Athens Journal of Law

Quarterly Academic Periodical,
Volume 7, Issue 3, July 2021
URL: https://www.athensjournals.gr/ajl
Email: journals@atiner.gr
e-ISSN: 2407-9685 DOI: 10.30958/ajl

Front Pages

Athens Journal of Law

Published by the Athens Institute for Education and Research (ATINER)

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The Athens Journal of Law
ISSN NUMBER: 2407-9685 - DOI: 10.30958/ajl
Volume 7, Issue 3, July 2021
Download the entire issue (PDF)

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The current issue is the third 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

The Law Unit of ATINER, will hold its **18th Annual International Conference on Law, 12-15 July 2021, Athens Greece** sponsored by the Athens Journal of Law. The aim of the conference is to bring together academics and researchers from all areas of law and other related disciplines. You may participate as panel organizer, presenter of one paper, chair a session or observer. Please submit a proposal using the form available (https://www.atiner.gr/2021/FORM-LAW.doc).

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The Business, Economics and Law Division (BLRD) of ATINER is organizing its **8th Annual International Conference on Business, Law & Economics, 2-5 May 2022, Athens, Greece,** sponsored by the Athens Journal of Business & Economics and the Athens Journal of Law. In the past, the six units of BLRD have organized more than 50 annual international conferences on accounting, finance, management, marketing, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. Please submit an abstract (email only) to: atiner@atiner.gr, using the abstract submission form (https://www.atiner.gr/2022/FORM-BLE.doc)

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Considering the Issue of Purpose in Leadership: A Review of Literature

By Megan Vercueil[*] & Angelo Nicolaides[±]

This article reviews and integrates the findings of academic leadership studies to guide leaders as they deal with practical implications of "purpose" in leadership at the workplace. This paper offers a theoretical analysis of trait, situational, and value-based leadership theory and presents a philosophically informed theoretical examination of purpose in leadership. Although there is great enthusiasm around the topic of purposeful leadership, much of the knowledge is based on qualitative studies rather than empirical evidence. We hope this article could usefully inform leadership by bringing academic knowledge to the fore to support the enterprise leadership environment. To date, limited empirical research on the role and importance of "purpose" in leadership is available. Our study fills this gap and is unique in that it analyses existing literature and proffers guidance irrespective of the leadership style of those towards whom it is directed.

Keywords: *Leadership, individual, mission, organisation, purpose, values, vision.*

Introduction

The process of enabling businesses to achieve significant results is entwined with notions of vision, mission, goals, objectives, and business plans, all of which imply that this process is related to purpose.[1] According to Birkinshaw, Foss & Lindenberg[2] purpose cannot be imposed through dictum, but is chosen by individuals. Basu and Palazzo hold the view that leadership studies have not framed purpose in the literature (work within the field of leadership has been characterised by rather simplistic commentaries on purpose), but rather, considerable attention has been paid to notions of purpose linked with business ethics and social responsibility.[3]

This article aims to share the findings of academic leadership studies to guide leaders as they deal with practical implications of "purpose" at work. Recognizing that leadership style can be affected by the purpose of the leader, the intention here is to proffer guidance irrespective of the current leadership style of those towards

[*]PhD, Graduate School of Business Leadership, University of South Africa / UNISA, South Africa; Head: Enterprise Moblity MTN (Pty) Ltd. Corresponding author.
E-mails: 66256593@mylife.unisa.ac.za; megan.vercueil@mtn.com.
[±] Professor, Graduate School of Business Leadership, University of South Africa.
E-mail: pythagoras13@hotmail.com.
[1]Bass (1985).
[2]Birkinshaw, Foss & Lindenberg (2014).
[3]Basu & Palazzo (2008).

whom it is directed. Further, the article acts as a foreground to the role of purpose within leadership studies.

High-level Overview of Traditional Leadership Models

Multiple aspects of leadership have been studied. It has been used as the subject for sociology, politics, psychology, pedagogy, ethics, and business, with much of the focus in each case being placed on the individual leader.[4] Scottish Philosopher Thomas Carlyle looked, in 1840, at the distinctive innate qualities common among great leaders and believed that they were born and not made. This formed the basis of the Great-Man Theory.[5] However, in 1948, Stogdill's research showed that there was no combination of traits that consistently differentiated leaders from non-leaders in different situations.[6] Hersey and Blanchard developed a situational leadership framework that focused on enacting different management styles (based on the subordinates' maturity level) to enable competence and motivate staff and drive performance.[7]

In 1975, Dansereau *et al*. introduced the vertical dyad linkage theory, which dealt with the individual dyadic relationships formed between leaders and their subordinates; it has become more widely known as the leader-membership exchange (LMX) theory.[8] Rost, based on the way leaders build high/low-quality exchange relationships with their subordinates (where the quality of such relationships depends on the level of trust, respect, and obligation between the manager and each subordinate), evolved the theory to more closely describe the relationship between the leader and his/her followers.[9]

Transformational theories focus on the connections between leaders and followers (Vision and Values which implies the "Whereto"). This concept was first introduced by James MacGregor Burns, and it arose from his studies of political leaders in 1978.[10] House introduced charismatic leadership theories (included in transformational theory) that drew extensively upon the concept of vision, and these theories were further enhanced by Conger & Kanungo and Shamir, House & Arthur.[11]

Transformational leaders are characterised by extraordinary will and distinguish themselves by four main characteristics: charisma, inspirational motivation, intellectual stimulation, and individualised consideration.[12] These theories focus on the connections formed between leaders and followers (Vision and Values, which implies the "Whereto").[13] Included in transformational theories

[4]Cardona (2019).
[5]Northouse (2019).
[6]Stogdill (1948).
[7]Hersey & Blanchard (1969).
[8]Dansereau, Graen & Haga (1975).
[9]Rost (1991).
[10]Northouse (2019).
[11]Conger & Kanungo (1988); House (1977); and Shamir, House & Arthure (1993).
[12]Bass & Avolio (1994).
[13]Northouse (2019)

are transactional theories, first described by Max Weber in 1947 and then by Bernard Bass in 1981. These theories focus on the role of supervision, organisation, and group performance (Goals, Plan, and Standards, which implies the "How").[14] Value-based theories include servant leadership, which originated in the writings of Greenleaf in 1970. Authentic leadership, popularised by Bill George in 2003, and adaptive leadership, was advanced in 2002 by Ron Heifetz and Marty Linsky in the book *Leadership without Easy Answers*.[15] These theories emphasise the attention and concern of leaders towards followers. The leaders themselves are trustful and honest (authentic) and encourage people to deal with change (adaptive).[16] They encapsulate purpose within the notion of "inspirational motivation."[17]

Defining Purpose

According to Collins, purpose may be seen as an objective that guides action to achieve a goal in a particular context.[18] To this extent, organisational vision and mission can be assimilated into purpose and interrelated with organisational leadership.[19]

The idea of purpose being inherent in all beings was anchored by Aristotle within his ideas regarding teleology.[20] Howie interprets Aristotle's notion of purpose not as simply having an idea of what is purposeful but also translating it into action. In the Merriam-Webster dictionary, purpose is defined as (i) noun: the reason for which something is done or created or for which something exists; a person's sense of resolve or determination; (ii) verb: have as one's intention or objective.[21] MacIntyre also draws upon the Aristotelian philosophy (specifically the notion of telos, an ultimate object or aim) in that a person will feel fulfilled and gain a sense of well-being and purposefulness only if they move towards their telos.[22] The preceding philosophical definitions of purpose emphasise the notion of purpose as being a worthy idea and activity, the outcome of which is beyond the individual.

According to Craig and Snook, at an individual level, people may express their purpose in different ways in different contexts, but it is what others who know the individual well recognise as unique to the individual and would miss most if they were gone.[23] At its core, leadership purpose springs from a person's identity—the essence of who they are—and must not be confused with their job, position, or title, or their education, experience, and skills. For the leader, it is

[14]Yukl (2013).
[15]Western (2019).
[16]DeRue, Nahrgang, Wellman & Humphrey (2011); Northouse (2019); Western (2019).
[17]Bass (1985).
[18]Collins (2001).
[19]Kempster, Jackson & Conroy (2011).
[20]Howie (1968).
[21]Merriam-Webster (2020).
[22]MacIntyre (2004).
[23]Craig & Snook (2014).

important that they intentionally identify their core, lifelong strengths, values, and passions, and pursuits that not only energise them but also bring them joy.[24]

Ladkin asserts that, to be congruent with one's purpose as a leader, one is required to attend to what one says, the way that one says it and also to ensure that it incorporates authenticity.[25] In Carritt's collection of philosophical writings about beauty, he asserts that, "[to]Plato, beauty is not just truth or edification, beauty is not a physical thing, like gold, but rather some relation of things to our minds, perhaps to our purposes."[26] This implies that to people, what is perceived as beautiful is connected to the mind and purpose. Leading is not just determined by position in a context, but also by the extent to which the leader acts in a way that "fits"' his/her purpose.[27] According to Craig, "Purpose is not a cause, a passion, an aspiration, or the sum of your values. Purpose is the unique gift that you bring to the world."[28]

Murray states that perfect purpose is defined as an "overlap between doing something you love, the world needs, something you are great at, something you are paid for."[29] Alexandra and Douthit showed that determining "the why" in a business, establishes the drive of that organisation—its purpose is established with intention and is built on generating value internally for employees and externally for stakeholders and customers.[30] Alvesson believes that used as a compass, purpose can provide a sense of direction to leaders and add to the DNA of the organisation.[31]

Purpose, Vision, and Mission

According to the EY Beacon Institute, organisational purpose involves a vision that provides an aspirational reason for being grounded in humanity and inspires a call to action.[32] Having an overarching purpose has been linked with meaningful work. It has been highlighted as the second most important factor for young people in the first five years of their career.[33] According to Hill *et al*., organisational purpose should not be dismissed as cynical "fluffy nonsense"' or, alternatively, monetised as the latest management fad, but rather it should be recognised as an essential approach to doing business and organizing work in the modern world.[34]

People often feel that they are in the same storm and working with others within the same company, yet they do not feel that they are in the same boat (or,

[24]Ibid.
[25]Ladkin (2008).
[26]Carritt (1931).
[27]Ladkin (2008).
[28]Craig (2018).
[29]Murray (2017).
[30]Alexandra & Douthit (2016).
[31]Alvesson (2013).
[32]EY Beacon Institute (2016).
[33]Gusic (2015).
[34]Hill (2015).

indeed, on the same page). According to Hutchison, organisational values become the foundation for mission development in that they are "the common strand running from a holistic understanding of the landscape, to mission statement formation and guidance of management."[35] The military defines leadership as influencing people by providing purpose, direction, and motivation, while operating to accomplish the mission and improve the organisation.[36] For a team or a company, the mission concerns its members and cannot be imposed.[37] Missions do not have bosses, but have leaders who do not necessarily fit within the chain of command.[38] A sense (emotional and deeply personal feeling) of mission, according to Campbell and Yeung, can be defined as "an emotional commitment felt by people towards an organisation's mission" and occurs when there is a match between the values of an organisation and those of an individual.[39]

Stepping back to gain perspective is a practice as useful for organisations, as it is for individuals.[40] According to Graham, in order for individuals and organisations to be the best versions of themselves, they need to have purpose, along with passion, possibilities (vision), and place.[41] Jacobs and Longbotham found that processes such as seeking the counsel of trusted individuals, praying, and reflecting, helped establish a higher purpose in leaders and drove the desire to minimise any discrepancy between their spiritual beliefs and environmental conditions they found themselves in.[42]

Craig and Snook showed that not even 20% of leaders are aware of their own individual purpose.[43] They showed that, while leaders may identify with their organisation' s purpose, they lack personal purpose. "Purpose is […] the key to navigating the complex world we face today, where strategy is ever-changing, and few decisions are obviously right or wrong. If, therefore, we fail to identify our leadership purpose, we will be unable to develop and follow a plan to bring it into action and thereby achieve our most desired goals in both personal and professional regard."[44] Most organisations have a profit-focused purpose, as individuals' purpose is not what we do, but rather how and why we do it. As a result, it is closely aligned with qualities such as awareness, respect, morality, vision, and understanding.[45] In times of change, it is important for leaders, when conducting town halls and group conversations, to question what the organisation stands for as well as what it should continue or cease doing.[46]

Leadership studies have consistently acknowledged the essence of vision (the idealised verbal portrait of what an organisation aspires to achieve) as a significant

[35]Hutchinson (2011).
[36]Kolzow (2014).
[37]Drucker (1973).
[38]Malbašić, Rey & Posarić (2018).
[39]Campbell & Yeung (1991).
[40]Goleman & Boyatzis (2017).
[41]Graham (2011).
[42]Jacobs & Longbotham (2011).
[43]Craig & Snook (2014).
[44]Ibid.
[45]Marques & Dhiman (2017).
[46]O'Reilly & Tushman (2013).

component and determinant of leadership performance.[47] Vision is future-oriented, an idealised utopia with a long-term time frame, and is crafted as a generalised, broad statement that can lend itself to multiple interpretations.[48] Most studies on leadership have focused on how the vision is articulated and communicated.[49] Strange and Mumford showed that the vision process arises from the leader's prescriptive mental model.[50] Vision statements often make use of abstract language and imagery and emphasise values, distal goals, how to achieve them (which may be vague), and utopian outcomes.[51] Boisot and McKelvey hold that, to be effective, organisations need to have adaptive systems where the complexity of their business can match that of the environment.[52]

According to Erçetin *et al.*, order can emerge from chaos and that natural systems have the ability to self-organise.[53] Natural systems show us that "strange attractors" in chaos bring order, as seen, for example, in snowflakes.[54] In today's competitive and globalised world, more companies rely on intellectual capital rather than production activities. These evolving organisations deeply embrace innovation, knowledge, technology, learning, and adaptation as core competencies.[55] In addition, they have to constantly adapt and change (to survive) to environmental changes and an increasingly complex world through innovation and continuous learning.[56] Kahane identified three complexities at the root of the toughest problems leaders face today: "(i) dynamic complexity: cause and effect distant in time and space; (ii) social complexity: diverse stakeholders with different agendas and worldviews; and (iii) generative complexity: emergent realities wherein solutions from the past no longer fit."[57] A realistic view of current leadership demands and the contextual environment must incorporate the complexities involved in developing an effective vision.[58]

Due to environmental dynamics, organisational actors are constantly changing. Leadership tenure in modern organisations is often short-lived because of competing institutional challenges, demands for agile leadership competence, and low tolerance for failure among stakeholders.[59] A central question is whether vision is relevant, or even necessary, given the complexities and dynamics of the environment and the need for constant adaptation.[60] To be effective, a vision requires the leader to have an understanding of the past, have deep knowledge of the present, and the capacity to use available information to make accurate

[47]Rafferty & Griffin (2004).
[48]Marques & Dhiman (2017).
[49]Carton, Murphy & Clark (2014); Venus, Stam & van Knippenberg (2013).
[50]Strange & Mumford (2002).
[51]Berson, Halevy, Shamir, & Erez (2015).
[52]Boisot & McKelvey (2010).
[53]Erçetin, Açikalin, & Bülbül (2013).
[54]Ibid.
[55]Marques & Dhiman (2017).
[56]Hahn, Pinkse, Preuss,& Figge (2015).
[57]Kahane (2004).
[58]Marques & Dhiman (2017).
[59]Treviño & Nelson (2017).
[60]Marques & Dhiman (2017).

projections of future events.[61] Working with other neuroscientists, Zimmer conducted a study on mental time travel and found that individuals use the same region of their brain to both, remember the past and envision the future.[62] Zimmer concluded that episodic memories of the past are crucial to predicting the future.

In many organisations, mission and vision statements eventually tend to be forgotten.[63] Vision requires not only thoughtful planning but also intention.[64] Intention is also closely tied to one's sense of purpose.[65] Meaningful purpose creates much stronger intention, and the vision keeps the purpose alive and vivid with anticipatory images of the future.[66] Collins, in his best-seller *Good to Great,* observes that one of the reasons some companies manage to maintain an outstanding performance over a long period compared to their competitors is that they have an enduring sense of purpose.[67] He notes that having such sense of purpose breeds a clear sense of direction and in turn, aids prioritization and inspires people to go the extra mile. Furthermore, he concludes from his five years of research, that the very best leaders (Level V, as he refers to them) possess two competencies: (i) a resolute and unflinching focus on the purpose of the organisation coupled with; and (ii) a deep sense of humility.

Integrating Purpose and Leadership

At an individual level, a person discovers and defines their personal mission. They are the only one who can fully assess its scope and meaning.[68] From a neuroscience perspective, having a sense of purpose and belonging, being respected, and feeling worthy changes our brain chemistry and fosters positivity in the way people approach life and the challenges facing them.[69] Having a personal mission drives higher performance, enhances the use of existing capabilities, and creates new skills.[70] According to Dhang, many individuals lack clarity of direction and clarity of what they want to achieve. Most people live and die like that."[71] At the leadership level, according to Craig and Snook, despite the interest in purposeful leadership, few leaders have a clear sense of their own purpose and many are unable to distill this down to a specific statement of purpose or an action plan.[72] This raises the question of how someone without a personal mission can define a mission for someone else.[73]

[61]O'Reilly & Tushman (2013).
[62]Zimmer (2011).
[63]Marques & Dhiman (2017).
[64]Taiwo, Lawal, & Agwu (2016).
[65]Graham (2011).
[66]Marques & Dhiman (2017).
[67]Collins (2011).
[68]Christensen (2010).
[69]Murray (2017).
[70]Grant (2008); Craig & Snook (2014).
[71]Dhang (2012).
[72]Craig & Snook (2014).
[73]Malbašić, Rey & Posarić (2018).

Smircich and Morgan argue that leadership involves a process of defining reality in ways that resonate with followers.[74] They present a process comprising three phases through which leaders create meaning for followers. Phase 1 includes framing and shaping context—isolating an element of experience within the context in which it is set; phase 2 involves interpreting the significance of the issue; and phase 3 grounds the subsequent action within the interpretation of the meaning of that action.[75] They further argue that leaders have dual conflicting roles that involve maintaining institutionalised order and structures, and having also to rise above the formal structures to provide meaning and direction.[76]

According to Dhang, personal and organisational missions have several common characteristics: (i) both must be concise, clear, and informative; and (ii) a personal mission statement should cover the same three areas—purpose, activities, and values—as an organisational mission statement.[77] It is important to note, as pointed out by Ramsey, that mission statements do not contain specific time frames, benchmarks, or yardsticks, but rather are overarching blueprints for everyday life and work.[78] Christensen holds the view that people should decide what they stand for and then stand for it all the time.[79]

Kotter exhorts leaders to influence their followers to unite toward a shared vision (or purpose).[80] Pye argues that leadership can be productively seen as a process of framing and managing meaning.[81] Carton *et al*. believe that the most central of all leadership behaviours is to communicate purpose to align the organisation around an envisaged cause or dream.[82] Although alignment has been considered key to attaining extraordinary performance in the past, new studies have found that it may no longer be the right approach to succeed in the creation of a common purpose. According to Mayfield, purposeful leadership combines different factors, such as vision, inspiration, direction, action-orientation, critical thinking, morality, values and ethics.[83]

Purposeful organisations that consider the needs of multiple stakeholders are presumed to be capable of generating higher levels of performance and more valuable innovations as well as improving employee motivation and engagement.[84] Birkinshaw *et al.* showed it is not merely about communicating the firm's purpose, but rather discovering (and rediscovering) the pre-existing shared purpose.[85] As it relates to influence, it is not in the hands of one (the leader), but in the hands of all who share the purpose and who are thus eager to bring it to life in their work. The result is an authentic commitment by employees to fulfil their responsibilities with

[74]Smircich & Morgan (1982).
[75]Ibid.
[76]Ibid.
[77]Dhang (2012).
[78]Ramsey (2003).
[79]Christensen (2010).
[80]Kotter (1996).
[81]Pye (2005).
[82]Carton, Murphy & Clark (2014).
[83]Mayfield (2013).
[84]Wilson (2015).
[85]Birkinshaw, Foss & Lindenberg (2014).

a sense of honour and obligation that arises only from a fully internalised understanding of the shared purpose.[86]

Cardona and Rey noted three ways in which the personal mission is related to, but remains different from, the organisational mission: (i) organisational mission is not the personal mission (personal mission will have goals more specific than those of organisational mission); (ii) organisational mission does not override the personal mission (people can get caught up in their work life, sometimes forgetting their personal life, and behave as if serving the company were their sole purpose in life) and (iii) organisational mission and personal mission must be complementary (staff at a company have the sense that their daily work acquires a genuine sense of contribution and self-realization).[87]

Given the amount of time spent at work, the workplace has become a source of meaning for individuals.[88] The context for employee engagement is embedded in the culture of an organisation, and the culture is the vehicle into which purpose is embedded.[89] According to Schein, it is by understanding our culture that we can understand ourselves and the forces acting upon us that define us.[90] Culture is identified as the "strongest competitive difference" a company has. Honeyman found that there is an increasing trend that asks businesses and leaders to strive for more.[91] Deloitte postulated that putting an emphasis on purpose rather than profits generates confidence, drives investment and creates long-term success.[92]

Motivation theorists and humanistic psychologists have supported the notion that individuals have an inherent need for meaningful work.[93] People are looking for meaning in life and if they can find that in their work and the companies they work for, it unleashes a powerful motivator that companies are beginning to understand. In addition, from a societal perspective, it is becoming increasingly difficult to separate profit from purpose.[94]

Connecting Organisational Purpose and Individual Purpose

In general, vision, mission, and objectives are oriented to corporate purposes that deliver external expectations.[95] Drath and Palus argue that leadership is more than a person—it is a sense of purpose, a force that gives people a common direction and place with an increasing emphasis upon systemic relationships and mutual meaning-making.[96] According to Kempster *et al*., there is a tendency for

[86]Ibid.
[87]Cardona & Rey (2009).
[88]Alexander & Douthit (2016).
[89]Ibid.
[90]Schein (201).
[91]Honeyman (2014).
[92]Deloitte (2014).
[93]Alderfer (1972); Herzberg, Mausner & Snyderman (1959); McClelland (1965); McGregor (1960).
[94]Lin (2010); Deloitte (2014).
[95]Kempster, Jackson & Conroy (2011).
[96]Drath & Palus (1994).

purpose within business and the public sector to become overly preoccupied with the outputs of external goods such as profit, shareholder return, and value for money, or efficiencies.[97] Cardona *et al.* found that leaders who are willing to support people, within their organisations, in the development of their purpose, receive more help in return while driving organisational needs.[98] Organisational purposes that go beyond a mere focus on the bottom line have fuelled interest in understanding the growing disillusionment with the short-term financial imperatives that are blamed for the collapse of leadership integrity.[99] Gusic holds the view that leaders play a significant role in helping organisations realise their purpose.[100]

According to Cardona and Rey, it is precisely at the junction of both the company mission and personal mission that role mission is configured. For an individual, role mission reveals what their personal mission brings to the company mission and vice versa.[101] This contribution characterises the identity of each person in their professional role.[102] Once the role mission is part of the company mission, it is also common to both the company mission and the individual mission. It is not a simple exercise in "self-awareness" disconnected from the company mission, nor is it an exercise in indoctrination of the corporate mission without regard for personal mission. Both extremes generate disappointment, lack of authenticity, and loss of work motivation. Hence, it is in the individual's "interest" that the company has a mission, just as it is in the company's "interest"' that the individual has a life mission.[103]

Empirical research shows that meaningful work affects employee commitment, job satisfaction, engagement and work performance.[104] Individuals with a sense of purpose have an emotional attachment and commitment to a company, what it stands for, and what it is trying to do.[105] A company with a clear and strong mission statement does not necessarily translate into its employees having an emotional commitment to that mission statement.[106]

Erickson theorised that young adults (millennials) are focused on building relationships and when they reach middle age, there is a shift to associate identity with what one is contributing to society.[107] According to Campbell and Yeung, "people are too varied and have too many individual values for it to be possible for a large organisation to achieve a values match for all its employees."[108] That said,

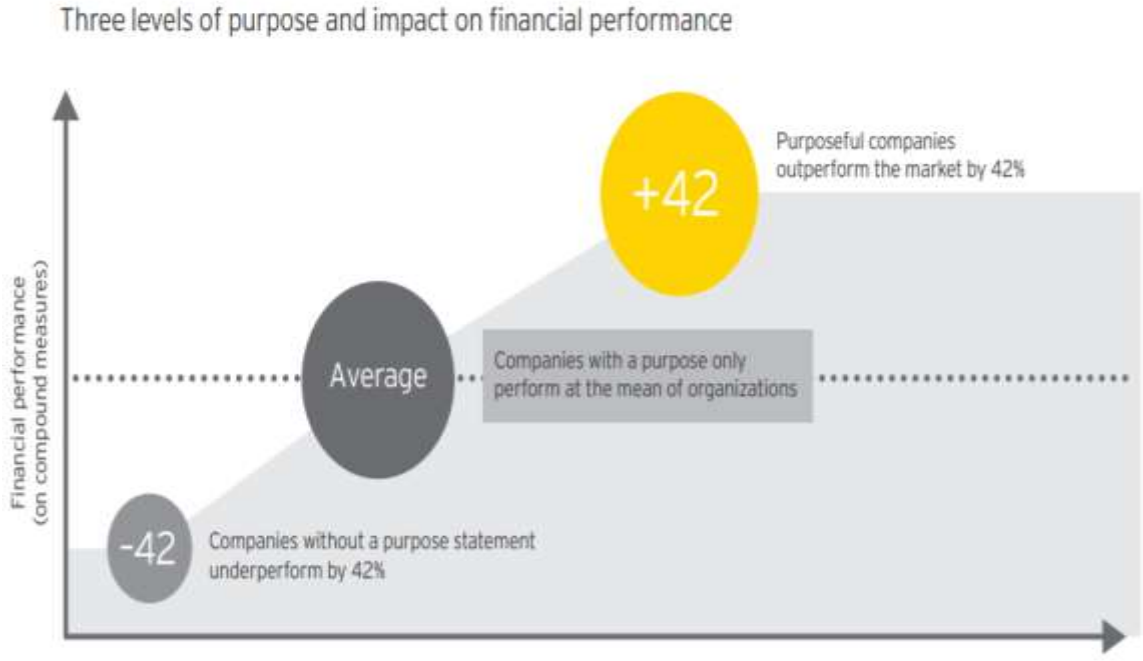
[97]Kempster, Jackson & Conroy (2011).
[98]Cardona, Rey & Craig (2019).
[99]Bailey, Madden, Alfes & Fletcher (2017).
[100]Gusic (2015).
[101]Cardona & Rey (2008).
[102]Cardona & Rey (2008).
[103]Malbašić, Rey & Posarić (2018).
[104]Steger, Dik & Duffy (2012); Steger, Littman-Ovadia, Miller & Menger (2013).
[105]Campbell & Yeung (1991).
[106]Malbašić, Rey & Posarić (2018).
[107]Erickson (1994).
[108]Campbell & Yeung (1991).

leaders need to lead by example, conscious of the fact that their colleagues' mission depends, in part, on how they live their own.[109]

Impact of Purpose on Organisational Performance

While many companies understand that having a stated purpose is important, they struggle to weave it into day-to-day business.[110] The EY Beacon Institute undertook research in 2018 to understand whether company purpose had any long-term financial performance effect.[111] Their study covered 1,470 business leaders across 12 locations (Australia, the United Kingdom, the United States, China, India, Brazil, Japan, Singapore, Hong Kong SAR, South Africa, France, and Germany) and 10 industries (automotive and transportation, banking and capital markets, consumer products and retail, diversified industrial products, government and public sector, health, life sciences, mining and metals, oil and gas, and professional services). The findings showed that strong and active purpose raised employee engagement and acted as a unifier, supported more loyal and committed customers, and helped frame effective decision making for leaders in an environment of uncertainty.[112]

Figure 1. *Impact of Purpose on Organisational Financial Performance*



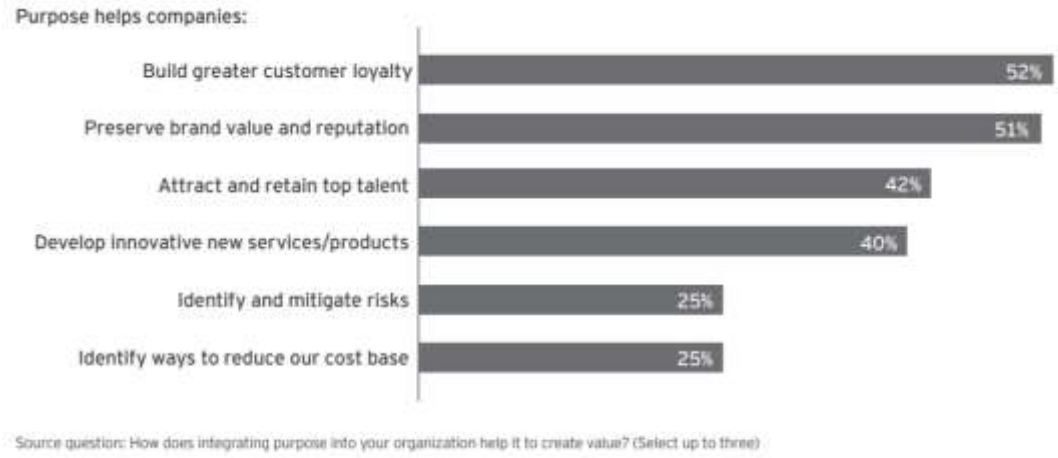
Source: Global Leadership Forecast released by DDI, The Conference Board, and EY (2018)

[109]Marimon, Mas-Machuca & Rey (2016).
[110]Quinn & Thakor (2018).
[111]EY Beacon Institute (2018).
[112]Beacon Institute (2018).

Of the 1,470 global C-Suite executives surveyed, 84 per cent believed that their business operated in an increasingly disrupted environment and likened purpose to a fixed point to help navigate change and uncertainty.[113] The findings further showed that purposeful organisations (those with the support of active leadership who authentically demonstrated their values and company purpose—living, breathing and effectively demonstrating a commitment to that purpose is an infinitely larger task than paying lip service in this regard) had a stronger financial performance in the short and long term than companies where only a purpose statement was written up but not enacted. They were also better equipped to deal with fast-changing, competitive environments. The Global Leadership Forecast 2018 showed that "living a purpose statement at work not only had a positive effect on engagement (engagement levels were 12 per cent and employees' intent to stay 14 per cent higher), but twice as many leaders found meaning from the work they were doing.

The changing economic landscape has prompted a fundamental rethink within many companies about the how and why of their business. Purpose is personal at an individual level and, at the company level, needs to be embedded into the goals, strategies, objectives, governance, and decision-making processes and systems.[114]

Figure 2. *How Purpose Creates Value*



Source: Global Leadership Forecast released by DDI, The Conference Board, and EY (2018)

Implementing purpose within an organisation' s way of work faces a number of barriers such as short-term shareholder pressure, systems, and infrastructure that are not aligned with long-term purpose and the perceived cost for employees who seek to minimise personal cost and effort.[115] Purpose aligns people toward something more significant than shareholder returns.[116] However, according to Quinn and Thakor, leaders need to choose between stricter controls (employees choose to respond primarily to the incentives outlined in their contracts and the

[113]Beacon Institute (2018).
[114]Quinn & Thakor (2018).
[115]EY Beacon Institute (2018); Quinn & Thakor (2018).
[116]Bailey, Madden, Alfes & Fletcher (2017).

controls imposed on them to achieve the desired impact) or aligning the organisation with an authentic higher purpose that intersects business interests and goals and helps guide decisions across all levels.[117]

Conclusion

People need leadership for personal fulfilment and to reach their full potential.[118] It is often during a crisis where leaders are forced to challenge their assumptions about motivation and performance and to experiment with new approaches.[119] When leaders connect their own purpose to organisational purposes, their influence intensifies.[120] In the current changing world, where the way forward appears increasingly blurred and it is more difficult to determine whether a decision is right or wrong, leaders' life missions play a critical role in guiding and leading over time, as does the need for organisations to be more human in an ever-increasing digital age.[121]

Mission and values are inextricably linked, and discussions of leadership for the "new normal" often implicitly assume that we all share the same old normal. An employee's personal mission, manifested through purposeful work, affects important elements of organisational behaviour and business performance. The role of values in determining purpose, vision, and mission is vital, as values are the "glue" that hold personal and organisational purposes together.[122] Serving all stakeholders, and aspiring to improve society, gives a company a broader vision, making it more likely to spot unexpected opportunities and new risks that are emblematic of disruptive and volatile times.[123]

Leading translates possibilities into realities and purpose is crucial in each moment as part of how leaders interact and address challenges. In the face of tough realities for organisations, everyone associated needs to be open to being a leader. The purpose is not genetic and no person is born with a predetermined work orientation—even the world's most successful leaders have secrets in their journey to success and achieving their purpose.[124] Leading requires courage and the understanding of where managers' responsibility ends and responsibility as leaders begins—providing purpose is a leader's role and leadership is a major intangible asset to a business.

According to Professor Michael Beer of Harvard Business School, "It is essential that companies develop the kind of leaders that can communicate and align the whole organisation around purpose. A leader's ability to influence people

[117]Quinn & Thakor (2018).
[118]Cardona, Rey & Craig (2019).
[119]Quinn & Thakor (2018).
[120]Cardona, Rey & Craig (2019).
[121]Craig & Snook (2014).
[122]Malbašić, Rey & Posarić (2018).
[123]Beacon Institute (2018).
[124]Dweck (2016).

to act does not necessarily come from the position they hold but rather from a strong belief in a purpose and willingness to pursue that conviction."[125]

Organisations are political systems on their own and it should not be too difficult to state a purpose and a set of values.[126] When a company announces its purpose and values and they are not reflected by the behaviour of senior leadership, those words ring hollow.[127] It is much harder to enact purpose in the organisation because it requires leaders to continually search for multi-disciplinary consistency.[128] According to Kolzow, "[u]nless leaders understand the vision that motivates them to lead, the purpose that inspires them, and the values that empower them, it is difficult to make courageous and necessary choices and decisions in a chaotic world."[129]

A review of the available literature shows that there is a great amount of enthusiasm around the topic of purposeful leadership. However, much of this is based on qualitative studies rather than empirical evidence, and further research is needed to substantiate this notion of the importance and impact of purpose in terms of leadership and its desired outcomes.

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[125]Botelho, Powell, Kincaid & Wang (2017).
[126]Dweck (2016); Rousmaniere (2015).
[127]Quinn & Thakor (2018).
[128]Ibid.
[129]Kolzow (2014).

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Athens Journal of Law - Volume 7, Issue 3, July 2021 – Pages 297-316

Tackling of Corruption in India by Recently Enacted Penal Laws

By Pradeep Kumar Singh[*]

Corruption is not only a crime but also a serious social problem which further begets many other problems like black money, black market, money laundering etc. Corruption affects infrastructural development, economic growth, prosperity of nation and ultimately erodes public faith in law, government, governmental policies and governance. In this era of globalization, and science and technology, anything happening in one nation affects all other nations and persons throughout world. When in one nation public servants commit corruption and they have corrupt mentality; such situation affects not only the nation concerned but also the world community. It is always important requisite that the legal regime to tackle problem of corruption has to be reviewed and amended to suit the requirements of criminal justice system. In India recently legal regime relating to corruption has been amended for effective tackling of corruption and corruption related problems. In this paper analysis will be made regarding effectiveness of recently enacted laws to deal with corruption.

Keywords: *Benami property; Black money; Corruption; Confiscation; Criminalisation; Money laundering; Society; Tax evasion.*

Introduction

Corruption is a serious challenge before the criminal justice which erodes faith of citizenry in law, rule of law and good governance. Without any exception both the developed and developing nations are seriously affected by alarming increase in corruption and corrupt practices but with passing time, development, education, and market based economy impact of corruption in developing countries is becoming more devastating. In developed countries also corruption is graver problem but there society is more developed in various references particularly infra-structure and economy development, therefore corruption is not as problematic as it is in developing countries. In developing countries like India, corruption affects infrastructural development, and ultimately serious setbacks are caused to the whole economy and over-all development of the country. Corruption augments demoralizing effect and bumps up criminogenic forces particularly for socio-economic criminality. Corruption is increasing leaps and bounds which engulfs whole developmental activities particularly infra-structure development. Corruption is not only dangerous problem in itself but it is mother of various problems which cumulative impact is complete damaging of social value system and social developmental process.

[*]PhD, Professor, Faculty of Law, Banaras Hindu University, Varanasi, Uttar Pradesh, India. Email: pradeepsinghk6@gmail.com.

Corruption is major problem in India affecting the whole developmental and welfare activities, and further, every aspect of life of people; without tackling corruption India cannot attain its goal of development of society, well-being of citizenry, and prosperity of the nation. Corruption affects every aspect of national development particularly infra-structural development. Recently Indian legislature has enacted some modern and effective penal laws to check the menacing problem of corruption. Corruption is not simple problem but complicated one; it is necessary to enact modern, efficient and sufficient penal laws to effectively deal the corruption, corrupt practices and corrupt mentality.

Prevention of Corruption Act 1988

Initially Prevention of Corruption Act was enacted in 1947 to tackle the problem of corruption, but with passing time it was realised that the rate and seriousness of corruption cases are increasing and the aforesaid Act is needed to be modernised, therefore, in 1988 Prevention of Corruption Act 1947 was repealed and Prevention of Corruption Act 1988 was enacted. To make it modern and effective in dealing with corruption problem in 2018 Prevention of Corruption (Amendment) Act 2018 has been enacted which makes complete change to corruption related legal regime. Previously gratification was taken as monetary gratification only and such concept was seriously weakening efforts to tackle corruption as when public servant would have taken any other sort of gratification. In corruption activities public servant not only takes pecuniary considerations but it may be of varied nature. In Section 2 of Prevention of Corruption Act 1988 by Amendment Act 2018 definition of 'undue benefit' is added which means any gratification other than legal remuneration, and further, by adding Explanation to this clause 'gratification' is defined it is not limited to pecuniary gratification or gratification estimable in money. Thereby, impact of the Act has been made wider to include any kind of improper act of public servant committed for any kind of favour or benefit. When undue advantage and gratification are read together, it makes this Act as very effective instrument for dealing with problem of corruption and corrupt practices.

By Section 3 of Prevention of Corruption (Amendment) Act 2018 Section 4 of Prevention of Corruption Act is amended and now it directs for speedy trial in corruption cases. Speedy disposal of cases have effective impact over dealing with crime problem. When corrupt person is punished speedily with infliction of severe sentence, it may be lesson for corrupt public servant and persons with corrupt mentality. Societal reaction against corruption is also sharpened by speedy disposal of case. Now after amendment sub-section 4 of Section 4 of Prevention of Corruption Act directs for day to day hearing and taking endeavour for conclusion of trial within a period of two years and in case trial is not concluded within such period then to record reasons in writing and period of trial may be extended further but in one instance it can be extended only for six months and provisions contained in sub-section 4 of Section 4 of the Act ultimately provides that the maximum period for trial shall not be ordinarily more than four years; here

ordinarily term is used, it means in exceptional situation trial period may be extended for further period also. Lokpal has also crucial role in establishment of special courts for trial of corruption cases. Section 35 (1) Lokpal and Lokayuktas Act 2013 provides that for trial of cases under Prevention of Corruption Act 1988 and Lokpal and Lokayuktas Act 2013 Central Government shall constitute such number of special courts as recommended by Lokpal.

