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ATHENS INSTITUTE FOR EDUCATION AND RESEARCH

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

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Before you submit, please make sure your paper meets some [basic academic standards](#), which include proper English. Some articles will be selected from the numerous papers that have been presented at the various annual international academic conferences organized by the different [divisions and units](#) of the Athens Institute for Education and Research.

The plethora of papers presented every year will enable the editorial board of each journal to select the best ones, and in so doing, to produce a quality academic journal. In addition to papers presented, ATINER encourages the independent submission of papers to be evaluated for publication.

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

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



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Recognising the Various Trends of Globalisation: Inequality in International Economic Relations

By Isaac O. C. Igwe*

Globalisation is based on freedom of economic transactions, aimed at making the world a global economic village, as an engine of interconnectedness, growth and increased living standards of all citizens of the world. It is presupposed to be the radical and revolutionary approach of deconstructing unequal economic policy as it affects developing countries. Deconstruction for Derrida is justice, or it is situated between law and justice and will be applied in solving the global economic marginalisation of the developing nations. This treatise will argue economic justice in the light of 'erga Omnes' after John Rawls, for global economic justice, fairness and equity in the distribution of economies, to balance the need for growth in wealth with regards to the deprived developing nations.

Keywords: *Deconstruction; Developing Countries; Law; Equity; Justice; Fairness; Globalisation; Marginalisation; Distribution; Economic.*

Introduction

The concept of globalisation has been used in diverse contexts and is at the centre of one of the most contentious debates in contemporary intellectual circles. The idea of competing forms of globalisation theory is itself problematic. This is because the term denotes a proposed interpretative framework for understanding the world. Rosenberg opined that undertaking such a study is 'fraught with difficulty'.¹ It becomes even more difficult when issues of global governance pertain to analysing the problem of 'weak' states.²

The problem mostly relates to the economic aspect of the political and governmental dimensions of contemporary globalisation. Its central ideological basis is global capitalism and the relationships between national governments and institutions of supranational governance. After the Cold War and the so called 'triumph' of capitalism, neo-liberal economic development became the order of economic activity across the world.³ The International Monetary Fund (IMF), the World Bank, the World Trade Organization (WTO) and the Transnational Corporations (TNCs) have been active in this direction, propagating policies in economic activities across the globe.

Globalisation discourse is fragmented into different aspects of human interaction: economic, political, financial and cultural globalisation, to mention

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¹See Rosenberg (2001).

²See Fukuyama (2004).

³See Fukuyama (1993).

but a few.⁴ To some degree, these sub-concepts represent an acknowledged structure for understanding the term globalisation. The problem inherent in this approach is that one cannot separate them conceptually and empirically, as interrelations exist among the sub-concepts.⁵ Without denying either the existence or importance of the systems commonly described as political and cultural globalization, this chapter will focus on economic globalisation as primarily a synonym for the development and effects of a neo-liberal capitalist world economy over the last fifty years.

Overall, globalisation has introduced serious challenges to the very basis of governance in the world today. The continuous increase of TNCs, Foreign Direct Investments (FDIs), global financial interactions and supranational institutions has taken away some authority held by nation-states and has led many to argue that national sovereignty has been eroded. A critical overview of the globalisation debate argues that the path of global economic development is leading to greater inequality in a world devoid of social justice.⁶ Accordingly, critics have argued that the accumulation of wealth and power by certain capitalist elites at a global level has shown that TNCs are driven primarily by greed and profit at the cost of developing countries.⁷

This writing will attempt to define the term 'globalisation' as it affects the freedom of economic transactions through making the world a 'global economic village'. This implies that globalisation is an engine of interconnectedness and growth that brings increased living standards to the Third World but this writing will argue that globalisation is a Western framework, structured and designed to subjugate the economic lifeline of the Third World, such that the North becomes richer while the South remains poor. The approach taken is critical of world economic process and pessimistic about the slim chances of regulation of a fair international economy. It will conclude by making the case for a radical and revolutionary deconstruction of this unequal economic policy as it presently affects the developing countries.

Historical Structure

The literature of capital flows from the core rich to the periphery poor countries, otherwise known as globalisation, dates back to before the end of nineteenth century. As now, there is vigorous contention as to whether the lending or borrowing countries benefit most. Early Marxists like Hobson (1902)⁸ and Lenin (1917)⁹ conceived the idea as a continuation of the strategic accumulation of wealth by the core rich nations. They perceived that the industrialised nations faced overproduction and decline in rates of profit and looked for foreign markets

⁴See Castells (1996) (1997) (1998).

⁵See Held & McGrew (2002); see also Brawley (2003).

⁶See Vandana (2004).

⁷See Bello (2002); see also Amin (1974).

⁸See Hobson (1902).

⁹See Lenin 1917.

through colonial expansion or subtly by economic domination in the form of foreign investment. This line of argument later became the basis for ‘dependency theory’.¹⁰

Openness in trade started before World War One. This was an age, prompted by various technological advances, of liberal trade, a considerable global free movement of people and uninhibited capital movement. It brought remarkable economic growth and prosperity. The Gross Domestic Product (GDP) per head at this period, according to Angus Madison rose at a rate of 1.3 percent a year in the world between 1870 and 1913.¹¹ Nonetheless, victims of colonialism like Africa and Asia did not benefit as others from the rise in prosperity. The first globalisation period, ruined by World War One, led to the economic disarray of the interwar period. The US failed to share costs of the war, UK and France became economically weak, there was bitterness between Germany and France, while the rise of Russian communism did not help issues, so the first liberal order failed.¹² The process of globalisation is not new but the term ‘globalisation’ is new.

Officially, globalisation did not in the strict sense of the word start until the 19th century. Although the first era of globalisation could be argued to have started between 1870 and 1913, it was not officially globalisation per se, but a process which cannot be properly worded as such. That era could be properly described as the era of liberal trade order or economic openness. The process started from different places and in different ways but all culminated to jumpstart globalisation. Similar events are the age of European exploration, the slave trade, the expansion of Islam, the Great Depression, the Industrial Revolution and the technological revolution.

The history of globalisation has become the subject of ongoing debate and is not the essence of this writing, which focuses on the unequal policies of economic globalisation as demonstrated by the Bretton Woods institutions for the past 50 years. The second era of globalisation dates back to the nineteenth and early twentieth century. The classical work of Karl Marx and Friedrich Engels,¹³ and sociologists such as Saint Simon and Augustus Comte recognised how modernity was integrating the world.¹⁴

It was not until the 1960s and early 1970s that the term ‘globalisation’ achieved wide fame among academics and economists when large US multinationals became operational. Theorists began to argue that firms needed to become global instead of duplicating branches in multiple national-scale operations. By the 1990s, this process was referred to as ‘globalisation’ and the term entered academic, management and major business literatures.

Kenichi Ohmae argued that globalisation at such a solid level might become a challenge for business towards the end of twentieth century.¹⁵ Another academic

¹⁰See Furtado (1965); Prebisch R (1950).

¹¹Maddison (2003).

¹²Wolf (2004) at x-xviii.

¹³See Marx & Engels (1980).

¹⁴See Holton (1998).

¹⁵See Ohmae (2004).

contribution in the realm of social and cultural theory was most notably Marshall McLuhan's media-centered idea of the 'global village.'¹⁶ This was based on finding a way in which modern expanding global society could integrate with the new forms of communication. There were also many other contributions to academic literatures in the area of political economy and social services with regard to post-war international economic development and politics.

These academic theories were drawn on in an argument based on a 'development-as-modernisation' paradigm with a sceptical view towards the new Bretton Woods institutions in relation to the Third World.¹⁷ Some of these arguments were derived from the social, political and philosophical theories of Marx, Weber and Durkheim. The proponents of globalisation theories in this dimension were Andre Gunder Frank and other dependency theorists, who maintained that the developing nations were subjected to a state of underdevelopment by the industrialised capitalist world.¹⁸ Frank theorised that if a country's economic strength is determined by its colonial history it certainly will control its global power.¹⁹ He argued that when development is export oriented, it creates imbalance and weakens the developing world.²⁰ He frowned at the notion of 'world system' and suggested it should be rightly called 'single world system', based on the economic domination of the industrialized nation. He argued that the world system was created only in the 4th millennium BCE which witnessed improvements in human culture and stood as the beginning of the Bronze Age and Writing.²¹ In Gunder Frank's early work he sees underdevelopment in terms of a chain of exploitative metropolis-satellite relationships wherein:

*... at each point the international, national and local capitalist system generates economic development for the few and underdevelopment for the many.*²²

By the same token, Immanuel Wallerstein's 'world system analysis' from a Marxian viewpoint argued that the capitalist world is described by a core-periphery relationship and that the capitalist system has overtaken the world in the twentieth century.²³ Wallerstein criticised world system as a global economic structure that redistributes resources from the underdeveloped raw material-exporting world (periphery) to the developed (industrialised) nations through the market, the system by which the developed world exploits the underdeveloped.²⁴

¹⁶See McLuhan, (1962); McLuhan (1964) at.3; McLuhan (2003) at 6.

¹⁷The new Bretton Woods is the institutional troika which includes the World Trade Organisation, the International Monetary Fund and the World Bank which was created to channel resources to the developing nations in order to strengthen the liberal infrastructure.

¹⁸See Frank (1979).

¹⁹See Frank (1967).

²⁰Ibid.

²¹Immanuel Wallerstein contrasted Frank's opinion and said that the world system was actually formed at the beginning of the 16th century; See Wallerstein (1980) at 347-357.

²²See Frank (1969) at 7-8.

²³See Wallerstein (1979). For further similar argument on the same subject, see Wallerstein (2004) at 23-30.

²⁴See Wallerstein (1980).

Wallerstein argued that world system is a framework of developed nations competing amongst themselves to gain world resources, economic dominance and hegemony over the poor countries. They come into the limelight when they achieve economic dominance in the form of productivity dominance, trade dominance and financial dominance.²⁵ For Wallerstein, the capitalist world economy was that in which production was constantly expanded so that profits could be made, and producers innovated to expand the profit margin.²⁶ Expounding on this, Wallerstein made it clear that capitalism did not necessarily mean profit margin by persons or firms when he stated that:

*“ [...] We are in a capitalist system only when the system gives priority to endless accumulation of capital. Using such a definition, only the modern world-system has been a capitalist system. Endless accumulation is quite a simple concept: it means that people and firms are accumulating capital in order to accumulate still more capital, a process that is continual and endless”.*²⁷

Before this time, Wallerstein defined capitalism as ‘a system of production for sale in a market for profit and appropriation of this profit on the basis of individual or collective ownership.’²⁸

Globalisation actually gained influence following the collapse of state socialism and the consolidation of capitalism worldwide when public awareness intensified in the 1990s. However, the sovereign states in the 1990s were constrained by risks and uncertainties. They perceived the era with an attitude of global market expansion. This was substantiated by the end of the Cold War and the ‘triumph of free-market capitalism’.²⁹ The process accelerated through the 1990s as globalisation became commonplace and generated controversies among academics and theorists.

Scepticisms about Globalisation

There are numerous opinions denying that today’s trends of globalisation represent anything totally new. The argument is that the phenomenon is not new as it began at least several centuries ago, with some considerable universal openness at the peak of the international economy prior to the 1914 liberal economic order. But the terms of world trade, the functioning of the financial system via the gold standard, and every other significant aspect of the pre-1914 economy were imposed and maintained by European states.³⁰ Sceptics like Hirst and Thompson argue that the present international economy and interdependence is less open. In

²⁵Ibid.

²⁶See Peet & Hartwick (1999).

²⁷See Wallerstein (2005) at 23-24.

²⁸See Wallerstein (1979) at 66.

²⁹See Fukuyama (1993).

³⁰See Held & McGrew (2203).

fact, they argue that the international economy was considerably more open in the pre-1914 period than it was at the end of the twentieth century.³¹ Held argues that trade has grown, post 1914, as the pattern of trade has changed, especially among Western industrialised countries.³²

The shift is focused on the liberalisation of international limitation on the flow of capital, money and other financial activities, consonant with trade liberalisation. At the centre of this is the ideological basis of coexisting global capitalism and supranational institutions. The concept of globalisation is described as unsatisfactory, for it triggers the question of what it is that is 'global' about it.³³ The 'global' is often addressed as self-government, above the control of nations, coming from the most powerful nations, combined with their regulatory regimes.³⁴ The United States emerged as the dominant world power after World War II, controlling the global economy through its strong influence on the international economic institutions. Although about fifty years of international development cooperation have passed, elimination of poverty remains a global challenge.

Hirst argued that if 'the global' cannot be interpreted literally as a universal phenomenon, then the concept will at best be a synonym for Westernisation.³⁵ Accordingly, globalisation should not be construed as the emergence of a harmonious world society or a free process of universal integration where different cultures and civilizations converge and interrelate.

This is because growing interconnectedness not only creates conflicts among nations but encourages economic and political dichotomy. Moreover, it is informed by the fact that a substantial proportion of the world's population does not benefit from globalisation, especially the developing nations like Africa, Latin America, Caribbean and East Asia. It is a divisive system and a highly controversial process.

The internationalisation of global economic and political cohesion is contingent on the policies and preferences of industrialised nations like North America who are able to meet the conditions requisite for a free international order.³⁶ This argument means that without American hegemony, the liberal world order of intensification of international interdependence cannot be realised.³⁷ Globalisation can in no way stand as a newly created world order, and is rather a continuing 'imperialism without colonies',³⁸ or a 'globalised nationalism'.³⁹

³¹See Hirst & Thompson (1966) at 2.

³²See Held (2004).

³³See Hirst (1997).

³⁴See Hirst & Thompson (1996).

³⁵Ibid.

³⁶See Waltz (1979).

³⁷See Gilpin (1987).

³⁸See Magdoff (1972).

³⁹See Douzinas (2000) at 212.

The Dialectics of Globalisation

Dialectics refers to the study of systemic contradictions. It is a process of searching for the innate disposition within a system which produces its own disagreements pending the time it can no longer sustain and recreate itself without a radical transformation. In terms of a capitalist socio-economic system, the contemplation of transformation has predominantly occupied the space in Marxist literature. The point is that the world capitalist system has remained inelastic to the wind of change brought in by its own mechanisms of reformation – ‘globalisation’. Some writers have proposed a world system of capitalist development which creates asymmetrical characteristics of core and peripheral areas.

These variations are described as dialectical results of the contradictions which gave rise to reactions from neo-Marxist writers like Samir Amin,⁴⁰ Ernest Mandel,⁴¹ and Harry Magdoff⁴² who similarly identified the world economic system as being at a monopoly capitalism or competitive imperialist stage.⁴³ The United Nations’ first development decade was declared by 1950 with decolonisation in full flow. As a result the problem of global poverty and inequality became internationalized and a known issue in international political theory.⁴⁴

Apparently, the New International Economic Order (NIEO) was represented in international relations as a reaction by Third World States to their perceived economic and political vulnerability. However, this move was misconstrued as a hidden agenda of the South to create a new international political order as a result of the conflicts among the Southern states’ leaders.⁴⁵ Nonetheless, Hoeffmann,⁴⁶ an international political theorist, at some point addressed the demand for a NIEO in the context of Rawlsian justice theory in international relations and idealistically used the views of Michael Walzer’s ‘just and unjust wars’.⁴⁷ Conventional theorists of international justice are of the view that justice as between states is clearly shown by the principles of international law that are impartial and impartially applied. Rawls seeks impartiality in his theory of justice.⁴⁸ He believes that social and economic inequalities are to be handled in a way that will create the greatest advantage to the least advantaged under the conditions of fair and equal distribution in available opportunities.⁴⁹ In this context, the least advantaged means the developing and least developed countries (LDCs), who should be given the greatest economic benefits through impartial economic policies that would ensure balanced economic growth for all participating nations of the world.

⁴⁰See Amin (1977).

⁴¹See Mandel (1976).

⁴²See Magdoff (1978).

⁴³See Chase-Dunn (1991).

⁴⁴See Brown (2002).

⁴⁵See Thomas (1997). See also Brown (2002).

⁴⁶See Hoeffmann (1981).

⁴⁷See Walzer (1992).

⁴⁸See Rawls (1971).

⁴⁹Rawls (1971) at 302.

Ordinarily, there may be disagreements among commentators and international lawyers using Rawls' 'A Theory of Justice' in international scope as Rawls' contribution was structured for domestic legal frameworks.⁵⁰ In any case, international lawyers and commentators have applied Rawls' work in the international strata. They have argued that every transnational relationship demands justification in the conditions attached to domestic political reasoning. They have concentrated on political reasoning for the normative approval of income distribution amongst those states that have so much and others that have so little.⁵¹ Rawls' intent is to balance the need for growth in wealth with regard to the deprived part of a society.⁵² He argues that it may be permissible to create greater social wealth but a system of inequality will be too harsh to be supported by argument as fair.⁵³ Although Rawls' theory of justice has been subject to criticism,⁵⁴ he tried to provide the principles of justice as a rationally dynamic and socially just mechanism that would contribute to growth.

Though the American-led Bretton Woods managed world economy was supportive of free markets and of the internationalisation of capital, it was nevertheless a period of 'embedded liberalism'. The term was coined by John Ruggie in his article⁵⁵ and the term is used in Polanyi's book, *The Great Transformation*⁵⁶ where he argues that before capitalism the 'market' had always been embedded in the society.

His assertion was informed by the fact that prior to capitalism, the market operated as a system of distribution and reciprocity determined by the rules of the particular society. However, capitalism created artificial goods like land, money and labour and put them into the market to be sold and supplied at relative market demand. 'Embedded liberalism' refers to 'market liberalism' and means the liberalisation of the market and state intervention in the market. This idea was based on the belief that a self-regulating market is more profitable than state intervention in the market. A typical example of 'embedded liberalism' is modern globalisation. This is an international pressure to liberalise every domestic and global market by imposing the removal of trade tariffs, privatising state services and reducing the strength of labour laws for greater wage flexibility. The reason behind all these is to create a single world regulating market.

Contemporary globalisation is an embedded mechanism, dependent on the regulation of 'artificial goods' by the international organizations such as the United Nations, IMF, World Bank and WTO. These are in principle multinational organisations which enjoy common features of weighted vote and veto powers topped up by the United States. Both the IMF and World Bank allow exclusive veto power to the US. Although the US does not have veto power in the WTO, it

⁵⁰See Pogge (1989) at 247. Instead of Rawlsian original individualism, Pogge imagined a globalised position where every individual would be represented by means of a worldwide method of justice as fairness.

⁵¹See Mandle (2000). See also Sen & Foster(1997).

⁵²See Rawls (2001).

⁵³See Rawls (2005).

⁵⁴See Blair (1988). See also Sen (1991).

⁵⁵See Ruggie (1982).

⁵⁶See Polanyi (1944).

enjoys such privilege in practice as it has the greatest consumption potential. Similarly, the US enjoys no exclusive veto power in the UN, but its exclusive power in the World Bank and the IMF gives its UN veto a weighted vote.

By and large, the UN can be perceived as the global adjudicator of these 'artificial goods' of land as it has the final say on territorial disputes, apparently controlled by the United States. In the same vein, the WTO, World Bank and the IMF are the adjudicators of money and labour as they dominate their members in running their economies and labour laws.

After World War II (1946-1948), many countries deliberated for the establishment of a trade agreement later called the General Agreement on Tariffs and Trade. These countries that came together to form the GATT, known collectively as the contracting parties, did not intend it to be an actual organisation,⁵⁷ but merely a temporary agreement.⁵⁸ While creating the GATT, the contracting parties deliberated for the establishment of an International Trade Organisation (ITO)⁵⁹ to strengthen the GATT. The ITO was created in a bid to become the third arm of the Bretton Woods economic order with the International Monetary Fund (IMF) and the World Bank.⁶⁰ The contracting parties, through a conference in March 1948 in Havana, Cuba created a Havana Charter that did not stop at regulating trade between countries, but extended to restrictive trade practices, rules on employment and foreign investments.⁶¹ The GATT was used in place of the ITO because the ITO was rejected by the US congress on grounds that it conflicted with their domestic policy.

From the outset, the GATT was designed as a partisan instrument, formed to liberalise areas that would enhance the US post-war economy while protecting agriculture.⁶² The GATT succeeded because it was an institution among others that served to gather together American power and the economic system that served its interests best. Its objectives were narrow and specific compared to the widely framed development, reconstruction and full employment agenda of its predecessor the ITO.⁶³ Yet the contemporary advent of the GATT was described in a manner that separates its formation from political purpose. The underlying argument for the institution of the GATT is for a return to both liberalism and liberalisation. It was argued that without multilateral trade, protectionism and insecurity would increase. If protectionism goes without check, countries will be susceptible to pursue bilateral or regional economic objectives which may lead to fragmentation of the world economy and the features of the 1930s interwar economic depression could resurface.⁶⁴

⁵⁷See Jackson Testimony in the World Trade Organisation and United States Sovereignty Hearing Before the United States Senate Committee on Foreign Relations, 994 WL 266992, June 4, 1994.

⁵⁸See Hudec (1999).

⁵⁹See Jackson (1994).

⁶⁰See Stichele (1996).

⁶¹Jackson (1992).

⁶²See Brown (1950).

⁶³See Final Act of the United Nations Conference on Trade and Employment (1948).

⁶⁴For an example of the case made for both the formation of the ITO and the GATT, see Wilcox (1949).

The development dimensions since the birth of multilateral trade regulation through the ITO and GATT differ in ideological dispositions and economic interests. Nonetheless, the story is portrayed neutrally to encourage participation in and continuity of the system. As opposed to the GATT, the ITO was committed to build a social market globally since it was obligated to find a common ground between the full employment regulation and labour standard⁶⁵ that had become a concern of the agenda through the industrial world and the developmental needs of the developing countries in the new global order.⁶⁶ The Havana Charter was the defining moment, recasting the relationship between trade, development and employment.⁶⁷ Its extinction created a lacuna in the structure of the post-war institutions of global governance in five analytical areas: labour rights and standards, dispute settlement and interpretation, the international price for primary commodities, the regulation of transnational business and on governments themselves.

By contrast, the GATT had only residues of the non-liberal characteristics that had stopped the ITO from becoming an institution. The issue of labour standards was not contained in the GATT, 'except for the provision in Article XX (e) that permits governments to ban trade in goods produced using prison labour, GATT says nothing about labour standards',⁶⁸ nor was it included in the WTO. Under the Havana charter, members are given authority to make legal and binding interpretations of the charter. This was essential because such power would not only expedite the operation of the institution, but besides, it would enhance the interests of the agreement, allowing it to develop and modify along with the changing international economy. Ordinarily, the express provision of such power to make legal and binding findings in an international organisation is preferred to those provisions which can only 'recommend' compliance.

The ITO in its dispute settlement or interpretation carries a binding treaty even when its members turn down its decision on grounds that they are not conducive for them.⁶⁹ Non-compliance with the binding treaty obligation carries sanctions, the main penalty being in the form of trade concessions.⁷⁰ Conversely, the GATT lacks such binding interpretative powers. The GATT had no requirement under the norms of international law settings as opposed to the ITO where every nation is entitled to use its dispute resolution procedure exclusively and can refer to the International Court of Justice on certain matters.⁷¹ Such appeal provision to the court was imperative, as expounded in the words of Clair Wilcox, the Vice-chairman of the US delegation to the Havana conference: 'It provided for the development of a body of international law to govern trade relationships'.⁷²

The inclusion of the formal binding interpretation would serve as a check to the countries; otherwise the GATT's dispute settlement mechanism would be

⁶⁵See Kock (1969).

