct by parties during the pendency of litigation. The issues that may remain for trial or final hearing may be very limited or may have become infructuous.

Conclusion

A litigant in the environmental context hopes to convince the court that she is before the court with a plea to protect the environment and to stop any activity that she believes is causing injury to a distinct natural resource or that an injury to the environment may turn out to be irremediable with the passage of time. Presently, courts hold divergent opinions on standards applied to injunction pleas and the lack of consistency and ambiguity is largely evident. In the present context, Professor *Leubsdorf ''s* theory on preliminary injunction and the redundancy in issuing an injunction without preliminary examination on the merits is well reasoned out. Similarly, the scholarly premise put forth by *U.S. Magistrate, Martin Denlow*, on the need to adopt a new and uniform federal standard for injunctive relief is compelling and persuasive. A multitude of scholars have sought the aid of the Supreme Court of the United States to develop a uniform federal standard for granting environmental injunctions that can impact the way courts accentuate their decisions in climate change litigation.

Courts invariably, fail to examine the economic consequences of their own injunction orders. Legal infirmities such as inconsistent judgements and inequitable decisions that form the core of environmental jurisprudence need to be limited, if not totally eliminated. A final remedy in environmental litigation is more functional when it serves a larger cause or the greater good. A reworking of environmental statutes to list out violations that imposes strict liability and statutory remedies on the lines of natural capital accounting can ease the burden on courts that are on the constant lookout for parameters. Natural Capital standard is one such tool, the application of which can ensure that right and relevant information is presented to the court to determine any *prima facie* violation by the defendant. Failure to produce critical information required to assess the impact and dependency of the relevant business activity on the ecology and natural resources of a region as called for by the Natural Capital Protocol should facilitate an injunction. Economic efficiency flows with corrective justice that is based on the idea that the plaintiff should not be made to suffer and must be made whole by restoring him or her to their rightful position. Simply put, the plaintiff should be placed in the position they were but for the harm of the defendant.[84]

[84]Weinrib (1994).

Currently, there are four major methods the courts and legislature of the United States have developed to calculate remedies in environmental harms; the economic loss model, contingent valuation method, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Oil Protection Act (OPA), and the Restore Act. The economic loss model does not take a comprehensive view of environmental harms that are restricted merely to people and their businesses. Loss of value to nature, natural resources is most often undermined in such an approach to environmental litigation. According to some, the contingent valuation method results in double counting of harms. The CERCLA and OPA and the other legislations are based on the rule of strict liability where clean-up is ordered scientifically leaving no scope for ambiguous interpretation of damage caused by hazardous wastes. On a review of case laws it is evident that courts have refrained from applying principles of corrective justice and economic efficiency. The speculative nature and ambiguity in determining environmental harms can be overcome by adopting a scientific approach to assessing the real and actual extent of damage to natural resources using the *Natural Capital Protocol*. Environmental protection and natural resource management can no longer stand alone on statutory capabilities. They need to assimilate principles of environmental economics, social welfare economics and ecological economics into the decision-making processes. Environmental governance is taking a form that is more technologically advanced and changing the contours of environmental jurisprudence. The courts need to alter their line of inquiry that is more scientific and global in order to meet goals of sustainable development.

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