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Front Pages

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

Gregory T. Papanikos
President
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- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **12 June 2023**

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Important Dates

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

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Transnational Class Actions: The Canadian Experience and the Improvement of Access to Justice in Latin America

*By Larissa Clare Pochmann da Silva**

This paper analyses how the Canadian experience of class actions could contribute to the improvement of access to justice in Latin American, in a scene that damages are no longer restricted to state borders. For that, the text clarifies the concept of transnational class actions and how they could improve the prevention and reparation of damages that are no longer restricted to state borders. Then, based on the Canadian experience, that are different models of class actions, proposals are made for the admissibility and enforcement of transnational class actions in Latin American context.

Keywords: *Transnational class actions; Latin America; Canada.*

Introduction

Class actions are not a recent issue, but globalisation and the consequent hasty dissemination of information and also of harm has been calling attention to the fact that injuries are not always restricted to a single territory. Therefore, access to justice must be rethought for the prevention and damage repair, regardless of borders.

The present survey articulates a reflection limited to the Latin American scenario on the topic of class actions as a procedural mechanism, especially for its significance to access to justice and substantive law effectiveness.

The paper proceeds as follows: from the bibliographic and documentary research, a qualitative management is provided to the data obtained, beginning with a regard to how Latin America, despite hardly pointed out, is a region that also subsists with harming reality in one or several areas of its countries. Afterward, the study elucidates what transnational class actions would be and its relevance. Finally, it seeks to approach the Canadian experience and, based on this outlook, formulate alternatives to improve access to justice in Latin America concerning transnational class actions.

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Transnational Damage in the Latin American Context

In the present scenery, in the public as well as in the private sphere, mass affairs are continually expanding, as a consequence of urban concentration, globalisation, production and consumption in scale, the standardisation of agreements, the uncontrolled elaboration of State norms, allied to technological innovations and the fast diffusion of information, with an intense flow of data, goods and people, with multiplus harms due to factual circumstances[1] or legal relationships[2] in everyday life, capable of generating mass injuries[3], which affect a plurality of individuals[4].

From this viewpoint, two distinct panoramas emerge, and in a concomitant way: i) on one hand, it reveals procedural system insufficiency in what comes to resolve conflicts at a strictly individual level[5], which allows many other countries to think of either the implementation, or improvement of collective procedural laws[6]; ii) on the other hand, it is understood damage would not be limited to the geographic borders of the States.

Although both approaches are relevant to access to justice[7-8], the research focused on the second issue[9], a subject-matter that gradually acquires international significance, particularly in a globalised economy[10-11].

Following this line of reasoning, it should be illuminated that transnational injury does not concern a problem restricted to Latin America[12] not even limited to just one continent[13]. What happens is that in Latin America, besides cases

[1]Galanter (2011) at 105.
[2]Mendes & de Silva (2018) at 35.
[3]Hensler, Pace, Dombey-Moore, Giddens, Gross & Moller (2000) at 99.
[4]Nagareda (2007) at viii.
[5]Mendes & Wambier (2013) at 48.
[6]Hensler (2016a) at 240.
[7]Gibbons (2012) at 118.
[8]Verbic (2017) at 239.
[9]In relation to the first scenario, we refer to Mendes, Moreira & Marinoni (2014); Campos, Barreiro & Labat (2012); Gómez (2022); Instituto Iberoamericano de Derecho Procesal. *Procesos Colectivos*: I Conferencia Internacional y XXIII Jornadas Iberoamericanas de Derecho Procesal. Buenos Aires: 6-9 junio 2012; Karlsgodt (2012); and Hensler, Hodges & Tulibacka (2009).
[10]Cloption (2015) at 388.
[11]Basset (2003) at 43.
[12]The issue of transnational damage began to be analysed by the author together with her advisor at Mendes & Silva (2018). The European Union (EU) can be used as an example, once one of the most publicised cases of damage across borders concerns Apple. The lawsuit started in March 2012, when inspections were made in order to check if the company website in each member country of the bloc was respecting EU community consumerist rules. It was discovered the website did not provide clear information about the guarantee of products in the United Kingdom, Italy, Spain, Belgium, Luxembourg, Portugal, France, Denmark, Germany, the Netherlands, Poland, in Slovenia, Greece and Romania, a violation of European rules on the duty to inform consumers. Although the damage involved several countries, the solution ended up being left to the scope of each nation.
[13]To illustrate the statement, we bring up the Royal Dutch/Shell Transport Securities case, which involved an agreement between American and Dutch shareholders at the Amsterdam Court of Appeal. In this motion, it was discovered that after a decline in its oil and gas reserves, between 2001 and 2003, the Royal Dutch Shell Company set in its oil and gas reserves volume predicts an increase of 20% (twenty percent) in relation to the factual estimate, which would engender a

informed are less frequent, the treatment given to residents and non-residents is often not homogeneous.

One of the first cases of transnational damage portrayed in the doctrine involved consumer rights on Firestone tires[14]: Firestone Tire and Rubber Company provided tires for Ford automobile manufacturers, and one of the vehicles that were manufactured by Ford with these Firestone tires, the Ford Explorer, became a car with a high number of sales in several countries.

In the 1990s, however, the triumph was interrupted since numerous Ford Explorer drivers from different countries such as Saudi Arabia, Colombia, Venezuela, Panama and Ecuador had accidents. Subsequent investigations in all those countries clearly revealed the cause of the accidents was a defect in the Firestone tires.

Single and collective lawsuits were filed in the United States, trying to benefit petitioners of different nationalities. Nevertheless, the class action certification order only covered North American parties. As a result, the defendants only proposed to enter into agreements with US claimants, without considering injuries caused to the other victims, despite the fact the defective product manufactured in one country was exported to various States. Latin American litigants ended up not having an immediate proposal for compensation, and not all of them received reparations in their countries and, those who did it, received much lower values than the North American suitors.

That case is not the only one in point when it comes to consumer law; similar circumstances can also be illustrated with many injuries that may happen once a defective foreign good is acquired by diverse Latin American people. From this perspective, a case related to environmental law will be scrutinised concerning the fact that foreigner companies have been concentrating their operations in Latin America[15], mainly, but not only, because of lower production costs, which sometimes finishes up causing environmental damage and climate change.

For example, Repsol S.A., a Spanish multinational energy and petrochemical company, has been accused by Native Peruvians of destroying the Amazon Forest as well as occasioning climate change that, despite being more concentrated in Peru, would impact all Amazonian area that includes nine countries: Brazil, Venezuela, Colombia, Bolivia, Ecuador, Suriname, Guyana, French Guiana and, obviously, Peru. There is no information about a lawsuit against the company, not even an agreement for a possible negotiation, although it is not difficult to come across a report on the probable damage resulting from the destruction of the

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reduction of 67.5 billion dollars in the future recipe forecast causing its own shares values decrease in the real estate market. As a result, individual actions and a class action were filed in the United States which, after being consolidated before a US court, a Dutch fund apprehensive about US decision concerning foreign investors and, aware of consummation risk of prescription valid reimbursement claim in accordance with European directives, filed an action based on the Collective Agreements Act at the Amsterdam Court of Appeal. After the Amsterdam Court admitted the claim, the company decided to settle an agreement contemplating both national and foreign investors, which was only signed at the end of 2006. Since all victims received compensation, the actions processed in the United States were extinguished. For the case study see Hensler (2016).

[14]Gómez (2005) at 283.

[15]Organisation for Economic Co-Operation and Development.

Amazon Forest, climate change and the risk to native peoples in Peruvian territory.[16]

Another pertinent case on transnational damage implicates Real Estate Values in Brazil, a country which has one of the oldest and most advanced act if compared with other countries around[17]. That is the case concerning Petrobras, a Brazilian company with shareholders of different nationalities. Due to embezzlement caused by corruption scandals, company shareholders´ financial losses were verified. Whereas, several individual and collective actions were filed, being the most prominent the class actions´ lawsuit in the United States[18], Brazil[19] and the Netherlands[20], along with collective arbitration[21]. There was a deal concerning US class action suit[22], which covered only the reparation of shareholders living in that country, the others are still awaiting, without any further information about how and if they, who also suffered the damage, will be repaired.

At last, the study cases previously delineated were not presented with the purpose of fully exhausting the matter about transnational collective damage in the region, but only to highlight how ordinary they are and why they need more attention.

Transnational Class Actions Contribution in Cross-border Damage Context

Latin America has experienced[23] and has been watching[24] Judicial reforms designed to improve efficiency of Civil Justice. Among the various reforms experienced, the concern with strengthening the collective process cannot be limited to the borders of each country. The appreciation of a collective process restricted to geographic limits would be in dissonance with the contemporary damage reality that can be widespread across different territories. It is necessary to work on collective actions more broadly, from the perspective of demands in which the interests in matter involve residents and non-residents in a certain State.

Transnational class action lawsuits are able to ensure that victims, regardless of economic situation and of where they are living, could have the damage repaired. In a transnational collective action, all victims may benefit from injury reparation, no matter where the domicile is, without the need for any initiative to file a class action seeking compensation in their national state[25].

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[16]https://www.business-humanrights.org/sites/default/files/documents/ corporate_ conquistadors - en-web-0912_0.pdf

[17]Gómez (2022).

[18]In re Petrobras Securities Litigation (No. 14-CV-09662 (JSR)). http://www.petrobrassecurities litigation.com

[19]It concerns court case number 1106499-89.2017.8.26.0100, class action filed by the Minority Shareholders Association (Aidmin) against Petrobrás at Court of Justice of São Paulo State.

[20]https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2018:7852.

[21]https://www.lexisnexis.com.br/lexis360/noticias/684/cinco-maiores-bancos-aderem-a-arbitragem-coletiva-.

[22]http://www.petrobrassecuritieslitigation.com/

[23]Vargas (2007) at 35-50.

[24]In respect of current legal reforms: Castro & Ballesteros (2018).

[25]Nuyts & Hatzimihail (2014) at 67.

The context can be of fundamental importance if we consider there are Latin American countries without any collective procedural law such as Venezuela and Cuba, or with a modest development and insufficient provision for collective rights protection, in a broad sense, for example as Costa Rica and El Salvador[26]. Rights guardianship cannot be left to the advent of national act discretion or in the case law already exists, that a class action will be effectively filed in each country in order to repair transnational damage. Transnational class actions would guarantee injury compensation, determining the right protection as a priority, despite domicile or nationality.

This way, the situation in which victims residing in a specific locality are compensated while others facing the same damage are not just because they live in another country is avoided.

Furthermore, letting victims residing in different territories benefit from a unique class action could mean a reasonable duration of process as well as costs reduction, so that the class action could progress in a single court, a place where the evidence production could be easier to achieve[27].

It is also remarkable that the existence of a single collective action meant to repair the damage to all victims would ensure a relevant procedural economy and would also prevent contradictory decisions, arising from distinct jurisdictions, concerning the same harmful event. This would prevent that, depending on the jurisdiction, each victim could have a different judgment when it came to the same damage.

From this standpoint, the Canadian experience may be pertinent, since the country has a significant familiarity within the American continent regarding transnational class actions.

Class Actions in Canada

In Canada each province also has a statewide rule for collective procedure. The first state legislation for class actions was in 1978 in the province of Quebec, driven by court rulings that admitted class actions, even without a regulation, by pressure from consumer groups and environmental defenders . After Quebec, the Ontario Act, the Class Action Proceeding Act, was created in 1992 but only came into force in 1993; followed by British Columbia, with the Class Proceeding Act (1995).

In 2001, the Canadian Supreme Court judgment represented a major incentive for class actions in the country, in the case of *Western Canadian Shopping Centers Inc. v Dutton*[28]. It was a case of allegation of mismanagement of funds from the province of Alberta, where the requirements for class actions were laid down in

[26]The assumption was made from the general report and national reports provided to XI Brazilian Conference on Procedural Law and XXV Ibero-American Conference on Procedural Law Journeys published in Lucon, Aprigliano, Silva, Vasconcelos, Orthmann & Grinover (2016) at 1013-1372.
[27]This understanding was stated by the Superior Court of Justice, in Brazil, in the Conflict Competence judgment n. 97.351/SP, decided by the First Section of the court on May 27th, 2019.
[28][2001] 2 SCR 534.

the state court's own rule, but allowed the judge to assess, in the particular case, the admission of a claim as a class action considering the benefits of balance of procedural relation and access to justice that class action can bring.

From that judgment, other provinces developed their own laws for class actions, such as Saskatchewan and Newfoundland, Class Action Statute (2002), and the legislation of Manitoba and Alberta, introducing class actions in 2003 and 2004, respectively. Provincial legislations, however, drew inspiration from the legislation of three (3) provinces: from Quebéc, dated 1978, from Ontario, dated 1993, and from British Columbia, dated 1995 .

Currently, almost all provinces, except for Prince Edward Island, have a collective procedural law. There are some distinctions between provincial legislations, such as the certification procedure and opt-in and opt-out mechanisms.

These differences are not relevant when dealing with damage bound to a province. However, when the damage is not restricted to a province, the scenario becomes particularly important, even because the collective action of one province may be able to protect all victims, regardless of the province in which they are located. Collective procedural laws allow admission to cover nonresidents in the province, as long as they have some relation with the matter debated in court.

When it is a question of effecting the judgment of one province in another, although the predictions are different, the criteria adopted for its effectiveness are: 1) the primacy of the collective actions, assuming that a favourable collective judgment could not cease to be effected by the victim ; 2) in case of divergence between the laws of the province in which the class action and the province in which the enforcement of the judgment is sought, it is only applicable if the collective judgment does not offend the general provisions of the law if there is no offense to federal legislation , in order to ensure the effectiveness of the collective process.

In this perspective, the Canadian scenario has been a true lesson in relation to transnational class actions.

The theme is the year of 1990, when the Canadian Supreme Court ruled in *Morguard Investments Ltd. v De Savoye*[29] that, to benefit non-residents or to recognise a foreign judgment that would benefit non-residents, the principles of reciprocity and justice, considering that foreign judgment should not offend the Canadian Constitution. The Canadian scenario has demonstrated to be a real lesson on transnational class action. The theme is set in 1990, when the Supreme Court of Canada decided, in the case of *Morguard Investments Ltd. v De Savoye*[30] that, in order to benefit non-residents or to recognise a foreign judgment that would benefit non-residents, the principles of reciprocity and justice, considering that the foreign judgment must not offend the Canadian Constitution[31].

Silver v IMAX[32] and *Kaynes v BP PLC*[33]. are other two cases that deserve to be traced. The first one concerned securities, more specifically the fact Canadian

[29][1990] 3 SCR 1077.
[30][1990] 3.SCR 1077.
[31]Walker (2004) at 765-766.
[32][2013] ONSC 1667.
[33][2016] ONCA 601.

company *IMAX* would have presented a report with a stock exchange value that did not correspond to the real one. There was a class action filed in Ontario and another in the United States by stock exchange shareholders, but in the American class action, it was recognised that it concerned a global class, and an agreement that would benefit all shareholders was reached. Nevertheless, *IMAX* requested in the Ontario Court that shareholders who had filed the class action in Canadian territory could not benefit from the US collective agreement. The Ontario Superior Court partially upheld the claim, only to exclude from the Canadian class action those who did not wish or could not benefit from the collective agreement concluded in the United States, so that recognizing the transnational collective agreement.

In the second case, *Kaynes* applied for an order in the Ontario Court to stop the Court itself from prosecuting and adjudicating a class action, referring to securities on the New York Stock Exchange (NYSE), since there was a pending class action in the United States. The order was not granted by Ontario Court when the US Court was already trying the matter, but, once again, Ontario Court ruled that if the issue was not previously being decided in the United States, an order for compensation could be awarded by Ontario Court to the shareholders who invested in the New York Stock Exchange.

By Way of Conclusion: Final Reflections and Proposals on how the Canadian Experience could contribute to Improve Access to Justice in Latin America

Throughout This Work, The Research Sought, By Means Of Concrete Situations, To Spotlight Previous Damage Propagated Injuries All Over Latin American Countries. Consecutively, It Also Portrayed How Transnational Class Actions Could Contribute To Improving Access To Justice In The Region.

An Attempt Was Made To Demonstrate The Need To Rethink Procedural Law Beyond State Borders. Specifically About Collective Procedural Law, A Proposal For A Model Of Transnational Collective Demand Would Also Improve Access To Justice Without Restriction To The Limits Of Each State, As Well As Substantive Law Effectiveness, Ensuring That, Even In The Face Of Insufficiency Or Nonexistence Of National Models, The Damage Will Not Be Left Unrepaired.

Regarding Transnational Class Actions, Two Problems Urge To Be Confronted: The Processing Of These Claims In National Territories And The Execution Of Judgments Handed Down In Other Countries In The National Territory.

So, It`S Time To Make Research Proposals.

Concerning The First Aspect, Above And Beyond Residents In Its Territory, It Is Necessary That, in the case of transnational damage, class actions can benefit all injured parties who have not sought reparation yet. Access to justice and the effectiveness of substantive rights are not fully achieved if the reparation embraces only part of the victims. Class actions in process must contemplate all class members who are not covered by any other form of compensation, allowing everyone to benefit from the trial, no matter the country it takes place.

The purpose was not to create an attempt to build a class action model for transnational damage compensation, but simply to state that the collective process cannot be selective, benefiting only part of the victims when the other portion is unable to seek injury prevention or treatment, or in the case they simply haven't done it yet.

It is also underlined that a broad model for class actions[34], has been defended, although the existing model in a country could already be enough to not leave damage unrepaired, being relevant only the coverage of all victims, as admitted by the Court of Ontario, in Canada.

In the Latin American scenario, the nonexistence of legislation on collective proceedings or the absence of provision, in current legislation, on transnational class actions cannot be an obstruction to their admission. The effectiveness of rights cannot end up being conditioned to the development of an act.

In this circumstance, both the access to justice and the due process of law guarantees, which drove[35] and still drive[36] Latin America civil justice reforms for greater efficiency and the effectiveness of rights, would already demonstrate to be the main scope regarding legal systems with the aim of admitting transnational class actions. This mechanism would ensure that victims of harm would not be left without compensation, as well as they would have the possibility to join, even via representation of their interest in court.

Particularly applicable to judgment effectiveness, it should be emphasised that the lack of a collective process model cannot be a hindrance to the right effectiveness previously recognised in a collective judgment. The reciprocity of the other country and the nonexistence of offense to the Constitution, without any restriction to the model adopted, must prevail over the formal procedure compatibility, since eventual form of Procedural Law must not and cannot stop the Substantive Law effective reparation, as well as Access to Justice accomplishment.

The proposals presented are not restricted to the Latin American scenery, although they are especially relevant there, particularly in the execution sphere, considering there are some countries in which collective procedural legislation is missing, or they need to improve it, and also due to victims who, for that reason, end up without adequate protection of their rights. So those proposals would make it possible that, even if the collective knowledge procedural has not been developed in a country, its residents can be benefited with that.

In this way, its non-residents would not be left without the possibility of preventing or repairing damage, at the discretion of an act that was not even projected up to this time.

[34]Mendes & Silva (2018). .
[35]Vargas (2007) at 35-50.
[36]Castro & Ballesteros (2018); 10 Ideas sobre el modelo de reforma a la Justicia Civil que promueve CEJA.

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Legal Aspects of Corporate Governance in Russia

*By Vladimir Orlov**

Corporate governance in Russia is subject to the present civil law provisions, contained in the Civil Code and laws regulating different forms of corporations, including companies, enacted in accordance with it, which concern governing bodies and decision-making procedures. The supreme governing body of the company is the general meeting of its participants, and the issues, which are within its exclusive authority, are enlisted in the law. A company must have an executive body that represents it. It may have also a collegiate executive body and a collegiate governing body for controlling the executive bodies. The members of the governing bodies are presupposed to act in good faith and reasonably, and they bear liability for negligence. The liability is personal as well as solidary (joint and several), but the persons who did not take part in the administration (or voted against) are not to bear liability. Characteristic for the liability of executives and representatives of company is, that their liability is to be realised simply at the moment when their duty to act in good faith and reasonably is violated.

Keywords: *Civil Law; Company; Governing Body; General Meeting; Decision-Making; Liability*

Introduction

The issues related to corporate governance belong to the scope of corporate law in Russia[1], and are subject to the provisions of the Civil Code on governance in a corporation (Article 65^3) as well as the provisions of the Joint Stock Company (JSC) Law on general meeting of shareholders (Chapter VII) and on board of directors (supervisory board) of a company and the executive body of a company (Chapter VIII) and the Limited Liability Company (LLC) Law on governance of a company (Chapter IV). Important are also the rules of the Civil Code on decisions of meetings (Chapter IX^1) and invalidity of transactions, particularly, Article 174 on the consequences of the improper execution of authorisation, as well as the rules on liability of the corporate executives contained in the Civil Code (Article 53^3) and in the JSC law (Article 71).

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[1]For more on the subject *see* Orlov (2015), Orlov (2011) and the material cited therein as well as Dedov & Molotnikov (2017); Zhevnyak, Shablova, Ryzhkovskaya & Tihovskaya (2019); Lomakin (2020) and Popondopulo (2016).

General Rules

The issues related to corporate governance are basically subject to the provisions of the Civil Code on juristic persons (Article 49) and governance in a corporation[2] (Article 65^3) as well as the provisions of the JSC law on general meeting of shareholders (chapter VII) and on board of directors (supervisory board) of a company and the executive body of a company (chapter VIII) and the LLC law on governance of a company (Chapter IV).

All entities that are directly allowed to exercise entrepreneurial activities, or commercial organisations in Russia, are listed in the Civil Code, and they are provided with the (registered) juristic personality to enter transactions and take responsibility for their obligations in their own name. They exercise their legal capacity through their legislatively defined governance mechanisms that are charter-based or contractual.

Charter-based governance is common for corporations. The charter, confirmed by the founders of the enterprise, is a local normative act validated by registration, which specifies the legal status of the established (incorporated) enterprise, and is binding for the established enterprise and its participants. The charter provisions are constantly valid until changed. Contractual governance based on free disposal or consent of the parties is also known in corporate law. Contractual arrangements are characteristic for the governance of partnerships.

Charter-based governance is usually represented by companies that are highly regulated corporations. Detailed legal rules concern without particular exceptions decision-making in their governing bodies. The supreme governing body of the company is the general meeting of its participants, and the issues, which are within its exclusive authority, are enlisted in the law. A company must have an executive body that represents it. It may have also a collegiate executive body and a collegiate governing body for controlling the executive bodies.

The most highly regulated corporations are public joint-stock companies. The general meeting of shareholders of a public company is not, for instance, entitled to consider and adopt resolutions on the issues that do not fall within its competence. Furthermore, the council of directors (supervisory council) is obligatory for a public joint-stock company.

In turn, not-public joint-stock companies are less regulated than the public ones. The charter of a non-public company may provide the issues that are not in accordance with the law under the competence of the general meeting of shareholders as being subjected to this. Moreover, in the general meeting of the non-public company all shareholders are entitled to make decisions on issues not included in the agenda of the meeting and even may change the agenda.

Lesser than joint-stock companies regulated are limited liability companies. For instance, the minimum requirement for a limited liability company is two-level system of governing bodies consisting of the general meeting and the executive body. However, the general meeting of also the limited liability company may adopt decisions with regard to issues not included on the agenda of the meeting if all the members of the company are present at it. Moreover,

[2]Russian Civil Code, art. 65^3.

decisions are to be adopted by a majority of votes of all members of the limited liability company, whereas the votes of the shareholders participating in the general meeting of the joint-stock company are of decisive significance. There are also entrepreneurial entities that are outside of the scope of the corporate law regulation.

Juristic Person

Juristic person[3] is the basic concept of a collective association that is subject of law. The legal forms of juristic persons practising entrepreneurial activities[4] are listed exhaustively in the Civil Code. According to Article 48 of the Civil Code, juristic persons in Russian law are distinguished into corporate entities (organisations) and unitary entities (enterprises and also institutions) as well as into commercial and non-commercial (non-profit) organisations. Commercial corporate entities include (general and limited) partnerships, business (limited liability) partnerships and companies as well as production cooperatives and farms. In turn, companies are distinguished into (public and non-public) joint stock companies and limited liability companies. Limited liability companies, partnerships, and production cooperatives are governed by the general provisions of the Civil Code concerning those as juristic persons[5], corporate entities[6], and commercial organisations: business partnerships and companies[7].

According to Article 53 of the Civil Code on the (governing) bodies of juristic person, a juristic person is to acquire civil law rights and engage with civil law obligations via its bodies operating in accordance with the law, other legal acts and the constituent document. In the cases provided by the Civil Code[8], the juristic person is to have the right to acquire the civil law rights and to engage with civil law obligations through its participants. The procedure for the formation of, and the scope of competence of, the bodies of a juristic person are to be defined by the law and constituent document. The constituent document may provide that the power to act in the name of the juristic person is granted to several persons who act jointly or separately from each other. Information on it ought to be submitted to the (state) Register of juristic persons.

[3]For more on the subject see, for instance, Lomakin (2020) at 4–5 and 10–12.
[4]Entrepreneurship (business activity) may be practised in Russia by forming or without forming a juristic person (legal entity), but in both cases it requires registration. According to the Civil Code, if a physical person intends to be engaged into entrepreneurship without forming a juristic person, he is obliged to be registered as an individual entrepreneur (sole trader).
[5]Id. at arts. 48–65.
[6]Id. at arts. 65^2–65^3.
[7]Id. at arts. 66–68.
[8]Id. at art. 53.2.

Governing Bodies

According to the Civil Code[9], the supreme governing body of the corporate entity is the general meeting of its participants, except for production cooperatives and non-commercial organisations with more than 100 participants where some other collective representative body, for instance, the assembly or conference could act as the supreme authority. Unless otherwise provided for by the Civil Code or other law, the issues, which are within the exclusive authority of the supreme governing body of the corporate entity, include:

- the determination of the priority directions for the activity and the principles for formation and use of property of the entity;
- the approval of the charter and its amendments;
- the determination of the order for entry and dismissal of participants except for the cases established by the law;
- the formation of the other bodies of the entity and early termination of their powers, and
- the approval of annual reports, bookkeeping balance sheets, as well as
- decisions on the establishment of or participating in other juristic persons and on the establishment of branch and representative office, unless such matters fall under the charter in accordance with the law to the authority of the other collegial bodies;
- decisions on the reorganisation and liquidation of the entity, and
- the election or the appointment of the audit body, as well as
- other issues determined by the law or constituent documents.

A corporate entity must have one or several one-person executive body (the director, the director general, the president), and it may be also a juristic person. The executive power of the entity may rest, in the cases provided by the law or charter, with a collegiate executive body (the board, directorate). The law or charter may provide additionally under the Civil Code[10] for the foundation of a colligate governing body for controlling the executive bodies.

Decisions of Meetings and Invalidity

The rules of the Civil Code on decisions of meetings (Chapter IX^1) are, according to the Article 181^1 of the Civil Code, (generally) applicable, unless otherwise is established by the law or in the order determined by it. Accordingly, the decision of a meeting that has civil law effects under the law is to cause its aimed legal effects, for all the persons who have been entitled to take part in the given meeting (participants of a juristic person, co-owners, creditors in case of bankruptcy and other participants of a civil law community), as well as for other persons, if it is established by the law or results from the nature of relations.

[9]Id. at art. 65^3.
[10]Id. at art. 65^3.4.

A meeting's decision is to be deemed adopted, under the Civil Code[11], if the majority of the meeting's participants have voted for it and at least fifty per cent of the total number of participants of an appropriate civil law community have taken part in it. The session of the meeting may be attended remotely using the electronic or other hardware, if the participants may be identified, and the decision can be adopted without a session (absentee voting) through sending the documents containing the information of their voting by at least 50 percent of the total number of the participants. In the event that the agenda of a meeting contains several issues, an independent decision ought to be adopted on each of them, unless otherwise is unanimously established by the meeting's participants. The session of the meeting and the voting results in it are to be recorded in the minutes.

According to the Civil Code[12], a meeting's decision ought to be deemed invalid, on the grounds established by the law, by virtue of declaring it as such by the court (disputable decision) or irrespective of such declaring (void decision). An invalid decision is disputable, unless it follows from the law that the decision is (null and) void. In the event the decision is published, a report on declaring it invalid by the court ought to be published in the same publication on account of the person determined in accordance with the procedural rules.

A meeting's decision may be declared by the court invalid, according to the Civil Code[13], if it is failed to meet the law requirements, including the cases of

1) the essential breach of the procedure for decision making that affected the expression of the will of the participants of a meeting;
2) deficiency of the authority of the person who spoke on behalf of the meeting's participant;
3) the breach of equality rights of the participants and
4) the essential breach of the rules on drawing the minutes.

However, a meeting's decision may not be recognised by the court as invalid on the grounds connected with failure to follow the procedure for adopting the decision, if it is confirmed by the successive decision of the meeting adopted in the established procedure prior to rendering a court decision. [14]

According to the Civil Code[15], a participant of an appropriate civil law community who has not attended the session or absentee voting or has voted against the adoption of the disputable decision is entitled to dispute the meeting's decision with the court. In turn, a meeting's participant, who has voted for adoption of a decision or has abstained from voting, is entitled to dispute with court the decision if his expression of will was broken in the course of voting. But a meeting’s decision may not be declared invalid by the court if the voting of a person whose rights are affected by the disputable decision could not influence its

[11]Id. at art. 181^2.
[12]Id. at art. 181^3.
[13]Id. at art. 181^4.
[14]Id. at art. 181^4.2.
[15]Id. at art. 181^4.3.

adoption and the meeting's decision did not entail any essentially unfavourable consequences for this person.

Under the Civil Code[16], a meeting's decision may be disputed in the court within six months from the date when the person whose rights were violated by the adoption of the decision *became known or should* have become known about it but at the latest two years from the date when data on the adopted decision became generally accessible for the participants of an appropriate civil law community. The person disputing a meeting's decision must notify in advance in writing the participants of an appropriate civil law community on his intention to make the claim and to provide them with other information related to the case. The participants of an appropriate civil law community that have not joined the claim, in particular those, who have other grounds for disputing the given decision, are not entitled afterwards to dispute the decision, unless the court finds the reasons for the claim valid.[17] The invalidity of the decision declared by the court as invalid starts from the moment of its adoption.[18]

According to the rules on the nullity of a meeting's decision of the Civil Code[19], unless otherwise provided for by the law, a meeting's decision is to be deemed null and void, if it:

1) is adopted on an issue that is not included into its agenda, except if all the participants of an appropriate civil law community have attended the session or absentee voting;
2) is adopted in the absence of the required quorum;
3) is adopted on an issue that is not within the scope of the meeting's authority; or
4) is contrary to the basics of legal order or morals.

Also, the provisions of the Civil Code on the invalidity of transactions contain the rules that concern the corporate governance. According to the Article 174 of the Civil Code on the consequences of the improper execution of authorisation, a transaction made by the governing body of a juristic person, which exceeds the limits of its legal capacity, may be recognised by a court as invalid upon the claim of the juristic person, only in those cases, when it is proven that the other party to the transaction knew or should have known of the restrictions.[20] However, in the case where the body of the juristic person acts in the name of this for the damage to the interests of the juristic person, the transaction concluded by it may be recognised, according to the Civil Code[21], by a court as invalid upon the claim of the juristic person, and in cases provided for by the law, upon the claim of another person or body filed in the interest of those, provided that the counterparty to the transaction knew or should have known of the obvious damage to the juristic

[16]Id. at art. 181^4.7.
[17]Id. at art. 181^4.8.
[18]Id. at art. 181^4.9.
[19]Id. at art. 181^5.
[20]Restrictions may also be provided by the special act of the juristic person.
[21]Russian Civil Code, art. 174.2.

person, or in case of the existence of circumstances obviously testifying to the fact that there has been a bad-faith agreement or joint acts of the juristic person's body with the counterparty of the transaction for the damage to the interests of the juristic person.[22]

Liability

According to the general provisions of the Civil Code on liability of the corporate executives[23], the person who by force of the law or of the juristic person's constituent document comes out on its behalf, or use the representative power in the name of the company is expected to act in the interests of the juristic person it represents in good faith and reasonably; the same duty is extended also to the members of the collegiate executive body of the juristic person. In case of non-observance of these as well as the customary requirements such a person is obliged, upon the demand of the juristic person, or the founders (the participants) acting on behalf of this, to compensate the damages caused by his fault[24] taking into account ordinary business practices and risks, which ought to be proved[25]. However, the members of the collegiate executive body, who voted against the adoption of the decision or did not take part in the voting concerning the issue[26], are excepted from the liability for the decision. In the event of jointly caused damages the liability is solidary[27]. Furthermore, the Civil Code[28] expressly provides that an agreement on the restriction or elimination of the executives' liability is null and void.[29]

Business Companies

Charter-based governance is usually represented by companies that are highly regulated corporations. Detailed legal rules concern without particular exceptions decision-making in their governing bodies. The supreme governing body of the company is the general meeting of its participants, and the issues, which are within its exclusive authority, are enlisted in the law. A company must have an executive body that represents it. It may have also a collegiate executive body and a colligate governing body for controlling the executive bodies.

[22]Orlov, Popondopulo 2016: 177–178.
[23]Russian Civil Code, art. 53.3.
[24]Id. at art. 53^1.
[25]Id. at art. 53^1.1.
[26]Id. at art. 53^1.2.
[27]Id. at art. 53^1.4.
[28]Id. at art. 53^1.5.
[29]Id. at art. 53^1.

Joint Stock Company[30]

The supreme governing body of the joint stock company is, according to the JSC Law[31], the general meeting of its shareholders. In certain cases, the personal participation of the shareholders in the general meeting is not required. However, a general meeting of shareholders, the agenda of which includes issues related to the election of the council of directors (supervisory board) of the company or the audit commission (inspector) of the company, and approval of the company auditor, as well as approval of the annual report and annual accounting (financial) statements of the company, unless these issues are subjected in accordance with the charter to the competence of the council of directors (supervisory board) of the company, may not be held in the form of absentee voting (Article 50). And if all voting shares in a company are held by one shareholder, decisions on the issues subjected to the competence of the general meeting are to be made solely by this shareholder and documented in writing[32].

The election of members of the council of directors (supervisory council) and auditors as well as the approval of annual reports, bookkeeping balance sheets, and the profit and loss accounts of the company, and the distribution of its profits and losses, are exclusively within the authority of the annual meeting, where also other issues falling within the competence of the general meeting of shareholders may be resolved. Other general meetings than annual meetings are regarded extraordinary[33], as provided for by the JSC Law[34].

The issues falling within the authority of different governing bodies of the joint stock company are detailed in the JSC Law. According to its Article 48.1 the following issues fall within the competence of the general meeting of shareholders:

1) Introduction of changes and amendments to the company's charter or approval of the company's charter in a new version;
2) Company reorganisation;
3) Liquidation of the company, appointment of a liquidation commission, and approval of interim and final liquidation balance sheets;
4) Determining the number of members of the council of directors (supervisory board) of the company, election of its members, and early termination of their powers;
5) Determining the quantity, par value, and category (type) of declared shares and the rights granted by them;

[30]A joint stock company is, under the Civil Code (Article 96) and the Joint Stock Company Law (Article 2.1), a company whose charter (authorised) capital is divided into a definite number of shares (of stock) certifying rights of obligations of the participants or shareholders (stockholders) to the company (Article 2.1). For more on the subject see, for instance, Lomakin (2020) at 39–58.
[31]Joint Stock Company Law, art. 47.1.
[32]Id. at art. 47.3.
[33]Shareholders owning not less than 10 percent of voting shares as well as the auditors of the company are entitled to require the convocation of an extraordinary general meeting According to the Article 55 of the Joint Stock Company Law.
[34]Id. at art. 47.1.

6) Increase of the charter capital by increasing the nominal value of shares or by placing additional shares unless this issue is subjected in accordance with the law to the competence of the council of directors (supervisory board) of the company;
7) Decrease of the charter capital of the company through the reduction of the par value of shares, the acquisition of a part of shares by the company to reduce their total number, or the redemption of shares acquired or repurchased by the company;
8) Formation of the executive body of the company and early termination of its powers, unless such issues fall, according to the charter, to the authority of the council of directors (supervisory board), as well as the cases when the council of directors (supervisory board) has not made the decision on formation of the sole executive body[35] and the decision on early termination of the powers of the sole executive body[36];
9) Election of members of the audit commission of the company and early termination of their powers, if the audit commission is according to the charter obligatory for the company;
10) Approval of the company's auditor;
    10.1) Payment (declaration) of dividends following the results of the first quarter, six months, or nine months of the reporting year;
11) Approval of the annual report and annual accounting (financial) statements of the company, unless these issues are subjected in accordance with the law to the competence of the council of directors (supervisory board) of the company;
    11.1) Allocation of profit (including payment (declaration) of dividends, except for payment (declaration) of dividends following the results of the first quarter, six months, or nine months of the reporting year) and loss of the company following the results of the reporting year;
12) Determining the procedure for holding the general meeting of shareholders;
13) Election of members of the tally commission and early termination of their powers;
14) Splitting and consolidation of shares;
15) Decisions on the approval or subsequent approval of interested party transactions body[37];
16) Decisions on the approval or subsequent approval of large-scale transactions[38];
17) the acquisition by the company of placed shares;
18) Decisions on participation in financial and industrial groups, associations, and other groups of commercial entities;
19) Approval of internal documents regulating the activities of company bodies (including decisions concerning the listing and delisting of the company shares and other securities;
20) Resolution of other issues stipulated by the law.

[35] Id. at art. 69.6.
[36] Id. at art. 69.7.
[37] Id. at art. 83.
[38] Id. at art. 79.