Through Amendment Act of 2018 Section 7, 8, 9, and 10 are completely substituted to make the Act effective to deal with corruption problem in effective manner.[1] Section 7 of Act prescribes punishment for corruption committed by public servants in performance of his official duties or attempt or abetment. Section 7 of Prevention of Corruption Act 1988 declares that the taking undue advantage in performance of an official act is an offence. Section 7 of Act after amendment in 2018 has become wider and effective; when undue benefit has been taken or attempt is made to obtain undue benefit for doing or forbearing to do an official act or showing or forbearing to show favour or for rendering or attempting to render any service, the act committed by public servant will become corrupt act punishable under provisions contained in the Section 7 of the Act. Explanation 1 to Section 7 of Act clarifies that offence is committed as soon as undue benefit is involved, obtained, accepted or attempted to obtain, it is regardless whether act was committed or not, it will be corruption. Explanation 2 to Section 7 of Act clarifies that it is immaterial whether public servant has taken undue advantage directly or through some third person, act of such public servant is punishable offence under Section 7 of Act. Further, public servant has taken undue advantage for doing corrupt act himself or using his position and influence over another public servant for committing corrupt act is crime under Section 7 of the Act. By Amendment Act 2018 punishment prescribed under Section 7 has been enhanced; previously prescribed punishment was imprisonment for not less than six months and extended up to five years and also liable to fine, now prescribed punishment is imprisonment for not less than three years but which may be extended to seven years and is also liable to fine. Section 7 of Act imposes punishment on public servant for corruption; Section 7-A is included in the Prevention of Corruption Act 1988 by Amendment Act 2018 which penalises a person who is not public servant and he takes undue advantage to induce a public servant to commit corruption, such act of such person is punishable with imprisonment not less than three years which may extend to seven years and also liable to fine.

Giver of undue advantage lures public servant to become corrupt. Section 8 (1) of Act prescribes punishment for giving undue advantage; giver of gratification is main cause of corruption. If giver in corruption case would not provide illegal gratification, public servant would not become corrupt person. Section 8 of Act

[1]By Section 4 of Prevention of Corruption (Amendment) Act 2018 Section 7, 8, 9 and 10 are completely substituted. In un-amended Act of 1988 there was compulsory requirement to prove that the gratification other than legal remuneration was taken as motive or reward for corrupt acts and proving of such motive was difficult as in corruption cases, generally, evidences are not available in traditional reference. Now explanation added to section 7 of Act clarifies that only taking undue advantage is sufficient for attracting penal provisions contained in Section 7 of Act.

prescribes imprisonment for a term which may extend to seven years or with fine or both. Punishment prescribed in this section does not prescribe mandatory minimum imprisonment as punishment, and further, court has discretion to impose imprisonment or fine or both. Third Proviso to Section 8 (1) provides that when giver of undue advantage is commercial organisation, it shall be punishable with fine only. Situation mentioned in third proviso to Section 8 (1) is dealt in detail in provisions contained in Section 9 of Act which provides in reference to giving of undue benefit by the commercial organisation that when any person associated to such organisation gives undue benefit to public servant then such organisation shall be punishable with fine. Commercial organisation shall have defence in criminal prosecution that such organisation has adequate procedure to prevent the persons associated with it from doing such kind of acts. Section 9 (3) (c) of Act clarifies who are the persons associated with commercial organisation for whose act commercial organisation is penalised, according to it such person performs services for or on behalf of commercial organisation. Explanation 2 to Section 9 (3) of Act provides that in deciding whether person is associated to commercial organisation, all the relevant circumstances shall be taken into consideration. Whenever commercial organisation is involved in giving undue benefit punishable under Section 9 of Prevention of Corruption Act then Section 10 imposes imputed liability on director, manager, secretary or other officer of such commercial organisation that such offence is committed with the consent or connivance of such officer/officers and such officer shall be liable for punishment of imprisonment for term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Giver of illegal gratification are usually victim and compelled by public servant to pay the illegal gratification, therefore, there is need to protect innocent common man who is innocent person, he is actually victim of corruption. Further, in struggle against corruption such victim is main recourse to obtain information regarding corrupt public servant and acts of corruption, such persons are main witnesses and measures to collect evidences. Section 8 of the Prevention of Corruption Act substituted through Amendment Act considers the need of criminal justice system and provides protection to compelled giver of gratification; such person is not criminal but victim of crime of corruption. First Proviso to Section 8 (1) provides that section shall not apply where a person is compelled to give such undue advantage and sub-section (2) of Section 8 of Prevention of Corruption Act provides that sub-section (1) shall not be applicable when giver of undue advantage informs law enforcement agency and to assist them gives or promises to give undue advantage.

In Prevention of Corruption Act Section 13 deals with criminal misconduct and in un-amended Act it was much confusing and it was usually affecting the efficacy. Prevention of Corruption Act has substituted sub-section (1) of Section 13 and now it provides two instances when acts of public servant may amount to criminal misconduct – (1) when public servant fraudulently or dishonestly misappropriates any property entrusted to him or property under his control or public servant facilitates another person for misappropriation of such property. It is very wider provision and covers situation of enriching of public servant on cost of

public property. This provision may sufficiently deal with abuse, misuse and misappropriation of public fund. (2). When public servant illegally enriched during holding the office. It is also very wider provision may cover all the situations of public servant found in possession of property and assets more than his known sources of income and it is completely cleared by Explanation 1 and 2 to Section 13 (1) of the Act.[2] To effectively deal with corruption most crucial action is confiscation of property accumulated by corrupt acts, this is taken care by various penal Acts recently enacted, Prevention of Corruption (Amendment) Act 2018 also provides provisions in aforesaid reference. Chapter – IV A has been added which consists Section 18 A which makes attachment and confiscation of property obtained by corruption more effective by prescribing that besides Prevention of Money Laundering Act provisions contained in Criminal Law Amendment Ordinance 1944 shall also be applicable. Prevention of Money Laundering is applicable for acts of money laundering, where matter is not amounting to money laundering then attachment and confiscation of property may be under Criminal Law Amendment Ordinance 1944.[3] Further for effective dealing with corruption creation of deterrence in the mind of corrupt public servant is necessary. Prevention of Corruption (Amendment) Act 2018 has increased the punishments prescribed for offences punishable under the Act 1988, further, for subsequent conviction for corruption Amendment Act prescribes enhanced punishment. Thereby, Prevention of Corruption Act provides more severe punishment for habitual corrupt public servant. Section 14 of prevention of Corruption Act 1988 is substituted by Section 8 of Prevention of Corruption (Amendment) Act 2018 and it provides that on second or further conviction prescribed punishment shall be of imprisonment for term not less than five years which may extend to ten years and shall also be liable to fine.

Public servant is also needed to be protected for proper discharge of his official duty and in it not only he has interest but also society has interest. Proper discharge of his public duty by public servant is necessary for societal development and excellence. Public servant should have fearless environment for discharge of his duty; honest public servant should not have fear that some vested interest may initiate proceeding against him and his social reputation may be affected by his arrest or made accused in false case of corruption. In Criminal

[2]Explanation 1 and 2 to the Section 13 (1) of Prevention of Corruption Act clears that illegal enriching of public servant means persons found in possession of more property than his known sources of income is criminal misconduct. Explanations provides – "Explanation 1- A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.
Explanation 2 – The expression "known sources of income" means income received from any lawful sources."

[3]Criminal Law Amendment Ordinance is applicable for attachment and confiscation of property obtained by commission of crime; jurisdiction in Ordinance 1944 is given to District Judge but Section 18 A of Prevention of Corruption (Amendment) Act 2018 confers such jurisdiction on Special Judge appointed under Prevention of Corruption Act 1988. For attachment and confiscation of property obtained by corruption, various enactments are relevant like LokPal and Lokayukta Act, Benami Property Act, Criminal Procedure Code etc.

Procedure Code in Section 197 protection is provided to public servant for all and every kind of prosecution by prescribing requirement of prior sanction for taking cognizance of criminal case; in Section 19 of Prevention of Corruption Act special provision is given for prescribing special procedure for corruption cases that court cannot take cognizance of corruption case without previous sanction of related Government or competent authority. Now by Amendment Act 2018 time limit for disposal of matter relating to grant of previous sanction has been prescribed in Section 19 of Act of 1988 according to which matter for grant of previous sanction has to be decided within three months from the date of receipt of proposal requiring grant of previous sanction and when there is need of legal consultation for disposal of such matter then such period may be extended by one month. By prescribing time limit for disposal of matter relating to grant of previous sanction may cure the problem of delaying of matter and affecting of criminal justice. Further, it may be conducive for effective dealing with corruption cases. Private person may seek previous sanction of Government or competent authority for initiation of prosecution only when he is complainant and his complaint is not dismissed by Court under Section 203 of Criminal Procedure Code 1973, otherwise only law enforcement agency is permitted to seek previous sanction. Initiation of investigation particularly arrest may affect the reputation of a public servant, therefore, to protect honest public servant it is necessary that there should be proper procedural safeguards and now it is provided by addition of a new provision Section 17 A in the Prevention of Corruption Act 1988.[4] Section 17 A of the Act provides that inquiry or investigation can only be conducted after obtaining the previous approval from the Government or competent authority. Normally in cognizable case investigating agency is competent to initiate investigation without obtaining any authorisation but this new requirement imposes restriction on the power of investigating agency. But Second Proviso to Section 17 A of Prevention of Corruption Act imposes time limit of three months on Government and competent authority to dispose matter relating to grant of previous approval to investigating agency and this time limit may be extended for one month but maximum time which may be available to concerned authority for taking decision about grant of previous approval is four months. This provision also implicitly clears that public servant cannot be arrested on charge of commission of corruption without obtaining prior approval from the concerned authority but First Proviso to Section 17 A of the Act clears that such approval shall not be needed for case involving arrest of a person on spot on the charge of accepting or attempting to accept undue advantage. Hereby, when a public servant is arrested at the spot while he is in process of taking or attempting to take undue advantage then there is no need of previous approval for arrest and investigation in the case.

[4]Section 17 A is added in Prevention of Corruption Act by Section 12 of Prevention of Corruption (Amendment) Act 2018.

Prevention of Money Laundering Act 2002

It is primary criminological consideration that the causation of crime should be kept in focus in criminal law enactment and criminal law enforcement. In corruption, major and primary cause is greed and materialism and to satisfy it public servant commits corruption; money is obtained through corrupt practices which is concealed or invested and projected as untainted property. Such property also creates problem of black money; corruption and black money are interrelated problem. Corruption creates black money and black money creates corruption. If proceed of corruption is sternly dealt and confiscated, a public servant indulged in corruption or public servant making mind to commit corruption may not think to commit corruption.[5] Corrupt person should have lesson that corruption may not be beneficial; even after commission of corruption, money obtained may not be used but may be confiscated.

Concealing of proceed of corruption is major component in crime of corruption; concealing and projecting proceeds of crime as untainted money is called as money laundering; Prevention of Money Laundering Act 2002 declares it as crime.[6] Section 2 (1) (p) of Prevention of Money Laundering Act provides that Money Laundering has the meaning assigned to it in Section 3, thereby, when meaning of money laundering is attempted to inferred from Section 3 of the Act 2002, money laundering is an offence of concealing or investing or projecting proceed of crime as untainted money. Money laundering is commission of any offence mentioned in Section 3 of the Act 2002.[7] Section 3 of Act 2002 declares every act any way related to concealing of proceeds of crime and projecting as untainted property as crime. In original Act money laundering activities were not specifically specified, thereby, it was creating confusion; by Finance Act 2019 in Section 3 of Prevention of Money Laundering Act 2002 an Explanation has been added which clears that a person is guilty of money laundering if he is directly or indirectly attempted to indulge or knowingly assisted or knowingly he is party or actually involved in any manner in - concealment or possession or acquisition or use or projecting as untainted money or claiming as untainted money. By addition of Explanation to Section 3 now act of money laundering is clearly specified and it covers every aspect relating to money laundering, whether committed in one manner or other; and further, it also covers every person concerned with money laundering, whether connected directly or indirectly. Furthermore, this Explanation

[5]In Ancient Indian law there was clear direction for confiscation of property obtained by corruption. In *Manu-smriti* which has been most acknowledged ancient law scripture in India king was directed to confiscate the whole property of corrupt public servant (*Manu-smriti*. IX. 231). Confiscation of property is main measure to deal with corruption. when public servant losses his property accumulated by corruption, and further, punishment is also imposed for corrupt act then he and also other potential corrupt public servant get clear lesson that corruption is undesired and painful; never such act has to be committed.

[6]Section 3 of Prevention of Money Laundering Act 2002.

[7]Money laundering is declared as an offence u/s 3 of Prevention of Money Laundering Act 2002 and Section 4 of this Act prescribes punishment that it is punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

in its clause (ii) clarifies that acts relating money laundering is continuing crime and it continues till such person is enjoying proceeds of crime.[8] Money laundering is crime relating to proceed of crime and proceed of crime is defined in Section 2 (1) (u) of Prevention of Money laundering Act as property obtained or derived from criminal activity relating to a scheduled offence or value of any such property. Hereby, issue relating Proceed of crime is crucial and material for effective action against money laundering. Definition of proceed of crime given in Act enacted in 2002 was not clearly showing that whether proceed of crime is property obtained by commission of scheduled offence only or it is also including property obtained by commission of some offence relating to scheduled offence. To clarify and to make law effective to deal with money laundering in Section 2 (1) (u) of Prevention of Money Laundering Act 2002 one Explanation has been added by Section 192 of Finance Act 2019 which clearly mentions that proceed of crime not only derived or obtained from the scheduled offence but also any property which may be directly or indirectly be derived or obtained as a result of any criminal activity relatable to scheduled offence. This explanation clears that not only property derived from scheduled crime is proceeds of crime but also profit obtained by investment of such property is proceed of crime. Further, not only property obtained by schedule offence is proceed of crime and Section 3 of Act shall be applicable but also property obtained by offence which is not scheduled offence but relatable to scheduled offence is also proceed of crime and Section 3 of Act 2002 shall be applicable.

Only imposition of sentence may not be sufficient for tackling the problem of money laundering and ultimately the crime from which such proceeds of crime has been obtained but it is required that the proceeds of crime be identified and confiscated. For identification and confiscation of proceeds of crime Directorate is established and director, deputy director and assistant director are empowered to attach the proceeds of crime provisionally for maximum period of one hundred eighty days. Then matter is referred to adjudicatory authority. After completion of proceeding if it comes out that the property is proceeds of crime, attachment of property is confirmed. Against order of adjudicatory authority appeal may be filed before Appellate Tribunal established by Central government. By Section 195 of Finance Act 2019 Section 12 AA has been added in the Prevention of Money Laundering Act 2002 which prescribes that whenever any financial transaction takes place the reporting entity[9] has to verify identity of the person participating in financial transactions as per provisions contained in Aadhar (Targeted Delivery of

[8]Clause (ii) of Explanation added by Section 193 of Finance Act 2019 in Section 3 of Prevention of Money Laundering Act 2002 provides: "the process or activity connected with proceeds of crime is a continuous activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever".

[9]Financial and other institution mentioned as reporting entity under Chapter IV of Prevention of Money Laundering Act 2002. Financial institution, banking companies and other intermediaries through whom financial transaction is made has responsibility to maintain the record of transactions and provide documents and information to various instrumentalities functioning check problem of money laundering.

Financial and other Subsidies, Benefits and Services) Act 2016. Further, reporting entity has to obtain information regarding ownership, financial position, source of funds and intended nature of relationship between transaction parties. Whenever reporting entities identifies have suspicion relating to use of proceeds of crime in transactions, it has to increase future monitoring including greater scrutiny of business with such client and in such case reporting entity has maintain records of transaction between such client making such transaction and reporting entity. When reporting entity identifies suspicious transaction (it is named as specified transaction), reporting entity has to apply due diligence over such client and his transaction and record of information gather in this reference has to maintained for period of five years from the date of transaction between client and reporting entity.[10]

Offence of money laundering punishable under Sec. 4 of the Act is declared as cognizable and non-bailable. Offences relating to concealment of Proceed of crime is dealt under Prevention of Money Laundering Act and provisions have declared them as cognizable and non-bailable but offence of which proceed is dealt herewith itself may be declared as non-cognizable and/or bailable in Criminal Procedure Code; such confusion is need to be specifically dealt with and clarified, therefore, by Section 200 of Finance Act 2019 one Explanation has been added in Section 45 of Prevention of Money Laundering Act 2002 which specifically clarifies that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything contrary contained in the Code of Criminal Procedure 1973. Therefore, for all the offences under Prevention of Money Laundering Act 2002 law enforcement agency is empowered to arrest without warrant subject to due observance of conditions mentioned in Section 19 of Prevention of Money Laundering Act 2002.[11] This offence is committed by organised gangs and also they may have international connections, therefore, for investigation of offence and attachment of proceeds of crime international co-operation may be required. Section 56 empowers Central Government to make agreement with other countries for enforcement of this Act and exchange of information for prevention of money laundering. On request of investigating officer court may issue letter of request to court authority in the other country for collection of evidences.

[10]Section 12 AA (4) Added in Prevention of Money Laundering Act 2002 by Section 195 of Finance Act 2019.

[11]Section 19 of Prevention of Money Laundering Act directs that law enforcement agency may, on reason to believe that a person is guilty of offence under the Act derived from material recovered from possession of such person, arrest without warrant. Law enforcement agency must record reason of such believe in writing. Such arrested person must be produced before the Judicial Magistrate or Metropolitan Magistrate within twenty four hours of his arrest excluding time required for the journey from the place of arrest to the court. Law enforcement agency has to forward, all the materials recovered from possession of such arrested on the basis of which law enforcement has formed such believe that he is guilty of offence under this Act, to the Adjudicating Authority.

Prohibition of Benami Property Transactions Act 1988

Corruption is mainly committed for obtaining illegal gratifications particularly in money terms and after obtaining money it is invested in purchase of properties. Better method to tackle problem is to hit hard on objective of crime commission. In case of corruption, crime is committed to get more and more money. When such money or property obtained by such money is searched and confiscated, person may not commit crime because he will have lesson for future and also it will be for potential corrupt persons that there is no benefit in committing corruption as whatever obtained by crime commission may be confiscated. In 1988 Benami Transactions (Prohibition) Act 1988 was passed. Benami property is major measure to use unaccounted money obtained through corruption. This Act has been enacted to deal with problem of benami property ultimately to check problem of corruption, black money and other kinds of organised crimes.

The Act of 1988 was having many loopholes and it was not achieving its desired aim to check the problem of benami property, this Act was containing merely nine sections and no procedure and competent authorities were prescribed for enforcement of law. Further, un-amended Act did not prescribe any penalty or punishment for participating in benami transaction. Un-amended Benami Transaction Act 1988 was ineffective. Therefore to make the law effective Benami Transactions (Prohibition) Amendment Act 2016 was passed and Benami Transactions (Prohibition) Act 1988 was renamed as Prohibition of Benami Property Transactions Act 1988. This Act has been made to find out benami property and confiscate it. Benami property is obtained in the name of some other person or even such person may be fictitious person. Person who is holding the property, he may exist and identifiable, but he is not real owner of property, only he is holding property for benefit of person invested money in the property. In some cases person in whose name property is shown may have lend his name for the purpose of using name to show as owner of property. In some cases person whose name is used may not be existing, he may be fictitious person. Person who holds the benami property is called as benamidar[12] and person for whose benefit benami property is held by benamidar is called beneficial owner[13]. Section 4 of Benami Transactions (Prohibition) Amendment Act 2016 has substituted the whole Section 2 of Prohibition of Benami Property Transactions Act 1988. Section 2 (8) of Prohibition of Benami Property Transactions Act 1988 defines benami property as any property which is the subject matter of benami transaction and also includes the proceeds from such property. The proceeds of benami property also form benami property. Hereby, property is benami or not, depends on whether transaction relating to property is benami transaction. Whenever transaction relating to any property is benami transaction, the property and proceed of such

[12]Section 2 (10) Prohibition of Benami Property Transactions Act 1988. This definition clears that benamidar may be existing and alive person or fictitious person. In case of existing person some benamidar may have lend his name for holding such property. Lending the name has reference that such person is taking money for use of his name for holding the benami property..

[13]Section 2 (12) Prohibition of Benami Property Transactions Act 1988.

property shall be benami property. Benami transaction is transaction or arrangement by which a property is transferred to or held by a person but consideration of such property is paid by another person and such property is held by benamidar for immediate or future benefit of person who provided the consideration.[14] But when property is held in such a situation by karta or member of Hindu undivided family for benefit of members of family or spouse or child or person in fiduciary relationship like trustee, executor or director of company etc., the transaction shall not be benami transaction and property shall not be benami property. Further, when person paying the consideration for property is joint owner with his near relatives like sister, brother etc. and paid consideration for property is paid out of known sources of such person, property will not be benami property. But in all these cases in which property is taken in name of other person and it is not treated as benami property, it is necessary that property must be within known sources of person paying the consideration. Hereby, Amendment Act has made major change in traditional concept of benami property that even when property is taken in name of nearly related if property is more than known sources of person paying the consideration, property shall become benami property and action may be taken under this Act. When person has property in his own name and it is more than known sources, action is taken under relevant laws like law relating to income tax etc.; and when he has taken in name of nearly related like spouse, son, daughter, sister, brother etc. and property is not within known sources of income of person paying consideration, property is benami property and in such situation together with other relevant laws like law relating to income tax provisions of Prohibition of Benami Property Transactions Act 1988 shall also be applicable and effective action may be taken.

When property is taken in name of fictitious person or consideration for property is paid by fictitious person then also transaction is benami transaction and property shall be benami property.[15] Furthermore, when person who is shown as owner, he is not aware about it or he denies ownership of such property then also transaction shall be benami transaction and property shall be benami property.[16] Un-amended Act of 1988 dealing with benami property was not prescribing complete measures for tackling problem of benami property but amendment made by Act of 2016 provides effective procedure for dealing with benami property problem, thereby, ultimately problems of corruption and black money. Section 5 of Prohibition of Benami Property Transactions Act 1988 confers power on Central Government to confiscate benami property.[17] Benamidar cannot transfer property to the beneficial owner; any transfer of benami property to beneficial owner or his representative is declared as null and void.[18] Section 3 (3) Prohibition

[14]Section 2 (9) (A) Prohibition of Benami Property Transactions Act 1988.
[15]Section 2 (9) (B) and (D) Prohibition of Benami Property Transactions Act 1988
[16]Section 2 (9) (C) Prohibition of Benami Property Transactions Act 1988
[17]Section 5 of Prohibition of Benami Property Transactions Act 1988 provides: "Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government".
[18]Section 6 of Prohibition of Benami Property Transactions Act 1988. Only transfer of benami property from benamidar to beneficial owner is permitted under Section 190 of The Finance Act 2016. Under Finace Act 2016 there was asset declaration scheme and under it person paid

of Benami Property Transactions Act 1988 declares participation in benami transaction on or after enforcement of Benami Transaction (Prohibition) Amendment Act 2016 as an criminal behaviour for which specific penal provisions are prescribed in Chapter VII of the Prohibition of Benami Property Transactions Act 1988. Section 53 (1) contained in Chapter VII of Act declares act of benamidar, beneficial owner and persons abetting benami transaction as criminal acts and sub-section (2) of Section 53 prescribes punishment of imprisonment for term not less than one year but which may extend to seven years and also punishable by fine which may extend to twenty five percent of fair market value of property. Fine imposition is mandatory. There are double pronged blow on benami property, thereby, corruption and black money; property is confiscated under Section 5 and here under Section 53 (2) there is mandatory imposition of fine and it is higher that is twenty five percent of fair market value of property. Generally benamidar and beneficial owner give false information and false documents to conceal benami transaction and benami property, such acts are also declared as crime u/s 54 of Prohibition of Benami Property Transactions Act 1988 and punishments prescribed are of imprisonment for term not less than six months which may extend to five years and also fine which may extend to ten percent of fair market value the property.

Benami Transactions (Prohibition) Amendment Act 2016 has completely changed Benami Transactions (Prohibition) Act 1988; not only name of Act is changed but provisions contained therein are wholly and completely changed. The un-amended Benami Transaction (Prohibition) Act 1988 was containing merely nine sections and provisions were completely incomplete in every reference, neither properly relevant aspects were defined nor regulatory, penal and confiscatory provisions were provided nor proper authorities were established nor adequate procedures were provided to deal with benami property and benami transaction. In amended Act every needed measure is provided for identification and confiscation of benami property; in this regard Authorities (Initiating officer, Approving authority, Administrator and Adjudicating authority) and Appellate Tribunal are established. Amended Act provides provisions for penalizing benami transactions related activities and for it criminal courts, jurisdictions and procedures are provided. In 2019 by Finance Act 2019 some amendments have been made in Section 23, 24, 26, 30, 46, 47, 54 and 55 of Prohibition of Benami Property Transactions Act; these amendments are inserted in reference to calculation of various periods under the Act like limitation period, period for filing of appeal before Appellate Tribunal, period for rectification of error etc. After amendment in 2016 by Benami Transactions (Prohibition) Amendment Act 2016 and in 2019 by Finance Act 2019 The Prohibition of Benami Property Transactions Act 1988 dealing with benami property has become very effective and efficient law, thereby, if this Act is properly enforced, it may effectively and efficiently deal with corruption and related problems.

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consideration for benami property declared his asset that it is his property giving evidences and transfer is made within stipulated time then such property will not be confiscated under benami Act (Section 3 Prohibition of Benami Property Transactions Act 1988) but now such actual owner shall be dealt under Income Tax Act and other related laws.

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015

Now in the era of globalization person committing corruption, money laundering, tax evasion, black money and other organised crimes operate through across the national borders and internationally. All such crimes are inter-connected. In criminal matters usually sovereignty notions of countries which causes problem relating to criminal jurisdiction application and criminals take benefit of such technicality and after commission of crime they run away to some other country or from other country operate commission of crime. In case of commission of corruption and tax evasion money proceed is invested and money laundering related acts are committed in some other country. Through the establishing of fake companies (shell companies)[19] tax evasion, corruption and black money related offensive acts are committed; there is need of strict actions against them. Corruption problem can be tackled when undisclosed property and income, whether these are within the country or outside country, are effectively identified and proper actions are taken. Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 has been enacted to deal with problem of black money that is undisclosed foreign income and assets. Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 is a taxation enactment which prescribes measures for identifying undisclosed asset and foreign income held outside India, imposition of tax and penalties and its recovery. Section 2 (11) defines undisclosed asset located outside India as an asset or financial interest in any entity in other country in his own name or as beneficial owner and such person has no explanation for source of investment in such property.[20] Undisclosed asset located outside India is foreign asset held by a person in his own name or name of some other person and such person has not disclosed such asset and it is beyond his known sources of income. If such property is identified, then there will be tax imposition and recovery under this Act

[19]Shell Company is company without any active business. Only in paper company is established and generally it has no capital also but on paper it does business and also earns larger profits. It is now used as major measure to make black money as white money, to commit corruption particularly bribe taking, to send money in other country, thereby law enforcement agencies may not take actions effectively. Shell Company is also established in other country and it is used to invest money through it as foreign investment; in this process money obtained in one country is invested in the same country, only it is shown as investment is coming from some other countries. Shell Company is also used for tax evasion in the name of double taxation. Income tax in one country is higher than another country, then person in former country establishes shell company in later country and show that income earned by him is in later country and there he paid the income tax and thereby he avoid payment of income tax in former country where actually he earned his income. Shell Company is also used for taking bribery by sale and purchase of shares. Shell Companies are serious threat for economy, well-being and security of a nation; there is need of strict action against them.

[20]Section 2 (11) Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 provides – " "undisclosed asset located outside India" means an asset (including financial interest in any entity) located outside India, held by the assessee in his name or in respect of which he is beneficial owner, and he has no explanation about source of investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory".

and further, under other relevant Acts (Penal Laws) investigation how such property was obtained and actions thereon. Section 2 (12) Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 defines undisclosed foreign income and asset as total amount of undisclosed income from source located outside India and the value of undisclosed asset located outside India.[21] Hereby, undisclosed foreign income is value of undisclosed foreign asset and income from such asset. Tackling undisclosed foreign asset is major challenge before law enforcement agencies; without international cooperation it is not possible. Usually by corruption accumulated wealth, tax evaded black money, money obtained by bank fraud are concealed in other country or invested in property and entities in other country. Section 5 of Act 2015 provides measures for calculation of undisclosed foreign income accordingly no deduction of expenditure or allowance or set off of any loss is allowed. Section 3 of Act 2015 provides that for every assessment year commencing from 1st day of April 2016 assessee shall be charged tax at the rate of 30% of undisclosed foreign income and asset. Income Tax Authority for income tax assessment, imposition and recovery under this Act of 2015 is tax Authority specified in Section 116 of Income Tax Act 1961.

Under Section 10 of Act 2015 Assessing officer after receiving information from income tax authority or any other authority or any other way having information, issues notice for production of documents or evidence or accounts. Assessing officer makes inquiry; if person produces documents, it is considered and if such person fails, officer on basis of collected document and giving opportunity of being heard makes assessment of income tax. For undisclosed foreign income and asset penalty is imposed and it is taken from assessee. Section 41 of Act 2015 prescribes a sum equal to three times the tax computed under Section 10 of the Act. Chapter IV of Act prescribes imposition of various penalties for failure of disclosure of foreign asset, requisite information and default of payment of fine. Chapter V of Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 declares certain specific acts as offences and Section 48 (2) contained in this Chapter provides that provisions of this chapter are in addition to other orders passed under the Act, thereby, income tax imposition order and its recovery may be and also there may be prosecution and imposition of sentence for commission of offence. Further, Section 48 (1) of Act declares that penal provisions contained in Chapter V of Act are in addition to penal provisions and prosecution under any other law. Hereby, this enactment prescribes much stern law to deal with undisclosed foreign income and asset. When a resident in India not disclose foreign income and asset as required u/s 139 Income Tax Act 1961, his offence is punishable by imprisonment which shall be not less than six months but which may extend to seven years and with fine.[22] When a person wilfully attempts to evade tax, penalty or interest chargeable or

[21]Section 2 (12) Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 provides – " "undisclosed foreign income and asset" means the total amount of undisclosed asset located outside India, referred to in section 4, and computed in the manner laid down in section 5".

[22]Sections 49 and 50 Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015.

imposable under this Act, Section 51 (1) of Act 2015 prescribes punishment of imprisonment which shall not be less than three years but which may extend to ten years and with fine. Section 54 of Act 2015 shifts burden of proof by prescribing presumption clause that the court shall presume culpable mental state on part of accused. Accused may give evidence to disprove the presumption that he had no such presumption. *Mens rea* for commission of offence relating to undisclosed foreign income and asset need not be proved by prosecution but it is presumed by court. Culpable mental state term in Section 54 (1) of Act 2015 is used in wider reference to include intention, motive or knowledge of fact or belief in, or reason to belief, a fact. For such presumption it will be needed that prosecution should prove the fact of the case. Presumption is provided for culpable mental state but there is no presumption regarding act of having undisclosed property in other country or nonpayment of income tax or/and penalty; act has to be proved then mental state is presumed.

In case of commission of offence under this Act by Company, person who was in charge of company or controlling business of company at the time of commission of offence and company both will be deemed as guilty for the offence and penalised. For offence commission by company under this Act presumption clause is applied that person in charge of company or looking after business of company (it also includes unincorporated body and Hindu undivided family) is also guilty, for the aforesaid imputed liability is provided.[23] Such in charge of company or person looking after business of company at the time of commission of offence may get himself absolved from liability by proving that offence was committed without his knowledge or he exercised due diligence to prevent the commission of crime. When such in charge of company had no knowledge about commission of crime by company or he had knowledge and he exercised due diligence to prevent commission of crime then such person shall not be guilty. Presumptions regarding offences under chapter V of Act are not conclusive but rebuttable presumption; presumptions are rebuttable by accused through adducing evidences. Director, manager, secretary or other officer whoever is found as provided consent or connivance or on is part neglect was attributable for commission of crime by company, shall also be deemed guilty and penalised. When Company is found guilty, for offence punishable by imprisonment and fine both, company shall be punished with fine only and persons (in charge of company, director, manager etc.) shall be punished with punishment prescribed for offence.[24] For initiation of prosecution under Chapter V of Act prior sanction of principal Commissioner or Commissioner or Commissioner (Appeals) as the case may be necessary.[25]Section 80 of Act 2015 gives trial competency to Court of Metropolitan Magistrate or Judicial Magistrate first class or superior criminal courts. Black Money (Undisclosed Foreign Income and Assets) and Imposition of

[23]Section 56 (1) Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015.
[24]Section 56 (4) Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015.
[25]Section 55 Black Money (Undisclosed Foreign Income and Assets) and Imposition of tax Act 2015 .

tax Act 2015 is very crucial enactment; proper and effective enforcement of provisions of this Act may be effective measure to tackle corruption and black money.

Lokpal and Lokayuktas Act 2013

Nation works through its public servants, thereby, present and future wellbeing of nation, citizenry and ultimately of whole world community depend on honesty, integrity, ability and humanity of public servant. As and when allegations are made against public servant or otherwise information is available for corruption commission by public servant, it is necessary that matter be inquired and proceeding should be initiated for penalizing corrupt public servant. Further, it is responsibility of state itself to keep vigil over public servants that they are not misusing powers and indulged in corrupt practices. Such actions on part of state attain public faith and create anti-criminogenic environment, and further, enhances deterrence in public servant thereby, they may not commit corruption. Considering aforesaid requirements, in 2013 for establishment of Lokpal at Union and Lokayukta at state level, conferment of powers and procedures, one crucial and important Act was enacted by Union legislature. Lokpal and Lokayuktas Act 2013 specifies the objective that it is enacted to inquire into, investigation and prosecution of allegations of corruption against certain public functionaries.

Under Chapter III and Chapter IV Inquiry Wing and Prosecution wing are established in Lokpal. Section 20 of Lokpal and Lokayuktas Act 2013 provides that Lokpal after receiving allegation of corruption may make preliminary inquiry by its inquiry wing or direct any investigating agency. Lokpal has jurisdiction in reference to Prime Minister[26], Minister of Union, Member of Parliament, public servants, and employees and officers of board, corporation, authority, company, society, trust or autonomous body. When *prima facie* case exists then Lokpal may direct any investigating agency for investigation.[27] When allegation of corruption is against public servants belonging to Group A, B, C or D then Lokpal will direct Central Vigilance Commission for preliminary inquiry. Central Vigilance Commission submits report of preliminary inquiry before the Lokpal. Whether preliminary inquiry is made by inquiry wing of Lokpal or any other body, on prima facie establishment of allegation Lokpal directs any investigating agency including Central Bureau of investigation for making investigation in the case. Before directing investigation Lokpal gives opportunity of hearing to public servant. Section 20 (5) Lokpal and Lokayuktas Act 2013 specifies that investigation agency shall complete investigation as expeditiously as possible and maximum period for completion of investigation is determined as six months from

[26]Section 14 Lokpal and Lokayukta Act 2013 provides that in reference to Prime Minister, Lokpal cannot initiate inquiry or cause to initiate inquiry in matter relating to international relations, external and internal security, public order, atomic energy and space. Whenever any inquiry is to be made against Prime Minister it is essential requisite that Chairperson and all the members considered matter and at least two third members have approved the inquiry.

[27] Section 20 (1) (b) Lokpal and Lokayuktas Act 2013.

the date of order. But some cases may be complicated in which more time may be needed for completion of investigation, in such case Lokpal may extend time limit for investigation for six months at a time.[28] Hereby, balance is tried to be made between fixed time for investigation and more time need for complicated case to make investigation, thereby, speedy investigation is ensured. Corruption cases are such which affect the whole society, in such case speedy and effective investigation is needed. Lokpal has power of superintendence over and to give direction to Central Bureau of Investigation for matters referred by it to investigation agency.[29] When Lokpal has reason to believe that a person is in possession of proceed of corruption, he may take decision for provisional attachment of such property for maximum period of 90 days and ultimate decision is taken by special court constituted under the Act.[30] Section 31 of Act 2013 empowers special court on prima facie satisfaction to pass order for confiscation of proceed of corruption subject to final disposal of case. Section 30 (4) of Act 2013 prescribes that when public servant is convicted on charges of corruption, the proceeds relatable to the offence under Prevention of Corruption is confiscated and vest in the Central Government.

Section 35 (1) Lokpal and Lokayuktas Act 2013provides that for trial of cases under Prevention of Corruption Act 1988 and Lokpal and Lokayuktas Act 2013 Central Government shall constitute such number of special courts as recommended by Lokpal. For effectively tackling corruption Section 35 (2) of Act 2013 prescribes one year duration to complete trial of case. Whenever trial is not completed in this stipulated time, then court has to give reason in writing and trial has to be completed in further three months. On conviction of public servant for commission of corruption, special court shall also calculate that how much loss is caused to public exchequer and it has to be recovered from the public servant.[31] When more periods are needed, it may be extended for three months each time. Section 44 of Lokpal and Lokayuktas Act 2013 requires that every public servant shall declare his assets and liabilities and also assets and liabilities of his spouse and dependent children. Such declaration has to be given by public servant every year before 31st July.

Public servants are crucial officer for governance of country; this Act which establishes important authority to deal with corruption may be misused by some vested interest that may be interested in pressurizing honest public servant or affect his reputation; in such situation there is need to take action against person who files false complaint under this Act. Therefore, Section 46 (1) of Lokpal and Lokayukta Act 2013 declares filing false and frivolous or vexatious complaint under this Act as an offence punishable with imprisonment for a term which may extend to one year and with fine which may extend to one lakh rupees. Section 57 of Act 2013 declares that the provisions of this Act are in addition to, and not in derogation of any other law for time being in force. Lokpal has supervision, guidance and control over investigation, inquiry and prosecution in corruption

[28]Proviso to Section 20 (5) Lokpal and Lokayuktas Act 2013.
[29]Section 25 Lokpal and Lokayuktas Act 2013.
[30]Section 29 Lokpal and Lokayuktas Act 2013.
[31]Section 39 Lokpal and Lokayuktas Act 2013.

cases punishable under Prevention of Corruption Act 1988. Lokpal has recommendation power in reference to establishment courts for trial of corruption cases. Further, Lokpal has power to recommend to Central Government regarding actions against public servant involved in corruption. Corruption cases may be filed through Central Vigilance Commission, directly to Central Bureau of Investigation and other investigation agencies; Lokpal considers only those cases in which complaint is filed before it. Lokpal cannot take direct action except preliminary inquiry, direction to various investigation agencies, supervision over prosecution, provisional attachment of property alleged of proceeds of corruption and recommendation to Government for actions against public servant. Special Court has Jurisdiction of trial in corruption cases. Proper functioning of Lokpal may prove a great success for criminal justice system in tackling of corruption. Lokpal may supervise, guide and control the law enforcement agencies dealing with corruption and may fill long requisite need of criminal justice system.

