Athens Journal of Law

Quarterly Academic Periodical,
Volume 7, Issue 4, October 2021
URL: https://www.athensjournals.gr/ajl
Email: journals@atiner.gr
e-ISSN: 2407-9685 DOI: 10.30958/ajl

Front Pages

MEGAN VERCUEIL & ANGELO NICOLAIDES
Leadership in a Virtual Working World: A Review

VLADIMIR ORLOV
Russian Legal Discourse

MIHAELA ELVIRA PATRAUS & IONITA MARIA OFRIM
Contractual Unpredictabiliy in the Context of Covid-19 Pandemic

MICHAEL P. MALLOY
Encountering Charles Dickens: The Lawyer's Muse

PETROS FANTA CHORAMO
Factories` Observance to the Legal Framework for the Protection of the Environment: A Case Study in Debre Berhan Town

MICAEL FERNANDES GOMES DOS SANTOS & MICHELY VARGAS DELPUPO ROMANELLO
Law, State and Religious Freedom in Brazil: A Historical and Constitutional Analysis of Freedom of Belief and Religion

LAVINIA-OLIVIA IANCU
Insolvency of the Natural Person and COVID 19 in Romania

MARTYNA KASPERSKA
Personality Rights – A Universal Tool for the Recovery of Non-Pecuniary Loss

GASPARE JUCAN SICIGNANO
The Case of "Mafia Capitale": The Judicial Proceedings Prosecuted by the Anti-Mafia District Office of Rome against Massimo Carminati and Salvatore Buzzi

ANATOLIY A. LYTVYNENKO
The Rise of the French Doctrine of Informed Consent: Criminal Responsibility for an Unauthorised Medical Experiment – The Case of the Antiquaille Hospital and Subsequent Notable Judgments

ALEKSEJS JELISEJEVS
Crucial Issues with Legal Protection of Consumers Human Rights when Banks unilaterally Close Accounts

Athens Journal of Law

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

****

***

ATINER is an Athens-based World Association of Academics and Researchers based in Athens. ATINER is an independent and non-profit Association with a Mission to become a forum where Academics and Researchers from all over the world can meet in Athens, exchange ideas on their research and discuss future developments in their disciplines, as well as engage with professionals from other fields. Athens was chosen because of its long history of academic gatherings, which go back thousands of years to Plato's Academy and Aristotle's Lyceum. Both these historic places are within walking distance from ATINER's downtown offices. Since antiquity, Athens was an open city. In the words of Pericles, Athens"…is open to the world, we never expel a foreigner from learning or seeing". ("Pericles' Funeral Oration", in Thucydides, The History of the Peloponnesian War). It is ATINER's mission to revive the glory of Ancient Athens by inviting the World Academic Community to the city, to learn from each other in an environment of freedom and respect for other people's opinions and beliefs. After all, the free expression of one's opinion formed the basis for the development of democracy, and Athens was its cradle. As it turned out, the Golden Age of Athens was in fact, the Golden Age of the Western Civilization. Education and (Re)searching for the 'truth' are the pillars of any free (democratic) society. This is the reason why Education and Research are the two core words in ATINER's name.

****

The ***Athens Journal of Law (AJL)*** is an Open Access quarterly double-blind peer reviewed journal and considers papers from all areas of law. Many of the papers published in this journal have been presented at the various conferences sponsored by the Business, Economics and Law Division of the Athens Institute for Education and Research (ATINER). All papers are subject to ATINER's Publication Ethical Policy and Statement.

The Athens Journal of Law
ISSN NUMBER: 2407-9685 - DOI: 10.30958/ajl
Volume 7, Issue 4, October 2021
Download the entire issue (PDF)

Front Pages i-viii

Leadership in a Virtual Working World: A Review 437
Megan Vercueil & Angelo Nicolaides

Russian Legal Discourse 463
Vladimir Orlov

Contractual Unpredictabiliy in the Context of Covid-19 Pandemic 485
Mihaela Elvira Patraus & Ionita Maria Ofrim

Encountering Charles Dickens: The Lawyer's Muse 507
Michael P. Malloy

Factories` Observance to the Legal Framework for the Protection of the Environment: A Case Study in Debre Berhan Town 517
Petros Fanta Choramo

Law, State and Religious Freedom in Brazil: A Historical and Constitutional Analysis of Freedom of Belief and Religion 541
Micael Fernandes Gomes dos Santos &
Michely Vargas Delpupo Romanello

Insolvency of the Natural Person and COVID 19 in Romania 563
Lavinia-Olivia Iancu

Personality Rights – A Universal Tool for the Recovery of Non-Pecuniary Loss 575
Martyna Kasperska

The Case of "Mafia Capitale": The Judicial Proceedings Prosecuted by the Anti-Mafia District Office of Rome against Massimo Carminati and Salvatore Buzzi 587
Gaspare Jucan Sicignano

The Rise of the French Doctrine of Informed Consent: Criminal Responsibility for an Unauthorised Medical Experiment – The Case of the Antiquaille Hospital and Subsequent Notable Judgments 603
Anatoliy A. Lytvynenko

Crucial Issues with Legal Protection of Consumers Human Rights when Banks unilaterally Close Accounts 617
Aleksejs Jelisejevs

Athens Journal of Law
Editorial and Reviewers' Board

President's Message

All ATINER's publications including its e-journals are open access without any costs (submission, processing, publishing, open access paid by authors, open access paid by readers etc.) and is independent of presentations at any of the many small events (conferences, symposiums, forums, colloquiums, courses, roundtable discussions) organized by ATINER throughout the year and entail significant costs of participating. The intellectual property rights of the submitting papers remain with the author. Before you submit, please make sure your paper meets the basic academic standards, which includes proper English. Some articles will be selected from the numerous papers that have been presented at the various annual international academic conferences organized by the different divisions and units of the Athens Institute for Education and Research. The plethora of papers presented every year will enable the editorial board of each journal to select the best, and in so doing produce a top-quality academic journal. In addition to papers presented, ATINER will encourage the independent submission of papers to be evaluated for publication.

The current issue is the fourth 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

Athens Institute for Education and Research

A World Association of Academics and Researchers

19th Annual International Conference on Law
11-14 July 2022, Athens, Greece

The Law Unit of ATINER, will hold its **19th Annual International Conference on Law, 11-14 July 2022, 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/2022/FORM-LAW.doc).

Academic Members Responsible for the Conference

- **Dr. David A. Frenkel**, LL.D., Head, Law Unit, ATINER & Emeritus Professor, Law Area, Guilford Glazer Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel.
- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.

Important Dates

- Abstract Submission: **13 December 2021**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **13 June 2022**

Social and Educational Program

The Social Program Emphasizes the Educational Aspect of the Academic Meetings of Atiner.

- Greek Night Entertainment (This is the official dinner of the conference)
- Athens Sightseeing: Old and New-An Educational Urban Walk
- Social Dinner
- Mycenae Visit
- Exploration of the Aegean Islands
- Delphi Visit
- Ancient Corinth and Cape Sounion
    - More information can be found here: https://www.atiner.gr/social-program

Conference Fees

Conference fees vary from 400€ to 2000€
Details can be found at: https://www.atiner.gr/fees

9th Annual International Conference on Business, Law & Economics
2-5 May 2022, Athens, Greece

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)

Important Dates

- Abstract Submission: **4 October**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **4 April 2022**

Academic Member Responsible for the Conference

- **Dr. Gregory T. Papanikos**, President, ATINER.
- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.
- **Dr. David A. Frenkel**, LL.D., Head, Law Research Unit, ATINER & Emeritus Professor, Law Area, Guilford Glazer Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel.

Social and Educational Program

The Social Program Emphasizes the Educational Aspect of the Academic Meetings of Atiner.

- Greek Night Entertainment (This is the official dinner of the conference)
- Athens Sightseeing: Old and New-An Educational Urban Walk
- Social Dinner
- Mycenae Visit
- Exploration of the Aegean Islands
- Delphi Visit
- Ancient Corinth and Cape Sounion

More information can be found here: https://www.atiner.gr/social-program

Conference Fees

Conference fees vary from 400€ to 2000€
Details can be found at: https://www.atiner.gr/fees

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 437-462

Leadership in a Virtual Working World: A Review

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

Understanding how the function of leading in a virtual cloud environment is becoming critical as organisations are increasingly forced to use dispersed teams to continue business operations in the "un-usual" current economy. This paper shares some findings of a study titled "A select bouquet of leadership practices advancing good governance and business ethics: A conceptual framework" undertaken in the pursuit of a doctoral degree submission. These findings can inform leaders by providing academic knowledge on the subject. Furthermore, it can support the enterprise leadership environment in transitioning from a physical to a cloud-based proximity which, because of the COVID-19 pandemic, must and is happening relatively fast.

Keywords: *COVID-19; communication; empathy vision; trust; Leadership; humility; people; profit.*

Introduction

It is generally accepted that, as companies grow, their structures evolve. The dispersion of their functions and teams also evolve across sites, whether nationally or globally. COVID-19 (Coronavirus disease 2019) has upended this norm and has established virtual teams connected through the cloud as "the new norm." Here, we address concerns on how this has affected our perception regarding leadership's new role "in the cloud," where face-to-face interactions must be experienced in a virtual context.

We live in an age where much of what we do can be achieved through an application or at the push of a button or where there is a drive-through option and a requirement for 24/7 availability. Virtual worlds operate in a similar fashion, paying little or no regard to personal boundaries, work–life balance, and cultural diversity. Leadership comprises concrete situated acts (which are relationally based) that are purposeful and systematic to influence subordinates to meet goals and deliverables. Thus, the question that arises is whether there are solid theoretical foundations to leadership that, in the midst of what has become ambiguous daily work-life balance where the demarcation line between work and daily life is not clear, can support leadership's role and ensure that leaders have the ability to motivate subordinates to deliver as required. If the COVID-19 pandemic has

[*]PhD Head, Enterprise Mobility MTN (Pty), Ltd. South Africa. Corresponding author. E-mails: megan.vercueil@mtn.com.
[±]Professor, Department of Philosophy and Applied Ethics, University of Zululand, South Africa. E-mail: pythagoras13@hotmail.com.

taught us anything, it is that leadership matters – even more so for organisations facing an unknown future.

This paper aims to share findings from academic leadership studies to help guide and assist leaders (irrespective of their current leadership style) in transitioning from a face-to-face world to one that relies on the technology of cloud-based interactions.

To Thine Own Self Be True

Leadership is relational in nature. It involves purposeful acts and a systematic influencing of subordinates to reach concrete, task-related goals.[1] Leaders bear a huge responsibility, and often, face expectations from superiors, peers, and subordinates to know everything and make perfect decisions.[2] Nonetheless, and despite such lofty expectations, leaders do remain fallible. As a crisis strikes, a leader's first responsibility is usually to "stabilise the threat." The leader must create space to become self- informed and attain accurate situational awareness within and around the organisation.[3] When placed within extreme and unique contexts unexpectedly, a leader cannot pretend to know more than they do and make decisions based on instinct or previous experience.[4] Individuals operating in a "physical world" rely on different strengths than those needed in a virtual world. With the increasing digitisation of society, work pushes the boundaries of our abilities while offering opportunities and challenges to our moral boundaries.[5]

To make the best decisions for the organisation, leaders will undoubtedly need to rely on expertise that they may not have. If they can avoid the trap of over-indexing on "excessive belief in one's own strengths", the resulting expression of humility will be a huge asset.[6] Owens, Johnson & Mitchell define expressed humility as an interpersonal characteristic that emerges in social contexts and connotes the following behaviours: (I) a manifested willingness to view oneself accurately, (ii) a displayed appreciation of others' strengths and contributions, and (iii) teachability.[7] Expressed humility comprises a pattern of humble behaviours that occur in interpersonal interactions and is observable by others. Authentic leaders' who are perceived to be emotionally balanced, consider various courses of action, have respect for others, exhibiting courage to do the right thing and have an accurate self-view supports consistency between personal values and behaviour.[8] Humble leaders' accurate self-view regarding their weaknesses serves their innate drive to learn and value others' opinions because leaders can appreciate the strengths in, and learn from, others.[9]

[1]Alvesson & Einola (2019).
[2]Chi, Lan & Dorjgotov (2012).
[3]Day & Antonakis (2012).
[4]Hannah, Uhl-Bien, Avolio & Cavarretta (2009).
[5]Royakkers, Timmer, Kool & van Est (2018).
[6]Owens & Hekman (2012).
[7]Owens, Johnson & Mitchell (2013).
[8]George (2015).
[9]Owens & Hekman (2012).

During a crisis or extreme event, a leader must recognise their own natural human response to events and process the possible strong emotions that accompany it. This will develop the capacity to recognise and understand the same reactions in their subordinates. That is, leaders must first relate to and help themselves before they can do the same for others.[10] To do this, the leader must deliberately raise their self-awareness by paying attention to themselves at the present moment, without evaluating or judging what comes to mind.[11]

Emotions have been shown to determine affect-driven behaviours like impulsive acts, organisational behaviours, and conflict resolution which, in turn, influence employees' behaviours.[12] Individual level tasks are performed at a cognitive level. When a task is transferred to a team, an emotional level is introduced because of conflict over differing opinions and ideas relating to the task deliverable.[13] The effectiveness and appropriateness of a leader's conflict management skills are strongly influenced by the depth and development of their self-management skills.[14]

The foundation of authentic leadership rests on four components: self-awareness, internalised moral perspective, balanced positioning, and relational transparency.[15] Leroy, Anseel, Gardner & Sels show that self-consistency and self-knowledge have a positive impact on follower satisfaction with leaders, organisational commitment, and perceived team effectiveness.[16] The psychological attributes impacting authentic leadership are confidence, hope, optimism, and resilience. According to Northouse, "they are trait-like because they may characterise a relatively fixed aspect of someone's personality that is evident throughout their life (like extroversion), and they are state-like because, when training or coaching, individuals are capable of developing or changing their characteristics."[17] Stander, Beer & Stander find that authentic leadership led to stronger work engagement because of the qualities of optimism and trust that this kind of leadership generates in employees.[18] Semedo, Coelho & Ribeiro find that authentic leadership is highly correlated with followers who thrive at work and with employee creativity.[19] Nobody can be authentic by trying to imitate somebody else. It is important to acknowledge that authenticity is paramount as no leader can have all the perfect answers all the time.[20]

Being self-aware can improve a leader's ability to listen to others, alleviate their fear and anxiety, and enable them to move forward. Awareness of what

[10]Davidson, Kabat-Zinn, Schumacher, Rosenkranz, Muller, Santorelli, Urbanowski, Harrington, Bonus & Sheridan (2003).
[11]Davidson, Kabat-Zinn, Schumacher, Rosenkranz, Muller, Santorelli, Urbanowski, Harrington, Bonus & Sheridan (2003).
[12]Chang, Sy & Choi (2012).
[13]Jordan & Ashkanasy (2006).
[14]Chang, Sy & Choi (2012).
[15]Northouse (2019).
[16]Leroy, Anseel, Gardner & Sels (2015).
[17]Northouse (2019) at 208.
[18]Stander, Beer & Stander (2015).
[19]Semedo, Coelho & Ribeiro (2016).
[20]Hougaard & Carter (2018).

others are feeling, and the modelling of vulnerability, empathy, and compassion during a crisis, have been shown to lower stress and limit the adverse physical symptoms of team members, while improving team goal achievement and productivity.[21]

Effective Communication and Trust

Leaders are looked for guidance during these unfamiliar times. Non-face-to-face leaders who operate "virtually" must know how to use technology and be willing to make themselves accessible and available to their employees.[22] Leaders must talk to their people. Having consistent, reliable fact-based communications is a key ingredient for bringing organisations together and reducing workplace anxiety.[23] While leaders must still make challenging decisions (for which they will be judged in hindsight), making well-informed decisions will be key.[24] To be well informed, leaders must listen. Having the ability to shift gears into "listening to understand" from "listening to respond" will be crucial for success in virtual operations.[25]

In situations resulting in extended stress, leadership that provides competence, support, structure, priorities, role clarity, effective communication, coordination, and maintains cohesion, focus, calm, a sense of humour and adequate preparation and response has, in the preliminary research on these topics, typically been evaluated as effective.[26] Physical distance, in general, increases the need for better communication to ensure effective coordination.[27] Based on the research findings of Van Iddekinge, Ferris & Heffiner, Nicolaides, LaPort, Chen, Tomassetti, Weis, Zaccaro & Cortina, Dugan and Bavik, Tang, Shao & Lam psychosocial proximity is found to influence the types of actions taken by organisations and have psychological effects on members.[28] By maintaining appropriate communication, companies can maintain the high levels of identification required by units without compromising the authority of leadership systems.[29] According to Burris, Detert & Chiaburu[30] leaders who are difficult to work with tend to stifle communication. In situations with high uncertainty, followers are more attracted to ethical leaders because they provide focus, direction, behavioural guidance, and show concern and support for followers.[31]

[21]Scott, Colquitt, Layne Paddock & Judge (2010).
[22]Bradt (2015).
[23]Ko, Ma, Bartnik, Haney & Kang (2018).
[24]Hehman, Sutherland, Flake & Slepian (2017).
[25]Bradt (2015).
[26]Klein, Ziegert, Knight & Xiao (2004); Salas, Goodwin & Shawn-Burke (2010).
[27]Antonakis & Atwater (2002); Bell, McAlpine & Hill (2017); Hannah, Uhl-Bien, Avolio & Cavarretta (2009).
[28]Van Iddekinge, Ferris & Heffner (2009); Nicolaides, LaPort, Chen, Tomassetti, Weis, Zaccaro & Cortina (2014); Dugan (2017); Bavik, Tang, Shao & Lam (2018).
[29]Bell, McAlpine & Hill (2017).
[30]Burris, Detert & Chiaburu (2008).
[31]Ko, Ma, Bartnik, Haney & Kang (2018).

Most people do not know their leaders personally and can only know what they make sense of from afar through cues and messages (by way of communication and behaviour) sent from those in leadership.[32] One of the strongest variables that affects communication is referred to as "psychological safety," which Edmondson defines as a shared belief held by members of a team that the team is safe from negative consequences to self and career while indulging in interpersonal risk-taking (confronting differences with others in ways that could lead to learning and change).[33] In a "psychologically safe" environment, people expect others to respond positively should an individual expose their thoughts by asking a question, seeking feedback, reporting a mistake, or proposing a new idea.[34] As it relates to social aspects (like the COVID-19 pandemic), Seifert suggests that to promote trust and relieve anxiety relating to a crisis, leaders must be open, transparent, and publicise ongoing efforts to restore processes, systems, and reconstitute personnel and other resources, and identify the various forms of support available to members.[35] Without such transparency, maladaptive myths and rumours can spread easily in extreme contexts.[36]

Leonard and Howitt highlight that organisations can operate within routine or non-routine contexts; establishing communications across internal and external networks in both contexts is important.[37] In simulated situations, Hannah, Uhl-Bien, Avolio & Cavarretta show that leaders focused more on performance planning and consideration of followers, as advocated in situational theory, are more successful in removing followers from purported dangerous situations and in keeping events under control (internally and externally).[38] They did this by providing clear, step-by-step directions and communication for followers and ensuring the appropriate and correct communication was extended to the external environment.

Transparency and trust can build and sustain a relationship. This is an essential consideration in addressing sustainability challenges, as it requires openness and transparency in acknowledging and confronting realities, resilience and flexibility when withstanding pressures, and innovation where more than incremental improvement is required.[39] Leadership itself cannot be distinguished from the unique social dynamics inherent in the context. Followers will re-evaluate trust in their leaders and focus on the leader's competence more so than on their character.[40] Trust between the leader and the follower is a mediator to company performance.[41]

[32]Treviño, Brown & Hartman (2003).
[33]Edmondson (1999).
[34]Detert & Edmondson (2011).
[35]Seifert (2007).
[36]Hannah, Uhl-Bien, Avolio & Cavarretta (2009).
[37]Leonard & Howitt (2007).
[38]Hannah, Uhl-Bien, Avolio & Cavarretta (2009).
[39]Treviño & Nelson (2017).
[40]Hannah, Campbell & Matthews (2010).
[41]Clapp-Smith, Vogelgesang & Avey (2009).

Customers and society place an inherent expectation on firms to be ethical in meeting their demands.[42] Trust and respect among key stakeholder groups (particularly employees and customers) are vital to an organisation's success. Trust engenders loyalty and cultivates the company's good reputation, thereby building brand value and company performance.[43] Leaders in the public sector are mandated to set examples on issues of trust and integrity (which may not be detrimental to society's values), while determining and driving public sector activities to enhance the utility of human needs.[44]

Should a leader constantly change their behaviour, followers will perceive leaders as unpredictable and unreliable, and therefore, unworthy of trust.[45] If a leader espouses one set of values (the way they should behave) and actively promotes them but personally practices another set, trust will be further undermined. The traits that CEOs most often attribute to ethical leaders are honesty, trustworthiness, and integrity. Trust is associated with credibility, consistency, and predictability in relationships. Honesty is the crucial element needed in a trust-based relationship.[46]

According to the Merriam-Webster dictionary, "trust" is defined as "assured reliance on the character, ability, strength, or truth of someone or something with an expectation or belief that one can rely on another person's actions and words and that the person has good intentions to carry out their promises."[47] Trust is most meaningful in situations where one party is at risk or vulnerable to another party. Traditionally, trust is the primary mechanism through which leaders and followers exchange power and influence. It is a fundamental requirement for leaders to demonstrate their ability and competence to lead and their integrity and benevolence toward those over whom they wield power.[48] This is achieved by employees being exposed to leaders who consistently demonstrate behaviours (what they say and how they behave are aligned) that promote trust, such as consistency, integrity, concern, and benevolence. In a virtual environment, however, many physical face-to-face and direct interactions that build connections and trust are absent.

When groups first form, people are usually willing to give others the benefit of the doubt, with the prevailing feeling being that "we're all in the same boat." In a virtual environment, it can be difficult to understand what is really going on, and even harder to build rapport and trust. According to Bullock and Klein, trust is proposed as the primary challenge facing virtual teams today.[49] Academic literature on team management and leadership acknowledges that there is a relationship between personal communication and trust.[50] The leaders' empathy that subordinates perceive makes them more willing to give the leader their trust. The

[42]Valenzuela, Mulki, Jaramillo (2010).
[43]Avery, McKay, Volpone & Malka (2015).
[44]Rehman (2011).
[45]Treviño & Nelson (2017).
[46]Mihelič, Lipičnik & Tekavčič (2010).
[47]Merriam-Webster dictionary (2020).
[48]Marques & Dhiman (2017).
[49]Bullock & Klein (2011).
[50]Zolin, Hinds, Fruchter & Levitt (2004).

leaders' attractiveness has a positive effect on empathy.[51] The perceived attractiveness of leaders can be altered based on increased exposure to them, or as people become more familiar with the leader. Lasting trust and strong relationships come from reliable actions and communications over time.[52]

Stakeholder Relationships and Team Dynamics

Leadership influence affects employee behaviour[53] and the organisation's overall performance.[54] From an organisational perspective, leaders are expected to set the company's strategic direction. They are responsible for serving and protecting their stakeholders and the whole community.[55] Factors like the globalisation of markets and rapidly evolving technology force businesses to respond to survive.[56] A company's values should be the foundation of why it exists, how it makes decisions, and its true purpose. These values must be authentic and specific so that they resonate with stakeholders.[57] All stakeholders must be part of a global discussion about how technologies are changing the systems that surround them and impacting the lives of humans.[58]

Ethical leaders withstand the challenges that come with leading an organisation. They must have an extensive understanding of the importance of positive relationships with the stakeholders (internally and externally). Additionally, the quality of the relationship between them must be built with trust and respect as important determinants of success.[59] According to Nelson, Poms & Wolf,[60] living in harmony with ethical and authentic characteristics and principles establishes the efficiency of a sustainable human enterprise that can flourish. Buble advocates that leaders must be perceived as people of good moral standing who show concern for employee welfare and are very approachable.[61] Chi, Lan & Dorjgotov further support this by emphasizing that ethical leaders consistently try to incorporate moral principles in their behaviour and that their values and beliefs embody their commitment to an organisation's purpose, enshrined through prudence, persistence, and patience.[62]

Leadership comes with many risks (physical harm, financial harm, reputation loss, failure, and accountability). It includes the need to make tough decisions in the pursuit of success while operating in uncertain environments where policies

[51]Colquitt, Hollenbeck, Ilgen, LePine & Sheppard (2002).
[52]Reis, Maniaci, Caprariello, Eastwick & Finkel (2011).
[53]Hughes (2019); Noelliste (2013).
[54]Mayende & Musenze (2018); Yatich & Musebe (2017).
[55]Rossouw & van Vuuren (2018).
[56]Bedi, Alpaslan & Green (2016).
[57]Northouse (2019).
[58]Hadfield (2016).
[59]Resick, Martin, Keating & Dickson (2011).
[60]Nelson, Poms & Wolf (2012).
[61]Buble (2012).
[62]Chi, Lan & Dorjgotov (2012).

and procedures are not enough.[63] It is also the leader's responsibility to manage risk effectively.[64] To manage risk, leaders must (i) ask the right questions even if they are difficult,[65] (ii) consult various stakeholders with different perspectives, backgrounds, points of view, and knowledge to predict, assess, and manage risk,[66] and (iii) be of good character, have integrity, courage and compassion, and be careful, prudent, and aware of their limitations.[67]

Leadership is a choice, and a responsibility shared with other leaders in an organisation who influence other people (internally and externally), programs, systems, culture, and company structure. It is embedded in a specific context that has stakeholders; it does not exist in a static time frame, but covers more than just the present. Leaders are viewed as an organisation's representative to internal and external stakeholders. They are accountable for performance outcomes.[68] External stakeholders, like the community, may require philanthropic programs like poverty alleviation, unemployment reduction, and provision of basic infrastructures in the health and education sectors to solve their socio-economic needs. This set of needs creates pressure on a firm.[69] Sagiv and Schwartz emphasise the assumption that society exerts pressure on an organisation's culture, and thus, there are similarities between societal and organisational values.[70] At a macro level, the value choices made by companies have a large impact. At a micro-level, rules, codes, norms, and principles that guide the entity's internal activity can affect internal and external stakeholders, with ultimate responsibility being placed on the company's board.[71]

Delivering on organisational goals in increasingly complex global companies requires that leaders align new needs with existing structures and influence others, in both internal and external social contexts. Doing so requires flexibility in adapting to changing organisational systems, team dynamics, and diverse workforces.[72]

Researchers agree that leading virtual versus traditional face-to-face teams is more challenging.[73] Virtual leaders are expected to invest additional time and effort to help coordinate virtual team tasks, build relationships among geographically distributed members, and facilitate team processes.[74] Leadership at the team level impacts team processes and outcomes, and individual effectiveness.[75] To structure tasks and facilitate social–emotional processes within a virtual team, leadership is

[63]Hoskisson, Chirico, Zyung & Gambeta (2016); Northouse (2019); Yukl (2013).
[64]Treviño & Nelson (2017); Zeidan & Müllner (2015).
[65]Giessner & van Quaquebeke (2010); Hoskisson, Chirico, Zyung & Gambeta (2016); Siepel & Nightingale (2014).
[66]Treviño & Nelson (2017).
[67]Ahn, Lee & Yun (2018); Byun, Karau, Dai & Lee (2018); Den Hartog (2015); Moore, Mayer, Chiang, Crossley, Karlesky & Birtch (2019); Zhang & Tu (2018).
[68]Carton, Murphy & Clark (2014).
[69]Okpara & Wynn (2012).
[70]Sagiv & Schwartz (2007).
[71]Du Plessis, Hargovan & Harris (2018).
[72]Carmeli & Halevi (2009); Kozlowski, Watola, Jensen, Kim & Botero (2009); Morgeson, DeRue & Karam (2010); Uhl-Bien & Marion (2009).
[73]Hoch & Kozlowski (2014).
[74]Purvanova & Bono (2009).
[75]Morgeson, DeRue & Karam (2010).

an important ingredient.[76] Depending on the focus, task and relationship-oriented behaviours can be either directed at the entire virtual team or individuals within the team.[77] In terms of leader influence on virtual collaboration, both task and relationship-oriented behaviours are critical. According to Colquitt, Hollenbeck, Ilgen, LePine & Sheppard,[78] and Kirkman, Rosen, Tesluk & Gibson,[79] leader task-oriented behaviours, such as coaching, enhance virtual communication and collaboration. Fostering good relationships among team members promotes a collaborative context and work climate within a virtual team and makes members more responsive and willing to help other team members.[80] As a virtual team's members will likely have diverse backgrounds, leaders of such teams must ensure that all members understand, appreciate, and leverage diversity to establish trusting relationships.[81]

Where self-managing teams are active, there is a tendency to have shared leadership. This represents a process by which team members share responsibilities, mutually influence and guide each other, and conduct collaborative decision making.[82] Distinct from traditional hierarchical leadership, shared leadership has an influence process that is more lateral than vertical.[83] It is a form of collective effort that enhances team performance in an electronic context.[84] Leaders may choose to facilitate the formation of shared leadership within teams, which may complement formal leadership. In a virtual environment, leaders may formalise the team goals and communicate them to the entire team via e-mail, whereas virtual leaders may ask members to take responsibilities for various tasks during virtual conferences and encourage them to periodically report on their work status to everyone else in the team.[85] According to Carte, Chidambaram & Becker,[86] shared leadership in virtual teams is "best characterised as task leadership." This implies that assigned leaders are responsible for building trusting relationships within virtual teams, thereby facilitating the emergence of shared leadership, and thus, enhancing team performance. While leaders exhibit behaviours that are directed at the entire virtual team, they should also interact with each team member individually (every team member faces challenges that are unique to their local work environment).[87] Virtual leader behaviours directed at the individual levels are paramount in shaping employee cognitive, affective, and motivational states, and contribute to individual effectiveness.[88]

[76]Al-Ani, Horspool & Bligh (2011).
[77]Wang, Zhou & Liu (2014).
[78]Colquitt, Hollenbeck, Ilgen, LePine & Sheppard (2002).
[79]Kirkman, Rosen, Tesluk & Gibson (2004).
[80]Al-Ani, Horspool & Bligh (2011); Hill & Bartol (2016).
[81]Malhotra, Majchrzak & Rosen (2007); Maruping & Agarwal (2004).
[82]Hoch & Kozlowski (2014).
[83]Al-Ani, Horspool & Bligh (2011).
[84]Carte, Chidambaram & Becker (2006).
[85]Liao (2017).
[86]Carte, Chidambaram & Becker (2006),
[87]Hill & Bartol (2016).
[88]Liao (2017).

Albuquerque, Koskinen & Zhang find that team-level processes and emergent states such as empowerment, positively impact individual members' informal learning and commitment in the team.[89] Chen, Kanfer, DeShon & Mathieu and Tajfel & Turner demonstrate that team-level efficacy is positively related to individual-level self-efficacy,[90] as employees working in teams see themselves as individuals and incorporate team membership into their definition of self. NA can be contagious, as individuals are able to learn by observing and replicating behaviours of other team members.[91]

Unlike in a traditional (face-to-face) team setting, coordinating within teams, building trust, forming shared experiences, and managing conflict requires additional efforts in a virtual enterprise world.[92] Additionally, virtual leaders also must face the challenge of establishing their credibility.[93]

Purpose and Vision

People can often feel that they are "in the same storm" and working with others within the same company, and yet not feel that they are "in the same boat" or on "the same page". Stepping back to gain perspective is a practice as useful for organisations as it is for individuals.[94] According to Graham,[95] for individuals and organisations to be the best version of themselves, they must have purpose, along with passion, possibilities (vision), and place.

Jacobs & Longbotham find that processes like seeking the counsel of trusted individuals, praying and reflecting, help establish a higher purpose in leaders and drive the desire to minimise any discrepancy between their spiritual beliefs and the environmental conditions they find themselves in.[96] Craig & Snook show that less than 20% of leaders are strongly aware of their own individual purpose.[97] They show that leaders may identify with their organisation's purpose (which they generally know very well), but at an individual level, 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".[98] Purpose is not what we do, but how and why we do it. Thus, it is closely aligned with qualities like awareness, respect, morality, vision, and understanding.[99] In times of change, it is important for

[89]Kukenberger, Mathieu & Ruddy (2015).
[90]Chen, Kanfer, DeShon & Mathieu (2009); Tajfel & Turner (1986).
[91]Bandura, Freeman & Lightsey (1997).
[92]Liao (2017).
[93]Al-Ani, Horspool & Bligh (2011).
[94]Goleman & Boyatzis (2017).
[95]Graham (2011).
[96]Jacobs & Longbotham (2011).
[97]Craig & Snook (2014).
[98]Craig & Snook (2014) at 107.
[99]Marques & Dhiman (2017).

leaders to pose questions about what the organisation stands for, and what it should continue to do or stop doing in the future when conducting town halls and on-line group conversations.[100]

Leadership studies have consistently acknowledged the essence of vision (the idealised verbal portrait of what an organisation aspires to achieve; an aspiration of what to strive for) as a significant component and determinant of leadership performance.[101] 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.[102] Most studies on leadership have focused on how the vision is articulated and communicated.[103] Strange & Mumford show that the vision process arises from the leader's prescriptive mental model.[104] Vision statements often use abstract language and imagery, and emphasise values, distal goals (and how to achieve them, which may be vague), and utopian outcomes.[105] According to Boisot & McKelvey,[106] to be effective organisations, companies must have adaptive systems where the organisation's and environment's complexity can be matched.

According to Erçetin, Açikalin & Bülbül, we have learned that order can emerge from chaos and that natural systems can self-organise.[107] Natural systems show us that "strange attractors" in chaos bring order as in the case of snowflakes, for example.[108] In today's competitive, globalised and connected world, more companies are relying on intellectual capital rather than manufacturing and primary industrial activities. These evolving organisations deeply embrace innovation, knowledge, technology, learning, and adaptation as core competencies.[109] Furthermore, they must constantly adapt and change – not as a matter of choice, but as a means of survival – to environmental changes through innovation and continuous learning to be part of an increasingly complex world.[110] Kahane identified three complexities at the root of the toughest problems that 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."[111] A realistic view of current leadership demands and the contextual environment must incorporate the complexities involved in developing an effective vision.[112]

[100]O'Reilly & Tushma (2013).
[101]Rafferty & Griffin (2004).
[102]Marques & Dhiman (2017.
[103]Carton, Murphy & Clark (2014); Venus, Stam & van Knippenberg (2013).
[104]Strange & Mumford (2002).
[105] Berson, Halevy, Shamir & Erez (2015).
[106]Boisot & McKelvey (2010).
[107]Erçetin, Açikalin & Bülbül (2013).
[108]Erçetin, Açikalin & Bülbül (2013).
[109]Marques & Dhiman (2017).
[110]Hahn, Pinkse, Preuss & Figge (2015).
[111]Kahane (2004) at 4.
[112]Marques & Dhiman (2017).

Due to environmental dynamics, organisational actors are constantly changing. Leadership tenure in modern organisations is often short-lived and fluid because of competing institutional challenges, agile leadership competence demands, and stakeholders' low tolerance for failure.[113] A central question is whether vision is relevant or even necessary, given the environment's complexities, dynamics, and the need for constant adaptation.[114] To be effective, a vision requires the leader to understand the past to similar mistakes, have deep knowledge of the present (including the connectivity and interactions of various components of the whole system), and the capacity to use available information to make accurate projections and predictions of future events.[115] Neuroscientists conducting studies on mental time travel find that individuals use the same region of their brain to remember the past and to envision the future. Episodic memories of the past are crucial to predicting the future.[116]

In many organisations, once mission and vision statements have been crafted and written up, they tend to be forgotten.[117] Vision requires thoughtful planning and intention.[118] Intention is also closely tied to one's sense of purpose.[119] Meaningful purpose creates a much stronger energy of intention, and the vision keeps the purpose alive and vivid with anticipatory images of the future.[120]

Re-Invention

To improve the effectiveness and performance of companies, leaders in highly turbulent and complex environments have long considered new idea generation and opportunity recognition as effective means of supporting the growth and competitiveness of their business.[121] How does business do what it has always been doing, but differently? Leadership is also viewed as the inspiring and enabling factor that influences different aspects of employees' performance and work behaviour.[122] Re-invention mode versus survival mode is dependent on the mindset. Further, the opportunity in this regard lies in what is to be – what the company, its leaders and people will be, how they can work, reach their customers, and communicate – and not what has to be preserved.[123] When there is no longer any uniqueness in what a company is offering its customers, the result is merely a matter of survival. Competition is then based only on price.[124] In the African context, the values that should be espoused by leaders include legitimacy in a role,

[113]Treviño & Nelson (2017).
[114]Marques & Dhiman (2017).
[115]O'Reilly & Tushman (2013).
[116]Zimmer (2011).
[117]Marques & Dhiman (2017).
[118]Taiwo, Lawal & Agwu (2016).
[119]Graham (2011).
[120]Marques & Dhiman (2017).
[121]Chen, Tang, Jin, Xi & Li (2014).
[122]Chen, Tang, Jin, Xi & Li (2014).
[123]Sinek (2020).
[124]Kim & Mauborgne (2005).

the desire to develop a group and promote the growth of individuals, a community focus, joint decision making in a spirit of sharing values, the promotion of dignity and respect in the culture of an organisation and in its climate.[162]

Facing change is not new to companies. Leaders must decide between waiting for the change to happen and driving the change – which could possibly involve no longer protecting what, overnight, has become an old business model. What if, knowing nothing, you had to re-invent the industry you are in now? What is its purpose? Why did the business start in the first place? What value and values do you offer the people who buy your product and service, and can you ignore and let go of what was or has been?[125]

Pairing vulnerability with confidence is the next normal. It will be critical in helping people transition from states of anger or denial into working together to build a desirable future. Leaders are uniquely positioned to ignite hope and create the future organisation's image that people are excited to be a part of.[126] The virtual world of connecting is not there to put a company out of business but rather to drive re-invention (although this has been sudden due to COVID-19). It is not about what is done but why it is done – the important consideration is purpose and understanding what jobs support this purpose.[127]

Leaders must drive the improvement of employees' commitment and persistence, gain stakeholders' support and persuade them to realise the new way forward.[128] This implies that leaders must develop new leadership competencies to effectively direct the process of change and opportunity recognition in highly challenging, turbulent, and competitive environments.[129] Since the 2008 financial crisis, many global companies (especially in developing markets) have switched their competitive strategy from low cost (based on price competition) to differentiation, as cost leadership strategy is no longer suitable for accommodating the diverse and short-term customer needs.[130] The challenge strategic leaders have to contend with is balancing the short- (which will inhibit change or innovation) and long-term company needs (inevitability of change) such that both innovation and the company's daily operations run efficiently.[131] To achieve both short and long-term deliverables, leaders must be clear about their values and vision. They must allow (by delegation) employees to make operational decisions so that the leaders can focus on the company's strategic decisions while being aware of the organisation's current capabilities to benefit the company and its stakeholders in both the short and long term.[132] To create new offerings and products, companies must change the internal environment keeping in mind a culture of innovation, characterised by flexibility and ability to adapt quickly. This will help them respond

[125]Sinek (2020).
[126]Norman, Luthans & Luthans (2005).
[127]Sinek (2020).
[128]De Jong & Den Hartog (2010); Middlebrooks (2015); Ng & Feldman (2013) and Radaelli, Lettieri, Mura & Spiller (2014).
[129]Chen, Tang, Jin, Xi & Li (2014).
[130]Ray Gehani (2013).
[131]Galpin, Jouflas & Gasta (2014).
[132]Baskaran, Yang, Yi & Mahadi (2018).

efficiently to newly identified opportunities. These opportunities will often involve high quality, customised offerings, with after-sales service and customer support.[133]

Due to the COVID-19 pandemic, there may be no going back to "normal." Life will be different (to an as-yet-unknown degree); customer needs will change, business models will evolve and, to be successful, businesses and individuals must adapt to the "new" based on their existing skill sets, capabilities, and mindsets. This change to the "new normal" will affect everyone, irrespective of job title, circumstance, skill, and knowledge. From a leadership perspective, mindset will be important, as will not caring about *who* is right, but *what* is right.[134]

People and Profit

Take care of the people and they will take care of the numbers. Money is important. It is needed to run a company. In this digital era, there is no app for relationships and job satisfaction.[135] As we move forward into the new normal, society will require leaders who can nurture collaboration.[136]

Emotions are universal and common.[137] It is universally accepted that is not easy to achieve harmony between one's emotions and rational recognition of certain reasons for action.[138] Several studies have acknowledged that leaders are active managers of group emotion.[139] When positive emotions outweigh negative emotions, our brains can more effectively handle complex and/or novel tasks as we are more open to new ideas and tend to approach things with a growth mindset.[140] In the face of a crisis, positive emotions will be critical to leaders,[141] especially now as they shift their companies into a virtual world while dealing with a face-to-face physical world that must still operate.

Cognitive change is problem focused. It entails the leader exhibiting behaviours that put situations in perspective (the leader is attempting to reduce the situation's emotion-provoking aspects) for the follower and helping them see the situation positively. By adopting this approach, the leader is seeing a stressor in a more positive light and as a challenge rather than only as a threat.[142] Emotions are rich with communicative information. Their expression can enhance communication, promote positive relational functioning, and bring needed attention to important organisational issues.[143] According to some authors a key cause of relationship deterioration is the suppression of emotion. When leaders encourage or model the suppression of emotions, especially in the event of a

[133]Auzair & Sofiah (2011); Urbancova (2013).
[134]Sinek (2020).
[135]Sinek (2020).
[136]World Economic Forum (2020).
[137]Ashkanasy (2003).
[138]Hursthouse & Pettigrove (2018).
[139]Ashkanasy & Humphrey (2011).
[140]Jung, Wranke, Hamburger & Knauff (2014).
[141]Little, Gooty & Williams (2016).
[142]Wright, Mohr, Sinclair & Yang (2015).
[143]Little, Gooty & Williams (2016).

sudden change, they lose the opportunity to address problems with employees, making staff feel invalidated. This also discounts employees' experiences, leading to a breakdown in open communication.[144] Furthermore, research has shown that the physiological stress of suppressing emotions, as it relates to job satisfaction, may directly generate dissatisfaction.[145]

Empathic leadership is based on the concept that we are connected with each other and that societies survive owing to our ability to feel for one another and respond.[146] Research shows that empathic leaders have the ability to create emotional bonds, and thus, become competent in understanding and addressing their employees' and customers' needs, appreciating and drawing on people's talents, recognizing others' perspectives in problem solving, and including the correct people in decision making.[147] Leaders who are not naturally empathetic should deliberately surround themselves with others who can help fill that gap.[148] A leader being authentic in exhibiting vulnerability by lowering their guard and confronting the crisis that is unfolding, results in groups feeling genuinely cared for.[149] Cultivating these qualities in a balanced way (by first tuning inward to understand and integrate one's own emotions and fears, and then turning outward to alleviate anxiety and support others over time) enables people and businesses to recover.[150] Many people mistakenly view empathy as a mere emotional reaction. However, it is broader than that and involves "the ability to transcend our ego and see and sense larger systems".[151] According to Rifkin, empathy is like an invisible social glue that enables a complex individuated society to remain integrated.[152]

According to Enderle,[153] a challenge for an ethical leader is producing quality, profitable products while protecting and promoting the well-being of employees and accepting that the right thing may not always be the most profitable. Unlike the 2008 financial crisis, the COVID-19 pandemic abruptly and severely constricted global economic activity.[154] One of the few bright spots of the unintended remote working situation that arose because of COVID-19 is that reduced costs and created efficiencies for organisations by developing and supporting a more extensive virtual working infrastructure.[155] Short-term profit expectations determine the number of possible staff appointments a firm can make and maintain.[156] Profit also regulates macroeconomic processes and as many workers have now grown accustomed to eliminating their commute or spending

[144]Little, Gooty & Williams (2016).
[145]Grandey & Gabriel (2015).
[146]Issah (2018).
[147]Mahsud, Yukl & Prussia (2010).
[148]Goleman & Boyatzis (2017).
[149]Lopez (2018).
[150]Holt Marques, Hu & Wood (2017).
[151]Senge & Krahnke (2014) at 194.
[152]Rifkin (2010).
[153]Enderle (1987).
[154]Reinhart (2020).
[155]Brownlee (2020).
[156]Storey & Salaman (2017).

additional quality time with family, teleworking expectations are likely to increase.[157]

Albuquerque, Koskinen & Zhang show that corporate social responsibility (CSR) activities strengthen customer loyalty and result in reduced susceptibility of corporates in terms of economic downturn.[158] Research on past crises suggests that the relationships between a firm and its workers, suppliers, customers, and local community can shape corporate performance and resilience to shocks.[159] By creating safe, healthy workplaces, engaging in ethical business practices, providing enduring, reliable services to customers, and investing in the local environment and community more generally, a firm can signal its commitment to satisfying implicit contracts. This, in turn, will boost stakeholders' willingness to support its operations, especially in difficult times.[160]

As the pandemic spreads across countries and causes depressed corporate sales, requiring firms to manage liquidity to cover costs, investors and the market at large could re-evaluate a firm based on its cash reserves, leverage, profitability, international supply chains and customers in other countries. The stock prices of firms where the majority shareholding is made up by investment bankers/hedge fund managers have a tendency to perform worse when there is a crisis than the stock prices of those owned by non-financial corporations. These findings are consistent with the view that investment bankers/hedge fund managers tend to sell their shares rapidly in response to negative information about COVID-19 cases, intensifying the downward pressure on prices, whereas owners with long- strategic commitments to firms (including large corporations) tend to dampen the pandemic's adverse impact on stock prices.[161]

Conclusion

The coronavirus pandemic (COVID-19) has, in a very short time frame, had a profound effect on the lives and well-being of the world's population and businesses. Businesses are treading through a time of inconvenient uncertainty. Those in leadership positions will be required to persevere and co-ordinate, sharing knowledge as opposed to taking an isolated approach. Leading successfully will not be contingent on any particular leadership approach or title; leadership will be required at almost all levels of human interaction. Collectively, everyone will learn important lessons and the choices made will affect everything going forward. A moral manager dimension is lacking in many companies which If present would be characterised by the manager's pre-emptive efforts to influence followers' ethical and unethical behavioural practices in the workplace which could compromise *inter alia*, quality. When moral managers exist in a workplace, they make ethics an explicit part of their management agenda since they communicate a moral, ethics

[157]Brownlee (2020).
[158]Albuquerque, Koskinen & Zhang (2019).
[159]Ding, Levine, Lin & Xie (2020).
[160]Deng, Kang & Low (2013).
[161]Ding, Levine, Lin & Xie (2020).

and values message. They make a point of role modelling ethical conduct, and may use the reward system (rewards and discipline) to hold followers accountable for ethical conduct. Such explicit behaviour helps the ethical leader to make ethics a leadership message that gets followers' attention by standing out as being socially salient against an business milieu that is often ethically neutral at best, thus sharing of knowledge is critical.[161]

Opportunity underlies all crises and moving from a predominantly face-to-face to a cloud-based environment will require people to trust each other, work together, and communicate more than before with a clear goal in mind. They will also possibly have to re-invent themselves, how and what their companies offer customers, and ultimately will have to work in a new way and with the possibility of a new purpose in mind.

Future research may be needed to understand "pandemic" leadership and its effect on virtual teams, how they are managed and the tasks they possibly cannot do virtually. Furthermore, in times of pandemic crisis, how much more communication would be needed from those leading and what is needed to avoid miscommunications. The limitations of this paper lie in the above work being based on current findings available in publicised literature and as yet the impact of radical changes in government policies and work practices across the world as a result of the COVID pandemic is still to emerge.

References

Ahn, J., S. Lee S. & S. Yun (2018). 'Leaders' core self-evaluation, ethical leadership, and employees' job performance: The moderating role of employees' exchange ideology' in *Journal of Business Ethics* 148(2):457–470. https://doi.org/10.1007/s10551-016-3030-0

Al-Ani, B., Horspool, A. & M.C. Bligh (2011). 'Collaborating with 'virtual strangers': Towards developing a framework for leadership in distributed teams' in *Leadership* 7(3):219–249. https://doi.org/10.1177/1742715011407382

Albuquerque, R., Koskinen, Y. & C. Zhang (2019). 'Corporate social responsibility and firm risk: Theory and empirical evidence' in *Management Science* 65(10):4451–4469. https://doi.org/10.1287/mnsc.2018.3043

Alvesson, M. & K. Einola (2019). 'Warning for excessive positivity: Authentic leadership and other traps in leadership studies' in *Leadership Quarterly* 30(4):383–395. https://doi.org/10.1016/j.leaqua.2019.04.001

Antonakis, J. & L. Atwater (2002). 'Leader distance: A review and a proposed theory' in *Leadership Quarterly* 13(6):673–704. https://doi.org/10.1016/S1048-9843(02)00155-8

Ashkanasy, N.M. (2003). 'Emotions in organizations: A multilevel perspective'. *Research in Multi-Level Issues* 2:9–54. https://doi.org/10.1016/S1475-9144(03)02002-2

Ashkanasy, N.M. & R.H. Humphrey (2011). 'A multi-level view of leadership and emotions: Leading with emotional labour' in A. Bryman, D. Collinson, K. Grint, B. Jackson & M. Uhl-Bien (eds.), *Sage handbook of leadership*, pp. 363–377. London: SAGE.

Auzair, S.M. (2011). 'The effect of business strategy and external environment on management' in *International Journal of Business and Social Science* 2(13):236–244.

Avery, D.R., McKay, P.F., Volpone, S.D. & A. Malka (2015). 'Are companies beholden to bias? The impact of leader race on consumer purchasing behavior' in *Organizational Behavior and Human Decision Processes* 127:85–102. https://doi. org/10.1016/j.obh dp.2015.01.004

Bandura, A. (1997). *Self-efficacy: The exercise of control*. New York: Freeman.

Baskaran, S., Yang, L.R., Yi, L.X. & N. Mahadi (2018). 'Ethically challenged strategic management: Conceptualizing personality, love for money and unmet goals' in *International Journal of Academic Research in Business and Social Sciences* 8(4): 293–311. https://doi.org/10.6007/IJARBSS/v8-i4/4015

Bavik, Y.L., Tang, P.M., Shao, R. & L.W. Lam (2018). 'Ethical leadership and employee knowledge sharing: Exploring dual-mediation paths' in *Leadership Quarterly* 29(2): 322–332. https://doi.org/10.1016/j.leaqua.2017.05.006

Bedi, A., Alpaslan, C.M. & S. Green. (2016). 'A meta-analytic review of ethical leadership outcomes and moderators' in *Journal of Business Ethics* 139(3):517–536. https://doi.org/10.1007/s10551-015-2625-1

Bell, B.S., McAlpine, K.L. & N.S. Hill (2017). 'Leading from a distance: Advancements in virtual leadership research'. https://digitalcommons.ilr.cornell.edu/articles/1296

Berson, Y., Halevy, N., Shamir, B. & M. Erez (2015). 'Leading from different psychological distances: A construal-level perspective on vision communication, goal setting, and follower motivation' in *Leadership Quarterly* 26(2):143–155. https://doi. org/10.1016/j.leaqua.2014.07.011

Boisot, M. & B. McKelvey. (2010). 'Integrating modernist and postmodernist perspectives on organizations: A complexity science bridge' in *Academy of Management Review* 35(3):415–433. https://doi.org/10.5465/amr.35.3.zok415

Bradt, J. (2015). 'The three keys to leading virtual teams.' https://www.forbes.com/sites/ georgebradt/2015/11/19/the-three-keys-to-leading-virtual-teams/#5dba776d6dc5

Brownlee, D. (2020). '7 Leadership traits for the post COVID-19 workplace.' https://www. forbes.com/sites/danabrownlee/2020/05/07/7-leadership-traits-for-the-post-covid-19-workplace/#4e10a8be2d4d

Buble, M. (2012). 'Interdependence of organizational culture and leadership styles in large firms' in *Management: Journal of Contemporary Management Issues* 17(2):85–97.

Bullock, C. & J.T. Klein (2011). *Virtual work environments in the post-recession Era*. Brandon, Manitoba: Bradman University.

Burris, E.R., Detert, J.R. & D.S. Chiaburu (2008). 'Quitting before leaving: The mediating effects of psychological attachment and detachment on voice' in *Journal of Applied Psychology* 93(4):912–922. https://doi.org/10.1037/0021-9010.93.4.912

Byun, G., Karau, S.J., Dai, Y. & S. Lee (2018). 'A three-level examination of the cascading effects of ethical leadership on employee outcomes: A moderated mediation analysis' in *Journal of Business Research* 88:44–53. https://doi.org/10.10 16/j.jbus res.2018.03.004

Carmeli, A. & M.Y. Halevi (2009). 'How top management team behavioral integration and behavioral complexity enable organizational ambidexterity: The moderating role of contextual ambidexterity' in *Leadership Quarterly* 20(2):207–218. https://doi.org/ 10.1016/j.leaqua.2009.01.011

Carte, T.A., Chidambaram, L. & A. Becker (2006). 'Emergent leadership in self-managed virtual teams' in *Group Decision and Negotiation* 15(4):323–343. https://doi.org/10. 1007/s10726-006-9045-7

Carton, A.M., Murphy, C. & J.R. Clark (2014). 'A (blurry) vision of the future: How leader rhetoric about ultimate goals influences performance' in *Academy of Management Journal* 57(6):1544–1570. https://doi.org/10.5465/amj.2012.0101

Chang, J.W., Sy, T. & J.N. Choi (2012). 'Team emotional intelligence and performance: Interactive dynamics between leaders and members' in *Small Group Research* 43(1): 75–104. https://doi.org/10.1177/1046496411415692

Chen, G., Kanfer, R., DeShon, R.P., Mathieu, J.E. & S.W.J. Kozlowski (2009). 'The motivating potential of teams: Test and extension of cross-level model of motivation in teams' in *Organisational Behaviour and Human Decision Processes* 110(1):45–55. https://doi.org/10.1016/j.obhdp.2009.06.006

Chen, Y., Tang, G., Jin, J. Xie, Q. & J. Li (2014). 'CEO transformation and product innovation performance. The roles of corporate entrepreneurship and technology orientation' in *Journal of Product Innovation Management* 4(31):2–17.

Chi, H., Lan, C. & B. Dorjgotov (2012). 'The moderating effect of transformational leadership on knowledge management and organizational effectiveness' in *Social Behavior and Personality: an International Journal* 40(6):1015–1023. https://doi.org/10.2224/sbp.2012.40.6.1015

Clapp-Smith, R., Vogelgesang, G.R. & J.B. Avey (2009). 'Authentic leadership and positive psychological capital: The mediating role of trust at the group level of analysis' in *Journal of Leadership and Organizational Studies* 15(3):227–240. https://doi.org/10.1177/1548051808326596

Colquitt, J.A., Hollenbeck, J.R., Ilgen, D.R., LePine, J.A. & L. Sheppard (2002). 'Computer-assisted communication and team decision-making performance: The moderating effect of openness to experience' in *Journal of Applied Psychology* 87(2): 402–410. https://doi.org/10.1037/0021-9010.87.2.402

Craig, N. & S.A. Snook (2014). 'From purpose to impact: Figure out your passion and put it to work' in *Harvard Business Review* 92(5):104–11, 134.

Davidson, R.J., Kabat-Zinn, J., Schumacher, J., Rosenkranz, M., Muller, D., Santorelli, S.F., Urbanowski, F., Harrington, A., Bonus, K. & J.F. Sheridan (2003). 'Alterations in brain and immune function produced by mindfulness meditation' in *Psychosomatic Medicine* 65(4):564–570. https://doi.org/10.1097/01.psy.0000077505.67574.e3

Day, D.V. & J. Antonakis (2012). *The nature of leadership*. 2nd ed. Thousand oaks, California: SAGE.

De Jong, J. & D. Den Hartog (2010). 'Measuring innovative work behavior' in *Creativity and Innovation Management* 19(1):23–36. https://doi.org/10.1111/j.1467-8691.2010.00547.x

Den Hartog, D.N. (2015). 'Ethical leadership' in *Annual Review of Organisational Psychology and Organisational Behaviour* 2(1):409–434. https://doi.org/10.1146/annurev-orgpsych-032414-111237

Deng, X., Kang, J. & B.S. Low (2013). 'Corporate social responsibility and stakeholder value maximization: Evidence from mergers' in *Journal of Financial Economics* 110 (1):87–109. https://doi.org/10.1016/j.jfineco.2013.04.014

Detert, J.R. & A.C. Edmondson (2011). 'Implicit voice theories: Taken-for-granted rules of self-censorship at work' in *Academy of Management Journal* 54(3):461–488. https://doi.org/10.5465/amj.2011.61967925

Ding, W., Levine, R., Lin, C. & W. Xie (2020). 'Corporate immunity to the COVID-19 pandemic' in *National Bureau of Economic Research,* Working Paper 27055. http://www.nber.org/papers/w27055.

Du Plessis, J., Hargovan, A. & J. Harris (2018). *Principles of contemporary corporate governance*. 4th ed. Sydney: Cambridge University Press.

Dugan, J.P. (2017). *Leadership theory*. San Francisco: Jossey-Bass.

Edmondson, A.C. (1999). 'Psychological safety and learning behavior in work teams' in *Administrative Science Quarterly* 44(2):350–383. https://doi.org/10.2307/2666999

Enderle, G. (1987). 'Some perspectives of managerial ethical leadership' in *Journal of Business Ethics* 6(8):657–663. https://doi.org/10.1007/BF00705782

Erçetin, Ş.Ş., Açikalin,. S.N. & M.S. Bülbül (2013). 'A multi-dimensional approach to leadership in chaotic environments' in S. Banerjee (ed.), *Chaos and complexity theory for management: Nonlinear dynamics*, pp. 89–104.Turkey: IGI Global.

Galpin, T., Jouflas, G. & M. Gasta (2014). 'Leading the sustainable organization at Vail Resorts.' *Journal of Business Strategy* 35(6):19–30. https://doi.org/10.1108/JBS-02-2014-0008

George, B. (2015). *Discover your true worth. Becoming an authentic leader*. Hoboken, NJ: John Wiley & Sons.

Giessner, S. & N. van Quaquebeke (2010). 'Using a relational models perspective to understand normatively appropriate conduct in ethical leadership' in *Journal of Business Ethics* 95(Sup. 1):43–55. https://doi.org/10.1007/s10551-011-0790-4

Goleman, D. & R.E. Boyatzis (2017). 'Emotional intelligence as 12 elements. Which do you need to work on?' in *Harvard Business Review*. https://hbr.org/2017/02/emotional-intelligence-has-12-elements-which-do-you-need-to-work-on

Graham, K. (2011). 'Leading with purpose: A case for soul leadership' in *Development and Learning in Organizations* 25(4):5–7. https://doi.org/10.1108/14777281111147026

Grandey, A.A. & A.S. Gabriel (2015). 'Emotional labor at a crossroads: Where do we go from here?' in *Annual Review of Organizational Psychology and Organizational Behavior* 2(1):323–349. https://doi.org/10.1146/annurev-orgpsych-032414-111400

Hadfield, G. (2016). *Rules for a flat world: Why humans invented law and how to reinvent it for a complex global economy*. Oxford: Oxford University Press.

Hahn, T., Pinkse, J., Preuss, L. & F. Figge (2015). 'Tensions in corporate sustainability: Towards an integrative framework' in *Journal of Business Ethics* 127(2):297–316. https://doi.org/10.1007/s10551-014-2047-5

Hannah, S.T., Campbell, D.J. & M.D. Matthews (2010). 'Advancing a research agenda for leadership in dangerous contexts' in *Military Psychology* 22(Sup. 1): S157–S189. https://doi.org/10.1080/08995601003644452

Hannah, S.T., Uhl-Bien, M., Avolio, B.J. & F.L. Cavarretta (2009). 'A framework for examining leadership in extreme contexts' in *Leadership Quarterly* 20(6):897–919. https://doi.org/10.1016/j.leaqua.2009.09.006

Hehman, E., Sutherland, C.A.M., Flake, J.K. & M.L. Slepian (2017). 'The unique contributions of perceiver and target characteristics in person perception' in *Journal of Personality and Social Psychology* 113(4):513–529. https://doi.org/10.1037/pspa0000090

Hill, N.S. & K.M. Bartol (2016). 'Empowering leadership and effective collaboration in geographically dispersed teams' in *Personnel Psychology* 69(1):159–198. https://doi.org/10.1111/peps.12108

Hoch, J.E. & S.W. Kozlowski (2014). 'Leading virtual teams: Hierarchical leadership, structural supports, and shared team leadership' in *Journal of Applied Psychology* 99(3):390–403. https://doi.org/10.1037/a0030264

Holt, S., Marques, J., Hu J. & A Wood (2017). 'Cultivating empathy: New perspectives on educating business leaders.' *Journal of Values-Based Leadership* 10(1):3. https://doi.org/10.22543/0733.101.1173

Hoskisson, R.E., Chirico, F. & J. Zyung (2016). '(Daniel), gambeta E' [Managerial risk taking] in *Journal of Management* 43(1):137–169.

Hougaard, R. & J. Carter (2018). 'The mind of the leader: How to lead yourself, your people, and your organisation for extraordinary results.' *Harvard business review*

press e-book. https://store.hbr.org/product/the-mind-of-the-leader-how-to-lead-your self-your-people-and-your-organization-for-extraordinary-results/10153

Hughes, C. (2019). 'Research ethics, governance and the future,' in C. Hughes (ed.), *Ethical and legal issues in human resource development*, pp. 113–129. Cham: Palgrave Macmillan.

