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Articles

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

Gregory T. Papanikos
President
ATINER

Athens Institute for Education and Research

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12-15 July 2021, Athens, Greece

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Important Dates

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

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Important Dates

- Abstract Submission: **5 October 2020**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **5April 2021**

Academic Member Responsible for the Conference

- **Dr. Gregory T. Papanikos**, President, ATINER.
- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.
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Theoretical and Practical Aspects Regarding the Investigation of the Criminal Offence of False Testimony

By Elena-Ana Iancu[*]

The process of building social capital is closely correlated to the manner in which personal safety and human security are ensured. It is also influenced by the correctness, clarity and accuracy of the statements a person makes before the judicial bodies (in a criminal case, a civil case or other judicial procedures), as well as by their omissions, with the form of guilt required by the law. Untrue testimonies may lead to situations that constitute offences falling within the realm of obstruction of justice. They also contribute to a decrease in the level of trust in the state institutions' maintenance of emergency situations or a state of crisis, as well as the decrease of trust among fellow citizens, regardless of whether they are participants in the criminal process or members of certain communities. This article is aimed at highlighting the legal content and the constituent elements of the criminal offence of false testimony, as they result from Article 273 of the Romanian Criminal Code, while simultaneously presenting the particularities of the process of crime investigation. The discussion of this topic is interdisciplinary, as during the process of investigation of a false testimony offence, the evidence-gathering procedures that may be ordered in the case vary, depending on the concrete circumstances in which the act was committed, the material element of the objective side and the circumstances surrounding the active or passive subject. The identification, reporting and decoding of simulated or dissimulated behaviours which may have negative consequences on actions aimed at ensuring public order and safety, national security and security in the context of global communities, are of particular importance.

Keywords: *false testimony, criminal offence, investigation, crisis, perjury*

Introduction

Article 57 of the Romanian Constitution provides for the manner in which constitutional rights and freedoms ought to be exercised. In this sense, good faith and respect for the rights and freedom of citizens are attributes that contribute to ensuring the safety of the individual and safeguarding the values that are protected by law.

In order to ascertain that justice is achieved, it is essential that the role and specific activities of the different judicial bodies be presented in a correct and

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clear manner, since this may have ramifications on the relationship between the bodies that are involved. Literature on the subject emphasises the meaning of the concept of justice[1] as a particularly important value, upon which the entire rule of law is based.

If justice cannot be attained, the consequence is a decline of trust among the participants in the criminal proceedings, obviously depending on the situation of each participant. An important aspect is the reciprocity of liability, as this sanctions both the deeds of the natural persons or legal entities who, through their behaviour, caused a disservice to the judicial bodies, and the deeds of circumstantiated persons who are charged with specific duties in the achievement of justice. Untrue answers or intentionally incomplete answers provided to the questions asked by the judicial body, pose a threat to the values that are being protected, regardless of whether they come from a natural person or a legal entity.

Such answers, if substantiated by official documents concluded and signed by both parties, will be used as means of proof in criminal proceedings. Each person will be a perpetrator of the deed, even if several people have apparently committed the material element of a single criminal offence. The criminal offence of false testimony is a crime *in persona propria*, and each participant will be held accountable as a perpetrator. Explanations based on dynamic knowledge have been highlighted in the criminological literature.[2] Some authors, referring to sociological studies, present two types of justice, as follows: "distributive (to give to everyone what is due to them, i.e. what they deserve) and retributive (to restore the previously achieved order by means of an appropriate reward or sanction)."[3]

In this paper, we will pursue the following objectives:

a) To analyse the constitutive content of the crime of false testimony as it results from the legal text, in order to understand the manner in which the Romanian legislator criminalized the facts that can be legally classified as falling under the legal text concerned;
b) To identify and present comparatively examples of legal texts that criminalize similar situations in the criminal legislation of Romania, the Federal Republic of Germany, Hungary, Italy, and Greece, examining the common aspects and differences that might generate ambiguities in practice, especially in the case of investigation of international crimes, given that knowledge of this subject matter might contribute to the provision of safety;
c) To present some specific elements in the evidentiary proceedings, depending on the circumstantiation of the active subject and in relation to the Romanian legislation, in view of emphasizing the theoretical and practical implications this has to the stages of the criminal proceedings;
d) To highlight the importance of good-faith conduct in the relations between the possible subjects of this criminal offence and the authorities that achieve

[1]Duvac (2010) at 437.
[2]Cioclei (2016) at 36.
[3]Lopez (2009) at 104.

justice, while also ensuring the safety of the individual by increasing the degree of trust between peers and in relation to the judicial bodies.

Aspects of Material Criminal Law related to the Criminal Offence of False Testimony

Regulation of the Criminal Offence in the Romanian Criminal Code

Title IV, bearing the marginal name "Offences Against the Achievement of Justice" ("Obstruction of Justice") of the Criminal Code of Romania, provides for the deeds that may be classified as criminal offences of the type indicated by the legislator in Article 273, entitled "False Testimony." By analysing the legal text, we note that the offence is presented in three paragraphs: the first refers to the standard, simple form of the offence, the second to the aggravated form and the third paragraph provides for a special cause of impunity.

The generic *legal object* consists of the social relations that protect the achievement of justice. The *special legal object* protects the social relations that contribute to the discovery of the truth by giving true answers to the questions posed by the authorities administering justice.

The *material object* is missing, the action or inaction that achieves the objective side (content), posing a threat to the value being protected from the moment when untrue answers are expressed. The statement of the witness or the report drawn up by the expert is the means by which the deeds are committed.

The *active subject* is circumstantiated (qualified). In the simple form, they are the *witness*: "[…] any person who is aware of facts or factual circumstances that constitute evidence in a criminal case."[4]

In the aggravated form, the three first sections list the circumstances related to the active subject, while the fourth section relates to the circumstances regarding the deed, referring to the punishment provided for by law as being "the punishment of life imprisonment or imprisonment for 10 years or more."[5]

With reference to the active subject, the aggravated form indicates other circumstances relating to the witness: "witness with protected identity or witness subject to control by the Witness Protection Program."[6] Regarding the protection of witnesses, specific regulations are included in the special law on the matter[7] and in the Criminal Procedure Code,[8] which also relates to the use of an undercover investigator.[9] Undercover investigators may be heard in the criminal proceedings under the same conditions as threatened witnesses.[10] The active subject may only

[4]Art. 114, Para. 1 of the Romanian Criminal Procedure Code.
[5]Indicated in Para. 2.
[6]Provided for in Para. 2a.
[7]*Law no. 682/2002 on witness protection*
[8]Section 5, with the marginal name "*Witness Protection*" (articles 125-130) in Chapter II "Hearing of Persons" contained in Title I, with the marginal name "Evidence, Methods of Proof and Evidentiary Processes".
[9]Art. 138, Para. 1, letter g.
[10]Art. 148, Para. 8.

be a circumstantiated person, either in the sense of "a person who draws up an expertise report" or in that of an *interpreter*.[11]

In addition to the state (as holder of the social values attributed to the achievement of justice), as the *general passive subject*, there may be a *secondary passive subject*, more specifically, the natural person or legal entity who has been harmed by the action or inaction committed.

Additional terms that are relevant to the discussion are the objective and subjective components. *The objective component* is the material element, which depends on the capacity of the active subject in relation to the evidentiary process ordered and the method of proof by which the material element is achieved (e.g. statement, expertise report, technical-scientific finding report). As a result, the material element may be achieved either by "making false statements" or by "not saying everything one knows." The *objective component* includes certain essential requirements, relating to: the category of the case, the facts that are typical for the forms of this offence constituting either a criminal case or a civil case; "any other proceedings" in which witnesses are heard; the facts, which should be essential and examined; and the circumstances, which should be essential and examined.

The *subjective component* is relevant when the offence is committed intentionally. The motive and the purpose of the crime have legal relevance for the individualization of the punishment.[12]

Criminal participation may take the form of complicity or instigation. The witness cannot be a co-perpetrator. If there were several experts appointed to carry out the method of proof, they could be co-perpetrators if they had a criminal resolution regarding the realization of the material element. A similar situation is that of interpreters in the event that they perform, on the basis of an agreement, an activity not permitted by law. This offence is considered to have occurred at the moment when the action/inaction that forms the material element has been achieved, and it is not relevant for the retention of this classification whether they influenced the solution pronounced, or to what extent.

Elements of Comparative Law

Regulation in the Criminal Code of the Federal Republic of Germany

In German criminal law, the special part of the Criminal Code includes a section bearing the marginal name "False Testimony and Perjury."[13] From this section we may learn that the Criminal Code of Germany distinguishes between the false testimony made without taking an oath[14] and that made under oath.[15] The term "oath" refers to three possible situations:[16] an affirmation in lieu of oath; an

[11]Art. 148, Para. 2, letter c.
[12]Art. 74 of the Criminal Code.
[13]Section IX, §153-§162.
[14]§153, "False testimony made without taking an oath."
[15]§154 "Perjury".
[16]§155, assimilated form (affirmation equivalent to an oath).

invocation of a previous oath; and an invocation of a previous affirmation in lieu of oath. The legislator imposed two requirements, one regarding the entity before which the false testimony is given, i.e. the false testimony must be given before a court or another institution empowered to take testimonies under oath. The second requirement relates to the oath itself.

The punishment provided by law is imprisonment, ranging from 3 months to 5 years in the case of the criminal offence,[17] and imprisonment for at least one year in the case of the criminal offence, for the simple form.[18] For the mitigated form, concerning less serious cases, the penalty is imprisonment ranging from 6 months to 5 years.

Part of the German Criminal Code[19] relates to a person making a false sworn affidavit or falsely testifying while referring to such an affidavit, an offense punishable by up to 3 years imprisonment or a fine. The following sections indicate possible reasons for reducing the punishments or waiving the application of the punishment, such as if the false testimony was given in order to favour a relative, in cases where the requirements are met,[20] or if the false testimonies were corrected before producing the consequences to which the legislator explicitly refers.[21]

Regulation in the Criminal Code of Hungary

The Hungarian Criminal Code relates to "Crimes against the Judicial System."[22] According to this Code, the forms of the criminal offence and the penalties provided by law for the offence of false testimony (false accusation) differ, depending on the type of case in which the false testimony is given. This means that the legislator distinguishes between criminal cases, civil cases or conventional actions or other judicial actions or disciplinary actions, and also between crimes of a higher value or ones for which the special maximum penalty is life imprisonment. In addition, the Hungarian legislator does not make express reference to testimony given under oath or without taking an oath. The code relates to false testimony,[23] and contains provisions regarding the criminal offence that is the subject of our article.[24] The code provides for an offence committed by an active subject, the witness who gives "false testimony before the authority concerning an essential circumstance... or suppresses evidence."[25] The code also differentiates between as active subject who is circumstantiated by the capacity of expert or special adviser, and an interpreter or translator, if they commit the typical action or inaction provided for by paragraph 1.[26]

[17]Provided for in §153.
[18]§154.
[19]§156 "False sworn affidavit in lieu of oath."
[20]§157.
[21]§158.
[22]Chapter XXVI, Sections 268-289 of the Hungarian Criminal Code, known by the marginal name "Crimes Against the Judicial System."
[23]Section 272, "False Testimony."
[24]Sections 273, 274 and 275.
[25]Section 272 Para. 1.
[26]Para. 2a and 2b, respectively.

The legislator has imposed a number of essential requirements, including one that is related to the entity before which the false testimony is given, meaning that the false testimony must be given before an authority. Another requirement relates to the type of procedure or action that has taken place, which might lead to a different legal classification. Thus, the punishment provided by law is imprisonment from one to five years if the false testimony is given in a criminal case, regardless of the criminal offence to which it refers. The exception is in the case of a crime for which the maximum punishment is life imprisonment, in which case false testimony is punishable by imprisonment from two to eight years.[27] In the event that the false testimony is given in a civil case, the sanction is imprisonment for up to three years. The exception is when the civil case concerns a "particularly considerable value or any other form of interest that is considered particularly substantial",[28] then the penalty provided for is imprisonment from one up to five years.

It should be noted that a provision exists for elements of criminal procedural law, as it states that criminal proceedings "may be instituted in connection with a case for which false testimony was presented" solely at the request of the authority handling the initial process.[29] The same section refers to the limitation period, showing that it begins on the date of the "conclusion of the principal action".

The Hungarian criminal law explicitly stipulates that this offence may be committed by way of negligence (basic intent), as a form of guilt, in which case the punishment is imprisonment for up to one year. By analysing the punishments provided by law, we have determined that the offence has a standard form,[30] an aggravated form,[31] and two mitigated forms.[32] Notably, the legislator exhaustively indicates the cases in which the deeds will not be retained as typical false testimony offences,[33] as well as the case of special punishment or exemption from criminal liability.[34]

Regulation in the Criminal Code of Italy

In Italian criminal law, judicial activity is protected in a special part of the Italian Criminal Code.[35] As can be seen, the legislator distinguishes between testimonies made under oath in civil or criminal cases, before the judicial bodies and procedural fraud, and relates separately to false testimonies.[36] The active subject is circumstantiated differently in the legal content of the criminal offence,

[27]Section 272, Para. 4.
[28]Section 272, Para. 5.
[29]Section 274.
[30]Section 272, Para. 4, thesis I.
[31]Section 272, Para. 4, thesis II; Para. 5, thesis I and II.
[32]Section 272, Para. 6 and in Section 273, respectively.
[33]Section 275 Para 1a-1c.
[34]Section 275 Para 2.
[35]Title III, with the marginal name "On Crimes Against the Administration of Justice", in Part. I - "On Crimes Against Judicial Activity", articles 361-384-ter.
[36]Art. 372, the "False Testimony." Additional articles on the subject include Art. 371, "False Oath of the Party", and Art. 374, "Procedural Fraud".

and instead of referring to aggravated forms, for example, the code includes different legal classifications. Thus, in an article with the marginal name "false testimony",[37] the active subject is circumstantiated, referring to the person who submits the "witness testimony", whereas in a previous article, with the marginal name "False Oath of the Party",[38] the active subject is "the one who, as a party" swears falsely, though this relates only to civil trials. It should be noted that in the case of an active subject circumstantiated by the capacity of "expert or interpreter", the legislator assigned an article[39] with the marginal name "False Expertise or False Interpretation", on the condition that the expert or interpreter be appointed by the court.

Another article found in the Italian Criminal Code[40] contains provisions applicable in the event that, during the criminal prosecution, the prosecutor or the prosecutor of the International Criminal Court requests a person to provide information regarding the conduct of investigations, and the latter makes false statements or conceals what they know "about the facts regarding which he/she is heard." This is punishable by imprisonment for up to 4 years.

The penalty for committing the criminal offence of false testimony is imprisonment from 2 to 6 years. The same punishment is provided by law in cases where the deed is legally classified as an offence of false expertise or false interpretation, in which case the punishment applied will also prohibit the offender from working in a particular profession or occupation,[41] and holding public office.[42] When individualizing the punishment, the judge should take into account the seriousness of the resulting crime and evaluate the effects of the punishment. The Italian Criminal Code contains the general criteria for assessing the seriousness of the offence committed,[43] allowing "the judge shall apply the sentence at his/her own discretion" within the limits set by law.[44] The conditions for impunity are provided for in cases where the guilty party withdraws the false oath "before the final sentence is pronounced with regard to the motion for judgment."[45]

Regulation in the Criminal Code of Greece

As the other states examined in this paper, the Criminal Code of Greece also provides guidelines for managing instances of false testimony,[46] relating

[37]Art. 372 of the Italian Criminal Code.
[38]Art. 371.
[39]Art. 373.
[40]Art. 371-bis, with the marginal name "False information provided before the prosecutor or the prosecutor of the international criminal court".
[41]Found in the provisions of Art. 30 of part. III, "On ancillary penalties in particular".
[42]The provisions of Art. 373, Para. 1, in relation to Art. 28 of part. III, "On ancillary penalties in particular."
[43]Art. 133.
[44]Art. 132.
[45]Art. 371, Para. 2.
[46]Section XI, with the marginal name "Offences Relating to the Administration of Justice", Articles 224-234.

explicitly to "False Testimony",[47] "False Testimony Without Oath",[48] "False Testimony Committed by an Expert and an Interpreter",[49] and an article including provisions that concern the application of punishments or special cases of impunity.[50] The analysis of the abovementioned legal texts shows that the legislator distinguishes between the false statement made under oath, and those that are not. Regarding the active subject, the Greek code is quite specific, and relates to such situations as any person who is a party in civil proceedings,[51] any person examined as a witness under oath,[52] and any person who is not under oath and who "testifies falsely or denies or conceals the truth".[53] The expert or interpreter may be the active subject of the offence,[54] and if they are, in fact, under oath, they will be prohibited from exercising their profession.[55]

The code also specifies that "oath" refers to either the confirmation by the clergy in religious service or the declaration allowed by law in lieu of the oath in the case of people whose religion does not allow them to take an oath.

According to Greek law, giving false testimony is punishable by imprisonment for a minimum of one year[56] or a monetary penalty.[57] If the active subject is the expert or the interpreter, the punishment provided by law is at least 2 years of imprisonment.

The law also provides for a case of special impunity when "by their free will, the responsible person revoked before the same authority the false testimony by making a new one."[58] The court has the option of refraining from applying any punishment,[59] for specific deeds that are committed "in order to avoid criminal liability, either one's own or that of one of one's relatives."[60]

Components of the Investigation of the Criminal Offence as Stipulated in the Romanian Legal Regulations

Witness. The criminal procedural law stipulates that any person may be heard as a witness in the criminal case "if they are aware of facts or factual circumstances that constitute means of evidence."[61] This includes people who

[47]Art. 224.
[48]Art. 225.
[49]Art. 226.
[50]Art. 227.
[51]Art. 224, Para. 1, simple form.
[52]Art. 224, Para. 2, assimilated form.
[53]Art. 225, Para 1a.
[54]Art. 226, Para. 1, if they are under oath, or in Para. 2, if they are not.
[55]Art. 67.
[56]If Art. 224, Art. 225 Para. 1 applies.
[57]If Art. 225, Para. 2, applies.
[58]Art. 227, Para. 2.
[59]as results from Art. 227, Para. 3.
[60]Provided in Art. 224, Para. 2 and Art. 225.
[61]C.P.C, Art. 114, Para. 1.

are part of the fact-finding bodies.[62] The exceptions, who may refuse to testify as witnesses, are listed quite clearly in the legal text.[63] The tactics applicable when hearing a person will be determined by the judicial body, so that it may assess the statements in an objective manner, corroborate the statements and take into account the specific stage of the criminal proceedings.

Witnesses may also be acting of good faith when giving incomplete or inaccurate statements. The process of forming statements is based on the processes of knowing the objective reality, starting from the perceptual process, to the laws of memory preservation and to the way in which things that are known are recounted according to the objective factors and/or concurrent subjective factors that influence this process. The perception process may be influenced both by factors determined by the circumstances of the setting[64] and the individual's psycho-physiological and personality particularities, including the quality of the sense organs, the individual's personality and education level, age and intelligence, temperament and level of thought process mobility, states of fatigue, affective states, attention and distortion factors (e.g. excessive influence of perceptions from previous experiences).[65] We must consider the fact that in order to be an active subject of this offence, the following conditions must be present: the witness must intentionally commit the action or omission, not saying everything they know in response to the question, in the specific, solemn context of the trial, in the presence of a number of participants (publicity of the court sessions), after they reacted differently in the criminal prosecution stage, sometimes contrary to everything they are stating at the trial.[66]

Interpreter. According to the Romanian Criminal Procedure Code (henceforth the C.P.C.), hearing testimony mediated by as interpreter takes place when the person being heard "does not understand, does not speak or does not express himself/herself well in Romanian."[67] Thus, a certified interpreter must be appointed. Exceptions are allowed in cases where either an urgent procedural measure is required or interpretation by a certified interpreter cannot be provided.[68]

Expert. After the appointment of the expert, either by the criminal prosecution body or by the court, the expert will be aware of the objective of their expertise, as well as the questions to be answered. According to the regulations[69] regarding their realm of expertise, the expert has the right to propose modifications or completions to the questions. In addition, the judicial body will indicate to him the purpose of their analysis and the basis upon which the conclusions will be drawn. In cases where the expert is appointed by a "forensic institution, a laboratory of forensic expertise or any specialized institute," an exception will

[62]The meaning is derived from Art.s 61 & 62 of the C.P.C.
[63]Art. 117, paragraph 1 of the Criminal Procedure Code: "a) a suspect's or defendant's spouse, ancestors and descendants in direct line, as well as their siblings; b) persons who were a suspect's or defendant's spouse."
[64]Mircea (1999) at 255-256.
[65]Stancu (2008) at 416-418.
[66]Butoi (2012) at 130.
[67]C.P.C. Art. 105, Para. 2.
[68]Iancu, Şinca & Şinca (2018), 2860-2865.
[69]C.P.C. Art. 177.

be made regarding the rule of meeting with the judicial body before providing expert services.[70] In order to demonstrate the constitutive elements of the offence of false testimony, taking into account the capacity of the active subject in the process of investigation of the offence, a follow-up plan will be drawn up, beginning with the questions formulated and the answers provided by the expert. This will take place regardless of the manner in which the expert was appointed, the appointment procedure, the type of expertise and its performance.

An expert may also be present during the procedural activities related to the criminal investigation or trial. While being heard by the criminal prosecution body or by the court, the expert might provide untrue answers. If an expert signs the expertise report by themselves, they will be the perpetrator of the offence, and if they sign the report along with other experts, they will be a co-perpetrator. Along with the criminal procedural regulations,[71] A government ordinance also regulates the forensic expertise activity[72] and relates to the types of expertise that may be requested during the judicial process and the basic requirements for being appointed an expert allowed to participate in this process.

Protected Witnesses.[73] The C.P.C.[74] defines the concept of a threatened witness,[75] as well as the measures that must be taken during a criminal prosecution[76] or trial.[77] Specific regulations are provided for the hearing of a protected witness, a capacity that aggravates the deed in the event that they make false statements.[78] A relevant status is that of the *vulnerable witness*.[79] A protected witness may give their statement without being physically present at the place where the judicial body is located, and the medium on which it was recorded "in the original, sealed with the seal of the prosecutor's office or, as the case may be, of the court before which the statement was made, shall be kept confidential."

Undercover Investigator. The C.P.C[80] regulates the investigation procedures in which an undercover investigator is used: "the use of a person with an identity other than their real one."[81] The judicial body orders this evidentiary process in the event that the purpose is to obtain "data and information regarding the commission of a crime". If, in connection with the activities carried out based on the mandate received, the undercover investigator is subjected to threats, intimidation or other

[70]C.P.C. Art. 177 in relation to Art. 173, Para. 3.
[71]C.P.C. articles 172-191.
[72]Government Ordinance no. 75/2000, Regarding the organization of the forensic expertise activity, published in the Official Journal no. 407 of 29 August 2000, with subsequent amendments and additions.
[73]Law no. 682/2002, regarding witness protection, republished in the Official Journal. no. 288 of 18 April 2014.
[74]in Chapter II "Hearing of Persons", Section 5 "Witness Protection".
[75]Art. 125.
[76]Art. 126.
[77]Art. 127.
[78]Art. 129.
[79]Art. 130, Para. 1a: "the witness who suffered a trauma as a result of the commission of the offence or as a result of the subsequent behaviour of the suspect or defendant"; Para. 1b: "underage witness".
[80]Art. 148 ("Use of undercover or real-identity investigators and of informants") and Art. 149 ("Measures for the protection of undercover investigators and informants").
[81]Art. 138, Para. 10.

acts of violence, the law states that they may benefit from the same protection measures as witnesses. The benefit of protection measures may also be arranged to include their family members.