Concluding Remarks

Corruption is not only dangerous problem in itself but it is mother of various other problems which cumulative impact is complete damaging of social value system and social developmental process. When any socially offensive act becomes socially accepted and part of cultural notion then it becomes difficult for criminal justice system to tackle effectively. For proper tackling it is necessary that society, members of society and also person indulged in the offensive act should consider that act concern is delinquent, offensive and undesired act. Further, corrupt person should consider that his corrupt activities have caused graver and serious harm to whole society and nation.

Corruption relating activities are committed during performance of official duty, thereby, it is always difficult to identify whether corruption was committed or it was performance of official duty. When gratification is obtained by misappropriation of public fund, no complaint is made by any person. Further, when gratification is given by any Person, he is benefitted by corruption, thereby, he does not lodge complaint. Complainant also fears for retaliatory action against him as alleged person has power, position and status. Generally, in corruption matters complaints are not filed by affected persons which affect registering and recording of criminal case. corruption is committed by public servants in course of performance of his professional duty in which they are expert, therefore, generally evidences are not available and even, if available those are not of traditional nature which creates problem in its collection, and further, during trial in evaluation and ultimately to decide corruption case and inflict punishment. Corruption is committed in organised manner. Investigation, prosecution and sentencing in corruption cases are serious challenges before criminal justice system. It is necessary to strengthen law enforcement agencies, procedure relating to investigation, prosecution, prescription of sufficient sentence, identification of illegal gratification and its confiscation. Recently enacted penal laws in India are enacted with due consideration of all the aforesaid requisites. Proper and effective

enforcement of recently enacted penal laws may be efficiently tackle problem of corruption in India and pave the path of development of Indian society with proper pace and in appropriate direction.

Cases

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Athens Journal of Law - Volume 7, Issue 3, July 2021 – Pages 317-334

Rule of Law and Constitutionalism in Nigerian Democracy: A Critical Relativism Discuss in the Context of International Law

By Isaac O. C. Igwe[*]

The synthesis of rule of law enthrones democracy, justice and goes with such characteristics as liberty, freedom, and the restoration of the dignity of man. The rule of law is predicated upon absolute autonomy being accorded to the judicial arms of the government of any society, state, or country. Thus, the application and interpretation of the law must be under the control of impartial courts adjudicating within the ambit of fair judicial procedures. The dialectics of power and the guiding principles of governance are anchored in the constitution which enshrines the provisions of enforceable laws. The law is the cardinal power of a nation, a direction for due process, and a guiding principle for good governance. The age of enlightenment and the middle ages have a special place for the rule of law as opposed to tyranny otherwise, life could have been chaos. The role of law cannot be left in isolation of democracy as both are interlaced as core universal principles of the civilised world. This paper will explore the rule of law as a paramount factor in constitutionalism, idealism, and realistic principles of the law of any given society. The treatise will in general terms discuss the principles of rule of law and articulate it with the hitherto Nigerian democracy. It will conclude with the argument that complete independence of the judiciary in Nigeria is paramount to ensure proper implementation of rule of law for a better Nigeria.

Keywords: *Rule of Law; Constitutionalism; Independent Judiciary; Tyranny; Nigerian Democracy. Rule of Law;*

Introduction

Essentially, rule of law is a cornerstone of present-day constitutional democracy.[1] The nomenclature rule of law is interrelated to constitutionalism.[2] Nonetheless, the concept and conception of 'rule of law' is fluid, means different things to different people, and varies from one place to another and from one period of time to another.[3] In the array of values of liberal political morality, the Rule of Law is one ideal that predominates over other values such as democracy, social justice, economic freedom, and human rights. Evaluating this plethora of values, legal philosophers such as Raz[4] have emphasised the need to differentiate

[*]LLB (Hons), Barrister & Solicitor Supreme Court of Nigeria, LLM, Ph.D. (Law), Birkbeck, University of London, London, UK. Email: isaacigwe@hotmail.com.

[1]See Ferioli (2015).

[2]See Ten (2017).

[3]See William (2020).

[4]See Raz (1977).

the rule of law from other values. As a matter of analytical clarity, they limit the priority of rule of law to formal and procedural angles of governmental institutions and not the substantive policies they administer. The rule of law applies not only to the government but also to citizens, who should respect and adhere to legal norms whether they agree with them or not. In instances where their interest conflicts with others, they should accept the legal determinations as these pertain to their rights or duties. The rule of law requires the law to be uniform for everyone; no one is above the law and everyone has access to the law's protection. In these generalities, the dialectic of the rule of law per se is a controversial idea. It has been contrasted with the 'Rule of Men'[5] and distinguished from the rule of legislation,[6] identifying the rule of law as the gradual development of common law. The application of this concept in any society promotes not only peace among the citizens but economic, social, and political security. Whilst the absence of the rule of law can breed despotism, dictatorship, lawlessness, anarchy, or absence of checks and balances of power within the three arms of government which can destabilise the structural framework of the government.[7] The concentration of power in one pair of hands or a group is, to say the least, dangerous, since *"Power corrupts and absolute power corrupts absolutely."*[8] Suffice to say that the greater the power, the more dangerous the abuse.[9] The rule of law is a system for preventing the abuse of power by individuals or government discretionary powers. It affords the court the power to direct the government to rule within the principles of the law and for both citizens and their government to be bound by the Orders of the Courts.[10] The concept of rule of law presupposes that a society should be governed by the law. This ordinarily refers to the impact and authority of law within the society, especially as a curtailment of individual citizens' activities, as well as those of government officials. The current unlawful detention of Nigerians against the rule of law, against court Orders, is not only contrary to legality but against the universal values of Human Rights. A Country without respect for the rule of law is not only primitive but uncivilised. It is undeniable that the rule of law is intertwined with the independence of the judiciary since the constitutional responsibility of upholding the principles of rule of law is within the watch of the judiciary. It cannot be overemphasised that the independence of the judiciary must be supported and kept separate from any undue interference of the government in keeping with the doctrines of separation of powers. That is the spirit of democracy as a model to check arbitrary power, corruption, or unlawful activities. The principal idea of the rule of law is that the law is supreme, no one is above the law and law applies equally to all ruled and rulers. It ensures a 'government of law' and not a 'government of men.'[11] Thomas Paine wrote in his book 'Common Sense' the Principles and the essence of the rule of law when he stated that:

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[5]See Aristotle.
[6]See Hayek (1972).
[7]See Acholonu (1995).
[8]See Dalberg-Acton (1910). .
[9]See Burke (1771).
[10]See Burke (1771) at 43-47.
[11]See Gaynor (1903).

> *"[…] the world may know that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the king is law, so in free countries, the law ought to be King; and there ought to be no other."*[12]

Thomas Paine's intent and purpose here was to demonstrate the supremacy of the Law above all persons and authority, no matter your position in the society, political or ecclesiastical. The nomenclature 'Rule of Law' has been widened in the scope above the classic formulation articulated by A.V. Dicey and has extended to the supremacy of the constitution, the supremacy of the law, including the placing of court decisions above all persons and governments. It has also spread its tentacles to the independence of the Judiciary; the right to personal liberty and keeping to the tenets of democratic values, freedom of the press, and freedom of association, including free and fair elections.[13] The opposite of the rule of law is arbitrary government. In like manner, the rule of law introduces the relationship between the government and the people. That is why John Locke says that *"wherever law ends, tyranny begins."*[14] The rule of law applies to both private and public officials and covers their conduct and behaviour. Apart from the fact that no one is above the law under the rule of law, it is trite that the sub principles of the rule of law are that the law is always applied and that the legal redress is always through the courts. The rule of law is a complex principle made up of collections of subprinciples. It is difficult to ascertain how far the law rules Nigeria and in most cases can be likened to a 'noble lie'[15] to the Nigerian constitution.[16]

The Nigerian institution of governance is weak and constructed around individual leaders who have malign intentions for self-enrichment of themselves, their families, and even generations unborn. This intention metamorphosed into corruption, abuse of power, poor leadership, judicial ineptitude, and flagrant disrespect to the rule of law or due process. One of the greatest challenges in the Nigerian governance structure is government by mediocrity. Most of the past and present Nigerian leaders are either illiterate, half-baked educated leaders or educated illiterates. The leadership of mediocrity has to be replaced with a government of enlightenment. There has to be an intellectual movement emphasizing individualism rather than tradition. The Nigerian governance structure needs to be overhauled to reflect the age of enlightenment in consonance with the importance of science and reason, instead of religion, tradition, tribe, or ethnic sentiments. This was massively impacted by 17th-century philosophers such as John Locke, Immanuel Kant, Jean-Jacques Rousseau, Adam Smith, Rene Descartes, Isaac Newton, Johann Wolfgang von Goethe, etc. Countries like England, Europe, Canada, Switzerland, Singapore, the United States of America,

[12]See Paine (1776) at 49.
[13]See Anifowose & Enemuo (1999) at 151.
[14]See Locke (1988).
[15]Noble Lie- Originated from Plato's Republic, Book 111. Noble lie to Plato is a myth or untruth propagated by leaders to maintain social harmony or to strengthen an agenda. It represents a political deception or political lies. Plato's scepticism was hyped especially concerning human nature and the volatility of man's policy to laws. See Taylor & Kraut (1977).
[16]See Harden & Norman (1988).

and other civilised worlds to mention but a few, do well economically, advanced in respect for the rule of law and stable government because they are governed by well -educated civilised leaders. The education we know is power. Nelson Mandela said that: *"Education is the most powerful weapon which you can use to change the world."*[17] *He further said that: "The power of education extends beyond the development of skills we need for economic success. It can contribute to nation-building and reconciliation. "A good head and good heart are always a formidable combination. But when you add to that a literate tongue or pen, then you have something very special."*[18]

Nonetheless, Nigeria has so many well-educated people both at home and abroad that can take up the leadership position and reform the governance system with strict implementation of the rule of law, except that the governance process is not about election, but a selection of individuals into power through lobbying and elite corrupt leadership conspiracy. It is a far cry to expect an individual who is ill-equipped in the art of governance or in-exposed to human relations, economics, diplomacy, law, or international relations to govern a complex multicultural country like Nigeria. A solid governance structure with strict adherence policy to the rule of law should be put in place and the right people should be allowed into the government of Nigeria. Otherwise, one should not put something on nothing and expect it to stand, because, it will surely collapse.[19] God did not make any mistake allowing biblical Moses to be brought up by the Pharaohs of Egypt who were then one of the most enlightened powerful ruling families in the world. God must have known that one day Moses will lead his people to the promised land of Canaan in Israel. It could be argued that what aided Moses in his leadership was his exposure to a good education, sound civilisation, general knowledge, skills, and technical know-how. This paper will examine the concept of "rule of law" and separation of powers with the independence of the judiciary in a democratic government. This article will further explore the supremacy of the rule of law and articulate its constitutionalism, idealism, and realism in a democratised society with particular emphasis on the Nigerian government. Finally, the writing will postulate some recommendations on the way to achieve complete independence of the judiciary for a democratised Nigeria.

Overview of Nigerian Democracy

It could be argued that the beginning of Nigeria's democracy dates back to 1914 when the Northern and southern regions of Nigeria were allowed by the British colonialists to govern themselves. This marked the first time a Nigerian governed in a Nigerian government for Nigerians. In contemporary Nigerian society, though Nigeria is practicing democracy, it is not yet up to the standard experienced in advanced countries like the United States of America, Canada, England, or Europe. That is why Sagay stated that: *"Democracy in Nigeria is still*

[17]See Mandela (1990).
[18]Ibid.
[19]See MacFoy v United Africa Company Limited (1961).

'fledge', 'nascent', and 'young' and that it needs to be properly nurtured"[20] The author is trying to say that democracy is incomplete without the proper application of the rule of law, which is the cream of democracy. It is only when the law is supreme that individual freedom and liberty will be safeguarded and no single individual or government power will dominate the political system. That is the time the Nigerian democracy will become mature and attain the standard of a free society. Nigeria after 60 years of independence still struggles between democracy and military dictatorship which in the past usually topple the existing democratic government through military coup as a corrective measure. Paradoxically, the military government ends up lasting longer in power than the democratic government they came to "correct." The question now is whether the intervention is corrective or a bastardisation of the democratic process.[21] The military coup sometimes comes with a deep confusion, colossal loss of lives, loss of resources, destruction of infrastructure, and properties of citizens. Military intervention is never in the interest of individual citizens. It is autocratic or dictatorial and intended to establish leadership by selection as opposed to the election. At best, a coup de ta that ousted a democratic rule is not a democracy, but a liberalised autocracy. The author is not in any way excusing the democratic election and practices in Nigeria which apparently may justify the military intervention. Nonetheless, the democratic process in Nigeria is bedevilled with corruption, undemocratic with rampant assassinations, thuggery, intimidation, rigging, harassment, and other electoral vices.[22] The democratic process also encourages selection, not election because a particular recycled set of politicians are the ones in power. Sometimes, these recycled politicians are called "the Cabal". It is hardly possible for a new face in politics to emerge as a leader or be appointed into an esteemed governmental position unless that person has a godfather in government or has paid the dues or belongs to a special group, family, or sect. As a result of these, it undermines the full operation of the law against some people who are now regarded as white elephants. This brings about the suppression of the weight of the law upon some people and leads to them violating the orders of the court with flagrant disrespect to the rule of law. Some of these over recycled political leaders are careful to the extent they use the full force of the law on certain individuals of the same class for fear of being implicated in their past tomfoolery or atrocity as they also do have some skeletons in the cupboard. In this circumstance, the operation of the rule of law is highly impaired and the door to dictatorship is widely opened. To this end, a great deal of the Nigerian population is disillusioned in the electoral process and more inclined to absent themselves from the electoral process which results in the imposition of the will of the minority over the will of the majority. This system is cancerous and has eaten deep into the fabrics of Nigerian society and must be resisted, changed, or stopped literarily through a surgical operation. The standard of governance in Nigeria is not yet in the realm of strict observance of the rule of law and the absence of observing rule of law is an aberration. Where rule of law reigns, corners are not cut in

[20]See Sagay (1996).
[21]See Sagay (1996) at 529.
[22]See Ome (2011).

governance, and justice is maintained. The adherence to the rule of law strengthens the operation of each organ of government and guides them to operate within the roles created by law without usurping the roles of other organs of the government. In so doing, there will be peace among the organs and minimal frictions. The theoretical ideals of the rule of law propounded by Dicey are opposed to the Nigerian governance system which subjugates rule of law, inclined to rule by man or absolute authority by the man that breeds arbitrary powers against the citizens. At present, different law applies to different classes of the population, and these laws are not administered by courts but by a minority of powerful individuals. Automatically, the interpretation and enforcement of the laws which are the exclusive reserve of the courts are taken away.

Ideally, one of the core features of democracy is adherence to the rule of law through the institution of independence of the judiciary. The rule of law could be defined as the minimisation of executive powers of the state about a country's constitution and laws formed by the majority.[23] This simply means a government of laws, not men' popularised by John Adams, the second President of the United States.[24] It implies the supremacy of the law over and above the authority of any individual and connotes overriding checks on political power, state power against individual rights. Fundamentally, the State's power must be regulated by a system of laws, procedures, judicial precedents, and judgments to ensure the survival of democracy. Let us take a cue from some foreign countries like Germany, Singapore, and Switzerland that have an existing strong rule of law. This makes their business both local and foreign to grow, people feel free to walk around any time without fear of getting mugged, raped, or killed. By and large, with rule of law solidly in place, the economy will be booming, the country will be safe, the foreign inflow of investment attracted, tourism will be improved and quality of life will be enhanced. The strong presence of rule of law in Nigeria can transform it from a third-world country to a first world. Admittedly, Nigerian experience both in the military and democratic administration is the opposite as its successive leadership often has infringed this concept with impunity. The outcry of its citizens to the government's flagrant carelessness and incautious attitude to the concept of rule of law has often fallen on deaf ears. Unless these existential shenanigans are properly addressed and implemented within Nigerian polity, the country can at best be described as an undemocratic enclave. It is a far cry to say that there is a judicial Independence in Nigeria where other arms of government especially the executive publicly criticises the courts, intimidates them, or in extreme cases put some judges under house arrest or give orders through their aids to physically drag serving judges out of their houses.[25] This defeats the sacredness of the seat of judges in the temple of justice, ordinarily created to be feared as an oracle of justice of any country. The constitution should have a major impact on the judicial system. It is wrong for the power of the President to override due process as the constitution tends to grant him a lot of powers. As a result of such absolute power, he can set aside any provisions of the law if he likes. This has nothing to do with

[23]See Diamond (1988) at 4.
[24]See Handlin & Hadlin (1966).
[25]See Onyekwere & Onochie (2019).

executive powers and immunity, but there must be checks and balances to avoid tyranny. It appears that the institutions of governance are built around individual leaders and that truncates the proper functioning of the government process independently outside prevailing political corruption, judicial ineptitude, weak leadership, abuse of power, and absence of due process.[26] In the words of former Secretary-General of the United Nations, Mr. Kofi Annan:

> *"Corruption is an insidious scourge that impoverishes many countries and affects all. It discourages foreign investments and hinders economic growth. It is a major obstacle to political stability and the successful social and economic development of any nation."*[27]

Realistically, the solution should be centered on policies that will empower institutions of governance in such a manner that will be extremely difficult for an individual leader to manipulate them.

Independence of the Judiciary

One fundamental principle of law is that the Judges must be impartial and non–political. Fundamentally, it is important to differentiate between liberal democratic countries and authoritarian regimes. In a liberal democratic country, authority of the law is not influenced by the political regime in power and thereby presupposes that the government is non-political. In such countries, laws are interpreted by independent Judges. Judicial independence is the key factor in upholding the rule of law. Such independence must be guaranteed under the constitution and government officials must keep to this responsibility. To uphold justice, the independence of the judiciary should not only be free from government interference but should be respected. Otherwise, the judges might be inclined to work in favour of the government resulting in injustice. Where there is no illicit relationship between the judges and the government, there will not be any possibility of kick-backs or financial gratifications from the government to judges which can influence them to act in favour of the government. Conversely, in an authoritarian regime, the courts could become an instrument of the state. This was exemplified in the 1930s Soviet Union where judges applied "Social legality" as termed. These are organised show trials used against political opponents to expose and punish them. Generally, in Nigeria, independence of the judiciary is always under pressure because of political judicial decisions. Substantively, the appointment process of the members of the judiciary affects the independence of the judiciary. Those appointments are controlled by the President[28] and as long as the position of the head of the judiciary is fused with that of the Chief executive of the country, the role of the judges is under the whims and caprices of the person

[26]See Efebeh (2015).
[27]See United Nations (2004).
[28]See the Constitution of the Federal Republic of Nigeria, 1999, as amended. Chapter 7, Section 231 (1).

that put them in office and the independence of the judiciary appears a mere constitutional fiction. The Judiciary according to Black's Law Dictionary is *"The branch of government responsible for interpreting the laws and administering justice."*[29]

The outcome of the interpretation of the law is justice. The powers of the judiciary in Nigeria are enshrined in Section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Among the three arms of government, the Executive, the legislature is elected into office, while the judiciary is not elected into office by the electorates but appointed. The Magistrates, the Judges, and justices representing the judicial members are appointed and this makes their position vulnerable because they can be hired and fired. Separation of powers is the fundamental feature of a democratic government. It was introduced by Baron de Montesquieu to protect citizens from dictatorship. It is the intent of Section 6 of the Nigerian Constitution that the judiciary shall be poised to take every case brought before it unless on grounds of conflict of interest. The judiciary should not pick and choose political cases on the unknown pretext of being led to be corrupt.[30] The Judiciary in the interest of justice should resist corruption and fight any act that will make the public believe that its authority is used to cover criminality or corruption. They should always be guided by the comments of Hon. Justice Niki Tobi, that:

> *"A judge who takes bribes is not only a criminal who should be prosecuted, he is also a sinner who is for eternal condemnation […] The bench is not a place to make money, it is a place to make a name."*[31]

The judiciary is the arm of government that checks and directs the other arms of government as the last hope of the common man.[32] As the court is the last hope of both the common and uncommon man, it beholds on the judges to eschew corruption since corruption is the antithesis of the judicial office which is supposed to be integrity-driven, sustained by respect. They must live above board like Caesar's wife because they hold power over 'life and death.'[33] The judiciary is the last hope of the common man arguably means that the court is the only place where the common man can get justice. In circumstances where there is a dispute between two parties and they cannot settle it between themselves, among their kinsmen or mediators, they can run to the court as the last resort for legal remedies. That is why the judiciary's function is to interpret the law and not to

[29]See Garner (2004).
[30]See Egbewole (2011).
[31]See Ani (2021).
[32]See Egbewole (2013).
[33]People who are involved with a famous or prominent figure should avoid attracting negative attention to themselves, rather, they should exude exemplary ethics. The wife of a Roman emperor is presumed to be above fault; if her character is suspicious, it could negatively impact on the husband's image, political or social strength. That phrase "Caesar's wife must be above suspicion" was claimed to have been used by Julius Caesar to defend why he divorced his wife, Pompeia.

twist the truth or distort facts.[34] The result of the interpretation of the law is justice. The court is like a holy sanctuary where both the common and uncommon man resort to if there is any wrong done to them. The role of the judiciary in the government of Nigeria presupposes that the judiciary is not corrupt. This assertion cannot be conclusive as in any twelve, there must be a Judas. There has been an incidence of corruption of judges which has opened criticisms from the judiciary, academics, and intellectuals. Professor Itse Sagay said: *"judges who are corrupt have destroyed the judiciary and nothing is too much for their punishment."*

Hon. Justice Mahmud Mohammed added on 7th November 2016 on the Occasion of swearing-in of two justices of Supreme Court that: *"You must remain blind to personality and status, and remain the hope of all men whether common or uncommon."*[35]

Whilst Hon. Justice Samson Uwaifo stated that: *"A corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street."*[36] The National Judicial Council ("NJC"), a body responsible for the approval of the Chief Justice of Nigeria ("CJN"), operations must be checked as power corrupts and absolute power corrupts absolutely.

Consequently, Harry Truman has this to say, *"there is a lure in power, it can get into a man's blood just as gambling and lust for money have been known to do."*[37] Ordinarily, the judges are sworn to be impartial in the application of the law to protect the interest of the citizens. That is why the emphasis that the judiciary is the last hope of the common man resonates in the legal profession. Instead, the appointment process of the members of the judiciary especially the Chief justice of the Federation, justices, Grand Khadi, and the Attorney General of the federation through the Nigerian Judicial Council ("NJC"), weighted by the President, influence their independence and impartiality in dispensing justice or adjudication on matters of state interest in the court. Potentially, in such circumstances, they become unduly loyal to the President, the ruling political party, and somehow fell in the expected principles of non - political and impartiality. One cannot say that the Nigerian government is keeping to the tenets of independence of the judiciary as there has been evidence of usurpation of power from one tier of government to another. The recent unceremonious removal of the Chief Justice of Supreme Court of Nigeria (CJN), Justice Walter Onnoghen by President Mohamadu Buhari arguably is a concern for the healthy growth of Nigerian democracy and the Judiciary. The CJN was indicted on a Six count charge of "omitting or failure to declare" certain named assets and false declaration of assets dated 10 January 2019. Justice Onnoghen (CJN) denied allegations of asset declaration fraud which is the vexed issue before the Code of Conduct Tribunal (CCT) but admitted to having forgotten to declare some assets. President Buhari said that the CJN admission is enough to remove him from office considering his status as an officer of the Court. Mr. President said that the CJN should not rely on the claim that he forgot, as ignorance is not a defence in law and thus on the 25th January 2019,

[34]In some cases, the judiciary makes law by way of "Judicial Precedent."
[35]See Agunkwu (2017).
[36]See Ani (2021).
[37]See Gibbs & Duffy (2012).

removed the CJN by ex parte order of the CCT.[38] Persuasive as the President's argument may seem, but has the due process been observed and followed by the constitution of the Federal Republic of Nigeria? Has the President a unilateral authority to remove a Federal Judge under a democratic government? Would the ex- part Tribunal Order be enough to rely upon by the President to remove a federal judge knowing that such order is temporary and without notice to the other party in the suit? Has the President's action offended the maxim of natural justice? Thus, fair hearing in the context of section 36 of the Nigerian Constitution of 1999 encompasses the plenitude of natural justice in the narrow technical sense of the twin pillars of justice *'Nemo judex in causa sua and Audi alteram partem' (a Latin maxim meaning 'You cannot be a judge in your own cause' and 'listen to the other party' respectively)* in a broad sense not only for justice to be done, but to be seen to have been done. Section 36(1) provides:

> *"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."*

An interim ex parte order is to keep matters in status quo pending the hearing of an application for an interlocutory injunction on notice to both sides. It could be argued that the ex parte order from the CCT runs counter to the letters and spirit of section 36 of the 1999 constitution and should not have been entertained. Nevertheless, could the outcome of the decision of the Tribunal been different and not lead to the removal of the CJN? Nwanguma Okechukwu of Premium Times commenting on the removal of the CJN said:

> *"The action subverts the constitution and the principle of Separation of powers. It undermines the Independence of the Judiciary and above all puts Nigeria's democracy in peril…. The credibility of the 2019 election will be compromised and democracy imperilled in the absence of an independent and responsive judiciary."*[39]

The question remains whether the action of the President is within the law and for the betterment of Nigeria as an entity, or was it motivated by sectional sentiments. As a corollary, the CJN can only be removed or suspended from office either if he has been convicted or if under section 292(1) (a) (i) of the constitution Federal Republic of Nigeria 1999, the Senate affirms a request by the President to remove the CJN by two-thirds majority vote. Under S. 292 of the Nigerian Constitution, 1999,[40] the President's unilateral act is construed as a constitutional breach to have suspended and replaced the Chief Justice and head of the Judiciary without due consultation or support of the legislative branch of government. The President reliance on the ex parte order of the code of CCT, (an auxiliary judicial panel that addresses assets filings of public officials), to remove the CJN from

[38]See Okakwu (2019).
[39]See Ogundipe (2019).
[40]See the Constitution of the Federal Republic of Nigeria, 1999, as amended. Section 292 (1) (a) (i).

office and appointed a replacement, Justice Ibrahim Tanko Mohammad is not in tandem with the Nigerian constitution. The CCT is an arm of the President since the judges are appointed by the President. It is unclear if an ex-parte order can be utilised to suspend and/or remove a Chief justice. The Black's Law Dictionary defines an ex parte order as: *"An order made by the court upon the application of one party to act without notice to the other."*[41] Essentially, the Nigerian locus classicus (authority) of the concept ex parte and the principles surrounding its operation and granting of it as ex-parte orders of interim injunction was stated in the famous case of Kotoye v The Central Bank of Nigeria (1989) where Nnaemeka Agu JSC stated inter-alia:

> *"That by their nature injunction granted on the ex-parte application can only be interim in nature. They can be made without notice to the other side. But most importantly it must be stated that the applicant who is seeking for an interim order vide ex-parte application must disclose all materials facts pursuant to the application as the court will deal strictly with a party applying for an ex-parte order and misrepresenting facts."*[42]

The Nigerian legal system permits a justice system that gives a fair hearing to an accused person and presumes an accused person innocent until proven guilty. This is amplified under Section 36(5) of the Nigerian Constitution, 1999 as amended which states: *"Every person who is charged with a criminal offense shall be presumed to be innocent until he is proved guilty."* The appointment of the CJN, President of the Court of Appeal and Chief Judge of a State and that of Federal High Court is created under Section 231 (1), 1999 Constitution of Nigeria as amended.[43] The President makes the appointment on the recommendation of the National Judicial Council (NJC) subject to the Senate confirmation. In the like manner procedure, the President appoints the President of Court of Appeal as provided under section 238(1) of the 1999 constitution of Nigeria as amended. Comparatively, in the past, many Indian sitting judges have faced charges of misconduct or corruption, but none has been removed from office for the failure of one or other procedural reasons. In 1991, Justice v Ramaswami, a supreme court judge became the first judge in Independent India to face removal proceedings charged with extravagant spending on his official residences during his tenure as Chief Judge of Punjab, but no two-third majority was formed in bicameral legislatures of India in both Lok Sabha (House of the People) and Rajya Sabha (Council of States). Besides, in 2017, Nagarijuna Reddy faced a removal proceeding charged with misusing his position as High Court judge to "victimise" a Dalit judge. He was also accused of disproportionate income. Rajya Sabha members withdrew in the second attempt to remove him and the motion failed. The Indian constitution provides that a judge can only be removed by an order of the President following the motion passed by both the Lok Sabha and the Rajya Sabha based on the majority of the entire membership of the House coupled with

[41]See Garner (1999).
[42]See Koyote v CBN (1989).
[43]See The Constitution Federal Republic of Nigeria, Section 231 (1) as amended 199.

the majority of at least two-thirds of the members of that House present and voting.[44] The question is, whether the action of President Buhari on the removal of Mr. Onnoghen (CJN) could be treated as in the case of the Pakistan President, Pervez Musharraf apparent suspension and removal of the Chief justice of Supreme Court of Pakistan, Iftikhar Muhammad Chaudhry on 9 March 2007. The apparent suspension and removal of the Pakistan Chief Justice of Supreme Court by the President on allegation of misconduct erupted a mass protest, led by lawyers, which was branded Lawyer's Movement and known as the Movement for the Restoration of Judiciary or the Black Coat Protests. The Chief Justice was asked by the President to resign on allegation of misconduct but he refused and was detained under house arrest, while speedy arrangements were being made to appoint an Acting-Chief justice. The President's action was criticised by legal analysts as not only unjust or inappropriate, but unconstitutional and illegal. The Government of Pakistan made it almost impossible for a fair hearing to take its natural course in the case and many lives and properties were lost in the process of the proceedings in the Pakistan Supreme Court. Nonetheless, on 20 July 2007, the Supreme Court of Pakistan gave a verdict on the case in favour of Chief Justice Iftikhar Muhammad Chaudhry, threw out the reference filed against the CJ by President Pervez Musharraf as illegal, and unanimously reinstated the Chief Justice.[45] In like manner, the incidents of then Nigerian CJN, Justice Onnoghen and the President Muhammadu Buhari of Nigeria, if such scenario is not put in check, no doubt, it will erode the long and tested sacrosanct and sanctity that follows the judiciary as the last hope of the common man. Technically, in the Nigerian Constitution, the term 'no one is above the law' exempts the President of Nigeria or Vice President, Governor, or Deputy Governor under Section 308 of the 1999 Constitution of the Federal Republic of Nigeria. Substantively, the immunity clause under Section 308 of the 1999 Constitution is provided to the President, Vice President, Governor, or Deputy Governor to give them freehand and mind in the performance of their duties to avert distraction from the multiplicity of litigations. According to Black's Law Dictionary, the term immunity means an exemption from a duty, liability, or service of process, especially such as exemption granted to a public official.[46] By the same token, the Oxford Dictionary of Law defines immunity as freedom or exemption from legal proceedings.[47] The immunity clause should apply to the office of the CJN, head of the judicature that upholds the supremacy of the constitution and protects the sanctity of the country's democracy. The prosecution of the CJN is in breach of public policy, contrary to the interest of the public or public welfare, and should be discouraged. Instead of public prosecution of the CJN, National Judicial Council should discipline judicial officers accused of alleged misconduct as enshrined by the constitution. This will save the government or the Country the degradation of proceedings against CJN, the country's face of the law in public prosecution by a Court of law. In

[44]See The Times of India (2018).
[45]See Chaudhry v President of Pakistan (2007).
[46]See Garner (1999).
[47]See Law (2015).

Fawehinmi v. Inspector-General of Police,[48] the Supreme Court of Nigeria stated that:

> *"The main purpose of Section 308 of the 1999 constitution is to allow an incumbent President, Vice President, Governor or Deputy Governor mentioned in that section a completely free hand and mind in the performance of the duties and responsibilities assigned to the office which he or she holds under the constitution."*

It is difficult to fathom the rationale of arraigning the CJN, the head of the judicature before the Code of Conduct Tribunal or before any Court since the public policy principle protected immunity applies to the President, Senate President, or Governor of a State. It erodes the legitimacy of that immunity clause as some of the heads of the three tiers of government are left unprotected from public prosecution whilst still holding office. How relevant is this protected immunity if it is meant to pick and choose who it should apply to within the heads of the three arms of the government in the country? The rationale for the grant of the protected immunity under Section 308 of the 1999 Constitution by Karibi-Whyte JSC in Tinubu v I.M.B Securities Plc.[49]is to provide "a public policy principle." The public policy principle means actions anti to the interest of the public, public good, or public welfare. However, the rationale for the grant of protected immunity is two folds:- Protection for the public office and protection of the sovereignty of the State. It will amount to degradation of the office of the President or the Sovereignty of the State to drag the President or Governor of a State to Court to face examination and cross-examination in the full view of the Court. Admittedly, the CJN does not fall within the brackets of the incumbent President or the Governor of a State, but he is the head of the judicature. Dragging the CJN before the CCT will not only degrade his office but will cause embarrassment to the public who believes in the judiciary for protection and that will be contrary to public policy, Public good, the interest of the public, or public welfare. The Arraignment of the CJN before the CCT which is contrary to the public interest can be prevented by the Attorney General, the Chief Law officer of government since he has a constitutional right to do so under Section 174(3) of the 1999 Constitution of Nigeria as amended. At best, such allegation of misconduct is reserved under the Constitution for National Judicial Council (NJC) to handle as a council that disciplines judicial officers with an allegation of misconduct.[50] National Judicial Council is created as Federal Executive bodies under Section 153 of the Constitution of the Federal Republic of Nigeria with the CJN as the Chairman. The Court held in Nwaogwugwu v President F.R.N (2007)[51] that the NJC is a creation of the Constitution. Its primary duties are as contained in the Constitution and include amongst others, to recommend appointments or exercise disciplinary control over judicial officers. The Constitution at Section 158 (1)

[48]See Fawehinmi v Inspector-General of Police (2002) at 699-700.
[49]See Tinubu v I.M.B Securities Plc (2001).
[50]The duties and role of the NJC are provided in paragraph 21 of part One of the Third Schedule of the 1999 Constitution of the Federal Republic of Nigeria, as amended.
[51]See Nwaogwugwu v President F.R.N. (2007).

further provided that the NJC shall not be subject to the direction or control of any other authority in carrying out its power to make appointments or exercise disciplinary control over judicial officers. After all, these offenses are not of grave moral stigma or heinous acts and may be described as technical offenses and not crimes in the ordinary sense. The Privy Council held in Kariapper v Wijesinha,[52] relying on the U.S. Supreme Court in the United States v Lovett (1945), and *said "that the penalty imposed by law was not punishment for the criminal offense of corruption, but only disciplinary sanctions "to keep public life clean for the public good."* Interestingly, in 1965 a Ceylonese legislative assembly and local government councils were convicted of corruption by a Commission of inquiry. Subsequently, the Ceylonese legislature made a new law and vacated their seats in the parliament and the local government councils and disqualified them from voting or being voted for to any office in the country for seven years. The Privy Council further said that there is a difference between a disciplinary penalty and a punishment for an offense. In support of this view, the Privy Council quoted the words of Frankfurter in the United States v Lovett (1945),[53] where he said that:

> *"Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that the governmental authority inflicts harm does not make it punishment […]"*

The Privy Council has shown that the CCT is formed as a disciplinary body with its powers under paragraph 18 of the Fifth Schedule of the Nigerian 1999 Constitution intended to regulate the civil, not criminal obligations or liabilities of public officers, but to discipline for non-compliance with Asset declaration. In the case of Federal Republic of Nigeria v Dr Orji Uzor Kalu,[54] the former Governor of Abia State, Nigeria, Dr. Orji Uzor Kalu was arraigned before CCT on a charge of corruption, and a court in the sense of the Constitution is not just any tribunal, but one in which judicial power is vested. He pleaded the defence of immunity under Section 308 (1) of the Nigerian Constitution. The CCT held as per Justice Constance Momoh that S. 308 (1) does not apply to CCT as it is not a Court but purely a disciplinary body and lacks the power to try criminal matters; that matters before the CCT are 'sui generis' and not civil or criminal proceedings that apply to section 308 (1). A court in the sense of the Nigerian Constitution is not only a tribunal but one with vested judicial powers.[55] Furthermore, the nature of CCT as a purely disciplinary body is contained in Paragraph 3(e) of the Third Schedule of the Constitution and stated that its power can only be invoked by the Criminal Conduct Bureau (CCB) complaint of non-compliance with or breach of the Code of Conduct provisions. The Nigerian Constitution under Schedule Five, paragraph 18 is intended not to punish, but to discipline and in the words of Privy Council, to 'keep public life clean for public good.'[56] From the foregoing, it is only

[52]See Kariapper v Wijesinha (1967).
[53]See United States v. Lovett (1945) 328 U.S.303 at 491.
[54]See Federal Republic of Nigeria v Dr. Orji Uzor Kalu (2006).
[55]See the Constitution of the Federal Republic of Nigeria (1999) as amended). Section 6 (5).
[56]Ibid at schedule V, Para. 18

appropriate that the case of the former CJN be referred to the NJC for possible disciplinary actions. It is a bad precedent to remove the CJN in such a cavalier manner without due process bearing in mind the colossal damage this could cause in the minds of the citizens. The office of the CJN is sacred and must be guarded, respected, and protected as its impairment will derail the country's walls of justice.

Recommendations

The judiciary is the pinnacle of the legal profession. To ensure complete independence of the judiciary in Nigeria, firstly, an independent judicial appointment process should be established and called Nigerian Judicial Appointment Body (NJAB). The NJAB shall be established by the Constitution as one of the Federal Executive Bodies.[57] This body shall be responsible for the recommendation, appointment, remuneration, promotion, discipline, and/or dismissal of the judicial officers in liaison with the Federal Judicial Service Commission, the Judicial Service Committee of the Federal Capital Territory, Abuja. This body shall be autonomous, autochthonous, and free from any subjugation or control from the executive arm of the government or the President in any form or manner. It does not mean that the new body will render the existing Nigerian Judicial Council (NJC) moribund, but its functions will be elaborate, firm, and independent of Presidential interference, except for checks and balances, and will work with the NJC for the restoration of the Judiciary in Nigeria. This body shall appoint the judicial officers through an electoral process participated by the citizens through a secret voting method conducted by the Independent National Electoral Commission (INEC). The implication is that these judicial officers are to serve the entire citizens of the country and have to be elected the same way the other two tiers of the government (Executive and Legislature) are elected. By so doing, the judiciary will discharge their duty without favour or fear of being removed from office arbitrarily by the ruling government if they refuse to bend due process of the law. The selection of the qualified persons to occupy the offices of the judiciary must be on merit through the countries National Judicial Council and reviewed by the NJAB. After the review, the persons selected will be screened by an independent judicial committee (IJC) that will thereafter present the successful candidates to INEC after endorsement before public voting of the citizens. This process may seem rigorous, may not have been practiced before any place in the world. Nonetheless, it is a dream for a greater future visionary, an innovation for greatness, and it is very essential for the triumph of rule of law in any country for peaceful coexistence. Any government that is not laid on a solid foundation of the rule of law is not bound to achieve an economic boom and stable governance. Secondly, the Nigerian legal system must incorporate and practice judicial review which is a critical check on the powers of the executive public body's decisions to ensure they acted within the law. Thirdly, the office of the judges should be for a lifetime as far as they satisfy the legal and ethical standards

[57]Ibid, at Sec. 153.

of their judicial role until retirement. Fourthly, the payment of judges should not be regulated by the legislative and executive branches of the government but should be from a government consolidated account. Fifthly, the judges should not be poorly paid and should be placed at the same rate of salary as the head of the executive and legislature. This will guarantee their responsibility to their families and capability to cater for their children's education to any institution they desire. It is only on such a benchmark that the government would have a moral rectitude to fight corrupt judges. I advocate for a total overhaul of the salary structure and conditions of service of judicial staff and public officers in Nigeria to equate their counterparts in developed countries. Apart from Lagos State with enhanced salaries for judicial officers, other States' salaries are poor concerning their status. That is why Justice Akanbi stated that: *"Quite often, a poorly paid judge stands the risk of becoming endangered species and is likely to fall foul of the standards expected of him as a judge."*[58] Finally, complete independence of the Courts of justice is an essential content of the Nigerian Constitution because only an independent judiciary can impartially check an excessive exercise of power by other arms of government.