According to the Article 48.2 of the JSC Law issues falling within the competence of the general meeting of shareholders are not to be transferred for resolution to the executive body of the company, unless otherwise provided for by the law, nor for resolution to the council of directors (supervisory board) of the company, except for the issues provided for by the law, and in this case, shareholders are not entitled to demand redemption of the shares[39].[40] However, the charter of a non-public company may provide for the transfer of the issues, subjected under the law to the competence of the general meeting of shareholders, to the competence of the council of directors (supervisory board) of the company, except for the issues stipulated hereby[41]. Provisions related to such transfer may be included in the charter, or amended to or removed from it by the decision made at the general meeting by all of the company's shareholders unanimously[42].

It is expressly provided in Article 48.3 of the JSC Law that the general meeting of shareholders of a public company is not entitled to consider and adopt resolutions on the issues that do not fall within its competence. However, the charter of a non-public company may provide the issues that are not, in accordance with the law, under the competence of the general meeting of shareholders as being subjected to this. The respective provisions may be included in the charter, or amended to or removed from it by a decision made at the general meeting by all of the company's shareholders unanimously.[43]

According to the JSC Law, notice of the general meeting of shareholders ought to be communicated to the persons entitled to participate in the general meeting of shareholders and registered in the register of company shareholders[44]. The general meeting is competent (have a quorum) if shareholders owning in total more than half of the votes under the company's authorised voting shares have taken part in it[45]. The quorum for a new general meeting convened in place of the unconstituted meeting is at least 30 percent, and even a smaller quorum may be provided for by the charter of the company whose number of shareholders is greater than 500,000[46].

In general, a resolution of the general meeting on an issue put to a vote is to be made by the majority vote of shareholders owning voting shares of the

[39]Id. at art. 75.

[40]Redemption of the shares may be provided in cases of the general meeting's decision on the reorganisation of the company or on the approval of large-scale transaction.

[41]Accordingly, transferable are the increase and decrease of the charter capital; formation of the executive body of the company and early termination of its powers; election of members of the audit commission of the company and early termination of their powers; approval of the company's auditor; payment (declaration) of dividends following the results of the first quarter, six months, or nine months of the reporting year; approval of the annual financial documents; the procedure for conducting the general meeting; splitting and consolidation of shares; approval or subsequent approval of interested party transactions; acquisition by the company of placed shares and participation in financial and industrial groups and other organisations as well as resolution of other issues stipulated by the law.

[42]Joint Stock Company Law, art. 48.2[1].

[43]Id. at art. 48.4.

[44]Id. at art. 52.

[45]Id. at art. 58.1.

[46]Id. at art. 58.3.

company who take part in the meeting, unless otherwise established by the Law. Moreover, only a separate (independent) decision may be made on each issue put to a vote.

A decision of the general meeting regarding, for instance:

- the reorganisation of the company;
- an increase in charter capital by increasing the nominal value of shares or by placing additional shares;
- splitting and consolidation of shares;
- interested party and large-scale transactions;
- the acquisition by the company of placed shares;
- participation in financial and industrial groups and other organisations, and
- approval of bylaws for the regulation of the internal affairs of the company, requires under the JSC law the proposal by the council of directors, unless otherwise provided for by the charter.

A decision with regard to the:

- amendments to the charter of the company;
- reorganisation of the company;
- liquidation of the company;
- determination of the amount, types and par value of the declared shares as well as rights granted by them;
- acquisition by the company of placed shares; and in some other cases, concerning, for instance, large-scale transactions must be adopted according to the JSC Law by the general meeting by a qualified majority (a majority of three-quarters of the votes of the shareholders participating in the general meeting), unless otherwise provided for by the charter[47].[48]

Under the JSC law[49] the general meeting is not entitled to make decisions on issues not included in the agenda of the meeting, nor to change the agenda, except when all shareholders of the non-public company are present at making a decision on the issue not included in the agenda or at changing the agenda of the general meeting. The agenda of the general meeting is usually prepared by the council of directors[50]. The shareholders (shareholder) owning in aggregate not less than 2 percent of voting shares are entitled within a defined period to submit proposals for the agenda of the annual general meeting, including nomination of candidates for the governing bodies. The council of directors may refuse the agenda proposals, however, only if the terms for making proposals are not observed, in which case the shareholder is entitled to demand in the court that the company

[47]Id. at art. 49.4.
[48]Decisions concerning other issues are to be adopted by an ordinary majority.
[49]Joint Stock Company Law, art. 49.6.
[50]Id. at art. 54.

shall include the proposed issue in the agenda of the general meeting or include the candidate in the list of candidates for voting[51].

According to the Article 64 of the JSC Law, the council of directors (supervisory council), which is, in accordance with the Article 97.3 of the Civil Code, obligatory for a public joint-stock company, executes the general management of the company's activities, except for deciding issues relegated to the authority of the general meeting. Also in other cases, a collective managerial body of the company may be established. And in the event that the number of shareholders owning voting shares is less than 50, the company's charter may provide, in accordance with the JSC Law[52], that the functions of the council of directors of the company (supervisory board) ought to be performed by the general meeting of shareholders. In such a case, the charter of the company is to indicate the person or body of the company to whose competence the issue of holding the general meeting of shareholders and approving its agenda is reserved.

According to the JSC law[53], members of the council of directors of a company are elected by the annual general meeting. As a member of the council of directors, only a physical person, not necessarily a shareholder, may be elected. Members of a collegial executive organ of the company can be members of the council of directors, but they may not comprise more than one-quarter of it; however, the person effectuating the functions of a one-man executive organ may not be simultaneously the chairman of the company. Furthermore, the council of directors of a public company must have not fewer than five members, and non-public company—three members, unless a larger number of members is provided for by the charter or the general meeting's decision. In turn, in a company whose number of shareholders is more than 1,000 at least seven persons must form the council of directors, unless a larger number of members is provided for by the charter or the general meeting's decision. Members of the council of directors of the company ought to be elected by way of cumulative voting[54]. The candidates who receive the greatest number of votes are to be deemed elected to the council of directors of the company.

Within the authority of the council of directors, is, according to the Article 65 of the JSC Law, determination of the priority directions of activity of the company, except for the issues subjected to the authority of the general meeting[55]. Also, formation of the executive body of the company and early termination of its powers and establishing of committees of the council of directors as well as determination of the principles of the risk management as well as internal control and audit are within the authority of the council of directors. The council of directors also makes decisions on the convocation of the annual and extraordinary general meeting and on the confirmation of its agenda as well as other questions regarding its conduct. It decides on placement of additional shares and issue of

[51]Id. at art. 53.
[52]Id. at art. 64.1.
[53]Id. at art. 66.
[54]In cumulative voting each share corresponds to as great a number of votes as the number of members on the council of directors, and the votes may be either given to one candidate or divided between several candidates (Joint Stock Company Law, art. 66.4).
[55]Id. at art. 64.1.

bonds and other securities as well as on the approval or subsequent approval of large-scale transactions[5657]. The council of directors also determines the price (monetary value) of assets of the company. The authority of the council of directors also includes other issues provided for by the Law and by the company's charter. The issues relegated to the authority of the council of directors may not be delegated for decision to executive bodies.[58]

According to the JSC Law, if a decision on the formation of the sole executive body of the company[59] or a decision on the early termination of the powers of the sole executive body of the company[60] as well as decisions on the approval of an interested party transaction or of a large-scale transaction have not been made by the council of directors (supervisory board), the law empowers measures for convening of the extraordinary general meeting of shareholders to resolve the issue at question, including the right to demand it in the court[61].

According to the Article 69.1 of the JSC Law, management of the company's daily activity is to be executed by the sole executive body of the company (director, general director), or it may be collegiate, executed by the board (directorate) together with a one-person executive body. The executive bodies are accountable to the board of directors (supervisory board) of the company and to the general meeting of shareholders. The executive body of the company decides on all the issues which are not within the authority of the other governing bodies.

Under the JSC Law the decision on the formation of the executive body may be adopted not only by the general meeting but also by the council of directors, if this is provided for by the charter[62]. The executive body of the joint stock company may be collegiate (the board, directorate) and/or one-person (director, director general). The simultaneous existence of both the one-person and collegiate executive body must be provided for by the charter, which must also determine the authority of the latter. In this event, the one-person executive body must also effectuate the functions of chairman of the collegial executive body.[63] However, the member of the one-person executive body (director) may not be, as previously noted, simultaneously the chairman of the council of directors, whereas the members of a collegial executive body may comprise at most one-quarter of the council of directors[64]. By decision of the general meeting, the powers of the executive body of the company may be transferred, according to the JSC Law[65], under a contract to another commercial (managing) organisation or even to an individual entrepreneur (manager).

[56]Id. at art. 79.
[57]Also establishing of committees of the council of directors and determination of the principles of the risk management as well as internal control and audit are within the authority of the council of directors.
[58]Joint Stock Company Law, art. 65.
[59]Id. at art. 69.6.
[60]Id. at art. 69.7.
[61]Id. at art. 55.8.
[62]Id. at art. 65.
[63]Id. at art. 69.1.
[64]Id. at art. 66.2.
[65]Id. at art. 69.1.

The rights and duties of the executive body (and its members) are defined, in accordance with the JSC law, by the law and contract concluded with each member[66]. The general meeting or the council of directors, if the authority to form the executive bodies is delegated to it, may decide on the termination of the authorities of the executive body or its members at any time. The general meeting also has the right to terminate the authorities of the managing organisation or manager. The charter may provide the council of directors with the power to suspend authorities of the one-person executive body and delegate them to a provisional body.[67]

In accordance with the Article 85 of the JSC Law, the (internal) audit commission is established in a non-public company, unless its charter provides the absence of it, whereas in a public company its establishing ought to be required by the charter. In turn, the (external) financial and economic activity of the company ought to be audited by the auditor (an individual or an audit organisation) that is approved by the general meeting of shareholders[68]. A public company is also obliged to arrange its risk management and internal control, and is required to execute an internal audit for evaluating the reliability and efficiency of it[69].

A company is obliged, under the JSC Law[70], to keep the bookkeeping report and to submit the financial documents (to the public authorities) in accordance with the legal requirements, for which the executive body of the company is responsible. The reliability of the data contained in the financial documents must be confirmed by the audit commission (auditor) of the company, if this is provided by the charter. The annual report of the company is subject to preliminary confirmation by the council of directors or, in the absence of this, by the one-person executive body not later than 30 days before the date of conducting the annual general meeting. In the event that the approval of the annual report falls within the competence of the council of directors (supervisory board), it ought to be approved in the same time period. A company is obliged to store its important documents and grant information concerning it, in accordance with the law requirements, to the public authorities and third persons as well as shareholders.[71]

A public company must disclose its annual report and annual accounting (financial) statements and also the prospectus concerning the issue of securities and the notices of general meetings of shareholders as well as other information determined by the Bank of Russia; also, a non-public company, if it has over 50 shareholders, must disclose its annual report and annual accounting (financial) statements[72]. The disclosure duty of the company arises not only in connection with the requirements concerning the company's activity information established by the JSC Law but also in accordance with the public law provisions empowering certain authorities to demand certain information from companies. Empowered to

[66]Id. at art. 69.3.
[67]Id. at art. 69.4.
[68]Id. at art. 86.
[69]Id. at art. 87^1.
[70]Id. at art. 88.
[71]Id. at arts. 89–91.
[72]Id. at art. 92.

demand information are tax, custom, antimonopoly, finance, statistics, and investigation (police) authorities as well as judicial bodies.[73]

The liability of the members of the governing bodies of the company that is provided by the Joint Stock Company Law is based on the general company law rules on liability of the Civil Code[74] and means in general the liability for negligence. Under the Article 71 of the Joint Stock Company Law, the members of the governing bodies[75] are presupposed to act in good faith and reasonably, and are liable to the company for losses inflicted to it by their wrongful actions (inaction), including violation of the procedure established for acquiring company shares, unless other grounds for liability are established by the law. In determining the grounds and extend of the liability of the corporate executives, however, ordinary business practices and other relevant considerations must be taken into account. The executives' liability is personal as well as solidary (joint and several), but the persons who did not take part in the administration (or voted against) is not to bear liability; in this case the company or shareholders owning not less than 1 percent of the common shares of the company have the right to apply to a court with a suit. In the event of violation of the rules on acquisition of company shares such a right is provided to a shareholder without limitations on ownership.[76] Thus, characteristic for the liability of executives and representatives of company is, that their liability is to be realised simply at the moment when their duty, determined through the value concepts[77], to act in good faith and reasonably is violated, provided that it has caused damages[78].

Limited Liability Company

The minimum requirement for a limited liability company[79] is two-level system of governing bodies consisting of the general meeting and the executive body. However, the charter may provide additionally under the LLC law[80] for the foundation of a council of directors (supervisory council).

[73]Id. at art. 90.
[74]Russian Civil Code, art. 53.3.
[75]namely, members of the board of directors (supervisory board), the sole executive body of the company (director, general director), the temporary sole executive body, members of the collective executive body (management board, directorate), as well as a management company or a manager, as well as representatives of the state or the municipality in the board of directors.
[76]Id. at art. 71.5.
[77]The growing use of the value concepts and the value norms in Russian civil law indicates its development towards the growing role of the judicial discretion and consequently the approval of the significance of the judicial practice.
[78]The damages caused by the acts of the director are regarded as the requirement of the director's liability.
[79]A limited liability company is, under the Civil Code (Article 87) and the Limited Liability Company Law (Article 2), a company established by one or several persons, the charter capital of which is divided into (ideal) shares (parts) or membership interests or member's ownership interests. For more on the subject see, for instance, Lomakin (2020) at 26–38.
[80]Limited Liability Company Law, art. 32.2.

The supreme governing body of a limited liability company is, according to the LLC law[81], the general meeting of its members, and its authority is determined by the charter in accordance with the law. Among the issues which are within the authority of the general meeting of members, in accordance with the LLC law[82], are:

1. general direction over the activity of the company;
2. approval of the charter and its amendments;
3. formation of the executive bodies or transfer of the executive body powers to an external manager (organisation), and
4. formation of the audit commission (auditor) of the company;
5. approval of annual reports and bookkeeping balance sheets as well as bylaws for the regulation of the company's internal affairs;
6. the distribution of net profits;
7. the issuing bonds and other emission securities of the company;
8. decisions on the reorganisation and liquidation of the company as well as
9. other decisions provided by the law and charter.

Approval of the annual results of the activities of the company is within the authority of the annual meeting; general meetings other than annual meetings are extraordinary[83].

Participation of a member in voting at the general meeting requires his registration under the LLC law[84]. The general meeting is not permitted to adopt decisions with regard to issues not included on the agenda of the meeting unless all the members of the company are present. In general, decisions are adopted by a majority of votes of all members of the company, but decisions with regard to the amendments of the charter and in some other cases must be adopted at the general meeting by a qualified majority (a majority of not less than two-thirds of the votes of the members).[85] However, amendments to the charter allowing withdrawal from the company[86] and decisions with regard to the reorganisation and liquidation of the company must be made, under the LLC law, by the members unanimously.[87]

Unanimous decisions of the general meeting are required also for the monetary valuation of property contributed to the charter capital[88]. Furthermore, according to the LLC law, the amendments concerning the additional rights[89] and duties[90] and the restrictions on the size of a membership interest[91] or proportion of

[81]Id. at art. 32.1.
[82]Id. at art. 33.2.
[83]Id. at arts. 34 and 35.
[84]Id. at art. 37.2.
[85]Id. at art. 37.8.
[86]Id. at art. 26.1.
[87]Id. at art. 37.
[88]Id. at art. 15.2.
[89]Id. at art. art. 8.
[90]Id. at art. 9.
[91]Id. at art. 14.3.

the interests (as well as votes and dividends) also require unanimous decisions; however, if such a change concerns a certain member, the decision can be made by a vote of two-thirds of the members with the consent of such a person[92]. Amendments to the charter providing a fixed price for the interest as well as the order of the preemptive acquisition requires unanimity of the general meeting; however, the elimination of such provisions may occur by its qualified majority decision[93].

A decision of the general meeting may, under the LLC law[94], be adopted by means of conducting external voting (poll) excepting the approval of annual reports and bookkeeping balance sheet. Cumulative voting with regard to the election of the members of the council of directors, executive body, and audit commission may also be established by the charter[95]. In a single limited liability company, the decisions of its member in regard of the issues provided for the authority of the general meeting must be completed in writing and by his requests notarially certified[96].

An extraordinary general meeting must be held, according to the article 35 of the LLC law, in those cases provided for by the charter, and also in any other cases if it is necessitated by the interests of the company and its members. The meeting must be convened by the executive body of the company and this also may be required by the council of directors, the auditors as well as members holding not less than 10 percent of the all votes in the company.

Under the LLC law, the one-person executive body of the company (director general, president) must be elected by the general meeting, and he must be a physical person. The powers of the one-person executive body of the company may be transferred under a contract to an external manager. The activity and decision-making of the one-person executive body is defined in the LLC law and they may be detailed by the charter and other internal documents of the company as well as by the contract concluded with the person executing the functions of the one-person executive body. The executive body of the company may be collegiate (the board, directorate) and one-person, if it is provided by the charter. Also, members of the collegiate executive body must be elected by the general meeting and they are to be physical persons, but not necessarily members of the company. The activity and decision-making of the collegiate executive body is to be established by the charter and internal documents of the company.[97]

In the case of the foundation, under the charter, of the council of directors (supervisory council), many of the issues listed above as those to be within the authority of the general meeting of members may be transferred to its authority in accordance with the LLC law[98]. Among the issues which are under the exclusive competence of the general meeting and not transferable to the council of directors are:

[92]Id. at arts. 21.4 and 27.
[93]Id. at art. art. 21.4.
[94]Id. at art. 38
[95]Id. at art. 37.9.
[96]Id. at art. 39.
[97]Id. at arts. 40–42.
[98]Id. at art. 32.2[1].

- approval of the charter and its amendments;
- formation of the audit commission (auditor) of the company;
- approval of annual reports and bookkeeping balance sheets of the company;
- distribution of the net profits, as well as
- decisions on the reorganisation and liquidation of the company.

The charter may provide, in addition to issues transferred from the authority of the general meeting, that decisions on the organisation of general meetings are delegated to the council of directors[99] and in such a case the executive body of the company is furnished with the right to demand an extraordinary general meeting[100].

In accordance with the Articles 32 and 47 of the LLC Law, the (internal) audit commission is to be established if it is required by the charter, or if the company has over 50 members. In turn, the (external) financial and economic state of the company may be audited by the professional auditor.[101]

According to the LLC law, a limited liability company must publish every year an annual report and a balance sheet and disclose the information on its activities in cases of the public placement of its bonds and other securities. A company is obliged to store its important documents and grant information concerning it, in accordance with the law requirements, to the public authorities and members of the company[102].

Alternatives to Highly regulated Corporations

General Partnership and Limited Partnership

In accordance with the Civil Code[103] the general partnership[104] is to have the right to acquire the civil law rights and to engage with civil law obligations through its participants. Thus, management in the general partnership is to be carried out by mutual agreement of all the partners, or it is based on the principle of consensus, but the constituent agreement may also indicate the cases when the majority decision is sufficient in decision-making. Every partner has one vote, but the constituent agreement may include other rules. Partners also have the right to operate on behalf of the partnership, unless the constituent agreement provides that this must be done jointly or by one of them, in which case other partners must have a power of attorney to conclude any transaction in the name of the partnership. The management rights granted to one or several partners may be terminated by the court on the demand of another (or other) partner, provided there

[99]Id. at art. 32.2.
[100]Id. at art. 32.2[2].
[101]Id. at art. 48.
[102]Id. at arts. 49 and 50.
[103]Russian Civil Code, arts 53.2 and 71.
[104]General (full) partnership is defined, under the Civil Code (Article 69), as a commercial organisation (partnership) the participants of which (general partners) are engaged, in conformity with the agreement signed between them, in business activities on behalf of the partnership and bear liability for its obligations with their property, however subsidiary.

are serious grounds for this, such as a gross violation of the duties or incapability to provide sensitive management.[105]

Management in the limited partnership[106] is to be carried out by its general partners in accordance with the rules on the general partnership of the Civil Code. The silent partners (investors) have not the right to take part in the management of the limited partnership or to come out on its behalf other than by a warrant. Neither they have the right to dispute the actions of the general partners involved in the management of the partnership. [107]

Limited Liability Partnership

Contrary to the general and limited partnership that acquire the civil law rights and engage with civil law obligations through its participants, a business partnership or a limited liability partnership[108] is to acquire civil law rights and engage with civil law obligations via its bodies that is similar to the (business) companies.

According to the general rules provided for by the Business Partnership Law, the constituent document of a business partnership is the charter (Article 8), and it must contain the name, the objects and fields of activities and the location of the partnership; the amount and composition of its joint capital; the term and order of the election of the one-person executive body that is obligatory for the partnership, as well as the information on the management agreement and on the notary who authenticates the management agreement and stores this.

According to the general rules provided for by the Business Partnership Law (Article 5.3), the (business) partnership is governed by its partners in proportion to their share, unless otherwise provided for by the management agreement. According to the Business Partnership Law (Article 18), the system, structure, and authorities of the partnership's governing bodies as well as the order of their formation and activities are subject to the terms of the management agreement given the provisions of the Business Partnership Law, whereas the charter contains only general stipulations concerning the order and term of the election of the (obligatory) one-person executive body. Thus, the business or limited liability partnership is, though the charter is its constituent document, subject to contractual governance.

Production Cooperatives

[105]Id. at art. 72.2.

[106]A limited (special) or commandite (*in commendam*) partnership is defined under the Civil Code (Article 82) as such a partnership in which, alongside the general partners (who have the status of the partner of the general partnership), there is (are) also one or several participants-investors (silent partners, commanditaires). For more on the partnerships see, for instance, Lomakin (2020) at 18–25.

[107]Id. at art. 84.

[108]As a limited liability or business partnership is recognized, under the Article 2 of the Business Partnership Law, a commercial organisation, established by two or more (max 50) physical and (or) juristic persons, in the governance of which participants are, according to the law, the partnership members and also other persons within the limits and extend provided by the management agreement. For more on the subject see, for instance, Lomakin (2020) at 71–74.

According to the provisions of the Civil Code on the peculiarities of management in a production cooperative[109] the executive bodies of a production cooperative is its chairman and board, if its formation is provided for by the law or charter[110]. Only members of a production cooperative may be members of the board and the chairman of the cooperative. Furthermore, each member of the cooperative has one vote at its general meeting[111].

Employee-owned Enterprise

Employee-owned[112] or people's enterprises or joint stock companies that are familiar in Russia[113] are subject, in addition to the general rules, also to the special law (1998) provisions on them. Special rules of the Law on Peculiarities of the Legal Status of Employee-owned Joint Stock Companies concern decision-making in the company where, in particular, the status of employees is safeguarded. The non-shareholders may participate in the general meeting (with consultative vote) and even, in certain cases, be represented in the supervisory council, if this is established. In respect of the main part of the issues that are under the exclusive authority of the general meeting, each shareholder has one vote in the general meeting.[114]

Non-commercial Corporations[115]

In addition to business entities, Russian law also recognises non-commercial or non-profit organisations as (registered) juristic persons that have limited civil law capacity to make transactions connected with the objects of their primary

[109]A production cooperative is defined in the Civil Code (Article 106^{1}) as a voluntary association of citizens on the basis of membership for joint production or other economic activities, and which requires their personal labour and other participation together with the property share contributions of its members (participants). For more on the subject see, for instance, Lomakin (2020) at 74–78.
[110]Russian Civil Code, art. 106^{4}.
[111]Id. at art. 106^{4}.3.
[112]For more on the subject see, for instance, Lomakin (2020) at 61–63.
[113]An employee-owned company may be founded only by means of reorganisation of an existing enterprise, where employees possess less than 49 percent of shares. The foundation of such an enterprise requires the consent of three-fourths of the participants and all of the employees of the reorganizing organisation. In the employee-owned company, the number of shareholders is not to exceed 5,000, and the minimum number of employees is not to be less than 51, among which the maximum share of non-shareholders ought to be 10 percent of all employees. Moreover, the employees are to have in their possession more than 75 percent of shares. Furthermore, the status of a shareholder in an employee-owned company is directly connected with working in the company — dividends are to be paid to the shareholder in proportion to his labour contribution. As the constituent document, the charter of an employee-owned company must contain, among other, the provisions on the maximum amount of the shares (size of the membership interest) that is allowed to be in possession of the non-employees in total, as well as a single employee (maximum 5 percent).
[114]Russian Civil Code, art. 10.
[115]For more on the subject *see*, for instance, Gubin & Lahno (2020) at 376–378.

activities. Such organisations, including consumer cooperatives[116], societal organisations[117], associations (unions)[118], partnerships of real estate owners[119] and Cossack societies[120], are listed in the same way as commercial organisations in the Civil Code. Charter-based governance is common also for non-commercial or non-profit organisations, whose founders are granted with the membership including the right to form the supreme governing body of the organisation.

The peculiarities of governance in Russian non-commercial organisations are that

- the charter of a consumer cooperative ought to contain provisions on the composition and competence of the bodies of the cooperative and the procedure for them to take decisions, including the issues on which decisions are taken unanimously or by a qualified majority of votes, as well as provisions on the procedure for the cooperative's members to cover the losses incurred by it.
- In a societal organisation, as well as in an association, a sole executive body (chairman, president, etc.) ought to be set up and permanent collective executive bodies (council, board, presidium, etc.) may be set up. Furthermore, by a decision of a general meeting of members of the organisation the powers of its body may be terminated before the due date in the event of that body's gross violation of its duties, discovery of inability to properly conduct business or if there are other serious grounds; the similar rule concerns also partnerships of real estate owners.

[116]A consumer cooperative is defined in the Civil Code (Article 123^2.1), as a membership-based voluntary association of physical persons or physical and juristic persons for the purposes of meeting their material and other needs realised by means of the pooling of property participatory share contributions by its members.

[117]Societal organisations are, under the Civil Code (Article 123^4.1) voluntary associations of physical persons, who, in the law-established order, have joined on the basis of common interests to meet spiritual and other non-material needs for the purposes of representation and protection of common interests and for attainment of other objectives not contravening a law.

[118]An association (union) is, under the Civil Code (Article 123^8.1), an organisation of juristic persons and/or of physical persons based on voluntary or, in the law-established cases, on mandatory membership and formed for the purposes of representation and protection of common, including professional interests, attainment of socially useful goal and also other objectives that do not contravene the law and are of non-commercial nature.

[119]A partnership of real estate owners is, under the Civil Code (Article 123^{12}.1), a voluntary association of the owners of immovable property (premises in a building, for instance in a block of flats, or in several buildings, dwelling houses, garden houses, gardening or truck-farming land plots, etc.) established by them for joint possession, use, and, within the law-established limits, for disposition of the property (things) that is by virtue of the law in their common ownership or use, and also for the attainment of other objectives provided by the law.

[120]As Cossack societies are recognised, according to the Civil Code (Article 123^{15}.1), the societies included in the Russian State Register of Cossack societies that are established for the purposes of conserving the traditional lifestyle, economic activities and culture of the Russian Cossacks, and also for other purposes provided by the law, who have voluntarily undertaken in the law-established procedure the state service or another service duty.

Other Entrepreneurial Entities

There are also entrepreneurial entities in Russia that are outside of the scope of the corporate law regulation. They include small and medium-sized enterprises[121] and social enterprises.

The term small and medium-sized enterprises or SME covers a group of entrepreneurial entities that are subjects to favouring them public law regulation contained in the special law norms[122], however, remaining as subjects of civil law. The list of the recognised subjects of small and medium-sized entrepreneurship that is contained in the law includes business companies and partnerships, including limited liability partnerships, as well as production and consumer cooperatives, farms and individual entrepreneurs[123]. A SME ought to be registered in the Register of small and medium-sized enterprises after meeting the criteria determined by the law, including those that are related to the number of employees and the income from business activity.[124] In turn, social entrepreneurship is understood in Russia as socially oriented activities of the small and middle-sized enterprises aimed at the achievement of the socially beneficial aims, particularly targeted for solution of the social problems of people and society, including the support of persons who live in difficult life situation. Social enterprises belong to the subjects of small and medium-sized entrepreneurship practicing its activities in the sphere of social entrepreneurship, and they are under the scope of application of the rules regulating small and medium-sized entrepreneurship.

Economic activities may be practised also by physical persons separately as individual entrepreneurs or self-employed persons[125], and they are distinguished in the tax law: through the registration they may obtain special tax regime. Physical persons may practice other than entrepreneurial activities also as jointed in the simple partnership that is purely contractual form provided for by the law as a type of contract[126].

Russian legal literature is familiar also with family enterprises and there are even some legislative initiatives on the issue where attention is paid to the family enterprise peculiarities related to family, corporate and labour relations as well as taxation.[127]

Legal Reality v. Actual Reality[128]

It is common for the Russian corporate law that the legal reality does not properly correspond to the actual reality. The charter documents of companies are often only façade for the real corporate governance arrangements securing the autocratic management in the company; particularly it concerns private companies

[121]For more on the subject *see*, for instance, Gubin & Lahno (2020) at 332–356.
[122]Law no 209-FZ of July 24, 2007 on Development of Small and Medium Businesses in Russia.
[123]For more on the subject *see*, for instance, Gubin & Lahno (2020) at 215–222.
[124]Laws no 222-FZ of June 5, 2016 and no 313-FZ of August 3, 2018.
[125]For more on the subject see Chesalina (2020).
[126]Russian Civil Code, arts. 1041–1054.
[127]For more on the subject *see* Mokina (2019) at 88–97.
[128]For more on the subject *see*, for instance, Verbitsky (2019) at 27–37 and Verbitsky (2020) as well as Trofimova (2020) at 70–74.

created as a result of privatisation. A Russian company may be actually ruled by the owner or a majority shareholder instead of the quasi-elected bord of directors. Moreover, is not exceptional for Russian companies that the same person is the owner, the general director and the chairman of the board of directors in the same time.

In general, actually dominating in Russia family business culture is reflected in the plenty of enterprises established by relatives and friends, they are, however, practically outside of the juridical concern. In turn, small and medium-sized as well as social entrepreneurship has deserved its own legislation in the country.

In any case, the introduction of elements of the modern corporate governance is rather facultative in Russian non-public companies. It does not represent strict requirements of following the international standards, and usually is based on their practical expediency. Moreover, following the best business practices has become less attractive at present, in Russia, particularly due to the actualizing tendencies to nationalisation of private enterprises.

In general, the development of the modern corporate governance is burdened by the actualised scarcity of resources problem that the exhausting possibilities of the customised commercial or market capture and, particularly, maintenance of natural resources demonstrates. It is followed by the strengthened attempts of the power capture of resources that are not supported by real ideas of sustainable entrepreneurial (business) solutions of the scarcity of resources problem where economic rationality and ethical acceptability are required. In particular, it means to follow the new economic paradigm that better corresponds to the conditions for the existence of nature and further societal development, however, without necessarily abandoning the historically developed corporate structures and culture.

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Violence against Women and Domestic Violence: The European Commission's Directive Proposal

*By Marta Picchi**

The Commission proposed to enshrine in the law of the European Union minimum standards to criminalise certain forms of violence against women; protect victims and improve access to justice; support victims and ensure coordination between relevant services; and prevent these types of crimes from happening in the first place. In particular, the Commission's proposal would make it possible, on the one hand, to surmount the gaps existing in some Member States and, on the other hand, to standardise the various national legislations with a single discipline valid in all the countries of the European Union. This paper focuses on the contents of the European Commission's proposal by highlighting and reflecting on the key points.

Keywords: *Violence against women; Domestic violence; Directive proposal; European Commission; Minimum standards*

Introduction

Violence against women and domestic violence are widespread in all Member States: according to the European Union Agency for Fundamental Rights (FRA), they effect one in three women in the EU. In 2014, one in ten women reported that they had been victims of sexual violence and one in twenty had been raped. More than one in five women have suffered domestic violence. Cyber violence is also widespread[1]: In 2020, one in two young women experienced gender-based cyber violence[2]. In addition, around one third of all women in the EU have experienced sexual harassment in the workplace.

In her political guidelines[3], President Ursula von der Leyen stressed the need to prevent and combat violence against women, protect victims and punish the perpetrators of these crimes, making it a key priority of the European Commission. Later, the Gender Equality Strategy 2020-2025[4] announced EU measures to prevent these forms of violence, protecting victims, prosecuting offenders, and implementing related comprehensive and coordinated policies. The European

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[1]Jurasz & Barker (2021).

[2]See European Parliamentary Research Service (EPRS), *Combating gender-based violence: Cyberviolence, European added value assessment*, 2021, available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662621/ EPRS_STU(2021)662621_EN.pdf*

[3]See von der Leyen (2019).

[4]See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions of 5 March 2020, A Union of Equality: Gender Equality Strategy 2020-2025*, COM (2020) 152 final.

Pillar of Social Rights Action Plan[5] confirms this effort to combat gender-based violence and propose legislation to this effect[6].

Most EU Member States have introduced measures to combat violence based on gender or sexual orientation. However, this phenomenon is not yet effectively addressed because of the dearth of a common definition and rules. This creates legal uncertainty about rights of such victims across the EU. Moreover, while there are existing pieces of EU legislation currently contributing to this goal, they are not sufficiently effective.

It is necessary to have a comprehensive legal instrument to address the problem in all its components. Only in this way, it will be possible to trigger the change by effectively contributing to the elimination of violence against women.

On several occasions, the European Parliament[7] has asked for European legislation to be introduced in this regard, with watchful attention to safeguarding the rights of women, both as citizens and as a vulnerable category[8]. Recently, it adopted the *Resolution of 6 October 2021 on the impact of intimate partner violence and custody rights on women and children*[9], in which it expressed its disapproval of the failure to complete the process of accession by the European Union to the Council of Europe's Convention *on preventing and combating violence against women and domestic violence*[10], known as the Istanbul Convention[11], adopted on 7 April 2011[12]. The European Parliament also blamed

[5]See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 4 March 2021, The European Pillar of Social Rights Action Plan*, COM (2021) 102 final.

[6]Abels & Mushaben (2020).

[7]Roggeband (2021).

[8]See *European Parliament resolution of 13 February 2019 on experiencing a backlash in women's rights and gender equality in the EU*, P8_TA(2019)0111; *European Parliament resolution of 28 November 2019 on the EU's accession to the Istanbul Convention and other measures to combat gender-based violence*, P9_TA(2019)0080; *European Parliament resolution of 21 January 2021 on the EU Strategy for Gender Equality*, P)_TA(2021)0025; *European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU*, P9_TA(2021)0388. In this latest resolution, the European Parliament called on the Commission to establish the legal basis for including gender-based violence among EU crimes and for establishing common legal definitions and standards by setting minimum criminal sanctions across the EU. Previously, the European Parliament called - in the *European Parliament resolution of 11 February 2021 on challenges ahead for women's rights in Europe: more than 25 years after the Beijing Declaration and Platform for Action*, P9_TA (2021) 0058 – a European directive to prevent and combat gender-based violence in all its forms. On this occasion, Members of the European Parliament called on the European Commission to develop a European Union Protocol on gender-based violence in times of crisis and to include protection services for victims, such as helplines, safe accommodation and health services as 'essential services' in the Member States.

[9]P9_TA(2021)0406.

[10]Berthet (2022).

[11]The Istanbul Convention – currently ratified by thirty-four countries – is the most important international instrument containing rules that provide for the States that have ratified it the obligation to adopt internal provisions aimed at preventing violence against women, protecting the victims and punishing those responsible.

[12]The Commission and the Presidency of the Council signed the Istanbul Convention on 13 June 2017, but the EU accession process has not been finalised as the Council has not yet adopted the final decision. Recently, the Court of Justice of European Union ruled that the EU may decide to

the six EU Member States (Bulgaria, Czech Republic[13], Hungary, Lithuania, Latvia and Slovakia) that have not yet ratified it, and expressed concern at Poland's willingness to withdraw from the Istanbul Convention, similarly to Turkey's previous decision. The Parliament noted that not ratifying the Convention "would be a serious setback with regard to gender equality, women's rights and the struggle against gender-based violence"[14].

However, in the Resolution of 6 October, the European Parliament also expressed its concerns about the solutions adopted by the member states who have ratified the Istanbul Convention, above all due to the fragmented nature of the interventions carried out at the state level.

The European Parliament has insisted that the European Commission present proposals on combating gender-based violence and cyber violence[15], because failing to address violence against women and domestic violence is also costly on the financial level. Violence against women has a considerable impact on those involved, including victims, witnesses, perpetrators, national authorities, companies, and the wider community and society. However, some of the negative social and health impacts also gives rise to costs of an economic nature[16], as estimated by the European Institute for Gender Equality (EIGE)[17].

Although the completion of EU's accession to the Istanbul Convention remains a priority for the Commission, on 8 March 2022 it advanced a proposal[18] for a Directive of the European Parliament and of the Council *on combating violence against women and domestic violence*[19], since combating them is part of the European Commission's action to protect the core EU values and to ensure compliance with the EU Charter on Fundamental Rights. This proposal aims at achieving the objectives of the Istanbul Convention[20] within the EU's remit of

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accede to the Istanbul Convention even if not all Member States consent or have ratified the Convention: see Grand Chambre, opinion 1/19 of 6 October 2021.