Findings/Results

Romanian case-law includes cases that necessitated the resolution of a legal issue in the matter or filing an appeal in the interest of the law. Within the context of this paper, regarding a person who makes a *false statement*, it must be noted that such a witness may be an active subject of the offence of false testimony,[82] but not an active subject of the offence of aiding and abetting a perpetrator.[83] There are also cases where a person is *heard as a witness*, and if, during that procedure they perform the action or inaction as provided for by the legislator in the Criminal Code,[84] they will be an active subject[85] of that offence only, and will not be considered to have perpetrated the offence of aiding and abetting a perpetrator.[86] We would also like to emphasize the importance of expressly addressing the witness with the question referring to the essential requirements related to the objective side, in order to clarify the circumstances or facts that are essential in the investigation or resolution of the case, and as a condition[87] for achieving the objective side of this offence. This assessment, emphasising the essential nature of the circumstance, relates to "evidentiary efficiency, relevance and conclusiveness", and is relevant "regardless of whether the court that resolved the case removed from the evidence administered the statements given by the witness as insincere".[88]

There are cases in which the fact-finding bodies[89] conclude fact-finding reports regarding facts that may be legally classified as a crime, and such bodies may be heard in the capacity of witnesses. The act concluded by the fact-finding bodies[90] is "an act of seizing (notification of) the criminal investigation bodies."[91] The case-law includes situations in which the fact-finding body also carried out a criminal investigation in the same case. In one such case, the judge conducting the

[82]In this respect, "Decision no. 1/16 January 2020 regarding the issuance of a preliminary ruling on the resolution of a point of law", High Court of Cassation and Justice, court panel for resolving legal issues in criminal matters, published in the Official Journal no. 173 of 3 March 2020, RO.
[83]Romania Criminal Code, Art. 269.
[84]Art. 273, Para. 1.
[85]In this respect, "Decision no. 1/14 January 2019 on the appeal in the interest of the law declared with regard to the deed of a person heard as a witness...", the High Court of Cassation and Justice, the court panel with jurisdiction to rule on the appeal in the interest of the law, published in the Official Journal no. 187 of 8 March 2019, RO.
[86]Art. 269, Para. 1.
[87]In this respect, "Decision no. 53 of 22 January 2019", published in the Official Journal no. 347 of 6 May 2019, RO.
[88]In this respect, "Decision no. 1319/2016, pronounced by the High Court of Cassation and Justice – Criminal Division", published in the Official Journal no. 347 of 6 May 2019, RO
[89]As defined in Art. 61.
[90]In accordance with Art. 61, Para. 1.
[91]Art. 61, Para. 6.

preliminary hearing maintained that, based on the report, the criminal investigation had been carried out by the same fact-finding body that had the capacity of a criminal investigation body, and this led to the annulment of the gathered evidence, by reason of the evidentiary processes ordered. Thus the fact-finding bodies acquire the capacity of a witness, through the provisions of the criminal procedural law.[92]

Possible active subjects must conduct themselves adequately, within the values defended by the legislator through the laws containing criminal provisions. This is reflected in the punishments provided by law in the case of false testimony, the focus of this study: the special minimum prison sentence is six months and the special maximum is five years, and may be substituted by a fine. in any case, the punishment provided by law should be individualized, established and applied by the court, depending on the defendant's situation. It should also have educational values, contributing to the prevention of crime.

The subjective attitude of the perpetrator, as reflected by the actions/ omissions committed intentionally before the judicial bodies, creates distrust around and within the bodies involved in the administration of justice. Punishments that lean towards the special maximum would, most probably, discourage the perpetration of further criminal acts, also conveying the message that the judicial bodies act firmly in their application of the law and ensuring order and safety in the community.

Our analysis of the incriminations of false testimony, provided in the penal codes of the states referred to in this article, has found that:

a) Although the act of perjury is criminalized in all European countries, differences in legal content, as well as various marginal names, make it difficult to compare the relevant legal rules, especially in ambiguous situations such as those involving transitory people, occurrences that take place during judicial proceedings, without taking an oath or in the case of corporate crisis.
b) The use of marginal names translated from other languages or notions specific to criminal law can create confusion, lead to ambiguity between the variants of translated texts, make it difficult to understand the text of the law or create confusion in similar hypotheses, leading to behaviour inconsistent with the criminal law of different states. While the Romanian legislator relates to the legal content of the crime of "False Testimony",[93] there are translations that use the word "Perjury". This ambiguity may also occur regarding the definition of such terms as expert, protected witness, threatened witness and vulnerable witness, for example.
c) Comparing the marginal name "False Testimony", we have found that it is used to denote the same meaning as defined by the legislator in the criminal codes of Romania, Hungary, Italy, Greece. However, the criminal codes in Germany, Greece and Italy also detail similar crimes with different marginal names, differentiated by their components, such as

[92]More specifically Art. 114, Para. 4.
[93]Art. 273.

whether the crime of false testimony was committed under oath or without taking an oath. In Italy there is a text of law that explicitly refers to false testimony given under oath, taken as part of the civil process. Only in Germany is there a section entitled "Perjury" which is often used in legal language.[94]

d) in Germany and Greece the legal content differentiates between a false statement made without taking an oath and a false statement made under oath, but at the same time takes into account the active subject, the circumstances or the type of case in which the persons are heard.

Discussion

Article 273 of the Romanian Criminal Code provides for the legal content of the criminal offence of "False Testimony" (Perjury). In addition, the legislator has provided other relevant special laws, such as laws indicating the legal definition of the concepts of expert, protected witness, threatened witness and vulnerable witness.

Having examined the legal texts of certain European states (Romania, Germany, Hungary, Italy, and Greece) and compared the manner in which they relate to the subject of "false testimony", we have found the following:

1) We find the same marginal name "False Testimony" (or "Perjury") given by the legislator in the criminal (penal) codes of Romania, Hungary, Italy and Greece, though the criminal codes of Germany and Greece refer also to other crimes, with different marginal names, based upon the different components of the case, depending on the situation in which the person makes their untrue statements (under oath or without taking an oath). In Italy there is a legal text that explicitly refers to the false oath made within the context of a civil trial.
2) The legal content of the offences in Germany and Greece differentiates between a false statement made without taking an oath and a false statement made under oath, and the circumstantiation of the active subject;
3) The legal object emerges from the chapter/section in which the legislator included the crime of false testimony, as follows: in Italy and Greece, the protected values are related to the administration of justice, in Romania they are related to the achievement of justice, in Hungary the protected values are related to the judicial system, and in Germany, to the activity of the judicial bodies, implicitly the activity of the courts.
4) The active subject related to the marginal name of "False Testimony" is similar in the legislations of Romania and Hungary, in the sense that they are found in similar capacities (witness, expert, interpreter). By contrast, we note that the Romanian Criminal Code has a different legal classification for a witness (simple form), as opposed to a witness with a protected

[94]Section 154 of the German Penal Code.

identity, a witness included in the Witness Protection Program or an undercover investigator (aggravated forms). In the Hungarian Criminal Code, the special adviser and the translator are mentioned among the active subjects. The Italian Criminal Code refers only to the witness as the circumstantiated active subject of the offence. The expert or interpreter are included as possible active subjects under other offences with distinct marginal names, but containing a similar material element.

5) The analysis of the legal texts in the states indicated above shows that the subjective side, i.e. guilt, is in the form of intention. The Hungarian Criminal Code, in addition to intention, contains a specific negligence as a form of guilt[95] and the German Criminal Code includes a section providing that criminal acts of false oath committed through fault are punishable.[96]
6) Special causes of punishment are emphasised in the codes of Germany and Hungary.
7) Causes of impunity are emphasised in the codes of Romania, Hungary, Italy, and Greece.
8) Causes for nonenforcement of the punishment, left to the discretion of the courts, are emphasised in the codes of Hungary, Germany and Greece.
9) The penalties provided by law are different. In some states, the special minimum punishment is indicated. In Germany, for example, the penalty for mild forms of the crime is imprisonment for at least three months. In Romania, the penalty is imprisonment for no less than six months. We find an unspecified special minimum punishment, but a specified special maximum punishment in Hungarian legislation, e.g. imprisonment for up to one year or imprisonment for up to three years. As for the special maximum punishment, it may be as high as eight years in Hungary, if the false testimony refers to a crime for which the maximum punishment is life imprisonment. The criminal law of Greece provides for a specified minimum punishment, such as imprisonment for at least one year, without specifying a special maximum punishment.

Conclusion

In the current context, the truthful accounting or offering of true answers is of significant importance, specifically in procedures intended to ensure and maintain public order and safety. In order to identify the best solutions to the problems that occur as a result of certain concrete situations, it is important to be aware of the psychological processes involved in the formation of statements in the conscience of participants in the criminal proceedings or other judicial procedures. Being aware of general elements that are of interest to humankind, especially good Euro-regional governance, ensures human safety and contributes to the construction of social capital even when paradigms change. Communication in situations of uncertainty is affected by a number of needs, and therefore one factor influencing

[95]Para. 6 of the Art. refering to the offence.
[96]Section 161.

the development of our accounts is how safe we feel in our given situation at a specific time.

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Development of Individualism in Chinese Legislation and Social Solidarity – A Durkheimian Approach

By Helen Peng Han[*]

The concept of individualism plays an important role in Durkheim's work of sociology. He viewed the rise of individualism as an indicator to reflect a society's development. When a society develops, collective consciousness leaves more room to the development of individualism. Durkheim also argues that when society evolves, the predominance of different types of social solidarity changes. Durkheim developed his theory of using law as an external index to observe the changes of society. This paper applies Durkheim's approach in Chinese society and through examining the changes of individualism in Chinese legislation it concludes that individualism develops rapidly in Chinese society, reflected by the increasing focus on individuals and more protection of individual rights in both repressive and restitutive laws. This paper also argues that to avoid the occurrence of anomie, when individualism develops, more proper rules and laws should be developed accordingly.

Keywords: *Individualism; Legislation; Durkheim; Solidarity; China*

Introduction

Durkheim identified the fact that when societies become more advanced, there is less individual resemblance, shown by the historical biological evidence that the more differences in individual cranial capacity, the more advanced civilisation there is. Individualism, from Durkheim's view, refers to "personality", i.e. "the combination of the expression of individualized wants and needs and of beliefs, sentiments and ideas that derive from the individual's interaction with the social world."[1] Individuals are born different naturally in terms of the body, but there is change from the sacred body of individuals to the sacred personality in modern society. Personal autonomy unites individuals morally in modern society as it is the society which confines the scope of individual freedom. Although Spencer and the classical economists school argued that "the purpose of society, it is held, is the individual and for the sole reason that he is all that there is that is real in society...it adds nothing and can add nothing to this wealth of all kinds that the society stores up and that the individual benefits from"[2], the existence of a society should mean more than that.

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[1]Cotterrell (1999) at 113-114.

[2]Durkheim (1950/1992) at 52.

Durkheim's View of Individualism

According to Durkheim, society should have higher goals, not just a product to realise utilitarian interests. When moral values such as sympathy, respect, and kindness are eroded, there will be no correct moral restrictions on people, who may become greedy, and their desires can never be satisfied. Anxiety, dissatisfaction, pursuit of material desire, excessive production of anarchy, inequality, exploitation, and social conflicts day after day, ultimately endangering society as a whole.[3] Morality needs to be rebuilt, argued by Durkheim, and the source of reconstruction is not a solipsism, but a sympathy for all people, a love for those who suffer, a greater enthusiasm to fight for them, reducing suffering, and achieving more justice.[4] Durkheim has much confidence in the capacity of society to create morality, and moral morbid phenomena will eventually disappear. When morality is deeply rooted in the consciousness of each individual, moral individualism will become the "moral catechism" and the source of a new morality in modern society. At that time, the "cult of the individual" becomes one of the most distinctive characteristics of modernity and the individual and the society exist at the same time and complement each other.

Even though, as Cladis claimed, that Durkheim often talked of conflict between the individual and society in his works[5] and he thought there was an antagonism between individual and society which mutually contradict and deny each other[6], for Durkheim, individuals cannot be separated from society. Individuals are "members" in a society, not only because of individuals' "subjective" role but also because only though society, can individual rights be regarded and private interests be gained. Durkheim has made a strong argument in this sense for disputing the postulate that the rights of the individual are inherent, admitting that the institution of these rights is in fact precisely the task of the state.

> "History seems indeed to prove that the state was not created to prevent the individual from being disturbed in the exercise of his natural rights: no, this was not its role alone–rather, it is the state that creates and organises and makes a reality of these rights. And indeed, man is man only because he lives in society."[7]

That means that only through the state are individual rights possible. The state therefore plays an active and significant role in not only preventing individual rights from being obstructed but also providing necessary conditions for the realisation of individual rights. This is because it is the society which raises individual nature and "subject[s] that nature to itself."[8] Moreover, attitude toward morality in modern society, for Durkheim, is in fact "moral individualism", which is "a religion in which man is at once the worshiper and the god."[9] Of course, such

[3]Tole (1993) at 16.
[4]Durkheim (1898/1973) at 49.
[5]Cladis. (1992) at 115.
[6]*See* e.g. Durkheim (1906/1974) at 59.
[7]Durkheim (1950/1992) at 60.
[8]*Ibid.*
[9]Durkheim (1898/1973) at 46.

"sacred" dimension of modern individuality is not from some inherent rights of individuals. It is modern society which makes it possible in terms of granting rights and liberty to individuals and makes individuals themselves worshipful. For this reason, "every society is despotic"[10] because associations in society group individuals and exercise authority over their members by coercive measurement. However, such despotism of society is *natural* and *necessary*, because "the individual has been raised in this way by the collectivity, he will naturally desire what it desires and accept without difficulty the state of subjection to which he finds himself reduced."[11] "Moral individualism" is, in this sense, characterised by "(1) a set of social beliefs and practices that constitute a pervasive shared understanding or common faith that supports the rights and dignity of the individual; and (2) a plurality of social spheres that permits diversity and individual autonomy, and that furnishes beliefs and practices that morally associate individuals occupying a particular sphere."[12] Meanwhile, Durkheim believes in the productive function of the state in generating moral individuality as "it is the state that sets it [the moral individuality] free."[13] "Far from its tyrannizing over the individual, it is the state that redeems the individual from the society […] the fundamental duty of the state is laid down in this very fact – it is to persevere in calling the individual to a moral way of life."[14]Therefore, for Durkheim, individualism is a "value system that emerges gradually as both a framework for and an expression of human nature in this sense"[15] as a balance between the force of the social sentiments and the individualised force of personal need. Individualism also ties individuals to society via the networks of responsibility to each other.[16]

Individualism rises with the decline of the intensity of collective consciousness as there is a social fact that "the only collective sentiments that have become more intense are those which have for their object, not social affairs but the individual".[17] Therefore, the individual personality must have gained more importance and "it is not enough for the personal conscience of each to have grown in absolute value, but also to have grown more than the common conscience [collective consciousness]."[18]

Durkheim advocates for Spencer's view that the place of the individual in society becomes greater with civilisation. He argues that the homogeneity of individual consciousness and collective consciousness is a characteristic of primitive society because the individual personality "did not exist"[19] in primitive societies. Although he disagrees with Spencer's sociology concerning the causes

[10]Durkheim (1992). Bryan S. Turner (trans) *Professional Ethics and Civic Morals*, London: Routledge at 61.
[11]*Ibid.*
[12]Cladis (1992) at 43.
[13]Durkheim (1950/1992) at 69.
[14]*Ibid.*
[15]Cotterrell (1999) at 114.
[16]*Ibid*. at 115.
[17]Durkheim (1893/1933) at 167.
[18]*Ibid*.
[19]*Ibid.* at 194.

of the rise of individualism, he admits that "it is none the less true that individualism has developed in absolute value by penetrating into regions which originally were closed to it"[20] and it is "the fruit of an historical development".[21]

Durkheim argues that the rise of individualism is a consequence of the development of division of labour and civilisation. He differentiates social division of labour from physiological one as in the former, an individual has freedom to change the role compared with cells in the organism. The fact is when there is more social division of labour, there is more flexibility and freedom in society. Individuals, therefore, are transformed while society changes as the number of social units and their relationships changes. Individuals free themselves increasingly from the dominance of the organism of society. The more development, growth and densely populated society, the more sociable humans become and psychological life developed as well. Individual personalities are formed and become conscious of individuals themselves and in turn the society becomes more complex and flexible. Hence, individualism is used by Durkheim as an indicator to reflect the social development and social transition.

Durkheimian Approach: Law as Symbol of Social Solidarity

As a pioneer of modern sociology, Durkheim published a large number of papers and monographs on education, religion, suicide, law, crime and so on, providing solid theoretical foundation for modern sociological studies. It should be also noted that among classical sociologists, he is also one of the founders of "legal sociology" or "socio-legal studies". Durkheim is assumed to provide an evolutionary theory on sociology and law. In his early works, he regarded the classification of law as a direct response to different types of social solidarities, which will be discussed particularly in later sections. In his later works, he emphasised that the law itself as a research field of sociology has important significance. He later found that the laws in modern society increasingly express a moral individualism and in this sense, individualism is the foundation of human rights which contains individual dignity and autonomy in nature. Such concept of individualism is different from selfishness and self-centeredness, which do not have moral basis. His many followers such as Marcel Mauss and Paul Fauconnet, also have outstanding contributions in the field of legal sociology.

In Durkheim's first major sociological work *The Division of Labour in Society*, he took *social solidarity* to be a central object of sociological analysis and accorded it a privileged place in his theoretical framework. This analytical concern came about because, for Durkheim, it is social solidarity which binds society together.

Durkheim shows his central concern with the changing nature of social solidarity and the function of the division of labour in society. He conceives the division of labour as the necessary condition of civilisation. While organic

[20] *Ibid.* at 198.
[21] *Ibid*. at 199.

similarities can largely affect psychological similarities and then sensory impressions, the more individual resemblance in society, the more primitive the society is.

Durkheim also argues that the division of labour serves as the condition of the existence of societies, because "through it, or at least particularly through it, their cohesion would be assured; it would determine the essential traits of their Constitution"[22], which is a much more important role than is ordinarily given consideration. It ensures the cohesion of societies because the true function of the division of labour is to create in two or more persons "a feeling of solidarity"[23] and then it has developed to be the main cause of solidarity in society. Social solidarity arises where there are differences which require each other for their mutual fruition. Through the division of labour, individuals are linked to each other because they rely on one another in obtaining products that they cannot produce by themselves.

However, "social solidarity is a completely moral phenomenon which, taken by itself, does not lend itself to exact observation nor indeed to measurement."[24] In order to examine to what extent social solidarity derived from the division of labour and "in what degree the solidarity that [the division of labour] produces contributes to the general integration of society [and] whether it is an essential factor of social cohesion"[25], Durkheim proposed a strong argument that law is the *visible symbol* of social solidarity. This is because he found law as the "substitute" for social solidarity in the sense that law as "an external index which symbolises it [social solidarity] and [so we can] study the former in the light of the latter." Such substitution is possible because he conceives social solidarity as a moral phenomenon which can manifest its presence by sensible indices. Therefore, he categorises social solidarity by using its "visible symbol" – *law*. As juridical rules symbolise social solidarity, the categorisation of juridical rules corresponds to different types of social solidarity.

As "law reproduces the principal forms of social solidarity"[26], Durkheim proceeds to find different types of social solidarity by classifying the different types of law. In order to categorise law scientifically, Durkheim identifies an essential characteristic to juridical rules, and thus, a different approach of the classification of law is developed. The characteristic is "sanction" as "every precept of law is a rule of sanctioned conduct."[27] By classifying the different types of sanctions, it will be possible to find the different types of laws which correspond to them.[28] There are two types of sanctions (and thus, as have been already noted, two classes of laws) – repressive sanctions and restitutive sanctions. Repressive sanctions consist of suffering and punishments, which are mainly contained in "repressive laws", such as criminal laws, and restitutive sanctions meaning the *restore the status quo*, are largely contained in "restitutive laws", such

[22]*Ibid.* at 63.
[23]*Ibid.* at 56.
[24]*Ibid.* at 64.
[25]*Ibid.* at 64.
[26]*Ibid.* at 68.
[27]*Ibid.* at 68-69.
[28]*Ibid.* at 49-70.

as contract laws. For Durkheim, repressive laws comprise all penal law while civil law, commercial law, procedural law, administrative and constitutional law, after abstraction of the penal rules are restitutive laws.

Since law reproduces the principal forms of social solidarity, different types of solidarity which correspond to different types of laws are identified: mechanical solidarity and organic solidarity. The two terms are the key concepts that overarch the theoretical and empirical studies in Durkheim's research. The type of solidarity which corresponds to repressive laws is called "mechanical solidarity", which refers to a social solidarity that lies in the likeness of consciences in the population, wherein repressive measures are imposed, and which shows the extensive common morality. The type of solidarity which corresponds to restitutive laws is "organic solidarity", which concerns another source of social cohesion, i.e. the division of labour in society. In an organic solidarity society, individuals depend upon each other in terms of their differences from others and restitutive laws are prevalent.

In *The Division of Labour in Society* and in his subsequent essays and lectures, Durkheim used empirical evidence to show the progressive development of a society from a primitive one displaying mechanical solidarity as predominant to an advanced one where organic solidarity predominates owing to the increased division of labour in modern times.

For Durkheim, the two types of social solidarity coexist in different types of societies. Mechanical solidarity comes from social likenesses while organic solidarity emerges through the division of social labour. However, the predominance of the two types of solidarities varies in different types of societies.

In primitive societies[29], mechanical solidarity is the predominant type. The individual is a part of the same collective type and shares common values or sentiments with others. Such shared common values or sentiments are called "collective consciousness", defined as "the totality of beliefs and sentiments common to the average citizens of the same society which forms a determinate system which has its own life."[30] For example, the hatred of murder or rape can be a typical content of collective consciousness. As "society exists only by virtue of the reality of common values, ideas, and beliefs"[31], collective consciousness constitutes the major source of social solidarity. Repressive laws largely exist in society as a measure of punishment of crimes which "offends strong and defined states of the collective conscience [collective consciousness]"[32].

[29]It should be noted that in this essay, "primitive society" doesn't refer to the uncivilized society in barbarians but a concept used in Durkheim's theory which is characterized by mechanical solidarity, limited division of labour, the homogeneity of values, strong collective social bonds, little individualism, strong "collective consciousness" and repressive laws. Meanwhile, "advanced society" is used as a counter concept with "primitive society" where the division of labour is highly developed and is featured by the increased independence of social members from group, high "interdependence" between individuals, the rise of individualism, increasing secularism, tolerance, mutual indifference and weaker collective consciousness. I use these terms from Durkheim, but it should be emphasized that they are not to be understood pejoratively.

[30]Durkheim (1893/1933) at 79.

[31]Hunt (1978) at 64.

[32]Durkheim (1893/1933) at 80.

By contrast, in modern societies, through the development of the division of labour, the intensity of collective consciousness becomes weakened and individualism has increased because individuals rely more on others in the same measure that they are distinguished from them. The division of labour has developed and becomes the main cause of solidarity in society. The type of solidarity produced by the division of labour is organic solidarity, which developed to be the predominant type of solidarity in modern society. Restitutive laws have increased and performed a different function, compared with repressive laws: they *restore the status quo*. Contracts are the purest example of restitutive law. They are entirely grounded in the expectation that the other person will uphold their end of the contract.

Durkheim also discovered three pathological forms as the abnormal consequences of the development of division of labour during social transition. These are: *anomie*, enforced division of labour and the one lack of internal organisational coordination. Among those pathologies, *anomie* was suggested as an exceptional consequence of the division of labour when solidarity is not produced because "the relationships between the organs are not regulated."[33]

Based on the above theory, this paper adopts Durkheim's approach of using law as an external index to observe the changes of society. As individualism is one of the key concerns of Durkheim, this paper selects it as research object and tries to observe the changes of individualism in the changing laws of the PRC in recent decades to understand the changing nature of social solidarity in China. Findings from Chinese laws and Chinese society will also reflect on the original Durkheimian theory.