Hursthouse, R. & G. Pettigrove (2018). 'Virtue Ethics'. https://plato.standard.edu/cgi-bin/encyclopedia/archinfo/cgi?entry=ethics-virtue

Issah, M. (2018). *Change leadership: The role of emotional intelligence*. SAGE Open, vol. 8(3), pages 21582440188, September.

Jacobs, G.A. & G.J. Longbotham (2011). 'The impact of spirituality on the formation of a leader's purpose' in *Journal of Management, Spirituality and Religion* 8(1):69–91. https://doi.org/10.1080/14766086.2011.552259

Jordan, P.J. & N.M. Ashkanasy (2006). 'Emotional intelligence, emotional self-awareness, and team effectiveness,' in V.U. Druskat, F. Sala & G. Mount (ed.), *Linking emotional intelligence and performance at work: Current research evidence with individuals and groups*, pp. 145–163. Mahwah, NJ: Lawrence Erlbaum Associates Publishers.

Jung, N., Wranke, C., Hamburger K. & M. Knauff (2014). 'How emotions affect logical reasoning: Evidence from experiments with mood-manipulated participants, spider phobics, and people with exam anxiety' in *Frontiers in Psychology* 5:570. https://doi.org/10.3389/fpsyg.2014.00570

Kahane, A. (2004). *Solving tough problems: An open way of talking, listening and creating new realities*. San Francisco, CA: Berrett-Koelher Publishers.

Kim, C.W. & R. Mauborgne (2005). *Blue ocean strategy*. Boston, MA: Harvard Business School Press.

Kirkman, B.L., Rosen, B., Tesluk, P.E. & C.B. Gibson (2004). 'The impact of team empowerment on virtual team performance: The moderating role of face-to-face interaction' in *Academy of Management Journal* 47(2):175–192

Klein, K.J., Ziegert, J.C., Knight, A.P. & Y. Xiao (2004). 'A leadership system for emergency action teams: Rigid hierarchy and dynamic flexibility' in *Academy of Management Journal* 47(6):1–55.

Ko, C., Ma, J., Bartnik, R., Haney, M.H. & M. Kang (2018). 'Ethical leadership: An integrative review and future research agenda' in *Ethics and Behavior* 28(2):104–132. https://doi.org/10.1080/10508422.2017.1318069

Kozlowski, S.W.J., Watola, D.J., Jensen, J.M., Kim, B.H. & I.C. Botero. (2009). 'Developing adaptive teams: A theory of dynamic team leadership,' in E. Salas, G.F. Goodwin & C.S. Burke (ed.), *Team effectiveness in complex organizations: Cross-disciplinary perspectives and approaches*, pp. 11–155. New York: Routledge.

Kukenberger, M.R., Mathieu, J.E. & T. Ruddy (2015). 'A cross-level test of empowerment and process influences on members' informal learning and team commitment' in *Journal of Management* 41(3):987–1016. https://doi.org/10.1177/0149206312443559

Leonard, H.B. & A.M. Howitt (2007). 'Against desperate peril: High performance in emergency preparation and response,' in D.E. Gibbons (ed.), *Communicable crises: Prevention, response and recovery in the global Arena, Age*, pp. 1–26. Charlotte, NC: Info.

Leroy, H, Anseel. F., Gardner, W.L & L. Sels (2015). 'uthentic leadership, authentic followership, basic need satisfaction, and work role performance. A cross- level study' in *Journal of Management* 41(6):1677-1697.

Liao, C. (2017). 'Leadership in virtual teams: A multilevel perspective' in *Human Resource Management Review* 27(4):648–659. https://doi.org/10.1016/j.hrmr.2016.12.010

Little, L.M., Gooty, J. & M. Williams (2016). 'The role of leader emotion management in leader-member exchange and follower outcomes' in *Leadership Quarterly* 27(1):85–97. https://doi.org/10.1016/j.leaqua.2015.08.007

Lopez, S.O. (2018). 'Vulnerability in leadership: The power of the courage to descend.' PhD diss., Seattle Pacific University. Available at https://digitalcommons.spu.edu/iop_etd/16

Mahsud, R., Yukl, G. & G. Prussia (2010). 'Leader empathy, ethical leadership, and relations-oriented behaviors as antecedents of leader-member exchange quality' in *Journal of Managerial Psychology* 25(6):561–577. https://doi.org/10.1108/02683941011056932

Malhotra, A., Majchrzak, A. & B. Rosen (2007). 'Leading virtual teams' in *Academy of Management Perspectives* 21(1):60–70. https://doi.org/10.5465/amp.2007.24286164

Marques, J. & S. Dhiman (2017). *Leadership today. Practices for personal and professional performance*. Switzerland: Springer International Publishing.

Maruping, L.M. & R. Agarwal (2004). 'Managing team interpersonal processes through technology: A task–technology fit perspective' in *Journal of Applied Psychology* 89(6):975–990. https://doi.org/10.1037/0021-9010.89.6.975

Mayende, T.S. & I.A. Musenze (2018). 'Ethical leadership and staff retention: The moderating role of job resources in Uganda's healthcare sector' in *SA Journal of Industrial Psychology* 44(1):1–20. https://doi.org/10.4102/sajip.v44i0.1531

Merriam-Webster Dictionary (2020). Available at https://www.merriam-webster.com/dictionary/trust

Middlebrooks, A. (2015). 'Introduction-Entrepreneurial leadership across contexts' in *Journal of Leadership Studies* 8(4):27–29. https://doi.org/10.1002/jls.21349

Mihelič, K.K., Lipičnik B. & M. Tekavčič (2010). 'Ethical leadership' in *International Journal of Management and Information Systems* 14(5):31–41. https://doi.org/10.19030/ijmis.v14i5.11

Moore, C., Mayer, D.M., Chiang, F.F.T., Crossley, Y.C., Karlesky. M.J. & T.A. Birtch (2019). 'Leaders matter morally: The role of ethical leadership in shaping employee moral cognition and misconduct' in *Journal of Applied Psychology* 104(1):123–145. https://doi.org/10.1037/apl0000341

Morgeson, F.P., DeRue. D.S. & E.P. Karam (2010). 'Leadership in teams: A functional approach to understanding leadership structures and processes' in *Journal of Management* 36(1):5–39. https://doi.org/10.1177/0149206309347376

Nelson, J.K., Poms, L.W. & P.P. Wolf (2012). 'Developing efficacy beliefs for ethics and diversity management' in *Academy of Management Learning and Education* 11(1): 49–68. https://doi.org/10.5465/amle.2009.0115

Ng, T.W.H. & D.C. Feldman (2013). 'Age and innovation-related behavior. The joint moderating effects of supervisor undermining and proactive personality' in *Journal of Organisational Behavior* 34(5):583–606. https://doi.org/10.1002/job.1802

Nicolaides, A. (2015). 'The paradox of Business Ethics, Quality and Leadership: The path to business sustainability' in *African Journal of Hospitality, Tourism and Leisure* 4(1).

Nicolaides, A. & K.C.T. Tornam Duho.(2019). 'Effective leadership in organizations: African ethics and corruption' in *Modern Economy* 10(7):1713–1743. https://doi.org/10.4236/me.2019.107111

Nicolaides, V.C., LaPort, K.A., Chen, T.R., Tomassetti, A.J., Weis, E.J., Zaccaro, S.J. & J.M. Cortina (2014). 'The shared leadership of teams: A meta-analysis of proximal, distal, and moderating relationships' in *Leadership Quarterly* 25(5):923–942. https://doi.org/10.1016/j.leaqua.2014.06.006

Noelliste, M. (2013). 'Integrity: An intrapersonal perspective' in *Human Resource Development Review* 12(4):474–499. https://doi.org/10.1177/1534484313492333

Norman, S., Luthans, B. & K. Luthans (2005). 'The proposed contagion effect of hopeful leaders on the resiliency of employees and organisations' in *Journal of Leadership and Organizational Studies* 12(2):55–64. https://doi.org/10.1177/107179190501200205

Northouse, P.G. (2019). *Leadership*. 2nd ed. London: SAGE.

O'Reilly, C.A. & M.L. Tushman (2013). 'Organizational ambidexterity: Past, present, future' in *Academy of Management Perspectives* 27(4):324–338. https://doi.org/10.5465/amp.2013.0025

Okpara, J.O. & P.M. Wynn (2012). 'Stakeholders' perceptions about corporate social responsibility: Implications for poverty alleviation' in *Thunderbird International Business Review* 54(1):91–103. https://doi.org/10.1002/tie.21441

Owens, B.P. & D.R. Hekman (2012). 'Modelling how to grow: An inductive examination of humble leader behaviors, contingencies, and outcomes' in *Academy of Management Journal* 55(4):787–818. https://doi.org/10.5465/amj.2010.0441

Owens, B.P., Johnson M.D. & T.R. Mitchell (2013). 'Expressed humility in organizations: Implications for performance, teams, and leadership' in *Organization Science* 24(5): 1517–1538. https://doi.org/10.1287/orsc.1120.0795

Purvanova, R.K. & J.E. Bono (2009). 'Transformational leadership in context: Face-to-face and virtual teams' in *Leadership Quarterly* 20(3):343–357. https://doi.org/10.1016/j.leaqua.2009.03.004

Radaelli, G., Lettieri, E., Mura, M. & N. Spiller (2014). 'Knowledge sharing and innovative work behavior in healthcare. A micro-level investigation of direct and indirect effects' in *Creativity and Innovation Management* 23(4):400–414. https://doi.org/10.1111/caim.12084

Rafferty, A.E. & M.A. Griffin (2004). 'Dimensions of transformational leadership: Conceptual and empirical extensions' in *Leadership Quarterly* 15(3):329–354. https://doi.org/10.1016/j.leaqua.2004.02.009

Ray Gehani, R. (2013). 'Innovative strategic leader transforming from low-cost strategy to product differentiation strategy' in *Journal of Technology Management and Innovation* 8(2):144–155. https://doi.org/10.4067/S0718-27242013000200012

Rehman, R. (2011). 'Role of emotional intelligence on the relationship among leadership styles, decision-making styles and organizational performance: A review' in *Interdisciplinary Journal of Contemporary Research in Business* 3(1):409–416.

Reinhart, C.M. (2020). This time truly is different. 'Project syndicate'. Available at https://www.project-syndicate.org/commentary/covid19-crisis-has-no-economic-precedent-by-carmen-reinhart-2020-03 3

Reis, H.T., Maniaci, M.R., Caprariello, P.A., Eastwick, P.W. & E.J. Finkel (2011). 'Familiarity does indeed promote attraction in live interaction' in *Journal of Personality and Social Psychology* 101(3):557–570. https://doi.org/10.1037/a0022885

Resick, C.J., Martin, G.S., Keating, M.A., Dickson, M.W., Kwan, H.K. & C. Peng (2011). 'What ethical leadership means to me: Asian, American, and European perspectives' in *Journal of Business Ethics* 101(3):435–457. https://doi.org/10.1007/s10551-010-0730-8

Rifkin, J. (2010). *The empathic civilization: The race to global consciousness in a world in crisis*. Cambridge: Polity Press.

Rossouw, D. & L. van Vuuren (2018). *Business ethics*. 6th ed. Oxford, South Africa: Oxford University Press.

Royakkers, L., Timmer, J., Kool, L. & R. van Est (2018). 'Societal and ethical issues of digitization' in *Ethics and Information Technology* 20(2):127–142. https://doi.org/10.1007/s10676-018-9452-x

Sagiv, L. & S.H. Schwartz (2007). 'Cultural values in organizations: Insights for Europe' in *European Journal of International Management* 1(3):176–190.

Salas, W., Goodwin, G.F. & C. Shawn-Burke. (2010). *Effectiveness in complex organizations: Cross-disciplinary perspectives and approaches*. New York: Taylor & Francis Group.

Scott, B.A., Colquitt, J.A., Paddock, E.L. & T.A. Judge (2010). 'A daily investigation of the role of manager empathy on employee well-being' in *Organizational Behavior and Human Decision Processes* 113(2):127–140. https://doi.org/10.1016/j.obhdp.2010.08.001

Seifert, C. (2007). 'Improving disaster management through structured flexibility among frontline responders,' in D.E. Gibbons (ed.), *Communicable crises*, pp. 83–116. New York: Information Age Publishing.

Semedo, A.S.D., Coelho, A.F.M. & N.M.P. Ribeiro (2016). 'Effects of authentic leadership, affective environment and job resourcefulness on employee's creativity and individual performance' in *Leadership and Organization Development Journal* 37(8):1038–1055. https://doi.org/10.1108/LODJ-02-2015-0029

Senge, P. & K. Krahnke (2014). 'Transcendent empathy: The ability to see the larger system' in, K. Pavlovich & K. Krahnke (eds.), *Organizing through empathy*, pp. 185–202. New York: Routledge.

Siepel, J. & P. Nightingale. (2014). 'Anglo-Saxon governance: Similarities, difference and outcomes in a financialized world' in *Critical Perspectives on Accounting* 25(1):27–35. https://doi.org/10.1016/j.cpa.2012.10.004

Sinek, S. (2020). 'There is no going back to normal' at. https://www.youtube.com/watch?v =ThJdlJD-foY

Stander, F.W., Beer, L.T. & M.W. Stander (2015). 'Authentic leadership as a source of optimism, trust in the organization and work engagement in the public health care sector' in *SA Journal of Human Resource Management* 13(1):1–12.

Storey, J. & G. Salaman (2017). 'Employee ownership and the drive to do business responsibly: A study of the John Lewis Partnership' in *Oxford Review of Economic Policy* 33(2):339–354. https://doi.org/10.1093/oxrep/grx022

Strange, J.M. & M.D. Mumford (2002). 'The origins of vision' in *Leadership Quarterly* 13(4):343–377. https://doi.org/10.1016/S1048-9843(02)00125-X

Taiwo, A.A., Lawal, F.A. & M.E. Agwu (2016). 'Vision and mission in organization: Myth or heuristic device?' in *International Journal of Business and Management* 4(3): 127–134.

Tajfel, H. & J.C. Turner (1986). 'The social identity theory of intergroup behavior,' in S. Worchel & W.G. Austin (ed.), *Psychology of intergroup relations*, 2nd ed, pp. 7–24. Chicago: Nelson-Hall.

Treviño, L.K., Brown, M. & L.P. Hartman (2003). 'A qualitative investigation of perceived executive ethical leadership: Perceptions from inside and outside the executive suite' in *Human Relations* 56(1):5–37. https://doi.org/10.1177/00187267 03056001448

Treviño, L.K. & K.A. Nelson (2017). *Managing business ethics: Straight talk about how to do it right*. 7th ed. Hoboken, NJ: John Wiley & Sons, Inc.

Uhl-Bien, M. & R. Marion (2009). 'Complexity leadership in bureaucratic forms of organising: A meso model' in *Leadership Quarterly* 20(4):631–650. https://doi.org/10.1016/j.leaqua.2009.04.007

Urbancova, H. (2013). 'Competitive advantage achievement through innovation and knowledge' in *Journal of Competitiveness* 5(1):82–96. https://doi.org/10.7441/joc.2013.01.06

Valenzuela, L.M., J.P. Mulki & J.F. Jaramillo. (2010). 'Impact of customer orientation, inducements and ethics on loyalty to the firm: Customers' perspective' in *Journal of Business Ethics* 93(2):277–291. https://doi.org/10.1007/s10551-009-0220-z

Van Iddekinge, C.H., Ferris, G.R. & T.S. Heffner (2009). 'Test of a multistage model of distal and proximal antecedents of leader performance' in *Personnel Psychology* 62(3):463–495. https://doi.org/10.1111/j.1744-6570.2009.01145.x

Venus, M., Stam, D. & D. van Knippenberg (2013). 'Leader emotion as a catalyst of effective leader communication of visions, value-laden messages, and goals' in *Organizational Behavior and Human Decision Processes* 122(1):53–68. https://doi.org/10.1016/j.obhdp.2013.03.009

Wang, M., Zhou, L. & S. Liu (2014). 'Multilevel issues in leadership research,', in, D. Day (ed.), *The Oxford handbook of leadership and organizations*, pp. 146–166. New York: Oxford University Press.

World Economic Forum. (2020). 'How Digital infrastructure can help us through the COVID-19 Crisis'. https://www.weforum.org/agenda/2020/04/digital-infrastructure-public-health-crisis-covid-19/

Wright, R.R., Mohr, C.D., Sinclair, R.R. & L.-Q. Yang (2015). 'Sometimes less is more: Directed coping with interpersonal stressors at work' in *Journal of Organizational Behavior* 36(6):786–805. https://doi.org/10.1002/job.2002

Yukl, G (2013). *Leadership in organizations*. 8th ed. New Jersey: Pearson.

Zeidan, R. & J. Müllner (2015). 'Firm, market and top management antecedents of speculation: Lessons for corporate governance' in *Journal of Multinational Financial Management* 32–33:42–58 42–58. https://doi.org/10.1016/j.mulfin.2015.08.001

Zhang, S. & Y. Tu (2018). 'Cross-domain effects of ethical leadership on employee family and life satisfaction: The moderating role of family-supportive supervisor behaviors' in *Journal of Business Ethics* 152(4):1085–1097. https://doi.org/10.1007/s10551-016-3306-4

Zimmer, C. (2011). 'The brain: Memories are crucial for looking into the future'. *Discover*. Available at https://www.discovermagazine.com/mind/the-brain-me mories-are-cruc ial-for-looking-into-the-future

Zolin, R., Hinds, P.J., Fruchter R. & R.E. Levitt (2004). 'Interpersonal trust in cross-functional, geographically distributed work: A longitudinal study' in *Information and Organization* 14(1):1–26.

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 463-484

Russian Legal Discourse

*By Vladimir Orlov**

Due to the nonrecognition of the origin of the business law in the commercial law, or, the law merchant, grown out of the customs and usages of merchants that existed before the emergence of law itself, and which, even in the process of formalizing the law into the legislation, characteristic for the continental law, in respect of commercial activities that introduced its public regulation, has reserved its self-regulatory and dispositive nature, the Russian legal discourse is quite different to what is generally represented as the Western legal discourse. Although Russian business law has been developed under the influence of Western law, the idea of the legislatively established legal surveillance of business activities, where written law is regarded as a progressive means of regulation, plays still an important role, and the breach of the law requirements is a sine qua non condition for civil liability (for damages) in Russia.

Keywords: *Law, Legal Discourse; Legislation; Praxis, Regulation*

Introduction

This article handles issues related to the Russian legal discourse that means Russian law in a very large sense, including the issues ordinary regarded as not being legal. The article contains the parts that are devoted to:

- basic concepts in general, including legal discourse and legal sources,
- genesis of Russian law,
- Russian legal system and
- peculiarities of Russian legal discourse, and ends with conclusion.

The aim of the article is to draw attention to the doctrinal inadequacy of Russian law to the needs of business activities in Russia.[2,3]

The article is based on the notion that our knowledge has a cognitive basis, and it is constructed of our visions on reality—this could be scientist reality, legal

[*]Dr. of Legal Sciences; Professor, Herzen State Pedagogical University of Russia, Saint Petersburg, Russia and Adjunct Professor, University of Helsinki, Helsinki, Finland.
Email: vladimir.orlov@saunalahti.fi

[2]As a consequence of it, it is still generally expected (even among the law students) in Russia, that enforcement authorities act within the law whereas entrepreneurs ought to follow the law. See, for instance, https://deloros.ru/na-ploshhadke-delovoj-rossii-obsudili-zashhitu-biznesa-ot-silovogo-davleniya-v-pfo.html; https://ria.ru/20210125/zakon-1594499687.html; https://vn.ru/news-yuriy-petukhov-otvetstvennost-biznesa-eto-garantiya-nadezhnosti

[3]On the modern legal doctrine see, for instance, Orlov (2019) at 164–165.

reality, metaphysical reality, pragmatic reality, etc.[4] In any case the article represents the realistic approach: as reality, the law exsts, though the difficulties of its definition, for instance, in the legislative and jurisprudential acts,[5] wherefore phenomenological reality demension is characteristic of law.

Furthermore, according to the nonlinear scientific notions, the world, in particular, the social world consists of mass phenomena, the items of which are self-determining, wherefore exact knowledge on them is impossible[6]. Thus, social (and also legal) phenomena may not in principle be definitely determined, since they always contain an element of unpredictability.[7]

Important is also that legal phenomena are subject of the behavioural sciences, where the intentionality is a decisive factor in defining the content of the issue in question, wherefore we may not deal with the exact knowledge on them but only present our interpretation of the issue.[8]

The development of Russian business law in this article is followed in relation to the influence of Roman law[9] on it. In this context, the whole body of Roman law and its development could be divided into two stages: the formation of classical Roman law and Justinian and post-Justinian period.

With respect to business regulation, the formation of classical Roman law could be schematically presented as having started in Hellenistic East, where customs established in the Mediterranean Sea trade as being a sort of common *lex mercatoria maritima* formed Rhodian maritime law code (*Lex Rhodia*)[10] that survived until the Roman Empire and was adopted to the Roman law as corresponding the demands of the economically developing society. The Roman law that obtained theoretical and value ground in the Antique Greece became positivistically shaped in classical period law, and in the Justinian period it became codified as *Corpus Juris Civilis*, containing civil law and canon law norms. Noteworthy is that the interpretation of the *Corpus* was ordered by Justinian to be based on its texts without any references to the original sources, meaning the opinions of classical roman law scholars[11]; that was the way the exegetical (or literal) principle of interpretation[12] became applicable in Roman law.

The second part of the history of Roman Law that continued the Justinian

[4]To some extent real knowledge (including understanding) could be constructed of positivist knowledge, taking into account the teleological (intentional) aspect of human activity and placed in its cultural values background von Wright (1971) and Egidi (2009).

[5]And its purport is first of all to prevent and solve social collisions.

[6]Even in the exact sciences it is impossible to reach definitely exact knowledge.

[7]See, for instance, Orlov (2019) at 164–165.

[8]It is obvious that such revolutionary notions threaten the established Post soviet scientific order.

[9]The term "Roman law" firstly refers to the legal system of ancient Rome from the time of the city founding in 753 BC until the fall of the Western Roman Empire in the 5th century CE. Later it was used in the Byzantine Empire (Eastern Roman Empire) until 1453. "Roman law" is also used to denote the legal systems implemented in the Western Europe until as late as the 18th century known as *ius commune*. See, for instance, Lucio (2021),

[10]Probably issued in about 900-800 BC.

[11]Pokrovsky (1913), Chapter V.

[12]According to the Exegetical teachings law and statute are identical, and the other sources of law — custom, scholarship, case law, natural law — had only secondary importance. See, for instance, van Caenegem (1992) at 191.

code is represented by its eastern and western branches, and they were essentially different. The western tradition of Roman law[13] became later realised in the continental law, where civil law became crowned by the codified legislation with its sophisticated theoretical basis corresponding the needs of economic and societal development.[14] In turn the eastern branch of Roman law[15], after continuing successfully the Justinian heritage for centuries, lost as such its novelty and universality later.[16]

Basic Concepts in General

Legal discourse stands in this article for issues related to the law. Freedom of business activities, including free contracting, is the basic principle of the western legal discourse, that had been inherited from the trade customs. These customs were the embryos of the *lex mercatoria* that forms the basis of commercial law. Even in the process of formalizing the law into the legislation, which is characteristic for the continental law, the law regulating business (commercial) activities, although it introduced the public regulation of these activities, has reserved its self-regulatory and dispositive nature, as well as effectiveness, particularly due to the positive attitude to business customs.

The core of legal discourse is represented by laws or legislative norms in continental law and binding decisions on previous cases at common law. They both serve as constructive elements of the national legal systems that usually include also customs legal doctrine. They all constitute the legal sources, the concept and doctrine of which became necessary due to the systematisation of the modernised western law that took form of codifications in continental law countries started in the beginning of the 19th century and had replaced the traditional particularity of legal regulation.

It was the developing market economy and political democratisation, that presupposed clearly functioning legal orders where predictability and equality were important values, which made a normative theory of how different sources of law should relate to one another necessary. Consequently, the continental legal formalism based on the new concept of sources of law made written norms the most important source of law and (national) legal codifications necessary. Similar predictability of legal regulation is secured by the theory of stare decisis at

[13]Significant step in the history of Roman law was the recovery of the Corpus Juris Civilis and, in particular, its Digest or Pandect of Civil Law that contained the extracts from the authoritative writings of the leading Roman lawyers in 11th century in Italy. It initiated academic studies and teaching of Roman law in Western Europe.

[14]The limits of its theorization the Roman law achieved in the German conceptual jurisprudence that represents a conceptually closed system of civil law.

[15]Where the *Corpus Juris Civilis* was revised into Greek, when that became the predominant language of the Eastern Roman Empire.

[16]Compared to Byzantine, the shaping of the modern western state occurred in different situation that favoured intensive state and societal construction where new social relations and institutes emerged together with the new law. Hvostova (1998) at 2.

common law.[17]

The systematisation of Western law was supported by theorisation of law mainly represented by competing positivist and natural law theories. The concept of legal source has been particularly necessary for the theorisation of positive law in order to avoid further appeal to the doctrinal scholastic or metaphysics, explaining the origin of law in the nature or the existential thinking.

In the modern doctrine continental laws and common law precedents as legal sources are equated, but at the same the issues related to legislation and the issues related to judicial decisions are differentiated into issues of legisprudence and jurisprudence. It is also regarded important, for instance, in the Finnish legal doctrine that the legal science as well as the history, sociology and philosophy of law are distinguished in the legal discourse in particular from the jurisprudence because of the different scientific nature of this— the legal discourse deals with the competences oriented to the judicial activities. In turn, the legal science is nowadays aimed mainly at securing the legal system and its coherence.

Legal sources comprehend normativistically only those legally enlisted, whereas in the descriptive aspect, they mean any factor that has influenced the legal decision, including those that are recognizable only as belonging to the legal discourse in the other legal system. Normativistically, the main legal source is in the continental law the (written) law or statute, whereas at the common law it is the precedent. As the descriptively existing legal sources, cultural factors and real arguments[18] may be mentioned.

Genesis of Russian Law

Russian law[19] and, correspondingly, its legal discourse has specific features that are explained by the historical factors that are related, in particular, to the genesis of Russian law. The historical background of Russian law was formed by old customs, reflecting the agrarian roots of the Russian culture, Byzantine canon law[20] heritage, and influences of' western law. In particular, the influences of' western law, related to the urban development of the country, have been generally respected as an ideal to be striven for, and for stating the successful achievements of them, also rhetoric means are often used.[21]

[17]*See* Pihlajamäki (2020) at 1145.

[18]Real arguments mean, for instance, the arguments that are used or may be used in the pragmatic endeavour of attempting to establish good reasons for beliefs and actions

[19]Russian law, particularly civil law, where the primary legal source is written law or statutory law, shares the continental law tradition. Continental law is characterised as a normative legal system concerning the a priori fixed social behavioural rules that are applicable to concrete cases of social collision through the dogmatic, originally exegetic, interpretation. See, for instance, Orlov (2019) at 118.

[20]Canon Law generally stands for regulation of the issues related to the religion. Specific for the Byzantine canon law was that it was the result of a process of convergence of sources of both ecclesiastical and civil origins.

[21]Usually, and particularly concerning Russia, it is that, in a hope for the wished future, nominations and metaphors are often used to substitute for reality, and, in default of real content, a nomination or a metaphor is supported by its ideological projections.

Joining Byzantine and Roman Law

The adoption of Christianity by Grand Prince Vladimir of Kiev in 988 opened Russia to a wealth of canon law from Byzantium—the orthodox Christianity has become an essential part of the Russian cultural identity.[22] That time Byzantium was, after the ruling of Justinian, still at the peak of its historical development. The Byzantine Empire was one of the most powerful military and culturally developed states, and its administration system was highly authoritative, centralised and bureaucratic. Moreover, the Byzantine Empire was a theocracy, where church and state were combined into one all-powerful body[23] in accordance with the idea of a (Byzantine) symphony[24] of Church and State.[25,26] The joining of Russia to the Byzantine church[27] and law was not, however, legislatively fixed. The canonical and legal realities as well as the cultural and socio-political realities of Byzantium and Rus were significantly different, wherefore the use of the imperial laws and canons in the territories of newly enlightened barbarians[28] did not seem possible. Consequently, Byzantine canonical rules could be applied in Rus only in so far as they were recognised by church and princes of a certain church and political centre.[29]

The joining of Russia the Byzantine culture and in particular church occurred in church Slavonic language by using Cyrillic letters[30] after the Bible was translated into a Slav language. This means the creation of not only a script for the Slavs, but

[22]After the Mongols *destroyed Kiev* in 1240, the only source of identity that remained was the religious and cultural alliance with Constantinople. See, for instance, https://www.learnrussianineu.com/religion-russia-history-russian-orthodox-church

[23]The emperor was believed to be both the head of the government and the living representative of Jesus Christ. See https://studyres.com/doc/12152392/the-byzantine-empire

[24]The nomination of different kinds of social relations with the names belonging to the domain of theology and political orthodoxy was usual in Byzantine civilisation. See, for instance, Hvostova (1998) at 21 and 35.

[25]Symphony as a legal concept was formulated by Byzantine emperor Justinian, in his Novella 6 of 535 C.E., and it is readily utilised by the post-Soviet Russian Orthodox Church as the model of ideal church-state relations even at present *See Antonov (2020) at* 552–570.

[26]Thus, the Byzantine state was a regime in which the sovereign was the head of the church and the state and that he exercised absolute authority and jurisdiction over the ecclesiastical realm. *See Pennington (2010) at* 183-185.

[27]The choice of religion was most likely determined by political reasons. First, the Slavs had long-term relations with the Byzantine Empire. Second, in the 10th century the Byzantine Empire was one of the most powerful military and culturally developed states. The integration with it on the religious basis was extremely beneficial for the young state. Furthermore, promoting economic, cultural, religious closeness with the Byzantine Empire and other orthodox states, Russian Church was against the Roman Catholic faith, assisting the isolation from the countries of Western Europe and cultural processes, which took place there. See, for instance, https://russia.rin.ru/guides_e/6483.html

[28]This is how Rus was regarded in the Empire of Romans. More details on Greek-Byzantine concept of barbarism and on the attitude of Byzantians to Rus. *See* Ivanov (2003) at 19-21, 169-172 and 209–223.

[29]See, for instance, Smith (1996) at 2.

[30]In Russia, the Cyrillic script was reformed in the time of Peter the Great whose was to promote the approach of Russia to Europe. The last substantial changes to the Cyrillic script were made after the Great October Revolution. Since 1918 the Russian Cyrillic script has remained the same. See https://www.alanier.at/Orthodoxy.html.

also of a language that became the liturgical language of the whole Eastern church, the Old Church Slavonic.[31] As modified to the national languages, it continues to be the language of the orthodox Slav churches.[32] Contrary to the Latin, in particular, scientific Latin, that is the language of philosophical analysis, the Church Slavonic, that appeared during the 14th century and is still used in the Russian Orthodox church, is a sacred language to be used for liturgical worship and hymns.[33] Consequently, the law adopted in Eastern Europe was incapable of any practical synthesis between the written Roman law of Byzantium and local folk laws[34]. It is also significant that Orthodox Christianity was adopted in Russia at the time when the period of its dogmatic pursuits in Byzantine had ended. Therefore, the Russian religious consciousness has understood the Christian doctrine as being complete and not subject to analysis. Thus, openness to the problematisation of fundamental religious questions had not rooted in Russia. Non-critical attitude to the a priori knowledge has also been (and still is) characteristic for the Russian traditional societal, particularly social scientific, thought that has been oriented towards the exploration and elaboration of the (in the first instance universal) truth composing the system of linearly accumulated knowledge.[35]

For the first five centuries Russian Church was subordinate to Patriarch of Constantinople who appointed its head from among the Greeks. The situation changed in 1051 when the first non-Greek Metropolitan of Kievan Rus' was appointed by Grand Duke Yaroslav the Wise. Russian Church became independent de facto since December 15, 1448, when Moscow did not support the union of the Roman and Byzantine churches and appointed its own head of Russian Church. Then later at the end of the 16th century, Russian Church was recognised independent de jure, and its Metropolitan received the status of Patriarch, formally and officially equal in rights to Greek Patriarchs.[36] After the fall of Constantinople in 1453, Russian Church declared itself as "Moscow the Third Rome", the sole heir to the true teachings of Christ.[37]

---

[31]For a very short time (868-886) the *Old Church Slavonic* was acknowledged by Rome as a liturgical language, but it was prohibited 1n 886 by the pope that is considered an important step towards the Great Schism between Eastern and Western church, between Byzantium and Rome.

[32]In medieval Russia the Church Slavonic was the language of the scholars, as Latin in the Western church, and for a very short time (868-886) it was acknowledged by Rome as a liturgical language.

[33]*See*, for instance, Chulev (2015).

[34]*See* Giaro (2015) at 314–315.

[35]For more on this subject see, for instance, Zenkovsky (1989) at 3; Mamzin (2008) at 136; Kourany (1998) at 254–257 and Chestnov (2004) at 16–19.

[36]In 1721 the Moscow patriarchate was abolished by Peter the Great, and the Russian Orthodox Church was subordinated to the state through the Holy Governing Synod, a ministry of ecclesiastical affairs under the direction of a lay chief procurator; then the Holy Synod was abolished in 1918 along with all the other governing institutions of the imperial regime. Patriarchy was restored to Russia in 1943.

[37]In general, not all Byzantine doctrines and ideas have been unconditionally accepted in Russia. Especially after the signing of the Union of Florence in 1439 with the Pope and the fall of Constantinople in 1453 in Moscow strengthened the opinion that the Greeks (Byzantines) were punished by God for deviation from the faith, and only in Russia preserved the true faith. It emerged the doctrine of the Third Rome, according to which the historical successor to the Roman and Byzantine empire is Russia. See https://www.geopolitica.ru/en/1068-the-state-and-the-church-in-russia.html. Today Russian Orthodox Church has a rather big influence with the society, and it

Thus, the Russian legal tradition is primarily based on the influences from the Byzantine Empire with its law that was essentially a continuation of Roman law with increased Christian influence. Actually, Russian civil law, including its business regulation provisions, is like the whole body of the Russian law doctrinally based in the Byzantine canon law.[38] As to the western influences, it was only with the emergence of the Russian Empire in the early 18th century and the Westward-looking leadership of Peter the Great that European influences began to reshape traditional Russian law.

Legal and Societal Development of Russia[39]

Customary laws were for the first time attempted to be codified in the *Russkaya Pravda* or Russian justice approximately 1016 in Novgorod. *Russkaya Pravda* is regarded as the earliest surviving compilation of Russian laws, and contained norms of criminal, obligation, heritage, family and procedure law.[40] Among the provisions of the *Russkaya Pravda* were revenge for murder and monetary payment for damages. The first written legislative acts in Russia concentrated on criminal rather that civil matters and focused on regulating the interaction between families. As in the West, Russian society in the 11th century was evolving into a feudal state, in which feudal relations were, however, only weakly defined by customary law.[41] It was characterised as "feudalism without feudal law." In later versions of the *Russkaya Pravda*, Byzantine influences were evident, such as the provisions that masters should be liable for crimes committed by their slaves. Also, the *Sobornoe Ulozhenie* or Cathedral Code of 1649, which was the first attempt at systematic legislation in Russia, shows the influences of the Byzantine (Roman) law; the *Ulozhenie* survived into the 19th century, when it was replaced by the *Svod Zakonov* or Body of Laws of 1832.[42]

Although the Byzantine Canon Law norms[43] were at first purported to handle questions related to the Orthodox religion, they were, however, the result of a process of convergence of sources of both ecclesiastical and civil origins, where civil law norms could not contradict the canons. Since late 6th century canon law collections named *nomokanons*, issued in Byzantine, combined directly ecclesiastical

sometimes plays an important role in the country's political life. *See* https://www.learnrussianineu.com/religion-russia-history-russian-orthodox-church

[38]However, even the extremely strong influence of the Orthodox culture of Byzantium was unable to compensate in Russia for the absence of Roman civil law that everywhere in Continental Europe promoted individualism and civil society development. See Avenarius (2014) at 89 and 91.

[39]For more on the history of Russia see, for instance, Munchaev & Ustinov (2009).

[40]The first Russian legislative acts served the judicial purposes.

[41]Feudalism in Western Europe became between 1050 and 1150 rationalised through the drafting of feudal and manorial laws. Russia, however, remained remote and isolated from these developments.

[42]*See*, for instance, Smith (1996) at 2¸and Avenarius (2014) at 140–147.

[43]The Byzantine Canon Law norms may be formally hierarchised as follows: (1.) written law, (2.) custom (3.) judicial precedent, Canon Law stands for regulation of the issues related to the religion. Legal norms of the Byzantine Canon Law may be formally hierarchised as follows: (1.) written law, (2.) custom (3.) judicial precedent, (4.) analogy with the law in force, (5.) authorised opinion. However, the highest criterion for the priority of the legal source is the original source of the Canon law that is the will of God. See Kaufhold (2012) at 215-342; and Tsypin (1994).

(canons) and secular norms or imperial laws. One of the most important Byzantine nomokanons, the *Nomokanon* of 14 Titles[44] was translated into Slavic languages and passed into the Russian Church; in the 12th Century it was revised provided with a prologue and commentary by Theodore Balsamon, who was the most important canonist in Constantinople that time.[45,46]

Russian version of the Nomokanon, so-called *Kormchaya Kniga*,[47] included the rules applicable not only in religious issues but also in judicial and administrative activities concerning secular issues. It was officially recognised by the (Russian) Synod and included in the *Svod Zakonov*. Then in 1839, it was partly replaced by the new (current) canon law book, the Book of Rules (*Книга Правил*), where the outdated and irrelevant content was deleted.[48]

The role of Greek clerics, who were well educated, in promoting legal and societal development in Russia was very important. Under the circumstances of the underdeveloped state institutions the clerics were expected to act on the behalf of the state. Following the Byzantine tradition, the church supported the state in securing public order and even morality, particularly in family relations.[49]

In particular, the orthodox clergy was an important factor in the development of old Russian jurisprudence since they possessed the legal material representing the achievements of the Byzantine law based on the best works of the Roman legal scholars. The legal material brought by clerics concerned not so much legislation but rather legal science, and in particular, skills in elaboration, classification and systematisation of legal material, those are the skills they achieved in the studies of sacred texts by applying logical methods. Actually, the *Kormchaya kniga*, was an example of the fluent presentation of the legal rules that were constructed not on the outdated customs or the occasional decision of the authorities, but on the successfully developed and recognised legal principles corresponding the actual needs of the society.[50,51]

Thus, the Russian (Nomokanon) *Kormchaya Kniga* followed by the *Book* of Rules (*Книга Правил*), the purport of which was to serve as a manual in the church governance and in the ecclesiastical court, created, thanks to their high theoretical

[44]The conciliar canons in the first part of it are basic texts of Greek Orthodox ecclesiastical law up to the present time.

[45]In his Scholia (explanatory notes) the text is paraphrased, difficult concepts are interpreted, reference to the reasons which led to the enactment of the canons is made, the text is compared with similar canons, the conflicts with contrary or different texts are pointed out, and harmonisation of the contradictions is attempted. Balsamon's exegetical method is generally similar to that adopted by contemporary canonists of the Latin West.

[46]For more on the subject see, for instance, Hartmann & Pennington (2012) at 115–169.

[47]For more on the subject *see*, for instance, https://omolitvah.ru/eto-interesno/chto-takoe-kormchaya-kniga.

[48]For more on the subject see, for instance, Muravyev (2003) at 318–325.

[49]Russian orthodox church has never pretended to be politically and legally autonomous and fully shared the symphony with the secular power though their competencies were distinguished. See Fogelson (2015) at 41; and for more on the issue *see* Dorskaya (2016) at 1.

[50]Such a brief-law-book style that followed the synoptic Byzantine codifications became popular in Russia. It strengthened the development of Russian law towards its abstractness.

[51]For more on the subject see, for instance, Muravyev A. (2003) at 318-325, Klyuchevsky (2000) at 328–330 and Tomsinov (2009) at 14–15.

and technical level, the ground for adoption of constructions of the French exegetical jurisprudence and then also German conceptual jurisprudence (*Pandect law)* in Russian civil law. Moreover, the basis of Russian canon law, without being bound to any legal, in particular civil law tradition, became a platform for value orientation of Russia and its law, originated in the Orthodox Christianity[52], where law in the meaning *Pravda* (positive law codification) is also identified with right and justice implying equity and even truth (*veritas*). So, the Byzantine canon law tradition is the original philosophic root of the Russian law aimed at integrating positive law with moral values and seeking for the verity, often even at the expense of economic rationality.

Since the Byzantine as well as the Russian church was tightly interwoven with the state, religious and secular issues were not properly distinguished, and the canon law norms as a whole were contained in the general system of state laws[53] with the reservation that such laws are under the competence of the emperor as a universal and absolute lawmaker, who was the head of both the church and the state.[54] So following the Byzantine tradition[55], czarist Russia was an ideocratic state and the will of the monarch was the only legal source of law; life in the country was regulated by a great number of normative acts and regulations, but there were no exact laws.[56]

The Russian society was in the first place a hierarchical class society. The state subdued all social classes and institutions, including the church; furthermore, the body of civil servants (but in principle all social groups were under the duties) was a class dependent of the Czar and separate from society.[57] For upholding societal integrity, the ideological pillars were purported. In addition to orthodoxy, they include *sobornost* and *derzhavnost*. *Sobornost* or conciliarity stands for a form of sociality—or conciliary unity—that expresses and embodies the unity and freedom of its members.[58,59] In turn, *derzhavnost* or statehood or primacy of the state means the domination of vertical societal relations, in which the interests of individuals are subordinated to the higher-level interests, usually personified in the

[52]Unfortunately, the facts of any practically positive impact of the Russian canon law on ordinary secular life I have not traced. Moreover, it is of common knowledge in Russia that positive (written) law as a means of state governance was unknown in Czarist Russia; fiscal interests *of the crown* were the main concern of the Russian legislator. In fact, and peasants as individuals were not legal subjects, and mainly they enjoyed living according to the custom law. Furthermore, the utilitarian attitude of the state to the citizens and vice versa is a traditional problem of the Russian society, and to live in accordance with the law is still a challenge in Russia. *See* Fogelson (2015) at 41–50.

[53]Only between 11th and 12th the law became an autonomous discipline with its own method in the Byzantine East as well as in the Latin West.

[54]The ideal for law in Byzantine was linked to the conception of the Czar's autocratic power, because the emperor was the embodied law, the *nomos*. Consequently, if you give something a name, you empower it, and when you call something a law it becomes very solemn and strictly adhered to. See https://pravoslavie.ru/49277.html

[55]Contrary to the Roman churches, the orthodox churches are national churches, the priests and patriarchs always considered themselves the first patriots of the country and their most important aim was to serve their nation.

[56]See Orlov (1999) at 359-360.

[57]Even the nobles were set free only on the second half of the 18th century.

[58]The members of such a unity are completely united and completely free at the same time.

[59]See Horujy **(**2011)

state power, and it also means the habit of appealing not to the law but to the authority of an official.[60]

Strengthening the power of the state and, in particular, its head was the main concern of czar Peter's reforms in the field of law. Also, Catherine II (1762-1796) and Alexander I (1801-1825), in their attempts to modernise the Russian society and law in accordance with the western liberal ideas and models, showed clearly their unwillingness to accept any legal restrictions on their power as sovereign. In general, the use of law and the legal system to reinforce the power of the ruler is characteristic feature of Russian legal culture. The Czar's personal power was at all times superior to any rule, law or statute, and any societal improvement in the country required the enlightened mind of the monarch. Still in the 19th Century, the Russian imperator issued laws and supervised the observance of them. He was also the supreme judge, and he decided on the finance of the state[61]. Administrative regulation has always been dominant in the development of law in Czarist Russia and later. The centralised exercise of power that was adopted from Byzantine law was reflected in the detailed regulation of life and often also as an arbitrary regimentation in Russia.[62] As to the German concept of *Rechtsstaat*, or law-ruled state, it became known as *pravovoe gosudarstvo* to Russian constitutional thought only starting from the 1880s.[63]

Dealing with the consequences of the belated modernization has been the main concern of Russia in respect of developing modern legal system that ought to correspond the needs of economic development. The social and economic development of Russia was really interconnected with the development of modern Russian law. The economic and cultural differences were in Czarist Russia an obstacle to the formation of the uniform family, personal, and property law ideals which were necessary in order that the uniform system of civil law norms could be achieved; however, all attempts at uniform legislation failed, although the gathering of legal norms into bodies of law began in Russia in 1649. Moreover, trade customs were traditionally ignored in Russian law, and commercial activities were not regarded as suitable for the upper classes in the czar Russia.[64,65] Furthermore, the established feudal society structure[66] and, in particular serfdom, denied the rights of peasants who were the majority of Russia to exercise commercial activities, and it restrained substantially the development of commodity production in Russia[67], since the czar Russian agriculture was mainly self-

[60]For more on this subject see, for instance, Loskutov & Tribunskaya (2015) at 345–354.
[61]For more on the subject see, for instance, Bohanov (2002) and Bohanov (2004).
[62]See, for instance, Smith (1996) at 8 and Heuman (1991) at 122–123.
[63]*See* Giaro (2015) at 316 and the material referred therein.
[64]Nobles are not expected to do any work in Russia, as elsewhere in the traditionally civilised countries and even in the uncivilised world if possible; this concerns in particular men. The same values are particularly shared by the children of the nouveax riches in present Russia.
[65]See, for instance, Puginsky (2013) at 25.
[66]In the legal sense, the Russian society was divided into two flatly different parts: peasants, the life of whom was regulated by custom law, and privileged groups, for which laws were passed; each estate has its own rights and duties.
[67]In the absolutist Russia (the end of the 17th—the first half of the 19th century) the emerging industrial and professional corporations were to survive in the established feudal and absolutist

sufficient. Even according to the Charter of the Cities of 1875 trade activities were a status privilege of merchants. In fact, Russian society was not been much familiar with the market economy tradition. Strong enterprises, independent from the state power were absent in Russia, and business activities were mainly subject to public law regulation that was aimed to secure, in the first instance, public interests.[68]

Particularly in the 19th Century the capitalistic development in Russia met with obstacles which were connected to the dominant social structure, particularly the autocracy and serfdom. Serfdom still restricted the development of markets and entrepreneurship; only a proportion of the estate owners managed, although with difficulty, to adopt to the market economy, but also it fell into crisis after the abolishment of serfdom (1861), because the nobles were unable to use paid work.[69]

Thus, the conditions for organic capitalist market economy development were insufficient. Unrecognition of trade customs and factual nonexistence of free and independent merchants were real obstacles to economic development of Russia. Therefore, the state made efforts to promote business activities by legal means, and the promotion of industry and trade became prioritised in the Government's policy particularly since the 19th century. And in the years between 1861 and 1874, Alexander II decreed his reforms that concerned Russia's social, judicial, educational, financial, administrative, and military systems. The reforms liberated roughly 40 percent of the population from serfdom, created an independent judicial system, introduced self-governing councils in towns and rural areas, eased censorship, transformed military service, strengthened banking, and granted more autonomy to universities.[70] Furthermore, in the 19th Century, many traditions and institutions of Western European civil law were adopted and law became the main source, while customs were placed second. In particular, the second half of the 19th Century was remarkable: trade law began to be differentiated from civil law and the Statute on Trade reformed in 1887 and 1893 allowed commercial activities by anybody irrespective of the estate, and also commercial customs were applied according to it, but subject to restrictions. The trade legislation contained, however, more organisational than private law norms.[71]

Influences of Roman (Civil) Law

With the emergence of the Russian Empire in the early 18th century and due to the westernisation policy of Peter the Great, the European influences based on Roman law began to reshape traditional Russian law, and so Roman law began to

system. However, there were peasants who became successful merchants and even equalised with the landlords who served the state as civil servants. See Munchaev & Ustinov (2009) at 44.

[68]For more on the subject see, for instance, Orlov (1999) at 363 and the material cited therein.

[69]For more on the capitalistic development in Russia see, for instance, Munchaev & Ustinov (2009) 138–150; as well as Orlov (1999) at 338 and the material cited therein.

[70]Some reforms of Alexander II even succeeded regarding especially the local self-government and judiciary reform. See, for instance, Butler (2009) at 31-32.

[71]But the development of Russian trade law as an independent discipline did not last for long, because the Commission founded in 1884 to prepare the Civil Code of Laws stated that its norms belonged to civil legislation.

influence Russia law indirectly through the influences of Western European, primarily French and German law.[72] The actual acquaintance with Roman (civil) law in Russia was related to the necessity of the modernization of Russia and its legal system following the experience of the western Europe in the development of the modern, in particular civil law, based on Roman law.[73] Following, for instance, the influence of the French exegetical approach to the law, that required strict obedience of the law and ignored doctrinal constructions, the legislative work in Russia reached the significant result. It was the *Svod Zakonov* or body of laws of the Russian empire published from 1832[74], which contained the civil, state, administrative, criminal, and procedural law normative acts; the private law part of it contained also some Roman transplants. On the whole, the *Svod Zakonov* was casuistic, unmethodical and unsystematic. In fact, it was more compilation than a codification.[75]

A significant role in the modernization of Russian law, with the reference to Roman law, played the Governing Senate (*Pravitelstvuyushchiy Senat*) that was a legislative, judicial, and executive body of the Russian Emperors, instituted by Peter the Great, which evolved In the 19th century into the highest judicial body in Russia. For instance, it was the Court of Cassation for civil cases of the Governing Senate who finally acknowledged the distinction between private and public law in the Russian legal practice.[76,77]

In particular, German law attracted much attention in Russia, and German universities were intensively visited by Russian scholars for their studies of Roman law. Still in the end of the 19th century Roman law was in force in Germany, as elsewhere in Western Europe, and the norms of the *Corpus Juris Civilis* were directly applied in practice. The teaching of pandect law and exegesis of Roman legal texts was very important in Germany due to the particularity of legal regulation (or existence of many legal systems) in the country. Moreover, German law studies were regarded in official Russia as a better alternative to the revolutionary (natural) law ideas emerged by the French revolution.[78]

The next significant step in in the development of Russian civil law was the draft of the Civil Code of Laws, in which the German Pandect doctrine was applied, and this meant the scientific rationalisation of the traditional legal order in Russia. The impact of German private law on the Russian drafts was particularly strong. In the spirit of Pandect Science, Russian institutions were adapted to their

[72]Thus, Byzantium was not the conduit of Roman (civil) law to Russia, and in fact, the *Corpus Iuris Civilis*—neither the original Latin text, nor its Greek version from the late 9th Century, called *Basilics*—was known in Russia until the end of the seventeenth century.

[73]Before the 19th Century no learned law, no juristic literature and no juristic profession of the western type related to civil law was known to Russia. *See* Avenarius (2014) at 231–270.

[74]It occurred as a result of the abandoned, due the Napoleonic Invasion of 1812, plans to adopt the French-style civil law in Russia. *See* Avenarius (2014) at 89 and 91.

[75]Ibid at 202–203.

[76]See, for instance, Avenarius (2014) at 319–321.

[77]Roman law was also subject to the critical attitude in Russia. According to Pobedonostsev, who was a conservative politician and head supervisor for the Russian Orthodox Church, contrary to Roman law with its unlimited egoistic concept of ownership, Russian law was oriented towards the collective consciousness and the hierarchical spirit of the Orthodoxy Ibid at 309.

[78]See Rudokvas (1998).

Roman law patterns.[79] However, the encoding of Russian civil legislation failed because of the First World War, but the draft of the Civil Code of Laws contributed to the content of the Civil Code of the Soviet period (1922).[80]

The modernisation of the imperial (absolute) Russia and its capitalist future was ended up with the Russian Revolution of 1917. The modernisation efforts of the state had started the contradictory period of the history of Russia.

Still in the beginning of the 20th Century, the Last Russian Czar Nikolai II (1895-1917) continued ideocratic ruling sincerely believing in the divine origin of his power. And he repudiated his power too late, when the country had met the catastrophe connected with the unfortunate participation in World War I and the Revolutions.

Soviet and Modern Russia

The Revolution was followed by the period of the socialist construction of the society that included also the adoption of the codified civil law modified to the needs of the new society. The first Civil Code of the Soviet period (1922) was an instrument for transition from capitalist to socialist society. However, the adoption of the codified civil law showed a kind of continuity between the pre-revolutionary and the Soviet legal system. Particularly, the continuity concerned in administrative law as well as other branches of public law.[81]

Legal science was purported to play a significant role in the construction of a new socialist society. In accordance with Marxist legal science, the course of history in the new Soviet vision was determined by universal laws (regularities), above all by the means of production and class struggle.[82] The vision was connected to the belief in man's rationality and ability to construct an ideal society with the revolutionary vision of history. Law, in turn, was understood, in accordance with the principle of revolutionary legalism, as a tool of governance and repression in the interest of the ruling class, meaning in a socialist society legal policy aimed at achieving political goals of the state by legal means.[83] The application of such a policy led to the emergence of the legal science marked by Marxism, sociological approach and concepts, extreme dogmatism, reference to the authorities as the ultimate argument and self-sufficiency in the Soviet Union.[84]

The Code of 1922 was followed by the Civil Code of 1964 that was a basic civil legislative act of a socialist society.[85] In accordance with the Code, business

[79]See Avenarius (2014) at120-125 and 532.

[80]For more on the development of Russia between the 19th Century and the beginning of the 20th Century see, for instance, Munchaev & Ustinov (2009) at 138–158 and 198–207; as well as Orlov (1999) at 363–364 and the material cited therein.

[81]Giaro (2015) at 316–317.

[82]Consequently, legal history, including Byzantine law was marginalised as secondary to the economy and class struggle.

[83]In fact, the communist ruling in the Soviet Union was ideocratic. In particular, it concerns the revolutionary times and the Khruschev's period with the caricature believe in the victory of communism as the most scientific theory.

[84]See, for instance, Poldnikov (2019) at 150–155.

[85]For more on this subject see, for instance, Ostroukh (2013) at 373–400.

activities in the Soviet Union were subject to the economic law regulation standing for civil law provisions strengthened by compulsory norms that concerned the formation of contract and its content as well as settlement of disputes.

Industry and trade became priority activities of the state, whereas private business activities became strictly limited and even prohibited in the Soviet Union. A remarkable exception in the Russian business history are the cooperatives that are a modern modification of a traditional Russian *artel*, association of workers, sometimes mixed with partnership.[86] In the Soviet Economy, cooperatives in the form of collective farm, or *kolhoz* played an important role. The same concerned production cooperatives until the "modernization" reforms of Khruschev, strived for the "light communist" future, in the end of 1950s, when the production cooperatives were absorbed to the state sector, and almost any kind of self-initiative entrepreneurial activity was officially criminalised. However, in 1980s, cooperatives had the renaissance by giving impulse to the expansion of private entrepreneurship in Russia.[87]

The scientifically grounded, directed from the above socialist economic policy succeeded in the building of the fundament of the modern society in the Soviet Union, thanks to the strict and sometimes even extremely strict mobilisation of resources, The mobilisation meant not so much the use of coercive, mainly disciplinary measures, but rather the appeal to general Russian consciousness, and this implicated the ideology and propaganda means that used the metaphysic language comparable with the one used in the Byzantine imperium. But, starting from the late 1960s, the further development of the Soviet economy faced the problems, regardless of the promises of the scientifically proven communist future.

The construction of the socialist future was interrupted by the Perestroika started in the mid-1980s, when Mikhail Gorbachev, the last ruler of the Soviet Union opened the "totalitarian doors" for denial of the socialist past, and due to the massive propaganda for reforms the Perestroika brought the rather massive inspiration to turn to the capitalist alternative. However, "the free-market economy" and "natural capitalist development", scientifically discovered as trustworthy, even as verities in the process of problematization of socialist economy in 1990s,[88] brought any particular success, except for the benefits enjoyed by the active part of the Soviet ruling elite through the privatization of the state property.

As a result of the reforms started in the end of the Soviet period, Russia became an independent state with its own legislation including the Constitution and Civil Code, and is politically[89] and confessionally pluralistic society.

The present Civil Code of 1994-2006 is purported to be the basis for a market

---

[86]Initially, the *artel* was the traditional association of peasants, usually from the same rural commune, who worked or sought work together away from the village. In the Law of 1902, labour *artels* were defined as partnerships founded for performance of specific work or production as well as for provision of services through personal work of the participants at their expense and by their collective guarantee.

[87]For more on this subject see, for instance, Orlov (2015) at 413 and the material cited therein.

[88]So, the only one true orthodox faith became replaced by the only one true science.

[89]Major parties in the Russian State Duma are United Russia (*Единая Россия*; in power), Communist Party (*Коммунистическая партия*), Liberal Democratic Party (*Либерально-Демократическая Партия*), and Fair Russia (*Справедливая Россия*).

economy and a liberal society in Russia, and it has introduced first commercial customs and then customs in general as a legal source to the Russian civil law.[90] Enterprises are independent and basically act in accordance with the civil law requirements, allowing the application of customs, including trade customs; enterprises are juristic persons and act mainly through the contracts.

Russian Legal System

As the basis of the Russian legal discourse, the Russian legal system is normativistically defined[91] and comprehend hierarchically determined legal sources as follows:

The first in the Russian legal system are (written) laws (normative legal acts) divided into

1. Basic laws, including
    a) Constitution of the Russian federation (1993) and
    b) Constitutions of the subjects of Russian federation, and
2. Federal laws that include Constitutional laws and ordinary laws, and
3. Laws of the subjects of Russian federation.

The Constitution of the Russian federation is the main source of law in Russia. Also, other basic laws of the Russian federation are endowed with the highest legal force. Following the provisions of the Constitution, the federal law takes absolute priority and it may be used to regulate any issue, unless otherwise provided in the Constitution. According to the Civil Code, civil legislation falls under the Constitution within the jurisdiction of the Russian Federation, and it consists of the Civil Code and other federal laws adopted in accordance with it. In respect of all other laws, the Civil Code requires in principle that the norms they include shall be consistent with it. Furthermore, many norms of the Civil Code contain references only to law, and consequently prohibitions to enact or apply a normative act subordinated to the law.

The second in the Russian legal system are (other) normative acts subordinated to the law (substatutory acts), including Ukases (edicts) of the President and Decrees of the Government.

Other normative acts still form a significant part of Russian civil legislation. But, although the legal acts of the President, Government, ministries, and other

[90]For more on this subject see, for instance, Ostroukh (2013) at 373–400.

[91]Russian law is also familiar with legal consciousness, natural law, good faith and general principles considerations and academic commentaries and discussions that could be regarded as descriptively existing legal sources. Noteworthy are also the international private law rules. According to the article 1191.1 of the Civil Code, in the application of foreign law, a court establishes the content of its norms in compliance with the official interpretation, application practices and doctrine in the respective foreign state. Thus, the rules of the applicable foreign law are to be regarded as descriptively existing legal sources.

executive authorities of Russia are regarded as civil law sources, they do not belong to the proper civil legislation.

In respect of the ukases of the President, it is provided under the Civil Code that civil law relation may be regulated by them, but only on condition that such ukases are not contradictory with the Civil Code[92] and other laws.

The legal grounds for the power of the Government to issue decrees containing civil law norms can be, according to the Civil Code[93], only Civil Code and other laws as well as the ukases of the President, and it restricted only to the implementation of these. The Civil Code and other laws contain sometimes direct provisions on the enactment of decrees of the Government. In certain cases, the Civil Code refers directly to the possibility to issue a law or other legal act, and it also means that the decree of the Government may be applied to the legal relation in question.

In respect of the legal acts of the federal executive bodies or substatutory acts, the Civil Code provides that these bodies may issue acts containing civil law norms, in the cases and within the limits provided by the Civil Code, other laws and legal acts (ukases and decrees) [94]. Thus, the issuance of any administrative normative act must be grounded by the provision of the law or other legal acts.

The priority of the law over the normative acts subordinated to the law is directly enforced in the Civil Code and other laws. In the event of a conflict between an ukase of the President or a decree of the Government and the Civil Code or other law, the provisions of the Civil Code or respective law shall be applied. Thus, the ukases and decrees clearly differ by their legal force from the laws and, consequently, in event the court finds out the contradiction between the ukase or decree and the Civil Code or other law, it is not only its right but also obligation to leave the contradictory normative acts subordinated to the law inapplicable. As to the administrative acts contrary to law, it may be left inapplicable or recognised as invalid by the court.

The third in the Russian legal system are norms of international law and international treaties and the fourth in the Russian legal system are

- other legal sources, including
- customs.[95]

The fifth in the Russian legal system are normative agreements (treaties, contracts) that may, as legal sources, establish the legal rules of behaviour for their participants;

Russian law is acquainted with constitutional and administrative agreements, as well as with labour collective contracts (agreements).

---

[92]Russian Civil Code, art. 3.3.
[93]Russian Civil Code, art. 3.4.
[94]Russian Civil Code, art. 3.
[95]Additionally, Russian law recognises the analogy application. According to the Article 6 of the Civil Code, civil law (legislation) could be applied in a by analogy (the analogy of the legal rule and the analogy of the law), if the law, contract or custom regulating the relation in case is missing. In applying the norm or law by analogy attention should also be paid to the requirements of good faith, reasonableness and justice.