[13]Regarding the directive proposal, the Czech Chamber of Deputies issued a reasoned opinion on subsidiarity grounds, expressing concerns that the criminalisation of offences should be left to the Member States, and suggesting instead an amendment to the victims' rights directive: see *Parliament of the Czech Republic, Chamber of Deputies, Committee on Constitutional and Legal Affairs, Resolution No. 31 of 18 May 2022*, available at *https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-0105/czpos*.

[14]P9_TA(2021)0406, § 5.

[15]See *European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence*, P9_TA(2021)0489.

[16]Cavaghan (2017).

[17]See EIGE (2021).

[18]The proposal is included in the 2022 Commission work programme (*Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions of 19 October 2021, Commission work programme 2022: Making Europe stronger together* COM (2021) 645 final) and in the joint declaration on EU legislative priorities for 2022 (*Joint Declaration of the European Parliament, the Council of the European Union and the European Commission, EU Legislative Priorities for 2022*, 2021/C 514 I/01).

[19]COM (2022) 105 final.

[20]Although the provisions of the Istanbul Convention currently do not have a binding legal value in EU law, they have recently been invoked by way of interpretation in a judgment before the Court of Justice of the EU. In case C-930/19, X vs. État Belge, Advocate General Szpunar stated that, "although the Istanbul Convention does not, for the time being, have a direct impact on the

complementing the existing EU acquis and Member States' national legislation in the areas covered by the Convention. Once the EU accedes to the Istanbul Convention, the Directive shall be an implementation of it[21].

There is currently no EU legislation that specifically addresses violence against women and domestic violence. However, the issue falls within the scope of various directives and regulations[22] adopted in the areas of criminal justice, gender equality and asylum. The suitability of the legal framework, currently in force at the EU level to address the issues raised by these phenomena, was assessed for the purpose of preparing the proposal under consideration. In that context, it was found to be insufficient, since the relevant legislation of the EU has been ineffective in preventing and combating violence against women and domestic violence.

In addition, violence against women and children, particularly domestic violence, has increased since the outbreak of the COVID-19 pandemic. However, it is necessary to consider this over time in order to understand if this increase in incidence is temporary or if it is indicative of a trend.

During this period, in which the increase in risk factors for violence (such as, for example, isolation, stress, work from home) was accompanied by a decrease in accessibility to various forms of support for victims, several stakeholders noted an increase in contacts to help lines for victims of violence against women and domestic violence, requests for specialised support services (emergency accommodations, counselling services), as well as referrals to law enforcement

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interpretation of Article 13, par. 2, of Directive 2004/38, the same cannot be said in respect of the legal developments it entails which are bringing about political and social changes relating the protection of victims of domestic violence. In so far as Article 59(1) of that convention allows victims to obtain the necessary protection from authorities without fearing that the perpetrator will retaliate by withdrawing or threatening to withdraw residence benefits under the perpetrator's control, it seems to me that it would be inconsistent, whether or not the European Union accedes to that convention, to ignore the risk of 'blackmail with threats of divorce' or 'blackmail with threats of departure' when interpreting Article 13, par. 2, of Directive 2004/38. Moreover, this would prevent victims from being entitled to the protection provided for by that provision, whereas its purpose is precisely to protect the spouse who is a third-country national and who has, inter alia, been 'a victim of domestic violence while the marriage or registered partnership was subsisting', by maintaining his or her right of residence in the host Member State" (*Opinion of Advocate General Szpunar delivered on 22 March 2021*, par. 107). In essence, the Istanbul Convention could serve as a source of inspiration for interpreting EU regulatory acts.

[21]See COM (2022) 105 final, *Explanatory Memorandum*.

[22]In particular, there are fourteen acts of the Union which, for this purpose, can be considered relevant, as they establish general rules applicable also to this particular category of victims or specific rules referring to particular forms of such violence: for example, the provisions on protection and access to justice contained in the Victims' Rights Directive (*Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*), the directive against the sexual abuse of minors (*Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and the sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*) and the anti-trafficking in human beings directive (Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/ 629/JHA).

and protection order requests.

Thus, the directive proposal would make it possible, on the one hand, to overcome the gaps existing in some Member States, especially those that have not ratified the Istanbul Convention. On the other hand, it may facilitate standardising the various national legislations with a single discipline valid in all the countries of the European Union.

Furthermore, the proposed measures are based on the recommendations of the Group of Experts on Action Against Violence Against Women and Domestic Violence (GREVIO), the independent expert body responsible for monitoring the implementation of the Istanbul Convention. The measures may factor in recommendations by international experts and organisations in the field, including those under the auspices of the United Nations, and their reflections on internationally accepted good practices in combating violence against women and domestic violence.

However, the Commission's proposal is different to the Istanbul Convention, as it sets minimum standards for Member States within the areas of EU competence, including the criminalisation of cyber violence offences that is not specifically covered by the Istanbul Convention[23]. In any case, the proposal does not prevent Member States, especially those that are already parties to the Istanbul Convention, from maintaining higher standards.

This contribution aims at analysing the contents of the European Commission's proposal by highlighting the key points and reflecting on them.

The Proposal's Content

The European Commission notes that "violence against women is a persisting manifestation of structural discrimination against women, resulting from historically unequal power relations between women and men. It is a form of gender-based violence, which is inflicted primarily on women and girls, by men. It is rooted in the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for women and men, generally referred to under the term 'gender'"[24]. Domestic violence is also a serious social problem which often remains insidious[25]: It can take on various forms (physical, sexual, psychological and financial) and may occur whether the offender shares or has shared a household with the victim[26].

An open public consultation on *protecting victims and punishing offenders* was held on the Commission's consultations website from 8 February until 10 May 2021. The survey exhibited the problem that the public was not sufficiently aware of this kind of violence, or that they view it as a private matter[27].

Therefore, the European Commission believes it is necessary to lay down a

[23]De Vido & Sosa (2021)
[24]COM (2022) 105 final, recital no. 7.
[25]Podaná (2021).
[26]Recital no. 8.
[27]COM (2022) 105 final, at 13.

comprehensive set of rules addressing the persisting problem of violence against women and domestic violence in a targeted manner that caters to the specific needs of victims of such violence. As such, it proposes to codify in EU law minimum standards to criminalise certain forms of violence against women, to protect victims and improve access to justice, to support victims and ensure coordination between relevant services, to prevent these types of crimes from happening. Member States should take measures to prevent the cultivation of harmful gender stereotypes to eradicate the idea of the inferiority of women or stereotyped roles of women and men, and preventative measures should also take place in formal education. It is crucial to address gender stereotypes starting from early childhood education and childcare because, from a very young age onwards, children are exposed to gender roles that shape their self-perception and influence their social, academic and professional choices.

Moreover, the Commission proposes to make EU-wide data collection an obligation, being that the availability of EU-wide data on the scale of the problem is currently limited. Policy for adequately tackling violence against women and domestic violence can only be formulated based on comprehensive and comparable disaggregated data. Member States should regularly conduct surveys to gather data and transmit them to the Commission, allowing them to effectively monitor developments in the Member States and fill the gaps.

The Offences that the Commission Proposes to Criminalise

The proposed directive is based on the combined provisions of Article 82(2) and Article 83(1) of the TFEU. Article 82(2) TFEU provides the legal basis for establishing minimum standards regarding the rights of victims of crime to the extent necessary to facilitate mutual recognition of judgments and judicial decisions, as well as to enhance police and judicial cooperation in criminal matters for issues of a transnational dimension. Article 83(1) of the TFEU provides the legal basis for the minimum standards relating to the definition of offenses and sanctions relating to the sexual exploitation of women and children and of cyber crime[28].

In accordance with the view of international human rights bodies, including the Council of Europe, the Commission proposes the criminalisation of rape[29]. Article 5(1) of the proposal defines conduct such as rape punishable: "a) engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object; b) causing a woman to engage with another person in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object". Therefore, it is conceived as a crime that can only be perpetrated against a woman, while for the other crimes – of non-consensual sharing of intimate or manipulated material, cyber stalking, cyber harassment and cyber incitement to violence or hatred – the victim is referred to simply as a person.

Article 5(2 and 3) also specifies that "Member States shall ensure that a non-consensual act is understood as an act which is performed without the woman's

[28]Persâk (2022).
[29]Rigotti (2022).

consent given voluntarily or where the woman is unable to form a free will due to her physical or mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability. Consent can be withdrawn at any moment during the act. The absence of consent cannot be refuted exclusively by the woman's silence, verbal or physical non-resistance or past sexual conduct". It is important that the proposal refers to the non-consensual act rather than the use of force, threats or coercion for the crime of rape: this choice intends to overcome the fact that, although rape is criminalised in all Member States, eighteen of them require the use of force, threats or coercion for it to be punishable. Only the approach of non-consensual act achieves the full protection of the sexual integrity of victims. Therefore, it is necessary to ensure equal protection throughout the European Union by providing the non-consensual act as a constitutive element of the crime of rape of women.

Cyber stalking is a modern form of violence, which is often perpetrated against family members or former partners to intensify coercive control and surveillance, but specific provisions are rarely present in the domestic legal system. Therefore, minimum rules on cyber stalking should be established.

Cyber harassment covers attacks, such as threats, insults or other offensive behaviour against individuals, notably women and girls, which typically takes place through social media or other online services[30]. This form of violence particularly impacts women active in public life, such as politicians, journalists and human rights activists. Although cyber harassment can have the effect of silencing women, hindering their societal participation and undermining the principle of democracy as protected in the Treaty on European Union, currently this form of violence is addressed only in four Member States. The Commission proposes to criminalise cyber harassment where it may have the effect of causing significant psychological harm and where the attacks occur on a vast scale.

The proposal also criminalises non-consensual sharing of intimate images. At present, some Member States already punish this offense, which can be particularly harmful for the person concerned due to its propensity for easy, rapid and widespread distribution and perpetration.

Female genital mutilation is explicitly addressed in criminal law in only fifteen Member States, while other Member States cover it with general offences, such as bodily injury, mutilation and crimes against health. This exploitative practice causes irreparable harm to victims and is performed for the purpose of exerting social control over the sexuality of women and girls and preserving and asserting male domination over them.

The Commission proposes criminalising cyber incitement to violence or hatred. The increase in internet and social media usage has led to a sharp rise over the past years in public incitement to violence and hatred, including those based on sex or gender. Women are often the target of sexist and misogynous hate online, which can escalate into hate crime offline. For these reasons, such conduct should be intercepted from the earliest stages.

[30]Stringhi (2022).

Reporting of Violence against Women or Domestic Violence

The proposal considers the widespread problem of the scarcity of complaints concerning acts of violence perpetrated against women. It also considers the contention that victims should be able to easily report crimes of violence against women or domestic violence, without being subject to secondary or recurring victimisation. To this end, the Commission proposes the introduction of new, safer, simpler and more accessible reporting methods (including online).

Furthermore, it provides that if a well-founded imminent risk of serious physical harm is reported, professionals dealing with violence (for example, health professionals or psychiatrists) would no longer be hindered by the rules for the protection of privacy.

Additionally, the authorities should carry out individual risk assessments from the moment of the first contact between the victim and the competent authorities, to be able to assess to what extent the perpetrator may represent a risk. The individual assessment shall focus on the risk emanating from the offender or suspect, including the risk of repeated violence, the risk of bodily harm, the use of weapons, the proximity of the offender or suspect possibly living with the victim, an offender or suspect's drug or alcohol misuse, child abuse, mental health issues or stalking behaviour. It is important that the assessment consider the victim's individual circumstances, including whether they experience discrimination based on a combination of sex and other grounds and therefore face a heightened risk of violence, as well as the victim's own account and assessment of the situation. It shall be conducted in the best interest of the victim, paying special attention to the need to avoid secondary or repeated victimisation.

Then, based on the individual assessment, the authorities shall adopt adequate protection measures by issuing urgent removal measures or protection orders.

Protection of the Victim's Private Life and Compensation from Offenders

The European Commission proposes that evidence or questions relating to the victim's private life, especially his or her sexual history, can only be used if strictly necessary: Once again, the aim is to avoid possible forms of secondary victimisation.

Furthermore, to avoid secondary victimisation, victims should be able to obtain compensation during criminal proceedings. Compensation from the offender should be full and should not be restricted by a fixed upper limit. It should cover all harm and trauma experienced by victims and costs incurred to manage the damages including, among other things, therapy costs, impact on the victim's employment situation, loss of earnings, psychological damages and moral prejudice due to the violation of dignity.

Victim Support

The Commission proposes that Member States shall provide for appropriately equipped, easily accessible rape crisis or sexual violence referral centres to ensure effective support to victims of sexual violence, including assisting in the preservation and documentation of evidence. In any case, victims at greatest risk of violence[31], including women fleeing armed conflict, should receive targeted support. Member States should ensure that national helplines are operated under the EU-harmonised number and that this number be widely advertised as a public number, free of charge and available round-the-clock.

Furthermore, if the victim is a minor, the authorities should provide her with age-appropriate support, to protect the best interests of the minor.

Victims of cyber violence should also have adequate support, including advice on how to obtain legal help and how to remove certain online material.

Appropriately, the proposal considers that an individual assessment to identify the victim's protection needs should be conducted upon the very first contact of competent authorities with the victim, or as soon as suspicion arises that the person is a victim of violence against women or domestic violence.

In any case, the primary concern should lie in safeguarding the victim's safety and providing tailored support, considering, among other matters, the individual circumstances of the victim.

Because victims of violence against women and domestic violence are often in need of specific support, the competent authorities should refer victims to appropriate support services, especially when an individual assessment has established the victim's support needs. In that case, support services should be able to reach out to the victim even without the victim's consent.

Although harassment and sexual harassment in the workplace is already prohibited in the EU[32] and under criminal or civil legislation in the Member States, many victims do not know where to turn when it happens. This means that support, protection and prevention are not sufficient[33]. While the Commission does not propose the criminal offense definition per se, it deems it necessary that sexual harassment at work – not only sexual harassment of a physical nature, but all forms of unwanted verbal, non-verbal or physical conduct of a sexual nature – is addressed in relevant national policies, while Member States should provide dedicated support for victims of sexual harassment at work. Moreover, given that sexual harassment at work has significant negative consequences both for the victims and the employers, advice on adequately addressing such instances at the

[31]Naik (2022).

[32]See *Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services*; *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*; *Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC*.

[33]Elomäki, Kantola & Koskinen Sandberg (2022).

workplace, on legal remedies available to the employer to remove the offender from the workplace, and providing the possibility of early conciliation, if the victim so wishes, should be provided by external counselling services to both victims and employers.

Furthermore, managers in the public and private sectors should receive training on how to detect sexual harassment at work, provide support to victims and respond in an adequate manner.

Prevention

The directive proposal is concerned with ensuring effective prevention of violence against women and domestic violence. To this end, it introduces, for example, the obligation for Member States to carry out awareness campaigns, to launch research and education programmes and to disseminate relevant information on a vast scale. All this encompasses the aim of tackling harmful gender stereotypes, to promote equality between women and men and to encourage everyone, including men and boys, to serve as positive role models to facilitate behavioural change throughout society.

In addition, professionals most likely to come into contact with victims should receive appropriate training and obtain information at a level appropriate to their contact with victims. This will ensure that professionals will be enabled to identify, prevent and deal with the victims' cases of violence against women or domestic violence and interacting with the victims in a manner consistent with the trauma, gender dimension and age of any minors.

Moreover, the directive proposal provides for the establishment of targeted and effective intervention programmes, aimed at minimising the risk that crimes of violence against women or domestic violence are committed or repeated. These programmes should also be open to the voluntary participation of people who fear they might commit similar crimes.

Coordination and Cooperation

To streamline national policies and ensure an effective multilevel response to these types of violence, the directive proposal requires Member States to designate or set up an official body to coordinate, implement, monitor and evaluate policies in this area. Added to this is the obligation to establish adequate mechanisms to ensure, at a national level, effective coordination and cooperation between all those involved in aiding victims.

Since non-governmental organisations play a key role in aiding victims and preventing violence, Member States should cooperate with them and consult them on relevant policies.

To ensure that victims of online violence offenses can effectively exercise the right to remove illegal material relating to those offenses, Member States should encourage cooperation between intermediary service providers. To ensure that such material is promptly identified and effectively combated and that victims are adequately assisted and supported. Member States should facilitate the adoption of

self-regulatory measures by the intermediary service providers themselves.

The directive proposal also aims at facilitating cooperation between Member States in ensuring the exchange of best practices and mutual consultation on individual cases, including through Eurojust and the European Judicial Network in Criminal Matters. The proposal also urges the exchange of information and best practices with relevant Union agencies and assistance to Union networks dealing with issues directly related to violence against women and domestic violence.

Data collection and research are essential for the formulation of appropriate policy measures in this area. For this reason, Member States must establish a system for the collection, development, production and dissemination of statistics on violence against women and on domestic violence. The European Institute for Gender Equality (EIGE) will have to assist Member States in defining a common methodology and collection of data, considering its expertise and current work in the field. To effectively monitor developments on the ground, with reference to all forms of violence covered by the Directive, it is also envisaged that Member States should conduct periodic surveys using the Commission's harmonised methodology (Eurostat) to collect data and transmit them to the Commission itself.

Brief Reflections

The European Commission is clear in stating that the directive proposal aims to effectively combat violence against women and domestic violence, which also includes the harmonisation of rape law.

Rape is one of the most serious offences breaching a person's sexual integrity and is a crime that disproportionately affects women. It entails a power imbalance between the offender and the victim, which allows the offender to sexually exploit the victim for purposes such as personal gratification, asserting domination, gaining social recognition, advancement or possibly financial gain. According to the proposal, rape includes all types of sexual penetration, with any bodily part or object, and the lack of consent is appropriately a central and constitutive element of the definition of rape, given that, frequently, no physical violence nor use of force is involved in its perpetration.

This choice is an important step forward that allows the protection of victims to be extended, especially in those Member countries where the use of force or threat is still required by definition.

Nonetheless, the crime of rape can be caused by unbalanced power relations between offender and victim that depend on multiple grounds of discrimination. Consequently, the constitutive elements of the lack of consent, and of the protection of the sexual autonomy of every individual must lead to the conception of rape in neutral terms, guaranteeing equal protection to all individuals regardless of gender.

In the hope that the directive proposal be adopted urgently and without delay, it is important to express appreciation for the attention it pays to the issue of secondary victimisation. Moreover, it should be remembered that this issue is raised more and more often by the European Court of Human Rights, highlighting

the inadequacy of the internal regulations of the Member States and the fact that this problem is also the result of cultures that are characterised by gender stereotypes. Only appropriate education and professional training can reverse the trend of this phenomenon, while the inability to detect the signs of violence together with sexist preconceptions delay interventions or prevent careful assessments of cases, leading to dreadful repercussions.

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The Access Conditions of the Natural Person to the Insolvency Procedure in Romania

*By Lavinia-Olivia Iancu**

Since the beginning of 2020 in Romania, the COVID-19 pandemic has been exhibiting its negative effects. As expected, the hardest hit were the ordinary citizens who, overnight, awakened to reduced wages or downright joblessness. Moreover, the year 2021 has brought price increases in all areas, from basic foodstuffs to electricity, gas, fuels. The over-indebtedness of a large population of individuals has become the norm under the above conditions. The insolvency proceedings law for individuals seemed to be a solution for their over-indebtedness predicament, but we have found that this law is not performing at its true potential. In addition to a complex application form requested of the simple citizen, we contend that the access conditions to the insolvency procedure of the natural persons can be simplified and improved. Given the economic conditions in Romania, along with the reduction in the living standard, the legislator will have to give priority to the possible legislative solutions that will offer the indebted a fresh start.

Keywords: *Insolvence; Natural person; COVID-19*

Introduction

The central element of the insolvency proceedings is the individual debtor.

Since Art. 1 of Law no. 151/2015 outlines the persons covered by law, it is mentionable that this procedure aims to establish a collective procedure for the recovery of the financial solvency of the natural person debtor who is in good faith. The debtor and his/her property rebalancing are the focus, while the creditors' interests are not positioned in the foreground. This prioritisation is a natural one in the context in which the individual debtor, such as a legal entity whose financial situation is irreparably compromised, is not eliminated or ignored. Regardless of the “severity” of the patrimonial damage of the natural person, he/she must be offered the possibility to carry on with life. This "protective care" taken by the legislature for individuals experiencing financial difficulties may seem unfair to other people who struggle to overcome difficult financial situations, but the conditions imposed on the debtor for access to the procedure and its success are intended to select only individuals meritting these benefits.

The Romanian legislature has adopted a separate scheme for consumer insolvency, with major substantive differences as well as with procedural differences, compared to the insolvency applicable to professionals[1], establishing a

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[1]Bufam, Deli-Diaconescu &Moțiu (2022) at 1112.

procedure.series of conditions for the individual natural debtor to have access to the

The Debtor, a Natural Person in Good Faith

The natural person debtor covered by law, for any of the three insolvency proceedings, is the modest individual whose obligations do not result from the operation of an enterprise[2].

The jurisprudence[3] has established that the debts of the natural person, coming from the guarantee of some loans for a company where he/she holds the position of statutory administrator, result from the operation by him/her of an enterprise, having not fulfilled the legal condition provided in Art. 4 paragraph (1) of the law for opening the insolvency procedure. Also, in the situation where the debts of the natural person represent obligations originating as a result of attracting personal liability (for the liabilities of an insolvent company according to Law no. 85/2014 or obligations arising from liability for a company's tax claims under the Fiscal Procedure Code), the court[4] found that the Insolvency Commission's decision to reject the request to initiate the procedure was correct, as these obligations resulted from the exploitation of an enterprise.

The literature[5] has shown that the notion of the consumer can be used in the sense of a natural person whose undertakings do not stem from professional activities. This notion of consumer includes, *de lege lata*[6], any natural person or group of natural persons constituted in associations, who act for purposes outside the commercial, industrial or production activity, artisanal or mercantile. Its further illustrations that under European rules, which are binding in national law, the definition of consumer includes only natural persons acting outside the business arena.

The debtor is the only one who may initiate the insolvency procedure, according to Law no. 151/2015[7]. The initiation of the procedure by the creditors or the ex officio notification is excluded. The insolvent debtor may submit to the Insolvency Commission a request to open insolvency proceedings based on a debt repayment plan. If the debtor avows that his/her financial situation is irreparably compromised and that a debt repayment plan cannot be drawn up and implemented, he/she may request opening insolvency proceedings via asset liquidation directly from the competent court. If the debtor meets the conditions

[2]Art. 3 Cod civil defines the notion of „ operation of an enterprise" as the systematic exercise of an organised activity consisting in the production, administration or alienation of goods or in the provision of services, regardless of whether or not is for profit.
[3]Decision no. 464 of 27.05.2020 pronounced by the Dâmbovița Court, unpublished, www.rolii.ro
[4]Civil sentence no. 2490 of 12.06.2020 pronounced by the Ploiești District Court, unpublished, www.rolii.ro
[5]Deteșan (2015a) at 25 et seq.
[6]Art.2 para.(1) of Law no. 193/2000 on abusive clauses in contracts concluded between professionals and traders
[7]Art. 6 Law no.151/2015.

from Art. 65 of the law[8], he/she may submit a request for the application of the simplified insolvency procedure to the Insolvency Commission.

As only the natural person debtor may make the request to open insolvency proceedings, he/she must have full exercise capacity, i.e. the ability to conclude civil legal acts alone[9]. The doctrine[10] defines the capacity of full exercise of the natural person as the human attitude to acquire and exercise civil rights and to assume and exercise civil obligations by concluding, personally and unaccompanied, all civil legal acts.

If the capacity of the natural person, i.e. the ability to have civil rights and obligations, begins at the person's birth and ceases with his/her death, the full capacity to exercise begins at the age of 18, when the person enjoys the presumption of capacity. This can be contested only if proof of the prohibition of that person is proved or if the lack of discernment is proved.

The Civil Code establishes, by exception to Art. 39, the fact that a minor acquires, through marriage, the full capacity to exercise. If the marriage is annulled, the minor who was in good faith at the conclusion of the marriage retains his/her full capacity to exercise. Thus, only in exceptions, the natural person, male or female, may marry after the age of 16, and the conclusion of the marriage generates effects regarding the anticipated birth of the exercise capacity.

The minor who has reached the age of 14, has limited exercise capacity. Legal acts may be carried out only with the consent of the parents or, as the case may be, of the legal guardian, in the cases provided by law and with the authorisation of the guardianship court. The minor with limited capacity may exercise acts of preservation, acts of administration which do not prejudice him/her, as well as acts of disposition of low value, of current character and which are executed at the date of their conclusion. According to Art. 42 Civil Code, the minor may carry out legal acts regarding work, artistic or sports occupations or those related to his/her profession, with the consent of the parents or guardian, as well as in compliance with the provisions of the special law, if applicable. In this case, the minor exercises the rights unassisted and also executes the obligations arising from these acts and may dispose of the acquired income single-handedly.

All these categories of natural persons who, by reaching the age of 18 naturally or by the legally established exceptions, have the capacity to exercise, may access the insolvency procedure provided by Law no. 151/2015.

Good Faith

Good faith is a fundamental notion in the Romanian legal system occupying a central place in the insolvency procedure of the natural person.

[8]Art. 65 of Law. 151/2015 provides the restrictive and cumulative conditions to be met for accessing the simplified procedure: reaching the standard retirement age or lower age if the debtor has lost half or all of his/her work capacity, has no traceble assets or income, debts do not exceed 10 minimum wages on the economy.
[9]Art. 37 Civil Code.
[10]Beleiu (2001) at 349.

Even the Romanian Constitution[11] maintains the obligation of Romanian citizens, foreigners and stateless persons to exercise their constitutional rights and freedoms in good faith, without violating the rights and freedoms of others.

The New Civil Code[12] raises good faith to the rank of principle by ruling that any natural or legal person must exercise his/her rights and perform his/her civil obligations in good faith, in accordance with public policy and ethics.

This notion is a complex one, difficult to define and measure in the legal field. The difficulty lies in the fact that good faith, *bona fides*, refers to the truth, justice, and lawfulness perceived by each person. It is seen as a group of elements, namely good intention, diligence, legality and abstinence from harm to others, elements that are a consequence of the transfer of a group of psychological facts that make up honesty (loyalty, prudence, order and temperance) in the sphere of law[13].

Good faith is a mental state characterised by the sincerity of the person that he/she had a correct representation of stating fact or law of existence at a given time, a vision that allowed him/her to make a decision or to have an attitude in a given circumstance, because man can distinguish between truth and falsehood, justice and injustice, good and evil, fairness and iniquity, lawful and unlawful[14].

The entire procedure of rescuing the debtor in financial difficulty has, as its core, the natural person of good faith. In the context of insolvency, the notion of good faith holds the attitude of the fair and honest debtor who, without being seriously culpable in relation to the state of financial difficulty, will access the procedure provided by Law no. 151/2015, in order to benefit from a "fresh start" after a certain period of time.

The good faith required from the debtor is not limited only to the period of the insolvency procedure. It will also take the attitude of the debtor into account before opening the insolvency procedure as well as subsequent to the completion of the actual procedure.

In the pre-insolvency phase, in order to access the procedure, the debtor must provide a plethora of personal information to convince that his/her insolvency is not a scheme to deny creditor payment; that for reasons beyond his/her control, the state of financial difficulty was externally triggered. The analysis of good faith, with which the debtor acts, is assessed in light of the information provided by him/her in the request to open the procedure.

Art. 13 paragraph 5 of Law no. 151/2015 obligates the debtor to provide the following information:

a) the reasons that led to insolvency;
b) the name/denomination of the creditors, their domicile/registered office, the value and type of the claim: certain or conditional, due or not due, showing the amount and, if applicable, the right or cause of preference;

[11]Art. 57 from the Romanian Constitution, Exercise of rights and freedom.
[12]Art. 14 Civil Code.
[13]Gherasim (1981) at 34-35.
[14]Păun (2016).

c) *legal actions against the debtor's property, including, where applicable, enforcement proceedings initiated, precautionary measures applied;*
d) *steps for extrajudicial renegotiation of certain debts undertaken by the debtor, prior to the formulation of the request to open insolvency proceedings;*
e) *civil status;*
f) *professional status;*
g) *the amount of income from work and that assimilated to it, of the amounts of money due as a pension under social insurance or representing another category of social benefits, as well as of any other income, including income due under a property right, intellectual property and dividends received in a period of 3 years prior to the submission of the application, as well as the expected changes in income in the next 3 years;*
h) *the debtor's assets, including the assets in common ownership in shares or in disinheritance, specifying other real rights other than the property right that the debtor holds over the assets of other persons;*
i) *the accounts opened with credit institutions or financial investment companies by the debtor, as well as the accounts through which the debtor manages his/her financial or investment funds, as well as cash from these accounts;*
j) *receivables owned by the debtor, as well as any real rights, other than property right, that the debtor holds over the assets of other persons;*
k) *documents free of charge, as well as transactions of more than 10 minimum wages per economy completed in the last 3 years prior to the formulation of the application;*
l) *the names of the persons to whom the debtor is currently performing maintenance services and the title with which they are provided and, where applicable, the names of the persons who contribute, together with the debtor, to the provision of this service;*
m) *ongoing or completed disputes to which the debtor is or has been a party, which could affect its patrimony in any way;*
n) *the mention that he/she was not convicted for committing the crime provided in art. 88, of the crime of tax evasion, of the offenses of forgery or of an intentional crime against the patrimony through the disregard of the trust, or that the restoration for such convictions transpired, together with the verifying documents;*
o) *the statement that he/she has not benefited from a release of residual debts, according to this law, in the last 5 years prior to the submission of the application, respectively, that he/she has not been the subject of an insolvency procedure based on a debt repayment plan or liquidation of assets, which has been closed for reasons attributable to it, in the last 5 years prior to the submission of the application;*
p) *if applicable, the name of the companies in which the debtor had the position of sole shareholder, administrator or associate/shareholder in the last 2 years prior to the introduction of the application, the number or percentage of shares/shares/interests held;*

q) where applicable, the capacity of an authorised natural person, owner of an individual enterprise or member of a family enterprise held in the last 2 years prior to the introduction of the application.

Throughout the insolvency proceedings, the debtor must maintain an honest and correct attitude, otherwise the debtor will be sanctioned with the closure of the insolvency proceedings and with the impossibility of release from residual debts.

Following the closure of the insolvency proceedings, the debtor, under certain specific conditions, may request the release of the residual debts, i.e. the exemption from part of the unpaid debts. The debtor's good faith is also supervised in the post-insolvency period in order to comply with legal obligations and prohibitions. Moreover, even after the issuance of the decision to release debt, if within three years it is found that the debtor has conducted acts of fraud on creditors, prior to or during the insolvency proceedings, any creditor may apply to the court to revoke the benefit of the release from residual debts.

In conclusion, the debtor's good faith will be analysed from several perspectives: the correctness of the information provided about him/herself, the honesty and diligence with which he/she will use the benefits of the procedure, the real assumption and fulfillment of the obligations established in the procedure and post-procedure. Provided that good faith characterizes the debtor in his/her acts and deeds, he/she will be protected by the insolvency law, while bad faith will be drastically sanctioned by law, with all legal benefits being withdrawn.

Conditions for accessing the Procedure

In accordance with Art. 4 paragraph (2) of Law no. 151/2015, only natural persons who have their domicile, residence or habitual residence in Romania for at least 6 months prior to the submission of the application are eligible. Phsyical permanent residence in Romania, even if he/she has not fulfilled the legal registration formalities, still allows for eligibility.

The second condition imposed on the natural person to be subject to the law, concerns his/her assets, which must be characterised by the insufficiency of these funds available for the payment of debts. Art. 3 point 12 of the law establishes that insolvency is that state of the debtor's patrimony which is characterised by the insufficiency of such funds available for the payment of debts, as they become due. The insolvency of the debtor is presumed when, after a period of 90 days from the due date, he/she has not paid his/her debt to one or more creditors. The manifestation of the state of insolvency consists of the effective cessation of payments. Thus, the second condition imposed on the natural person to access the insolvency procedure of the natural person is to be in insolvency.

The third condition is proof of the absence of a reasonable probability of becoming able, within a maximum period of 12 months, to perform obligations as contracted, while maintaining a reasonable standard of living for him/herself and his/her dependents' maintenance[15]. The assessment of the reasonable probability

[15]Art. 4 para. (1) lit. b) Law no.151/2015.

will take into account the total amount of obligations related to the income realised or forecasted to be realised, compared with the level of professional training and expertise of the debtor, as well as to the traceable assets held by him/her. Thus, the additional condition that the debtor is required to demonstrate involves the presentation of the total amount of debts in comparison with his/her income for the next 12 months, as well as the assets that can be capitalised to cover debts. In this context, it becomes extremely important to compare the asset with the patrimonial liability necessary to the state of insolvency of the natural person.

Also, in the debtor's patrimony, there must be patrimonial assets that can be capitalised to satisfy the creditors' claims. However, the patrimonial assets that can be capitalised are limited from a double perspective: On the one hand, the insolvency law itself establishes that certain assets are not traceable. On the other hand, even if the natural person is in a state of insolvency, preserving a reasonable standard of living for the debtor and his/her family must be considered. As such, while part of the debtor's income is untraceable, it can not be distributed to creditors.

Ope legis, the patrimonial asset, not traceable through the forced execution of common law, is composed of the goods provided in Art. 727 C. proc. and the incomes provided by Art. 729 C. proc. civ.: i.e. the essential goods for the debtor and his/her family, indispensable items for the disabled and those intended for the care of the sick, the food necessary for the debtor and his/her family for 3 months or, under certain conditions, the food necessary until the new harvest, the fuel necessary for 3 winter months, to which is added half of the debtor's net monthly income, regardless of the nature of the receivables, or half of the amount of the minimum net salary per economy[16].

The untraceable assets, which cannot be capitalised from the property of a debtor who is in the procedure of insolvency of the natural person are[17]:

- personal or household goods, including furniture, necessary for the debtor and his/her family for a reasonable standard of living, but without the value of each exceeding RON 5000;
- objects of worship, if there are not more than one of the same kind, but without the value of each exceeding RON 2000;
- a vehicle, if it is indispensable for the debtor and his/her family, including for traveling to/from work, and is worth a maximum of € 5000, and the cost of its acquisition is not the subject of a claim against the debtor's property;
- the objects reasonably necessary for the debtor or the dependents suffering from a disability and the objects intended for the care of the sick in this situation;
- the food necessary for the debtor and his/her dependents during the procedure;
- goods used for the exercise of the debtor's occupation or profession;

[16]Deteșan (2015a) at 83.
[17]Art.3 point.2 Law no.151/2015.

- the agricultural inventory, including work animals, fodder for these animals and seeds for cultivation, if the debtor is engaged in agriculture, to the extent necessary to continue work in agriculture, unless there is a real right of guarantee over such goods, or a privilege to secure the claim;
- personal or family letters, photographs and pictures.

The untraceable incomes of the debtor, which are not intended to satisfy the creditors' claims, but will be intended to maintain a reasonable standard of the debtor's daily life, are[18]:

- the amounts necessary to cover the housing, food, transport, health and other current needs of the debtor and the persons to whom he/she provides routine maintenance;
- the amounts necessary for the debtor and the persons to whom he/she provides routine maintenance in order to take compulsory education courses, as well as the amounts necessary for the beginning or continuation of post-secondary, university or post-university studies;
- the amounts required for the payment of compulsory insurance premiums.

Moreover, in the insolvency procedure of the natural person through a repayment plan, the administrator of the procedure expressly analyses the housing situation of the debtor and must propose measures to be taken regarding the family home. The costs incurred by the debtor remaining on the property, the amount of rent or mortgage installments, the amount of tax insurance premiums or maintenance costs of the property will be taken into account.

The costs of an alternative rental solution will also be considered. Even if the repayment plan states that the debtor's home is to be capitalised to cover the liability, he/she may remain on the property until capitalisation, but not more than 6 months from the date provided in the capitalisation plan. After the capitalisation of the property, the debtor has a preferential right to terminate lease of the property or part of it, at an amount of rent established under market conditions. It should be noted that all these provisions are innovative in comparison with the procedure of execution of the common law for residential buildings, where the only respite that can be granted by the bailiff is the one provided by art. 896 para. (1) C. proc. civ., which is one of maximum 3 months and only if the forced execution is done in winter[19].

The comparison between common law enforcement and insolvency proceedings reveals the increased protection enjoyed by the individual debtor in insolvency proceedings, by establishing a diverse range of non-trackable assets

[18]Art. 3 point 25 Law no.151/2015.

[19]Art. 896 para. (1) Code of Civil Procedure „ no eviction from residential buildings may be made from 1 December to 1 March of the following year, unless the c reditor proves that, within the meaning of the provisions of housing law, he/she and his/her family does not have a suitable home or that the debtor and his/her family gave another suitable home in which he/she could move immediately".

and income for expenses considered necessary for a reasonable standard of living of the debtor and his/her family.

In conclusion, within a maximum period of 12 months, the debtor must prove a reasonable improbability of resuming solvency as well as the inability to perform his/her obligations as contracted, while maintaining a reasonable standard of living for him/herself and the persons of concern. In practice, the process must bear in mind the traceable assets allowed by insolvency law, as well as the expenses necessary to maintain an acceptable standard of living.

As evident, all the conditions imposed by law have the maintenance of a reasonable standard of living for the debtor as a central element. This infers that the debtor must make efforts to overcome the difficult financial situation he/she is in. However, these efforts must not lead the debtor to lowering the level of lifestyle below the reasonable limit. The notion of "reasonable standard of living" is extremely complex and dynamic and can be perceived differently by each individual. Precisely for this reason, a legislator of the Insolvency Commission, set up at the central level, is appointed in charge, in order to determine criteria for establishing a reasonable standard of living and for assessing the living needs of debtors and their families.