⁶⁶See Havana Charter, Atr.1 and Art 55.

⁶⁷See Havana Charter, Art.1, Art 2; and Art. 10-11.

⁶⁸See Charnovitz (1995) at 171.

⁶⁹See Jackson (1989) at 90.

⁷⁰Ibid.

⁷¹See Havana Charter, Art. 96

⁷²See Havana Charer at 93.

voluntary or disregarded without penalty and could obliterate the chances of forming new legal norms. For instance, a contracting party was not obligated to admit an amendment which it kicked against.⁷³ By and large, the end of the ITO meant a problem to the developing world since its ambitious framework to stabilise the international price of primary commodities met a sudden death. Moreover, the failure of the ITO prevented the possibility of producers working together to market primary commodities. In the area of investment rules, the Charter in Art. 52⁷⁴ provided that new investment can only be allowed into a host country on condition that erected barriers are removed and a code must be enforced regulating the restrictive practices of international trade. The point here is that investors' rights would not be allowed to override the responsibility of the host country. That is to say, no member is prevented from enforcing any national law to prevent 'monopoly practices'. Furthermore, the Havana Charter applied to both governments and private firms who indulge in restrictive practices that limit the liberal ideal of non-discriminatory trade practices.⁷⁵ Thus the ITO provided anti-competitive practices which were clearly omitted in the GATT provisions.⁷⁶

Protectionism was undoubtedly excluded from GATT procedures and does not form a part of its consideration under GATT's dispute mechanism.⁷⁷ In fact, under the GATT, governments are only answerable to international regulation, not private authority or multinationals and therefore were silent on the issue of monopolistic practices by overpowering transnational corporations. Indeed, the ITO charter contained a provision for social dumping⁷⁸ which means the practice of selling exports below what the costs of production would be if international labour standards were followed. This provision received attention at the UN Conference on Trade and Employment, as well as at the world trade union conference held in London in 1945. Also, in the dimension of human development, the Charter provided that long term loans should be made available to colonial countries for economic and social development on condition of observing internationally agreed principles. It called for the International Labour Organization (ILO) and the ITO to be in close cooperation and consultation with each other on matters of common interest.⁷⁹ This close cooperation is in partial fulfilment of Roosevelt's wartime promise⁸⁰ that the ILO would play an essential role in rebuilding a 'stable international system of social justice for all peoples.'⁸¹

Most of the academic writings on the history of the International Trade Organization deal with the negotiation of the Havana charter, which could have

⁷³See Jackson (1989) at 94-103.

⁷⁴See Havana Charter, Article 52.

⁷⁵See Havana Charter, Art. 20-21, 22

⁷⁶See Havana Charter, Art.56.

⁷⁷See GATT, Article xxiii.

⁷⁸See Havana Charter, Art. 34

⁷⁹See Havana Charter, Art. 7.

⁸⁰In 1941, Franklin D. Roosevelt and Winston S. Churchill met off the coast of Newfoundland and agreed that the principles of multilateralism would be the background of the new international order which would allow the well-being and employment prospects for all to be increased at an equal pace. See Atlantic Charter 1941.

⁸¹See Alcock (1971) at 169.

led to the formal establishment of the ITO. Wilcox portrayed the consequences of mixing liberalisation with economic interest and political ideology by giving an account of the century that preceded the First World War as peaceful and stable, where goods moved 'with relative freedom between the nations of the world'.⁸² Wilcox associated the pursuit of liberalisation with the accentuation of 'progress' and its result with the 'freedom' of the nineteenth century. He used disease as a metaphor for the consequences of changing and stopping the process of liberalisation. He used the illustration of extreme poverty and misery to juxtapose liberty and prosperity to give credence to his message.

Wilcox proposed to the US and its allies, the biggest vested interest in the post-war order, to pursue liberalisation as an important factor for peace building in the post-war period.⁸³ Although Wilcox's account is not without flaws, such as his claim that peace preceded the First World War; there were some traces of known conflicts like the Napoleonic wars (1799-1815), American civil war (1861-1865) and other civilian wars and rebellions. On his claim that goods moved freely prior to World War One, British agriculture was heavily protected, except for the repeal of the Corn Laws in 1846, after which protectionism continued. Similarly, Germany and Sweden protected their agriculture in the 19th century; Britain, France and Germany protected their infant industries and as a measure of protectionism at this time, the USA's tariffs were routinely high⁸⁴ and extended to foreign investment in banking, shipping and mining which was highly regulated.⁸⁵ However, it is not criticism of Wilcox's account that is important; but his compelling message that added weight to the call to revert to liberalism, the spring board to a new era of liberalisation which must be distanced from partisan interests. Wilcox's most compelling logic is the necessity to avoid a return to the 1930s economic depression and the possibility of resurgence of another world war.⁸⁶

The consequences of not reconstructing the trade regime led to the development of an argument that gathered support for the multilateral agenda that preferred liberalisation which formed the historical basis of the GATT. The criticisms about persistent protectionism, bilateralism and regionalism resulted in a call for increased free trade as certain GATT/WTO practices were deemed unfair, undemocratic and non-transparent. But the GATT's partisan nature, coupled with the way it evolved, caused trade negotiations from the outset to be highly contested and thus likely to result in crisis or collapse.⁸⁷ Albeit, crisis discourse was created to abate this condition but what emerged was a sort of political control where trade negotiations are framed in a way consistent with the conclusion of bargains by reminding the parties the consequences of interrupting trade liberalisation.⁸⁸

⁸²See Wilcox (1949).

⁸³Wilcox (1949) at 3-10, 12-13.

⁸⁴See Irwin (2001).

⁸⁵See Chang (2007).

⁸⁶See Viner (1947).

⁸⁷See Wilkinson (2006).

⁸⁸See Wilkinson (2009).

In the ITO, major decisions by the member states would be based on 'sovereign equality' rather than weighted-voting⁸⁹ as in the case of the IMF and the World Bank. Democratic governance at the international level demanded recognition and extension of majority voting rather than elite control by the few. At the World Bank, the US had a fifth of the voting power, the EEC almost a quarter and OECD nations close to 60 percent. Capital rich nations comprised 16 percent of the membership in 1982 but four times the votes. It is not difficult to see why, as a consequence of these voting arrangements, after the disappearance of the ITO, the World Bank and the IMF have supported the rights of foreign investors and have condemned international behaviour that extends host countries' rights to maintain control over their resources.⁹⁰ The ITO was inspired by the fact that no country nor powerful business lobby nor trade union ever wants to be tied to an inflexible set of rules that does not let countries protect themselves from the short-term difficulties of adjustment that lead to loss of jobs or markets or both when faced with sharp changes in the business arena. No doubt, the brief existence of the ITO brought progress to the world trading order. The ITO influenced the single largest tariff cut over some \$10 billion trade prior the war prices consisting of 45,000 concessions made by the US to cut tariffs up to 50 percent. As a result, the value of world trade shot to some 360 percent from 1947 to 1966.⁹¹

However, the ITO was replaced by the GATT and was succeeded by the WTO in 1994, which came with many policy changes in global trade regulation. Originally, the GATT was formed with the specific purpose of stimulating US post-war economic growth. Although it was designed to offer a measure of assistance in the reconstruction of the European allies, the nature of the trade liberalisation it pursued revolved around these two specifics. From the start the liberalisation agenda in industrial goods proved beneficial to the US and Europe while it remained of less value to the GATT's early contracting participating countries such as Chile, Sri Lanka, Brazil, Southern Rhodesia (now Zimbabwe), Burma, Cuba, and Pakistan. These original GATT contracting parties were more inclined to liberalise agriculture and tropical produce which have remained heavily protected areas.⁹² The combination of political bargaining among states of vastly different capabilities and exchange as the mechanism of liberalising trade has produced bargains that are of significantly different value to participating states. When these countries requested a better trade policy, they would be coerced to agree to new concessions in return. Based on this premise and coupled with underlying power inequalities between participating nations, there have been continuous asymmetries in outcome that have adversely affected the GATT rounds. The epitome of institutionalisation of 'unembedded' liberalism is represented by the WTO Uruguay Round GATT agreement of 1994, in particular the protocols to 'trade-related investment measures' (TRIMs) and 'trade-related

⁸⁹Weighted-Voting is a system where the preferences of some voters are given more importance than those of others. The interest in the voting system is measured not in terms of vote but the concept of political power.

⁹⁰See Lipson (1985) at 90-91.

⁹¹See Dur (2007).

⁹²See Brown (1950).

intellectual property rights' (TRIPs). These protocols undermine the sovereign authority of states, especially developing countries, in relation to regulating foreign investment and external trade for development.⁹³

In the absence of fundamental departure from existing ways of regulating multilateral trade, few chances exist to meet development gains for all participating countries, especially the poor countries. Anything less than a balanced regulating multilateral trade will be at best a patched-up problematic system. The fact is that there exist some institutional barriers to the reform of the multilateral trade system to encourage a greater development dimension in the WTO. The liberalisation agenda of the WTO is partisan and largely serves the interests of the developed nations in the way the organisation is structured and the manner in which liberalisation is pursued.

Moves towards a Truly Globalised Economy

At present, the global economic process remains a far cry from being purely 'global.' Rather; international trade concerns such as financial circulation and investment are focused in America, Japan and Europe. These industrialised nations have the economic capability to determine global financial markets and other ancillary economic dispositions.⁹⁴

The term 'globalisation of law' refers to 'the degree to which the whole world lives under a single set of legal rules. Such a single set of rules might be imposed by an international body adopted by global consensus or arrived at by parallel development in all parts of the globe.'⁹⁵ The emergence of various actors in the financial markets that foster financial flows has made accountability difficult in such numerous types of transactions. Some of these actors have defied state control through the use of sophisticated technologies. This trend, which is found both at the national and international level, has created considerable obstacles to the efficient regulation of the financial market. Nonetheless, the emergence of truly global markets is signalled further by an increase in the issue of private bonds and equities and by the fact that interest rates are now determined globally rather than nationally.⁹⁶

Another major contributor of financial flows is foreign direct investment (FDI). This is a faster mechanism that has overtaken the imprints of international trade. It is the shifting of capital across national borders in a way that allows the investor to regulate accrued assets. This usually takes the form of investment or production facilities in the recipient country.⁹⁷ It is different from equity investment that may go beyond borders but carries no such control.

⁹³See Watkins (1992).

⁹⁴See Hirst & Thompson (1966) at 2-3.

⁹⁵See Dasgupta.

⁹⁶See Perraton (1997) at 265-271.

⁹⁷See Held, McGrew, Golblatt & Perraton (1999).

The process of FDI started operating across Europe in the medieval period and was an essential evolutionary stage of European colonialism.⁹⁸ Nineteenth century imperialism operated in the form of equity investments while FDI stood as a tool for the internationalisation of production.⁹⁹ The trend of FDI flows increased mostly after the Second World War with the US companies as the primary source. The period between 1945 and 1960, the US FDI activities in the world stood at three-quarters. The FDI in the 1960s and 1970s was however sourced mainly from Europe and Japan. In the 21st century, the Asian and Latin American economies have equally become sources of FDI, showing the increase of multinational corporations and transnational corporations.

The UNCTAD in 1999 stated that:

*“Total FDI reached US \$644 billion in 1998 – a gain of 39 percent over the previous year, driven by cross-border mergers and acquisitions. The share of FDI inflows to developing countries in 1998 was 42 percent, up from 18 percent in the mid 1980s. However, of the total FDI going to developing countries and Eastern Europe in the 1990s more than 80 percent went to only 20 countries. More than one quarter went to China alone. In 1998, the top five developing countries receive 55 percent of total FDI inflows to the developing world.”*¹⁰⁰

No doubt FDI has contributed to the economic growth of the countries where it is properly implemented. However, to all intents and purposes, it has not contributed to a uniform global development approach as its true nature speaks for itself. The influence of FDI in the global economy has grown strongly in recent times.

The second manifestation of a shift in the international order has been through the operations of transnational corporations (TNCs). When a company engages in importing goods, it is engaging in transnational activities. If it engages in lobbying foreign governments about trade, it becomes a transnational political actor. At the time this company extends its operations across the borders of their home countries in the form of branches or subsidiaries, it becomes a transnational corporation (TNC).¹⁰¹ According to some theories, it is required that the large company's activities shall be up to fifty per cent or above its total turnover and it must have a wide scope of activities in many countries.¹⁰² Some of these 'extensive activities' have been identified by Hirst and Thompson as activities stretched towards independent and specialised sectors, aimed at universal economic management by way of multinational principles, global development and awareness.¹⁰³

⁹⁸Ibid.

⁹⁹See Garrett (2003).

¹⁰⁰See UNCTAD (1999).

¹⁰¹See Baylis, Smith & Owens (2008).

¹⁰²See Martinussen (2004).

¹⁰³See Hirst & Thompson (1999) at 89.

Transnational corporations can be categorised as the most important actors in the world economy in recent times. They have grown so quickly in size, occupying uninterrupted growing shares of global production, trade and services. It could be said that the interconnectedness of capital has greatly increased through these corporations.¹⁰⁴ An estimate for 1980 put the number of TNCs at over 10,000 and the number of foreign affiliates at 90,000.¹⁰⁵ By the early 1990s, according to another estimate, these numbers had risen to 35,000 and 170,000 respectively.¹⁰⁶

The estimate of increase in 1998 was 60,000 transnational corporations including 500,000 external associates. The impact of TNCs is mostly felt in world investment, production, trade and technology transfers.¹⁰⁷ The reports of the UNCTAD have shown among other things that TNCs have taken over international trade relations between the developed world and the developing countries. Although the exact proportion cannot be ascertained, more than half of the developing countries' exports to the Organisation for Economic Cooperation and Development (OECD) countries are regulated by large number of TNCs.¹⁰⁸

The TNCs have a strong presence in the developing countries. They control important products in many economic sectors that have rare importance for the accumulation, growth and export of manufactured goods.¹⁰⁹ Ohmae considers the trend towards TNCs to be well established.¹¹⁰ He argues that such 'stateless corporations are now the prime movers in an interlinked economy centred on North America, Europe and Japan [...] macroeconomic and industrial policy intervention by national governments can only distort and impede the rational process of resource allocation by corporate decisions and consumer choices on a global scale.'¹¹¹ The TNCs have played both negative and prospective roles in Third World development. Amartya Sen widens the target of concentration on one aspect of development, the gross domestic product as a widely accepted measure of a nation's economic strength.¹¹² He argues that 'it is important not only to give markets their due, but also appreciate the role other economic, social and political freedoms in enhancing and enriching the lives that people are able to lead.'¹¹³ Sen agrees with Adam Smith that an unrestricted market is naturally good as it attracts increased wealth.¹¹⁴ The globalisation of a global economy will encourage economic growth, expansion of living standards and income which will definitely alleviate the suffering of the poor, although in the trend of financial crisis, globalisation can manifest itself as a double-edged sword, especially for countries that are not yet prepared to engage in competition with other countries.

¹⁰⁴See Martinussen (2004).

¹⁰⁵See Stopford & Dunning (1983) at 3.

¹⁰⁶See *The Economist*, 27 March 1993: 5 as cited in Arrighi (2003) at 73.

¹⁰⁷See Martinussen (2004).

¹⁰⁸*Ibid.*

¹⁰⁹*Ibid.*

¹¹⁰See Ohmae (1990).

¹¹¹*Ibid.*

¹¹²See Sen (1999).

¹¹³*Ibid.*, at 9.

¹¹⁴*Ibid.*, at 26.

It should not be a case of competition among nations, but a matter of fairness and justice in the structuring of global economic policy to ensure just distribution of income. The unequal economic policy of the North remains unsettled and unfair towards developing countries. The logical assessment of it requires the understanding of justice and the conception of law. It has been argued that justice and legitimacy always create tension and ought to be ‘managed’ side by side.¹¹⁵ However, no solution has been offered on how these two competing ideas can be managed. Justice per se promotes change and is dynamic. In other words, ‘justice exceeds law and calculation’ and Derrida sees law as ‘exceeding’ justice.¹¹⁶ Law is law and only exceeds itself ‘in the direction of’ justice.¹¹⁷

Global economic policy in respect of developing countries must tilt towards the dimension of development. Ideally, developing countries will settle for distributive justice with legitimacy. In circumstances where preferences are to be made between the two, distributive justice would be preferred to legitimacy.¹¹⁸ Although a Rawlsian version of distributive justice alongside Dworkin and law could work in parallel, to obtain the fairness illustrated by Rawls requires the application of legal brilliance defended by Dworkin which maintains that law shall be founded on the socio-political values of the community.¹¹⁹ The main argument here is that the economic policy of the North must reflect the socio-political and cultural identity and economic values of the developing countries. The developing countries must not be seen only as potential economic enrichment factors by the North without considering their diversity as human beings. Karl Marx, in his 1875 critique of the Gotha Programme, subjected this kind of treatment to severe criticism.¹²⁰ There should be increased participation by the developing nations in international economic regulation and increased voices in the socio-economic framework to ensure even development. This will offer a balanced legal structure for both national and international institutions and as well act as a catalyst to people in pursuit of global justice.

Conclusion

In this treatise we have highlighted that the developed nations’ trade liberalisation and globalisation framework for global economic management is nothing but Western domination. The conceptual ideology of globalisation and liberalisation is infused with complexities, especially when applied to the South. Ordinarily, liberal ideology could have been a model for development if it were truly designed to serve the economic interests of all concerned. Against this background, there is glaring injustice, inequality and unfairness in its application. The interpretative basis of Rawls’ idea of justice has not yet been attained to lift

¹¹⁵See Thomas (1995) at 147-160; Qureshi (2003) at 847.

¹¹⁶See Derrida (1992) at 28.

¹¹⁷Ibid, *ibid*.

¹¹⁸See Franck (1995) at 147-160

¹¹⁹See Dworkin (1986) at 31-44.

¹²⁰See Marx (1875) at p. 9 of the 1938 English translation.

the developing world from poverty. The most advocated development and economic growth for all participating countries through a liberal market is fraught with protectionism. However, it is unlikely that the introduction of the Bretton Woods system would bridge the socio-political and economic gap between the North and the South. This system was created as an institutional infrastructure that includes the principles of a liberal international economic order. It is proposed that the developing nations should speak with one voice and stand up against potential injustice.

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The Opening of the Insolvency Procedure: Theory v Practice

By *Lavinia-Olivia Iancu**

The exit from the market of debtors, who no longer deal with maturing payments, is legally regulated in most countries around the world. The first modern regulation of the insolvency procedure in Romania is found in 1995 and it suffers to date many modifications meant to keep the insolvency procedure in direct connection with the socio-economic reality. The special attention paid by insolvency lawmaker, but also its continued development over 20 years, would require a clear procedure for all parties involved. The opening of insolvency proceedings is accessible to debtors who recognise their financial difficulty, but also to creditors under certain conditions expressly lay down by the Insolvency Law. Although the legal text in a first reading seems to be lacking in ambiguous interpretations, its application in practice has raised a number of difficulties, quantified in completely different jurisprudence. The unit of jurisprudence in legal matters is an imperative of any state. The lack of consistency of judicial practice generates an undesirable phenomenon, the insecurity of the legal circuit translated into the decline of the Romanian citizens' confidence in the act of justice. The law must have the same meaning for all.

Keywords: *International Treaties; Human Rights; Islamic Court; Aceh; Indonesia*

Introduction

Let us imagine a spider web built in a tree. Although it seems solid, the cobweb reinforced in several points crossing each other is far from being indestructible. It must withstand natural phenomena such as rain, wind or mankind/animal intervention. The web can be destroyed to a lesser or greater degree, the time of remaking it being prorated to its destruction degree but various factors such as the size of the spider, its ability and rapidity when building the web, and its social activity are essential, too.

The size of spiders varies; the smallest is *Patu digua* of 0.37 mm and the biggest - *Theraphosa blondi* of 90 mm. Small-size spiders spend less time building the web and as a paradox, their cobweb is very big as compared to their own size. The big spiders, although investing a lot of time in weaving their web, do not display the same performance as the small ones considering the spider/web size ratio. And speaking of the cobweb size, I must mention the social spiders named *Anelosimus eximius*, which live in colonies up to 50,000 individuals. In 2007, in Texas, in the Tawakoni natural reserve, a huge spider web of approximately 180 meters was discovered¹²¹.

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¹²¹Information available on <https://ro.wikipedia.org/wiki/P%C4%83ianjen>

I have stated that the spider's social activity influences the building/ repairing of the web because males have specific complex rituals of courtship, which they perform for a greater purpose than reproduction, that being for preventing that the females eat them after mating.

Taking that information to the business world, one will find many resemblances. The business world is made up of several entities, which act on the market and are interconnected by the business they unfold. Failure of a business can be generated by external factors independent of the manner in which the business was ran, such as the competition or the law amendments, as well as by internal factors that are closely connected to the abilities and professionalism of the company's management bodies. A skilful manager will protect the company against the intervention of disrupting external or internal factors, thus rendering the risks minimal. The same as for the spiders, if the social activity distracts the manager's attention, a plain unfavourable situation corroborated with the passive character of the decision makers can lead to the dissolution of the company.

Similar to the behaviour adopted by social spiders, one can find gradually more often business organized under the form of the economic concern group, made up of several individual entities particularly meant to mitigate the shock caused on the market by the intervention of different factors.

In a perfect ecosystem, there would be a cobweb that after being built would help the spider during its entire life, without the web having to be rebuilt, but perfection is a utopia. The same stands for the perfect business network.

The Insolvency Procedure in Romania

In general, the business environment is going through continuous formation and transformation. Some players are successful, while others fail. There must be a balance between the players entering and exiting the market. By adequate laws, the entry of new players on the market is facilitated, as well as the exit of those that failed in paying their debts when due.

As early as 1995, the Romanian Parliament acknowledged the importance of the Law of insolvency, as well as the need for an adequate legal framework to be in place for facilitating the recovery of the creditors' receivables by means of granting a recovery opportunity of the debtor's business or winding up its wealth when the business reorganization would no longer be possible.

The constant concern displayed by the Romanian Parliament for correlating the laws to the economic reality was proven by the passing of Law no. 85/2014 on the procedures of preventing the insolvency and the insolvency, also named the New Code of Insolvency. Even now, the Romanian Ministry of Justice is unfolding a project for improving the legal provisions for the insolvency domain, together with the National Union of Insolvency Practitioners of Romania.

The business environment of Romania is clearly affected by the insolvency of economic entities, which leave the market without having met their obligations. The commercial security, which can be summarised in the creditor's confidence to receive payments when due, is strongly affected. A business entering the

insolvency procedure indirectly affects the entire network in which it was included: its partners, customers, suppliers, and employees. Because of that, in the specialty literature the insolvency was compared to an *epidemics*¹²² spreading rapidly in the business environment.