But legal theory (doctrine) has been and is still excluded from legal sources in Russian law; and Judicial practice is also not regarded (at least traditionally) as a proper legal source; however, the precedent decisions of the Constitution Court could be seen as having legislative effect.

Furthermore in 2020 the Supreme Court has obliged the lower courts to check the correspondence of their decisions to its position.

In securing the functioning of the legal system in Russia, the highest judicial bodies, the Constitutional Court and the Supreme Court play an important role, although it is traditionally regarded in the Russian doctrine that judicial institutions do not possess norm-creative functions; they do not create norms of law, but merely interpret and apply them.

The Constitutional Court interprets the Constitution and resolves cases of compliance with the Constitution of federal laws and other normative acts as well as international treaties of Russia that have not entered into force. Furthermore, it resolves disputes about competence between state bodies. The Constitutional Court also considers appeals against a violation of the constitutional rights and inquiries from courts to verify he constitutionality of a law being applied or subject to application in a particular case.

In giving its normative explanations concerning constitutional issues, the Constitutional Court is empowered to deviate from the text-bound interpretation of the legal norms, and has resorted to using this power in the interpretation of, for instance, tax law[96]. The Constitutional Court has also ventured, in its interpretation of the Constitution, to declare that fairness, legal equality, proportionality, and equity are the principles corresponding to the Constitution, and this may be interpreted as a legislative action.

The Supreme Court of the Russian Federation is the highest judicial body in the resolution of economic disputes and in civil, criminal, administrative and other matters that are within the jurisdiction of lower courts established in accordance with federal constitutional law. It exercises judicial review of the activities of the courts and provides explanations on matters of judicial practice. [97] There are also separate cassation and appeal courts of general jurisdiction in Russia. Noteworthy is that, although precedent law is not officially recognised in Russia, the role of the highest judicial bodies in securing the adequacy of the Russian legal system is important.

Business activities are, for the most part, regulated in Russia by the Civil Code that is the main civil law source, containing imperative (compulsory) and dispositive legal rules. In respect of contracts, legal sources may be generally hierarchised, in accordance with the Civil Code, as follows:

- The first are imperative norms of the law and

[96]For instance, in its decision of 1999, the Constitutional Court enforced the principle that any ambiguities of tax legislation shall be interpreted in favour of the taxpayer.

[97]The plenums of the Supreme Court in Russia are competent to give not only decisions in concrete appeal cases, but also generalise the judicial practice and pass interpretative rules or guiding explanations on the applicable legal norms obligatory for the lower general courts.

- The second are the terms of the contract agreed upon by the contracting parties.
- The third in contract regulation are dispositive norms which shall be applied in default of the contractual terms, and,
- The fourth are customs (business customs) that are applicable in default of both contractual terms and dispositive norms.[98]

Thus, dispositive norm has priority over business custom in Russia[99].

Peculiarities of Russian legal discourse

Specific for Russia is particularly how the law is generally understood. The basic idea of Russian (post-Soviet) law is that it (law, legal reality, legal substance exists as

a) legal consciousness, idea, concept of law (that are the subject of the natural law theory and the psychological theory of law),
b) legal norms (that are the subject of the positivistic and normativistic theories), and
c) social relations (that is subjected to theories of sociology of law).

The sociology of law approach, related to the social engineering, seems however, not to be generally distinguished from the jurisprudence (law in proper sense), and the term of legal order is usually associated with the society effectively governed by the rule of law.

Furthermore, the legisprudence is not properly distinguished from the jurisprudence and legal science. It reflects the scientist approach to the function of law in Russia, which is ordinarily realised in linear thinking, favouring single causal explanations.

In accordance with the general notions of law, Russian (civil) law regulating business activities has, following the traditional continental (in particular, German pandect) law system, the conceptual legislative basis where the law represents the axiomatic system of the norms that

[98]In the event a commercial custom or dispositive norm is included in the terms of the contract, it is regarded as a condition of this.

[99]There is an exception to the general rule prioritizing a dispositive norm in relation to commercial custom. It is contained in the rules of the Civil Code concerning the performance of obligations (Art. 311 and 312) there is an exception to the general rule prioritizing a dispositive norm in relation to commercial custom: commercial custom takes priority in those rules. The Russian contract law rules contain also the exclusion to the general rules on the hierarchy of contract conditions concerning imperative norms. In accordance with the Article 422.2 of the Civil Code, the terms of contract could take priority over the imperative norms, if these are enacted after the conclusion of the contract. And it is only the law (not any other normative act) which may include a provision which supersedes the term of contract.

- Exists without gaps or gives answers to all questions;
- Is unambiguous or does not contain a proposition and its negation at the same time; and
- Gives the only right answer or does not contain alternatives to the provided prescriptions, prohibitions and powers.

Russian law is extensively codified, and written law, in which form not only proper legal rules but also abstract general concepts and general principles are shaped, holds a very strong position. Thus, concepts and general rules dominate at the expense of concrete rules in Russian law. Thus, Russian business law operates basically by legislatively fixed terms and concepts, wherefor prescriptiveness and strict dogmatism are its characteristics.

Specific for the Russian legal discourse is also that law is associated traditionally in Russian culture with *pravda* (often meaning positive law codification) that is also identified with right and justice implying equity and even truth (*veritas*). The absence of strict differentiation of these concepts, adopted in the Russian Orthodoxy, is still characteristic for Russian legal culture in general.

Characteristic for Russian legal discourse are also the following features:

- Scientist believe in the power of the constantly modernising law, where
- Legal science is regarded as the system of constantly growing and accumulating knowledge[100].

Specific to Russian law is also

- Reduction of law to statutes and
- Identifying law with the state as well as
- Ignorance of soft law and alternative means for settling disputes, and that
- The idea of 'the only one proper solution' still dominates the Russian legal thought.

Classical legal thinking is still dominating in Russian law, where the law is held to be a closed system and judicial decisions are deductively (syllogistically) constructed. And it means, general rules are applied to the concrete case following the idea of only one proper solution.

Characteristic for Russian law is still also a strong belief in the omnipotence of the legisprudential, law-based solutions, which is reflected in the dominance of statute law. Together with the overemphasised role of the state, the legal-positivistic approach, where statute law (in the form of written legal source) is identified with law, has been dominant in Russian law during its modern and contemporary history. The question is if Russian law ought to be based on

[100]Seeking for verity and discovery of the universal laws of the society and law is still a significant challenge for the Russian legal science. Top of the Russian legal science is occupied by the verity holders, and many legal scholars are eager to participate into the scientific construction of the future, at now for instance, dealing with the problems of artificial intelligence and digitalisation is actual.

practical reasonability, instead of conceptual consistency, obviously oriented to the algorithmizing of the legal regulation of entrepreneurial activity.[101]

Conclusion

Russian law has not traditionally properly recognised trade customs as a legal source ignoring the fact that the origin of the western business law is in the commercial law, or, the law merchant, that had grown out of the customs and usages of merchants, existed before the emergence of law itself, and this law has reserved its self-regulatory and dispositive nature even in the process of formalizing the law into the legislation, characteristic for the continental law, that introduced public regulation in respect of commercial activities. Due to it, the Russian legal discourse is quite different to what is generally represented as the Western legal discourse.

Furthermore, although Russian business law has been developed under the influence of Western law, the idea of the legislatively established legal surveillance of business activities, where written law is regarded as a progressive means of regulation, plays still an important role, and for instance, the breach of the law requirements is a *sine qua non* condition for civil liability (for damages) in Russia.

The history of Russia could be regarded as partly the history of its ideocracy. It started with the guarding of orthodox Christianity, continued with pretences of being a "Third Rome" and ended with promises of the scientifically proven communist future. At present, Russia enjoys with the patriotism, but otherwise is further strengthening its pluralistic governance.

Obviously, Russian legal system will continue its development based on its legislative basis, however, with growing significance of the decisions of the Constitutional Court and Supreme Court. As to the fate of the legal doctrine, it ought to continue serving teaching and explanatory work and participating in the legislative work. It is obvious that Russian legal science is to abandon the Byzantine ideocratic tradition in order to concentrate on the instrumental functioning of the law, that is to serve the basic needs of the social and in particular economic development and means active role of the state in facing great challenges. It does not mean that the cultural and moral values inherited from Byzantine that still identifies the Russian culture are to be thrown away.

And finally, regardless the doctrinal inadequacy, Russian law manages to correspond to the needs of business activities owing to the active role of the judicial bodies in securing the adequacy of the Russian legal system. However, in respect of business activities, it also needs favouring the application of customs as well as soft law and alternative means for settling legal collisions.

[101]For more on the essentials of Russian law, *see* Orlov (2011): 1–5 and Orlov (2015) at 1 and the material cited therein.

References

Antonov, M. (2020). 'The Varieties of Symphonia and the State–Church Relations in Russia' in *Oxford Journal of Law and Religion* 9(3):552–570.

Avenarius, M. (2014). *Fremde Traditionen des römischen Rechts. Einfluß, Wahrnehmung und Argument des »rimskoe pravo" im russischen Zarenreich des 19. Jahrhunderts*. Göttingen: Wallstein.

Bohanov A. (2002). *Самодержавие: Идея царской власти* [*Autocracy Idea of czar's power.* Moscow.

Bohanov, A. (2004). 'Самодержавие – русская форма монархического авторитаризма [Autocracy–Russian form of monarchist autoritarianism]' in *Московский журнал* [*Moscow Journal*] 3:38–42.

Butler, W.E. (2009). *Russian Law*. Oxford University Press.

van Caenegem, R.C. (1992). *An historical introduction to private law*. Cambridge University Press.

Chestnov, I.L. (2004). *Методология и методика юридического исследования* [*Methodology and Methodics of Legal Research*]. St Petersburg.

Chulev, B. (2015). 'Glagolitic. Glagoling (speaking) the Glagolic, its origins, chronology, preserved written monuments, etc.' https://www.academia.edu/17371522

Dorskaya, A.A. (2016). 'Эволюция российской модели государственности в ракурсе государственно-церковных отношений: традиционная и инновационная составляющие [Evolution of the Russian Model of Statehood in a Foreshortening of State and Church Relations: Traditional and Innovative Components]'. *Экономика, педагогика и право* [*Economics, pedagogy and law*]. 2:1.

Egidi, R. (2009). 'Von Wright's Philosophical Humanism' in *European Journal of Pragmatism and American Philosophy* [Online], I-1/2 | 2009. http://journals.Openedition.org/ejpap/973. https://doi.org/10.4000/ejpap.973

Fogelson, Y. (2015). 'Возможность верховенства права в современной России [Possibility of rule of law in modern Russia]' in *Хозяйство и право* [*Economics and Law*] 12:28–52.

Giaro, T. (2015). 'Russia and Roman Law' in *Rechtsgeschichte - Legal History* 23:309–319.

Hartmann, W. & Pennington, K. (eds) (2012). *The History of Byzantine and Eastern Canon Law to 1500*. Catholic University of America Press.

Heuman, S.E. (1991).'Взгляд на правовую культуру предреволюционной России [Look at legal culture of pre-revolutionary Russia]'. *Советское государство и право* [*Soviet State and Law*]. 1:121–127.

Horujy, S.S. (2011). 'Russian Spiritual Tradition: Union of Conciliarity and Ascesis' in Horujy, S.S. *Orthodox Spiritual Tradition and Russian World*. Brotherhood of SS Peter & Paul, Hong Kong: 7–24.

Ivanov, S.A. (2003)**.** *Византийское миссионерство* [*Byzantine missionary*]. Moscow.

Kaufhold, H. (2012). 'Sources of Canon Law in the Eastern Churches' in *Hartmann, Pennington*: 215–342.

Klyuchevsky, V.O. (2000). Православие в России [*Orthodoxy in Russia*]. Moscow.

Kourany, J.A. (1998). *Scientific Knowledge: Basic Issues in the Philosophy of Science*. Wadsworth.

Loskutov, V.G. & U.G. Tribunskaya (2015). 'Концепция державности как инструмент анализа современного кризиса социально-экономической системы России [Great power statehood conception as a tool of analysis of modern crisis of socioeconomic system of Russia]'. *Развитие политико-экономической мысли в современной*

России [*Development of political and economic mind in modern Russia*] in *Tambov*, pp. 345–354.

Mamzin, A. (2008). *История и философия науки* [*History and Philosophy of Science*]. St Petersburg.

Mitrofanov, A.Y. (2011). 'Формирование византийского «кодекса канонов» [Forming the byzantine «codex of canons»]' in *Государство, религия, церковь в России и за рубежом* [*State, religion, church in Russia and abroad*]: 92–99.

Munchaev, V.M. & Ustinov, Sh.M. (2009). *История России* [*History of Russia*]. Moscow.

Muravyev A. (2003) 'Церковное право [Church law]' *Отечественные записки*. [Patriotic Notes] 2: 318-325.

Orlov, V. (1999). *Entrepreneurship in Russia***.** Finnish Lawyers' Publishing. Helsinki.

Orlov, V. (2011). *Introduction to Business Law in Russia*. Ashgate.

Orlov, V. (2015). *Alternatives to capital-oriented corporations under Russian law.* Research Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations. Edward Elgar Publishing.

Orlov, V. (2019). 'Legal Sources and Interpretation in Russian Civil Law' in *New Challenges of the Law in a Permeable World*. Athens Institute for Education and Research, at 147–165.

Ostroukh, A. (2013). 'Russian Society and its Civil Codes: A Long Way to Civilian Civil Law' in *Journal of Civil Law Studies* 6(1):373–400.

Pihlajamäki, H. (2020). 'Länsimaisen oikeuden lähteet: varhaismodernista moderniin oikeuteen' in *Lakimies* 7-8:1126-1145.

Pokrovsky, J. (1998). *История римского права* [*History of Roman law*]. St Petersburg.

Poldnikov, D. (2019). 'Byzantine Roman law studies in Russia within the framework of political ideologies,' in: *'Ius commune graeco-romanum': essays in honour of Prof. Dr. Laurent Waelkens*. Leuven: Peeters Publishers, pp. 147-164.

Puginsky, B.I. (2013). *Коммерческое право России* [*Commercial law of Russia*]. Moscow.

Rudokvas, A.D. (1998). 'Иосиф Алексеевич Покровский и изучение римского права в России [Yosiph Alekseevich Pokrovsky and studies of Roman law in Russia]' in *Pokrovsky* (1998) pp. 5-11.

Smith, G.B. (1996). *Reforming the Russian Legal System* by Gordon B. Cambridge University Press.

Tsypin, V.A. (1994). *Церковное право* [*Church law*]. Moscow.

von Wright, G. H. (1971). *Explanation and understanding*. Routledge & Kegan Paul, London.

Zenkovsky, V.V. (1989). *История русской философии* [*History of Russian Philosophy*]. Paris.

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 485-506

Contractual Unpredictabiliy in the Context of Covid-19 Pandemic

By Mihaela Elvira Patraus & Ionita Maria Ofrim* [±]

The new realities require a revitalisation of the legal system to overcome the effects of the Covid-19 pandemic. The current health crisis is, at the same time, a challenge not only for public authorities, but also for the scientific community and legal practitioners, concerned with finding viable solutions for the adaptation of legal institutions. For the legal system, the contract is an essential factor from a theoretical and practical point of view, an indispensable element for the sphere of private law; it is an essential piece of evidence that lawyers will support in the face of new challenges posed by the current pandemic context. In this article we have in view an objective analysis of the contractual contingency, starting from the jurisprudential consecration that was conferred under the previous regulation and until the introduction of this institution in the national legislation with the entry into force of the new Romanian Civil Code in 2011. We intend to present a brief retrospective on the theory of unpredictabiliy and will discuss the regulation found in national law, as well as the existence of this institution in comparative law. In a dynamic social and economic context, it is essential to clarify the relationship between the binding force of contracts and the possibility of invoking unpredictabiliy, in situations where certain changes affecting the contractual balance occur in the performance of obligations. At the same time, as a case study, we will try to answer the question whether this institution finds its applicability in the most debated issue at legal, national and international level in the current period, namely the effects on contractual relations, generated by the Covid-19 pandemic and the measures taken by public authorities to limit the effects of the virus on human health. In the sphere of performance of contractual relations, in progress at the time of the pandemic, a multitude of controversies have been created, regarding the possibility of invoking, as the case may be, force majeure, fortuitous event or unpredictabiliy and in this article we will highlight to what extent the parties have these remedies at hand. Last but not least, the study will highlight the jurisprudential orientation due to the significant changes suffered in the current social and economic context amid the Covid-19 pandemic, respectively if the institution of unpredictabiliy comes to help the contracting parties to save the contracts concluded before the pandemic which have been affected in the context of the measures and restrictions taken by each state.

Keywords: *Unpredictabiliy; Covid-19 coronavirus pandemic; contractual relations; force majeure; fortuitous event; rebus sic stantibus; pacta sunt servanda.*

[*]Associate Professor, Facuty of Law and jurisprudence, School of Law, University of Oradea, Oradea, Romania. E-mail: mihaelapatraus@yahoo.com
[±]Judge, Zalau Court, Romania. E-mail: ionita.ofrim@gmail.com

Introduction

In the Romanian civil law, the will of the contracting parties is placed at the center of contractual operations. However, the direct intervention of the legislator and increasingly of the judge in contracts, in the name of public order and in order to reconcile the interests of the contracting parties to ensure contractual balance, is now manifest and necessary in order to meet the requirements of commutative justice. In addition, political and economic change may give rise to new grounds for both the legislator and the judge to call into question those contractual legal relationships directly affected by these external events that cause harm and insecurity to at least one party, if not both.

Unpredictabiliy as a legal institution, is not entirely new in the Romanian civil law, it has its roots in the Romanian legal tradition, where it was shown that *conventio omnis intelligitur rebus sic stantibus*, an expression that meant that all conventions are considered valid if the circumstances in which have been concluded remain unchanged.

As specific objectives, we formulate the following:

- to analyse from a systemic point of view this mechanism made available to the parties, in order to understand the context in which it appeared, how it developed in the Romanian legal system with the entry into force of the new Civil Code and its express regulation;
- to identify and compare the regulation of this institution in the legislation of France, Germany, England, Italy and Greece, in order to understand the commonalities and differences that exist in the approach of other legislations;
- to present the manner in which the courts have applied this mechanism and how they have intervened in the conventions of the parties in order to safeguard them;
- to point out the most topical discussion, namely the extent to which unpredictabiliy can help the contracting parties affected by the pandemic declared by the World Health Organisation.

Literature Review

Brief History of the Theory of Unpredictabiliy

Before moving on to the analysis of contractual unpredictabiliy, as regulated in the new Civil Code, we consider it useful to make a historical foray to see how this institution has been viewed over time, having as a starting point even the Roman law.

From a historical perspective, the theory as such was not enshrined in a general way in the Roman law, but only through a series of interpretative directives, applicable in concrete cases, and the source of the theory of Unpredictabiliy was identified as being in the next passage in Africanus, identified in *Solutionibus et*

liberationibus, (Digest, XLVI, 3, fr. 38): *„Tacite enim haec stipulatio videur sit in eadem causam maneat",* from which emerges the idea of the existence in the contract of a tacit, implied clauses of termination of the contract, in the event of a change of circumstances[1].

References that can be associated with the theory of unpredictabiliy can also be found in the works of the jurisconsults Paul, Marcelus or in Justinian's Digest. The relationship between Unpredictabiliy and the obligation of contracts is also found in the works of the Roman philosophers Seneca and Cicero, who conditioned the observance of the promises by maintaining the circumstances as unchanged[2].

Canon law offered a more evolved perspective on the obligation of the contract, starting from the principles of the laws of equity and charity, thus introducing the idea of commutative justice, operating a non-existent distinction in the Roman law between just and legal: the just is the rule of conduct imposed by a fair conscience, and the legal results from the provisions of public authority.

The most important representative of the canonists, St. Thomas Aquinas is the forerunner of admitting the theory of unpredictabiliy by implying in the contract of a clause, *rebus sic stantibus*[3], (*"Contractus qui habent tractum succesivum et dependentiam de futuro rebus sic stantibus intelliguntur").* In other words, this implied clause suggests some stability of the conditions taken into account when concluding the contract. The first codification that explicitly recognised the existence in contracts of the *rebus sic stantibus* clause, with the consequence of the possibility to request partial execution or adaptation of the contract, was the Codex Maximilianeus Bavaricus Civilis enacted in 1756 by the Duke of Bavaria, Maximilian III Joseph, and which was in force until 1900.

In old French law, doctrine and jurisprudence ignored the issue of Unpredictabiliy, as the legislator did not make any mention of the theory of contractual Unpredictabiliy, but only of the principle of autonomy of will. In this regard, the French literature cited, as a classic example, the so-called *Craponne Canal Affair,* concerning the conclusion of some conventions in 1650 and 1567 on charges for irrigation owed by the owners of an irrigation canal, built by an enterprise, to the latter, on which occasion a sum of 3 saus *(or* = old French coin worth 5 cents) was fixed, payable periodically. Towards the end of the 19th century, the company operating the canal claimed an increase in the tax, motivating its need due to the decrease in the real value of the currency and the increase in the price of labor. The Court of Cassation of France, by Decision of 6 March 1876, dismissed the action and declared the intangible nature of the contract by virtue of its binding force.

In view of this decision, both the French and Romanian jurisprudence, in accordance with the first, repudiated the idea of redistributing the obligations arising from a contract, in the absence of an agreement of the parties in this regard, for a long time. However, the dynamism of economic and social realities has led to a weakening of this jurisprudential reluctance and the imposition of new

[1]Bradin (2018) at 2.
[2]Zamșa (2006) at 6.
[3]*"The contracts with successive execution and which depend on the future presuppose that the circumstances remain unchanged (t.n)".*

mechanisms for adapting contractual relations, over time. Given the evolutions of some factors that cannot be foreshadowed by the parties at the time of conclusion of the contract, keeping it in its original form could be deeply unfair. However, the issue of monetary devaluation and its negative effects has been strikingly brought to the attention of jurists, the perpetuation of wartime economic instability and inflation forced doctrine and jurisprudence to explicitly address the foundations of the theory, even if it was not legislatively referred to[4].

The vision in the Romanian law on this theory began to take shape with the admission of *Lascăr Catargiu's action against Bercovici Bank.* Therefore, the first case of admission of Unpredictabiliy circumstances at national level, settled by the Ilfov Court, Commercial Section I, by judgment of 11 May 1920, marked a huge step towards accepting that, under pressure from the economic environment, circumstances existing at the time of the execution of the conventions. The impossibility of amending a contract concluded on the basis of objective data existing at the time of the conclusion of the contract would mean giving absolute value to circumstances which, by their nature, are characterised by dynamism[5].

Relevant is one of the considerations of the judgment, which stated that:

> *"if [...] totally exceptional events intervened and which changed the situation up to that point, causing the balance to be broken by the creation of excessive advantages on the one hand, or ruinous losses on the other, and if those events could not be foreseen on the date when the convention was concluded, it is fair for the parties to be exhonerated of their obligations".*

It is noted that that decision opened the possibility of modifying the contractual relationship, based on equity considerations.

It is interesting to note the relationship between the principle of binding force and the theory of unpredictabiliy over a century: from 1920 - the admission of the theory of unpredictabiliy- until 2011 - when it was enshrined as a real exception to the principle of binding force in the new Civil Code[6].

In 2011, the game of mutual influence and contradiction between doctrine and jurisprudence ended by regulating, as a real exception to the principle of binding force, the unpredictabiliy, the seat of the matter being included in art. 1271 et seq. Civil Code.

The unpredictabiliy has become a topical issue with its regulation in art. 1271 of the Civil Code, since, until then, the contract seemed to be the law of the parties. Until then, on the old Civil Code, although there was no express regulation of unpredictabiliy, the doctrine and jurisprudence accepted its existence, starting from the provisions of art. 970 of the old Civil Code, *conventions must be executed in good faith, they oblige not only to what is expressed in themselves, but to all consequences, what fairness, custom or law gives the obligation by its nature,*

[4]Burzo (1998) at 67.
[5]Togan (2017) at 4.
[6]Regarding the period after 1989 and until the adoption of the New Civil Code, an attempt was made to mitigate the rule of compulsory contracts. Although the theory of imprevision was rejected, the possibility of readjusting contracts through the freely expressed agreement of the contracting parties was legally enshrined.

good faith and fairness being the starting point for mitigating the principle of binding force of the contract from art. 969 of the old Civil Code. At the same time, a series of special legal provisions were adopted through which special unpredictabiliy hypotheses were regulated, with limited applicability to the respective fields[7].

Good faith was also central to the judgment of the Quebec Court of Appeal, delivered on 1 August 2016 in the Case *Churchill Falls (Labrador) Corp. v. Hydro-Québec, 2018 SCC 46,* maintained in 2018 by the Supreme Court of Canada, which examines the possibility of applying the unpredictabiliy and adapting the contract in the absence of a text of law that expressly enshrines it, based on the principle of good faith. The reasoning identified in this decision seems to be similar to that set out by the Constitutional Court in Decision no. 623/2016 regarding the exceptions of unconstitutionality of Law no. 77/2016 on the payment of real estate in order to settle the obligations assumed through loans, as well as the Decision of the Constitutional Court no. 15/2017 regarding the exception of unconstitutionality of the provisions of art. 3, art. 8, art. 10 and art. 11 of Law 77/2016, by which the constitutional contentious court placed the institution of unpredictabiliy and under the rule of the old Civil Code, apparently bypassing the rules of application in time of the civil law from art. 6 of the new Civil Code[8] and from art. 107 of Law 71/2011 for the implementation of the new Civil Code[9], showing only that this mechanism was applicable under the old Civil Code, in a similar form.

Renouncing the Francophone legal tradition, the Romanian legislator expressly regulated the unpredictabiliy as an exception to the principle of the binding force of the contract in art. 1,271 para. (2) Civil Code. The source of inspiration in this matter is represented by the vision of the German legislation and doctrine on the possibility of admitting the judicial review of contracts for unpredictabiliy, as well as by the international model of uniform regulation of unpredictabiliy provided by UNIDROIT[10], The Principles of European Contract Law[11], Common frame of reference for European contract law. The conditions provided in art. 1,271 para. (2) - (3) are proof of the acquisition by the national legislator of this internationally promoted guideline on the existence of the contract[12].

---

[7]See, for example, Law no. 8/1996 on copyright and related rights; Government Ordinance no. 42/1997 regarding the naval transport; Law no. 195/2001 on volunteering; Government Ordinance no. 5/2001 regarding the order of payment procedure.

[8]According to which *"The provisions of the new law apply to all acts and deeds concluded or, as the case may be, produced or committed after its entry into force, as well as legal situations arising after its entry into force"*.

[9]According to which *"The provisions of art. 1271 of the Civil Code regarding imprevision applies only to contracts concluded after the entry into force of the Civil Code".*

[10]Art. 6.2.1-6.2.3 of the UNIDROIT Principles provided for the revision or renegotiation obligation based on a hardship clause implied in all contracts in which the hardship hypothesis was not excluded.

[11]The principles of the European contract law are a set of rules created by reputable legal specialists from European Union countries under the auspices of the Commission on European Contract Law (The Lando-Commission) and aim to standardise the European contract. See http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/6.111.html for art. 6.111.

[12]Seperiusi-Vlad (2020) at 49.

Provisions of Domestic Law

The name *"theory of unpredictabiliy"*, under which this theory is known today in national law, was borrowed from French doctrine where the effects of changing circumstances were analysed under the title *"la théorie de l`imprévision"*, probably to emphasise the key element, due to changing circumstances and breaking the contractual balance: the occurrence of an unpredictable event.

The binding force of the contract, a principle also known as *pacta sunt servanta*, as a fundamental principle that governs its effects between the parties, imposes on them the obligation to strictly perform the duties they have assumed, justified by the need to ensure stability and security in itself, as well as for reasons of justice and fairness between these parties. To demand full compliance with the contractual provisions in conditions of economic stability is absolutely natural and any deviation from them would harm the community in general. But to claim the same if unexpected circumstances overturn or distort the parties' expectations at the time of the conclusion of their contract and result in a clear disproportion of the benefits they owe, has the same negative effect on the community and the sense of justice in general.

Although the *pacta sunt servanda* and *rebus sic principles* are seemingly antagonistic, they complement each other, the latter operating as an exception to the first, with the common goal of ensuring the legal security of contracts[13].

Contracts with successive execution and contracts affected by a suspensive term of execution are exposed, during their existence, to random circumstances whose origins are in the economic situation and, especially, in monetary fluctuations (depreciation of the purchasing power of money). When a contract is concluded, especially during periods of relative monetary stability, the contracting parties shall assume obligations in view of the circumstances or economic realities of the time. But, if, after the conclusion of the contract and before its execution, unforeseen events occur (war, crises, revolution, etc.), serious imbalances may occur between the value of the parties' benefits. The Covid-19 pandemic, the global health crisis that has paralysed the development of trade relations and contractual relations, has recently been included in the category of these unforeseen events, putting the parties in an impossible situation.

In the face of the chronicity of the evil called inflation, respectively monetary depreciation[14], the strict application of the principle of binding force of the contract revealed a risk of ruin for one of its parties and a cause of enrichment for the other.

In the absence of an express legal definition, unpredictabiliy has been qualified in law as damage suffered by one of the contracting parties as a result of the serious imbalance of value between its services and the other party's consideration during performance of the contract, caused by currency fluctuations or of other circumstances[15].

[13]Ungureanu (2015) at 49.

[14]The intervention of the *deflation* process, that is the increase of the purchasing power of money, is not excluded either.

[15]Pop, Popa & Vidu (2013) at 153.

Currently, the application of the theory of unpredictabiliy requires the intervention of the judge to restore the broken contractual balance due to unforeseen circumstances of the parties at the conclusion of the contract and unpredictable from the same date, in the absence of express clauses or legal provisions to enable it to review the contract.

The legal norm that we have in mind in our research is included in art. 1271 of the Civil Code, which provides that

> *"(1) The parties shall be bound to execute their obligations even when such execution has become more onerous, either because of an increase in the execution costs or because of a decrease in the performance value.*
> *(2) However, when the contract execution has become excessively onerous due to an exceptional change in circumstances, which would render the binding of the debtor to fulfill the obligation evidently unjust, the court of law may order: a) the adaptation of the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances;*
> *b) the termination of the contract at the moment and under the conditions established under it.*
> *(3) The provisions of para. (2) shall applicable only if: a) the change in circumstances occurred after the conclusion of the contract; b) the change in circumstances, as well as their extent, were not and could not have been reasonably considered by the debtor upon contract conclusion; c) the debtor did not undertake the risk of the change in circumstances and they could not have been reasonably considered to have undertaken that risk; d) the debtor tried, within a reasonable period and in good faith, to negotiate the reasonable and equitable adaptation of the contract."*

The text of article 1271 is an exception to the binding force of the contract, provided in art. 1270 of the Civil Code, a text which stipulates that:

> *"(1) The valid contract concluded has the force of law between the contracting parties. (2) The contract is modified or terminated only by the agreement of the parties or for reasons authorised by law "*

Thus, we can notice that the limitations brought to the principle of *pacta sunt servanda* are essential to ensure the fairness of the contractual relationship in case of factually unfavorable situations for one of the parties. The parties are required to perform their obligations even though the execution has become more onerous, either due to the increase in the execution of their obligation or due to the decrease in the value of the consideration (application of the principle of binding force of the contract), thus highlighting the principle of *monetary nominalism*[16].

However, art. 1271 of the Civil Code states that not every change in the consistency of the obligation occurred after the conclusion of the contract leads to the possibility of resorting to the mechanism of unpredictabiliy, but the text states that the change must be *"exceptional"*, meaning it must be of such magnitude that the obligation to become *"excessively onerous"*[17].

[16]Holban & Marțincu (2018) at 7.
[17]Bârsan (2015) at 80.

As previously mentioned, the second paragraph of art. 1271 of the Civil Code refers to the *"execution of the contract"* which has become excessively onerous due to the exceptional change of circumstances, changes which, according to the third paragraph of letter a), *intervened after the conclusion of the contract*. It follows, therefore, that the performance of the contractual obligations must take place either at a certain time after the conclusion of the contract or periodically. Therefore, the unpredictabiliy cannot be applied to contracts with immediate (instantaneous) execution unless they are affected by the modality of the suspensive term or condition. Instead, the preferred category of contracts to which unpredictabiliy is addressed is that of contracts with successive execution, contracts whose existence is usually long-term.

The specialised literature also expressed the same opinion, showing that the unpredictabiliy may have an impact on certain types of contracts that may be affected by the change of circumstances considered by the parties at the time of their conclusion, such as: (i) synallagmatic contracts, for a fee and successive (long-term) performance, (ii) synallagmatic contracts, for a fee and uno ictu performance, if the unpredictabiliy situation arises before the performance of the contractual obligations, (iii) certain unilateral contracts, if the unpredictabiliy situation makes the execution of the debtor's obligation excessively onerous for him, (iv) the contracts free of charge, under the conditions of art. 1,006, art. 1,007 and art. 1,008 Civil Code[18].

The difficulty in applying the theory of contingency as a basis for the judge's ability to amend a contract lies precisely in the fact that the law uses notions with a certain degree of relativity such as: *"more onerous obligation"* (when the contract must be performed even in these conditions) and *"excessively onerous"* respectively (when the contract may be re-established under the *rebus sic stantibus* rule), without providing a clear distinction, which may lead to inconsistent judicial practice. In the literature, it is considered that an obligation can be qualified as excessive, when it is clear that one of the parties would not have contracted if it had foreseen this situation before the conclusion of the contract.

In the event that certain contractual obligations have become excessively onerous, certain conditions must be met for the admissibility of the unpredictabiliy. Article 1271 para. (3) lists these conditions, which must be met cumulatively:

A first condition presupposes that the change of circumstances occurred after the conclusion of the contract, otherwise, if it had already occurred at the date of the conclusion of the contract we are no longer dealing with unpredictabiliy, but with the initial impossibility of execution, which is now subject to a different regulation, contained in art. 1227 of the Civil Code, or even an error, as regulated by art. 1207 Civil Code. The moment of obvious disproportion between the consideration thus has a special role, because it distinguishes betweenu and other legal institutions, such as injury –vice of consent.

The phrase *"change of circumstances"* has a complex content, as it encompasses in its meaning both the idea of an event and the fact that the event produced a change in the contractual status quo, meaning that the elements taken

[18]Sandar (2013), at 61.

into account in determining the value. goods or services which are the subject of the contract, elements according to which the parties have established the initial contractual balance. Also, the change of circumstances must be effective and not hypothetical.

The second condition that follows from the provisions of art. 1271 Civil Code implies the need that the change of circumstances, as well as their extent, was not and could not reasonably have been taken into account at the time of the conclusion of the contract. The condition of unpredictabiliy of the change of circumstances results explicitly from the provisions of art. 1271 para (3) letter b) Civil Code, referring to a *reasonable* unpredictabiliy, meaning that to some relative extent, and not absolute, which leads to the essential difference between unpredictabiliy and force majeure, in which case we discuss about an absolute and insurmountable unpredictabiliy, according to art. 1251 para. (2) Civil Code. Also, if the parties have provided at the time of the conclusion of the contract the possibility to modify the contract and have introduced in the contract either an indexation clause or a hardship clause, the unpredictabiliy can no longer be successfully invoked.

The third condition presupposes that the debtor has not assumed the risk of changing circumstances or is not reasonably considered to have assumed such a risk. This condition is subsequent and complementary to the previous condition, and the legislator understood to emphasise by these two hypotheses in which the unpredictabiliy does not work: in one of them, the debtor has expressly assumed the risk of an unforeseen event and in the second case, the assumption of the risk of the unforeseen event is inferred by way of interpreting the contract.

Another condition implies that the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and fair adjustment of the contract. The debtor has the duty to notify the creditor of the occurrence of the unforeseen event and to try on this occasion to negotiate the rebalancing of the contract affected by the unpredictabiliy. Modification of the contract by agreement of the parties is an application of the *mutuus consensus, mutuus dissensus, mutuus consensus, mutuus dissensus* principle, not a result of unpredictabiliy.

As it results from the text of art. 1271 letter d) of the Civil Code, it imposes on the debtor two conditions that must be circumscribed his attempt to negotiate the contract, conditions that must be proved before the court, if the conciliation attempt failed. Thus, the first condition imposed on the debtor is to prove that he tried to negotiate the contract in order to adapt it to the new circumstances imposed by the occurrence of the unpredictabiliy within a reasonable time, which is, in the absence of an express legal provision to determine the minimum or maximum duration, a question of fact which may put the debtor in difficulty if he has to prove to the court his attempt to negotiate the contract within a reasonable time. With regard to the timing of the negotiation of the adjustment of the contract, it was stated that it is necessary that these negotiations should take place as close as possible to the intervention of the contractual imbalance[19].

[19]Lozneanu, Barbu & Bebi (2012) at 54.

This condition has raised many questions in judicial practice, from the perspective of its nature as a precondition for notifying the court or a substantive condition for the incidence of unpredictabiliy, and the literature has statued that the provision established by art. 1271 para. (3) Civil Code establishes a mandatory prior procedure for the parties for the conventional review of the contract, before notifying the court, the non-fulfillment of this condition constitutes a fine of inadmissibility if it is formulated in court without fulfilling this preliminary procedure[20].

In the same sense, it was stated that this condition does not represent a condition of unpredictabiliy, but rather a condition for notifying the court, a preliminary procedure similar to the procedure of direct conciliation in cases and requests in commercial matters, provided by art. 720 ind. 1 of the old Code of Civil Procedure.

Next, we will reproduce some other conditions that are implicit in the analysis of the legal provisions and that have been indicated in the doctrine. Thus, within the provisions of art. 1271 para. (2) Civil Code, which states that the execution of the contract must have become excessively onerous "due to an exceptional change of circumstances" is the condition regarding the exceptional nature of the change of circumstances.

In order to establish the exceptional character of an event, the reporting must not be done *in abstracto*, meaning by reference to generic events such as wars, revolutions, strikes, yet the assessment must aim at a concrete event.

Also regarding the exceptional circumstances that disturb the contractual balance, in the recent literature it has been stated that currency fluctuation does not constitute an unpredictable event from the perspective of applying unpredictabiliy in the case of loan agreements with banking institutions, in the increasingly current context of abusive causes contained in these conventions[21].

Another condition concerns *the transformation of the debtor's obligation into an excessively onerous one*, which clearly results from the content of art. 1271 para. (2). The meaning of the term *"onerous"* is explained in the first paragraph of the same article, which, referring to obligations that have become "more onerous", states that this happens "either due to increased costs of fulfilling its obligation, either due to the decrease in the value of the consideration".

A last condition debated in the doctrine refers to *the absence of the debtor's fault regarding the change of circumstances or the extent of their effects*. Although this condition does not explicitly result from the content of Article 1271 of the Civil Code, existing doctrinal controversies regarding the necessity or usefulness of retaining such a condition, most of the doctrine considers this issue as necessary to retain the unpredictabiliy.

The effects of unpredictabiliy are regulated by art. 1271 para. (2) of the Civil Code, which stipulates that once the conditions of unpredictabiliy are met,

> *"if the performance of the contract has become excessively onerous due to an exceptional change of circumstances which would make it manifestly unfair to oblige*

[20]Ludusan & Puie (2013) at 24.
[21]Motica & Bradin (2015) at 546.

the debtor to perform the obligation, the court may order the adaptation of the contract in order to distribute equitably between the parties the losses and benefits resulting from the change of circumstances."

The adaptation of the contract involves the direct intervention of the court, so that, by the judgment given, the economic values of the parties' services are modified in order to restore the disturbed contractual balance.

The court may adjust the contract either by acting on the value of the benefits or by amending certain contractual clauses. If the last option of adapting the contract is chosen, the court will have to take into account the fact that, through the correction it will make to the contract, it cannot innovate, meaning that the court is forbidden to rewrite the contract or change its nature by imposing on the parties a new and completely different contract, in which its object has been changed or completely new obligations have been imposed.

Another measure that the court can take if it finds that the conditions of unpredictabiliy are met is to order *"the termination of the contract, at the time and under the conditions it establishes"*, being a termination with effects for the future.

However, we state that the court will not be able to replace the will of one of the parties that has assumed insufficiently described rights, without deadlines, without delivery obligations, without conditions, but will intervene only in those cases where external factors, whose evolution has not been correctly subject to the agreement of will, radically transforms the amount of rights and obligations of the convention, affecting the initial contractual balance[22].

When we talk about the judicial review of the contract affected by the unpredictabiliy by reducing the benefits, even if we keep in mind that we are not formally talking about a partial termination, it is impossible not to notice that the legal act "suffers" the same legal fate, being partially abolished on the reason of imbalance in consideration[23].

The current legislation does not offer solutions regarding the possibility of suspending the contract affected by unpredictabiliy, and as noted in the Constitutional Court Decision no. 623/2016, the answer seems to be negative, as the conditions of applicability must be interpreted *stricto sensu* and the same solution would be required in terms of effects.

Elements of Comparative Law

[22]"If a contract for repair works has not established a deadline for the delivery of the repaired property, any attempt to establish, even by the court, a deadline, can only be made with the defeat the principle of freedom of will of the parties and in violation of the principle of legality. According to this principle, the court is itself obliged to respect the law, and, in this case, the law is given by art. 969 of the Civil Code (art. 1169 NCC), the contract is the law of the parties, and if the parties have not established a term, the court cannot add to the contract of the parties. Therefore, the High Court has ruled that, if no contractual term has been established, it cannot be considered that the work was delivered late and, consequently, no damages can be awarded for this reason". (Decision no. 373 of February 1, 2012 ruled on appeal by the Second Civil Section of the High Court of Cassation and Justice having as object claims)".

[23]Lazăr (2016) at 13.

Beyond the borders of domestic law, it is not surprising that we can identify the regulation of an institution similar to the one called unpredictabiliy in our domestic law, because as we have already shown, many states have adopted the theory of unpredictabiliy long before our country.

For example, in the English law, the contractual unpredictabiliy is found under the broader concept of *frustration*, which, beyond the name that suggests the condition of one of the contracting parties when it realises how much the circumstances have changed since the time of concluding the contract, in the English law designates that sphere of impossibility of execution, among which, along with unpredictabiliy, is the force majeure, too[24].

The German law does not regulate a theory perfectly corresponding to the contractual unpredictabiliy in the Romanian law, being a broader concept, similar to that found in the English law, under the name of *Geschaftsgrundlage*, the regulation being found in art. 313 of the German Civil Code of 2000, being a theory of disruption of the contractual basis, respectively that situation occurred in a totally unforeseen way, which completely destabilises the contractual balance[25].

The Italian law has a general regulation in art. 1467 and 148 of the Italian Civil Code, the concept being called *eccesiva onerosita* and the remedy implying a termination of the contract that has lost the balance of benefits[26].

In France, until the emergence of the legislative reform in 2016, the principle pacta sunt servanda was applied without exception by the courts, which had no legislative basis to apply the doctrinal theory of unpredictabiliy. Starting with October 1, 2016, the unpredictabiliy is regulated by art. 1195 of the French Civil Code, almost identical conditions to those found in our law being provided[27].

The Greek civil law provides in art. 388 that the unforeseen change of the circumstances taken into account at the conclusion of the contract may allow the reduction of the debtor's performance or the termination of the contract, being practically an application of the principle of good faith in the contractual relations.

This regulation found in the Greek Civil Code is similar to that of our domestic law, requiring several conditions to be applicable, including the synallagmatic nature of the contract, the unforeseen change in circumstances that the parties considered in the conclusion of the contract, the change of circumstances is due to an exceptional and unforeseen event and this has led to a transformation of the obligation of one of the parties into an excessively onerous one[28].

Unpredictabiliy in the Context of Covid-19 Pandemic

One of the most debated issues at the international level today was the Covid-19 pandemic, especially the legal, economic and social effects of this pandemic. As already mentioned, at the time of concluding a contract, especially in periods of

[24]Dumitriu (2013) at section 4.
[25]Zimmermann (2002) at 2.
[26]https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1942-03-16;262
[27]The French provision being available at: https://www.trans-lex.org/601101/_/french-civil-code-2016/#head_62.
[28]Iftimie (2015) at 133.

relative monetary stability, the contracting parties undertake in the light of the circumstances or economic realities of the moment. Yet, the economic reality also shows that during the execution of the contract unforeseen events can occur, for example, war, crises, revolution, pandemic, which can generate a series of consequences, such as: shortage of goods, decrease in the purchasing power of money through inflation, exaggerated increase in prices, services and wages. Hence, it is a single step towards the economic chasm to which a party is exposed if serious imbalances can occur between the value of the parties'[29].

Naturally, the world's attention is currently focused on COVID-19, the disease caused by the SARS-coV-2 coronavirus, which appeared in China at the end of 2019 and has so far spread to over 150 states. The health crisis created by the spread of this virus has caused the disruption of economic activity and destabilisation of legal relations, worldwide being enough victims to make the World Health Organisation, on 11.03.2020, declare that we are in the presence of a pandemic - qualification that has led most states to take measures to prevent the spread of the virus, which has important legal effects in most areas. The analysis of the nature and legal effects of the pandemic generated by the SARS-CoV-2 coronavirus is a recent and ongoing concern of legal specialists, in order to anticipate potential contractual and/or litigious situations that may arise during the state of emergency or even after its cessation (including by the cessation of some of the effects of the special, derogating legislation, adopted during this period, and, therefore, after the restoration of the domestic legal order).

In order to combat and prevent the spread of the Sars-CoV-2 virus, a state of emergency was ordered throughout Romania (initially, by Decree no. 195/2020, later extended by Decree no. 240/2020), and this exceptional context has led to the gradual application of restrictive measures, which generated a major shock for the national economy and consequences with a significant impact on the economic situation of debtors, individuals or legal entities, whose incomes have decreased considerably.

In the same vein, the restrictive measures established by military ordinances began with banning the movement of individuals, closing the country's borders, suspending all trade flights in countries severely affected by the pandemic (with more than 10,000 people confirmed positive with this virus), closing restaurants, cafes, bars and terraces, banning gatherings of more than 3 people (initially, this number being gradually increased), including banning events such as weddings, baptisms, parties, etc.)

Clearly, the impact of the legislative measures and restrictions adopted to limit the spread of the COVID-19 epidemic has affected ongoing contracts, mainly works, services and transport contracts, but not only.

Thus, amid increasingly drastic measures, the issue of how to exonerate civil liability cases has been raised, given the risks currently present, mainly determined by the following factors: restrictions imposed by the Government; lack of employees, determined by isolation/quarantine; interruptions/delays in the execution of contractual obligations.

[29]Andries (2016) at 28.

Methodology/Material and Methods

Notions such as force majeure, fortuitous event and unpredictabiliy are already discussed in ongoing contracts. The answer to the question whether the COVID-19 pandemic and the establishment of the state of emergency automatically fall under one of the three notions mentioned above, is not a valid general answer, each situation having to be analysed in the light of its particularities. Moreover, in the context of this exceptional situation, *one-size-fits-all* approaches must be viewed with caution, given the different limitations and legal consequences that each situation entails[30].

As it results from the conditions already analysed, the unpredictabiliy is not to be mistaken for force majeure or fortuitous case, as exonerating causes of liability. The unpredictabiliy is not to be mistaken for an impossibility of performance, but it concerns the situation in which the fulfillment of the contractual obligations is still possible, but it has become excessively onerous in relation to the counterparty's consideration.

There are multiple situations in which the spread of the pandemic will have the effect of force majeure or fortuitous event, in that it has made the execution of the contract objectively impossible. Moreover, the public authorities have already instituted measures to block the activity of certain categories of professionals, coming to their aid with measures such as postponing the payment of rent and utilities, under the conditions of art. X of the E.G.O. no. 29/2020[31]. However, these measures are not generally applicable, as economic market actors have not been uniformly affected din E.G.O. no 29/2020[32].

As we have already shown, in order to highlight its basis and purpose, contractual unpredictabiliy must be distinguished from a number of other similar legal figures, such as injury, error, randomness, force majeure, resolutive condition or repair of unforeseeable damage.

For our study, especially for the effect of the pandemic, the greatest interest is the difference between unpredictabiliy and force majeure, this institution which, in terms of its character, is irresistible, invincible and inevitable.

---

[30]Strambei (2020) at 11.

[31]Emergency Ordinance no. 29 of March 18, 2020 on some economic and fiscal-budgetary measures *Art. X (2) By derogation from other legal provisions, in the ongoing contracts, other than those provided in para. (1), concluded by the small or medium enterprises provided in para. (1), force majeure may be invoked against them only after the attempt, proven by documents communicated between the parties by any means, including by electronic means, to renegotiate the contract, to adapt their clauses taking into account the exceptional conditions generated by the state of emergency. (3) It is presumed to constitute a case of force majeure, in the sense of the present emergency ordinance, the unpredictable, absolutely invincible and inevitable circumstance referred to in art. 1,351 para. (2) of the Civil Code, resulting from an action of the authorities in applying the measures imposed by the prevention and control of the pandemic caused by COVID-19 coronavirus infection, which affected the activity of small and medium enterprises, damage attested by the emergency certificate. The presumption may be rebutted by the interested party by any means of proof. The unpredictability is related to the birth of the affected legal relationship. The measures taken by the authorities in accordance with the normative act that established the state of emergency will not be unpredictable.*

[32] Șeulean (2020) at 2.

As we have already anticipated, the two institutions have a common character through the sphere of constitutive events, both of unpredictabiliy and force majeure. From here another similarity can be emphasised, which concerns the unpredictability of these situations. The unpredictability of force majeure is such as to remove the debtor's liability only if he was unable to objectively foresee both the occurrence of the event and the adverse effects which it caused. In the case of unpredictabiliy, the feature of unpredictability which gives rise to a serious disturbance of the contractual balance is essential.

Another similarity is provided by the effect on the contractual liability of the party affected by the intervention of the event which determines the removal of liability, the contractual obligation will no longer be performed in the agreed terms.

Finally, exposed to a case of unpredictabiliy or force majeure, the parties are obliged to negotiate, as a form of the obligation of cooperation that must exist between them during the performance of the contract.

As can be seen from the definition given by the Civil Code to force majeure, it is specific to its absolutely invincible and inevitable character, which highlights the extent of the prejudicial event that occurred unexpectedly. Therefore, in the case of force majeure, irresistibility and inevitability are two conditions that must be met cumulatively, because even if the event could have been anticipated objectively, its occurrence and its devastating effects generated could not have been avoided, despite the fact that the debtor has taken all necessary measures[33]. The doctrine states that in the case of unpredictabiliy, "an irresistibility of a lower degree can be retained, in the sense of the impossibility of removal, of resistance to excessive onerousness or of the drastic diminution of benefits.

As regards the effects on the contract, the occurrence of an event of force majeure entails the legal impossibility of performance of the obligation assumed. In the case of contractual unpredictabiliy, the affected party is not unable to execute or accept the service, but the excessive burden of the obligation or the drastic decrease of the service to be received occurs.

The different status of incidental remedies is a factor generating a new difference. In the case of force majeure, the remedy for the party exonerated from liability shall take into account the duration and magnitude of the event that occurred - the total or partial termination or suspension of the contract. On the contrary, contractual unpredictabiliy has a specific remedy, to adapt the contract to the new circumstances, in order to preserve it.

Finally, the force majeure is a real exception to the principle of binding force of the contract, while the unpredictabiliy is an apparent exception, which reconfirms this principle and gives substance to the obligation of good faith seen as loyalty in the performance of contracts.

Therefore, in the field of civil law, the pandemic is not, automatically and abstractly, a case of force majeure or a fortuitous event, nor does it entail the *ope legis* application of the unpredictabiliy.

[33]Boilă, Baias, Chelaru, Constantinovici & Macovei (2012) at 1492.

However, given that the COVID-19 pandemic has an undeniable impact on the civilian circuit, affecting the security of ongoing legal relations, the three institutions could be applied, but a case-by-case assessment will be needed to conclude whether and in which to what extent their conditions are applicable to a given situation.

We must not forget that the contractual will of the parties is sovereign and may remove the incidence of cases of force majeure, fortuitous event and, in particular, unpredictabiliy (art. 1351 para. (1) and art. 1271 para. (3) letter c) of the Civil Code), in many matters being such usual contractual clauses to remove the application of the institutions in question. In the conditions of excluding the possibility to invoke them, however, the party which, according to the relevant provisions of the Civil Code could have been exonerated from liability, so which assume the risk of events likely to attract the application of the institutions in question, will be required to fulfill the contractual obligations or repair the damage resulting from their non-performance[34].

As such, if we are not in a fortuitous impossibility of execution due to force majeure or fortuitous event, but the emergency situation due to the SARS-CoV-2 pandemic can be considered an exceptional change of circumstances in the execution of the benefits of one of the parties, which become excessively onerous compared to the circumstances considered at the date of signing the contract, likely to affect the contractual balance, the party affected by this change could request the court to adapt the contract, pursuant to art. 1271 Civil Code.

Findings/Results

Further, it is necessary to pass the pandemic through the filter of the conditions already exposed to retain the incidence of unpredictabiliy. Thus, with regard to the condition that the change of circumstances occurs after the conclusion of the contract, we show that the spread of this virus, together with all measures taken by the states after the official declaration of the pandemic is an exceptional change that can be invoked in concluded contracts and still not executed on the date of the official declaration of the pandemic by the World Health Organisation, respectively 11.03.2020.

Regarding the condition of unpredictability of changing circumstances and their extent at the time of concluding the contract, it is clear that the pandemic is an external and unpredictable event, but some nuances can be made about when this phenomenon of virus spread became known to people in Romania. Thus, although it cannot be stated with certainty that the evolution of the pandemic became predictable with the media coverage of the effects of infection with this virus and the number of people who died in China due to this virus, the same cannot be said about the time of the spread of this virus in Italy, or more, at the time of the declaration of the pandemic by the WHO. Specifically, this condition will not be met in all cases, a verification being made by reference to the time when the

[34] Preda (2020) at 2.

parties to the contract knew of the possibility of changing circumstances due to the Sars-CoV-2 virus.

Subject to the condition that the debtor has not assumed the risk of a change in circumstances or is not reasonably considered to have assumed such a risk, we recall that the parties are free to stipulate certain clauses limiting the contractual liability, as well as clauses by eliminating the possibility of invoking unforeseen events in the event of changes. However, given this condition in the current context, it is easy to imagine a contractual clause whereby the parties choose to exclude the incidence of fortuitous event or force majeure (or expressly, the pandemic). For example, several people were surprised to find that in the contracts with the travel agencies for the purchase of holiday packages there were clauses excluding fortuitous events, force majeure and unpredictabiliy in the event of events such as a pandemic, clauses which they did not analyse sufficiently thoughtfully in the given context.

The condition that the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and fair adjustment of the contract does not raise issues in this analysis, regarding the debtor's conduct after the pandemic. In this context, we point out that a large part of the contracts affected by the change of circumstances taken into account at the time of their conclusion were renegotiated and/or rebalanced by the parties, following the negotiations, in order to bear fairly the losses suffered as a result of the changing economic context. For example, in the case of a lease contract with a legal entity, which in turn subleased Airbnb to tourists, the measure restricting the freedom of movement of people outside the country led to the cessation of all reservations made by the tourists on that platform, with the consequence of losing the profit from which the legal person pays the rent established by the contract.

Finally, reviewing the implicit conditions shown above, we appreciate that it is clear that the condition of the exceptional nature of the change of circumstances is met. Thus, the whole of humanity was surprised by the appearance of this pandemic, which is, in itself, an exceptional event, being compared to the Spanish flu that devastated the whole world last century and had tragic effects on those times.

Also, as regards the transformation of the debtor's obligation into an excessively onerous one, the verification of this condition is to be made in each individual case. A common situation is when the debtor's income has been considerably diminished (either due to technical unemployment or dismissal), which prevents him from either paying the bank loan installments, due rent, or continuing previous contractual relationships.

Another common situation concerned the freight transport, in particular cross-border transport contracts. As we have shown, the traffic restrictions were severe, at the border crossing points being established real epidemiological controls, along with the formalities of registration of persons transiting several countries, the purpose of transit and especially the final destination. Adding to all these controls and the fear generated by the possibility of contracting the virus in contact with other people in countries deeply affected by the pandemic (with about 1000 deaths per day), leading to the situation that transport companies did not have drivers

available to assumes these risks for the same income as before the pandemic, which is why they requested significant salary increases. These additional costs incurred by transport companies have led to the transformation of pre-pandemic obligations into excessively onerous ones.

The situation generated by coronavirus could make many companies objectively unable to fulfill their contractual obligations to their trading partners. In such cases, the non-performance of the obligations could be excused by a situation of force majeure, which usually implies the existence of an objective, unpredictable, invincible and external event. An example would be the obligation to deliver a good in an isolated city, which cannot be entered.

As we have shown on the occasion of the delimitation between force majeure and unpredictabiliy, if for some situations of force majeure, they can justify the non-execution, others could only be in a situation that does not make the execution impossible, but only much more onerous. For example, if the city where the property in question is to be delivered is not isolated and entry into it is not blocked by the authorities, yet fulfilling the delivery obligation becomes much more expensive for the debtor - for example, the usual route used for deliveries is no longer valid, because it passes through blocked cities, and / or has to find other suppliers, because the ordinary one could no longer produce goods, it turns out that such a situation could radically increase the cost for the one who has to deliver a good. Yet there is nothing in the present case that would prevent the debtor (objectively) from fulfilling his obligation, but would only make it much more difficult for him to comply with his contractual commitments. In such situations, although he cannot use the excuse of force majeure, the debtor could still rely on the unpredictabiliy mechanism to obtain a remedy.

We consider that in the latter hypothesis we can talk about a potential contractual imbalance, which occurred as a result of the pandemic. The parties must negotiate in good faith, a context in which we consider that the disadvantaged party has to prove in concrete terms the excessive burden of its obligation.

Equally, a distinction must be made between unpredictabiliy and fortuitous impossibility of execution, in the light of the premise of each institution. For example, in one case, the Bucharest District 3 Court ruled that from the grammatical interpretation of the provisions of art. 1271 Civil Code, the intervention of the unpredictabiliy can be questioned only in the hypothesis in which the execution of the contract has become excessively onerous, or, in the case brought before the court, the obligation of the defendant to organise a wedding event with 150 people on August 22, 2020 has not become overly onerous, but has become impossible to enforce due to legal restrictions at the time.

Therefore, it is not excluded that the pandemic with COVID-19 is a case of unpredictabiliy, if the conditions previously analysed are met. The mere occurrence of this event, however, does not exempt the party invoking it from the obligation to prove concretely the contractual imbalance encountered, as well as the direct causal link between the occurrence of the pandemic and the situation thus created.

Conclusions

The regulation of unpredictabiliy in the New Civil Code is certainly one of the great challenges brought by the legislator in the civil legislation of Romania. The current regulation appeared in the context of denying the intervention in the contract and evolved towards the possibility of the judge to adapt the contract, in order to rebalance it.

Used as a means of aligning economic and legal realities with the new challenges of the 21st century, the theory of unpredictabiliy is intended to be a viable solution to ensure the completion of as many contracts as possible whose performance is jeopardised by the existence of a major imbalance between the parties, appeared after the conclusion of the contract.

However, adapting the theory of unpredictabiliy of our legal system does not appear to be easy, as the implementation of this theory will overlap with the legal regime of other legal or economic institutions, such as force majeure or credit, for example, a regime that should not be affected.

The current social and economic context has undergone significant changes due to the Covid-19 pandemic, meaning that the institution of unpredictabiliy also comes to help the contracting parties to save the contracts concluded before the pandemic, which were affected in the context of measures and restrictions taken by everyone.

In the matter of execution of the contractual obligations assumed before the declaration of the pandemic and, later, of the state of emergency, there is no generally valid solution, the contractual treatment finds - to a large extent - its solution, in the very clauses of the legal act which ascertains the obligatory relations, corroborated with the factual situation specific to each contracting party, in part. It is essential that we have established that the pandemic and the state of emergency regulated, followed by normative and administrative measures issued by the authorities, fall into the category of cases of force majeure lato sensu and the same causes can be the support, in particular situations, to invoke the fortuitous case by some persons (placed in such circumstances, by the force of the application of restrictive measures by the authorities) or, as the case may be, for invoking the unpredictabiliy.

We believe that it will be a test both for the participants in economic and legal life, as well as for the courts, which will have to rule impartially and professionally when called upon to assess the adaptation of contracts, in the context of ambiguous formulations of the legislator and in the absence of clear criteria for this mission, but especially in the context of the global difficulties posed by the pandemic that hit the world in early 2020.

References

Andries, M.C. (2016). 'Efectele schimbărilor climatice sub aspectul impreviziunii contractuale şi al imposibilităţii fortuite de executare' (The effects of climate change in terms of contractual contingency and fortuitous impossibility of execution) in *Romanian Journal of Private Law* 4:28-57

Bakos, A. (2020). 'Unpredictabiliy, an alternative for companies that have difficulties in performing contracts, but can not invoke force majeure'. https://www.avocatnet.ro/articol_54072/Impreviziunea-o-alternativ%C4%83-pentru-firmele-care-au-dificult%C4%83%C8%9Bi-in-executarea-contractelor-dar-care-nu-pot-invoca-for%C8%9Ba-major %C4%83.html.