According to Decision no. 7/2018[20], the Insolvency Commission approved general criteria for establishing a reasonable standard of living. Hence, they used the value of the minimum monthly consumption basket, which represents the minimum threshold below which the expenses for ensuring a reasonable standard of living may not be established. This amount represents the amount of money from the debtor's income that cannot be impeded for the purposes of dept payment .because it is necessary to cover the expenses indispensable to ensure the daily livelihood for himself and his/her family. The value of the minimum monthly consumption basket was differentiated from the insolvency procedure based on the debt repayment plan, the simplified insolvency procedure and the judicial insolvency procedure through asset liquidation. The amount of expenses to ensure a reasonable standard of living may be equivalent to the value of the minimum monthly consumption basket, but may also exceed this value, depending on the particular needs of each debtor and his/her family members while taking into account respect for rights, fundamental freedoms and human dignity.

The value of the minimum monthly consumption basket was established differently for the debtor living in urban areas as compared to the debtor living in rural areas. The value of the minimum monthly consumption basket for the debtor and his/her family members living in urban areas in the insolvency procedure based on the debt repayment plan or the simplified insolvency procedure is set at 797 RON[21] for each adult, 587 RON for each child over 14 years, 419 RON for each child up to 14 years old. The value of the minimum monthly consumption basket for the debtor and his/her family members living in rural areas in the insolvency procedure based on the debt repayment plan or the simplified

[20]Decision no. 7 of December 17, 2018 of the Central Insolvency Commision published in the Official Gazette no. 41 of January 16, 2019.

[21]We specify that 500 RON is the equivalent of 100 euros1 euro = 5 ron

insolvency procedure is set at 644 RON for each adult, 473 RON for each child over 14 years old, 339 RON for each child up to age 14.

It should be noted that the analysis carried out by representatives of the Ministry of Labor and Social Justice, the National Institute for Economic Research of the Romanian Academy, the National Forecast Commission, the National Institute for Scientific Research in Labor and Social Protection, the Research Institute for Quality of Life of the Romanian Academy, The National Institute of Statistics and the National Authority for Consumer Protection regarding the values of the exposed consumer basket was performed at the level of 2018, with these values being included in Decision no. 7/2018. Although the minimum amounts necessary for a reasonable livelihood are constantly changing, four years after the adoption of these values, we find that they have not been updated. In our opinion, an annual update is imperative to achieve the proposed goal of quantifying the amounts needed for a reasonably sustainable livelihood. Moreover, the years 2020-2021, characterised by the COVID pandemic, which produced disastrous economic and social effects, should have persuaded the central Insolvency Commission to review the value of the consumer basket applicable to 2022.

The Insolvency Commission at the central level, by Decision no. 7/2018, concretises the general provisions of Law no. 151/2015, expressly establishing the amounts allocated to each member of the debtor's family in order to maintain a reasonable standard of living. It also takes into account a number of particular situations that lead to increased values, such as children's education, medical treatment, transportation of debtor family members, and so on. The territorial Insolvency Commissions, together with the administrators and liquidators for the insolvency procedure of natural persons, aims at establishing, in concrete terms, the expenses for ensuring a reasonable standard of living for the debtor[22].

The non-traceable assets established in the insolvency proceedings are considerably higher than those established in the common law enforcement procedure. The protection afforded by the legatee to the debtor and his/her family is obvious and clear, the central idea being to overcome the difficult financial situation with some effort. This effort, however, should not put pressure on the debtor and his/her family to lower the standard of living below the level of decency and human dignity.

The fourth condition imposed on the individual to enter under the insolvency law is a minimum level of debt corresponding to 15 minimum wages per economy. The legislator defines the notion of "threshold value" in Art. 3 point 24 as the minimum amount of due debts of the debtor necessary to be able to introduce the request for opening the insolvency procedure, based on the debt repayment plan or the judicial insolvency procedure through asset liquidation. The fulfillment of this criterion will take into account the date of the request made by the debtor to access the insolvency procedure, considering that the minimum wage in the economy undergoes periodic changes. In order to access the simplified insolvency procedure, a maximum debt threshold corresponding to 10 minimum wages per economy is required.

[22]Art. 2 para.(3) The methodological norms for the application of Law no.151/2015.

Starting from the central idea of this law, namely overcoming a difficult situation from a financial point of view, for the debtor who is a natural person in good faith, the legislator imposed a series of bans on the access of certain categories of debtors to insolvency proceedings. For various reasons, expressly regulated by law, certain debtors are denied access to insolvency proceedings and implicitly to the benefits they offer when the debtor can no longer be characterised as one in good faith.

The doctrine[23] mentioned that Art. 4 para. (3) and para. (4) of the law sets real fines for non-compliance of the debtor with the character of a sanction against possible misconduct, excluding these debtors, *de plano*, from the applicability of the law.

The procedures provided by this law are not applicable to the debtor against whom the insolvency procedure was terminated, for reasons that are attributable to him/her less than 5 years prior to the formulation of a new request to open the procedure[24].

The notion of 'imputable reasons' is linked to misconduct found during the previous insolvency proceedings, this prohibition being a sanction for the acted in Fraud toward the creditor. The imputable reasons are assessed at the moment of pronouncing the decision, or the decision being irrelevant to the behaviour bad faith debtor who has not complied with his/her legal obligations or has of the debtor after the closing of the procedure.

In other words, although the debtor was given the chance to financially recover, his/her reckless or fraudulent behaviour led to the closure of the procedure. The debtor may receive a new chance to access the procedure only after a period of 5 years. This prohibition also persists if the debtor, against whom the proceedings have been closed due to the imputable element, has paid all the claims, including interest and penalties which will be taken into account due to his/her unfaithful conduct.

The procedures provided are not applicable to the debtor who has been definitively convicted of an offense of tax evasion, forgery or an intentional offense against property by disregarding trust. Since in this case the central element is good faith, the final conviction for these crimes denotes a bad faith behaviour of the debtor. It should be noted that not every conviction of the debtor will lead to the impossibility of accessing the insolvency proceedings. The legislator expressly mentions the offenses concerned: the crime of tax evasion, the crime of forgery or intentional offenses against property by disregarding trust, etc. Intentional crimes against property by disregarding trust include abuse of trust, abuse of trust by fraud to creditors, simple bankruptcy, fraudulent bankruptcy, fraudulent management, misappropriation of property found or erroneously brought to the perpetrator, deception, public fraud, the patrimonial exploitation of a vulnerable person.

Also, the procedure will not be applied to the debtor who has been dismissed in the last 2 years for reasons attributable to him/her[25].

[23]Deteșan (2015b) at 26.
[24]Art. 4 para. (4) lett. a) Law no.151/2015.
[25]Art. 4 para. (4) lett. c) Law no.151/2015.

Dismissal for imputable reasons involves reckless, chaotic, irresponsible behaviour that causes the employer to dismiss him/her, aspects that are incompatible with good faith, a central element that must govern the debtor's behaviour prior to the opening of insolvency proceedings.

As the law does not provide for any exceptions, we consider that the mere existence of a dismissal, attributable to the last two years, prohibits the debtor's access to insolvency proceedings, regardless of whether the debtor is employed or not employed at the time of the application. The employment of the debtor after the imputable dismissal is not a factor to be taken into account, as the sanction is imposed on any debtor who has been dismissed in the last two years for imputable reasons. The fact that the debtor succeeds in committing him/heruself after the imputable dismissal is not a guarantee that he/she has changed his/her behaviour and that he/she will further act in good faith.

The debtor who is unjustifiably unemployed will not have access to the procedure, i.e. the debtor who, although fit for work, is without a job or other source of income, who has not made the reasonable diligence necessary to find employment or has unjustifiably refused a proposed position or any income-generating activity[26].

The obtaining of income by the debtor is a necessary condition for the insolvency procedure, because he/she must ensure, on a monthly basis, a reasonable standard of living for him/her and his/her family. In the absence of any income, this goal is particularly difficult to achieve.

The good faith of the debtor implies the development of an income-generating activity. The legislator also considers the situation in which the debtor does not have a job at the time of the application, but this situation is not attributable to him/her whe the debtor can prove that he/she is interested and that he/she has made efforts to obtain employment.

When formulating the request to open the procedure, it will be assessed whether there is a good faith reason regarding the lack of employment, or if this reason tends towards a bad faith behaviour. A clear proof of bad faith, expressly mentioned by the legatee, is the situation in which the debtor refuses to engage in actively procuring employment. This phenomenon is observable only in the situation when, being registered in the records of the employment agency to which he/she is assigned, he/she refuses a job offer.

The procedures provided by this law are not applicable to the debtor who has accumulated new debts, through luxuriant expenses, while he/she knows or should know that he/she is in a state of insolvency.

The notion of "luxuriant expenditure" is not defined by insolvency law. In the regulation of the artificial real estate accession, at Art. 578 paragraph (3) letter c of the Civil Code, luxuriant works are defined as those performed for the simple pleasure of the one who performed them, without increasing the economic value of the building.

Through a broad interpretation, we can appreciate that the luxuriant, epicurean expenses from the perspective of the debtor who requests access to the insolvency procedure, are those made strictly for the pleasure of the debtor,

[26]Art. 4 para. (4) lett. d) Law no.151/2015.

without leading to the increase of the patrimonial asset. Certainly, not all the expenses allowed to be made by the debtor, which are established by the decision of the Insolvency Commission at national level to ensure a reasonable living, can be considered as epicurean.

Although we can observe the intention of the legislator not to allow the debtor unjustified financial excesses in relation to his/her financial situation, we appreciate that the notion of "luxuriant expenses" must be legally defined from the perspective of the insolvency law.

The procedures provided are not applicable to the debtor who determined or facilitated the state of insolvency, intentionally or through gross negligence. It is presumed to have had this effect:

1. Contracting, in the last 6 months prior to the formulation of the request to open insolvency proceedings, debts that represent at least 25% of the total value of the obligations, except for the excluded obligations;
2. The assumption, in the last 3 years prior to the formulation of the request, of excessive obligations in relation to his/her patrimonial state, to the advantages he/she obtains from the contract or to all the circumstances that contributed significantly to the debtor's inability to pay his/her debts, other than those due by him/her to the persons with whom he/she contracted thus;
3. Making, in the last 3 years prior to the application, preferential payments, which have significantly contributed to the reduction of the amount available for payment of other debts;
4. the transfer, in the last 3 years prior to the application, of goods or values from his/her patrimony to the patrimony of another natural or legal person while he/she knew or should have known that through these transfers he/she will reach a state of insolvency;
5. Termination of an employment contract by agreement of the parties or by resignation in the last 6 months prior to the formulation of the request to open the procedure.

The five presumptions established by the legatee are relative, i.e. they allow the debtor to prove otherwise[27]. All bad faith behaviours referred to in Art. 4 paragraph (4) letter f of the law have as a finality either the decrease of the patrimonial assets, or the increase of the debtor's liabilities, both situations being prejudicial for creditors who view their chances of recovering the receivables diminished. Precisely because the insolvency proceedings are intended to give the debtor a chance in good faith, such conduct is not permitted toward the debtor prior to the opening of the proceedings.

The procedures provided by this law are not applicable to the debtor who, at the date of formulating the request to open an insolvency procedure, according to the law, has already opened another insolvency procedure[28].

[27]Art. 327 Code of Cicil Procedure defines presumptions as „the consequences that the law or the judge draws from a known fact in order to establish an unknown fact".
[28]Art. 4 para. (4) lett. g) Law no.151/2015.

Naturally, the debtor against whom the insolvency proceedings have been opened, in any of the three forms provided by law, will not be able to submit a new application to open the proceedings, regardless of the reasons of good faith he/she invokes. The prohibition refers strictly to the possibility for the debtor to access the second insolvency procedure, the first already opened not being affected by the submission and rejection of the second application.

The debtor against whom the insolvency procedure of the natural person was opened, which ended with the cancellation of the unpaid debts after the closing of the proceedings, cannot benefit from a new procedure if at least 5 years have not passed since the cancellation of the unpaid debts from the previous procedure.

Art. 4 paragraph (3) of Law no. 151/2015 states: "The debtor who has been the subject of such a procedure may not benefit from an insolvency procedure based on a debt repayment plan, a judicial insolvency procedure by liquidation of assets or a simplified insolvency procedure, completed with the release of residual debts, less than five years before a new application for insolvency proceedings was made."

Although, in order to benefit from the cancellation of the residual debts, the debtor must show good faith, the formulation in less than 5 years of a new request to open the insolvency procedure that can lead to a new elimination of residual debts, goes out of the scope of good faith. The purpose of the law is to give the bona fide debtor a chance to benefit from a fresh start, with the cancellation of unpaid debts. But the possibility to repeatedly request the protection of the law is temporarily conditioned at 5 years, considering a behaviour lacking diligence, honesty and good faith, if in a shorter time the debtor requests the re-opening of insolvency proceedings.

Conclusions

Insolvency law gives over-indebted individuals a second chance. There is an increased legal protection of debtors who, in good faith, try to overcome their state of financial difficulty. However, in order for them to act under the protection of the law, the conditions for accessing the procedure are numerous and restrictive.

As we have shown, a long series of documents must accompany the request of the debtor to open insolvency proceedings. Also, some debtors are not allowed to access the insolvency proceedings, but these prohibitions are not clearly defined by the legislator and leave room for interpretation.

Excessive forms and possible interpretations of the law have led to a distrust by citizens in accessing it, although the COVID-19 pandemic has led to the over-indebtedness of many individuals.

The legislator must also focus his/her attention on this matter so that the insolvency procedure of the natural person becomes a real help and support for the citizens who are in a situation of over-indebtedness, wishing in good faith to overcome it.

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Genealogy, Variations and Specificity of the Right to Truth

*By Agostina Latino**

This essay focuses on the right to truth as a specific guarantee of the human person, characterised by both an individual and collective dimension, especially in the context of transitional justice. The analysis takes as its perimeter of investigation both the normative datum, which highlights its development in three phases (at first exclusively in the sphere of international humanitarian law, then circumscribed to the context of enforced disappearances, and today applicable in any case of serious violation), and the practice of the decisions of international tribunals and human rights control mechanisms. The aim is to highlight how the right to truth, far from constituting an aspiration that is more ethical than juridical or a mere explication of pre-existing rights already established, can, if crystallised, serve the pursuit of its own objectives that would be difficult to achieve without it.

Keywords: *Human rights; Rights to the truth; Transitional justice; Gross violations*

Introduction

On 21 December 2010, the General Assembly of the United Nations (UN) proclaimed 24 March as the *International Day for the Right to Truth about Gross Violations of Human Rights and for the Dignity of Victims*.[1] The anniversary is part of a debate, which has become more accentuated in recent years, both in doctrine[2] and in practice, on the emergence or otherwise of a 'right to truth' understood as an obligation incumbent on States to disclose, both to victims and to the community, every fact and circumstance of which they are aware in

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[1]UN General Assembly (2010). The date was chosen to honour the work of Bishop Oscar Arnulfo Romero of El Salvador, who was assassinated on 24 March 1980 for denouncing violations of the human rights of the most vulnerable population and defending the principles of protection of life, human dignity and opposition to all forms of violence. The purpose of this day is therefore twofold: to honour the memory of the victims of gross and systematic human rights violations and to promote the importance of the right to truth and justice by paying tribute to those who have dedicated and lost their lives in the struggle to reaffirm human rights for all.

[2]Without claiming to be exhaustive, there are four different approaches: a) those who deny a legal autonomy of the right to truth, as Graziani & Rotondo (2020), b) those who, qualify it as a last-generation human right, as Klinkner & Davis (2021), González (2018); and Callejon (2006), c) those who conceive it as a kind of specification of pre-existing rights, as Antkowiak (2002), Aldana-Pindell (2004), and Groome (2011), d) those who speak of it as an emerging principle not yet established as Naqvi (2006).

relation to serious violations of human rights, mainly in post-dictatorship or post-conflict contexts of transitional justice.[3]

The then UN Secretary General Ban Ki-moon, on the occasion of the first anniversary of this *International Day*, clarified the rationale behind the right to truth:

> "*[…] victims of gross human rights violations and their families are entitled to know the truth about the circumstances surrounding the violations, the reasons they were perpetrated and the identity of the perpetrators. [...] Knowing the truth offers individual victims and their relatives a way to gain closure, restore their dignity and experience at least some remedy for their losses. Exposing the truth also helps entire societies to foster accountability for violations. And since the process of determining the truth often involves fact-finding inquiries and public testimony by victims and perpetrators, it can provide catharsis and help produce a shared history of events that facilitates healing and reconciliation*".[4]

The right to the truth would accrue first and foremost to the victim, i.e. the person directly injured by a criminal act, as well as to persons closely associated with them, first and foremost – but not exclusively – their family members, who have suffered harm as a result of that act, and secondly, but not least, to the community as a whole.[5] From the point of view of the passive side, the right to truth would entail a series of *facere* obligations for States, the hard core of which would be the carrying out of effective investigations,[6] the initiation of prosecutions and the conviction of those found responsible. This triad of basic elements, corollaries of the principle according to which the exercise of *ius dicere* is a monopoly of the State, i.e. it is a right *positum* by the authority in charge of it (having regard, upstream, to its production, downstream, to its application), characteristic of the retributive approach to justice (according to the *suum cuique tribuere* principle, in virtue of which benefits must be equivalent to counter-performances, rewards to merits, penalties to demerits)[7] would be enriched, in the case of the right to truth, with specific forms of reparation, other than the typical modality, i.e. pecuniary reparation. In fact, in order not to reduce legal epistemology to an imitative or reproductive level of the mathematical method, the idea of restorative justice has emerged in recent years, based on a vision that requires a different apparatus of tools, broader and more complex

[3]Stamenkovikj (2021); Mendez & Bariffi (2012); Naftali (2017); Minow (1998); Méndez (1998).

[4]Secretary General (2011). On how international courts try to ascertain the 'procedural' truth, see Wheeler (2019) at 84 and Bhuiyan (2022).

[5]Bassiouni (2006).

[6]According to the Council of Europe, the requirements for an investigation to be 'effective' are: adequacy (the State must do all that is reasonably possible to reach a result); thoroughness (considering every relevant element); impartiality; independence; timeliness; and publicity, without compromising the conduct of the investigation and the fundamental rights of the parties. See Directorate General of Human Rights and Rule of Law (2011).

[7]For Simone Weil, very often the sentence pronounced by the judiciary is nothing but the lowest of revenges: Weil (1957) at 41. This can lead to an aberrant result, namely that the history of the repression of crimes by the State becomes more frightening than the history of the crimes themselves: thus Muller (1995) at 145 ff.

than that which belongs to a merely applicative knowledge, given the crisis of the idea of punishment as affliction, an act that compensates but does not repair.[8] The acme of this tension, at once ethical and juridical, is represented by the Truth and Reconciliation Commissions:[9] the *ratio* behind the work carried out by these Commissions hinges precisely on the right to truth in order to (re)establish a (new) paradigm of values, giving due prominence to the past, through the memorisation of events, in an attempt to avert the recurrence of atrocities and violence.[10] In fact, by making the truth known and avoiding the shortest route, i.e. the *escamotage* of amnesties *tout court*,[11] one restores to a people, an ethnic group, a social community, a stolen heritage, i.e. its memory, avoiding that the concealed and concealed reality defuses and sabotages from the outset any form of reconciliation, an objective that only time can help achieve.[12]

In this change of course, the right to truth seems to take on the role of helmsman, giving the direction and pursuing it, so that in these notes, an attempt will be made, first of all, to reconstruct from a historical-normative point of view the emergence of this new instance in the panoply of those posed to protect the rights of the human person, taking into account practice, in order to highlight, so to speak, 'the state of the art', i.e. whether the right to truth can today be considered a crystallised right or a right *in fieri*, as well as its function, i.e. for what purposes it could usefully be exercised.[13]

The question underlying the investigation of this contribution is therefore, in the first instance, whether the right to truth has now risen to the rank of an autonomous human right endowed with a normative force of its own beyond its rhetorical enunciation as a legitimate aspiration, or, conversely, whether it should (still) be considered a mere specification of other fundamental human rights, consolidated both at the level of convention and at the level of customary law, such as, in particular, the right of States to enact positive measures aimed at preventing and/or repressing serious violations of substantive human rights (*in specie*, the right to life or the prohibition of torture), or procedural rights (such as the right to a fair trial or an effective remedy).

To this end, we shall first of all delimit the content of the right to truth, in the twofold meaning of individual right and collective right, outlining its normative origins and stressing how, in the case of the right to truth, the classic synallagmatic reconstruction of right-duty falls, at least in part, in a bi-univocal *vis-à-vis* declination between the holder of the guarantee and the

[8]Already *illo tempore* Francesco Carnelutti (1951) at 211-212, stated that "il diritto è un fatto essenzialmente spirituale […]. Un contratto, un delitto, un processo sono degli uomini uno di fronte all'altro. Vuol dire che bisogna capire quegli uomini per capire il diritto. Ma questa è materia ribelle […]".

[9]Szoke-Burke (2015); Kukoska (2015).

[10]Baranowska & Glisczczynska-Grabias (2018).

[11]ee Le Moli (2021).

[12]On the practice of truth and reconciliation commissions, let us refer to Latino (2017).

[13]On the broad or narrow interpretation of the notion of truth, see Klamberg (2012) at 611. On the polysemous ambivalence of the concept 'right to truth', (ab)used sometimes in an instrumental manner, see Naftali (2016).

obligor to respect it. In fact, if it is true – and it is true – that the disclosure to the victim of what has happened, functional to his or her specific interest (i.e. reduction of suffering/elaboration of the event), is specularly counterbalanced by the State's duty to investigate the facts relating to serious violations of human rights, nevertheless the State's obligation to ascertain these situations does not end in this key purely related to the victims but also serves other purposes. In fact, the identification and prosecution of the alleged perpetrators and, in general, investigations aimed at tracing the factual picture of what really happened in the case of atrocities, often constitute an indispensable building block to recompose a society fragmented along ethnic, political or religious lines, to enable it to come to terms with its past and to establish policies of equality among its members, reconstructing a national identity and unifying the country through dialogue on a shared history. From a legal point of view, this also has an impact on another profile, that of the active legitimisation of such a right: if the right to truth is to be declined in a way that is (also) independent of the legitimate claims of the victims (albeit not in a contradictory key, but in a supplementary and complementary one), who can invoke it (apart from the victims): their representatives, non-governmental organisations, so-called civil society, etc.?

The right to the truth will therefore be reconstructed in the light of practice in order to verify whether, and with what characteristics, it can today be considered an autonomous case in the international legal panorama, and this, not, as Ignatieff puts it, from the point of view of rights inflation – the tendency to define anything desirable as a right – since this ends up eroding the legitimacy of a defensible core of rights,[14] but on the basis of the fact that there are interests that justify the right to know what actually happened independently of the interests of prosecution, punishment of the offender or (even sometimes) reparation for the wrong suffered by the victim.

The analysis will therefore aim to highlight how the right to truth constitutes a pragmatically and legally indispensable tool in the global perspective of transitional justice, as defined by the UN Secretary General, i.e. «the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof».[15]

[14]Ignatieff (2000). Ignatieff's words can be contrasted with those of Helmons (2000): "la liste des droits de l'homme n'est pas exhaustive. Cette liste se complète au fur et à mesure des besoins de la personne".

[15]Report of the Secretary General (2004).

Legal Prolegomena of the Right to Truth

The emergence of the right to truth in international law is articulated according to a three-phase process: the first, the oldest and most circumscribed, developed in the framework of international humanitarian law; the second, specifically in the context of enforced disappearances; the third, the current, marks a progressive expansion of the operativeness of this guarantee whose legal effects would be released in any scenario in which serious and systematic violations of human rights (*gross violations*) have occurred.

Firstly, in fact, the prodromes of the legal autonomy of the right to truth are to be found in international humanitarian law: the four Geneva Conventions of 1949 prescribe the obligation of belligerents – admittedly, somewhat indefinite – to acquire all the information needed to identify the wounded, sick and dead of the opposing party and to communicate the data collected to the latter.[16] Subsequently, giving normative substance to the UN General Assembly's assertion that the need to be informed of the fate of loved ones – 'civilians as well as combatants' – in a context of war is "a basic human need»",[17] Article 32 of the First Protocol of 1977 to the Geneva Conventions requires that all those who find themselves acting in this sphere – High Contracting Parties, Parties to the conflict and competent international humanitarian organisations – be motivated «mainly by the right of families to know the fate of their relatives».[18] This rule, which details – *ratione materiae* – and specifies – *ratione personae* – what was already generically provided for in the four Geneva Conventions of 1949 for belligerents, was adopted unanimously «after careful reflection, and [...] in full consciousness», thus marking «an important step forward in the field of international efforts to protect human rights»,[19] so that, having now acquired a customary nature, it is also applicable to internal armed conflicts, as clarified by the International Committee of the Red Cross.[20]

[16]Art. 16 of the First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Countryside; Art. 18-20 of the Second Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Art. 120-122 of the Third Convention relative to the Treatment of Prisoners of War; and Art. 129-131 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

[17]UN General Assembly (1974).

[18]First Additional Protocol. In Section III '*Missing and Deceased Persons'*, which opens with Article 32, the right to truth is not evoked as a mere ethical aspiration but, on the contrary, imposes on the Parties a series of obligations to *facere*: to search for the missing, to facilitate for this purpose the collection of all useful information and to transmit the results of such searches (Art. 33), to respect the remains of the deceased, to care for and mark burial places and to facilitate the return of the remains of the deceased and their personal effects to the State of origin (Art. 34). It should also be remembered that Article 26 of the Fourth Geneva Convention for the Protection of Civilian Persons in Time of War states: «Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organisations engaged on this task provided they are acceptable to it and conform to its security regulations'».

[19]Sanzoz, Swinarski & Zimmermann (1987) at 345-346.

[20]Henckaerts, & Doswald-Beck (2005) in specie *Rule 117* at 421 ff.. See also Henckaerts (2005).

The second phase in the evolution of the right to truth develops in the Latin American context, which is unfortunately characterised by serious and systematic enforced disappearances, a phenomenon that causes the victim's relatives unbearable psychological anguish due to the lack of knowledge about the circumstances of their disappearance and their fate.[21] Since the late 1970s, the United Nations has been sensitive to the issue: first, with Resolution 33/173, in which the General Assembly said it was "deeply moved by the anguish and sorrow", having regard to the difficulty of the relatives of the *disappeared "* in obtaining reliable information from competent authorities as to the circumstances" of the disappearances[22] and, subsequently, with the First Report of the Working Group on Enforced or Involuntary Disappearances, in which, the right to the truth is firmly stated as the prerogative of the relatives of disappeared persons «to learn what happened to their relatives».[23] The normative pinnacle in this context, also thanks to the driving force of the Organisation of American States (OAS),[24] is undoubtedly the International Convention for the protection of All Persons from Enforced Disappearance of 2006.[25] In fact, in that Convention the recognition of a right to truth for victims of enforced disappearance, which represents «one of the most significant developments in international human rights law»,[26] hinges on Art. 24, divided into four paragraphs: the provision, in § 1, provides a broad notion of "victim" that includes, in addition to the disappeared person, all those who have suffered an injury as a direct consequence of enforced disappearance; in § 2, it contemplates the right of victims to know the circumstances of the facts relating to the disappearance of their relatives and to be informed of the developments and results of the relevant investigations in § 3, it enshrines the obligation of States Parties to take all necessary measures aimed at the release of disappeared persons still alive and, in the event of their death, at the recovery of their bodies, and, according to § 4, to provide reparation mechanisms aimed at ensuring prompt, fair and adequate compensation. It is therefore the family members who can exercise their right to know the truth about the circumstances of the enforced disappearance, the developments and results of the investigation and the fate of the missing person. The Committee on Enforced Disappearances, i.e. the Committee composed of ten independent experts with the function of monitoring the implementation of the Convention

[21]Garibian (2014).

[22]UN General Assembly (1978).

[23]Commission on Human Rights (1981) § 192. Note that § 187 expressly refers to Article 32 of the First Additional Protocol.

[24]See the Resolutions of the General Assembly of the OAS inviting the members of the Organisation «in which disappearances of persons have occurred to clarify their situation and inform their families of their fate»: OAS General Assembly (1983) § 5; OAS General Assembly (1984) § 5. See also Resolution of the OAS Permanent Council (2005) urging members of the Organisation to take all necessary measures to prevent enforced disappearances and guarantee the right to truth to relatives of missing persons.

[25]The Convention entered into force on 23 December 2010, in accordance with Article 39(1), which reads as follows: «this Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession».

[26]Citroni & Scovazzi (2009) at 102. Earlier, in the same vein, see Taxil (2007).

against Enforced Disappearances by the States that have ratified it, set up pursuant to Article 26 of that Convention, has repeatedly pronounced on the duty of the State to protect the 'right to truth' in domestic law, a right that does not end with the 'traditional' procedural duty of investigation and repression, aimed at avoiding the impunity of the agent.[27] Suffice it to recall that «the family and friends of disappeared persons experience slow mental torture, not knowing whether the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health. Aware, furthermore, that they too are threatened; that they may suffer the same fate themselves, and that to search for the truth may expose them to even greater danger».[28] The right to the truth is thus a positive obligation, albeit one of means and not of result, incumbent on the State, which goes hand in hand with the duty to take adequate measures for the prevention of enforced disappearances, and takes the form, in addition to carrying out investigations in the event of their occurrence and punishing the perpetrator, of informing the victim's relatives of the "circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end".[29]

The third phase in the evolution of the right to truth is the one in which this guarantee, which had already exceeded the legal perimeter of international humanitarian law (*lex specialis* of armed conflicts) to develop in the context of enforced disappearances, also overcomes this legal fence and begins to assert itself *tout court* in the case of serious and systematic violations of the rights of the human person. This broadening of the scope in which the right to truth releases its legal effects is "certified" by the Working Group on Enforced or Involuntary Disappearances according to which: "the right to the truth – sometimes called the right to know the truth – [...] is now widely recognised in international law. This is witnessed by the numerous acknowledgements of its existence as an autonomous right at the international level, and through State practice at the national level. *The right to the truth is applicable not only to enforced disappearances*".[30] The beginnings of the importance of seeking the truth regarding gross violations can be found in the work of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Louis Joinet, who, in 1997, formulated the *Set of Principles for the protection and promotion of human rights through actions to combat impunity*.[31] Starting from the assumption that «before a new leaf can be turned, the old

[27]*Ex plurimis* see, for example, UN Committee on Enforced Disappearances (2013) §35: "the Committee encourages the State party to continue its efforts to ensure that its legal system guarantees all victims of enforced disappearance the right to obtain reparation, *learn the truth* and receive prompt, fair and adequate compensation [...]" (*emphasis added*).

[28]UN Working Group on Enforced or Involuntary Disappearances (2022).

[29]Last *Affirming* the Preamble of the Convention for the protection of All Persons from Enforced Disappearance.

[30]UN Working Group on Enforced or Involuntary Disappearances (2010) Preamble at 12 (*emphasis added*).

[31]UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1997).

leaf must be read»,[32] the four pillar-rights of transitional justice are enucleated therein: to know the facts, to justice, to reparation, to guarantees of non-repetition. The bicephalic nature of the right to know emerges from its very definition as it is reiterated that the individual right of each victim relating to his or her right to know what happened (*the right to truth*) is coupled with the «collective right, drawing upon history to prevent violations from recurring in the future».[33] This *Set of Principles* was later developed by Diane Orentlicher in 2005, and became the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, in which Principle 2 states that «every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations» and, in Principle 4, that «irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate».[34] Again, these Principles, taken up and developed in the reports of the Special Rapporteur of the Sub-Commission, Theo van Boven, and the Special Rapporteur of the Commission on Human Rights, Cherif Bassiouni, formed the basis for the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[35] In this Resolution, the UN General Assembly reaffirmed that the right to truthfulness falls under the umbrella of reparation and recognised that satisfaction may (also) consist of verification of the facts and full and public disclosure of the truth, accompanied, where appropriate, by an official statement or judicial decision aimed at restoring the dignity and reputation of the victim(s) and those closely associated with them; with a public apology, in which the acknowledgement of the facts and the assumption of responsibility are clearly evident; with commemorations and tributes to the victims; and with the inclusion of an accurate account of violations of international human rights and humanitarian law in training materials at all levels. In 2006, the *Report of the Office of the United Nations High Commissioner for Human Rights*, specifically titled *Study on the right to the truth*, saw the light of day, concluding that «the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations».[36] All the subsequent *Reports* on the subject are in this

[32]Ibid., § 50.
[33]Ibid., § 17.
[34]UN Commission on Human Rights (2005).
[35]UN General Assembly (2005).
[36]UN Commission on Human Rights (2006).

wake,[37] from whose analysis, in my opinion, it can be affirmed that the legal content of the right to the truth should not be confined to the ethical-deontological sphere circumscribed to the intimate feelings and private reparation of the victim and his family, but may well constitute the effective basis for the recognition of pragmatic and concrete guarantees: think for instance of the need for a death certificate for insurance purposes to safeguard the sustenance of the family of the missing victim.

From a juridical point of view, it seems important to stress how the characteristics of the right to truth enshrined in the most recent instruments, namely inalienability and imprescriptibility, echo the typical profiles of the fundamental rights of the human person, almost suggesting its inalienable nature. Another fundamental aspect concerns the (also) collective dimension of this right: already in 1980 the Inter-American Commission on Human Rights stated that «every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future».[38] In my opinion, this approach outlines the overcoming of victim-centrism *uti singuli*, so that the – consequent – peculiarities of the right to truth are also reflected on the function of (possible) punishment: the usual and "classic" purposes and canons (general and special prevention, retribution-proportionality) are enriched and sometimes "supplanted" by extraordinary purposes (stigmatisation, reparation, compensation, reconciliation).

To sum up, according to the reconstruction I have tried to outline, it seems therefore that the right to truth was born as a *lex specialis ratione temporis* (norm applicable exclusively in cases of armed conflicts), developed as a *lex generalis* limited *ratione materiae* (*ad hoc* right for the disappeared and their relatives) to rise today to the rank of *lex generalis tout court* in the case of serious and systematic violations of the rights of human persons, especially in the context of transitional justice. In my view, the copious multiplication in recent years of instruments (albeit mainly of soft law) in which the right to truth is recognised testifies to the coagulation of *opinio iuris* as to its legal autonomy,[39] albeit in the awareness, to borrow the words of the United Nations

[37]UN Human Rights Council (2007), Id. (2009), Id. (2011).

[38]Inter-American Commission on Human Rights (1985-1986) at 205: «Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources, so that the judiciary itself may undertake whatever investigations may be necessary».

[39]Also in favour of the consolidation of the *opinio iuris* regarding the right to the truth can also be considered the increasing multiplication of Truth and Reconciliation Commissions and other typical mechanisms of transitional justice, all of which are inspired by the right to the truth, insofar as they are prevalently decided and instituted at the State level, which also constitutes evidence in support of a widespread practice. Even the UN High Commissioner for Human Rights (2007, §81) has expressed himself in favour of the crystallisation of the right to truth in the current international legal system, observing that «the right to know the truth about gross human rights violations and serious violations of humanitarian law is recognised in some international treaties and instruments,

High Commissioner for Human Rights, that it is «closely linked with other rights».[40]

The Right to Truth in the Light of Practice

The right to truth is outlined, as just illustrated in the previous paragraph, in many international instruments: it is therefore necessary to verify its resilience in the light of the pronouncements of the human rights treaty monitoring bodies, both international and regional. First of all, an initial reconnaissance shows that, in the face of the almost total absence of *ad hoc* norms on the right to truth in these types of agreements, apart from the aforementioned important exception of the 2006 Convention against Enforced Disappearances, the judicial bodies and international committees in charge of monitoring the correct application of these treaties have usually derived it from other positive provisions and rights expressly provided for.

Indeed, the first explicit reference to the right to truth at the international para-judicial level can be found in the *Considerations* in the case of *María del Carmen Almeida de Quinteros* et al. v. *Uruguay* of 1983 in which the UN Human Rights Committee stated that the anguish caused to a mother by the disappearance of her daughter Elena and the continuing uncertainty as to what may have happened to her and where she (or her remains...) might be, constitutes *in re ipsa* a violation of the 1966 Covenant on Civil and Political Rights, specifically Article 7 on the prohibition of torture and inhuman and degrading treatment, concluding that «the author has the right to know what has happened to her daughter».[41] The South American regional context has recorded numerous complaints, appeals and decisions directly or indirectly related to the right to truth, both by the Inter-American Commission of Human Rights (IACHR),[42] and the Inter-American Court of Human Rights (IACtHR).[43] National courts in Latin America also referred to the right to truth, invoking either their own domestic legislation or the American Convention on Human Rights (ACHR, also known as the San José Pact).[44] Subsequently, albeit to a lesser extent, the European Court of Human Rights (ECtHR) has discussed issues related to the right to truth, although often not explicitly addressing it as such.[45] In the African context, the African Commission on Human and People's Rights (ACHPR) has explicitly referred to the right to truth, arguing that the responsibility rests with the State, in the face of its failure to take all necessary measures in a transparent manner to investigate suspicious deaths and all killings by agents of the State

in the national legislation of several countries, in national, regional and international jurisprudence and by many international and regional intergovernmental organisations».

[40]UN Commission on Human Rights (2006), *Summary*.

[41]UN Human Rights Committee (1983, § 14).

[42]Particularly interesting and rich in practice is the compendium of Inter-American Commission on Human Rights (2014).