Changes of Individualism in Laws of China

Scope of Laws

The data has been collected through in-depth selections of laws in China since 1982 until now. The reason for choosing 1982 as a starting point lies in the fact that Chinese legal infrastructure changed tremendously in that year after 1978 when China has launched open and reform regime. It was in 1982 when the constitutional framework of China was established on which the legal system is based.

For Durkheim, law is a coercive and regulatory force, which "reproduces the principal forms of social solidarity"[34] and "we can thus be certain of finding reflected in law all the essential varieties of social solidarity."[35] However, law, in Durkheim's analysis, is not explicitly defined. Nevertheless, "the implication is that law is the set of rules which are more or less formally promulgated and enforced in a society."[36] Thus, "law" in this paper refers to *state law*, which has

[33]Durkheim (1893/1984) at 304.
[34]Durkheim (1893/1933) at 68.
[35]*Ibid.* at 65.
[36]Reiner (1984) at 177.

universal validity backed up by state coercive power and is "more easily used to exemplify and measure the way in which social cohesion was created and changed in different types of society".[37]

Thus, the research will analyse the changes of the state laws of the PRC which refers to a set of laws made through formal process of legislation in the PRC which have formed an integral system. As discussed before, by classifying "sanction", Durkheim finds two types of laws in society: repressive laws and restitutive laws. For Durkheim, civil law, commercial law, procedural law, administrative and constitutional law, after the abstraction of the penal rules are restitutive laws. Criminal law is the main type of repressive law.

Admittedly, it is hard to review all legal rules enacted through official legislative processes, and only key *state laws issued by the NPC (National People's Congress) and the SCNPC (Standing Committee of the NPC)* rather than all levels of legal rules will be examined as it is impossible to review every change of each article of all laws during the past years. Therefore, the most important changes in those restitutive laws will be analysed, which may indicate the most significant changes in organic solidarity over the past decades in the PRC.

Findings: Rise of Individualism in Repressive Laws

Augmentation of protecting Human Rights

Human rights are fundamental rights of individuals and without sufficient protection of human rights, individualism cannot sustain. Criminal law is the safeguard to protect human rights, and therefore it is stricter and more effective compared with other laws. This safeguard is an irreplaceable guarantee and the most solid backing for individual rights. Without criminal law, the implementation of protecting individual rights and individualism cannot be fulfilled satisfactorily. Therefore, the increasing importance of protecting human rights attached by criminal law represents a dramatic progress because it mirrors the rise of modern spirit of laws in society.

The criminal protection of human rights centres on the exercise of power for punishment. This lies in the realisation of protecting human rights in terms of prohibitive rules stipulated by criminal law. As the application and enforcement of power to punish are lying on the state and judicial organs, their public power should be restricted consequently; otherwise the abuse or illegal exercise of it would infringe human rights. Therefore, the change of criminal laws in protecting human rights, on the one hand, is reflected by approaches to legalise more private rights or to use more humane treatment of criminals, perpetrators, victims, family members and so on; on the other hand, by limiting judiciary power such as the prohibition of torture to extort confessions, the observance of "legality" principle to apply laws according exactly to laws and the absolute interdiction of criminal analogy and so on. According to this rationale, in this section, following two aspects are found:

On the one hand, the establishment of momentous and historic principles on human rights to limit public power that may infringe human rights, which includes

[37]Cownie, Bradney & Burton (2007) at 10.

five principles. On the other hand, the protection of specific rights is also under discussion.

(1) Principle of Legality

The principle of legality, to put it in a simple way, means no punishment should be allowed without an explicit regulation in statutory laws. Judgments should be made according to criminal laws and no sanctions or punishment can be imposed to suspects without provisions regulating on his/her crimes. Feuerbach, in his criminal jurisprudence, proposed a doctrine that "there is no crime and hence there shall not be punishment if at the time no penal law existed."[38]

The aim of 1979 Code was to mainly protect "people" and "public goods" and therefore it lacks of conception of "rights protection". Moreover, before 1990, the Principle of Legality was criticised often in academic circle, which were found as basic principles as cornerstones for modern criminal law and rights protective spirit in later times. In practice, a "Severe and Fast" principle to combat crimes was endorsed which signified the lack of human rights notion from the top of the state around 1970s until 1990s. The state functionaries were required to fight crime as severe as they can and as fast as they can. Regulations at that time compassed much content which reflect "severe and fast" ordinance.[39] In order to complete the task, there was extremely limited time for handling a criminal case, and sometimes the defendant had no time to hire a lawyer to defend for him. Large numbers of cases may lack justice as a consequence in judicial practice.

A tremendous change occurred in 1997 when basic principles of criminal law were established, which signified the occurrence of human rights notion and the consideration on individualism. It signifies that in PRC Criminal Law, human rights protection begins to be taken as fundamental tenet. In 1979 Criminal Code of the PRC (1979 Code *hereinafter*), there was no such principle and the regulations were very general rather than concrete. Article 3 in 1997 Criminal Code of the PRC (1997 Code *hereinafter*) begins to stipulate that only acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished. Abolition of the system of analogy and the reaffirmation of the non-retroactivity of a heavier law principle and making provisions with respect to the concrete crimes and the statutory punishment for them easier to be applied and so on can reflect the request of legality principle. This indicates that the value orientation of PRC Criminal Law begins to change from the laterality of protecting social rights to attaching equal importance to the protection of social and human rights, which is an explicit symbol of social transition from mechanical solidarity focusing mainly on public interests and collective consciousness to individualism oriented organic solidarity taking considerations on private rights and human rights.

[38]See at Wikipedia (2019b).

[39]For example, On the Supplementary Regulation of the Limit of Time for Completing Criminal Cases (1984) was stipulated according to the "fast principle"; On the Supplementary Regulation of Punishing Smuggling Crimes (1988) and On the Supplementary Regulation of Punishing Embezzlement and Bribery Crimes/(1988) were made according to the "severe principle".

(2) Principle of Prohibiting Criminal Analogy

The principle of prohibiting criminal analogy is a derivative principle from the principle of legality. It means that judicial organs should only judge offences according to specified regulations stipulated in specific provisions of criminal laws on this particular crime rather than adopting similar provisions on other crimes or in other laws. The "Prohibition of Analogy" is a significant rule for modern criminology. The abolishment of this rule in 1997 Code, therefore, became a crucial and momentous signal to reflect tremendous progress in modifications of PRC criminal laws in terms of protecting human rights.

(3) Prohibition of Ex Post Facto Laws

"Ex post facto laws" is "a law that retroactively changes the legal consequences (or status) of actions that were committed, or relationships that existed, before the enactment of the law…it may aggravate a crime by bringing it into a more severe category than it was in when it was committed; it may change the punishment prescribed for a crime, as by adding new penalties or extending sentences; or it may alter the rules of evidence in order to make conviction for a crime likelier than it would have been when the deed was committed"[40]. The principle of prohibiting *ex post facto laws* derives also from the principle of legality, which means that actions that were committed legally before a new enactment of criminal law should not be criminalised or aggravated in its punishment. In "Decision on Severely Punishing Criminals Who Seriously Undermine the Economy (March 1982)" and "Decision on Severely Punishing Criminal Elements Seriously Endangering Public Security (September 1983)", the *ex post facto laws* was adopted, which has adverse effect on criminals and then abolished in 1997 Code. The thereafter criminal laws prohibited *ex post facto laws* completely which symbolise a leap in human rights protection in China.

(4) Principle of Presumption of Innocence

The doctrine of presumption of innocence as a minimum modern human rights protection rule in both state laws and international conventions means anyone should be deemed as innocent before he or she was proved to be guilty according to effective and plenty evidences. The duty to prove innocence should not be assumed by defendants. This principle is advocated popularly in international world and stated by the United Nations as one of the minimum standards for constituting state statutory criminal laws. In 1979 Code, even though no explicit provisions advocating the opposite rule of *presumption of guilt*, in some words or phrases it used can show the implicit adoption of the rule. Hence, the deletion of those words shows a tremendous transition in substituting *presumption of guilt* by *presumption of innocence*. For example, Article 247 of 1997 Code uses "criminal suspects or defendants" to replace "confession" and Article 94 and it also deleted "criminals" for describing judicial functionaries.

The deletion of stated words reflecting the *presumption of quilt* in 1997 Code and the particular stipulation of the *presumption of innocence* in Article 12 of the modified the PRC Criminal Procedure Law in 1996 both indicate the replacement

[40]See Wikipedia. (2019a).

of "presumption of guilt" by the rule of "presumption of innocence" in Chinese penal laws, which unavoidably an indicator of extraordinary evolvement of PRC criminal law.

(5) Prohibition of Using Force to Extract Testimony from Witnesses

The prohibition of illegal detentions and the extortion of confessions through torture were regulated in 1979 Code as a basic guarantee for the rights of suspects and defendants avoiding harms from the authority or judiciary power. However, the personal life and interest of the witnesses were not fully protected until the erection of Article 247 in 1997 Code. In Article 247, "judicial workers who extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses, are to be sentenced to three years or fewer in prison or put under criminal detention. Those causing injuries to others, physical disablements, or death, are to be convicted and severely punished according to Article 234 and Article 232 of this law." The establishment of this rule effectively banned the occurrence of extracting testimony from witnesses by force or violence in practice during that time.

More Stress on Private Rights especially the Right to Property

The protection of private rights reflects the escalating individualism in society. Since the protection of private rights and intensification of individualism are inseparable, the increasing protection of private rights of individuals can also be deemed to possess an elite position in our discussion.

The comparisons between 1979 and 1997 articles show several improvements in the development of protecting specific rights of the victim, the criminals and the family members of criminals. Even though not many changes occurred, they are notable.

In order to protect the victim's rights, no limitation on the period for prosecution were changed to be imposed if a victim puts forward accusation during a limitation period for prosecution. Moreover, the right of "special defines/ preventive justifiable defines" was created for victims to fight against severe violent crimes, which refers to the defines against an on-going assault, murder, robbery, rape, kidnap or any other crimes of violence that seriously endangers individual personal safety, and then causing injury or death to the perpetrator of the unlawful act will not trigger criminal responsibility. The regulation with respect to the right of special defines is beneficial to victims and promotes the social solidarity among citizens, as it also encourages people to help others when they are faced with serious danger.

The civil and political rights of "freedom of religious belief" was established in the 1997 Code in Article 251, which regulates that citizens enjoy the freedom of religious belief no matter it is "legitimate" or not. In previous 1979 Code, only "legitimate" freedom of religious belief was protected which left large room for the interference of public power who judges what religious belief is legitimate and what is not. That discretion in judicial organs may create unfair judgments on this issue and *anomie* occurred due to such lack of explicit regulation and legal

protection. The basic political rights of citizens were not fully protected in 1970s and 1980s.

Last but not least, in Article 59, a new rule was erected that when all of the property of a criminal is confiscated, necessaries of life for the criminal and his dependent family members shall be left out. In other words, the criminal and his or her families' economic rights began to be protected. This change not only indicated the humanisation of carrying out confiscation penalty of criminal's property, but also limited the harm to the family members' rights.

Humanisation

(1) Derogating Death Penalty

Dramatic decrease in the application of the death penalty occurred when 1997 Code modified stipulations in this field. The major modifications include the exclusion of minor criminals less than 18 years old out of the subject scope in applying death penalty and cutting down the number of crimes punishable by death penalty from 71 before the promulgation of 1997 Code to 68 in the revised Code, while the amount of crimes in total had increased from 130 in 1979 Code to 413 in 1997 Code. Lots of articles have restricted the application of death penalty positing stricter conditions in order to limit the free discretion of judges.

The abolition of death penalty reached its second peak in Amendment VIII in 2011. On the one hand, the death penalty will not be given to a person attaining the age of 75 at the time of trial, unless he has caused the death of another person by especially cruel means[41]; on the other hand, the death penalty in 13 economic nonviolent crimes were abolished[42]. Amendment IX in 2015 also abolished death penalty in crimes of counterfeiting currencies and crowdfunding fraud. Moreover, there are stricter rules and procedures to approve death penalty stipulated by Amendment IX[43]. That reflects the importance of respecting and protecting human rights that the law has attached to, as another indicator for social transition from mechanical to organic solidarity argued by Durkheim.

(2) Care for Disadvantaged Group

Two important revisions have been made of 1997 Code in this area. One is concerning the modification of the scope of criminal responsibility committed by a minor between the age of 14 and 16. The Article 14 of 1979 Code stipulates that those minors should bear criminal responsibility for serious crimes such as homicide, hurting someone severely, arson, stealing habitually or other crimes seriously disturbing social order. However, in judicial practice, as there was no criterion for understanding "other crimes seriously disturbing social order", the obscure and indefinite regulation resulted in the lack of criminal justice due to inordinate free appreciation of the court. Therefore, Article 17 in 1997 Code modified the stipulation to confined eight crimes which the minors between 14 and 16 shall bear responsibility: serious injury or death of the person, rape, robbery,

[41]Article 49 of 1997 Code.

[42]Such as crime of smuggling cultural relics, the crime of smuggling precious metals, crime of smuggling precious animal or animal products and so on.

[43]Article 50 of 1997 Code.

drug-trafficking, arson, explosion or poisoning. This as a consequence makes the rule concrete and clear. The 1997 Code also abolished the Death Penalty with a two-year suspension of execution of juveniles between 16 and 18 in Article 49. These changes mirror the incarnation of individualised criminal punishment and the modern spirit of criminology in protecting the young criminals' legal rights with humanism.

Special treatment to disadvantaged group developed from amendment VI. Article 262 in Amendment VI created a new crime that: "Where anyone organises any disabled person or any minor below the age of 14 by force or coercion to beg, he shall be sentenced to fixed-term imprisonment of not more than three years or detention, and shall be fined. If the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years not more than seven years, and shall be fined."[44] Such newly established crime of organizing disabled person or minors below 14 indicated the particularly social care to the young avoiding from being utilised as working instrument to earn money.

In Amendment VIII, special protection to the old, the pregnant women and the young highlighted the humane character of it. Article 17 was supplemented by: "A person attaining the age of 75 may be given a lighter or mitigated penalty if he commits an intentional crime; or shall be given a lighter or mitigated penalty if he commits a negligent crime."[45] The previous mentioned exemption from death penalty of the old more than 75 years old established in Article 49 is another example. Despite those, the protection of the minors under 18 as a recidivist in Article 65 as well as the exceptional care of disadvantaged group in terms of the probation opportunities during criminal detention or short-term imprisonment[46] all reflect the tremendous progress in terms of humanistic care to disadvantaged group in society in recent years. Amendment IX also expanded the Abuse Crime subjects to include persons and unit in charge of guardianship and care duties to better protect human rights of children and elderly. It is a significant progress which has profound effect to deal with the child and elderly abuse cases by kindergartner and carers. Nevertheless, the relevant laws are still insufficient to better protect the rights of disadvantaged group and need to be further improved.

(3) More Opportunities to Minor Crime Offenders

Article 68 of 1997 Code expanded the scope of mitigated punishment or exemption opportunities in order to encourage meritorious service. Compared with Article 63 of 1979 Code, the new rule separated the meritorious service from voluntarily surrenders' activities to obtain its own mitigation rules and the scope of meritorious services is largely expanded to encourage criminals to make contributions to society with result in lightening or exemption of their own punishments. Similar changes occurred in Amendment VII. Changes in Article 201 provided opportunities to enjoy mitigated punishment to tax payment criminals who have regretted. Amendment VIII also expanded the opportunities for criminals in terms of truthful confession in Article 67.

[44]*See* Amendment VI.
[45]*See* Amendment VIII.
[46]Article 72 is amended.

One important issue to be mentioned here is the reporting obligation of the rehabilitated offenders. In 1979 Code, no such reporting obligation was issued but the 1997 Code, under the economy-oriented policy, in order to protect the employer's interest such rule was created in Article 100 as a result of derogation of human rights protection of criminals. Amendment VIII modified the rule and encouraged minor crime committers who have much less social harm, to make a fresh new start in society. This modification also prevents *anomie* that may arise leading to the retaliation upon the society by released person after the completion of criminal sentence.

(4) Means or Methods for Criminal Treatment

The deletion of shooting method in carrying out death penalty in 1997 Code shows a process of humanisation in the treatment of criminals, which also a basic requirement for human rights protection in modern world. Moreover, the inauguration of "community correction" as a supplementing means of "control (管制)" is an innovative method in punishment enforcement.[47] "Community correction" perfects the implementation of judgments and laws, which means that when criminals were sentenced to the "control" as their sanction, they are no longer directly executed by the public security organs but to be exposed to the community correction under the supervision of communities and the public. Only in case of violation of certain special rules, the public security organs shall involve for further punishment. It is the embodiment of the socialisation and humanisation of punishment execution. Even though it also performs criminal penalty function, the severity is far lower than other means such as death penalty and imprisonment.

Stress More on Property

Among all private rights, the right to property is particularly imperative and essential. In Durkheim's work, it can most represent the evolution of laws and therefore, it is singled out as a consequence.

First, private property, no matter "lawful" or not, becomes legally protected in the tasks of the 1997 Code. Even though there is only one-word modification, namely, to use "the citizen's privately-owned property" to replace "the citizen's privately-owned *lawful* property", the protecting effectiveness and consequence can make a huge difference in practice. This is because if an authority bureau or judicial organ intends to intervene or do harm to some private property of a citizen, the previous article can provide the power with an excuse of exploiting individual property rights by desperately pointing out that their property is "unlawful" and the judgments of whether such property is lawful or not fall into the hands of authority and the power. Therefore, the modification of Article 2 in 1997 Code, in practice, resulted in a huge leap in private property rights protection in China.

Furthermore, 1997 Code also changed the scope of private property in its definition by expanding it to include "any means of production that are under individual or family ownership according to law; legal property owned by

[47]The original paragraph 2 is changed into paragraph 3 and amended as: "Criminals sentenced to control shall be subject to community correction."

individual household and private enterprises; and shares, stocks, bonds and other property owned by individuals according to law"[48] which emerged due to the market development in that period. Moreover, the stipulations of 1997 Code added "property" as the targeted protecting objects in several places. It was added in the protected benefits in the rule of legitimised urgent danger prevention in Article 21, which shows the change in terms of the protection of "property" of both public and individuals in society because the rule encouraged the heroic performance to protect the public property or other's private property as a consequence. It shows that with the increasing protection of private property in repressive laws, the public property and public interest are also strengthened and protected more heavily. It was also particularly regulated in protecting the property rights of the criminals and their families, the creditors of the criminals and the victims and so on[49].

Findings: Changes of Individualism in Restitutive Laws

Restitutive laws cover a large scope of constitutional and administrative Laws, Civil, Commercial and Economic Laws, Social Laws, Procedural Laws etc. Due to word limit, I only provide examples to indicate the overall changes.

Administrative Laws: More Focus on Human Rights and Citizens' Rights

The "organisational"-"remedy"-"procedural" process of Chinese administrative law indicates the expansion of citizens' rights: from being managed or governed by the administrative agencies to being authorized with the right of litigation and right to get remedy and finally to possessing a right of supervising and overseeing the performance of administrative organs. During this process, there is an increasing power owned by citizens. Every enactment of administrative law indicates a difficult enlargement of the scope of citizens' rights and an exploitation of certain interests of some government authorities. Each administrative law is a compromise agreement among various powers of interest groups. Therefore, the enactment of the administrative law encountered many obstacles during legislative processes. The more limits to the power of administrative authorities, the stronger opposition is expressed by the government organs[50]. However, those obstacles indicate a hard-won victory of citizen's rights and the profound significance of the enactment of administrative laws. For example, the Administrative Punishment Law stipulates the process of hearing during legislative process. It is the first time when the hearing process is applied in China which has met with fierce opposition when the law was drafted.[51] It can be deemed as a victory of establishing a democratic mechanism in the PRC legislative process and has tremendous influence on the following laws. It has been argued that the large number of administrative litigations in practice provides a necessary motivation for the

[48]Article 92 of 1997 Code.
[49]*See* Article 59, 60 and 64 of 1997 Code, compared with Article 55, 56 and 60 in 1979 Code respectively.
[50]*See* Qin (2018).
[51]*Ibid*.

transition of China from "rule of men" to "rule of law."[52] Even stronger opposition took place when the Administrative Licensing Law was drafted because compared with punishment law, it has much more to do with various interests of authorities and interest groups.

Nevertheless, along with the evolution of administrative law, citizens' rights have been expanded from obtaining compensations passively to supervising activities of government officials actively. Such expanding process can be observed from the establishment of essential laws from the Administrative Litigation Law, Compensation Law to Administrative Punishment Law, Supervision Law, Review Law, Licensing Law and Compulsion Law. These all reflect the increasing respect of the private and public rights of people by the administrative authorities. It can be expected that along with the development of administrative law of remedy, supervision and procedure, more protection of citizens' rights will be provided. However, there is a long way to go for realizing a fuller protection of citizen's rights and a more effective supervision on the government performance by the public.

One of the hot issues which should be mentioned in recent years is the System of Re-Education Through Labour (RETL) — reflects the adverse impact of the lack of human rights protection in practice. RETL can be regarded as one of the methods to enforce administrative punishments.[53] However, it infringes the rights and freedom of citizens. The regulations on the objects of the RETL and the procedure of implementing the RETL are very obscure, which provide too much discretionary power for the administrative organs.[54] The overuse of administrative power causes tragedies in practice in terms of enforcing innocent citizens to receive RETL forcibly.[55] The approval of abolishing the RETL system in the 18th The Central Committee of the Communist Party of China in 2013, therefore, indicates a tremendous improvement in protecting citizens' human rights recently.

Laws relating to Private Property Rights

It has been claimed that property right is the foundation of individual liberty that citizens enjoy.[56] The 30-year PRC reform history reveals a process of the recognition, expansion and protection of property right. The concept of "Private Property Right" rises along with the deeper implementation of the reform and opening up policy and the development of the socialist market economy. This section argues that there is an improvement in the protection of private property right reflected by the content of rules in legislation and will only focus on the changes of laws stipulating rules regarding private property. As the regulations of private property are mainly stipulated in the Constitution, the 1986 General Principles of Civil Law (GPCL *hereinafter*), the Law of Succession, the Land Administration Law, the Guarantee Law, the Property Law, the Law of Rural

[52]Feng (2008). '
[53]Jun (2004) at 43.
[54]Chen (2001).
[55]Zhang (1999).
[56]Buchanan. (1993) at 59.

Land contracts and the Criminal Law and so on, discussions will only be focused on these laws.

In the early 1980s, the only civil law which contained relevant rules on private property was the Law of Succession in 1985.[57] The first major development in protecting property right after 1982 was the enactment of the GPCL,[58] which provides that a citizen's lawful property shall be protected.[59] However, the concept of "property right (物权)" was absent from the GPCL. Moreover, no equal protection for the property rights of the state, the collectives and individual citizens was declared by the GPCL. Instead, it provided unequal status for private property and state property in Article 75. Several key laws including The Land Administration Law (1986), the Administrative Urban Real Property Law (1994), the Guarantee Law (1995) and so on set out some rules regarding property rights. Even though they are "by no means well-organised, clear and tidy, the trend since the 1980s of giving increasing scope to private (as distinguished from state-controlled) economic activities on land and to the private sector of the economy may be seen from the foregoing review of legislative and constitutional developments."[60] Those laws became the major sources for drafting the PRC Law of Property.