Bârsan, C. (2015). *'Principiul nominalismului monetar și impreviziunea în contractul de împrumut de consumație având ca obiect o sumă de bani: asociere ireconciliabilă?'* (The principle of monetary nominalism and the unpredictability in the consumer loan contract having as object a sum of money: irreconcilable association*?)'* in *Liber Amicorum Liviu Pop. Reform of Romanian private law in the context of European legal federalism,* Bucharest: Judicial Universe Publishing House

Boilă, L. R., Baias F., Chelaru E., Constantinovici R. & I. Macovei (2012). *New civil code. Comment on Articles.* Bucharest: C.H. Beck Press.

Bradin, F.V. (2018). 'Contractual Unpredictabiliy in the new Civil Code', PhD thesis, Faculty of Law, West University of Timișoara (*Impreviziunea contractuală în noul Cod civil).*

Burzo, M.E. (1998). 'The effects of monetary devaluation in patrimonial civil legal relations' PhD thesis, Faculty of Law, "Babeș-Bolyai" University Cluj-Napoca (*Efectele devalorizării monetare în raporturile juridice civile patrimoniale)*.

Dumitriu, G.O. (2013). '*European contract law. Realities. Influences. Field of application.'* Bucharest: C.H. Beck Press (Gina Orga-Dumitriu, Dreptul european al contractelor. Realităţi. Influenţe. Domeniu de aplicare, Ed. C.H. Beck, Bucureşti.

Holban, D. & I. Marțincu (2018). 'Unpredictability. The "icons" of the hazard of the unjust advantage and the emotions of Roman Envy*'* paper presented at the meeting of Robertianum Center for Private Law, Faculty of Law of Al. I. Cuza from Iași, 17 May 2018 (*Impreviziunea. "Pictogramele" hazardului avantajului injust și emoțiile Invidiei romane).*

Iftimie, E. (2015). 'Good faith in Greek civil code' in *Journal of Public Administration, Finance and Law,* Special Issue 2/2015:133-141

Lazăr, R. (2016). 'Injury and unpredictability - distinct hypotheses of reduction of benefits due', in *Acta Universitatis Lucian Blaga (Leziunea şi impreviziunea – ipoteze distincte de reducere a prestaţiilor datorate)*.

Lozneanu, V., Barbu V. & P. Bebi (2012). 'Discussions about the exception of the lack of prior procedure in matters of unpredictabiliy'. *Romanian Journal of Compulsory Execution (Discuţii asupra excepţiei lipsei procedurii prealabile în materia impreviziunii).* 9:54-63.

Ludusan, F. & O. Puie (2013). 'Aspecte privitoare la procedura prealabilă a negocierii părţilor pentru adaptarea contractului în cazul apariţiei unor cazuri de impreviziune. Condiţie de exercitare a acţiunii în justiţie' (*Aspects regarding the preliminary negotiation procedure of the parties for the adaptation of the contract in case of unforeseen occurrence. Condition for starting trial) in Romanian Pandects Journal* 4:24-38.

Motica, R.I. & V.F. Bradin (2015). 'Impreviziunea și clauzele abuzive în cazul împrumuturilor bancare acordate în valuta' (*Unpredictabiliy and abusive clauses in the case of bank loans granted in foreign currency) in Liber Amicorum Liviu Pop. Reform of Romanian private law in the context of European legal federalism.* Bucharest: Judicial Universe Press.

Preda, M. (2020). 'COVID-19 pandemic - between force majeure, fortuitous event and unpredictability'. https://www.juridice.ro/678702/pandemia-covid-19-intre-forta-majora-caz-fortuit-si-impreviziune.html.

Pop, L., Popa I.F. & S.I. Vidu (2012). '*Elementary civil law treaty. Obligations under the new Civil Code'.* Bucharest: Judicial Universe Press (*Tratat elementar de drept civil. Obligațiile conform noului Cod civil)*.

Strambei, M. (2020). 'Public procurement - dynamics and perspectives in the current context generated by the COVID pandemic – 19' in *Public Procurement Journal (Achiziţiile publice – dinamica şi perspective în contextul actual generat de pandemia de COVID – 19)* 151:11-14.

Sandar, V. (2013). 'The configuration of unpredictabiliy in the new Civil Code. Considerations on hardship clauses', in *Romanian Journal of Business Law* 10:61-77.

Togan, R. (2017). *'*Analiza teoriei impreviziunii în cadrul juridic actual' *(Analysis of the theory of unpredictability in the current legal framework)'*, https://abcjuridic.ro/analiza-teoriei-impreviziunii-in-cadrul-juridic-actual/#_ftn12

Ungureanu, C.T. (2015). "Impreviziunea în contractele de comerț international' (Unpredictabiliy in international trade contracts) in *Journal of Legal Sciences*, http://drept.ucv.ro/RSJ/images/articole/2015/RSJ_no. 1_2015.pdf.

Seperiusi-Vlad, A. (2020). 'The theory of unpredictability in the field of inventions', in *Law Journal (Teoria impreviziunii în domeniul invenţiilor)* 3:49-77.

Șeulean, C. (2020)*, 'What happens to commercial contracts in the current context? Force majeure may be invoked to suspend obligations or not?'* https://www.universuljuridic.ro/ce-se-intampla-cu-contractele-comerciale-in-contextul-actual-poate-fi-invocata-forta-majora-pentru-suspendarea-obligatiilor-sau-nu/.

Zamșa, C.E. (2006). *Teoria impreviziunii. Studiu de doctrină și jurisprudență* (The theory of unpredictability. Study of doctrine and jurisprudence). Bucharest: Hamangiu Press.

Zimmermann, R. (2002). 'Remedies for Non-Performance: The Revised German Law of Obligations Viewed against the Background of the Principles of European Contract Law'. Edinburgh: Backhaus.

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 507-516

Encountering Charles Dickens: The Lawyer's Muse[1]

*By Michael P. Malloy**

This article explores the themes of the practical impact of law in society, the life of the law, and the character of the lawyer (in both senses of the term), as reflected in the works of Charles Dickens. I argue that, in creating memorable scenes and images of the life of the law, Charles Dickens is indeed the lawyer's muse. Dickens – who had worked as a junior clerk in Gray's Inn and a court reporter early in his career – outpaces other well-known writers of "legal thrillers" when it comes to assimilating the life of the law into his literary works. The centrepiece in this regard is an extended study and analysis of Bleak House. The novel is shaped throughout by a challenged and long-running estate case in Chancery Court, and it is largely about the impact of controversy on the many lawyers involved in the case. It has all the earmarks of a true "law and literature" text - a terrible running joke about chancery practice, serious professional responsibility issues, and a murdered lawyer.

Keywords: *Charles Dickens; Law and Literature; the Life of the Law.*

Introduction

In a seminar focused on the *Law and Literature* movement,[2] it is almost impossible to ignore Charles Dickens. He is in many respects the chronicler of law and lawyers. So many iconic images of the life of the law are of his devising. Think of Sidney Carton and Mr. Stryver — the jackal and the lion — as they sit through the night preparing briefs in ***A Tale of Two Cities***.[3] Think of Mr. Jaggers, arranging seminal events in ***Great Expectations***, while he obsessively washes his hands of the results.[4] Or think of the stinging variety of lawyers and law-related movers and shakers that stride across the pages of ***Bleak House***, surely the *roman à clef* of the lawyerly caste.

*J.D., University of Pennsylvania (1976); Ph.D., Georgetown University (1983). Distinguished Professor and Scholar, McGeorge School of Law, University of the Pacific. Sacramento, California, USA. E-mail: mmalloy@pacific.edu

 The author wishes to acknowledge the assistance of McGeorge School of Law, University of the Pacific, in preparing this paper, and also in supporting his work on the school's Law and Literature seminar. The author also wishes to express his gratitude to Justice Anthony M. Kennedy, who introduced him to this area of study and who co-taught the first sessions of Law and Literature at the school's Summer Program at Salzburg University in 2007 and 2008.

[2]On the Law and Literature movement, see Wertheim (1994) at 115.

[3]Dickens, *A Tale of Two Cities*, ch. 11.

[4]Dickens, *Great Expectations*, ch. 26 ("[H]e would wash his hands, and wipe them and dry them all over this towel, whenever he came in from a police-court or dismissed a client from his room").

This article explores the themes of the practical impact of law in society, the life of the law, and the character of the lawyer (in both senses of the term), as reflected in the works of Charles Dickens. I would argue that, in creating memorable scenes and images of the life of the law, Charles Dickens is indeed the lawyer's muse. Dickens – who had worked as a junior clerk in Gray's Inn and a court reporter early in his career – outpaces other well-known writers of "legal thrillers"[5] when it comes to assimilating the life of the law into his literary works. The centerpiece in this regard is ***Bleak House***, a novel shaped throughout by a challenged and long-running estate case in Chancery Court, *Jarndyce v. Jarndyce*. Dickens threads together two narrative lines. One theme is a first-person narrative of Esther Summerson and those around her who are impacted by the possible inheritance, but the other theme is largely about the impact of the controversy on the many lawyers involved in the case. It has all the earmarks of a true "law and literature" text - a terrible running joke about chancery practice, serious professional responsibility issues, and a murdered lawyer.

Encountering the Lawyers

There can be little doubt that the law and its impact is an important theme in the literary works of Charles Dickens. As one scholar has noted:

> He created nearly 40 different lawyer characters in his various novels, 'all sharply defined and individualized,' as well as countless other forms of legal life, including law clerks, magistrates, judges, law writers, law stationers, bailiffs, court clerks, law students, copy clerks, and clients. His novels include detailed descriptions of a variety of law offices and most of the courts of his time, as well as commentary (mostly critical) on legal procedures and practices, punishment, prisons, and cases. The various aspects and personages of the legal system are extremely well represented in Dickens' novels. Well represented, that is, in terms of numbers, if not in terms of attitude. For Dickens was concerned with the abuses of the law; his novels satirize its judges and lawyers, as well as its delays, injustices, inconsistencies, pretensions, irresponsibility, hyper technicality, unwieldy procedure, and insensitivity to the human toll it exacted.[6]

To some extent, however, this description of Dickens' treatment of lawyers and the law may overlook some of the subtle aspects of his presentation of the character of the lawyer. It may seem obvious what his attitude is towards lawyers and the life of the law. Yet at the same time, it is difficult to come to grips with Dickens, for both cultural and logistical reasons. Like Shakespeare, his works are almost too firmly embedded in our culture for us to approach him freshly and directly. Somehow, we seem to know him already — and have already made up our minds about him. Everyone knows "It was the best of times, it was the worst

[5]See, *e.g.*, Grisham (1991) *The Firm* (featuring a series of "accidental" deaths of associates who preceded the protagonist at the law firm that employs him); Rosenberg (2014) *Death on a High Floor* (involving a dead senior partner, stabbed in the back); *Turow* (1986) *Presumed Innocent* (featuring a lawyer murder suspect and serious professional responsibility issues).
[6]Markey (2002) at 692.

of times […]" and "It is a far, far better thing […]" – the beginning and the end of ***A Tale of Two Cities***, and we know the central plot device – the melancholic lawyer who gives his life in exchange for that of the husband of the woman he loves. And so, we think we know the book. What vanishes from sight — if it ever was within sight — is the gritty, edgy realism of the scenes of lawyers at work, scenes which could just as well have been written yesterday. Familiarity may breed inattention or misunderstanding. For example, one commentator has criticised Dickens for neglecting the professional implications of the actions of lawyers in his novels, arguing that "[i]n contrast to his apparent interest in the effect of law and lawyers on their clients and society in general, Dickens paid scant attention to the professional matters that concern lawyers."[7] And yet, a closer look at ***Bleak House***, reveals one narrative theme that is taken up entirely with the professional behaviour of lawyers and the ethical implications of that behaviour.

With inattention comes an unwarranted assumption that a Dickens work can be summed up in a headline, but the details may escape us. Consider the June 2011 Supreme Court decision in *Stern v. Marshall*,[8] a long-running bankruptcy case in which a widow — herself now deceased — claimed that her stepson had tortiously interfered with her expectancy of inheritance or gift from her deceased husband. Chief Justice Roberts begins his opinion for the Court as follows:

> This "suit has, in course of time, become so complicated, that [...] no two [...] lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."
>
> Those words were not written about this case, see C. Dickens, ***Bleak House***, in 1 Works of Charles Dickens 4–5 (1891), but they could have been. This is the second time we have had occasion to weigh in on this long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas […][9]

Roberts seizes upon one image from ***Bleak House*** — perhaps the only image that resonates in our cultural memory – a crude lawyer's joke about an estate case that takes so long to resolve that the entire estate is consumed in fees and costs. This joke does indeed provide a continuing narrative thread, the spine of the novel, but there is so much more to the story, so much more stimulating to our understanding of lawyers and the processes of the law.

There have been in fact many cases over the course of time that seem to rehearse this central, cynical joke from ***Bleak House***. Indeed, the novel itself is referred to or quoted in literally hundreds of judicial decisions in U.S. jurisdictions alone. Consider, for example, *Scales v. United States*,[10] an older U.S. Supreme

[7]Wertheim (1994) at 116.
[8]564 U.S. 462 (2011).
[9]*Ibid* at 468.
[10]360 U.S. 924 (1959).

Court case decided in 1959, involving the constitutionality of indictments under the Smith Act for "knowingly […] advocate[ing] […] or teach[ing] the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States."[11] The Court was rescheduling argument in the case, and in a separate opinion Justice Clark observed

> Much has been said of late of the law's delay, and criticism has been heaped on the courts for it. This case affords a likely Exhibit A. It looks as if Scales' case, like Jarndyce v. Jarndyce, will go on forever, only for the petitioner to reach his remedy, as did [the dying Jarndyce heir] Richard Carstone there, through disposition by the Lord.[12]

Ironically enough, the following year the Supreme Court rescheduled the case yet again.[13]

References to ***Bleak House*** have continued unabated in state courts as well. Consider the 2015 decision *Gordon v. National Railroad Passenger Corporation*,[14] in which the Delaware Court of Chancery – yes, a *chancery* court – dismissed a 25-year-old property case. The plaintiffs had sought damages and an injunction requiring the defendants to remove the contaminated soil that they had placed on the plaintiffs' property. Most of the court's discussion, and six of its seven footnotes, are references to ***Bleak House***. Vice Chancellor Glasscock, who wrote the decision – surely a Dickensian name if ever there was one – had started out many years before as a judicial master organizing such cases for trial. He observes that the case "would not be considered young, even in the glacially-paced Chancery Court made infamous in English fiction."[15] Over the course of the litigation, Glasscock tells us, "[a] long procession of Chancellors has come in and gone out. […]"[16]

It seems to have become almost a judicial rule to acknowledge ***Bleak House*** whenever the paperwork and documentation begins to pile up in a case. The precedent for this is the book itself, which includes scenes of the lawyers coming to the chancery court armed with hundreds of pages to support their arguments.[17] Likewise, in the 2021 case *Trustees of General Assembly of Lord Jesus Christ of Apostolic Faith, Inc. v. Patterson*,[18] involving a lengthy dispute over a receivership imposed on church property, Judge Marston wryly observed:

> Given the incredibly complicated nature of this action—as exhibited by the thousands and thousands of pages provided to this Court to decide the instant motion, and the scores of Judges who have rendered opinions and orders and held hearings in other

[11] 18 U.S.C. § 2385.
[12] *Scales*, 360 U.S. at 926 (footnote omitted).
[13] *Scales v. United States*, 362 U.S. 945 (1960).
[14] --- A.3d ---, 2015 WL 1775547 (Del. Ch. 2015).
[15] *Ibid.*(footnote omitted, citing *Bleak House*).
[16] *Ibid.* (quoting *Bleak House*).
[17] Dickens, *Bleak House*, ch. 1.
[18] --- F. Supp. 3d ---, 2021 WL 1061215 (E.D. Penn. 2021).

> related cases over the decades—we would be remiss if we failed to liken the matter before this Court to that in *Bleak House*.[19]

Twelve years into litigation in a bankruptcy case, Judge Frank, presiding over *In re National Medical Imaging, LLC*,[20] also seems compelled to mention that

> Since 2009, the volume of litigation between the parties is truly epic, and considering the length of time that has already passed and the potential for ongoing litigation, a comparison to the iconic, fictional case of Jarndyce v. Jarndyce comes to mind.[21]

These repeated references apparently operate in a closed loop. Judge Frank explains to the reader, in a footnote, that "Jarndyce v Jarndyce is a fictional case that threatened 'to go on forever.' "[22] He then cites *Scales v. United States*, in support, itself citing ***Bleak House***.[23]

While these references illustrate the pervasive impact of Dickens as the lawyer's muse, many of these allusions are somewhat superficial. The novel has much to tell us about the personal and professional effects of extended litigation on the lawyers involved, and this is not just a matter of how much paper is consumed. Yet in one case after another, that seems to be the only aspect of the Jarndyce case that the judges remember. For example, Judge Deller, writing the decision in a 2021 bankruptcy case, *In re Zimmer*,[24] in which creditors objected to the proof of claim against the estate filed by the Internal Revenue Service, observes

> The record reflects that the Morris Creditors are no strangers to this bankruptcy case, having previously filed a dizzying array of motions, objections, responses, replies, and similar papers. In fact, given the dizzying array of filings, this Court observed that the litigation contained within this bankruptcy case is 'reminiscent of the infamous case of Jarndycy [*sic*] v. Jarndyce as described in the Charles Dickens' novel *Bleak House*[...]'[25]

On the other hand, some judges appear at least to have appreciated the dark humour of the situation described by Dickens, when the Jarndyce case eventually implodes under the weight of unending costs and fees. In *VirnetX Inc. v. Apple Inc.*,[26] a patent infringement case spanning more than a decade, Judge Schroeder quotes at length from ***Bleak House***, as follows:

> We asked a gentleman by us, if he knew what cause was on? He told us Jarndyce and Jarndyce. We asked him if he knew what was doing in it? He said, really no he did

[19] *Ibid.*
[20] 627 B.R. 73 (E.D. Penn. 2021).
[21] *Ibid*, at 83 (footnote omitted).
[22] *Ibid*, at 83 n. 4.
[23] *Ibid.*
[24] 624 B.R. 92 (W.D. Penn. 2021).
[25] *Ibid*, at 95.
[26] --- F. Supp. 3d ---, 2021 WL 1941740 (E.D. Tex. 2021).

> not, nobody ever did; but as well as he could make out, it was over. "Over for the day?" we asked him. "No," he said; "over for good."
> […] Perhaps, at last, the same is true of VirnetX v. Apple.[27]

What is often missed, however, is the personal and professional character of the lawyers on display in Dickens' novels, and particularly in ***Bleak House***. The strained circumstances in which they operate appear, in most of them, to have warped their character, providing us with "nearly every bad lawyer type possible. Every lawyer Dickens created manifests at least some negative characteristics; and some are thoroughgoing scoundrels."[28] That observation certainly seems to be corroborated by the lawyers in ***Bleak House***.

We have, for example, Mr. Tulkinghorn, a drab, tight-lipped attorney who advises Sir Leicester Dedlock and his wife on a variety of legal matters. Tulkinghorn is working on Lady Dedlock's case in the High Court of Chancery concerning her marriage dowry, but he is also collecting information about her background, apparently with a view to exercising influence over her, and indirectly over Sir Leicester.[29] He is aided in these efforts by Mr. Snagsby, a meek, obese law stationer, serving him because he expects it will prove to be remunerative to him.[30] However, Tulkinghorn's selfish intrusion and obsession with the power that knowledge brings[31] will eventually lead to his murder.[32] Dickens slowly leads us to the realisation that "Mr. Tulkinghorn's time is over for evermore; […] from night to morning, lying face downward on the floor, shot through the heart."[33]

We later meet William Guppy, one of the law clerks in Kenge and Carboy, the firm that represents Mr. John Jarndyce, one of the claimants in Chancery. Mr. Guppy is a man of modest means but a keen eye for detail.[34] That eye will gradually unravel the mystery of Lady Dedlock's former life and Esther's parentage,[35] while he himself will also fall in unrequited love with Esther.[36] However, when Esther eventually asks Guppy to drop his investigation into her parentage, Guppy agrees honestly and honourably.[37] When Tulkinghorn tries to pressure Guppy into revealing what he knows, Guppy refuses outright,[38] a brave action for a young clerk trying to make his way in the world. Still, Tulkinghorn knows or suspects enough of the story to threaten Lady Dedlock with his knowledge.[39]

---

[27] *Ibid*.
[28] Markey (2002) at 693.
[29] Dickens, *Bleak House*, ch. 2.
[30] Dickens, *Bleak House*, ch. 10.
[31] See, *e.g.*, Dickens, *Bleak House*, ch. 12 (in which Tulkinghorn begins to hint at the knowledge he has gained of Lady Dedlock's past).
[32] Dickens, *Bleak House*, ch. 48.
[33] *Ibid*.
[34] Dickens, *Bleak House*, ch. 7.
[35] Dickens, *Bleak House*, ch. 29.
[36] Dickens, *Bleak House*, ch. 9.
[37] Dickens, *Bleak House*, ch. 38.
[38] Dickens, *Bleak House* ch. 39.
[39] Dickens, *Bleak House*, chs. 40-41.

Then there is the portly Mr. Kenge, of Kenge and Carboy, who is genuinely concerned with the needs of those who depend upon him, and not just for legal advice.[40] His concern is not only with respect to Mr. Jarndyce's interests, but also with the well-being of Esther Summerson, an apparent orphan, and with the young Jarndyce cousins Ada and Richard, all three of whom are under the patronage of Mr. Jarndyce. In contrast, we have Mr. Vholes, a solicitor's clerk who is assisting Richard in his efforts to gain an inheritance in the Jarndyce case for his own financial advantage.[41] When those efforts begin to appear unavailing, Vholes will hound the impoverished Richard for his fees.[42]

When at last a definitive, genuine last will is discovered and presented in Chancery, it turns out that "the whole estate is found to have been absorbed in costs."[43] All of the efforts of each of the litigants and all of the lawyers comes down to this conclusion. The battle over the estate, stretching out over generations, fizzles out only when the money is gone. There are various pairings of lovers that blossom into future happiness, in true Dickensian fashion. And the lawyers? Presumably, they move on to the next file on their desks. Except, of course, for Tulkinghorn. The reader's discovery of his death is staged by Dickens in an almost cinematic style. Each time I read it, I imagine the camera panning across the setting until it settles upon Tulkinghorn:

> Has Mr Tulkinghorn been disturbed? His windows are dark and quiet, and his door is shut. It must be something unusual indeed, to bring him out of his shell. Nothing is heard of him, nothing is seen of him […]
>
> For many years, the persistent Roman [in a ceiling fresco] has been pointing, with no particular meaning, from that ceiling. It is not likely that he has any new meaning in him to-night. Once pointing, always pointing – like any Roman, or even Briton, with a single idea. There he is, no doubt, in his impossible attitude, pointing, unavailingly, all night long. Moonlight, darkness, dawn, sunrise, day. There he is still, eagerly pointing, and no one minds him. […]
>
> He is pointing at a table, with a bottle (nearly full of wine) and a glass upon it, and two candles that were blown out suddenly, soon after being lighted. He is pointing at an empty chair, and at a stain upon the ground before it that might be almost covered with a hand. These objects lie directly within his range. An excited imagination might suppose that there was something in them so terrific, as to drive the rest of the composition, not only the attendant big-legged boys, but the clouds and flowers and pillars too – in short, the very body and soul of Allegory, and all the brains it has – stark mad. It happens surely, that everyone who comes into the darkened room and looks at these things, looks up at the Roman, and that he is invested in all eyes with mystery and awe, as if he were a paralysed dumb witness.
>
> So, it shall happen surely, through many years to come, that ghostly stories shall be told of the stain upon the floor, so easy to be covered, so hard to be got out; and that the Roman, pointing from the ceiling, shall point, so long as dust and damp and spiders spare him, with far greater significance than he ever had in Mr Tulkinghorn's time, and with a deadly meaning. For, Mr Tulkinghorn's time is over for evermore;

[40]Dickens, *Bleak House*, ch. 3.
[41]Dickens, *Bleak House*, ch. 37.
[42]Dickens, *Bleak House*, ch. 51.
[43]Dickens, *Bleak House*, ch. 65.

> and the Roman pointed at the murderous hand uplifted against his life, and pointed helplessly at him, from night to morning, lying face downward on the floor, shot through the heart.[44]

His death is one of the highlights of the riotous and colourful panoply of events in ***Bleak House***, and it is difficult to dispel that image from one's mind. The resolution of this mystery will take a while, because there are many potential suspects. When we discuss this scene, I like to tell my students that at least it proves that a lawyer has a heart.

Conclusion

John J. Osborn,[45] the author of *The Paper Chase*, a novel about the law school experience, once said that ***Bleak House*** is "probably the most important literary work about the law."[46] What it shows us about the practical impact of law in society, even if exaggerated for effect, is memorable. What it shows us about the life of the law, and how it can shape the character of a lawyer for better or worse is an important reminder that professional responsibility is not just an abstract principle, but something that follows us home. It is in creating such memorable scenes and images of the life of the law that Charles Dickens indeed becomes the lawyer's muse.

References

Books

Dickens, Charles [1859]. *A Tale of Two Cities*. (1970) London, UK: Heron Books.
Dickens, Charles [1852-1853]. *Bleak House*. (1970) London, UK: Heron Books.
Dickens, Charles [1861-1862]. *Great Expectations*. (1970) London, UK: Heron Books.
Grisham, J. (1991). *The Firm.* Penguin Random House.
Osborn, Jr., J.J. (1971). *The Paper Chase*. Peninsula Road Press.
Rosenberg, Ch. (2014). *Death on a High Floor.* Thomas & Mercer.
Turow, S. (1986). *Presumed Innocent*. Farrar, Straus and Giroux.

Articles

Markey, M.E. (2002). 'Charles Dickens' *Bleak House*: Mr. Tulkinghorn as a Successful Literary Lawyer' in *Saint Thomas Law Review* 14:689-758.
McChrystal, M.K. (1999). 'At the Foot of the Master: What Charles Dickens Got Right About What Lawyers Do Wrong' in *Oregon Law Review* 78;393-423.
Osborn, J.J. (2007-2008). 'Bleak House: Narratives in Literature and Law School' in *New York Law School Law Review* 52:339-347.

[44]Dickens, *Bleak House*, ch. 48.
[45]Osborn (1971).
[46]Osborn (2007) at 343.

Wertheim, L.M. (1994). "Law, Literature and Morality in the Novels of Charles Dickens" in *William Mitchell Law Review* 20:111-154.

Cases

Gordon v. National Railroad Passenger Corporation, --- A. 3D ---, 2015 WL 1775547 (Del.Ch. 2015).
In re National Medical Imaging, LLC, 627 B.R. 73 (E.D. Penn. 2021).
In re Zimmer, 624 B.R. 92 (W.D.Penn. 2021).
Scales v. United States, 360 U.S. 924 (1959).
Scales v. United States, 362 U.S. 945 (1960).
Stern v. Marshall, 564 U.S. 462 (2011).
The Trustees of the General Assembly of the Lord Jesus Christ of Apostolic Faith, Inc. et al. v. Patterson, et al., --- F. Supp. 3d ---, 2021 WL 1061215 (E.D. Penn. 2021).
VirnetX Inc. et al. v. *Apple Inc.*, --- F. Supp. 3d ---, 2021 WL 1941740 (E.D. Texas 2021).

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 517-540

Factories` Observance to the Legal Framework for the Protection of the Environment: A Case Study in Debre Berhan Town

By Petros Fanta Choramo[*]

This study mainly focused on industrial pollution in Debre Berhan town and observance of the legal frameworks concerning industrial pollution. The researcher gives more emphasis to identify the cause and effect of pollution in the town. It is also given due attention to various measures being taken by factories, pertinent government bodies, and the society based on relevant laws and observance of legal frameworks by them, in order to prevent pollution. This study used the primary and secondary source of data. The sampling technique which was selected for the study was purposive sampling. At the end, the research intended to address the extent of pollution and the overall challenges that are impediments which limit the achievement of creating a healthy environment that suits for the life of human being, fauna and flora. Accordingly, some of the final findings of the study are; the extent of pollution in Debre Berhan Town is increasing from time to time, while such pollution is mainly emanated from the fault of concerned government bodies, factories, societies.

Keywords: *Environment; Factories; Pollution; Pollutants; Legal Framework and Institutional Frameworks.*

Introduction

Today, interaction of human beings with nature is so extensive. The environmental issues have assumed such proportions as to affect all humanity.

Industrialisation, urbanisation, population explosion, overexploitation of resources, depletion of traditional sources of energy, and the search for new ones, the disruption of natural ecological balances as well as the destruction of a multitude of animal and plant species for economic reasons are the major factors that have contributed to environmental deterioration.[1]

Nature provides the most hygienic and health environment for the survival of mankind but this environment has been changed by mankind for selfish ends by adding concrete, charcoal, plastics toxic chemicals, hazardous wastes and many more objects, devices and processes. These manmade additions have unbalanced the ecosystem and are primarily responsible for environmental pollution and consequent health hazards. The industrial revolution had brought enormous comforts to mankind also been responsible for manifold miseries and disadvantages to it. The process of industrialisation, which aimed at mass production of goods of

[*]LL.B, LL.M, Lecturer at Mizan – Tepi University, Mīzan Teferī, Ethiopia.
E-mail: Fantapetrosa@gmail.com.

[1]Senger (2007) at 2.

better quality to fulfill the human needs is also polluting the environment, and now is fast assuming menacing proportions. As elsewhere in the world some cities are afflicted with the problem of environmental pollution resulting from industrialisation in Ethiopia. Indeed, Ethiopian legal system defined "environment" as the totality of all material whether in their natural state or modified or changed by humans , their external spaces and the interactions which affected their quality or quantity and the welfare of human or other living beings including but not restricted to, land atmosphere, weather and climate, water, living things and aesthetics.[2] Industries are widely being established by the government on various regions of the country. For instance, recently, the industry zone was established at Ambo, *Nekemte, Dire Dawa and Jimma* in addition to the existing industry zones at *kombolcha, Hawassa, Addis Ababa*, etc.[3]. Thus, it can be said that industrial development is started to be seen in Ethiopia since various cities of the country are becoming an industry zone by the government. On the other hand, private sector is also engaging in planting factories in Ethiopia and *Debre Berhan* Town can be an example for such phenomena.

The problem of environmental pollution, which initially started with the advent of man on earth, grew extremely acute in the developed, as well as the developing countries. The third world countries, like Ethiopia, are seeking the transfer of technology without and insurance against the risk or danger of pollution which is posing a grave danger not only for the workers within the premises of the industry, but also for the people in the vicinity. The Debre Berhan Town which is located within *Amhara* National Regional State in Ethiopia is not an exception to this phenomenon. Recently, the *Amhara* National Regional state held such town as the second industry zone in the region next to *Kombolcha.* As a result, the number of industries in *Debre Berhan* Town is increasing from time to time.

Like another Ethiopian towns, the environmental pollution in general and industrial pollution in particular was common phenomena in *Debre Berhan* Town. For instance, a river around the town called. *'Beresa'* is highly polluted from the emission of wastes by some factories in the town. The communities around the industries were vulnerable to the viral and bacterial disease because of air pollution. Furthermore, currently increasing number of industries in the town has a direct impact on the increment of pollution. However, the cause of such increment and on whose fault that such pollution was increasing was not researched.

Conceptual understandings and Legal and Institutional Frameworks of Environment, its Pollution and Protection

A legal definition of environment helps delineate the scope of the subject, determine the application of legal rules and the extent of liability when harm occurs. The word environment is derived from an ancient French word

[2]Environmental Pollution Control Proclamation of Federal Democratic Republic of Ethiopia, Proc No.300/2002, Art 2(6).

[3]The late Ethiopian Prime minister, Hailemariam Desalegn's speech via Ethiopian Broadcasting Corporation on May 9, 2007.

"environner" meaning to encircle. By broadly applying to surroundings, environment can include the aggregate of natural, social and cultural condition that influence the life of an individual or community.[4] *Geographically environment can refer to include limited areas or encompasses the entire planet including the atmosphere and stratosphere*

Of course defining an environment is not an easy task. Most writers, treaties, declarations, codes of conduct guidelines, etc. defined it in different. William, P C. & M. Cunningham defined environment as a circumstance or a condition that surrounds an organism or group of organisms or complex of social or cultural conditions that affect an individual or community.[5]

The word "pollution" is derived from the Latin word "pollutus" which means defiled or to make dirty or to pollute".[6]

Industrial Pollution is pollution caused by the pollutants released from industries and never ending problems resulted in to disease epidemics appearing so frequently. When we say types of industrial pollution, there are various kinds of pollutions, namely, air pollution, water pollution, soil pollution, noise pollution, radioactive pollution, thermal pollution, plant pollution and maritime pollution etc. Those types of pollution which are related with industries are discussed below.

Legal Frameworks

National Laws

i. **1995 FDRE constitution:** Even though the constitution provides the general principles, it is not silent on environment protection. It gives the right to all persons to live in health and clear environment. This is clearly envisaged from article 44(1) of FDRE constitution further more article 92 of the same provides obligation on the side of government to ensure that all Ethiopian live in a clean and health environment" (emphasis added). On the other hand people have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and project that affect them directly.[7] Both government and citizens shall have the duty to protect the environment. This is mainly to protect the environment from damage like pollution.
ii. **The Environmental Protection Organs Establishment Proclamation No 295/2002**
iii. **Environmental Impact Assessment Proclamation No 299/2002**
iv. **Environmental Pollution Control Proclamation No 300/2002**
v. **Ethiopianwaterresourcemanagementproclamationno1970**

[4]Berhane &Teklemedn (2009) at 1.
[5]Cummingham & Cunningham (2012) at 14.
[6]Mahesh (2007) at 61.
[7]The Constitution of Federal Democratic Republic of Ethiopia Proclamation No_1/1995, Art 92.

vi. **Public Health Proclamation No 200/2000**
vii. **Solid Waste Management Proclamation No 513/2007**
viii. **Prevention of Industrial Pollution Regulation No 159/2008**
ix. **Institute of Biodiversity Conservation and Research Establishment/ Amendment Proclamation of Federal Democratic Republic of Ethiopia Proc No 381/2004.**

Ratified Laws by the House of Peoples Representative

The Stockholm convention on persistent organic pollutants which was adopted on 22 may 2001.

The Basel convention on the control of Trans- boundary movement of hazardous waste and their disposal which was adopted on 22 marches 1989. Ethiopia also ratified amendment and protocol of Basel convention in different proclamation.

In short, Ethiopia ratified Bamako convention on proc no 355/2003, Stockholm convention on proc no 192/2000, Basel convention on proc no 279/ 2002, Basel convention amendment on proc no 356/2003 and Basel protocol on proc no 357/2003[8].

These ratified conventions are part and parcel of national law of Ethiopia pursuant to 9/4 of FDRE constitution, the above ratified conventions are mostly applicable on trans-boundary hazardous waste pollution.

Institutional Framework

Under the EPE, different agencies are assigned to "environmental and natural resource development and management activities on the one hand and environmental protection regulation and monitoring on the other." The EPA is the leading federal environmental agency with the objective of formulating policies, strategies, laws and the standard to ensure that social and economic development activities sustainably enhances human welfare and the safety of environment. In addition, EPA is responsible for evaluating the environmental impact assessment reports of federal and inter regional projects as well as auditing and regulating there implementation. EPA is also in charge of providing technical support for environmental management in the protection to regional offices and sectorial institutions.[9]

The proclamation that established the EPA also requires regional states to establish their regional environmental agency. These REAs are responsible for coordinating the formulation, implementation, review and revision of regional conservation strategy and for environmental monitoring, protection and regulation. In some regions, REAs have been established as parts of other agencies, while

[8]Bamako Contention Ratification Proclamation; Basel Convention Amendment Ratification Proclamation; Basel Protocol Ratification Proclamation; Stockholm Convention Ratification Proclamation.

[9]Environmental Protection Organ Establishment Proclamation of Federal Democratic Republic of Ethiopia Proc No 295/2002, Art 6.

other regions' REAs are separate institutions. All regions' city administrations have established REAs except the Somali regions, who are REAs, are continuously being restructured.

In addition to the EPA, environmental organ establishment proclamation mandated that SEU be established at every competent agency, with the responsibility of coordinating and following up activities in harmony with environmental laws and requirement. Purposes of the SEUs ensure "that environmental issues are addressed in development project and public instruments initiated by government institutions." However, SEUs have only been established so far as the ministry of mines, agriculture, water and energy, Ethiopian road authority, and Ethiopian electric power corporation, leaving most relevant federal agencies (as well as all regional ones) without environmental coordination.[10]

EPA in managing Ethiopian's environment, government agencies share important role with private individuals, communities, and companies. Before the enactment of the new law on civil organisations (which shrink their quality of service, number and capacity), such organisations in Ethiopia were maturing in their quality of service, geographical coverage, and creation of policy.

Data Presentation, Interpretation and Analysis

To achieve the objective of the research, researcher has selected five prominent factories which assumed to cause industrial pollution. Such factories are: - *Dashen Brewery share company (herein after Dashen Brewery S.C), Habesha Brewery share company (herein after Habesha Brewery* S.C), *Debre Berhan* Natural Spring Water S.C (Aqua Safe S.C), Debre Berhan Blanket factory P.L.C and *TikurAbay* Leather Shoe Factory. Indeed, questioners were distributed to communities around Concerned factories or if no community around it, to individuals who works on these areas. For better understanding, the following table shows name of factories, respondents on their age group, number of respondents on each group, sex and total number of respondents.

[10]Tesfaye (2012) at 64.

Table 1.

No	Name of factories	Respondents age group						Gender of the respondents		
		15-20	21-25	26-30	31-46	> 46	Total	M	F	Total
1	Dashen Brewery	1 (17%)	1 (17%)	1 (17%)	2 (33%)	1 (17%)	6 (100%)	3 (50%)	3 (50%)	6 (100%)
2	D/berhan Blanket factory P.L.C	1 (20%)	0	1 (20%)	3 (60%)	0	5 (100%)	1 (20%)	4 (80%)	5 (100%)
3	Tikur Abay leather shoe S.C	1 (17%)	2 (33%)	3 (50%)	0	0	6 (100%)	2 (33%)	4 (67%)	6 (100)
4	D/Berhan spring water (Aqua safe)	0	1 (20%)	2 (40%)	2 (40%)	0	5 (100%)	4 (80%)	1 (20%)	5 (100%)
5	Habesha brewery factory	1 (33%)	0	1 (33%)	1 (33%)	0	3 (100%)	2 (67%)	1 (33%)	3 (100%)
	Total	4 (16%)	4 (16%)	8 (32%)	8 (32%)	1 (4%)	25 (100%)	12 (48%)	13 (52%)	25 (100%)

As shown on the above table, 25 questionnaires were distributed to respondents resided around the factories. For the purpose of accuracy and convenience of the research, the researcher distributed questionnaires for the respondents above fifteen years age. From whole respondents, 13(52%) were females while remaining 12(48%) were males.

Applicability of Environmental Rights

The Right to Information

Totally, 20% of the respondents in all of the selected areas around the five stated factories responded positively that they had information regarding a plantation of the factory and the remaining mass (80%) didn't have such information. Generally Habesha Brewery Factory which is followed by Dashen Brewery Factory is better as compared to other factories and the respondents of areas around the remaining three factories, in one or another reason aforementioned, didn't have any information about the establishment of factory. Thus, the right to information which is one of environmental rights is little observed by the concerned government bodies i.e. article 6(1) of Proclamation No-295/2002 provides that the environmental protection authority has a duty to coordinate measures to ensure that the environmental objectives provided under the constitution and the basic principles set out in the environmental policy of

Ethiopia are realised.[11] As it was discussed before, a right to information can be considered as one of an environmental objectives enshrined under article 92 of the FDRE constitution. This shows that an environmental protection authority is one of the concerned government bodies which may be blamed for the stated failure to realise such environmental objective, i.e., prior consultation or prior information of the public.

Right to Awareness

Article 92(3) of the FDRE constitution again seems to incorporate the idea that public should be aware of environmental concern which may affect them.

In addition, article 6(17) of the environmental impact assessment proclamation number 295/2002 imposes duties on environmental protection authority. The first is to promote and provide non-formal environmental education program. Thus, the stated authority has a responsibility to create awareness interims of both formal and non-formal education.[12]

Public Participation

Public participation is emphasised throughout international and national law. It is based on the right of those who may be affected to have a say in the determination of their environmental future.[13] One thing to be noted here is that the previously discussed environmental right and the right to public participation are interrelated concepts. That means the right to information can be a prerequisite for realizing the right of public awareness and public participation since one should have information to engage in any matter which affect him\her in one way or another. This is why the Rio declaration provided them within one principal or provision, i.e. principle 10. Such principle says that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information with widely available. Thus, the right to information, public awareness and public participation are not mutually exclusive. Public participation, as can be inferred from the stated principles is core point under the Rio declaration to achieve sustainable development (cum with principle 1). As it was discussed before, article 92 (3) of the FDRE constitution is a provision which seems to incorporate the environmental rights which are subject of discussion in this chapter because it reads us that people have the right to full consultation, i.e. the right to information and awareness.

[11]Environmental protection Organ Establishment Proclamation of Federal Democratic Republic of Ethiopia at at. 6(1).
[12]Ibid Art 6(17).
[13]Berhane & Teklemedn (2009) at 91.

15% of the respondents around the five factories where this research was conducted reflected that they have been participating in various matters concerning the relationship of factories with the community around there and the remaining mass (85%) responded that they never exercised this right before or after the plantation of factories thereto. This shows that a pertinent government bodies were seldom committed to assume their responsibility which is entrusted to them in various international as well as national legislations.

Principle 10 of the Rio declaration prescribes that states shall facilitate and encourage public awareness and participation. Such declaration which serves as a guideline for states parties in order to protect environment and imposes a duty for states to facilitate and encourage public participation.[14] Thus, public participation is significant both prior as well as after the plantation of a factory. Public participation is also best realised through participation of public in EIA. The preamble of EIA proclamation No 299/2002 states that EIA serves to bring about administrative transparency and accountability as well as to involve the public and, in particular, communities in the planning of and decision taking on developments which may affect them and its environment.[15] The same law gives a public the power to review environmental study report by giving comment to it.[16] Similarly, article 1(1) of the same proclamation provides that the environmental protection authority or the relevant regional environmental agency shall make any environmental impact study report accessible to the public and society comments on it.[17] Sub article 2 of the same article also states that the above mentioned government bodies shall ensure that the comments made by the public and in particular by the communities likely to be affected by the implementation of a project are incorporated in to the environmental study report as well as in its evaluation.

Another legal document, which poses an obligation on the states to create a conducive environment for public participation; is ANRS proc no 181/2011. The same proclamation states that, the harmed part of society may take part in the conduct of environmental impact assessment. The power is also given for public in terms of public comments.[18] Thus, all the stated laws directly or indirectly shows that public participation is a crucial element which should be exercised by the community before the plantation of factory interims of environmental impact assessment and after the plantation of a factory in various matters affecting them.

Even though various legislations as stated above impose a duty up on the government to facilitate public participation which is very important to protect the environment including article 93(4) of the FDRE constitution, the performance in *Debre Berhan* Town is very low so that it is possible to say those government bodies, environmental protection Authority, *Amhara* National Regional State

[14]Rio Declaration on Environment and Development (1992) at principle 10.
[15]Environmental Impact Assessment Proclamation of Federal Democratic Republic of Ethiopia Proc, preamble.
[16]Ibid Art19(2).
[17]Ibid Art 15(1).
[18]Amhara National Regional State Environmental Impact Assessment Proclamation Art 12(2).

Environmental Protection, Rural land Administration and Use Bureau, North *Shoa* Zone Environment, Rural Land Administration and Use Office, *Debre Berhan* City Administration Environmental Protection and Land Administration Offices has failed to assume their responsibility provided under various legislations.

Types of Pollution which found in Study Area

The general meaning of various types of pollution were addressed under the previous chapter. This section comes up with type of pollution which is prevalent in *Debre Berhan* town specifically around the areas where the five factories on which the research was

Conducted situate. Accordingly the research found that there are four types of pollution in *Debre Berhan*. These are: -Water pollution, Air pollution, Land pollution and Noise pollution

In order to discuss the prevalence of these types of pollution, it is important to have a general overview of the table below.

Question: What types of industrial pollutions emitted from factories?

Table 2.

Name of the factories	No. of respondent per response						
	Water	Air	Land	Noise	All p.	No p.	Total
Dashen Brewery S.C	6 (100%)	4 (67%)	0	0	-	-	6 (100%)
Debre Berhan Blanket P.L.C	5(100%)	1 (20%)	0	0	-	-	5 (100%)
Tikur Abay Leather Shoe S.C	6 (100%)	6 (100%)	1 (17%)	1 (17%)	1 (17%)	0	6 (100%)
Debre Berhan Natural Spring Water PLC (Aqua Safe)	5 (100%)	3 (60%)	5 (100%)	0	0	0	5 (100%)
Habesha Brewery S.C	3 (100%)	1 (33%)	0	0	0	0	3 (100%)
Total	25 (100 %)	15 (60%)	6 (24%)	1 (4%)	1 (4%)	0	25 (100)

Water Pollution

Factories which the research was conducted emit liquid wastes to the river around the factory and that wastes in turn pollutes the river. This is a way how

water pollution occurs in *Debre Berhan* Town according to the observation of the researchers.

In general, 100% of the respondents around the areas where the research was conducted said that water pollution is highly prevalent in *Debre Berhan* Town.

Air Pollution

Totally, 60% of the respondents around the areas where the research was done replied that there exists air pollution resulting from the factory.

Land Pollution

The degree of land pollution is low as compared to the previously discussed types of pollution which show that only 24% of the total number of respondents in all areas where the research was conducted stated that the factories in *Debre Berhan* are polluting the land.

Noise Pollution

In general, noise pollution is little reported by the respondents in *Debre Berhan* Town, specially, where the research was conducted that is only 4%. 17% of the respondents around *TikurAbay* Leather Shoe Factory S.C. replied that all types of pollution aforementioned are prevalent at that area. That is 4% of the total respondents in areas where the research was conducted *(Debre Berhan* Town).

Thus, it is possible to say that all kinds of pollution exist in *Debre Berhan* Town due to the failure of government body to assume their responsibility as discussed before and factories to take appropriate measures to avert or mitigate pollution that is their failure to observe various legal instruments which obliges them to do so (to be discussed later).

Causes of Pollution

Accordingly, FDRE constitution states that the government of Ethiopia shall endeavor to ensure that all Ethiopians live in clean and healthy environment.[19] But pollution by its nature is an antagonistic event which inhibits the realisation of the stated right granted to all persons.

Polluting the environment by violating the relevant environmental standard is strictly prohibited under article 3(1) of pollution control proc. 300/2002. Article 4(1) of the same proclamation states that; the generation, keeping, storage, transportation, treatment or disposal of any hazardous waste; without a permit from the environmental protection authority or the relevant regional environmental agency is prohibited. In addition, government and citizens shall have the duty to protect the environment pursuant to articles 92(4) of the FDRE constitution.

[19]The Constitution of Federal Democratic Republic Of Ethiopia Proclamation No_1/1995, Art 92(1).

The preamble of proc.300/2002 also provides that the protection of the environment and the safeguarding of human health and wellbeing as well as the maintaining of the biota and the aesthetic value of nature in particular, are the duty and responsibility of all.[20]

Therefore, it can be understood that the concerned body for the prevention of industrial pollution, which can be considered as one part of environmental protection, are the government, factory and the society as discussed above. Each has their own duty and responsibility to prevent industrial pollution.

The researcher found that the stated legal frameworks are not satisfactorily observed so that industrial pollution is prevalent in *Debre Berhan* Town. Accordingly, the cause of industrial pollution in this town emanates from various factors. These are!-

- Failure of factories to take appropriate measures to eliminate or mitigate industrial pollution i.e. non-observance of factories to legal frameworks for the production of environment, specially, industrial pollution.
- Failure of the pertinent government bodies to assume their responsibility prescribed under various legislations.
- Failure of society to exercise their environmental rights envisaged in various legislations.

In order to analyse each of the factors mentioned above, having an incite from the table below is necessary

Question: By whose fault do you think pollution emanates?
Table 3.

Name of the factories	No. of respondents per response					
	Factory	Concerned gov.t body	Society	All	Others	Total
Dashen Brewery S.C	4 (67%)	6 (100%)	0	0	-	6 (100%)
DebreBerhan Blanket P.L;C	3 (60%	2 (40%)	5 (100%)	0	-	5 (100%)
TikuAbay Leather Shoe S.C	5 (83%)	4 (67%)	1 (17%)	1 (17%)	0	6 (100%)
DebreBerhan Natural Spring Water PLC (Aqua Safe)	5 (100%)	5 (100%)	2 (40%)	2 (40%)	0	5 (100%)
HabeshaBreweryFactory S.C	3 (100%)	3 (100%)	1 (33%)	1 (33%)	0	3 (100%)
Total	20 (80 %)	20(80%)	9 (36%)	4 (16%)	0	25 (100%)

[20]Environmental Pollution Control Proclamation of Federal Democratic Republic of Ethiopia, preamble.

Measures Taken to Control Industrial Pollution

So long as the plantation and expansion of the industries in the town was not questionable, the effects (side effects) of the industry were also unavailable. In relation to that to effectively assess the measures, researcher has classified measures into three parts:

- Precautionary measure
- Preventive measures and
- Remedial measures

Precautionary Measures

Environmental law bestows both pertinent environmental protection and land administration bodies and proponents of projects with obligation to take precautionary measures to control industrial pollution. Researcher has gathered data on the type and manner of precautionary measures taken by both factories and pertinent environmental protection organs by interviewing each of them.

a. Precautionary measures taken by offices of North Shoa Zone and Debre Berhan Town Environmental Protection and Land Administration Bodies

Environmental law provides so many types of precautionary measures which should be taken by the pertinent environmental protection bodies i.e. they have oblivion to formulate standards based on scientific and environmental principles i.e. Sewerage, air quality, type and amount of substances deposited to soil, water management system etc.[21]

Other precautionary measures that should be taken by the concerned bodies are; approval and assessing of EIA study conducted and initiated by the proponents of the projects.[22] The body have also obligation to monitor and ensure the implementation of the study.[23]

When we come to practical precautionary measures taken by the North *Shoa* Zone or in *Debre Berhan Town, the North Shoa* Zone the Department of Environmental Protection and Land Administration have taken the precaution nary measures such as before licensing assesses the EIA study conducted by proponents of the project (factory).[24] They also monitor factories to take mitigation measures. The office of *Debre Berhan* Town Environmental Protection and Rural Land Administration also has taken similar measures with zone.

However, the monitoring and review system of both zonal department and town office was weak and mostly concerned and focus on desk rather than field review.[25] It is obvious that for the effectiveness field reports and review have great

[21]Ibid, art 6(1).
[22]Amhara National Regional State Environmental Impact Assessment Proclamation, Art 4(3).
[23]Ibid, Art 15(1).
[24]Ibid.
[25]An interview held with Ato Samuel Weldehana.

role than that of desk review, since in field review the authority directly observers the implementing of the EIA study report conducted by the concerned factory.

b. Precautionary Measures Taken by Factories Operating in Debre Berhan Town

Law also provides obligation on the part of proponents of the projects (factory) to take precautionary measures. Thus, any person shall take appropriate precaution to prevent any damage to the environment or human health or well beings.[26] In that proponents of the project shall before entering into force deliver the study report of EIA to the bureau of the pertinent office of environmental protection and land administration[27] In addition to that it shall ensure the availability of occupational health services of employers.[28]

Standing from these legal requirements (precautionary measures) that should take by the factories, researchers have analysed the existing practical application of such laws by the factories in *Debre Berhan* Town. Thus, as far as the EIA study was concerned the representatives of each factory accepts or certainly on the existence of EIA study on the project. However *Debre Berhan* Blanket P.L.C and *TikurAbay* Shoe S.C didn't know about when and how the EIA study was Conducted, because of the fact that the project was not established and planted by the now existing proponents (ownership of the two factories were transferred from former established owners). On the other hand, *Debre Berhan* Natural Spring Water, *Dashen* Brewery and *Habesh*a Brewery were certain about the conduct of EIA assessment, because these factories were established on very recent. Blanket Factory and *TikurABay* Shoe Share Company shall have obligation to make study of environmental monitoring plan, deriver to the pertinent body of environmental protections and land administration pursuant to art 9(2) of EIA Proc No 181/2011. However, still today except the supervisory report, there was no formal study completed and delivered to the pertinent body, as what understood from their reflection.

Other precautionary measures taken by the factories in the town were safety (employment safety) measures. Such methods differ from one project to another based on the nature of the project. For example in *Tikur Abay* Shoe S.C use employees safety measures such as musk and glove while in Blanket factory they uses dust musk, eye glass, leather glove, plastic shoes and wear and tear goggle mandatory. *Both Habesha and Dashen* Brewery uses ear goggle and eye glass while *Debre Berhan* Natural Spring Water S.C uses no as such precautionary measures on employees. In overall Blanket PLC was safer than that of others, because it uses so many safety measures. However some factories deny the fact that importance of precautionary measures and they were reluctant to use safety measures like Debre Berhan Natural Spring Water. This is basically against what law provides.

[26]Environmental Pollution Control Proclamation of Federal Democratic Republic of Ethiopia, Proc Art 4(2).
[27]Amhara National Regional State Environmental Impact Assessment Proclamation No- Art 9(1).
[28]Public Health Proclamation Federal Democratic Republic of Ethiopia Proc Art 11(1).

Prevention Measures

Similar to precautionary, it is obligation of both the pertinent body of the environmental protection and land administration and proponents of project as well. For the convenience of clarification, researcher has classified preventive measures into two i.e. measures taken by pertinent body of the environmental protection and measures taken by factories.

a. Pollution Preventive Measures Taken by *North Shoa Zone and Debre Berhan Town* Environmental Protection and Land Administration Offices

The cumulative readings of article 4, 7(1&2), 8(2) of pro No299/2002 and Art 4(3) of EIA *Proc* No 18/2011 of *Amhara* National Regional State, Pertinent Environmental Protection and Land Administration Office should assess, evaluate and verity the incorporation of issues related to effects of projects, incorporation of nature, amount and content of the pollutants, etc in the EIA study.[29]

In relation to that when we see the practical truth in the town, the North *Shoa* Zone environmental protection and land administration office review EIA study report conducted by proponents of projects review, assess and audit the incorporated mitigation measures, follow up the enforcement of safety measures, follow up the existence and functioning of treatment plant and follow up the implementation of whole contents of the EIA study report of the concerned proponents of projects. In review they take may be both desk (with in office by using document) or field view (by going and observing the proponent projects) it also monitor and audit the functioning of liquid treatment plant dray wastage disposal mechanisms and gives feed backs.

Currently, the office also started to identify industry zone within one area and with that industry zone it made cluster by locating factories producing identical and similar as well as related products in one area. For instance, food factories i.e. powder, meat milk etc. in one area while leather, shoe, glass medicine etc. factories on the other place.[30] *Debre Berhan* Town environmental protection and land administration office also performs similar functions within town in collaboration with zonal.[31] However, the great issue in here is does these mechanisms were really resulted the prevention of pollution, we will see them on subsequent analysis below.

b. Preventive Measures Taken by the Factories Operating in Debre Berhan Town

Article 8(2) of the EIA proc No 299/2002 provides that the proponents of project should conduct study by incorporating at least minimum standards, nature and content of factories. Similarly, Art 3(3) of pollution proclamation provides that any person engaged in any field of activity which is likely to cause pollution or any other environmental harm (hazard) shall install a sound technology that avoids

[29]Environmental Impact Assessment Proclamation of Federal Democratic Republic of Ethiopia Proc No 299/2002, Art 8 (2,a & b).
[30]An interview with Samuel Weldehana, E.C
[31]An interview with Ato Dereje Kura,

or reduce, to the required minimum, the generation of waste and when feasible apply method for the recycling of waste.

Standing from the above and similar provisions, researchers have gathered data from the aforementioned five factories functioning in *Debre Berhan* Town, to search whether they apply the law in their project or not to prevent industrial pollution. Now on this section, we will analyse the data gathered from each factory one by one.

c. Prevention Measures Taken by *Tikur Abay* Leather Shoe S.C

Tikur Abay Leather Shoe S.C factory, which have got ownership to the company before two years or in 2006 E.C form the private limited company, have taken so, many pollution prevention mechanisms to control the pollution. It reconstructed prior treatment plant in a new manner. This treatment plant was now fully functioning primary (chemical treatment) which filters waste water and neutralises such water components. The aeration system and ventilator are also available. The windows of the factories functioning house is open for the ventilation purpose.[32]

The solid wastes are buried and since it is protein in nature (the result of hides), it is quickly decomposed within two or three years.[33] *Tikur Abay* leather shoe factory also renewed existing liquid water tunnel which elongated from factory to *Baresa* River (about 2K.M long). This tunnel was before its renewal 25 C.M wide and even broken and waste substances were flowing on the area where human being lives. To prevent such pollution, factory have made tunnel wider (increased its size to 50 C.M wide) and such tunnel was now galvanised and not easily exposed to damage. In addition to that the factory used chemical pamper and exhauster.[34] However, the liquid wastes are directly released to *Baressa* River. From the amount 5000 L Per day used, half of the water was released as waste and such wastes entered into *Baresa* River. Such wastes pollute the river unequivocal manner. Even though the company has tried and taken above mentioned preventive measures, it is not tried to give solution to the pollution of *Beresa* River and even nothing was planned for this purpose.

These activities of *Tikur Abay* leather shoe S.C was contrary to the art 12(2) of public health proc. No 200/200 which provides to that no person shall dispose solid liquid or any other wastes in a manner which contaminates the environment or affect the heath of the society. On this issue, environmental protection organ of both zone and town where not have taken any measure even though they have given data for the researchers as fully functioning their part. For that issue the environmental protection and land ministration office of the town raise the defense that we have no capacity to take any preventive measure since the *Tikur Abay* SC was licensed by regional bureau. But it's contrary to the Art. 13(2) of the proclamation no. 279/2000 which provides unless pollutants were treated effectively before release or discharge to water such discharge is prohibited, and Art. 3(5) of pollution control proclamation no. 300/2002 which authorises

[32]An interview with Ato Ermias Wesenu,
[33]Ibid.
[34]Ibid.

concerned body to take necessary preventive measure to control industrial pollution. This clearly reflects what is missed by factory and concerned body as well.

d. Prevention Measures Taken by D.B. Blanket P.L.C

Debre Berhan Blanket Factory has also taken preventive measure in addition to precautionary measures. There is treatment plant like other factories and wastes are treated within pond-- then discharged by zigzag about 50M outside and-- then released to *Beresa* River. However, the treatment plant was not effectively functional and proponent was not still renewed treatment plant.40 Researchers have concluded that it is against Art. 12 of Pollution Control Regulation no. 159/2008 which provides that existing proponent of the project shall comply with the requirements provided under proclamation and regulation within 5 years. Because so long as the factory was established in 1940s, it is very necessary to review the treatment plant. It is not only the failure of the factory but also concerned environmental protection organ as well. But interesting thing is that the company was in the process of reviewing the treatment plant for near future.

Another preventive mechanisms used by the factories were, it reduced the amount of wastes which were released to *Beresa* River (Before privatised 50-60 thousand litres water liquid waste were released per day in three shifts) while now it is released only 3 times per week. The dry wastes, except paper, other remained pieces become recycled and used to produce foam while papers were collected and burnt.[35]

e. Prevention Measures Taken by *Debre Berhan* Natural Spring Water S.C

Debre Berhan Natural Spring Water PLC also have taken some preventive measures such as treatment plant which functions as follows; source of water – reserve tanker-sand filter-activated carbon with micro carbon by using Co_2-ultralayer for ozone gas generator- pure tanker-pure water. In this process, there might be back flow water is also pure water and used for steam generator and for packaging purposes rather than leaving it as a mere wastage.[36] The factory proponent also burns wastes remained from labelling and packaging materials. Perform (plastic bugs) and cups are dry wastes of the factory are buried and burnt.

Even though the quality control head of the factory have given above mentioned information about factory, researches have observed different things i.e. waste water were released without any tunnel to the river around it. These liquid wastes have a bad smell, this pollutes the human environment. In addition to that, plastic bags and cups with its pieces were openly thrown around it. Because of these reason, researcher has understood that quality control of the factory giving information what ought to be done rather than what was taken by them. This is against the law which obliges factories to collect and recycle plastic and plastic bags.[37]

[35]An interview done with Ato Getachew.
[36]An interview with Roza Seifu.
[37]Industrial pollution control reg no 159/2002,Art 7 and 8.

f. Preventive Measures Taken by *Habesha* Brewery Factory

Like that of another factory, it also uses treatment plant to neutralise the waste it releases. It followed the procedures that; waste-temporary storage (in this if the waste is acid, PH will be added or if it is base HCL will be added to neutralise it) – anaerobic proof (without oxygen or it is closed system)--Aerobic (by using oxygen) in these process it takes about 7 hours before released to the water tanker, then finally relatively neutralise waste will be released to the water (river) through tunnel.[38] They also uses aeration system by using cyclone which purifies air and only purified air will be released while dust part is collected in the container. Glasses and its broken were recycled while dry wastes become disposed and burned.[39] The researcher has also observed these preventive mechanisms and concluded that it is better than other factories by the usage of preventive measure. In addition to that, it is also planned to provide and make suitable condition for farmers around it to use water released from factory for irrigation purpose.

g. Preventive Measures Taken by Dashen Brewery Factory

As that of *Habesha* Brewery Factory, *Dashen Brewery* established treatment plant to neutralise the wastes released from the factory. However, unlike *Habesha* Brewery, its treatment plant is not fully functioning.[40]In additions to that, the liquid wastes are released by factory openly without any tunnel and contaminates water (river) around it. This is again contrary to the law that prohibits discharge of wastes to the river (water) without treatment and law that prohibits dispose of contaminating substances that can harm human health, environment and wellbeing.[41]

Researchers also have observed the fact that the waste of *Dashen* Brewery pollutes environment because of its open discharge to water without tunnel or even ditch. On the other hand, the factory in collaboration with Habesha Brewery Factory planned to provide waste water passed through treatment plant for irrigation purpose and 400 hectares of farm land will be benefited from such irrigation as reported by *Dereje Kura*. But now the environment was under hardship because of pollution by *Dashen* Brewery Factory.