[43]Frisso (2018); Ferrer Mac-Gregor (2016).

[44]Marcionni (2017).

[45]Chernishova (2016).

and to identify and hold accountable individuals or groups responsible for violations of the right to life, constitutes in itself a violation of that right by the State, hence a series of measures including, *inter alia,* «making the truth known».[46] Lastly, in the context of international criminal law, the *ad hoc* criminal tribunals (International Criminal Tribunal for the former Yugoslavia-ICTY and International Criminal Tribunal for Rwanda-ICTR) as well as the International Criminal Court (ICJ) have also emphasised in their decisions the importance of the duty to prosecute «the truth about the possible» in the case of war crimes, crimes against humanity and genocide by "establishing an accurate, accessible historical record",[47] since as the Trial Chamber of the ICTY has underlined in its previous rulings « the 'truth' can never be fully established or satisfied».[48] It is also important to highlight that, with regard to the intensity of the suffering that enforced disappearance entails for family members, the refusal of the competent authorities to provide information to family members of disappeared persons has been considered by the ICJ as a cause of psychological suffering falling within the acts identifying genocide, provided for in Article II(b) of the 1948 Convention on the Prevention and Punishment of Genocide, when genocidal intent can be demonstrated.[49]

In fact, a more precise analysis of international practice shows that the right to truth, occasionally described as a right in its own right,[50] in most cases has not been considered by international courts and tribunals as having its own legal autonomy: such instances have sometimes explicitly,[51] sometimes implicitly, rejected this characterisation of the right to truth, so that it has mainly been developed on the basis of human rights already positively regulated. In particular, the primary legal foundations of which the right to truth would constitute a sort of offshoot would mainly be attributable to a triad of guarantees: the right not to be subjected to cruel, inhuman or degrading treatment (the so-called prohibition of torture), the right to life as well as the right to an effective remedy and to a fair trial.

Under the first profile, the prohibition of torture, cruel, inhuman or degrading treatment, undoubtedly a guarantee of *jus cogens*, codified in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 7 of the International Covenant on Civil and Political

[46]ACHPR General Comment no.3 (2015) § 17. In doctrine on the subject see Sweeney (2018).
[47]ICTY (2003a, § 60).
[48]ICTY (2003b) at 230.
[49]ICJ (2015, § 160).
[50]Of particular interest is the judgment of the IACtHR (2006, § 150) stating that "the Court considers it relevant to remark that the "historical truth" included in the reports of the above mentioned Commission (ed: the different Chilean Commission in trying to collectively build the truth of the events which occurred between 1973 and 1990) is no substitute for the duty of the State to reach the truth through judicial proceedings".
[51]See e.g. IACtHR (2005, §62): "the Court does not consider the right to know the truth to be a separate right enshrined in Articles 8, 13, 25 and 1(1) of the Convention, as alleged by the representatives, and, accordingly, it cannot find acceptable the State's acknowledgement of responsibility on this point. The right to know the truth is included in the right of the victim or of the victim's next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution".

Rights, Art. 5 of the American Convention on Human Rights, and Art. 5 of the African Charter on Human Rights and Peoples' Rights, constituted the primordial legal basis on which the first decisions explicitly referring to the right to truth were grafted. In the 1980s, in the wake of the aforementioned *Quinteros* case, there were many pronouncements in which international bodies reiterated that ignoring the whereabouts of the victim (or his remains...),[52] the uncertainty of his fate, the lack of adequate investigations or, moreover, complete inertia on the part of the State authorities, or even state action aimed at preventing the discovery of the truth, are all situations from which psychological suffering for the victims' relatives derives that is so severe as to constitute a substantial violation of the prohibition of torture. Given the breadth of these brief notes, it is obviously not possible to proceed with an exhaustive analysis of the entire practice: but one may recall, by way of example, *ex multis,* the decision of the ACHPR, in the case *Amnesty International and Others* v. *Sudan,* according to which: «there is substantial evidence produced by the complainants to the effect that torture is practised.

All of the alleged acts of physical abuses, if they occurred, constitute violations of Article 5. Additionally, holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned».[53] Similarly, the IACtHR, after arguing that the right to truth, although not codified in the San José Pact, nevertheless "it may correspond to a concept that is being developed in doctrine and case law",[54] in the case *'Las Dos Erres' Massacre* v. *Guatemala*, stated that: "the gravity of the facts of the massacre and the lack of a judicial response to clarify them has affected the personal integrity of the 153 alleged victims, next of kin of those deceased in the massacre. The psychological damage and suffering that they have endured due to the impunity that still persists, 15 years after the investigation began, makes the State responsible for the violation of the right recognised in Article 5 of the Convention (...)".[55] It is interesting to note that, within the framework of the ECtHR, in the case *Varnava and others* v. *Turkey,* while equating the psychological suffering of the relatives of the victims with cruel and inhuman treatment («the phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court's case-law recognised from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3»), yet it does not consider that it has the power to order the State to proceed operationally in pursuit of the truth (unlike its IACtHR counterpart), limiting itself to awarding compensation to the applicants.[56]

[52] *Ex multis*, see IACtHR (2002, §§ 122-125).
[53] ACHPR (1999, § 54).
[54] IACtHR (1997, § 86).
[55] IACtHR (2009, § 217).
[56] ECtHR (2009, § 200).

A second strand of decisions, mainly by the Strasbourg Court, relates the right to truth to the right to life, inferring that it includes procedural obligations, including the State's duty to initiate and conduct adequate, independent, effective and immediate investigations, so that delaying and, *a fortiori*, obstructing the investigation by the public authorities violates procedural guarantees, while also harming the right of victims, their families and heirs to know the truth about the circumstances of massive human rights violations.[57] A paradigmatic case is *Association '21 December 1989' and others* v. *Romania*, which concerned the brutal repression of anti-government protests in December 1998 that led to the overthrow of Nicolae Ceauşescu's regime.[58] The investigation of the perpetrators was procrastinated and obstructed in various ways so that the Court ruled that, in application of Article 46 ECHR, the defendant State had to put an end to situations similar to the present case, also in light of the importance for Romanian society to know the truth about the events of December 1989.

Finally, under the third aspect, the reconstruction of the link between the right to truth and the right to a fair trial and an effective remedy is more articulated and differently perceived by the different Institutions. In fact, if on the one hand, the ECtHR seems to deny in its practice that the right to truth and the corresponding duties of investigation are ascribable to the right to a fair trial and judicial protection, quite specularly the IACtHR notes that it is precisely the combination of Art. 8 ACHR (right to a fair trial) with Art. 25 ACHR (right to judicial action) provides the main legal basis for the right to the truth in the Inter-American human rights regime, so that, as stated in the leading case of *Bámaca-Velásquez* v. *Guatemala*, "the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention".[59] This approach is shared by the ACHPR: in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* of 2003 it states that the right to an effective remedy includes "(...) (iii) the access to the factual information concerning the violations"[60] i.e. precisely one of the typical concretisations of the right to truth.

Concluding Remarks

Having traced the genesis and evolution of the right to truth both in international instruments and in the practice of jurisdictional instances and organs of control of the protection of the rights of the human person, it is now necessary to ascertain whether the findings of these two profiles can be brought together on a, so to speak, pragmatic level. Put another way, what

[57]Panepinto (2017).
[58]ECtHR (2011).
[59]IACHR (2000, § 201).
[60]ACHPR (2003) at 5.

would be the *quid pluris* of the right to truth? In what and for what purposes would it enrich the copious catalogue of human rights? What infungible contribution would it make to the already positively envisaged guarantees? In my opinion, there are at least three levels in which the right to truth would be called upon to play anything but an ancillary or subsidiary role: the right to seek and receive information, the right of access to justice, and the right to reparation in a reconciliatory and not merely retributive key.

Under the first profile, the right to truth would guarantee, both in an individual key and in a collective dimension, that the search for all the elements useful to reconstruct the scenario of what actually happened, for instance through access to archives, cannot suffer exceptions, not even those that usually apply to the more generic right to freedom of information, e.g. public order, national security, protection of morals, privacy.[61] If the pursuit of truth is declined in an inescapable key, those who demand to know cannot be denied knowledge, not even by invoking superior interests. Society as a whole would thus enjoy the right to obtain clarification of the facts relating to gross violations and the relative responsibilities of the State (including the chain of command, the orders given and the instruments knowingly used to ensure secrecy of operations and impunity for those who carried them out). And this, mind you, in order to ascertain the fate of each of the victims individually, one by one, none excluded. Even if one wished to reconstruct the right to truth as an explication of other rights, such as the right not to be subjected to torture, thus denying legal autonomy to this case, however, interpreting the right to truth in a manner instrumental to the vindication of other essential rights would in turn make it incapable of justifying limitations or exceptions to its application. On the contrary, it could even be inferred that States are under an obligation to *facere*: to actively undertake to ensure that all information on the events in question, aimed at clarifying the nature, causes and extent of violations of human rights, as well as the underlying factors, the antecedents and the context that led to such violations, is sought and preserved, and made available to those who request access to it. Thus, the creation and maintenance of State archives, in which all documents relating to gross violations are kept, would be a kind of pre-condition for the effective exercise of human rights in general and the right to truth in particular.

Under the second profile, the right to truth would broaden the category of those entitled to redress: victims, indirect victims, family members – also through a representative of the community in which they live –, the community as a whole. Moreover, it could 'force' the State, in the absence of complainants, to proceed *ex officio*: the liability of the State for failure to respect the right to truth would not only emerge in the case where it did not respect the right to access to justice (commissive tort) but also where it was merely inert (omissive tort), so that the right to truth would imply an obligation to behave proactively. This approach would also have a diriment legal impact of delegitimising the practice of so-called

[61]As an example, consider the contribution made to the right to truth by access to the files of the Unterlagen *des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*, i.e. the archives of the East German secret police.

self-amnesty[62] and criminalising public debate on certain events that a State prohibits from being discussed, gagging the victims, their families and society as a whole.[63]

This aspect is inextricably intertwined with the third profile, i.e. the role of the right to truth in the framework of the consequences of gross violations with regard to the *coté* of reparations. In the prevailing procedural scheme and archetype, of a criminalistic matrix, as underlined in Johan Galtung's *lectio magistralis*, the State, which ascertains the crime and punishes the offender, replaces both the victim, dispossessing him of the right to revenge, and God, exercising the right of retribution.[64] In other words, what prevails is the retributive justice model that, even when it is not intended to be vindictive, but re-educative, as prescribed by the Italian Constitution in Article 27, although it is sadly known that prison separates and de-socialises rather than re-socialises, it combines a crime with a punishment, that is, it responds to evil with evil, so that the violence of the offender on the victim is answered by the violence of the State on the offender. In fact, in the traditional judicial process, the protagonists are the criminal and the judge: the victim is marginalised, almost invited to 'satiate' himself with the punishment inflicted on the condemned man (suffice it to think of the case that I consider paradigmatic: the victim's family members in the United States watch the execution of the death sentence on the guilty party). In this way, the social fracture persists and is exacerbated when it divides an entire community, especially if attempts are made to recompose it with so-called 'blanket amnesties' that do not elaborate but merely remove unpunished violence, on the basis of what is a kind of unspoken (and very wrong) assumption, namely that in certain contexts peace and justice are irreconcilable objectives: put another way, peacemaking would require a 'turning of the page' which, conversely, bringing to light what happened in the pursuit of justice would frustrate, because it would exacerbate the wounds, preventing them from healing.[65] A more effective solution would therefore be to

[62]As leading case in this regard, see IACHR (2001, § 5) which, dealing with Peru's post-dictatorship amnesty laws, found inadmissible all amnesty and statute of limitations provisions as well as the adoption of measures to exclude the liability of those involved because «the so-called self-amnesties are (...) an inadmissible offence against the right to truth». In doctrine see Zanghì (2002) and Laplante & Theidon (2007).

[63]Let us refer, by way of example, to Latino (2018).

[64]Galtung (1998).

[65]Particularly interesting in this regard is the decision of the ECtHR (2014, § 199), concerning the introduction of a Croatian law that had eliminated the effects of the amnesty previously granted for crimes against humanity, in which the Grand Chamber emphasised, in line with what the UN High Commissioner for Human Rights had previously ruled, that «amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. More so, in regards to the false dilemma between peace and reconciliation, on the one hand, and justice on the other, UN High Commissioner for Human Rights stated that «[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict».

reduce, if not replace, 'just violence' or 'violent justice' with restorative justice that tends to mend interpersonal relationships and social cohesion. Well, in my opinion, such a paradigm reversal can only be effectively pursued by pivoting on the right to truth, which is both the starting point and the landing place of the mechanisms proper to transitional justice, particularly, but not exclusively, the Truth and Reconciliation Commissions. In this perspective, the right to truth would constitute an essential and inextricable element for the consolidation of peace and reconciliation, to counter impunity, to avert the risk of similar events occurring in the future, not only at the state level but also at the global level, as seems to be read in the watermark, for example, in some precedents in which the Secretary General has recognised the need for the search for truth in cases in which the United Nations has failed to protect individuals from serious human rights violations (as in the case of the establishment of an independent enquiry into the actions – *rectius*: omissions – of the Organisation in Rwanda in 1994 during the genocide of Tutsis and moderate Hutus[66] or, similarly, when the General Assembly invited the Secretary General to provide a full report on the fall of Srebrenica and the failure of the 'safe area policy'[67]). From this perspective, the fulfilment of the right to truth of the victims and their families and of society as a whole (or rather, to borrow the words of the UN General Assembly, of the 'basic human need' for truth, where the term 'need', in my view, far from mute the legal profile of this guarantee, amplifies it because it makes it equal to a psychological need, if not almost physical, given that the locution 'basic need' in Onusian language is usually used for the needs of human beings relating to their own biological subsistence, such as the right to food, water or health) performs a cathartic function capable of providing relief that goes far beyond mere compensation or monetary reparation.[68]

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[66]UN Security Council (1999). In doctrine on the subject see Anglin (2000/2001).

[67]UN General Assembly (1999, § 7) in which the Secretary General states: «I hope that the confirmation or clarification of those accounts [of the fall of Srebrenica contained in books, journal articles and press reports] contributes to the historical record on this subject».

[68]As also seems to be inferred from reading Principle 22 in the UN General Assembly (2005).

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The Rohingya Crisis: A Critical Analysis of the United Nations Security Council and International Human Rights Law

*By Emmanuel K Nartey**

This essay reviews the human rights violations against the Rohingya people in 2017 and assesses the effectiveness of accountability under the United Nations Security Council (UNSC). It is concluded that under the principles of ethics and integrity in international law and human rights law, there should have been investigations into the crimes committed against Rohingya Muslims in accordance with the judgement given by the ICC's Pre-Trial Chamber. The essay underlines the fundamental principles of ethics and integrity in international law and human rights law. The principles of ethics and integrity in international law should have allowed the UNSC to act in accordance with the international doctrine of human rights. It is concluded that the UNSC's failure to carry out its obligations was solely due to Russia's political ties with Myanmar, which also resulted in Russia using its veto power and obstructing the UNSC's statement on the situation. The banal approach to the implementation and enforcement of international law and human rights has paralysed the principle of ethics and integrity. In this light, the essay affirms there is a need to create a better framework to resolve issues such as the Rohingya genocide and the Russian invasion of Ukraine and any complications that may arise in the future. It is suggested that in addition to the United Nations Assembly and the UNSC, there is a need to create a conflict management body within these two settings.

Keywords: *Accountability; Genocide; Human Dignity; Human Rights Law; Human Rights Violations; International law; Rohingyal; Russia; States; Ukraine; United National General Assembly; United National Security Council;*

Introduction

Even though the specific phrase 'human rights' is mostly traced back to the aftermath of World War II,[1] the idea is as old as humanity itself, and is inevitably intertwined with the history of justice and law.[2] Human rights are rights that individuals have by virtue of being human.[3] The essence of human rights revolves around the question of what it is about being 'human' that gives rise to rights.[4] Human beings, thus, support the 'bottom-up' approach to human rights, starting

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[1]Steiner, Alston & Goodman (2008).

[2]Monteiro (2014).

[3]Griffin (2008).

[4] Shelton (2020).

from the essence of being human.[5] In this understanding, human rights are viewed as moral principles and as legal principles rooted in morality. Deriving from these moral and legal principles are the overarching and interrelated principles of 'human dignity' and 'equality'.[6] When we, therefore, conceptualise this point, then we can say that out of these moral principles, ethics and integrity are known in society.

Over the years great thinkers, jurists, judges, lawyers, and politicians have talked about the concept of human rights as a fundamental principle for upholding justice and the social structures in a state,[7] without discussing the compound elements of this principle. The idea that human rights are an important component in traditional politics and accountability cannot be disputed. However, the idea that human rights alone bind the governing rule of society is highly contentious. Whatsoever is the principles is in human rights, and without that, no legal rule or governance can be, or be conceived is problematic. Hence, besides ethics and integrity, no legal substance can be granted or conceived on the premises of law and accountability at the state level. This goes to say human rights cannot in themselves bind everything together. Prior to the existence of the concept of human rights, society lived by virtue. Virtue became the substance - ethics - and integrity became the extended substance, in so far as it is conceivable, consist, as the great thinkers and scholars may observe. Denying the validity of virtue in legal principles undermines the tripartite doctrine of social norms and state accountability. In this essay, it is possible to observe that, the tripartite doctrine of norms and state accountability is ethics – integrity and rule of law.

As a consequence, human dignity as a concept is twofold. On the one hand, it serves as the foundational premise of human rights. On the other hand, it is a legal term, for instance serving as a tool for interpretation, while ethics and integrity complete the compound element. This last strand is often criticised for its use in methods of interpretation and application of specific human rights because of its lack of clear content or meaning in law.[8] For the present purposes of human dignity, human rights law is referred to as the foundation of all human beings, while ethics and integrity are referred to as the foundations of all legal principles and accountability. These rules are fundamental rights that protect human beings and societies.[9] A possible implication of this is that 'human dignity is understood as an affirmation that every human being has an equal and inherent moral value or status',[10] a view shared by Kant, who stated that no human being could be used merely as a means, but must always be used at the same time as an end in his classic work *The Metaphysics of Morals*.[11] In this sense, ethics and integrity belong to the essence of a thing that is necessary to give meaning to all behaviours and rules. Hence, if and when it is diminished the obedience of the law is removed,

[5] *Ibid.*
[6] Griffin (2008).
[7] Bingham (2007).
[8] Bates (2005).
[9] Shelton (2020).
[10] McCrudden (2008).
[11] Kant (2013).

and the thing itself will be considered as nothing, and thus it can neither be valid nor conceived as a true principle.

The concept of ethics and integrity also has value as a true legal proposition.[12] Therefore, helping human dignity serves as one of the most fundamental concepts of international human rights law, exemplified by its widespread appearance in almost all human rights instruments and regular application by human rights bodies.[13] It is a principle recurring in binding human rights treaties as well as in jurisprudence.[14] The European Court of Human Rights (ECtHR)[15] for instance affirmed that 'the very essence' of the European Convention on Human Rights (ECHR) was 'respect for human dignity', as evidenced by the application of Article 3 of the ECHR.[16] Human dignity is also explicitly present in the other regional human rights documents.[17] The notion of human dignity not only provides for a measuring or interpretational tool in the application of civil rights but also has a role to play in respect of economic and social life in answering the question of the benefits needed for a dignified life.[18] However, in this conceptual parameter then, we can say human dignity is not determined through the existence of itself, or by efficient principle or cause, which must necessarily give meaning to the obedience of the law. Thus, intrinsic factors such as ethics and integrity give human rights its accurate meaning and purpose. By this, I mean all law that has its reality and perfection is informed by ethics and integrity and has its conditioned existence in society. If then ethics and integrity and the rule of law concur in one principal action, so as to give effect to one cause of judgement, we can say the rule has its meaning and purpose, and therefore state accountability should exist.

Similarly, the concept of equality is inherently linked with human dignity, as exemplified by a reading of Article 1 of the Universal Declaration of Human Rights (UDHR) 1948: 'All human beings are born free and equal in dignity and rights.'[19] The moral principle underlying human rights is that we are all moral persons and therefore deserve equal respect, fittingly named 'the principle of equal respect.'[20] What is essentially being said here could be interpreted as the consequence of equality, a foundational principle wherein most human rights must be balanced against the rights of others. Equality holds in it a right of non-discrimination which is perceived as 'the most fundamental of the rights of man,

[12]Donnelly (1982).
[13]Shelton (2013). Mentioning in international human rights treaties see for instance Art. 10 ICCPR, Art. 13 ICESCR and preambles of CERD, CEDAW, CRC and CRPD.
[14]Shelton (2020).
[15]Mowbray (2004).
[16]ECtHR (Merits) *Pretty v The United Kingdom*, para. 65; ECtHR (Judgment) VC v Slovakia, para. 105.
[17]African charter on Human Rights and Peoples' Rights (1982), preamble; Arab Charter on Human Rights (2004), preamble, arts 3, 17, 20, and 40; ASEAN Declaration on Human Rights (2013).
[18]*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, No. 155/96. Furthermore German Federal Constitutional Court, 9 February 2010, BverfGE 125, 175 at 222 with comment by Winkler & Mahler (2013).
[19]Universal Declaration of Human Rights (UDHR), 1948, UNGA res 217 A, article 1.
[20]Shelton (2020).

the starting point of all other liberties.'[21] Such reasoning indeed lies at the foundation of the international concept of human rights, which is found for example in the abolition of slavery, minority rights and the right to self-determination.[22] It is possible, therefore, to assume that for the right of self-determination to exist or be given the institution and governance must build on ethics and integrity. Therefore, ethics and integrity give meaning and purpose to something because every part of the social structure has become governed by these invisible rules. This gives it the capacity to discriminate rights from wrongs and to make choices that are beneficial and contribute to the universal good of society. Ethics and integrity help legal structures and governance to discover the good deed of character, knowledge, and the general capacity of developed moral codes in society. In this conceptual parameter, ethics and integrity are the knowledge and understanding of law, politics, science, and religion. So to address the fragmentation of these in state accountability, much attention must be given to the ethics and integrity of the individual entities, otherwise human rights law will become redundant.

In this understanding, when considering human rights in legal terms we imagine that 'rights' exist as a counterpart of duties. Classically states are seen as the main duty holders in this regard since they exercise authority over persons and have the power to exercise a great degree of influence on them. However, when one keeps the moral foundations of human rights in mind we may imagine that states are not the only actors in the international sphere which have the power to exercise authority over individuals and the scope of duty bearers may thus be expanded,[23] an argument traced back to the moral foundation of human rights. In a more elaborate argument on human dignity, following up on Kant's views, Dworkin stipulates that human dignity has two faces: the intrinsic value of every human being and the moral responsibility to realise a successful life, which confirms the close interrelation of moral rights and moral duties. 'Based on this moral conception of human dignity, it leads to the argument that human rights constitute the legal face of human beings.'[24] 'That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation.'[25]

To conclude this passage, as Shelton states: 'human rights exist because human beings exist with goals and the potential for personal development based upon individual capacities which contribute to that personal development. This can only be accomplished if basic needs which allow for existence are met and if other persons refrain from interfering with the free and rational actions of the individual. Recognition of the fact that there are rational and legal limits to individual, corporate or state conduct that would interfere unreasonably with the free aims and

[21]Lauterpacht (2013).
[22]Ganji (1962).
[23]Clapham (2006).
[24]Nowak (2012).
[25]*Ibid.*

life projects of others is a basic idea underlying contemporary understanding of human rights.'[26]

Deriving from ethics and integrity, the foundation of human dignity is formed; therefore, the main characteristics of human rights as they are known today stipulate that they are inherent, interdependent, and indivisible. This means first that they are of such a nature that they cannot be granted or taken away, a concept rooted in human dignity. Second, interdependence means that the enjoyment of one right influences the enjoyment of another right. This holds true not only when considering the rights of one person, but also when balancing the rights of one against the rights of another, a promulgation of the principle of equality. And third, human rights are indivisible which means that they must all be respected without exception. Though the notion of human rights throughout history has been founded on a social contract between individuals and the state,[27] it is only since World War II that human rights have become a part of the realm of international law, forming the 'international human rights law' branch of international law. Ethics and integrity by their construction and implementation can be observed in the moral foundation of human dignity. That is to say, through ethics and integrity human dignity exists as a universal principle of observation and implementation. Therefore, this imposes duties on states not to violate human rights.

Take, for instance, that the concept of international law relies heavily on people in positions of power exercising their authority in an appropriate and just manner.[28] That power must be exercised within the framework established in society, meaning states have the faculties to stop the abuses of human rights in their jurisdictions.[29] In an ideological concept, this point may hold water. However, in a practical sense, this point is redundant, partly because states may not have the faculty to restrain themselves from the abuse of power and influence of the environment.[30] This is unless the individual possesses the faculties within themselves, to stop themselves from engaging in behaviours that are a detriment to the greater good of society. This disposition, therefore, is intolerable to the concept of international law and human rights. Thus, one cannot rely on the concept of international law to stop *ultra vires* behaviours, except when one restricts themselves from going that far.

International legal doctrine requires states to work within the parameters of the law in everything they do, and they should be held accountable through law when there is human rights abuse. This point is also contentious, for where there is a lack of ethics and integrity, respect for the law is diminished, and there is no accountability, and therefore the abuse of power becomes the custodial of the law. So, why are we to observe and divide the components? The answer is that obedience to the law is a quality that must be possessed by society and its structures. Therefore, international law becomes abstract and superficially

[26]Shelton (2020).
[27]Söllner (2007).
[28]Przeworski & Maravall (2003).
[29]Bingham (2007).
[30]Lockton (2012).

distorted if the other compound elements are not presented in society. As we imagine and discourse the compound elements, we will start to conceive the ideas and reasons behind the abuse of power in the modern world. If so, we can also regard ethics and integrity as qualities that the law must possess in its nature so we can address human rights issues under international law.

The Rohingya crisis is a typical example of the evaporation of ethics and integrity in international law and human rights. Therefore, where ethics and integrity fail, one of the potential consequences concerning human rights is crimes against humanity.[31] This failure can also be observed in the lack of urgency at the United Nations Security Council. The legacy can be traced back to the early 1990s when Rohingya refugees left Myanmar in an effort to escape the human rights violations perpetrated by the authorities there.[32] As a result of the human rights violation, the Rohingya (an ethnic Muslim group) who came from Myanmar were rendered stateless. Therefore, the purpose of this essay is to examine the Rohingya crisis in accordance with the principles of ethics and integrity in international human rights and state accountability. It shall be concluded that the atrocities were a violation of ethics and integrity, and therefore a violation of international human rights treaties and other agreements and constitutes a failure of obligation or accountability.

The Nature of Human Rights and the Law

International human rights law is the structuration of human rights in the international legal order. The great leap of said structuration became apparent in the post-WWII period.[33] International human rights law has become an area of international law that encompasses a set of individual entitlements of persons against governments.[34] These entitlements – human rights – range from civil to political rights such as the right to be free from arbitrary deprivation of life, torture and other ill-treatment, to the right to freedom of thought, conscience and religion, and to social and economic rights such as the right to health and education. Likewise, globalisation has reconfigured the territoriality and sovereignty that has traditionally been associated with states.[35] Economic actors, such as transnational corporations, have become powerful actors within the world's economy and they are increasingly using their economic power to influence the actions of states.[36] Transnational corporations' business operations also directly affect the enjoyment of human rights by individuals, especially women.[37] One such case which is considered in the literature is that of the Bangladeshi textile manufacturing

[31]Beyrer & Kamarulzama (2017).
[32]Leider (2020).
[33]Sieghart (1983).
[34]Schachter (1991).
[35]Kaleck & Saage-Maaß (2010).
[36]Richards, Gelleny & Sacko (2001).
[37]Ikelegbe (2005).

factories,[38] which produce clothes for some of the world's biggest retailers. As the case demonstrates, transnational corporations are increasingly escaping liability for abuses which happen within their corporate structures and supply chains.[39] Therefore, the question is one of responsibility and attribution.

Substantively, international human rights law can be found in many different sources of moral and legal rules. These rules are either conventional or customary; some are binding, while others are non-binding, and these non-binding rules are the so-called 'soft' laws.[40] Therefore, international human rights law has evolved both on the international and regional planes through several binding treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the Convention on the Elimination of All Forms Racial Discrimination 1965 (CERD), centred around state obligations and rights for individuals. Presently, a change in the international legal order can be perceived and the involvement of other actors is increasingly recognised.[41]

Now that the importance of human rights has been recognised in this essay the next question is: what is the law? Cassese identifies three steps toward legal positivism.[42] These steps are: identifying the substance of the rights, establishing binding duties for the protection of those rights and, finally, enforcing those duties.[43] The first step was taken with the Universal Declaration of Human Rights 1948,[44] and the second through the emergence of binding human rights treaties at the United Nations as mentioned above, the first of which was the CERD in 1965,[45] closely followed by the ICCPR in 1966[46] and the ICESCR in 1966.[47] The last stage of enforcement is the most difficult one to take in the realm of international law; and it was made more difficult by the polarisation of the international community during the Cold War. Thus, international human rights law is a part of 'public international law, which is traditionally governed by and for sovereign states'.[48] 'However, the role of other actors and the individual at the centre of international human rights law is undeniable.'[49] 'Indeed it is a field of law that is subject to constant evolution.'[50] 'However one conceives human rights law, it is surely not static. Human rights law is driven, not by the steady accretion

[38]Ali & Habib (2012).
[39]Khan & Rodrigues (2015).
[40]Clapham (2006).
[41]Cassese (2012).
[42]*Ibid.*
[43]Tomuschat (2014).
[44]*Universal Declaration of Human Rights* (UDHR), 217 A (III).
[45]UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, (1965).
[46]UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).
[47]UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (1966)..
[48] Clapham (2006).
[49] Shelton (2020)..
[50] Schiettekatte (2016).

of precedents and practice, but rather by outrage and solidarity.'[51] Nevertheless, the international legal system remains primarily governed by states.

In addition, human rights enforcement is a long-standing dilemma. Therefore, to address the irregularities in the current legal rules, human rights law should be enjoyed by everyone in the world. This enjoyment should also provide a mechanism for the enforcement of these rights. However, 'as the international community becomes increasingly integrated, the fundamental question that needs to be asked is how can ethics and integrity of human rights be respected in all jurisdictions? Is global human rights enforcement inevitable?'[52] 'If so, is the world ready for it.'[53] And how could an emerging global human rights mechanism 'based on and guided by human dignity and tolerance'[54] be accepted by all state parties? 'These are some of the issues, concerns and questions underlying the debate over universal human rights and the belief in effective enforcement.'[55] Relativism of enforcement 'is the assertion that human values, far from being universal, vary a great deal according to the different human rights perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different jurisdictions and ethnic, integrity and religious traditions.'[56] 'In other words, according to this view, human rights are'[57] related to the perception of a state party rather than universal.[58]

Taken to its extreme, the notion that human rights enforcement should be based on state discretion 'would pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been painstakingly constructed over the last few decades.'[59] If state discretion and jurisdiction alone govern a nation's 'compliance with international standards, then the widespread disregard, abuse and violation of human rights would be given legitimacy.'[60] 'Accordingly, the promotion and protection of human rights is perceived as'[61] a state obligation and should only be subject to national discretion on the grounds of security and public health. 'By rejecting or disregarding their legal obligation to promote and protect universal human rights, states advocating jurisdictional differences could raise their human rights norms and particularities above international law and standards.'[62] However, 'largely through the ongoing work of the United Nations, the universality of human rights has been clearly established and recognised in international law. Human rights are emphasised

[51]Schiettekatte (2016).
[52]Schiettekatte (2016).
[53]Shiferaw & Tesfa (2009).
[54]*Ibid.*
[55]*Ibid.*
[56]*Ibid.*
[57]*Ibid.*
[58]*Ibid*; Schiettekatte (2016).
[59]Shiferaw & Tesfa (2009).
[60]*Ibid.*
[61]*Ibid.*
[62]Shiferaw & Tesfa (2009).

among the purposes of the United Nations as proclaimed in its Charter',[63] 'which states that human rights are "for all without distinction". Human rights are the natural-born rights of every human being, universally. They are not privileges.'[64]

The only area of international law that is capable of addressing the human rights violations of individuals' rights perpetrated by a state is the action of the government or governmental actors against its citizens[65] and aliens. This doctrine falls into two parts. The first is the law of state accountability for injury to its citizens[66] and aliens,[67] which primarily deals with the disruption of property interests by aliens of foreign states, though this also includes attacks on individual persons in their jurisdiction (including its citizens). The second is the law and custom of war, which acknowledges certain limitations on the conduct of a state in war and is designed to promote some of the fundamental human rights of an individual during wartime.[68]

This concept is related to the principle of 'sovereignty'[69] that for many years has dominated international relations between states. Under current international law, sovereignty 'in the sense of contemporary public international law, denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law.'[70] This analysis indicates that it is only the state that is accountable for what happens in its jurisdiction and has a positive obligation to act. This positive obligation extends to the state's responsibility to protect not just its citizens,[71] but all aliens and actors in its jurisdiction. Hence, under the current concept of international law, it is adequate. However, it can be argued that the concept restricts the practical and legal concept of accountability because it neglects the broader notion of accountability which includes ethics and integrity.

It has departed from the 'concerted' approach for access to remedies and legal standards on state conduct and human rights. Nevertheless, this does not undermine states' obligations to oversee the conduct of entities under their jurisdiction, as they would operate under the international principle of subsidiarity, by which international institutions may exercise jurisdiction in cases where national legal systems are unwilling or unable to fulfil their primary obligation to protect human rights and redress human rights violations. This could enhance domestic efforts to protect human rights through international cooperation and legal coherence, as it would impose common international standards on the problem.[72] Thus, the current international legal framework has rejected the essential mechanism of accountability, which is an effective remedy and a fair and accessible justice system to hold

[63]Shiferaw & Tesfa (2009) and Totten (2008).
[64]Shiferaw & Tesfa (2009) and Schiettekatte (2016).
[65]Partsch (1985).
[66]Weiss (2002) and Bianchi (2002)..
[67]Murphy, Jr.(1966),
[68]McDougal, Lasswell & Chen (1980).
[69]Guiraudon & Lahav (2000).
[70]Steinberger (2000).
[71]Thakur (2011).
[72]Gallegos & Uribe (2016).

entities or individuals liable for misconduct.[73] Even though the reason for this deficiency was clear from the beginning of the creation of international law, could it be said that international law did not anticipate future dynamics with respect to the international legal obligations of state actors in relation to human rights accountability?

International law consists of the rules and principles of general application which apply to the conduct of states and international organisations, and their relations with one another and private individuals, minority groups, and transnational corporations.[74] Transnational corporations, however, do not have a legal personality under international law. The term 'international legal personalities' refers to the entities or legal persons that have rights and obligations under international law.[75] However, could we attribute ethics and integrity to these actors? This is something that has yet to be contested in the discussion of the relationship between non-state actors and international law.

Ethics and Integrity in Accountability

The definition of a state has the following characteristics: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter relations with other states. The international legal system is a horizontal system dominated by states which are, in principle, considered sovereign and equal. International law is predominately made and implemented by states. Only states can have sovereignty over territory.[76] Only states can become members of the United Nations and other international organisations. Only states have access to the International Court of Justice.[77] Other entities such as corporations do not meet the requirements under international law that allow them to acquire legal personality.[78] However, in the universal principles of ethics and integrity, non-state actors may not be exempt from liability as a result of a lack of legal personal.

This establishes a distinctive legal principle between the domestic legal system and the international legal framework for the liability of wrongful conduct.[79] Thus, international law and domestic law differ in terms of magnitude.[80] Domestic law governs the behaviour and actions of individuals within the state, whereas international law governs the behaviour and actions of bodies of government, including states.[81] National law, which can also be called municipal law, comes from legislature and customs, whereas international law consists of treaties and customs.[82] A legislature is a body of people who are able to make or enact laws.

[73]Shelton (2015).
[74]Allott (1999).
[75]Alvarez (2011).
[76]Agnew (2005).
[77]Raustiala (1997).
[78]Nowrot (1998) and Mwansa (2017).
[79]Portmann (2010).
[80]Kratochwil (1991).
[81]Steinhardt (1990).
[82]Eisenberg (2002).

Treaties are formal agreements among and between countries.[83] Customs are practices which are deemed normal for individuals or states.[84] Corporations may nonetheless be a subject of national law in domestic courts and may have a legal obligation in domestic courts, though not in international legal settings. We can, therefore, say definitely that corporations are subject to the principles of ethics and integrity.

Thus, the view of international law can be said to have resulted in the development of two distinct features of corporate accountability in domestic court and international legal settings: public and private accountability, and remedial mechanisms. The latter is divided into two parts, one related to the enforcement of public law offences and the other related to private law actions by affected individuals and communities at the national level.[85] Although domestic legal regimes do not necessarily fall neatly into one or the other grouping, it can be argued that there is some element of accountability at the domestic legal system.

However, the concept of accountability in many domestic jurisdictions is limited[86] and falls short of the notion of accountability even though there are barriers common to both methods of enforcement of human rights accountability.[87] It is possible that there are sufficient differences between the two to warrant the development of an ethics and integrity concept that has the ability to help the achievement of accountability for human rights violations. The problematic aspect of the concept of accountability lies in errors related to liability, sanction, enforcement, and the principles of ethics and integrity. Ethics and integrity in relation to accountability is the notion that neither state nor non-state actors are exempt from liability for human rights violations. Therefore, under the principles of ethics and integrity, they have a duty of care not to violate the human rights of the community. If words or acts amount to a violation, the person to whom they are attributed by virtue of an economic or business relationship is responsible for the other party's conduct. With this view, ethics and integrity establish a solid ground to hold any entity accountable for misconduct.