Conclusion

The ultimate aim of a society is for the law to govern, properly legally regulated and autocracy which depends on shared lies will not be on the rise. To save democracy, the truth must be prioritised over lies, tolerance over prejudice, and the Nigerian governance policy should be structured to jettison leadership by mediocrity with well-educated civilised individuals positioned into power. Democracy overtly is comprehensible where the citizens are not targeted, harassed or intimidated, detained, and/or executed because of who they are, religious beliefs, or where they come from. When the judiciary is independent, there will be clear checks and balances, and rapid economic growth. The conditions of service of the judiciary should be enhanced so that court orders are respected and implemented no matter who is involved. If the judiciary as the apex of the legal profession is respected, then democracy can still be saved with the containment of free speech, the right to life, liberty, the pursuit of happiness, and economic development in Nigeria.

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[58]See Akanbi (1996) at 51.

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Athens Journal of Law - Volume 7, Issue 3, July 2021 – Pages 335-358

Fake News and the Convention on Cybercrime[1]

By Robert Smith[*] & Mark Perry[±]

The COVID-19 pandemic and the recent term of the United States President, Donald Trump, brought the term "fake news" to the attention of the broader community. Some jurisdictions have developed anti-fake news legislation, whilst others have used existing cybercrime legislation. A significant deficiency is the lack of a clear definition of fake news. Just because a person calls something "fake news" does not mean that it is indeed false. Especially during pandemics, the primary aim should be to have misinformation and disinformation removed quickly from the web rather than prosecute offenders. The most widely accepted international anti-cybercrime treaty is the Convention on Cybercrime developed by the Council of Europe, which is silent on fake news, the propagation of which may be a cybercrime. There is an Additional Protocol that deals with hate speech, which the authors consider to be a subset of fake news. Using examples from Southeast Asia, the paper develops a comprehensive definition of what constitutes fake news. It ensures that it covers the various flavours of fake news that have been adopted in various jurisdictions. Hate speech can be considered a subset of fake news and is defined as the publication or distribution of fake news with the intention to incite hatred or violence against ethnic, religious, political, and other groups in society. The paper proposes some offences, including those that should be applied to platform service providers. The recommendations could be easily adapted for inclusion in the Convention on Cybercrime or other regional conventions. Such an approach is desirable as cybercrime, including propagating fake news, is not a respecter of national borders, and has widespread deleterious effects.

Keywords: *Fake news; hate speech; Convention on Cybercrime; draft legislation*

Introduction

Social media is becoming pervasive worldwide, especially as the cost of smartphones makes it more readily available to all levels of society. The widespread use of social media has opened up more opportunities for computer-related crime, where crimes that once required a real presence can be undertaken

[*]PhD (Civil Engineering); MPhil in law, Postgraduate Student, University of New England, Armidale NSW, Australia. Corresponding author. E-mail: r.b.smith@unswalumni.com or robert@aecconsultants.asia.
[±]Professor of Law, School of Law, University of New England, Armidale NSW, Australia. E-mall: mperry21@une.edu.au.
[1]This research is supported by an Australian Government Research Training Program (RTP) Scholarship.

in the virtual world;[2] hence the appellation – *cybercrime*. The simplest definition of cybercrime is a computer-related crime that uses a computer network.[3]

Cybercrime is a fast-growing area of crime. More and more criminals are exploiting the speed, convenience and anonymity of the Internet to commit a diverse range of criminal activities that know no borders, either physical or virtual, cause serious harm and pose genuine threats to victims worldwide.[4] The total value at risk from cybercrime worldwide in 2019-2023 is estimated to be as high as USD 5.2 trillion.[5] Worldwide spending on information security was estimated to be USD 114 billion in 2018,[6] with global spending on security exceeding USD 1 trillion cumulatively for 2017 to 2021.[7]

The most widespread misuse of social media is probably participation in the cybercrime of publishing or spreading misinformation or disinformation, commonly called *fake news*. The posting and sharing of fake news can be trivial[8] or extreme. It can lead to racial, sectarian, and political tension resulting in property damage, violence, and even death.[9] During the current (2020-2021) COVID-19 pandemic, the posting of fake news can have dire consequences where the promotion of unproven therapies and conspiracy theories can lead to needless victims and an increasing death toll. The difficulty for many social media users, especially in the developing world, is differentiating between the truth and fake news. There are also claims that fake news has been used to inflame ethnic tensions in Myanmar and Indonesia; and influence elections in countries such as Indonesia[10] and the Philippines[11]and countries in the developed world.[12]

In 2021 the Special Rapporteur for the United Nations Human Rights Council noted:

> Disinformation is a complex, multifaceted phenomenon with serious consequences. It destroys people's trust in democratic institutions. It thrives where public information regimes are weak and independent investigative journalism is constrained. It disempowers individuals, robbing them of their autonomy to search, receive and share information and form opinions. In the platform world, individuals are regarded as users, not as rights holders with agency.[13]

Smith and Perry argued that the aim of fake news legislation should be to stop the promulgation of fake news, have the information removed with a correction and an apology issued.[14] Only serious cases should be prosecuted.[15] Publication of

[2]World Bank and United Nations (2017) at 18.
[3]Gercke (2014) at 11.
[4]Interpol (2019).
[5]Accenture Security (2019).
[6]Cybercrime Ventures (2019).
[7]Ibid.
[8]Smith & Perry (2020).
[9]Temby (2019) at 6.
[10]Ibid.
[11]See e.g. Ong & Cabañes (2019); Tapsell & Curato (2019).
[12]See e.g. Allcott & Gentzkow (2017); Cantarella, Fraccaroli & Volpe (2019).
[13]Khan (2021).
[14]Smith & Perry (2020) at 259.

the charges in the press tends to spread the 'fake news' rather than suppress it.[16] Removing fake news and requiring an apology rather than making it a criminal offence would also help deny the internet trolls their hobby of reporting to police the posting of views that do not agree with their views or those of the monarchy or the government.[17] The action of such trolls is tantamount to persecution. Furthermore, conducting misinformation campaigns by government authorities, including the military, should be explicitly prohibited.[18]

Whilst referring specifically to the Association of Southeast Asian Nations (ASEAN), Smith and Perry considered that there should be a uniform approach to addressing fake news:

a. First and foremost is to develop a common understanding of what constitutes *fake/hoax news*;
b. Develop a 'model' anti-misinformation/fake news law, treaty or declaration that has a comprehensive definition of fake news with the focus being on the instigators and not the propagators. For fake news, civil penalties should be considered with the focus on removal of fake news from the Internet, corrections, and apologies rather than severe prison sentences. It should include a specific offence of spreading misinformation by government personnel, including the military, whether in an official or unofficial capacity. In addition, it should, if possible, grade the severity of possible offences; and
c. Provide guidelines on regulating the fake news industry.

This study will develop a comprehensive definition of fake news and test its utility. International borders do not constrain the posting and spreading of fake news in cyberspace, so it is critical to have a widely accepted definition. The difficulty arises with enforcement where the evidence moves from the physical to the electronic, requiring a different skills base for investigators and prosecutors.[19] The study will then investigate how the offence of fake news might be introduced into a treaty, the Convention on Cybercrime.[20]

It should be noted that misinformation and disinformation have similar meanings with authors preferring one term over the other.

[15]Ibid.
[16]Ibid.
[17]Ibid.
[18]Ibid at 260.
[19]World Bank & United Nations (2017) p 19.
[20]Convention on Cybercrime.

Background

Convention on Cybercrime

The Council of Europe developed the *Convention on Cybercrime*.[21] As of 16 May 2021, the *Convention* had been ratified by 66 countries, including 46 of the 47 members of the Council of Europe.[22] The Philippines is the only ASEAN member to have signed the *Convention*.[23] The other parties to the treaty are Argentina, Australia, Canada, Cape Verde, Chile, Colombia, Costa Rica, Dominican Republic, Ghana, Israel, Japan, Mauritius, Morocco, Panama. Paraguay, Peru, Senegal, Sri Lanka, Tonga, and the United States.[24] The *Convention* mandates what national-level legislative and other measures are required under the domestic law of the signatories.[25] Whilst the *Convention* is not unique, it is the most recognised and has the most member states as parties.

The *Convention* groups the offences into five categories.

Offences against the confidentiality, integrity and availability of computer data and systems are:

a) Illegal access;[26]
b) Illegal interception;[27]
c) Data interference;[28]
d) System interference;[29] and
e) Misuse of devices.[30]

Computer-related offences are:

a) Computer-related forgery;[31] and
b) Computer-related fraud.[32]

Content related offences are all related to child pornography.[33]

As can be seen from the above, computer-based crime, as defined in the *Convention,* is wide-ranging. Nevertheless, there is one obvious omission, namely any reference to *fake news*. The potential for social mass media was in its infancy,

[21]Reservations and Declarations for Treaty No.185.
[22]Ibid.
[23]Ibid.
[24]Ibid.
[25]Convention on Cybercrime, ch II.
[26]Ibid art 2.
[27]Ibid art 3.
[28]Ibid art 4.
[29]Ibid art 5.
[30]Ibid art 6.
[31]Ibid art 7.
[32]Ibid art 8.
[33]Ibid art 9.

and the focus was on criminal activity moving from the physical to the digital space. *Facebook*, the American social media conglomerate, which initiated the worldwide rise of computer-based mass social media and social networking, was founded in February 2004.[34] This was, over two years after the *Convention* was opened for signature and eight months before the Convention entered into force.[35] In its first-quarter report for 2021, Facebook reported that the number of daily active users (DAUs) was, on average, 1.88 billion for March 2020, and there were 2.85 billion monthly active users (MAUs) as of 31 March 2021.[36] This was an increase year on year of 8% for DAUs and 10% for MAUs.[37] With this almost exponential growth has come Facebook's use as a tool to propagate false news.[38]

On 1 March 2006, an *Additional Protocol*[39] on hate speech entered into force following five ratifications from members of the Convention.[40] As of 21 May 2021, the Protocol had been ratified by 33 countries, including 30 members of the Council of Europe.[41] Twelve parties had signed but not ratified the treaty.[42]

The Protocol defines *racist and xenophobic material* as any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination, or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.[43]

A party is required to make it a criminal offence under domestic law to distribute or otherwise make available when committed intentionally and without right, or "racist and xenophobic material to the public through a computer system".[44] Provided that other effective remedies rather other than criminal liability are available such liability need not apply where a person "advocates, promotes or incites discrimination that is not associated with hatred or violence".[45] A party may reserve the right not to apply criminal sanctions in cases of discrimination "for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies" under art 3(2).[46]

It also requires a party to make it a criminal offence under domestic law to use a computer system intentionally and without right, to make a racist and xenophobic motivated threat[47] and to use a computer system to make a racist and xenophobic motivated insult.[48] This offence occurs when the accused threatens or

[34]Facebook (2008).
[35]Convention on Cybercrime.
[36]Facebook (2021).
[37]Ibid.
[38]See e.g. Etter (2017); Mozur (2018); Stecklow (2018).
[39]Additional Protocol to the Convention on Cybercrime.
[40]Chart of signatures and ratifications of Treaty 189.
[41]Ibid.
[42]Ibid.
[43]Additional Protocol to the Convention on Cybercrime.
[44]Ibid art 3.1.
[45]Ibid art 3.2.
[46]Ibid art 3.3.
[47]Ibid art 4(1).
[48]Ibid art 5(1).

insults publicly through a computer system "persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or a group of persons which is distinguished by any of these characteristics".[49] In the case of insults, a party may reserve the right not to apply the article[50] or may require that the insult actually exposed the person or group of persons to hatred, contempt or ridicule.[51]

Denial, gross minimisation, approval or justification of genocide or crimes against humanity should also be established as a criminal offence.[52] Again, the party may reserve the right not to apply the article or require that the action be committed with intent.[53] When committed intentionally and without right, the aiding or abetting the commission of any of the offences in the Additional Protocol must also be established as a criminal offence.[54]

The Additional Protocol is different from the Convention in that each of the Articles allows for limited reservations. Nevertheless, despite the parties' ability to register reservations, there has been reluctance by a number of the parties to the Convention to become parties to the Additional Protocol. During negotiations for the Convention, the resistance of the United States resulted in provisions designed to eliminate racist ("hate speech") internet sites not being included in the Convention.[55] The United States is not a party to the Additional Protocol.

The United States Department of Justice wrote to the Council of Europe committee of experts drafting the Additional Protocol. It noted that the United States "deplores racism and xenophobia, and the violence and other harmful conduct that racist and xenophobic groups often seek to foster".[56] The United States does not criminalise or prohibit racist speech per se. In addition, it is severely constrained by the First Amendment to the United States Constitution on state action restraining or punishing speech based on its content.[57] "Nor are the restrictions of the First Amendment necessarily limited to materials originating in the United States or to publications with a purely American audience".[58]

In January 2018, the European Commission appointed a high-level group of experts (HLEG) to advise it on countering the spread of disinformation online.[59] The Committee preferred the word "disinformation" over "fake news" and "includes all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit".[60] Rather than recommending a legislative response, they recommended responses based on

[49]Ibid art 4(1) and art 5(1)
[50]Ibid art 5(2)(b).
[51]Ibid art 5(3)(a).
[52]Ibid art 6(1).
[53]Ibid art 6(2)(a).
[54]Ibid art 7.
[55]Murphy (2002) p 973.
[56]Boyd & Chertoff (2001).
[57]Ibid.
[58]Ibid.
[59]European Commission (2018) ch 3, p 2.
[60]Ibid.

five pillars: enhance the transparency of online news; promote media and information literacy; develop tools for empowering users and journalists; safeguard the diversity and sustainability of the European news media ecosystem; promote continued research on the impact of disinformation.[61]

Analysis

Developing a Comprehensive Definition of Fake News

Definition

There seems to be no accepted definition of "fake news" or a threshold for defining the offences. Often an item is posted in good faith, believing it to be true. At first glance, the definition of fake news proposed by Gelfert, namely the "*deliberate* presentation of (typically) false or misleading claims as news, where the claims are *misleading by design",*[62] would seem to be applicable. Even in cases of intercommunal tension, as was the case, in, for example, Indonesia[63] and Myanmar[64] it is highly likely that many of the transmitters of hate posts believe them to be true. Often the "news" in fake news does not appear to meet the standard dictionary definition — "information about a recently changed situation or a recent event".[65] Singapore, which is the only member of ASEAN with specific fakes news legislation extant,[66] has included the following two definitions in its *Protection from Online Falsehoods and Manipulation Act 2019*[67]:

a) a statement of fact is a statement which a reasonable person seeing, hearing or otherwise perceiving it would consider to be a representation of fact;[68] and
b) a statement is false if it is false or misleading, whether wholly or in part, and whether on its own or in the context in which it appears.[69]

A definition including "a reasonable person" poses some difficulties as it leaves the meaning wide open to interpretation.

For instance, Tapsell posed the following questions that need to be considered, especially in a country like Indonesia, which is seismically active as well as prone to monsoon-induced natural disasters:[70]

[61]Ibid p 5.
[62]Gelfert (2018) at 108 (emphasis added).
[63]Temby (2019).
[64]See e.g. Douek (2018); Gleicher (2018); Mozur (2018); Stecklow (2018); United Nations Human Rights Council (2018).
[65]Collins English Dictionary (2020).
[66]Al Jazeera (2019).
[67]Protection from Online Falsehoods and Manipulation Act 2019.
[68]Ibid s (1)(a).
[69]Ibid s (2)(b).
[70]Tapsell (2019) ar 7.

a) Was the sharing of information malicious, knowing it was fake, or did they consider it was real?
b) Should those who post-disaster warnings wait until an official warning is posted in situations where time is the essence? and
c) In political hoax cases, is posting it a crime or was it a non-chargeable error of judgement?

In the light of these questions, it appears there should be a minimum threshold in either the definition of fake news or the penalty to be applied. Therefore, a more detailed definition is preferred as it is considered that it would assist in developing the minimum threshold to be applied for the prosecution of fake news. Therefore, as a first step, it is proposed to adopt the definition of Gelfert[71] as the lower threshold, namely: *fake news is the deliberate presentation of (typically) false or misleading claims as news, where the claims are misleading by design.*

This definition is too simplistic, so it is proposed to amplify it by introducing the expanded definition of fake news by introducing the terms of the matrix developed by Wardle.[72]

The 'fake news' matrix consists of seven types of misinformation and disinformation:[73]

a) Satire or parody — no intention to cause harm but with potential to fool;
b) Misleading content — misleading use of information to frame an issue or individual;
c) Imposter content — where genuine sources are impersonated;
d) Fabricated content — content is 100% false and designed to deceive and harm;
e) False connection — headlines, visuals or captions do not support the content;
f) False context — genuine content is shared with false contextual information; and
g) Manipulated content — genuine information or imagery is manipulated to deceive.

The definition was then tested against examples of what was considered to be fake news in three of the ASEAN ten Asian nations, namely Indonesia, the Philippines and Thailand.

Indonesia

The following types of fake news in Indonesia have been identified by Smith (2020):[74]

[71]Gelfert (2018) at 108 (emphasis added).
[72]Wardle (2017).
[73]Ibid.
[74]Smith (2020) ch 3.

a) Saracen, a commercial fake news factory[75] claimed by police to own more than 2,000 online media and around 800,000 social media accounts[76] - fabricated content.
b) Jonru, the blogger, social media star and provocateur,[77] was arrested for 'inciting hatred against ethnic, religious or other groups in society'[78] - fabricated content.
c) Ratna the hoaxer[79] – misleading content.
d) Sharing hoax material about an earthquake and/or tsunami – not deliberate and not misleading by design.[80]
e) Sharing hoax material about children being kidnapped[81] – not deliberate and misleading by design.
f) Sharing fake news that a student protest was taking place in Jakarta[82] – fabricated content.
g) The administrator of an Instagram account spreading material stating President Jakowi was a communist[83] – fabricated content.
h) Uploading a hoax video that said the TNI[84] arrested Chinese citizens for donations to the presidential campaign[85] – fabricated content.
i) The editor of a video that had President Jokowi's running mate, dressed as Santa Claus[86] – fabricated content.
j) Spreading fake news that containers of already punched election ballot papers had arrived in Indonesia before the Presidential election[87] – fabricated content.
k) Sharing claim that President Jakowi had a fake degree[88] – fabricated content.
l) Claim that Election Commission computers had been programmed to automatically determine a President Jakowi win[89] – fabricated content.
m) False claims that Chinese PLA soldiers had infiltrated the Indonesian police[90] – fabricated content.
n) False posts that the Al-Makmur mosque in Jakarta had been attacked[91] – fabricated content.

[75]Chan (2017).
[76]Alfanisa (2017).
[77]Saraswati (2017).
[78]Ibid.
[79]Souisa (2018).
[80]Tapsell (2019) at 2.
[81]Ibid.
[82]Ibid.
[83]Ibid.
[84]Tentara Nasional Indonesia (Indonesian Armed Forces).
[85]Tapsell (2019).
[86]Ibid at 2.
[87]Ibid.
[88]Ibid.
[89]Ibid.
[90]Ibid.
[91]Ibid.

Philippines

The Philippines National Police (PNP) has not disaggregated its data. Smith (2020) noted that the cases investigated by the PNP either online libel-related[92] or COVID-19 Pandemic related.[93] Between January and November 2019, 1,166 cases were investigated by the Philippines National Police.[94] The authors assume that the COVID-19 cases are either not deliberate or misleading by design or fabricated content.

Thailand

a) Animals have been abandoned at Phuket Zoo[95] - not deliberate and misleading by design and possibly alternative offences possibly committed such as soliciting funds or trespassing;
b) Reports of imminent dissolution of House of Representatives[96] - satire or parody;
c) An accusation that the wife of Prime Minister was not Buddhist as she claimed[97] - fabricated content;
d) The government was to impose a tax on feminine hygiene products[98] - not deliberate and misleading by design;
e) A woman claimed that someone had 'returned' her lost wallet[99] - satire or parody;
f) Cups of coffee were selling for Thai baht 12,000[100] – not deliberate and misleading by design.
g) Report of a 'death' at Phuket airport[101] – not deliberate and misleading by design.
h) Report that a person collapsed 'with COVID-19'[102] – misleading content;
i) Suppression of a 'death' in Pattaya hospital'[103] – misleading content;
j) Releasing and sharing *fake news* about COVID-19[104] – misleading content;
k) Spreading *fake news* about COVID-19 spreading in Chiang Mai[105] - fabricated content.
l) False report of 40 COVID-19 cases in neighbourhood[106] - satire or parody;
m) False report of police COVID-19 checkpoint[107] - satire or parody;
n) 44 fake COVID-19 websites[108] - imposter content;

[92]Anti Cybercrime Group (2019).
[93]Caliwan (2020).
[94]Anti Cybercrime Group (2019).
[95]Thongtub (2020).
[96]National News Bureau of Thailand (2020).
[97]Thai PBS World (2019).
[98]Ibid.
[99]The Nation (2019a).
[100]The Nation (2019b).
[101]Phuket News (2020).
[102]Boonbandit (2020).
[103]Naew Na (2020).
[104]Nation Thailand (2020a).
[105]Thai PBS World (2020).
[106]Nation Thailand (2020b).
[107]Thongtub (2020b).

o) 'False' report of no COVID-19 screening at Bangkok Airport[109] – not deliberate and misleading by design; and.
p) Five negative posts on the cash handout scheme[110] - misleading content.

Classification of Fake News

To test the robustness of this definition, it is necessary to ascertain whether all of the offences identified above fill one of the matrix cells based on the available details. The analysis is tabulated summarised in Table 1.

Table 1. *Classification of Fake News Cases Reported Above*

Jurisdiction	Not deliberate and misleading by design[111]	Satire or parody[112]	Misleading content[113]	Imposter content[114]	Fabricated content[115]	False connection[116]	False context[117]	Manipulated content[118]	None of the above
Indonesia	2	0	1	0	12	0	0	0	0
Philippines	X[119]				X[120]				
Thailand	5	4	4	1	2	1	0	0	0

Source: Analysis by the authors.

Whilst this analysis is very preliminary and needs extensive verification, it shows that such a paradigm covers the variety of cases of fake news as discussed above. However, what is required is some refinement of the headings used by

[108]Thai Visa News (2020a).
[109]Human Rights Watch (2020); Thai Visa News (2020).
[110]Nation Thailand (2020c).
[111]The corollary of Gelfert's definition of fake news 'deliberate presentation of (typically) false or misleading claims as news, where the claims are misleading by design' (Gelfert (2018) p 108 (emphasis added)).
[112]'no intention to cause harm but with potential to fool'- Wardle (2017).
[113]'misleading use of information to frame an issue or individual' - Wardle (2017).
[114]'where genuine sources are impersonated' – Wardle.(2017).
[115]'content is 100% false and designed to deceive and harm' - Waedle (2017).
[116]'headlines, visuals or captions do not support the content'- Wardle (2017).
[117]'genuine content is shared with false contextual information' – Wardle (2017).
[118]'genuine information or imagery is manipulated to deceive' -Wardle (2017).
[119]Caliwan (2020). No details were available on the full range of the 47 offences. It is likely that some were unintentional whilst some may have been deliberate fabrications.
[120]Anti Cybercrime Group (2019). Between January and November 2019, 1,166 cases of online libel were investigated by Philippines National Police.

Wardle, although her more detailed descriptions provide some clarity. Rather than providing a definition of fake news and *truth* which are essentially impossible to define, it is proposed to define the offence incorporating critical components of the Wardle matrix.

Satire or parody is at the very minor end of fake news and certainly does meet the threshold for initiating criminal proceedings. Nor is it likely, in most cases, to meet the threshold for successful actions in civil proceedings for libel or defamation. It has, therefore, been removed from the list of activities that constitute fake news. The definition of fake news becomes:

Fake news is the deliberate publication or distribution of material that contains disinformation or misinformation that was misleading by design and:

a. the material is used to defame an individual; and/or
b. genuine sources are imitated; and/or
c. content is false and meant to deceive or harm; and/or
d. headlines, visuals, or captions do not support the content; and/or
e. genuine content is shared with false contextual information; and/or
f. genuine information or imagery is manipulated to deceive.

This definition does not explicitly cover hate speech which, based on the experience of Indonesia described and to a less extent with that of the Philippines as described above, is a serious issue in both countries. It is related to fake news in that fake news is used in a manner to incite hatred or violence against ethnic, religious, political and other groups in society. Therefore, it is proposed to also develop a definition of hate speech as a particular use of fake news. The definition of hate speech becomes:

Hate speech is the publication or distribution of *fake news* with the intention of inciting hatred or violence against ethnic, religious, political and other groups in society.

These definitions are independent of the mode of publication and distribution. In this case, the proposed convention is restricted to the publication and distribution of fake news in cyberspace. As a result, this requires a definition of a "computer system". In this case, the definition from the *Convention on Cybercrime* would be applicable[121] i.e. a *computer system* means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data;

Recently there has been an increase of persons misrepresenting themselves on social media, using fake names or conduct coordinated campaigns to manipulate public debate.[122] Facebook classifies inauthentic behaviour as people acting so as "to misrepresent themselves on Facebook, use fake accounts, artificially boost the popularity of content or engage in behaviours designed to enable other violations"

[121]Convention on Cybercrime art 1(a).

[122]See e.g. Reuters (2019); Douek (2018); Etter (2017); Gleicher (2019a); Gleicher (2020); Gleicher (2018); Gleicher (2019b); Irving (2018); Mozur (2018); Nyi Nyi Kyaw (2019); Sakim (2020); Stecklow (2018); Tanakasempipat (2021).

of their Community Standards.[123] "This policy is intended to protect the security of user accounts and our services and create a space where people can trust the people and communities they interact with".[124] Behaviour that Facebook prohibits includes:

a. Use of multiple Facebook accounts [to mislead other users];
b. Misleading users about ownership or control of a page;
c. Use inauthentic content about identity, purpose or origin of the entity they represent, source or origin of content or the popularity of the content, to mislead people or Facebook;
d. Use of multiple Facebook accounts working in concert to mislead as defined in dot points as to c above where fake accounts are central to the operation (i.e. coordinated inauthentic behaviour); or
e. Coordinated inauthentic behaviour conducted on behalf of a foreign or government actor.[125]

Whilst this behaviour is undoubtedly anti-social, it would be challenging to legislate it as a criminal offence. A much more appropriate approach is to pass responsibility to the platform service providers.

Fake news requires a distribution channel. In this case, the publishing platform is social media such as Facebook and Twitter and mobile phone messaging applications such as Line, Messenger and WhatsApp. The questions that need to be addressed are: are they neutral players, or are they complicit? What can be enshrined in law to ensure that they remain neutral players?

Role of the Platform Provider

Indonesian GR 80 2019[126] stipulates that a platform provider is not accountable for the content or the consequences due to the existence of illegal electronic information provided it takes immediate action to erase electronic links and/or illegal electronic information immediately becoming aware of its existence.[127] The Asian Internet Coalition (AIC)[128], whose members include Amazon, Facebook, Google and Twitter, suggested that, as their members had various timeframes to undertake removal action, they preferred that the timeframe be altered to "as soon as possible".[129] They recommended the UK. *Electronic Commerce (EC Directive) Regulations 2002* as best practice.[130] The wording of the *Regulations* is much clearer than that of *GR 80*. The hosting article of the *Regulations* reads:

[123]Facebook (2020) s 20.
[124]Ibid.
[125]Ibid.
[126]Government Regulation Number 80 (Indonesia).
[127]Ibid art 22(1)-(2).
[128]Asian Internet Coalition (2020).
[129]Paine (2020).
[130]Ibid.

Where an information society service is provided, which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where:

a) the service provider:
    i. does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or
    ii. upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and
b) the recipient of the service was not acting under the authority or the control of the service provider.[131]

As was seen when discussing the comparison between the Indonesian *Amendment to Electronic Information and Transactions Law*[132] and the Facebook Community Standards[133] showed that Indonesian requirements were stricter than those in the Facebook Community Standards. Whilst this was no doubt mainly because Indonesia is a conservative society. Nevertheless, it does show a need to regulate further the activities of platform service providers, especially concerning the removal of harmful content.

Reservations Clause

Clough considered that to be effective, harmonisation must seek to accommodate and reconcile differences between the parties.[134] He suggested that the inclusion of a reservations clause could facilitate this. In the case of fake news, this is even more critical, bearing in mind the right to free speech as, for instance, prescribed in First Amendment to the United States Constitution.[135] As discussed earlier, the United States is severely constrained on undertaking state action restraining or punishing speech based on its content.[136] This constraint is not limited to materials originating within the country or to publications restricted to a purely American audience.[137]

Offences

It is considered that the penalties should be harsher when the fake news is published and/or promulgated by a state actor or consists of hate speech.

[131]Electronic Commerce (EC Directive) Regulations 2002.
[132]Law Concerning Electronic Information and Transactions 2008.
[133]Facebook (2020).
[134]Clough (2014).
[135]Boyd & Chertoff (2001).
[136]Ibid.
[137]Ibid.

Draft Clauses

Definitions

1. *Fake news* is the deliberate publication or distribution of material that contains disinformation or misinformation that was misleading by design and:

    (a) the material is used to defame an individual; and/or
    (b) genuine sources are imitated; and/or
    (c) content is false and meant to deceive or harm; and/or
    (d) headlines, visuals or captions do not support the content; and/or
    (e) genuine content is shared with false contextual information; and/or
    (f) genuine information or imagery is manipulated to deceive.

2. *Hate speech* is the publication or distribution of *fake news* with the intention of inciting hatred or violence against ethnic, religious, political and other groups in society.
3. A *computer system* means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data.

Offences Related to using a Computer System to Publish or Distribute Fake News

1. Each party shall adopt such legislative measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally and without right, using a computer system to publish or distribute fake news.[138]
2. Each party shall adopt such legislative or other measures as may be appropriate so that offenders are liable to higher penalties than usual if any of the following aggravating circumstances are present:[139]
    (a) Where the offence includes the publication or distribution of hate speech; and/or
    (b) Where the offence is committed by a public official in the performance of his or her duties.[140]

Corporate Liability[141]

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence established under this Convention, committed for their benefit by

[138]The wording up to and including "without right" is taken verbatim from Convention on Cybercrime art 9.
[139]The wording is taken verbatim from ASEAN Convention Against Trafficking art 5(3).
[140]The wording is taken verbatim from ASEAN Convention Against Trafficking art 5(3) (g).
[141]The wording is taken verbatim from Convention on Cybercrime art 12.

any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on:

(a) power of representation of the legal person;
(b) an authority to make decisions on behalf of the legal person;
(c) an authority to exercise control within the legal person.

2. In addition to the cases already provided for in paragraph 1 of this article, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established under this Convention for the benefit of that legal person by a natural person acting under its authority.
3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.
4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Role of the Platform Service Provider[142]

1. Liability from Financial Remedies or Criminal Sanctions:

Where a service is provided which consists of the storage of information provided by a recipient of a service, the service provider (if it otherwise would) shall not be liable for damages or for any other financial remedy or for any criminal sanction as a result of that storage where:

(a) the service provider:
   i. does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or
   ii. upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

2. Inauthentic Behaviour by Platform Users:

Upon obtaining knowledge or awareness of the following activities being undertaken by users of the platform, the Platform Service Provider shall act expeditiously to remove or to disable access to the information:

(a) use of multiple accounts on the platform, with the intention to mislead other users;
(b) misleading users about ownership or control of a page;

[142]The wording is slightly modified from that in Electronic Commerce Regulations 2002 art 19 by deleting the words "information society" and adding a new clause on inauthentic behaviour.

(c) use of inauthentic content about identity, purpose or origin of the entity they represent, source or origin of content or the popularity of the content, to mislead people or the platform service provider;
(d) coordinated inauthentic behaviour by using multiple accounts working in concert to mislead as defined in dot points (a) to (c) above; where fake accounts are central to the operation;
(e) Coordinated inauthentic behaviour conducted on behalf of a foreign or government actor.

Discussion

It is increasingly clear, especially since the commencement of the COVID-19 pandemic in early 2020 that fake news is becoming more pervasive. As it has become more pervasive it has also become more dangerous as misinformation and disinformation has thrived during the pandemic. A global response is required. The *Convention on Cybercrime*[143] as it stands does not cover fake news. Hate speech but no other forms of fake news are the subject of the Additional Protocol.[144] In light of the fact that significantly less of the parties to the *Convention* are also parties to the *Additional Protocol* it may not be possible to negotiate and then obtain a sufficient number of parties for a protocol on fake news to enter into force.

A more appropriate approach could be to prepare it as a Model Law that would be available for jurisdictions to adopt as they feel appropriate. The advantage of this approach is that it would provide comprehensive definition of fake news as defined above, namely: *Fake news is the deliberate publication or distribution of material that contains disinformation or misinformation that was misleading by design*. It has two essential features that it is *deliberate* and is *misleading by design*. Prosecution should only apply when both these elements are present.

The other feature that the Model Law should also address is inauthentic behaviour on social media. This should include provisions that require platform service providers to take action concerning in authentic behaviour. Without solid support from the platform service providers, it will be impossible to adequately monitor and remove inauthentic content which does not come under the definition of fake news. Government monitoring sites can impact the spreading of fake news that they can identify or is reported to them. However, identification of inauthentic behaviour is a joint responsibility with the platform service provider taking the lead role.

There have been several non-legislative responses recommended in response to the spread of fake news. As mentioned, earlier the European Commission appointed a high-level group of experts (HLEG) recommended a non-legislative response to fake news. Such an approach was also developed by the Ministers Responsible for Information of the ASEAN Member States in their framework to

[143]Convention on Cybercrime.
[144]Additional Protocol to the Convention on Cybercrime.

minimise the harmful effects of fake news.[145] The framework included the following elements:[146]

a) Cooperation in the fields of information and media, and support development of socially responsible media in ASEAN
b) Capitalise on the potential of online and social media and ensure that the Internet remains a safe space;
c) Raise awareness on the potential problems posed by fake news;
d) Improve digital literacy;
e) Strengthen national capacity to detect and respond to fake news;
f) Encourage stakeholders to build on industry norms and guidelines against fake news;
g) Share best practices and experiences on responses to the challenge of fake news
h) Encourage all ASEAN partners and relevant stakeholders to cooperate and join hands in the implementation of this Framework.

Such an approach is undoubtedly required, but as fake news is so pervasive, it is unlikely to have a short-term impact. It may have an impact on the less sophisticated users of the Internet, including those who essentially only use social media. On the other hand, it will have a limited impact on the fake news production industry, such as the fake news factories or farms.

Conclusion

A draft protocol on fake news makes a valuable tool in the fight against the worst excesses of fake news. Even if not part of a protocol, the draft could act as a model for consideration for other jurisdictions, especially those that use non-specific cybercrime legislation to prosecute purveyors of fake news.

Probably the most crucial aspect of the paper has been to develop a robust definition of fake news. The definition must show intent to deceive. It is considered that an appropriate definition is: "*deliberate* presentation of (typically) false or misleading claims as news, where the claims are *misleading by design*".[147] Such a definition would preclude trivial offences and allow law enforcement agencies to focus on the extreme end of the spectrum.

It is also critical to enlist the resources of the platform service providers to control inauthentic behaviour. The approach of Facebook is a good start, but it needs to allocate adequate resources to monitor users.

[145]Framework and Declaration to Minimise Harmful Effects of Fake News.
[146]Ibid.
[147]Gelfert (2018).

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Marxism, International Law and the Enduring Question of Exploitation: A History

By George Forji Amin[*]

Until the 1990s, there was a longstanding disdain on Marxism amongst jurists especially international lawyers, with non-Soviet international lawyers only paying scant attention or lip service to Marxist thinking, based on a number of misgivings. Firstly, reminiscing of legal history in general, Marxism was perceived as activism reserved for a distant past and irrelevant to the present and future. Secondly, Marxism was long perceived as the prerogative of non-jurists, most especially as Marx himself did not pay attention to jurisprudence. Moreover, Marxism was throughout the cold war period generally associated with the Soviet Union. Any legal analysis from a Marxist perspective was tantamount to being misinterpreted as a defence for Soviet communism—a derogatory position for any scholar in the West at the time. Lastly, although many Soviet publicists did examine Marxism in their studies, Soviet international law was however often excluded from mainstream considerations —and framed as alternative international law rather than conventional discourse. With Soviet International law restricted to rules consented or acquiesced to by states (at least in principle), the Soviet brand of international law was perceived in the West as the most extreme form of positivism.

Keywords: *Marxist International Law; Capitalism; Exploitation Question; Human Development; Emancipation; Marxist Theory of Law*

Introduction

Is Marxism a human rights or anti-human rights project? As a method, Marxism has established a foothold in academia as an effective modality for explaining social justice by reference to modes of production and exchange. While Marx's critique of political economy is commonplace in social sciences, the reverse is not true with Marxist theory of law. Any legal scholar engaging the works of Marx is bound to grapple with the lack of jurisprudence and failure of the writings tying his analysis to any normative theory of law. In fact, neither Marx nor Engels—his right-hand protégé gave any serious consideration to the role of law in the contradictions of capitalism. Evidently not considered as an essential object of his analysis, Marx failed to accord law any centrality in resolving emanating crisis in social relations. Considering that Marx's work was a robust critique of political economy, one would naturally have expected his analysis to

[*]Dr. of Law(LL.D), Teaching Associate, Faculty of Law, University of Manchester, Manchester, UK; Adjunct Lecturer in International Law, University of Helsinki, Finland. Emails: aminforji@gmail.com; george.forjiamin@manchester.ac.uk; amin.forji@helsinki.fi.

redefine law in such a way as to carter to the exigencies of the working class—the social class for whom he was interceding.