The amplification of the insolvency phenomenon can be seen in the statistical data published by the National Trade Registry Office of Romania, that being the number of companies that became insolvent¹²³, which increased during the first quarter of year 2018 by 19.31% by comparison to the similar period of year 2017. For understanding the whole picture of the Romanian business environment, one must mention that during January-March 2018 5,725 companies suspended their activity (42.98% increase by comparison to the same period of year 2017) and 9,793 companies wound up (60.83% increase by comparison to the same period of year 2017)¹²⁴.

De lege lata (in the existing law), the insolvency notion is legally defined in article 5 paragraph (1) item 29 of Law no. 85/2014: “the state of the debtor’s patrimony which is characterised by the insufficient available funds for paying the certain, liquid and payable debts.”

The Law of Insolvency no. 85/2014 mainly ensures that the debtor be granted the opportunity to recover by using the business reorganization procedure, but it also sets out the conditions for the debtor exiting the market if it would fail to mend its business – the bankruptcy procedure. One must state that, even if the law of insolvency seems a protection granted particularly to the debtor that was unable to meet the obligations it has accepted when due, it is balanced by the rights granted to the creditors within the same procedure, which pursue the recovering of uncollected receivables.

Unfortunately, although the law comprises solid principles and rules that facilitate the business reorganization, it is minimally used in practice because company managers use the protection provided by the law of insolvency only when the financial situation is irremediably compromised and the activity can no longer be reorganised, thus that the bankruptcy procedure must be initiated.

Opening the Insolvency Procedure – Theory

The purpose of Law no. 85/2014 set out in article 2 is “creating a collective procedure for covering the debtor’s liabilities” while granting, when possible, the opportunity to recover its activity.

The possibility to use the insolvency procedure is open to the debtor and to the creditors, but the conditions vary. The coverage of the law of insolvency from the point of view of its subjects in connection to which it can be applied is very broad and refers to all professionals, except for those involved in liberal professions and those for which special provisions are stipulated for the status of

¹²²Schiau (2001) at VI.

¹²³Ministry of Justice - National Trade Register Office.

¹²⁴All that statistical information are available under the form of monthly tables on the website of the National Trade Registry Office of Romania, www.onrc.ro

their insolvency, such as insurance companies, banks, territorial administrative bodies or education facilities.

The law stipulates two types of procedures: a general one, in which the possibility of the debtor to recover must be analysed, and a simplified one, much shorter as regards the procedure terms, which implies only unfolding some operations for the debtor leaving the market and erasing it from the records of the Trade Registry. The simplified procedure will apply only to the debtors that do not hold any assets in their patrimony, their memorandum of association or accounting documents cannot be found, the director cannot be found, the registered office no longer exists or the address declared to the Trade Registry Office is no longer the registered office.

If a debtor finds, according to its accounting documents, that the moneys it has are insufficient for paying the debts that became certain payable and eligible over 60 days¹²⁵ before, it is bound for in 30-day time¹²⁶ to go before the court of law and submit a request for going through the insolvency procedure. It must be stated that prior to the Insolvency Code (Law no. 85/ 2014) entering in force, the conditions described above sufficed for substantiating the opening of the insolvency procedure. After the Insolvency Code entered in force, the threshold value¹²⁷ for opening the insolvency procedure was set for the debtor, too.

Following the analysis of the company recovery possibilities, the debtor will decide whether opening the simplified procedure, which would lead to deleting the legal person from records, or the general procedure within which the debtor's reorganization could be considered, the end being its reintegration on the market, must be initiated.

The debtor's request must bear its legal representative's signature and if it requests that the simplified procedure be initiated, it must also submit the decision of the general meeting of shareholders.

For the syndic judge allowing the debtor's insolvency request, several documents must be attached. They are expressly provisioned in article 66 paragraph (5) and article 67 paragraph (1) of Law no. 85/2014.

The documents that must be attached to the request of opening the procedure, which the debtor would submit are

- *proof of notifying the competent tax body on its intention to open the insolvency procedure (article 66 paragraph 1 and article 67 paragraph 1 letter m);*
- *last annual financial statement, trial balance for the previous month to the date of registering the petition of opening the procedure (article 67 paragraph 1 letter a);*

¹²⁵Article 5 paragraph (1) item 29 of Law no. 85/2014 defines the insolvency notion

¹²⁶Article 66 paragraph 1 of Law no. 85/2014

¹²⁷Article 5 paragraph (1) item 72 of Law no. 85/2014 defines the threshold value applicable to opening the insolvency procedure.

- *list of the debtor's assets with the amendments in the advertising registries for those having liens, list of bank accounts where funds are transacted (article 67 paragraph 1 letter b);*
- *list of creditors (article 67 paragraph 1 letter c);*
- *list of payments and asset transfers made 6 months prior to opening the procedure (article 67 paragraph 1 letter d);*
- *profit and loss account (article 67 paragraph 1 letter e);*
- *list of members of the economic concern group (article 67 paragraph 1 letter f);*
- *declaration indicating the intent to open the simplified procedure or the general procedure (article 67 paragraph 1 letter g);*
- *brief description of the reorganization manners (article 67 paragraph 1 letter h);*
- *notarised statement or attorney at law certified declaration indicating that the debtor has not undergone the reorganization procedure 5 years prior to submitting that request (article 67 paragraph 1 letter i);*
- *notarised statement or attorney at law certified declaration indicating that during the 5-year period prior to submitting the request, the business owners and the debtor's enforcement bodies have not been finally convicted for a series of intentional offences against assets, of corruption, forging documents, tax evasion, money laundering, etc. (article 67 paragraph 1 letter j);*
- *certificate of being accepted for trading on a regulated stock market or other issued financial instruments (article 67 paragraph 1 letter k);*
- *a declaration certifying the debtor's membership to a group of companies (article 67 paragraph 1 letter l);*
- *decision of the General Meeting of Shareholders on agreeing the opening of the simplified procedure (article 66 paragraph 5).*
- *In the absence of the relevant documents the syndic judge will reject the request on opening the insolvency procedure. Naturally, when one does not want to begin the company reorganization, the following documents must not be submitted: declaration on the reorganization manner and notarised statements.*

Summing up, it can be noticed that the debtor must go through an easy prior procedure for opening the insolvency procedure, that being previously notifying the competent tax bodies (proof of notice being the document requested for opening the procedure), submitting some accounting documents or some lists directly deriving from the accounting documents, drafting some plain statements and a notarised declaration.

If the request will be accompanied by those documents and bear an adequate stamp, the syndic judge will issue a conclusion on opening the general or the simplified procedure. The creditors of the debtor can oppose in writing the conclusion on opening the insolvency procedure in 10-day time of receiving the notice from the insolvency practitioner temporarily designated to administer the procedure.

If there is an incident engendering the debtor's assets, the syndic judge can order the urgent interruption of any approaches of enforcing the debtor's assets until the time when the decision on opening the insolvency procedure is issued.

The main effects of beginning the insolvency procedure fall on the patrimony and they are interrupting the judicial and extrajudicial actions, interrupting all ancillary amounts from accruing, interrupting the statute of limitation period, closing the existing bank accounts and opening the sole insolvency bank account. There are also non-patrimony effects, such as withdrawing the debtor's right to manage the company, promoting the company's insolvency situation, binding the debtor to supply the data and information requested in connection to its activity. The existence of some patrimony effects that could protect the patrimony of the company facing financial difficulties should persuade the honest debtors to use that procedure. In fact, although the debtors meet the legal conditions for lodging the petition of beginning the insolvency procedure, meaning they have debts over Lei 40,000, which were payable for over 60 days, they remain passive and bind the creditors wanting to recover their receivables to lodge that petition.

The creditor entitled to request the beginning of the insolvency procedure¹²⁸ is the company whose receivables on the debtor's patrimony are certain, liquid and payable for over 60 days. Certain receivables means receivables that derive from the receivable action itself, or even from other documents, even if they are not authenticated, issued by the debtor or acknowledged by it. The creditor will be able to request that the insolvency procedure be initiated only if, after setting off their mutual debts, no matter their type, the amount owed surpasses the threshold of Lei 40,000.

After the creditor has lodged its petition, the syndic judge will decide whether the conditions mentioned above were met and will order that the insolvency procedure be began or will reject the action on opening the insolvency procedure. If the receivables of the creditor who requested the insolvency procedure are paid until the date of closing the debates, the syndic judge will reject that petition as having no grounds¹²⁹.

Opening the Insolvency Procedure – Practice

Although the text of the law seems clear and straightforward, when first read, applying the legal norms mentioned above into practice has led to various difficulties and to an irregular jurisprudence.

The first issue I have found is that the debtor does not observe the due date until when it is bound to lodge a petition to begin the insolvency procedure. Article 66 paragraph (1) of Law no. 85/2014 stipulates “the debtor facing insolvency is bound to submit a petition to the court of law for having the provisions of this law applied to it in maximum 30 days of the date when the insolvency began.”

¹²⁸The definition of the creditor entitled to request that the insolvency procedure be initiated is given in article 5 item 20 of Law no. 85/2014

¹²⁹The rule is set out in article 72 paragraph 5 of Law no. 85/2014.

If the debtors observed that legal norm, the commercial security would enhance and the contractual partners' trust would increase. However, it does not happen so.

Any legal advisor knows that the punishment is included in the legal norms as the part setting out the consequences that derive from not observing that norm in the circumstances set out by its assumption, as well as the possible approaches the competent authorities might implement against the subject of law that breached the law.

The law of insolvency does not provision any punishment for not observing that provision, although it does indicate that the debtor is bound to submit the petition in 30-day time of the date when the insolvency began. Lacking any punishment that would persuade the insolvent debtor to observe the term imposed by law has led and is still leading to negative effects in the business world, the commercial security being thus challenged. The Romanian debtors do not begin the insolvency procedure when financial difficulties appear and the activity might be reorganised and that is shown by the high number of bankruptcy procedures, over 95% of the total number of insolvency procedures of Romania.

When solving the matter indicated above, in connection to the regulations that will be issued, my opinion is that, while considering the obligation to lodge the insolvency petition in 30-day time of the insolvency, a severe punishment must be set out, prorated to the damages brought to the commercial security, such as refusing to allow the interrupting of all ancillary amounts from accruing.

The second matter I am approaching refers to applying and observing article 67 paragraph 1 letter a of Law no. 85/2014, which requires to the debtor to attach to the petition the last financial statement and the trial balance for the month prior to the date when the petition to being the insolvency was registered.

Even when the petition to begin the insolvency procedure was lodged by the creditor, the debtor is bound to submit to the case file in 10-day time, the relevant documents, among which the summary financial statements¹³⁰.

In practice, there are many situations when the debtor, without having any regard for the importance of the insolvency practitioner analysing its current financial situation, submits next to the petition to begin the insolvency procedure the last balance sheet registered with the finance administration, which is not the balance sheet of the financial period prior to lodging the petition to begin the insolvency procedure.

The activity of the insolvency practitioner implies analysing the economic activity of the debtor for at least 2 years prior to the date when the insolvency procedure began. That review is particularly important because two vital reports for the insolvency procedure are grounded on it (report on the continuity of the observation period or beginning the simplified procedure regulated by article 92 paragraph (1) and the report that must state the persons that contributed to the debtor's insolvency state, which is regulated by article 97 paragraph (1)). It sets

¹³⁰Article 82 of Law no. 85/2014: "the debtor is bound to make available to the receiver/liquidator [...] information and documents deemed necessary in connection to its activity and wealth."

out the need to lodge some lawsuits¹³¹ for annulling the fraudulent documents or operations that the debtor made while damaging the creditors' rights, during the two years before the insolvency procedure was began. Next, the report on the causes and circumstances of the insolvency procedure grounds the need to lodge the petition for determining the patrimony personal liability of the persons that contributed to the debtor's insolvency, according to article 169 of Law no. 85/2014¹³².

As long as the debtor is allowed to lodge a petition for beginning the insolvency procedure by attaching "old" summarizing financial documents, while disregarding article 67 paragraph 1 letter a, which expressly requests attaching to the petition to begin the procedure the last financial statement and the trial balance for the month prior to the date when that petition was registered, it is obvious that the documents submitted have no economic or legal significance. The conclusions of the insolvency practitioner would thus be drafted only formally, without having any reliability.

In the file no. 1776/115/2017 of the Caras Severin Court of Law, upon a creditor's request, the insolvency procedure was began and the only accounting documents that were found were those of 2009-2011, according to which the accounting books were reviewed. Naturally, there could not be any action for annulment concerning only the operations made during the 2 years prior to the date when the insolvency procedure had been initiated or debating on the request to determine the personal patrimonial liability.

As long as only the syndic judge is authorised to check such documents attached to the petition of beginning the insolvency procedure, my opinion is that such a review should not be only formal, strictly referring to checking the document named balance sheet. The period to which the documents attached by the debtor must be checked as well. On the contrary, the entire insolvency procedure would be led beginning with assumptions that are no longer real.

The third matter is construing article 72 paragraphs 5 and 6, corroborated with the provisions of article 84 paragraph (1) of Law no. 85/2014, which allow the debtor to pay the receivables requested by the creditor asking to open the insolvency procedure until the debates close. When the syndic judge would find that the receivables were paid, he would reject the petition of beginning the procedure and if he would find that the payment was not made until the debates close, he would decide on beginning the insolvency procedure. Article 84 paragraph (1) provisions that all documents, operations and payments made by the debtor after the date of beginning the procedure are null de jure, except for those authorised by the syndic judge or endorsed by the receiver.

The decisions made by the syndic judge are enforceable and can be challenged only by lodging an appeal. The appeal, as a challenging manner, will

¹³¹The action for annulment is provisioned in Law no. 85/2014, Tile II, Chapter I, Section 5, article 117 and the next.

¹³²Article 169 of Law no. 85/2014 sets out the conditions and deeds, which when proven, can lead to binding the members of the debtor's management bodies to pay the debtor's obligations by using their own wealth.

begin a judicial inspection on the decision made by the syndic judge in the first instance court.

By means of this legal text, the debtor coming before the court of law for beginning the insolvency procedure stands another chance to meet the obligations it has accepted before the plaintiff creditor until the debates on the merits of the case close.

In the file no. 847/115/2015¹³³ on the case list of the Caras Severin Court of Law, the syndic judge found that the creditor held certain, liquid and payable receivables of Lei 202,058 against the debtor, that the condition on the threshold value was met, and that the receivables should have been paid for over 60 days. Given that all legal conditions were met, he ordered that the insolvency procedure be initiated in connection to the debtor G.E. SRL. The debtor G.E. SRL lodged an appeal against the decision of the syndic judge, and the Timisoara Court of Appeal¹³⁴ allowed the debtor's appeal, rejected the petition to begin the insolvency procedure and bound the creditor to pay Lei 3,097 as court expenses considering that until the date when the appeal was solved, the debtor had paid all of the debtor's receivables and in the accounting and financial period corresponding to year 2014, it had registered a profit of Lei 485,389.

A similar situation is found in the file no. 5480/115/2016¹³⁵ on the case list of the Caras Severin Court of Law. The syndic judge found that there were overdue invoices totally amounting to Lei 65,274 out of which, during the trial on the merits of the case, Lei 5,000 were paid, but he believed that the conditions for opening the insolvency procedure in connection to S. S.R.L. were met because the receivables were certain, liquid and payable for over 60 days and over the value imposed by law of Lei 40,000. The debtor S. SRL lodged an appeal; the judicial inspection court¹³⁶ allowed the debtor's appeal and annulled the decision that was challenged because all the receivables had been paid until the date of solving the appeal.

Although the Law of insolvency expressly provisions that the procedure can be initiated in connection to the debtor that during the trial on the merits had not paid the receivables, the cases presented above substantiate the possibility of paying the debts during the judging of the appeal. It must be said that the Law of insolvency is a special law, which deviates from the common law.

I believe that the freedom granted to the debtors of paying the receivables to the plaintiff creditors after the procedure was initiated contradicts the provisions of article 84 paragraph (1) of Law no. 85/2014, which set out the *de jure* nullity of any payment made after the insolvency procedure was initiated, which the syndic judge had not authorised or the receiver had not endorsed. That situation has led,

¹³³Civil decision no. 347/JS/June 11, 2015 issued for File no. 847/115/2015 of the Caras Severin Court of Law, unpublished.

¹³⁴Civil decision no. 1023/November 12, 2015 issued for File no. 847/115/2015 of the Timisoara Court of Appeal, unpublished.

¹³⁵Civil decision no. 405/JS/December 8, 2016 issued for the file no. 5480/115/2016 of the Caras Severin Court of Law, unpublished.

¹³⁶Civil decision no. 155/A/March 1, 2017 issued for the file no. 5480/115/2016 of the Timisoara Court of Appeal, unpublished.

as indicated in the first case, in the case of the creditor suing the debtor, while meeting all conditions for beginning the insolvency procedure, and the judicial inspection court believing that it was its fault because the debtor had paid its receivables.

In our opinion, after the insolvency procedure is initiated in the file on the merits of the case, the judicial inspection court can no longer consider subsequent payments made to the plaintiff creditor, given that they are *de jure* null. After the insolvency procedure was initiated, the judicial inspection court should only consider the situation submitted to the syndic judge because the insolvency procedure is collective and regards the entire body of creditors, having strict rules on the priority of payments made to the creditors and punishing the payments made to some creditors while disregarding others. Considering the patrimony and non-patrimony effects on the debtor's wealth, the date of beginning the insolvency procedure by the syndic judge is deemed T0 for interrupting the judicial and extrajudicial actions, interrupting the ancillary amounts from accruing, interrupting the statute of limitation, a matter that entitles me to believe that it applies to the payments made by the debtor without having the syndic judge's authorization or the receiver's endorsement, too.

As indicated above, the decision of the syndic judge to begin the insolvency procedure is enforceable, thus that the procedure follows its path, the preliminary receivables list being drafted until the appeal is judged; such a list refers to all creditors that have receivables to collect from the debtor. Even if the judicial inspection court will consider the payment made after the insolvency procedure was initiated, I believe that it cannot order that the petition be rejected just because the debtor paid the receivables to the creditor that lodged it, as long as the insolvency file comprises other creditors, too, which have lodged a petition to declare the receivables. For assessing whether the debtor is facing an insolvency situation after the date when the procedure was initiated by the syndic judge, it is my belief that the inspection court should look at the bigger picture, meaning it should check whether all creditors that requested that their receivables be paid by the insolvency procedure have received their money from the debtor.

Conclusion: Theory versus Practice

The law of insolvency of Romania is modern, the Parliament displaying a comprehensive insight on the manner in which the insolvency of the professionals affects the business environment. If the professionals can easily enter the market, the rehabilitation of those that can surpass the financial difficulties or the leaving of those that failed in meeting their obligations from the business environment is strictly controlled. Nevertheless, the law of insolvency is far from being perfect. The interpretation of the law in practice varies, thus leading to an irregular jurisprudence.

More important than the various interpretations of the legal norms concerning the insolvency area by the law practitioners, we believe it to be a priority to

educate the business environment so as it does not see insolvency as a stigma, but as an opportunity to recover granted to the debtors facing financial difficulties.

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The Concept of Sustainable Development in Global Law: Problems and Perspectives

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The aim of this paper is to focus on the multidimensional aspect of sustainable development and on the legal implications. Although in 1987 sustainable development was defined by the United Nations Environment Programme as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”, nowadays it lacks a more precise legal definition; therefore, legislators struggle to implement it effectively. Law should identify an adequate balance between all the different interests involved, which are the expression of the interdependence between social and economic development and environmental protection. This fascinating concept has passed from the ethics field to the legal field, and, as a global issue, it has caused interactions between international, European and national law. This process started in international context (starting from the Declaration of the United Nations Conference on the Human Environment in 1972), then in EU law (art. 2 TEEC, art. 1 European Landscape Convention 2000). Even if the concept of sustainable development has been included in many constitutions around the world, the lack of a precise legal definition makes it difficult to find the right balance point to identify a kind of development that can satisfy the necessities of human society. In our paper we propose to follow a two-step approach. Firstly, we will describe the evolution of the concept of sustainable development in the intersection of diverse rules stemming from different legal orders and the types of coordination between the different levels. Then we will analyse the potential synergies between these overlapping regulatory systems, in order to achieve a high level of protection for the environment as a whole and to ensure a better future to the present and new generations.

Keywords: *Constitution; Globalization; Environmental Protection; International Law; Sustainable Development.*

Introduction

The scale of human development on the natural world has been a cause of widespread concern that has progressively led to consider environmental protection as an ethical value. With the continuing evolution of technologies, nowadays environmental issues as sustainable development, its core principle, are at the top of international and domestic political agenda as a new field of academic enquiry from different perspectives (natural sciences, economics, politics, law,

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etc.). Since it clearly emerges as a priority issue of global dimension, a multilateral and transnational approach is needed. As a part of this holistic strategy, law plays an essential role in the pursuit of environmental protection and in the promotion of sustainable development, imposing effective obligations on States. Simultaneously, law could be considered as an instrument to impose certain ethical values, forming the framework in which ethical perspectives can operate to find a better governance of this contemporary, technological and complex society. The achievement of this target requires a radical reinterpretation of development¹³⁷. This paper explores how the concept of Sustainable Development has evolved over the last decades, starting from the first treaties on environmental protection. It is divided into three sections. The first section looks at the evolution of the concept of sustainable development in international and European law. Section 2 sketches the international legal framework emerging from the Paris Agreement and the 2030 Agenda, in the light of the concept of sustainable development. The last section is devoted to examining the adequacy of this conceptual framework, in order to address the threat of an ecological catastrophe.

The Evolution of the Concept of Sustainable Development

The Concept of Sustainable Development in International Law

The consequences of the growing environmental impact of human development on nature progressively led to consider environmental protection as an ethical value.

The environmental issues are global issues and they do not respect borders, so the evolution of the concept of sustainable development started in the field of international law, with the awareness that no country can resolve global challenges by acting alone.

Nowadays we can consider in the same way economic and financial issues that are becoming global issues for the creation of a common economic space in which the economic instability of a country, due to a butterfly-effect, can cause a crisis in the global economy, as it happened in 2008¹³⁸.

In 1968 the no profit association “Club of Rome” was founded by Aurelio Peccei with the aim to analyse the principle problems of humanity in a global context. It was the first international forum to deal with issues about the growth of population and its impact on the world. The first and most famous Report commissioned by the Club of Rome was “The limits to growth”¹³⁹, realized by a research team of MIT and published in 1972, regarding the effects of the increase of population on the environment and on human survival. According to this report, if the growth trends and the consequent exploitation of natural resources without limit continued as was the case in 1972, there would be environmental degradation, leading to “sudden and uncontrollable decline in both population and industrial

¹³⁷Gupta & Arts (2018).

¹³⁸Porena (2017) at 101.

¹³⁹Meadow, Meadow, Randers & Behrnes (1972).

capacity” in the next 100 years. So the report revealed the necessity of a sustainable ecological and economic stability.

Despite initial criticisms, this work highlighted for the first time the urgency to face environmental issues and the influence of economic development on environmental degradation. So, in 1970, the awareness of the necessity of a multilateral and transnational approach to tackle environmental issues started to emerge and was accompanied with the concern for the future generations.