Consequently, if ethics and integrity are to be applied to accountability, it would be presumed that this approach would result in an effective accountability system. However, this has not been the case, as the current concept of accountability has resulted in a 'free for all' or excuse for vengeance against victims of human rights abuses.[88] In this understanding, ethics and integrity do indeed establish liability for states and other entities, and this liability extends to misconduct in societal settings. But it comes with risks. The ethics and integrity being advocated in this essay will put the onus of proof in 'violations of human rights claims on entities because the relevant information (and expertise to understand it) is in the hands of the entities, not the victims. If claimants can *prima facie* demonstrate that they have suffered harm'[89] (injury), and that this is likely to have been the result of the entity's

[83]Morina, Korenica & Doli (2011).
[84]Merry (1998).
[85]OHCHR (2016).
[86]Steiner, Alston & Goodman (2008)..
[87]Ratner (2001).
[88]Jacobson (2005); Eaton (1997); Amnesty International (2017).
[89]Nartey (2021).

activities (causation), by the principles of ethics and integrity the burden of proof is on the entity in question.

Ethics and integrity through accountability processes should lead to liability and sanctions. If the State or an entity does not operate in accordance with human rights law, then sanctions should be put in place. However, the fundamental questions are: what is defined as a reasonable state or entity in the context of accountability? How does this fit with the concept of accountability?

'The reasonable state in law, is compared to a reasonable person, reasonable man, or the man on the *Clapham omnibus,*'[90] which is a hypothetical person of legal fiction who is ultimately an anthropomorphic representation of the body of care standards crafted by the courts and communicated through case law and jury instructions.[91] The reasonable person is the longest established 'group of personalities who inhabit the legal system, which is available to be called upon when a problem arises that needs to be solved objectively'.[92] Thus, the reasonable man could be the ordinarily prudent man of ethics and integrity,[93] the officious bystander,[94] the reasonable juror properly directed, and the fair-minded and informed observer.[95] All of these colourful characters and many others besides[96] provide important standard setting services to the law. The reasonable man standard is more than just a common law principle, but rather, a legal instrument to protect human rights doctrines. As states are part of society, the law is created to protect society. As international law is the manifestation of domestic and customary law, the presumption here is that the reasonable state[97] test can also be applied to international law and standards. Both states and entities should be held accountable if their conduct falls below the reasonable man standard, because the state is an entity and is required to act in accordance with the rule of law[98] and the principles of ethics and integrity in the society[99] where the entity conducts its activities.

Therefore, if the international legal system and domestic judicial systems are to hold states to a specific intent standard for human rights violations, as opposed to a knowledge standard or the reasonable man standard, the bar for accountability for human rights violations in human rights abuses would be substantially high.[100] It is difficult to impute specific intent on states for serious human rights abuses; arguably, the primary purpose of states is to maintain and increase security, stability and worth rather than commit human rights abuses. However, the pursuit of security may lead to complicit behaviour. An example of this is where a

[90]Lee (2007).
[91]*Blyth v Birmingham Waterworks Co* (1856) 11 Exch. 781. See also *Hall* v *Brooklands Auto Racing Club* [1933] 1 K.B. 205.
[92]Gardner (2015).
[93]*Speight v Gaunt* (1883) L.R. 9 A.C. 1 at 19, 20.
[94]*Shirlaw v Southern Foundries* [1939] 2 K.B. 206 at 227.
[95]*Webb v The Queen* (1994) 181 CLR 41.
[96]*Healthcare at Home Ltd v The Common Services Agency* (2014) UKSC 49.
[97]Lee (2007).
[98]Cosgrove (1980). Dicey, Morris & Carlile (2000).
[99]Simmons (1981).
[100]Scheffer & Kaeb (2011).

government itself has the specific intent to perpetrate the criminal act.[101] A note of caution is due here since criminal intent cannot be attributed to the entire state. Thus, if one accepts the liability of legal persons before international tribunals and under international law, there remain many details that require further judicial rulings in terms of determining *actus reus* and imputing *mens rea* to the legal person. Questions include: what type of decision-making authority on the part of the individual person is required to attribute responsibility to the entity? Is liability limited to the acts of 'organs' or 'representatives' of the state only, or does it extend also to acts of other agents?[102] Can a reasonable man be aggregated across the entire organisation or state, or do all elements of the human rights violations need to be present in one specific individual natural person in order to attribute responsibility to the entity? What are the appropriate and effective penalties for legal persons as perpetrators of international crimes?

The ethics and integrity in question are of vital significance when holding legal persons accountable for human rights abuses, as legal persons constitute a fiction. Therefore, the court must resort to the principles of ethics and integrity as readily available doctrines to levy against entities because, as legal persons, they cannot be imprisoned or otherwise confined.[103] Ethics and integrity are necessary to ensure that the objectives of international human rights law[104] are achieved, particularly in terms of retribution and deterrence. Also, it is questionable whether monetary fines are an appropriate means for punishing an involvement in human rights abuses.

If states fail in their obligation to protect or entities fail in their responsibility to respect human rights, they have failed to uphold the actions of the reasonable person. However, in order to arrive at this conclusion, one needs to first establish: who is causing the violation and what are the causes; what accountability arises from failing to meet the reasonable person standard; and to whom must one account to? It should then be established who is responsible for the commission of the violation and who the duty-bearers are in order to assess the context of the violations and how they happened, in addition to determining what can be expected from a court/tribunal and the inherent limitations of the state duties. The final issue that needs to be established is the extent to which the victims or their representatives face reprisal. The extent to which the entities complied with the principles of ethics and integrity and if the acts: (1) were within the scope of the conduct; (2) were committed or ordered by state (government officials); and (3) constituted human rights violations for which the punishments included fines and forfeitures of property.

Addressing these questions will result in an actor being identified, establishing who is to blame and what accountabilities arise from this blame. This will assist both international and national judicial bodies to have the authority and ability, in law and practice, to award a range of remedies in human rights law cases arising

[101]Kaeb (2016). .
[102]In the *Case Against Al-Jadeed S.A.L. & Al Khayat,* STL-14-05/ T/CJ, Judgment, 61 (Special Trib. for Lebanon Sept. 18, 2015.
[103]Coffee (1981).
[104]Smith (2022).

from state-related human rights abuses. These remedies may include monetary damages[105] and/or non-monetary remedial measures,[106] orders for restitution, aggravated damages, exemplary damages, measures to assist with the rehabilitation of victims and/or resources, satisfaction and public apologies, and guarantees of non-repetition including mandated compliance programmes, education and training, and criminal prosecution where appropriate.

It is recommended that the concept of accountability[107] should define, interpret, and enforce the formal legal norms and regulatory rules of international human rights.[108] According to this rationale, accountability should consist of a system of governance, meaning the standards, laws and norms that should be respected by all actors and all individuals and state officials operating in the international arena. Therefore, the notion of accountability should be seen as a legal framework that is capable of providing for the accountability of individuals, communities and other actors, including state and non-state actors, for their conduct. Consequently, accountability should have three essential components that are crucial for effective enforcement of human rights law and remedy: international human rights laws, norms and standards; accountability; and enforceability. This will aid in the establishment of a strong concept of accountability.

Failed Accountability in the Case of the Rohingya People

For one to say international criminal law has its validity and legitimacy in prosecution and enforcement, we must look at its institutional framework in line with accountability. Therefore, in the case of the Rohingya, the question is whether the institutional framework in its form and substance could have stopped the human rights violations from taking place. To address this form and substance, we need to view the killing of Rohingya civilians in Myanmar through a critical lens. Take, for instance, the issue that in South Asia countries, the jurisdiction of some national states is at odds with UN institutions such as the International Court of Justice (ICJ) and the International Criminal Court (ICC).[109] This disagreement can be seen in the measures initiated by the ICJ on 23rd January 2020, in respect of the Rohingya.[110]

When one examines this initiative in accordance with the ICJ point, Mayanmar was under a duty to take reasonable steps to avoid the killing of civilians in its territory. This claim is in line with Article II of the Genocide Convention.[111] In accordance with this initiative, Myanmar is also under an obligation to exercise control over its military, people and institutions to avoid the

[105]Maley (1987).
[106]Colandrea (2007).
[107]Mulgan (2000).
[108]Sieghart (1983).
[109]Wijesinghe (2018).
[110]Lintner (2020).
[111]Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/64/Add.1 (Dec. 9, 1948)

extension of civilian killing. Therefore, it can be conceived that this duty extends to individuals and institutions that come under the direct control or support of the Myanmar government.[112]

This is problematic, partly because the precautionary measure does not go far.[113] Accountability requires an absolute halt to human rights violations. This means the demand and obligation should be one of avoiding and halting all human rights violations. In essence, neither was achieved in the Rohingya case. Hence, it must or can be presumed that neither the ICJ approach nor the precautionary measures produced a desirable outcome for the civilians and international law in its short and long arm's length. However, accountability in this sense means non-negotiable, it is a duty that the state must bear and respect. In this conceptual analysis, we can thus say, the ICJ view of Myanmar's conduct is something that needs to be commended; specifically the decision to ask the government to show the steps taken to avoid or halt the human rights violations.[114]

Also, one of the underlining issues in the Myanmar case is the difference between the national legal system's approach to the protection of human rights and the ICJ's. This difference might be the main reason why the ICJ decision could not hold ground in Myanmar.[115] Whether there should be a difference in human rights protection or interpretation, is a significant concern in our understanding of the relationship between the national legal system and the application of international law. This issue led to the action taken under UN's Charter, Articles 94 and 99.[116] However, this action did not lead to anything of substance as China and Russia vetoed the action taken by the United Nations Security Council (UNSC). These vetoes mean that any enforcement action taken by the UNSC is paralysed at the outset.

In effect, the institutional dogmatism is the result of the failed human rights protection of the Rohingya. Take, for instance, that the concept of the rule of law relies heavily on people in positions of power exercising their authority in an appropriate and just manner.[117] It went further to state that power must be exercised within the framework established in society, meaning the rule of law has the faculties to stop the abuses of power.[118] In an ideological concept, this point may hold water. However, in a practical sense, this point is redundant, partly because humanity does not have the faculty to restrain itself from the abuse of power and influence of the environment;[119] This is with the exception of individual who possess the faculties within themselves to stop themselves from engaging in behaviours that are a detriment to the greater good of society. In this view, the UNSC is polluted with individual agendas and less focused on human rights protection and upholding the principles of equality and justice. Therefore the

[112]Mohajan (2018).
[113]Riyaz ul Khaliq (2020).
[114]Justice For All (2020).
[115]Rael (2021).
[116]*Ibid.*
[117]Przeworski & Maravall (2003).
[118]Bingham (2007).
[119]Lockton (2012).

paradox in this instance will be to restrict or limit the UNSC decision-making in respect of human rights protection in wartime. Fundamentally, this may lead to an effective and efficient approach to resolving human rights violations in wartime. Therefore, it is conceivable that the human rights protection decision should not be a debate or deliberated by the UNSC.

The consequence of not limiting the UNSC's power from matters concerning human rights may complicate and compromise the UN's position as a legitimate organisation for peace and security in the decades to come. Take, for instance, the case of the Rohingya, where the UNSC vetoes derailed the organisation's ability to halt the killing of thousands of civilians in Myanmar.[120] The derailing constitutes a failed peace and security project, which cannot be taken for granted in the slighted sense. This could also mean that the primary aims and objectives of the UN in the present and future are questionable. If these issues are not addressed, it is possible that in the decades to come the UN may not be able to hold the fragile peace and security of the world together.[121] Furthermore, the objectives of the UN as stated in the Preamble as well as in Article 1(1), are described as ones that need the maintenance of global peace and security.[122] It moves further to attest that the achievement of peace and security must be conceived through collective responsibility, simply implying that the organisation must act as one unit.[123] Now, in philosophical contemplation, unity cannot be achieved if peace and security cannot be treated equally in all aspects of the globe.

This unequal treatment damages the fundamental aspect of the UN's existence in the 21st century. While it is conceived that the UN provides a platform for diplomatic relationships, it should be contemplated that without peace and security there will be no diplomacy.[124] Lest not mistaking the duties imposed by the Preamble to the UN's Charter, which seem to suggest that protecting human rights is fundamental to its value. Therefore, this means that individual values and dignity must be given protection under the duties of the UN. This is a comprehensive statement, but this lead to the question, where is the dignity of the Rohingya people? Perhaps, dignity for the Rohingya people is inconceivable? If this is so then it is perfectly adequate to reach the conclusion that the UN is as useless as a dead lion.[125] It might be adequate to assume that the institutional structure created for international human rights is not fit for its purpose and needs validation in its conception. Therefore, the killing of Rohingya Muslims should not have happened under the watch of the UNSC. It is also possible to conclude that the current approach adopted and seen at the UNSC means, the Council lacks ethics and integrity in its conception.

United Security Council Meeting Future Challenges

[120]Barber (2019).
[121]Klaus Schlichtmann (2010).
[122]UN, 'Article 1' (2021) <https://legal.un.org/repertory/art1.shtml> accessed 26 March 2022
[123]Eagleton (1946).
[124]Kelsen (2000).
[125]Anwary (2018).

The future challenges for the UNSC are reaching a complete concession on the principle of the universal good of humanity. Therefore, I dare not to speak first about political will but the principle of the general good. I must interpret the current form of the UNSC as a body that lacks ethics and integrity. To meet future challenges, there must be a willingness to maintain the commitment to the general good in the face of adversity. This should not be constructed to mean that the danger posed to the peace and security of the general good or threat must exist, but that if the adversity should arise, with ethics and integrity the UNSC must continue its pursuit of the general good. However, difficulties may arise, when we attempt to attribute adversity and how much adversity one should encounter before a concession should be reached. This point becomes critical when we seek to ask the rights questions about the 2022 Russian invasion of Ukraine.[126] The UNSC and its so-called elitism did not stop the Russian invasion, nor was it able to persuade Russia to take a different path. Therefore, the UNSC's inability to stop the invasion signals three points: first, the UNSC does not possess the faculties to resolve the issue of human rights protection; second, it is an outdated body; and third, it lacks ethics and integrity oversight. Let me explain this point further.

The UNSC, in theory, has the capacity to pass a resolution that imposes an obligation on all member states to carry out its mandate. Additionally, Chapter VI of the Charter posits that the UNSC can seek all parties to resolve their dispute by peaceful means, and can suggest actions to achieve such an agreement. Now, this point is problematic, when a purposeful interpretation is given to such a connotation, it means the UNSC is the judge and jury of its own conduct. How can that be possible in the 21st century? This is not plausible and should be rejected in its form and substance. This rejection may also suggest that the UN Charter should undergo validation that can be based on the composition of 21st-century phenomena not a general abstract of 19th-century war. In this form and substance, it is possible to observe that the UN Charter established a base for future peace and security but does not guarantee this attainment in future endeavours. Therefore an appropriate resolution will be to shake the core foundation of the Charter so that its evolution can take place.

Also, after Russia started its invasion of Ukraine, the UNSC sat on 25th February to consider a resolution submitted by the United States and Albania to examine the invasion as illegal and an act against the doctrine of international law. The resolution also suggested an immediate cease of force against Ukraine and the withdrawal of the Russian military from Ukraine. The adoption of a substantive resolution in the UNSC needs an endorsement vote of the 15 members of the Council, with a concession vote, or abstention, of the 5 permanent members of the Council, which are China, France, Russia, the United Kingdom, and the United States. In light of the Ukraine invasion, all the 11 members voted in favour, and Russia voted no, vetoing the resolution. The process of the resolution and its passing phase has become problematic. It is problematic in the sense that in light of the ongoing war, in which Russia is the instigator, it is inconceivable to even contemplate that Russia should be allowed to vote on this issue. This problem

[126]Grajewski (2022).

touches the core of the very structures which the UNSC is to be defending. Therefore, an appropriate way forward will be an independent adjudicator or a mechanism that can allow a total suspension of any permanent member who has perpetrated an illegal war. Perhaps this approach may help to restore ethics and integrity in the operation of the UNSC. It is then plausible to say Russia's invasion of Ukraine presents an opportunity to reexamine the right bestowed on the UNSC permanent members.

On 28th February 2022, the UN General Assembly, of which 193 countries are members, held a special emergency session on Russia's invasion of Ukraine under General Assembly resolution 377 A(V), which is widely considered the "Uniting for Peace" (or U4P) resolution. Ironically this was the same resolution adopted to circumvent the Soviet vetoes in the UNSC during the Korean War in 1950. The U4P resolution outlines the steps the Assembly should take on an issue of international peace and security, when the UNSC is paralysed under its own dysfunctional structures, specifically when there is a lack of cooperation among the five permanent members. Furthermore, on 3rd March, the Assembly passed a resolution on Russia's invasion of Ukraine under the U4P, which confirmed the Assembly's obligation to Ukraine as a sovereign and independent state. Therefore, it strongly opposed Russia's invasion of Ukraine and the breach of Article 2(4) of the UN Charter. The resolution also demanded an immediate withdrawal of the Russian military from Ukraine. 141 members voted in favour of passing the resolution (including the United States) and five against (Belarus, Eritrea, North Korea, Russia, and Syria), with 35 abstentions (including China, India, Pakistan, and South Africa).

The Assembly approach, in general, is comprehensive and one that should be commended. For example, a resolution at the Assembly requires two-thirds of all the members present to vote in order for it to pass. This includes those adopted under the U4P framework, which turns out to be a recommendation in nature and nonbinding. However, it is also important to note that the General Assembly resolution carries political weight and the show of collective will of UN Member States. When we, therefore, speak of different obligations and commitments to the protection of human rights, we can see the significance of this in the conception of the Assembly approach. This may mean we need to distinguish our understanding of the duties of the UNSC from a different kind of obligation for the protection of human rights. I am, therefore, under no illusion to say that UNSC is a political and nuclear war system. It has lost legitimacy and does not represent the interests of the greater good.

There is a need to create a better framework to resolve issues such as the Russian invasion of Ukraine and any future complications that may arise in the future. I will suggest that in addition to the Assembly and UNSC, there is a need to create a conflict management body within these two settings. This new, independent body should be given the legal mandate to impose sanctions on states that fail to comply with the findings of the body. This sanction should carry enforcement and possible military intervention as a last result. However, it is also important for this body to manage interstate conflict in such a manner to ensure ethics and integrity are not compromised for individual gain. This could be

achieved by a combination of the two concepts of conflict management, such as integrating, avoiding, obliging and dominating.[127] In this developmental approach, we thus hope that the UNSC will be able to meet future challenges with an open-door policy and vision.

Conclusion

This essay has discourse on and reviews the Rohingya crisis in line with the current developments in the international area. It has also explained international human rights law and how it can be found in many different sources of moral and legal rules. These rules are either conventional or customary; some are binding, while others are non-binding, and these non-binding rules are the so-called 'soft' laws. Therefore, international human rights law has evolved both on the international and regional planes through several binding treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the Convention on the Elimination of All Forms Racial Discrimination 1965 (CERD), centred around state obligations and rights for individuals. The has gone on to observe that ethics and integrity put the onus of proof in 'violations of human rights claims on entities because the relevant information (and expertise to understand it) is in the hands of the entities, not the victims. If claimants can *prima facie* demonstrate that they have suffered harm' (injury) and that this is likely to have been the result of the entity's activities (causation), by the principles of ethics and integrity, the burden of proof moves to the entity in question.

Consequently, if ethics and integrity are to be applied to accountability, it would be presumed that this approach would result in an effective accountability system. However, this has not been the case, as the current concept of accountability has resulted in a 'free for all' or excuse for vengeance against victims of human rights abuses. In this understanding, ethics and integrity do indeed establish liability for state and other entities, and this liability extends to misconduct in societal settings. But it comes with risks. The ethics and integrity being advocated in this essay will put the onus of proof in 'violations of human rights claims on entities because the relevant information (and expertise to understand it) is in the hands of the entities, not the victims. If claimants can *prima facie* demonstrate that they have suffered harm' (injury) and that this is likely to have been the result of the entity's activities (causation), by the principle of ethics and integrity the burden of proof to the entity in question. Before, perhaps, dignity for the Rohingya people is inconceivable? If this is so then it is perfectly adequate to reach the conclusion that the UN is as useless as a dead lion. It might be adequate to assume that the institutional structure created for international human rights is not fit for its purpose and need validation in its conception. Therefore, the killing of Rohingya Muslims should not have happened under the watch of the UNSC. It is also possible to conclude that the current approach adopted and seen at the UNSC means the Council lacks ethics and integrity in its conception.

Lastly, the essay concluded that there is a need to create a conflict management body within these Assembly and UNSC. This new independent body should be

[127]Rahim (2011).

given the legal mandate to impose sanctions on the state that fails to comply with the finding of the body. This sanction should carry enforcement and possible military intervention as a last result. However, it is also important for this body to manage interstate conflict in such a manner to ensure ethics and integrity is not compromised for an individual gain. This could be achieved by a combination of the two concepts of conflict management, such as integrating, avoiding, obliging and dominating. In this developmental approach we thus, hope that the UNSC will be able to meet future challenges with an open-door policy and vision.

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The Functionality of the Election Tribunal in Nigeria concerning Election Petition[1]

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This paper scrutinises whether it is possible to have Court-Connected Alternative Dispute Resolution, hereinafter ADR, to cover election petitions in Nigeria. An election petition is a peculiar breed of adversarial matters litigated over in courts, which is exclusively created for the sole purpose of reaching a speedy resolution within the allocated time frame provided by the law. There are no provisions, under the extant legal framework for elections and election disputes in Nigeria, for the use of court-connected ADR to resolve or settle election disputes. The zero-sum nature of Nigerian politics, characterised as the winner takes all; the loser takes none, coupled with the fact that elections are prone to violence and corruption because the seats for grabs are very lucrative- government positions make election disputes unarguably unsuitable for ADR mechanisms. However, the ADR strategy of looking at the interests of the parties rather than at their positions may hold some hope for applying ADR options to election disputes. An interest-based perspective to resolving disputes holds more promise than the traditional position-based perspective. Hence, the paper will analyse what the election tribunal does and whether it has ever used ADR as an option in its history. If not, what hopes are held out that Court-Connected ADR or induced ADR could ever be introduced to disputes concerning an area hotly contested as an election petition? The paper employs qualitative, primary and secondary resources to tackle the above-stated questions.

Keywords: *Alternative Dispute Resolution; Election Tribunal; Election Petition; Political Parties and Nigeria.*

Introduction - Alternative Dispute Resolution *ADR* in simple terms

The Lagos Multi-Door Courthouse (hereinafter LMDC) Practice Direction on Mediation defined Alternative Dispute Resolution (ADR) as a 'range of processes designed to aid parties in resolving their dispute outside the formal judicial proceedings.'[2] On the other hand, Stuart et al. defined ADR as an 'alternative to litigation, which could be resolved in a more flexible structure by a neutral third party-the process is essentially consensual and confidential.'[3]

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[2]Practice Direction on Mediation Procedure, 2008.

[3]Blake, Browne & Sims (2012) at 22.

Following the above viewpoint, ADR remains ADR, whether court-connected or private. This is because the decisions from or of an ADR arrangement are only binding on parties who have consented to it; not even the court will adopt a decision that is not voluntary from both parties.[1] In other words, ADR organises fora where voluntary parties come together to reach an agreement.[2] That mutual agreement reached is binding on both parties. However, it will need the court's intervention to seal it and make it a court's consent judgment for enforcement.[3]

Therefore, it will be easier to attach anybody's account if it is a money judgment or levy execution where necessary. But that does not remove the fact that it is a voluntary decision reached by the parties. As long as the deliberation is an ADR, it is strictly voluntary for both parties; thus, if one party does not agree, there is no agreement, and nothing left for the court to enforce.

For example, if Party XYZ now agrees to terms with Party SSS, the court will have to sit on it and make its judgment. This, in effect, is the summation of the character of ADR because it requires that both parties agree to mediate. However, election petitions in Nigeria are often acrimonious and fought bitterly, involving appeals in many cases to the Supreme Court and the Court of Appeal (C.A).[4] The question remains whether the inducement of office and the financial gains that follow would ever allow this area of the dispute to be deliberated by ADR.

Interest-Based Mediation

Essentially, the interest-based bargaining perspective seeks to place less emphasis on what is often referred to as traditional adversarial, positional techniques while giving more traction to a collaborative, problem-solving approach.[5] The elimination of all the inherent conflicts between the parties to the dispute does not appear to be the focus of this process. Rather, this process is based on the idea that conflicts are usually reduced to the barest minimum when we apply factors such as identification of interests, possible options addressing those interests and standards against which to measure the acceptability of such options.[6] This enhances the chances of reaching mutually satisfactory agreements.

Hence, Interest-based Meditation simply reinforces the interest of the parties.[7] parties.[7]

[1]Umegbolu (2022).
[2]Blake, Browne & Sims (2012) at 22.
[3]Umegbolu (2022).
[4]Odili's case cited in Umegbolu (2022).
[5]Bureau of Mediation Services.
[6]Ibid.
[7]Litigation has to do with the position of the parties; however, meditation focuses more on their their interest as a way of resolving the conflict between the parties.

Election Petition in Nigeria

Election conflicts or disputes have always been bitterly contested in Nigeria; recently, it has been mainly between the two major parties, the People's Democratic Party (PDP) and the All Progressives Congress (APC), though not exclusively.[1] The reasons the elections are acrimonious and fought so hard within the tribunals and at the courts are due to multiple factors. Some of these factors are based on the fact that Nigeria, as a developing economy, lacks institutions that could properly supervise elections free from Corruption and inducement of the various offices, to mention a few.[2] Other factors could be the mindset of the politicians who are desperate to win at all costs. Suppose the Constitutional and Electoral Framework of an electoral process is faulty or manipulated. In that case, it may be difficult for such a process to produce results that would be fair and acceptable to the Nigerian people.[3] It is, therefore, no surprise that elections are often followed by violence from most parties or contestants to gain unwholesome advantages over their opponents.[4] However, the politicians do not carry out these attacks themselves; they pay their 'boys', who are hoodlums, to disrupt the elections. Thus, daggers will be drawn, so many tensions in the air, garnished with gunshots, there is too much of an ugly.

To buttress the point made above, 'the last election in 2019 that returned the current President Buhari into the office for a second tenure was rooted in political violence, some of it was by the soldiers and police officers.[5] In other words, if someone loses an election and the election is marred with violence, he will not want to settle via ADR but rather with Judicial intervention. For this reason, elections ought to be credible and recognised as legitimate; with the various stakeholders playing by the rules of the game, they must have some level of fidelity to the law.[6] In other words, the laws regulating the conduct of elections and the behaviour of all the political actors, and notably the settlement of disputes as to the former, must be precise and not arbitrary ambiguity and self-contrived lacuna.

In Nigeria's case, the process for settlement of disagreement is ambiguous and has many lacunas, as vividly stated by Ekong and Rufus:[7]

> *'That it is increasingly difficult to negotiate any breach of the provisions of the Constitution both in pre-and post-election procedures as the politicians come to power through means and procedures not recognised by the Constitution and the law.'*

[1]Most tribunal cases involve disputes in the conduct of the election, with the Independent National Electoral Commission joined as parties to the conflicts or disputes in their position- as a regulator.
[2]Human Rights Watch Report on 2007 Elections in Nigeria
[3]Okoye (2013) at 3.
[4]Idowu (2010) at 25.
[5]Nigeria: Widespread Violence (2019).
[6]Umegbolu (2022).
[7]Ekong & Rufus (2016).

The thinking behind this is that if someone loses an election and the court refers him to settle in ADR, the question remains 'how can he reach an agreement in such a meeting'? Since he feels bitter that he lost. Thus, he will frustrate the court's time; the case will be referred to court; therefore, getting a voluntary agreement from the election parties is near impossible. Election petitions or complaints are such that if someone wins an election, his opponent insists or says, 'no, I am supposed to be the winner.' It is nigh impossible for both parties to come out as victors, somebody must win, and somebody must lose: a 'winner-takes-all' nature which is not so in ADR.[1] The stakes are high, the political parties or what we call 'players' are desperate, and the spoils of office are enormous.[2] It was here that the behavioural pattern was established as documented in the Elective Principle that Sir Hugh Clifford introduced in 1922, which was used for the Calabar and Lagos Municipal Elections up to the 1946 Council Elections.[3] The battery of electoral laws as of 1922 allowed disputes to be challenged and co-opted parties informally to accept the outcome of such decisions. These decisions were not taken by the judicial process but by an administrative process overseen by the Colonial Office or, in some cases, the Governor-General.[4] The difference then was was that the colonial electoral enactment was provided for the participation of a few Nigerians, and voting was conditioned upon tax payment and restricted to adults with an annual income of not less than 100 Pounds Sterling.[5] In addition, when elections are rigged or manipulated, those who lose such elections are most likely to reject the results. In such cases, candidates and political parties that participated in an election may question the credibility of such elections before tribunals are set up for that purpose.[6]

The cooperation of participants in the electoral process was thus guaranteed in that they conformed to and accepted the process and procedure, which included solving disputes. This was, however, done away with by new electoral rules introduced by General Abdulsalam Abubakar's military regime in a new legal electoral framework that included the Transition to Civil Rule (Political Programme) Decree No.34 of 1998; the National Assembly (Basic Constitutional and Transitional Provisions) Decree No.5 of 1998; and The Presidential Election (basic Constitutional Provisions) Decree No.6 of 1999. These were decrees devoid of political and judicial input and mainly responsible for the current electoral dispensation.

However, there is a new call from the than chairman of the LMDC governing council Hon. Justice Adesuyi Olateru-Olagbegi called on politicians to embrace the opportunity offered by ADR to resolve election petition disputes. With the call coming from a high-ranking member of the judiciary, what was once thought to be an impossible area for ADR has received a signal of possibility. [7] What remains to

[1]Umegbolu (2022).
[2]Ibid.
[3]Eko-Davies (2011) at 10.
[4]Akpan (2017).
[5]Babayo, Mohd & Bakri [2018].
[6]Ezugworie, Ostar & Albert (2021).
[7]Umegbolu (2022).

to be seen now is how the political class would respond to this invitation or who would be the first to accept this invitation and crack this sector open to ADR.

Furthermore, to regulate and limit the violence of elections, which are mostly after the results of elections, most parties are engaged in agreements to do everything to cull violence. It is not a subject matter strictly speaking that can easily flow by ADR. However, there will hardly be a voluntary agreement of parties to settle matters, and where there is no voluntary agreement of parties, even the court cannot enforce the agreement.[1] Though the law has made adequate provisions such as the Election tribunal, the Election tribunal substantively captures all the features of an ADR; therefore, why not replace Election Tribunals with ADR[2]?

The Election Tribunal

An Election Tribunal is a constitutionally created special court of Law for hearing and deciding disputes in election matters.[3] It is indeed *sui generis* in that it it exists in a class of its own, in the sense that it must not be encumbered by the technicalities and procedures of non-electoral matters. Although, constitutionally, it is bound by time limits is expected that speed is of the essence where justice and fairness must not be sacrificed on the altar of technicalities.

It is imperative to point out that election petitions are handled by special panels called tribunals,[4] which are not permanent tribunals but are specialist courts courts set up to deal with election petitions. In essence, there are different types of elections, the local government, state and federal elections even each cadre they have different kinds of elections it could be as the position of the vice president, chairman amongst others.[5]

It, therefore, follows that whenever there is a petition on any of the elections, the tribunal is set up at that level; thus, the tribunal is speedy. Even the election petition act creates a time limit upon which those matters must start and conclude, which is about one hundred and eighty (180) days.[6] Thus that makes the speed of the tribunal a non-negotiable element; in other words, it is swift; it works as fast as ADR. However, recent research conducted at the LMDC pointed out that cases or matters can end within one (1) day or two (2) days or maximum within three (3) months depending on the nature of the case, which is way less time than the time created by the election petition act for the settlement of election matters.[7]

On the other hand, most cases of violations of the electoral act include the non-adherence to the specific rules stipulated in the constitution. These are clear and non-ambiguous. For example, if the campaign time-span rules were violated

[1]Ibid.
[2]Ibid.
[3]Nwagboso (2011).
[4]Section 285 of the 1999 Nigerian Constitution
[5]Oniekoro (2012) at 21.
[6]Kalu, Obidimma & Anazar (2016).
[7]Umegbolu (2022).

by both the ruling People's Democratic Party (PDP) and the main opposition party, the All Progressive Congress (APC). In such matters, it will be difficult to see how ADR will be effective because the issue will not be acceptance of the results but the credibility of the election.[1] It is imperative to note that even with the agreements, any contravention of the rules cannot be settled outside of the specifics of the constitution. Perhaps the electoral reforms will address the areas of an electoral process that will be subject to the interference of ADR.[2]

The Truce Document

Before an election, the two leading political parties, APC and PDP, will be required to come and sign a valid agreement. That is to say, they will sign a contract that neither of them will cause a commotion if the election does not go in their favour. In simple terms, prior to the election, they would sign the truce document that they would control the excesses of their boys to make sure that they do not go violent or disrupt the election and at the same time advise all their supporters to be law-abiding and peaceful. Hence that agreement is usually signed as a memorandum of understanding. It means an agreement that is not court-connected, an agreement that does not have the force of law but is binding on both parties; however, if a party breaches it, it does not have foreseeable legal consequences; it is a gentleman's agreement. Hitherto, it is expected that the parties to such agreements would honour them. However, in most cases, one person can get to court and rescind because it has been argued and observed that everyone wants to win an election in Nigeria.

Mere looking at it from this angle, it is argued or inferred there is no need to have election petition/political disputes within the ambits of ADR; it will not produce the result needed, nor will it provide the competence required. However, from another angle, why not call it ADR instead of the tribunal? As it has almost all the features/advantages of ADR; one of such advantages was corroborated by the recent research carried out in 2021, where both the users and stakeholders of the LMDC and Enugu State Multi-Door Courthouse (ESMDC) pointed out that ADR is free from an allegation of corruption in contrast to the adversarial system. Emmanuel Ojo's postulation validates the above statement: there are 'perceptions of claims of rampant corruption against tribunal and appeal panellists amongst the public.'[3]

Consequently, in theory, it is possible to apply ADR in election matters or petitions. However, in practice, it is a more daunting prospect. We can only hope that with the calls from senior members of the Judiciary to the political class -to employ or embrace the use of ADR, sooner rather than later, they will relent and begin to give in to all the advantages that ADR has over litigation.[4] Most elections elections will involve issues that pertain to Voters and Political Party's rights.

[1]Ibid.
[2]Ibid.
[3]Nigeria: Widespread Violence (2019).
[4]Umegbolu (2022).

Such disputes may relate to the right of a qualified citizen to be registered as a voter or of people who come together to form political parties for the purposes of attaining power.

Consequently, or inevitably the rights of a citizen, either as a voter or a member of a party, maybe infringe in the process of seeking their party's endorsement for representation or the right of a citizen to vote. These rights are open to being breached, and to enforce them, the need to have them addressed becomes foremost in the drive for democracy.

Therefore, elections in themselves present legal and constitutional challenges. An example would be where electoral management bodies (EMBs) are under constitutionally required duty to conform to the constitution and electoral regulations in a fair and just manner. In the case of Nigeria, Independent National Electoral Commission (INEC) strives to avoid the label of bias or lack of independence, which erodes or has eroded the credibility of the conduct of the electoral process. Therefore, one way of addressing the citizen and or party grievances is to introduce a fast and inclusive system to address these failures. ADR can be that system.

It is imperative to point out that for elections to be adjudged fair and would mean that it is acceptable to all parties, especially the voters and Political parties. However, it is also recognised that this may not necessarily be the case in all election grievances. To have post-electoral disputes and challenges as a part would be ineffective because they mainly involve challenges to voting and manipulation of the process. Often, the challenges occur after the elections in which INEC is the main defendant. To have a resolution system at this time may be tedious as it usually pertains to the conduct rather than to the rights of the voters and the political parties. It is not certain as to whether the challenges stem from or relate to instances of allegations of fraud or the difficulty of political contestants to swallow the pill of electoral defeat.

Thus, the challenge of the outcome through the judicial process makes it essential to address electoral disputes and their resolution with a framework that acknowledges the participants of the electoral process. It means that the stakeholders and participants such as voters and party members, should be aware of what mechanisms are available to resolve their grievances prior to the elections. This mechanism makes a dispute resolution process fair and allows equal access to all comers without contradicting or making it difficult for INEC to fulfil its primary duty.

High Perception of Corruption

In addition to other notable disadvantages of the adversarial system, this paper has observed further that one of the significant challenges facing the judicial process is the perception of corruption.[1] It has been argued that the Election Petition Tribunal process is set up by the Constitution of the Federation to administer justice in cases or disputes relating to election into a political office-

[1]Oduntan (2017).

one area that is marred with prevalent corruption.[1] The entire judicial system has been vehemently criticised for being highly corrupt.[2] Most litigants no longer depend on the judicial process, and many have relied on self-help in resolving their respective legal battles.[3] The recent END SARS protest that degenerated into bloodshed and sheer lawlessness, which saw the Lagos High Court and some other courts across the Federation vandalised beyond recognition, is a testament to the people's displeasure with the judicial system.[4] Regrettably, the LMDC situated within the Lagos High Court was not spared.[5] Obviously, there is an urgent need to reassure the people that the Court is there to serve them and that they can always depend on the Court to do considerable justice in their respective matters.[6] However, this will take much work and some time, but it is achievable. 'Recent research conducted at the LMDC has found that ADR through the MDC is free from allegations of prevalent corruption'.[7] The ADR setup is such that parties would have to agree or come to an agreement on their own with the help of a mediator, thus free from any external interference. Therefore, the tribunal, being a special court, can rectify such agreements.