(1) The Legislation of Property Law

After being deliberated for 7 times, the Property Law was finally passed in 2007[61]. It refers to many issues which possess Chinese characteristics such as the property of the state-owned enterprises, rural land contract and management rights, and "ownership by owners of apartments in condominium buildings (建筑物区分所有权)". Even though it has not revolutionized the existing law, its main significance lies in "providing a conceptual framework for the purpose of organizing, consolidating and systematizing the existing law relating to property rights in movable and immovable property."[62] One of the most significant contributions lies in the declaration of *equal protection* for the property rights of the state, collectives and individuals.[63] Even though it has been challenged that there is a big difference between the protection of public property and private property in practice[64], the establishment of the "equal protection" principle has been regarded as a victory of the law drafters over the critics who challenged that the draft of Property Law was "unconstitutional".[65] Such victory was viewed as a

[57]Article 3 of the Law of Succession (1985).
[58]Chen (2011).
[59]Article 75 of GPCL.
[60]Chen (2011).
[61]For the deliberation process of Property Law, *see* Liang (2010) at 65-69.
[62]*Ibid*.
[63]Article 3 (3) of the Property Law.
[64]Ma (2008).
[65]In 2005, Prof.GONG Xiantian published a public letter named "一部违背宪法和背离社会主义基本原则的物权法草案 [A Draft of Property Law Which Violates the Constitution and Socialist Basic Principles]" who argued that the draft of Property Law as "unconstitutional"

major breakthrough in Chinese legal and political thinking. Therefore, the Law of Property has been deemed as a milestone which "is one of the most important core components of the evolving civil law in the PRC."[66]

(2) Marriage Laws

Being influenced by the Soviet civil theory, the marriage relationship was treated as a special relationship which was excluded by the civil relationships and therefore, marriage law in China was legislated as an independent department for a long time. After the mid-1990s, scholars began to argue for a "return" of marriage law to be one of civil laws. From then on, marriage law changed from a law cantering on "the identity as family members (亲属身份法)" towards a law focusing on "the property right of families (亲属财产法)". An increasing number of rules regulating the property right have been stipulated in amendments. For example, when marriage law was amended in 2001, much more detailed rules were stipulated regarding the division of property when a marriage is ended.[67] Moreover, a no-fault party shall have the right to make a request for damage compensation under some circumstances when bringing about divorce.[68] Those changes in the modification of marriage law reflect an increasing attention paid to property right by Chinese marriage law.

(3) Company Law

When the Company Law was established, according to the principle of "decision by Capital Majority (资本多数决定)", the large shareholders had more discourse power and there was a lack of recognition of the protection of the interests of small shareholders.[69] When it was modified in 1999, 2004, 2005 and 2013 continuously, various rules were established in order to put more emphasis on the protection of the rights and interests of small shareholders. Those rules include "the right to know (知情权)", "the appraisal right (回购请求权)", "the proceedings against the Board resolution (对公司决议的诉讼)" which reflect the more protection of individual rights. Moreover, the 2013 amendment simplified the setup rules of a company and abolished some key requirements for the company establishment, including the paid-in capital, the minimum of registered capital, the instalment of registered capital contribution and the capital verification in order to encourage the development of the individual private economy.[70]

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because it declared of equal protection for the property rights of the State, Collectives and private persons. *See* Liang (2010) at 67.

[66]*Ibid*. at p 81.

[67]9th SCNPC. *Decision Regarding the Amendment of Marriage Law of the PRC*, passed on April 28, 2001.

[68]No. 30 of the Decision Regarding the Amendment of Marriage Law of the PRC.

[69]Zhao (2009).

[70]Article 7, 23, 26, 27, 29, 33, 59, 77, 81, 84, and 157 were modified.

(4) Securities Law

In the 1990s, the rapid development of the Chinese securities market and the lack of supervision by regulators led to an increasing number of civil disputes caused by insider trading in listed companies, false statement, and the manipulation of the stock market et cetera. However, before 2001, the lawsuits of those types were all dismissed by the PRC courts, which failed to protect the right of individual investors. The SPC announced "Some Provisions of the SPC on Trying Cases of Civil Compensation Arising from False Statement in Securities Market/关于审理证券市场因虚假陈述引发的民事赔偿案件的若干规定" in 2003 in order to regulate the civil acts in the securities market and protect the legitimate rights and interests of investors. It made an influential impact on the judicial trials on cases concerning securities compensation in practice. The modified the Securities Law clarified the civil liability regime and built the confidence of individual investors to invest on Chinese securities market. Even though there is still a lack of advanced system in practice, the development of Securities Law demonstrates the increasing protection of the rights and interests of individual citizens by legislators.

(5) Bankruptcy Law: The Priority of Workers to Claim Compensation

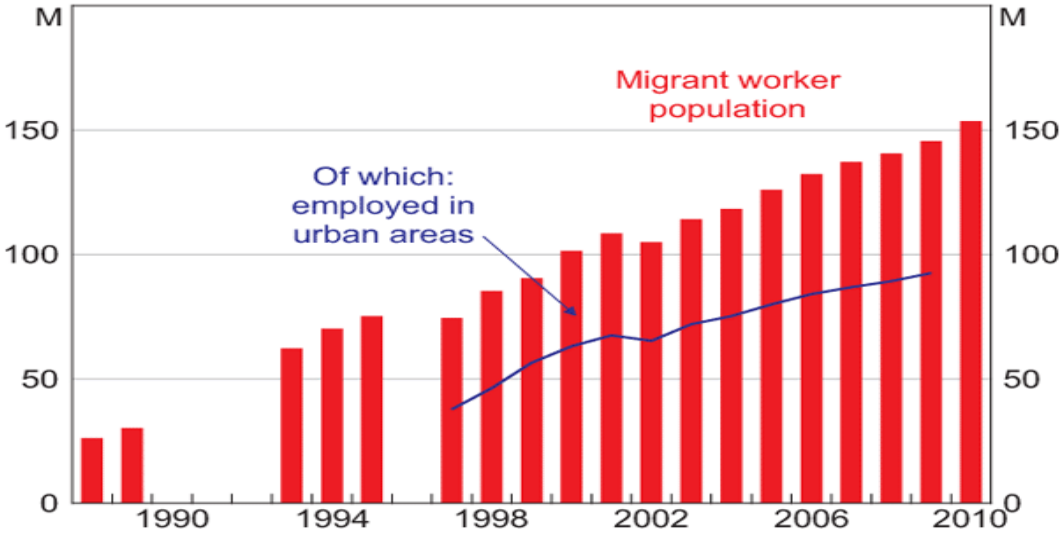
Besides the creditors, employers are the victims of the bankruptcy of a corporation, whose interests are directly harmed. However, in the old bankruptcy legal system of China, their rights were not fully protected. Therefore, the Bankruptcy Law (2006) provided a privileged place for workers to claim compensation when a corporation was bankrupted in Article 132. This reflects the increasing respect and protection of workers' rights in Chinese bankruptcy law. Moreover, it shows the increasing importance that the law attaches to the individual rights of labour in modern China.

More Protection of the Interests of Migrant Workers

The PRC labour migration from agriculture to non-agricultural sectors and from rural to urban areas is regarded as an inevitable trend in the process of industrialisation and urbanisation.[71] The graph below shows the rapid increase in the number of rural migrant workers in Chinese urban area over decades. It is difficult for a rural migrant with rural "household registration (户口)" to obtain an urban household registration permanently. This leads to the fact that rural migrants are excluded from accessing most urban welfare services, health care and educational services. Generally speaking, they cannot get fully access to work-related injury insurance, medical insurance, unemployment insurance, endowment insurance, subsistence allowance and cannot enjoy sufficient public welfare or community welfare.

[71]Qiu (2018).

Figure 1. *The Number of Rural Migrant Workers in China*[72]



* The red colums refer to all rural migrants without local 'hukou' where they are living; the blue line by Herd, Koen and Reuterswald (2010) calculates the level of rural–urban migrant employment, RBA estimate for 2009 number following their methodology

Sources: Chan (forthcoming) for 1988, 1989, 1993–1995 data; MOLSS (2002) and RBA for 1997–1999 data; Herd *et al* (2010) for all 2000–2008 data; NBS (2010) and RBA for 2009 data; MOLSS (2011) for 2010 data

As discussed previously, with regard to the issue of protecting the rights of rural migrant workers, laws and regulations were enacted gradually. The Labour Law stipulates strict rules in wage payment;[73] the Law on Labour Contracts provides specific regulations to ensure the access of labour compensation;[74] The Law on the Promotion of Employment also provides important rules for protecting the rights of rural migrant workers. However, in practice, a number of employers ignore those laws and even though they sign labour contracts with rural migrant workers, contract fraud may frequently occur as a means for the exploitation of labour. In order to facilitate the enforcement of labour laws, various regulations were issued by the central and local government in order to provide more protection for the rights of rural migrant workers in terms of improving their social security and working environment. These regulations include the Notice on Making a Good Job in Employment and Management Services for Migrant Workers (2003), the Notice on Solving the Problems of Arrears for Migrant Rural Workers' Wages by Construction Enterprises (2003), the Regulation on Labour Security Supervision (2004), the Notice by the Ministry of Construction on the Opinions of Further Solutions to the Problems of Arrears of Project Funds in Constructions (2004), the Interim Procedures on Settlement of Cost of Engineering Construction (2005) etc. In 2006, the State Council also issued the Opinions of the State Council on Addressing Migrant Worker Issues. To enforce these laws and regulations, local regulations were made which had effective influence in practice.

[72]Rush (2011).
[73]Article 50 of the PRC Labour Law.
[74]Article 30 of the PRC Labour Contract Law. *See* also Article 10(1), 17(6), 85.

According to the General Labour Union, 30.13 billion yuan (RMB) wage arrears were paid to rural migrant workers in total.[75]

Conclusion

Individualism develops rapidly in Chinese society, reflected by the increasing focus on individuals and more protection of individual rights in both repressive and restitutive laws. Collective consciousness allows more room for the growth of individualism in society when society develops. Meanwhile, the increasing individualism during social transition reflects the changes in the nature of social solidarity from mechanical to organic.

However, it should be noted that the rapid increase of individualism might also cause certain problems. If individualism develops too rapidly in society, *anomie* may occur, which derives from the tension between individualism and collective consciousness. As rules deriving from the division of labour are necessities for building solidarity, if such rules are not be developed in accordance with the speed of the development of the division of labour or they are vague and loose, or they lack of effective implementation, an abnormal form occurs. This is named *anomie* because the division of labour does not produce solidarity when the relations of the organs are not regulated. Therefore, this *anomie* caused by "the lack of regulation". When anomie occurs, social problems may appear, which may affect social stability and order. Therefore, to avoid the occurrence of *anomie*, when individualism develops, more proper mechanisms and rules should be developed accordingly.

Nevertheless, it can be seen that the current Chinese society is experiencing a good trend of development, reflected by the development of Chinese laws. It is expected that the status of individualism will become higher in society in the future, indicating increasing growth of organic solidarity in Chinese society.

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Numerus Clausus of Real Rights: Current Value and Practical Issues

By Maria Luisa Chiarella[*]

This paper deals with the numerus clausus of the limited property rights of enjoyment of someone else's property. It examines the historical and ideological development of the numerus clausus principle by identifying the legal and regulatory framework. The paper explores how Courts apply civil law rules and how the concept of numerus clausus differs from that of typicality. Then the survey explores how a-typicality can find room in this field. How the protection of third parties and, at the same time, the evolution of the system can be conciliated? Which is the role of judges and notaries towards the new real rights introduced by the legislator, with doubt law qualification in term of real or personal (i.e. obligational) nature? What about those rights, not regulated by law and introduced by commercial practice? This paper also considers the semi-clausus principle and how it has been elaborated by current doctrine. Numerus clausus is of remarkable relevance in the Italian context because in December 2019 the Second Section of the Court of Cassation remitted to the United Sections the issue of the qualification of the right of exclusive use in condominium. The right of "exclusive use" on res of common property is often negotiated, but its legal qualification is not clear. Awaiting the Supreme Court's response provides the opportunity to revisit the well-known dogma of private law and reflect on some possible solutions.

Keywords: *Real rights; numerus clausus; rationale; legal certainty; public order; political economics; contractual autonomy; right of exclusive use.*

A Definition of *Real Right*

Despite the Greek and Austrian experience[1] defining real rights, there is no definition of *real* right in the Italian legal system. Instead, it is a theoretical notion, well-known and accepted by jurists, who summarise a determined series of subjective rights, with common characteristics, whose regulatory discipline has remained unchanged over time and which today is confronted with the new problems raised by the progress of needs and ways to use the goods[2].

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[1] A definition of *real* rights is found in Art. 973 of the Greek Αστικόκώδικα (Civil Code), according to which *real* rights are those rights *which guarantee, directly and against anyone, a lordship over the thing* («Δικαιώματα που παρέχουν εξουσία άμεση και εναντίον όλων πάνω στο πράγμα») and in §. 307 of the Austrian ABGB which defines *Rechte dingliche* all those rights, which *belong to a person over the thing, having no regard to certain people* («*Rechte, welcheeiner Person über eine Sache ohne Rücksicht auf gewisse Personen zustehen, warden dingliche Rechte genannt*»).

[2] Natucci (1988) at 143, n. 49.

The adjective *real*, etymologically deriving from the Latin *regalis* and the ancient French *reial*, evokes the idea of the "King's" right, suggesting an ontological connection with the paradigm of sovereignty and, therefore, of territoriality. However, reference to the Latin word *res*, also reveals that at the conceptual basis there are the Roman schemes, albeit shaped and modelled by generations of jurists[3].

The category of limited *real* rights is constructed and interpreted through constant reference to its main axis given by property; the existence of *real* right in fact postulates the ownership of others, as it is historically expressed in the well-known brocardo *nemini res sua servit,* which indicates the legal impossibility of the existence of a *real* right on what is of the same owner[4]. *Real* right is opposed to *credit* right on the basis of an antithesis rooted in the Roman law and precisely in the dichotomy *actio in rem –action in personam*. It is a procedural dichotomy that emerged substantially in the medieval age with the elaborations of the Glossators and Commentators. Specifically, Ugo Donello and the French Dogmatic School are the authors of the incorporation of *iura in re aliena* and *dominium* into a single category[5].

What are the characteristics of *real* rights? *Real* rights are absolute (since asserted in conditions of independence from a dimension of legal relationship), immediate (not implying the necessary collaboration of other obliged parties), typical (as *ius in re, real* rights are only those required by law), inherent to *res* (the right is guaranteed even if the property has passed into the ownership of a third party and also in the context of bankruptcy proceedings), as well as susceptible to possession and accompanied by specific protection (of a dual, petitory and possessory, nature).

The Dogma of Numerus Clausus

A traditional principle of Western legal culture is that the Legislator reserves the possibility to create *real* situations through foreclosure, in order for privates to create new types and the Courts to provide a creative contribution in this field[6].

Numerus clausus and typicality constitute the two faces of the same dogma, which implies both the inadmissibility of different *real* rights with respect to the figures envisaged in the system and the non-configurability of a negotiating discipline that affects the content of each typical *real* right[7].

The principle of the *numerus clausus* of real rights was already present in the classical Roman law, not as a ban for private individuals, but as *real* rights corresponding to the types established by the system which contemplated a few fundamental figures among which the property –*dominium* was the most important.

[3]Arces (2019) at 4 et seq.
[4]Biondi (1967) at 50.
[5]Donello (1841) at 1273.
[6]Natucci (1988) at 143; Comporti (2011) at 217 et seq.; Baralis (2009) at 180 et seq.; Burdese (1983) at 236 et seq.; Bianca (1999) at 133 et seq.
[7]Akkermanns (2008) at 245.

In medieval juridical experience there is a fragmentation of property and a multiplicity of figures of limited *real* rights, concurring on the same *res* several rights and forms of enjoyment with the overlapping of private and public rules originating from the feudal lord[8]. During medieval times, the principle of the typicality of *real* rights was renowned, as res deriving and originating not from private conventions, but from customary sources[9]. Medieval property was surrounded by constraints, restrictions and charges that severely limited the owner's freedom and evidently affected the economic development, representing a limit for the full use of resources and wealth. It can be noted that the principle of the closed number of *real* rights, in the modern sense, was affirmed only in the 19th century with the French Revolution when the feudal structure of *real* situations reflecting the noble privileges was abolished in order to grant full enjoyment and availability of assets. This principle configured weight-free property and minor *real* rights as rigidly typed rights, existing in a limited number, exceptional and temporary, to grant full enjoyment and availability of assets (*i.e.* land) to their owners. It incorporated the liberal ideology, soul of the French Revolution, aimed at abandoning a political approach to goods in favour of a markedly economic system, as evidenced in the famous expression of Portalis «*au citoyen appartient la propriété, et au souverain l'empire*».

However, starting from the Napoleonic codification, private property (specifically of real estate) gradually becomes the cornerstone of the bourgeois economy according to the paradigms of individualism, which recognises the owner both the absolute power of enjoyment of his goods and the role of citizen. At the beginning of the 19th century Benjamin Constant affirmed that «*la propriété seule rend les hommes capables de l'exercice des droits politiques*», warning against possible legislative interventions on the property beyond what was already foreseen in the code: «*The arbitraire sur la propriété est bientôt suivi de arbitraire sur les persone: premièrement, parce que arbitraire est contagieux; In second lieu, parce que la violation de la propriété provoque nécessairement la résistance*»[10].

Code Napoléon takes apart medieval dogmas and restrictions postulated by Enlightenment and property right is reconstructed as a form of individual and exclusive belonging, formally and potentially accessible to every citizen. The *Code Napoléon* transposes liberal ideologies on the normative level and expresses the victory of individualism against the feudal power expressed in the constraints imposed on *dominium*[11].The 19th century property was absolute, leaving the *dominus, ie* total freedom to decide on the use of the goods, including the same option for inaction or total disinterest, in terms of *jus utendi ac abutendi*[12].The dogma of the *numerus clausus* of *real* rights obtains formal recognition in the French *Code civil* (Art. 543), according to which *real* rights are considered rigidly typed: only the law is empowered to give rise to limitations and burdens on the

[8]Grossi (1992) at 104 et seq.
[9]Natucci (1988) at 30.
[10]Constant (1872) at 55, 116.
[11]Giuffrè (1992) at 56; Coco (1965) at 56; Mannino (2005) at 46.
[12]Iannarelli (2018) at 75.

property, thereby erasing the medieval relevance of custom[13]. In addition to the historical arguments, there are also philosophical reasons, considering property as a *personal* value and therefore viewing every limitation of it as an attack on freedom itself. This is reminiscent of the dogma of the autonomy of the will[14]. The acceptance of the *numerus clausus* reflects the abolition of the feudal system (with the pluralism of the situations of belonging typical of the *Ancien régime*) and the related intent to protect the owner's individual freedom, with the legislator reserving the power to place limitations on property[15].

Current Value of the Principle

Unlike the French *Code Civil*, in the Italian legal system the principle of the *numerus clausus* of *real* rights had not an express formulation[16]. It was obtained only indirectly based on Art. 1130 of Italian *Codice Civile* (1865), according to which, except in the cases established by law, the relationships deriving from the contract have limited efficacy to the contracting parties.

Instead, in the current system the principle finds specific normative basis given primarily by Art. 42, paragraph 2, of the Constitution, which, in addition to formalizing the recognition and guarantee of the right of ownership in the system (against limitations deriving from public authorities), states that the methods of purchase, enjoyment and limits of ownership are regulated by law[17]. In the *Codice Civile*, there is Art. 832 to establish that the limits and obligations placed on property are set by law. The Code also provides for the possibility of creating atypical figures only in contract area (Art. 1322, paragraph 2)[18] and it clarifies that the contract is effective towards third parties only in the cases provided for by law (Art. 1372, paragraph 2). In fact, the latter regulates the normative power of private individuals, by limiting their effectiveness only to the contracting parties[19].

The characteristic of limited *real* rights is that they are effective *erga omnes*. The problem of *ultra partes* efficacy then arises only for the so-called atypical real

[13]Caterini (2005) at 70.

[14]We can remember that Art. 87 of the French Constitution of 1791 included the right of property among the natural and imprescriptible rights of man, together with freedom and security, as an expression of personal freedom and subjectivity. As for the controversial relationship between property and freedom, see: Mattei (2014) who defines property as an institution against freedom itself and (at the same) emancipation, solidarity and citizenship, since behind it there is a depriving power, which institutionalises the extraction and exploitation of man and nature and which is the very enemy of freedom. In argument see also the anthology of Rodotà (2013), at 16 et seq.; Quarta (2016) at 36 et seq.; Struycken (2010) at 70.

[15]Demolombe (1861) at 374 et seq.

[16]Contrary to what happens in other legal experiences, including for example the Portuguese system which provides for an express ban on giving rise to atypical *real* rights: «*Não é permitida a constituição, com carácter real, de restrições ao direito de propriedade ou de figures parcelares deste direito senão nos casos previstos na lei; toda a restrição resultante de negócio jurídico, que não esteja nestas condições, tem natureza obrigacional*» (Art. 1306, comma 1, *c.c.*).

[17]Caterini (2005) at 85; Iannarelli (2018) at 69 et seq.

[18]Natucci (1988) at 157, 163.

[19]Natucci (1988) at 157 et seq.

rights. Of such rights, the source would be the autonomy of private parties to whom, however, pursuant to Art. 1372, paragraph 2, of the Italian *Codice Civile*, it is forbidden to enter into contracts with efficacy with third parties outside the cases provided for by law[20]. So the freedom to determine the content of the contract finds a limit in the restriction of the effects to the contracting parties: private individuals are free to establish the content of the contract, but the effects of the latter, in the case of atypical rights, will be limited to contracting parties[21] .Thus, in light of these normative rules, individuals are precluded from conforming private property, since the legislator reserves this function[22]. It's up to the latter to define the new classes of *real* rights, if this is required by the overall social and economic evolution of the system[23].The value of the principle is based on specific legal policies: the aim is to protect property, not adding extra burdens than those expressly regulated by law and, at the same time, to protect third parties who enter into relations with the owner (or with the holder of the *real* right) in order to put them in a position to know exactly the extent of their rights[24].

The principle of the *numerus clausus* of limited real rights is one of the many dogmas of private law born and developed in a period in which land was the heart of the private system and the very source of wealth. This dogma(aimed at establishing a strict typicality of such rights) is historically based on the need to prevent atypical limitations on property safeguarding a full availability of the same and the secure circulation of goods[25].

Over time, however, the liberal ideology and the *numerus clausus* have been questioned, due to the dematerialization of ownership, the emergence of new partial rights and the progressive evanescence of the public order. These are reasons that offered a certain rationale to the principle but are now being considered a mere *prejudice*[26].Consequently, the rationale behind the principle of *numerus clausus* is now contested. This is because the original justifying reasons (related essentially to the exploitation of land and to the category of real estate) are less important nowadays[27]. In this sense, there are those who have highlighted the definitive overcoming of the principle since the *real* right would be endowed with the same expansive potential of the contract. From this point of view, the existence of a so-called *numerus clausus* of real rights is no longer justifiable: contract and its rigid content are contradictory terms[28].