In 1972 the Declaration of the United Nations Conference on the Human Environment signed the first step in the evolution of the concept of sustainable development in the legal field. The Declaration was adopted during an international Conference, held in Stockholm, in which countries agreed on the necessity of a common outlook and for common principles to inspire and guide the world in the preservation and enhancement of the human environment.

In particular, the first principle of the Declaration establishes that: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated”. This principle expresses a responsibility of the present generations towards future generations, but it doesn’t yet formulate the concept of sustainable development.

Also, in the Declaration the growth of population and its impact for the preservation of the environment is considered. People in propelling social progress, creating social wealth, developing science and technology, continuously transform the human environment, so the adoption of adequate policies and appropriate measures are necessary to face this problem.

The concept of sustainable development implies the protection of the future generations, but for an accredited definition of sustainable development we had to wait until 1987. In this year the Report “*Our Common Future*” of World Commission on Environment and Development (so called Brundtland Report in recognition of former Norwegian Prime Minister Gro Harlem Brundtland’s role as Chair of the World Commission on Environment and Development), was published, in which sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”¹⁴⁰.

This is the first and the most accredited definition of sustainable development and links the two concepts of development and protection of the future generations, highlighting their interdependence.

The definition contains two key elements: the necessity of taking into account the needs of present and future generations, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs¹⁴¹.

¹⁴⁰World Commission on Environment and Development (1987) at 16.

¹⁴¹Idem: “The concept of sustainable development does imply limits - not absolute limits but

In the definition there isn't any reference to the environment, although it is well known that the concept of sustainable development had started to evolve in the field of environmental issues. The definition adopted by the United Nations Environment Programme increases the concern for the needs of future generations beyond the concept of environmental preservation, including political and social issues and this trend was followed by other international documents.

Another fundamental step in the evolution of the concept of sustainable development was represented by the United Nation Conference on Environment and Development, also known as the Rio de Janeiro Earth Summit, held in 1992. During this international conference "Rio Declaration on Environment and Development", which consists of 27 principles to achieve sustainable development, and the Agenda 21, a non-binding action plan, were adopted. These non-binding acts are considered as important achievements in the evolution of the concept of sustainable development.

In the principle n. 5 of the "Rio Declaration of Environment and Development" is established that "all States and all people shall co-operate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world", whereas the principle n. 8 identifies sustainable patterns of production and consumption and appropriate demographic policies as measures to achieve sustainable development, extended this concept even beyond the environmental issues.

So this concept progressively affirms a responsibility among the present generations, which is logically derived from the proclamation of the responsibility towards future generations. Although the Rio Declaration does not refer by name to any concept of intra-generational equity, several of its substantives provisions

limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can be both managed and improved to make way for a new era of economic growth. The Commission believes that widespread poverty is no longer inevitable. Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes. 28. Meeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources required to sustain that growth. Such equity would be aided by political systems that secure effective citizen participation in decision making and by greater democracy in international decision making. 29. Sustainable global development requires that those who are more affluent adopt life-styles within the planet's ecological means - in their use of energy, for example. Further, rapidly growing populations can increase the pressure on resources and slow any rise in living standards; thus sustainable development can only be pursued if population size and growth are in harmony with the changing productive potential of the ecosystem. 30. Yet in the end, sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful choices have to be made. Thus, in the final analysis, sustainable development must rest on political will".

imply that intra-generational concerns represent a fundamental element in the contemporary development of international environmental law¹⁴².

The concept of sustainable development has shifted to focus more on economic development and social development and the concern for future generations, issues that are linked to the environmental protection. In this holistic approach, the consideration for the carrying capacity of natural systems is connected with the social, political and economic challenges of our time. The concept of sustainability can be expressed by using a three pillar model: environment dimension (intergenerational equity), social dimension (intergenerational equity), and economic dimension; these dimensions have to be considered in an equal way to achieve sustainable development¹⁴³.

Therefore, the concept presents a multidisciplinary character, because it is composed of various aspects and we can find references to the principle in different legal sources, but, from a pragmatic point of view, we must recognize the presence of a certain vagueness which affects the correct application of the principle¹⁴⁴.

On one hand the concept of sustainable development is like a point of balance, it must be flexible and reach the best settlement among opposed interests, on the other this flexible and multidisciplinary character makes it difficult to create effective obligations on States and consequently to implement the principle, relegating sustainable development in the field of ethical values.

The legal status of this concept is controversial, part of the doctrine recognizes sustainable development already as a principle of international law, and for some scholars it even represents the formation of a new branch of law¹⁴⁵, but for other scholars sustainable development is still an ethical value¹⁴⁶. Probably the concept could be better understood as a general guideline to policy action.¹⁴⁷

The Concept of Sustainable Development in European Union Law

In the European Union Law the operational nature of the concept is particularly enhanced. Intact, sustainable development is listed among the goals to achieve and it is considered as a legally binding objective that the policies of the European Union have to pursue, from the adoption of the Amsterdam Treaty

¹⁴²Birnie & Boyle (2002) at 91: The Principle n. 3 of the Rio Declaration establishes that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”. The principle n. 22 declares that “Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices” and establishes that “States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development”. The principle n. 23 declares that “the environment and natural resources of people under oppression, domination and occupation shall be protected” whereas the principle n. 25 underlines that “peace, development and environmental protection are interdependent and indivisible”.

¹⁴³Kerschner & Wagner (2016) at 60.

¹⁴⁴Kramer (2002) at 71.

¹⁴⁵Atapattu (2006) at 194; Fracchia (2010) at 259.

¹⁴⁶Dell’Anno (2004) at 75.

¹⁴⁷Brownlie (2008) at 278-279.

in 1997, which introduced the concept into article 2 and article 6 of the Treaty establishing the European Economic Community¹⁴⁸. It was underlined that there was a slight time lag between the recognition of sustainable development at the international level and its emergence in the political discourse of the European Communities. In fact, it was only ten years after the Brundtland Report, that sustainable development was legally recognized in the Treaties with the Treaty of Amsterdam¹⁴⁹.

The concept was included in the Treaties together with the other provisions on the environment. This consideration signals “the commitment to ensure a prudent use of natural resources in order to take the environmental and economic interests of future generations, as those of the present ones, into account”¹⁵⁰.

Another consideration to underline is that “sustainable development” is also defined as a principle and not a concept. Although the controversies in the doctrine about whether sustainable development is an inspiring ethical concept or a solid legal principle, the inclusion of the concept among the “principles” may denote that in the European Union Law sustainable development is consolidated as a principle¹⁵¹.

There is no legal definition of the concept in the European Union system, which follows in this matter the definition provided by the Report “Our Common Future”.

The term sustainable development has also been introduced into the preamble and in the article 37 of the European Union Charter of Fundamental Rights, which establishes that “a high level of protection and improvement of the quality of the environment must be integrated into the Union’s policies and ensured in accordance with the principle of sustainable development”. This provision doesn’t grant a “real” fundamental right to single persons, but rather proclaims a general duty of the EU and the Member States to take into account environment protection in their policies¹⁵².

In the European Union Law sustainable development is closely related to another fundamental principle: the general integration principle, embodied in Art. 11 of the Treaty on Functioning of the European Union (TFEU). In particular, the article imposes that “environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, in particular with a view to promoting sustainable development”.

In June 2001, at the Göteborg Summit, the first European Union Sustainable Development Strategy was adopted. The Strategy, composed of two main parts, identified objectives and policy measures to face a number of key unsustainable trends and called for a new approach to policy-making that ensures the EU’s economic, social and environmental policies mutually reinforced each other. The Göteborg Declaration is the core of the EU’s policies towards sustainable

¹⁴⁸Kenig-Witkowska (2017) at 67.

¹⁴⁹Pallemaerts & Azmanova (2006) at 20.

¹⁵⁰Kramer (2000) at 7.

¹⁵¹Mahmoudi (2000) at 125.

¹⁵²Kerschner & Wagner (2016) at 58.

development. These policies also include the global pledge made at the 2002 World Summit on Sustainable Development in Johannesburg and the Millennium Development Goals agreed in 2000.

The first EU Sustainable Development Strategy establishes overall objectives and concrete actions for seven key priority challenges for the period until 2010: 1) climate change and clean energy; 2) sustainable transport; 3) sustainable consumption and production; 4) conservation and management of natural resources; 5) public health; 6) social inclusion, demography and migration; 7) global poverty and sustainable development challenges.

Despite important achievements in implementing the Strategy, the persistence of unsustainable trends required a new Sustainable Development Strategy.

In June 2005, the European Council adopted the “Declaration on the guiding principles for sustainable development” designed to give new life to the European Union’s commitment to sustainable development. The notion of sustainable development is not explicitly defined by the European Council’s declaration, but this document structures a comprehensive vision of the concept, which the Commission describes as a “broad long-term vision of sustainability”. In particular, the Declaration establishes that “Sustainable Development is a key objective for all European Community policies, set out in the Treaty. It aims at the continuous improvement of the quality of life on earth of both current and future generations. It is about safeguarding the earth’s capacity to support life in all its diversity. It is based on the principles of democracy and the rule of law and respect for fundamental rights including freedom and equal opportunities for all. It brings about solidarity within and between generations. It seeks to promote a dynamic economy with a high level of employment and education, of health protection, of social and territorial cohesion and of environmental protection in a peaceful and secure world, respecting cultural diversity” (Communication from the Commission to the Council and the European Parliament - Draft Declaration on Guiding Principles for Sustainable Development, COM/2005/0218 final).

To achieve these aims in Europe the European Union defines “key objectives” to pursue and respect. These objectives represent long-term aims reflecting the three pillars of sustainable development: environmental protection, social equity and cohesion and economic prosperity. “The guiding principles include a number of principles related to democracy, solidarity and good governance (promotion and protection of fundamental rights, citizen and stakeholder participation, access to information and justice, intra-generational and intergenerational solidarity, policy coherence, use of best available knowledge) combined with some of the basic principles of EU environmental policy (precautionary principle, integration, and the polluter pays principle). None of these principles really breaks new ground; it is their combination in a single document under the heading of sustainable development, and the Commission’s assertion that they «correspond to the underlying values of a dynamic European model of society», which are noteworthy”¹⁵³.

Furthermore, these policy-making documents constitute legal basis for the EU legally binding acts.

¹⁵³Pallemaerts & Azmanova (2006) at 48.

In December 2005 the Commission presented a proposal for a reviewed Strategy and platform for further action based on the 2001 Strategy. Subsequently, at the European Council in June 2006, the renewed Strategy for an enlarged EU was adopted. The main purpose of the Strategy was to move towards a better integrated approach to policy-making.

The European Commission adopted in October 2007 the first progress report on the Sustainable Development Strategy. According to the report, there have been significant policy developments in some of the seven key priorities identified in the reviewed Strategy of 2006, but progress on policy has not yet translated into substantial concrete action. In December 2007, the European Council stressed that the main focus should be on effective implementation at all levels of the renewed Strategy (Presidency conclusions, Brussels European Council, 14 December 2007).

In the last ten years the EU has taken the lead in the fight against climate change and the promotion of low-carbon economy.

In 2009, the Commission adopted the Review of EU Sustainable Development Strategy, confirming that “sustainable development is set out in Article 3(3) (TEU) of the new Treaty as an overarching and long-term goal of the EU. The EU Sustainable Development Strategy (SDS) is a framework for a long-term vision in which environmental protection, economic prosperity, social cohesion and global responsibility are mutually supportive” (Council of the European Union, Presidency Report on the 2009 Review of the EU Sustainable Development Strategy, 2009). The Commission also underlined that urgent actions are needed to prevent the climate change, to decrease high - energy consumption in the transport sector and reverse the current loss of biodiversity and natural resources. Priority actions should be more clearly specified in future reviews.

The new EU 2020 Strategy on sustainable development, adopted in 2010, contributed to moving Europe out of the crisis and laying the foundations for a more sustainable future, based on smart, sustainable and inclusive growth. The Commission proposed five measurable EU targets for 2020 to steer the process and to be translated into national targets related to five critical areas: employment, research and innovation, climate change and energy, education and fight against poverty (Communication from the Commission “Europe 2020. A Strategy for smart, sustainable and inclusive growth”, COM (2010) 2020, 2010).

The Concept of Sustainable Development in Constitutional Law

In 54 Constitutions around the world a reference about sustainability or about the principle of sustainable development is included, while in 69 Constitutions the concern of future generations is contained and, in the majority of these, it is related to the environmental protection. These provisions, as the definition of sustainable development in the field of international law, are vague and general, so also in the field of constitutional Law emerges the need of a legislative or judicial implementation¹⁵⁴.

¹⁵⁴Groppi (2016) at 43.

Even if the concept of sustainable development has been included in many legal sources, the lack of a precise legal definition makes it difficult to find the right balance point to identify a kind of development that can satisfy the necessities of human society, also we have to consider that authority is often divided between several levels of government, including local government with considerable independence and self-determination.

Law could be considered as an instrument to impose certain ethical values, forming the framework in which ethical perspectives can operate to find a better governance of this complex society and its role could be fundamental to reach a fair balance of interests among so many disciplines and actors dealing with sustainable development. Nowadays legislators struggle to implement the concept of sustainable development effectively and to bring it to the centre of decision making¹⁵⁵.

A solution to achieve effectivity could be found by including binding procedural provisions in the Constitutions, aimed at integrating sustainability instances into decision making, to ensure the protection of the future generations, who have no voice to be heard.

The Concept of Sustainable Development in the International Agreements on Climate Action

The events surrounding international climate negotiations of the past 20 years have shown the difficulty of achieving a broad consensus on collaborative actions against climate change. The Kyoto Protocol was an international treaty that committed state parties to reduce greenhouse gas emissions; it was adopted in 1997 and entered into force in 2005. It was based on the principle of common but differentiated responsibilities, because individual countries have different capabilities in combating climate change, owing to economic development; it put the obligation to reduce current emissions on developed countries on the basis that they are historically responsible for the current levels of greenhouse gases in the atmosphere. According to the Kyoto Protocol only 37 countries had binding targets. Sustainable development was mentioned in Article 2 of the Protocol, as the aim of the gas emission reduction. The Kyoto Protocol did not offer a satisfactory solution to the problems encountered: it failed because some States (such as the USA) refused to ratify the Protocol, and others (China, India and the rest of the developing countries) were not bounded at all. More generally, the problem with the Kyoto Protocol was that it “subjected the world to an ineffective path-dependent model for solving climate change”¹⁵⁶.

The Paris Agreement, which was adopted on 12 December 2015, marks a significant departure from the Kyoto Protocol and also from many other international agreements on climate change. It is the world’s first comprehensive climate agreement, and it aims to strengthen the global response to the threat of climate change by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature

¹⁵⁵Salardi (2011) at 79.

¹⁵⁶Rosen (2015).

increase to 1.5 °C above pre-industrial levels. In order to achieve the greatest possible consensus, the Paris Agreement abandons the Kyoto Protocol's dualistic scheme. As a result, it does not impose legally binding targets: each Party "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve" (Paris Agreement, Article 4.2). Is it only "soft law"? Can a Party downgrade its nationally determined contribution (NDC) to climate mitigation without violating its Treaty obligations? This is a legal question that generated much debate when President Trump decided to dismantle Obama-era domestic regulations designed to address US greenhouse gas emissions well in advance of the withdrawal decision. Some scholars think that while national contributions as such are not legally binding, they are subject to binding procedural requirements and to normative expectations of progression and highest possible ambition. Read together, these binding and non-binding terms make it clear that a Party would contravene the spirit of the Paris Agreement if it downgraded an existing national determined contribution (Rajamani and Brunnée, 2017).

The Paris Agreement's Preamble refers to the "intrinsic relationship that climate change actions, responses and impacts have with *equitable access to sustainable development*" (italics added), but it also clarifies that Parties should "respect, promote and consider their respective obligations on human rights, [...] and *the right to development*". The 2030 Agenda for Sustainable Development (hereinafter "2030 Agenda"), which must be read in conjunction with the Paris agreement, claims that the Sustainable Development Goals and targets are "integrated and indivisible, global in nature and universally applicable, taking into account different national realities, capacities and levels of development and respecting national policies and priorities" (2030 Agenda, 55).

Towards a Reconciliation of Sustainable Development and Right to Development: A Concrete Utopia?

This tension between the "right to development" and the "right to promote sustainable development" was already present, *in nuce*, in the United Nations Framework Convention on Climate Change (UNFCCC). In 1992, while the developing countries wanted to include the Right to Development and objected to sustainable development as a new conditionality, industrialized countries supported the Right to Promote Sustainable Development. So there are two different rights, the right to development and the right to promote sustainable development – which is also a duty.

The right to development is very important for developing countries in the post-colonial order, because the collective efforts required for realizing the 1.5 °C objective could have negative repercussions for their economic systems. Their development prospects could be affected negatively by international law. So they have every reason to ask for a redistribution of international resources, and to take into consideration past colonial injustices.

In order to address this legitimate request, the more developed countries can't consider their right to development as the right to full sovereignty over all natural

wealth and resources. The Right to Promote Sustainable Development pursues sustainable development which calls for considering economic, social and ecological aspects and reconciling the rights of current and future generations. It establishes *at the very least* that it is legitimate for states to promote sustainable development. One step further than this would be to recognise a right to progressively achieving sustainable development. While this right by no means has crystallized fully in current international law, it might be a prelude of a season of reforms of old codifications of international law norms and obligations, *in the light of sustainable development impact assessments*, and it might call for applying sanctions or trade incentives to promote sustainable development¹⁵⁷. Moreover, we have to create a framework unifying the right to development and the right to promote sustainable development. We need a radical redefinition of development, in order to create an “integrated concept”. Climate change is now undeniably one of the greatest challenges facing humanity: we can face this tremendous challenge only if we learn to strike the right balance between economic growth and respect for the environment.

According to the IPCC’s (Intergovernmental Panel on Climate Change) latest report, from 1880 to 2012 average global temperature increased by 0.85 °C. Oceans have warmed, sea level has risen. The best case scenario currently possible to us is an increase of 1.7 °C by the end of the century and requires that we immediately decrease CO2 emissions by 2100. This means that in order to see a max temperature increase of 1.7 °C, all of our energy must come from carbon-free sources by 2100. The current emissions path that we are on corresponds approximately to a global surface temperature increase of about 4.8 °C and a sea level rise of about 1 meter by 2100.

Despite its shortcomings, the Paris Agreement is a considerable improvement when compared with the Kyoto Protocol. But there is still a long way to go. On the one hand, we need stronger obligations on the international level; on the other hand, we must conceive new forms of global cooperation, which do not depend on the market or on diplomatic negotiations. And the first lesson to consider is the one repeatedly made by Stephen Jay Gould: the utter contingency of our existence¹⁵⁸.

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Anti-Dumping Regulations and Policies: Some Insights from Algeria

By Soheyb Salah Kahlessenane*

The purpose of this paper was to highlight some laws and policies that regulate anti-dumping and provide some insights from Algeria. An armchair library approach was employed; a review of primary legal material borrowed from Universiti Utara Malaysia's library, Algerian High Court Library, and second materials (magazines, books, articles, reports, and online database). An exploratory approach applied to know the legislation which is related to anti-dumping in Algerian law. The results revealed that the Algerian lawgiver made huge efforts in regulating the anti-dumping laws. Over and above, Algeria has been continued to give broad attentions to limit dumping actions and protect the companies and enterprises that are working in its territory. This paper is timely, original and could read due to that it provides a general view and crystallises a general idea about anti-dumping law and policies in Algeria.

Keywords: *Anti-Dumping; Algeria; Regulations; Policies.*

Introduction

Nowadays, the openness economic and accessibility to markets is the dominant feature of economic life and business in the local and international levels. Internationally, the success of openness and accessibility principles requires the lifting of restrictions, obstacles that hinder the freedom of trade exchanges, and limit products.¹ However, these principles may have applied deliberately to harm others. Thus, the international trade law came to impose basic rules respected globally.² The international trade law refers to rules and principles that are applicable to most of countries; these regulations either international customary law, multilateral treaties, agreements, and/or international trade law are indispensable and important, due to the following reasons:

- i. It is the safe shield is behind that allow governments to protect its people interests, and a protection against trying to dump the markets and kill the economy.
- ii. It is the protector and promotor of the social values and interests.
- iii. It achieves the minimum level of equality in economic international relationships.³

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¹Stiglitz (2003).

²Van den Bossche & Zdouc (2008).

³Ibid

Moreover, the international trade law and international agreements – or regional– about anti-dumping it was intentionally deliberated in more than one occasion. The main points were the need to raise the barriers of customers, and mainly fees imposed on goods entering to the local markets' agreements. For that, the General Conventions on Tariffs and Trade (GATT) prevents all signatory countries, who are seeking to join her to impose such operational measures on products entering to their markets, because this opposes to the basic principle of its provisions, and the free movement of goods and services.

Background of the Study

One of the main features of the international trades is the restrictions' lifting on goods and materials movements. Meanwhile, the international trade law imposes requirements to insure this movement and is considered as the famed and protector. Lifting restrictions on trade and supporting freedom of movement it may lead to another side of business practices which harms the economies. The foreign producers, dealers, and consumers might harm the local producers in many ways, an illegal business competition, an exploiting the lifting of customs, and an exploiting of the ease access to the local markets. These actions lead to sink commercial markets by products sold for less than the value of their production in order to dominate and control the market initially, control to pricing, and finally getting the large market share.⁴

In fact, this is what is called the market dumping, and for the protection from these acts and ethics the international trade agreements came to give freedom act and the right to all countries that affected by a commercial dumping to issuing a local law, and impose customs fees and restrictions on these import products, with the aim of secure their economics to face such practices. The World Trade Organization (WTO) consider as the protector of its members, this by return to agreement of Article VI on the General Agreement on Tariffs and Trade (GATT) in 1994, which was changed and became later the World Trade Organization (WTO) in 1995.⁵

Literature Overview

According to Article VI on the GATT agreement, part one, article 2: 1-2

“For the purpose of this Agreement, a product is to be considered as being dumped i.e. Introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”⁶

⁴Jahlol (2011).

⁵Ibid

⁶Agreement on Implementation of Article VI- of General Agreement on Tariffs and Trade, 1994.