Consequently, they can do ADR subject to the tribunal's rectification; this will make the work of the tribunal easier; they do not need to be calling for evidence amongst others. Whatever the party's Terms of Agreement (TOA) states, the tribunal can adopt as a consent judgment. This will significantly decongest the courts and create a cordial relationship within the party or between the parties.

Conclusion

The ADR setup is such that parties would have to agree or come to an agreement independently with the help of a mediator; thus, it is free from any external interference. Then such agreements can be rectified by the tribunal-because the tribunal is a special court. By and large, they can do ADR subject to the tribunal's rectification, which will make the work of the tribunal easier; hence, they do not need to call for evidence amongst others. Therefore, whatever the party's Terms of Agreement (TOA) state, the tribunal can ask parties if that is what they agreed on and then adopt it as a consent judgment. This will significantly decongest the courts and create cordial relationships within the party or between the parties. This is because one of the chief inadequacies of the current electoral laws in Nigeria is the failure of the Electoral Act to prescribe a specific deadline for the conclusion of legal challenges to election results. While Section 141 of the 2006 Electoral Act states that 'an election petition shall be presented within thirty (30) days from the date the result of the election is declared,' the Act

[1]Ojo (2011) at 110.
[2]Ibid.
[3]Umegbolu (2020).
[4]Umegbolu (2022).
[5]Umegbolu (2022).
[6]Ibid.
[7]Ibid.

does not put a ceiling on when the tribunals and the court should conclude such petitions. The use of ADR will drastically reduce the timeframe of cases languishing in the national court and also save the tribunal's time. It would also basically comply with the specifics of the constitutional requirements.

ADR is a framework that can provide a straightforward, unambiguous procedure that can apply equally to everyone, ensuring the aggrieved parties' full participation. Though the policies or procedures for resolving pre-electoral disputes may differ from those governing other forms of legal disputes, such as electoral tribunals as they exist now, the legal and formal institutions currently in place are essentially the same in character function, and orientation. But under Nigerian laws[1] governing the resolution of electoral cases, the respondent does not have the onus of proof. This effect is that there is an unbalanced state against the petitioner or the aggrieved party with an uphill task. Section 138 of the Electoral Act 2002 allows a person returned by The Independent National Electoral Commission (INEC) to retain the office of which the electoral return was provided while the legal challenge to the victory is pending. The attainment of justice should be the only relevant, if not the only goal. National INEC Commissioner Prof Anthonia Okoosi-Simbine[2] speaking on the core values of the Commission's duty on electoral disputes, stated,

> *'Our traditional forms of dispute resolution are still with us. We have simply failed to use them. Our failure is simply because we have imbued the litigation process with so much efficacy that we assume that only a judge sitting in judgment over our matters can resolve them. And then, we leave the courtrooms with and continue to dwell in our animosities.'*

How does Interest Based Mediation come into play as it looks at the interest of the parties? Since most times the petitioner and respondent do not belong to the same party, it will be difficult to focus on the position. Nevertheless, if interest-based mediation is applied-it focuses on ways of appeasing the petitioner. For instance, where the petitioner is seeking to be declared the winner-in other words, he is not saying that the entire election should be set aside then the options of making him a minister or a commissioner (by the respondent) or giving him other benefits but where it has to do with the nullification of the election perhaps interest based mediation maybe a lot difficult because the party may believe if he contests for the election in court, he may have a reasonable chance of the court to set aside the entire election but then if the court set aside the entire election the court will order a rerun.

Therefore, Interest-based mediation focuses on the interest of the parties and not their positions; thus, by focusing on the interest they will likely achieve a settlement of the election petition disputes, but then it also depends on their respective strengths and the cause of action of the petition and the reliefs they are

[1]Section 138 of the Electoral Act 2002

[2]Speaking at the opening of a two-day workshop for 60 EADR Focal Persons from 30 registered Political parties in Calabar, Cross River State: Electoral Alternative Dispute Resolution (ADR). https://inecnigeria.org/news-all/inec-makes-case-for-sustainable-adr-culture-in-the-political-process.

seeking. Whether the petitioner believes he has a good chance of overturning the entire election and ordering a re-run or whether he would rather stick to allowing the election to stand as it is, then he would be asking that the respondent be disqualified because he was not qualified to contest in the first place.

In sum, interest-based mediation entails the interest of the parties- so if the interest is to serve and contribute one's humble quota to the betterment of society, perhaps the petitioner could be given a position in the government of the respondent, or he could port from his political party to the political party of the respondent or they could form a collation between his political party and the political party of the respondent, but then again it depends on the positions they are contesting for. For instance if it is the presidency or a governorship position it could be possible to achieve some kind of a collation however when it is like a house of assembly seat maybe appointing the aides of the petitioner as one of the persons that will work with the respondents those should be options that would be of the interest of both parties.

Recommendation

It is argued that some of the reviewed literature suggested high perceptions of corruption against the adversary method of settling disputes[1] and tribunals;[2] hence we recommend ADR for election petition, if not in part. These can be achieved by politicians agreeing to sign legal documents (which are far-reaching and have repercussions) that they must accept election results in good faith or take just legal actions if they are not satisfied with repercussions such as disqualification from future elections to outright bans. It is suggested that ADR through the Multi-door Courthouse (MDC) would, in all probability, be free from such allegations.

The debates, arguments and counterarguments as to whether the intervention of the Judiciary to settle the matters of electoral disputes as such in presidential elections will be against the principle of the nation's constitution. Despite court verdicts regarding the interpretation of the law and addressing the participants' challenges, it will not assuage the people's feelings if the mistrust is against the system and not the process. It is admitted that it will go a long way to stem violence, but that is not the purpose of ADR or adjudication.

[1]Oduntan,(2017).
[2]Ojo (2011) at 110.

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Acts Considered as Terrorism Crimes and Compatibility of Counter-terrorist Measures to International Standards: In Context of Ethiopia

*By Petros Fanta Choramo**

Existence of accurate legal definition of terrorism is important for society and for governance to enable successful investigation and prosecution of terrorists within the established judicial system. Without international agreement on a definition of terrorism, it has not been possible to adopt a treaty covering all its forms. In other words, without a clear and precise definition of terrorism, it becomes impossible and impractical to talk about concepts and counter-terrorism measures in one country. Moreover, without a definition for terrorism, how can we define and investigate the correctness of those who practice it are? Further, even though terrorism is a danger to the peace, security and development of the country and a serious threat to the peace and security of the world at large and view of these challenges, the Government of Ethiopia has been exerting the necessary effort to prevent and combat terrorism through enacting and effectively implementing domestic laws, it must in conformity with the human rights law, and international humanitarian law. Thus, the basic objective of this Article was to critically observe and examine definition of terrorism, acts that constitute terrorism and other acts which can be considered as contributory to terrorism crimes under Ethiopian relevant laws adopted to combat terrorism; specially Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020. Under this article author also critically made analyses on the manner how current Ethiopian government adopted the new counter terrorism law and consideration given to it.

Keywords: *Definition of Terrorism, Counter Terrorism Movement, Terrorist Acts, Terrorism Crimes, Sub-Ordinate Crimes, Human Rights Approach*

Introduction

Terrorism and other forms of violent extremism also pose a threat to fragile states by destabilising political systems, creating an inhospitable environment for development, and threatening civil liberties and human rights. Moreover, terrorist groups have exploited vulnerabilities such as porous national borders, weak governance, limited law-enforcement capacities, fragile governments, and local grievances to militancy to emerge or flourish. As such they challenge not only the authority of the state but its ability to provide the necessary security for achieving progress on development objectives.[1] To challenge permissive conditions for

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[1]International Peace Institute, "Global Terrorism," IPI Blue Paper No. 4, Task Forces on Strengthening Multilateral Security Capacity, New York, at 7, Rosand, Fink & Ipe (2009).

violent extremism, States have the primary responsibility for protecting their populations from the threats posed by terrorism[2] preventing terrorism and addressing conditions conducive to terrorism are crucial for the achievement of the 2030 agenda for sustainable development. according to African union high-level inter-governmental meeting on the prevention and combating of terrorism in Africa, since terrorism is a violent form of transnational crime that exploits the limits of the territorial jurisdiction of states, differences in governance systems and judicial procedures, porous borders, and the existence of informal and illegal trade and financing networks, Member States reaffirmed their unequivocal rejection of terrorism and need to counter terrorism at both the individual and collective levels.[3]

Ethiopia is one of the victims of terrorism and terrorist acts, who had lost lives and sustained damage to property through the cruel acts of terror committed at hotels, transport facilities, markets and other civilian spots.[4] In view of these challenges, the Government of Ethiopia has recently revised its previous Anti - Terrorism proclamation and adopted new Proclamation No.1176/2020 is aimed at preventing and controlling the crime by enabling the security forces to take strong precautionary and preparatory acts centred at the nature of the crime while ensuring perpetrators received penalty proportional to their acts.[5]

Conceptual Understandings on Terrorism and Historical Underpinning of Counter-Terrorism Movement

At its most general level, the term "terrorism" denotes the (generally criminal) use of politically motivated violence. It is typically used to refer to "a special form or tactic of fear-generating, coercive political violence" as well as "a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and noncombatants, performed for its propagandistic and psychological effects on various audiences and conflict parties."[6] "At the origin of terrorism stands terror – instilled fear, dread, panic or mere anxiety - spread among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act – it's shocking brutality, lack of discrimination, dramatic or symbolic quality and

[2]See Worcester (2015) at 3. The fight against terrorism is not a job which can be undertaken by one single agency, it requires team work and input from a wide range of national and international organizations including law enforcement agencies, the military, the intelligence services, the financial sector, the diplomatic service and health organizations.

[3]See preamble of African Union High-Level Inter-Governmental Meeting On The Prevention And Combating Of Terrorism In Africa Algiers, Algeria 11-14 September 2002; Article 10(a) of this convention directs and obliges member States to sign, ratify and fully implement the Algiers Convention on the Prevention and Combating of Terrorism and, where necessary, seek the assistance of other Member States or the international community to amend national legislation so as to align such legislation with the provisions of this Convention.

[4]See Statement by Asgedom (2020).

[5]Ibid.

[6]Stewart (2018) at 6.

disregard of the rules of warfare and the rules of punishment. Terrorist violence is predominantly political – usually in its motivation but nearly always in its societal repercussions [and] [t]he immediate intent of acts of terrorism is to terrorise, intimidate, antagonise, disorientate, destabilise, coerce, compel, demoralise or provoke a target population or conflict partly in the hope of achieving from the resulting insecurity a favourable power outcome, e.g. obtaining publicity, extorting ransom money, submission to terrorist demands or mobilising or immobilising sectors of the public."[7]

However, no single or agreed legal definition exists at the international level. Furthermore, the U.N. has failed to develop a definition for terrorism.[8] The definition given for terrorism even may vary in case of war and guerrilla warfare.[9] There are over 109 different definitions of terrorism. U.S. American political philosopher Michael Walzerin defined Terrorism as the deliberate killing of innocent people, at random, to spread fear through a whole population and force the hand of its political leaders.[10]

The failure to craft an agreed definition of terrorism at international level has left a vacuum for actors, whether they be state or non-state, to define terrorism in ways that serve their own perceived political and strategic interests, and, in the case of state responses, remits of 'counter-terrorism' are often determined accordingly.[11] The term is frequently employed to describe a wide range of acts committed in response to varying circumstances and phenomena at both the domestic and international levels. Its use is often politically-charged. In many states the Legal definitions of terrorism are often vague or broad, and applied in a selective, indiscriminate or discriminatory manner. Such definitions may be used to suppress political opposition relative to issues that have no discernible links to security concerns.[12]

Even though, Terrorism is an old tactic, the terrorist attacks of 11 September 2001 in the US,[13] as well as other similar incidents in different parts of the world

[7]Schmid (2011) at 86-87.

[8]Teklu (2014) at 50. The problematic nature of terrorism is not restricted to the absence of a definition. But the argument goes further, concerning at what point terrorist acts constitute crimes under international criminal law, see Cassesse (2008).

[9]Brustolin (2019) at 1.

[10]Oluwasey, (2020) at 6.

[11]Richards (2015) at 3.

[12]The study prepared by the Expert Team comprising of Ms Abigail Hansen and Ms Sylvie Nicole. Operational Human Rights Guidance for EU external cooperation actions addressing Terrorism, Organised Crime and Cyber security, European Commission Instrument contributing to Stability and Peace Expert Support Facility IFS 2014 - LOT 3 Europe Aid/134757/C/SER/multi Request for Services N° 2014/350719/1, 2014, P.17

[13]On 9/11, America experienced the worst terrorist attack on its soil, committed by Al Qaeda ("The Base"). On that fateful day, Al Qaeda killed more people than the Irish Republican Army had killed in thirty-five years. According to a 2006 Gallup poll, involving over 50,000 interviews in various nations, 7% of the 1.3 billion Muslims in the world—90 million people—see the 9/11 attacks as "completely justified." This incident was base for the current Global War on Terror (GWOT), which was initiated by President George W. Bush (the late president of US), is the most all-encompassing counterterrorist campaign in history and the most important fight since the fall of the Berlin Wall. See Jackson (2005) at 40.

have caused profound changes in political, economic, and social relations globally.[14] However, counter-terrorism laws existed in many countries prior to 2001, the attacks of 9/11 and the immediate response by the international community served as a catalyst for states to develop new measures and strengthen existing laws. Subsequent attacks and attempted attacks – including in Africa, Asia, Europe, and the US – reinforced states' urgency not only to prevent non-state actors from conducting attacks on their soil, but also to prevent people from undertaking so-called preparatory acts of terrorism, such as attending terrorist training camps, raising or laundering funds for terrorist activities, and inciting terrorist attacks.[15]

The United Nations has adopted several counter-terrorism measures to punish individuals and groups engaging in terrorism. UN Security Council Resolution 1267 and subsequent related resolutions require UN member states to freeze funds and other financial resources of the Taliban, al-Qaeda and affiliated individuals and groups, and designate specific individuals and groups as sanctioned.[16] Additionally, resolution 1373 and subsequent related resolutions require states to implement laws and measures to improve their ability to prevent terrorist acts. These measures include criminalising the financing of terrorism; freezing the funds of individuals involved in acts of terrorism; denying financial support to terrorist groups; cooperating with other governments to share information; and investigating, detecting, arresting, and prosecuting individuals and entities involved in terrorist acts.[17]

In recent years, Security Council adopted a number of resolutions to eliminate/ minimise terrorism, such as resolution 2482 (2019), on threats to international peace and security; resolution 2467 (2019), on women and peace and security and sexual violence in conflict; resolution 2462 (2019), on threats to international peace and security caused by terrorist acts and preventing and combating the financing of terrorism; resolution 2341 (2017), on terrorist threats against critical infrastructure; resolution 2347 (2017), on the destruction of cultural heritage and the smuggling of cultural property by terrorist groups in situations of armed conflict; resolution 2354 (2017), on countering terrorist narratives; resolution 2368 (2017), reaffirming the sanctions regime against Islamic State in Iraq and the Levant (ISIL) (Da'esh); resolution 2370 (2017), on preventing terrorists from acquiring weapons; and resolution 2396 (2017), on terrorist fighters returning and relocating to their countries of origin or nationality, or to third countries. Pursuant to resolutions 2444 (2018) and 2498 (2019), the Office, through the Indian Ocean Forum on Maritime Crime, is mandated to work with Somalia and relevant countries to develop strategies to disrupt the illicit trafficking of charcoal and other goods that finance Al - Shabaab in Somalia.[18]

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[14]Workneh (2019) at 3.

[15]Burniske, Modirzadeh & Lewis (2014) at 3.

[16]See Country Reports Pursuant to Resolution 1373 (2001) and Resolution 1624 (2005), http:// www.un.org/en/sc/ctc/resources/countryreports.html.

[17]Ibid.

[18]United Nations Economic and Social Council, Report of the Secretary-General, Technical assistance in implementing the international conventions and protocols related to terrorism, integration and coordination of efforts by the United Nations Office on Drugs and Crime and by Member States in the field of crime prevention and criminal justice: ratification and implementation

Conceptual and Legal Frame Works Concerning on Terrorism in Ethiopia

Even though Ethiopia has criminal laws which criminalise acts which are danger to the peace, security and development of the country and a serious threat to the peace and security of the world at large, the comprehensive, special and independent counter terrorism law called "Anti-Terrorism Proclamation No. 652/ 2009" adopted and entered into force on 28th day of August, 2009.[19] But recently Ethiopia adopted "Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020" with objective to replace the Anti -Terrorism Proclamation No. 652/2009, a Proclamation were enacted to prevent and suppress terrorism, has substantive and enforcement loopholes which produced a negative effect on the rights and freedoms of citizens, with a law that enables adequately to protect rights and freedoms of individuals and prevalence of accountability of law enforcement bodies.[20] Under this section an author analyses acts considered as terrorism and ancillary acts to the crime terrorism under Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020 (herein after PSTCP) and its compatibility with general Ethiopian criminal and international principles and jurisprudence.

Definition of Terrorism

Article 2 sub article 2 of PSTCP defined; Terrorism Crime as those criminal acts provided under Articles 3, 5 to 11, 29, and 30 of the Proclamation. In relation to that when we look the stipulation of Article 3 it defines Terrorist Acts as;

> *Acts to Causes serious bodily injury to person, Endangers the life of a person, commits hostage taking or kidnapping, causes damage to property, natural resource or environment and/or seriously obstructs public or social service; with the intention of advancing political, religious or ideological causes for terrorising, or spreading fear among the public or section of the public or coercing or compelling the Government, Foreign Government or International Organisation.*[21]

Article 5 criminalises acts to intimidates to commit any of the terrorist acts provided for under Article 3 of the Proclamation; Article 6 criminalises Planning and Preparation for Commission of Terrorist Acts provided for under Article 3 of this Proclamation; Article 7 criminalises conspiracy to carry out or cause to carry

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of the international instruments to pre vent and combat terrorism Commission on Crime Prevention and Criminal Justice, Thirtieth session Vienna, 17–21 May 2021, Item 6 (c) of the provisional agenda, P.2

[19]See preamble of Anti-Terrorism Proclamation No.652/2009. Fourth Paragraph of the preamble of this proclamation provides that adoption of this proclamation has become necessary to incorporate new legal mechanisms and procedures to prevent, control and foil terrorism, to gather and compile sufficient information and evidences in order to bring to justice suspected individuals and organisations for acts of terrorism by setting up enhanced investigation and prosecution systems.

[20]See the second paragraph of Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020

[21]See Article sub Article of Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020

out terrorist acts provided for under Article 3 of the Proclamation; Article 10 criminalises causing the commission of one of the crimes provided for in Article 3 of the Proclamation intentionally incites of another person by inducing, promises, money, gift, threat or any other similar means shall be punishable with a punishment provided for the offence provided that the crime was attempted or committed. Article 8 criminalise False Threat of Terrorist Act and Article 9 criminalises knowingly supporting or assisting directly or indirectly the commission of a terrorist act or with the intent to support a terrorist Organisation. Article 10 criminalises intentional inciting of another person by inducing, promises, money, gift, threat or any other similar means shall be punishable with a punishment provided for the offence provided that the crime was attempted or committed while Article 11 criminalises the possession of such property or makes use of it knowing that the property is associated with terrorism crime, or makes use of it.[22]

On the other hand Article 29 criminalises the heading of an Organisation proscribed as a Terrorist Organisation as a whole or a part there of while Article 30 criminalises joining with the Organisation as member or took training with knowing that the Organisation is a Terrorist Organisation or should have known such fact.[23]

From the above stipulation we may possibly find, understand and analyse especially from article 2 sub article 2 and PSTCP in general that in first place it tried to differentiate "terrorism crimes" from "terrorist acts". On this it defined "terrorist acts" under article 3 while defined "terrorist crimes" as a synergy of terrorist acts and acts of intimidation, conspiracy, incitement, rendering support, false threat, planning and preparation to commit terrorist act as well as heading and joining with terrorist organisation.[24] However, when we cumulatively read Article 2 sub article 2 with article 11, PSTCP provided circular definition for the *terrorism crimes* as knowingly possession of the property that is associated with *terrorism crime* or makes use of it. This creates a confusing legal situation where the definitions are circular, which may give rise to questions as to the certainty and foreseeability of the legislation.

As far as terrorist acts concerned, PSTCP defined acts considered as terrorist acts under article 3 sub article 1. It defined terrorist act as -

> *Whosoever, with the intention of advancing political, religious or ideological causes for terrorising, or spreading fear among the public or section of the public or coercing or compelling the Government, Foreign Government or International Organisation:*
>
> *a. Causes serious bodily injury to person;*
> *b. Endangers the life of a person;*
> *c. Commits hostage taking or kidnapping;*
> *d. Causes damage to property, natural resource or environment; or*
> *e. Seriously obstructs public or social service.*

[22]See Art 5 sub 1 and Article 11 sub 1

[23]See Article 29 sub 1 and Article 30 sub Article 1(B)

[24]See, Articles 3, 5-11, 29 and 30, since PSTCP under Article 2 sub article 2 defined "Terrorism Crime" means those criminal acts provided under Articles 3, 5 to 11, 29, and 30 of this Proclamation"

In surprising manner, even though, the caption of Article 3 says "terrorist act", and under sub 1 seems to define acts what constitute terrorist acts, in fact it is not. It is rather talks about persons who were considered to be participated in terrorist act. Another problem under this definition is that definition stated under this provision was circular by itself. This is envisaged on definition of **Terrorist Acts** that "Whosoever, with the intention of advancing political, religious or ideological causes for **terrorising**…"[25] On the word from this definition we observe that Terrorist Acts is **terrorising…** So, this definition of terrorist act provided under this proclamation is circular and it is open for another controversy and difficulty for application regarding on the concept of terrorising. To avoid such and similar problem, The High Commissioner for Human Rights and United Nations human rights mechanisms have consistently recommended that States review their counter - terrorism legislation in order to clarify and narrow the definition of the offences concerned.[26] The principles of legal certainty and legality require that criminal laws specify precisely the types of behaviour and conduct that constitute a criminal offence, as well as the consequences of committing such an offence.[27] Thus, Criminalising acts without providing foreseeably clear notice of the conduct proscribed poses a risk of breaching obligations such as those enshrined in article 15 of the International Covenant on Civil and Political Rights.[28] Article 15 ICCPR also includes the requirements of *nullum crimen sine lege* (all elements of a crime must be defined by the law), *nulla poena sine lege* (all punishments must be defined by the law), accessibility (the law must be publicly available), precision (the line between permitted and prohibited conduct must be clear), and foreseeability (the law must enable an individual to anticipate the consequences of his or her conduct). The safest way to secure compliance with these requirements is to base any definitions of terrorist crimes on an exhaustive list of already defined serious violent crimes. Criminalization of terrorist intent as such, or circular definitions that refer back to the word 'terror', or definitions that generally cover crimes against the state, regularly fail the test under Article 15 ICCPR.

Even though this weakness of law maker, according to their intention, terrorism acts are; Causes serious bodily injury to person, Endangers the life of a

[25]See Article 3 Sub Article 1

[26]See for example, A/HRC/28/28, para. 22; A/HRC/43/46/Add.1, para. 60 (a); CCPR/C/GNQ/CO/1, paras. 22 –23; CCPR/C/BEL/CO/6, paras. 11 –12; CCPR/C/FIN/CO/7, paras. 10–11; CCPR/C/KEN/CO/4, paras. 16 –17; CCPR/C/TUN/CO/6, paras. 31–32; and CCPR/C/BHR/CO/1, paras. 29 –30.

[27]2021 Report of the Secretary-General on Terrorism and human rights, Seventy-sixth session, Item 75 (b) of the provisional agenda at 5.

[28]Ibid. As per Article 15/1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under nationalor international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. See, for example, CCPR/C/ETH/CO/1, para. 15; CCPR/C/KOR/CO/4, para. 20; CCPR/C/BEL/CO/6, para. 11; CCPR/C/KEN/CO/4, paras. 16 –17; CEDAW/C/CHL/CO/7, paras. 30–31; and p. 6 of communication SAU 12/2020. https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25726

person, Commits hostage taking or kidnapping, Causes damage to property, natural resource or environment; or Seriously obstructs public or social causes for terrorising, or spreading fear among the public or section of the public or coercing or compelling the Government, Foreign Government or International Organisation.

Inchoate Acts That Considered as Terrorism Crimes

Inchoate crimes, also called incomplete crimes, are acts which involve the inclination to commit, or indirect participation in, a criminal offense or acts just began but not completed. On the other word inchoate offences refers to those crimes which were initiated/began but not completed and acts that assist in commission of another crime.[29] Such category of acts are; preparation, attempt, conspiracy, aiding and abiding and others.

When we come to Ethiopian PSTCP, Articles 6, 7, 9 and 10 incorporated inchoate offences and criminalised inchoate offences which are attributable to terrorist act as defined under Article 3 of the same proclamation.[30]

Thus, Article 6 criminalised; Planning and Preparation for Commission of Terrorist Acts. It states that;

1. *Whosoever undertakes act of plans to commit any of the terrorist acts provided for under Article 3 of this Proclamation shall be punishable with rigorous imprisonment from three years to seven years.*
2. *Whosoever makes preparation to commit any of the terrorist acts provided for under Article 3 of this Proclamation shall be punishable with rigorous imprisonment from five years to twelve years.*

As per this provision PSTCP criminalised a mere plan and preparation to terrorist act because of injurious nature of act of terrorism which is a serious threat to peace and security of our Country and International Community causing serious damage to human and property. However, the punishment provided for these crimes seems not proportional or it is more aggravated. On one hand plan and preparation by itself is broad concept and even difficult to fix or determine the exact starting point to say something planned or started preparation. As result this may open a wide road for executive to prosecute certain persons for their political or other motive and this may hamper the human rights of the subjects. On the other hand punishing a person for a mere plan or preparation for seven year or twelve years rigorous punishment respectively is not seems proportional.

Another category of inchoate offences criminalised under this proclamation are; intimidates to commit any of the terrorist acts,[31] committing conspiracy to carry out or cause to carry out terrorist acts,[32] knowingly supports or assists directly or indirectly the commission of a terrorist act or with the intent to support a terrorist Organisation by Preparing, providing or hands over documents or

[29]https://www.justia.com/crimina/offenses/inchoate-crimes/,
[30]See Articles 5, 6, 7, 9 and 10 of Ethiopian PSTCP.
[31]See Article 5.
[32]See Article 7.

information, by Providing technical, counselling or professional support, Prepares, makes available, by providing, or selling any explosive, dynamite, inflammable substances, firearms or other lethal weapons or poisonous substances; or by Providing training or recruits members,[33] and also intentional inciting another person by inducing, promises, money, gift, threat or any other similar means shall be punishable with a punishment provided for the offence provided that the crime was attempted or committed.[34] In short it criminalised inchoate offences, such as; intimidation, plan, preparation, conspiracy, rendering supports or assists and incitement for the commission of a terrorist act.

Sub-Ordinate Acts That Constitute Terrorism Crimes

On this Article when an author saying Sub-ordinate acts that constitute terrorism crimes; it is to mean acts which are by it considered neither terrorist act nor inchoate crimes. Rather this category of offences was considered as terrorism crimes by the reason of its disturbing community and may pave the way for terrorist acts. The types of acts considered as this category of acts are:

1. False Threat of Terrorist Act

Article 8 of the Ethiopian PSTC proclamation reads*: Whosoever while knowing that it is false, causes shock, fear, anxiety, or worry in the public or in the society or certain section of the society by expressing through any means or performing false act that a terrorist act has been or is being or will be committed shall be punishable with simple imprisonment or if the act caused damage rigorous imprisonment from three years to ten years*

2. Possessing Property Associated with Terrorism Crime

Article 11 of the Ethiopian PSTC proclamation reads*:*

1/ Whosoever, knowing that the property is associated with terrorism crime, is found in possession of such property or makes use of it shall, without prejudice to the confiscation of the property, be punishable with rigorous imprisonment from three years to ten years.

2/ Where they provided under sub-article (1) of this articles committed by negligence; the punishment shall be rigorous imprisonment from one year to three years.

3. Crimes Committed Against Whistleblowers and Witnesses

Article 12 of the Ethiopian PSTC proclamation reads*:*

1/ Whosoever interferes to prevent a person who may be whistle-blower or witness or who has evidence of crime provided under this proclamation from giving information or evidence to justice authorities or being a witness in an investigation or judicial proceeding by using sabotage, violence, threat or by extending undue advantage, by inducements or getting involved in any other way against such person or a person who has close relationship with him shall be punished with rigorous imprisonment from three years to seven years.

[33]See Article 9.

[34]See Article 10.

2/ Whosoever assaults, threats, suppresses or harms any person or a person who has close relationship with such person, who gave information or evidence to justice authorities or appeared as witness in an investigation or judicial proceeding of crime provided for in this Proclamation shall be punishable with rigorous imprisonment from three years to seven years.
3/ Where the crime mentioned in Sub-article (1) or (2) of this Article entailed grave harm to the body or health of the victim or his death, the relevant laws related to these crimes shall apply concurrently.

4. Crimes Committed Against the Judiciary and Executive Organs

Article 13 of the Ethiopian PSTC proclamation reads:
1/ Whosoever obstructs the functions of a person who is engaged in the prevention, investigation, prosecution or judicial proceeding proper to his office concerning crimes provided for in this Proclamation or prevents him from carrying out his duties by using intimidation, coercion, violence or any other means of intimidation against him or a person who has close relationship with him or causing the performance or omission of an act in violation of his duty, shall be punishable with rigorous imprisonment from three years to seven years.
2/ Whosoever causes bodily injury, threatens or use violence against an individual who assists a person engaged in the prevention, investigation, prosecution or judicial proceedings of crime provided under this Proclamation shall be punishable with rigorous imprisonment from three years to seven years.
3/ Where the crimes provided for under Sub-article (1) and (2) of this Article entailed grave harm to the body or health of the victim or his death, the relevant laws related to these crimes shall apply concurrently.

5. Crimes Committed By Destroying Evidence

Article 14 of the Ethiopian PSTC proclamation reads:
1/ Whosoever destroys, damage, or hide any evidence to be used in the course of investigation or judicial proceedings of crime provided under this proclamation shall be punishable with one year to three years rigorous imprisonment.
2/ Where the acts provided for under Sub-article (1) of this Article committed in grave manner or where the evidence considered as substantial in the investigation or judicial proceeding of terrorism crime and to be used to prove such crime, the punishment shall be rigorous imprisonment from three years to ten years.

6. Failure to Notify and Aiding a Suspect

Article 8 of the Ethiopian PSTC proclamation reads:
1/ Whosoever without justifiable cause fails to immediately notify to the police or appropriate law enforcement organ knowing that any act provided for in Articles 3, 6, 7, 9 to 10 of this Proclamation is about to be committed, being committed or committed or the identity of the suspect shall be punishable with rigorous imprisonment from one year to three years.
2/ Where the failure to notify is grave and in particular where the notification made in advance could have prevented or contained the commission of the crime, the punishment shall be rigorous imprisonment from three years to seven years.
3/ Whosoever knowingly saves from prosecution, a person who is suspected or accused of committing one of the crimes provided for under Sub-article (1) of this Article whether by warning him or hiding him, by concealing or destroying the traces, by misleading the investigation, or in any other way, shall be punished with rigorous imprisonment from three years to five years.

> *4/ Notwithstanding the fact that it has been possible to prevent the crime or to cause the punishment of a suspect by successfully carrying out investigation or to arrest the suspect the provisions of (1), (2) and (3) of this Article shall be applicable.*
> *5/ Sub-article (1) of this Article shall not be applicable to a person who has a legal right or obligation not to disclose confidential information. Provided, however, a person who has the information that a crime is about to be committed or is being committed shall not raise such right or obligation as a defence.*

From the above provision we can understand that, since terrorism is illegal criminal act which injuries purpose of public safety and disturbs international community and which is manifested in the form of violence or threat of violence against the natural or legal persons; destruction (damage) or the threat of destruction (damage) of the property and other material objects, endanger people's lives; causing significant property damage or approach of other socially dangerous consequences; encroachment on life of a state or public figure,[35] an Ethiopian Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020 criminalised subordinates acts to terrorist acts as terrorism crimes, such as; false threat of terrorist act, possessing property associated with terrorism crime, crimes committed against whistleblowers and witnesses, crimes committed against the judiciary and executive organs, crimes committed by destroying evidence and failure to notify and aiding a suspect.[36] This is basically to prevent; citizens, state or other political institution from such a terrorist activity or from attack targeted on a representative of a foreign state or an employee of an international organisation, which are having the use of international protection, as well as other generally recognised international legal instruments aimed at fighting the terrorism.

Participation of Juridical Person in the Commission of a Terrorism Crime

Recently, developments have been made in criminal law with respect to wrong doings by legal persons. In law, personality is manifested not only in natural persons but also in juridical persons. The application of the doctrine that juridical persons are legal persons separate from the individual persons involved in its operations, is that a company can commit many crimes of strict liability. In relation to that Article 34 of stipulates as:[37] A juridical person other than, the administrative bodies of the State is punishable as a principal criminal, an instigator or an accomplice where it is expressly provided by law. A juridical person shall be deemed to have, committed a crime and punished as such where one of its officials or employees committed a crime as principal criminal, an instigator or an accomplice in connection with the activity of the juridical person with the intent of promoting its interest by an unlawful means or by violating its legal duty or by unduly using the juridical person as means.

[35]Baisagatova, Kemelbekov, Smagulova & Kozhamberdiyeva (2016) at 5905.
[36]See Article 8, 11, 12, 13, 14 and 15.
[37]The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Article 34

The Juridical person is punishable with fine under sub-article (3) or sub-article (4) of Article 90 of this Code; and, where necessary, an additional penalty may be .imposed to suspend, close or wind up the juridical person.

And accordingly, when we look Article 90(3 and 4) it provides fifty thousand Ethiopian birr as maximum limit of punishment. How over when look Article 17 and 18 of the proclamation it increased punishment for juridical person which have participated in the terrorism crimes in whatever capacity shall punished up to one million five hundred thousand Ethiopian birr depending on the nature or seriousness of the act. The basic reason was aimed at preventing and controlling the crime by enabling the security forces to take strong precautionary and preparatory acts centred at the nature of the crime while ensuring perpetrators received penalty proportional to their acts.

Counter-Terrorism Measures Vis a Vis Human Right Approach

Human right approach is also called right based approach. The rights-based approach is a 'conceptual framework,' which means that its proponents work to change the context within which decisions are made. This approach is based on international human rights standards and is directed towards promoting, enforcing and protecting the presence of human rights.[38] In theory, the rights-based approach aims to integrate established human rights standards into the discussions, policies, conventions, and processes that address sustainable development.[39]

According to 2021 Report of the Secretary-General on Terrorism and human rights, Acts of terrorism have a detrimental effect on the full enjoyment of human rights and fundamental freedoms, destabilise Governments, jeopardise peace and security, undermine democracy, good governance and civil society, threaten social and economic development, and disproportionately affect specific groups, including women and children.[40] In some cases, women and children endure most of the violence inflicted by terrorist groups, including a high number of violations involving sexual violence, including rape and forced marriage.[41] Indeed, The Security Council, in its resolution 1373 (2001), empowered States to take a number of measures to prevent and counter terrorism. But in its subsequent resolutions the Security Council harnessed and restricted this power by obliging

[38]Choondassery (2017) at 17-23.

[39]Jonson (2010). The atrocities of World War II put an end to the traditional view that states have full liberty to decide the treatment of their own citizens. The signing of the Charter of the United Nations (UN) on 26 June 1945 brought human rights within the sphere of international law. The Charter contains a number of articles specifically referring to human rights. Indeed all UN members agreed to take measures are there really such large number of articles in UN Charter which deals will human rights protection to protect human rights. subsequent to UN Charter the multiple of human right instruments were adopted by international states and obliged member states to adopt human right approach on their affairs based on their respective treaties.

[40]Report of the Secretary-General on Terrorism and human rights, Seventy-sixth session, Item 75 (b) of the provisional agenda.

[41]Ibid

them to act in light with human right approach.[42] On these the Council stressed that States must ensure that any measures taken to combat terrorism comply with all of their obligations under international law and adopt such measures in accordance with international law, in particular international human rights law, refugee law and humanitarian law.[43] The Security Council also directed states that, the effective counter terrorism measures must be in complementary to the respect for human rights, fundamental freedoms and the rule of law are, mutually reinforcing and an essential part of a successful counter -terrorism effort.[44] The central idea of these Security Council resolutions were that, state must use balanced approach, on one hand it must take counter measures on terrorism to prevent citizens from violent acts and on other side such counter measure on terrorism must not violate rights citizens, recognised under international human right and related instruments. In order to fulfil their obligations under human rights law to protect the life and security of individuals under their jurisdiction, States have a right and a duty to take effective counter-terrorism measures, to prevent and deter future terrorist attacks and to prosecute those that are responsible for carrying out such acts.[45] At the same time, the countering of terrorism poses grave challenges to the protection and promotion of human rights.[46] So, Effective counter-terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction.