Until the 1990s, there was a longstanding disdain on Marxism amongst jurists especially international lawyers, with non-Soviet international lawyers only paying scant attention or lip service to Marxist thinking, based on a number of misgivings. Firstly, reminiscing of legal history in general, Marxism was perceived as activism reserved for a distant past and irrelevant to the present and future. Secondly, Marxism was long perceived as the prerogative of non-jurists, most especially as Marx himself did not pay attention to jurisprudence. Moreover, Marxism was throughout the cold war period generally associated with the Soviet Union. Any legal analysis from a Marxist perspective was tantamount to being misinterpreted as a defence for Soviet communism—a derogatory position for any scholar in the West at the time. Lastly, as Bowring has observed, although many Soviet publicists did examine Marxism in their studies, Soviet international law was however often excluded from mainstream considerations—and framed as alternative international law rather than conventional discourse.[1] With Soviet International law restricted to rules consented or acquiesced to by states (at least in principle), the Soviet brand of international law was perceived in the West as the most extreme form of positivism.[2]

While noting that Marx never developed any systematic theory of law, this paper nonetheless locates the framework of the Marxist theory of law as grounded on Marx's insights on social relations which are scattered throughout his writings on broad notions of justice. I further contend that Marx's critique of political economy while underscoring the scourge of exploitation in the international society, incidentally, showed how international law develops over time. That is, even if Marx did not directly critique law or jurisprudence, he nevertheless through the dialectic of historical materialism unswervingly cantered his studies on social justice and structure of the bourgeois state, thereby revealing the intricate relationship between statehood and human rights violations. It has been observed that Marx's critique was twofold, to wit: a) a critique of bourgeois state, and b) a critique of bourgeois humanism.[3]With regard to the first critique, the preeminence which religion once enjoyed and exercised over society had over time been cooped by the sovereign bourgeois state, which had in turn orchestrated a class structure amongst its constituent members.[4]With regard to the second critique, given that the bourgeois state was founded on theological foundations and abstract liberal doctrines, humans imperatively need to seek emancipation from something higher than religion.[5]

Marxian analyses are imperative for evaluating the ethos and universality of human rights.[6] His vision of social justice was not only historically driven but moreover a function of class interests (reductionism). His analyses have over the

[1]Bowring (2008a) at 133-4.
[2]Bowring (2008b) at 12.
[3]Koskennienmi (2008) at 33-38.
[4]Koskennienmi (2008) at 34.
[5]Koskennienmi (2008) at 35-36.
[6]Marks (2008) at 25; Vincent (1993) at 391.

past decades inspired a barrage of reductive forms of analysis of the global economic order, amongst dependency theorists.[7]Employing a reductive concept of justice to critique political economy, Marx clearly saw the capitalist order as unjust and proceeded to outline the parameters of injustice in the system.[8] He revisited history and illustrated that capitalism from the onset was borne out of injustice and violence in the fifteenth century, through the forcible removal of peasants from their lands by feudal lords. Now landless, peasants were turned into a life of vagabonds. New laws that were set up to protect the nobility class and their acquired assets, excluded peasants further from rights.[9]

While prevailing literature on political economy focused on abstract political rights, Marx was quick to notice that the approach habitually neglected the interests of the masses. In spite of their strong affirmation for political freedoms, Marx observed that classical enlightenment thinkers before him generally disregarded the dynamics of unfair competition, failed to question the ethics behind profits, and above all, failed to take the plight of the working class into account. In one of many critiques against the philosophy of Proudhon, Marx displayed a total lack of faith on the attainment of justice by enforcing the prevailing laws of his time on commodity production. As he put it, "we may well therefore feel astonished at the cleverness of Proudhon, who would abolish capitalist property by enforcing the eternal laws of property that are based on commodity production."[10]

Legal Review of Marx's Works

Although various writings of Marx frequently overlap with one another, one scholar[11] has nonetheless grouped them into four broad categories, to wit: a) works that are philosophically inclined, such as: the *Economic and Philosophical Manuscripts* (1844), and the *German Ideology* (1845), b) works that are directed at particular political objectives, such as the *Communist Manifesto* (1848), c) works informed by historical events, such as *18th Brumaire of Louis Bonaparte* (1852), and finally d) works that exemplify systemic economic theories, such as *Grundrisse* (1858) and all three volumes of *Das Kapital* (1867-85). With his analysis frequently overlapping in the different texts, contemporary legal Marxists imperatively have to dig across all these four categories in order to discern a Marxist perspective of law.

[7]Gilbert (1982) at 329-330.
[8]Wood (1984) at 11.
[9]As Marx put it, "The rapid rise of the Flemish wool manufacturers, and the corresponding rise in the prices of wool in England, gave the direct impulse to these convictions. The old nobility had been devoured by the great feudal wars. The new nobility was the child of its time, for which money was the power of all powers" see Marx (1967) at 718 and "The agricultural people, first forcibly expropriated from the soil, driven from their homes, turned into vagabonds, and then whipped branded, tortured by laws grotesquely terrible, into the discipline necessary for the wage system." Marx (1967) at 737.
[10]Marx (1967) at 427.
[11]Vincent (1993) at 372.

Despite failing to articulate any normative theory of law, Marx nevertheless offered thorough comprehensive insights on the concept of justice and law, through several writings. Upon establishing firm distinctions between use value and exchange value, proletariat versus bourgeois, and the base versus the superstructure, Marx deconstructed the nature of the right to property in social relations, and determined that law was indeed a false universal.[12] Despite the consensus amongst academics on the institution of law as in place to safeguard the interests of all constituent members in society, Marx differed and perceived the function of law as one of representing, protecting and promoting the interests of a privileged class—the bourgeois. Considering the transmutation in his analysis over the years—from a progressive ideologue to a radical pragmatist, scholars nowadays frequently review Marx's writings by separating the early works (1842-1848) from his more mature scholarship (1859-1975).[13]

Prominent early works of Marx span from *Debates on the Law of Thefts of Wood* (1842)[14], *Critique of Hegel's Philosophy of Right* (1843)[15], to *On the Jewish Question* (1844)[16], and *The Communist Manifesto* (1848)[17]. As a more mature scholar, Marx published four other groundbreaking works, to wit: *Preface to the Critique of Political Economy* (1859), *Grundrisse* (1858), *Das Kapital* (all three volumes), and *Critique of the Gotha Program* (1875).

Young Marx (1842-1848)

The *Debates on the Law of Thefts of Wood* (1842) was an essay which Marx published in five separate segments in *Rheinische Zeitung*—where he served as Editor-in-Chief. It was in this essay that Marx first articulated his first critique on the conception of private property. The essay explored the injustice faced by ordinary peoples in Germany during his time from the hands of land owners. Even though woods were privately owned, there was nonetheless a longstanding tradition over the centuries, of ordinary peoples walking freely in the bushes and picking fallen logs for firewood and other basic needs. Irritated by these free riders, wood owners in the 19th century increasingly petitioned the state to stop this practice. The state responded by instituting laws protecting private property and barring ordinary peoples from further collecting fallen woods. While the state justified the law on theft of woods on grounds of safeguarding universal interest, Marx observed its enforcement of "universal" interest unfairly tilting in a particular manner. The law on theft of woods is in effect just an instance of how the bourgeois monopolise state apparatus in order to protect self-interests. What is dubbed as universal interest stems from the privatistion of the state by the bourgeois. In his words, "*The wood thief has robbed the forest owner of the wood*

[12]Marx essentially saw law as part of the problem, and not the solution to the injustice and exploitation faced by the working class.
[13]Marx, Easton & Guddat (1997); Elliott (1978).
[14]Marx (1842).
[15]Marx & O'Malley (1977).
[16]Marx (1975) at 262-3
[17]Marx & Engels (1967).

but the forest owner has made use of wood thief to purloin the state itself."[18] While laws protecting private property formally seemed neutral, they had practically-speaking been usurped by property owners to defend their self-interests.

The *Critique of Hegel's Philosophy of Right* (1843) is an article published by Marx in the German Paris-based journal, *Deutsch–Französische Jahrbücher*, in which he called to question the works of his mentor, Georg Wilhelm Friedrich Hegel (1770-1831)—and most especially, his influential book: *Elements of the Philosophy of Right*. While Hegel hammered on the importance of *Geist* (spirit) and religion in a civil society, and used that analysis to formulate a philosophical concept of universal right, Marx viewed the findings as abstractions detached from practicalities. Qualifying the role of Geist in Hegel's work as mystification, Marx borrowed Hegel's concept of *alienation* ((*Entfremdung*) and reframed it as a more objective modality for social justice in a human society.[19]

Although Marx adopted the entire frame of Hegel's alienation conception, he nevertheless completely eliminated the idea of absolute spirit from his considerations. Since Hegel's solution for overcoming alienation was basically limited to thoughts, Marx perceived this to be too speculative and abstract. On his part Marx retailored the concept to address the everyday experiences of workers in the age of modernity. Although industrialistion brought about mass production, Marx assumed that success could only be appreciated by examining the nature of production processes that occasioned it. By applying the concept of alienation on historical processes, Marx was able to reveal the plight of the working class in the new industrial age.[20]

It was in the essay *On the Jewish Question* (1844), that Marx first articulated a materialist conception of history. While criticizing two earlier studies by the young Hegelian, Bruno Bauer on the "*Rights of Man"*, Marx confronted and addressed the question of what it means for a person to be free as a human. In response, he distinguished between political emancipation and human emancipation. While political emancipation to Marx implied freedom as per the law or legal system, human emancipation on the other hand meant being truly free as a human being. While political freedom offered humans essential guarantees (rights of man) such as provisions that all men are free and equal before the law, these guarantees were in practical sense just formal. Real freedom to him was human emancipation—that is, freedom from alienation.[21] By framing law as a purely formal system, Marx was laying the claim that political emancipation is not true liberation but rather a stumbling block to real human emancipation. Despite claims of political freedoms by many legal systems, the concrete reality of social relations for the vast majority of peoples, Marx observed, was not an enjoyment of human emancipation but their bondage to the economic system.

In the pamphlet *The Communist Manifesto* (1848), Marx together with Engels to a large degree summed up the key ideas in the afore-noted previous works. The pamphlet is most notable for the elaboration of class struggles and depiction of

[18]Marx (1975) at 263.
[19]Marx & O'Malley (1977).
[20]Marx & O'Malley (1977) at chapters 1-4.
[21]McLellan (2000) at 88, 91-5, 110.

system of law in human society as bourgeois jurisprudence. "The history of all hitherto existing society is the history of class struggles."[22] By the nature of class structure, an oppressive majority (proletariat) is perpetually living in bondage to the whims of an oppressive minority ruling class (bourgeois). The legal system binding everybody as a result is nothing by the will of the bourgeois—who are the ultimate beneficiaries of the capitalist system. The bourgeois state is accordingly just an instance of bourgeois self-interests and manipulations disguised as universal justice. He lambasts the bourgeois ruling class in the following terms: "*Your very ideas are but the outgrowth of the conditions of your bourgeois product and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all […]*"[23]

Mature Marx (1859-1875)

The *Preface to the Critique of Political Economy* (1859) was a pamphlet that both complemented the arguments begun in *The Communist Manifesto* as well as provided an *avant goût* for *Das Kapital*. In line with the class struggle introduced in *The Communist Manifesto*, Marx in *Preface to the Critique of Political Economy* dwelled on the economic base and the juridical superstructure. While the base encompasses the relations of production and property relations (economic workforce, employer-employee relationship, division of labour, etc.), the superstructure on its part denotes the laws, the state, the political structures, etc., that are built upon the base. Marx contended that the superstructure lacked an autonomy of its own but was instead intrinsically bound to the base.

Grundrisse (1858) published posthumously in 1939 is believed to be the first draft of *Das Kapital*.[24] Since its publication, *Grundrisse* has however been overshadowed by *Das Kapital*, in part because the volume was not as well polished, and further because of the close overlapping of topics (economic distribution, relations of production, exchange, value, and capitalism) in both works. Marx introduced the metaphor of *Robinsonades* to mock the liberal abstract notions of right and law. While liberal thinkers espoused for the independence of the individual, they nonetheless failed to observe that production and distribution in social relations are always done collectively and never as an individual act. The valorisation of virtues of independence of the individual favours the bourgeois as an exploitative economic order is vindicated as benign, meanwhile the individuals enjoy nothing else but abstract freedom. In the end, the same societal relations that give rise to the commodity form and capitalism are the same processes that produce the state, law and forms of exploitation.

Of Marx's epic works, *Das Kapital* is without doubt the most impactful. It critiqued conventional ideals of political economy on liberty and growth by unlocking what academics have now termed as the *Lockean Provisio*.[25] The *provisio* so-to-speak denotes the classical contention of John Locke that everyone

[22]Marx & Engels (1967) at 2.
[23]Marx & Engels (1967) at 4-5.
[24]Musto (2008) at Foreword, 1.
[25]Simmons (1994) at 293.

is entitled to the products and fruits of their labour. While the *provisio* at a quick glance seemed quite benevolent and just, Marx observed that because of the way the dynamics of capitalism were structured, the *provisio* was in practical sense malevolent. Instead of the fruits of their labour, what the working class reaped and experienced in relations of production was often exploitation and unfairness. The question then becomes: how do benevolent promises of everyone enjoying the by-products and fruits of their labour end up with extensive injustice and exploitation? A reading of *Das Kapital* suggests that it is as a result of the structure of the economic order and accompanying legal system. Although nominally entitled to the products and fruits of their labour, the working class, deprived of private property are left with no other choice except to trade the only one thing they have left—their labour, to the capitalist for survival. With the economic order structured to benefit the bourgeois class, Marx explains rampant injustice and unfairness are as a result of the laws being squarely implemented, and not because of the failure to enforce the laws. The imbalances in the system unavoidably create rampant poverty—which we have all become accustomed to, amongst the majority exploited class.

While *Das Kapital* was groundbreaking, the *Critique of the Gotha Program* (1875) was the one volume wherein Marx crystallised his thoughts and solutions to the problematic of capitalism and alienation, by introducing a two-stage modality of the transition to communism, and by so-doing establishing himself as a seasoned intellectual and revolutionary activist. Having established that social relations of commodity production produces nothing else but bourgeois law, Marx nonetheless observed that given the enormity of the problems orchestrated by capitalism, no society could realistically instantly reverse the capitalist order in a direct revolution and immediately transition to communism. Following the revolution and overthrow of the oppressive bourgeois state, a society was going to need a transitory stage, which he dubbed as "the dictatorship of the proletariat."[26] During this stage, the society was supposed to be managed by the proletariat for the benefit of the entire masses. Instead of a deceitful bourgeois jurisprudence that only safeguarded the interests of the bourgeois, the proletariat order on the other hand was supposed to institute socialism, abolishing profits, classes and private property. It is only after the proletariat must have purified the society of injustice and exploitation that it could then move to the ultimate second utopia phase dubbed as communism, where both the state and law were bound to wither away.[27]As Marx sees it, human emancipation is only possible when bourgeois system of law is completely dismantled. Contrary to the *Lockean provisio* perceived by Marx as a sham, the masses in communist social relations are truly entitled not just to the products and fruits of their labour, but moreover in accordance with their needs.

[26]Marx (2008) at 39.
[27]Marx (2008) at 38-39, 55.

Commodity Form Theory of Law

Pashukanis and the Commodity exchange theory of Law

The years 1935-1938 were marred by state sanction ruthlessness across the Soviet Union, with an estimated one million to three million government and communist party officials being executed in what became known as the *Great Purge*.[28] One of the tragic victims of the carnage was Evgeny Bronislavovich Pashukanis (1891-1937)—a Bolshevik Marxist legal theorist who was indicted by the Soviet *Pravda* on 20 January 1937, amongst other things with the following treasonous charges: "a Trotsky-Bukarin fascist agent", "a band of wreckers" and "a Trotskyite saboteur".[29] Having failed to define international law to the satisfaction of Stalin's bureaucracy, Pashukanis who since 1931 served as the Director of Law at the Soviet Academy of Sciences in Moscow, was summarily executed by the Soviet state in September 1937.[30] Before his purge, he was the leading and most visible Soviet legal theorist both within and withal the Soviet Union, only rivaled by his Protégé, Piotr I. Stuchka who earlier in 1932 passed away at the age of 67.

Pashukanis' seminal work: *The General Theory of Marxism and Law*[31]was published in 1924, geared at developing a Marxist theory of law based on Marx's materialist method in *Capital, Critique of the Gotha Programme*, and related writings. On one hand, the book not only unearthed unprecedented insights into the origins of the legal form in social relations but traced it to be derivative from the commodity form. On the other hand, it underscored the challenges and roadmap which a society was bound to charter for it to transition from capitalism through socialism, to communism. It is a process through which law was going to attain irrelevancy, following a society's maturation to full communism. Unlike Marx who failed to consider any normative theory of law, Pashukanis understood that it was impossible for capitalists to effectuate the complex social relations of exploitation and injustice which Marx rightly spotted, except through the mechanism of law. The indispensability of exchange of commodities in capitalist relations implied that there could be no capitalism except through the operation of law, for the regulation of social relations. To that effect, he identified private law—the regime of contract law to be specific, as the mechanism through which the regulation of private property was conducted.[32]

The General Theory placed Pashukanis at the centre of debates on the relationship between law and the state in social relations. The volume is particularly noteworthy amongst other things for its illumination of what Pashukanis termed as the "Commodity Exchange Theory of Law". The concept, inspired from Marx's analysis of commodities in the first volume of *Capital*, was developed as a

[28]Head (2007) at 15.
[29]Bowring (2008a) at 146; Head (2007) at 15.
[30]Hazard (1938) at 246.
[31]Originally published in Russian in 1924, the English translation did not see the day until 1978 – Pashukanis (1978).
[32]Pashukanis (1978) at Chapters 48-50.

counter-argument to doctrines of international instrumentalism. The concept is to the effect that the exchange of commodities requires private property rights, which in turn accords legal personality to the parties involved in the exchange.[33] The commodity form as a result has two corresponding angles namely: ownership and exchange. Private property, he observed, generates legal personality through the process of commodity relations. The theory further provides that for commodities to be exchanged, they necessarily have to fulfil three conditions: there has to be established ownership over the commodities for exchange, the right of ownership recognised by both parties, and formal equality of the two owners.[34]

Having defined international law as "the legal form of the struggle of the capitalist states amongst themselves for domination over the rest of the world"[35], Pashukanis perceived law as deriving its core form from the nature of commodities operated by capital-producing societies. He constructed the commodity exchange theory of law by evaluating the socio-economic relations between the commodity form and juridical subjects. In the same way that legal subjects are homologous to commodity owners, legal relations by analogy are homologous to commodity exchange.[36] Given that law enshrines property rights unto juridical subjects in the first place to ensure the exchange of commodities, social relations as a consequence only make sense when they exist for the purpose of exchange.[37]The exchange of commodities by analogy not only produces a value form but a legal form as well. Upon reaffirming Marx's theory on commodity exchange, Pashukanis observed that there was an analogous nexus between the rationality of the commodity form and the logic of the legal form. In the same way that the concept of exchange value was very vital to Marx vis-à-vis relations of exchange, Pashukanis on his part observed that law is the form in which relations of exchange express themselves.[38] Not only does the commodity form triumphs where the commodity form defines all social relationships, law is the social form for the realisation of capitalism.[39]

Pashukanis in fact launched his legal career during the period of transition from Vladimir Lenin (1870-1924) to Joseph Stalin (1878-1953)—a time when the Soviet Union was quite tolerant to theoretical debates on socialism. Released at a time when the Soviet Union had just entered the constitutive phase of a socialist empire and thus in dire need of a defining Marxist ideology, *The General Theory* was very timely in every respect. This is the more so considering that the Soviet regime during this age implicitly required all jurists to tailor their jurisprudence to reflect state practice and the dogmas of the communist party. Despite his groundbreaking findings, the same masterpiece that propelled him to prominence was thirteen years later however sadly going to become the object of his demise. As Stalin increasing became erratic and politically insecure in the 1930s, so too

[33]Pashukanis (1978) at Chapter 4.
[34]Pashukanis (1978) at xi, xxiv, 22; Stark (2011) at 200; Marx (1967) at 51.
[35]Pashukanis (1980) at 184-185.
[36]Marks (2008) at 20.
[37]Pashukanis (1978) at 112.
[38]Pashukanis (1978) at 11.
[39]Pashukanis (1978) at 61.

was the fate of scholars whose writings did not explicitly endorse official state policy and practice. To make matters worse, the release of *The General Theory* coincided with the publication of Stalin's own thesis on national communism titled: *Socialism in One Country* (1924).[40]Upon release, *Socialism in One Country* became the official guiding instrument driving Soviet economic policy. Contrary to conventional practice by many Soviet scholars at the time, Pashukanis did not tie his *General Theory* to Stalin's *Socialism in One Country*.

In effect, Pashukanis' troubles with the Soviet state were twofold. First, he subscribed to the withering away of law and the state for socialism to takeover. He moreover provided that relations of socialist countries with the outside world were regulated by bourgeois law.[41] Prior to Pashukanis' epic work, Soviet jurists typically considered Marxist thought mostly in terms of class interests embodied in the character of the law.[42]By placing too much emphasis on class domination—Pashukanis observed, many theorists had failed to capture the critical nexus binding law and the economic structure of society.[43]While other Marxist theorists placed law at the helm of the superstructure of society, Pashukanis showed that law was both a product of the base and the superstructure.[44] In fact, Pashukanis located his theory on the same spot as Marx—tracing the wealth of capitalist societies to "an immense collection of commodities."[45]Dwelling extensively on conceptions of legal subjectivity and commodity exchange, *The General Theory* afforded new lenses to understand law—as the instrument of mediation between subjects and commodities. It is thanks to the intercession of law that subjects become endowed with juridical rights over commodities, thus conferring these bearer of rights with capacity to exchange commodities.

Unlike other dominant legal theorists of his time, Pashukanis determined that the modern legal form was embodied in the core of capitalism, and functioning in a non-detectable fashion. Almost instantly, *The General theory* became a useful legal framework for analysing historical materialism. Although the commodity form originates from human needs and creative labour, it nevertheless possesses a "peculiar capacity of concealing its own essence from the human beings who live with it and by it."[46] In other words, people exploited by the system are blindsided by the structure of their exploitation. The concept of commodity fetishism depicts an ironical reversal of functions—a condition whereby humans who create commodities using their labour become objects, whereas commodities which are the object of human labour become subjects.[47]Commodities, it has been observed, "appear to take a life of their own, dominating the very human subjects who in fact bring them into existence but who no longer know this."[48]

[40]Sandle (1999) at 158.
[41]Chimni (1993) at 247.
[42]Vincent (1993) at 374.
[43]Kamenka (1981) at 27.
[44]Pashukanis (1978) at 104.
[45]Pashukanis (1978) at 85.
[46]Lefebvre (1969) at 47; cf Balbus (1977) at 574.
[47]Balbus (1977) at 574-75.
[48]Balbus (1977) at 574.

Pashukanis concluded that the legal form has historically operated according to a peculiar social form of regulation amongst and between classes, attaining maturity under capitalism. The legal form was bound to come to a dead end in the post revolution communist society, given that classes would have been abolished thus rendering class conflicts redundant. Reviving a position which Marx adopted in his *Critique of the Gotha Programme*, Pashukanis observed that law was eventually going to wither away with the collapse of capitalism, following the full take-over of the society by universal socialism and socialist production—a moment when exploitation, inequality and injustice were going to become relics of the past.[49] As to how law was going to eventually wither away, Pashukanis explained that since bourgeois law was imbedded in capitalism, it went without saying that the "*the withering away of the categories of bourgeois law will under these conditions mean the withering away of law altogether*"[50]

Having established that "only a bourgeois-capitalist society creates all the conditions essential to the attainment of a complete definiteness by the juridical element in social relationships"[51], Pashukanis nonetheless saw no contradiction in the proletariat revolution being administered in the transition period by bourgeois law. He further observed that the Soviet Union was not yet ripe to abolish law altogether. By adopting this position, he countered with those who were advocating for proletariat law. But Pashukanis dismissed this position, contending that there can be no proletariat law, given that law by nature was bourgeois.[52]

All things considered, Pashukanis' General Theory distinguished him from other Marxist legal theorists in two major ways: a) it evidenced the legal form as something much more than just an instrument of class struggle. b) It dispelled the assumption that the bourgeois system of law had been replaced by proletariat law in the post revolution Soviet state.

The Imperativeness of Contracts

Pashukanis' conviction on the necessity of bourgeois law under capitalist and transitionary orders rested on the importance that he placed on contracts. To him, the legal form finds its true expression in contract law rather than coercion. To him, law derives its essence when a juridical subject entertains relations with another juridical subject on the basis of equality.[53]Without contracts, Pashukanis contends, "the concepts of subject and of will only exist, in the legal sense, as lifeless abstractions. These concepts first come to life in the contract."[54]Since freedom and equality are inherent in bourgeois law, he observed, the citizenry by analogy were contractually-speaking subjects of the law, hence "bearers of every imaginable legal claim."[55]He made two observations with regard to contracts.

[49]Anderson & Greenberg (1983) at 75; Pashukanis (1978) at 61.
[50]Pashukanis (1978) at 61.
[51]Pashukanis (1978) at 110.
[52]Pashukanis (1978) at 50-54.
[53]Pashukanis (1978) at 121; Kamenka (1981) at 26.
[54]Pashukanis (1978) at 121.
[55]Pashukanis (1978) at 119.

First, individuals needed to be free in order to judiciously exchange commodities. Secondly, given that parties in a commodity exchange unavoidably had different interests, it went without saying that disputes were bound to arise. Law as a consequence emerged as the catalyst to regulate and resolve emanating disputes from the contractual relationships.[56]

Pashukanis' observation that conditions of commodity exchange are synonymous to conditions for legal interactions between states, led him to the logical conclusion that rights by nature are commodified.[57] From the standpoint of Pashukanis, international law evolved side by side with the commodification process, as a catalyst for regulating private interests and dispute settlements.[58] The term commodification is generally employed by academics to denote a process of turning entities and subjects "into commodities by giving them exchange as well as use value in the marketplace."[59]It was by examining the commodification process that Pashukanis was able to trace social relations of exchange, the legal form and the particularity of law in capitalist producing societies. Rights are not as inherent as often presented but rather privileges which the state accords as it finds fit. Being the principal legal subject of the international society, the exorbitant powers of the state are synonymous to the fetishing of commodities, in that the state not only monopolises rights but can exchange them (through a bargaining process) in ways remising of private individuals with commodities.[60] The state fetishes its core interests in the same way as commodities.

By analysing commodity exchanges as the basis of the legal form, Pashukanis in fact returned public law to private law contract regime. This was a stark distinction from the prevailing tradition of separating public law and private law as two diametrically opposite regimes. One of the fundamental purposes of law in Pashukanis' conception was the adjudication of conflicts of private subjects, for the common good.[61]To that effect, he presented the legal form as a regulatory mechanism stemming from a partnership between private and public law, and functioning to promote commodity exchanges. Concurring with Pashukanis on the imperativeness of private law, Ronnie Warrington has noted that private law is not the antithesis of public law but rather its centre of gravity.[62]

Pashukanis' theory further distinguished itself on the analysis of commodification and rights on one hand, and the modality for bestowing property rights unto juridical subjects on the other hand. "At the same time, therefore, that the product of law becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and the bearer of rights."[63]The exchange of

[56]Pashukanis (1978) at 119.
[57]Pashukanis (1980) at 176.
[58]Pashukanis (1978) at 72.
[59]Fletcher (2013) at 139.
[60]Pashukanis (1978) at 73,87.
[61]Head (2007) at 296.
[62]Warrington (1980) at 105. Pashukanis adopted a similar position, stating that public law "can only be developed through its workings, in which it is continually repulsed by private law, so much that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity." (Pashukanis (1978) at 106.)
[63]Pashukanis (1978) at 112.

commodities to Pashukanis is in fact legally enforceable only where one of the parties in a contract duly recognises the other as owning a thing and entitled to rights thereto.

While many Soviet Economists and lawyers adopted the position that a utopia society could be attained by simply doing away with bourgeois abstract labour, but preserving the proletariat useful labour, Pashukanis being the pragmatist that he was, observed that bourgeois capital could not be completely eliminated. While Pashukanis was a firm believer in the linear communist process that was bound to pass through socialism marked by the withering away of law and the state, Stalin on his part was a believer of a strong state and law. In 1936, Stalin unilaterally declared the Soviet Union as having attained socialism, followed by a draft constitution that same year, which although billed as Marxism-Leninism for the unique purpose of realizing pure socialist aspirations, nonetheless instead legitimated state terror tactics and operations.[64]The 1936 constitution and Stalin's declaration by implication signaled the strengthening rather than relaxing of state apparatus—a position certainly at odds with Marx's vision for the withering of state apparatus.[65]

Limitations of Pashukanis' theory

Despite its usefulness, Pashukanis' commodity exchange theory was nonetheless quite general, in at least three levels. Firstly, even though he rightly located the roots of the legal form in commodity exchange, his analysis nonetheless failed to observe that alternative legal forms do emerge through other social modalities. Social relations are formed in many different ways than just economics, such as through politics, sports, entertainment, etc.[66]Secondly, his conception of the juridical subject as bearer of property rights seemed too general at one end and narrow at another end. Despite the fact that private actors have since the close of the second world war increasingly amass significant rights in the international society, the fact remains that it is states and not individuals who are principal actors of international law. Finally, his theory was so conclusive about legal subjectivity and failed to appreciate or consider any non-propertied channels that could generate rights-bearing standing.

China Mieville and the conception of state as vector of Violence:

Pashukanis' *General Theory* has accurately been described as "the kernel of an historical materialist approach to the rise and evolution of the legal form."[67] Despite the 1937 purge and Stalin's immense attempt to liquidate *The General Theory* from existence, Pashukanis even after seven decades arguably remains the leading Marxian legal theorist the world-over. *The General Theory* particularly

[64]Fine (2002) at 107.
[65]Head (2004) at 270.
[66]Anderson & Greenberg (1983) at 74.
[67]Head (2007) at 177.

witnessed a remarkable rediscovery and resurgent revival with the publication of China Mieville's epic book: *Between Equal Rights* (2005), wherein he revived and reframed the erstwhile commodity exchange theory of law as "the commodity form theory of Law".

Just as was the case in the days of Pashukanis, Marxist jurists even nowadays typically align themselves within one of two juridical streams, namely: instrumentalism or reductionism and formalism. While instrumentalists conceive law or legal order as an instrument of the powerful geared at fostering their will in society, formalists on their part consider the legal order as an autonomous structure deriving its essence from its own internal dynamics.[68] In other words, whereas instrumentalists contend that the legal order neither possesses self-autonomy nor have a will of its own but rather functions according to "*the demands imposed on it by actors of the capitalist society on which it is imbedded*,"[69] formalists conceive law as autonomous from class interests. The choice ultimately rests on "*absolute legal subservience to the relations of production and absolute legal autonomy from them*."[70]

Upon agreeing with Pashukanis that the logic of the commodity form is analogous to the logic of the legal form, Mieville reaffirms the classical Marxist conditions necessary for the legal form during a commodity exchange: "each commodity must be the private property of its owner, freely given in return for the other…Therefore, each agent in the exchange must be i) an owner of private property, and ii) formally equal to the other agent. Without these conditions, what occurred would not be a commodity exchange? The legal form is the necessary form taken by the relations between these formally equal owners of exchange values."[71]

Without a normative theory of law, Mieville observed, "the specificity of law itself is impenetrable."[72]Despite agreeing with Pashukanis on the roots of the legal relations as grounded on commodity exchange, Mieville nevertheless digressed significantly with him on the central form by embracing the instrumentalist socialist theory of coercion as a core kernel in the nature of the commodity form. While Pashukanis perceived commodity exchange and emanating legal relations as non-violent, Mieville on his part contended that commodity exchanges amongst juridical subjects stringently derive their basis from coercion. If it is true that the ruling class in capitalist producing societies generally amass political power and economic control through force as frequently contended by Marxists, then it goes without saying that it was really somewhat surprising that a prominent Marxist legal theorist such as Pashukanis could not detect coercion in the bourgeois law.

The deviation from Pashukanis' postulation compelled Mieville to treat international law as a violent hegemonic project unlike Pashukanis who despite underlining the exploitative nature of the legal form and envisaging the withering of law in the long run, nevertheless still perceived international law as non-violent

[68]Balbus (1977) at 571-572.
[69]Balbus (1977) at 571.
[70]Koen (2011) at 110.
[71]Miéville (2008) at 78.
[72]Miéville (2008) at 2.

progressive project. To Mieville, "the chaotic and bloody world around us is the rule of law."[73]As to why coercion is inevitable in the commodity form, Mieville turned Pashukanis' theory on contracts over its head, observing that this stemmed from the fact that actors in a commodity exchange naturally nurse conflicting interests, thus increasing the likelihood of dispute settlements:

> *Violence-coercion-is at the heart of the commodity form, and therefore the contract. For a commodity meaningfully to be 'mine-not-yours'—which is, after all, central to the fact that it is a commodity to be exchanged—some forceful capabilities are implied. If there were nothing to defend its 'mine-ness', there would be nothing to stop it becoming 'yours', and when it would no longer be a commodity, as I would not be exchanging it.*[74]

Mieville's work essentially revives and expands on familiar questions of violence and power politics by academic writing on imperialism. Without violence, he contends, "there could be no legal form", just as there would correspondingly be no international law without imperialism.[75]One scholar has however disagreed with Mieville's assertion, contending that there are many other reasons that compel subjects of international law to respect private property regimes. Some of these factors include inter alia, "economic reasons (if you steal someone's property they will not trade with you again) or ideological reasons (you genuinely believe that private property is sacrosanct) for abstaining from theft."[76]

While publicists typically espouse international law as having transformative potentials to regulate the international society, Mieville strongly doubts these predispositions, and instead projects the discipline as marred by indeterminacy, legal subjectivity and violence.[77] As he sees it, peaceful relations are only possible as long as conditions are profitable to property owners. Were conditions to be otherwise, Mieville's reading of Marx is that property owners would unfailingly resort to their last resort, namely, force: "between two equal rights, force decides."[78] Only powerful states are capable of deploying sufficient force necessary to back up their particular interpretation of the law.[79]

Coercion as conceived by Mieville is expressed by military violence, either directly or indirectly as a deterrence. Mieville's coercion claim is partly useful for elucidating the exploitation of third world resources by powerful industrialised countries. Considering that violence is intrinsic in the commodity form, it follows that those powerful countries in need of economic resources would unfailingly deploy both fair and foul means to acquire commodities in distant territories, badly

[73]Mieville (2008) at 132 ; Miéville (2004) at 319.
[74]Miéville (2004) at 126.
[75]Mieville (2008) at 127.
[76]Knox (2009) at 425.
[77]Knox (2009) at 413.
[78]Mieville borrowed the title of his book from an observatory statement by Marx in *Capital I*: "the normal working day is the result of a struggle between capital and labour. 'Between equal rights force decides.'(Marx (1967) at 151. Mieville borrowed the title from Marx. *See* Marx (1967) at 344.
[79]Knox (2009) at 418.

needed to stimulate economic growth. On the flip-side, meanwhile Mieville mostly conceives such force in brute terms, in reality, many commodity relations between countries despite their asymmetric differences, are pacific in nature. It is often doubted why the third world despite their numerical advantage hardly ever successfully challenge the hegemony of powerful states especially at the United Nations. A reading of Mieville suggests that it is because unlike powerful states, third world countries naturally lack the capacity to back their worldview with force. In his words:

> *Intrinsically to the legal form, a contest of coercion occurs, or is implied, to back claim and counterclaim. And in the politically and militarily unequal modern world system, the distribution of powers is such that the winner of that coercive contest is generally a forgone conclusion.*[80]

To Mieville, imperialist violence is always structural. In *Capital III*, Marx sought to unveil the hidden secret of the state in social relations, tracing its core essence in the commodity form of production:

> It is in each case the direct relationship of the owners of *the conditions of production to the immediate producers…in which we find the innermost secret, the hidden basis of the entire social edifice, and hence also the potential form of the relationship of sovereignty and dependence, in short, the specific form of the state in each case*.[81]

Although states traditionally intercede on behalf of the citizenry, Mieville observes that the structural essence of states and the basis of social relations are grounded on the specific form of commodity production. While reaffirming Pashukanis, Mieville observed that the same "conditions required for commodity exchange are the conditions required for legal interactions between states."[82]These conditions include conceptions of private property and ownership on one end, and legal rules for their protection and promotion on another end.

Noting that "Grotius transferred the notion of liberty-as-property to the state in international affairs, viewing the character of state boundaries as that of a private estate", Mieville insinuates that States just like individual private property owners, interact amongst one another in the international society as property owners of their territories—having consolidated their power "in a context of increasing international interaction and conflict."[83]States treat one another as commodity owners when they conduct international trade.[84] With states being the principal actors of international law and the standard frame for universal expression, the discipline is perceived to derive *locus standi* when two conditions are met, to wit: a) when a sovereign can legitimately lay claim to a territory (own a territory), and b) when the sovereign acquires the capacity to trade and interact with other sovereigns. Mieville's work in fact reveals International law as

[80]Miéville (2004) at 292.
[81]Marx (1966a) at 927.
[82]Marks (2008) at 20. [Citing Mieville].
[83]Miéville (2004) at 96, 109,
[84]Miéville (2004) at 191

conceptualizing state entities not only as owners of their territories but moreover as determining rights and obligations based on this understanding.

Contrary to formalists, Mieville indeed does not see the state as a neutral entity but rather as an element of the ruling class. Why does the ruling class always resort to law when it comes to power? For classical Marxists, both the state and laws are weapons at the disposal of the governing class to advance the interests of bourgeois in relation to other classes. Law is quintessentially a manifestation of the state's readiness to enforce its interests through coercion.[85] This explains the coercive character of the law in the commodity form:

> *The problem is actually intractable. In the commodity-form theory, law is simultaneously a form inheriting between two free, abstract individuals and a necessary subjection to coercion. For this reason, there is no neat solution. It is not the legal theory which is paradoxical, but the relations that it represents*.[86]

Conclusion

It is fair to assume that it was the flagrant shortcomings of prior enlightenment thinkers that compelled Marx to offer an alternative account of political economy. He importantly demonstrated that contrary to conventional givens, social justice was in actuality dependent on relations of production: "the justice of transactions which go on between agents of production rests on the fact that these transactions arise as a natural consequence of the relations of production."[87]While unravelling the contradictions in the essence of capital, Marx was in effect presenting himself both as a representative and the voice of the working class—better still, the advocate for their human rights. That is why despite showing at length the pervasiveness with which law and order co-existed with inequality and exploitation in human societies, he remained focused on the possibilities of human emancipation from exploitation. Having tacitly expressed an immense lack of faith in human law, Marx while distinguishing human freedom from political freedom envisaged an emancipatory revolution as the only modality to cleanse society and guarantee social justice.[88] While international law has steadily come to terms with aspects of Marxism during the last three decades especially on questions of human rights, there has been obvious uneasiness amongst international lawyers with his discourse of revolution perceived by many as antithesis to the very spirit of law. Evidently, legal reforms assume the guise of evolution rather than revolution.

[85]Mieville (2008) at 104.
[86]Miéville (2004) at 149.
[87]Marx (1966a) at 339-40.
[88]Marx (1993) at 87-88.