Thus, in the simplest cases, one can identify dumping simply by comparing prices in two markets. On the other hand, the situation is rarely, if ever, that simple, and in most cases, it is essential to undertake a series of complex analytical steps in order to identify the suitable price in the market of the exporting country (known as the “normal value”) and the suitable price in the market of the importing country (known as the “export price”), so as to be able to undertake a suitable comparison.⁷

For almost one hundred years, international trade policy makers have proceeded on the view that “dumping” is a practice that “is to be condemned” and have allowed the developing country to take certain countermeasures, at least when the dumped goods cause “material injury” to compete industries in the developing country.⁸

Anti-dumping law is well-known as a legal device that counteracts the practice of dumping by a foreign exporter. The counteract action appears to make perfect sense: If an exporter engages in unfair pricing in a foreign market with the goal of driving out incumbent producers, it must be counteracted by practicing the antidumping duty, this will neutralise the negative impacts. On the other hand, the consumers of an importing country at first may be considered beneficiaries of price discrimination, due to lower prices for imports, the main concern of governments which invoke anti-dumping measures against such imports, is that in terms of the outcomes of international competition, the importing country might not reflect the underlying competitive positions of the domestic industry and its employees. This may lead to the domestic industry of the importing country being adversely affected.⁹

Furthermore, anti-dumping regulations are employed as a means of providing protection to the domestic industries and their workers from the injurious effects of unfair international price discrimination. The use of anti-dumping measures dates to the origins of the GATT and has been by far the most frequently used means of protecting domestic industries in the developed world from international competition.¹⁰

Actual anti-dumping measures were the exception until the 1980s, although anti-dumping regulations were instituted in most countries before to the First World War. After having lowered the general import duties in the various GATT rounds, dumping measures became one of the most significant restrictions in global trade. Until the late 1980s, the most important users of antidumping laws were the USA, Australia, and Canada. Other developed countries such as Japan, Switzerland, Norway, Sweden, and Finland have anti-dumping laws on their books but have seldom invoked them.¹¹

Since then a number of developing countries, beginning with Mexico have adopted anti-dumping laws and have begun using them; the history of anti-dumping actions dates back to at least one century ago, when Canada for the first

⁷Wto.org. (2016).

⁸Howell & Ballantine (1997) at 271.

⁹Jahlol (2011).

¹⁰Ibid.

¹¹Wto.org. (2016).

time took such an action (1904); it has also demonstrated that in due course countries such as Australia, Great Britain and the USA. Also, they put in place anti-dumping legislation within the municipal framework.¹²

According to Zvidza (2008) the Uruguay Round brought about the biggest reform of the world's trading system since GATT was created at the end of the Second World War. It covered more issues and involved more countries than any previous round. Its Final Act prescribes, among other things, that tariffs on industrial products be reduced, and that a new body, the WTO, be established to facilitate the implementation of multilateral trade agreements and to serve as a forum for future negotiations.

The GATT contracting parties have had four opportunities to develop antidumping law:

1. In 1947 when the GATT was drafted;
2. Between 1964 and 1967 when the Kennedy Round Antidumping Code came into existence;
3. Between 1974 and 1979 when the Tokyo Antidumping Code was produced; and
4. Between 1986 and 1994 when the Uruguay Round Antidumping Code came into being. (Wto.org, 2016).

Methodology

Social research is a systematic study into social, political, or other fact-conditions, to discover unknown or partly known factors working behind phenomenon, to understand why something happens and to draw inferences and general conclusions, it is to identify the cause and effect of certain problem.¹³ This paper is an attempt to find out the regulations and policies relating to Anti-Dumping in Algeria. In conduction this paper, it is intended to use the exploratory study on the Algerian law to know the legislation which related to the Anti-Dumping in Algeria. The armchair library approach employed for the collection of the primary legal materials. For this purpose, the Library of University Utara Malaysia, the Faculty of Law Library, and the Algerian High Court Library used to source the primary legal material. The secondary data, books, articles, reports, and online database equally sourced through the library approach.

Results

The Ethical Aspect of Anti-Dumping

Basically, the business activities based on trust, honesty and commitment of the required law rules. In the trade relations it must resort to the rules and

¹²Zvidza (2008).

¹³Yaqin (2007).

principles of barely differ between the market and the other no matter how far or different details of dealing with them. In fact, the presence of controls for business behaviour of market deals is based mainly on ethical standards, the violation of these standards means breaking the proper handling rules.¹⁴

Regardless to religious principles, taking anything belong to others without their permission is unallowed. Most people have agreed that stealing is unethical act, this is simply meaning that you can not to take property does not belong to you. Moreover, there is a widespread consensus that destroying the property of others is a big mistake unless in case of self-defence, this is one hand.¹⁵

On the other hand, there is a basic ethical principle saying that, it is always unethical to initiate the use of force against others. That does not mean that self-defence is unethical, or that pre-emptive strikes are unethical if the pre-emptive strike prevents someone from initiating force against you or violating your rights.¹⁶ These argument leads to impose the following questions: Does dumping is using of power with harm intention? is this led to violating of other rights or destroying their property? If the answer is yes, how the self-defence and pre-emptive strike will not depart from the ethical principles? Shortly, what are the unethical and ethical aspects of anti-dumping law?

Firstly, as mentioned above, dumping it is means that some company is selling its product for less than production cost or for less the domestic market than in some foreign market. The local producers might be harmed; they even close their own businesses by losing sales or found themselves forced to reduce products prices that cannot cover the production costs. However, this reduction of prices is never meaning that the market is under dumping, or their rights are violated by these foreign company or products that dump. Consequently, if any force implicated, it is the force of competition. This point view expresses the final customers' opinion; if the customers prefer to buy a foreign product and are cheaper than domestic counterpart and with best quality, they remain one of the customers' rights.

A sensible issue it should be discussed, how the final customer can safe his right to purchase quality products with low prices? the local producers/dealers cannot utilise the executively in local market or taking dumping action as a strong justification to violate people/customers' rights. Stealing is taking property that does not belong to you, all people agree with that, whether it was directly or with another way like rising products prices. Mostly, what happen exactly when the government initiates an anti-dumping act the business dealers utilise the law power to steal the people's money. The anti-dumping law become as an umbrella and cover where they raise the prices higher than the case in unhampered markets. For instance, if customers need to buy a car, they pay 15000 € instead of 8000 €, so the anti-dumping law, which forces these people or customers to pay an extra of 7000 € as a condition of doing business with foreign companies. This is a violation of consumers' rights and stealing of their money, this is in fact unethical side of anti-dumping.

¹⁴Jahlol (2011).

¹⁵McGee & Block (1997).

¹⁶Ibid.

Absolutely, the result does never change if consumers and customers decide to buy a domestic product because of the anti-dumping laws lead to higher prices of foreign product this leads to raise the price of domestic product too, because of reduce the competition. As a result, in the presence of anti-dumping law the property and contract rights of consumers are violated, whether they will buy a domestic or foreign product, the producer prices will be higher, because of the chilling effect on price competition.¹⁷

Secondly, which is assumptive, destroying other properties is unethical act. So, is anti-dumping law destroying the property of others? If the answer is yes, how is that? According to McGee and Block, (1997) the answer is a yes. The producers or the competitors find themselves in front of the obligation to pay heavy administrative and legal costs to defend its rights for selling, this costs it is almost similar thing like the destroying their properties. For example, forcing the competitors to spend 500,000 € of administrative cost and legal fees to defend itself in investigation of anti-dumping. So, it is not very different from a poke the fire in warehouse insides, but the only different is to give the first one a legal cover. The stealing and destroying the properties of others are not an ethical act, in any way or any reason.

Based on the above discussions, it can reasonably be deduced that anyone initiate anti-dumping action for any reason guilty of unethical behaviour. In fact, the anti-dumping law enacted to protect consumers from high prices. But these laws will be used unethically to reduce competition until market monopoly. Thus, it should prevent most of the local producers resorting to unethical anti-dumping laws to raise prices and steal part of the consumer's income.

On the other side, the ethical aspects of anti-dumping in the utilitarian ethics. Utilitarianism is an ethical philosophy espoused by all economics, so if we apply the utilitarian theory to know at what extent anti-dumping law are ethical?

Henry Sidgwick, an utilitarian and he extends this philosophy, as follows: ‘an action is right if and only if it brings about at least as much net happiness as any other action that the agent could have performed; otherwise it is wrong do that’.¹⁸ Basically, utilitarianism aims at the greatest good for the greatest number, but is the anti-dumping passes the utilitarian philosophy? No of course, because there is so many evidences against them. For example, in US, steel companies stand to benefits from the implication of anti-dumping law, which means the duties are imposed on foreign steel producers. These duties harm more than 20 producers in the world, let say all the industries in the US that must now pay higher prices for steel, and the consumers who purchase the product they will pay. For more explanation, if the he U.S. auto industry would have to pay more for steel, this would make it less competitive in international markets. Thus, auto manufactures would also suffer where dumping duties were imposed on foreign steel. So, it cannot achieve in this way of the general utilitarian, it is clearly that the antidumping laws fail in the utilitarian test because losers exceed winners.¹⁹

Anti-dumping Law as a Protector from the Negative Effects

¹⁷Ibid.

¹⁸McGee (2000).

¹⁹Ibid.

Companies could be aware of their responsibilities to the society, environment, customers, and suppliers, with aim to be good corporate citizen that is the last stage and the peak in Carlo's Corporate Social Responsibility (CSR) pyramid. The companies which dumping has not been in the first stage even, because its target is not only being profitable but also be harmful to the domestic and competitive companies.

The dumping has many effects, and mostly is negative and harmful for domestic producers, consumers, and the national economy. The following sentences highlight some effects:

- Higher losses to the local competitors represented in lower sales volume, loss of market shares, and the accumulation of stagnant inventory and the lower production and the using incomplete of resources and downturn their business.
- Higher losses to the domestic competitors, if they are trying to follow the seam methods.
- Downturn semi-industrial business and all related and associated activities that supported the main industries that lead to contraction all manufacturing businesses.
- An increase of unemployment rate after closing the business and losing the job opportunities
- Lake of public financial resources due to decrease of taxes on companies and enterprises that suffered losses or those that came out of the market.
- Squandering the available domestic resources, it is a main reason to trend toward monopoly, which leads to:
 - Get away from the improvement of the level of production, and the elimination of the spirit of renewal, innovation's investment, production, and trade.
 - The exclusion of any new investor wants to enter the market.
 - Eliminate the safety of supply and demand rule that constitutes the essence of a market economy.²⁰

Anti-Dumping Actions

The dumping action is prohibited by GATT / WTO, and the Member State which proves, that the goods dumped entered its markets, it has the rights to take a defensive action, represented by charging duty and costume fees of dumping or anti-dumping. When the goods are entering to the country in the customs border, and this is in accordance with Article VI of the GATT scholars²¹ stated that the value of these custom fees are usually equal to margin of dumping or does not exceed it. This margin which is defined as the difference between the price of the commodity in the domestic and overseas markets, and more specifically, the difference between the normal value and the export price.

²⁰Gachi & Benkamla (2013).

²¹Ibid.

The adoption of the final anti-dumping procedure is practicing according to a specific and precise mechanism which was developed and organised by the World Trade Organization, which includes four stages and conditions as follow:

1. Open investigations after a complaint from the affected;
2. Must be an investigation to prove the existence of dumping;
3. Must be an investigation to prove the occurrence of physical damage to the domestic industry that produces a product compete for that dumped product;
4. Because of the harm and the presence of the dumping, this damage did not happen because of other factors. So, must be that there be a causal relationship between the dumping and the occurrence of damage.²²

Typically, these final procedures apply during period of five years, before it finished it must doing a check/review by aim to know whether the damage or the existence of dumping may still both or one of them; in the event of vanishing, it is going to finishing the charging the customs fees immediately; In contrast, not to stop or cancel the last actions, and it remains until another review list; also, these parties concerned can require the review before the end of the five-year period. Usually, it is also to take preventive measures (temporary) before the final procedures and exactly during the period of investigation. At each step or stage, it shall be notified the anti-dumping procedures to World Organization Trade.

In addition to the U.S government which its companies and enterprises accuse the application of dumping, and companies that export goods concerning dumping, and domestic producer's owner's complaint.²³ The state which applies the anti-dumping duties to its exports may see that such practices seek behind the protection of domestic producers; and primarily those who cannot compete. Therefore, it is a violation of WTO rules on anti-dumping, whereupon it can initiate a complaint against the government or state in front of the dispute Settlement system of WTO.²⁴

Anti-Dumping in Algeria

Recently, it has been clear that Algeria have been taken stable steps to be more open on the world and keeping up with globalization. This openness made the Algerian national market wide open to all possibilities, whether is beneficial with serving the Algerian companies or cause harms to them. For that, to make this openness and the integration harmless to the local economy, the lawmaker enacts a set of legislation that regulates the trade and criminalises the dumping acts.

It should draw attention that Algeria refuses to join the World Trade Organization, and until 2007, it remains as a political decision taken by the

²²Babili (2006).

²³Gachi & Benkamla (2013).

²⁴Babili (2006).

government. Simply, the position of Algeria as an observer in WTO is a comfortable position for government, as them says.²⁵

All countries around the world, which pursue the protection of its economy institutions from dumping and its practices, keen to enact a set of laws. In fact, between 2005 and 2007 Algeria has been adopted the Trade Defense Measures MDC (Mesures de Défense Commerciale -Fr-), that includes the terms and how to implement the compensation rights, anti-dumping measures, preventive measures, as well as the regulation of investigatory procedures in it.²⁶ By the way, the Algerian anti-dumping legislation, and their contents does not totally differ from what is a prevalent in many countries.

•*Algerian national anti-dumping measures and their role in the accompaniment of companies*

As already mentioned, Algeria between the years 2005 and 2007 has enacted a set of legislation called the Trade Defense Measures MDC; this legislation was agreed in substance with anti-dumping legislation of many countries in this regard, but beyond that it was correspond with the legislation in Article VI of the GATT. According to 'Executive Decree No. 222-05 dated 15 May of 1426, corresponding to June 22, 2005, the conditions to implement the right anti-dumping and proceedings' (2005) by Algerian Houses of Business.

We can say that this legislation has not come only to protect the economic dealers or companies from unfair competition only but is a changing in the vision of Algerian government to be a member of World Trade Organization also. It states the following points:

1. The authority which has the right to open an investigation, and anti-dumping is the competent departments in the Ministry of Trade, and it does not apply anti-dumping duties only upon the achievement of the authority in charge of doing that. Also, the application of organization and investigation procedures is on as prescribed by the Minister of Trade.
2. The investigation will start based on a written request from the production branch of companies, or the presenter of their name, with present evidence of support degree or opposition from the other local producers of the request. This request for the investigation includes elements of justification shows sufficient facts and actual existence of dumping and damage. As well as the causal relationship between the importation products and the damage happen. This request also, should be includes all useful information relating to the complainant or its local production branch.
3. The period of examine the request and opening an investigation should be to not exceed forty-five days from the date of receive request, and during this period of studying it, must send form questions for the applicant, accused, and all parties concerned.
4. Give period of thirty days for foreign exporters and producers from the date of receiving the form questions to answer it, with ability to give am

²⁵Quiedar & Abdullah (2006).

²⁶Gachi & Benkamla (2013).

- extension if the exporters and producers demanded it with condition of providing a very convincing explanation.
5. The authority charged with the investigation provides during the investigation time, for all parties involved (the exporters and their governments, the local producers, and all the other parties local or foreign that can be considered relevant in view of the requirements of the investigation) the possibility of meeting, and possibility for each party to submit its justifications.
 6. Immediately, the investigation will close in the case of whether of the authority in charge of investigation, determined that the margin of the dumping is very little, and/or the volume of the real or potential imports concerned by the dumping or damage is very limited. The dumping margin is very little if it is less than 2% for the export price, and the volume of imports concerning the dumping that is little, if it represents less than 3% of the volume of imports of the same product in the local markets.
 7. The investigation closing will be in a maximum period eighteen month, unless there are special circumstances.
 8. Normal value and dumping margin do not calculated unless the investigation authority identified, that the sales of imports concerned of dumping has been in a period ranging between six (6) and twelve (12) months, and in quantities greater than twenty percent (20%) of the total volume of transactions, which was considered for identifying or determining the normal value.
 9. When determining the damage, is should be considered whether the volume of imports concerned of dumping is show in total a huge increase. Moreover, these imports were had a reflection on the national producers may be impacted on the situations of this sector.
 10. The anti-dumping tax fees will be in the form of a cash guaranty deposit or bank guaranty and being equal to the dumping amount which is calculated temporary. This fee does not apply if there is no positive determining existence of dumping and damage, and that action is necessary to prevent any damage may occurs during the period of investigation. Only after 60 days from the date of starting the investigation until a period not exceeding four 4 months.
 11. Suspend or close the investigation without the application of anti-dumping duties, temporary or definitively, will be if the agent vowed to revise its prices or not exporting in the future with dumping prices.²⁷

Cases from Algeria

The Algerian government in the begun of February 2013 imposed new tax to reduce the importation of rebar and other steel products from the 17 countries which are part of the Great Arab Free Trade Agreement (GAFTA).

The authorities published a list of goods (including rebar) and it has been applicable from February 1st, 2014, the main act have been taken is that exclude

²⁷Executive Decree No. 222-05.

all GAFTA members from the benefiting of import duty exemptions. As a result, rebar imports from the GAFTA countries are now subject to a 15% import tax that make the business of these types of raw materials bootlicker even for nearby countries such as Morocco (one of the largest rebar producers) to trade with Algeria. These procedures were taken because of the dumping of internal market by rebar that what influenced to domestic producers, and the main producer 'Sonasid' (government-owned), which leads to economic damage.

Another example happened in the period from 2003 until 2011 between Algeria and European Union, when the European Union imposed an anti-dumping tax on the Algerian fertilizers and pesticides, in order to protect their companies and then its economy, Algeria tried to explain this case and this problem to EU, but the bid by Algerian company 'Urea Ammonium Nitrate' (UAN) the producer of fertilizer has be exempted from tax of 13%, anti-dumping duties imposed on exports to the European Union has failed. This 13% tax hit that far Algerian exports of fertilizer, had been established by the EU, following a complaint from the European association of producers of fertilizers, which had held that the fertilizer products in some countries came gas cheaper in the European market.²⁸

However, Algeria has challenged this unilateral action, going against the free trade, by initiating discussions in 2007 to its cancellation. It had been provided for this purpose in the European part of the explanation of the composition of gas prices, which had shown that while the price of this energy well practiced in Algeria covers the costs of exploration, extraction, transportation, storage but also implies an adequate profit margin for reinvestment; and also, our government explained that: 'there is no support from the state's gas prices, no hidden subsidy from the state to fertilizers companies'.

For this the EU lifted officially the anti-dumping tax imposed on Algerian exports of fertilizers; and 'the notice of expiration of this anti-dumping measure, which took effect from 22 December 2011 was finally released late last December in the official journal of the EU'.²⁹

Conclusion

In addition to the legal and economic sense for the business dumping represented as entry of certain products to the other countries at a price less than the total value of production, it can be argued that, the other important findings spin in this context; is an ethical and an unlawful act. The commercial dumping in reality is unfair competition, due to the exiting duties in business dealing in general, which results in a range of legal and economic impacts. Generally, the dumping leads to the economic shrinkage, and inhibiting the economic development efforts; with disorder of dealing, and lack of respect, for the rules of fair competition; also, the imposition of antidumping duties that leads directly to

²⁸Antidumping.vn (2012).

²⁹Icis.com (2014).

an increase in commodity prices to consumers. The Algerian government condemns the dumping acts and is made huge efforts to combat it.

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Revisiting Implementation of Treaties on Human Rights in The Islamic Court of Aceh, Indonesia: Compliance or Violation?

By Rina Shahriyani Shahrullah*

Indonesia has ratified six international treaties in the field of human rights, namely CEDAW, CAT, CERD, CRC, ICESCR, and ICCPR. These international human rights treaties oblige a ratifying state to transform them into their national law; consequently Indonesia as a ratifying state must transform them to its applicable legislation, so that courts in Indonesia can apply them when making decisions. Different from the Religious Courts which are established in other provinces in Indonesia, the Aceh Islamic Court has jurisdiction to decide both private matters and criminal offenses. Since the competencies of this court cover the area of public law, this study aims to examine whether it has implemented the principles or norms of international treaties which have been ratified by Indonesia. To achieve this particular objective, the study adopts normative legal research by focusing on the examination of the Aceh Jinayat Qānūn and Islamic Court decisions. Data used in this study was based on secondary data obtained from official legal documents, books, research reports and journal articles and it was analysed by using the qualitative approach. It was found that the international treaties has never been implemented by the Islamic Court of Aceh because the Court adopts the caning punishments which are considered inhuman and cruel; consequently they violate human rights and the ratified international treaties. It was also found that the Central Indonesian government is silent regarding this matter even though international community and the UN Human Rights Committee called on Indonesia to evaluate the Aceh Jinayat Qānūn to comply with the ratified international treaties. It was further found that although the Aceh Jinayat Qānūn which imposes the caning execution and considers being cruel and inhuman, people of Aceh remains to support the implementation of the Qānūn and have no objections to the Islamic Court decisions.

Keywords: *International Treaties; Human Rights; Islamic Court; Aceh; Indonesia*

Introduction

Majority of population in Indonesia embrace Islam as their religion. Yet, it does not mean that Islamic Law is implemented in its entirety by all courts in 34 provinces in Indonesia. Aside from Aceh Province, courts in other provinces only implement Islamic Law which is relevant to the matters relating to marriage, inheritance, succession, gifts, and the endowment of money for religious purposes (*wakaf*), the giving of alms (*shadaqah*) and Islamic economic matters such as Islamic finance and banking.¹ Islamic law is integrated into the Indonesian legal

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¹Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law covers marriage, inheritance and endowment (*Wakaf*). Religious Court settles all financial, banking and economic

system together with Customary Law (Adat Law),² the Civil Law System with a Dutch Colonial Law model³ and to some extent the Common Law System due to a new development of law in Indonesia.⁴ Hence, the Indonesia legal system in principle constitutes a pluralistic legal system.

As a result of pluralistic legal system, the judiciary system in Indonesia consists of state courts (*Peradilan Negeri*), military courts, administrative courts and religious courts as it is stated under Article 24 of the 1945 Constitution. Each of the courts has its own appeal court (*Pengadilan Tinggi*), and the Supreme Court (*Mahkamah Agung*) is the highest in the hierarchy. The organizations and competencies of Islamic Court are established under the 1989 Religious Judicature Law.⁵ Article 4(1) of the Law stipulates that the first instance courts (*Peradilan Agama*) should exist in each regency (*kabupaten*) and municipality (*kotamadya*), while the Islamic appeal courts (*Peradilan Tinggi Agama*) are located in every capital of province.⁶

In 2006, the 1989 Religious Judicature Law was amended by the 2006 Religious Judicature Law. The later Law sets up a number of changes relating to the courts' powers, in particular the abolition of the "choice of law" rule relating to inheritance. Based on this Law, Indonesian Muslims are no longer permitted to submit their inheritance cases decided according to the customary law (*Adat*) in the civil courts. The 2006 Religious Judicature Law also added new competencies to the Islamic courts to include disputes relating to "Shariah Economics" (*Ekonomi Syariah*).⁷ In 2009, the second amendment was made to the 1989 Religious Judicature Law. In order to improve the uniformity in the implementation of Islamic law within the jurisdiction of Islamic courts,⁸ in 1991 the Indonesian President issued a Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (*Kompilasi Hukum Islam*). The Compilation of Islamic Law consists of Three Books, namely Book One on Marriage, Book Two on Inheritance, and Book Three on Charity. The Compilation is implemented by the Religious Courts in Indonesia except Aceh Province. Based on the contents of the Compilation and the 2006 Religious Judicature Law, it is obvious that the

matters based on the Islamic Law (*Syariah*) based on Law No.3 of 2006 as amended by Law No.3 of 2009 concerning the Second Amendment to Law No.7 of 1989 concerning Religious Court Judicature.

²Law No. 5 of 1960 concerning Agrarian Law (Land Law) is based on Adat Law.