When we look the Ethiopian Prevention and Suppression of Terrorism Crimes Proclamation, it points Ethiopia to prevent and suppress terrorist acts, in cooperation with countries having Anti-Terrorism it is believed to be necessary as their objectives and to implement International treaties to which Ethiopia is a party and accepted in particular Treaties and resolutions adopted by the United Nations and African Union.[47] Furthermore, the proclamation provided replacing the Anti-Terrorism Proclamation No. 652/2009, a Proclamation were enacted to prevent and suppress terrorism, has substantive and enforcement loopholes which produced a negative effect on the rights and freedoms of citizens, with a law that enables adequately to protect rights and freedoms of individuals and prevalence of accountability of law enforcement bodies, as one of its core objective.[48] From these stipulations it seems observable that, the current Ethiopian counter- terrorism law planned to adopt human right approach. This is clearly observed as on one hand proclamation empowers state to cooperate with other state to take counter measure over terrorist act while on the other side it obliges state to act in light with

[42]Ibid

[43]Ibid, See Security Council resolutions 1456 (2003), annex, para. 6, 1535 (2004), and 1624 (2005), para. 4

[44]See Security Council resolutions 2129 (2013), 2170 (2014), 2178 (2014), 2395 (2017) and 2396 (2017).

[45]Office of the United Nations High Commissioner for Human Rights on Human Rights, Terrorism and Counter-terrorism (Fact Sheet No. 32) at 7.

[46]Ibid. at 8

[47]See Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, Para. 3 of preamble.

[48]Ibid, see Para. 4 of preamble

Treaties and resolutions adopted by the United Nations and African Union[49] and avoid the negative effect of counter- terrorist measure on the rights and freedoms of citizens. Thus, at least on theoretical level Ethiopian Prevention and Suppression of Terrorism Crimes Proclamation recognised human right approach as its basic principle which has to be observed during enforcement of counter-terrorist measure.

However, some of the substantive part of the proclamation deviates from afore mentioned principles incorporated under preamble of the same proclamation. For example Art 3 sub Article 2 of the proclamation provides death penalty as one of punishment which can be provided for an offender of terrorism crime. Even though Ethiopia does not adopt an ICCPR second optional protocol on abolition of death penalty,[50] international trend moved to abolish death penalty. For example, Article X(2) of Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism provides that, under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out.[51] In addition as discussed in detail on above at ch. 3.1, the proclamation defined the word terrorism in circular manner as "definition of ***Terrorist Acts*** that "Whosoever, with the intention of advancing political, religious or ideological causes for ***terrorising***…" This definition clearly contradicts with Article 15 ICCPR[52] which provides the requirements of nullum crimen sine lege (all elements of a crime must be defined by the law), nulla poena sine lege (all punishments must be defined by the law), accessibility (the law must be publicly available), precision (the line between permitted and prohibited conduct must be clear), and foreseeability (the law must enable an individual to anticipate the consequences of his or her conduct). This definition may lead someone wrong interpretation and this may highly endanger a fundamental/ human rights of suspect.

Conclusion

Since terrorism has a direct impact on the enjoyment of human rights, which is why, under international law, States have both a right and a duty to protect individuals under their jurisdiction from terrorist attacks. Effective implementation of the international legal framework requires states to make every effort to prevent terrorist attacks via legislation, regulations and investigation techniques have to reflect a proactive approach, while ensuring respect for human rights and fundamental freedoms. The UN General Assembly and securitycouncil empowered States to take measures to counter terrorism and violent extremism conducive to

[49]This may also include resolutions passed by Security Council, like cited on above notes.

[50]United Nation Human Right Treaty Bodies Data Base, Ratification status of Ethiopia.

[51]Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism adopted by the Committee of Ministers at its 804th meeting (11 July 2002), X(2)

[52]Ethiopia ratified and adopted international convention on civil and political rights on 11 Jan 1994. United Nation Human Right Treaty Bodies Data Base, Ratification status of Ethiopia, http://treaties. un.org

terrorism and to preserve national security were in compliance with the obligations of States under international law, in particular international human rights law, international refugee law and international humanitarian law. States have taken considerable steps to hold perpetrators of terrorism -related offences to account. Since there was no universally accepted definition for the term terrorism state has a mandate to enact its own legislation that define terrorism, provides counter terrorism measures and related issues in detail. However, in enacting legislation states has obligation to consider two basic international obligations. In first place the laws and measures to take counter terrorist measures must conforms to the principles of legality that requires legal certainty and legality require that criminal laws specify precisely the types of behaviour and conduct that constitute a criminal offence, as well as the consequences of committing such an offence. In second place, all measures taken to combat terrorism must themselves also comply with States obligations under international law; in particular international human rights, refugee and humanitarian law.

Even though Ethiopia has criminal laws which criminalise acts which are danger to the peace, security and development of the country and a serious threat to the peace and security of the world at large, the comprehensive, special and independent counter terrorism law called "Anti-Terrorism Proclamation No.652/ 2009" adopted and entered into force on 28th day of August, 2009. Furthermore Ethiopian Government recently adopted "Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020" with objective to replace the Anti -Terrorism Proclamation No. 652/2009, a Proclamation with motive to prevent and suppress terrorism, to fill a number of substantive and enforcement loopholes which produced a negative effect on the rights and freedoms of citizens and to adopt a law that enables adequate protection of rights and freedoms of individuals as well as to bring prevalence of accountability of law enforcement bodies. 2020 counter terrorism legislation defined acts that constitute terrorism such as completed acts, attempts, inchoate terrorist offences, subsidiary and accessory after facts in relation to the commission of terrorist acts. In addition this new proclamation tried to adopt human right based approach in better manner than its predecessors. But this proclamation is not free from legal loopholes and criticisms. On one hand, definition of terrorist act provided under this proclamation is circular, lacks clarity and it is open for another controversy and difficulty for application regarding on the concept of terrorising. To avoid such loopholes and similar problem, Ethiopia should review its counter - terrorism legislation in light with the requirement of the principle of legality. On other hand, even though new proclaimed come in to force to the law address some of the gaps in the previous Anti-Terrorism Proclamation in conformity with the country's obligation under international law, particularly the Charter of the United Nations, human rights law, and international humanitarian law and this was also observed from the preamble from the proclamation, the substantive part of the proclamation deviates from international human right instruments; for example, it provided death penalty for the crime of terrorism crime, provided disproportional punishments, recognised counter- terrorist measures which are not least restrictive to human rights (permission of sudden investigation, interrogation, interception, surveillance and others without court warrant). So, it is

recommendable that Ethiopia must revise its proclamation in conformity with international human and humanitarian instruments, constitution and at least the general practices of democratic societies accepted/adopted as international custom.

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Language Policies and Linguistic Rights

*By MD. Tanvir Alam**

Linguistic Planning and Policy (hereinafter LPP) focuses on overt and covert laws that determine when, how, by whom, and which language has been spoken, as well as the ideals and privileges associated with all of those languages. LPP researchers study the evolution of top-down and bottom-up policy documents, as well as their application and influence at the municipal, regional, state, and national level. Whereas the emphasis of LPP is on how effects are developed, enforced, sometimes challenged, non-linguistic factors are frequently overlooked. The ecological analogy grounds LPP research in the bigger social, economic, and language context. These frames and analogies are frequently employed in LPP research, particularly in new and emerging fields of study and discussion. LPP uses methods like conversation analysis, corpus analysis, and film studies on a regular basis.

Keywords: *Linguistics; Research; LPP*

Introduction

Personal freedoms are an essential component of the global legal transformation that has occurred since 1945. They've also become an important part of contemporary national discourse. Rights rhetoric has infiltrated mainstream political society as well as many non-legal scientific domains.[1] When an individual or a group does have a claim, it is usually expressed in terms of rights, and most often, in terms of rights expressed in terms of Many organisations have found the rights debate to be extremely beneficial in the past few decades.[2] For instance, the legal basis of some subgroups, such as lesbians, gays, bisexuals, and transsexuals, has improved greatly in a short amount of time, thanks in part to appeals to civil rights.[3] Nevertheless, the right republic's triumph has resulted in an increase in rights complaints. The number of interests covered by rights lawsuits has increased dramatically.[4] The list of civil rights under multilateral treaties is amazing, and it appears to be growing all the time. Many minority language activists, attorneys, and researchers are drawn to the idea of human rights, and they frequently discuss and use national rights as if they were clearly civil liberties or existing before affirmative legislation. A number of experts on minority language problems, for example, have advocated for a human rights

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[1]Homberger (1998).
[2]Ricento (2002).
[3]Shoamy (2007).
[4]Pavlenko (2011).

framework for language rights.[5] They have, in fact, promoted the idea of language civil rights. The argument for linguistic individual rights implies a far-reaching linguistic rights framework for the welfare of all world residents. The linguistics human rights-based approach places great emphasis on communication rights to education.[6] According to the argument, only the right to study and then use one's native tongue, as well as at least one of the national languages of one's place of residency, are considered inherent, basic linguistic rights.

When viewed outside of the framework of education for women, however, the concept of linguistic civil rights is less solid[7]. International bodies can sometimes help to create a false impression of a high level of linguistic rights law. For example, if one goes to the website of the International Council Area of Education, Science, and Heritage Institutions (UNESCO) and looks at the multilateral treaties trying to deal with language groups, one gets the sense that lingual civil liberties are a well-defined classification with a solid foundation in existing global legislation.[8] A study of the substance of forty-four articles related to language groups demonstrates that the collection of linguistic civil rights is less rich, and their area of preservation is less comprehensive, than what it seems on the face.[9] In this work, I will attempt to demonstrate that the linguistics principle of justice on issues of language has several flaws. This method is based on a set of assumptions about constitutional principles that the study of legal interpretation may find at best questionable. To begin with, it is noteworthy that the concept of constraints (specific work area, massive number, demography density, corpora and standing three conditions, and so on) is seldom acknowledged in the grammatical human rights-based approach.[10] The notion of boundaries is much more compelling if linguistic civil liberties become rights, because a sense of limitations is central to the concept of privileges; many civil liberties are not ultimate because they invariably conflict with each other or with other respectable values. This has been emphasised by eminent scholars who have long been committed to minority language preservation and revival.[11]

According to Josh Fish, the premise of an ethnic and linguistic republic must include some sense of boundaries. The main problem, though, is that the actual position and importance of language issues in civil rights, humanitarian treaties, and constitutions could be changed. High aspirations can end in disappointment in this domain. The claims to language human rights stand in stark opposition to affirmative constitutional requirements, both internationally and domestically. The lingual human rights-based approach vibrates between contemplating lingual civil dignity as international legal standards and contemplating them as spiritual values, or makes a claim; among wide-ranging proclamations of massive violations and deprivations of linguistic civil rights, including lingual genocide, and the search as

[5]Bloor & Wondwosen (1996).
[6]Skutnabb-Kangas (2019).
[7]Haque & Patrick (2014).
[8]Bui & Nguyen (2016).
[9]Chayinska, Kende & Wohl (2021).
[10]Batterbury (2012).
[11]Tardy (2011).

to what should be considered unalienable rights, foundational lingual free speech. Certainly, the method is well-intentioned; it attempts to ensure minority language multigenerational continuity and to address some of the current imbalances.[12] Yet, it should be noted that language civil liberties must be regarded in this light as aspirations and ambitions first and foremost, rather than as entitlements already acknowledged by internationally enforceable standards and whose successful fulfilment can be required of states. In this article, I suggest a more comprehensive definition of issues of language. I will demonstrate that the universal absorption or equivalence of linguistic rights in general is not only incorrect but also distorts the connection between government and policy.[13] While civil liberties should limit (at least in theory) government action, linguistic minorities are frequently ceded to the political system. It is important to distinguish between rights that are now categorised as fundamental or constitutionally guaranteed rights and ambitions that one thinks should be classified similarly. Many people, of course, oppose government arrangements and demand the establishment of international law to acknowledge more political rights. That is absolutely justifiable, but I have decided to concentrate on the current state of language usage.[14] All throughout the article, several speculative reasons for the low status or uneven acceptance of language usage in local and international legislation will be provided.

Literature Review

Beginning with our reading, we arrive at the following definitions, frameworks, concepts, and theories that plans and policies have produced in establishing human and linguistic rights:

(a) Linguistic, colonisation, and the essential need for suitable policy documents to mitigate the latter's negative consequences for old colonies:

The truth that the past of languages is inextricably linked to European colonialisation, Asia, and America, both intensely and cognitively, no longer generates any scepticism.[15] This is especially true in the aftermath of the publication of Herrington's seminal novel Language Studies in an Imperial Globe, which was accompanied by a slew of other trophies such as documents on colonial rule and Preacher Philology, all of which have been presaged in some ways by Herrington's momentous job in Language Studies and the equally ground breaking work Dialect and Marginalization. William Johnson, who’s pivotal 1786 email to the Asiatic Society in Calcutta set the groundwork for what would become known as linguistic analysis in the twentieth century, as well as George Abraham Grierson, whose ambitious plan. The Textual Questionnaire of Asia (started in 1894 and completed in 1928), were both intimately involved with the colonial power of the Indian subcontinent, including its complex autocracy.

[12]Kamwangmalu (2012).
[13]Gao (2016).
[14]May (2003).
[15]El-dali (2011).

However, such actual events only serve to emphasise the close proximity of the reality of the new linguistic philosophy to the era of imperialism and the mentality it promoted[16]. They offer no conclusive evidence of a direct connection or suspected coordination or cooperation here between the pairs. However, as soon as it starts to give a brief overview, we are hit by the realisation that the colonialist mentality and its poisonous ideology were woven into the very thoughts of these early forerunners of modern "scientific" linguists. That mentality has yet to be completely tracked down and eradicated, and it will continue to rear its head occasionally until that mission is completed.[17]

This is true when it comes to many conceivably focused linguists' reticence or lack of desire to fully face the dramatic reforms in language ecosystems arising from unparalleled massive immigration and people all over the world starting to come into intimate interaction with each other due to digital rebellion, making fun of Saussure's concept of "filibusters," which linguists hold dear to their soul. The forthright declaration that contemporary languages are, at their core, still 19th-century fields serve as a gloomy reminder that some of their fundamental notions need to be completely overhauled in order to remove the remaining remnants of their imperial baggage. The very contentious notion of the "native speaker" is one of Contemporary Linguistics' work instruments that reveals its imperial origins[18]. It is "one of the foundation myths of contemporary linguistics," because it is linked to a number of other well-entrenched notions that shaped the nineteenth-century Zeitgeist. She keeps adding to her famous book "The Beginnings of the English Native Person Speaking" as it gets close to the end. Even though it's been present for a long time, Anglo-Saxonism acquired a decidedly distinctive character in the nineteenth century, which rendered it compatible with the increasing race theory being established in the new science of man, including by colonial thinkers and advocates. "The British view of Asia was extremely tactile," it says at the start of her novel. The clumsy way that the inherent challenges of broad linguistic diversity are very often stage-managed in such set-ups reveals the continuing impacts of European colonialism on the nascent countries of Africa, Asia, and America. To start, let us recall that language speakers are primarily a European fantasy, a method of addressing all around the fifteenth century, maybe around.

The entire concept had come to maturity as a result of a strategy of purposefully restricting minorities' right to use their own language for the sake of "nation-building" (thus the late nineteenth century phrase "One people, one government, one tongue"). When these European countries went on a rampage to conquer and colonise Asia, Africa and the Americas, they brought with them a new idea of national identity based on a shared language and tried to make linguistic policies that fit with this idea. As the articles in this collection that examine the complicated linguistic circumstances of Bahraini and Saudi Arabia indicate, the outcomes were a complete disaster, particularly in the less secure areas of Africa, and the ramifications are still felt years later. The publishing of this novel, titled Linguistic Plans and Programs: Philosophies, Ethnic Groups, and

[16]Erikson, Schipper, Scoville-Simonds *et al* (2021).
[17]Guyo (2017).
[18]Mufwene (2002).

Symbolic Interaction Areas of Authority, is a great addition to the increasing articles on the subject and it is certain that it will give a much-needed jolt to some to awaken from their 'doctrinaire deep sleep.' As we read through the chapters that make up this book, it becomes clear that the writers understand the importance of translation studies in mitigating the erosive after-effects of colonial rule that still exist, although in nuanced and often unnoticeable ways, in most of the individual nations that were only recently sculpted out of the ruins of colonial rule. Language instruction strategy, of course, is a critical and fundamental aspect of this approach. Because, as the authors point out in Chapter One, "what qualifies as a language" comes out to be a major concern in post-colonial reality, which the authors of this series of papers focus on through tales from Africa, America, and the Arab world. The participants say that teaching approaches in these kinds of settings are influenced by this tiered concept of speech and the system of linguistic rights that it implies.

It is difficult to stress the critical need for investigations like those described in this book. However, they also emphasise the need for more voices from the South to join the crowd. There is a good reason for this: imperialism and its residual effects are plain to see and assess. However, how one goes about it will reflect one's position and viewpoint. In other words, from the perspectives of those on the 'Khushi' half of the colonialist split and those on the murky half, there are sure to be at least two approaches to the problem. Descriptions of the legacy of colonialism that claim impartiality and moral impartiality frequently wind-up trivializing (no humour!) the true narrative of imperial slavery's enormous pain and long-term effects. Only real concerned speakers talking on behalf of the oppressed can effectively advocate for structural adjustment in the shambolic condition of things left over after colonialism and make reparations for the ongoing inequalities. As a result, the findings included in this book are a step in the proper direction.

(b) Language strategy and preparing modernity's post structuralism Landscape:

Language is a complicated, multifaceted, and culturally contentious topic. Language learning is any systematic endeavour to influence current aspects of language choice, organisation, and learning. While language learning is prevalent in all facets of life, it is most visible in the educational field, where it is concerned primarily with decisions concerning the language of instruction. Since education is generally seen as the foundation of cultural and ideological regional integration, its importance can be recognised. This process generates a direct or indirect official language for a certain organisation (e.g., a school): a set of rules or standards meant to direct language conduct. It is said to have introduced the word "state development" and "vocabulary development" as a way to standardise the Norwegian language. Linguistic policy differs depending on a person; levels of participation; goals; individuals and institutions engaged; underpinning linguistic ideology; local contexts; power dynamics; and historical background, among many other factors.

For instance, North American, European, African, Asian, Latin American, and Ukrainian cultures, for instance, do not have the very same theoretical-methodological concerns and techniques. Despite this diversity, the establishment of language laws as an organised field coincided with that of psycholinguistics. A conference hosted by William Brilliant at California State University in 1964, which brought numerous experts, was one organisational marker of this rise. We regard language planning's birth as a discipline to become an ideology structure that enforces an "area of things, a series of methods, a corpus of dependencies mainly, a game of laws and descriptions, of methods and technologies. This initial stage of language policy formation in the countryside as a discipline field, taking aim at standardizing and trying to rationalise mainly depending on the characterisation of the connection between language families and their functional areas within the confines of the unified state, was marked by what we can consider "crosslinking partisanship. This era is evident in a field-defining corpus of writings from the 1960s and 1970s that connected language management with industrialisation and nation-building activities.

The release of Language Difficulties of Emerging Economies in 1968 was one illustration of the experts' interest in policy matters. The notion of "epistemological patriotism" directed linguistic planning forward towards a specific linguistic philosophy. Ideologies are common sense ideas about linguistic structure and functionality that are implemented through institutions and everyday activities to prescriptively position their practitioners in the social structure. Aspects of language are beliefs about the purposes, goals, conventions, expectancies, inclinations, and responsibilities that influence linguistic practice. Ideologies express larger socio-political philosophies. Any organised selection of a language variation as the information transmission for conducting governance and schooling has enormous stratified implications for the groups or individuals whose variations are excluded and undervalued. "Position policy choices conform to ruling elite beliefs or react to conflicting ideas among those maintained by the ruling elite and those of other diverse stakeholders," we mean in this way. In other words, a "reflectionist" view, in which language is considered as a corpus of phrases accounting for autonomously existing things, shaped the creative phase of the discipline of applied linguistics. All policymaking debates on linguistics, however, are motivation and effort in the respect that they are socially constructed, and so they are related to questions of power dynamics and inequalities, as later key theoretical advances demonstrated. When a government 'brands' a vernacular under the correct institutional constraints, a modern social construct is created; a new image is forced on the empirical reality. Standards, hierarchy categories of language (colloquial expressions, normal, classic, hybrid, and dialect), and the identification of linguistic forms are instances of an initial domain of items and procedures in language learning and teaching (among many others, instructional languages, formal, global, lexicon modernisation, renationalisation, and etymological unity). In its broadest definition, standardisation entails the choice, definition, and application or enforcement of a standard. The rhetorical techniques of codification and socialisation force order on the chosen norm, resulting in a dichotomy between normal and non-normal, but it's these culturally implanted

values that drive people's language choices. As a result, since they construct systemically sanctioned linguistic hierarchy, these processes are tactics for reaching agreement, authority, and inequity. To put it another way, standardizing and cutting back on the factors that distinguish presents the effects of factors that determine opportunities in an uneven socio-linguistic body of work. It's a profoundly democratic activity since it uses normalizing and naturalizing tools, including schooling institutions, to build distinction and dominance. Both theorists and people who worked on building a country's social identity were involved in language planning and policy.

Standardised, as practice of linguistic strict discipline or institutional, plays a critical part in the creation of "individual nations," according to a group of specialists in the subject of nationalist research. As a result, language learning has always been a political construct. Language has aided in the construction of abstract, separated, and regulated (normalised) language conceptions that have been replicated by educational guides. The term "normal language philosophy" describes this perspective on English. Furthermore, at the start of language laws as a discipline field, "in keeping with the prevalent academic weather of science positivity, only a minority of LPP founders were extremely sceptical about the boundaries of technological procedures, and many envisioned exorcising subjective nature and preferences from consideration." These technical considerations have taken precedence over political concerns, assisting in the formation of a realist approach that, despite repeated critique, continues to serve as a model for current language laws. The critical linguistics ethnography method for linguistic design arose as a response to established methods and is influenced by social theory. The concept of ‘social environment' is far more complicated in this viewpoint than in the old approach. A backdrop is a dynamic system in social contact that is defined and regulated as a cultural and social area by a generally positioned presentation of an assemblage of societal beliefs, information, circumstances, and behaviours. It is a multi-layered system of physical and metaphorical relationships that organises the use of speech. Contextual factors are not solely strictly regulated, exceedingly instructed, or objectively engrained, as in ritualistic discourse commands (e.g., general practitioner interplay) or other organisations of socialisation (e.g., education), where people are placed as per fairly constant roles (e.g., Silverstein's preconceived indexicality). Dialogic activities build and alter settings, making them "emerge." The conclusion for applied linguistics is that research needs to focus on the emotional realm of ideas and representation as well as the factual features of the environment. In this popular tendency, language is seen as divorced from its enabling context in the popular tendency (this is required before standard linguistics are imposed). On the other hand, in the scientific viewpoint, "speech" is understood as "cultural," but it is always dialogically permitted, regionally controlled, and appreciated. Language policy is a paragon of practical dialogue in this way since it connects linguistic and socio-political problems. Most notably, the conventional paradigm's issue of the "autonomous person" has been transformed into a matter of "speech" and action in the metaphorical frontiers of power dynamics. Thus, the complete discourse machinery, including historical circumstances of structure and perception that (de) value language output, must be

studied. Language learning follows the official language and is neither consistent nor homogenous. Linguistic Conflicts and the Way People Communicate for instance, the Study of Contemporary Norwegian, for instance, identified four layers of translation studies: normative choice, programming, integration, and language additional explanation. These tiers were eventually expanded to also include corpus making plans (scripting, trephinations, syntax, lexical standardisation, poetic handbooks), status making plans (statutes and rulings regulate language indicators or usage), development proposals (language learning practices), making plans of usage (partisanship of linguistic propagation and use), and prestigious making plans (partisanship of linguistic propagation and use) (evaluation of linguistic uses). We can add "discussion design" to these 5 levels because it deals with the ideology activity of organisations, communication, and authoritative discourse in the production and dissemination of ideas and linguistic ideas. We suggest that the idea of action at macro, mesa, and micro stages in language planning reflects a "dynamics of size."

There are two actual political aspects at play in this scalability point of view as tried to apply to language laws as one that ties official language to organisational, straight up and down, formal, and lawful behavior; and another that concentrates policy statements on local traditions and behaviors, philosophies, and motivating factors that ultimately lead subject areas to choose one or another preferred language. For instance, it recommends a convergence of local policies and procedures, focusing on linguistic control, linguistic ideology, and linguistic behaviours. The lines between applied linguistics and teleology become increasingly blurred in this scenario. While linguistic planning research has focused primarily on the macro scale, it is crucial to understand that policy and planning acts are at the micro level as well," says the author. A level geopolitics has also influenced what constitutes linguistics in Africa, Latin America, and the Arab world. Furthermore, in such situations, educational strategies are influenced by this tiered aspect of language and the system of linguistic rights that it implies. In this view, law and management, in this view, are philosophical socio-political systems that are entrenched both in broad and regional settings. According to the study, "Policy and planning are ideology practices that help to maintain uneven power dynamics among dominant and minority dialect communities." We believe that by assuming pre-organised concepts and procedures that can be applied to regional languages, we risk reproducing global behaviours and beliefs that have historically favoured some individuals and organisations over others (the so-called West- and Southeast-oriented languages) (the so-called East- and South-oriented thoughts). We also recognise that an examination of the linguistic rights system must take into account capitalist development and technologies, which have turned ideals of variety and native customs into commodities of want and purchase. "Language and cultural relativity are hot topics in the business world," it says. It's a successful industry studying linguistic variety and marketing the outcomes of that study. Propose a timeline in a review of the literature on the topic of language policy and planning:

- Emergent literacy planning studies, which began in the 1960s and focused on the geopolitics of reunification, in which speech was viewed as a commodity and subjected to technical skills;
- Critical literacy policy, which addresses the social processes that underpin language policy and regulations; Expanded work in the late 1970s and early 1980s that began to question the positivist paradigm of pioneering pioneers;

We argue that a change like this seems pedagogical and only makes sense in North American and European contexts, but it does not cause any problems for colonialism and post-colonial applied linguistics. It unifies the goals, kinds, and methodologies of language planning into a single framework. We know and understand both as follows:

- The influence of Euro–North American viewpoints on how dialects have been created in non-European or non-North American settings and
- Local non-Euro–North American ideas and "perceptions of speech" require an analytical and historic approach. As a result, ethnography, as it has been developed in North American and European academic settings, may contribute to the reproduction of past colonial notions.

We believe that understanding how colonial recollections have been replicated and modified into modern applied linguistics is aided by the past. Finally, because laws are inextricably linked to certain racial attitudes, language stories also require specific means of presentation. Immigrants' or refugees' language difficulties, for example, are also issues of identity in the context of what defines membership in a country or nationalist conditions.

In some cases, the use of the preferred language is an "established" basic right. Destructive philosophies portrayed speech as a species (for example, "verbal death"), laying the groundwork for the mainstream discussion on language. The pastoral nomads' philosophy of terms (for example, Herrington's discussion on language death) are methods of place-making and awareness production. A critical interpretive ethnographic viewpoint argues for the incorporation of language within a concept of transformational grammar by focusing on how local socio-linguistic markets organise language abilities. From a social, historical, rhetorical, multi-lingual, and multi-semiotic linguistic standpoint, the concepts of absorption and assimilation, as well as accent, variation, and linguistic, can all be problematic.

The semantic structuring of social areas is another topic that is handled by language learning. The term "lingual landscapes" was coined in the area of language management, specifically in the settings of Belgium and Quebec, to emphasise the linguistic in structuring public space via linguistic regulations on visible signs. Yet, in the usual method of applied linguistics, which concentrated primarily on concerns connected to corpora and position planning, the notion of language systems was under-theorised and under-researched. It offered a description of the notion that became the standard as the linguistic environment of a certain area, province, or urban agglomeration is formed by the languages of

official street signs, commercial posters, road names, street names, business shop fronts, and publicly posted signs on government facilities. Though the seminal paper used an analytical method to investigate languages as a factor of ethno-linguistic vigour in multilingual settings, research methods and metaphysics have since advanced significantly, employing a variety of multiple perspectives and methodologies such as semiology, ethnology, and discourse. The course's research today incorporates sociocultural philosophy to investigate how cultural and contemporary factors manifest themselves inside the language system. This anthropological historical focus challenged the abstraction and self-contained concept of "speech," rather expanding it to include all kinds of semiotic interaction and how they are connected to certain other societal, geopolitical, and economic contexts.

Methodology

This presentation provides a basis for language policy and planning as well as an outline of primary factors. Following a short emergence to the ground that explores some overall key issues by providing a framework for the kinds of activities that describe the field, five phases cover four iconographic areas of major focus to linguistic organisers, namely prestige planning, corpus preparation, dialect planning, and prestigious planning, with a concluding part looking at approaches to translation studies, with a focus on minority language privileges. Key publications summarizing crucial current trends are reviewed in these categories. As a result, we used journal articles from reputable sources for the research methods, while the presumptions were made on a contract basis. Papers that look at language planning from a crucial point of view show how strong the course has become again.

(a) Framework

Linguistic policy (declarations of intention) and plans (application) (LPP) are described as preparations frequently sizable and global in scope typically performed by authorities with the goal of influencing, if not changing, current societal ways of speech or literacy habits. The "linguistic design" procedures on which the field was to be founded originated after WWII, but it was not until the late 1960s that it began to take shape as a subject. Although conceptualizing the subject was an early interest, there is still no widely accepted foundation for the subject.

The goal direction to the 4 activities (status preparation, corpus planning, dialect planning, and prestigious planning) generally used to describe self-control is examined all over strategy and planting planning in a structure that implies that consciousness of such objectives may be blatant (informative, scheduled) or secretive (implied, unexpected), and may take place at several different levels (macro, mesa, and micro). Other methods of defining the subject (e.g., linguistic administration) are feasible. Although the sets of activities and their aims sound right for explanatory reasons, they are extremely simplified by nature. In reality,

rhetorical and management objectives are usually numerous and more complex, spanning a variety of activity kinds and perhaps clashing. Based on the chapters produced for the Language Learning area, I'd want to propose four probable broad advancements, each with likely outcomes for the area's orientations. These sections were built all around the policy and planning framework for dialect that was initially provided:

- Stages of language preparation While much of the research described in LPP focuses on political or macro-level linguistic policy and planning, micro-planning is becoming increasingly popular. While the latter has significant consequences for goal formulation and allocating resources, the latter while understudied in literature focuses on specific behaviour and is gaining in popularity.
- False linguistic design While this may appear to be a contradiction in the analysis of language planning, the failure to achieve LPP clarity, or to tackle some language issues at all (namely, (in) decisions), has an impact on how languages are learnt and delivered, as well as how they are contextualised and perceived.

The role and objectives of planners have become more important as LPP has evolved from being considered as a wide range of scientific processes to one with an emphasis on context. Planning for compulsory early foreign language acquisition, particularly English (ESL/EFL/EIL). Many countries across the world are using LPP to boost early exposure to international dialects (particularly English) with the aim of improving competency and allowing them to participate in the information economy. LPP will look at how these programs were made and how well they work, as well as how they affect language learning education for regional, minority, indigenous, and other groups. Each of four types of linguistic strategic planning we'll look at now illustrates these challenges to varied degrees.

(b) Status Planning

It looks at high-level preparing queries like "Which 2nd cultures should be recognised, understood, and tried to teach?" and "What facets of the primary language) chosen must be known, managed to learn, as well as tried to teach, i.e., which wide selection and to what level?" as well as "Who really should learn them and whom will they be tried to teach?" and "When can learning start and in what situations?" Samples from the Netherlands and Southern Europe are used to demonstrate these concerns. According to the study, there are four dimensions to the position of language skills:

- Their position for communication's sake.
- Their role as a lingua franca or medium for teaching language skills.
- Their status as immigrant or ethnic minority tongues.
- The extent to which linguistics or linguistic minorities are affected by l2 learning development.

When adopting a status plan, all of these factors must be considered. Regardless of the status quo's goals, planning decisions must be based on public needs. The focus of the assessment then shifts to the type of requirements and how they might be recognised and thus prepared for through assistance in their development. Finally, it argues that while there is a sufficient body of knowledge and conceptual foundation to address all status issues in the field of l2 learning, there still appears to be a preferred choice for under informed laymen (party leaders) working to develop laws without regard to research evidence or advice. (Expresses concern about secret groups, who runs them, and the need to start teaching language early).

(c) Corpora Planning

It addresses what is understood about corpus planning and its relationship to linguistic research and education in a review of the 2nd quintessential region. Corpus planning, with its focus on the nature of the language to be taught to the students, is the developing method with the most language knowledge for its research methods, but it is moulded by prestige strategic planning. Its outcome contributes greatly to communication plans, and it may make a contribution to, or advantage from, a language's social reputation. The appropriate begins by outlining the scientific foundations for corpus strategic planning (i.e., trephinations, grammaticalisation, and lexicalisation), as well as exposition lexical growth, aesthetic advancement, and restoration), with examples from both political entities and tongues. Knowing this cycle lays the groundwork for creating curriculum planning solutions, notably syllabi preparation and material design. Educators frequently share information in the preparation and adjustment of syllabuses and materials used in classes. Therefore, the significance of creating a system for language education becomes clear at this stage. The increasing usage of English as a lingua franca among non-native learners is one topic that becomes more of an issue as English language teaching develops. The fact that many educational resources are created by L1 groups and reflect norms becomes a key corpus design problem. Furthermore, in such situations, it is being debated whether canonical or various local literature are the best vehicles for instruction.

(d) Dialect Planning

In one ‘s evaluation of communication policy and planning, also known as buyer-supplier, they found that in many countries, communication policy and planning are the exclusive language policy actions, but that such actions are restricted in their effect due to slow information sharing prices, a small viewing public, and a shortage of funds. While communication planning is most commonly associated with schools, it can also apply to less structured learning environments in the public or in business. The chapter then looks at illustrations of the execution of seven main communication policies (connect strategy, selection and training, syllabus strategy, methods and equipment policy, resource planning policy, society policy, assessment policy) and four major communication preparation (linguistic

upkeep, linguistic target acquisition, foreign/second language teaching, and interlingual) objectives in three countries: Asia, Europe, and Norway.

Findings and Discussion

Although reputation or reputation management is not a well-developed field within LPP, it proposes that users start by looking at three cases as Wales, Malaysia, and Québec. The study of LPP in these political groups shows that managing your reputation can be broken down into three different tasks as follows:

- First, as in Québec, it appears that appearance (accolades) is linked to racial or municipal identification (real or virtual) and linguistic development.
- Secondly, in Wales, the picture appears to be employed to illustrate a technique of establishing and managing policy statements.
- Finally, as in Malaysia and especially in Québec, image has much to do with motivation as well as the actions of language coordinators and the people they serve. Each of these three types of images is examined in depth, with additional examples provided to demonstrate the classifications.

It shows how many motivating factors associated with powerful nations and powerless people influence language policy creation in the last section. Problems of reputation or brand have an impact on what dialects are taught and how minority language privileges are implemented. It tells a unique narrative about how people can try to affect the status and reputation of linguistics. Minority language liberties (MLR), also known as linguist civil rights, have become more prominent as LPP's activity has become more intimately involved in its social and economic relationships with the areas where language policy and planning take place. The chapter examines the sometimes serious and complex character of the interplay between LPP and MLR, emphasizing LPP's larger social, economic, cultural, and political and social analyses, especially as it relates to the subject of minority varieties' position, usage, and influence in the world today. This finding contrasts with LPP's politically neutral, historically inaccurate, and technical paradigms, which have distinguished it since its inception. While this modern construction method for building languages fluently was considered as a virtue, it resulted in the marginalisation of minority languages and their users, as well as the creation of MLR studies as a result. In the framework of linguistic ecology and language civil rights frameworks, the chapter also highlights MLR activists' worries. Linguistic transition as well as lost opportunity; linguistic ecosystems; nationalistic, porphyry, and chronological social constructivism; linguistic substitute and mobility; lingual civil rights; tolerance-and publicity linguistic privileges; and advancements in international and domestic legislation are among the study topics covered in this paragraph. It might well be claimed that as a response to these study results, linguistic coordinators and legislators are now more openly discussing the political and social dimensions of LPP, as well as its

implications for minority languages. These challenges are also making their way more clearly into the language teaching field in the micro-planned perspective. This paper gives an overview of LPP and looks at some recent changes and possible future trends in the field of translation studies. It also looks at some of the criticisms that have been made about it.

Conclusion

In terms of the relationship between LPP and Language Functions, carrying out research on language laws reinforces Applied Languages as a growing field, broadening further than language teaching to include a regard for human interference in dialect and its societal consequences. Practical linguistics is now widely regarded as a broad field concerned about social concerns wherein speech plays a central role. As a result, recognizing what subjects of involvement and conversation in LPP have been allows people to clarify what the latest events in several countries Language Studies have been, to the extent that having to look into the LPP investigation of time to look as per various research hypotheses ratifies the parts of the city "in discipline" essence. Rising linguistic policy work in light of the following theoretical propositions will enable agents from various positions on issues (education, including such educators, school administrators, and profs) to measure the impact of linguistic policy choices on their everyday lives, as well as recognise their own roles in the development of explanation and allocation of these policy initiatives. It can also reveal the patterns of language strategy and wider social, financial, and political goals. The findings described in this study can be used as a resource for people with an interest in LPP. It may also aid in self-awareness within the area, revealing what countries researchers consider to be important study topics as well as certain issues that must be addressed.

This study has provided us a look into the possibilities of developing future studies evaluating recurring theories and approaches in several countries studies or examining the architecture of collaborative relationships in creating knowledge in the country’s domain of LPP. We feel that research examining a field's consciousness helps us to better comprehend research methods and future research directions. In other words, where we are now and where we are headed in the field of LPP.

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