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Athens Journal of Law - Volume 7, Issue 3, July 2021 – Pages 379-398

Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain

By David Parra Gómez[*]

Democracy is an instrument at the service of a noble purpose: to ensure the freedom and equality of all citizens by guaranteeing the civil, political and social rights contained in constitutional texts. Among the great principles on which this instrument rests is the division of powers, which consists, substantially, in the fact that power is not concentrated, but that the various functions of the State are exercised by different bodies, which, moreover, control each other. Well, the increasingly aggressive interference of the Executive and, to a lesser extent, the Legislative in material spheres that should be reserved exclusively for the Judiciary, violates this principle and, for this reason, distorts the idea of democracy, an alarming trend that, for some time now, are observed in European Union countries such as Hungary, Poland and Spain. Preventing the alarming degradation of European democracy, of which these three countries are an example, requires not only more than necessary institutional reforms to ensure respect for these principles and prevent the arbitrariness of the public authorities, but also a media network and an education system that explains and promotes these values and principles, that is, one that makes citizens aware of and defend constitutionalism.

Keywords: *Rule of law; Democracy; Separation of powers; judicial independence; Europe.*

Introduction

As various indices measuring the quality of democracy worldwide reveal[1], in recent years we have witnessed a significant deterioration of democracy in different regions of the world, a deterioration that is particularly striking in the European Union (EU), where thirty years after the fall of the Berlin Wall and the theoretical triumph of liberal democracy, the progressive erosion of liberal-democratic principles is not limited to the recently acceded Eastern Bloc countries[2], but also affects Western European countries. It is a democratic decline

[*]Dr. of Constitutional Law, Lecturer in Constitutional Law at the University of Murcia, Department of Foundations of the Legal and Constitutional Order, Murcia, Spain. Email: david.parra@um.es.

[1]The *Global State of Democracy* (by International Institute for Democracy and Electoral Assistance), the *Democracy Index* (by The Economist) and the *Rule of Law Index* (by World Justice Project).

[2]On 1 May 2004, the largest enlargement of the EU ever, in terms of both size and diversity, became a reality with ten new countries: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. In 2007, Romania and Bulgaria joined, and in 2013 Croatia joined, bringing the EU then to 28 Member States.

that has in the political aggression to the judicial independence, one of its most worrying manifestations[3].

It is well known that one of the basic dogmas to which the Constitutional Movement[4] entrusted the construction of its new theory of power -as subordinate to the Law- is the principle of separation of powers, whose classical formulation we owe to Montesquieu[5] and which proposes the distribution of power among three powers, each of which must operate as a brake on the others: the Legislative (Parliament), the Executive (Government) and the Judiciary (Judges and Courts). The principle of judicial independence has therefore been one of the cornerstones of the rule of law since its creation, because only the existence of a judiciary that is bound only to the law and not to any of the other branches of government makes it possible to effectively safeguard - free from pressure - this submission of power to the law.

However, judicial independence is under harassment not only in dictatorships/ self-governments, but also in European Union countries, especially in Hungary, Poland and - to a lesser extent - Spain, which is the subject of our interest in this paper. It is therefore not surprising that the 2019, Scoreboard for Justice in the European Union[6]shows a more than worrying result: the public's perception of the lack of independence of judges and courts has increased in three fifths of the Member States, mainly due to a growing sense of political interference in justice[7].

On the other hand, the political divisions in society have been notably accentuated in these countries and in other democracies such as the United States, Brazil or even the United Kingdom - traditionally a paradigm of moderation - political polarization that we fear will become extreme in the context of the economic crisis provoked by the Covid-19. This is a disturbing phenomenon with potentially lethal consequences for the future of democracy, which, as an expression of pluralism, requires the existence of a consensus on the rules of the political game and on the fundamental principles and values of the constitutional state. This is compounded by another alarming trend which, under the pretext of achieving "real equality" for previously oppressed groups, is undermining another foundation of the liberal and democratic state based on the rule of law: the principle of equality before the law, which requires that no discrimination on the

[3]As denounced by the European Parliament, both in plenary and in the Commissions - specifically in the Parliamentary Committee with competence in the area of Freedom, Justice and Home Affairs, known as the LIBE Committee- when it dealt extensively with the challenge posed by the alarming signs of deterioration and regression of democracy in the EU during the 2009-2014 and 2014-2019 European legislatures.

[4]See Codecho (1974).

[5]Montesquieu (1748). See also Locke (1690) and Garrorena Morales (2011).

[6]An instrument developed by the European Commission from 2013 that provides a comparative analysis of the quality, independence and efficiency of the judicial systems of the EU Member States, while at the same time providing information to national authorities to improve their judicial systems.

[7]As regards national prosecutors' offices, the Scoreboard indicates that in some Member States there is a tendency to concentrate management powers, such as evaluation, promotion and the transfer of prosecutors, in the hands of a single authority. See also https://ec.europa.eu/commission/presscorner/detail/es/IP_19_2232

grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance may prevail.

The global crisis provoked by Covid-19 has also revealed another fundamental problem of contemporary democracies for which neither political theory nor practice has provided a minimally satisfactory response: the structural inability to adopt long-term agreements and decisions. On a small and large scale, we see that organised and short-term (minority) interests have prevailed for decades over the general interest that democracy seeks to shape and guarantee.

Let us not forget that the constitutional State, characterised by respect for the great principles whose mission is to limit the exercise of political power in order to guarantee the fundamental rights of citizens (popular sovereignty as legitimacy of power, political representation, full subordination of public powers to the law, separation of powers, equality before the law, legal security, pluralism and the principle of constitutional supremacy), represents the most advanced form of political organization in the history of mankind. Its current political and institutional degradation, particularly in democracies that we have hitherto considered to be exemplary, is truly disturbing.

The Alarming Democratic Deterioration in Hungary

A New Partisan Constitution

The Hungarian government of Viktor Orbán, in power since 2010, promoted in 2011 a new Constitution which, adopted on 18 April 2011 by the National Assembly of the Republic of Hungary exclusively with the votes of the deputies of the ruling parties[8], that it to say, without any political or social consensus, it came into force at the beginning of 2012[9] and has already been reformed several times. The Hungarian Fundamental Law (FL) presents many controversial aspects from the perspective of respect for the basic principles of the rule of law, of which the following should be highlighted, trying to summarise them:

a) The FL incorporates several laws that the Hungarian Constitutional Court (CC) had declared unconstitutional. As an example, and in clear violation of the right of the ordinary judge predetermined by law, the new constitutional text gives the President of the Hungarian judiciary the power to choose the court for any legal dispute, which may lead in some cases to the indirect decision of the judge for a specific dispute. A similar power is also held by the State Attorney General in criminal cases. Similar provisions of the Code of Criminal Procedure had been annulled by the CC for contravening the European Convention on Human Rights

[8]The "national consultation" on the Constitution, moreover, consisted of a list of twelve questions on very specific issues drawn up by the ruling party (which thus had the possibility of inducing obvious answers) and did not include the text of the draft basic law.

[9]Its transitional provisions (Transitional Acts) were approved in a different parliamentary procedure on 30 December 2011, also entering into force on 1 January 2012.

and the Constitution then in force[10]. Likewise, following the constitutional reform of 11 March 2013 (Fourth Amendment), most of the transitional provisions annulled by the CC in 2012 on the grounds that they were not of a truly transitional nature were incorporated into the text of the FL[11].

b) The FL reserves for organic or cardinal laws, the adoption of which requires a two-thirds majority, a wide range of issues relating to Hungary's institutional system, the exercise of fundamental rights and other matters of importance to society (such as the protection of the family and the tax and pension systems), which virtually blocks political action by future governments that do not have a two-thirds majority in Parliament.

c) The FL provides that the approval of the State Budget Act requires the prior consent of the Budget Council, a body composed of three members[12] for a period of 6 years (beyond the term of the legislature). This power of authorisation of a non-parliamentary body jeopardises the budgetary sovereignty of Parliament and is an obstacle to the action of future governments.

d) The CC, most of whose members are appointed by the Government, has very limited powers. Thus, its powers to examine ex post the constitutionality of laws with budgetary implications are reduced to violations of an exhaustive list of rights, which hinders the examination of constitutionality in case of violation of other fundamental rights such as the right to property, the right to a fair trial and the right not to be discriminated against[13]. It also excludes the possibility that CC can pronounce on the substantive content of the constitutional amendments, and leaves without force all the CC's judgments prior to the entry into force of FL, thus preventing the Court from using its own jurisprudence to argue its decisions and interpret the new cases.

e) The FL provides for selective personal continuity in independent institutions. In fact, all those who were elected in accordance with the previous Constitution will remain in their functions, except for the Data Protection Commissioners (institution that would be abolished and replaced by a Data Protection Authority)

[10]Likewise, the FL incorporates the law that prohibits the insertion of electoral propaganda in private channels, the one that criminalises homeless people who settle in "certain public spaces", the law that obliges religious creeds to be registered -and to be approved by the Parliament- in order to be considered as such (except all Christians and Jews), as well as the rule that obliges university students who study with a scholarship to work in Hungary after finishing their studies for a certain period of time or to return the amount of the scholarship. All of them had been declared unconstitutional by the CC.

[11]Judgement Nr. 45/2012, 28 December, following a constitutional request by the Hungarian Commissioner for Fundamental Rights.

[12]Article 44.4 FL: "The members of the Budget Council are the President of the Council, the President of the National Bank of Hungary and the President of the National Court of Audit. The President of the Budgetary Council is appointed by the President of the Republic for a period of 6 years".

[13]If the public debt exceeds half of the gross domestic product, CC can examine the compatibility with FL and, consequently, annul the State Budget Laws, the Laws on their implementation, the Laws regulating the tax modalities, the special taxes and contributions, the customs duties, as well as the conditions set by the State for local taxes, exclusively in connection with the right to life and human dignity, with the right to personal data protection, with the freedom of thought, conscience and religion or with the rights linked to the Hungarian nationality. Of course, this control extends only to a small part of all possible parameters.

and the President of the Supreme Court, whose mandate is terminated early after two years of a six-year term, a measure only acceptable after the end of a dictatorship or in case of violations of the law by the judge, which are not present here.

In addition, there has been frenetic legislative activity that has been criticised by the UN, the Council of Europe (Venice Commission[14]) and the European Union (EU), as well as many human rights organizations. As far as the EU is concerned, the European Commission has initiated sanctioning procedures against Hungary (for alleged violations of Community law) because of the legislative reforms on the Central Bank, on the authority responsible for supervising data protection and on the advancement of the retirement age of judges. This last measure, which fully affects the principle of judicial independence, is dealt with below.

The Controversial Advancement of the Retirement Age of Judges

The 2011 amendment of the organic laws on the judiciary (Act CLXI of 2011 on the organization and administration of courts, and Act CLXII of 201 on the legal status and remuneration of judges), among other measures, it raised the retirement age for judges, prosecutors and notaries (from 70 to 62) and gave great power to the National Office of the Judiciary -its president is elected by the Government for a nine year term- which is empowered to decide on the appointment of judges, directors and other judicial officials and to transfer cases and judges between courts.

The European Commission, following the appropriate[15], denounced the Republic of Hungary before the Court of Justice of the European Union (CJEU) in June 2012[16] for breach of Directive 2000/78/EC on equal treatment in employment and occupation, the purpose of which (Article 1) is "to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in the field of employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment".

[14]Venice Commission, or European Commission for Democracy through Law, is a consultative body of the Council of Europe whose primary task is to advise countries on constitutional matters to improve the functioning of their democratic institutions and to protect human rights. It has 61-member states: 47 members of the Council of Europe and 14 other countries. On the Venice Commission see, among others, Craig, P. (2017) and Biglino Campos (2018).

[15]On 17 January 2012, the Commission requested Hungary, pursuant to Article 258 TEU, to submit a statement of objections concerning the infringement of Articles 1, 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the purpose of which was to set the new age limit for judges, public prosecutors and notaries. Although Hungary denied any infringement in its reply of 17 February 2012, the Commission maintained its position in its reasoned opinion of 7 March 2012. In that opinion it set a deadline of one month for Hungary to bring the alleged infringement to an end. However, Hungary did not change its mind in its reply of 30 March 2012.

[16]CJEU also denounced Hungary for not respecting the independence of the data protection authority. Instead, the Commission accepted the Hungarian government's commitments to adopt measures to guarantee the independence of the Central Bank.

Although on 16 July 2012 the Hungarian Constitutional Court declared the change in the retirement age of judges unconstitutional, its decision did not have direct retroactive effect, as it did not automatically result in the judges already retired from service being reinstated (for this they had to go to the competent Hungarian courts), so the judgement of the CC did not end the dispute with regard to the judges concerned. As the Advocate General states in his Opinion[17]:

> "*The sudden retirement of the judges concerned raises doubts as to the independence and hence the quality of the courts. The concept of judicial independence involves two aspects: one external and one internal. Of relevance in the present case is the external aspect of independence, which requires that the body to be adjudicated must be protected from external interference or pressure which might jeopardise its independence in the prosecution by its members of disputes brought before it. The executive cannot therefore remove judges from office during their term of office. This is certainly not a question of executive action against individual judges or procedures. However, it does involve serious interference in the administration of justice, namely the removal of a considerable number of judges who, under the previous rules, were still required to serve up to eight more years. For this interference to be relevant, it is not necessary that there is a real intention to influence the administration of justice: even any appearance of influence must be avoided*".

The Court of Luxembourg (First Chamber)[18] finds that that new Hungarian national legislation governing the legal status of judges and prosecutors establishes a difference in treatment which is either not appropriate or not necessary to achieve the objectives pursued, in breach of the obligations arising from Directive 2000/78/EC.

The Persistence of the Democratic Deficit

More recently, the European Parliament has denounced Hungary's authoritarian drift in its report of 4 July 2018, which calls on the Council, under Article 7 of the Treaty of European Union (TEU), notes the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, set out in Article 2 TEU: respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Indeed, the European Parliament has expressed its reservations about the situation in Hungary; in particular, it is alarmed at the functioning of the constitutional system and, in particular, the electoral system, the independence of the judiciary and other institutions, the rights of judges, corruption and conflicts of interest, data protection and privacy, freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, the rights of persons belonging to minorities and the fundamental rights of immigrants, asylum seekers and refugees, and economic and social rights.

[17]ECLI:EU:C:2012:602, paragraphs 54, 55 and 56.
[18]Judgement of 6 November 2012, *European Commission v. Hungary*, C-286/12, ECLI:EU:C: 2012:687.

The European Commission decided in 2018 to bring Hungary before the CJEU for the so-called "Stop Soros Law"[19], for preventing non-EU nationals with permanent residence permits from exercising their profession of veterinary surgeon and for the situation of immigrants in the transit zones near the border with Serbia, the latter case having recently been ruled on by the CJEU (judgment of 14 May 2020), which found that Hungary was illegally detaining asylum seekers in the transit zone of its southern border with Serbia and demanded their release, as their detention was in breach of EU law[20].

Finally, Orbán has taken advantage of the coronavirus to promote a legal amendment, approved by the Hungarian Parliament on 30 March 2020, on the basis of the article of the Constitution that allows the Government to be given extraordinary powers in the event of a "situation of danger" (Article 53), which authorises the Executive to govern by decree for an indefinite period. The new law allows the Hungarian leader to extend indefinitely the state of emergency without the need for parliamentary approval, to suspend the application of certain laws by decree, to deviate from legal provisions and to block the dissemination of information "that may hinder or make impossible the defence" against the epidemic, setting penalties of up to five years in prison for the dissemination of false news.

Nine press organisations had asked the EU to oppose the adoption of this law. The Office of the United Nations High Commissioner for Human Rights has said it "accompanies political developments in Hungary with concern" and the Council of Europe has warned that "an indefinite and uncontrolled state of emergency cannot guarantee respect for the fundamental principles of democracy"[21].

The Constitutional Crisis in Poland

The Blockade of the Constitutional Court

In Poland, what started as a dispute over the integration of the Constitutional Court (CC) has turned into a constitutional and political crisis that threatens the rule of law in this Central European Republic of 38 million inhabitants[22].

According to the Polish Constitution of 1997 (Article 194), the CC is composed of fifteen judges individually elected by the Chamber of Deputies (the Sejm) for a period of nine years. In 2015, the Sejm, dominated by the then

[19]This law provides for prison sentences for individuals and organizations that assist asylum seekers and allows asylum seekers to be locked up in transit zones, with severe restrictions on applying for protection.

[20]That decision was preceded by the judgement of the Grand Chamber of the European Court of Human Rights (ECHR) in the case *Ilias and Ahmed v. Hungary* of November 2019, in which the Strasbourg Court found that Hungary was in breach of its human rights obligations by returning asylum-seekers to Serbia without considering the danger of inhuman and degrading treatment they might face upon arrival. The CJEU goes one step further than the ECHR, stating that the confinement in the Röszke transit zone, in the absence of a formal decision and due process safeguards, constitutes arbitrary detention.

[21]See Sánchez (2020).

[22]See Chmielarz-Grochal, Sulkowski & Laskowska (2017).

governing party (Civic Platform), passes, on the one hand, a new Constitutional Court Act (CCA) on 25 June (four months before the legislative elections that would give victory to Law and Justice), and, on the other hand, appoints -according to the new CCA- five new magistrates (called 'the October judges') in the last parliamentary session before the elections, on 8 October: three to replace the judges whose terms were due to end in November 2015, and two to replace the judges who were due to end in December. The CC reviewed both decisions (the CCA and the election of the five judges) and concluded that the 7th Sejm legislature should have elected three judges -not five, as it did- and the incoming one (8th legislature) should have elected the other two.

Days after the first session of the 8th legislature, the Sejm, already with the numerical strength of the absolute majority of Freedom and Justice, reformed the CCA (November 19) to undo the changes made to it by the Civic Platform and its allies in June 2015, annulled those five appointments (November 25) and proceeded to elect five new candidates (December 2).

In other words, the Sejm filled the two vacancies that legally corresponded to it, but exceeded its powers by annulling the election of three legally elected judges during the 7th legislature. The CC declared this reform unconstitutional (sentence of 9 March 2016), and although its opinion was clear and obliged the President of the country to swear in the three judges mentioned (those appointed in the 7th legislature), the TC refused and appointed the five new ones. The Prime Minister also refused to publish the judgement.

The Sejm then approved a new Constitutional Court Act on 22 July 2016, which was in turn declared partially unconstitutional by the CC (sentence of 9 August 2016), annulling twelve points of the new law, such as the possibility for four judges to block court verdicts, or the obligation of the CC to hear cases in the chronological order of the filing date.

The Definitive Assault on the Judiciary

Under the Act of 8 December 2017, the retirement age of judges of the Polish Supreme Court (SC) has been brought forward from 70 to 65, a new Disciplinary Chamber is created within the SC to resolve issues related to the disciplinary regime, forced retirement and labour and social security law of judges (previously decided by the Social Chamber of the Court) and the system for appointing members of the National Council of the Judiciary (NCJ), the body responsible for ensuring the independence of the judiciary.

With this reform, the judge of the SC who had reached retirement age could only continue in office if he requested to continue in this situation between six and twelve months before reaching the age of 65 and also had the favourable opinion of the NCJ; but the reform also applied to judges who had reached the age of 65 before its entry into force (03/04/2018) or in the following three months, as they would be in retirement after three months if, within the month following the entry into force, they did not present the favourable opinion of the NCJ.

Since the SC was to be renewed with new appointments and the continuation of the active pensioners was to be reported favourably, this law closed the circle of

political control of the SC by modifying the system of appointment of the members of the NCJ, and by extension of the judges of the SC. In fact, if before this legal reform 15 out of 25 members of the NCJ were judges elected by all judges, after the reform these 15 judges were to be elected by the Sejm's Diet (a kind of commission), i.e. by the Legislative (although 2,000 citizens or 25 serving judges could propose candidates to the Diet).

The Court of Justice of the European Union (CJEU), having suspended (in a historic decision of 19 October 2018) this reform provisionally, ordering that all the judges concerned be retained in their posts and that any new appointments be made, declares in its judgment of 24 June 2019 (Case C-619/18 *European Commission v. Poland*) that by lowering the retirement age of judges and applying it to serving judges, as well as conferring on the President of the Republic the discretionary prerogative to extend the term of office, the irrevocability and independence of the judges of the SC had been infringed and Poland had failed to fulfil its obligations under Article 19 TEU, paragraphs 1 and 2; a judgment requiring Poland to reverse the retroactive application of the retirement age.

In a further legislative twist in its attack on judicial independence, on 20 December 2019 the Sejm adopted a law tightening the disciplinary regime for judges by providing, among other measures, for sanctions -including dismissal- for those judges who question the legality of appointments resulting from judicial reform and for those who engage in public activities that may undermine the position of judicial neutrality. Under this Act, the organs of judicial self-government lose the right to express their opinions on candidates for judges and senior judicial posts, as well as the right to adopt critical decisions on changes in the administration of justice. In addition, judges are required to disclose their membership of judicial associations and the President may correct deficiencies in the procedure for appointing judges.

But for the second time in just 18 months (8 April 2020), the CJEU has suspended the reform as a precautionary measure with immediate effect, thus paralysing the application by the Disciplinary Chamber of the SC (created, as we know, in the 2017 reform) of the new disciplinary regime to the country's judges, in that "the objective circumstances in which the tribunal in question was formed, its characteristics and the means by which its members were appointed are likely to create legitimate doubts as to its imperviousness to outside factors, in particular the direct or indirect influence of the legislature and the executive"[23].

[23]As the latest episode of tension between the European Union and Poland, the Education, Audiovisual and Culture Executive Agency (EACEA) announced on June 29th 2020 that it has blocked European funding to six Polish cities in the framework of the "Europe for Citizens" project's European town-twinning programme, because of their rejection of the LGBTI community of homosexuals, transgender and intersex people.

Main Signs of Democratic Degradation in Spain

Despite the fact that the most rigorous rankings on the quality of democracy in the world place Spain among the "full democracies"[24], this country is involved in a deep crisis (territorial, economic, political and judicial institutions), and this is reflected in the surveys, which have made the actions of our political representatives one of the main concerns for citizens. We will now briefly address the three main causes of the current deterioration of Spanish democracy[25]: the secessionist challenge of the Catalan authorities to the constitutional order, the intensification of political interference in the justice system and the relegation of the role of Parliament.

The Putsch Attempt in Catalonia

Based on Kelsen's classic definition of a putsch or coup d'état: "A revolution, in the broad sense of the word, which also includes a coup d'état, is any non-legitimate modification of the Constitution - that is, not carried out in accordance with the constitutional provisions - or its replacement by another. From a legal point of view, it makes no difference whether this change in the legal situation is carried out by an act of force directed against the legitimate government, or by members of the same government; whether it is carried out by a movement of the masses of the people, or by a small group of individuals. What is decisive is that the valid Constitution be modified in a way, or replaced entirely by a new Constitution, which is not prescribed in the previously valid Constitution[26], what happened in Catalonia in the autumn of 2017 cannot be described in any other way: the Parliament of this Autonomous Community approved Law 19/2017, of 6 September, on the referendum on self-determination, and Law 20/2017, of 8 September, on the legal and foundational transitory nature of the Republic, which the Spanish Constitutional Court (CC) declared unconstitutional and null[27]); the regional government, chaired by Carles Puigdemont, convened by Decree 139/ 2017 of 6 September (also annulled by the TC[28]), held on October 1[29]; and on 10 October the Catalan Parliament approved (with 70 votes in favour, 10 against and 2 abstentions, out of a total of 135 regional MPs) the "Declaration of Independence".

[24]The *Democracy Index 2019* places Spain in nineteenth position among the 167 states analysed, the same position it holds in the *Rule of Law Index 2020* (in this case, out of 128 countries).

[25]We leave for another moment the analysis of other problems of interest for the Spanish democratic quality, such as the suspension of transparency - at least of the "passive" transparency - during the state of alarm, because the Government has not processed the requests of transparency formulated by the citizens and organizations of the civil society.

[26]Kelsen (1960) at 138.

[27]Judgements 114/2017 of 17 October and 124/2017 of 8 November, respectively.

[28]Judgement 122/2017 of 31 October 2017.

[29]In a letter dated 2 June 2017 addressed to Puigdemont, the President of the Venice Commission rejected the invitation for that institution to cooperate in the holding of the referendum on 1 October. As explained in that letter, the alleged cooperation of the Catalan authorities with the Commission had to be carried out with the agreement of the Spanish authorities and also recalled that the Venice Commission has placed particular emphasis on the need for any referendum to be conducted in full compliance with the Constitution and applicable laws.

That ineffective declaration of independence was the result of a legislative process that was carried out in open and stubborn opposition to all the requirements formulated by the Constitutional Court, and did not take practical shape given that on October 27, the Senate Plenary issued a ruling, at the proposal of the Government of the Nation in application of the provisions of Article 155 of the Constitution -and following the mandatory requirement of that article which was not met- an agreement approving the measures necessary to guarantee compliance with constitutional obligations and for the protection of the general interest by the Government of Catalonia and providing for the immediate dismissal of all members of the regional Government, the dissolution of the Parliament of Catalonia and the calling of regional elections. Puigdemont and other members of that regional government fled Spain, while other secessionist leaders -including the vice-president, Oriol Junqueras- were sentenced two years later by the Supreme Court, among other crimes, for sedition[30].

The Catalan secessionist process continues today to be a serious factor in the DE legitimization and destabilization not only of Spanish democracy, but of the European Union as a whole[31], mainly for two reasons. Firstly, because it is promoted by public authorities that form part of the same Spanish State (the Catalan government and the majority of political groups represented in the autonomous legislative chamber), against the constitutional and legal order of that State and without unilateralism and disobedience having been ruled out throughout this time. Secondly, because the secessionist political parties condition the current Spanish Government in the Congress of Deputies.

Indeed, those disloyal parties[32] allowed the motion of censure that made the Secretary General of the Socialist Party (PSOE), Pedro Sanchez, President of the Government on June 1, 2018, and on which the stability of the current PSOE-Podemos coalition government largely depends, in exchange for controversial concessions such as the constitution of the so-called "Table of dialogue on the political conflict in Catalonia" agreed upon between the Sanchez government and the Catalan government presided over by Quim Torra, generating a bitter controversy and political and legal controversy, especially when Torra was condemned in December 2019 by the Catalan High Court of Justice to not hold any public office for 18 months for disobedience[33], which led the Central Electoral Board to disqualify Torra as an autonomous deputy and president of Catalonia, since being a member of the Catalan Parliament is an indispensable requirement for being the head of the autonomous government.

[30]Judgement (Criminal Chamber) Nr. 459/2019 of 14 October 2019.

[31]Although there is no doubt that it has had a negative effect on Spain's image abroad, in no case is it a question of structural damage, it also demonstrates the confidence of the EU institutions and Member States, reiterated in public and in private, in the Spanish constitutional system.

[32]PDeCAT (today JxCAT), the party of Puigdemont, and ERC, chaired by Oriol Junqueras.

[33]For failing to comply with the order of 11 March 2019 of the Central Electoral Board to remove the secessionist flags and symbols from the public buildings.

The Aggravation of the Politicization of Justice

The Group of States against Corruption (GRECO), body dependent on the Council of Europe to improve the capacity of Member States in the fight against corruption, warned Spain again at the end of 2019 that the "Achilles' heel of the Spanish judiciary: its alleged politicisation" remains unaddressed. These are the words of the report by the body that analyses the degree of compliance with which the Spanish State has responded to one of the most important recommendations that GRECO itself made to him six years ago: to change the way in which the judges' governing body, the General Council of the Judiciary (CGPJ), is elected, without taking any action in this regard for the time being.

Article 122.3 of the Spanish Constitution (CE) provides for a system of appointment of the members of the CGPJ in which there must be 12 judges or magistrates (plus the President, who also presides over the Supreme Court), and 8 jurists of recognised prestige proposed by the Congress of Deputies (4) and by the Senate (4), elected by a reinforced majority of 3/5. The first model of selection of the members of the CGPJ that was adopted, that contained in the Organic Law 1/1980, regulating this body, established a system of selection of the 12 judicial members by the judges themselves. But since the reform of the Organic Law of the Judiciary of 1985 (LOPJ), with a PSOE government, the selection of all the members of the Council corresponds to the Chambers.

The Constitutional Court (Judgment 108/1986 of 29 July, legal argument Nr. 13) admitted that the 12 judicial members did not necessarily have to be appointed by judges and magistrates, although it also recognised that "there is a risk that the Chambers, when making their proposals, forget the objective pursued and, acting with criteria that are admissible in other areas, but not in this one, attend only to the division of forces existing within their own ranks and distribute the positions to be filled among the different parties, in proportion to the parliamentary strength of these. The logic of the state of parties pushes towards actions of this kind, but this same logic obliges us to keep certain spheres of power out of the party struggle"[34].

When the Popular Party (PP) came to power in the 6th legislature, it wanted to amend the issue, seeking a different Council configuration. This opened a process that in 2001 gave birth to the model currently in force. A mechanism that leaves the election of the 12 candidates for "judicial" members in the hands of the Chambers, but from a list of 36 candidates presented by the associations of judges and non-associated judges[35]. The mixed technique that was established was the result of the agreement that the two big parties -PP and PSOE- managed to reach on this matter, receiving the consequent criticism for their bilateralism.

This model has ended up promoting a system of agreements between the majority parties in the Spanish Parliament on who is to form part of such a body, with a selection criterion that seems to be based more on reasons of loyalty to the political party than on indisputable prestige, proven independence or professional excellence. In short, it is a question of establishing political distribution quotas, with the judicial associations having enormous power to influence the appointment

[34]See Serra Cristóbal (2013).
[35]LO 2/2001, of 28 June on the composition of the CGPJ, amending LOPJ.

of the members of the court. Although the members elected by the Chambers do not receive an imperative mandate from them, there does seem to be a subliminal mandate that responds to their ideological or associative convictions. Thus, as long as we do not have a truly independent CGPJ, as the fathers of the Constitution intended by reserving 12 of the 20 seats on the Council for judges and magistrates of all judicial categories, it will be virtually impossible to eliminate the continuing shadow of suspicion that hangs over the judiciary as a whole.

Furthermore, the Spanish Government intends to reduce by the end of 2020 the majority required for the Parliament to elect the 12 judicial members of the CGPJ, dangerously increasing its control over the Judiciary[36].

Spain has also failed to comply with the GRECO Report's recommendation to establish objective evaluation criteria for the appointment of senior members of the judiciary, in order to ensure that the process of selecting them does not give rise to any doubts as to their independence, impartiality and transparency. In this regard, it should be recalled that in our country the appointment of senior officials in the judicial career is generally made by competition[37]. All these positions are covered at the proposal of the CGPJ, in accordance with the provisions of Regulation 1/2010 of 25 February, which regulates the provision of discretionally appointed positions in judicial bodies. In addition, 1/3 of the positions in the Civil and Criminal Chambers of the High Courts of Justice of the Autonomous Communities will be filled by jurists of recognised prestige appointed at the proposal of the GPCJ from a list of three candidates presented by the regional parliament (art. 330.4 LOPJ)[38].

As regards the Public Prosecutor's Office, the appointment earlier this year of Dolores Delgado, former Minister of Justice in the Pedro Sanchez government[39], as State Attorney General was received by all the prosecutors' associations as "a slap in the face to the independence and impartiality of the Public Prosecutor's Office", and provoked an unprecedented situation in the CGPJ, which approved with a very narrow majority the suitability report required by law before his official appointment. Moreover, the Government's announcement of its intention to reform the Criminal Procedure Act (LECr) so that prosecutors will conduct criminal cases instead of investigating judges has given rise to great doubts, precisely because it is not accompanied by any other reform to strengthen the independence of the Public Prosecutor's Office[40].

[36]To this end, the political parties in government, PSOE and UP, presented a proposal to reform the LOPJ on 13 October 2020 in the Congress of Deputies.

[37]Except for the Presidents of the Courts, High Courts of Justice of the Autonomous Communities and National Court, Presidents of Chambers and Supreme Court Judges (article 326.2 LOPJ).

[38]See Gutiérrez (2020).

[39]As a Minister, Dolores Delgado was disapproved three times by Parliament in the previous legislature.

[40]As the associations of judges and prosecutors have warned, it would be devastating for the rule of law if the Government, through the Attorney General, could remove an investigating prosecutor (for investigating, for example, one whom the Government does not want investigated), or give orders to a prosecutor to investigate or not, an eventuality which, under the current Organic Statute of the Public Prosecutor's Office, is now possible.

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The recent dismissal, agreed by the Minister of the Interior, of Colonel Perez de los Cobos as the head of the Guardia Civil in Madrid for refusing to leak to the Director General of this body the judicial proceedings on 8-M[41] also represents an attack on judicial independence, as the proposal for dismissal itself has shown, which justifies the deposition "for not informing the development of investigations and actions of the Guardia Civil, within the operational and judicial police framework, for purposes of knowledge", because when the police act as the judicial police, they depend on the judges and the Government cannot -nor should it- know the content of the judicial investigations, especially if the investigation affects someone related to the Government on which these police officers organically -but not functionally - depend[42].

The Undermining of Parliamentary Work

The fragmented composition of the Spanish Parliament as a result of the various general elections held since 2015[43], marked by the decline of the two large majority parties and the emergence of new political formations, now decisive for governance, together with the recent declaration of the state of alarm - and its successive extensions - for the management of the health crisis situation caused by the Covid-19[44], has profoundly affected all parliamentary functions, especially the legislative power and the control function of the Government, reducing the main role that, in any democracy, must be played by Parliament. Because of its undoubted impact on the principle of the division of powers, we would highlight the following practical trends:

a) The new parliamentary arithmetic has produced a complete turnaround in the practice of the power of the Government of the Nation, recognised in article 134.6 CE, to oppose the parliamentary processing of those bills that imply an increase in credits or a decrease in budgetary income (known as the power of "budgetary veto"), since from its almost total disappearance it has become a frequent use. In fact, once the first post-constitutional times had passed, successive Executives had generally avoided making use of this veto power, mainly due to its

[41]The Court of Instruction number 51 of Madrid agreed to investigate the Government Delegate in Madrid for an alleged crime of administrative prevarication and injuries due to professional negligence for allowing the march for the International Women's Day last March 8, despite the warning's days before the European Centre for Disease Control and Prevention about the risk of infection by coronavirus. Finally, the case has been provisionally closed.

[42]See Articles 126 CE, 548.1 LOPJ and 283 LECr.

[43]Since that year, four general elections have been held: 20 December 2015, 26 June 2016, 28 April and 10 November 2019.

[44]The Government declared the state of alarm in Royal Decree 463/2020 of 14 March and has extended it, with the authorisation of the Congress of Deputies, on six occasions, ending on 21 June.

political cost, preferring to act through their parliamentary majority to reject the consideration of this type of proposals in the corresponding plenary session.

However, the Government headed by Mariano Rajoy vetoed, during his term in the 12th legislature (from July 2016 to May 2018[45]), 45 bills presented by the opposition in the Congress of Deputies; two of these vetoes were, in turn, rejected by the Congressional Bureau, which prompted the Executive to bring a conflict of powers before the Constitutional Court, which was resolved in 2018 in favour of Congress[46]. The government of Pedro Sanchez, for its part, although it began by reconsidering the vetoes made by the previous government on 18 opposition bills, in the current legislature (the 14th) it has vetoed 3 bills[47].

b) Although it was to be expected that greater vigour in our parliamentary system associated with parliamentary fragmentation would correct - at least in part - the abuse of decree-laws that the government has been making since the 1978 Constitution came into force, and which has turned this exceptional source of law into an almost ordinary way of legislating, the abuse of this type of regulation reaches truly alarming proportions in the new multi-party context. Thus, in the period between 1979 and 2015, the volume of State decree-laws accounted for 29% of all legislation[48]; in the 12th legislature (from July 2016 to March 2019) the decree-laws represented more than 60% (specifically 61.53%) of all legislative production; and during the 13th legislature (the most fleeting in democracy, from May to September 2019) and the time we have been in the current legislature[49] no law has been passed and yet 28 decree-laws have been validated (7 in the 13th legislature and 21 in the current one), so that, for the first time since the Spanish Constitution came into force, the decree-laws represent 100 % of the national legislation[50].

To all this we must add another fact that is also worrying: a large number of these decree-laws (specifically, the last 6 decree-laws approved during the 12th legislature and the 7 decree-laws validated in the 13th) have been approved by the Permanent Delegation of the Congress of Deputies, which is reprehensible for two reasons.

Firstly, because -with some exceptions[51]- these decree-laws -described by the Government itself as "social"- do not seem to respond to an urgent and extraordinary need. Although it is true that this is not the first time that the Permanent Delegation of the Congress has validated decree-laws, it is no less true that the vast majority

[45]Until his resignation on June 1, 2018, due to the approval of the motion of censure that brought Pedro Sanchez to the presidency, the first motion of censure since the restoration of democracy in 1978.
[46]Judgements 34/2018 of 12 April 2018 and 44/2018 of 26 April 2018.
[47]Sources: Own elaboration, with final date of data consultation July 30th 2020, through the website of the Congress of Deputies: http://www.congreso.es.
[48]See Martín Rebollo (2015).
[49]Sources: Own elaboration, with final date of data consultation 31 August 2020, through the website of the Congress of Deputies: http://www.congreso.es
[50]The same trend, although less pronounced, can be observed in all nine Autonomous Communities with this type of legislation.
[51]For example, the decree law on 'brexit', which was originally due to take effect on 30 March 2019.

of those previously validated were aimed at adopting urgent measures to alleviate the damage caused by disasters.

Secondly, because it is only possible for the Permanent Delegation of the Congress to validate or repeal them, without being able to process them as bills, so that they are incorporated into the system without the possibility of correcting, through a real legislative procedure with the intervention of the two Chambers that make up the Parliament, the defects of constitutionality that they may eventually suffer.

Finally, the reprehensible use of the singular law decree has been maintained, if not accentuated, that is, for the regulation of particular cases. With the figure of the special decree law, not only does the Government occupy the space proper to Parliament, dictating rules that affect rights and obligations in general outside the narrow constitutional parameters in which this situation was considered justified, but, even more seriously, it does so without the guarantee or counterweight of control by the judiciary, thus violating not only the principle of separation of powers, but also the fundamental right to effective judicial protection[52].

c) Article 116 CE, after giving the Government to declare the state of alarm for a maximum period of fifteen days, entrusts the Congress of Deputies with the tasks of controlling the scope and content of the Government's declaration and, if necessary, agreeing to extend it. However, the parliamentary activity before and after the Government's declaration of the state of alarm on the occasion of Covid-19[53] has not been normal or habitual, since it was affected by a series of decisions of the Presidency and the Bureau of the Congress of Deputies which, in our opinion, violated the legal system[54].

Thus, on March 10, 2020, the President of Congress, after meeting with the Board of Spokespersons, agreed to dispense with the plenary session of that week. Likewise, that same day, the Bureau of the House agreed to cancel all parliamentary activity, with the exception of the appearance of the Minister of Health, Salvador Illa, before the Health and Consumer Affairs Commission to report on the evolution of the coronavirus. Finally, two days later the Bureau suspended the parliamentary activity of the Congress of Deputies for two weeks, including the aforementioned appearance. It is also completely anomalous that in the week of

[52]To illustrate this, we will cite two examples of recent unique decree-laws: Royal Decree-Law 17/2019, of 22 November, which adopts urgent measures for the necessary adaptation of remuneration parameters affecting the electricity system and which responds to the process of ceasing the activity of thermal generation plants; and Royal Decree-Law 10/2018, of 24 August, which modifies Law 52/2007, of 26 December, which recognises and extends rights and establishes measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship.