In over all, the factories such as *Habesha* Brewery Factory and in some extent *TikurAbay* Leather Shoe Factory used better mechanism than other while *Dashen Brewery* Factory is under worst condition in the prevention of industrial pollution. But the researchers have concluded that it is not only because of the weakness and failure of factory to observe legal frameworks for pollution control and comply with it, but also pertinent environmental protection body as well. Because pertinent body should monitor audit and inspect the implementation project according to cited EIA study.[42] In relation to that, a mere authorisation of the study shall have

[38]An interview with Ato Amsalu,Fenta,
[39]Ibid.
[40]An interview with Ato Dereje Kura.
[41]Public Health Proclamation Federal Democratic Republic of Ethiopia Proc No_200/2000, Art 12(2).
[42]Amhara National Regional State Environmental Impact Assessment Proclamation rt 15(1) .

no effect unless implemented and it shall not exonerate the proponents of project from liability.[43]

Extent of Industrial Pollution in Debre Berhan Town

The researcher has distributed questioners and interviewed society and other concerned government bodies. Thus, the following table shows the responses of the communities around the respective factories to the question.

Question: What about the extent of industrial pollution?

Table 4.

Name of factories	No. of respondents per their response				
	Increasing	Decreasing	Constant	Totally eliminated	Total
Dashen Brewery S.C	3 (50%)	1 (17%)	2 (33%)	0	6 (100%)
Debre Berhan Blanket P.L.C	2 (40%	0	3 (60%)	0	5 (100%)
Tikur Abay Leather Shoe S.C	3 (50%)	0	3 (50%)	0	6 (100%)
Debre Berhan Natural Spring Water P.L.C (Aqua Safe)	4 (80%)	0	1 (20%)	0	5 (100%)
Habesha Brewery S.C	0	0	3 (100%)	0	3 (100%)
Total	12 (48 %)	1 (4%)	12 (48%)	0	25 (100%)

The above table shows the response of the communities for the question how about the extent of industrial pollution in your locality (whether industrial pollution was increasing or decreasing or not changed or totally eliminated. Thus, from respondents around Dashen Brewery Factory, 50% responded the extent of pollution was increasing while 17% responded decreasing while 33% responded that there was no change. 40% of the respondents around Debre Berhan Blanket Factory PLC responded increasing while 60% answer no change.50% of the respondents around Tikur Abay leather shoe S.C answered increasing while 20% said no change. 80% of the respondents to Debre Berhan Natural Spring Water responded increasing while 20% said no change. 100% the respondents of Habesha Brewery Factory responded no change.

Totally, 48% responded increasing and 48% responded no change and only 4% responded decreasing. From these, it is understandable that only Habesha Brewery Factory respondents responded only no change while only 17% of that of Dashen Brewery Factory said decreasing, the remaining others responded

[43]Ibid, art 4(3).

increasing and no change. From this, researchers have concluded that even though factories and pertinent bodies argued that they have functioning and practicing in light with pertinent laws, it is unsatisfactory to community and seems they have not taken effective preventive measures. Debre Berhan Town Environmental Protection and Land Administration Office agreed and accepted and even unequivocally proved the increment of the extent of industrial pollution from time to time.[44] In short, it is manifestation and reflection to the weak implementation or failure of implementation of legal frameworks for the control or prevention of industrial pollution.

The Effects of Industrial Pollution in Debre Berhan Town

In this section, researcher has analysed the effect of industrial pollution and remedial measures which have taken by the societies on one hand and by pertinent environmental protection and land administration body in Debre Berhan Town. In order to know, researchers have asked communities around the factories through questionnaires whether there is effect of pollution on their localities. Accordingly, more than 90% of the respondents responded by saying there was effects of the industrial pollution in the town. Some of these effects raised by respondents were; communities around Dashen Brewery Factory became out of the river around because of pollution by such factory and their animals were subjected to diseases because of drinking water polluted by the pollutants, even though it was not scientifically proved. On the other hand, communities around *Beresa* River were out of the use of the river because of its contamination by the discharge of waste form Leather Factory, Blanket Factory and others.

Societies around Leather Factory were subjected to common cold because of air pollution, they were also to even eat their meal at their home freely because of industrial pollution (bad smell emanates from the factory).In relation to that, if such effects of pollution were resulted from the factories, the next issue will be what remedial measures have taken by communities and pertinent environmental protection body of the town. This is because art 11(1 and 2) of pollution control proc no 300/2002 with Article 10(1-3) of industrial pollution control regulation no 159/2008 stipulates that the right to compliant against pollution at the authority or relevant environmental agency and if not satisfied by the response of such authority, he/she can appeal to highest authority and even to court. Indeed, practically whether society in Debre Berhan Town exercise these rights against industrial pollution or not is better understood with the table below.

[44]An interview with AtoDerejeKura.

Question: Is there any time that lodged a complaint or reported at authority?

Table 5.

Name of factories	No. of respondents per their response					
	Yes	Percent	No	Percent	Total	Percent
Dashen Brewery S.C	5	83%	1	17%	6	100%
DebreBerhan Blanket P.L.C	2	40%	3	60%	5	100%
TikurAbay Leather Shoe S.C	3	50%	3	50%	6	100%
DebreBerha n Natural Spring Water P.L.C (Aqua Safe)	0	0	5	100%	5	100%
Habesha Brewery S.C	0	0	3	100%	3	100%
Total	10	40%	15	60%	25	100%

Thus, in order to understand the application of such, researcher distributed the questionnaire for the respondents of concerned factories. For this, respondents around Dashen Brewery Factory responding by 83% yes and 17% no while from respondents of Blanket Factory 40% answered yes and 60% said No, form among respondents on leather factory 50% by 50% yes and no respectively. Participants responding on Debre Berhan Natural Spring Water S.C by 100% said no by saying 'we have never complained against pollution' and similarly 100% of respondents around Habesha Brewery Factory totally responded no. From these data, one can understand that the only respondents on Dashen Brewery Factory and in some extent Leather Shoe Respondents applied above mentioned right(right to complaint) better than others. In addition, the table shows that from total number of respondents, only 40% responded yes (used his/her right to complaint at authority).This indicates that even though pollution and its effects existed in the town, society was not willing to complain to authority still (Hidar 24/2008 E.C). No case was appeared before the court as a result of industrial pollution in the town.[45] This shows either unawareness of society or reluctant and negligence or thinking (no response and solution for it form the government body).The last issue what to be raised in this subsection was the type and situation in which the remedial measures taken by pertinent environmental protection body. This obligation emanates from Art 3(5) of the pollution control proclamation no. 300/ 2002 which states that when any activity poses a risk to a human health or to the environment, the authority or relevant regional agency shall take any necessary measures up to relocation or closure of any enterprise in order to prevent harm. In

[45]An interview with Ato Fekadu Negash.

addition to that pursuant to Art 11 of the procn.300/2000 with its regulation no 159 on art 10, authority or relevant regional agency shall take effective measures to the complaint without proving vested interest. Furthermore, pursuant to Article 7(2) of the same regulation; competent organ shall suspend or cancel license of factory if it causes series pollution. Concerning the practical remedial measures taken by the offices of environmental protection and land administration of zone and town, such measures taken by this offices were; relocation of some factories that may potentially pollute other factories. For instance, glass and medicine factories were relocated and suspended license as a result of causing pollution to food factory (meat, powder, and milk near the above mentioned factories) around them.[46]

However, above mentioned remedial measures, pertinent environmental protection body have not given any actual response to the complaint lodged by the community around factories, i.e., from Dashen Brewery Factory and Leather Factory. But pertinent government organs have not taken any satisfactory measures in response to the complaint. This clearly indicates the weakness and lack of effective enforcement of aforementioned laws.

Challenges to Control Industrial Pollution

On the preceding sections, the researcher has presented and analysed the practical applicability in Debre Berhan Town and weakness on the part of pertinent environmental protection organ, factories and societies as well. However, on their part pertinent environmental protection and land administration offices, factories and societies provides challenges to them that caused gap in the implementation of laws on protection of industrial pollution. Such challenges are:

- Lack of strong environmental protection office in the town because of its infancy (since it was become independent from agricultural office after 2005) and there was still no environmental legal expert in the office of the town.
- Lack of awareness on the side of proponents of the project about the sustainability environment for the future generation rather they only focus on their project and willing to maximise their profit.
- Lack of research centre to conduct research to know and check the existence, cause and effect of the pollution
- Difficulty to relocate factories which were planted in earlier time (before current reform) on the unsuitable location, for example, there is difficulty on the part of government either to relocate leather factory which functioning in kebele 07 or residents around it. Because it is very difficult and even seems impossible to relocate.
- Lack of active commitment of society to control industrial pollution in collaboration with government, factories and other concerned bodies.

[46]An interview with Ato Samuel Weldehana,

- Shortage of electric power, which was resulted the back flow of the liquid waste to the unwanted places because of malfunctioning (stoppage) of chemical pumper which is activated by electric power.
- Since officers or workers on environmental protection and land administration are not graduates on fields related to environment and have no deep knowledge on it, most of the time they were exposed to deception by technical words used by proponents of projects and lacks ability to identify the existence and extent of pollution by the project.
- Lack of awareness on part of societies about mitigating measures and relativity of the side effects of factories.
- Gaps on the part of concerned government body on rendering of public awareness, information and creation of the conducive environment to public participation on decision making process.

Conclusion

The duty of government to make relevant information available to the public is little observed by the concerned government bodies and the society is not addressed with the right to information to the extent that the law requires.

Most of the society around factories didn't take any training or education with respect to any issue related with the factory.

Public participation is insignificant both prior as well after the plantation of the factory. Government is better in realizing public participation through EIA but public participation after the plantation of a factory is very low.

EPA, *Amhara* National Regional State Environmental Protection, Rural Land Administration and Use Bureau, Zone Environmental Protection, Land Administration and Use Office and *Debre Berhan* City Administration Environmental Protection and Land Administration Office has failed to assume their responsibility, entrusted to them by various legislations to the extent as required by law.

Four types of pollutions have prevailed in *Debre Berhan* Town. These are water pollution, air pollution, land pollution and noise pollutions. All types of pollutions are emanated from the failure of the government, the factories and the society to act as the relevant laws direct them.

Various measures were taken by the government and factories to prevent and reduce pollution. Such measures taken are classified as precautionary measures, preventive measures and remedial measures.

The extent of industrial pollution is reported to increase from time to time. Effect of all types of pollution stated above may be inflicting harm on health of human beings, animals and plants, complaints lodged and various remedial measures which were given by relevant government organs at different levels.

The overall challenges for the protection of industrial pollution are:

i. Factories highly focus on profit making process and their observance to legal frameworks on protection of industrial pollution is very low.

ii. Lack of coordination among the pertinent government bodies, factories and the society in order to prevent industrial pollution and comply
iii. With the legal frameworks on protection of industrial pollution.

References

Berhane, T. & M. Teklemedn (2009). Environmental law teaching material, Mekele University, Ethiopia.

Cunnungham, W.P. & M.A. Cunningham (2012). *Environmental Science: A Global Concern*, 12th ed. New York, NY: McGraw- Hill business unit of Mc Graw-Hill companies Inc.

Mahesh, M. (2007). *Legal Control of Environmental Pollution*. New Delhi Publishing Press.

Senger, D.S. (2007). *Environmental law*. New Delhi: Prentice-Hall of India Pvt.Ltd Publishing press.

Tesfaye, A. (2012). 'Environmental Impact Assessment and Monitoring under Ethiopian Law' in *Haramaya Law Review* 1:103-124.

Interviews

An interview held with Ato Amsalu, Fenta, Envirnmental senor chemist of Habesha Brewerys on 20/03/2008.

An interview held with Ato Dereje Kura, DB city EP and land administration department coordinator on 24/03/2008.

An interview held with Ato Ermias Wesenu, production supervisor of TikurAbay Leather shoe factory S.C. (D/B branch), on 20/03/2008.

An interview with Ato Fekadu Negash, President of D/B city first instance court on 24/03/2008.

An interview held with Ato Getachew, manager of D/B Blanket factory PLC, on 21/03/2008.

An interview held with Ato Getaneh Zike,facility manager of Dashen brewery s,c,on 22/03/2008.

An interview held with W/ro Roza Seifu, quality control head of D/B natural spring water PLC, on 21/03/2008.

An interview held with Ato Samuel Weldehana, head of N.S zone EP, Land Adm & EIA office, on 24/03/2008.

Legal Instruments

Amhara National Regional State Environmental Impact Assessment Proclamation No-181/2011

Bamako Contention Ratification Proclamation No_ 353/2003

Basel Convention Amendment Ratification Proclamation NO_356/2003

Basel Protocol Ratification Proclamation No_357/2003. *The* Constitution of Federal Democratic Republic of Ethiopia Proclamation No.1/1995

Environmental Impact Assessment Proclamation of Federal Democratic Republic of Ethiopia Proc No 299/2002

Environmental Organ Establishment Proclamation of Federal Democratic Republic of Ethiopia Proc No 295/2002

Environmental Pollution Control Proclamation of Federal Democratic Republic of Ethiopia, Proc No.300/2002.

Institute of Biodiversity Conservation and Research Establishment/Amendment Proclamation of Federal Democratic Republic of Ethiopia Proc No 381/2004

Prevention of Industrial Pollution Regulation No159/2008

Public Health Proclamation Federal Democratic Republic of Ethiopia Proc No_200/2000

Rio Convention on Climate Changes and Bio-Diversity Convention, 1992

Solid Waste Management Proclamation of Federal Democratic Republic of Ethiopia Proc No. 513/2007

Stockholm Convention Ratification Proclamation No 192/2000

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 541-562

Law, State and Religious Freedom in Brazil: A Historical and Constitutional Analysis of Freedom of Belief and Religion

By Micael Fernandes Gomes dos Santos & Michely Vargas Delpupo Romanello±*

This research sees to discuss the position of the State regarding Freedom of Belief, under the legal perspective. In other words, as the Brazilian Constitution guarantees freedom and the free exercise of religion in its art. 5, item VI, the question is: May the Brazilian State interfere with the freedom of individual belief, or can it provide legal guarantees so that this freedom is ensured? By the deductive method and by the analysis of recent judgments of the Brazilian Federal Supreme Court in cases of extraordinary appeals, the limits of the State of action or inaction in relation to religious freedom will be upheld, concluding that the State must always ensure the sovereignty of secularity and neutrality in religious matters, observing freedom of belief.

Keywords: *Religious freedom; Brazilian State; Law*

Introduction

"[...] Give, therefore, to Caesar what belongs to Caesar and to God what belongs to God". (Matthew 22:21).

From this biblical text, it is possible to infer the antiquity that occurs when the theme is the relationship between State and Church. Now, for a long time, as can be seen from history, this relationship was corroborated by disturbed acts and agreements that aimed at the inquisitive and non-sensory power. In other words, the State-religion relationship was aimed at the practices of power and inquisition, leaving no reserves of individual beliefs capable of enjoying freedom of thought.

It is important to highlight that the construction of a society is based on congruent and divergent factors, and the thought is not uniform when the theme is religion. Should the State then, in view of its sovereignty, use law as a vehicle and tool capable of equalizing divergent relations? Now, it is known that the law is a full and direct instrument, capable of settling controversies and minimizing litigation of the most diverse agendas. However, how could it be applied in the State vs. religion litigious extinction?

*Law Graduate, University Adventist Center of São Paulo, São Paulo, Brazil & Intern at Zanin Business Advocacy. Email: micaelfernandes000@gmail.com
±Lawyer and Professor of Civil Law, Pontifical Catholic University of São Paulo, São Paulo, Brazil. Email: michelydelpupo@terra.com.br

Religion, as an individual or collective guarantee of conscience. Based and wrapped up in the democratic rule of law, it is shaped by the faithful conduct, or not, of the individual who turns to grows and liturgies that he wants. From this, it is known that, in order to have a legal guarantee, there must be a state legislative action in order to settle and settle disputes that involve the will to believe or simply not to believe, which makes the direct activity of the State evident.

This time, both the State and the religions have rules of conduct. Reconciling them is a fine line, as this requires interference by the state in the church or by the church in the state. In other words, from the moment that the individual, seeking his constitutional guarantees, turns to the democratic State of law, this, in a positive way, must exercise the activity of ensuring such rights.

In view of this, the question is: would state activity in the preservation of freedom of belief and religion be an affront to the constitution, since interference in religious matters is prohibited? And yet, how do fundamental rights fit into the state's obligation to protect minorities?

It is important to highlight the role that the State plays, through legislative and judgmental politicisation, since it tries to demonstrate the State's non-secularity, but, in a correct way, its neutrality in the way of judging; to interfere when necessary to protect individual rights; and to legislate. Such neutrality is mainly designed to guarantee the rights of the most inaccessible minorities, as will be analysed in the recent judgment on freedom of belief involving Seventh-day Adventists.

This time, the historical analysis of religious freedom is of great importance. Observing the social and legal difficulties that this one went through until reaching the constitutional guarantee that we have today. It also seeks to discuss state secularity, religious equality and analysis of jurisprudence.

Based on such propositions, this research uses the so-called deductive reasoning as a scientific method to guide its questions. The choice of such method was based on the fact that it was outlined as the most suitable for the discussions presented here. In this sense, we start from general premises and propositions for particulars; or of arguments that are considered to be true and unquestionable and then reach formal conclusions.

Given the bibliographic character of the research, the investigation techniques were centred on books, articles specialised in the subject, periodicals, theses and dissertations, legislation and pertinent jurisprudence.

Historical Developments of Freedom of Belief

In this topic, a little of the historicity of religious freedom will be treated, bringing its historical precedents and social emergence. It is extremely important to study this topic since fundamental freedoms emerged from social factors widely experienced and witnessed by Christian, Evangelical, Catholic or simply atheists.

Thus, human beings have always had the need to create images, symbols and models that could translate their reality and give concrete meaning to their actions. Religion is born as a fundamental subterfuge of the practice of believing, or not in

something specific or general. So, talking about religion in a historical character denotes the whole story, as it has always been present, intrinsically or extrinsically, in the daily life of society[2].

Nevertheless, the Jewish faith and life are based on the will of God, His scriptures and teachings. It is not by chance that Christians have inherited Jewish monotheism, where they deposited their salvation through spiritual conversion through repentance of sins and faith in Jesus Christ. It is noted, in passing, that this belief goes beyond the individual limits of the individual and their free conscience, being dissipated according to the society and the context in which they are inserted.[3]

In this treadmill, the individual conscience which leads someone to believe or not in something, can be seen in two different perspectives. First, there is the individual conscience based on the individual's morals. A set of beliefs and moral standards that delimit their actions. On the other hand, there is an awareness regarding the individual's intellectual capacity, as it starts to review, conceptualise and critically evaluate, being its governing moral code. It is imperative to emphasise that, even though they are different perspectives, there is a logical coherence between them, and at any time in the individual's life, conscience as a moral code proceeds to conscience as a moral capacity[4].

Thus, religion and belief, inserted in the individual's moral conscience, was not always guided by freedom. In ancient Rome, the fact that devout Christians did not submit to the Catholic creed and demands, as well as non-loyalty to the supreme emperor, validated persecution, destruction of temples and even the death penalty for atheists who did not assume the imposed ideological position for the government[5].

In this scenario, a very important figure emerges for the evolution of the power of free conscience and creed. Martin Luther, in the exercise of his moral capacity, creates a fissure in truth centred through the Protestant Reformation. He diverged, through his 95 theses, from the doctrinal principles of the Catholic Church, such as the sale of indulgences and the issue of purgatory[6].

Thus, it is noted that the Protestant reform initiated by Martin Luther and other "reformers" was an important factor in the reconstruction of the individual autonomy of the power of choice, which was in constant litigation between the church and the absolutist power.[7].

> Luther did not intend to break with Rome, but was urged by the Roman Curia, denounced by the Dominicans, coincidentally in charge of the sale of indulgences and the Inquisition. In October 1518, in a discussion with the papal legate in Augsburg he stated that "the authority of the scriptures was superior to that of the pope". In 1519, at Leipzig, he declared that, even if the Council declared him in error, "he would not

[2]Port (2003) at 3.
[3]Port (2003) at 3.
[4]Chiassoni (2017) at 260.
[5]Port (2003) at 3.
[6]Neto (2006) at 19.
[7]Bergara & Gonçalves (2008) at 02.

withdraw his opinions because he felt obliged to submit to the superior authority of the Scriptures".[8]

Likewise, this reform was not limited to just one person, a very typical figure in the form of government Rome adopted, where all power was concentrated in the pope. Now it became a set of guiding principles that were imperially based on three: The supreme authority of the scriptures; salvation by faith and the priesthood alone. Regarding the last principle, Christians should be real priests of God on earth, missionaries, with the aim of disseminating the scriptures[9].

In this step, ideals emerge that, later, are postulated within the so-called "first generation rights", in which religious freedom is inserted. Based on the triad "freedom", "equality and "fraternity", symbols of the French flag, the first dimension rights originated from the bourgeois revolts inspiring Enlightenment and unnaturalise doctrines of the 17th and 18th century. Synthesised in civil and political rights, the first dimension rights concern the state abstention and individual freedoms, protected against State oppression that harms this individual right.

As can be seen, the legal advances with the presence of individual and collective guarantees are notorious. Human Rights, in turn, inserted in the "third dimension" right, are born in accordance with the needs of the current society, and its emergence is not linked to the fact of human organisation in a social set, much less because of the worldwide verberation for lack of such guaranteeing norms. Human rights arise according to human evolution and its needs[10].

In this sense, this fact becomes evident when, after the Second World War, society is obliged to protect diffuse guarantees, with the aim of defending the universality, indivisibility and interdependence of rights against the atrocities experienced in the period. Taking as an analysis the text of the Declaration of Human Rights of December 10, 1948, the protection of fundamental rights is noted and, consequently, the limitation of state power, until then from where all power emanated[11].

The Enlightenment and the French Revolution are the influential landmarks for the increase of religious freedom within international law. When, clearly, the Declaration provided in its tenth article that "no one can be harassed by their opinions, including religious opinions, as long as their manifestation does not disturb the public order established by law". Inferring from this maxim that such a right was not absolute, since personal manifestation that disturbed public order would be prohibited[12].

With the discovery of the United States, there was an interest in creating new laws there that escaped European dogmatics. The aim was to bring to the "new continent" more liberal and comprehensive laws. "The Anglo-Saxon Puritans, with the intention of making norms for the USA totally contrary to the country they

[8]Neto (2006) at 19.
[9]Teraoka (2010) at 19.
[10]Wermuth & Schorr (2017) at 825.
[11]Wermuth & Schorr (2017) at 825.
[12]Martins & Mituzani (2011) at 230.

came from, had the intention of creating a "more liberal" State, where Human Rights would be protected".[13]

In response to this, in 1791, the US has its first Amendment to the Constitution enshrined, stating that: "Congress shall not enact any law establishing a religion, or prohibiting the free exercise of worship; nor will it restrict freedom of speech or the press; or the right of the people to assemble peacefully, or to petition the government for the correction of injustices".[14]

> From the analysis of this first amendment, two clauses emerge: the first, establishment clause: which separates the religious confessions from the State, that is, the US Congress is prevented from legislating with the objective of establishing an official religion in the United States. In turn, the second clause, free exercise clause, guarantees the right to religious freedom, prohibiting the free exercise of cults[15].

Thus, in the USA, there was a blind rupture of the European model, where religion and the State were not separated, bringing, now, in the American mold, the freedom of belief and of placing God as a major reference was observed and respected. Notwithstanding this neutrality of the State, there is now a need for the State not only to be neutral, but active in the observance of respect for the numerous denominations arising from free conscience.[16].

It then moves on to the study of how the positivisation of religious freedom took place in Brazil and its historical setbacks.

Arrival in Brazil

It is almost unanimously agreed that Brazil, in the matter of postulating material rights, was long overdue. Instead, it used as a basis for internal affirmation of rights texts and legal studies from the external world. Thus, it is important to bring this topic as the application of religious freedom and its legal substitute.

The development of religious freedom in Brazil took place in a not so quick way, since Portugal, together with its crown, had a strong relationship with Roman Catholicism. Nevertheless, the discovery of Brazil itself had a significant incentive from the church as a way not only to expand the Portuguese market, but also to propagate the Roman Catholic apostolic religion.[17].

As Padre António Vieira points out in his work:

> Other men by divine institution have only the obligation to be Catholic: the Portuguese have the obligation to be Catholic and apostolic; other Christians have an obligation

[13]Bergara & Gonçalves (2008) at 02.
[14]Brega Filho & Alves (2009) at 76.
[15]Morais (2012) at 230.
[16]Teraoka (2010) at 24.
[17]Casamasso (2010) at 6167 – 6168.

> to believe the faith, the Portuguese have an obligation to believe it, and more to spread it.[18]

Moved by this maxim of dissemination of belief, the Portuguese pour into the ocean in search of the faithful, having found, in Brazil, "ignorants" capable of being easily catechised. In this way, the church helped the State to colonise the population of Brazilian lands, and in return, it attracted more faithful to its Catholic jurisdiction, with adherents of other faiths being subjected to the "holy inquisition", completely lacking the figure of religious freedom in, until then, colonial Brazil[19].

This time, Brazil reaches its Proclamation of Independence loaded with political-religious values and ideals in the European mold. Likewise, more or less a year since the proclamation, the Emperor Dom Pedro I, on March 25, 1824, promulgates the Imperial Constitution, the first constitution in Brazil that brought liberal and authoritarian principles in its legal body[20].

In a way, there is an advance in the promulgation of this Constitution, as it allowed the practice of cults as long as they did not exceed the limit of their activity. Otherwise, the promulgated Constitution ratified the Catholic religion as the main one of the Empires, in its 5th article, which said: "Art. 5th. The Roman Catholic Apostolic Religion will continue to be the religion of the Empire. [...]"[21]. That is, even allowing a certain freedom of belief, it ensured the Empire's religion as supreme among the others, prospering, in any case, the aforementioned authoritarian principle[22].

That said, there was no need to talk about total religious freedom until the year 1890, since there is a very important historical milestone to trigger once and for all the protection of religious freedom in Brazil. It is Decree No. 119-A, of January 7, 1890, written by Ruy Barbosa and granted in the government of Marshal Deodoro da Fonseca, which prohibited the State from intervening in matters of religious matters, also extinguishing the patronised[23] as described in art. 4 of the legal diploma: "Art. 4th The patronage with all its institutions, resources and prerogatives is extinguished".[24]

In this regard, it is important to bring up the first article of the aforementioned Decree which says:

> Art. 1 The federal authority, as well as that of the federated States, is prohibited from issuing laws, regulations, or administrative acts, establishing any religion, or prohibiting it, and creating differences between the inhabitants of the country, or in services supported at the expense of the budget, for reasons of beliefs, or philosophical or religious opinions[25].

[18]Vieira (2003).
[19]Bergara & Gonçalves (2008) at 02.
[20]Casamasso (2010) at 6167
[21]Constituição (1824).
[22]Morais (2012) at 230.
[23]Morais (2012) at 234.
[24]Decreto nº 119-A (1890).
[25]Decreto nº 119-A (1890).

that Brazil was already taking a big step towards state secularism, since the Magna Carta promulgated in 1891 brought a series of rights and prerogatives that totally separated religion and the State, dismantling the supreme religion of the empire and protecting the several existing religions. It is easy to notice this in the reading of article 11, paragraph 2 of the referred law, which prohibits embarrassment to figures by the public authorities.

From that point on, all the supervening Constitutions covered, in their text, the protection of religious freedom, and the current Magna Carta (1988) further expanded this national guarantee, no longer being subordinated to public order and good customs. It is noted that, even with all these historical advances in the protection of freedom of belief and belief, endless debates are still launched today about the real effectiveness of the legal text, since there is a dilemma and legal fissure about whether the State activity, in face of guarantee religious freedom, must be positive or negative.[26].

In this step, it is important to analyse the next topic when it comes to state secularity, since it is essential, for this research, the real assessment of the position that the state exercises in relation to disputes arising from the correlation between rights and religion.

State Secularity

The State, as already mentioned, employed a series of protective norms for freedom of conscience and belief, embodying the Constitution in force and having its concepts and determinations widely respected. Nevertheless, it is necessary to emphasise the difference between conscience and belief, since they are not confused for dogmatic purposes, since a free conscience can be based on the will not to adopt any belief, and only the adherence of moral values and spiritual, not necessarily passing through to a concrete religion[27].

In this way, the Constitution of 1988 lists in its text three distinct freedoms (conscience, belief and worship), even though they are different from each other, they have a degree of correlation:

> Art. 5 (VI) - the freedom of conscience and belief is inviolable, the free exercise of religious cults being guaranteed and the protection of places of worship and their liturgies guaranteed, in accordance with the law[28].

Thus, analysing the legal text exposed above, it is easily possible to notice that the constituent brought a greater scope in the protection of fundamental freedoms. Freedom of belief refers to the freedom of the individual to choose their religion or religious sect, as well as their right to change or leave any religion, having the power to choose not to adhere to any religion. freedom of disbelief, protected by

[26]Casamasso (2010) at 6169.
[27]Brega Filho & Alves (2009) at 80.
[28]Constituição (1988).

the law which gives the individual the prerogative of, if he wishes, not to be bound by any religion, such as atheists[29].

There is no need to misinterpret that such freedom, as it is constitutionally guaranteed, is absolute. Now, let it be said in passing, that nothing in law is absolute, not being, in this way, religious freedom. It happens that it can be "violated", contrary to the legal provision, if it causes damage to public order or, even, if its cults harm any other principle or legal norms in force.

In the second part of the same highlighted item, there is the protection of places of worship and their liturgies, and, unlike the first constitution in the Brazilian imperial period in which services could only be held in specific places, now, the practice of religion can be done in public or private places, being penalised by the penal code whoever hinders such right, as it appears from article 208 of the Penal Code in force, in verbis:

> Art. 208. To mock someone publicly, for reasons of religious belief or function; prevent or disturb ceremony or practice of religious worship:
> Penalty – detention, from 1 (one) month to 1 (one) year, or fine.
> Single paragraph. If there is use of violence, the penalty is increased by one third, without prejudice to that corresponding to violence[30].

In view of this, for there to be an effective observance of the listed fundamental freedoms, the State cannot, or should not, be linked to any religion. Such bond being formally prohibited since Decree No. 119, of January 17, 1890, bringing the real separation of State and Church, establishing the lay or lay State, in its abstentionist character[31].

In this sense, Jorge Miranda (2014) brings the concept of secular State, defending the negative obligation of the State:

> Secularity means not assuming religious tasks by the State and neutrality, without preventing the recognition of the role of religion and the various cults. Secularism means distrust or rejection of religion as a community expression and, because it is imbued with philosophical or ideological assumptions (positivism, scientism, free thought or others), it ends up calling into question the very principle of secularism (...).

In this way, the theory of State secularity proclaims the autonomy of different and different religions, restricting the positive activity of public authorities when it comes to religious confessions. However, having such religions placed on the same level of equality, they can exert political influence within the limits and proportions of their social burden. The lay state does not profess, does not indicate, does not determine[32].

Therefore, the lay State of this safeguard the associations linked to religious activity, preserving the autonomy of the churches in relation to their activity and

[29]Brega Filho & Alves (2009) at 79.
[30]Decreto-lei nº 2.848 (1940).
[31]Brega Filho & Alves (2009) at 79.
[32]Brega Filho & Alves (2009) at 80.

protestant exercises. Likewise, the relative separation between the State and religion is guaranteed, since it is not absolute due to the still imminent duty of the State to ensure the observance of individual rights and freedoms listed in the Federal Constitution[33].

These rights, to adhere to a religion or not, can also be seen, for example, in the International Covenant on Civil and Political Rights, where it states in its art. 18, al. 2 that "No one may be subjected to coercive measures that may restrict their freedom to have or to adopt a religion or belief of their choice". From this comes the total prohibition of the inquisitorial power on the part of the State in making someone adopt, on a compulsory basis, a certain religion[34].

In the conception of Marli Eulália Port, the existing separation between churches and the State perfectly allows for free competition between churches (which is not intended to be discussed here) and prevents the hegemonic predominance of a single religion.

Thus, the same author brings the idea defended by Thomas Jefferson, who lectures as follows:

> (...) the intervention of the state as coercion would only be justified in those cases where it was a question of making the constitutionally established rights and duties enforceable or of protecting the rights of third parties. These religious freedom influences were felt in the Virginia Bill of Rights.

In this tuning fork, the principle that guides the separation of church and state would constitute a negative competence, with certain situations of fact and law beyond the reach of state interference.

In view of this, what can be seen today is a tireless struggle in favor of social union, since there is no concrete religious base in general, capable of bringing this unity. Which is more than certain, since differences, in this sense, place democracy as supreme, relying then on the principles of justice, reciprocity and dialogic constitutionalism to settle religious conflicts[35].

Even though the State is secular, and society is secularised, it must be recognised that both can be influenced by religious factors. Of course, noting the need to reconcile religious factors with positive freedoms, not taking into account the conviction of each one. That is, even though they are part of a secular environment, the protection of God is real, in a way, by the State[36]. It is possible to note this in Article 5, items VII and VIII of the Federal Constitution, which states that:

> VII – it is ensured, under the terms of the law, the provision of religious assistance in civil and military entities of collective detention;
> VIII – no one shall be deprived of rights for reasons of religious belief or philosophical or political conviction, unless he invokes them to exempt himself from the legal

[33]Morais (2012) at 230.
[34]Brega Filho & Alves (2009) at 80.
[35]Port (2003) at 20.
[36]Port (2003) at 20.

> obligation imposed on everyone and refuses to comply with an alternative provision, established by law; (...)[37].

The assistance, which stands out in the first item mentioned above, must be provided to a list of people who are in the establishments of civil entities, such as hospitals; and in military establishments, such as prisoners, and minor offenders. Thus, religious assistance serves as a psychological subterfuge capable of speeding up the intern's recovery time. As for the sick, it also serves as a mental way of providing hope capable of reflecting on physical improvement, reducing suffering and tension[38].

In this tuning fork, even though religious assistance is beneficial, in most cases, when used. There is no need to talk about the obligation of this assistance, since, if imposed in a mandatory way, it would be contrary to the constitutional text itself and, also, would be hurting the theme discussed here, religious freedom[39].

Already in item VIII above, brings to light the excuse of conscience in which the non-performance of legal duties in respect of religious convictions is allowed. Of this, for example, we can mention the individual who does not do military service because he is not compatible with their religious dogmas. On another screen, there are alternative services that are compatible with the state's need and respect for the individual's creed and, having the individual denied the provision of the legal obligation and therefore also denying the provision of the alternative obligation, he will suffer the consequences provided for in article 15, Item IV, of the Major Law, which imposes the loss or suspension of political rights[40].

Under this bias, it is certain that secularity plays a role in which it will fluctuate according to the political context in which it is inserted, depending on the degree of secularisation of each society. This is inferred from the legal advances that the protection of belief has obtained over the years and also from the process of state secularisation[41].

It is noted that all terms previously used that are linked to religious freedom (belief, conscience, creed, worship) work in a dialectical manner, that is, when any of them is no longer protected, it directly compromises constitutional supremacy, placing the religious freedom podium in fundamental rights[42].

From this, it is possible to say that the State protects the individual's right to self-determination, and the cult, or specific rite, is the way in which the protected object seeks his or her postulated right. Duguit (2005), dealing with this, states that:

> (…) every religion contains a second element: the rite or cult. For religious freedom to exist, everyone must be entirely free to practice any religious cult, that no one can be harmed by it, nor prevented, directly or indirectly, from practicing the cult

[37]Constituição (1988).
[38]Bergara & Gonçalves (2008) at 07.
[39]Bergara & Gonçalves (2008) at 08.
[40]Bergara & Gonçalves (2008) at 08.
[41]Borges & Alves (2013) at 234.
[42]Brega Filho & Alves (2009) at 81.

> corresponding to their religious beliefs, and the reverse . […] religious freedom is, therefore, seen in this way, essentially freedom of worship.

The State, therefore, should not remain inert in the face of the issue, but, in a concise and coherent manner, act objectively seeking the real protection of the rights listed in the Constitution. The State must provide and allow that the duties arising from each religion are respected, not talking about "cesaropapism" (in which political power dominates the religious) but an authentic democratic State of law. Thus, if the State, despite granting laws that protect the individual belief of each one, imposes conditions that prevent them from practicing that same belief fully, it will not speak of religious freedom[43].

It is important to bring up Article 12 of the American Convention on Human Rights, which provides:

> Article 12 (...)
> §1. Everyone has the right to freedom of conscience and religion. This right implies the freedom to retain one's religion or beliefs, or to change religion or beliefs, as well as the freedom to profess and disclose one's religion or beliefs, individually or collectively, both in public and in private.
> §two. No one may be subjected to restrictive measures that could limit their freedom to retain their religion or beliefs, or to change their religion or beliefs.
> §3. The freedom to manifest one's religion and beliefs is subject only to the limitations provided for by law and which are necessary to protect the security, order, health or public morals or the rights and freedoms of others.
> §4. Parents and, where applicable, guardians, have the right to have their children and pupils receive a religious and moral education that is in accordance with their own convictions.[44].

In this way, the State, in safeguarding the right to religious freedom, is not based on passivity, it does not consist in complete omission, since a State that is totally silent is an enemy of religious freedom. On the contrary, the State is required to cooperate, without ideological or religious proselytism, with the aim of defence and protection, providing everyone with real freedom to exercise their religion. Thus, it would be correct to say that a secular State is not expected, but a religiously neutral State that, by this neutrality, can dismiss legal, cultural and social conflicts involving religious freedom without, for this, being completely silent[45].

Now, insofar as it is stated that the State must not be entirely secular, it is necessary to ensure, in another way, that the State must be completely neutral, this neutrality being, as already mentioned, absolute. Absolute in the sense that there is no discrimination, on the part of the State, between the various religions and temples, whether for their benefit or harm, thus prospering the equality of treatment[46].

[43]Borges & Alves (2013) at 235.
[44]Decreto nº 678 (1992).
[45]Brega Filho. & Alves (2009) at 85.
[46]Vieira (2003) at 86.

Here, the principle of "treating equals equally and unequal in proportion to their inequality" is fully applied, given that unequals considered as minorities must have an equal treatment, with the State, through its three powers, legislate, judge and execute actions that protect such minorities.

In this wake, Vladimir Brega Filho[47]:

> It could be argued that this "unequal" treatment could lead to confrontation, to religious sectarianism. Just the opposite is believed. Unequal treatment aims to guarantee all constitutionally guaranteed rights, promoting the inclusion of all people, regardless of their religion.

From this, it is clear that only through regulation by law, with regard to competitions, entrance exams, etc., it is possible to eradicate discrimination and social exclusion of followers of minority religions and beliefs. Here comes the idea of democracy, since it is not limited to the act of governing for the majority in that, in this step, it encompasses a space in which a diversity of different views in a political community behaves.[48].

In this step, even if one of the views prevails over the other, it is essential that the State, as a presupposition of minimum action, diversity, the common reference and the equality of conditions that provide, any creed, to participate in this multiple political space[49].

Therefore, it is possible to observe an existing conflict in the case of public examinations, school activities and entrance exams, where the day keeps and the right to believe is strongly debated when such acts are put to the test. It is observed that the lack of strict regulation on such guidelines brings serious harm to those who profess minority religions, and therefore it is not reasonable to require them to renounce their faith to adjust to the broadly comprehensive constitutional dictates.[50].

Guard day is, if not the most important, one of the basic principles of many religions. Once you take for yourself, based on the bible or sacred texts, a preconceived day to worship and respect the rituals of each creed. As an example, Roman Catholic Apostolics keep Sunday, as defined by John Paul II in Dies Domini in 1998; Seventh-day Adventists keep the Sabbath (Jewish shabbat); Muslims, Friday; among other religions of which it has its own guard days[51].

Note the great repercussion that this issue has caused, generating friction precisely by guarding these days when determining reasons for dismissal from work, exams and military service[52].

[47]Brega Filho & Alves (2009) at 75-94
[48]Martins & Mituzani (2011) at 322.
[49]Martins & Mituzani (2011) at 345.
[50]Bergara & Gonçalves (2008) at 15.
[51]Bergara & Gonçalves (2008) at 16.
[52]Chiassoni (2017) at 260.

Religious Isonomy and Seventh-day Adventists

In this topic, the relational analysis of religious isonomy against the freedom of belief of Seventh-day Adventists will be made. The choice was based on recent major judgments involving Adventists that have had great repercussions. However, it is noted that over time they have gained expressive rights for the full exercise of their faith, as will be shown.

In this compass, religious isonomy is a very old term already included in some legal texts, as mentioned in topic 1 of this research. Refreshing the memory, this principle is observed in the Universal Declaration of Human Rights of 1948, in its article II, 1; in the American Declaration of the Rights and Duties of Man, also dated 1948 and, finally, it is also possible to observe in article 5 of our Magna Carta this principle instilled in a generic way[53].

The study of isonomic treatment is complex, as it refers to the role of the State (Law and Law) to eradicate unequal treatment. However, it is important to emphasise the characteristic of the fundamental rights listed in the Federal Constitution, considered as "optimisation commandments" since it defends the analysis and factual support in a broad way, defending each situation in the screen in the most concrete way possible.[54].

It is important to bring up what Thiago Massao Cortizo Teraoka:

> Thus, isonomy does not prohibit the occurrence of distinctions between individuals; however, it forbids unreasonable distinctions. The discretion to be elected cannot be unreasonable or prohibited by the Constitution. In this thinking, any distinction not allowed by the constitutional text should not be admitted. At this point, the religious option is not elected by the Constitution as a possible criterion for discrimination.[55]

It is noteworthy then that, in theory, there should be no distinction based on the religion of each individual, except for constitutional provisions that allow it, such as the conscientious objection observed in the military enlistment. Even so, regarding this exemption from military service, as already discussed in topic 2 of this work, the conscientious objector will have the duty of alternative services provided for in Law[56].

Data venia, the church, having in its institutional scope a regulatory character of rights and duties, like the Law itself; it can create some antagonisms with its internal rules and the legal system itself. The example prism is polygamy; ritual animal sacrifice and drug use in a religious context. In this way, creating untutored rights[57].

On the other hand, it is also possible that religions restrict Rights which the legal system itself does not prohibit. Taking as an example the prohibition of blood transfusion and eating certain types of food. It is in this antagonistic context that

[53]Teraoka (2010) at 143.
[54]Martins & Mituzani (2011) at 325.
[55]Teraoka (2010).
[56]Morais (2012) at 246.
[57]Teraoka (2010) at 145.

the maxim of differentiated treatment for some religions emerges, or rather, for the individual/collective exercise of freedom of belief[58].

Thus, it is possible, in Brazil, a differentiated treatment based on conscientious objection. However, there is a legal barrier when it comes to legal equality, since it is necessary to regulate, in a concrete way, exceptions that aim to untangle the current repetitive litigations in the religious theme[59].

In view of this, in order for there to be a differentiated treatment, it is necessary to weigh factors that are important to gauge the real need to impose exceptions. As, for example, the importance that religion and faith have for the believer; the importance of the legal asset protected by the Law and, finally, the consideration, based on reasonableness, of opposing legal assets. In other words, in the absence of the Law, as an exception and not a rule, differential treatment for religious reasons is allowed when restrictions on religious freedom are disproportionate to the protected legal interest[60].

It should be noted that the aforementioned conscientious objection refers to legal law (protection by law) and not to unlawful facts that, in this way, are not under the aegis of the Constitution. In this, says Taraoka that "the conscientious objection is the waiver of a certain obligation imposed by general law. They are exceptions, generally based on religious motives, with the objective of making an exception for a legal command"[61].

On this mat, there is a dispute when the day of guard (rest) is put on the agenda. For the most part, existing religions keep either Saturday or Sunday, with Seventh-day Adventists keeping that. It so happens that the Federal Constitution, correctly, does not determine any official day of custody, thus observing its abstentionism in the matter. However, in article 7, item XV thereof, the constituent power placed, preferably, the day of rest on Sunday[62].

The problem arises when, when speaking of Adventists, they are put to the test at public exams, exams, work and entrance exams on the sacred day, since they refuse to take the exam or exam when it falls on Saturday. Thus, there is a need for unequal treatment, but in a reasonable way, with the aim of, through unequal treatment, ensuring equality.

In this ball, the Sabbatarians had a great victory when the days of ENEM were changed to two consecutive Sundays, differing from the previous model which concerned only one weekend, with the tests being held on Saturday and Sunday. Before, they had their right of belief respected, being able to start taking the exam only after sunset on Saturday, however it was necessary to wait inside the room, which caused great discomfort.[63].

In this way, precedents judged, as will be shown in the next topic, has already been pacifying the idea that, not harming the public event, nor the other candidates and, still, not generating a financial loss to the public purse, it is possible to make

[58]Teraoka (2010) at 146.
[59]Chiassoni (2017) at 272.
[60]Teraoka (2010) at 148.
[61]Teraoka (2010) at 147.
[62]Chiassoni (2017) at 273.
[63]Bergara & Gonçalves (2008) at 16.

the day more flexible of the exams, that is, to attend the right of belief of the Sabbatarians. In other words, if there is no chance of damage, nor injuring the rights of other candidates, the right to religious freedom must be maximised[64].

From this, it is observed that, even being a minority religion, as discussed above, they have a relevant number of faithful, since Sabbath observing is not limited only to Seventh-day Adventists, with many other religions in Brazil having adopted this unavailable duty, such as the Jewish community; Seventh-day Baptist Church; Promise Adventist Church and more[65].

It is worth bringing up State Law of São Paulo No. 12,142, of 12/08/2005, which discusses public examinations, entrance exams and the rights of students enrolled in public and private schools:

> Article 1 - The public examinations or selection process for filling public positions and the entrance exams of public and private universities will be held from Sunday to Friday, between 8:00 am and 6:00 pm.
> § 1 - When the promotion of contests in accordance with the "caput" is unfeasible, the organizing entity may hold them on Saturday, and must allow the candidate who alleges a reason for religious belief the possibility of doing them after 6 pm.
> § 2 - The permission referred to in the previous paragraph must be preceded by a request, signed by the interested party, addressed to the organizing entity, up to 72 (seventy-two) hours before the opening time of the event.
> § 3 - In the case of § 1, the candidate will be incommunicado from the regular time provided for the exams until the beginning of the alternative time previously established for him.
> Article 2 - It is assured to the student, duly enrolled in public or private educational establishments, of elementary, middle or higher education, the application of tests on days that do not coincide with the period of religious custody provided for in the "caput" of article 1.
> § 1 - The student may, for the same reasons provided for in this article, request that the school, in substitution for their presence in the classroom, and for the purposes of obtaining attendance, be assured, alternatively, the presentation of a written work or any other academic research activity, determined by the educational establishment, observing the curricular parameters and lesson plan of the day of your absence.
> § 2 - The requests referred to in this article will be mandatorily accepted by the educational establishment.

In this sense, the cases in which the Law regulates the form of protection for religious minorities are rare, being found in some states, such as in the case of São Paulo, the protection of the conscience rights of candidates who abstain from performing acts on their day of guard.

It is important to note that the day of guard also reflects in the labor sphere, when the hired Sabbatarian is faced with the obligation to work on Saturdays. However, it is clear that the constitution gave preference to Sunday as a day of rest, and it is not the employer's obligation to grant the employee a day of rest on Saturday. However, analysing article 1 of Law n.605 of January 5, 1949, which is still in force, we have that: “Art. 1st Every employee is entitled to weekly paid rest

[64]Teraoka (2010) at 155.
[65]Teraoka (2010) at 157.

for twenty-four consecutive hours, preferably on Sundays and, within the limits of the technical requirements of the companies, on civil and religious holidays, in accordance with local tradition[66]."

It appears from this that the possibility of negotiation between employer and employee on the subject is fully applicable, constitutionally and infra-legally, and the absence of the employee associated with a minority religion in his/her day of custody is admissible, provided that, for this, it is made the proper recompositing and does not cause inconvenience for the company[67].

Finally, it should be concluded that, since there is no legislative solution to settle disputes or differences in the issue of protecting religious freedom, it is perfectly up to the judiciary to use its prerogatives and powers to regulate, through judgments and jurisprudence, this extremely important right for a society mostly believer.

Now, the analysis of judgments on the theme of religious freedom and the day of custody of Seventh-day Adventists is turned. It is important to bring up recent judgments of the Federal Supreme Court and the content of the votes given during the judgments.

Analysis of the Votes of the Ministers in Extraordinary Appeal No. 611,874 and Interlocutory Appeal in Extraordinary Appeal No. 1,099,099

In this topic, two processes that ran before the Supreme Court and were res judicata will be analysed. The subject is freedom of belief and the exercise of religion and belief of two people who had their rights curtailed for alleging exception of belief in which, in the first process (611,874), an Adventist candidate's search for an evaluation is noted. For entry into public office on a date and time different from those established in the competition calendar.

In this way, in the second process (1,099,099), the search for her rights refers to a public teacher, also an Adventist, who was in the probationary stage and was exonerated for excessive absences at sunset on Friday at sunset on Saturday, claiming that he cannot work on those days because it is, within the Adventist belief, the day of guarding and rest, even if he is willing to work in alternative hours.

Thus, for the principle of analysis, it is worth bringing up, first, the amendment of this case, which has Minister Edson Fachin as Rapporteur. If not, let's see:

> SUMMARY: Constitutional. Administrative. Freedom Of Consciousness And Belief. Seventh Day Adventist. Magistry. Night Day. Friday. Credit Hours Compliance. Fail In Probattory Stage. 1. The constitutional issue regarding conscientious objection, for religious reasons, is endowed with general repercussion as a justification for generating the administrator's duty to provide an alternative obligation for public servants, in a probationary stage, to fulfill their functional duties. 2. General repercussion of the recognised constitutional issue.

[66]Teraoka (2010) at 158.
[67]Teraoka (2010) at 165.

> (ARE 1099099 RG, Rapporteur: EDSON FACHIN, Full Court, judged on 12/13/ 2018, ELECTRONIC PROCESS DJe-048 DIVULG 03-11-2019 PUBLIC 03-12-2019)[68].

The cases in question were judged together, given their degree of similarity to each other. However, it is important to highlight the votes of some specific ministers, such as the Rapporteur, Minister Edson Fachin, and the vote of Minister Dias Toffoli, since he is totally against the rescheduling of tests and the flexibility of working hours under the allegation of excuse of conscience.

Minister Dias Toffoli maintains that "Although the Federal Constitution protects the freedom of belief and conscience, at no time does it prescribe the state's duty to promote conditions for the exercise or access to the determinations of each religious belief." Still, it claims that this differentiated treatment would harm the principle of isonomy, bringing an even greater burden to the public administration.

However, it is noted that this understanding goes against the constitutional precepts, since in article 5, item VIII of our Magna Carta, it prohibits the deprivation of rights for reasons of religious belief and, also, since the author was willing to comply alternative provision, this could not be denied.

The newest minister of the house, Nunes Marques, had the same understanding, proclaiming that the State, as a lay person, should not impose the duty of the administration to carry out differentiated treatments based on faith. It argues that:

> Freedom of belief imposes the recognition that each person has the domain of their religious trajectory and of taking the necessary measures to implement their life projects. If, on the one hand, everyone must be free to believe as they wish, this does not mean that the State should associate itself with the same beliefs and, with unpredictable consequences, be compelled without provision by law to create alternative means in order to meet the restrictions of the more diverse religious commandments.

In this way, trying to discharge the State, erroneously, from striving for equality, even when it is necessary to impose an inequality to do so. It is noted that the State, making this distinction in favor of equality, is not allying itself with any belief, but, contrary to popular belief, crystallizing the full exercise of isonomy, which is the duty of all component spheres of the State body.

Following the two ministers in this same thinking, minister Dias Toffoli maintained, even though there is no duty of the administration to provide alternative benefits for public servants in a probationary state under the bias of their excuse due to religious conscience. However, it is up to the administration, since there are no positive rights that oblige it to do so, to assess the public interest and the interest of the public servant to grant such rights.

In this sense, binding the candidate fully to the notice of competition would not be a way to exercise the right to equality. Since, even if the candidate adheres to all the facts of the notice, this document could, as in this case, restrict his full

[68]Supremo Tribunal Federal (2018).

rights as citizens, directly confronting paragraph 2, article 12 of the American Convention on Human Rights - Pacto San José from Costa Rica, which says:

> Art.12 (...)
> 2nd. No one may be subjected to restrictive measures that could limit their freedom to retain their religion or beliefs, or to change their religion or belief".

It is then noted that, if an obligation of the State is imposed on the citizen to choose between his work and his faith, there would already be an injury to the rights of such citizen, since it would be forcing him to choose between food support or sustaining you spiritually.

In this interregnum, as mentioned above, it is necessary to bring up the summary of process number 611,874, which had the same votes as the process highlighted above. In this way, the votes in favor of religious freedom are now highlighted. If not, let's see:

> CONSTITUTIONAL AND ADMINISTRATIVE LAW. WARRANTY OF SAFETY. PURPOSED AUTHORISATION TO CARRY OUT A PUBLIC TENDER STAGE AT A DIFFERENT TIME FROM THE TIME DETERMINED BY THE ORGANIZING COMMITTEE OF THE CERTAM BY POWER OF RELIGIOUS BELIEF. CONSTITUTIONAL PRINCIPLES IN CONFLICT. RECOGNISED GENERAL REPERCUSSION. MERIT. VIOLATION OF THE RIGHT OF EQUALITY. FEATURE NOT PROVIDED. 1. The constitutional fabric must move away from the idea that state secularity, understood as its non-confessional nature, implies abstention from religious issues. After all, to constrain the person in order to lead him to renounce his faith represents disrespect to the diversity of ideas and to the spiritual diversity itself. 2. In the debate about the adequacy of administrative activities to alternative hours in respect of religious convictions, the State must implement positive benefits that ensure the full experience of religious freedom, which are not only compatible, but also recommended by the Constitution of the Republic, pursuant to item VII of art. 5, CRFB, which ensures the "provision of religious assistance in civil and military entities of collective detention", as well as art. 210, § 1, CRFB, which provides that "religious education, with optional enrolment, will constitute a discipline in the normal hours of public elementary schools. 3. The separation of Church and State cannot imply the isolation of those who keep a religion to their private sphere. The principle of secularism is not to be confused with secularism. The State must protect diversity, in its widest dimension, among which I include religious freedom and the right to worship. The limit to the exercise of such right is in the constitutional text itself, under the terms of item VI of art. 5th. 4. The setting, for reasons of religious belief of the candidate in a public examination, of an alternative date and/or time to carry out stages of the competition must be allowed, within reasonable limits, after prior and substantiated manifestation of conscientious objection by religious reasons. It is a practice to be adopted by the State, as it represents the implementation of the exercise of religious freedom without prejudice to other fundamental rights. 5. Extraordinary appeal not granted, establishing the following thesis: "In accordance with art. 5, VIII, of the CF,

(RE 611874, Rapporteur: DIAS TOFFOLI, Rapporteur for Judgment: EDSON FACHIN, Full Court, judged on 11/26/2020, ELECTRONIC PROCESS DJe-068 DIVULG 04-09-2021 PUBLIC 04-12- 2021)[69].

Due to the obligation of the State to provide different tools for the protection of freedom of conscience, Minister Edson Fachin defended the right of citizens who previously and justified their excuse of conscience to reach alternative times and days before the administration, both in exams and for activities in probationary stage. It maintains that "The administrator must offer alternative obligations so that religious freedom is ensured to the server in a probationary stage."

In this tuning fork, the other ministers followed Edson Fachin's thinking, but with limitations, that is, even the public power is not linked to dogmas and religious calendars, it could not be short-sighted in the face of injuries and suppression of basic rights guaranteed to all, which includes the religious minority in question.

Thus, Minister Luís Roberto Barroso, in a more precautionary view, protested the fact that it is necessary for the State to promote alternative ways of holding the public examination at a different time or date, as well as providing it to the official in probationary internship under discussion, reasonable alternatives for your work, provided that it does not generate a disproportionate burden to the public administration and also does not interfere with the isonomy of the existing case.

It is worth bringing up the phrase of Minister Rosa Weber, when she stated: "The State is separated from religion, but human beings are not separated from faith". Thus, the purpose of the two cases was partially done, not recognizing the existence of a subjective right for the authors, but, in another way, ratifying the State's obligation to equalise religious minorities and respect, in a coherent way, the seriousness of belief of each one, as we can infer from the menu highlighted above: "After all, to constrain the person in order to lead him to renounce his faith represents disrespect to the diversity of ideas and to the spiritual diversity itself."

It can be seen then that the majority votes were not just in favor of religious freedom. The votes were against the observance of constitutional guarantees that extend to minorities, since they need greater support and protection, making the State, through positive attitudes, fleeing from inertia, guarantee the equality protected by the Magna Carta.

Conclusion

The institute of religious freedom, concretely instilled in the individual freedoms protected by the Constitution, over time has made significant advances in its understandings and judgments. Importance is given when one sees the vast types of religions in which the believing minority finds difficulties in exercising their full activity. Thus, it is imperative to emphasise from this work that the judiciary, in the absence of the legislature, must guarantee individual freedoms with the aim of aligning the rights of all.

[69]Supremo Tribunal Federal (2020).

Unlike the State & Religion relationship that existed in the past, where the inquisitive power was the guide for decisions. The sensory vector is now more present in diverse agendas that involve the rights of belief. It is important to remember the maxim transcribed in this work: "The lay State does not profess, does not indicate, does not determine", being certain that such State must profess, indicate and determine only in favor of equal and homogeneous rights.

However, state secularism is not limited to the state's inertia in relation to religious matters. It refers to its duty to be neutral in relationships involving faith and creed, since secularity denotes a totally negative activity by the State, removing its responsibility to resolve disputes involving matters of religion, which is seen as wrong, since in the face of inequalities, the State has the duty to guarantee equality, in a neutral way, weighing the values in question.

In this thinking, as seen, the courts have taken into account this neutrality, acting in a positive way to guarantee equal rights. It is noted, therefore, that the Adventist society received support as citizens, since the majority of ministers in the court decision decided for democracy and for not distinguishing citizens for reasons of belief and religious choices. What is right is, by the way, an obligation of the State.

That said, the present work proved to be relevant to evaluate, in a concrete way, the type of relationship that the State has with religion and its interference limits. As we have seen, the separation between the State and the Church is not at all absolute, and if there are abuses in the religious sphere or even suppression of rights in the private or public sphere, State activity is necessary.

References

Bergara, S.P.N. & R.B.T. Gonçalves (2008)**.** LIBERDADE RELIGIOSA. *Revista do Programa de Mestrado em Ciência Jurídica da Fundinopi* [In Portuguese]

Borges, A.W. & R.V. Alves (2013). O Estado laico e a liberdade religiosa na experiência constitucional brasileira. *Revista Brasileira de Estudos Políticos*,

Casamasso, L.M.A. (2010). *Estado, Igreja e Liberdade Religiosa na "Constituição Política do Império do Brazil"*, de 1824. XIX Encontro Nacional do CONPEDI realizado em Fortaleza, Fortaleza, p. 6167-6173, 12 jun. 2010. [In Portuguese].

Chiassoni, P. (2017)**.** Liberdade de consciência e liberdade religiosa em um Estado Constitucional – O que visa proteger. *Revista Jurídica da Presidência.* [In Portuguese].

Duguit, L (2005). *Manual de derecho constitucional*. Granada: Comares, p. 232-233. [In Spanish].

Filho, B.V. & F. Alves (2009). Da Liberdade Religiosa Como Direito Fundamental: Limites, Proteção e Efetividade. *Revista do Programa de Mestrado em Ciência Jurídica da Fundinopi.* [In Portuguese]. https://doi.org/10.9732/P.0034-7191.2013v 107p227. [In Portuguese].

Martins, A.C.M. & L. Mituzani (2011). Direito das Minorias Interpretado: *o compromisso democrático do direito brasileiro.* Revista Seqüência, Santa Catarina [in potuguese]

Miranda, J. (2014). *Estado, Liberdade Religiosa e Laicidade*. Observatório da Jurisdição Constitucional. Ano 7, no. 1, jan./jun. 2014. ISSN 1982-4564. [In Portuguese].