The presence of new building and urban planning techniques, the configuration of entirely new negotiating models has led to the creation of new rights and limitations on *res* characterised by the inherence and opposability *erga omnes.* The

[20]Quadri (2018) at 561.
[21]Natucci (1987) at 168.
[22]Natucci (1987) at 171.
[23]Mezzanotte (2017) at 36.
[24]However, it has been shown in doctrine that the constitution of new real rights is not necessarily pernicious for the general economy, being on the contrary useful where it can allow a better use and exploitation of goods. In this sense, see: Giuffrè (1992) at 65.
[25]Mezzanotte (2015) at 17.
[26]Nicolò (1964) at 908.
[27]Roppo (2014) at 170 et seq.
[28]Costanza (1981) at 170.

legal effects typical of *real* rights, although substantially different from their legal models, are deeply embedded in the Italian doctrine, which hypothesises the existence of atypical *real* rights, in contrast with the rule of *numerous clausus* which should govern them[29]. From a speculative point of view, this position shows the need not to sink into dogmatic sleep, in an ahistorical dichotomy between norms and reality, in the awareness (*i*) of the necessary historicity and conventionality of legal concepts and (*ii*) of a renewed elasticity of the property which increasingly renews its content as the *bundle of rights* takes advantage of new methods of exploitation[30].There is, therefore, a debate on the *mobile frontiers of real rights*, due to the constant emergence of new figures with the connotations of reality to implement the legal situations already present in positive law[31].

In this regard, it is imperative to consider the new situations, emerging from the social ridge, as *real* rights, when there is a sort of social categorization of the (unregulated) case in its essential components while filtering economic merit[32]. At a hermeneutic level, the provision of Art. 2645 c.c. with its elastic formulation would allow the transcription of such atypical figures, given the correspondence of the same to efficiency and, therefore, the non-contradiction with the needs of public order, to which the principle of typical *real* rights historically answers. Given the above, the parties would have the power to impose their determinations also on third parties, giving rise to legal situations valid *erga omnes*[33].

However, such option is not accepted by the dominant legal theories which remain consolidated on the affirmation of the current value of the principle of the *numerus clausus*[34]. According to academics and judges, an open attitude towards the creation of atypical *real* rights by contract would force third parties to undergo limitations, outside a legislative provision and in violation of the express reservation placed by Art. 42, paragraph 2, of Italian Constitution[35]. The issue here is related to the need of the parties for information[36], third parties and of all individuals interested in the events concerning the *res* and, therefore, to the standardization of contractual models in order to reduce transaction and information costs in the case of circulation of the *res*[37]. Nowadays the theoretical rationale of the principle of the *numerus clausus* is given (*i*) by the legal reserve set out in Art. 42, paragraph 2, of the Italian Constitution; (*ii*) the requirements of legal certainty (*iii*) and, correlatively, of economic public order(protection of an efficient and secure circulation of goods)[38].

For the latter, in fact the security of the buyer on the existing rights and of their content is granted by the principle of *numerus clausus*. Only the existence of

[29]Roppo (2014) at 171.
[30]Baron (2014) at 56 et seq.
[31]Guarneri (2008) at 29 et seq., 61 et seq.
[32]Fusaro (2011) at 517 et seq.
[33]Giuffrè (1992) at 66.
[34]Natucci (1988) at 161-162; Moscati (2013) at 441 et seq.; Giorgianni (1996) at 152.
[35]Natucci (1988) at 140 et seq.; Caterini (2005) at 109.
[36]Mezzanotte (2015) at 44.
[37]Morello (2008) at 67 et seq.; Baralis (2009) at 182.
[38]Galgano (2017) at 170; Magri (2002) at 1434; Natucci (2011) at 319 et seq.; Comporti (2011) at 223; Romano (2014)at 64 et seq.; Morello (2008) at 69, 75.

a set of pre-defined rights allows the parties to have *ex ante* useful information regarding the constraints and legal relationships related to the asset (*numerus clausus* as an 'informational principle'[39]). The principle of legality is central in this field, as it minimises the risk of creating atypical *real* rights by negotiation. Nevertheless, the existence of a regulatory coverage does not solve all application problems. Whenever the legislator has regulated the case in a cryptic manner and without precise indications of legal qualification: we can consider the case of timeshare, building rights, destination deeds and the so called *right of exclusive use* (which will be later examined). In such cases, it will be up to the interpreter to reconstruct the identity of the figure in the light of various factors including the *ratio legis*, its traits and effects and even the systematic location of its regulatory provisions.

At the same time, in practice new legal situations can emerge, without regulatory provisions. At an exegetical level, it will be necessary to proceed, if possible, (*i*) to an assimilation to the typical real rights, as well as (*ii*) to determine a regulatory framework by taking into account also the space for negotiating autonomy given by the atypical content of *real* rights. This is what legal scholars consider a *semi-clausus* principle of *real* rights allowing a *real* qualification for those situations of uncertain nature. In this way, the borders set by traditional dogma are overcome, since *numerus clausus*, «if strictly applied, creates the risk that innovation takes too much time, which might hamper the further development of new categories of property rights that are being developed in legal practice»[40].Also at a European level, in the context of harmonization projects for a future common law of property, the adoption of a *semi-clausu*s number of *real* rights is considered since it can balance the characteristics of clarity and efficiency typical of the closed number with the need for modernization[41].

Contractual Autonomy and Real Rights Typicality

As it has already been pointed out, in principle the possibility of creating new *real* rights by contract is excluded, given the incompatibility between the *inter partes* effectiveness of the contract and the *erga omnes* relevance of *real* rights. A contract from which atypical *real* rights arise, having passed the judgment of merit *ex* Art. 1322, paragraph 2, of the Italian *Codice civile*, will be valid, but ineffective towards third parties. In this sense, the notion of *numerus clausus* is different from that of *typicality*, because while the former concerns the source (the *law* limiting individual autonomy), the second concerns the determination of the content, that is to say, of the "type" of the *real* situation[42].

Nevertheless, there is room for negotiating autonomy with reference to typical *real* rights, in the sense that private individuals could integrate or derogate from the law discipline in compliance with its essential core through the exercise of

[39]Mezzanotte (2017) at 44.
[40]Van Erp (2003) at 11.
[41]*Ibid.*
[42]Comporti (2011) at 225.

their autonomy *secundum legem* and not *praeter legem*[43]. Clearly, the agreements on real estate rights in derogation from the legal discipline, if allowed, will be subject to the written form and will be due to transcription in public registries[44]. In this regard, it is necessary to consider the dualism present in the legal statute of *real* rights: on the one hand, there are mandatory rules that identify the distinctive features of the specific law type; on the other hand, there are provisions, generally not binding, which offer only a model of regulation and exercise of the law situation[45].The existence and identification of a fundamental nucleus, as the essential content of each *real* situation, is crucial since it cannot be modified by contract. On the contrary, the content that does not touch this nucleus, but indicates only rules for the exercise of the *real* type, can be modified by autonomy either interactively (by inserting new provisions where the law allows it) or reductively (derogating from the powers and obligations of the typical scheme)[46].

Investigating the options available for negotiating autonomy, we can see that the elasticity and ductility of the right of servitudes allows a wide use of it (we talk indeed of "atypical" servitudes), being the figure conceivable as a neutral model, in which a very varied content can be allowed, since the law indicates only generic features[47]. In particular, the wideness of its content and its *utilitas* allows to frame different destination restrictions among servitudes and also severe limitations on the owner's disposition faculties (for example, non-building servitudes or limits on the ability to build) that are not susceptible to be fully defined by the legislator even in the presence of a delimitation in its essential profiles of the right of servitudes (present in Art. 1027 c.c.).

Given the above, the *numerus clausus* of *real* rights limits contractual freedom in relation to the structure of the situation, not to the content of the same. Hence, the dispute on the existence or not of the *numerus clausus* in our legal system must consider the possibility for legal operators (and primarily notaries) given by the atypical content of *real* rights. In addition to the case of the so-called atypical servitudes, this possibility works also for the other *real* rights figures in which the owner and of the *real* right titular could conventionally regulate their mutual relations[48].

This is also confirmed by legal scholars since it is assumed that the conformation of the typical *real* rights is not entirely precluded to individuals, given that the system gives wide space to autonomy in the concrete determination of powers, faculties, limits and obligations that make up the content of the various real situations through the packaging of a largely dispositive regulatory framework[49]. As already mentioned, the regulation according to autonomy of *real* rights is admitted until the essential and fundamental content of each situation is

[43]Comporti (2011) at 153; Baralis (2009) at 189 et seq.
[44]Comporti (2011) at 158.
[45]Comporti (2011) at 158.
[46]*Ibid.*
[47]Guerinoni (2011) at 227 et seq.
[48]In argument see for instance the decisions of the Italian Court of Cassation of 15 November 2013, n. 25773, in *De Jure Database*; 12 October 2009, n. 21629, in *De Jure Database*; 11 February 2008, n. 3196, in *Giur. it.*, 2008, p. 2185.
[49]Comporti (2011) at 149; Caterina (2009) at 214.

compromised; thus the interpreter will have to identify - on the basis of the set of interests established by the system and the *ratio* of the regulation - the fundamental core relating to the structure of the legal framework[50], which - only - must be considered intangible. Consequently, non-marginal spaces are opened to private autonomy in conforming the content of *real* rights even if typified by the legislator[51]. There is, therefore, an adaptation of the atypical constraints to the typical *real* schemes allowed by case law when the new figures are compatible with the basic regulatory architecture[52].

In this regard, the presence of the closed number principle in our legal system is still justified and operative, since we cannot accept the idea that the contractual creation of a new *real* right should be considered valid and effective, if its content could be represented by legislator giving birth to a new form of *real* right[53]. It is *erga omnes* efficacy that calls into question the possibility of creating atypical *real* rights: real rights imply an advantageous position for the owner and related disadvantages (limits, charges, obligations) for third parties. The admissibility of atypical *real* situations would undermine the safety of traffic since third parties would not be able to know exactly the constraints affecting the asset, nor its extension.

Third parties who acquire a real right on res will not be required to respect the *real* rights that the law does not provide for and which are contractually created[54]. Therefore, the contracting parties cannot impose or prohibit on third parties, regardless of their consent, powers and faculties that the law allows or forbids, since private subjects have no power over other private individuals, just as the law has[55].

Evidently these themes are connected to the historicity of the concepts and legal institutions, as well as to the issues regarding transcription. The latter is an instrument capable of accepting, for the purpose of supporting the reasons of commercial traffic, all those situations of enjoyment of goods which, on the basis of the law principles, can acquire the characteristics of *reality*, in order to guarantee their *opposability* to third parties[56].Therefore, the link between the closed number of *real* rights and the same principle working in the field of transcription cannot be ignored: the closed number principle is inextricably linked to the real estate publicity system (and for reasons of certainty regarding real estate rights)[57]. Consequently, it is clear why the legal scholars admit the atypical *real* rights on movable property for which transcription does not apply and the nature of the right is set by the parties in the constitutive title pursuant to Art. 1153, paragraph 2, of the Italian *Codice Civile*[58].

[50]Comporti (2011) at 153.
[51]Granelli (2014) at 311.
[52]Spanò (2018) at 1 et seq.
[53]Natucci (2011) at 326.
[54]Struycken (2010) at 81.
[55]Natucci (2011) at 331.
[56]Petrelli (2009) at 689 et seq.
[57]Benatti (2010) at 163.
[58]Gazzoni (2019) at 252.

The foreclosure of giving rise to atypical real rights with a contractual source, therefore, also depends on the protection of the interests of the buyers and, in general, of all third parties interested in knowing clearly and precisely the rights existing on the goods they mean to purchase[59]. Thus, the reasons of economic public order (currently underlying the principle of *numerus clausus*) can be considered solid. They encompass the protection of legal certainty and the efficient and secure movement of goods.

Italian Current Debate about the "Right of Exclusive Use"

The qualification of the *right of exclusive use* of common property in condominium is debated in Italian case law. For example, it's the case of the flat roof used as a terrace and accessible only by the owner of the apartment on the top floor, or the case of garden or courtyard portions for the exclusive use of the owners of the real estate facing them or the case of the condominium land facing the commercial premises and reserved for them.

In principle, characteristic of this figure is that all the condominiums retain the co-ownership of the common *res*, while the condominium titular of the right has the exclusive enjoyment with the only limit of not modifying its intended use[60].The practical utility of the figure is controversial. Sometimes, it is preferable to assign the (otherwise) "common" property in exclusive *ownership* already in the contract, precisely to avoid subsequent conflicts between condominiums. However, the sense of assignment for exclusive use (instead of ownership) lies precisely in the constraint of the intended use that safeguards heterogeneous interests. We can consider the case of a garden assigned for exclusive use: it must remain so even in order to respect the aesthetics of the building and the owner of the *right of exclusive use* will not be able to make those changes incompatible with its destination[61].

The problem of the legal qualification was also raised due to its widespread diffusion and the need to identify a regulatory statute. In this regard, the position of law practitioners is not always the same: sometimes the *right of exclusive use* has been qualified in terms of *real* right[62], sometimes as a *personal* (*i.e.* relative) right of enjoyment, relying on the principle of the closed number of *real* rights[63].At a

[59]Struycken (2010) at 80.

[60]If, for example, the *res* is intended for a garden or terrace, the titular will not be able to create works in contrast with this destination (for example, building a workshop or a swimming pool). The modification of the intended use can be authorised only with a condominium assembly resolution adopted with the joint majority of the 4/5 of both the participants and the value of the condominium (Art. 1117-*ter* of the Italian Civil Code).

[61]Amagliani (2015).

[62]See Italian Court of Cassation, 16 October 2017, n. 24301, in *Riv. not.*, 2018, 6, II, at 1191 et seq. In the same perspective, see: Cass., 10 October 2018, n. 24958, in *Diritto & Giustizia*, 11 October 2018; Cass., 31 may 2019, n. 15021, in *De Jure Database*; Cass., 4 July 2019, n. 18024, *therein*; Cass., 3 September 2019, n. 22059, *therein.*

[63]Cass. 12 November 1966, n. 2755, cit.; Cass., 9 December 1989, n. 5456, in *Giur. it.*, 1990, I, p. 1305; Cass., 26 February 2008, n. 5034, cit.; Cass., 27 April 2012, n. 6582, in *Diritto & Giustizia online,* 2 may 2012; Cass., 15 may 2018, n. 11823, in *Diritto & Giustizia*, 16 may 2018. Due to

hermeneutical level, despite the terminological assonance, it is excluded that the figure corresponds to the right of use (*diritto d'uso*) regulated by Art. 1021 c.c.[64]. First, because the parties are not allowed to restrict the content of the right of use with the exclusion of certain faculties included in it and the attribution to the beneficiary of a special utility[65]. Secondly, the approach is problematic in consideration of the limits of duration, transferability, and methods of extinction of the right of use codified in the current system of *Codice Civile*[66]. Where the contractual title shows the creation of a somehow distorted right of use (restricting the content of the right, with the exclusion of certain faculties naturally included in it and the attribution to the beneficiary of a very special utility), the case law opts for the identification of a *personal* right subject to the 'relativity rule' which is typical of contractual relationships pursuant to Art. 1372 of the Italian *Codice Civile*[67]. Consequently, the obligations assumed with the *right of exclusive use* in favour of the owner of a specific real estate unit would be transferred to the purchaser, only through one of the negotiating tools existing for this purpose (delegation, expropriation, acceptance and assignment of the contract)[68].

At the same time, in praxis, the *exclusive use* is not qualified as 'praedial servitudes' since co-essential to this latter figure is the individuation of given faculties of use or given abstentions indicated in the constitutive title and also because the servitudes can't consist in the total elimination of the faculties of enjoyment of the serving fund, but only in the restriction of some of them[69]. In the latter case, the right is configured as an atypical servitude[70].Furthermore, the attribution of a *right of exclusive use*, as an exception to Art. 1102 of the Italian *Codice Civile*, is seen as a manifestation of private autonomy that conforms the enjoyment of the common *res*, through which the right gets perpetuity and transmissibility to subsequent successors of the real estate[71].Due to these uncertainties, recently the II Section of the Court of Cassation referred the case to the First President for the possible assignment to the United Sections[72].

Some Notes about the Issue

The exclusive right of use is a legal figure expressly codified by Italian law: it can be found in the III book of the civil code under articles 1122, 1123, paragraph 2, 1126. Beyond these few regulatory references, which give legal status to the

these applicative uncertainties, recently the II Section of the Court of Cassation remitted the case to the First President for the assignment to the United Sections (Cass., 2 December 2019, n. 31420, in *Diritto & Giustizia*, 3 December 2019).

[64]Cass., 4 July 2019, n. 18024, cit.; Cass., 3 September 2019, n. 22059, cit.; Cass., 16 October 2017, n. 24301, cit.

[65]Cass., 31 August 2015, n. 17320, in *De Jure Database.*

[66]For all these issues see Bigliazzi Geri (1994) at 11; Caterina (2009) at 175 et seq.

[67]Cass., 2 December 2019, n. 31420, cit.

[68]*Ibidem.*

[69]Cass., 2 December 2019, n. 31420, cit.

[70]Tribunal of Milan, 31 August 2018, in *Condominioelocazione.it*, 30 May 2019.

[71]Cass., 16 October 2017, n. 24301, cit.

[72]See *supra* note 63.

figure, there is no other discipline. We can't find any indications of the legal qualification as a *real* (*i.e.* absolute right) or *personal* (*i.e.* relative) right[73].

This situation is often common to other cases regulated in a cryptic manner by the legislator, for example: building rights (Art. 2643, lett. 2-*bis* c.c.), deeds of destinations (Art. 2645-*ter* c.c.) or timeshare (Art. 69 et seq. Italian consumer code), which are the subject of debate regarding whether or not they can be considered as *real* rights.

Another similar situation is that of the "stage right", regulated by the Italian law 26 July 1939, n. 1336, without any explicit normative indications regarding the legal qualification; this was offered by case law through the "typing" technique which is useful since it allows, where compatible, the classification of a new legal figure in known categories already governed by law[74].Thus, pursuant to Art. 1362 of the Italian *Codice Civile*, the examination of the negotiating intent is essential to ascertain whether the parties wished to establish a *personal* (classic hypothesis: a loan) or a *real* situation (which does not exclude gratuity, but implies the *reality* of the right). Problems arise, specifically, where the parties have intended to constitute a *real* right, perpetual, inherent to the *res* and with the characteristic of the ambulatory (*ie* running with the land), given that such *right of exclusive use* does not correspond to the right of use (*diritto di uso*) of referred to in Art. 1021 of the Italian *Codice Civile*, nor to any typical *real* rights. It represents the creation of contractual autonomy supported by limited regulatory clauses in the current code from which we can argue the mere eligibility of the exclusive enjoyment of a common property in a condominium. Therefore, the following question arises: are the parties allowed, by current law, to give birth to a new *real* right to alter the physiognomy of the typical *real* models?

Based on the principle of *numerus clausus* of *real* rights, the answer may be negative since private individuals are not allowed to conform *real* situations, but only debt relationships. The dogma implies both the inadmissibility of different *real* rights with respect to the figures envisaged in the system, and the non-configurability of a negotiating discipline that affects the content of typical *real* models. Far from providing answers, the principle of typicality of *real* rights actually opens up other questions, given that in the Italian law system the figure of exclusive use enjoys express typing (articles 1122, 1123, paragraph 2, 1126 of the civil code) and it is therefore in line with the fundamental principle of legality (Art. 42, paragraph 2 of the Italian Constitution).If the parties have intended to create a *real* situation, it would not be possible to exclude the abstract qualification of the exclusive right of use as *real* right, considering the latter as a nucleus of legal situations sufficiently homogeneous and endowed with their own characteristics[75].

As already stated, the distinctive features of the so-called *iura in re aliena* are the otherness of the thing, the absoluteness, the immediacy, and the inherence of the right to the *res*. The key concept of real rights is the well-known principle of

[73]On the latter, see recently Gigliotti (2018), *passim*.

[74]For the traceability of the stage right to the surface, see: Bologna Court of Appeal, July 28, 2015, in *De Jure Database*; T.A.R., Parma, 10 June 2014, n. 197, *therein*; Cass., 4 February 2004, n. 2100, *therein*.

[75]Pugliese (1964) at 775.

numerus clausus. It may be useful to inquire about the correspondence or not of the *exclusive right of use* to these characters. With regard to the first profile, given by the otherness, it is clear that the *res* is in communion, therefore partially of others; this does not exclude the possibility of the creation of a real right which is instead precluded, on the basis of the *nemini res sua servit* principle, in the case of a single owner[76].Absoluteness, *i.e.* independence from a dimension of legal relationship, can be considered existing because the owner can exercise his right without the need for other people's cooperation. Likewise, the immediacy is reflected in the peculiarity of the subject-object relationship, whereby the interest of the titular is satisfied by immediate power over the *res*. The *exclusive right of use* is certainly inherent in the *res*, being characterised by the real incorporation into the thing, becoming one of its qualities. From this it follows that, burdening the right on the *res*, it is insensitive to the events that concern it. As for the content aspect, it implies (*i*) the exclusive enjoyment in favour of the titular, (*ii*) a related liability for the expenses necessary for the conservation and enjoyment of the *res* (Art. 1123, paragraph 2, c.c.), and (*iii*) the co-ownership of the *res* by all the condominiums. With this figure, we have a right which is distinct from the right of use (referred to in Art. 1021 c.c.) as well as from any other *real* rights, which indicates the ways of enjoyment of the *res communis* on the basis of what agreed by parties.

Perspective of Party Autonomy in Property Law

A margin of operation for party autonomy is admitted, given that private individuals could integrate or derogate from the legal discipline in compliance with the essential mandatory core[77]. Indeed, the overcoming of the basic nucleus would end up giving the figure a new substantial identity by breaking the dogma of typicality and giving rise to *personal* rights.

In this regard, we consider again the dualism present in the legal statute of *real* rights: on the one hand, there are mandatory rules that identify the distinctive features of each model; on the other hand, there are provisions, generally not binding, which offer private individuals a model of regulation aimed at allowing the parties to provide otherwise for the satisfaction of their interests, provided that they do not alter the fundamental content[78]. The principle of typicality of *real* rights implies the prohibition for the parties to alter the essential features of the typical law schemes, so that the effect of those negotiations in contrast with such limit is a requalification of the legal situation with consequent exclusion of *real* effectiveness.

With reference to the right of servitudes, for example, the mandatory requirement of 'praediality' is recorded with the provision of a weight, on a ('servient') fund for the utility of another ('dominant'), configured as an

[76]Cass., 29 November 2004, n. 22408, in *De Jure Database*; Cass., 15 April 1999, n. 3749, cit.; Cass., 6 August 2019, n. 21020, in *Guida al dir.*, 2019, 46, at 61.
[77]Cass., 4 January 2013, n. 100, in *De Jure Database*.
[78]Comporti (2011) at 153.

inseparable *qualitas* of both assets. At the same time, it is considered admissible, based on the principle of contractual autonomy pursuant to Art. 1322 of the Italian *Codice Civile*, that the will of the parties may give rise to merely 'personal servitudes' with the stipulation of an obligation exclusively for the personal advantage of a beneficiary beyond his/her real estate ownership[79]. With regard to the right of use pursuant to Art. 1021 c.c. we find a figure with a precise legal identity: it confers an *ad personam* asset attribution; whose vocation, in meeting the needs of the user and his/her family, is manifested in the non-transferability provided for under Art. 1024 c.c.[80].

As a result, the possibility of transfer for the *right of use* appears difficult in light of the textual provision of Art. 1021 c.c. [according to which those who have the *right to use* a thing can use it and, if it is fruitful, can reap the fruits according to his/her (own) and his/her family needs], which traces a limit beyond which the autonomy of negotiation would overflow in atypical schemes[81]. However, overcoming the transfer ban pursuant to Art. 1024 of the Italian *Codice Civile*, does not entirely echo public interest reasons (given that it mainly affects a private interest, *i.e.* the proprietary prerogatives), so that it was considered modifiable by an express agreement between the owner-constituent and the holder of the limited *real* right[82].

If the parties have intended to constitute a perpetual right on the common *res*, given the limited duration of the transferor's life (pursuant to Art.1026 of the civil code), the *right of use* (indicated in Art. 1021 c.c.) is not suitable[83]. As already mentioned, even the reference to the right of servitudes is not appropriate where there is a total elimination of the faculties of enjoyment of the serving fund. The interpreters may perhaps match the figure with the category of atypical servitudes, transmissible together with the real estate according to the principle of ambulatory, whenever residences are given any faculties on the *res* (and so they are not entirely excluded from the use of some utility on the property in *exclusive use* of a condominium).