³The Civil Law System is inherited by the Dutch Colonial Law and it strongly influences the Indonesian style of legal thoughts, structure of legal institutions, legal classification and procedures. See Marzuki (2012) at 26.

⁴Law No. 20 of 2001 concerning the Amendment to Law No. 31/1999 on the Eradication of the Criminal Act of Corruption adopts the approaches of the Common Law.

⁵Law No.7 of 1989 concerning Religious Judicature.

⁶Article 4(2) of Law No.7 of 1989 concerning Religious Judicature.

⁷Elucidation of the 2006 Religious Judicature Law states that Syariah Economics are commercial activities carried out according to the principles of the Shari'a."The elucidation also includes a non-exhaustive list of subjects encompassed by 'ekonomi Syariah', including Shari'a-compliant banking, finance, microfinance institutions, insurance, fund management, time deposits, securities, pawn brokerage, pension funds, and other business transactions.

⁸Mawardi (2003) at 125,127.

jurisdiction of the Religious Courts in other provinces are limited to private and Islamic economics matters only.

Different from other provinces in Indonesia, since 1999 Aceh Province has formally implemented Islamic Law through Law No.44 of 1999 which recognized the “Special Status of the Province of Aceh Special Region in the fields of religion, education, and customary law (*Adat*)”.⁹ Other legal sources which render full authority to Aceh Province to implement Islamic Law are Law No. 18 of 2001 on Special Autonomy for the Province of Aceh, and Law No. 11 of 2006 concerning the Government of Aceh. The Laws provides the authority to Aceh Province to formulate its regulations (*Qānūn*) at provincial level based on Islamic Law. Table 1 shows the Hierarchy of Rules in Aceh Province.

Table 1. *Legal Hierarchy in Aceh Province*

| Types and National Hierarchy of Rules | Types and Hierarchy of Rules for Special Autonomy | Types and Hierarchy of Rules based on Islamic Law |
|---|--|---|
| The Constitution of the Republic of Indonesia of 1945 | The Constitution of the Republic of Indonesia of 1945 | The Constitution of the Republic of Indonesia of 1945 |
| People's Consultative Council Decree | People's Consultative Council Decree | |
| Law/Government Regulation In Lieu of Law | Law/Government Regulation In Lieu of Law | Law/Government Regulation In Lieu of Law/ Islamic Law (al-Qur'an/Sunnah/ Ijtihad/ Mazhab) |
| Government Regulation | | |
| Presidential Regulation | Presidential Regulation | |
| Province Regulation/Regency/Municipality Regulation | Qānūn of Aceh/ Qānūn of Regency/Municipality/ Reusam Gampong | Qānūn of Aceh |
| | | Qānūn of Regency/Municipality/ Reusam Gampong |

Source: Al-Yasa' Abubakar.¹⁰

Law No.11 of 2006 also gives a special authority to Aceh Province to issue Qānūn which covers the field of family matters (*ahwal al-syakh siyah*), civil matters (*muamalah*) and criminal matters (*jinayat*). Consequently if a Qānūn is contrary to the Government Regulation, Presidential Regulation, and Province Regulation/Regency/Municipality Regulation, it is not automatically cancelled. This is because such regulations must be adjusted to Law No.11 of 2006 as an umbrella legislation for Qānūn.¹¹ Aceh Province has Qānūn No.11 of 2002 on the Implementation of Islamic Law on the Fields of Doctrine (*Akidah*), Ritual

⁹Cammack & Feener (2012) at 38.

¹⁰Abubakar (2007) at 18.

¹¹Kasim (2011) at 13.

Practices (*Ibadah*), Markers of Identity (*Syiar Islam*), Qānūn No. 7 of 2004 on Obligatory Charitable Giving (*zakat*), and Qānūn No.10 of 2007 on the Institution of Obligatory Charitable Giving (*Baitul Mal*).¹² Previously, it has Qānūn No. 12 of 2003 on the Consumption of Alcohol (*Khamr*), Qānūn No.13 of 2003 on Gambling (*Maysir*), and Qānūn No.14 of 2003 on Improper Covert Association (*Khalwat*). Yet, they were repealed when Qānūn No.6 of 2014 on *Jinayat* Law (Criminal Law) was issued. To strengthen the implementation of Islamic Law in Aceh Province, the Indonesian President issued a Presidential Decree No.11 of 2003 concerning Islamic Court (*Mahkamah Syar'iyah*) and it was followed by the Decision of the Chief of Indonesian Supreme Court No.KMA/070/SK/2004 which delegates the authority of general courts to the Islamic Court (*Mahkamah Syar'iyah*) in Aceh Province.¹³ Different from the Religious Court in other provinces, the Islamic Court of Aceh Province decides both private matters and criminal offenses.

Since the Islamic Court has jurisdiction to decide both criminal and private cases under the Islamic Law, controversies arise regarding the punishments imposed by the Court. This is because the form of whipping for example is not only foreign to the higher level of legislation in Indonesia, but also to the international legal instruments which are ratified by this country. In this regard, it must ensure that its legislative products at the national and regional level, both the existing ones or and those that will be formulated later, must comply with the provisions of the ratified international treaties. Accordingly, Qānūn as 'a statutory regulation similar to provincial regional regulation which governs the administering of government and life of Aceh community'¹⁴ must also be in accordance with the treaties ratified by Indonesia. Up to the present, Indonesia has ratified six major international human rights treaties, namely:

- a. International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Law 7 of 1984;
- b. Convention International Against Torture and Treatment or Punishment other Cruel, Inhuman and Degrading Man's Dignity (CAT), ratified by Law 5 of 1998;
- c. International Convention on Elimination of All Forms of Racial Discrimination (CERD), ratified with Law 29 of 1999;
- d. International Convention on the Rights of the Child (CRC), ratified through Presidential Decree No. 36 of 1990;
- e. International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Law 11 of 2005;
- f. The International Covenant on Civil and Political Rights (ICCPR), ratified by law 12 of 2005.¹⁵

¹²Cammack & Feener (2012) at 39.

¹³Kasim (2011) at 12.

¹⁴Article 1(21) of Law No.11 of 2006.

¹⁵Kasim (2011) at 14.

Literature Review on Punishments in Islamic Law

Based on Islamic Law, there are six major offenses which are referred to the offenses of *hudud* or *hadd* punishment.¹⁶ They are drinking of alcohol, theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity, and apostasy.¹⁷ Their penalties are prescribed in *the Qur'an*¹⁸ or *the Sunnah*.¹⁹ Islamic Law also prescribes punishment for homicide and the infliction of injury which could be either as *Qisas* (retaliation) or the payment of *Diya* (blood-money).²⁰ Relatives of the deliberate murder may demand *diya* instead of *qisas*.²¹ Table 2 shows the category of *hudud* and *qisas* offenses and their punishments.

Table 2. *Criminal Offenses (Jarimah) and Punishments (Uqubat)*

| Criminal Offenses (Jarimah) | Category of Offenses | Punishment ('Uqubat) | Sources |
|---|-----------------------------|--|---|
| Theft (<i>al-Sariqa</i>) | <i>Hudud</i> | Amputation of hand | Qur'an: al-Ma'idah: 38. |
| Armed Robbery (<i>al-Hiraba</i>) | <i>Hudud</i> | Death penalty, crucifixion, cutting off the hands and feet on the opposite sites, banishment | Qur'an: al-Ma'idah: 33 – 34. |
| Illicit Sexual Relations (<i>al-Zina</i>) | <i>Hudud</i> | 100 lashes | Qur'an: al-Nur: 2; Qur'an: al-Anfal:38. |
| False Accusations of Unchastity (<i>al-Qadhf</i>) | <i>Hudud</i> | 80 lashes | Qur'an: al-Nur: 4. |
| Consumption of Alcohol (<i>al-Khamr</i>) | <i>Hudud</i> | 40 lashes | <i>Sunna</i> (practices established by Prophet Muhammad Peace be Upon Him). |
| Apostasy (<i>Murtadd</i>) | <i>Hudud</i> | Death penalty | <i>Sunna</i> (practices established by Prophet Muhammad Peace be Upon Him). |
| Homicide | <i>Qisas</i> or <i>Diya</i> | Retaliation or blood-money | Qur'an: al-Baqarah: 178-179. |

Source: Abū Zahrah.²²

¹⁶El-Awa (1982) at 1.

¹⁷El-Awa (1982) at 1-2.

¹⁸The Qur'an is the literal word of God, which He revealed to His Prophet Muhammad peace be upon Him through the Angel Gabriel. See Ibrahim (1997) at 5.

¹⁹The Sunnah is comprised of *hadeeths*, which are reliably transmitted reports by the companions of Prophet Muhammad peace be upon Him of what he said, did, or approved of. See Ibrahim (1997) at 49.

²⁰El-Awa (1982) at 71.

²¹El-Awa (1982) at 71.

²²Zahrah at 76.

Apart from *hudud* and *qisas*, other offenses in Islamic Law are categorized as *Ta'zir* (discretionary punishment).²³ The ultimate objectives of *Ta'zir* are 'to punish wrong deeds which may do harm to the society or to the rights of an individual'.²⁴ In this regard, its objectives are to prevent further commission of crimes and to reform punishment the offender'.²⁵ *Ta'zir* constitutes a discretionary power of judges; consequently they are free to determine the types of offenses and their punishments.²⁶ The punishments of *Ta'zir* are admonition (*al-Wa'z*), reprimand (*al-Tawbikh*), threat (*al-Tahdid*), boycott (*al-Hajr*), public disclosure (*al-Tashhir*), fines and the seizure of property (*al-Gharamah wal-Musadarah*), imprisonment (*al-Habs*), flogging (*al-Jald*), death penalty (*al-Ta'zir bil Qatl*).

According to Suparyanto,²⁷ punishments in Islamic Law contain specific purposes, namely:

- a. Punishment is to prevent offenders to repeat the same crimes. In addition, it also prevents others from conducting such crimes since they understand the consequences or punishments that can be imposed on them.
- b. Punishment aims to educate offenders. In this regard, they abstain from conducting the crimes not only because of fearing the punishment, but because of their self-consciousness and willingness of obtaining forgiveness from God.

The execution of punishment under Islamic Law requires some conditions to be met in order to achieve the purposes of punishments stated above. The conditions are²⁸:

- a. Punishment must be prescribed by Islamic Law (principle of legality). This means that the punishment is based from the Islamic Law sources, namely the Qur'an, As-Sunnah, Ijma, or the law set by the authorized institution (*Ulil Amri*). The latest must not be in contradiction with the provisions of Islamic law, otherwise it is void.
- b. Punishment should be personal (principle of accountability). This implies that it should be imposed only on a person who commits the crime.
- c. Punishment must be universal (principle of equality). This means that it is applicable to everyone without discrimination.

Methodology

This study aims to analyse whether the Islamic Court in Aceh Province implements the international treaties on human rights ratified by Indonesia. To

²³El-Awa (1982) at 2.

²⁴El-Awa (1982) at 116.

²⁵El-Awa (1982) at 116.

²⁶El-Awa (1982) at 110.

²⁷Suparyanto (2015).

²⁸Suparyanto (2015).

achieve this particular objective, it adopts a normative legal research²⁹. Data used in this study was secondary data which consists of³⁰:

- a. Primary legal materials, namely International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Law 7 of 1984; Convention International Against Torture and Treatment or Punishment other Cruel, Inhuman and Degrading Man's Dignity (CAT), ratified by Law 5 of 1998; International Convention on Elimination of All Forms of Racial Discrimination (CERD), ratified with Law 29 of 1999; International Convention on the Rights of the Child (CRC), ratified through Presidential Decree No. 36 of 1990; International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Law 11 of 2005; The International Covenant on Civil and Political Rights (ICCPR), ratified by law 12 of 2005 Law No. 11 of 2006 concerning the Government of Aceh, The *Jināyat Qānūn* of Aceh Province (Qānūn No.6 of 2014), Presidential Decree No.11 of 2003 concerning Islamic Court (Mahkamah Syar'iyah) and Aceh Islamic Court Decisions.
- b. Secondary legal materials, namely books, research reports and journal articles.

All data collected were analysed based on their content (content analysis) using the qualitative approach.³¹ There are five main steps employed in the process of analysing the materials listed above. They are:

- Step 1: categorizing the secondary data which consists of laws, cases, experts' arguments obtained from books, research reports and journals
- Step 2: identifying the issues and categorizing the arguments (pros and cons arguments) based on the identified issues.
- Step 3: summarizing the relevant issues and arguments obtained from Step 2. The summaries that are originally written in Indonesia to be translated into English.
- Step 4: critically reviewing and analysing the summaries.
- Step 5: establishing analytical arguments in order to produce compelling conclusions pursuant to the summarized materials obtained from Step 4.

Findings

The *Jināyat Qānūn* of Aceh Province (Qānūn No.6 of 2014) consists of ten chapters, namely General Provisions (Chapter I), Principles and Scope (Chapter II), Reason and Rejection Reason (Chapter III), *Jarīmah* and 'Uqūbat (Chapter IV), Bonding *Jarīmah* (Chapter V), *Jarīmah* and (Chapter VII), Other Requirements

²⁹Soejono & Abdurahman (2003) at 56.

³⁰Marzuki (2005).

³¹Qualitative research is a type of scientific research that aims to seek answers to the questions 'what', 'how' or 'why' of a phenomenon. See Coutin (2015).

(Chapter VIII), Transitional Provisions (Chapter IX) and Closing Provisions (Chapter X). Table 3 shows the category of offenses and their punishments under the *Jināyat Qānūn* of Aceh Province.

Table 3. *Offenses and Punishments under the Jināyat Qānūn*

| Criminal Offenses (Jarimah) | Description | Provisions and Punishment |
|------------------------------------|---|--|
| <i>Khamar</i> | An intoxicating drink and/or containing alcohols of 2% (two percent) or more. | <p>Article 15(1): Anyone who deliberately drinks <i>Khamar</i> is threatened with '<i>Uqubat Hudud</i>' by whipping 40 (forty) times.</p> <p>Article 15(2): Everyone who repeats such acts referred to in paragraph (1) shall be threatened with '<i>Uqubat Hudud</i>' by whipping 40 (forty) times plus '<i>Uqubat Ta'zir</i>' by whipping at most 40 (forty) times or a fine at most 400 (four hundred) grams of pure gold or imprisonment for a maximum of 40 (forty) months.</p> <p>Article 16 (1): Any person who knowingly produces, store/store, sell, or enter <i>khamar</i>, each is threatened with '<i>Uqubat Ta'zir</i>' by whipping at most 60 (sixty) times or fine at most 600 (six hundred) grams of pure gold or imprisonment for a maximum of 60 (sixty) months.</p> <p>Article 16(2): Every person who intentionally buys, carrying/transporting, or awarding <i>Khamar</i>, each is threatened with '<i>Uqubat Ta'zir</i>' by the most whips of 20 (twenty) times or a fine of at most 200 (two hundred) grams of pure gold or a maximum of 20 (twenty) months imprisonment.</p> <p>Article 17: Any person who deliberately commits an act as referred to in Articles 15 and 16 with involving children subject to '<i>Uqubat Ta'zir</i>' by whipping at most 80 (eighty) times or a maximum fine of 800 (eight hundred) grams of pure gold or the longest imprisonment of 80 (eighty) months.</p> |

| | | |
|----------------------|--|---|
| <p><i>Maysir</i></p> | <p>An act that contains the element of the bet and / or an element of chance made between 2 (two) parties or more, accompanied by an agreement that the parties who wins will get paid / certain profit from the losers either directly or indirectly.</p> | <p>Article 18: Everyone who deliberately performs <i>Jarimah Maysir</i> with a bet and/or a maximum of 2 points (two) grams of pure gold, is threatened with '<i>Uqubat Ta'zir</i>' by whipping at most 12 (twelve) times or a maximum fine of 120 (one hundred and twenty) grams of pure gold or the longest imprisonment of 12 (twelve) months.</p> <p>Article 19: Everyone who deliberately performs <i>Jarimah Maysir</i> with a bet value and / or gain of more than 2 (two) gram of pure gold, is threatened under '<i>Uqubat Ta'zir</i>' with the most whip many 30 (thirty) times or a fine of not more than 300 (three hundred) grams of pure gold or imprisonment not exceeding 30 (thirty) months.</p> <p>Article 20: Any person who deliberately organizes, provide facilities, or finance <i>Jarimah Maysir</i> as referred to in Articles 18 and 19 shall be threatened with '<i>Uqubat Ta'zir</i>' by whipping at a maximum of 45 (forty five) times and/or a fine of not more than 450 (four hundred and five) pure gold gram and/or a maximum of 45 months imprisonment.</p> <p>Article 21: Everyone who deliberately performs <i>Jarimah Maysir</i> as referred to in Articles 18 and 19, which involving children is threatened with '<i>Uqubat Ta'zir</i>' involving children is threatened by whipping at a maximum of 45 (forty five) times or a fine of maximum 450 (four hundred fifty) grams of pure gold or imprisonment of a maximum of 45 (forty five) months.</p> <p>Article 22: Anyone who attempts to do the <i>Jarimah Maysir</i> as referred to in Articles 18 and 19 shall be liable '<i>Uqubat Ta'zir</i>' is at</p> |
|----------------------|--|---|

| | | |
|------------------|---|--|
| | | most 1/2 (half) of <i>Uqubat</i> which is threatened. |
| <i>Khalwat</i> | An act of being in a closed place or hidden between 2 (two) people of different types sex which is not <i>Mahram</i> ³² and without marital ties with the willingness of both parties that leads to fornication. | Article 23: (1) Everyone who deliberately does the <i>Jarimah khalwat</i> , is threatened with ' <i>Uqubat Ta'zir</i> ' by the most whipping of 10 (ten) times or the most fine of 100 (one hundred) grams of pure gold or the longest imprisonment of 10 (ten) months. (2) Every person who deliberately organizes, provide facilities or promote <i>Jarimah khalwat</i> , is threatened with ' <i>Uqubat Ta'zir</i> ' by the most whipping of 15 (fifteen) times and/or a maximum fine 150 (one hundred and fifty) grams of pure gold and/or imprisonment at a maximum of 15 (fifteen) months. |
| <i>Ikhtilath</i> | The act of touching, hugging and kissing between a man and a woman who is not a husband and wife with a willingness of both sides, either in a closed or open place. | Article 25: (1) Everyone who deliberately does the <i>Jarimah Ikhtilath</i> , is threatened with ' <i>Uqubat</i> ' by whipping 30 (thirty) times at the most or a fine of not more than 300 (three hundred) gram of pure gold or imprisonment not later than 30 (thirty) months. (2) Every person who deliberately organizes, provide facilities or promote <i>Jarimah Ikhtilath</i> , is threatened with ' <i>Uqubat Ta'zir</i> ' by whipping 45 (forty five) times at the most and/or the most fine of 450 (four hundred fifty) grams of pure gold And/or imprisonment of a maximum of 45 (forty five) months. Article 26: Any person who deliberately performs <i>Jarimah Ikhtilath</i> as referred to in Article 25 with a child whose age is over 10 (ten) years, is threatened with |

³²Mahram is very close relatives or family members that you are not allowed to marry. They are your children, grandchildren, mother, father, grandfather, grandmother, maternal grandfather, maternal grandmother, brothers, sisters whether real or children of the same father or of the same mother, uncle, niece, maternal uncle and niece, maternal aunt and nephew, paternal aunt and nephew, foster brother and sister. See Madani (2001) at 487-488.

| | | |
|-------------|---|--|
| | | <p>'<i>UqubatTa'zir</i> by whipping at a maximum of 45 (forty five) times or a fine of not more than 450 (four hundred and fifty) grams of gold pure or imprisonment of a maximum of 45 (forty five) months.</p> <p>Article 27: Any person who deliberately performs <i>Jarimah Ikhtilath</i> with people who have <i>Mahram</i> associated with him, in addition to be threatened with '<i>Uqubat</i> as referred to in Article 25 paragraph (1), it may be supplemented by '<i>Uqubat Ta'zir</i>' at the maximum fine of 30 (thirty) grams of pure gold or '<i>Uqubat Ta'zir</i> of imprisonment for a maximum of 3 (three) months.</p> |
| <i>Zina</i> | Intercourse between a man or more with a woman or more without marriage bonds with the willingness of both parties. | <p>Article 33</p> <p>(1) Any Person who deliberately committed the <i>Zina Jarimah</i>, is threatened with '<i>Uqubat Hudud</i> by whipping 100 (one hundred) times.</p> <p>(2) Everyone who repeats such acts referred to in paragraph (1) shall be threatened with '<i>Uqubat Hudud</i> by whipping 100 (one hundred) times and can be supplemented with '<i>Uqubat Ta'zir</i> of a maximum fine of 120 (one hundred and twenty) gram of pure gold or '<i>Uqubat Ta'zir</i> of imprisonment not more than 12 (Twelve) months.</p> <p>(3) Any person and/or business entity intentionally provides facilities or promote <i>Jarimah Zina</i>, is threatened with '<i>Uqubat Ta'zir</i> by whipping at maximum of 100 (one hundred) times and/or a fine which is not more than 1000 (one thousand) grams of pure gold and/or a maximum of 100 (One hundred) months imprisonment.</p> <p>Article 34: Any adult who commits <i>Zina</i> with a child, is</p> |

| | | |
|-------------------|---|--|
| | | <p>threatened with '<i>Uqubat Hudud</i>' as referred to in Article 33 paragraph (1), it may be supplemented by '<i>Uqubat Ta'zir</i>' by whipping at a maximum of 100 (one hundred) times or a maximum fine of 1,000 (one thousand) grams of pure gold or imprisonment of 100 (one hundred) months.</p> <p>Article 35: Any person who deliberately commits the <i>Zina Jarimah</i> with the people who have Mahram associated with him, is threatened with '<i>Uqubat</i>' as referred to in Article 33 paragraph (1), it may be supplemented by '<i>Uqubat Ta'zir</i>' at a maximum fine of 100 (one hundred) grams of pure gold or '<i>Uqubat Ta'zir</i>' of maximum 10 (ten) months imprisonment.</p> |
| Sexual Harassment | An act of immorality or deed obscene that someone is deliberately committed in public or against others as victims of both men and women without victim's willingness. | <p>Article 46: Everyone who deliberately does <i>Jarimah</i> sexual harassment, is threatened with '<i>Uqubat Ta'zir</i>' by whipping At a maximum 45 (forty five) times or a maximum fine of 450 (four hundred fifty) grams of pure gold or a maximum of 45 (forty five) months imprisonment.</p> <p>Article 47: Everyone who deliberately does <i>Jarimah</i> Sexual Harassment as referred to in Article 46 against a child, is threatened with '<i>Uqubat Ta'zir</i>' by a maximum whipping of 90 (ninety) times or a maximum fine of 900 (nine hundred) grams of pure gold or a maximum of 90 (ninety) months imprisonment.</p> |
| Rape | Sexual intercourse with victim's <i>faraj</i> or rectum with an offender's <i>faraj</i> or rectum or other objects used by the offender against victim's mouth, <i>vice versa</i> , by force or coercion or threat to the victim. | Article 48: Everyone who deliberately does <i>Jarimah</i> Rape is threatened with ' <i>Uqubat Ta'zir</i> ' by whipping minimum 125 (one hundred and twenty-five) times, maximum 175 (one hundred and seventy five) times or a fine of minimum 1,250 (one thousand two hundred fifty) grams of pure |