Morais, M. E. P. (2011), 'Religião e direitos fundamentais: o princípio da liberdade religiosa no Estado Constitucional Democrático brasileiro' in *Revista Brasileira de Direito Constitucional – RBDC n. 18*

Neto, J.W. (2006). A edificação constitucional do direito fundamental à liberdade religiosa: um feixe jurídico entre a inclusividade e o fundamentalismo. *Pontífica Universidade Católica do Rio Grande do Sul, Porto Alegre*. [In Portuguese].

Port, M.E. (2003). Liberdade Religiosa numa Comunidade Constitucional Inclusiva: dos direitos da verdade aos direitos dos cidadãos. *Coimbra Editora Limitada*. In Portuguese].

Taraoka, T.M.C. (2010). A Liberdade Religiosa no Direito Constitucional Brasileiro. Doutorado, Faculdade de Direito da Universidade de São Paulo, São Paulo - SP. [In Portuguese].

Vieira, A. Padre (2003). Sermões, volume 1, São Paulo: *Hedra.* [In Portuguese].

Wermuth, M.Â.D. & J.S. Schorrr (2017). *Liberdade Religiosa e Sistemas Regionais de Direitos Humanos: Uma Análise a Partir de Casos Julgados pelo Tribunal Europeu e Pela Corte Interamericana de Direitos Humanos.* Revista Direitos Sociais e Políticas Públicas (UNIFAFIBE), São Paulo, v. 5, n. 2, p. 817-146, 5 nov. [In Portuguese].

Cases

Supremo Tribunal Federal. (2018). *Agravo em Recurso Extraordinário n. 1099099.* Diário da Justiça, Brasília-DF. [In Portuguese].

Supremo Tribunal Federal. (2020). *Recurso Extraordinário n. 611874.* Diário da Justiça, Brasília-DF. [In Portuguese].

Legialtion

Constituição (1824)]. *Constituição Política do Império do Brasil.* Brasília, DF: Presidência da República. [In Portuguese].

Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988.* Brasília, DF: Presidência da República. [In Portuguese].

Decreto nº 119-A, de 7 de janeiro de 1890. Proíbe a intervenção da autoridade federal e dos Estados federados em matéria religiosa, consagra a plena liberdade de cultos, extingue o padroado e estabelece outras providencias. [In Portuguese].

Decreto-lei nº 2.848 (1940). Institui o Código Penal. [In Portuguese].

Decreto nº 678 (1992). Promulga a Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica). [In Portuguese].

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 563-574

Insolvency of the Natural Person and COVID 19 in Romania

By Lavinia-Olivia Iancu[*]

Considering that since 2009 draft normative acts have been submitted to the Romanian Parliament, for regulating the insolvency of the natural person, the adoption of the law into 2015 and the entry into force in 2018 represents an indisputable progress but also an entry into normality in the context that all EU member states already had legislation in this area. Three years after the entry into force of the insolvency of the natural law, we can say that the results anticipated by the legislator are far from the reality. The year 2020 characterised by the devastating effects of COVID 19, affected both individuals and legal entities. If the impossibility of overcoming difficult situations by legal entities leads to their deregistration, as far as natural persons are concerned, their disappearance due to the difficulties cannot be taken into account, they must continue their existence with overcoming the situation. Accessing the insolvency procedure of the natural persons is the solution that can be accessed by those in financial difficulty.

Keywords: *insolvency; natural person; COVID 19.*

Introduction

In 2014, by the enactment of Law No. 85, the "Insolvency Code" tered into force, which unified the insolvency prevention procedures, the insolvency procedure applicable to all the economic agents as well as the insolvency legislation in relation to the credit institutions, the insurance/reinsurance companies, the corporate groups, and the cross-border insolvency. The "Insolvency Code" name is used in practice in reference to Law No. 85/2014, but such normative act is not a code, in the sense given to this notion by Law No. 24/2000[1], i.e., a systematization and a concentration of the legislation in a certain field or a branch of law subordinated to certain common principles. Obviously, this act is incomplete, due to the absence of legal provisions in the matter of the insolvency of the natural person. The Romanian insolvency legislation is characterised in the recent doctrine[2] as being ephemeral, sliding and disseminated into too many normative acts.

The literature[3] claims the necessity of a law to regulate the insolvency

[*]Dr. of Law, Lecturer, Faculty of Economics, Tibiscus University of Timişoara, Romania. Email: relicons@yahoo.com.

[1]Art. 18-19 of Law No. 24/2000 on the legislative technique norms for the drafting of normative acts.

[2]Piperea (2020) at 501.

[3]Bercea, L., Bufan, R., Buta, A., Clipa, C., Comșa, M., Deli-Diaconescu, A., Deteșan, D., Dumitru, Ș., Folea, F., Micu, P., Mihai, N., Miloș, S.-M., Milu, O.D., Moțiu, F., Moțiu, D.D., Flavius, F.I., Munteanu, S.A., Nász, C.B., Nemeș, C.V., Pașca, V., Popa, A., Sanda, G.C., Sărăcuț, M., Stănescu, A.O., Șarcane, A-I. & S. Târnoveanu (2014) at 1023.

procedure of the natural persons who do not carry out a business activity, stating that a balanced procedure, devised on the basis of the *win-win* principle, in the application of a payment plan with the discharge of the residual debts on condition of the restitution of a significant percentage of the liability, the debtor would be jointly interested in making the effort of paying a part of the debt knowing that, in the end, he will be exempt from the remaining part, while the creditor would sustain a much smaller loss.

The sole legal provisions that still acknowledged the fact that natural persons as well may have financial difficulties with honoring their assumed obligations are found in art. 1417 of the Civil Code[4], which states that the debtor loses the benefit of payment by instalments if he is in an insolvency state or, as the case may be, in insolvency declared according to conditions of law and in art. 675 of the Code of Civil Procedure[5], where, within the same context of losing the benefit of payment by instalments, reference is made to the "debtor who is in a commonly-known insolvency state".

The reason for avoiding the adoption of an insolvency code results from the letter of intention issued by the Romanian authorities in September 2012, approved by the International Monetary Fund and ratified by the Government Emergency Ordinance No. 45/2013[6], where the Romanian state committed not to adopt the Insolvency Law of natural persons with the purpose of maintaining the lending discipline and of avoiding the moral hazard among debtors. Such commitment led to the rejection of three draft proposals in the matter of the insolvency of natural persons.

It was only in 2015 that the Romanian legislator prioritised the necessity of harmonizing the national legislation with the European one and of adopting the Law of insolvency of natural persons No. 151[7]. The law was adopted on the 25th of June 2015 and it should have entered into force within 6 months from the adoption, i.e., on the 25th of December 2015. The 6-month deadline was meant for the performance of the implementation steps required to put it into practice. The law (art. 92) establishes clear implementation deadlines starting from the date of publication in the Official Journal: 60 days for the approval of the methodological norms for the application, 3 months for the establishment of the insolvency commission at a central level and of the insolvency commissions in the territory, 5 months for drafting the lists of members admitted as administrators/liquidators in the natural person insolvency procedure. Since none of these objectives were reached, the deadline for the application of the law was postponed by the G.E.O

[4]Law No. 287/2009, republished in the Official Journal No. 505 of the 15th of July, 2011.
[5]Law No. 134/2010, republished in the Official Journal No. 247 of the 10th of April, 2015.
[6]The Government Emergency Ordinance No. 43/2013 on the ratification of the Letter of Intention signed by the Romanian authorities in Bucharest on the 12th of September 2012, approved by the Decision of the IMF Executive Board of the 28th of September 2012, as well as of the letter signed by the Romanian authorities in Bucharest on the 8th of March 2013, approved by the Decision of the IMF Executive Board on the 15th of March 2013, by means of which Romania was requesting the extension of the Stand-by Agreement between Romania and the International Monetary Fund.
[7]Law No. 151/2015 published in the Official Journal of Romania No. 464 of the 26th of June 2015 and entered into force on the 1st of January 2018.

No. 61/2015[8] to the 31st of December 2016. The postponement of the entry into force by a year was not enough for the drafting of the methodological norms and the organization of the technical body required for the application of the law, so that by the Government Emergency Ordinance No. 98/2016 published in the Official Journal of the 21st of December 2016 - the application of the normative act was postponed again to the 1st of August 2017. By the Government Emergency Ordinance No. 6 of the 27th of July 2017, the deadline for the entry into force was prolonged to the 1st of January 2018. The arduous journey of the entry into force of the law of insolvency for natural persons was completed by the adoption of Law No. 234/2017 when the Government Emergency Ordinance No. 6/2017 for the extension of the deadline for the entry into force of Law No. 115/2015 on the natural person insolvency procedure was adopted.

Finally, Law No. 151/2015 on the natural person insolvency entered into force as late as the 1st of January 2018. The methodological norms[9] for the application of Law No. 151/2015 on the natural person insolvency entered into force on the 1st of August 2017. The insolvency commissions at the local and central level were established by the Government Decision No. 11/2016.

Landmarks of the Law

Law No. 151/2015 comes to regulate the insolvency of the natural persons whose obligations do not result from the operation of a company. Within such new context, the notion of insolvency acquires a legal definition sanctified by art. 3 point 12 of Law No. 151/2015: "the state of the debtor's patrimony, which is characterised by insufficiency of pecuniary resources available for the payment of the debts, when they become due. The debtor's insolvency is presumed when, 90 days after the due date, the debtor has not paid his debt to one or more creditors. The presumption is relative.

The notion of over-indebtedness or excessive indebtedness responds to the definition of insolvency that indicates a lack of liquidity for the payment of all the assumed obligations. In a study by the European Commission[10] it was stated that there is no unanimous definition of the notion of over-indebtedness, such notion being approached differently by the national legislator. Nonetheless, the vast majority of legislations approach the economic dimension, the temporal dimension,

[8]GEO No. 61/2015 was published in the Official Journal No. 962 of the 24th of December 2015 and it establishes by means of a sole article: the deadline for the entry into force stated in art. 93, the first thesis of Law No. 151/2015 on the natural person insolvency procedure, published in the Official Journal of Romania, Part I, No. 464 of the 26th of June 2015, is extended to the 31st of December 2016.

[9]The methodological norms for the application of Law No. 151/2015 on the natural person insolvency procedure, which were approved by the Government Decision No. 419 of the 9th of June 2017, published in the Official Journal of Romania No. 436 of the 13th of June 2017, entered into force on the 1st of August 2017.

[10]The over-indebtedness of european-households: updated mapping of the situation, nature and causes, effects and initiatives for evalluating its impact http://ec.europa.eu/consumers/financial _services/reference_studies_documents/ docs/part_1_synthesis_of_findings_en.pdf.

the social dimension and the psychological dimension of the phenomenon. The economic standpoint contemplates the amount due, the temporal approach refers to the medium and long-term possibility of payment of the debts, the social dimension comprises the expenses required for everyday life and the psychological standpoint points at the stress of the subject that must cope with the difficult financial situation.

The main purpose of this law is the financial recovery of the natural person debtor, so that the protection of the natural person who is in a difficult financial situation becomes a priority for the legislator. The normative act provides the natural person acting in good faith a series of procedures to be accessed so as to offer the opportunity to surpass the solvency issues with a view to the social and economic reintegration of such person.

Moreover, the wording chosen by the legislator to define the purpose of the law reveals an imbalance even between the manner of protection of the debtor's interests and his creditors. The debtor appears as a protégé from the economic and social standpoint, while the creditors will recover their claims within the limit of the debtor's possibilities. Such approach is natural within the context where the subject facing financial difficulties is not a legal entity whose failure in business is sanctioned by cancellation from the registry where it is registered. It must be stressed that the natural person will continue its existence after this procedure as well, therefore the very first article establishes the debtor's discharge from debts. A mere debt rescheduling is obviously not satisfying for the insolvent natural person, given that a cancellation, a removal of the debts that are impossible to pay within a reasonable time is necessary.

The financial recovery of the debtor acting in good faith within the context of legal protection of the essential elements of his patrimony for the preservation of a decent living and with the possibility of total or partial debt discharge accounts for the legal framework that gives the insolvent natural person the opportunity of a fresh start.

The chance of a fresh start is conditioned by the good faith of the debtor whose insolvency state must be excusable. It is obvious that the option of accumulating debt with the perspective of non-payment towards the creditors provided for by the Insolvency Law for the natural person may also generate a bad-faith or fraudulent behaviour, which, however, if discovered, is sanctioned by the law by the non-discharge of the residual debts.

The bodies that apply the insolvency procedure are the insolvency commission and the administrator of the procedure, the courts of law and the liquidator.

The efficient application of the law entails the assignment of the human and material resources required within the context of performance of the natural person insolvency procedure. Reaching the principles of such procedure: the debtor's financial recovery, the protection of the creditors' rights and interests, the maximization of the debtor's assets, the expeditiousness, the transparency, the predictability, is ensured by specialised bodies. Although the legislator had bodies already specialised in the matter of insolvency of the professionals, and we refer here to the insolvency practitioners and the syndic judges within the courts of law, the legislator changed such configuration profoundly precisely in order to ensure the debtor's accessibility to the procedure. Moreover, the legislator created a new

body in the Romanian legislation - the insolvency commission. The difficulties generated by the allocation of the required human resources, which must also have a high professional standard, are obviously reflected by the subsequent postponements of the entry into force of the insolvency law for natural persons.

An unprecedented fact in the Romanian legislation, the legislator passed special regulations on the insolvency of natural persons - the insolvency commission at a central level and the insolvency commissions at a local level, establishing their attributions.

Whereas the insolvency commission at the central level has the main attributions of monitoring and coordinating the insolvency commissions at the local level, the latter are organised and operate at the level of each county and they have decisional, controlling and supervision attributions within the insolvency procedure.

The local insolvency commission is made up of representatives of the deconcentrated structures within the territory of the National Authority for the consumer protection, the Ministry of Labour, Family, Social Protection and the elderly, as well as one representative of the Ministry of Public Finance.

The establishment of a new body, specific to the insolvency of natural persons encountered a series of difficulties, which led to the postponement of the entry into force of the law until the beginning of 2018. The application of the norms issued by Law No. 151/2015 imposed the establishment of a complex system at the national level, made up of 42 local insolvency commissions, one technical body, logistics as well as the adoption of the application norms for the law. For an efficient operation of such new structure, both human and financial resources had to be allocated. Moreover, the human resources needed a specialization and professional training on the activity they were to carry out.

The Directorship for the Insolvency of Natural Persons within ANPC (National Authority for Consumer Protection) provides the technical body of the central insolvency commission and of the commissions organised at the local level. ANPC is a public institution that operates as a specialty body of the local public administration, with legal personality, subordinated to the Government, which coordinates and accomplishes the Government's strategy and policy in the consumer protection field. Although initially 270 contractual staffing positions were allocated, they were subsequently reduced to 255 and then, radically, to 81, so that currently, the staffing plan only includes 64 positions[11].

Although the efforts made for devising and implementing this new body - the insolvency commission - were consistent, they were hindered by the lack of trust of the Romanian in the provided solutions, aspects that may be quantified in the small number of people who requested to access the natural person insolvency procedure.

Both the procedure administrator and liquidator shall be appointed from among the insolvency practitioners, officers of the court, lawyers and public notaries registered in the List of procedure administrators and liquidators for the natural person insolvency procedure.

[11]Bărbulescu (2020).

The list of procedure administrators and liquidators for the natural person insolvency procedure includes insolvency practitioners, officers of the court, lawyers and public notaries who expressed their intent to perform such activity.

Traditionally, the notion of insolvency was related to the insolvency practitioner who, under the name of trustee or judicial liquidator used to administer the insolvency procedure of professionals. The organization of the insolvency practitioners' activity is regulated by the Emergency Ordinance No. 86/ 2006[12]. The admission to the insolvency practitioner profession entails passing an examination, completing a 2-year professional training course and only then sitting the final professional certification examination. Remaining in the profession requires the completion of annual professional training courses.

Within the context of the regulation of the insolvency practitioner profession, it seemed bizarre to allow some other three liberal professions, i.e. officers of the court, public notaries and lawyers, to enrol in the List of procedure administrators and liquidators for the natural person insolvency procedure. Moreover, the norms of regulation of such professions [13] actually contain express interdictions to exercise simultaneously the insolvency practitioner profession. The firm position of the legislator in allowing, by way of exception, several liberal professions to act as administrators or liquidators of the natural person insolvency procedure results from the provisions of art. 12 comma 2 of Law No. 151/2015: "the capacity of insolvency practitioner, officer of the court, lawyer, and notary is compatible with exercising the capacity of procedure administrator or liquidator for the natural person insolvency procedure". Thus, by means of an article all the interdictions and incompatibilities existing in the various normative acts that regulated the activity of lawyers, public notaries or officers of the court were lifted.

The doctrine[14] also formulated the arguments for which the members of four liberal professions were allowed to become administrators or liquidators in the natural person insolvency procedure. One of the arguments is that for an over-indebted natural person debtor it is more simple and less costly to find support as close as possible, whereas the insolvency practitioners are especially concentrated in the localities where there are county courts, and not in other localities, while the other three professions usually have representation at least in the localities where there are district courts. Another argument is that the insolvency practitioners' expertise in the professionals' procedures would be wasted in the administration of natural person procedures, which are more or less professionally challenging, but which are expected to be numerous, therefore repetitive and time and resource-consuming. On the other hand, in regard to the over-indebted natural persons, oftentimes individual forced execution procedures are in progress, initiated by the officers of the court, who, knowing the patrimony situation of the specific debtors, will administer more efficiently the collective procedure. Since such procedure

[12]The Emergency Ordinance No. 86 of the 8th of November 2006 on the organization of the insolvency practitioners' activity, published in the Official Journal No. 94 of the 22nd of November 2006.

[13]Law No. 51/1995 for the organization and exercise of the profession of lawyer, the Law of public notaries and notary activity No. 36/1995, Law No. 188/2000 on the officers of the court.

[14]Deteșan (2015) at 183.

refers to the natural person, and his/her financial difficulties may have various causes (family, loss of job, health issues), the access of lawyers, respectively of notaries was also permitted, to act as administrators/liquidators of the procedure, who may support the debtors to find a solution to their problems. Furthermore, the public registries kept by the notary offices are an important source of information to which the commission must have access, so that the notaries would anyway be involved in the application of this law, and it is therefore legitimate to also grant the capacity of procedure administrator, to the extent to which the representatives of these liberal professions are willing to accept the administration of the procedure. Last but not least, given that the law opens the access to a large number of natural persons to the procedure, it was necessary to have a covering number of persons that may have the capacity of administrator/liquidator so as not to prevent the natural person debtors to take advantage of the provisions of the law.

The large number of debtors that would access the procedure in 2015, once with the entry into force of the law, was anticipated by the legislator based on the Report by National Bank of Romania for 2014 where it was stated that as of December 31st the Central Credit Register had a number of 218,000 natural person debtors registered by the credit institutions, the non-bank financial institutions and the payment institutions, with arrears representing 309,000 loans amounting to 33,704 million lei. Faced with such numbers, the Romanian legislator considered that many of these natural persons who have outstanding credits will apply for the natural person insolvency procedure, this being also the reason, in our opinion, why the exercise of the capacity of administrator or liquidator in the natural person insolvency procedure was also permitted to the officers of the court, notaries and lawyers. The intention certainly was to make available to the debtor a considerable number of professionals, easily accessible from a territorial standpoint, who would support, guide and direct the natural person debtor in the insolvency procedure.

The explosion of the natural-person insolvency cases, anticipated by the legislator, did not occur, and 3 years after the entry into force of Law, 25 natural persons are in insolvency, which does not justify the ample system engaged in the performance of the natural-person insolvency procedure.

According to art. 10 of Law No. 151/2015, all the requests and actions in the judicial insolvency procedure by liquidation of assets, the appeals against the insolvency commission decisions and also the debt release requests will fall within the competence of the district court, under the jurisdiction of which the debtor had his/her residence for at least 6 months before referral to the court, without taking into account the subsequent residence changes of the debtor.

Whereas traditionally the court with full competence for the merit trial in the court of first instance in the matter of insolvency was the county court, this time the subject-matter jurisdiction was attributed to the district court.

The arguments used by the legislator to allow the four liberal profession categories to act as administrators, respectively, liquidators of the natural person insolvency procedure also underlie the decision to grant the district court the subject-matter jurisdiction. In addition, it was taken into account that once with the entry into force of Law No. 151/2015, the forced execution requests, which are also under the jurisdiction of the district court, will decrease significantly. The

reports[15] on the state of justice drafted and published annually by the Superior Council of Magistracy reveal that from 2011 to 2015, over 50% of the cases newly introduced to civil-case judges are constantly related to forced execution. Thus, anticipating the massive access to the natural person insolvency procedure, which entailed the decrease of the number of forced execution cases, fairness was found in attributing the subject-matter jurisdiction to the district court. Yet, the legislator's predictions, as we have shown, did not prove real with respect to accessing the natural person insolvency procedure by the possible beneficiaries. The reports on the state of justice for 2018 and 2019 continue to reveal that over 50% of the cases newly introduced to civil-case judges are still related to forced execution, aspects deriving from the natural person insolvency procedure not being used.

In the present, noticing the small number of natural persons interested in accessing Law No. 151/2015, we consider that the insolvency procedures might have been attributed to the first instance jurisdiction of the county courts[16]. We make this claim because the professionals' insolvency matter has a tradition of 26 years and is successfully managed by the syndic judges within the county courts. Moreover, keeping the first instance jurisdiction line within the county court for all the insolvency procedures (professionals and natural persons), would have allowed, on the one hand, the management of the natural person insolvency procedure by judges specialised in the insolvency matter, and, on the other hand, the provision of unitary case law.

The procedures accessible by the natural person debtor are: the administrative insolvency procedure on the basis of a repayment plan, the judicial insolvency procedure through the liquidation of the debtor's assets and the simplified insolvency procedure.

The administrative insolvency procedure on the basis of a repayment plan is defined as the collective and egalitarian insolvency procedure, which is applied to the natural person debtors acting in good faith for their financial recovery, for the adequate management of income and expenses in order to cover as much as possible the liabilities, by means of a debt repayment plan, followed by a release of the residual debts, in accordance with the present law. The central element of this procedure is the debt repayment plan, which must be drafted within 30 days from the communication to the creditors of the final debt table.

The debt repayment plan is the document drawn up by the debtor with the administrator of the procedure, which includes the way in which claims against the debtor's assets are covered, the amounts and the payment deadlines, but not more than the amounts due according to the debt table, as well as any other measures for the financial recovery of the debtor.

The judicial insolvency procedure through liquidation of assets is, pursuant to Article 3(18) of Law No. 151/2015, the collective and egalitarian insolvency procedure, which applies to the natural person debtor acting in good faith, with a view to capitalise the enforceable assets and/or income of the debtor in order to cover the liabilities, followed by the release of residual debts, in accordance with the law. Characteristic of the liquidation procedures is the debtor's loss of the right

[15]https://www.csm1909.ro/267/3570/Rapoarte-privind-starea-justi%C5%A3iei.
[16]Nasz (2016) at 170.

to dispose of his/her own enforceable assets and income. As results from the very name of such procedure, its essence consists in the liquidation/capitalization of the debtor's enforceable assets so as to cover the creditor's liabilities.

The simplified insolvency procedure is destined to a limited category of debtors. Thus, besides the general requirement for the debtor to be a natural person in an insolvency state and for there not to exist a reasonable probability for the debtor to become, within a 12-month period, capable to fulfil his/her obligations, as they were contracted, with the maintenance of a reasonable standard of living for himself/herself and his/her dependants, with the verification of the interdictions imposed by the law to certain categories of debtors to access any insolvency procedure, the legislator requests the fulfilment, cumulatively, of the following conditions[17]: the total amount of the obligations is at most 10 national minimum wages; the debtor does not have enforceable assets or income; the debtor has passed the standard retirement age or has lost entirely or at least half of the work capacity. Consequently, the recipients of this procedure are the natural persons who are no longer able to work because of old age or other reasons, do not have assets or income, and their debts do not exceed the amount of 23,000 RON (approximately 4600 Euros).

The literature[18] compared this last procedure with a social assistance measure for certain categories of debtors and, although it is a standalone procedure, having its own triggering conditions, it is not a genuine collective insolvency procedure.

The financial difficulty that the debtor confronted may not be exceeded only by the suspension of the forced executions or of the accessories, or by granting longer payment deadlines, while the essential aspect is the cancellation of a part of the debt for the debtors acting in good faith. Good faith, as we have shown, is a central element of the natural person insolvency procedure, which must characterise the debtor's behaviour before the opening of the procedure, during the procedure and also after the closure of the insolvency procedure so that the debtor may take advantage of the residual debts release.

Insolvency of the Natural Person in the Context of the COVID 19

The crisis caused by the COVID 19 pandemic from 2020 to 2021 is a major shock for citizens both from a financial-economic standpoint and from a social standpoint. The member states adopted a series of measures to enhance the systems' capacity to offer help to the people form the severely-affected sectors.

Even though at an academic level we speak of supporting the "critical sectors of the economy", the protection of jobs and of citizens in general were particularly contemplated.

The economic impact varied from one sector to another and from one company to another. A series of factors were decisive, among which the possibility to adapt to the interruptions within the procurement chain, stock existence, financial reserves and so on. It is no secret that very many small and medium businesses

[17]Art. 65 of the Law.
[18]Comșa (2018) at 87.

closed temporarily or for good during the pandemic and very many citizens survived on diminished salaries or were even left without a job. Such aspects led to the diminution of the standard of living.

In a study[19] published in June 2020 it was shown that in Romania there are about 7 million people at risk of poverty of social exclusion, and the COVID pandemic will further increase this number up to 8 million citizens.

Within the context of a profound economic and financial impact on the Romanian citizen, caused by the pandemic, without being able to anticipate in a real manner the quantitative or temporal dimension of the disaster, the natural person insolvency procedure had to appear as a solution.

In June 2018, the National Office of the Trade Registry (ONRC) announced the publishing in the Romanian Insolvency Proceedings Bulletin (BPI) of the first case of insolvency of a natural person whose obligations do not result from the operation of a company. In March 2019[20], more than one year after the entry into force of the Law, only 13 Romanians had accessed the natural person insolvency procedure. In January 2020[21], two years from the entry into force of the Law only 25 natural person debtors had chosen to claim the advantages provided by the natural person insolvency law[22].

The failure to access the procedure is recognised at institutional level; in September 2020 ANPC[23] announced in a press release that it offers gratuitous guidance procedures for the preparation of the insolvency file of the natural persons who have debt repayment delays exceeding 90 days, and that it will identify new tools suitable for the clients acting in good faith resorting to the insolvency procedure.

Three years after the entry into force of the insolvency law, a very small number of natural persons are in insolvency, although the period from 2020 to 2021, characterised by the COVID 19 pandemic, should have brought a significant increase of this number. Even though this epidemic brought along severe financial difficulties for natural persons, and declaring personal bankruptcy would be a solution, still it is not used by the potential recipients.

Analysing the devastating economic effects caused by the COVID 19 pandemic and materialised into a global recession, the World Bank draws attention to the national legislators on the importance of the crediting activity. The specialists stress the transparency of the crediting process, the reduction of the credit costs, waiving confidentiality clauses and urgent legislative reforms that would allow an efficient management of the debts of natural persons and legal entities. Furthermore, the adoption of urgent measures to improve and consolidate the legal

[19]Chivu & Georgescu (2020) at 26-27.
[20]Niculescu (2019).
[21]Bakos (2020).
[22]BPI does not provide statistics with respect to the number of natural persons for whom the insolvency procedure is currently open, providing only information related to the number of procedural files issued by the courts of law, the insolvency commissions and the procedure administrator/liquidators and published in BPI - the Debtors Section - natural persons having obligations that do not result from the operation of a company. Thus, in 2018, 28 such files were published, in 2019, 40 files were published and in 2020, 28 such files were published.
[23]https://anpc.ro/articol/1495/comunicat-de-presa.html.

framework in the matter of insolvency are considered "critical".[24]

The doctrine on the natural person insolvency in Romania is scarce, yet the authors do agree that the first shape drafted by the legislator - Law No. 151/2015 is not an attractive one for debtors, inasmuch as it is complicated, by many rules, imprecise and interpretable notions and that its modification is required so as to transform it into a tool that would be able to provide clear and concrete solutions in order to exceed the state of financial difficulty of the natural person.

Conclusion

From a medical standpoint, the fight against the COVID 19 virus in Romania seems to be reaching an end, through the vaccination process that is currently in progress, although the doctors warn of possible subsequent waves of infections caused by mutations of the virus.

From a financial-economic standpoint though, we consider that we will only be able to quantify the effects of the pandemic, generated by the fracturing of the balance existing in society, in 2022.

It is certain that the standard of living of the Romanian citizens decreased and a large part of the population is excessively indebted. Among the efforts made to reduce the social and economic effects generated by COVID 19 on the citizens, we must take into account the encouragement to access the natural person insolvency procedure, by means of which the debtors acting in good faith may be exonerated from part of their debts.

Unfortunately, as we have shown, despite the multiple benefits of such procedure, it is not accessed by the over-indebted natural persons. The ambiguous and interpretable legislation along with the large number of documents required in order to access the procedure does not convince the natural persons to resort to such solution.

The Romanian legislator, following the recommendations of the World Bank, must provide a new legal framework for the natural person insolvency procedure. The law will have to convince the potential natural-person recipients of the benefits provided to them, being able to provide a fresh start to any citizen acting in good faith who has reached a financial state of over-indebtedness for reasons not ascribable to the citizen.

References

Bakos, A. (2020). 'Only 25 debtors have so far entered a procedure, although the law has been into force for two years' (Insolvența persoanei fizice: Doar 25 de datornici au intrat până acum într-o procedură, deși legea e în vigoare de doi ani) at www.avocat net.ro [in Romanian].

Bercea, L., Bufan, R., Buta, A., Clipa, C., Comșa, M., Deli-Diaconescu, A., Deteșan, D., Dumitru, Ș., Folea, F., Micu, P., Mihai, N., Miloș, S.-M., Milu, O.D., Moțiu, F.,

[24]World Bank (2021) at 18.

Moțiu, D.D., Flavius, F.I., Munteanu, S.A., Nász, C.B., Nemeș, C.V., Pașca, V., Popa, A., Sanda, G.C., Sărăcuț, M., Stănescu, A.O., Șarcane, A-I. & S. Târnoveanu (2014). *Tratat practic de insolvență.* București: Ed. Hamangiu.

Bărbulescu, O. (2020). Eșecul legislației privind falimentul personal, www.profit.ro

Chivu, L. & G. Georgescu (2020), Labour market vulnerabilities under COVID-19 impact in Romania at https://mpra.ub.uni-muenchen.de/id/eprint/101676

Comșa, M. (2018). *Legea privind procedura insolvenței persoanei fizice nr. 151/2015 - Legislatie relevanta si comentarii*. București: Ed. Universul Juridic.

Deteșan, D. (2015). *Insolvența persoanei fizice. Tratamentul juridic al supraîndatorării consumatorului*. București: Ed. Hamangiu.

Nasz, C.B. (2016). Procedura insolvenței persoanelor fizice. București: Ed. Universul Juridic.

Niculescu, D. (2019). 'Only 13 debtors have so far entered a insolvency procedure, although the law has been into force for one year' (*Doar 13 români au intrat până acum în faliment, deși insolvența persoanelor fizice se aplică de peste un an*) at www. avocatnet.ro [in Romanian]

Piperea, G. (2020). *Drept comercial român. Teoria generală, întreprinderea și insolvența.* București: Ed. C.H. Beck.

World Bank (2021). Gobal Economic Prospects, June. Wahington, DC.

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 575-586

Personality Rights – A Universal Tool for the Recovery of Non-Pecuniary Loss

By Martyna Kasperska[*]

As society develops, the concept of personality rights and their legal protection gain significance over the years. Naturally, this concept is evolving as society changes, and it should protect new personal interests against infringement. At the same time, there are reported instances of granting legal protection with doubtful legal justification. In Poland, many commentators and scholars point out that the courts, in some cases, seem to use the concept of personality rights as a universal tool in order to compensate for nearly any mental distress. In this paper, I wish to present interesting examples of this "search" for new personality rights as tools to compensate the plaintiffs for non-pecuniary damages, along with some controversial cases of granting non-pecuniary damages based on questionable legal justification. Following, I will attempt to clarify the notion of non-pecuniary loss and examine whether the courts try to expand its meaning to grant legal protection to plaintiffs. My analysis will be based on Polish law, with some comparative remarks. As the problem is complex and varies according to the jurisdiction, this paper provides a general illustration of the issue at hand.

Keywords: *Tort law; Personality rights; Non-pecuniary damage; Non-pecuniary loss; Compensation*

Introduction

This paper aims to illustrate the problem of using the concept of personality rights' protection in order to request compensation for non-pecuniary damage. In Poland, scholars and the courts themselves note a considerable growth of cases in which plaintiffs use the concept of personality rights to successfully gain compensation for non-pecuniary loss, based on doubtful legal arguments. As society develops, it not only influences the whole concept of personality rights' protection but also contributes to greater legal awareness among its members. The character of personality rights is vague by nature, and therefore the concept is sometimes used as a tool to justify the protection of interests that, from a legal point of view, should not be protected. The examples presented in this paper provide only a limited illustration of a more general problem. Each of the cases could generate a separate extensive discussion, and this paper does not attempt to offer a complex analysis of the problem but rather bring to the forefront an important phenomenon that deserves widespread attention. Although the problem described in the paper is observed and discussed from the perspective of Polish law, I also include several comparative remarks.

[*]PhD Candidate, the Doctoral School at the University of Silesia, Faculty of Law and Administration, University of Silesia in Katowice, Poland. Email: martynakasperska@gmail.com.

Following, I offer a brief description of the concept of personality rights in Poland and present different problematic aspects of compensating non-pecuniary losses, including compensation for infringement of family bonds, national identity and national dignity and non-pecuniary loss resulting from non-performance or improper performance of a contractual obligation.

Personality rights in Poland

It is generally accepted that personality rights are private law rights that are non-patrimonial and highly personal by nature, since they are inseparably bound to personality.[1] The infringement of a personality right primarily results in personality harm, non-pecuniary loss or ideal damage, which is any damage or harm to a personality interest that does not affect a person's patrimony and cannot be easily calculated.[2] Personality rights can be generally defined as rights relating to legitimate personality interests protected by the law of delict. They can be described as a hybrid between fundamental human rights (in the context of public law) and subjective rights (in the meaning of private law).[3] The subject of personality rights is not easy to describe and categorise as their various aspects overlap, and while comparing the concept of personality rights in the diverse legal system, one has to consider both systematic and cultural differences.[4]

Before analysing the details of Polish regulations in this matter, it is imperative to understand the common approaches to the concept of personality rights' protection. This concept can be based on a single general personality right approach or several narrower individual personality rights. A third approach involves focusing on the conduct, endangering particular interests rather than the protected interests themselves.[5] Poland adopted the second approach, providing legal protection to certain individual personality rights. The list of personality rights in the Polish civil code is non-exhaustive, and it is possible to identify other personality rights not specified in the code.[6] It also must be noted that Polish public law is of great significance when discussing the protection of personal rights in private law. The Polish Constitution has an especially strong influence on the interpretation of personality rights' civil law regulations.[7] According to Art. 23 of Polish civil code (further referred to as CC),[8] a human being's personality

[1]Neethling (2005) at 223.
[2]Ibid, at 224.
[3]Brüggemeier (2010) at 6.
[4]van Dam (2013) at 185.
[5]Steininger (2018) at 14. See also Neethling (2005) at 211-218; van Dam (2013) at. 184.
[6]However, under Art. 30 of the Polish Constitution, it is a person's dignity that constitutes the basis for any other personality right protected by law.
[7]Kubiak-Cyrul (2013) at 76: "[…] there is a close relationship between the category of fundamental rights guaranteed in constitutional law and the subjective rights recognized in private law. The content of personal subjective rights is strongly conditioned by the scope of fundamental rights forming a superior category, which must be taken into account in the process of applying the law."
[8]The Act of 23 April 1964 - Civil Code (Journal of Laws of 2020 item 1740 as amended). Translation of the Polish CC provisions into English by Kancelaria "Kuczek-Maruta" – Bil, T.,

rights, such as health, freedom, dignity, freedom of conscience, surname or pseudonym, image, correspondence confidentiality and home inviolability as well as scientific, artistic, inventive and reasoning activities, shall be protected by the civil law regardless of the protection provided for in other provisions. The means for personality rights' protection are provided in the subsequent Article. The last sentence of Art. 24 section 1 of CC provides that a person whose personality rights are threatened by another person's actions may, among others means of protection, demand monetary recompense according to the terms provided for in the civil code.[9] This Article is complemented by Art. 445 and 448 of Polish CC, which provisions allow the aggrieved party to demand compensation for the harm suffered due to infringement of their personality rights.

The non-exhaustive character of the personality rights' list can result in problems concerning the creation, or rather discovery, of new personality rights. The increase of a demanding attitude in society is particularly visible in the field of personality rights, as in case of an infringement, plaintiffs are not required to prove pecuniary damage. Nowadays, the judicature is more often inclined to recognise new rights relating to personality, loosely related to the constitutionally protected human's dignity, from which they are traditionally derived.[10] As a result, it is necessary to consider the common features of all personality rights and select those interests that not only are worth protecting but also have a strictly individual character.[11] Certain mechanisms are needed to select these interests, infringement of which result in liability for damages.[12]

Polish scholars have noted the problems that may derive from the ambiguous nature of personality rights. Under current regulations, it is not possible to compensate non-pecuniary damage if personality rights were not infringed.[13] However, Polish courts grant protection to individuals who suffered non-pecuniary damage, while simultaneously their personality rights, understood as non-

---

Broniek, A., Cincio, A. & Kiełbasa, M. (translation), Dannemann, G. (consultation), Frederick Fischer, S. & Zoll F. (consultation and review).

[9]The exact wording of Art. 24 of Polish civil code is as follows: § 1. A person whose personal interests are jeopardised by another person's action may demand that the action be abandoned, unless it is not illegal. In the case of actual violation, he may also demand that the person who committed the violation perform acts necessary to remove its consequences, in particular that the latter make a statement of a relevant content and in a relevant form. On the basis of the principles provided for by the Code he may also demand pecuniary compensation or a payment of an adequate amount of money for a specified community purpose; § 2. If, as a result of a of personal interest damage to the property was inflicted, the injured party may demand it to be redressed on the basis of general principles; § 3. The above provisions shall not prejudice the entitlements provided for by other provisions, in particular by copyright law and by patent law.

[10]Strugała (2019) in Chapter V, para. 2.

[11]Grzeszak (2018) at 7, 12.

[12]In tort law generally there are mechanisms that allow for this selection: on the one hand, they can exclude protection of some categories of interests upfront (*in abstracto*), and on the other hand they can exclude protection of recognised interests under the circumstances of a particular case (*in concreto*). In Polish law, when it comes to compensation of non-pecuniary loss, the prerequisite of a certain personality rights infringement plays a role of a filter – Strugała (2019) in Chapter III, para.7.

[13]A general basis for tortious liability is provided in Art. 415 of Polish CC, which states that a person who caused damage to another person by their own fault shall be obliged to redress it. This provision allows for compensation of pecuniary damages only.

pecuniary interests strictly related to the individual, were not infringed.[14] This could lead to a situation when any unpleasantness suffered by people can be translated into money.[15] The courts often decide to award compensation, using the concept of personality rights' protection, as the award seems just from an axiological point of view, and the legal system lacks adequate tools to grant protection.[16] Thus, the personality rights' concept is used as a tool of sorts, to complement imperfect or insufficient legislation. This phenomenon may lead to the excessive expansion of the personality rights' concept beyond the borders intended by the legislator.

Compensation for Non-Pecuniary Loss

Generally, one of the main remedies available to a party whose personality rights were infringed is compensation for pecuniary and non-pecuniary loss. Cases for non-pecuniary loss seem to be more difficult than cases in which pecuniary loss is at stake, as they inevitably lead to the problematic question of whether the infringement resulted in non-pecuniary loss and how to assess non-pecuniary interest in monetary terms.[17] Non-pecuniary harm should be understood as an actual loss, as it implies a detriment beyond the pure normative detriment resulting from the violation of the legal norm.[18] For instance, the French legal system is generally open to compensate for the non-pecuniary loss suffered due to violation of a personality interest. At the same time, German courts require the existence of a grave violation of the personality right to justify monetary compensation for non-pecuniary loss. [19]

Protection of Family Bonds

One of the commonly noted problematic examples of claims for non-pecuniary damages is a claim of a person close to an aggrieved person, even if that person is deceased. It is noted that most European legal systems allow for compensation in the event of the death of the direct victim.[20] In Poland, since 2008 the closest members of a deceased's family may claim compensation for the harm suffered by the deceased.[21] Despite this, the problem remains valid, as there is still no consensus on whether compensation can be awarded to family members of a person who has suffered an injury or health disorder. Since the Polish Supreme Court has issued contradictory rulings on this matter, the panel of combined chambers of the Supreme Court (Civil Chamber and Extraordinary Review and

[14]Ibid, at 8.
[15]Ibid, at 25.
[16]Traple (2020) at 140.
[17]Steininger (2018) at 19.
[18]Banakas (2015) at 304.
[19]Steininger (2018) at 20, and the literature referenced there.
[20]Rogers (2005) in Lahe & Kull (2016) at 2.
[21]Under Art. 446 section 4 of Polish CC: The court may also grant a relevant amount to the closest family members of the deceased on account of pecuniary compensation for the wrong suffered. The provision came into force on August 3, 2008.

Public Affairs Chamber) is about to answer the question of whether a person close to the aggrieved person can claim compensation due to *inability to establish or continue a typical family bond*. In other words, the Supreme Court will analyse whether a family bond can constitute a personality right, and, consequently, whether the plaintiff can claim compensation for the harm caused by the infringement of a family bond.

Previous judgement of the Supreme Court resulted in diverse conclusions. In the 2008 resolution, the Supreme Court stated that a family bond is one of the legally protected personality rights, even if it exists under different names (e.g. a family bond, a right to family life).[22] The Court referred to the provisions of the Draft Common Frame of Reference (DCFR, 2009) and the Principles of European Tort Law (PETL, 2005), which adopted the principle of compensation for non-pecuniary damage suffered by the persons close to the aggrieved party. On the other hand, in the 2019 resolution, the Supreme Court stated that there is no such personality right as a right to family bonds.[23] The Court explained that Art. 446 section 4 of the Polish CC clearly limits the option of claiming compensation and cannot also cover the situation when the aggrieved party is alive. The Court reasonably argued that traditionally in Polish law, there is no general rule that every non-pecuniary damage is subject to compensation. Therefore, there must always be a clear normative basis for awarding compensation for such damage. In other words, the mere fact that a person has suffered harm does not yet prejudge the legitimacy of their claim. Furthermore, the Court stated that it is clear that the harm itself does not prove that a particular personality right has been infringed, as there is a whole spectrum of non-pecuniary interests (both protected and unprotected by law) that do not have the form of rights relating to personality. According to the Court, the mere fact that a specific person has suffered even serious harm is therefore not sufficient for awarding the compensation if there has been no infringement of personality rights or there has been no other particular legal basis for compensation.

The abovementioned problem is not limited to Poland. In Estonia, a similar debate started after the claimant sought compensation for non-pecuniary damage due to the death of both parents in a traffic accident caused by a person without a valid permit to drive.[24] However, under the Estonian Law of Obligations Act, it is possible to request compensation for such damages if exceptional circumstances justify compensation.[25] The court dismissed the claim, finding no exceptional circumstances. In a case heard by the Austrian Supreme Court, the Court confirmed the decision of the lower court refusing to grant leave for a claim petitioning for compensation of a non-pecuniary loss suffered by a seven-month-old baby who would grow up without a grandfather killed in a car accident. According to the Court, the minor could not set forth either injury to health or bereavement, and it is

[22]The resolution of the Supreme Court dated 27 March 2018 (III CZP 36/17).
[23]The resolution of the Supreme Court dated 22 October 2019 (I NSNZP 2/19).
[24]Lahe & Kull (2016) at 2.
[25]The Estonian Supreme Court stated that this additional prerequisite will be met in cases such as the spatial (physical) proximity of the claimant to the aggrieved party. Ibid, at 5.

unclear whether they would suffer compensable mental harm because of having to grow up without their grandfather.[26]

Although in some cases Polish courts recognised the right to family bonds in case of death or injury of a relative, they were hesitant to protect family bonds in cases of family conflicts. In a judgement from December 11, 2018, the Polish Supreme Court excluded the possibility of awarding compensation for non-pecuniary damages caused by an infringement of family ties. The Court argued that in the case of so-called marital infidelity, the provisions on the protection of rights relating to personality do not apply to the protection of family legal ties between spouses.[27] In this case, the Court abstained from focusing on the harm itself, and instead emphasised the practical consequences of granting a possibility of compensation. As compensation is only one of the remedies available for a party whose personality rights were infringed, other adequate remedies, such as claims of prohibitive character, would have to be accepted. Thus, it would be possible to accept the spouse's claim regarding, for example, prohibiting a specific person from approaching their spouse. The legal obligation of marital fidelity should not be qualified as an obligation to respect a personality right since it exists only in the relationship of the spouses (*inter partes*). However, the concept of personality rights' protection aims to protect the individual, non-pecuniary interest of the entitled person, which is protected by the law effective *erga omnes.*[28]

Interestingly, tortious liability for breach of marriage duties was the subject of an Italian case, where the plaintiff, after having divorced her husband, brought an action for damages due to violation of marriage duties that resulted in pecuniary and non-pecuniary losses. The Italian Supreme Court upheld the plaintiff's claim, confirming the trend to extend the tort law protection and compensation for non-pecuniary losses to family relationships.[29]

Another interesting example of claims for non-pecuniary damage are those connected to bonds with animals. Although compensation of non-pecuniary damage resulting from the loss of an animal is rare, in one of the cases, the court found that the bond with an animal could be regarded as a right relating to personality.[30]

[26]Judgement of the Austrian Supreme Court (Oberster Gerichtshof - OGH) dated 12 May 2005 (2 Ob 41/03y) cited by Steininger (2005) at 134-135.
[27]Judgement of the Polish Supreme Court dated 11 December 2018 (IV CNP 31/17).
[28]Grzeszak (2019) at 608.
[29]Judgement of the Italian Supreme Court dated 15 July 2005 (no. 15022) cited by Bargelli (2005) at 375-377.
[30]Judgement of the Regional Court in Cracow dated 7 September 2017 (II Ca 1111/17). In another case the Regional Court in Koszalin found that stealing a cat can result in infringement of mental health, being indisputably a personality right (judgement of 22 February 2011, I C 124/10). Although, axiological reasons for these rulings are understandable, the protection granted under personality rights' regulations is questionable. The Court of Appeal in Białystok in the judgement dated 13 January 2021 (I ACa 289/20) decided otherwise. The Court stated that an emotional bond with an animal cannot constitute a personality right and even commonly accepted intangible values do not automatically become subject of to legal protection proper to personality rights.

Protection of National Identity and National Dignity

A sense of national identity and national dignity are "new" personality rights, whose legitimacy is disputable in the Polish legal discourse.[31] However, the Polish court's rulings on possible infringement of personality rights caused by the use of terms such as "Polish concentration camps" were equivocal.

In one of the cases, the plaintiff, a former concentration camp prisoner, claimed to have suffered a non-pecuniary loss when a publisher of an internet portal used the term "Polish death camp" in one of its articles. The plaintiff argued that she was particularly close to the history of the Polish nation, particularly regarding the war experiences and the memory of the crimes committed against Polish citizens. She felt outraged that the article published by the defendant associated the Polish nation with the organisation of concentration camps, indicating the infringement of her national identity and national dignity as a basis for her claim. The Court considered that the plaintiff was acting as a representative of the whole nation, and the claim was aimed not at the protection of the plaintiff's own personality rights but rather in defence of specific values and interests of a collective nature.[32]

In a case with similar factual circumstances, the courts of both instances agreed that the defendant, using the phrase "Polish death camps" in a program announcement on its website, infringed the plaintiff's personality rights such as human dignity, national identity and national dignity. The Appellate Court ruled that, contrary to the defendant's arguments, national identity and dignity belong to the list of protected personality rights, and in this case, the requirement of individualisation of the infringement was met. The Appellate Court agreed with the Regional Court's justification that since the plaintiff was a prisoner of the concentration camp mentioned in the defendant's announcement and took an active part in activities to preserve the memory of the concentration camps' tragedy, he proved that his personality rights were infringed. According to the Court, the use of a similar wording does not automatically mean that the personality rights of every member of the Polish nation could be infringed. In the plaintiff's case, as he was a former prisoner of a concentration camp, using the abovementioned term infringed his national identity and national dignity, resulting in a non-pecuniary loss.[33]

Finally, the most interesting ruling was issued by the Appellate Court in Warsaw. The plaintiff was a grandson of a concentration camp prisoner who died

[31]The discussion grew even more intense in 2018, after the introduction of an amendment to the Act on the Institute of National Remembrance that provided the option to claim compensation because of damage to the reputation of the Republic of Poland or the Polish nation. The reason for the amendment was the use of terms such as "Polish concentration camps" in the mass media. According to the new law, the State Treasury can claim both pecuniary and non-pecuniary damages in case of infringement. The critics of the amendment indicate that neither the Republic of Poland nor the Polish nation can be subject to personality rights as they are not subject to civil law relations.

[32]Judgement of the Regional Court in Olsztyn dated 24 February 2015 (I C 726/13). The appeal against this judgement was dismissed by the Appellate Court in Bialystok on 30 September 2015 (I ACa 403/15).

[33]Judgement of the Appellate Court in Cracow dated 22 December 2016 (I ACa 1080/16).

in the camp. The plaintiff claimed his national identity and national dignity were infringed because of the defendant's article, in which the term "former Polish concentration camp" was used. The defendant claimed that the phrase was used by mistake and that the proper apology was published. The court of first instance dismissed the claim. The Court stated that even though national identity and national dignity remained under legal protection as rights relating to personality, only a person directly affected by the offensive term could demand protection. Furthermore, the Court found that the defendant's statement referred to a group of unidentified people and not directly to the plaintiff or his family. The court of appeals found differently. The Appellate Court stated that the term used by the defendant referred directly to the plaintiff as it falsified the legacy that had a significant influence on the plaintiff's personality, bearing in mind that the plaintiff's grandfather died in a concentration camp. However, the Appellate Court upheld the judgement, indicating that the defendant, having published an apology, performed the actions necessary to remove the consequences of the infringement.[34]

The critics of the last ruling emphasise that personality rights should be understood as individual ("egoistic") interests and not as general values important to society as a whole.[35] Individual members of the society do not have an individual interest in seeking protection since the infringement concerns an abstract community.[36] Otherwise, one can easily imagine a situation where numerous claims could be brought by members of different communities determined to protect commonly recognised general value infringements that do not affect them personally. Legal instruments adequate for civil law relations do not seem to be appropriate for the protection of "common values."

Non-Pecuniary Loss Resulting from Non-Performance or Improper Performance of a Contractual Obligation

It is commonly accepted that in Polish law awarding compensation for non-pecuniary loss is possible under an unambiguous normative basis. For that reason, the attempts to interpret the current regulations in a way that allows the protection of non-pecuniary interests as part of contractual relations are not convincing.[37] As the regulation on compensation is included in the part of the Polish Civil Code devoted to tort, it limits the possibility to remedy the harm only to cases in which the infringement of personality rights results from a tort.[38] However, the Polish courts more and more often award non-pecuniary damages on contractual grounds, using the concept of personality rights' protection in cases when the harm suffered comes down to disappointment or discomfort resulting from the failure to achieve the contract's purpose.[39]

[34]Judgement of the Appellate Court in Warsaw dated 31 March 2016 (I ACa 971/15).
[35]Grzeszak (2018) at 23.
[36]Ibid, at 24.
[37]Kryla-Cudna (2018) at Chapter II, para. 3.5.6.
[38]Ibid.
[39]Traple (2020) at 141. The discussion in this matter was strongly influenced by the judgment of the European Court of Justice (Sixth Chamber) of 12 March 2002 in case C-168/00, Simone Leitner v. TUI Deutschland GmbH & Co. KG. in which the Court ruled that the Art. 5 of Council Directive

On the other hand, there are strong arguments in favour of changes that will allow the possibility of compensation for non-pecuniary loss under the contractual regime. Comparative legal arguments, as well as global development trends, indicate that the development of European regulations on this matter has left the Polish legal system behind. Social expectations and a growing number of claims in fields such as medical and tourist services speak for the practical significance of the problem. Most European legal systems accept that any personal injury, including harm, should be subject to redress, regardless of the liability regime.[40] However, not all non-pecuniary interests can and should be classified as personality rights. This possibility is often excluded due to their relative nature or a considerable degree of subjectivity, and thus these interests should not be artificially put into the list of rights relating to personality.[41] Even if certain interests not included in the personality rights' list deserve legal protection, it is the legislator who should define the protection's legal frames.

Conclusions

The cases illustrated in the paper give us a certain perspective on a problem related to non-pecuniary loss. The definition of non-pecuniary loss is being extended to all kinds of mental distress, discomfort and dissatisfaction. Under the Polish CC, it is impossible to compensate any non-pecuniary loss based only on general provisions on tortious liability. In order to make such a claim, one must prove that the non-pecuniary loss resulted from the infringement of the personality rights of the aggrieved party. It seems that the concept of personality rights is sometimes used (or even "misused") to cover certain interests that do not conform to the definition of personality rights due to their features. Thus, the concept of personality rights is extended and the courts discover new personality rights to justify protection, which seems desirable from the axiological point of view. The necessity to compensate for the non-pecuniary damage serves as a means by which new personality rights are determined. The courts try to improve the legal system's weaknesses using the instruments readily available. Comparison with other European legal systems leads to the conclusion that even recognition of the possible flaws of current regulations cannot justify using the concept of personality rights as a tool to compensate the non-pecuniary loss in such situations when personality rights are, in fact, not infringed.

90/314/EEC of 13 June 1990, on package travel, package holidays and package tours, is to be interpreted as conferring on consumers, in principle, a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.

[40]Bagińska (2021) at 122 and the literature referenced there. The author refers to the amendment to the Dutch and German civil codes in this regard. In 2018, an amendment to the Dutch Civil Code introduced a claim for compensation both in the event of death and serious damage to health or in the event of invalidity and provided for flat-rate compensation. In 2017, an amendment to the German Civil Code provided the possibility to award compensation for relatives in the event of death of the directly injured person – see Bagińska (2021) at 131.

[41]Ibid, at 123.

References

Bagińska, E. (2021). 'O granicach kompensacji szkody niemajątkowej w przyszłym kodeksie cywilnym (uwagi na tle prac Komisji Kodyfikacyjnej Prawa Cywilnego)' in *Państwo i Prawo*, 3:117-136.

Banakas, S. (2015). 'Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape' in *Journal of Comparative Law* 10:291-342.

Bargelli, E. (2005). 'Italy' in Koziol, H. & Steininger, B. C. (Eds.), *European Tort Law*. Vienna: Springer, 368-379.

Brüggemeier, G. (2010). 'Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms' in Brüggemeier, G., Colombi Ciacchi, A. & O'Callaghan, P. (Eds.) *Personality Rights in European Tort Law*. Cambridge: Cambridge University Press. 5-10.

Grzeszak, T. (2018). Dobro osobiste jako dobro zindywidualizowane in *Przegląd Sądowy* 4:7-41.

Grzeszak, T. (2019). 'Zdrada małżeńska a naruszenie dóbr osobistych w orzecznictwie Sądu Najwyższego' in *Monitor Prawniczy* 11:607-610.

Kryla-Cudna, K. (2018). *Zadośćuczynienie pieniężne za szkodę niemajątkową powstałą wskutek niewykonania lub nienależytego wykonania umowy*. Warszawa: C.H. Beck.

Kubiak-Cyrul, A. (2013). 'Personality Rights in Poland' in *Opolskie Studia Administracyjno-Prawne* 3:71-94.

Neethling, J. (2005). 'Personality rights: a comparative overview' in *The Comparative and International Law Journal of Southern Africa* 38(2):210-245.

Rogers, W.V.H. (2005). *Principles of European tort law: text and commentary*. Wien, New York: Springer-Verlag.

Lahe, J. & I. Kull (2016). 'Compensation of non-pecuniary damage to persons close to the deceased or to the aggrieved person' in *International Comparative Jurisprudence* 2(1) 1-7.

Steininger, B.C. (2005). 'Austria' in Koziol, H. & Steininger, B.C. (Eds.), *European Tort Law*. Vienna: Springer 118-155.

Steininger, B.C. (2018). 'The Protection of Personality Rights in Comparative Perspective: Basic Questions' in K. Oliphant, Zh. Pinghua & Ch. Lei (Eds.), *The Legal Protection of Personality Rights: Chinese and European Perspectives*. Leiden: Brill/Nijhoff 13-23.

Strugała, R. (2019). *Dobra i interesy chronione w strukturze czynu niedozwolonego.* Warszawa: C.H. Beck.

Traple, E. (2020). 'Nadużycie instytucji ochrony dóbr osobistych w praktyce orzeczniczej sądów polskich' in Pisuliński, J. & Zawadzka, J. (Eds.), *Aksjologia prawa cywilnego i cywilnoprawna ochrona dóbr*. Warszawa: C.H. Beck 139-161.

van Dam, C. (2013). *European Tort Law*, 2nd ed. Oxford: Oxford University Press.

Cases

Case C-168/00, Simone Leitner v. TUI Deutschland GmbH & Co. KG, Judgment of 12 March 2002 (Sixth Chamber), ECR 2002, I-2631

Judgement of the Regional Court in Koszalin dated 22 February 2011 (I C 124/10)

Judgement of the Regional Court in Olsztyn dated 24 February 2015 (I C 726/13)

Judgement of the Regional Court in Cracow dated 7 September 2017 (II Ca 1111/17)

Judgement of the Appellate Court in Warsaw dated 31 March 2016 (I ACa 971/15)
Judgement of the Appellate Court in Cracow dated 22 December 2016 (I ACa 1080/16)
Judgement of the Court of Appeal in Białystok dated 13 January 2021 (I ACa 289/20)
Resolution of the Polish Supreme Court dated 27 March 2018 (III CZP 36/17)
Judgement of the Polish Supreme Court dated 11 December 2018 (IV CNP 31/17)
Resolution of the Polish Supreme Court dated 22 October 2019 (I NSNZP 2/19)

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 587-602

The Case of "Mafia Capitale": The Judicial Proceedings Prosecuted by the Anti-Mafia District Office of Rome against Massimo Carminati and Salvatore Buzzi

*By Gaspare Jucan Sicignano**

The "Mafia capitale" trial marked a significant point in the interpretation of the specific elements of mafia-style association valid in Italian law. This paper will examine the various stages of the trial proceedings, focusing in particular on the final ruling of the Court of Cassation. This study thus further develops the structure of the crime referred to by art. 416 bis Italian criminal code, discussing in order the externalization methods of the so-called "mafia method."

Keywords: *Mafia; Rome; Italian law; Corruption.*

Introduction

One of the most discussed trials of recent years is the one everyone knows as "Mafia capitale." The case is also commonly called the "Middle World", which originates from the contents of a well-known telephone interception gathered over the course of the investigation. The one who was referred to as the head of the criminal structure – clearly inspired by the English writer John R. R. Tolkien, the creator of the mythical land called "Middle Earth," where the events of "The Hobbit" and the "Lord of the Rings" took place – explained to an interlocutor how it was possible for street and white collar criminals to communicate among themselves: "In the theory of the middle world, there are, as they say, the living above and the dead below. And we're in the middle. That means that there is a world in the middle where everyone meets"[1].

The investigation immediately took the spotlight in Italian media. For years, in newspapers, on social media, on the radio and on talk shows, no one talked about anything else. In just a few months documentaries, films, and books were published dedicated to "Mafia capitale." The book by the journalists Marco Lillo and Lirio Abbate entitled "I re di Roma. Destra e sinistra agli ordini di mafia capitale", published in February 2015, was a best-seller for months. The authors explained: "Rome discovered that organised crime was right at home, and it came to know about 416 bis: the crime of mafia-style association for committing crimes"[2]. Netflix aired "Suburra", a television series drawn from the eponymous

*PhD Researcher in Criminal Law, Faculty of Law, Suor Orsola Benincasa Univerisity, Naples (Italy). Email: gaspare.sicignano@unisob.na.it

[1]Insolera (2019) at 76; Pignatone & Prestipino (2015) at 95; Sicignano (2021) at 251.

[2]Abbate & Lillo (2015).

novel by Carlo Bonini and Giancarlo De Cataldo, which was clearly inspired by "Mafia capitale".

Foreign media also devoted significant space to the investigation. While the New York Times claimed: "the inquiry has blossomed into a national scandal and a reminder that virtually no corner of Italy is immune to criminal penetration"[3], Le Monde carried a cartoon depicting a giant octopus that enveloped Rome with its tentacles[4]. The Independent also gave much space to the affair, claiming that "even by Rome's standards the tsunami of sleaze that has swept over the eternally corrupt city in the past 48 hours has left its weary citizens slack-jawed in disbelief"[5]. El Pais was of the same opinion, "*a pesar de las operaciones policiales que terminaron con «la quinta mafia de Italia», La ciudad todavía no se ha repuesto de décadas de saqueos ni de una clase política incapaz de sobreponerse a la corrupción y la mala gestión*"[6]. According to Newsweek, "the biggest mob trial in modern-day Rome opens on Thursday, with a one-eyed former neo-fascist gangster and 45 other defendants in the dock accused of operating a mafia network that plundered city coffers". The Daily Beast, one of the most-read news sites in the US, dealt with the topic in an article entitled "In Rome Mafia Trial, One-Eyed Gangster and his 40 Thieves"[7].