[53]Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19 (BOE no. 67, of 14 March 2020).

[54]Specifically, article 116.5 CE, according to which the functioning of the Congress of Deputies, as well as that of the other constitutional powers of the State, cannot be interrupted during the state of alarm; articles 1.4 and 8. 1 of Organic Law 4/1981, of 1 June, on the states of alarm, exception and siege, according to which the declaration of the state of alarm "does not interrupt the normal functioning of the constitutional powers of the State", and "the government shall inform the Congress of Deputies of the declaration of the state of alarm and shall provide it with the information required"; and articles 31, 32 and 162.1 and 3 of the Regulations of the Congress.

23-29 March the Permanent Commissions were not meeting to monitor the actions of the Ministers to whom the Royal Decree declaring the state of alarm granted important powers[55].

In short, neither the Spanish Constitution, nor Organic Law 4/1981 of 1 June 1981, regulate states of alarm, exception or siege, and the Regulations of the Congress of Deputies do not empower the Presidency or the Bureau of the Congress of Deputies to agree to the suspension, interruption or postponement of parliamentary activity, including the activity of controlling the Government[56]. As Professor Manuel Aragón recently stated:

> *"The declaration of the state of alarm cannot legitimise the annulment of the Government's parliamentary control, as it seems to be happening, because the Constitution establishes that the functioning of the Chambers cannot be interrupted during the validity of any of the exceptional states, and because the absence of provisions in the regulations of the Congress and the Senate for circumstances such as the present one is not an obstacle for the presidents of the respective Chambers to use the power they have to substitute those regulations in cases of omission and to adapt the parliamentary functioning to the limitations on meetings or even their non-presential modalities that the situation requires*"[57].

Conclusions

Democracy today, in its essence, remains the government of the people. However, democracy is an instrument at the service of a noble purpose: to ensure the freedom and equality of all citizens by guaranteeing the civil, political and social rights contained in constitutional texts. Among the great principles on which this instrument rests are the division of powers, which consists, substantially, in the fact that power is not concentrated, but that the various functions of the State are exercised by different bodies, which, moreover, control each other.

Well, the interference - increasingly aggressive - of the Executive and, to a lesser extent, of the Legislative in material spheres that should be reserved exclusively to the Judiciary, violates this principle and, for this reason, distorts the idea of democracy. When political power takes over the different organs of the State and prevents the possibility of controlling each other, the guarantee for the good democratic functioning that the division of powers entails is deactivated, and the whole edifice of the rule of law is seriously damaged. That is precisely what, for some time now, is happening in European Union countries such as Hungary, Poland and, to a lesser extent, Spain, as we have analysed in this paper.

The sixteenth goal of Agenda 2030 (Peace, justice and strong institutions) includes among its goals those of "promoting the rule of law at national and international levels and ensuring equal access to justice for all", as well as "building effective and transparent institutions at all levels that are accountable",

[55]Permanent Commissions on Defence, Transport, Mobility and the Urban Agenda, Home Affairs, Justice and Foreign Affairs, among others.
[56]See Alonso Prada (2020).
[57]Aragón Reyes (2020).

with the understanding that the rule of law and development are significantly interlinked and mutually reinforcing, and thus essential for sustainable development at national and international levels. The political and institutional degradation of democracy in Europe, in some cases exacerbated by the current health emergency caused by the Covid-19 pandemic, is an obstacle to progress in the respect for human rights which inspires Agenda 2030, by undermining the positive influence which consolidated democracies must have on the well-being of mankind.

The constitutional regime, in short, is not only articulated in a series of legal and political institutions and mechanisms (rule of law, political representation, equality before the law, counterbalance of powers, guarantee of fundamental rights and public liberties), but it also requires ideological and mental guidelines, a political culture that favours, for example, mutual respect, coexistence between different people, rejection of any kind of discrimination, peaceful alternation in power or the renunciation of taking justice into one's own hands, to mention some of the most elementary references.

Avoiding the alarming democratic degradation that we have denounced here, therefore, not only requires effective monitoring by the international community and more than necessary institutional reforms that make these principles respected and prevent arbitrariness by the public powers, but also a media network and an educational system that incorporates the explanation and promotion of such values and principles, that is, that makes the citizen aware and a defender of constitutionalism and liberal democracy.

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Athens Journal of Law - Volume 7, Issue 3, July 2021 – Pages 399-412

The Legal and Economic Questions posed by the German Constitutional Court's decision in the Public Sector Purchase Programme (PSPP) Case

By Andrew James Perkins[*]

This paper seeks to explore the PSPP decision of the German Constitutional Court and its effect on the monetary policy decisions taken by central banks. It begins by exploring the decision and its effect in Germany, together with its wider implications for the European Monetary Union before moving onto consider the standard of review that should be applied by the Courts when they are required to review central banks actions. Conclusions are reached to show that any standard of review should be limited because of the unique economic and political circumstances in which central bank decision making takes place.

Keywords: *Central Banking; Judicial Review; Proportionality; European Law; European Monetary Union.*

Introduction

In the week in which countries of the European Union celebrated VE Day, the *Bundesverfassungsgericht* (the German Federal Constitutional Court) delivered a landmark Judgment in the *Public Sector Purchase Programme (PSPP) Case*[1] banning fresh purchases of German Bonds through the European Central Bank's Asset Purchase Programme. From an economic perspective questioning the monetary mandate of the European Central Bank at such a crucial juncture is potentially a blow to the European Union's Covid-19 pandemic recovery process. The decision also poses questions of an existential nature in the midst of the Covid-19 crisis concerning the balancing between the authority and primacy of EU law, and national competences and sovereignty beyond budgetary matters[2].

This paper seeks to examine this decision from three core perspectives. Firstly does the *Bundesverfassungsgericht* decision effectively insist for the independence of the *Bundesbank* (the German Central Bank) on bond purchases as well as upon broader financial issues? Secondly if this is so could other national courts seek to declare that the PSPP provisions are incompatible with their own national laws? Finally to demonstrate that from the perspective of financial regulation this represents a problematic precedent if a central bank needs to persuade a Court of a sufficient proportionality analysis in regulatory monetary and economic matters.

[*]Senior Lecturer, Truman Bodden Law School of the Cayman Islands. George Town, Grand Cayman, Cayman Islands. Email: andrew.perkins@gov.ky. My thanks to Mr. Mitchell Davies, Dr. John Epp and Professor Amy Wallace for their comments on this piece. Any errors in drafting are my own.

[1]2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

[2]Konstadinides (2019).

Conclusions will be reached to show that this decision represents a notoriously difficult position to adopt within a monetary union, especially for the *Bundesbank* which is deemed to have a controlling interest within the European Monetary Union. Furthermore this paper will demonstrate that there needs to be a light touch of proportionality applied when courts interact with the decisions of central banks because of the unique economic and political framework in which central bank decision making operates. Any monetary policy decision should be subjected to a limited form of judicial scrutiny.

PSPP and the German Reaction

The global financial crisis and the recognition of the constraints posed by the zero lower bound on the policy rate has led central banks to increase their focus on financial stability and to develop new tools to promote fiscal consistency and to conduct non-conventional monetary policy. Central banking has entered a brave new world in which challenges have become greater and the conduct of policy has become more complex[3]. Against this background the European Central Bank (ECB) dramatically expanded the scope of its actions particularly in respect of the financial assistance function of the Eurozone[4]. The whole goal following the events of 2007 to 2009 was to weather the financial storm and to keep the Euro afloat.

As part of the redesign of the Eurozone the ECB gained a pivotal role in bank supervision and resolution[5] and in the macro prudential oversight of the financial system within the European Union[6]. As part of Mario Draghi's infamous "whatever it takes"[7] dictum the European Central Bank along with other Eurozone central banks began an asset purchase process under which the PSPP was constructed so that the Euro system acquired vast amounts of debt securities from a wide range of professional counterparties to release its liquidity into the market[8]. At the heart of PSPP is the increase of monetary supply and thus support the Eurozone economy through investment and to ultimately return inflation levels close to but below the 2% target threshold[9]. These actions can be attached to the primary objective of the European Union's monetary policy. The actions of the ECB are not unique and follow earlier steps by other high profile central banks namely the US Federal

[3]Mishkin (2019) at 595.
[4]Dermine (2019).
[5]Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation 806/2014 establishing uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation.
[6]Regulation 1092/2010 on EU macro prudential oversight of the financial system and establishing of a European Systemic Risk Board 2010 and Regulation 1096/2010 conferring specific tasks on the European Central Bank concerning the functioning of the European Systemic Risk Board 2010.
[7]Draghi (2012).
[8]ECB Monetary Policy Decision 13th December 2018.
[9]Huetras, Schelling & von Berg (2020).

Reserve, the Bank of England and the Japanese Central Bank who all used large scale purchases of government bonds to drive up inflation[10].

Shortly after launch in 2015 a case was brought before the *Bundesverfassungsgericht.* The central arguments advanced by the Plaintiffs were that the ECB had exceeded its competence in the realm of monetary policy by straying into the realm of economic policy in launching PSPP which in principle is left to member states in accordance with Article 119 of TFEU[11]. This limitation is imposed by firstly Article 123(1) TFEU the prohibition on monetary financing of public debt and Article 125(1) the so called 'no bail out' clause. Naturally, political agreement amongst member states plays into these treaty-imposed limitations with the inevitable consequence of some states benefiting from the current structure of the European Monetary Union and some being disadvantaged[12].

The question framed by the *Bundesverfassungsgericht* was the compatibility of PSPP with both the prohibition on monetary financing and upon public debt mixed with Article 4(2) TFEU namely member states constitutional identity. During the course of proceedings five questions were referred to the CJEU for a preliminary ruling pursuant to Article 267(1) TFEU. From a central bank's perspective questions 3 and 4[13] are of paramount importance because scrutiny of the proportionality assessment used in its decision making when adopting PSPP was demanded.

In answering those questions, the CJEU in *Weiss*[14]held that the primary objective of the European Union's monetary policy was to maintain price stability and that without prejudice to that policy the ECB is to support the general economic policies in the Union. Following these factors and the low level of inflation in the Eurozone and the exhaustion of the instruments normally used for the conduct of its monetary policy led the ECB to consider the adoption and implementation, with effect from 2015, of an asset purchase programme with the features of the PSPP was necessary both in principle and in its various practical aspects. Monetary policy must be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy and should be suitable for attaining the legitimate objectives pursued by the legislation and not go beyond what is necessary[15].

The findings of the CJEU are in my view cogently reasoned, replying to the preliminary questions with a proportionate outcome that it is clear that PSPP is intended to ease monetary and financial conditions, including those of non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to the levels sought over the medium term. In accordance with practices of other central banks the purchase of government bonds can contribute to achieving that objective by means of facilitating asset financing that is

[10]Gros (2018).
[11]Tuori &Tuori (2014).
[12]Komarek (2020).
[13]2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 at paragraphs 146 and 216
[14]*Weiss and Others*.
[15]Ibid.

conducive to boosting economic activity by giving a clear signal of the inflation target and that therefore the actions of the ECB through the PSPP were proportionate and did not go beyond what was necessary to achieve the objective sought[16].

When the case proceeded back before the *Bundesverfassungsgericht* a surprising outcome occurred. Taking an unexpected tack, the PSPP enacted by the ECB was found to be a manifest and structurally significant exceeding of competences[17] and more surprisingly the CJEU in delivering Judgment in *Weiss* had manifestly failed to give consideration to the importance and scope of the principle of proportionality which also applies to the division of competences, and is no longer tenable from a methodological perspective given that it completely disregards the effects of the PSPP[18]. The CJEU Judgment in *Weiss* was found to manifestly exceed the mandate conferred on the CJEU in Article 19(1) TEU and that as the Judgment had resulted in a structurally significant shift in the order of competences it constituted an ultra vires act nullifying the effect of the PSPP within Germany.

The Judgment of the *Bundesverfassungsgericht* is capable of having this effect because the Court has developed a role as guardian of the German constitutional order and has enforced its power over monetary policy measures as a function of constitutional control required in its view to protect the German democratic principle. The democratic principle is used by the Court as a standard which has proved decisive for the control of domestic public authority, particularly administrative decision making within Germany[19]. When construing this principle the court views any exercise of public authority being democratically founded, which means citizens must substantively consent to the exercise of political power in conditions of freedom and equality[20]. In this instance the need by the German Court to enforce constitutional control was because the economic policy effects of the PSPP are disregarded completely by the CJEU and therefore when applying a principle of proportionality such a test cannot fulfil its purpose, given that a key element of the balancing of conflicts of interests is missing. As a result, the review of proportionality in respect of the PSPP is rendered meaningless[21]. The procedural standard was deemed to be insufficient, from the prospective of the Court what is required is a substantive review of the delineation between monetary competences of the ECB on the one hand and the economic competences of the member states, on the other hand because of the substantive fiscal and economic effects of the programme.[22]

The effect of this decision within Germany is that it has been mandated by the Court that for the purposes of financial instruments and the actions of either the ECB or the *Bundesbank* that a test of necessity is met. This means that the relevant

[16]Ibid.
[17]*German Constitutional Court PSPP Case* 2 BvR 859/15.
[18]Ibid.
[19]Jestaedt (2014).
[20]Violante (2020).
[21]Ibid.
[22]Akkermans (2020).

financial policy measure be first suitable to achieve the objective pursued and second, necessary to achieve that objective. In other words, the competent authority could not have obtained the objective with a less onerous measure. When applying this methodology to the PSPP it was found by the Court that the PSPP failed to meet the necessity test because when designing and implementing PSPP, the ECB did not balance the effects of monetary policy with other policy areas of the EU[23].

The *Bundesverfassungsgericht* has insisted for independence for the German Central Bank not only on matters of bond purchases but also on broader financial issues because the *Bundesbank* is required by this decision to ensure that the ECB has taken an appropriate proportionality assessment in accordance with the standards set out above. If there is failure to evidence such to the satisfaction of the Court German Constitutional organs, administrative bodies, and courts may neither participate in the development nor in the implementation, execution or operationalisation of ultra vires acts.[24] This is a bold position and effectively puts a caveat on all ECB's actions in respect of Germany which is deemed to have a controlling interest in the European Monetary Union. This is an instance of an extra layer of scrutiny in respect to financial decision making even though this is an area where decisions need to be taken when time is of the essence and sophisticated analysis to a stringent standard of proportionality not possible.

A Difficult Precedent?

From the perspective of monetary policy within the EU and its member states the PSPP decision represents a difficult precedent. The decision has called into question the EU legal order and the very role of the law in governing monetary policy[25]. The legal meaning of monetary policy within the EU is framed in accordance with Article 3 of TFEU as an exclusive competence of member states yet also Article 127(2) TFEU provides the ECB with the mandate to implement monetary policy within the union.

A dilemma exists for central banks within the union and for the ECB could other national courts apply similar standards as expounded by the *Bundesverfassungsgericht?* And if this be so could this detrimentally affect the way central banks take decisions in relation to monetary policy. This will depend upon two factors firstly how member states apply the principle of proportionality in their standard of judicial review and secondly the relationship of the member state in question as to the status of EU law within their Jurisdiction.

Dealing firstly with the application of the principle of proportionality. Proportionality is a general principle of European Union Law and is found in Articles 5(2) and the second sentence of Article 5(4) TFEU. It has also developed as a common law principle through the jurisprudence of the European Court of Human Rights and the legal orders of Europe. At one level proportionality

[23]Solana (2020).
[24]*German Constitutional Court PSPP Case* 2 BvR 859/15.
[25]de Arriba-Sellier (2020).

possesses neutrality, a capacity of rationality[26] and the ability to make a legal concept of rights the best it can be[27]. Proportionality is arguably unavoidable in the process of judicial review as it can be the only rational way to make a judgment[28] that appropriately bolsters the role of majoritarian decision making about rights within a constitutional democracy.[29]

When applying the principle of proportionality to the actions of a public authority which would include a central bank, German law, French law and Spanish law make the assessment based upon the elements of suitability, necessity and appropriateness. Italian law also takes a similar approach with the added element of reasonableness which is also reflected in the Jurisdictions of Austria, Poland, Hungry and even the United Kingdom. Jurisprudence from the CJEU has also developed a doctrine of proportionality which requires that the acts of EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives[30]. Therefore if macroeconomic actions of a central bank as in the PSPP case were deemed to be disproportionate it is entirely possible that the constitutional principle of proportionality could be used to strike down policies whose outcome is considered disproportionate and unreasonable by a national constitutional court.

Whether a national constitutional court is willing to take such an action will depend upon the primacy in which European Law is held at a national level. Whilst it was held that the reason the *Bundesverfassungsgericht* struck down the PSPP was for a lack of proportionality the court held that it had to make such a finding because the CJEU had exceeded its judicial mandate deriving from Article 19(1) TFEU and had thus acted ultra vires, which was why the Judgment in *Weiss* had no binding force in Germany[31]. This is based upon the doctrine of conferral of powers by European Institutions which can be found in national constitutions, the treaties, and the legislation approving the treaties, the case law of national constitutional courts and the case law of the CJEU. However, whether EU law remains prime law within a jurisdiction will become a constitutional question if courts are willing to perform their own review of the compliance of EU measures[32] when organs of the state or the EU exceed the powers conferred upon them. Whilst the PSPP case represents a landmark departure from the supremacy of EU law within member states, it is not the first time that a national constitutional court has declared the actions of an EU institution to be ultra vires and disapply the application of EU law within a jurisdiction.

The Constitutional Court of the of the Czech Republic (*Ústavní soud České republiky)* concluded in the 'Slovakian Pension Case'[33] that a decision of the CJEU

[26]Beatty (2004) at 164 & 171.
[27]Ibid.
[28]Barak (2012) at 3.
[29]Gardbaum (2010).
[30]*Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*.
[31]2BvR 859/15 at 143.
[32]Akkermans (2020).
[33]*Landtova*.

was ultra vires. A finding was reached that the CJEU had overstepped the boundaries in respect of the powers transferred to the EU by the Czech Republic under Article 10(a) of the Czech Constitution. A core reason put forward by the Czech court was that the CJEU applied its principles to the dissolution agreement between the two countries. This judgment marks the beginning of member states displaying domestic judicial disapplication of the primacy of EU Law.

An additional example can be found from the Danish Supreme Court (*Højesteret)* in which the Court took the opportunity to set new boundaries as to the applicability of the CJEU's rulings in Denmark and ultimately the primacy of EU Law. The Danish Court refused to set aside a conflicting provision of Danish law and thus providing national law with precedence over EU law. The Danish Supreme Court held that the law on accession does not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition.[34] In doing this, the Supreme Court of Denmark concluded that the judge-made principles of EU law, such as the general principle of non-discrimination on grounds of age, were not binding, as they do not have their origin in a specific treaty provision.

A few days after the German Constitutional Court published its decision in the PSPP case, the CJEU handed down Judgment[35] in which the CJEU was asked to rule in relation to the treatment of asylum seekers being held in the transit zone at the Hungarian-Serbian border. The case originated from preliminary ruling requests in December 2019 by the Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*) asking the CJEU to rule on whether, among other questions whether its actions in detaining refugees in the transit zone for 464 days and 526 days without being able to leave in a lawful manner. The CJEU ruled that being held in a transit zone for such period amounted to detention under EU law[36] and that such detention cannot extend beyond four weeks. However, the Hungarian prime minister has referred to the judgment as part of a 'coordinated attack' by the EU on Hungary. Significantly, the prime minister stated that, if the CJEU issues a judgment that conflicts with the Hungarian Constitution, then the constitution must have priority. This statement clearly echoes the sentiments of the Judgment in the PSPP Case in which it was expressed if there is a conflict between EU law and national constitutional traditions those traditions may prevail.

Therefore, it is entirely possible based on the intensity of judicial control in relation to monetary policy decisions that the Courts of member states could if it considers it necessary to construe the principle of proportionality as a principle of delimitating competences[37] strike down a decision of a national central bank or the ECB should it find that a policy decision has sufficiently reached a threshold to trigger ultra vires censorship. Furthermore should a national constitutional court find that the CJEU's procedural and therefore limited approach to the standard of review of central banks actions fails to provide a credible standard of control

[34]*Dansk Industri*.
[35]*Commission v Hungary*.
[36]Namely Directive 2013/33/EU.
[37]Wendel (2020).

which prevents an effective scrutiny of central banks decisions and fails to provide credible enforcement of the division of competences between monetary policy and the Member States powers over economic and fiscal choices[38] disapply the decision of the CJEU as the *Bundesverfassungsgerich* did in the *PSPP Case* in dis applying *Weiss* and make a ruling based on their own national standards of proportionality.

This represents a concerning situation for Central Banks in that there appears a case where complex financial decisions could be subject to different standards of review in different jurisdictions based on differing constitutional traditions. This is concerning because the euro continues to be heavily rules based without a clear account of the role of the Court therein and the haphazard development of euro crisis law[39]could lead to a situation where differing interpretations lead to a lack of control action by ECB. Therefore, a common standard of proportionality is required at a national and European level to prevent member states constitutional courts from hampering the development of the monetary union in times of financial uncertainty.

The Standard of Proportionality that should be applied to Central Banks

The financial and euro area crisis have painfully illustrated the consequences of the lack of a credible fiscal backstop for sovereigns in the euro area[40]. The function of a lender of last resort through fiscal tradition has in most states fallen to the central bank. The European Monetary Union was however, not built upon this principle. Two distinct treaty provisions fly in the face of the traditional role of a lender of last resort firstly *Article 123 TFEU* which prohibits monetary financing and secondly *Article 125(3) TFEU* referred to as the no bail out clause. Furthermore, the European Central Bank has only been given exclusive competence in accordance with the treaties for monetary policy decisions and not economic ones which are left to the exclusive competence of the member states central banks.

The European financial order has had to come to terms with this reality through ensuing litigation in the cases of *Gauweiler*[41]*, Pringle*[42]*, Weiss*[43] and the *PSPP* Case. Each of these decisions has resulted in a standard of proportionality being applied by the CJEU and by a National Constitutional Court in relation to monetary policy measures being enacted by a Central Bank. There needs to be an end to the judicial dialogue concerning the evolving powers of the ECB and national central banks and, more broadly the structural changes to the European Monetary Union since the euro area crisis[44] . Article *125 TFEU* has been held to include the provision of support provided it is indispensable to safeguard the

[38]Violante (2020).
[39]van ver Slus (2019).
[40]De Grauwe (2012).
[41]*Gauweiler and Others v Deutsche Bundestage*.
[42]*Pringle v Government of Ireland*.
[43]*Weiss and others*.
[44]Hinarejos (2019).

financial stability of the euro area as a whole and of its member states and if it is subject to strict conditionality[45]. If those conditions are met, it needs in spite of political agendas and a lack of treaty change to be recognised that the framework of the European Union allows for the euro area member states to create a vehicle capable of providing unlimited assistance in order to prevent sovereign default[46] and that monetary policy does not have a precise definition but provided that a policy measure falls within the Central Bank's mandate in terms of both instrument and objective[47] that such actions are lawful provided they satisfy a standardised test of proportionality.

From the perspective of the CJEU a test of proportionality has been applied on a consistent basis through the financial policy jurisprudence in *Gauweiler, Pringle and Weiss*. An assessment balancing the suitability and necessity of a measure. Whilst at face value this seems uncontroversial, we need to examine the level of intensity that this balancing should take. It needs to be ensured that a central bank is able to operate effectively and to perform their economic functions with a degree of flexibility and autonomy. It is essential for the monetary union that the powers of central bankers and the courts are delineated in such a way as to allow efficient and flexible monetary policy whilst at the same time ensuring the respect of legal limits[48]. The *PSPP* judgment suggests that in making the assessment of proportionality a central bank should assess the effects of its actions on other policies, in particular those within member states. This shows a divergence in the standard of what is proportionate.

The intensity with which EU Courts will examine the legality of a decision is indicated by the applicable standard of review. The European Courts have two standards of scrutiny from which to choose: full review and marginal review[49]. In principle, full review is the prevailing threshold of judicial control with respect to questions of law and fact and represents the strictest form of scrutiny that EU Courts may exercise[50]. Such standards are exercised by the European Court when individual's rights must be protected against discretionary interferences by firms with their fundamental freedoms. By contrast, marginal review is engaged where the decision touches upon policy matters or entails complex economic assessments and is thought to connote a more relaxed standard of control under which judicial intervention is confined to instances of "manifest errors of assessment" in the decision taken. Such a standard it is arguable may include other considerations with the Court being less willing to intervene to challenge the exercise of an EU body's discretion. In reviewing the exercise of such powers, the Court cannot substitute its own assessment for that of the Community legislature, but must confine itself to examining whether that latter assessment contains a manifest error or constitutes a misuse of powers or whether the authority in question clearly

[45]*Pringle* ***v*** *Government of Ireland* at paragraph 142.
[46]Editorial (2015).
[47]*Gauweiler and Oth. v Deutsche Bundestage* and *Pringle v Government of Ireland* at paragraph 53.
[48]Lehmann (2017).
[49]Türk (2013).
[50]*Tetra Laval BV v Commission of the European Communities* and *Pfizer Animal Health SA v Council of the European Union.*

exceeded the bounds of its discretion[51]. The principle requires that acts of the EU institutions be appropriate for attaining legitimate objectives sought by the legislation at issue and that such measures do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued[52]. Under this standard the EU body must be allowed broad discretion in an area such as that involved in the main proceedings, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.[53]

Decisions of the ECB should be seen as an admixture of a general legislative act and an individual decision[54] as the ECB has a mandate to exercise a degree of discretion when making economic and policy choices within its mandate as provided for in *Articles 127* to *129 of TFEU*, The Statute of the ECB and the ECSB to act in areas of monetary policy. What standards of review should be applied to their actions? Central bankers need credibility to exercise their mission because their task is to a large extent psychological.[55]An overly stringent standard of review could be detrimental to market confidence if there was ex post facto reversal of a decision of a central bank in court. In any standard of review it also needs to be recognised that monetary policy decisions are technical and complex and also require a careful balance of the pros and cons and consist of a value judgment, this is different from other areas where competent authority's actions are narrowly defined by statute.

Any monetary policy decision should be subjected to a limited form of judicial scrutiny, a court should firstly look at whether the ECB or a national central bank has the competence to take a certain measure and then to categorise in accordance with the European Treaties whether the decision is part of monetary policy or not[56]. However, Courts should appreciate that in order to keep central banking as adaptable as possible monetary policy should be understood as a broad and open concept. When assessing the proportionality of a decision made the

[51]*The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd*, and *Omega Air Ltd , Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority*.

[52]See, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco* at paragraph 122; *ERG and Others* at paragraph 86; and *Gauweiler and Others*, at paragraphs 67 and 91.

[53]See, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco* at paragraph 123.

[54]Öberg (2020).

[55]Blinder (2000) at 15-16 provides empirical evidence that credibility is even more important than central bank independence; Rochon & Rossi (2015) discuss the theoretical basis of central bank credibility.

[56]*Gauweiler and Others v Deutscher Bundestag* at para 40 "The ECSB must act within the limits of the powers conferred upon it by primary law and it cannot therefore adopt and implement a programme which is outside the area assigned to monetary policy by primary law".

standard that should be applied is very light and should lead to the annulment of a monetary policy measure only where the measure exceeds what is necessary to achieve its objective in such an obvious way that it can be said to lack a rational basis[57].

The Practical Effect

The practical effect of the *PSPP* Judgment required the German Federal Government and the Bundestag to address the shortcomings of the ECB's decision-making process as to the assessment of proportionality when setting up the PSPP. This led to the ECB providing the Bundesbank with supplementary unpublished documents that contained information that was used when it assessed the proportionality of the PSPP prior to its implementation. This information was passed to the Bundestag who passed a resolution on 2 July, 2020 considering the requirements of the PSPP Judgment to have been fulfilled. This arguably is a middle of the road solution which satisfies the limitations imposed by the PSPP Judgment and allows for the European financial order to continue unhindered in a time of great uncertainty.

From a European perspective the Judgment was met with great consternation. The European Court of Justice issued a press statement in which it made it abundantly clear that when the court gives a preliminary ruling it is binding upon the court for the purposes of the decision to be given in the main proceedings and that divergences between courts of the members states as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty[58].

Conclusions

Arguably this decision has set a bomb under the EU legal order[59] in respect of its financial institutions. Taking the reasoning of the *Bundesverfassungsgerich* at its most stringent any participation by the Bundesbank in an ECB asset purchase programme as a form of quantitative easing will require an extra layer of scrutiny from a German Perspective to ensure that a sufficiently German standard of proportionality has been applied. If it has not then Germany may be excluded from participating in the relevant measures, this represents an untenable position in an economic and monetary union especially for Germany which has a controlling interest. More practically this decision has put a halt to an expansion of powers for the ECB at a time when the pandemic emergency programme needs innovative solutions to prevent a return to significant financial crisis. This could also inhibit the ability of the European financial order to adapt quickly to future emerging

[57]Lehmann (2017).
[58]Press Release 58/20 following the Judgment of the German Constitutional Court of 05 May 2020.
[59]Sandbu (2020).

financial challenges. Effectively this may represent the outer edge of what maybe constitutionally possible under the current framework[60], with negotiations as to what a new financial order may look like, an ongoing pandemic and emerging fiscal difficulties this will be the wrong time to embark on such a review.

European and national courts have also been called upon time and time again to assess whether a decision of a central bank is proportionate, whilst recognising that it is difficult for courts to decide whether a given monetary policy is consistent with a treaty based upon the principle of proportionality. However, it needs to be recognised that this is the situation that the treaty structure leaves us with. Courts need to be urged to use their proportionality review to enhance the legitimacy of Central Bank's activities in the area of monetary policy and to build confidence within the market. If there must be a review of a financial measure such as the PSPP which will have been enacted under unique political and economic circumstances, the standards applied should be limited. A court should check there is a treaty competence to enact the measure and view the actions of monetary policy broadly to appreciate the technical nature of the measures and provided there is a balance of the pros and cons which has been conducted in a rigorous way by a Central Bank the measure should be found to be proportionate. To do otherwise would give the impression of prejudice or preconceptions about the limits of the European financial order which is unacceptable in a monetary union.

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Athens Journal of Law - Volume 7, Issue 3, July 2021 – Pages 413-436

Arbitrate and Violate - A Critique of the Foundation Laid by the Delhi High Court in the Case of NTT DoCoMo Inc. vs. Tata Sons Limited

By Charan Rawat[*]

The decision of the Delhi High Court in the matter of NTT DoCoMo Inc vs Tata Sons Limited and the settlement thereof in the year 2017 has attracted significant attention from all stakeholders. The case involves an analysis of the foreign direct investment policy and the regime regarding foreign investments in India and exits of foreign investors from companies in India. The dispute involves an interplay of interpretation of contracts and the role of the Reserve Bank of India. While the Foreign Exchange Management Act, 1999 does not permit "assured returns" to a foreign investor at the time of its exit, it appears that the arbitral tribunal, and the DHC took a favoured view when it came to NTT DoCoMo Inc. The decision of the DHC, upholding the foreign arbitral award for a contract that was in obvious violation of FEMA was quite startling. Unfortunately, this rationale was also used by the Supreme Court in the case of Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others, which further compounds this issue. The Apex Court accepted the view of DHC in the NTT Docomo case, and held that a violation of the provisions of the FEMA does not result in a "breach of public policy of India". This paper aims to analyse and critiq the decisions taken by the arbitral tribunal, DHC and the Supreme Court in the case of NTT DoCoMo Inc vs Tata Sons Limite and Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others. Besides legality, these two cases also raise serious concerns regarding the quality of corporate governance of companies and the professional ethics of legal advisory services, which has been discussed further in this paper. In the author's view, RBI, as a custodian of the foreign currency reserves and implementer of FEMA, is best placed to interpret the regulations and operational guidelines issued under FEMA. The decision in these two cases, where the parties have used the international arbitration clause to bye-pass the laws of India, has now provided a template for parties to enter into contracts with a deliberate intention to bypass the provisions of the law, and indulge in unethical practices. The paper tries to elucidate how these cases have set an incorrect precedent as regards assured returns in India.

Keywords: *"assured returns", "international arbitration", "Tata - NTT Docomo Dispute", "pricing guidelines"*

[*]PhD Candidate in Faculty of Law at Symbiosis International (Deemed University), Pune, India. Email: charan.rawat@gmail.com.

Introduction – The Agreement and the Dispute

In the landmark case of *NTT DoCoMo Inc.*[1], the DHC took a startling view that an arbitral award permitting an action that may not be in complete compliance with the provisions of the FEMA, is not in violation of the "public policy" of India, and can be enforced. The dispute involved an interpretation of the contractual provisions relating to the exercise of a put option, its interplay with the provisions of the FEMA (and the rules issued thereunder), and the views of the arbitral tribunal (and subsequently, the DHC). While issuing an award in favour of DoCoMo, the arbitral tribunal held that:

> "*It was common ground between the Parties that performance of Tata's obligations under the first part of Clause 5.7.2 was the subject of a general permission in two respects. First, a non-resident purchaser was always able to buy the Sale Shares at the Sale Price, in accordance with Regulation 9(2)(i) of FEMA 20. Second, a purchaser resident in India, including Tata, was always able to buy the Sale Shares at their fair market value, determined in accordance with the pricing guidelines in force from time to time, in accordance with Regulation 10B(2) of FEMA 20. The impediment to performance was therefore factual rather than legal. The only reason these two methods of performance were not available to Tata after delivery of the Trigger Notice in 2014 was that the market value of the Sale Shares had fallen, so that no non-resident buyer was willing to pay the Sale Price; and the fair market value was a fraction of the Sale Price."*[2]

Therefore, the arbitral tribunal took the view (which view was upheld by the DHC), that Tata Sons Limited's inability to buy the shares held by DoCoMo was not due to a legal restriction, but factual and practical considerations. The author humbly disagrees – the extant foreign direct investment policy clearly restricted exits on an "assured returns" basis, and the purchase of the shares of DoCoMo at 50% of the purchase price would run afoul of this restriction. The rationale behind this decision, and an analysis of the same, is set forth in Sections I to IV of this paper.

The principles followed by the arbitral tribunal (and consequently, the DHC) in this case were also subscribed to by the Supreme Court in the case of *Vijay Karia & Other*[3]. Today, several agreements contain similar exit provisions in favour of non-resident investors, relying heavily on the precedent set forth by these 2 cases. The clauses are drafted so as to state that the resident would find a buyer to purchase the shares of the non-resident investor at a pre-agreed price; and upon failure of the resident to do so, the resident would be obligated to purchase the shares at fair market value. The differential, if any, between the fair market value and the pre-agreed price would be paid off as an "indemnity" claim on account of breach of contract by the resident. In the authors view, this a clever and cheeky way to achieve indirectly what cannot be achieved directly – an assured exit at an assured price to the non-resident investor. Through this paper, the author raises

[1] *NTT DoCoMo Inc vs Tata Sons Limited* (hereinafter DoCoMo).
[2] Paragraphs 138 and 139, Final Award of the Arbitral Tribunal dated 22 June 2016.
[3] *Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others*.

several points demonstrating how the view taken by the DHC and the Supreme Court is incorrect and has the potential of being misused. Paragraphs 1 to 7 of this Section I give a brief background of the dispute, the arguments raised, and the rationale behind the award. Further, Sections II to V contain an in-depth analysis of the decision, including an analysis of the corporate governance and legal issues involved. The conclusions of the authors are set forth in Section VI of this paper.

Tata Teleservices Limited[4], a company promoted by Tata Sons Limited[5], is an Indian company engaged in the business of telecommunication and broadband services. In 2009, DoCoMo, a Japanese corporation, agreed to subscribe to 26% of the equity share capital of TTSL, at an aggregate consideration of approximately USD 2.5 billion. Pursuant to this investment, Tata Sons and DoCoMo executed a shareholders' agreement dated 25 March 2009, to record the rights *inter-se* as shareholders of TTSL[6]. The SHA was governed under the laws of India, and any disputes arising therefrom were subject to arbitration under the rules of the London Centre of International Arbitration[7].

Please note that given the sensitive nature of the business involved, the telecom sector in India is heavily regulated. Under the foreign direct investment policy issued by the Ministry of Commerce and Industry, which governs any foreign direct investment in Indian entities ("**FDI Policy**"), companies engaged in the telecom sector can receive up to 49% foreign direct investment, without any government approval. Any investment above 49% of the capital of the company would be subject to the prior approval of the Government of India. The FDI Policy also contains certain performance linked conditions, which are specific to the sector in which the investment is made.

The Dispute

The SHA contained certain pre-defined performance milestones to be met by TTSL in the manner prescribed therein[8]. Failure to meet these Key Performance Indicators would attract Clause 5.7 of the SHA, that reads as follows:

> "*If TTSL failed to satisfy certain 'Second Key Performance Indicators' stipulated in the SHA, Tata would be obligated to find a buyer or buyers for Docomo's shares in TTSL at the higher of (a) the fair value of those shares as of 31st March 2014, or (b) 50% of the price at which Docomo purchased its shares (the "**Sale Price**").*

Furthermore, the SHA also provided that the shares held by DoCoMo could be purchased by Tata Sons itself, or Tata Sons could arrange for these shares to be bought by a third party at a price prescribed in the SHA (per the pre-arranged

[4]Hereinafter TTSL.
[5]Hereinafter Tata Sons.
[6]Hereinafter SHA.
[7]Hereinafer LCIA.
[8]Hereinafter Key Performance Indicators.

pricing formula). In essence, DoCoMo viewed Clause 5.7 as a "safety net", which provided "stop-loss protection" in the event TTSL failed to perform satisfactorily[9].

TTSL was unable to demonstrate its compliance with Key Performance Indicators due to prevailing market conditions. Accordingly, on 7 July 2014, DoCoMo served a notice to Tata Sons, requesting Tata Sons to find a buyer for its shares in TTSL within the stipulated period, i.e., by December 3, 2014. Tata Sons was unable to find a suitable buyer and accordingly, a dispute arose between the parties.

The Pricing Guidelines Conundrum

Under the FDI Policy, any purchase/subscription of shares of an Indian company by a non-resident cannot take place *below* the fair market value of the equity shares, as determined by a chartered accountant, cost accountant or merchant banker. Similarly, in case a non-resident wishes to sell its shares in an Indian company to a resident, the value of such shares cannot *exceed* the fair market value of such shares, as on the date of sale. These pricing conditions are collectively referred to as the "*Pricing Guidelines*".

It is important to note that the FDI Policy does not permit non-resident investors to exit its investment in India, i.e., sell the shares of an Indian company at an *assured return*. This means that the divestment price *cannot be pre-arranged.* Accordingly, any exit by the foreign investor must be at fair market value (or lower) as determined by a chartered accountant, cost accountant or merchant banker *at the time of exit*, and must be in strict compliance with the Pricing Guidelines. Therefore, the exit price for an investment cannot be determined upfront at the time of the investment since that would fall under the scope of an "assured return".