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| | | <p>gold, maximum 1,750 (one thousand seven hundred and fifty) pure gold grams or minimum 125 (one hundred and twenty five) months imprisonment, maximum 175 (one hundred and seventy five) months imprisonment.</p> <p>Article 49: Everyone who deliberately does <i>Jarimah</i> Rape of people who have a <i>Mahram</i> relationship with him, is threatened with '<i>Uqubat Ta'zir</i> by whipping minimum 150 (one hundred and fifty) times, maximum 200 (two hundred) times or a fine of minimum 1,500 (one thousand five hundred) gram of pure gold, maximum 2,000 (two thousand) grams of gold pure or imprisonment of minimum 150 (one hundred and fifty) month, maximum 200 (two hundred) months.</p> <p>Article 50: Everyone who deliberately does <i>Jarimah</i> Rape as referred to in Article 48 against child is threatened with '<i>Uqubat Ta'zir</i> by whipping minimum 150 (one hundred and fifty) times, maximum 200 (two hundred) times or a fine of minimum 1,500 (one thousand five hundred) grams of pure gold, maximum 2,000 (two thousand) grams of pure gold or imprisonment of minimum 150 (one hundred and fifty) months, maximum 200 (two hundred) months.</p> <p>Article 51 (1): In the case of a victim's request, any person who is subject to '<i>Uqubat</i> as referred to in Article 48 and Article 49 may be subject to a maximum '<i>Restricted Uqubat</i> of 750 (seven hundred and fifty) grams of pure gold.</p> |
| <i>Qadzaf</i> | Accusing someone of <i>Zina</i> without presenting at least 4 (four) witnesses. | <p>Article 57: (1) Any person who deliberately performs <i>Qadzaf</i> is threatened</p> |

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| | | <p>with <i>'Uqubat Hudud</i> by whipping 80 (eighty) times.</p> <p>(2) Everyone who repeats the deeds as it is referred to in paragraph (1) shall be threatened with <i>'Uqubat Hudud</i> by whipping 80 (eighty) times and can be supplemented by <i>'Uqubat Ta'zir</i> fines maximum 400 (four hundred) grams pure gold or <i>'Uqubat Ta'zir</i> for a maximum of 40 (forty) months imprisonment.</p> <p>Article 58;</p> <p>(1) In the case of any defendant's request, any person who is subject to <i>'Uqubat</i> as referred to in Article 55 may be subjected to <i>'Uqubat Restitution</i> at maximum 400 (four hundred) grams of pure gold.</p> |
| <i>Liwath</i> | <p>The deed of a man by the way putting his penis into another male's rectum with the willingness of both parties.</p> | <p>Article 63:</p> <p>(1) Everyone who deliberately does the <i>Jarimah Liwath</i> is threatened with <i>'Uqubat Ta'zir</i> by whipping at maximum 100 (one hundred) times or a fine of at maximum 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment.</p> <p>(2) Everyone who repeats such acts referred to in paragraph (1) shall be threatened with <i>'Uqubat Ta'zir</i> by whipping 100 (one hundred) times and can be added with a fine at maximum 120 (one hundred and twenty) grams of pure gold and / or imprisonment of no more than 12 (twelve) months.</p> <p>(3) Any Person who does <i>Liwath</i> with a child, in addition to be threatened with <i>'Uqubat Ta'zir</i> as referred to in paragraph (1) may be added with a whip of at maximum 100 (one hundred) times or a fine of not more than 1,000 (one thousand) grams pure gold or a maximum of 100 (one hundred) months imprisonment.</p> |

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| <i>Musahaqah</i> | The deed of two or more women by mutually rubbing limbs or <i>faraj</i> to obtain sexual stimulation (pleasure) with the willingness of both parties. | <p>Article 64:</p> <p>(1) Everyone who deliberately does the <i>Jarimah Musahaqah</i> is threatened with '<i>Uqubat Ta'zir</i>' by whipping at maximum of 100 (one hundred) times or a fine of at maximum of 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment.</p> <p>(2) Everyone who repeats such acts as referred to in paragraph (1) shall be threatened with '<i>Uqubat Ta'zir</i>' by whipping 100 (one hundred) times and can be added with a fine at maximum of 120 (one hundred and twenty) grams of pure gold and / or imprisonment of no more than 12 (twelve) months.</p> <p>(3) Anyone who does the <i>Jarimah Musahaqah</i> with children, in addition to being threatened with '<i>Uqubat Ta'zir</i>' as referred to in paragraph (1) may be supplemented by whipping at maximum of 100 (one hundred) times or a maximum fine of 1,000 (one thousand) grams of pure gold or a maximum of 100 (one hundred) months imprisonment.</p> |
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Source: Qānūn No.6 of 2014 concerning *Jināyat* Law (Criminal Law)

The punishment by whipping under Qānūn No.6 of 2014 is done by rattan which has a diameter between 0.75 cm to 1 (one) centimetre, 1 meter long without a double edge/split. It is conducted in public. Offenders must wear white clothes. Women must cover their heads. The executor must cover the face and head to cover the identity.

Data from the Acehese Child and Woman Protection Agency stated that there were 428 cases in 2013, 515 cases in 2014 and 548 cases in 2015. At least 108 people are executed by caning law. The Institute for Criminal Justice Reform found at least 180 prisoners have been executed by whipping sentences throughout Aceh Province. Data from the Institute for Criminal Justice Reform (ICJR) recorded that the Aceh Shariah Court made at least 221 decisions on *jinayat* cases from January to September 2016. Five major areas where the *jinayat* case decided are:

1. Banda Aceh: 40 cases;
2. Kuala Lumpur: 29 cases;
3. Kutacane: 24 cases;
4. Blangkejeren and Jantho: 21 cases;
5. Langsa: 17 cases.³³

Based on the annual report of the Supreme Court of Indonesia, 274 cases were decided in 2017 for various categories, namely:

1. *Maysir*: 113 cases.
2. *Ikhtilath*: 64 cases.
3. *Zina*: 24 cases.
4. Sexual Harassment: 24 cases.
5. *Khamar*: 19 cases.
6. *Khalwat*: 21 cases.
7. Rape: 7 cases.
8. *Liwath*: 2 cases.³⁴

Discussion

Article 128 of Law No. 11 of 2006 concerning the Government of Aceh stipulates that the implementation of *Shariah* law in the life of Acehnese people is within the national legal system in the Unitary State of Republic of Indonesia (NKRI). This provision implies that international treaties ratified by Indonesia have to be reflected in the Aceh Qānūn. Hikmahanto Juwana asserts that international agreements on human rights have the substance of formation norm (law making), consequently a ratifying state has an obligation to transforming them into their national law. Accordingly, the international human rights legal instruments require Indonesia as a ratifying state to transforming the existing principles and norms of the treaties into its applicable and existing legislation.³⁵ Article 2 paragraph (2) of the ICCPR and Article 2 paragraph (1) of the ICESCR requires the state to take legislative measures to include provisions in both covenants at the national level. Article 2 of CEDAW obliges also the state to take all appropriate steps to establish a policy of elimination of all form of racial discrimination. It also emphasizes the importance of reform the state laws to ensure the promotion of women's human rights. Similarly, Article 4 paragraph (1) of the CERD and Article 4 of the CRC requires that a state to take appropriate legislative, administrative and other measures to implement the norms of the Convention. Accordingly, all Indonesian legislation including the Aceh Qānūn the must reflect the international norms and principles of the ratified Conventions.

However, the Aceh *Jinayat Qānūn* which imposes the carrying out of the punishment on offenders by using rattan canning raises controversies among most

³³Institute for Criminal Justice Reform (ICJR) (2016).

³⁴*Laporan Tahunan Mahkamah Agung 2017* (2017)

³⁵Juwana (2010).

Indonesian jurists because the punishment system in Indonesia strictly prohibits the use of caning. Many of international jurists also consider that it violates human rights and international treaties ratified by Indonesia in the field of human rights. Table 4 shows the punishment in Aceh Province which are regarding as the violations of international treaties ratified by Indonesia.

| Criminal Offenses (Jarimah) | Case Descriptions | Punishment ('Uqubat) |
|------------------------------------|--|--|
| Khamar | The case of Miftahul Alias MIP bin Jusran. The case number 10/ JN.S/2015/MS.KC. He was convicted legally guilty to drink alcohol. | 40 lashes in public |
| | The case Rita Sinaga (Non Muslim) was convicted legally guilty of selling alcohol. | 28 lashes in public at the Takismon Arts House (GOS) of Takengon, Central Aceh |
| Maysir | The case Gunawan Wahyudin Als.Gogon Bin Zakaria. The case Number JN.S / 2016 / MS.KC. He was convicted legally guilty to gambling. | 7 lashes in public minus the prison days that was undertaken by the offender during the investigation process. |
| | Alem Suhadi and Amel Akim (Non Muslim).They were found guilty of cockfighting. | 9 lashes (Alem Suhadi) and 7 lashes (Amel Akim) in public. Their sentences were mitigated because they had spent over a month in detention |
| Khalwat | The case of Ramli Tampubolon Als. Ramli (Christian) and Luciana Als. Uci Binti Mahyudin (Muslim). The case Number 03 / JN.S/2016/MS.KC. They were convicted legally guilty to conduct Khalwat. | 8 lashes in public less the number of prison days that were undertaken by the offender during the investigation process. |
| Ikhtilāf | The case of Sa who was convicted legally guilty to conduct Ikhtilāf. | 20 lashes in public at Al Furqan Mosque, Gampong Beurawe, Kuta Alam Sub-district, Banda Aceh. |
| Zina | Two people of Kampung Burlah residents. They were convicted legally guilty of Zina. | 100 lashes respectively in public at Tugu Blangkejeren, Gayo Lues district. |
| Rape | The case of Ali Imran Bin Abdul Samad. The case Number 0004 / JN / 2016 / MSY-TTN. He was convicted legally guilty of rape. | 125 lashes in public at Istiqamah Tapaktuan Grand Mosque. |
| Liwāf | MT and MH were found guilty of conducting Liwath or similar relationships. | 82 lashes in public. |

Source: Compiled by the author.

The implementation of caning penalty in Aceh Province is frequently criticized by international community on the grounds that it can be categorized as torture, inhuman and degrading punishment; consequently it violates the ICCPR which has been ratified by Indonesia.³⁶ Article 7 of the ICCPR states that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. In addition, the execution does not only cause physical pain, but also mental torture because it is conducted in public.³⁷ The public display also results in a culture of violence in Aceh society.³⁸ In 2013, the UN Human Rights Committee whose functions to monitor the state compliance with their obligations under the ICCPR, calls on Indonesia to repeal the Aceh Qānūn because it does not comply with the ICCPR. From international law perspectives, Indonesia fails to undertake its obligations under the ICCPR. However, Head of Public Relation Bureau of Aceh Government, Frans Delian claimed that the *Jinayat Qānūn* is effective since none of offenders repeat their offenses. In addition, Aceh society has supported the implementation of the *Jinayat Qānūn* as it can be proved that Non Muslims preferred to choose to be punished under the Islamic Law even though they have option to be punished under the Indonesian Criminal Code.³⁹ Similarly, Alem (Non Muslim) who was caned due to gambling offense asserted that ‘we live in Aceh, so we have to obey the regulations in our region’.⁴⁰ This reveals that the offender accepted the consequences of the offense without objecting to it.

It is also advanced that the caning punishment is also a violation of CAT. Hence, in 2008 the UN Anti-Torture Committee requested Indonesia to evaluate and eliminate its national and local law products which impose harsh punishment that can be categorized as acts of torture.⁴¹ This is a manifestation of Article 2(1) of CAT which states that ‘each State Party shall take effective legislative, administrative, judiciary or other measures to prevent acts of torture in any territory under its jurisdiction’. Head of Public Relation Bureau of Aceh Government, Frans Delian asserted that up to now the Central Government has not called on the Aceh Government to review the implementation of *Jinayat Qānūn*. He objected if its implementation is considered as a violation of human rights since the caning punishment is not as cruel as people imagine. He said that ‘no one who has been caned is taken to the Intensive Care Unit’.⁴²

Ayu Ezra Tiara of the Indonesian Legal Aid Foundation claimed that the execution of caning penalty in public violates the protection of children since they are allowed to watch it. This apparently violates Article 6(2) of the CRC which requires ‘states parties shall ensure to the maximum extent possible the survival and development of the child’. The display of caning execution may impact on the psychology development of children.⁴³ The Coordinator of Women Solidarity

³⁶Madani (2001) at 487-488.

³⁷Abidin (2011) at 39.

³⁸Madani (2001) at 487-488.

³⁹Artharini (2016).

⁴⁰The Straits Times (2017).

⁴¹Madani (2001) at 487-488.

⁴²Wardah (2014).

⁴³Wardah (2014). The Aceh Governor issued a Governor Regulation No. 5 of 2018 concerning the Implementation of *Jinayat* Procedural Law which regulates that the place of the caning punishment

Program, Nisa Yura pointed out that the *Jinayat Qānūn* is discriminative against women. She said that ‘if a woman reported that she was raped but she was unable to prove, the accused man could sue back on the ground of defamation’. It is obvious that a violation of CEDAW occurs since Article 2 of CEDAW requires a state party to ‘establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination’. In addition, Nisa Yura argues that a caning punishment to a woman causes not only physical but also psychological impacts because it is conducted in public without a face cover. It may lead to exclusion or discrimination to the female offender after the punishment because women are always considered as a moral guard.⁴⁴ Apart from the controversies regarding the implementation of the *Jinayat Qānūn* and the compliance of the Aceh Islamic Court to international treaties ratified by Indonesia, people of Aceh remain to support the Islamic Law to govern their life as it is reflected from the Aceh proverbs ‘*hukom nanggro keupakaian, hukom Tuhan keu kulahkama*’ which means ‘state law is for dress, God’s law is for crown’.

Conclusion

Indonesia as a member of international community has ratified six international treaties in the fields of human rights. Criticisms regarding the implementation of international treaties in the Islamic Court of Aceh has arisen controversies due to the implementation of caning punishment which are considered inhuman and cruel. International community and the UN Human Rights Committee request Indonesia to repeal the Aceh Qānūn to comply with the ratified international treaties. Up to now, there is no action taken by the Central government of Indonesia since it considers that Aceh society obeys the implementation of *Jinayat Qānūn*. It can be concluded that in addition to the Government, people of Aceh support the *Qānūn* which is based on Islamic Law to govern their life as it is reflected from the Aceh proverbs ‘*hukom nanggro keupakaian, hukom Tuhan keu kulahkama*’ which means ‘state law is for dress, God’s law is for crown’.

should be carried out in the correctional institution. The purpose of the Regulation is that the carrying out of the punishment will not be watched by children nor be recorded by TV reporters by using cellphones or cameras. Today, the controversies against the Regulation still occur in Aceh society. See Serambinews (2018).

⁴⁴Wardah (2014).

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Subject-Matter Competences of Administrative Courts of the European Union Countries: A Comparative View of Legislation and Judicial Practice

By Aida Hoxha*

Also defined as the authority of a specific institution, subject-matter competence is the right and duty to decide on specific matters. In administrative justice, the competence refers to the legal “ability” of administrative courts to exert jurisdiction over specific issues as defined by the provisions of specific laws that regulate the administrative courts. The evolution of administrative justices in some countries, important members of European Union such as Italy, Greece, and Germany has been determinant on specifying clear subject-matter competences of the respective administrative courts. On the contrary, there are countries like Albania with a relatively new legislation on administrative courts, mostly influenced from the above mentioned countries with a long tradition. The study aims to juxtapose the subject-matter competences provided in the respective organic laws of countries like Italy, Greece (in Greece the administrative jurisdiction has been provided since 1833), and Albania (in Albania the law On Organization and functioning of Administrative Courts is from 2012) while analysing the judicial practices provided from administrative courts of these countries. This article aims to serve to the growing trend of the establishment of specialized courts in many countries or corresponding sections that will arrange the judicial review of administrative acts within ordinary courts. The countries working on the establishment of administrative courts while providing new administrative procedural rules, usually encounter difficulties on the interpretation and implementation of new legislation. This transitory state does not favour citizens who are the most affected group in the rule of law. Based on the achieved results, the article will present appropriate recommendations from the methodology of comparison and analysis of administrative courts’ subject-matter competences of above mentioned countries.

Keywords: administrative justice; subject-matter competences; administrative court; judicial practice.

*If we desire respect for the law, we
must first make the law respectable*
Louis D. Brandeis

Introduction

Background and the Purpose of the Study

The establishment and consolidation of European Union compels any member state or state that aspires to join the European Union to embrace the function and

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organizational knowledge of other countries. This prerequisite originates from the underlying concept of the rule of law having different meanings for different states. According to the administrative justice, there are different state attitudes concerning the judgment of administrative disputes.

Some countries count on the administrative disputes as to semi consultative and semi judicial bodies called Council of State. Several other countries, which constitute the large majority, have aimed at special courts specialized in administrative cases. The purpose of this study is to compare these different systems while examining the administrative body function and the administrative courts in order to understand the different experiences these countries have. The focus of the paper, are the subject matter competences of different countries administrative courts such as Albania, Italy, Greece, and France.

The first issue to be argued in this paper is the importance of specialized courts, in particular the administrative courts. The second issue will present a clear view of administrative justice history in different countries, the administrative courts actual situation, the subject matter competences by evaluating the organic law, and some aspects of judicial practice related to the subject matter competences. Being aware of the changes, the assessment of administrative justice difference is an issue of relative worth, despite the significance of comparison, not a goal in itself, but a method to better understand the authenticity of each system. In conclusion, the paper's aim is to show some recommendations that might be taken into consideration by countries and their legislative bodies, especially expert drafting law, considering all the strengths and weaknesses of others experience, at the moment their country will decide to establish specialized courts instead of administrative bodies.

Research Questions

The main research question that has guided this paper is: How are administrative courts subject-matter competences treated in the European Union countries and the aspiring membership countries to join the European Union?

Related questions that were also examined are:

1. How are defined the administrative courts subject-matter competences in specific laws of these countries?
2. Does the judicial practice point out any problem concerning applicability of the laws?

Methodology

Regarding the paper, certain methods are used for its fulfillment. Firstly, the structure arrangement of main issues, positioning the division into the study of legislation in different countries, as well as common denominators treatment between the states, the administrative courts, in particular their subject competences treatment.

This paper deals with the comparative aspect of the Administrative Courts competences so the following methods have been the priority:

The method of analysis and comparison of legislation has been essential in the body function; assessing the attributed competences to administrative courts by law enforcement, organic law function and organization. The aim of the paper is the dissection of several laws such as: Law No. 49/2012 “On the Organization and Functioning of Administrative Courts and Judgment of Administrative Disputes” (as amended by Law No. 100/2014) in force in the Republic of Albania.

“Administrative procedures code” and the law no 2690 ratification of the administrative procedure and other provisions into the republic of Greece, 6 December 1971, No.1034, published in the Official Gazette 13 December 1974, no. 314. The comparative method in this paper assists the clarifying norms; their comparison pinpoints the differences between them, while the most efficient legislations generate examples and precedents for other countries.

The method of judicial practice analysis is mainly focused on Albanian and Italian practice, two states with distinctive and contrasting histories in the administrative justice evolution. The encountered difficulties through the implementation of concrete legal provisions are highlighted in the analysis of judicial practices. As a part of this paper, are selected the decisions of peculiar interest because of the issues they treat, ways of reasoning and legal interpretations.

The doctrinal research method has demonstrated an equal importance compared to the other methods of the paper. The literature selection has been extended to a considerable number of studies, manuals, foreign and domestic authors. The choice of literature involved the identification, collection and placement of publications of specialized bodies, concerning the interpretation of issues.

Findings and Results

The Importance of having Specialized Courts, in Particular that of Administrative Courts

Administrative law is part of public law, therefore is eventually related to the decisions of government institutions. The necessity of the administrative law is a by-product of the political, economic and social issues complexities that can turn into an object of conflicts between administrative bodies and citizens.¹

The judicial control requisite of administrative activity is drawn by the rule of law, principles directed by the subjective rights of citizens in protection against other people and public administration. Since the rule of law is acknowledged as the basis of state organization, the principle of separation of powers will result in

¹Dobjani (2008).

the judicial power while not extending its influence over administrative activity, which would interfere in the reserved area of executive power.²

Administrative courts are specialized courts that resolve issues concerning the exercise of public power. This is the classic definition of the justice system component organisms.

Administrative courts refer to state bodies established and authorized by law to review administrative law disputes between administrative authorities and private entities. These organs judicially review the lawfulness of an administrative act; suitability of the act or both. Many countries growing trends is to raise specialized courts which will deal with the judicial review of administrative acts. The encountered difficulties in the interpretation and implementation of new legislation do not favour private individuals seeking justice.

Their role is very important as they create opportunities to guarantee and ensure that officials are working in accordance with the law, in their daily duties. In these days, the debate does not focus on the existence or non-existence of administrative courts, but in terms of extending the scope and strength of trial review of courts administrative decisions. These days the administrative court debates are focused on the judge's role in these courts and the major decision-making power organization, to assist as much land, economy, business community and citizens.

The Administrative Court purpose is to guarantee the subjective rights protection and individuals' legitimate interest through a due process and within a reasonable and fast deadline. The specialized courts create the proper conditions for an effective review, establishing the rights violated by the administrative acts issued by public bodies. Equality is an important principle between public interest, on the one hand, and the subjective rights and legitimate interests of the person, on the other.

The aim is to strengthen the active role of administrative sector, within the administrative relationship, through public persons and bodies respecting the subjective rights of persons.

Efficient administrative courts also increase the transparency of administrative decisions while playing an important role in fighting the corruption. An important and interesting fact is the judicial control of public administrative actions by a well-functioning administrative judiciary; a stimulating force for the public administration modernization, improving the quality of its services and consequently raising the confidence of citizens for state institutions: Arguments in Favour of Specialized Courts are: judicial system efficiency, legal system efficiency, uniformity, expertise, improved case management, increased system flexibility³. In many countries, there has been controversial debate about the advantages and disadvantages of specialized administrative jurisdiction. In most of them the dualistic approach has won.

²Hoxha (2013).

³Zimmer (2009).