The Charges

The investigation was carried out by the Anti-Mafia District Office of Rome[8].

Among the various indictments, those arrested were charged with the crime referred to in Article 416 bis Italian criminal code (c.c.)[9] of being part of a mafia-

[3]Povoledo (2014); Sergi (2015): *'According to the prosecutors, this trial is all about the "mondo di mezzo," the "world in between" and the "in-betweeners" who populate it are public officials, counsellors, local politicians, mediators and brokers who are close to figures in higher office (the "world above"), and who are seen as likely to accept promises of a better career and/or other benefits and income by exchanging favours with figures in the "world below".'*

[4]Ridet (2014).

[5]Day (2014): *'Roman prosecutors have seized a former terrorist and dozens of associates whom they claim have formed a new Mafia group that has sucked hundreds of millions of euros out of the near-bankrupt capital. It wasn't a shock that politicians, officials and businessmen were on the make. But it's claimed they were directed by a newly formed Mafia headed by a one-eyed, former neo-fascist who enjoyed, according to some reports, the collusion of police and secret services. "We have identified the criminal organisation that we call Mafia Capitale, which is Roman, without links to other southern Mafias, but uses Mafia methods," said Rome's chief prosecutor Giuseppe Pignatone, after he ordered 37 arrests today. Among those held was Massimo Carminati, a former member of the far-right terror group NAR. Prosecutors believe he was leading the group*'.

[6]Ordaz (2015).

[7]Latza Nadeu (2017).

[8]Angeli, Forgnone & Giannoli (2014); Consulich (2016) at 126.

[9]Art. 416 bis, Italian criminal code: *'Persons belonging to a Mafia-type organisation of three or more persons shall be liable to imprisonment for a term of between three and six years. Persons who further the activities of or manage the organisation shall be liable to imprisonment for a term of between four and nine years for that offence alone. A Mafia-type organisation is an organisation whose members use the power of intimidation deriving from the bonds of membership, the state of subjugation and conspiracy of silence that it engenders to commit offences, to acquire direct or*

type unlawful association operating in Rome and Lazio, which made use of the power of intimidation arising from ties to the association and the conditions of subjection and "*omertà*" (the code of silence)[10] that came with them. This was all to commit crimes of extortion, loan sharking (usury), money laundering, bribing public officials, and acquiring direct or indirect management of and control over economic activities, concessions, authorizations, procurement contracts, and public services[11].

The head of the tight-knit group was identified as Massimo Carminati, a former far-right terrorist, and a past member of the so-called "Magliana Gang". Salvatore Buzzi, who had been previously condemned in the 1980s to fourteen years in prison for voluntary manslaughter and slander, who ran the association's economic activities through a network of cooperatives. The main areas in which the group conducted its illegal affairs were waste collection and disposal, receiving refugees, and maintaining public green spaces[12].

According to the charges, this was a very different mafia from the classic organizations operating in southern Italy, one characterised not by domination of its territory, but rather by the control of a particular business and political environment[13]. Indeed, thanks to Carminati's "criminal prestige", the group had

---

indirect control of economic activities, licences, authorisations, public procurement contracts and services or to obtain unjust profits or advantages for themselves or others, or to prevent or obstruct the free exercise of vote, or to procure votes for themselves or others at elections. If the organisation is armed, members shall be liable to imprisonment for a term of between four and ten years in the circumstances described in the first subsection and between five and fifteen years in the circumstances described in the second subsection. The organisation shall be deemed to be armed if its members have access to weapons or explosives for the purposes of furthering the aims of the organisation, even if hidden or stored. If the association is directed towards committing one of the crimes under Articles 600, 601, and 602, a prison sentence of between five to fifteen years is applied in the cases foreseen in the first paragraph and from four to nine years in cases foreseen in the second paragraph. If the economic activities which the members intend to acquire or maintain control over are financed in whole or in part by the proceeds of crime, the penalties set out above shall be increased by between a third and a half. In the event of a conviction, instruments or means which were used or intended to be used to commit the offence and the proceeds thereof shall be forfeited. The provisions of this section are also applicable to the Camorra and any other organisation, whatever its name, that make use of the power of intimidation deriving from the bonds of membership to pursue goals typical of Mafia-type organisations'.

[10]Grandi (2016): '*The interpretation given in the literature and case law of the concept of "silence" (omertà, the code or conspiracy of silence) is more complex: Italian legislators have viewed the phenomenon from a sociological perspective, describing a typical social situation strictly connected with the presence of the "traditional Mafia". One of the many definitions proposed conceives omertà as a form of passive resistance to state authorities, which spreads throughout the community due to the supremacy of the mafia and which the latter promotes by using fear and intimidation and nurturing widespread mistrust of the public authorities. According to another definition, omertà is an unconditional and almost absolute refusal of people to cooperate with law enforcement authorities, not only because they fear of retaliation and wish to protect the group they belong to, but also because they deny the government's right to interfere with individual lives and the group's affairs'*.

[11]Brancaccio (2016) at 91.

[12]Apollonio (2016) at 133; Ciccarello (2016) at 107; Dalla Chiesa (2015) at 1; Martone (2016) at 29; Mete & Sciarrone (2016) at 10.

[13]Vitarelli (2020) at 3.

acquired an "independent intimidation capacity" such that it created a "widespread propensity for fear" that was well-suited for instilling subjection and "omertà" [14].

The Pre-trial Detention[15]

Initially, following the petitions by those defendants regarding the legality of the pre-trial detention, the charges were confirmed by the Court of Cassation[16]. In twin orders the Supreme Court recognised the mafia-like character of the group, recalling its "corruptive-collusive dimension"[17]. In fact, it was argued that the systemic repetition of its corruption activities had contributed to increasing the

[14]Candore (2018) at 1168.

[15]In Italian law, the pre–trial detention (also known as remand, or provisional detention) is when a defendant is place in custody, before and until the trial is ended. This measure could be requested when there are serious circumstantial evidence demonstrating that the defendant has committed a crime. Moreover, it is necessary to prove that there is alternatively: a flight risk, the risk of destroying or creating false evidence, or at least the risk of committing another crime. The judge for preliminary investigations, upon the request of the public prosecutor, have authority to ordering it. The defendant or the prosecutor can appeal against such decision at the Court of Liberty, that can uphold, modify, or quash the Judge's order, reviewing all the circumstantial evidence. This decision can be appealed before the Court of Cassation.

[16]In Italy, the Court of Cassation is at the top of the ordinary jurisdiction; between the main functions that are conferred by the Basic Law on the Judiciary of 30 January 1941 no. 12 (art. 65) is to ensure "the exact observance and uniform interpretation of the law, the unity of the national objective law, compliance with the limits of the various jurisdictions." One of the key features of its mission and unifying nomophylactic essentially aimed at ensuring certainty in the interpretation of the law (in addition to issue judgments of the third degree) is the fact that, in principle, the current rules do not allow the Court of Cassation to know the facts of a case unless they prove by deeds already obtained in proceedings in the pre-trial stages, and only to the extent that it is necessary to know in order to assess the remedies that the law allows you to use to motivate an application at the Court. The appeal in cassation may be lodged against the measures issued by the ordinary courts at the appellate level or in degree only: the reasons given to support the use may be, in civil matters, the violation of the right material (errores in iudicando) or procedural (errores in proceeding), the vices of motivation (lack, insufficiency or contradiction) of the judgment under appeal; or, again, the grounds for jurisdiction. A similar scheme is expected to appeal to the Supreme Court in criminal matters. If the Court finds one of the defects mentioned above, has the power and duty not only to quash the decision of the judge in the lower grade, but also to enunciate the principle of law that the contested measure must be observed: the principle that even the national court cannot fail to comply when shall review the facts of the case. The principles laid down by the Supreme Court are not, however, binding on the courts, in general, when they must decide different causes, in respect of which the decision of the Supreme Court may, however, be considered a "previous" influential. In fact, the judges of the lower courts shall comply with decisions of the Supreme Court in the majority of cases. You do not need any special permission to file an appeal before the Supreme Court. According to article 111 of the Constitution every citizen may appeal to the Supreme Court for violation of the law against any decision of the judicial authority, without issuing any appeal in civil or criminal, or against any measure restricting personal freedom. The Court of Cassation is also assigned the task of establishing jurisdiction (ie, indicate, when you create a conflict between the ordinary courts and the special, Italian or foreign, who has the power to treat the cause) and the competence (ie, to resolve a conflict between two lower courts). The Supreme Court also performs non-judicial functions relating to elections and referendum for the repeal of laws.

[17]Cass. pen., sez. VI, 10 aprile 2015, n. 24535 e Cass. pen., sez. VI, 10 aprile 2015, n. 24536, in *Dir. pen. cont*., 15 June 2015.

criminal fame the organization enjoyed, which allowed it to leverage – particularly with regard to the business owners who had no intention of adapting to the rules of the illicit market – its aura of invincibility that came from the dense network of support offered to it by a circle of reliably subservient public officials[18].

According to the Court, therefore, for the purpose of determining the applicability of the crime of a mafia-type unlawful association for committing crimes, the intimidating force exerted by the associational ties, which led to subjection and "omertà", can be directed to threaten either the life or personal safety and/or the essential existential, economic, or work conditions of specific categories of people. With a reserve of violence firmly remaining as part of the association's heritage, this intimidating force can be acquired by the creation of an organizational structure that, in virtue of its political and electoral connections and by shows of force and systematic bribery, exerts widespread influence over awarding procurement contracts, granting concessions, controlling areas of activity by public entities or equally public businesses, to the extent that it can substantially nullify competition or new initiatives by those who do not comply or are not connected to the group.

The Court of Cassation discerned a sort of operational continuum between the practices of intimidation and bribery in a symbiotic relation in which each one feeds the other in the association's common perspective of imposing its own illicit rules over the area of public disbursements[19].

[18]Fornari (2016) at 24; Insolera (2015) at 223; Manzini (2016) at 107.

[19]Ronco (2013) at 139; Visconti (2015b); Grandi (2016): *'The applicability of Article 416-bis Cc even when no violent conduct is engaged in was upheld by the Court of Cassation in its very recent decisions concerning the unlawful activities affecting the public administration of the municipality of Rome, referred to as "Mafia capitale". According to preliminary investigation results, a powerful criminal organization had gained control over the administrative procedures for the awarding of public procurements, grants and permits, related to a variety of profitable economic activities (waste collection, reception of refugees, public parks maintenance), by means of systematic bribery of public officials. While the defence lawyers contended the criminal group had not taken advantage of the characteristic mafia-type intimidation, but only of the complicity of corrupted civil servants, the Court of Cassation has held that: The effect of the intimidating power stemming from the bonds of association has been aimed not so much at determining the activities of the corrupted public servants who act as members of the criminal group, which ensures and increases their illicit profit; but rather as a means of establishing and preserving a conventio ad excludendum, in order to preclude the free participation in public procurements by undertakings that do not accept the system of rules imposed by the criminal group itself". In other words, systematic corruption had enabled the criminal group to influence the decisions of a number of public offices in Rome, with no need to make use of violence or threats; as a consequence, potential competitors and, more in general, all the individuals involved in public procurement had experienced a "condition of subjugation which was so widespread and deep-rooted that nobody dared to voice opposition, either at a political or judicial level, before criminal courts or before administrative ones'.*

The Judgment of the Tribunal of Rome[20]

While accepting the charges almost in their entirety, the Tribunal of Rome reversed the conclusions of the Court of Cassation by excluding the existence of the mafia- type unlawful association[21].

The Tribunal found in particular the existence of two distinct non-mafia criminal groups: one directed by Massimo Carminati dedicated to committing common crimes of an extortionist and usurious nature, and the other directed by Salvatore Buzzi that was active in the area of crimes against the public administration.

The Court added that the specifics referred to in Art. 416 bis c.c. require the present and concrete operation of the mafia method by means of three specific requirements: 1) the capacity of intimidation, understood as the ability of the organization to induce fear by its steady and not infrequent disposition to exert coercion; 2) subjugation, understood as a state of psychological submission of the potential victims of intimidation – identified on the basis of the territory of influence of the criminal consortium – deriving from serious and inescapable danger due to the strength of the association; 3) "omertà", understood as the presence in its dominated territory of a general and not infrequent refusal to work with the justice system, a refusal and fear that commonly manifest as false and reticent testimony or favouritism.

According to the Tribunal of Rome, an association aiming to illegally obtain public contracts through corruptive agreements can never be mafia-like. For the purposes of Art. 416 bis c.c. the use of the mafia method is in fact necessary, and there is no crime under that statute when the illegal outcome is attained by systematic recourse to bribery, even if it is integrated into a context of political and business groups, and even where these prove to be particularly dangerous because they are capable of steadily infiltrating the political-economic sphere. If the association establishes an eminently corrupt relationship without well and truly subjugating the employees and directors of the Roman administration by the group's efforts, it is not a mafia[22].

This does not deny that, broadly speaking, the facts of corruption can be crimes of a mafia-style organization, or that they could take place in an environment that appears asymptotically similar to that of a mafia-style subjection;

[20]In Italy, once an investigation is completed, the Public Prosecutor opens a criminal case in order to initiate a criminal trial, unless he or she believes that the case may be dismissed. A criminal proceeding usually takes place in three stages: in a court of first instance (Giudice di pace, Tribunale, Corte di Assise), the Corte di Appello and the Corte di Cassazione. In the first stage, all the evidence – witnesses and documents – is obtained and ends in a conviction or acquittal. Both the defendant and the prosecutor may appeal the sentence to the Court of Appeals, which will retry the defendant. The ruling of the Court of Appeals may be appealed again to the Court of Cassation, which may not rule on the merits. Both the Court of Appeal and the Court of Cassation can confirm, modify or annul the sentence. Once all the stages of the trial and appeal process have been completed, the verdict is final.

[21]Trib. Roma, sez. X, 20 july 2017, n. 11730, Pres. Ianniello, cons. Orfanelli-Arcieri, in *Foro it.*, II, 2018, 176 et seq.

[22]Amarelli (2018) at 960; Fiandaca (2018) at 176; Zuffada (2017) at 285.

it simply says that if they are the predominant activity of a newly formed criminal group that does exhibit mafia-style methods with public officials or interested private parties, then the *quid pluris* that distinguishes a mafia association from an ordinary one cannot be recognised [23].

The Judgment of the Court of Appeal of Rome

The Court of Appeal of Rome overturned the conclusions of the Tribunal, the court of first instance [24].

At the outcome of the appeal by the public prosecutor and the defendants, the appellate court judge found the existence of a single mafia-type unlawful association that was active between 2011 and 2014. In the view of the Court of Appeal, there was a consortium, with a single head that divided into various internal groups, that utilised the same methods previously employed for usury and extortion in the public procurement contract sector [25].

On the basis of these findings, the Judicial Panel emphasised that, for the purposes of the existence of the crime referred to in Art. 416 bis c.c., neither the modest number of victims (which the Tribunal indicated was eleven) nor the limited relational or territorial context are relevant. Indeed, the characteristics that constitute the crime of Art. 416 bis c.c. are neither the general control of a territory nor a general condition of subjugation and "omertà" in a community. Regarding the question of the force of intimidation, the Court – contrary to what the Tribunal of first instance held – concluded that there is no incompatibility between this element of the crime of Art. 416 bis c.c. and bribery. Indeed, in the Panel's view on this specific case, intimidation would be employed precisely when bribery and partitioning agreements are not sufficient for the group to attain its goals.

The ruling has been highly criticised as literature; critics maintain that, following this approach, the force of intimidation becomes fluid, disconnected from the use of violent methods, and based on the capacity of a criminal group to establish relations with "deviant" State agencies, such as secret services and law enforcement on the one hand and corrupt functionaries on the other[26].

In any case, the Court handed down only a formal *reformatio in peius*, considering that – while recognizing the crime under Art. 416 bis c.c. – it imposed milder sentences than those decided by the lower court of first instance, which had excluded the mafia-type unlawful association.

[23]Amarelli (2018) at 960; Catino (2019) at 31.
[24]App. Roma, sez. III, 11 september 2018, n. 10010 in *Dir. pen. cont*., 14 may 2019
[25]Cipriani (2019); Greco (2019) at 108: Mazzantini (2019) at 4; Ubiali (2019) at 662.
[26]Della Ragione (2020) at 5; Mezzetti (2020) at 15.

The Judgment of the Court of Cassation

A final plot twist occurred with the judgment of the Court of Cassation, which concluded the judgment on the merits[27].

The Court returned to the positions expressed by the Tribunal of Rome, recognizing the existence of two distinct non-mafia criminal groups: one oriented towards carrying out traditional sorts of crimes, the other towards crimes directed against the public administration. Indeed, according to the Supreme Court, the mafia- type unlawful association is not a "pure" crime of association, and in order to qualify a crime as coming under Art. 416 bis c.c. it is necessary that the group actually make effective use of the force of intimidation[28]; the mere willingness to resort to it or the probability of doing so is not sufficient[29].

The group must demonstrate that it possesses this force and has made use of it. Furthermore, for the purpose of showing the existence of the crime of mafia-type unlawful association, the force of intimidation must originate from the association itself, not from the criminal reputation of an individual member. A mafia-type unlawful association is such when its own criminal fame remains alive even if individual members are identified, prosecuted, and isolated, including those with significant personal criminal fame. Thus, in the view of the Court of Cassation, the Court of Appeal, rather than dealing with the probative argument of the Tribunal of first instance, only adopted the Court of Cassation's decision as a precautionary measure without considering the different evidentiary basis that had taken shape in the meantime.

Furthermore, for the Court of Cassation, the city of Rome's public procurement contract system was not managed by the fear of mafia intimidation, but rather by a well-oiled system of corrupt practices. Indeed, the capital's public competitive bidding processes were polluted not by the fear of violent retaliation by a group that was already known for its previous use of similar operational methods and its common criminal history, but rather by general, widespread, and systemic collusion, due to the stipulation of reciprocal agreements in the mutual interest of parties operating in a different environment. It follows that there is an incompatibility between a mafia-type unlawful association and a relational context based on relations inter pares: for the intimidating force of the associational bonds to be such, which the insiders use, it must coerce the moral liberty of outsiders. Where human relations instead develop voluntarily and with no moral coercion,

[27] Cass. pen., sez. VI, 22 october 2019, n. 18125, in SP, 18 june 2020

[28] Grandi (2016): *'the offence of unlawful association is considered to have taken place at the very moment when an agreement to commit more than one crime is entered into; on the other hand, the offence of mafia-type association is considered to have taken place when an already existing association starts using a particular method14 to attain its objective, which may also be legitimate. According to a majority of legal scholars and case law, whenever a mafia-type association also has the purpose of committing more than one crime, so that the two categories overlap, only the offence under Art. 416-bis should apply due to the principle of speciality. Contrarily, Art. 416 will apply whenever the special constituent element of the mafia-type method is not fulfilled'.*

[29] Abukar Hayo (2020); Apollonio (2020); Fiandaca (2020).

such use of force – which constitutes the characteristic of the mafia method – fails[30].

Conclusions

The Court of Cassation's solution has the merit of providing a response to the dilemma about qualifying aspects of new mafia-style associations that are different from the classic mafias operating in southern Italy[31]. By means of a rigorous system of argumentation, the Supreme Court specified that the intimidating ability of a mafia-type unlawful association – from which derive the conditions of subjugation and "omertà" of those who actually come into contact with it – must be actual rather than potential[32].

The other position does not seem convincing, according to which the crime of Art. 416 bis would be a purely associational crime that would be satisfied merely by a group's potential for intimidation[33]. Article 416 bis c.p. typifies both a crime of damage and a crime of danger[34]. Regarding the subjective element (*mens rea*) of the crime, the law only punishes those who participate in an association with the intent (*dolo specifico*) of carrying out the particular criminal program of a mafia association[35]. Its existence requires not only conspiracy, but also that it manifest an

[30]Della Ragione (2020) at 28; Zuffada (2021) at 420.

[31]Amarelli & Visconti (2020); Balsamo & Recchione (2013) at 15; Canato (2020), at 12; Dell'Osso (2017) at 66; Iannotti (2020) at 26; Maiello (2007) at 52; Manna & De Lia (2020) at 22; Mazzantini (2020), at 1270; Merenda (2021), at 336.

[32]Court of Cassation, 3.6.1993 n. 1793, De Tommasi, in CED, n. 198577: *'Article 416 bis of the Criminal Code outlines an offence of criminal association of a multi-faceted, mixed nature, in the sense that whereas the offence of simple criminal association entails only the establishment of a stable organization aimed at the commission of a number of crimes, in the case of mafia-type association, it must likewise be shown that the group has gained a concrete power of intimidation in the surrounding environment and that the participants have effectively taken advantage of that power in order to carry out their criminal plan. The act of "taking advantage" can imply either the mere exploitation of the existing power of intimidation, or the commission of further acts of violence and threats, provided that such acts do not produce the psychological effect in and of themselves, but they rather underpin the already existing coercive power of the association'.*

[33]Grandi (2016): *'the roots of the offence of mafia-type association started to develop long before the legislative bill of 1980. Indeed, a parliamentary Commission of Inquiry on the phenomenon of the Sicilian Mafia, established in 1962, had already called for a law reform aimed at addressing the shortcomings of existing legislative instruments. Although mafia criminal activities had been affecting the country for many decades, the original version of the Criminal Code enacted in 1930 did not contain any explicit reference to the mafia itself. Nonetheless, this does not mean that during the long period before the introduction of Article 416-bis participation in mafia-type organizations had been left unpunished. In fact, both the literature and case law called for such organizations to be included within the scope of application of the provisions against the offence of unlawful association to commit a crime (Article 416 Cc), which applies when three or more persons associate together in order to commit more than one crime. Notwithstanding the abundant case law concerning the application of Article 416 Cc, the latter provision showed to be insufficient to effectively tackle the rapid spread of mafia-type criminal activity, especially in some areas of the country'*.

[34]Amarelli (2019) at 1229; Turone (2015) at 323; Merenda & Visconti (2019) at 3.

[35]Fiandaca (1983) at 261; Insolera (1982) at 702.

autonomous intimidating capacity that is able to bend to its own ends the wills of those who come into contact with its members[36]. In this sense the multiple infractions of the case also play a role: Art. 416 bis c.c. is a crime of damage regarding a first category of legal goods (public order and moral liberty of the group's members) and a crime of danger regarding a second category of legal goods (economic order, impartiality and good performance of the public administration, the democratic order)[37]. It is indeed a commonly held opinion that a mafia association is not an association "in order to commit crimes," but rather one that "commits crimes." [38]. Moreover, the third paragraph of Art. 416 bis c.c. requires that the participants "avail themselves" – not that they "can avail themselves" – of the various qualifying elements of the mafia method[39].

In this context it seems correct to hold the view that "Mafia capitale" is not a mafia. The association does indeed seem a far cry from traditional mafia organizations, since we are dealing with a group that is a link between the criminal and political worlds, and that prefers dialoguing with political figures rather than exercising various forms of violence and intimidation within the community[40]. The group rarely resorted to violent methods (during the trial only eleven episodes of violent crime were considered to be proven), preferring the systematic use of corruptive techniques that were designed to guarantee that group members, and in particular the companies they controlled, would be awarded public service contracts[41]. And while in the past the charge of association for carrying out mafia-style crimes had been made against groups that were not organically traceable to traditional mafias[42], the specifics of this case are clearly different.

We agree with the conclusion stated by Costantino Visconti, according to whom Italy is a country "afflicted with mafia bulimia, in which without the word 'mafia' in the middle, things do not seem serious enough to spend time and energy on them". Visconti also warns that the real problem is that employing the word «mafia» in legal circles has very serious consequences: "it sets in motion judicial systems with a high repressive potential that infect the entire system with a series of effects that are often irreversible. The sword tends to prevail over the scales of justice, and the justified goal of scorched earth around an enemy risk taking on the fearsome guise of the «tyrant principle» that crushes all others – the others, however, are fundamental in a State under the rule of law. But in the long run it is like pouring a drop of oil in a reflective pool; although it is originally small, the drop slowly extends to cover much of the surface. One no longer sees the water underneath; everything seems oily, and someone will finally say – and not without reason – "The Mafia is everywhere". It is unfortunate that the immediate

[36]Amarelli (2019); De Vero (2020) at 1043; Deroma (2016) at 2838; Gaeta (2018) at 2718.
[37]Damante (2020) at 6.
[38]Cass. pen., Sez. V, 13 febbraio 2006, n. 19141, in *C.E.D. Cass.* n. 234403; Insolera & Guerini (2019), at 85.
[39]Amarelli (2018) at 959.
[40]Basile (2016); Salviani (2018) at 1212; Vannucci (2016) at 41; Visconti (2015) at 353.
[41]Apollonio (2016) at 133; Ciccarello (2016) at 107; Dalla Chiesa (2015) at 1; Martone (2016) at 29; Mete & Sciarrone (2016) at 10;
[42]Fiandaca (1985) at 301 et seq.; Serraino (2016) at 264 et seq.

consequence of this statement is to conclude that "if everything is Mafia, then nothing is Mafia!"[43].

References

Abbate L. & M. Lillo (2015). *I re di Roma. Destra e sinistra agli ordini di Mafia Capitale*. Roma: Chiarelettere.

Abukar Hayo, A. (2020). 'Il "sistema" corruttivo della c.d. "mafia capitale" non costituisce un'associazione di stampo mafioso di nuovo conio. (Nota alla sentenza n. 18125/2020 emessa dalla sesta Sezione della Corte di Cassazione)', in *Diritto di difesa.* https://dirittodidifesa.eu/il-sistema-corruttivo-della-c-d-mafia-capitale-non-costituisce-unassociazione-di-stampo-mafioso-di-nuovo-conio-nota-alla-sentenza-n-18125-2020-di-ali/

Alessandri, A. (2017). *Espansione della criminalità organization nell'attività d'impresa al Nord*, Torino: Giappichelli editore.

Amarelli, G. (2017). 'Prove di populismo penale: la proposta di inasprimento delle pene per lo scambio elettorale politico – mafioso', in *Diritto penale contemporaneo,* 5, at 5. https://archiviodpc.dirittopenaleuomo.org/upload/9832-amarelli517.pdf

Amarelli, G. (2018). *Le mafie autoctone alla prova della giurisprudenza: accordi e disaccordi sul metodo mafioso*, in *Giurisprudenza Italiana*.

Amarelli, G. (2019). 'Mafie delocalizzate all'estero: la difficile individuazione della natura mafiosa tra fatto e diritto*',* in *Rivista italiana di diritto e procedura penale.*

Amarelli, G. (2020). 'Per la Cassazione non si tratta di vera mafia', in *Cassazione penale*, 10.

Amarelli, G. & C. Visconti (2020). 'Da 'mafia capitale' a 'capitale corrotta'. La Cassazione derubrica i fatti da associazione mafiosa unica ad associazioni per delinquere plurime', in *Sistema penal* https://www.sistemapenale.it/it/scheda/amarelli-visconti-cassazione-18125-2020-mafia-capitale

Angeli, F., Forgnone, V. & V. Giannoli (2014). Mafia a Roma, 37 arresti per appalti del Comune. Indagato Alemanno. Pignatone: "Gli uomini dell'ex sindaco nell' organizzazione", La Repubblica, Dec. 2. https://roma.repubblica.it/cronaca/2014/12/02/news/perquisizioni_alla_pisana_e_in_campidoglio-101923254/

Apollonio, A. (2016). *Rilievi critici sulle pronunce di "mafia capitale": tra l'emersione di nuovi paradigmi e il consolidamento nel sistema di una mafia soltanto giuridica*, in *Cass. Pen.*

Apollonio, A. (2020). *Essere o non essere "Mafia Capitale". Commento a Cass., sez. VI, 22 ottobre 2019 (dep. 12 giugno 2020), n. 18125*, in *www.giustiziainsieme.it.* https://www.giustiziainsieme.it/it/diritto-penale/1181-essere-o-non-essere-mafia-capitale-2

Balsamo, A. & S. Recchione (2013). 'Mafie al Nord. L'interpretazione dell'art. 416 bis c.p. e l'efficacia degli strumenti di contrasto', in *Diritto penale contemporaneo*. https://archiviodpc.dirittopenaleuomo.org/upload/1381757435BALSAMO-RECCHIONE%202013a.pdf

Basile, F. (2016). 'Riflessioni sparse sul delitto di associazione mafiosa', in *Diritto penale contemporaneo*.https://archiviodpc.dirittopenaleuomo.org/upload/1461238341Recensione%20Turone%20Basile.pdf

Brancaccio, L. (2016). 'Mafia Capitale: associazione mafiosa e fazione politica', in *Meridiana* 87.

[43]Visconti (2016) at 3.

Canato, M.C. (2020). 'L'art. 416-bis c.p. alla "prova" delle cd. "nuove mafie": dall' esteriorizzazione della forza di intimidazione alla "riserva di violenza*"',* in *Giurisprudenza penale,* 12. *https://www.giurisprudenzapenale.com/2020/12/02/lart-416-bis-c-p-alla-prova-delle-cd-nuove-mafie-dallesteriorizzazione-della-forma-di-intimidazione-alla-riserva-di-violenza/*

Candore, G. (2018). 'Il mosaico spezzato: da "mafia capitale" a "corruzione capitale', in *Cassazione penale.*

Catino, M. (2019). 'Fare luce sulla zona grigia', in *Discrimen.it*. https://discrimen.it/wp-content/uploads/Catino-Fare-luce-sulla-zona-grigia.pdf

Ciccarello, E. (2016). 'La posta in gioco di Mafia Capitale. Nuove mafie e interpretazione dell'articolo 416-bis', in *Meridiana,* 87.

Cipriani, E. (2019). 'La pronuncia della Corte d'appello di Roma nel processo cd. mafia capitale: la questione dell'applicabilità dell'art. 416-bis c.p. alle mafie "atipiche"', in *Diritto penale contemporaneo*. https://archiviodpc.dirittopenaleuomo.org/d/6675-la-pronuncia-della-corte-d-appello-di-roma-nel-processo-cd-mafia-capitale-la-questio ne-dell-applica

Consulich, F. (2016). 'Associazioni di tipo mafioso anche straniere', in F. Antolisei (ed.), *Manuale di diritto penale. Parte speciale,* Tomo II,124. Milano: Giuffré.

Dalla Chiesa, N. (2015). 'A proposito di «Mafia Capitale». Alcuni problemi teorici', in R*ivista di Studi e ricerche sulla criminalità organizzata*, 1, n. 2, at 1.

Damante, E. (2020). 'Quando manca l'intimidazione: a proposito della c.d. "Mafia silente" o "mercantista"', in *Discrimen.it.* https://discrimen.it/wp-content/uploads/Damante-Quando-manca-lintimidazione.pdf

Day, M. (2014). New Mafia group sweeps across Rome sucking hundreds of millions of euros out of Italy's near-bankrupt capital, The Indipendent, December, 3.

Della Ragione, L. (2020). ' "Mafia capitale" e "Mafia corrotta": la parola definitiva della Suprema Corte nel processo di stabilizzazione giurisprudenziale dell'associazione di tipo mafioso', in *Legislazione penale*. http://www.lalegislazionepenale.eu/wp-con tent/uploads/2020/10/L.-Della-Ragione-Mafia-capitale-1.pdf

Dell'Osso, A. (2017). 'I "limiti" del reato di associazione di tipo mafioso di fronte alla "Mafie in trasferta*"',* in A. Alessandri (ed.), *Espansione della criminalità organizzata nell'attività d'impresa al Nord,* at 66. Torino: Giappichelli editore.

Deroma, G. (2016). 'La capacità di intimidazione dell'associazione di tipo mafioso', in *Cassazione penale*.

De Vero, G. (1988). *Tutela penale dell'ordine pubblico. Itinerari ed esiti di una verifica dogmatica e politico-criminale*. Milano: Giuffré.

De Vero, G. (2020). 'L'ambigua connotazione nemicale della criminalità di stampo mafioso', in *Rivista italiana di diritto e procedura penale*.

Donini, M. (2019). 'Mafia e terrorismo come "parte generale" del diritto penale. Il problema della normalizzazione del diritto di eccezione, tra identità costituzionale e riserva di codice' in *Discrimen.it*. https://discrimen.it/mafia-e-terrorismo-come-parte-generale-del-diritto-penale-il-problema-della-normalizzazione-del-diritto-di-eccezi one-tra-identita-costituzionale-e-riserva-di-codice/

Faiella, S. (2020). 'Istigazione e corruzione tra privati', in *Diritto di difesa,* 3, at 82. https:// dirittodidifesa.eu/istigazione-e-corruzione-tra-privati-di-simone-faiella/

Fiandaca, G. (1983). 'Commento all'art. 1, l. 13 settembre 1982 n. 646', in *Legislazione penale*.

Fiandaca, G. (1985). "L'associazione di tipo mafioso nelle prime applicazioni giurisprudenziali", in *Foro italiano,* V.

Fiandaca, G. (2018). "Esiste a Roma la mafia? Una questione (ancora) giuridicamente controversa", in *Foro italiano,* II.

Fiandaca, G. (2020). 'Mafia capitale: metodo mafioso e metodo corruttivo non vanno sovrapposti', in www.*foroitaliano*.it. https://www.foroitaliano.it/news/143/mafia-capitale-metodo-mafioso-e-metodo-corruttivo-non-vanno-sovrapposti/

Fornari, L. (2016). 'Il metodo mafioso: dall'effettività dei requisiti al "pericolo d'intimidazione" derivante da un contesto criminale? Di "mafia" in "mafia", fino a "Mafia Capitale" ', in *Diritto penale contemporaneo*. https://archiviodpc.Dirittopenaleuomo.org/d/4803-il-metodo-mafioso-dall-effettivitadei-requisiti-al-pericolo-d-intimidazione-derivante-da-un-contest

Gaeta, P. (2018). *Nuove mafie: evoluzione di modelli e principio di legalità*, in *Cassazione penale*, 9, at 2718.

Greco, C. (2019). 'Mafia capitale: il banco di prova dell'art. 416-bis c.p.', in *Dir. pen. cont., riv. trim.*, 6.

Grandi, C. (2016). 'The contribution of italian case law in defending the notion of "mafia"', in *Legislazione penale*. http://www.lalegislazionepenale.eu/wp-content/uploads/2016/11/internazionale_grandi_2016.pdf

Iannotti, G. (2020). 'Come cambia l'associazione mafiosa: le nuove organizzazioni autonome dai clan mafiosi storicamente operanti sul medesimo territorio', in *Il penalista*, 26.

Insolera, G. (1982). 'Considerazioni sulla nuova legge antimafia', in *Politica del diritto*, at 702.

Insolera, G. (2015). 'Guardando nel caleidoscopio. Antimafia, antipolitica, potere giudiziario', in *Indice penale*, 3, at 223. https://discrimen.it/wp-content/uploads/Indice-Penale-3-2015.pdf

Insolera, G. (2019). 'I delitti associativi', in Insolera G. & T. Guerini (ed.), *Diritto penale e criminalità organizzata*, 76. Torino: Giappichelli editore.

Latza Nadeu, B. (2017). 'In Rome Mafia Trial, One-Eyed Gangster and his 40 Thieves', *The Daily Beast*, November, 4.

Maiello, V. (2007). 'Ordine pubblico (delitti contro l')', in *Il Diritto, Enciclopedia giuridica del sole 24 ore*, X, Milano.

Maiello, V. (2016). 'Sulla pretesa riconducibilità del delitto di scambio elettorale politico – mafioso alla categoria di quelli "commessi avvalendosi delle condizioni previste dall'art. 416 bis c.p.",' in *Diritto penale contemporaneo*. https://archiviodpc.dirittopenaleuomo.org/d/4394-sulla-pretesa-riconducibilita-del-delitto-di-scambio-elettorale-politico-mafioso-alla-categoria-di

Manna, A. & A. De Lia (2020). "Nuove mafie" e vecchie perplessità. Brevi note a margine di una recente pronuncia della Cassazione, in *Archivio penale*. https://archiviopenale.it/nuove-mafie-e-vecchie-perplessita-brevi-note-a-margine-di-una-recente-pronuncia-della-cassazione/articoli/23846

Manzini, M. (2016). 'Cosa c'è di nuovo in Mafia Capitale? Un punto di vista giudiziario', in *Meridiana*, 87.

Martone, V. (2016). 'Mafia Capitale: corruzione e regolazione mafiosa nel «mondo di mezzo»', in *Meridiana*, 87.

Mazzantini, E. (2019). 'Il delitto di associazione di tipo mafioso alla prova delle organizzazioni criminali della "zona grigia". Il caso di Mafia capitale', in *Archivio penale*, 3. https://archiviopenale.it/il-delitto-di-associazione-di-tipo-mafioso-alla-prova-delle-organizzazioni-criminali-della-zona-grigia-il-caso-di-mafia-capitale/articoli/21755

Mazzantini, E. (2020). 'Il punto su "mafie delocalizzate" e impiego del metodo mafioso', in *Diritto penale e processo*, 9.

Merenda, I. (2021). 'Niente scorciatoie probatorie: anche per l'associazione "derivata" che opera nello stesso territorio va accertato il metodo mafioso', in *Diritto penale e processo,* 3.

Merenda, I. & Visconti C. (2019). Metodo mafioso e partecipazione associativa nell'art. 416 bis. Tra teoria e diritto vivente' in *Diritto penale contemporaneo*. https://www.penalecontemporaneo.it/upload/8846-merendavisconti2019a.pdf

Mete, V. & R. Sciarrone (2016). *Mafia Capitale e dintorni. Espansione criminale e azione antimafia,* in Meridiana, 87.

Mezzetti, E. (2020). 'Quel che resta di "Mafia capitale",' in *Discrimen.it. https://discrimen.it/quel-che-resta-di-mafia-capitale/*

Ninni, L. (2017). 'Aggravante del metodo mafioso: la Suprema Corte propone una sintesi degli elementi probatori rilevanti per l'integrazione della circostanza di cui all'art. 7 d.l. 152/1991', in *Diritto penale contemporaneo,* at 165. https://archiviodpc.dirittopenaleuomo.org/d/5594-aggravante-del-metodo-mafioso-la-suprema-corte-propone-una-sintesi-degli-elementi-probatori-rilevan

Ordaz, P. (2015). 'La mafia de Roma se sienta en el banquillo. Arranca el proceso contra la red que acaparaba los mejores contratos públicos de la ciudad', *El Pais,* 5 Nov.

Pelissero, M. (2010). 'Associazione di tipo mafioso e scambio elettorale politico-mafioso', in M. Pelissero (ed.), *Reati contro la personalità dello Stato e contro l'ordine pubblico,* 284 et seq. Torino: Giappichelli editore.

Pignatone, G. & M. Prestipino (2015). 'Le mafie su Roma, la mafia di Roma', in Ciconte, E., Forgione, M. & Sales, I. (ed.), *Atlante delle mafie. Storia, economia, società, cultura*. Catanzaro: Rubbettino.

Povoledo, E. (2014). 'Italy Gasp sas Inquiry Reveals', *The New York times,* 2 Dec.

Ridet, P. (2014). 'A Rome, le fléau de la corruption', Le Monde, 8 Dec.

Ridet, P. (2015). 'Avec le procès «Mafia capitale», Rome joue sa réputation', Le Monde, 4 Nov.

Ronco, M. (2013). 'L'art. 416-bis nella sua origine e nella sua attuale portata applicativa', in B. Romano & G. Tinebra (ed.), *Il diritto penale della criminalità organizzata,* 139. Milano: Giuffré editore.

Salviani, F. (2018). 'Il requisito della capacità di intimidazione necessario per il delitto di cui all'art. 416 bis c.p.', in *Cassazione penale,* 4.

Sergi, A. (2015). 'The Mafia Capitale Mega-Trial That Has Italy on Tenterhooks', Newsweek, 10 Nov.

Serraino, F. (2016). 'Associazioni 'ndranghetiste di nuovo insediamento e problemi applicativi dell'art. 416-bis c.p.', in *Rivista italiana di diritto e procedura penale,* at 264 et seq.

Sicignano, G.J. (2021). 'I delitti corruttivi nel contesto della criminalità organizzata', in Cantone R. & Della Ragione L. (ed.), *Diritto penale dell'antimafia,* 251. Pisa: Pacini.

Spagnolo, G. (1984). *L'associazione di tipo mafioso*. Padova: Cedam.

Sparagna, R. M. (2015). 'Metodo mafioso e c.d. mafia silente nei più recenti approdi giurisprudenziali', in *Diritto penale contemporaneo*. https://archiviodpc.Dirittopenaleuomo.org/d/4274-metodo-mafioso-e-cd-mafia-silente-nei-piu-recenti-approdi-giurisprudenziali

Turone, G. (2015). *Il delitto di associazione mafiosa*. Milano: Giuffré.

Ubiali, M.C. (2019). 'Sul confine tra corruzione propria e corruzione funzionale: note a margine della sentenza della Corte di cassazione sul caso 'mafia capitale',' in *Rivista italiana di diritto e procedura penale,* 2.

Vannucci, A. (2016). 'Tra area grigia e «mondo di mezzo»: anatomia di Mafia Capitale', in *Meridiana,* 87.

Visconti, C. (2015). *Mafie straniere e 'Ndrangheta al Nord. Una sfida alla tenuta dell'art. 416-bis* in *Diritto penale contemporaneo, rivista trimestrale*, 1, at 353. https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/visconti_1_15.pdf

Visconti, C. (2015b). *A Roma una mafia c'è e si vede…*, in *Diritto penale contemporaneo. https://archiviodpc.dirittopenaleuomo.org/d/4002-a-roma-una-mafia-c-e-e-si-vede*

Visconti, C. (2016). *"La Mafia è dappertutto". Falso!* Bari: Laterza.

Vitarelli, F. (2020). 'L'operatività del 416 bis cp in contesti non tradizionali: una tipicità liquida? risvolti pratici e persistenti questioni teoriche all'esito del processo "mafia capitale",' in *Legislazione penale*. http://www.lalegislazionepenale.eu/loperativita-del-416-bis-cp-in-contesti-non-tradizionali-una-tipicita-liquida-risvolti-pratici-e-persistenti-questioni-teoriche-allesito-del-processo-mafia-capitale/

Zuffada, E. (2017). 'Per il Tribunale di Roma "Mafia Capitale" non è mafia: ovvero, della controversa applicabilità dell'art. 416-bis c.p. ad associazioni criminali diverse dalle mafie "storiche",' in *Diritto penale contemporaneo, rivista trimestrale,* 11. https://archiviodpc.dirittopenaleuomo.org/d/5732-per-il-tribunale-di-roma-mafia-capitale-non-e-mafia-ovvero-della-controversa-applicabilita-dellart

Zuffada, E. (2021). 'Non-mafia Capitale: l'ultima parola della Cassazione', in *Giurisprudenza italiana*.

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 603-616

The Rise of the French Doctrine of Informed Consent: Criminal Responsibility for an Unauthorised Medical Experiment – The Case of the Antiquaille Hospital and Subsequent Notable Judgments

*By Anatoliy A. Lytvynenko**

The French doctrine regarding a patient's informed consent has a long and very rich history, dating back at least to the mid-nineteenth century. Medical malpractice had become a frequent subject of criminal trials and civil litigation against physicians and surgeons in the nineteenth and early twentieth centuries, resulting in French medical case law and its academic scholarship becoming one of the most prominent throughout all the civil law jurisdictions. Simultaneously, medical malpractice lawsuits were not rare in civil or common law jurisdictions. The uniqueness of French jurisprudence lies in the development of a robust body of case law, which formed the basis for patients' rights, and specifically informed consent and the right to medical data confidentiality. The right to informed consent is a reflection of the patient's right to their own bodily integrity, which may not be violated for the purpose of treatment, except in an emergency. Moreover, the rule of consent is even stricter if physicians are administering experimental treatment (which is not generally banned, as it may benefit the patient), or conducting certain methods of treatment for purely scientific purposes – as was in the case of the Antiquaille Hospital in Lyon, where a dangerous and experimental method of treatment was used to treat a ten-year-old minor suffering from dermatophytosis, which was not authorised by his guardians. The case, which was adjudicated by the criminal court of Lyon, is historically one of the first legal cases to deal with unconsented treatment conducted for the purpose of a scientific experiment. Over the twentieth century, similar legal cases became more frequent in France.

Keywords: *informed consent, medical experiments, patient autonomy, right to bodily integrity, medical law, French law.*

Introduction

The responsibility of physicians and hospitals for actions of malpractice is one of the oldest topics of medical law, based on the commonly accepted tenet that a patient has a right to seek legal redress from a physician and/or the hospital for damage, based upon the contract or tort between the two parties. At the same time, during the nineteenth century the patient-physician relationships remained quite

*Doctoral student at Baltic International Academy, Riga, Latvia (Department of Legal Sciences); Doctoral student at the School of Law at the Robert Gordon University of Aberdeen

paternalistic, and occasionally the courts were even unable to reach a proper conclusion regarding the characteristics of the patient-physician relationship.[1] Nineteenth-century French legislation did not provide any special liability of doctors and nurses (except for the Professional Secrecy Obligation, protected under Art. 378 of the Penal Code), and general malpractice terms were attributed to them.[2] During earlier periods, they could be found guilty of Art. 311 or 319/320 of the Penal Code, but later the courts primarily attached civil liability on the basis of Art. 1382-1383 of the French Civil Code, which was attributed to more "moderate" negligence.[3] In order to be found criminally negligent, the physician's negligence had to involve gross disregard of the existing rules of the medical profession and the patient's health condition, causing serious injuries to the patient, displaying ignorance that is incompatible with the possession of a doctor's diploma.[4] Despite French courts have firmly affirmed that doctors are liable for their malpractice from a relatively early date,[5] the jurisprudence relating to medical liability during the Regime Ancien did not form an adequate body of case law (some parliaments could find a doctor liable for negligence or application of dangerous methods of treatment, while the others found that physicians could not be liable for negligence or medical errors occurring in the course of practicing their profession).[6] However, the inconsistence in the courts' position relating to the issue of doctor's liability, as such, was entirely abandoned in the first decades of the nineteenth century – medical practitioners, nurses and midwifes could be found to be liable for negligence, had they been in fault. Receiving compensation for a doctor's faulty actions (even in cases which resulted in a conviction and included a fine and occasionally several days of imprisonment) did not create any actual rights for the patient, at least not as we define patients' rights at present. In fact, patients' rights as we know them today could only develop from malpractice actions involving the patient's *will*. In 1982, the Federal Supreme Court of Germany, adjudicating a case concerning the plaintiff's right to access his medical record, claimed that the patient should not be regarded as a mere object of treatment,[7] a foundational idea upon which the doctrine of patients' autonomy is based.

Since we are dealing with a very unusual case, I would rephrase this claim in the following way: the *patient should not be regarded as a mere object of treatment in the course of a scientific experiment*. Experimental treatment methods could be applied if they are highly likely to benefit the patient, and if the development of medical science is contingent on the implementation of experimental methods, but they should be reconciled with the patient's will, or "*informed consent*," as it became known by the mid-twentieth century. Long before the case of *Salgo v.*

[1]*Reichsgericht*, III Strafsenat, Urt. v. 31.05.1894.
[2]*Morin* (1856) at 192-193.
[3]See, e.g. *X*. c. *B*.
[4]*Peyronnette c. Dr. Cormon*.
[5]The 1830 case of *Foucault c. Helie* was reported also in Labraque-Bordenhave (1879) and in Briand, Chaude & Bouis (1869); as well as in Dalloz Methodique, Vol. XXXIX (39), at 316-317
[6]Labraque-Bordenave (1879) at 196-197
[7]*Bundesgerichtshof*, 23.11.1982; VI ZR 222/79, para. 15-16.

Leland Stanford etc. Bd. Trustees (1957) was adjudicated,[8] French courts were using the terms "*a duty to warn*"[9] (referring to the doctor's duty to warn patients of the possible consequences of a certain method of treatment), or a "*free and informed consent*"[10] (referring to the requirement that the patient's consent be obtained before any medical intervention, including clarification of the planned procedure and, occasionally, its possible negative implications). A "duty to warn" is mentioned and discussed by Rene Demogue in his sixth volume on the treaty of obligations, which confirms the fact that the natural elements of informed consent were not only known in occasional court reports, but in respected legal doctrine as well.[11] In his doctoral thesis on the civil liability of the physicians, Abel also discusses the doctor's obligation to warn the patient of the hypothetical hazardous effects of a potentially dangerous medical intervention, referring to the existing case law in order to provide examples of how the courts dealt with the issue at the time.[12] based on these books, we may conclude that by the first part of the twentieth century, French medical law was an elaborate body of doctrine, law and jurisprudence and already possessed all the concepts of contemporary medical law.

The French counterparts of the Salgo case are considerably older, and the wording of the court reports lead to the conclusion that the French courts did *not* directly refer to a basic consent to medical intervention (predominantly, a surgical one), but rather to a far more "intelligent" one, in the same fashion as the California Court of Appeals did several decades later. The case I am referring to, the trial of *Guyenot and Gailleton* (as entitled in the official court report),[13] known also in Boucard's brochure of the case materials as "*The Case of the Antiquaille Hospital*," was adjudicated in 1859 by the criminal court of Lyon, contributed much to the French doctrine of informed consent. The case of *Dechamps* (1889-90), adjudicated first by the civil court of Liege, Belgium and appealed at the Court of Appeals of Liege, provided the next milestone judgment on this matter.[14]

Aims of the Paper and Research Methods

Although the judgment at the core of this paper is quite old, it perfectly illustrates the uniqueness of the French medical jurisprudence at its beginning, as it already provided a legacy not only on the subject of informed consent, but also on the issue of unauthorised medical experiments. This was very unusual for nineteenth-century case law, which provided the basis for medical law. Thus, this paper strives to acquaint the reader with the vaults of French medical law and the inception of the concept known as the patient's rights, which developed from a resonant judgment handed down in Lyon. This is arguably the first medical

[8]*Salgo v. Leland Board etc. Trustees.*
[9]*Chini c. Coconni; B. c. G.*.
[10]*Consorts Chavonin c. K.*; *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne.*
[11]Demogue (1932) at 186-187 (Ch. 1)
[12]Abel (1936) at 123-134.
[13]*Min. Publ. c. Guyenot et Gailleton.*
[14]*Demarche c. Dechamps.*

malpractice case featuring an experimental method of treatment that was applied solely for the necessity of medical science, and published in a professional scientific journal. I use the term "arguably" as an earlier English case, known as *Slater v. Baker and Stapleton*, had some similar characteristics, but is also considerably different, since the defendants rebroke the plaintiff's leg to apply a new means of treatment, and not for the specific purpose of publishing their new method of fracture treatments in a scientific article.[15] Thus, the "*Case of the Antiquaille Hospital*" may be rendered as the first case regarding an unauthorised medical experiment, conducted solely for the advancement of medical science.

This paper follows a historical-legal approach, and discusses a historical judgment that had a considerable impact on the future developments of French medical law and the evolution of pattients' rights. Historical jurisprudence should never be underestimated, as the foundation of the patient's rights is stringently valuable for the concept of the patient's autonomy and its vaults.

Literature Overview

"The Case of the Antiquaille Hospital" was not only featured in a court report in *Dalloz Periodique*, in which most of French (and occasionally foreign) judgments were published,[16] but was discussed in a brochure published by Boucard (1860), featuring additional facts regarding the case, including the speeches of the Attorney General (*Avocat Imperiale*) and counsel for defendant.[17] The journal *Revue de Therapeutique médico chirurgicale* (1860, [1]) also featured a paper containing the minutes of the case and the defence counsel's argument.[18] This judgment has been mentioned throughout the modern literature on the subject, for example in the works of Monnier[19], Azenkot[20], Beviere-Boyer in his work on medical research involving minor patients,[21] Memeteau[22] and Bernelin in her doctoral thesis.[23] Regrettably, the case facts and the judgment materials were not illustrated in the aforementioned works in much detail. It is this lacuna that the present paper will attempt to fill.

In their discussions of medical law, neither Boucard's contemporaries nor the next generation of French legal authors alluded to this judgment within the context of the civil or criminal liability of doctors and other medical staff for harming their patients. For instance, Labraque-Bordenave (1879) mainly discussed the "*Domfront case*"[24] and the responsibility of the physicians in the times of the

[15]*Slater v Baker & Stapleton*.
[16]*Min. Publ. c. Guyenot et Gailleton.*
[17]Boucard (1860).
[18]Anonymous (1860).
[19]See Monnier (2001) at 383-402, and 385-386.
[20]Azenkot (2001).
[21]Beviere-Boyer (2010) at 32.
[22]Mémeteau (2012).
[23]Bernelin (2017) at 67.
[24]It is a nickname for the case of *Foucault c. Helie*. This judgment was not once mentioned by contemporary authors.

Ancien Regime, where the existing case law was frequently inconsistent and the courts did not always acknowledge that physicians could be liable for negligence.[25] Labori, Schaffhauser & Duparcq mentioned the case in a treatise on criminal law while examining the issue of the victim's consent to a crime committed against her.[26] Demogue cites this judgment in his discussion of the liability of physicians whose acts, involving a dangerous medical intervention, are not aimed at curing the patient, but rather at "removing a physical imperfection." He refers to "The Case of the Antiquaille Hospital," claiming: "It is still the same if the physician indulges in hazardous [clinical] trials, not to cure, but for the purpose of study [i.e. research]."[27] The case was also briefly mentioned in Petit's paper on medical liability.[28]

Finally, it is important to note that the case note of the *Dechamps* appeal in 1891, also appearing in the *Dalloz Periodique*, discusses the case under discussion, citing earlier examples of medical malpractice cases where the consent of the patient was the main issue or was implicitly meant to be as such.[29]

Case Facts

In early December 1858, a 10-year-old (11 according to Boucard's brochure) minor, identified by the initial B. (the court report in *Dalloz Periodique* used the name 'Bouyon'), entered the Antiquaille hospital in Lyon to be treated from dermatophytosis, affecting his entire scalp. He was conservatively treated for a period of a month, without success. On January 7, 1859, Guyenot, a young intern at the venereal department, asked Gailleton, the head of the department, for permission to give the boy a "syphilitic" inoculation, which was an inoculation consisting of a mucoid plaque. The head of the department authorised him to do so, and later he administered four injections to the patient's right arm. No result was seen until February, when two superficial ulcerations (2mm in diameter) appeared, and in March roseola appeared on the boy's trunk. An anti-syphilitic treatment was instituted, but the symptoms disappeared after six days (or around ten days, according to the trial brochure), and the anti-syphilitic treatment was terminated. By April, the boy's condition improved. The boy felt good and the ringworm disappeared by August. The experimental method of treatment was described by Guyenot in a weekly Paris newspaper (*Gazette hebdomadaire de Paris*, 15 Avril 1859). The young doctor claimed that the boy was not hurt by the procedure and was doing well.

The public prosecutor learned of this errant procedure and instituted proceedings for battery. He stated that the procedure had been implemented

[25]Labraque-Bordenave (1879).
[26]Labori, Schaffhauser & Duparcq (1896) at 609 (para. 55-56).
[27]Demogue (1932) at 186-187.
[28]Petit (1912) at 139.
[29]See the case report of *Dechamps c. Demarche* in Dall. Per. 1891 II 281. Note that both the first and second-instance court reports with supplementary notes were published in diverse books and periodicals, and the supplementary note text also varied.

strictly out of pure scientific curiosity. M. Roe, the Imperial Advocate, claimed that while the right to experiment with healing methods was acceptable, it should only be applied in order to advance a patient's recovery: "such as an employment of a new [treatment] method when all the other means have been employed." The advocate also believed that possession of an advanced scientific title (e.g. a doctorate) was required in order to administer an experiment legitimately. Lastly, the advocate claimed that when an experiment has another goal other than just treating the patient's condition, the patient's consent must be obtained.[30] After having stated these assumptions, the Imperial Advocate reproached the accused Guyenot for experimenting without possessing a scientific doctorate and without having an actual goal to cure the patient. The Public Prosecution found that the doctor's acts contained elements of wilful injury – either by administering the injection itself or based on its consequences.[31] the Imperial Advocate assumed that the defence might claim lack of malice (which he objected to in his position later) and added that this failed to take into account the position of the patient, who was not interested in participating in such an experiment. Thus, the Imperial Advocate claimed that by conducting such an experiment, Guyenot was attempting to augment his medical reputation rather than acting in the interest of the patient. He also stated that the senior physician, Gailleton, was complicit in the offence, as he knowingly allowed the young doctor to conduct such an experiment on a child under his care.

The Position of the Counsel for Defendant

According to Boucard's Brochure, Mr Royer, counsel for defendants, put up various arguments.[32] First, the counsel presented a consultative summary endorsed by three surgeons and the Head of the Hospitals from Lyon, as well as two Antiquaille doctors. The summary claimed that the eleven-year-old boy entered the hospital with dermatophytosis, covering the entire scalp, which had lasted several years. The doctors claimed that the minor was in a state of chloroanemic cachexia and debility, suffering from mycobacterial cervical lymphadenitis, but after a course of treatment he gained weight and his health gradually improved. The summary also reiterated the course of treatment after the inoculation (see above). The doctors considered the boy's health as "flourishing" and simply incomparable to his previous condition of health, and they found the treatment to be successful, stating that it was not possible to have restored the boy's health "better or quicker." According to Royer, the treatment process lasted eight months and its results were exceptional. He also claimed that the doctors' acts should not be considered to be "assault and battery" and ascertained that it was absurd to speak of any malice on the part of the doctors. Regarding the patient's consent, Royer said that Mr Gailleton believed that "*this consent is, in reality, illusory; that the patient of the hospital will always consent to what [treatment] is offered to him*

[30]Boucard (1860) at 4; *Dall. Per. 1859 III 87*, p.p. 87-88
[31]Boucard (1860) at 4; *Dall. Per. 1859 III 87*, 87-88
[32]Boucard (1860) at 6 et seq., *Dall. Per. 1859 III 87*, 87-88

– *without any [possibility] to be able to calculate the consequences ... let him trust in the science of the doctor.*"[33] The counsel for the defendants concluded that 1) the treatment was harmless; 2) the treatment by analogy was applied; 3) the result was highly efficient. He pleaded for acquittal.[34]

The Judgment and the Court's Inferences

The court discussed the main facts of the case and summarised the position of the counsel for the defendant as follows: 1) the incriminating facts, upon his view, do not constitute an offence; 2) the means applied by the doctors were not purely for experimental purposes, as primarily they wished to cure the patient, and only as an incidental aim, to resolve a controversial issue of medicine. 3) the doctors had no malicious intent and did not wish to harm the boy. The court responded to these issues as follows:

1. The law applies a generic definition in order to define an act of "battery." This includes any lesion, even a small one such as the prick of a needle, affecting an individual's body.
2. The rights and obligations of the doctors towards science have their limits, and should never come before the rights of the patient. It is acceptable for the physician to treat the patient with a new method, if curing the patient is the only goal of applying the experimental method of treatment. The court, however, did not find that this was the situation in this case. The court believed that the doctors' main goal was to resolve a medical question by means of an experiment, seeking to determine if the manipulation they performed could possibly lead to a cure. The court also recalled that Guyenot admitted that he could not predict the results of the inoculation he had administered. Therefore, the Court inferred that the defendants could not maintain that they wanted to treat the patient by a curative method, of which they were not convinced themselves.
3. The Court stated that it is not necessary for the offender to act maliciously or with hatred and revenge in order for his actions to constitute an offence. In this case, it was sufficient for the defendants to act knowingly, attempting to resolve a scientific issue by taking the risk of causing harm (which obviously existed). The Court also noted that analogous experimental treatment, if carried out elsewhere, would not legitimise what had occurred at the Lyon hospital. The court found Guyenot and Gallieton liable – Guyenot for battery (Art. 311 of the Penal Code) and Gailleton for complicity. They were fined FRF100 and FRF50 respectively.[35]

According to the *Dalloz Periodique (Vol. 1859, p. III)*, the general guidelines resulting from this case are as follows:

[33]Boucard (1860) at 12
[34]Boucard (1860) at 13-14
[35]*Dall. Per. 1859 III 87*, 87-88

1. The court may presuppose that any lesion caused by a surgical instrument that affects the patient's body or health, even slightly, constitutes an "injury" (Art. 311 of the Penal Code). This includes an injection or its consequences.[36]
2. To establish the criminal character of the battery, it is not necessary for the health care provider to act with malice, revenge or hatred. It is sufficient that 1) he acted without a right to do so; 2) he acted with full knowledge of the facts; 3) he acted with a specific aim to conduct a scientific experiment.
3. The provisions of the criminal code attributed to assault and battery could be applied in this case (as a "casuistic" interpretation).
4. Consent of the person to an act of battery, in any form, does not exonerate the health care provider.
5. Physicians may use experimental curative methods only for the treatment of patients, and not for the purpose of resolving a specific medical question. Depending on the circumstances of the case, such action may give a rise to a lawsuit for battery.