The figure in question is therefore hybrid with traits of the right of use and traits of servitude: it would therefore be a *sui generis real* right, to be framed in the context of Art. 1122 c.c. which presupposes a specific agreement concluded between all condominiums regarding the use of the common *res*. As argued by Cass. n. 24301/2017, the *exclusive right of use* would constitute a regulatory element of the condominium discipline; it would confer unequal rights of enjoyment on the common parts determined by the title itself which attributed the main right of co-ownership to the condominiums[84]. Thus, the figure is the implementation of a conventional allocation of entitlement rights in derogation from what is presumed pursuant to articles 1102 and 1117 c.c.

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[79]Cass., 9 October 2018, n. 24919, in *De Jure Database*.
[80]Cass., 2 March 2006, n. 4599, in *Guida al dir.*, 2006, 16, at 90; Cass., 27 April 2015, n. 8507, in *Giustiziacivile.com*, 1 December 2015.
[81]Spatuzzi (2019) at 31 et seq.; Caterina (2009) at 180.
[82]Cass., 2 March 2006, n. 4599, in *Guida al dir.*, 2006, 16, at 90; Cass., 27 April 2015, n. 8507, in *Giustiziacivile.com*, 1 December 2015.
[83]Cass., 12 October 2012, n. 17491, in *Giust. civ. Mass.*, 2012.
[84]Cass., 16 October 2017, n. 24301, cit.

Art. 1117 c.c., in indicating the common parts of a condominium building, provides, in fact, that this indication is valid unless the opposite is apparent from the title[85].As recently highlighted also by the Court of Cassation, given that the enjoyment of the *res communis*is an intrinsic element of communion, the denial of it to some condominiums can only derive from the establishment of a *real right* in favour of the user, making a modification of the essential content of the co-ownership[86]. In my opinion, the issue must be resolved by considering the *ratio* of the legal discipline and considering the purposes for which the creation of *exclusive use* aims to achieve. The category of *real rights*, inspired by the need to allow the best exploitation of things, is based on the principle of typicality, aimed at avoiding the risk of an arbitrary *deminutio* of the proprietary faculties.

This risk exists if attention is paid on the deprivation of the enjoyment of the common good, for the community of condominiums, by virtue of the establishment of the *right of exclusive use*. From another point of view, we can consider the advantage acquired by the owner with the *right of exclusive use*. This is, however, a matter totally left to negotiating autonomy, on the basis of what decided by the builder (and accepted by the buyers of the real estate units in the notaries' deeds) or unanimously approved by the condominium assembly[87]. In a broader sense, this option indicates how the dogma of *numerus clausus* can be considered ductile and flexible and no longer in contrast with contractual freedom in the frame of a 'regulated party autonomy' which is at the heart of European law[88].

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[85]*Ibidem.*

[86]Cass., 2 December 2019, n. 31420, cit.

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[88]Mezzanotte (2017) at 45.

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Notary and Registrar's Civil Liability for Data Leaking at the Brazilian Electronic Central (E-Notariado)

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This paper analyses the acts performed by the Brazilian notaries and registrars at electronic databases and the new electronic internet device created by the Brazilian College of Notaries, called E-notariado, which acts as a digital certificate network with the purpose of establishing an Authority Certification. This platform includes various services such as cloud backup, notary clients' biometrics registration, digital signature for notarial acts, and a notary-chain that acts as a notary blockchain and an electronic real estate registry. The study stresses the need for a data protection law, concluding that the civil liability of notaries and registrars related to acts in electronic exchanges is subjective, as long as they respect the requirements established by the Brazilian data protection law. Suggestions to implement data protection are offered, using programs and platforms that benefit the development and the fulfilment of public interests, without harming or weakening the legal security and reliability of notarial acts and public records. Finally, the paper highlights the technological challenges inherent in the fourth industrial revolution, taking place at present.

Keywords: *Data leaking; Database; Notarial E-Centrals; Civil Liability of Notaries; Notaries Public; Registry Activity*

Introduction

At present, humanity is experiencing the culmination of the fourth industrial revolution. Society has become digitalised, and thus there is a need for public bodies to be updated, with the aim of monitoring these developments and making actions more swift and effective.

Along with various other fields, the work of notaries and registrars has undergone many changes, and they have gradually ridden themselves of the obsolete means of production of acts, in accordance with the dictates of the fourth revolution and the constantly-changing world. This has resulted in the development of E-Notariado, electronic real estate registration and other internal programs that transform notaries into certifying authorities, allowing notaries and registration officers access to real databases, containing the most sensitive data available today.

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While the new technologies have contributed much to society, they do not lack their own problems and disadvantages. In the context of this paper, these relate to the fundamental juridical assets of the individual and the collective. Unfortunately, complications have been occurring with a growing frequency.

Coinciding with the evolution of technology and both its positive and negative effect on society, the law, by one of its natural characteristics, includes mechanisms for the resolution of possible conflicts and accountability of the causative agents of damages, e.g. Laws Nºs 8.935/94 and 13.709/18. Therefore, the objective of this article is to analyse the civil liability of notaries and registrars in cases when they cause damage or injury to the legal assets protected by means of the electronic data bases.

This article begins by addressing the historical evolution of notaries and registrars. Next, we discuss the essential concepts of notarial and registrarial activity, such as public trust, and the differences between notarial and registrarial advertising are explained. Once this is established, we analyse the acts practiced in the electronic databases, the new data storage programs such as the E-Notariado, electronic real estate registry and others. A brief analysis of the categories and types of data resulting from the 2018 data protection law follows, along with a description of the data that these programs use when performing the acts. Finally, we will suggest the scope and limits of responsibility that should be applied to notaries and registrars, and briefly discuss the importance of notaries and registrars in the fourth industrial revolution. In addition, we will propose a manner of implementation that will not harm or weaken the legal security and reliability of notarial acts and public registers.

A Brief Historical Evolution and Legal Nature of Notarial and Registry Activity

Actions of a notarial and registrarial character were first mentioned in the biblical period,[1] where various verses cite the actions of scribes during the preparation and writing of acts performed at the time.[2] Traces of notarial and registrarial activity thus exist from times before the emergence of the State[3] and of the Law itself, because there was a need to produce documentation to prove different actions and agreements. Soon this task became the domain of specific people who were trusted and confided in.

Contracts from the Sumerian period (3,500 to 3,000 BC),[4] located in southern Mesopotamia, now Iraq and Kuwait, were written on animal skins, proving the existence of a kind of notary at the time. In Egypt, at the apex of the Ancient Empire and the Middle Kingdom, during the years 3,100 and 1,770 B.C, the Egyptians had a template that regulated private agreements. It was from there that the concept of the "subscribing witness" for notarial acts first originated, since

[1]Genesis, ch. 2.
[2]Ferreira & Rodrigues (2018) at 15.
[3]Erpen (1995) at 37-39.
[4]Pininga (2015).

such witnesses were essential to the work of the scribes who drew up the specific documents. After the document was prepared and signed by three witnesses, it was taken to a priest to affix a seal, giving the document authenticity and ensuring that the document could no longer be altered.

In Greece, the figure of the Mnemosyne appeared, the Greek Goddess of memory. The Mnemon was a memoriser, who formalised all public and private acts. The Roman Empire saw the emergence of the figures most similar to today's notaries and registrars. As the Roman territory expanded, Roman law was concerned with the protection of its conquered people, which marked the emergence of the *Tabullarius, Notarius, Argentarius* and *Tabellios*.[5]

Another relevant historical moment of notarial and registrarial activity took place during the years 527-565 AD, a time marked by the imposition of Justinian's Code, when the notary and registrar had servants to assist in the practice of notarial acts.

The term notary[6] was used for the first time in Portugal in 1283, influenced by the Bologna School,[7] and the Portuguese dialect was used for the first time in public contracts. As for the structure, these were public-faith preposts, which had not changed much as compared to Justinian's Code.

In Brazil, the functions of the notary and registrar were, by nature, subordinated to the judge, that is, the notary and registrar were linked to a state judge, and did not function independently. No lawyer in private practice could function as notary or registrar unless he was in the public service.

This situation was reinforced with the advent of the 1988 Federal Constitution in conjunction with the 1994 Law on Notaries and Registrars, when tests were formulated in order to authorise notaries and registrars to function independently from the judges.

Following, we would like to survey the importance of the acts performed by notaries and registrars and the public faith granted them by law.

Full Faith and Credit, Publicity in the Acts performed and their Importance

Notarial and registration law is almost synonymous with speaking in public faith and advertising, but what do the terms ‘full faith and credit’ and ‘advertising’ consist of?

According to the Aurélio dictionary, the term faith means belief, trust, or even authentic testimony, written by certain officials,[8] which has force in the judgment, and the term public means something that is relative or intended for the people, the collective, or the government of a country.

From a technical perspective, Paulo Roberto Benasse, in his legal dictionary, defines full faith and credit as "public trust in the truth or legitimacy of a thing or

[5]Ferreira & Rodrigues (2018) at 16
[6]Jacomino (2019).
[7]Pinho (2018).
[8]Holanda (2000) at 316.

an act emanating from public authority or power in the exercise of its functions",[9] therefore one can define 'public faith' as the trust granted in specific cases by the state to a public or private agent.

Within the context of Brazilian Notarial and Registral Law, 'public faith' means that the people have granted the State a certain trust to represent them, and the State, based on the Brazilian Federal Constitution, grants certain officials the same faith that they perform certain tasks.

Notaries and registrars are officials that have received the public's trust by means of the State, and their acts are considered trustworthy until proven otherwise by judicial means. Notaries are trusted by the public to be instrumental in legal transactions carried out by private individuals, while registrars are trusted by the public to perform legal acts in the strict sense. However, for an official to receive the public's trust, it is necessary that they fulfil certain requirements and formalities.[10] According to Notary Paulo Roberto Gaiger Ferreira and his alternate, Felipe Leonardo Rodrigues, these formalities include:

A) Being authorised by law;
B) Professional competence;
C) Social value.[11] The public's trust has been stated in our order through Art. 19, II and Art. 236 of the Federal Constitution of 1988, in addition to the provision of Law No. 8,935/94.

As far as advertising is concerned, notaries and registrars perform a broad public function,[12] so all acts performed by them should be public and fully accessible to the people, provided that the action was requested and paid for by the individual.[13] In order to competently discuss advertising, we must separate between notarial advertising and registry advertising. Notarial advertising is exercised by notaries of notes, and refers to that which confers the confidence of the State on business activities executed by individuals, giving cognisance and making them accessible to any interested party.[14] Registry advertising aims to give effective *erga omnes* to legal acts, removing them from the *inter partes* sphere, and causing them to be enforceable against third parties.

Both the concepts, public faith and advertising, concentrate on pursuit of a single objective with significant importance to the law, advancing legal security.[15]

Acts practiced in the Electronic Stations and their Risks

In the above topics, the primary assumptions of notarial and registral law were analysed, without which the roles of notaries and registrars would not exist. Because these are matters of law, they are subject to its general characteristics,

[9]Benasse (2000) at 181.
[10]Chaves & Rezende (2013) at 113.
[11]Ferreira & Rodrigues (2018) at 17.
[12]ADI 3.643, voto do rel. min. Ayres Britto, j. 8-11-2006, P, *DJ* de 16-2-2007.
[13]Brandelli (2016) at 80.
[14]Brandelli (2016) at 81.
[15]Enríquez (2012).

described by such classical authors as Professor Tércio Sampaio Ferraz Jr. and the German jurist and philosopher, Karl Engisch[16].

One of the prime characteristics of the law is dynamism,[17] which refers to the capacity of the law to adapt according to the evolution of society. With the constant changes arising from the new technologies[18] that were the results of the fourth industrial revolution, the law has had to adapt in order to regulate such demands, a matter we will soon discuss.

Technological innovations greatly affected the work of notaries and registrars, developing new technological mechanisms for drawing up notarial minutes, the E-Notariado system, *Notar-chain,*[19] and other programs and applications for data storage, all with the aim of facilitating notarial activities, expanding data storage and making their service more efficient and faster.

The innovative technologies that characterise the fourth industrial revolution allow an integration of the digital world with the real world, offering applications in a myriad of fields in everyday life. With these contemporary technologies, notaries and registrars have had to update their mode of work in order to meet the new demands arising from such a revolution and, as a consequence, notaries and registrars have started to use electronic centrals.

The E-Notariado system was implemented for the use and benefit of notaries. This tool is used as a kind of digital certificate network, aiming to establish the notary public as a certification authority.[20] Within this platform, one can find several services, such as cloud backup, biometric registration of notary public clients, digital signature for notary public acts, and Notar-chain,[21] which works as notary public blockchain, making physical documents obsolete and authenticating documents by digital means, with a high degree of security against potential system invasions.

The electronic real estate registry was created in 2009, with the advent of Law No. 11,977, and consists of a database that facilitates the exchange between real estate registry officers and the judiciary and public administration in general,[22] in addition to storing all the data from the registry office and facilitating the issuing of certificates. Along with the programs mentioned above, notary publics and registration services have programs and internal applications, both to store the signatures and photos of clients and to store more confidential documents, such as wills drawn up by notaries.

The use of these programs by notaries and registrars demonstrates the importance of the implementation of public faith and publicity in the acts practiced within the network. At present, the internet and digital media are not sufficiently regulated by the state, and thus there is a need for specific services that add

[16]Engish (2008) at 393.
[17]Ferraz Junior (2016) at 164.
[18]The fourth industrial revolution began approximately 30 to 40 years after the end of the third industrial revolution, proving the speed with which revolutions have been happening in society, and exhibiting the need for rules and laws to accompany these developments.
[19]Magalhães & Vendramini (2018).
[20]Autoridade responsável por emitir certificados digitais.
[21]E-Notariado (2019).
[22]SREI (2019).

reliability and legal security to the acts practiced by individuals in the digital and electronic world.

The abovementioned programs use users' data, that is, informational elements regarding a person/thing serving as a basis for a judgment. These data are currently considered "the oil of the twenty-first century"[23] because of the high sums for which companies, such as Google, sell these data to other companies for the purpose of targeted marketing.

Today, we have several kinds of data, some of them stated in Art. 5 of Law no. 13.709:

A) personal data, which refers to an identified or identifiable natural person;
B) sensitive personal data, which refers to racial or ethnic origin, religious conviction, political opinion, union membership or religious, philosophical or political organisation, data concerning health or sex life, genetic or biometric data when linked to a natural person;
C) anonymised data: data relating to a holder who cannot be identified, considering the use of reasonable and available technical means at the time of their processing.

Additional data that must be protected also includes such data as direct personal data where there is no need for other complementary information, indirect personal data that makes a natural person identifiable once presented along with other information, Pseudonymised data where there is no possibility of association with the original natural person, and anonymised data that are not personal data, where the holder cannot be identified. [24]

The Data Protection Law and the doctrine in this regard are self-explanatory. Thus, for the purpose of this article, we will concentrate on the type of data that are used by notaries and registrars in Brazil.

In extrajudicial services offered through its internal electronic centres and through the E-Notariado system, personal data of identified natural persons are used in instances when registration data is stored, such as addresses, photos, signatures, RG (Identity Cards), CPF (Cadastro de Pessoas Físicas), and title of voter, among others. This includes also sensitive data, such as in the case of storage of *homoafetive*[25] stable union deeds, or powers of attorney for the sick and declaration deeds that contain any kind of information about race or ethnicity, religious conviction, political opinion, union membership or religious organisation and so on. Sensitive data may also appear in notarial minutes[26] where the notary records the events in a deed in a tangible manner. An example of sensitive data in notarial minutes is a case involving a notarial act on an intimate video uploaded to the internet. Although most of the data stored by the extrajudicial services are

[23]The Economist (2017).
[24]Maldonado, Blum & Borelli (2019).
[25]Although the homoafetivas stable union deeds are public, it is possible to demand for secrecy through the courts.
[26]In the same sense as the previous footnote.

public, there is the possibility of requesting a restriction by judicial means, a subject we will focus upon next.

Although the technological revolution has changed our life in a positive manner, there are cases in which the same technological devices have caused damage and prejudice due to hacker invasion and data leakage. For example, in 2019 the data of at least 1 million people were exposed on the network due to a failure in the system of ARPEN-SP, which stores all the data of Civil Registry Officers of the State of São Paulo.[27] Unfortunately, cases like this are increasingly common in our society. For this reason, the law needs to accompany the changes in order to avoid the problems that may be caused by the abovementioned situations and ensure that the legal rights protected by law are not harmed, especially the individual's right to privacy. Following, we will examine the responsibility of notaries and registrars in case of data leakage and the invasion of third parties in their systems.

Civil Liability of Notaries and Registrars for the Leakage of Personal Data in Acts Performed in the Electronic Centres

In order to develop the argument, it is necessary to differentiate two distinct figures regarding the administration of the electronic centrals and the possible data leaks. First, there is the figure of the operator[28] of the electronic centrals, that is, the person who actually performs the manipulation of personal data on behalf of the controller[29]. The second figure is that of the notary public or registration officer who controls the central offices, issuing the decisions regarding the processing of personal data.

Regarding civil liability, Silvio Rodrigues[30] defines it as "the obligation that may be incumbent on one person to repair damage caused by another, by his own fact, or by the fact of persons or things that depend on him". This institute of civil law is one of the most evolved,[31] as it must follow the evolution of society.

Limited to the notarial and registry realm, civil liability serves to ensure the reliability and safety of services.[32] The civil liability of notaries and registrars is set forth in Law 8.935/94, and the judiciary power is tasked with overseeing and exercising disciplinary power over the delegates of the public service, according to Article 37 of said law. But which institute applies: objective or subjective civil liability?

It should be noted that notarial and registrarial activity are considered a public service in the broad sense, and the Federal Constitution itself, in Article 236, paragraph 1, reports that the civil liability of notaries and registrars must be applied by specific law. Therefore, the rules related to consumer law should not be applied,

[27]Militão (2019).
[28]Teixeira & Armelin (2019) at 42.
[29]Lei Federal nº 13.709, de 14 de agosto de 2018.
[30]Rodrigues (2002), at Vol. 4, p. 6.
[31]Tartuce (2019) at 337.
[32]Pedroso & Lamanauskas (2015).

ruling out the institute's incidence of objective civil liability, provided for in Articles 12 and 14 of the Consumer Protection Code.[33]

With the advent of Law 13.286/16 in 2016, Article 22 of Law 8.935/94, which refers to the civil liability of notaries and registrars during the performance of their activities, was amended, exposing notaries and registrars to the institute of subjective civil liability, provided that it is based on malice or guilt, thus safeguarding the right of recourse against their agents.

In fact, there is more than one law applicable to the case in question, causing a contradiction:[34] Law 8.935/94, referring to notaries and registrars, and Law 13.709/18, which provides for the protection of personal data. For this reason, the Brazilian judiciary system has provided criteria to solve this contradiction.

These chronological and specialty criteria are applied to the case of data leakage by notaries and registrars. The personal data protection law came into force in 2018 and is chronologically newer than Law 8935/94, as amended by Law 13.286/16, hence *lex posterior rogat priori*. With regard to the specialty criteria, it should be noted that the Data Protection Law, although somewhat generic when it comes to data protection, is more specific than Law 8,935/94, since it deals with an extremely limited matter in the notarial and registry sphere, hence *lex specialis derogat generali*. There is no mention of hierarchical criteria, since both rules are in the same degree of hierarchy.

It should be noted that the prevailing law on the issue of data leakage is Law No 13.709/18, as it is more specific and newer than Law No 8.935/94, which is applied in cases where the LGPD (The Brazilian General Data Protection Law) does not cover it. Regarding civil liability, which should be applied to notaries and registrars, it should first be established whether notaries and registry officers are public agencies, since the liability applied diverges between public and private agencies.

According to Art. 23, §§ 3 and 4 of Law 13.709/18, notaries and registration officers are to be treated as public authorities in the matter of personal data protection. This legislative statement is based on the fact that extrajudicial services, despite being exercised on a private basis, are delegated activities of the Public Power, as referred to in Article 236 of the Major Law.

Therefore, the notaries public and the registry officers appear as the long arm of the State for the practice of public services *sensu lato*, as mentioned above.

However, notaries and registrars are, in fact, ambiguous figures, being both public and private. As far as administrative sanctions are concerned, notaries and registrars are not subject to financial sanctions, since they are treated as public bodies for such accountability. According to Article 31 of the Data Protection Act, though, they are obliged to stop violations they encounter during the course of their work,[35] in accordance with the guidelines of the National Data Protection Authority.

As for civil liability, notaries and registrars should be punished as legal persons under private law. LGPD brings to the system the figure of subjective civil

[33]Velter Junior (2018) at 108.
[34]Bobbio (1995) at 91.
[35]Teixeira & Armelin (2019) at 99.

liability, provided that notaries and registrars have not complied with security, technical or administrative requirements that were put in place in order to protect personal data, unauthorised access, and accidental or illicit situations of destruction, loss, alteration, communication or any form of improper or illicit treatment. Provision No. 74 of the National Council of Justice, put on place on July 31, 2018, provides minimum standards of information technology for the security, integrity and availability of data for the continuity of activity by notary and registry services in Brazil.

Therefore, it must be proven that notaries and registrars acted in malice or failed to repair damages, and that the appropriate measures for data protection were not taken. The exception to this is the right of the notary and registrar to turn against their agents, applying Art. 42, §4 of the LGPD and, alternatively, Law No. 8,935/94.

In cases when the requirements made by law are not met or the operator's lawful instructions are not complied with, the person holding the position of data operator must answer jointly with the controller of the data, which in this case is the notary or registrar. Article 42, I of LGPD is very clear, since in most cases the notary and registrar take all the necessary precautions, but these are not complied with by the operator, causing an "unfair" liability to the notary and registrar.

Article 43 of the Brazilian Data Protection Legislation provides for situations when liability is excluded. This is applicable also to notaries and registrars:

A) when the data processing assigned to it is not carried out;
B) when the processing is carried out, and there has been no violation of the data protection legislation;
C) when the damage results from the exclusive fault of the data subject.

It should be noted that the Data Protection Law does not, at any time, use the characteristic expression of “objective civil liability,” i.e. “liable regardless of fault,” and it is therefore concluded that the civil liability to be applied to notaries and registrars is subjective, as long as the technical security requirements provided by the law are not met.

Conclusions

Many critics of the notarial and registrarial functions have stated that these positions would disappear with the evolution of technology, mainly because of the potential for problems emanating from technological developments. However, this statement has been proven wrong, since it is undeniable that notaries and registrars have a primary mission in the fourth industrial revolution, i.e. to serve the public interest through electronic and digital acts, while utilizing appropriate security measures in order to ensure public faith in private electronic acts, without harming or weakening the legal security and reliability of notarial acts and public records.

However, human beings have fundamental rights guaranteed by the Federal Constitution and Federal Laws, some of which are confidentiality, privacy and the

right to demand erasure of data. Such rights can be violated in case of data leaks, exposing the individual's life to the public through the digital world, causing discomfort and, often, the loss of dignity.

At present, notaries public and registry officials are privy to much personal information, and despite the security that such bodies present, both human and machine errors may, and do, occur.

Notaries and registrars should also be penalised according to the institute of civil responsibility. After conducting an in-depth study of the Brazilian law, it is concluded that the civil responsibility of notaries and registrars should be subjective, including cases when the technical criteria established by the Data Protection Law are not respected.