Administrative litigation always involves public interest and public welfare, the realization of which should not be dependent on the procedural skills of the parties. Thus, an inquisitorial procedure was necessary which in contrast to civil law authorized the judges to investigate the truth without being bound by the evidence presented by the litigants. In addition to that, in administrative law cases the plaintiff is most regularly a citizen who finds himself confronted with an especially powerful defendant - the state. This constellation required particular procedural provisions for the protection of the individual. Moreover, the founding fathers of the administrative jurisdiction noticed that in contrast to civil law litigation, the impact of rulings on the field of public law was often not limited to the case in question but could have far-reaching consequences for administrative action as such. Thus, experienced judges who could assess the effects of a ruling beyond the boundaries of the individual case were familiar with the functioning of the administration and knew the "tricks" which public authorities sometimes apply to conceal dubious acts. Finally, it was thought that the administration would accept the rulings of a specialized judiciary rather than the decisions of judges trained only in a general way. For all these reasons it is a fact that administrative jurisdiction is a revolutionary step.⁴

On the other hand, administrative justice plays a crucial role for the application of EU law.⁵

Most important developments are the Administrative Justice adaptation to meet the requirements of Art 6 ECHR⁶ and the EU *Acquits*. An administrative fact is that administrative courts seem to have judicial and executive powers. From a formal point of view administrative courts are part of the judicial branch, but their object of power and competencies closely connected to the executive branch. This special situation is reflected in the typical problems arising under it, for example the review in cases of administrative discretion or whether administrative courts may issue administrative acts in certain situations.⁷

⁴The Role of the Administrative Jurisdiction in Society and in the Development of the European Union Presentation by the President of the Federal Administrative Court in Helsinki on the occasion of the Finnish "Administrative Courts Day" on the 16th of November 2005

⁵Winkler (2007).

⁶Everyone has the right to be heard impartially, publicly and internally reasonable time by an independent and impartial tribunal, created by the law, which will decide how about disputes regarding his rights and obligations of the civil nature, as well as the merits of any criminal charge in its custody. The decision should be made publicly, but the presence in the courtroom may be prohibited press and public throughout the process or during a part of it, in the interests of morality, public order or national security in a democratic society when this is required from the interests of juveniles or the protection of the private life of the parties in the process or at the extent deemed necessary by the court when in special circumstances publicity would harm the interests of justice.

⁷Winkler (2007).

Administrative Courts in Albania, some Background Data, Subject Matter Competences and Functional Competences, some Aspects of Practice that have to do with the Subject Matter Competences⁸

1. The administrative courts were firstly introduced in Albania by law on 2012

To analyse administrative disputes, the legal reform aimed at reforming judicial procedures in terms of speed and quality through the establishment of an autonomous judicial system which specializes in administrative judges. In implementation of Law on Administrative Courts and in support of Decree no. 8349, dated 14.10.2013⁹ on November 4, 2013 started the administrative courts operation. As a consequence, the judicial practice needs to harmonize procedural acts in order to ensure a lasting jurisprudence. In accomplishing the procedural acts of the administrative adjudication, the litigants and the court should be inspired by the principles of administrative judgment sanctioned in Article 3 of Law on Administrative Courts.¹⁰ The principles related to the procedural acts of the trial process, especially the rapid trial aspect within reasonable time limits, as well as the principle of verbal adjudication and resolution of documents. Specifically, the principle of fair trial, known as the fundamental right of the individual¹¹ and Article 6 of the European Convent of Human Rights recounts to procedural acts in several respects, such as equality of arms, contradictions to the aspect of court decision reasoning. This principle requires that all courts at all levels take care of the proceedings they conduct to the Supreme Court. Similarly, a higher court can facilitate the lower court shortcomings, as well as the lower instance judge who is proceeding in a trial cannot act thinking that the highest court has the opportunity to correct his mistakes. The legal process is associated to the administrative judicial process with one main phase ‘Trial development within quick and reasonable deadlines’. The regular process particular aspect sets two tasks in the fulfilment of procedural acts: the deadline should be used effectively and must be handled in time. The use of deadlines should be reasonable regarding the nature of action required to be carried out in order to not harm the quality of justice, in particular, the right of the parties must be protected (the principle of legal certainty). The position of the parties in the trial against the deadlines is protected precisely from the other aspects of the due legal process.

2. Subject matter competence

The Administrative Courts in Albania, according the article 7 of Law No. 49/2012. “On Organization and Functioning of Administrative Courts and Judgment of Administrative Disputes” (amended by Law No. 100/2014) is competent to examine:

⁸Law No. 49/2012.

⁹Decree no. 8349 date 14.10.2013 of the President of the Republic “On the beginning of the functioning of the Administrative Court”,

¹⁰Law No. 49/2012.

¹¹Article 42 of the Constitution of Republic of Albania

- Disputes arising from individual administrative acts, normative by-laws and public administrative contracts issued during the exercise of administrative activity by the public body;
- Disputes arising from the unlawful interference or omission of a public body;
- Competency disagreements between different administrative bodies in cases provided by the Code of Administrative Procedures;
- Disagreements in the field of labour relations, when the employer is a body of public administration;
- The requests submitted by the administrative bodies in order to review administrative offenses, in which the law provides up to 30 days administrative punishment for the deprivation of liberty of the offender;
- Submitted requests of the administrative penalty replacement of up to 30 days of imprisonment with a fine.

3. Acts of Functional Competence¹²

Functional competence includes the right of a court in a vertical line, to review and make a valid decision on an issue submitted at the request of the subjects provided by law. In other words, functional competence divides the boundaries of issue's examination between the first and second instance administrative courts.¹³

According to point 1 of Article 10 of Law on Administrative Courts, the functional competence of first instance court to consider disputes over individual administrative acts and public administrative contracts, issued during the exercise of administrative activity by the public body; on the unlawful interference or inactivity of a public body, on the competence conflict between administrative bodies, on labour relations, when the employer is a public administration body, on administrative offenses, punishable by imprisonment of up to 30 days and on the replacement of administrative punishment imprisonment of up to 20 days fine. Disputes arising from normative acts are expressly excluded from the functional competence of the court of first instance.

The Administrative Court of Appeal has in its functional jurisdiction two sets of different types of cases. The first group includes appeals against decisions of the first instance court of law; in this case the function is a reviewer after adjudicating these cases in the second instance. The second group of cases comprises cases of initial jurisdiction of the Administrative Court of Appeals, including disagreements over normative acts and other cases provided by law. The latter also include a first instance trial of special requirements, which the law permits to surface at any stage of the trial (claims to challenge judicial jurisdiction).

¹²Article 10 Law No. 49/2012 "On Organization and Functioning of Administrative Courts and Judgment of Administrative Disputes" (amended by Law No. 100/2014) in force in the Republic of Albania.

¹³Manual on Procedural Acts for Administrative Trials, OSCE Presence in Albania Dea Print ISBN: 978-92-9235-263-9

In terms of the process validity, functional competence presents the same importance as the subject matter competence. Therefore, the procedural acts configured in the case of functional competence discussion follow the same legal regime, the time of drafting and legal power. These acts are the same as those of subject competence:

1. The request of the parties to challenge the functional competence;
2. Judicial decision on functional competence;
3. The parties' request of the dispute establishment on functional competence;
4. A court decision to proceed with the dispute over functional competence.

Consequently, the given explanations of subject matter acts are valid also in this case.

4. Case Study

The administrative courts competence in Albania is to solve disputes arising from individual administrative acts, normative by-laws and public acts. Administrative contracts issued during the exercise of administrative activity by the public body; several specific laws excluded from jurisdiction the Administrative Court.

The case study examines the Property Treaty Law, Law no. 133/2015 which regulates a sensitive area of Albanian society.

Referring to the provisions of Law no. 133/2015, despite the Property Treatment Agency (a public body) decisions issued by an administrative body are considered acts and as such should be judged by the First Instance Administrative Court; only the Civil Court of Appeal, the court with competences to review litigations concerning the right of property, has the right to appeal against agencies quasi-judicial decisions.

In principle, the appeal of PTA's decisions to the Court of Appeal may enable the extensive procedure of property's right to recognition as one of the main objectives of Law no. 133/2015, which several issues concerning the right to appeal against ATP's non-foundation decisions, are causing a conflict of competences between the courts, still unsolved today by the judicial practice of judiciary highest instances. It's worth to mention that civil and administrative courts' non-competence decisions to review non-core PTA (Property Treatment Agency) decisions are the by-product of factual erroneous assessment which generates a harmful practice of PTA trials regular development, as well as the economic judgment all together. The unification of judicial practice through a unifying court decision will ensure a fair balance of power between the administrative judiciary and the civilian judiciary, to avoid continuing similar cases of substantive incompetence between administrative and civil courts.

Administrative Courts in Greece: Some Background Data, Subject Matter Competences and Functional Competences

1. As part of civil law countries Greece has established specialized administrative courts. The establishment of administrative courts has originated from the Constitution of the Hellenic Republic, as defined in article 94:

- The administrative hearing of substantive disputes belongs to the jurisdiction of existing ordinary administrative courts. Not within the jurisdiction of the court, such disputes must compulsorily be subjected to this jurisdiction within five years from the date this Constitution shall enter into force; this time-limit may be extended by law.
- Until the remaining substantive administrative disputes come under the jurisdiction of ordinary administrative courts, either as a whole or by category, they shall continue to fall under the jurisdiction of civil courts, with the exception of those for which special administrative courts have been established under special statutes; these courts shall adhere to the provisions of paragraphs 2 to 4 of article 93.
- Specific laws may assign other competences of an administrative nature to the administrative courts.
- Only the ordinary taxation courts established by virtue of legislative decree 3845/1958 are considered as ordinary administrative courts.

2. There is a distinction between the administrative jurisdictions on one hand and the civil and penal jurisdictions on the other hand (art. 93 par. 1 of the Constitution).

Administrative courts are composed from district Courts of First Instance, district Courts of Appeal and a Supreme Administrative Court (called Council of State).

The primary administrative courts (first instance) are the One- and the Three-Member Administrative Court. The secondary administrative courts (Courts of Appeal) are the Three- and Five-Member Administrative Appeals Court.

The Supreme Administrative Court is the Council of State. The Council of State shall assume no judicial responsibilities as an administrative court in 1929. Various administrative courts were subsequently generated, such as the fiscal courts in 1958, with jurisdiction over certain administrative proceedings. The regular administrative courts were established in 1977, with broad administrative power of substance. Administrative Courts include the Court of Auditors, as a special Supreme Administrative Court.

The third Supreme Court, the Controller and Auditor General has competency, without appeal, regarding certain specific administrative disputes (listed in art. 98 of the Constitution). Conflict of Authority is settled by a Special Superior Court (art. 100 of the Constitution)¹⁴.

¹⁴Androulakis (2017).

3. Subject matter and functional competences

The Administrative Courts in Greece are competent for disputes arising from:

- Municipal and Community tax
- mines and quarries,
- signs,
- The validity of municipal and community elections; administrative instruments elections of public entities,
- The liability of the government, the local government and public entities for compensation,
- Any type of staff remunerations in government agencies and local public entities in general,
- Administrative contracts,
- Public revenue collection,
- The granting and revoking of licenses for establishment, operation and sanctions during the operation of catering stores and workshops, and the temporary closure of the stores, offices, factories, workshops and in general professional facilities of traders, the issue of permits for the installation and operation of service stations, garages, car washes - car lubricating facilities and administrative sanctions for violation of the relevant laws.
- Legislation Implementation on granting, revocation or withdrawal of vehicle circulation licenses; related sanctions enforcement, including those imposed by the Highway Code,
- The determination of the operating conditions of public use vehicles (buses, trucks, passenger ships, tankers and others), the change of their seat, and any other relevant change,
- the imposition of disciplinary sanctions on members of professional associations that operate as public entities,
- the imposition of administrative sanctions on violation of the rules and regulations of labour law and the legislation on health and safety at work,
- The breach of law on tourism enterprises,
- The breach of law on consumer protection,
- The refusal to grant certificates or proofs of being debt-free toward State or social security for any reason,
- Tax offences, or being a debtor to the State for any reason, the refusal to certify tax books and records, due to the non-payment of outstanding and due debt,
- Actions issued based on Community and national provisions concerning the payment of the Community aid provided for by the above provisions, subsidies and other cash benefits or the imposition of any relevant measure or sanction,
- Deeds for the concession of public spaces to the store operators for serving their operation, the permit issue for outdoor trade and public markets,
- The objections of third country residents to the decisions governing their stay in Greece,

- The recognition, assignment or award of any right or privilege, or any other benefit under the legislation on social security,
- Disputes pertaining to the insurance coverage and any kind of benefits for the disabled, war victims, national resistance fighters, earthquake victims and victims of natural disasters,
- The admission and general situation of productive graduates, future employees and changes in the reverse officers status,
- Staff promotion,
- The professor's general conditions of service; fellows of higher education, the implementation of educational legislation for university students, scholars and postgraduate students,
- The revocation of urban planning expropriations, the revocation of urban planning restrictions, the regulation, ratification and discounting of property compensation, the designation of buildings or structures as illegal constructions and their exemption from demolition, the issuing of building permits and permits for cutting trees, the connection of buildings with all kinds of networks.
- The issuing of permits for outdoor advertising, signs and the removal of illegal outdoor advertisements, signs and the imposition of fines,
- The fines imposed by the Greek Independent Authorities for any reason, in particular by the Securities and Exchange Commission, the National Broadcasting

The Council of State is competent at first and last instance for disputes arising from:

- Annulment of enforceable administrative acts application by someone who has a lawful interest that might terminate the act or reject the annulment application. Mainly, cases concerning the protection of the natural environment, forests and woodlands, waters, flora and wildlife; the protection of the cultural environment, antiquities and archaeological sites, monuments, listed buildings and traditional settlements, mines and quarries, the sea and beaches, zoning issues as well as issues on the approval; amendment and extension of city plans, general urban plans and planning studies; the imposition of conditions and restrictions for construction, the determination of active urban planning zones and urban land re-allotment, zones receiving special support and providing special incentives and residential control zones, other than those concerning building permits and deeds for the designation of constructions as illegal; issues relating to the establishment and operation of industries, factories and hotels in general and engineering facilities; the organization and functioning of the administration, legal persons under public law, the local government and higher education establishments.
- The recourse of civil, military, municipal, etc. officials against decisions of Official Councils on their promotion, dismissal, demotion, etc.
- The Council of State requests, at second instance: Appeals against final decisions of the Administrative Appeals Court, issued as defined in Article

1 of Law 702/1977, in the event of an application for annulment or opposition.

The CS demands, while functioning as a Supreme Administrative Court, appeals against regular courts administrative decisions, in which a citizen exercises their right to recourse against an administrative act.

Administrative Justice in France, some Background Data, Subject Matter Competences of Administrative Courts

1. In general, France has practiced the centralization, while Napoleon the energetic centralization. The will to have a powerful state was based on France Unification Principal, as well as the necessity of a uniform administration throughout the territory.

During the restoration of the monarchy, the setting up of decentralization had initiated on a small-scale. As viewed from the Third Republic, the laws of 1873's confer an important power to the General Council, also a permanent representation of the prefect. The latter remains in power until 1982, as the head of central administration and as the executive of local district authority (which is divided by the state). The municipal council was given the right to make crucial decisions and to elect the commune executive within it. However, for municipalities and districts, the state through the prefect or sub-prefect, continued to exercise harsh control on every decision carried out by the elected body; this control held the name of tutees. The local authorities were considered as minority on which a tutee was exercised, like the one with the children.

By not facing difficulties in the 19th century, the authoritarian system was doing quite well. At this period of time, the French public administration was considered to be the best. Step by step, it could be viewed an enhancement of the level of life and the democratization of society.

2. The Council of France: Even today, the Council of State is legally an administrative body, part of the executive process. Firstly, its members are not recruited as judges as they are appointed by the President of the Republic or the Prime Minister by the pupils (so they call it), the National School of Administration (and not the National School of Magistrates), or discretely by external personalities (less than one third).

Secondly, the Council of State members do not hold the judge's position; consequently they do not enjoy the judge's guarantees, whether they are in ministerial cabinets, administration or in private companies (also an issue of the French administration called "pantouflage").

Thirdly, a part of the Council of State members have the opportunity have a sense of graduation (especially the French administration's idea of grades) being part of a trial and advisory formation involved in the law preparation and other government acts or give its opinion on draft declarations and any other draft text prepared by the government (Article L.112-1 of the Code of Administrative Justice)

Otherwise the Administrative Courts, part of the Council of State authority, have a closer organization compared to the other conventional courts. The members hold the status, the capacity to judge and have the opportunity to be free, given by the law (articles L.231-1 until L.236-3 of the code of administrative law) although a part is still recruited among the students of National School of Administration. Their functions are almost exclusively judicial; the advisory ones are much reduced.

France in accordance with practice sustained in a series of notable decisions, arising in connection with the operation of a public service are withdrawn from the cognizance of the ordinary courts and subjected to the exclusive jurisdiction of the so-called administrative courts (jurisdictions administrative), composed of officers belonging to the administrative organization. Nevertheless it is hard to find a country in which the individual is offered more protection than in France, against the arbitrary administrative action. Consequently the liberality of the Council of State admits complaints against *ultra vires* acts and the extent to which it insists on the importance of juristic person responsibility of the public law, the individual enjoys, in France, a higher degree of protection against illegal, improper or imprudent acts of the administration, and even against injury which he may suffer as a consequence of the public service normal operation. The foregoing statements may seem paradoxical, to foreigners, particularly Anglo-Saxons, inclined to assume that the individual can be protected only by being granted substantial competence against the administration; as well as a strong organization of the ordinary courts of justice. The French system is the product of a peculiar and rather complex development, determined by the action of various factors. I am indebted to the editors of this Quarterly for the opportunity to sketch the main lines of this development and to indicate the protection afforded to individuals by the French administrative court.

Administrative Justice in Italy

1. The Italian system was established only with the Italian unification, that is, with the newly created kingdom of Italy in 1861.

The French system had a major impact in the Italian Kingdom not only for the prestige enjoyed at that time, also because of the strong relations of the royal residence of Savoy with France. Since the newly created Italian Kingdom (which existed until 1947) a highly centralized administration system was implemented according to the French model. It was in its process to become a unitary state with a unique legislation, a common administrative organization, and a strong central government represented in the province by the prefect. To achieve this goal, on March 20, 1865, five major laws were passed, respectively on municipalities and provinces, on public safety, public health, state council, administrative disputes, and public affairs. From the late 19th century has initiated the structural change of the administration that made a positive contribution to economic growth. There were more than mere boosters, state economic development agencies and economic society (the creation of large public companies in the rail sector, the

telephone, etc.). Moreover, in the province, the prefect lost much of its importance and power (which it was never that great as that of France); in particular, he lost the authority of state services which were not under the power of Ministry of Order. On the other hand, municipalities developed their own economic and social areas. The two wars and fascist ideology contributed to the development of this increasingly dispersed and less uniform administration, as well as to a more and less protected state administration. Step by step, the Italian state transitioned from the bourgeois to the providential state; recalling the Italian terminology signifies it progressed from the mono-class to the plural state. The Republic was proclaimed in 1848, leading to the first changes, which established the principle of creating autonomous circles. However the major transformations, such as in France have happened only later, as there have been many difficulties in the aftermath of war and the connection of citizens with traditional solutions. Since the middle of 1970's initiated the advancement of administrative system. On the one hand, it can be noticed the strengthening of territorial decentralization movement. Italy established regionalism, which failed to keep its promises due to the tradition of centralization but continued to be a priority of Italian evolution, as demonstrated by ongoing reforms, such as those of 1990 and 2001, which transformed Italy almost to a federal state.

2. Italian Council State

The state council is an advisory body to the government and a joint appeal court for all Italy. It is regulated mainly by law no. 186 of 27 April 1982. It consists of about 100 members, one chairman and 18 section chairmen (3 per section)

After the approval of Presidency of Council administrative law one fourth of the members are appointed in a discrete way by the government. One-fourth is appointed by competition, the middle depending on their seniority and the merit among the councillors of the regional administrative Court. The state Council is divided in three advisory and judicial sections. Law no. 127/1997 has created another advisory section.

On cases related to Sicily it exist a special appeal administrative court. The Council of administrative courts for the region of Sicily is the body equipped with advisory and judicial functions. The regional administrative courts are established by the law no. 1034, on 6December 1971, and are organized by the law no. 205 of 21 July 2000. There are twenty or only one per region. For any case there are the first instance administrate judges.

The independence of administrative magistrate is guaranteed by the Council of Presidency of administrative law, created by law no. 186/1982 (as amended by law no. 205/2000). This body is composed of: President of the Council of State, in charge with the day-to-day management of the Council, four professor or lawyers who shall have more than twenty years' experience and must be elected by the MP chamber, four state councillors elected by their colleagues and six councillors of the regional administrative courts, also elected by their colleagues. This Council is equipped with very important competencies. Firstly, the management of funds for the function of different administrative courts ensures a financial autonomy of

these courts. Secondly, the decision of court organization and the career management of the administrative magistrates while carrying out their disciplinary acts. This institution is the logical consequence of the fact that in Italy administrative courts are part of the judicial power and not of executive power administrate.

3. Establishment and expertise of regional administrative courts.

Regional administrative courts are established, such as organs of administrative justice at first instance. Their regional constituencies include the provinces which belong to the individual regions. They are based in the regional capitals. In the regions of Lombardy, Emilia-Romagna, Lazio, Abruzzi, Campania, Puglia, Calabria and Sicily, are established separate sections, whose offices and circumscriptions will be established in the regulations that implement this law as defined in article 52. A special section is also established in the Trentino-Alto Adige region, based in Bolzano and regulated by another law. The regional administrative court of Lazio, besides a detached section, has three sections based in Rome:

- I. The regional administrative court decides:¹⁵
 - a) On the assigned appeals by articles 1 and 4 of the consolidated text approved by royal decree 26 June 1924, n. 1058, as amended, to the provincial government administration in the courts;
 - b) On appeals for lack of competence, for power excess or for law violations against issued acts and measures:
- II. From the peripheral organs of the State and the ultra-regional public bodies, established in the circumscription of the regional administrative court;
 - a) By non-territorial public bodies based in the regional administrative court district within the same limits their activity is being exercised;
 - b) By the local public bodies included in the district of the regional administrative court.

4. Appeals for incompetence, excess of power or law violation against acts and measures issued by the central organs of the State and public bodies of an ultra-regional character are devolved to the jurisdiction of the regional administrative courts.

For acts of ultra-regional public bodies issued by central state organs, whose effectiveness is territorially limited to the regional administrative court district; and for those relating to public employees in service, at the date the deed was issued, in offices based in the regional administrative court district, the competence is of the same regional administrative court.

In other cases, the jurisdiction for the state acts belongs to regional administrative court with headquarters in Rome; for acts of public bodies of an ultra-regional nature, it belongs to the regional administrative court in whose constituency the institution is based.

¹⁵Law of 6 December 1971, n. 1034 Establishment of regional administrative tribunals /

The regional administrative court is competent to decide on appeals concerning dispute operations for municipal, provincial and regional council elections. With the decision of the appeals, the regional administrative court exercises the powers and adopts the provisions of article 84 of the consolidated text approved by decree of the President of the Republic 16 May 1960, n. 570, modified by the law of 23 December 1966, n. 1147. The norms of the article 7 as defined by the law number 23 remain reserved for the popular actions and the appeals allowed to the voters.

Conclusions and Recommendations

The legislation analysis of some countries, with highly developed administrative justice, leads to some examples of other countries aiming to create specialized administrative courts:

- The administrative courts competences must be precisely defined at each level;
- A clear overview list of organic law competences;
- At the hierarchical level the Supreme Courts with competence control on other courts should be specialized in administrative justice. This division guarantees efficiency of justice and respect of the human rights.
- Administrative Courts must be completely independent, belonging only to the judicial system rather than being part of the executive system. The principle of Separation of Power must be respected so that the justice being served is intact.

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