Aftermath

Another important milestone of the French law regarding patients' rights is the case of Dr Dechamps (1889-1890). A three-year-old child with a leg curvature was brought to a Liege hospital for corrective surgery. The doctor performed an (unconsented, according to the plaintiff)[37] osteotdalomy, after which gangrene set in, causing the foot's subsequent amputation. Interestingly, the defendant himself did not recommend that such an operation be performed on children under the age of six, which was taken into account by the trial court, though the appellate court claimed that the courts must not interfere in the application of the treatment methods, but should assess the possible imprudence of the doctor.[38] Having lost at the trial court, Dechamps appealed, claiming he could prove that the child's relatives had given their consent to the procedure, and he was not at fault. The respondent also claimed that the operation was badly performed, and the gangrene occurred owing to negligent postoperative care. Before allowing the appeal lodged, the court let the litigants to prove their claims by witness testimony.[39] This judgment elaborated on or confirmed a number of principles:

1) Surgery performed on a patient is valid only upon his own consent, and where a patient may not consent due to being incapable of doing so, upon the authorisation of his legal representative or guardian.
2) Consent is not required in urgent situations.

[36]See also Boucard (1860) at 4.
[37]*Dechamps c. Demarche.*
[38]See the case reports in: Dall. Per. 1891 II 281, 282 and Recueil Sirey 1895 II 237, pp. 237-238 (featuring the Dechamps case report in a different judgment case note, and a trial/appellate court report synthesis in Dall. Per. 1891 II 281, p. 281-283).
[39]*Belgique Judiciaire* 1891.699, at p. 701; Dall. Per. 1891 II 281, 283

3) The physician does not need to go into details concerning the technical features of the operation, it is enough for him to give a short explanation of the name of the procedure/operation, and the reason it is being performed (later, however, French courts extended this rule).
4) If a patient seeks advice for medical assistance, or is admitted to a hospital, it does not mean that he automatically consents to all treatment and procedures that a doctor may advise him to undergo.
5) The physician is not liable for applying any method of treatment, and the courts should not interfere in this aspect; the doctor is liable for imprudence or carrying out his duties contrary to the rules of the medical profession, and the courts are to assess this imprudence, had it occurred.[40]

Dechamps was the first of a chain of cases, where the lack of a patient's consent (and frequently, the failure of the doctor to warn the patient of the possible consequences of a surgical operation, manipulation or specific treatment procedure) constituted acceptable grounds for commencing a medical malpractice action based on Art. 1382-1383 of the Civil Code. In fact, experimental methods of treatment, though not always being purely scientific experiments, resulted in a multitude of legal actions against physicians, with diverse outcomes.

The Antiquaille Hospital Case had a substantial impact on the further development of jurisprudence on the subject of patients' rights. The judgment is stringently cited in the *Dalloz Periodique (Vol. 1859), Part III* note on the *Dechamps* appeal,[41] whereas the *Journal des Tribunaux* version of the trial's court report refers only to Belgian precedents, none of which involved the issue of unconsented surgery.[42] Tart (1894) made a number of statements regarding the patient's consent and the issue of experimental treatment (even though the text mainly concerned *Dechamps* and did not cite *The Antiquaille Hospital Case* directly): "*A doctor does not have the right to carry out experiments upon his patient. In order to [emphasise] this, I mean that any experimental research for the purpose of curiosity or scientific interest, is strictly prohibited. The patient's health is the measure of both the doctor's rights and his duties. The doctor's exclusive mission is to try to heal [the patient]; any act which goes beyond this limit becomes immediately illegal, and must be avoided*."

Tart emphasised that the doctors may use experimental methods of treatment if these could benefit the patient, and even relatively dangerous methods of treatment and medications could be justifiably applied in the course of healing, if they are implemented to save the patient.[43] The allusion to any experimental treatment implemented for the sole aim of conducting research is sufficiently comparable to *The Antiquaille Hospital Case*, as the defendants were convicted of exactly such acts.

Tart's position, and the position of the Lyon criminal court in the case of the Antiquaille Hospital, was upheld in both doctrine, jurisprudence and the judgment

[40]See summary of the *Dechamps* case facts reported in: Dall. Per. 1891 II 281
[41]See report of the *Dechamps* appeal in Dall. Per. 1891 II 281, 281-282
[42]See the Dechamps case report in Journal des Tribunaux (Bruxelles) Vol. IX (1890) at 5-7
[43]Tart (1894) at1070-1072.

notes supplied in periodicals. It was commonly known that a physician may not use his patient as a "test subject," as doing so would construe civil liability.[44] A very interesting case occurred in France in the 1930s, featuring a wrongful death suit brought by the heirs of Pierre Chavonin, who sued the defendant, Dr L., for negligence. Pierre Chavonin,[45] who suffered from obliterating arteritis, came to the defendant in December 1932 for a consultation. Following, he recurrently underwent radiotherapy treatment until May 1933. In November 1933, Chavonin was summoned to the hospital again, though the purpose of this visit is unclear. According to the facts, Dr L. was visited by two interns who were studying the diagnostics and treatment of obliterating arteritis by means of arteriography, and they asked him if he knew of any patients suffering (or who had suffered in the past) from the said ailment. He told them that he treated Chavonin around a year earlier, and that Chavonin was about to come to the hospital. The expert conclusions following Chavonin's death stated that he had not requested medical care nor a medical examination since May 1933, and was summoned to the hospital by Dr L only at the request of the two abovementioned interns, "in order to serve as a subject of observation for the said specialists." Their experiment failed and had fatal consequences. A short while after he visited the hospital, Chavonin developed severe pains and later gangrene, resulting from the obliteration of the artery where they injected the opaque. The patient died in the first days of December 1933. Later, Dr L. alleged that the gangrene developed as a consequence of the ailment Chavonin was suffering from earlier, in 1932-1933,[46] but the experts' conclusion stated there was a causal link between Chavonin's death and the experiment that the interns had conducted on him.

The court determined that under the doctrine established by case law and literature, a doctor who experiments with a remedy or new method of treatment on a patient unnecessarily and without his free and informed consent, is committing professional misconduct. Dr L. summoned Chavonin to undergo radiography, a procedure that did not involve anything hazardous to his health, and did not mention an injection of opaque (which is used for performing arteriography). Nor was it established that the two young men, the interns, had expressed to Chavonin their intention to conduct the medical experiment, or warned him of its possible dangers, or even merely obtained his consent. Dr L. admitted to being at fault for everything that had occurred and did not argue that he was not responsible for the acts committed by the interns. He also did not deny that he had summoned Chavonin to the hospital in order to facilitate the research of the two interns. The court also found that the interns had committed a fault by conducting such an experiment, which Chavonin had never requested nor agreed to, nor was it necessary for him to undergo. Dr L. was found to be responsible for the death of

[44]See, for instance, *Epoux R. c. Docteur P.*

[45]As it was later revealed by the court, Chavonin was an employee of an industrial firm, married, and a father of five, two of which were minors at the time of the proceedings. Despite the fact that his exact age was not stated, he seemed to be around 50 years old.

[46]See also the report of the case in Dalloz Periodique (1936), Part. II, p. 9-13, where the details of the autopsy examination are described in detail.

the patient and required to pay out FRF100,000 in damages.[47] The doctor filed an appeal, which was unsuccessful. The Paris Court of Appeals confirmed the facts established by the court of Seine, i.e. that Chavonin was in relatively good health after he received treatment in early 1933 and did not require any medical treatment at the time he was summoned to the hospital. The experiment obviously did not have curative goals, but was performed merely for scientific research, and thus the head of the department should be held liable for the incident.[48] Additional facts and a substantial supplementary note on this judgment can be found in the *Dalloz Periodique* version of the trial court judgment report.[49]

While previously the term "free and informed consent" ("*consentement libre et éclaire*") was used in contexts unrelated to medical law, such as issues of marriage, family and contract law, the *Chavonin* case is the first judgment in which the court used this term in the context of a patient's consent to a surgical or other medical intervention, examination or experiment. Thus, we may determine that "informed consent" in its broad sense (see above) is a French law innovation, established both in case law and doctrine, relating to various aspects of the doctor's duty to inform the patient of the proposed medical treatment, its methods and possible dangerous side effects.

The subject of experiments on humans is still discussed within French case law at present. In a 2012 judgment, the Administrative Court of Appeals of Paris annulled the decision of the Biomedicine Agency allowing the National Institute of Health and Medical Research to implement a research protocol on embryonic stem cells used for modelling facio-scapulo-humeral muscular dystrophy. This was because it was not established that there was no alternative method to conduct this research, which was the only justifiable argument that would deem the proposed protocol legitimate. Upon the appeal of Jereune Lejeune Foundation, the Administrative Court of Appeals quashed the judgment of the first-instance administrative court.[50]

Conclusions

The doctrine of informed consent seems to be well-established and researched. At the same time, there are many rare and lesser-known judgments on the subject, occasionally represented by academic literature. This paper strives to represent an alternate, more civil-law approach to the gist of informed consent and the origination of it in the legal system of France, which, at present, is one of the most elaborate in respect to medical law and the patient's rights, and has been such for over one hundred years. Despite the fact that consent to medical treatment was a rare subject of litigation in the late nineteenth and early twentieth century in countries with a more paternalistic view on medicine, the opposite was true for France and Belgium, where a multitude of medical malpractice cases already

[47] *Consorts Chavonin c. K.*
[48] *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne.*
[49] *L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne.*
[50] Case nr. 10PA0582.

existed. The focus of this paper, *The Antiquaille Hospital Case*, provides an example not only of negligence or assault by implementing an unconsented operation, but deals with an unconsented operation conducted solely for the purpose of a medical experiment on a minor. If we accept that the Fourth Generation of Human Rights in respect to medical law encompasses the issues of medical research and experiments on human beings, then *The Case of the Antiquaille Hospital* in 1859 may be considered its inaugural event, as the physicians' actions were specifically meant to obtain information within the framework of medical research, which was published in a local scientific journal. While the *Chavonin Case* (1935-1937) resembles the circumstances of the Case of Antiquaille Hospital in principle, its consequences were more deplorable for the patient. Similar judgments are of great value to the evolution of medical law, especially in civil law jurisdictions. While this paper represents only a fragment of the evolution of the informed consent doctrine in French medical law, the author intends to continue to delve into the doctrine of informed consent in French law, especially regarding *Dechamps* and the resultant judgments, which provided the basis for the concept of "informed consent" in modern French law.

References

Abel, B. (1936). La responsabilité civile des Médecins. Ph.D. Thesis. Université de Nancy, Faculté de droit. Nancy, Imprimerie Georges Thomas.

Anonymous (1860). 'Poursuites dirigées contre deux médecins à l'occasion d'inoculation syphilitique' in *Revue de thérapeutique medico-chirurgicale* pp. 23-28.

Azencot, S. (2001). *Le consentement du patient en médecine générale: au-delà de la jurisprudence quelle place en pratique quotidienne*. Sciences du Vivant [q-bio].

Bernelin, M. (2017). Les sources du droit de la recherche biomédicale en France et au Royaume-Uni, étude comparative du concept de légitimité / The Regulation of Biomedical Research in France and in the United Kingdom: A Comparative Study of the Concept of Legitimacy. Doctor of Philosophy (PhD) thesis, University of Kent, Université Paris Nanterre, France. [In English & French]

Beviere-Boyer, B. (2010). *L'intégration du mineur au processus décisionnel de sa participation à la recherché, Master 2* "*Recherche en Ethique*".

Boucard C.-V. (1860). *Inoculation d'accidents secondaires syphilitiques: [affaire de l'Hospice de l'Antiquaille]*. Lyon.

Briand J., Chaude, E. & J. Bouis (1869). *Manuel complet de médecine légale* & *Traité élémentaire de Chimie légale. 5ed.* Éditions J. Baillière & Fils.

Demogue, R. (1932). *Traité des obligations en general*, Tome VI. Paris: Bibl. A. Roussea [In French]

Labori, F., Schaffhuaser, A. & A. Duparq (1896). *Répertoire Eencyclopédique du droit Français*, T. 2. Paris.

Labraque-Bordenave, P. (1879). *De la responsabilite des medecins dans la pratique de leur art*, France Judiciaire Ann. 1879, p. I, p. 196-200.

Mémeteau, G. (2012). "La loi peut-elle contrôler la validité du consentement?" La lettre del'Espace de Réflexion Éthique, Publication du CHU de Poitiers.

Monnier, S. 2001. *La reconnaissance constitutionnelle du droit au consentement en matière biomédicale*, Revue internationale de droit compare /Année 2001/53-2 pp. 383-402. [In French]

Morin, A. (1850). Répertoire général et raisonné du droit criminel: où sont méthodiquement exposées la législation, la doctrine et la jurisprudence, Tome 1. Paris: C.-A. Durand, libraire-editeur.

Petit, M. (1912). 'De la Responsabilite Medicale', Archives d'electricite medicale (25.6.1912). [In French]

Tart, I. (1894). 'De la responsabilite des persones. Art du guerir'. (20 July 1894). *La Belgique judiciaire. Gazette des tribunaux belges et étrangers. 1891*. Alliance typographique, Bruxelles.[In French]

Cases

Germany

Reichsgericht, III Strafsenat, Urt. v. 31.05.1894, Rep. 1406/94 = ERG St. S. Bd. 25. S. 375, 380–382

Bundesgerichtshof, 23.11.1982; VI ZR 222/79, para. 15-16

France

Chini c. Coconni, Cour d'Appel de Aix, 22 October 1906, Dall. Per. 1907 II 41, 42-44 *and note*;

B. c. G., Cour d'appel Douai, 10 juillet 1946, Dall. Ann. 1946.351, 351-353.

Case 10PA0582, Cour administrative d'appel de Paris, 3-ème chambre, 10/05/2012.

Consorts Chavonin c. K., Admin. d'assistance Publique et soc., des laboratoires Thorande, Trib. civ. de la Seine (1 Chambre), 16 mai 1935, Dall. Heb. 1935.390, 390-392; Dall. Per. 1936 II 9 (first instance).

Dechamps c. Demarche, 27 Nov. 1889, Trib. civ. de Liege; Cour d'appel Liege, 30 juillet 1890, reported in: Journal des Tribunaux (Belge) 1890 (Vol. IX), p. 5-7 (trial court report); Revue judiciaire (Lausanne), Anno 1890, p. 85; Pasicrisie 1890 III 83, 83-85 (trial court); Pasicrisie 1891 II 78, 78-80 (appeal); Dall. Per. 1891 II 281 (appeal); Recueil Sirey 1895 II 237 (concise case report); Belgique Judiciaire 1890.471 (trial court); Belgique Judiciaire 1891.699 (appeal).

Epoux R. c. Docteur P., Cour d'Appel Lyon, 27 juin 1913, Gaz. Du. Pal 1914 I 506, 506-507.

Foucault c. Helie, Trib. civ. de Domfront, 28 septembre 1830, Dall. Meth. Vol. XXXIX (39), at p. 316-317 (printed in 1858).

L. c. Consorts Chavonin et Cie des produits chimiques de la Sorbonne, Cour d'Appel de Paris, 1 Chambre, 11 mai 1937, Dall. Hebd. 1937.340, 340-431 (appeal).

Min. Publ. c. Guyenot et Gailleton, Trib. corr. de Lyon, 15 dec. 1859, Dall. Per. 1859 III 87.

Peyronnette c. Dr. Cormon, Trib. corr. de la Seine, 20 juillet 1907, Pan. Fr. Per. 1910 II 153, 153-155.

X… c. B…, Cour de Cass, Ch. Req., 21 juill. 1862, Dall. Per. 1862 I 419, 419-420.

United Kingdom

Slater v Baker & Stapleton, 2 Wils. K. B. 359, 360-363 (1767).

United States of America

Salgo v. Leland Board etc. Trustees, 154 Cal. App. 2d 560, at p. 578-579 (1957) [Civ. No. 17045. First Dist. Div. One. Oct. 22, 1957].

Athens Journal of Law - Volume 7, Issue 4, October 2021 – Pages 617-634

Crucial Issues with Legal Protection of Consumers Human Rights when Banks unilaterally Close Accounts

By Aleksejs Jelisejevs[*]

When unilaterally closing a customer's account due to so-called de-risking, the customer's interests are not only ignored by the bank but their human rights, including respect for his private life and presumption of innocence, are also severely violated De facto, de-risking stigmatizes discarded consumers as being involved in criminal activity without a court conviction. As a result of the unfair account closure, both the consumer's social and psychological integrity can suffer. Their rights to establish and develop relationships with other human beings and the outside world and respect for reputation are put in jeopardy. In order to overcome the above collision of interests, this study proposes a doctrinal assessment of consumer's interests that should limit the bank's right to unilaterally terminate the contract by the systemic and teleological interpretation of regulating rules in combination with the general civil principle of good faith. By analogy with the original source of the problem, this tool has been called the "Good Faith-Based Approach". Therefore, in view of states' affirmative obligations under the European Convention on Human Rights, this research shows that the consumers' conflicting interests should take priority in legal protection until the consumer's involvement in money laundering and terrorist financing is established and proven. A certain level of restrictions imposed on the consumers' fundamental rights could be considered justifiable to prevent money laundering as long as the business relationship with the bank continues. However, when rupturing contractual relations within the de-risking paradigm, only close adherence to the good faith principles can guarantee that the bank's rights are not applied by the bank formally and unreasonably, that is, against the sense, meaning, and goals established by the regulating authorities or contrary to the general idea of law.

Keywords: *Good faith, De-risking, Bank account closure, Unilateral termination of contract, Human rights*

Introduction

Over the past years, large-scale bank account closure has acquired a systemic character and become an absolute public problem. While the cause of banks' actions could originate from a complex combination of factors, herein, money laundering risks clearly prevail. On the whole, the overzealous account closure is motivated by a Risk-Based Approach was introduced by the Financial Action Task Force (FATF) and included in financial sector regulations for almost all states,

[*]PhD Candidate in Law Science, Turība University, Riga, Latvia. E-mail: aleksejs@jelisejevs.lv.

including the EU and Latvia as well. In short, it implies anti-money laundering (AML) measures and combating the terrorism financing (CTF) risks to ensure the mitigation of these risks.

At the same time, unfortunately, this approach most often leads to so-called "de-risking," defined as an action taken by a payment service provider to avoid risk or, in practice, as the action is taken without assessing considering alternative avenues to mitigate this risk. Simply put, it means that banks are closing accounts at any hint of risk instead of trying to minimise this risk.

From the viewpoint of legal regulations, in this case, we are talking about the unilateral termination of the payment account contract by the bank against the will of the payment service user. And, of course, legal rules allow banks, like any other private business, to choose their customers[1].

This problem is recognised at various levels. For example, the Australian professor of law Louis de Koker, who specialises in these matters, notes that "de-risking is a situation when the bank may reduce risk by closing accounts while actually increasing the risks for society"[2]. Adam Szubin from US Treasury formulated that "de-risking is problematic. Financial institutions terminate relationships without careful examination of the risks. They do not use available tools to manage them"[3]. Latvian politicians and statesmen recognise this issue as well. Mārtiņš Kazāks, the president of Bank of Latvia, has admitted that in many cases Latvian banks are choosing not to manage risk but to avoid it[4]. Prime Minister Krišjānis Kariņš notes - the Latvian financial sector should start to focus more on risk management than to avoid any risk[5]. At last, the FATF has concluded that "De-risking should never be an excuse for a bank to avoid implementing a risk-based approach, in line with the FATF standards"[6].

As we can see, most of this discussion is political, financial and commercial. But few stakeholders have analysed the legal side of this question. In general, the "thought leadership" monopoly on this legal issue has been established by the banks, who were convinced that they are free to act as they wish. On the other hand, the doctrine on this matter is silent, and the universal case-law has not been formed yet. That is why it is critical to attempt to establish a scientific method to protect the rights of payment service consumers when banks unilaterally terminate account relationships.

Although the EU authorities have attempted to protect consumers' interests from arbitrary actions of banks, including a directive to guarantee of access to payment services via accounts with basic features, the human rights of the consumer, who has been rejected by the bank, remain deadlocked in the formal application of the legal norms that allow the banks to terminate their contractual relationships with a customer as long as they simply give proper notice. In order to

[1]See, for example, the two UK cases of Dahabshiil Transfer Services Ltd v Barclays Bank Plc and Harada Ltd and another v Barclays Bank Plc.
[2]De Koker, Sindh & Capal (2017) at 119.
[3]Adam Szubin (2016).
[4]Kazāks (2020).
[5]Kariņš (2020).
[6]FATF (2014).

overcome the above collision, I am proposing a doctrinal approach according to which the bank's right to withdraw from the contract unilaterally should be limited by the systemic and teleological interpretation of regulating rules in combination with the general civil principle of good faith which, by analogy with the original source of the problem, is called "Good Faith-Based Approach"[7].

Under the general principle of good faith, everyone should exercise his subjective rights considering the reasonable interests of others. In my previous research, I have tried to frame general measures of my Good Faith-Based Approach for these issues as follows: 1) respect for freedom of contract and valid reasons for intervention in private autonomy; 2) an assessment of the interests of both the bank and the consumer to measure whose interests have priority and should be protected in this situation according to the purpose of the law and the circumstances of the particular case; 3) objective incompatibility of results of applying a specific legal norm or transaction with the sense, meaning, and goals of regulating the relevant legal relationship or the general idea of law, including from the viewpoint of justice and public interests; 4) the bank using its subjective rights in a form formally consistent with the letter of law or the text of legal transaction but contradicting their true goals and meaning, as well as does not take into account the interests of the consumer.

Within the framework of several subsequent works, I intend to analyse in detail each of these aspects, but the subject of this paper is a doctrinal assessment of consumer's interests as a part of my research. On the whole, this analysis is inherently applicable to any national legal system transposing EU rules with respect to this matter, but its ground refers to the legislation, legal doctrine, and case law of Latvia.

My research is based on qualitative methods of scientific analysis, within the framework of which my original working hypothesis had served as the foundation for data acquisition. The data then was described, characterised and attributed to what, in turn, became a cause for correction and refinement of this hypothesis in order to build and express a scientific theory, based on which the comprehensive research document has been created. Consequently, a hypothetico-deductive model was employed as a principal toolkit to elaborate the doctrine. At the same time, I believe that comparative legal and system structure analysis methods assisted my argument in favor of this approach, within which the doctrinal interpretation and construction have been made to broaden the scope of the general good faith principle to this issue.

Interest Assessment within Good Faith

According to Latvian legal doctrine[8] and its case-law[9], the main purpose of the good faith principle is to preclude the person from exercising the subjective

[7]Jelisejevs (2021).
[8]Krons (1937) at 141.

right which formally resides with him if the conflicting interests of the opposing party to the legal relationship take priority under the legislative goal and circumstances of the particular case. Therefore, in each specific case, based on an objective assessment of the parties' interests, the court should determine whose interests are to be protected[10]. This becomes clear as a result of the correlation of specific legal norms regulating the interests of each party with the good faith rule (e.g., Art. 1 of the Latvian Civil Law), that is, through their systemic interpretation, which, in turn, is allowed only in those exceptional occurrences when the result of the application of these legal norms will be utterly unfair for one of the parties[11]. In such circumstances, an abstract solution for the conflict of interest formulated in the legal norms is fundamentally different from the actual features of the variance of parties' interests in the particular legal relationships in real life[12]. At the same time, the task of good faith is by no means considered to protect the socially weak side of the transaction *per se*[13]. However, the Good Faith-Based Approach can become the foundation to restore the interests of the transaction party, which is objectively in a weaker position in the view of legal regulation.

According to the approach adopted by the Court of Justice of the European Union[14] confirmed by the case-law of Latvia[15], the consumer is a priori recognised as the less protected side of the contractual relationships vis-à-vis the supplier because he is forced to agree to transaction terms drawn up in advance by the supplier without being able to influence the content of these terms. That is why the good faith principle requires any supplier not to use the consumer's lack of experience as well as his weaker position regarding both his bargaining power and his level of knowledge[16].

Thus, in civil circulation, the unequal position of the consumer and the service provider has an objective character and is not associated with the subjective characteristics of the parties in particular legal relationships[17]. The weaker position of the consumer in contractual relations demands replacing the formal balance which has been established between the rights and obligations of the parties with an effective balance that re-establishes equality between them[18]. Consequently, when regulating any legal relationship with a consumer's participation, the purpose

[9]Latvian Supreme Court's judgments: in case No.SKC–540 at p.5; in case No. SKC-75 § 13(6); in case No. SKC-259/2019 § 7.1 (2); in case No. SKC-1782/2018 § 6.5 (2) and in case No. SKC-231/2020 § 6.2 (7).

[10]Balodis (2002) as well as Latvian Supreme Court's judgments: in case No. SKC-259/2019 § 7.4 (5) and in case No. SKC-363/2017 § 11 (2).

[11]Latvian Supreme Court's judgment in case No. SKC-231/2020 § 6.1 (4 and 4) as well as Krons (1937) at 300.

[12]Krons (1937) at 293; Balodis (2002) at 282.

[13]Balodis (2007) at 148.

[14]See, e.g., Judgments of the Court of Justice of the European Union: in cases No. C-240/98 - C-244/98 § 25; in case No. C-168/05 § 25; in case No. C-243/08 § 22.

[15]Latvian Supreme Court's judgments in case No. SKA-59 § 12 (2) and in case No. SKC-154/2017 § 7 (2).

[16]Vītoliņa (2015) at 98.

[17]Latvian Supreme Court's judgment in case No. SKA-59 § 12 (3).

[18]Judgments of the Court of Justice of the European Union in No. C-168/05 § 36 and in No. C-243/08 § 25.

of the law is to effectively restore the real equality of the parties through the priority protection of the consumer's interests with a more critical attitude towards the exercise of the service provider's rights. There is no doubt that the same approach should be presumed in the contractual relationship between the bank and the client with a consumer status.

Moreover, if a payment service provider uses its subjective rights to unilaterally close payment accounts within the framework of the de-risking policy, that is, in order to refuse any risks connecting with services for some consumer, the protection of the consumer's interests from unfair behavior of the provider has an even higher priority. This assertion follows from the fact that the objective weakness and actual inequality of a bona fide consumer in such legal relations are even more evident. Analysing the bank activity in the scope of combating money laundering and terrorism financing, the Latvian Constitutional Court stated that "if a person is not engaged in terrorism financing or money laundering, then he is not able to foresee at all what exactly could be doubts and, at the same time, cannot predict what documents and information he would have to submit in order to prevent these doubts"[19]. As a consequence, in the case when to avoid the risk of terrorist financing and money laundering, a bank unilaterally withdraws from an agreement with a client who, as a matter of fact, is not engaged in the financing of terrorism and money laundering the priority protection should be provided to the interests of this client who has no natural ability to predict the exact nature of situations the bank could consider risky in order to avoid them[20].

De-risking v. Human Rights

Analysing the balance between conflicting interests of customers and banks relating to unilateral closure of accounts under the de-risking policy, we certainly need to stress that the consumers' access to payment services within the EU internal market is being recognised by European institutions as a tremendously important issue in respect of their legal protection and several special EU regulatory enactments[21] were aimed at harmonizing the national law of its members, taking into account some general principles. As a part of this legal regulation, we can note the exclusion of any discrimination against consumers legally residing in the EU because of their nationality or place of residence or any other grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union[22]. At the same time, there is the postulation of uneven positions of consumers and undertakings with their unalike needs for the protection level and specific

[19]Latvian Constitutional Court's judgment in case No. 2008-47-01 § 14.2.
[20]Ibid.
[21]Directive 2014/92/EU and Directive (EU) 2015/2366.
[22]Art. 15 of Directive 2014/92/EU.

guarantees for consumer rights[23], including access to payment accounts with basic features[24].

Moreover, the universal requirement of the pan-European legal regulation for payment services is the unconditional primacy of the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union[25] that is mandatory for the domain of combating money laundering[26] as well. It means that transposed into national legislation (including payment service[27] and anti-money laundering[28] laws), these directive rules, *inter alia*, prescribe the necessity to respect private and family life[29], protect personal data[30], and honor the presumption of innocence[31]. They also require respecting the freedom to conduct business[32].

Beyond doubt, all these safeguards relate, first of all, to ensuring the interests of payment service consumers. Still, only the postulate of the freedom to conduct business can apply to the interests of credit institutions as well. At the same time, the European legislator has clearly defined that the legal provisions against utilisation of the financial system for illegal purposes such as fraud, money laundering, or terrorism financing must not be used as a pretext for rejecting commercially less attractive consumers[33]. Consequently, it is in matters of termination of contractual relations with an invocation to the money laundering risks that payment providers' interest in the free conduct of business is normatively limited.

[23]Preambular paragraph 53 of Directive (EU) 2015/2366.

[24]One of the elements of safeguarding the rights of payment service users became the introduction into civil intercourse of a payment account with basic features, access to which should be ensured irrespective of the consumers' financial circumstances, such as their employment status, level of income, credit history or personal bankruptcy (see Preambular paragraph 35 of the Directive 2014/92/EU, which was transposed into Latvian Law on Payment Services and Electronic Money via the Law of 2 March 2017). Nevertheless, this legal tool cannot be considered exhaustive. It should not exclude other legal protection against unfair actions of payment service providers, if only because most of the provisions of the EU directives relating to this regulation subject matter are universal and apply to all types of payment services. In particular, according to preambular paragraph 53 of Directive (ES) 2015/2366, its core provisions should always apply, irrespective of the user's status. In turn, Article 15 of Directive 2014/92/EU prohibits discrimination against consumers when gaining access to any payment account within the European Union. Thus, by implementing the payment account with basic features, the legislator, per contra, emphasized the priority for protecting the interests of each consumer of any payment services over their suppliers.

[25]See, for example, preambular paragraph 90 of the Directive (EU) 2015/2366; preambular paragraphs 35, 55 and Article 15 of the Directive 2014/92/EU.

[26]Preambular paragraph 65 of Directive (EU) 2015/849.

[27]In Latvia it is the Law on Payment Services and Electronic Money (see Informative Reference to European Union Directives, §§ 3 and 4)

[28]In Latvia it is the Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing (see Informative Reference to European Union Directives, §§ 1 and 5).

[29]Art. 7 of the Charter.

[30]Art. 8 (1) of the Charter.

[31]Art. 48 (1) of the Charter.

[32]Art. 16 of the Charter.

[33]Preambular paragraph 34 of Directive 2014/92/EU.

Presumption of Innocence

At that, the bank's refusal to do business with its client due to the increased risk of money laundering and terrorist financing can reasonably be regarded as stigmatizing the customer as being involved in criminal activity. Indeed, money laundering and terrorism financing (as they have been defined, for example, by Article 5 of the Latvian AML Law) are undoubtedly criminal offenses. It follows that the bank's departure from the business relationship with the client because of money laundering and terrorist financing risks in itself means that the bank suspects this client of possible involvement in these offenses or, at least, admits such a possibility.

At any rate, all of the above implies that the bank treats such a client as a person committing or preparing to commit a crime. However, the general tenet runs that until a person's guilt in committing a crime is recognised under the law, treating this person as if it is proved that he has committed this criminal act is contrary to the presumption of his innocence[34]. Of course, the presumption of innocence, being a fundamental human right, manifests itself primarily in criminal proceedings[35]. Nevertheless, according to the conclusions of the European Court of Human Rights (hereinafter abbreviated as ECHR) supported by the Constitutional Court of Latvia, in general, this presumption forms the content of the right to a fair trial in the broadest sense, including also in determining the civil rights and obligations of the concerned person[36].

It is also evident that the presumption of innocence is not absolute and *per se* does not prohibit establishing restrictions to a person if such is necessary for reaching a respective legitimate aim[37]. Such restriction could be justified only with proportionality with the aim to be reached, that is assessed by 1) appropriateness (whether it is possible to reach the legitimate aim by means of the measure selected); 2) necessity (whether the legitimate aim could be reached by other measures that would restrict the rights of a person at a lesser extent), and 3) compliance (whether the benefit gained by the society is greater than the detriment done to the rights of a person)[38].

In another part of my research, which concerns analysing the banks' interests under the Good Faith-Based Approach, I have thoroughly analysed the proportionality issues in the course of a bank's unilateral closure of consumer's payment account. I will herein only point out that banks' withdrawal from contractual relationships with consumers due to de-risking is in itself unsuitable for achieving legitimate goals concerning anti-money laundering and terrorist financing. In fact, such actions on the part of financial institutions can indirectly contribute to the commission of such crimes[39]. On the other hand, the stated aims

[34]See, e.g., Latvian Constitutional Court's judgment in case No. 2005-22-01 § 5.1.
[35]See, e.g., Latvian Constitutional Court's judgment in case No. 2012-15-01 § 15.1.
[36]See, e.g., Latvian Constitutional Court's judgment in case No. 2015-25-01 § 13 (5).
[37]See, e.g., Latvian Constitutional Court's judgment in case No. 2005-22-01 § 5.1.
[38]See, e.g., Latvian Constitutional Court's judgment in case No. 2010-38-01 § 11.
[39]See, e.g., FATF (2014); de Koker (2011) at 361 and 368; McKendry (2014); Durner & Shetret (2015) at 19.

of combating money laundering and terrorist financing can definitely be achieved by other legal instruments that are less destructive for the consumer's rights, including updating information regarding him and overseeing his activities to ensure that his transactions are not considered suspicious.

But for all that, there can be no doubt with respect to compliance with the public interests when deviating from the absolute presumption of the innocence of the payment service consumers within the risk-based approach since this deviation has a legitimate aim to counteract serious crimes. Nevertheless, relevant state authorities are to ensure that risk assessment in the context of customer due diligence is carried out by the payment service providers without discrimination based on any ground[40]. Hence, by analogy (*extra legem*) with EU legal regulation of politically exposed person issues the risk-based approach regarding high-risk consumers should be of a preventive and not criminal nature. That is why there are quite justified reasons to limit the high-risk consumers' presumption of innocence in the due diligence process against them while their business relationship with payment service providers remains active. But if the provider terminates contractual relations with any such consumer based on this risk, then it is directly contrary to the letter and spirit of anti-money laundering regulation.

Furthermore, within the framework of civil relations, when fundamental human rights are being restricted based on the decision of a private person, for instance, a credit institution, rather than that of a public authority, then the consequences caused by its mistaken decision affect an individual more gravely than if the decision on this issue was made by public authorities[41]. When unilaterally closing a payment account due to money laundering and terrorist financing risk, that is, *de facto* presuming the client's possible culpability in these criminal offenses, a bank *a priori* has access to less information than state institutions. At the same time, the bank never seeks to assess whether the benefit gained by society if its suspicions turn out to be grounded in reality in proportion with the inflicted on a consumer's interests if the bank's suspicions prove to be incorrect. Besides, in order to avoid responsibility for its treatment of clients in such a way as if it has already been proven that the clients have committed or plans to commit these crimes, the payment service providers, as a rule, mask their true intentions behind an abstract right to terminate business relationships without providing reasons.

Therefore, we need to stress that under the good faith requirement, if some payment service provider withdraws from contractual relations with a consumer by direct or indirect reason of de-risking, the consumer's interests should be without fail analysed from the standpoint of compliance with his presumption of innocence. In other words, when assessing the legality of the payment account closure, the court must ensure that the application of this subjective right by the bank does not violate the relevant constitutional guarantees of the consumer's presumption of innocence (e.g., Article 92 of the Latvian Constitution), taking into account their interpretation following international human rights obligations[42],

[40]Preambular paragraph 66 of Directive (EU) 2015/849.
[41]See, e.g, Latvian Constitutional Court's judgment in case No. 2008-47-01 § 15.9.
[42]See, e.g., Latvian Constitutional Court's judgment in case No. 2008-09-0106 § 4.

including Article 48 (1) of the Charter and Article 6 (2) of the European Convention for the Protection of Human Rights (hereinafter referred to as Convention). In particular, the court has to check whether, by unilateral termination of business relations, the bank has not de facto stigmatised the consumer as a person suspected of involvement in criminal activities by unilateral termination of business relations.

Private Life

Similarly, if within de-risking the bank unilaterally terminates a legal relationship, the consumer's interests are subject to analysis from the perspective of respect for his right to private life, within the meaning that has been assigned to it by the case-law of the ECHR.

Being a broad term not susceptible to exhaustive definition, "private life" also involves a zone of interaction of a person with others even in a public context that is an essential element of the personal space protected by Article 8 of the Convention[43]. This human right covers the physical and psychological integrity of a person, including multiple aspects of the individual's physical and social identity[44]. Therefore, it can embrace the right to live privately, away from unwanted attention that secures an individual space within which he can freely pursue the development and fulfilment of his or her personality[45]. According to the ECHR's case-law it would be too restrictive to limit the notion of "private life" to an "inner circle" where the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle[46]. That is why Article 8 of the Convention protects the right to establish and develop relationships with other human beings and the outside world, including elements relating to a person's right to their image[47]. Furthermore, no clear reason is provided why this understanding of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people develop a significant, if not the greatest, opportunity of developing relationships with the outside world[48]. Regarding the consequences of illegal interference with private life for the person's "inner circle," the ECHR also ascribes them to the worsening of the material well-being of this individual and his family[49]. Moreover, in the Convention organs' case-law, it has been accepted that a person's right to protect his reputation is also encompassed by Article 8 as part of the right to respect for private life since it forms part of his personal identity and psychological integrity[50].

[43]See Peck v. the United Kingdom § 57.
[44]See Denisov v. Ukraine § 95.
[45]See Taliadorou and Stylianou v. Cyprus § 52.
[46]See Fernández Martínez v. Spain § 108.
[47]See S. and Marper v. United Kingdom § 66.
[48]See Niemietz v Germany § 29.
[49]See Pişkin v. Turkey § 185.
[50]See Pfeifer v. Austria § 35.

Within the framework of Article 96 of the Latvian Constitution, the national Constitutional Court's jurisprudence fully supports this doctrine, emphasizing that the right to private life also protects a person's honour and dignity, name, identity, and personal data[51].

Following this well-established approach, we have every reason to conclude that both the consumer's social identity and his psychological integrity, as well as his right to establish and develop relationships with other people and the outside world, may well become victims of unfairness when perfunctory application of legislative and contractual rules of unilateral closure of a payment account by a bank due to money laundering risks. It is also apparent that by treating a client as a possible or potential criminal, a bank infringes on his honor, dignity, and reputation. Likewise, by depriving the client of access to banking services, the provider damages his professional and business activities as well as his material well-being. Of course, the client's reputation also suffers when as a reason for withdrawing from contractual relations, a bank references so-called "adverse media"[52] and other negative information regarding the client derived from open sources. Thus, all of the above is illegal interference with the private life of the consumer, which is prohibited by Article 8 of the Convention, Article 7 of the Charter and Article 96 of the Latvian Constitution.

Although the purpose of Article 8 of the ECHR is primarily to protect a person from arbitrary interference by state institutions, it not only obliges the state to abstain from any interference with the individual's private life (negative undertaking) but also demands affirmative action from the state to ensure respect for this human right (positive obligation)[53]. Among others, these obligations are to involve the adoption of measures designed to secure respect for private and family life and should include the requirement that the state establish a system for the effective protection of an individual's right to privacy with implementation in cases of unlawful interferences falling within its scope[54].

As inherent in an effective "respect" for private life, the positive obligations of any EU state may involve the adoption of measures designed both for the provision of a regulatory framework of adjudicatory and enforcement mechanisms protecting individuals' rights and the implementation, where appropriate, of specific individual measures[55]. At the same time, these obligations apply to adopting such measures, which are designed to secure respect for private life even when applied to relations of individuals between themselves[56]. Therein there must be had a fair balance that has to be struck between the relevant competing interests[57], that, among other things, is the subject of this research.

---

[51]See, for example, Latvian Constitutional Court's judgments: in case No. 2016-06-01 § 18.1; in case No. 2015-14-0103 § 15.1.

[52]For example, it has been prescribed by paragraph 31.3 of Regulations of the Financial and Capital Market Commission No.5 dated 12 January 2021.

[53]See Pişkin v.Turkey § 202.

[54]See Taliadorou and Stylianou v. Cyprus § 49.

[55]See Tysiąc v. Poland § 110.

[56]See Parfentyev v. Russia § 33.

[57]Ibid.

Consequently, in each such case, the state authorities, including national courts, are obliged to ensure the implementation of specific measures of the judicial and law enforcement mechanism for adequate and effective protection of the inviolability and respect for the private life of the payment service consumer, since this is the state's positive obligation even when illegal interference with private life occurs in the sphere of relations between subjects of private law among themselves.

In the course of termination of a banking services relationship due to a higher risk of money laundering, the consumer's "private life" could be both the reason for the bank's actions (for example, the bank's use of the consumer's personal data, including negative information) and their consequence, which causes harm to the consumer's rights (for example, depriving the consumer of access to financial services, including the payments system). That is why it seems fairly reasonable for this analysis to combine the ECHR case-law approaches[58], one of which is based on the identification of the "private life" of a payment service consumer as the reason for the closure of his bank account (reason-based approach), and the second, which deduces the "private life" issue as the negative consequence of such closure (consequence-based approach).

In particular, when the bank bases the termination of business relations with a consumer on negative information concerning him (including "adverse media"), this means that the consumer's personal data[59], i.e., one of the protected aspects of his private life[60], serves as grounds for the bank's decision. Moreover, if, under such circumstances, the negative information used by the bank proves to be false, then the honor and dignity of the consumer are also threatened. Still, their inviolability is also an element of the consumer's private life as well. In this matter, the issue is further complicated by the fact that in order to protect public interests related to combating money laundering and terrorist financing, the data subject is not entitled to access the detrimental data collected by the bank about him (e.g., Article 52 (2) of the Latvian AML Law). This means that when his account is closed, the client has no way of refuting or disputing the served as the underlying reason for the bank to withdraw from the contractual relationship with him since this information is not communicated to him and, moreover, is hidden from him within the framework of the legal requirements. In this case, therefore, the bank's good faith is the only safeguard that doubtful and false information about the consumer will not be used to close the account, and, on the contrary, that the consumer will be given a chance to explain or refute the negative information collected by the bank about him.

On the other hand, the bank's unfair actions to unilaterally refuse to provide the consumer with payment service may lead to serious negative effects on the consumer's private life, including a pernicious impact on his "inner circle" (affecting his welfare), his ability "to establish and develop relationships with

[58]See Denisov v. Ukraine § 107; Fernández Martínez v. Spain §§ 110-112.

[59]Under Article 4 (1) of Regulation (EU) 2016/679 personal data means any information relating to an identified or identifiable natural person.

[60]See, for example, Latvian Constitutional Court's judgments in case No. 2016-06-01 § 18.1; in case No. 2015-14-0103 § 15.1.

others," and a derogatory influence on his social and professional reputation[61]. It is obvious that limiting the consumer's access to the system of banking services, as well as depriving him of the opportunity to receive, send and keep non-cash money, can have an extremely negative influence on the personal life of the consumer and his family.

Since non-cash money is incorporeal things or intangible property (*res incorporates*)[62], namely, obligation rights (claims) of the client against the bank (records in the bank's accounting system regarding the deposit on the client's account), then possession, exercise, and disposal of them without the participation of the bank is impossible. The disposal of non-cash money (non-cash payments) is, in fact, the transfer of the obligation rights (claims) against the bank from the former creditor (payer) in favour of a new one (payee) that is, on the whole, governed by the civil law provisions regarding cession (assignment of rights)[63] but not by rules of ownership[64]. Strictly speaking, non-cash money, like any other incorporeal thing, cannot per se be the subject of ownership, but the exercise of any client's rights in respect to them ultimately depends on the bank's positive actions in the form of payment services. Accordingly, in the absence of a contractual relationship with the bank, the client is unable to possess, use and dispose of non-cash money, which, in the context of the modern state policy to limit the circulation of cash and the current state of civil circulation, detrimentally affects the client's "private life" in a significant way. Among other things, as long as the unbanked person, due to de-risking policy, is deprived of any way from receiving and making non-cash payments within civil transactions, his participation in legal relations with other people is hugely complicated and may cause severe damage to his material welfare and reputation.

Regarding the restrictions (interference) of the consumer's human right to private life permitted by Article 8 (2) of the Convention and Article 96 of the Latvian Constitution (to prevent disorder or crime, to protect health, morals, or to protect the rights and freedoms of others), then, with reference to the above analysis of the legitimacy of aims and the proportionality of such restrictions for the presumption of innocence, we should note that such restrictions may be justified when conducting due diligence measures concerning the consumer and supervising his transactions in the normal course of business relations (e.g., as prescribed by Article 11-1 of the Latvian AML law), but only up to the point when such restrictions result in a unilateral withdrawal of the bank from above business relationships. If the latter is the case, both the legitimate aim of these restrictions and the reasonable necessity of the bank's intervention in the consumer's private

[61]Herein we are using the ECHR approach, which similarly specifies serious negative effects on the individual's professional life that are covered with Article 8 of the Convention in so far as these violations have or may have a serious negative impact on the individual's private life (see, for example, Denisov v. Ukraine, no. 76639/11, § 107).

[62]See, for example, Article 841 (2) of Latvian Civil Law that received this concept from the Roman law.

[63]Balodis (2007) at 111.

[64]Grūtups & Kalniņš (2002) at 20.

life are not respected. Moreover, such behavior on the part of the bank destroys the balance between public interests and the consumer's human rights.

It is also clear that each case requires a dedicated analysis addressing the gravity of the negative effect of interference with privacy for every individual, with the specific circumstances taken into consideration. It is necessary to assess to what extent, due to the closure of a bank account, a person's opportunities in his private life scope decreased, whether psychological aftermath was significant for him, how his life quality and relations with other people deteriorated, how seriously the termination of business relations with the bank affected the consumer's material well-being, etc. The damage caused to the individual's interests and suffering is to be assessed by comparing his life before and after the break of contractual relations with the bank. At the same time, it is appropriate to consider the subjective perceptions of the consumer against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the termination of the consumer's access to banking services, that should simultaneously have a causal connection with the impugned actions of the bank[65].

From apportionment of the evidential burdens between civil process parties (*ei incumbit probatio qui dicit, non qui negat* - proof lies on him who asserts, not on him who denies)[66], it follows that it is the consumer who must establish convincingly that the threshold of severity with respect to damage for all the above-mentioned aspects of his private life was attained in his case. He has to present evidence substantiating the consequences of the bank's unfair actions, which will be only applicable where these consequences are extremely grave and affect his private life to a very significant degree[67].

Overall, it is important to stress that the payment service consumer involved in a commission of a criminal offence or other such misconduct, and subsequently cut off by the bank, cannot rely on the foreseeable negative effects on "private life"[68] when appealing a unilateral termination of contractual relations. y. Consequently, even if the bank, when terminating the contract, has acted in violation of the good faith principle, it may protect itself from negative consequences and may legally refuse to restore contractual relations with a client by proving that the account closure came as a predictable consequence of the

[65]This approach is based on criteria for assessing the severity or seriousness of alleged violations of Article 8 of the Convention in different regulatory contexts that the ECHR has established (see, for example, Denisov v. Ukraine, no. 76639/11, § 117).

[66]See, for example, Līcis (2003) at 72.

[67]See, e.g., Denisov v. Ukraine § 116.

[68]Following the case-law of the ECHR, it is necessary to indicate that Article 8 cannot be relied on in order to complain of a loss of reputation, which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see, e.g., Sidabras and Džiautas v. Lithuania § 49). In the Court's view, other personal, social, psychological and economic suffering may also be foreseeable consequences of the commission of a criminal offence and can therefore not be used as a ground to complain that a criminal conviction in itself amounts to an interference with the right to respect for "private life" within the meaning of Article 8 of the Convention (see, for example, Gillberg v. Sweden § 68). This extended principle should cover not only criminal offences but also other misconduct entailing a measure of legal responsibility with foreseeable negative effects on "private life" (see, e.g., Pişkin v. Turkey § 178).

client's misconduct or any other inappropriate actions, which are directly or indirectly related to money laundering or financing of terrorism[69].

Conclusions

In summary, we can conclude that following the purpose of the law, public interests, the objective specifics of the contractual parties' legal status and the entire complex of legal regulation as well as in view of systemic and teleological interpretation of governing legal rules, in cases of unilateral closure of payment accounts by banks due to de-risking, the conflicting interests of consumers have priority in their legal protection. This precedence should survive until it is proven that the consumer acted unlawfully or was otherwise implicated in money laundering and terrorist financing.

Imposition on the consumers' fundamental rights may be considered justifiable to preclude money laundering for preventive purposes as long as the consumers' contractual relationship with the bank continues. But in the case of unilateral closure of payment account by a bank, only strict adherence to the good faith principle can guarantee that the bank's subjective right to withdraw from the agreement unilaterally is not used formally and unreasonably. Otherwise, the bank's abstract application of the terms of an "undiscussed" contract and the effect from the formal exercise of the bank's subjective rights may become absolutely unfair to the discarded consumer.

Therefore, taking into account the circumstances of each dispute, including the objective consequences of closing an account for the life of every specific consumer, the contractual terms and the bank's actions must be assessed for their compliance with the good faith requirements, which in turn should be recognised not only as permissible but also obligatory. When terminating contractual relations within de-risking, only close adherence to the good faith principle can guarantee that the bank's rights are not used by the bank formally and unreasonably, that is, against the regulating sense, meaning, and goals or contrary to the general idea of law.

References

Apse, D. (2006). 'Auxiliary Sources of Law and the Constitutional Court" in *Scientific Papers University of Latvia* 703:7-20 [in Latvian].

Apse, D. (2012). 'The influence of subsidiary sources of law on the quality of legal acts in the legislative process and the system of national governance' in *The collection of research papers in conjunction with the international scientific conference "The*

[69]As one of the founders of the Latvian interwar period civil procedural law doctrine, Vladimirs Bukovskis pointed out that in claims arising from unallowed actions or negligence, "If the claimant has proved that the defendant has acted for evil purposes, the defendant may remedy the consequences of such evidence by demonstrating that the claimant has also acted for evil purposes" (Bukovskis (2015) at 775). We believe that this proof formula can reasonably be extended to the above issues when invoking the principle of good faith.

Quality of Legal Acts and its Importance in Contemporary Legal Space", pp.56-68. Riga: University of Latvia Press.

Apsīts, H. (1938). 'The New Civil Law' in *Prezidenta Ulmaņa Civillikums. Rakstu krājums*, p.85. Riga: Pagalms [in Latvian].

Balodis, K. (2002). 'The role of the principle of good faith in modern Latvian civil law" in *Likums un Tiesības*, Volume 4, Nr.9(37):279.-286 [also in *Jurista Vārds,* 3. Dec. 2002, Nr. 24 (257)] [in Latvian].

Balodis, K. (2007). *Introduction to Civil Law.* Rīga: Zvaigzne ABC [in Latvian].

Berent, B., Ehlers, H., Blaese, G., Schilling, C. & Th. Zimmermann (1938). *Lettlands Zivilgesetzbuch.* of 28 January 1937 in Einzeldarstellungen. Riga: Verlag A/G "Ernst Plates"

Brazowski, J. (2019). **'**Risks in the financial sector must be managed, not abandoned' (in Latvian) in TVNET / LETA, 07.10.2019

Brox, H. & W. Walker (2010). *Allgemeiner Teil des BGB*. 34. München: Carl Heymanns Verlag.

Brox, H. & W. Walker (2020). *Allgemeines Schuldrecht*. 44. Aufl. München: Verlag C.H. Beck.

Bukovskis, V. (1933). *Textbook on Civil procedure*. Riga, reissued in 2015. [in Latvian}

Durner, T. & L. Shetret (2015). *Undersbanding bank de-risking and its effects on financial inclusion*. An exploratory study, Global Center on Cooperative Security. https:// www-cdn.oxfam.org/s3fs-public/file_attachments/rr-bank-de-risking-181115-en_0. pdf

Eckert, J. (2004). *Schuldrecht: Allgemeiner Teil* 4. Baden-Baden: Nomos.

FATF (2014) clarifies risk-based approach: case-by-case, not wholesale de-risking. Paris, 23 October at www.fatf-gafi.org/documents/documents/rba-and-de-risking.html

Grūtups, A. & E. Kalniņš (2002). *Comments on Civil Law, Part Three, Property Law, Property*. *2nd* ed. Riga: Tiesu namu aģentūra [in Latvian].

Hartkamp, A., Hesselink, M., Hondius, E. & E. Perron (2010). *Towards a European Civil Code*. 4th edition. Boston: Kluwer Law International.

Iļjanova (Rezevska), D. (2005). *Meaning and application of general principles of law*. Riga: Ratio iuris [in Latvian].

Jelisejevs, A. (2021). 'Good Faith-Based Approach as a way to protect payment service consumers' rights when banks unilaterally terminate contractual relations' in *Collection of materials XXII International Scientific Conference of Turiba University*, pp. 59-67.

Kariņš, K. (2020). 'The Latvian financial sector must reorient to risk management, not just avoid risks' (in Latvian) in *Delfti Bizzness*, September 9.

Kazāks, M. (2020). 'There are more pros than cons of the FCMC merging with the Bank of Latvia' (in Latvian) in *Delfti Bizzness*, January 3.

De Koker, L., Sindh, S. & J. Capal (2017). 'Closure of bank accounts of remittance service providers: Global challenges and community perspectives in Australia' in *University of Queensland Law Journal* 36 (1):119-154.

De Koker, L. (2011). 'Aligning anti-money laundering, combating of financing of terror and financial inclusion: questions to consider when FATF standards are clarified' in *Journal of Financial Crime* 18(4): 361-386.

Krons, M. (1937). 'Article 1 of the Civil Law (Good faith as a lawful conduct criterion)' in *Tieslietu ministrijas Vēstnesis*. Gulbja grāmatu izdevniecība, pp.270-301. Nr.2 Riga [in Latvian].

Kull, I. (2004). 'European and Estonian Law of Obligations - Transposition of Law or Mutual Influence?' in *Juridica International* IX:32-44//2004. University of Tartu.

Larenz, K. (1987). *Lehrbuch des Schuldrechts Band I Allgemeiner Teil*. 14.th ed. München: Verlag C.H. Beck.
Larenz, K. & M. Wolf (2016). *Allgemeiner Teil des Bürgerlichen Rechts*. 11th ed. München: Verlag Beck C. H.
Līcis, A. (2003). *Claims in legal proceedings and evidence.* Riga: Tiesu namu aģentūra [in Latvian].
McKendry, I. (2014). Banks Face No-Win Scenario on AML 'De-Risking'. In: American Banker, 17 November.
Neimanis, J. (2004). *Introduction to Law*. Riga [in Latvian].
Rezevska, D. (2015). *Meaning and application of general principles of law. 2nd edition, revised and expanded.* Riga: Daiga Rezevska [in Latvian].
Roth, G. (2015). Münchener *Kommentar zum Bürgerlichen Gesetzbuch Bd. 2, Schuldrecht Allgemeiner Teil*. München.
Schulze, R. (2017). In: *Bürgerliches Gesetzbuch, Handkommentar.* 9th ed. Baden-Baden.
Slicāne, E. (2007). 'The principle of good faith and its application in Latvian civil law' in *Jurista Vārds* 6(459) [in Latvian].
Schmidt, R. (2019). *BGB Allgemeiner Teil*. 18th ed. Schmidt, Dr. Rolf Verlag.
Szubin, A. (2016). Remarks by Acting Under Secretary Adam Szubin [USA] at the ABA/ ABA Money Laundering Enforcement Conference. Washington, 14.11.2016. https:// www.treasury.gov/press-center/press-releases/Pages/jl0608.aspx
Vītoliņa, B. (2015). *Basics of consumer protection.* Riga: Apgāds Zvaigzne ABC [in Latvian].
Wilkins, R. (2014). 'The danger of driving both illicit markets and financial exclusion' at http://www.fatf-gafi.org/topics/fatfgeneral/documents/danger-illicit-markets-financial-exclusion.html

Cases

European Court of Justice

Elisa María Mostaza Claro v. Centro Móvil Milenium SL, C-168/05, ECLI:EU:C:2006: 675, 26 October 2006.
Océano Grupo Editorial SA v. Rocío Murciano Quintero (C-240/98) and Salvat Editores SA v. José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/ 98), Mohammed Berroane (C-243/98), Emilio Viñas Feliu (C-244/98), ECLI:EU: C:2000:346, 27 June 2000.
Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi, C-243/08, ECLI:EU:C:2009:350, 4 June 2009.

European Court of Human Rights (ECHR)

Denisov v. Ukraine, no. 76639/11, ECHR 25 September 2018
Fernández Martínez v. Spain, no. 56030/07, ECHR 12 June 2014
Gillberg v. Sweden, no.41723/06, ECHR 3 April 2012
Niemietz v. Germany, no. 13710/88, A/251-B, ECHR 16 December 1992
Parfentyev v. Russia, no. 44376/09, ECHR 3 November 2020
Peck v. the United Kingdom, no. 44647/98, ECHR 28 April 2003
Pfeifer v. Austria, no. 12556/03, ECHR 15 November 2007
Pişkin v. Turkey, no. 33399/18, ECHR 15 December 2020

S. and Marper v. United Kingdom, no. 30562/04 and no. 30566/04, ECHR 4 December 2008
Sidabras and Džiautas v. Lithuania, no. 55480/00 and no. 59330/00, ECHR 27 June 2004
Taliadorou and Stylianou v. Cyprus, no. 39627/05 and no. 39631/05, ECHR 16 October 2008
Tysiąc v. Poland, no. 5410/03, ECHR 20 March 2007

Constitutional Court of the Republic of Latvia

Judgment of 23 February 2006 in case No. 2005-22-01. Latvijas Vēstnesis, 28.02.2006., Nr. 34.
Judgment of 16 December 2008 in case No. 2008-09-0106. In: Latvijas Vēstnesis, 18.12.2008., Nr. 197.
Judgment of 28 May 2009 in case No. 2008-47-01. Latvijas Vēstnesis, 02.06.2009., Nr. 85.
Judgment of 27 December 2010 in case No. 2010-38-01. In: Latvijas Vēstnesis, 30.12.2010, Nr 206.
Judgment of 28 March 2013 in case No. 2012-15-01. Latvijas Vēstnesis, 02.04.2013., Nr. 63.
Judgment of 12 May 2016 in case No.2015-14-0103. Latvijas Vēstnesis, 13.05.2016., Nr. 92.
Judgment of 15 November 2016 in case No.2015-25-01. Latvijas Vēstnesis, 16.11.2016., Nr. 224.
Judgment of 10 February 2017 in case No. 2016-06-01. Latvijas Vēstnesis, 13.02.2017., Nr. 33.

Department for Administrative Cases of the Supreme Court Senate

Judgment of 7 March 2006 in case No. SKC-59.

Department for Civil Cases of the Supreme Court Senate

Judgment of 9 February 2005 in case No. SKC-75. https://at.gov.lv/downloadlawfile/3533
Judgment of 4 October 2006 in case No. SKC-540. https://www.at.gov.lv/downloadlawfile/3475
Judgment of 30 June 2017 in case No. C33439211, SKC-154/2017. https://at.gov.lv/downloadlawfile/5210
Judgment of 27 October 2017 in case No. C09020614, SKC-363/2017, ECLI:LV:AT: 2017: 1027.C09020614.1.S.
Judgment of 18 December 2018 in case No. C73346818, SKC-1782/2018, ECLI:LV: T: 2018: 1218.C73346818.10.S.
Judgment of 17 December 2019 in case No. C04169414, SKC-259/2019, ECLI:LV:AT: 2019: 1217.C04169414.5.S.
Judgment of 12 March 2020 in case No. C68278418, SKC-189/2020, ECLI:LV:AT:2020: 0312.C68278418.8.S.
Judgment of 16 December 2020 in case No. C30501917, SKC-231/2020, ECLI:LV:AT: 2020:1216.C30501917.11.S.

United Kingdom

Dahabshiil Transfer Services Ltd v Barclays Bank Plc (Case No. HC13E04264), [2013] EWHC 4196 (Ch)

Harada Ltd and another v Barclays Bank Plc. (Case No. HC13E04616), [2013] EWHC 3379 (Ch)

Legal Instruments

Charter of Fundamental Rights of the European Union (2012/C 326/02) in Official Journal of the European Union, 26.10.2012, Vol. 55, p. 391

Civil Law of the Republic of Larvia in Valdības Vēstnesis, 20.02.1937, No.41

Constitution of the Republic of the Republic of Latvia

Consumer Rights Protection Law of the Republic of Latvia in Latvijas Vēstnesis, 01.04.1999., No.104/105

Directive (EU) 2015/2366 of the European Parlament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, in Official Journal of the European Union, 23.12.2015, Vol. 58, p. 35

Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, in Official Journal of the European Union, 28.08.2014, Vol. 57, p.214

Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, in Official Journal of the European Union, 05.06.2015, Vol.58, p.73

European Convention on Human Rights (as amended by the provisions of Protocol No. 14, CETS No. 194)

Law on Payment Services and Electronic Money of the Republic of Latvia in Latvijas Vēstnesis, 17.03.2010, No. 43

Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing of the Republic of Latvia in Latvijas Vēstnesis, 30.07.2008., No. 116

Personal Data Processing Law of the Republic of Latvia in Latvijas Vēstnesis, 04.07.2018, No.132

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) in Official Journal of the European Union, 04.05.2016, Vol. 59, p.1

Regulations of the Financial and Capital Market Commission of the Republic of Latvia No.5 dated 12 January 2021, in Latvijas Vēstnesis, 18.01.2021, No.11