Data protection must be made effective in the notarial and registry world, and public interest should be guaranteed. This should be achieved without harming or weakening the legal security and reliability of notarial acts and public registries, and requires the creation of specific legislation for data protection by notary and registry officers. Specific hardware and software must be developed, with a high level of security and reliability to guarantee the protection of personal data. Finally, severe penalties should be put in place for hackers and system invaders, who intentionally circumvent all the security measures created for the notary and registrarial systems.

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My Days of Mercy and *In Between*: Echoing Changes in Cinematic Representations of Women Lawyers

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The booming of Law and Popular Culture has been marked by an unprecedented production and consumption of a voluminous literature examining a wide range of legal themes in movies and TV series on both sides of the Atlantic, the UK and the US. The enthusiastic proponents of the field have been focusing mainly on examining issues of justice, plot, and lead characters in the role of lawyers. Partly, this literature draws parallels between cinematic representations of lawyers and real-life lawyers. Almost indiscriminately, this work focuses mainly on a critical analysis and investigation of cinematic representations of male lawyers, rendering women lawyers' cinematic portrayals largely unexplored on both sides of the Atlantic. Middle Eastern women lawyers' celluloid representations are even more limited, functioning as a constant reminder of this ever-present absence. This paper seeks to address this absence by examining a relatively small sample of films from both the Anglo-American and Middle Eastern cinematic traditions. It puts forward the suggestion that despite differences characterising the relevant cinematic traditions, cinematic representations of women lawyers remain largely similar.

Keywords: *Women Lawyers in Film, Gender, Femininities, Law and Popular Culture, Law in Film, Middle East.*

Introduction

Methodologically speaking, the example used from the Middle Eastern tradition is the recent, internationally acclaimed Israeli/Palestinian movie "In Between" (2016). The reason for the deployment of the specific movie is that it constitutes a rare example of cinematic representations of a female lead character as a lawyer, in the Middle Eastern tradition. The example used from the Anglo-American tradition is the movie "My Days of Mercy" (2017) serves an entirely different purpose. Methodologically speaking, the deployment of My Days of Mercy builds on the core suggestion of the paper by bringing forward the similarities between opposing sides while focusing on the life of the female protagonist lawyer. This paper is divided in three parts. The first part locates and traces the transition to the portrayals of women lawyers on screen from being constructed in a negative to a more positive light through striking a balance between professional and personal life whilst undergoing a transformation themselves. The second part of the paper situates the protagonist role of the

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woman lawyer in the movie "In Between" within an exploration of the pleasure-seeking attitude exhibited in the film. This accords to the organisational literature of the legal profession in the UK and the US exposing the new "ethics of aesthetics" of the legal profession. The third part of the paper reimagines the relationship between fictitious representations of women lawyers to real life women lawyers. In revisiting its main suggestion this paper concludes that irrespectively of the superficial differences and takes, cinematic representations of women lawyers in the East and West remain largely similar and closer to real life representations of women lawyers than ever before.

De-traditionalised Versions of Women Lawyers in both Cinematic Traditions

In addressing the similarities between the two traditions with illustrating examples, *My Days of Mercy* and *In Between* narrate a story of professional and personal metamorphosis deriving from a relationship with an individual who challenges their perception of the law. From this perspective, *My Days of Mercy* and *In Between* manage to depart from the traditional cinematic representations of women lawyers by examining not just their professional but also personal lives and the way the latter challenges the former through reconstructing gender relations.

More specifically, in each of these films the heroine's gender permits a special relationship to form without sacrificing her professional identity. Even more importantly, the heroine's gender is performed through her professional identity as attributes of more compassionate lawyering and more empathic stance deriving from the special relationship the heroine forms with another individual. *My Days of Mercy* focuses more on the difficulties experienced by the family of a man accused of murdering his wife and as a result being sentenced to death. *My Days of Mercy* focuses on the personal lives of one of the daughters, actively demonstrating against the death sentence imposed on her father and a criminal lawyer, prosecutor, who is pro capital punishment. The two protagonists fall in love with each other across the battle lines as they regularly see each other at demonstrations around the country. The prosecutor is played as a cool, impersonal, competitive professional, who eventually learns a lesson in empathy and compassion from the individual she gets romantically involved with. In the beginning, she relates to her partner to be, from an almost adversarial posture, interrogating her in the guise of educating her about her pro capital views. Mercy, the prosecutor, has seemingly a wry authority over an admirably chippy Lucy. Mercy's career activism is constantly challenged by Lucy's older sister with punch lines such as: "How was your pro boning?" Although this film is not perfect in its depiction of the struggle for justice the defaults and cogs of the US Criminal Justice system, its female lawyer's professionalism is not undermined by her sex; on the contrary, because she is a woman she is ultimately more empathic. This change, which signifies a change in the cinematic portrayals of women lawyers is not depicted as a weakness, but rather as a strength as a heroic moment. Her transformation through her increasing connection and

sensitivity to the opposing side is visual. Her appearance loosens up, she dresses more informally, she warms in speech and manner to views that fundamentally go against her personal views and beliefs. Her professional identity has become more compassionate and empathic. *My Days of Mercy* is a movie about the relationship of lawyers to the law, where a woman lawyer embraces issues that concern the treatment of women by the legal system and more specifically the Criminal Justice system and has the strength to seriously question her own personal and professional beliefs.

In Between concerns another transformation of a criminal defence woman lawyer that relates more to the emphatic popular culture argument of hero/ heroine. *In Between* narrates the story of three Palestinian women flat sharing in Tel Aviv, Israel. They are a criminal defence lawyer and a very liberal Muslim, a Computer science student and a conservative Muslim and a very liberal lesbian Orthodox Christian, who is a DJ. Leyla, the criminal defence lawyer comes across as having a combination of feminine and masculine characteristics as a criminal defence lawyer. The legal scenes are very limited; it is more like a shaping of the character of the lawyer protagonist. Nevertheless, the heroic moments are countless in the movie, as Leyla develops a special relationship with one of her flatmates, who becomes a rape victim by her fiancée, also a conservative Muslim. It seems like Leyla starts thinking and acting as a prosecutor rather than a criminal defence lawyer or in other words, puts herself in the victim's shoes. From this perspective, she undergoes a professional transformation. It feels like Leyla, while advising her flatmate who has been raped by her fiancée takes the law in her hands and she manages to achieve justice for the rape victim, her flatmate, without even going to trial. Another scene exemplifying Leyla's role in the movie is a scene resembling the Civil law jurisdictions taking place outside the Court and talking to the other councillor, her male, Jewish opponent. The scene involves harsh and very masculine talk by Leyla on the case, outside the Court House. There is the feeling that there has been something going on between the two as the scene is quite flirtatious and the impression that is created to the audience is that the two must have gone out together in the past. Despite their imperfections, however, these modern women lawyers project a positive image largely because they have conceded professional skills that they know how to use in the male dominated legal world. Moreover, they value, or learn to value, a personal morality that invades the terrain of professional conduct. At the conclusion of each film, the personal self has eroded rigid professional role definitions. This seems to depart from the negativity cinematic representations of women lawyers are usually framed in.

For example, Christine Corcos suggests that this negativity is primarily because women are being compared to men and the male lawyers are afforded more opportunities to be seen as heroes.[1] Corcos writes that popular culture is now saturated with female lawyer characters so they "are no longer rare, but their image on film and television has become to a large degree stereotypical."[2]

[1]Corcos (2003) at 203.
[2]Corcos (2003) at 204.

According to Corcos, the stereotypical popular culture image of a female lawyer is a woman who lacks opportunity and power; is less masterful at the law than her male counterpart; and is unable to maintain a healthy romantic relationship.[3] Most legal dramas depict strong male heroes who "achieve our admiration by remaining true to admirable principles (morality), even if by doing so they forego political or legal power."[4] Corcos surveys leading female lawyers in popular culture and determines they "cannot achieve heroism in the same way that male attorneys [. . .] can, even if she does exactly the same things."[5] Most female characters Corcos examine resort to traditional male roles, abandoning typical feminine characteristics, and some even turn to violence as a remedy.[6] Corcos persuasively argues that: "for the woman to 'win', professionally, she must give up any achievements in her personal life; otherwise the balance of things is upset."[7] The woman's attitude is 'let the man win' because women lawyers who try to match their male counterparts are often attacked for being disingenuous.[8] On-screen female lawyers cannot win because even when they adapt to be more like the male lawyers we see in films and television, they are viewed differently: as "bucking the system," as unwilling to be team players, or as unable to understand how to play the game.[9] "Because of the nature of society in general, women lawyers can never be as successful or as happy as men, nor can they be heroes in the traditional sense. In all of the films and shows Corcos analyses, "the woman's legal career is seen as such an aberration that personal failure is not only predictable but necessary to right the imbalance that the entrance of females into the legal profession creates."[10] Corcos notes how women are marginalised as lawyers because they are not the managing partners, but rather the lower-salaried lawyers[11] and they are not the ones winning the cases, because a man at the firm will come around and save the day.[12] Generally, Corcos does not believe we have escaped the negativity surrounding on-screen female lawyers. The negative images of female lawyers are not contributing to the success of either gender because they merely reinforce unfair stereotypes and cynicism.[13] Marek notes that female scholars have concluded that women lawyers are portrayed negatively on television. Marek states: "despite the huge increase in the number of women lawyers in the past three decades, there is still a great disparity between the opportunities for, and experiences of male and female attorneys."[14] Marek also recognises that this disparity remains a reason for popular culture continuing to illustrate the inequality between the genders.[15] Quoting Shapiro, Marek states,

[3]Corcos (2003) at 205.
[4]Corcos (2003) at 206.
[5]Corcos (2003) at 207.
[6]Corcos (2003) at 208.
[7]Corcos (2003) at 210.
[8]Corcos (2003) at 211.
[9]Corcos (2003) at 213
[10]Corcos (2003) at 216.
[11]Corcos (2003) at 217.
[12]Corcos (2003) at 218.
[13]Corcos (2003) at 220.
[14]Marek (2004) at 223.
[15]Marek (2004) at 224.

"after all, television's and film's ability to shape our view of the world in general, and the legal system in particular, makes it a powerful force [. . .] The visual image plays a central role [. . .] in maintaining the status quo."[16] Marek establishes criteria for determining if the female lawyers on television and film are providing a new image for women lawyers. Her criteria are:

(1)do the women seem fulfilled or do they struggle with balance between personal and professional lives;
(2)are the women perceived as competent lawyers;
(3)is physical appearance key to success; and
(4)do the women seem happy and well-liked by others.[17]

Marek believes that more recent representations of women lawyers on the screen are overall positive role models.[18] Marek notes when comparing leading women lawyers to the leading men, the women lawyers fare better than their male counterparts.[19] Marek appreciates the shift in portrayal of the male and female characters.[20] Marek stresses the importance of finding a proper work-life balance and she believes that representations of female lawyers are reflective of society's desire for that balance. Marek is willing to see the positive in the portrayal of female lawyers on television. She recognises that recent representations of women lawyers in films portray women lawyers in a new light as successful professionals, which is a positive thing for both sexes."[21] It is suggested that My Days of Mercy and In Between, constitute evidence in the quest and search for positive cinematic portrayals of women lawyers, even from different cinematic traditions.

Constructing Gender as a Pleasure-Seeking Attitude

The cinematic representations of women lawyers in recent films and more specifically in the movie *In Between* treat issues of gender in a variety of ways and addresses gender issues in a way that reflects the changes in the composition of the legal profession. The presence of women lawyers in the legal profession is now abundantly clear. From this perspective, the cinematic project reflects the growing presence of women in the profession and the changes in the profession's composition.[22]

The way gender is portrayed in the cinematic project, exposes hierarchies within legal practice and the working environment. For instance, the literature on large law firms reveals issues of gender by exposing the hierarchies within the

[16]Marek (2004) at 225.
[17]Marek (2004) at 228.
[18]Marek (2004) at 230.
[19]Marek (2004) at 233.
[20]Marek (2004) at 234.
[21]Marek (2004) at 235.
[22]This point is fairly well documented in the feminist accounts of the legal profession. See by way of example Skordaki (1996) See also Sommerlad (1994); McGlynn (1998) and Sommerlad (2002). On the same issue see also Sommerlad, Duff & Tomlinson (2010).

firm. The majority of those in senior positions in large law firms are men, something confirmed by studies of the profession which report that, despite some progress, women remain underrepresented in the upper echelons of the profession.[23] This image of large firms is at variance with the picture painted in the cinematic project on large law firms that suggests that women are better represented in higher positions, something again confirmed by studies of the profession. However, this partly conceals the true picture as the studies report that the majority of women lawyers in those firms often find themselves in less prestigious positions or areas of the law than men.

The overall impression created by the cinematic project on women lawyers is that the legal working environment is mixed in terms of gender representations. These representations of gender assume different forms. They depict female and male lawyers in mixed groups, portraying the mixed nature of legal employment. These images also signal team working, which constitutes one of the key requirements of legal practice. They emphasise the increasing sociality required by the nature of legal work, where the aims are to make and maintain contacts, to network, and to socialise. Nevertheless, it is usual to find portrayals of women lawyers appearing alone, signalling the individual and at times isolating nature of legal work. Images of female lawyers working into the night are not uncommon, signalling the long hour's culture and the demanding legal practice. At times, the cinematic project portrays women lawyers struggling to achieve the work-life balance, which constitutes a constant reminder of the studious nature of the legal employment. This, as Moran suggests, entails the function of image as a narrative, which promotes the reduction of law to the word.[24] Depictions of female lawyers outside are common, corresponding to the overall tendency of the use of space by law firms and chambers. On other occasions, portrayals of women lawyers emphasise the playful nature of work.

The cinematic project and especially the movies *My Days of Mercy* and *In Between* suggest a kind of departure from traditional representations towards more de-traditionalised aspects of gender. At times, these references are direct, portraying an attempt to spice up the nature of work. At times, they are more subtle; for instance, certain scenes in both movies imply more relaxed situations either in or out of the office, emphasising not just heterosexual but also homosexual even homoerotic encounters. In the attempt to stress the playful atmosphere of the workplace, there are attempts suggesting different possibilities. From this perspective, the cinematic project of women lawyers exposes more de-traditionalised versions of femininity by revealing a flirtatious side to legal practice. This points to the suggestion made by more recent feminist accounts that flirting can be used as a strategy by women lawyers to adapt to the working environment,[25] although according to Sommerlad, flirting is a product of pressure rather than a voluntary strategy adopted by women lawyers, as the cinematic project of women lawyers suggests.[26]

[23]See also McGlynn (2003a) at 139-148 and also McGlynn (2003b) at 159-174.
[24]See the discussion in Moran (2011) at 79-91.
[25]Sommerlad (2007) at 214.
[26]See Sommerlad (2007) at 214.

De-traditionalised images of gender are negotiated in the cinematic project of women lawyers through the persistence of the importance of looks which, with appearance, have always been associated with the organisational context of employment. This is emphasised even more in the corporate sector of big law firms. Francis and Sommerlad comment that some of the characters resemble those of the covers of magazines and portfolios in model agencies.[27] This is acknowledged by Collier in the context of corporate legal employment by emphasising the importance of grooming.[28] This is reminiscent of McRobbie's argument associating the importance which glamour plays in the formation of new femininities in advertising with gender issues, giving the impression of a drama taking place featuring glamorous characters.[29] McRobbie also suggests that new femininities are constructed through emphasis on pleasure, creating the impression that there is a break from traditional gender representations by portraying active, lustful, pleasure seeking and confident women.[30] This also emphasises the fact that consumption produces new formations of gender within legal employment. This could be subject to two different interpretations. It could emphasise what the feminist accounts have always termed *pressure to look the part*[31] which reinforces the heterosexual imagery within the context of legal employment. Alternatively, it could emphasise what is commonly known in gay literature as *passing*. Passing, Skeggs argues, could refer to women using aspects of cultural capital, which also refers to issues of image and appearance to modify notions of femininity in order to pass as heterosexual.[32] The point here is that although the images of gender in the cinematic project of women lawyers potentially abides to what has been termed within the overall context of legal employment as acceptable, heterosexual behaviour, they could also potentially be suggestive of issues of homosexuality.

Real and Fictitious Women Lawyers

My Days of Mercy and *In Between* portray a highly consumer-based and aestheticised almost hedonistic approach to the everyday mundane to a woman lawyer's lifestyle. Both movies are crammed with scenes of drinking, going out, going clubbing especially in *In Between.* This accords to recent claims of the aestheticisation of the legal profession and with it echoes the existence of a more aestheticised professionalism[33]. In questioning the term professionalism, Kritzer[34] and Paterson each suggest that professionalism is being reshaped and that is evidenced through the assertion that is 'does not exist in isolation.'[35] The claim

[27]Francis & Sommerlad (2009).
[28]Collier (2005)
[29]McRobbie (2000) at 210.
[30]See McRobbie (2000) at 210 and also McRobbie (2001b).
[31]This is also extensively discussed in the feminist accounts of the legal profession. Sommerlad (2002) at 217.
[32]Skeggs (1997).
[33]Chronopoulou (2014a).
[34]Kritzer (1999).
[35]Hanlon (1999) at 3.

that there is evidence of neo-tribal sociality in law is nothing more than re-assertion of the view that professionalism is a 'socially constructed notion.'[36] Thus, as Hanlon suggests 'professionalism is a product of the dialectic relationship with its environment.'[37] As an aestheticised form of sociality, neo-tribalism reaffirms the shift in the sociality of the legal profession towards a more aestheticised professionalism. Kritzer links the use of the term post professionalism to the wider changes in legal professionalism.[38] The re-shaping of professionalism is due to the inextricable link between production and consumption, and Kritzer sees this relationship in the same way as others who have studied the profession; he conceptualises consumption only in relation to clients as consumers.[39] This reinforces the importance of a consumer-based lifestyle and consumption itself. The changes in the profession reflect the interweaving nature of production with consumption, and regard lawyers as consumers as well as producers.

The renegotiation of legal professionalism towards a more aestheticised professionalism is inextricably linked with consumer-based lifestyles, which is suggestive of the neo-tribalism of the legal professionalism. This could be associated with the quality of care for the clients/consumers, which eventually results in the aestheticisation of business life, social relations, and the production of legal services through the promotion of a business-like image saturated with consumption. According to Featherstone,[40] the aestheticisation of business life takes its form and shape through presentation of business premises, which makes it part of the promotion of the business as well as professional image. This is an aspect of the aestheticisation of legal professionalism which is promoted as a sophisticated paradigm shift. It entails careful management strategies by firms and chambers with the ultimate purpose of safeguarding their interests and promoting and reflecting professional attitudes. As Kritzer suggests, consumers' attitudes have transformed legal practice.[41] This accords with Featherstone's argument about the aestheticisation of business life as a result of the rise in consumer culture. In *Consumer Culture,* Lury summarises her position on the aestheticisation of life by suggesting that 'the process of aestheticisation is what best defines the consumer culture'[42] and material culture.

The aestheticisation of legal professionalism through consumer-based lifestyles points to more changes in legal professionalism and the negotiation of professional values through consumer-based lifestyles. This highlights another issue; professional values are negotiated through neo-tribal sociality, and this indicates the negotiation of professionalism through an insight into lawyers' personal lifestyles and the degree to which legal professionalism can influence their personal consumer-based lifestyles and vice-versa. In the movie *In Between,* clubbing constitutes an aesthetic strategy of consumption. In drawing parallels with reality, clubbing also constitutes an integrated part of lawyers' personal

[36]See Skeggs (1997) at 138.
[37]See Chronopoulou (2014a).
[38]See Skeggs (1997).
[39]See Skeggs (1997).
[40]Featherstone (1991) at 95.
[41]See Skeggs (1997) at 715, 725.
[42]Lury (1999) at 4.

lifestyles. In disseminating the findings of my doctrinal research, the interviews revealed that professional core values are being renegotiated through the consumption of clubbing. This amounts to an aestheticised and therefore changed legal professionalism because it views lawyers as consumers. It also reflects the movement from the producers' *tribe* to the consumers' *tribe* by taking into consideration consumer-based aspects of lawyers' lifestyles. If there is one point that makes *In Between* to stand out as a movie is the very fact that the legal professionalism and this constitutes the first time this is ever portrayed in a movie seems to be negotiated through the neo-tribalism of clubbing.

Most studies tend to link professionalism and its core values with lifestyles issues,[43] but in general these are limited to family obligations.[44] The incorporation of consumer-based lifestyles such as clubbing departs from the focus on traditional lifestyles. This suggests a move away from traditional patterns of consumption and socialising practices, which hitherto distinguished the 'respectable from the unenlightened.'[45] The new form of professionalism uses what had once been seen as devalued forms of consumption in affirming respectability. The new aestheticised professionalism is based upon common associations, communicated through re-emergent forms of consumptions suggestive of a nomadic and postmodern profession.[46] The move away from traditional aspects of consuming and socialisation practices suggests that the notions of responsibility, reputation and commitment are now being renegotiated through participation in more hedonistic practices of consumption, which in turn is suggestive of transformations as well as transgressions of aspects of professionalism. The fact that core values of legal professionalism are negotiated through the consumption of clubbing constitutes another challenge to the Maffesolian theory of neo-tribal sociality. Maffesoli's argument concentrates mainly on the importance of identifications over that of identities and largely ignores the essential characteristics of identities. Being a member of a *tribe* entails certain identifications which, in the legal profession, entail elements of reputation through demonstrable commitment and responsibility. The interviews suggested that identification with clubbing raises concerns with respect to these identifications. Some practices popularly associated with clubbing, principally drug consumption, constitute transgression of core values of legal professional identity and professional reputation. This also exposes certain conservatisms of the legal profession that the Maffesolian theory of neo-tribal sociality tends to ignore. It partially invalidates the Maffesolian argument, while validating the one fundamental notion of neo-tribal sociality, the use of masks. Maffesoli argues that neo-tribal sociality suggests that the individual wears many masks according to the nature of the *tribe* in which he or she participates, and that these masks can be easily discarded.[47] One of the issues that *In Between* makes clear is that the protagonist Leyla displays great ease in which she acquires tribal membership to a number of neo-tribes, from lawyers to clubbers etc. Similarly, the

[43]Hanlon (1997) at 798.
[44]As explained, this position is mostly associated with feminist research.
[45]Sugarman (1996) at 123.
[46]Boon & Levin (1999).
[47]Maffesoli (1988)

interviews revealed that concerns were raised in relation to the disclosure of practices of clubbing. This validates the notion of masks as a strategy to adapt in the workplace, irrespective of whether or not the firm or chambers encourages clubbing. Although the notion of masks reinforces playful aspects, it does not take into consideration the risks such a strategy entails. Those risks are translated into cultural differences in the *In Between* simply because it refers to consumptions and playful leisure activities associated mostly with the Western elements of lifestyle.