Citing these provisions, Tata Sons refused to comply with the obligations of Clause 5.7.2, stating that the purchase of DoCoMo's shares in TTSL at the Sale Price would run afoul of the Pricing Guidelines, and consequently, the FEMA. Further, Tata Sons stated that such sale would require special approval of the RBI, since the sale would be in violation of the provisions prohibiting an assured return. In the author's view, the SHA had, from the get-go, included a clause that could potentially be deemed to be in conflict with the provisions of the FEMA (since it laid down a pre-agreed price for the sale of DoCoMo's shares). It is also imperative to note that TTSL had run-up substantial losses, due to which fair value of its equity was well below the pre-agreed price. Accordingly, it was also difficult to find a third-party buyer to purchase DoCoMo's TTSL shares.

In furtherance to the sale notice issued by DoCoMo, Tata Sons approached the RBI, seeking their approval to execute this transaction. RBI refused to grant this approval, citing the provisions set forth above. Stymied with this refusal of RBI, Tata Sons could not buy DoCoMo's shares as per the SHA requirements.

Aggrieved at the refusal by Tata Sons to meet its obligations under SHA, DoCoMo referred the dispute to LCIA to enforce its *put option*[10]. The LCIA

[9]Paragraph 10, Final Award of the LCIA dated 22 June 2016.

issued an award in favour of DoCoMo, forcing Tata Sons to pay USD 1.21 Billion to DoCoMo as damages for "breach of contract". The award was challenged by Tata Sons in DHC under the provisions of Section 48 of the Arbitration & Conciliation Act, 1996[11]. The decision of the DHC has been explained further in this paper.

Arguments raised before the Arbitral Tribunal[12]

The fundamental cause of the dispute was the inability of Tata Sons to buy DoCoMo's shares in TTSL in accordance with the procedure prescribed in the SHA. The issues and defences raised by Tata Sons and DoCoMo before the AT were more or less identical, but seeking different results – Tata Sons seeking to pay only as per the valuation models permitted under FEMA, whereas DoCoMo wanted the pay-out as per the SHA. Further, DoCoMo also demanded damages on account of breach of contract by Tata Sons. A brief description of the issues raised by each party before the AT is listed below:

Issues Raised by Tata Sons[13]

Some of the key issues submitted by Tata Sons were as follows:

(i) Whether the purchase of the shares from DoCoMo at the Sale Price would require special permission from the RBI?
(ii) Whether Tata Sons had an "absolute" obligation to purchase the shares in accordance with Clause 5.7 of the SHA?
(iii) What is the consequence in law, and under the SHA, if RBI refuses to grant special permission to purchase the shares of DoCoMo?
(iv) Whether Tata Sons' non-acquisition of the shares at the Sale Price directly or indirectly constituted a breach of the SHA by Tata Sons?
(v) Whether payment of any amount in excess of the amounts stipulated in the Pricing Guidelines is prohibited, and if yes, then can such excess amount can be indirectly made good by way of an award of damages or restitution?
(vi) Whether in any event DoCoMo is entitled to restitution of 50% of its investment?

Issues raised by DoCoMo[14]

Some of the key issues submitted by DoCoMo were as follows:

[10]A "*Put Option"* is a contract that gives the owner of the contract a right, but imposes no obligation, to sell to another person (the put option seller or writer) a specified amount of an underlying security, at a pre-determined price, on a pre-detrained date or on occurrence of a pre-specified event. A close analogy will be an insurance contract.
[11]Hereinafter Arbitration Act.
[12]Hereinafter AT.
[13]*DoCoMo at* Paragraph 8.
[14]*DoCoMo at* Paragraph 9.

(i) What were Tata Sons obligations under Clause 5.7 of the SHA, and did it perform those obligations?
(ii) Was Tata Sons excused from performing its obligations under Clause 5.7 of the SHA on the grounds that such performance was illegal under Indian law?
(iii) Were other methods of performance available to Tata Sons to which there was no legal impediment?
(iv) Was RBI's permission required:
    a) for a sale of the shares held by DoCoMo at the Sale Price to a third party?
    b) in order to allow Tata Sons to make payment by way of an indemnity?
    c) for a sale of the shares held by DoCoMo to a foreign affiliate(s) of Tata?
(v) Even if RBI permission was required for Tata Sons to purchase the shares at the Sale Price, or to indemnify DoCoMo up to the Sale Price following a sale to a third party at any price, is Tata Sons liable for its failure to perform?
(vi) Can Tata Sons rely upon the defence of illegality as set forth under Clause 2.2 of the SHA[15]?
(vii) To what damages or other form of relief including restitution is DoCoMo entitled?

Award of the AT

While considering the arguments raised by Tata Sons and DoCoMo, the AT granted an award in favour of DoCoMo, directing Tata Sons to pay USD 1.21 Billion to DoCoMo as damages for "breach of contract". Some of the points raised by the AT in coming to this conclusion are listed below:

(i) The object of Clause 5.7.2 of the SHA was to guarantee DoCoMo an exit at a minimum of 50% of the subscription price, i.e., the price paid by DoCoMo to subscribe to the shares of TTSL. This was not seriously challenged by Tata Sons in the dispute. Further, the AT was of the view that Clause 5.7.2 of the SHA was drafted in the way that it was because "*the Parties knew that exchange control regulations and other considerations might prevent performance under a simple put (option)"*[16]
(ii) The primary obligation of Tata Sons under Clause 5.7.2 was to find a buyer or buyers for the shares held by DoCoMo, on the terms that DoCoMo receives the Sale Price. That obligation was not qualified in any respect and was an absolute obligation.
(iii) The AT was of the view that the parties had provided for alternative methods of performance of this obligation, i.e., exit of DoCoMo, because

[15]Clause 2.2.2 of the SHA prohibited the parties from acting in violation of any applicable law.
[16]Word *"option"* in *italics* added by author for providing clarity.

they knew there might be restrictions on performance at the time of exit. For example, Tata Sons might not be able to find a buyer at the Sale Price because a 26% holding in an unlisted company is illiquid, licensing restrictions might prevent Tata Sons from increasing its holding in TTSL, *or there might be a requirement for special permission from RBI.* The parties must have intended that Tata Sons could only avail itself of those alternatives if it could perform in fact and in law. Therefore, alternatives were provided with knowledge that such an obligation may not be able to be performed.

(iv) The background to the SHA clearly establishes that both parties recognised that the FDI Policy might affect the ability of Tata Sons to perform its obligations under Clause 5.7.2, one way or another. The parties could have provided that Tata Sons would be obliged to perform its obligations under Clause 5.7.2, only if it obtained any necessary regulatory approval (i.e., inserted language akin to "Subject to RBI consent"), as they did elsewhere in the SHA, but they chose not to. Therefore, it is unlikely that the parties intended the obligation of Clause 5.7.2 to be discharged because an Indian buyer could not lawfully pay the Sale Price. There was no basis for implying such a provision. Further, the SHA provided for certain alternatives for the purchase of the shares as well. Since Tata Sons was unable to fulfil any such alternatives, it has committed a breach of contract.

Challenge before DHC

Aggrieved by the order of the AT, Tata Sons initially filed its objections to the enforcement of the award before the DHC. Subsequently, a joint application was filed by DoCoMo and Tata Sons seeking to place on record the consent terms agreed between the parties. Pursuant to the consent terms, Tata Sons agreed to pay the amount awarded by the AT. RBI had made an effort to implead itself in the dispute, since the dispute pertained to foreign exchange laws and FDI, and since RBI is the regulator and implementer of FEMA. Further, RBI also objected to the arbitral award as the award directed Tata Sons to take an action which was in direct conflict with FEMA. While the DHC heard these arguments, it refused to allow RBI to become a party to the case.

In a surprising turn of events, DHC upheld the arbitral award and ruled in favour of DoCoMo, overlooking / overriding the objections of RBI as regards the violation of the provisions of the FEMA.

The DHC, while upholding the validity of the award, raised the following points[17]:

(i) Both parties - Tata Sons and DoCoMo – agreed that the SHA protected DoCoMo from not losing more than 50% of its investment.

[17] *DoCoMo at* Paragraph 58.

(ii) Even RBI appears to have accepted that this was in the nature of a downside protection and was not in the nature of an assured return on its investment (explained below).

(iii) Clause 5.7.2 of the SHA was a contractual promise by Tata Sons to find a buyer for DoCoMo's shares which could always have been performed using general permissions of RBI under FEMA Notification 20[18]. This would not run afoul of the Pricing Guidelines, since it was only a contractual obligation to find a buyer, which had not been complied with.

(iv) Section 56 of the ICA provides that an agreement to do an impossible act is void. However, Clause 5.7.2 of the SHA is not impossible of being performed even after considering the Pricing Guidelines prescribed under FEMA and regulations issued thereunder. Tata Sons could have lawfully performed its obligations under Clause 5.7.2 through a non-resident buyer, who could purchase the shares at any price, including at a price above the shares' market value.

Alternatively, a purchaser resident in India could have bought the shares at fair market value followed by Tata Sons compensating Docomo for the price difference. FEMA and the regulations issued thereunder do not excuse non-performance of contractual obligations. There were alternates available with Tata Sons by which the obligations in question are covered by general permissions under FEMA. Therefore, an award of damages for breach of Clause 5.7.2 would not amount to a circumvention of relevant FEMA regulations. Failure of Tata Sons to find any buyer (including a non-resident buyer) amounts to a breach of contract, therefore entitling DoCoMo to damages.

Therefore, the Final Decision of the DHC was as follows

(i) SHA cannot be said to be void or opposed to any Indian law including the FEMA, much less the ICA. [19]

(ii) FEMA contains no absolute prohibition on contractual obligations. It envisages grant of special permission by RBI.[20]

(iii) As rightly held by the AT, Clause 5.7.2 of the SHA always was legally capable of performance without the special permission of RBI, using the general permission under sub-regulation 9(2) of FEMA 20.

(iv) As far as the award itself is concerned, the interpretation placed by the AT on the clauses of the SHA was consistent with the intention of the contracting parties and not opposed to any provision of Indian law.[21]

(v) There is nothing in the SHA as interpreted by the award that renders it void or voidable under the ICA or opposed to either the public policy of India or the fundamental policy of Indian law.[22]

[18]FEMA Notification 20 refers to the Foreign Exchange Management (Transfer or Issue of Security to a Person Resident Outside India) Regulations, 2000.
[19]*DoCoMo at* Paragraph 60.
[20]*DoCoMo at* Paragraphs 53 and 54.
[21]*DoCoMo at* Paragraph 61.

(vi) The AT's interpretation of the various provisions of the FEMA and the regulations thereunder have also not been shown to be improbable or perverse.
(vii) Violation of FEMA is compoundable offence and RBI could take such a step to rectify the flaw in the agreement.
(viii) What was invested by DoCoMo was US $ 2.5 billion and what it will receive in terms of the award is only 50% of that amount. Therefore, no ground under Section 48 of the Arbitration and Conciliation Act, 1996 is attracted to deny the enforcement of the award.

Extraneous Factors at Play

While the DHC took the view that the obligations under Clause 5.7.2 were in fact, contractual obligations that were in compliance with the provisions of the FEMA, it is possible that that this decision was also influenced, in some way, by the growing strategic relationship between India and Japan. At the time, the Indo-Japanese relationship covering FDI flows, and diplomatic and strategic relationships between India and Japan were casting its long shadow on the subjects. India had received and was anticipated to receive significant foreign investment from Japan. This issue had also been raised through diplomatic channels with Government of India for an amicable resolution.

It is instructive to note that even the regulators were conscious of this macro trans-national relationship, and this was shaping their views post the decision of the AT. In this regard, a few of the paragraphs of judgement[23] citing the RBI correspondence are instructive. The paragraphs below record the decision of the then Deputy Governor, Mr H R Khan, mentioned as DG (HRK) in the paragraph below:

> "*I would take a different view. The assured return applies where the overseas investor gets his entire principal PLUS a certain return. Here both the parties agreed to protect the downside loss at 50% of the invested value. This is according to me a fair agreement/contract and we should facilitate honouring this commitment. We may approve. DG(HRK)"*

This noting was made in response to the views of the then Executive Director Mr G Padmanabhan; mentioned as ED(GP) in the paragraph below:

> "*Although strictly as far as wordings of the regulation this may not be allowed. From the point of view of equity & the intention behind the regulation (that there would be no assured return) the foreign investor has a merit in this claim. The larger issue of fair commitment to reasonable contracts in relation to FDI inflows also have to be kept in view. Our strategic relationship with Japan has also become very significant in relation to FDI inflows. In the circumstances, we may propose to accept the plea of*

[22]*DoCoMo at* Paragraph 60.
[23]*DoCoMo at* Paragraph 44.

the foreign investors & in future, in all such cases similar principle could be applied. ED (GP) GM FED GM (HSM)"

It is thus obvious from the above paragraphs that the regulatory thought process was affected by the extra-legal factors even though the constraints of regulations were identified by the then ED. Accordingly, while the AT and DHC did raise some cogent points with respect to the interpretation and Clause 5.7.2 and its interplay with the Pricing Guidelines and the FDI Policy, it could also be said that the influx of foreign investment coming in from Japan played its part in the view adopted by the DHC.

Analysis of the Case

The case, findings of AT and the decision of DHC have been assessed from different vantage points as under:

1. Obligations cast on investor and investee in cases of FDI under provisions of FEMA;
2. Validity of the contracts within the meaning of ICA;
3. International arbitration and its impact on domestic laws;
4. Basic law doctrine envisaged in Arbitration Act;
5. Implications of this judgement on dispute resolution for cases of FDI;
6. Issues of corporate governance and ethics; and
7. Professional ethics of the legal advisors.

These are critical areas for analysis as India remains a capital scarce country, and FDI is a potent engine of economic growth. India has remained one of the more favoured destinations for FDI. It is hence imperative that the country have a stable and predictable exchange control regime that sends our clear signals to the investors, existing and potential. A thorough analysis is much needed for benefit of all stakeholders viz. investors, investees, legal advisors, bankers involved in implementation of the FEMA.

The SHA, decision of the AT and the court rulings need incisive analysis for the impact these findings have had. A rhetorical response can be summarised in a single sentence *–AT and Court got it all wrong*. They stuck to the technical wordings and missed the aim of the law in its entirety. An analysis of the judgement may lead to a conclusion that while put option clauses in a SHA assuring positive return to a foreign equity investor are prohibited in law, a downward protection of negative returns may be provided to foreign investors. If this were so, an Indian counter party to the SHA may agree to assure a foreign investor that if the investee company business is not doing well, the foreign investor may be provided an exit at a price which is above the fair market value of his shares. Such exits may be structured by making the Indian counter party agreeing that he will find a person resident outside in India who will buy the foreign investors shares at a contractually agreed price which could be above the fair market value of such shares.

If in the event the Indian party is unable to find such a third party non-resident buyer, the Indian counter party may itself buy the shares from the foreign investor at the fair market value, and the differential amount between the fair market value of such shares and the contractually agreed exit price may be shown as indemnity/compensation from the Indian counter party for being unable to fulfil its contractual obligations to find a third party buyer. According to the author, this was not the intention of the legislator while prohibiting assured returns and defeats the purpose of the law.

Obligations of Investor and Investee under FEMA - Was Investment by DoCoMo an Equity Investment in TTSL?

According to the author, the whole dispute seems to have overlooked the very obvious and fundamental question – was DoCoMo an equity investor or a debt provider?

Any investment in equity by its very nature is exposed to price risk. The principle amount invested is always at risk of loss. The investor is willing to take this risk in anticipation of profit generation capacity of the enterprise. A profitable and successful enterprise will on its own lead to enhancement in value of equity investment. The upside potential to the equity investment comes at a cost of risk of 100% loss of investment.

An equity investor hopes for investment and business plans to work out as thought through. If the investee company performs well, the investor receives significant rewards through profits. If it does not, its capital is lost in varying amounts, including 100% of amount invested. The world of limited liability corporations is replete with skeletons of failed enterprises and jilted shareholders.[24] Therefore, the author is of the view that an equity investors investment is subject to any risks in loss of value, which need not be legislated for in the agreements.

A creditor, on the other hand, wants return of capital and some interest on monies lent. Therefore, from a creditors standpoint, steady cash flows have significant importance. Having said that, try placing the motivation of DoCoMo against the fundamental definition of equity vs debt. In the authors view, this distinction was not made clear with respect to the investment made by DoComMo - and it could be argued that this was a debt investment disguised as an equity.

This argument is strengthened by the fact that DoCoMo was unwilling to accept a downside risk of losing 100% of amount invested, but also wanted the upside of equity. Having its cake and eating it too!

Paraphrasing the words of James P Carse[25] *DoCoMo wanted to play an infinite game with rules of a finite game.*

Validity of the Contract - Is SHA a Legitimate Document?

The decision of AT and the DHC was premised on the view that the SHA was a legitimate document. There are enough evidences and findings within the

[24]Goldgar (2008); Odekon (2017); Dale (2004).
[25]Carse (1986).

decision of AT and the DHC that leads one to conclude that the validity of the SHA is questionable in itself. This premise itself is found to be without foundation and the edifice of the judgement collapses.

The suspect legality of the SHA has been identified by the AT in its award, as is the inability of Tata Sons to perform under the contract.[26] The fact that the SHA had clearly legislated various alternatives to provide an exit to DoCoMo, and laid down alternate methods to achieve the assured repayment to DoCoMo is a clear indication that the parties has consciously created a structure to circumvent the express provisions of FEMA regulations and directions issued thereunder.

The AT has held that the object of Clause 5.7.2 was to guarantee DoCoMo an exit at a minimum of 50% of the subscription price. This was not seriously challenged by Tata Sons at the time of the dispute. However, Clause 5.7.2, as per the AT, Clause 5.7.2 was *"drafted in the way that it was because "the Parties knew that exchange control regulations and other considerations might prevent performance under a simple put."*[27] This is recognition that both parties knew at the time of execution of the SHA that the exercise of the put (option) by DoCoMo was not possible under the law as prevailed then.[28]

The European put option i.e. a right to sell a security at a fixed rate on a fixed date, is not permitted to a foreign investor even as on the date of this critique.

AT has clearly recognised that *"The parties provided for alternative methods of performance because they knew there might be restrictions on performance; or there might be a requirement for special permission from RBI."*[29] Thus, the parties knew from the beginning, that the performance of the option is not possible without special permission of RBI.

Further, the AT highlights that

> "*SHA established that both parties recognised that the FEMA Regulations might affect the ability of Tata to perform one way or another. The parties could have provided that Tata would be obliged to perform only if it obtained any necessary regulatory approval ("Subject to RBI consent"), as they did elsewhere in the SHA, but they chose not to. It was unlikely that the parties intended the obligation in the first part of Clause 5.7.2 to be discharged because an Indian buyer could not lawfully pay the Sale Price. There was no basis for implying such a provision."*

The AT findings underscore the fact that both parties knew at the time of signing the SHA that Tata will not be able to pay the amount as provisions of FEMA prevented such assured payment. Tata clearly knew that it needed prior RBI approval for the same.

Given the above, it is quite apparent that the parties knew of the possible violation of the provisions of the FEMA. In this regard, it will also help to review

[26]Its intriguing that despite having identified the clauses that were created to circumvent the provisions of FEMA, AT still found the SHA enforceable and court accepted the same.
[27]Paragraph 108, Final Award of the Arbitral Tribunal dated 22 June 2016
[28]FDI guidelines till date do not permit a non-resident investor to have a put option on equity investments.
[29]*DoCoMo at* Paragraph 11(iii).

the provisions of Master Circular – Foreign Investment in India (MC-FDI)[30] issued by the RBI on 1/7/2008. This MC FDI is a set of operative guidelines related to FDI issued to AD banks in particular and general public at large, to govern all aspects of existing and proposed FDIs between 1/7/2008 -30/6/2009. Annex 3 to MC FDI deals with transfer of shares/convertible debentures, by way of sale from a person resident outside India to a person resident in India. Para 2.3.(b)(ii)(C) of the Annex 3 states:

> *"where the shares are not listed on any stock exchange, [the sale shall occur] at a price which is lower of the two independent valuations of shares, one by statutory auditors of the company and the other by a Chartered Accountant or by a Merchant Banker in Category 1 registered with Securities and Exchange Board of India."*

Put simply, if a non-resident person wants to sell shares in an unlisted company to a person resident in India, the fair market value of these securities will need to evaluated at the time of such sale. After such computation by the statutory auditors and a chartered accountant/merchant banker, the lower of these 2 valuation is what can be paid to non-resident seller. Having laid down the provisions of the law, and given the poor performance of TTSL at the time of DoCoMo's exit, it is crystal clear that DoCoMo could not get a valuation for its stake higher than the fair valuation arrived at by independent valuers, which was substantially below the pre-agreed price. Any agreement that indicated a potential sale price other than the fair value clause is therefore, a nullity.

AT also had an interesting argument[31] on the issue regarding whether the SHA violated the provisions of the FEMA or not. The AT states as follows:

> *"The performance of TTSL's obligation under Clause 5.7.2 was subject to a general permission from the Reserve Bank of India (RBI) in two respects. First, a non-resident purchaser was always able to buy the same share at the sale price in accordance with Regulation 9(2)(i) of FEMA 20; second, a purchaser resident in India including Tata was also able to buy the Sale Shares at their fair market value, determined in accordance with the pricing guidelines in force from time to time, in accordance with Regulation 10(B)(2) of FEMA 20."*

The first contention latches on the FEMA provisions that a sale between 2 non–residents is not affected by the Pricing Guidelines. However, it also obliquely suggests that Tata Sons should have arranged for purchase of these shares by a non-resident buyer, who would have purchased the shares of DoCoMo at the price agreed in the SHA. Please note that the fair market value of the TTSL shares was below the price set out in the SHA. Assuming that Tata Sons had found a non-resident buyer to purchase the shares of DoCoMo at the pre-agreed price, the

[30]Master Circular on Foreign Investment in India, https://www.rbi.org.in/Scripts/BS ViewMas Circulardetails.aspx?id=4312

[31]*DoCoMo at* Paragraph 12(i).

motivation of such a buyer to acquire an asset at a substantially inflated price remains unclear. This goes against the very grain of economic rationale.

Does the SHA Stand Scrutiny under Indian Contract Act (ICA)?

While analysing this issue, the AT and DHC both recognised that the SHA did indeed carry clauses that may not be enforceable in view of provisions of FEMA. The author holds the view that while reviewing the underlying contract and its aims, a very narrow focussed technical view was taken by the AT. In this regard, the author would like to explain the principles set forth in the ICA, as set forth below.

Section 23 of ICA deals with lawful consideration and objects of a contract. Under section 23, any contract where the consideration or object is unlawful is void.

A contract, its consideration and object are considered to be lawful unless:

(i) it is forbidden by law; or
(ii) it is of such a nature that, if permitted, it would defeat the provisions of any law; or
(iii) it is fraudulent; or
(iv) it involves or implies, injury to the person or property of another; or
(v) the Court regards it as immoral; or
(vi) it is opposed to public policy.

Focussing our attention on the SHA in this case, violation of the clause (ii) i.e. *"its objects are such that if permitted would defeat the provisions of any law"* could not be starker. It is therefore clear that the alternative methods of performance were deliberatively provided to evade the restrictions imposed by FEMA.

Basic Law Doctrine under Arbitration Act - Enforceability of the International Award

Under section 48 of the Arbitration Act, an Indian court can refuse to enforce a foreign arbitral award if such award falls within the scope of the specific grounds listed therein.

One such ground is if the award violates the "public policy of India". In the *Renusagar*[32] case, the Supreme Court had held that enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to:

(i) the fundamental policy of India; or
(ii) the interest of India; or
(iii) justice or morality.

[32]*Renusagar Power Plant Co. Ltd. vs General Electric Co*. (1994).

In a subsequent case, *Shri Lal Mahal Ltd.*[33], the Supreme Court held that "enforcement of a foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii***) the interests of India;*** or (iii) justice or morality."

An award being *contrary to interest of India* is one of the grounds for rejection of the award. It is therefore a logical conclusion that making a payment in scarce foreign currency under a contract that has prima facie breached FEMA makes such an award *contrary to interest of India*.

Commercial and Regulatory Aspects of Award

While confirming that Clause 5.7.2 of the SHA was not in violation of the FEMA, the AT stated that Tata Sons had other alternatives to enforce the exit of DoCoMo, including finding a third party non-resident buyer for the shares. However, these shares were valued at a price much below the price agreed in the SHA. Accordingly, it beats common sense to assume that an unconnected person would buy an asset at prices substantially higher than the intrinsic value. This becomes all the more significant since India has stringent exchange control rules and any outward flow of foreign exchange needs to meet detailed regulatory requirements, supported by documentary evidence. Short of creating fictitious documents to support this exchange outflow, Tata Sons could not have made a remittance to recompense the proxy investor.

The only way these shares could be sold to another non-resident investor, would be if an overseas associate of Tata Sons had purchased the shares of DoCoMo.[34] This was an issue raised by DoCoMo to AT as well[35]. It is certainly within realm of arguments that with multitude of overseas subsidiaries within Tata conglomerate, any overseas entity could buy these shares. However, this would be in violation of the FDI Policy. Any FDI can only be made by a person *not resident in India*. The FEMA defines "*persons resident in India*[36]*" as "an office, branch or agency outside India owned or controlled by a person resident in India"*. Thus, an overseas subsidiary, controlled by owned and / or persons in India will fall within purview of this definition. Therefore, an overseas affiliate of Tata Sons would be regarded as a "person resident in India" and would therefore not be able to hold the shares as a "non-resident investor".

At an operational level these decisions create a major headache for the commercial banks who act as Authorised Dealer (AD) Banks to the transactions. AD Banks are obliged to adhere to the guidelines issued by RBI and follow the same in letter and spirit. Till date, there has been no modification of the guidelines post the decision of the DHC in the DoCoMo case. Thus an AD Bank can very

[33]*Shri Lal Mahal Ltd. vs Progetto Grano Spa* (2014).
[34]Tata is a large conglomerate, has various companies in India and multitude of overseas subsidiaries.
[35]Refer para 3.2(e)(iii) Section I.
[36]Foreign Exchange Management Act 1999, s 2(*v*)(iv).

well refuse to handle the transaction which has clauses similar to the ones seen in case of Tata Sons.

Inferences

It can be safely inferred from the foregoing that:

a) Nature of investment (i.e., whether it as debt or equity) made by DoCoMo was suspect from the get go. It is easily distilled that DoCoMo had made a debt investment disguised as equity.
b) Both parties entered into SHA knowing full well that the commitments made run afoul of provisions of FEMA and thus could not be complied with. If they were convinced that these commitments are enforceable, there was no need for Tata Sons to approach RBI for approval to complete the exercise of the sale option.
c) SHA had created alternate means of achieving the ends that were not otherwise permissible under FEMA.
d) Parties approached arbitration and court with unclean hands.
e) Any suggestion that Tata Sons could have an overseas affiliate buy the shares of DoCoMo is an invitation to commit further violation of law since commercially this was not feasible.

The author holds that these issues indicate that the SHA was in violation of FEMA, and accordingly, in violation of Section 23 of ICA. The decision of AT awarding damages - for breach of performance contract - which were equal to the sale consideration, stymies and defeats the provision of FEMA. This decision militates against the legal maxim

> *"If the thing stipulated for is in itself contrary to law, the action by which the execution of the illegal act is stipulated must be held as intrinsically null: pactis privatorum juri publico non derogatur".*

Justice would have been served well if the profound words Chief Justice Wilmot were remembered. "*No polluted hand shall touch the pure fountains of justice. […] The manner of the transaction was to gild over and conceal the truth; and whenever Courts of law see such attempts made to conceal such wicked deeds they will brush away the cobweb, varnish and show the transactions in their true light.*"[37]

[37] *Collins v Blantern* (1767).

Implications for other Similar Instances

As a connected subject, the case of *Vijay Karia & Others*[38] is worth analysing with respect to the above.

A brief summary of the facts are as follows:

(i) Prysiman had acquired majority stake in an Indian company that was promoted by Mr Vijay Karia.
(ii) The share purchase agreement had certain clauses which when triggered provided for transfer of shares from parties resident in India to parties resident outside India at a discounted price. Agreement also provided for arbitration to settle the disputes.
(iii) There were disputes between the parties and matter was referred to LCIA.
(iv) Indian party challenged the transfer of shares at a discount citing provisions of FEMA. Nevertheless, the arbitral award was in favour of Prysiman, the non-resident party.
(v) Enforcement of the award was challenged in India in terms of section 48 of the Arbitration Act.
(vi) Supreme Court upheld the award and permitted transfer of shares to non-resident party at a discount. The shares were transferred at a lower valuation than is permitted under FEMA.

Sum and substance of judgement delivered by the apex court is that a violation of FEMA does not vitiate the underlying contract. The court held that "*if a particular act violates any provision of FEMA or the Rules framed thereunder, permission of Reserve Bank of India can be obtained post-facto if such violation can be condoned."* The rules relating to compounding impose financial penalties on the violators as a deterrent. This power to impose penalty; and not incarcerate the violators as was the law under FERA, 1973; is not a power to *condone or approve* the violations. It begs explanation how the apex court has interpreted this power of RBI as power to condone.[39]

Further, the court held that "*a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian Law."*

FEMA does not provide for rectification of breach, it empowers RBI to imposes penalty on violators. An analogy of a tax payer who has delayed in filing its income tax return will help. Under Income Tax Act, 1961, such delayed filings attract penalty and fines. Will the payment of such amounts be considered as an *approval* by Income Tax Authorities for delay or will it be considered a *penalty for breach* of provisions of law? Would it have ***rectified*** the breach of law? Such provisions for imposition of penalty for breach of legal provisions exist in almost

[38]*Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others*.

[39]Administrative process for considering such breaches and violations of FEMA have been detailed in the *Master Direction- Compounding of Contraventions under FEMA, 1999* issued by RBI on 1/1/2016, consolidating the procedures in a single document. Powers to compound the offences is vested in RBI vide section 15 of FEMA which empowers the RBI to compound any contravention as defined under section 13 of the FEMA.

all laws in India. Will payment of penalty upon breach of any of these laws be considered as an *approval* of such illegal acts upon payment of penalty?

Role of the RBI

The Supreme Court held that

> *"even assuming that Rule 21 of the Non-Debt Instrument Rules requires that the shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach."*

Resident shareholders had raised the issue that shares cannot be sold to a non-resident investor below the market price. Following the observations of the court, if RBI instructs that shares be sold only at market value as per the rules, how would the award be enforced? The refusal to grant permission by RBI to sell shares at less than the fair value renders the court decision infructuous. The observations of court are thus incongruous with the final decision.

This is the core conflict between the powers of RBI as regulator and enforceability of an award that is premised on the violation of the underlying law. Further, even if RBI were to take action, the non-enforcement of a foreign award on the ground of violation of FEMA would not arise, as the award does not become void on that count.

As highlighted above, the execution and enforcement of award is contingent upon RBI agreeing to grant approval. It is within the powers of RBI to deny approval as the nub of the conflict, the edifice of the underlying contract, itself is executed in violation of extant rules. This case once again showed that the contract *ab initio* was in violation of FEMA. The usual trick of recourse to international arbitration at LCIA was played. Arbitration award was upheld by apex court even though the underlying contract was in violation of FEMA.

Thus the decision in case of Tata - NTT DoCoMo has set a wrong precedent, and has provided an opportunity to enter into cross border transactions which would not be permissible under FEMA, thereby diluting the powers of RBI.

Doctrine of Fundamental Policy of Indian Law

What is meant by Fundamental Law in Context of International Arbitration?

In both these cases, the foreign award was upheld on the premise that a violation of a FEMA regulation or rule does not violate the fundamental policy of

Indian law. Bar for such breach was set up in the matter of *Renusagar*[40] wherein apex court held that

> *"The fundamental policy of Indian law must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised."*

Referring favourably at para 82, court referred to the DHC decision in *Cruz City*[41] wherein DHC held that "*One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise."*

Incidentally, the 2015 amendment to Arbitration Act, amending Section 34 has embedded the same public policy provision of Section 48 with respect to an arbitration seated in India. As court noted in this case *"So far as "the public policy of India" ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to "public policy of India" would be the same as the ground of resisting enforcement of a foreign award in India."*

This raises two core issues with respect to:

1. What defines or what is the *core values of a member state's national policy*?
2. Can a private contract override the laws of a member state?

Let's address the first hurdle. In the matter of *Cruz City*[42], DHC had opined that *"The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental legislative policy,* ***not a provision of any enactment****." (emphasis added)*

Courts have held that a law that is foundational to manage the foreign currency reserves and flows is not fundamental to preserving India's sovereign assets in shape of foreign currency and economic stability. Every law, every legal provision is critical to further the sovereign duties, obligations and public interest in its sphere. FEMA is fundamental to managing foreign currency management, Public Debt Act is fundamental to managing the public finances of Centre and the States, OECD Principles for Enhancing Integrity in Public Procurement read with Prevention of Corruption Act is fundamental in suppressing and eradicating corrupt practices from public procurement process.

Can it be said that violation or breach of provisions of these laws/regulations/ rules does not affect public policy? Will courts uphold a contract in blatant

[40]*Renusagar Power Plant Co. Ltd. vs General Electric Co*. (1994).
[41]*Cruz City 1 Mauritius Holdings vs Unitech Limited* (2017).
[42]*Ibid.*

violation of any of our myriad laws simply because the contract is made subject to international arbitration?

If yes, then is it incorrect to infer that save for fundamental rights covered under Articles 12 to 35, every other law, enactment or constitutional provision can be made subject to arbitration under New York convention, overriding the sovereign powers of the state?

Corporate Governance & Professional Ethics

Corporate Governance Compromised

The peripheral issue connected with these cases is one of corporate governance. In both these cases, the agreements were executed in full knowledge of the fact that these are in violation of extant guidelines. Unlike in *Vijay Karia,* the SHA in the DoCoMo case clearly created a secondary channel for payments that were otherwise not permissible under FEMA. These patent breaches were identified by the arbitration tribunal as also the courts.

While the cases have been resolved and beneficiaries paid off, mockery has been made of the sovereign laws by these private contracts. While the court decision has upheld the enforceability of the contract, the cloud of illegality remains. It is also strange to see that neither the companies concerned, nor the people who facilitated such illegal contracts have bene held accountable.

Directors of a company are accountable to the shareholders. Albeit day to day operations are delegated to executive management, board cannot escape its accountability for illegal acts done by the employees. This is the fiduciary duty that directors owe to the stakeholders.

The *Tata Sons – NTT DoCoMo* issue unravelled in a board room coup leading to ouster of the Chairman Mr Cyrus Mistry. There is enough media evidence to suggest that Tata Sons under his leadership had refused to recognise the secondary route for making the payment[43]. It is also evident that this strident legal view of Mr Mistry collided with the views of erstwhile management that was led by Mr Ratan Tata that had executed the contract with NTT-DoCoMo.

As discussed in Section II above, if Tata Sons were absolutely convinced of their stance and legality of their contract, there was no reason for them to approach RBI for approval or contest the payment in arbitration. This itself indicates that either they knew that the contract was not kosher or alternately, they wished to avoid making payments which they had agreed for.

Incidentally, these are not the only instance in recent past where corporates or financial institutions have taken positions/decisions which are in direct conflict with provisions of FEMA.

[43]Srivas (2020). See also ‘Cyrus Mistry and Tatas spar over DoCoMo case, Mistry says Ratan Tata was always kept in loop’ (2016).

A Recent Instance of Dispute between Altico Capital and HDFC Bank is Case in Point

HDFC Bank was ordered by RBI to reverse the controversial action taken by them in appropriating a INR 210 Crores held in trust with HDFC Bank by Altico Capital.[44] This was a rare occasion that pitted State Bank of India Chairman Mr Rajnish Kumar against Mr Aditya Puri, CEO of HDFC Bank in a rather acrimonious public spat.[45]

It will be apt to recall the words of Prof A C Fernando[46] on business ethics *"Although laws and ethics are closely related, they are not the same; ethical principles tend to be broader than legal principles"*.

Professional Ethics of Legal Fraternity

The second issue that rears an ugly challenge is regards the ethics and professional conduct by the legal fraternity, at a time when transaction is being undertaken. In both the cases discussed, we have seen that the disputes had gone through arbitration process and then the judicial challenges. Success in courts has certainly been a vindication for the lawyers who drafted these agreements. But the cookie could as well have crumbled the other way. In *Vijay Karia* case, the elaborate acrobatic exercise to distinguish between an act of smuggling under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and violation of FEMA is quite evident.[47]

All the parties involved in these transactions had access to best legal assistance in India and overseas. That they still chose to skate on thin ice, incorporating clauses that were in violation of law leaves much to ponder about. A decision that would have gone against the beneficiaries would have dented the image of expertise and professionalism of these law firms in general and specific lawyers who handled the transaction in particular.

Coming to the specifics, in case of *Tata Sons – NTT DoCoMo,* award could as well have gone against NTT DoCoMo resulting in a loss of over US Dollar 1.2 Billion (approximately INR 900 Billion), there would have been a rash of personal liability suits against NTT-DoCoMo Inc. and its directors. Debate on Tata Sons allowed to make payment of this amount has been muted, plausibly because Tata Sons is not a public company and secondly, the high reputation for ethical standards enjoyed by Tata group in public perception. However, that still does not address the compromises made on professional ethics and standards of corporate governance.

[44]Ghosh (2020). See also Rawat (2020).
[45]Altico Crisis (2020).
[46]Fernando (2012) at 452.
[47]See also *Dropti Devi vs Union of India* (2012).

Conclusions

Had it not been for the international arbitration clause and seat of arbitration outside India, the contracts under dispute would have been consigned to dustbin at the very first instance. The arbitration awards would have been otherwise and contracts rendered null and void. The contracts executed by the parties were prima facie in violation of provisions of FEMA. These contracts could only be made enforceable by taking recourse to Arbitration Act. In the authors view, these two cases have established a principle that national law can be brazenly violated if a clause of international arbitration is slipped in, and hence the title of this article.

These two cases have sounded the death knell for the supervisory powers enjoyed by RBI in implementing FEMA. Decision of RBI in the matter of *Tata Sons – DoCoMo* case was also swayed by the Indo-Japan diplomatic issues as is amply evident from the judgement wherein correspondence between RBI and Government of India has been quoted extensively. RBI despite having denied the permission initially, was seen making a case to Government of India to provide special approval to Tata Sons to make the remittance. India was at that time looking forward to substantial FDI from Japan. This anticipation had its bearing on decision making. Whether a specific case with its own diplomatic imperatives can become a benchmark for a general law or regulatory policy is moot. The *Tata Sons* case became the foundation on which another case of *Vijay Karia* was decided, once again giving primacy to the arbitral award over the patent illegality.

International agreements and conventions undermining the domestic laws is the *leitmotif* of this article. The New York Convention evolved to bring about consistency in decision making and enforceability of awards related to commercial disputes settled in international arbitration.

That these arbitral awards or conventions can enforce private contracts overriding the laws of the member states is a disturbing thought. While Section 34 and Section 48 of Arbitration Act have both been synchronised so far as challenge on grounds of public policy is concerned, this is certainly discriminatory against those who adhere to the law – in letter and spirit. The crucial words *"fundamental policy of national law"* needs elaboration and deliberation. Mere pedantic adherence to these words is a lethal axe aimed at hacking away the national laws. Execution of such marquee contracts needs to adhere to higher standards of business ethics.

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