Professionalism has moved away from the negotiation of professional values through solely the production of legal services.[48] The interviews in my research suggested that practices of consumption possess an ability to individualise, collectivise and produce individual collectivises which enhances competition within the profession. The evolutionary nature of legal professionalism rests upon personal consumer-based lifestyles and on individual rather than collective ways,[49] suggesting a de-traditionalisation of legal professionalism. This de-traditionalisation of the legal profession comes across in the *In Between* through the portrayal of a woman criminal defence lawyer's consumer-based lifestyle. Aesthetic legal professionalism consists of characteristics of neo-tribal sociality, one of the main characteristics of which is the emphatic mobility from the *tribe* of producers to the *tribe* of consumers which is evident in the changing ethos of the profession[50]. It also has elements of individuality which challenge the Maffesolian theory of neo-tribal sociality. Neo-tribalism in law, as evidenced through the use of clubbing, eventually becomes a form of instrumentally rationalised technique or strategy, which invites an alternative interpretation of the whole thesis of neo-tribalism[51]. The incorporation of aspects of individual consumer-based lifestyles such as clubbing emphasises elements of individuality because they are used in association with legal practice. Although the presence of clubbing suggests a discursively constructed and therefore instrumentally rational form of neo-tribalism, it does not prevent aspects of individualism through consumption from becoming an integral part of contemporary practice[52]. On the contrary, it illustrates the ability of consumption to individualise. This form of neo-tribalism does not necessarily imply a move away from professional values; rather it reinforces the projection of professional values at the very heart of the profession. This not only becomes closely associated with aspects of personal lifestyle, it becomes exactly that, the lifestyle. Legal practice becomes equated to lifestyle. This also reinforces the importance of individualism and individual ways in the new kind of legal professionalism[53]. Although Shields claims that for the professional tribes, the ones that lack the favouritism of Maffesoli's argument simply because they are the

[48]This suggestion is brought forward by many commentators on the legal profession but concentrates mainly on aspects of the production of legal services. See also the discussion in Arthurs & Kreklewich (1996).
[49]Francis (2004).
[50]Chronopoulou (2014a). See also Chronopoulou (2016) at 179-191 and also Chronopoulou (2015) at 169-184.
[51]See Francis (2004).
[52]See Francis (2004).
[53]See Francis (2004).

least likely to have these kinds of experience,[54] the experience of clubbing as a form of neo-tribalism within the context of the profession highlights the negotiation of professional values alongside the thesis of neo-tribalism and reinforces aspects of individuality.

This highlights two points. The first is that if professional values can be negotiated through aspects of neo-tribalism of consumption, including clubbing, then this gives rise to an ethical dimension in the legal profession. In accepting that the new kind of legal professionalism constitutes a new aestheticised professionalism, it seems that the aesthetic dimension that clubbing adds an ethical dimension as well.[55] The second point is the notion of individualism as reinforced by the neo-tribalism thesis. The new form of neo-tribalism is suggestive of aspects of individualism. The consumption of clubbing exposes alternative ways of theorising gender in the legal profession. This does not necessarily contradict existing accounts; rather it attempts to enrich them. Clubbing can provide aestheticised versions of gender in the profession. *In Between* reinforces this point, not just in relation to the construction of gender as shown in the previous point but also through the reflection of the recent aestheticed cinematic project on women lawyers.

The traditional feminist studies of the legal profession suggest that participation in consumptions is hedged around with masculine qualities. Most have considered consumption as articulating masculinity through the exclusion of femininity.[56] The important contribution of these accounts is that femininity and masculinity can be articulated through cultural practices of consumption. Most, however, emphasise a de-valued femininity in a profession where masculinity is the only trait that matters. Consumption performed by women is less valued and therefore less respected. Notions of respectability have always been inextricably linked to participation in consumption in the profession and notions of respectability, as Skeggs[57] suggests, are closely articulated with notions of femininity. The incorporation of consumption has transformed legal practice and exposed a transformed approach of respectability and construction of new ways of femininity through consumption. Most studies of clubbing and the interviews agree that clubbing offers a liberated and respectable femininity. It breaks away from the traditional respectable femininity which is articulated through an emphasis on masculinity. A similar point is being reinforced through both movies *In Between* and *My Days of Mercy* as a departing point exposing new ways of constructing new femininities as they are played out within the strict organisational context of legal employment. This does not necessarily challenge existing feminist accounts of the profession. On the contrary, it adds to them because it opens new ways of theorising consumption in the profession as articulating aspects of femininities. Drawing parallels with reality, most women interviewees suggested

[54]Shields (1994).
[55]There are very limited accounts on the association of clubbing with professional identity, mainly my own work.
[56]Sommerlad (2002). Similar points are made by Thornton (1996). See also Francis & Sommerlad (2009) and Sommerlad (2007).
[57]Skeggs (2004a) at 25.

that participation in the cultural practices of clubbing provided benefit to legal practice, either because clubbing was viewed as a way of socialising, or as part of personal, individual lifestyle. Clubbing was seen by most as value rational. As Skeggs concludes,[58] the transformation of clubbing from an unvalued to a valued practice provides the structure on which valued femininities can be projected in the legal profession, even as a more playful way of doing business reflecting alternative lifestyles.[59]

In contrast to most feminist accounts, some of the women interviewees interpreted their consumption of clubbing and the problematic situation of the transformative nature of transgression as an ethical project of the self, which is an emotional issue. This is a recurrent theme in the movie *In Between*. This does not necessarily contradict accounts on rationality but rather provides an alternative way of rationalising emotion. Analysis of the interviews suggests that clubbing entails ethical issues with respect to projection of a successful professional self. As Nicholson[60] suggests, there has always been emphasis on the deontic ethics of rationality as coupled with emotions in the legal profession, and I would agree with Sillius that 'not all women in the legal profession are disadvantaged'[61] as most of the feminist literature maintains. As the interviews suggested, cultural studies might offer new ways of theorising gender in the legal profession.[62] It seems that, in contrast to most feminist accounts proclaiming a highly divided legal profession in terms of gender, the interviews suggest a more mixed situation, especially in terms of leisure-based consumptions associated with youth lifestyles, such as clubbing. This again is reflective of different lifestyles in the legal profession capable of forming distinctive ways of informing professional identity by exposing a new *habitus* associated with young women in the profession.[63] The interviews demonstrated that femininities in the legal profession were articulated by and tied to knowledge of the club scene and music through notions of *cool* and *hip* associated with club cultures, constructing in this sense more neo-nomadic femininities.[64] Drawing parallels with the cinematic project of women lawyers, *In Between* and *My Days of* Mercy, just as the interviews revealed, women lawyers protagonists in both movies demonstrated an ability to use and combine legal knowledge with the kind of knowledge gained through identifications with the club scene. This reflects the transforming nature of the legal professional project and the blurring of boundaries between production and consumption. It also reveals new ways of accumulating and utilising capital away from the already existing

[58]Skeggs (2004b).
[59]This is also in accordance with McRobbie's argument – McRobbie (2001a). See also McRobbie (1994) and McRobbie (1999). This is also in accordance with feminist accounts on club cultures. See the discussion in Rief (2003) and the discussion in Pini (2001).
[60]Nicholson (2005).
[61]Silius (2003).
[62]Chronopoulou (2014a). See also Chronopoulou (2016) at 179-191 and Chronopoulou (2015) at 169-184.
[63]This position contradicts most of the feminist accounts in the profession. Although it must be noted that more recent feminist accounts acknowledge that men can also be disadvantaged.
[64]This is also reminiscent of Braidotti's argument. See the discussion in Braidotti (1994) and in Braidotti (2002).

static theorisations on the use of capital in the legal profession.[65] In Between has exposed exactly all this that my research through interviews in the legal profession revealed. From this perspective, the parallels between reality and fictions seem to be stronger and more realistic than ever before.

Conclusion

This article attempted to trace the changes in the cinematic portrayals of women lawyers in the Western and Middle Eastern traditions. It also attempted to situate the changing cinematic representations of women lawyers within a new consumer-based and lifestyle saturated theoretical framework[66]. In doing so, this article also drew parallels with the changing women lawyers' cinematic project and real women lawyers. Despite having celebrated our differences for several decades, the suggestion this article put forward is that there is also a need to start celebrating our similarities. From this perspective, this article attempted to reveal the similarities between the Middle Eastern and Western cinematic traditions by examining two movies, one from each tradition, *In Between* from the Middle Eastern tradition, and *My Days of Mercy* from the Western tradition. The main purpose of the article was to achieve a retheorisation of cinematic representations of women lawyers. In doing so it attempted to depart from the negativity women lawyers have been portrayed in celluloid and put forward by the limited number of accounts on women lawyers in law and popular culture, with only a few notable but also limited exceptions. From this perspective, this article put forward a different account on representations of women lawyer on screen. On the one hand, it mainly focused on revealing the positive aspects of cinematic representations of women lawyers through emphasising detraditionalised versions of femininities played out on screen. This was depicted through an examination of consumer-based aspects of women lawyers' lifestyles. Moreover, it emphasised and revealed the ways in which consumer-based aspects inform, shape and form news ways of gender and femininities construction but also new ways of negotiating and renegotiating legal professional identity. From this perspective, this article addressed several absences and attempted an equal number of contributions to the field of law in film and law and popular culture. First, it contributed to the limited number of accounts on cinematic representations of women lawyers. Secondly, it also attempted to fill in the void of such accounts in the Middle Easter cinematic tradition. With many voids yet to be filled, this article mainly addressed the ever-present absence of accounts on cinematic representations of women lawyers. It is about time to start taking law and popular culture a bit more seriously as a discipline.

[65]This position is in accordance with Skeggs. See the discussion in Skeggs (1997).
[66]This line of reasoning has been explained in relation to law and literature. See Chronopoulou (2014b) at 157-168.

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Implementation of Nationally Determined Contributions under the Paris Agreement - Comparing the Approach of China and the EU[1]

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Climate change is a pressing global issue that is rapidly requiring a global response under international law. The UN Framework Convention on Climate Change was created by the UN to unite states in coordinating efforts to lower greenhouse gas emissions while continuing to develop in a more sustainable way. The Kyoto Protocol and the Paris Agreement were two succeeding efforts under the UNFCCC to decrease emissions and prepare adaptations for the effects of climate change. The Kyoto Protocol required mandatory reduction in carbon emissions by industrialised developed states, and it inevitably collapsed. The Paris Agreement required voluntary reduction of carbon emissions by all member states. In this paper, we look at the evolution of the international climate change legal regime, from the UNFCCC adaptation at Rio de Janeiro, to the failed Kyoto Protocol and the innovation of the Paris Agreement. In particular, we look at the implementation efforts by the EU and China of the Paris Agreement, as two of the major carbon emitters on the planet who are still parties to the agreement. Although both China and the EU set lofty goals in accordance with the Paris Agreement requirements, neither state's plan is adequate to deal with global warming in the long run. We argue that the greatest innovation of the Paris Agreement is in climate change related information gathering, sharing, and reporting. The rapidly deteriorating condition of the global climate makes accurate information on national carbon emission and carbon reduction efforts, essential for long-term prediction and planning. Therefore, in the fight against global warming, timely and reliable information on carbon emissions and how national governments are dealing with that have become more valuable than just complying with global targets.

Keywords: *Climate Change; Global Warming; International Law; UNFCCC; Kyoto Protocol; Paris Agreement.*

Introduction

The science of climate change was established long before anthropogenic sources of greenhouse gases existed. Some radiation from the sun reflects off Earth's surface instead of being absorbed, and naturally occurring molecules in the

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atmosphere cause some of that radiation to refract downward again.[2] This 'greenhouse effect' allows the Earth to stay warm enough to harbour life. However, the number of molecules in the atmosphere changes naturally through various systems and can fluctuate enough to alter the climate. Emissions of molecules from unnaturally occurring sources have rapidly increased in the last 100 years and have become a major problem for the global climate.

Anthropogenic interference has recently caused climate change to accelerate rapidly.[3] The greenhouse gas carbon dioxide (CO_2) had an atmospheric range of 260 to 300 parts per million (ppm) for ten thousand years before 1750, but from the start of the industrial era until 1999 it rose to 367 ppm, and then to 379 ppm in 2005.[4] Other greenhouse gas concentrations including methane and nitrous oxide have also increased in recent decades, as well as the presence of synthetic halocarbons which are directly linked to human activity since they were never found in the atmosphere before their production began in the 1930's.[5] Furthermore, global temperatures have increased about 1°C since the early 20th century,[6] which is at a much greater rate than previous records indicate.[7] This correlation between rise in greenhouse gas emissions and rise in global temperatures has been proven as causation by climate science over the previous few decades.[8]

Fossil fuels, which are burned in most forms of transportation and energy production/consumption, have been proven among other human activities to emit greenhouse gases. This is an issue because of the implications of increased climate change, including rising temperatures, loss of sea ice, subsequent sea level rise, increased severity of natural disasters, and more frequent droughts.[9] Despite well-researched and legitimate science, there has been a debate worldwide over the actual role of anthropogenic greenhouse gas emissions on global climate.[10]

While the science behind this research is peer-reviewed and based on over a century of reliably collected data, the problem with climate change is its global nature and the delayed manifestation of its consequences. Greenhouse gases cannot be measured precisely from every source on the planet, and it can take as long as 10 years to have an impact on global climate.[11]

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[2]Taylor (1991) at 881-918.
[3]See Taylor (1991).
[4]Le Treut, Sommerville, Cunasch et al. (2007) at 100.
[5]Le Treut, Sommerville, Cunasch et al. (2007) at 100.
[6]For reference: A change in temperature of 1°C is equivalent to 1.8°F.
[7]See ProCon.org (2020).
[8]Boer, McFarlane & Lazare (1992) at 1045-77; See Bauer, Claussen, Brovkin & Huenerbein (2003); See Stips. Macias, Coughlam et al. (2016).
[9]See ProCon.org (2020).
[10]Deniers claim that anthropogenic greenhouse gas emissions are too small to generate large changes in the atmosphere, and the planet's systems are capable of mitigating these emissions and their consequences. They argue that climate change is apparently naturally caused and the true explanation for the recent rises in global temperature, and they accuse the science behind climate change as misleading and questionable. See Dunlap (2013) at 691-698; Björnberg, Karlsson, Gilek & Hansson (2017) at 229-241.
[11]Studies show maximum warming from greenhouse gases occur ten years after they were emitted into the atmosphere. See Ricke & Caldeira (2014).

Currently, scientists have concluded that consuming fossil fuels is directly linked to increased concentrations of CO_2 in the atmosphere, which is the primary cause of climate change.[12] While there are still many climate change deniers, national governments have adopted international legal obligations on lowering greenhouse gas emissions through the UN. The basis of these treaties stems from assessment reports by the Intergovernmental Panel on Climate Change (IPCC), and many states are working to comply.

The IPCC was established by the UN Environment Program (UNEP) and the World Meteorological Organisation (WMO) to review and assess scientific and socio-economic information regarding climate change worldwide.[13] It has produced recent understandings of climate change causes and effects, and in 2014 stated that they were 95% certain that climate change is due to anthropogenic causes.[14] The current goal is to reduce greenhouse gas emissions enough to stay below 1.5°C, which research shows, would prevent many adverse effects of climate change.[15] The difficulty with this goal is that it would require extreme and rapid changes to various aspects of societies worldwide. Several conventions and treaties laid out frameworks for achieving this goal, and international climate governance law is still under development.

Evolution of International Climate Change Law

Starting in the 1980's, there has been a constant increase in international legal efforts to deal with climate change. The United Nations General Assembly endorsement of the IPCC in 1988 resulted in the creation of the UN Framework Convention on Climate Change (UNFCCC),[16] followed by the Kyoto Protocol in 1997, and the Paris Agreement in 2015. Both the greater understanding of climate change science and the global implications of reversing human practices of over 100 years greatly influenced the evolution of international law on climate change.

The UNFCCC was the starting point that outlined principles and goals with which to align future actions through annual discussions on the issue. Without this framework, the Kyoto Protocol and Paris Agreement would not have been created, and there would be a lack of international cooperation towards climate action. Over time, international climate change law became progressively more specific and deliberate in promoting more urgent action.

UNFCCC in Rio de Janeiro

In 1992 a conference was held in Rio de Janeiro, Brazil, that established the need for development to be sustainable; or development which meets all the needs of the present generations without compromising the needs or abilities of future

[12]IPCC (2014) at 47.
[13]See IPCC (2020).
[14]IPCC (2014) at 48.
[15]See United Nations (UN) (2019).
[16]See IPCC (2020).

generations, so that widespread poverty and degradation of environmental resources are sufficiently lowered and technology along with social organisation are improved to allow for economic growth.[17] Four major documents were produced at this conference, including the Rio Declaration on Environment and Development, the UNFCCC, the UN Convention on Biodiversity, and Agenda 21.[18] Under the UNFCCC it was agreed that greenhouse gases needed to be stabilised at a point where human interference would not damage the global climate system.[19] It was ratified by 197 parties, which gave it broad legitimacy.[20]

The main objective of the UNFCCC was to set targets to curb rising global temperatures due to increasing greenhouse gas emissions.[21] The convention recognised that climate change was a significant issue and bound nations to protect human life, even without complete scientific certainty.[22] It set a specific goal to stabilise greenhouse gas concentrations, and in order to protect food production and economic development the convention suggested that a sufficient time frame was necessary.[23] Developed countries (identified as 'Annex I' countries in the UNFCCC) were expected to show leadership since they had produced the most greenhouse gas emissions historically. This higher expectation on the part of developed countries came to be known in UNFCCC lingo as "common but differentiated responsibilities" and will prove to be both necessary and controversial over time.

All signatory nations were expected to reach a goal of reducing emissions to the same level as of 1990 by the year 2000.[24] A system of grants and loans was developed by the industrialised nations to provide financial and technical support for developing nations, aside from support already provided.[25] Annex I countries were required to report regularly on their progress in developing relevant policies and measures, and provide annual data on greenhouse gas emissions. Developing countries had to report on their general actions towards reducing greenhouse gas emissions and were to receive funding to meet their obligations.[26] These reporting requirements were to be further developed in later meetings of the parties.

The convention outlined the process for negotiating more specific international treaties that would provide precise targets and further guidelines for moving towards its goals.[27] The UNFCCC targets were ambitious, but this was also the first effort at the international level to identify climate change as a global threat which needed to be addressed. The parties have met yearly at the Conference of

[17]WCED (1987) at 16.
[18]The Rio Declaration on the Environment was the basis for development of new principles and rules that would determine international environmental law; and the Agenda 21 created a comprehensive set of actions for states that came with the development of a UN Commission on Sustainable Development to review progress on the agenda. See UNCED (2020).
[19]Article 2 of UN Framework Convention (1992).
[20]See United Nations (UN) (2019).
[21]Article 2 of UN Framework Convention (1992).
[22]Article 3, Section 3 of UN Framework Convention (1992) and see UNFCCC (2019c).
[23]Article 2 of UN Framework Convention (1992); UNFCCC (2019c).
[24]Article 4, Section 2b of UN Framework Convention (1992).
[25]Article 11 of UN Framework Convention (1992).
[26]Article 12 of UN Framework Convention (1992).
[27]Article 17 of UN Framework Convention (1992).

Parties (COP) to discuss the continued implementation of the convention and address any developments.[28] At these meetings, new agreements have been adopted which created more specific targets for member states to work towards.[29]

The Kyoto Protocol

The first major agreement to emerge from the UNFCCC COP process was finalised at the 1997 COP3 meeting in Kyoto Japan, where member states agreed on legally binding emissions reduction targets.[30] This 'Kyoto Protocol' to the UNFCCC was ratified by 192 nations. It reinforced the idea of "common but differentiated responsibilities" from the UNFCCC's original goals, which placed greater responsibility on developed countries due to their larger historical contribution of emissions.[31] Annex I countries were now required to account for at least 55% of the emissions of all parties due to emissions calculated from 1990.[32] In 2001, the Marrakesh Accords adopted at COP7 created the detailed rules for the implementation of the Kyoto Protocol, and in 2005 it entered into force.[33]

There were two commitment periods from 2008 to 2012 and from 2013 to 2020 in which states had to agree to targets.[34] The first period had a target of reducing global emission by 5.2% below 1990 levels.[35] In 2012, the Doha Amendment from COP18 decided targets for the second period.[36] This amendment included the new commitments for Annex I parties to reduce global emissions by 18% below 1990 levels,[37] a new list of greenhouse gases to be reported on,[38] and amendments to other issues found during the first period.[39] The composition of parties in each period was mostly the same, with a few more parties participated in the first period than the second.[40]

While parties were encouraged to meet targets by adopting domestic measures, the Kyoto Protocol allowed parties to fulfil their obligations of lowering emissions by acquiring emission reduction credits through three market-based mechanisms. These flexible market-based mechanisms included the Clean Development Mechanism (CDM), the Joint Implementation (JI), and International Emissions Trading.[41] CDM allowed parties with commitments to establish projects in developing countries that would reduce emissions, earning them certified emission reduction (CER) credits that count toward targets.[42] This allowed

[28]Article 7 of UN Framework Convention (1992).
[29]For a complete list of COP meetings, see UNFCCC (2020a).
[30]See UNFCCC (2019a).
[31]Article 10 of Kyoto Protocol (1997).
[32]Article 24, Section 1 of Kyoto Protocol (1997).
[33]See UNFCCC (2020a).
[34]See UNFCCC (2020a); Article 3, Section 1 of Kyoto Protocol (1997).
[35]Article 3, Section 1 of Kyoto Protocol (1997).
[36]See UNFCCC (2020a).
[37]Article 1, Section C of Doha Amendment to the Kyoto Protocol (2012).
[38]Article 1, Section B of Doha Amendment to the Kyoto Protocol (2012).
[39]See UNFCCC (2020a).
[40]Annex B of Kyoto Protocol (1997).
[41]See UNFCCC (2020a).
[42]Article 12 of Kyoto Protocol (1997).

flexibility in meeting targets while stimulating sustainable development and reducing emissions. JI projects allowed parties to earn emission reduction units (ERUs) by completing projects to reduce emissions at their source or enhancing carbon capture in other countries.[43] While these JI projects provided flexibility in meeting targets (same as the CDM), they promoted foreign investment and technology transfer to developing countries as well.

These emissions trading mechanisms created a new commodity and a global market for carbon emissions by allowing Annex I parties to sell their unused emissions allowance to countries which exceed their targets.[44] Items that can be traded under this article are removal units (RMU) based on land use, ERUs from JI projects, and CER credits from a CDM project. Furthermore, the Kyoto Protocol facilitated the development of new technologies to adapt to the adverse effects of climate change and increase resilience. The Adaptation Fund finances these new technologies from shares of the proceeds of CDM projects, JI initiatives, and emissions trading.[45]

Emission reductions and records of any emission trades were to be monitored under the Kyoto Protocol. Parties must submit inventories annually, regularly submit national reports, and maintain registry systems that track transactions occurring through the three mechanisms. The UN Climate Change Secretariat monitors national actions for consistency with the requirements rules in the Kyoto Protocol, through an international transaction log.[46] The extensive compliance system ensured parties met their commitments or received help if needed, which was facilitated by the Compliance Committee to the Kyoto Protocol outlined at COP7.[47] The system contains procedures and mechanisms in order to enforce, promote, and facilitate compliance.[48] The Kyoto Protocol set targets and encouraged compliance by mandatory reports of progress and in doing so (it was expected to) set the stage for future agreements which could even more comprehensibly achieve the goals of the UNFCCC.[49]

Therefore, the Kyoto Protocol created a very useful and accountable system for reducing carbon emissions by industrialised developed nations that were both responsible and had the means – based on market principles. Unfortunately, what prevented Kyoto Protocol from being effective was the geopolitical reality of international law and the global community. The mandatory carbon emission targets of the Kyoto Protocol only applied to developed countries, which by then were not at all the largest carbon emitters.[50] Large carbon emitters like China, India, and Russia were excluded, while the US opted not to participate. Couple that with the dubious notion of trying to enforce compliance at the international stage where sovereign nation states have to consent, and you have a well-

[43]Article 6 of Kyoto Protocol (1997).
[44]Article 6 of Kyoto Protocol (1997).
[45]Article 6 of Kyoto Protocol (1997).
[46]See UNFCCC (2020a).
[47]UNFCCC (2006) at 93-103.
[48]See UNFCCC (2002).
[49]Article 7 of Kyoto Protocol (1997).
[50]The Kyoto Protocol covered 36 countries, which accounted for only 24% of global greenhouse gas emissions in 2010. See Shishlov, Morel & Bellassen (2016).

intentioned system that was not sustainable. In particular, the mandatory carbon emissions agreed on the 2012 Doha Amendment for the second Kyoto Protocol implementation period (2013-2020) never happened, since only 138 countries adopted it, when 144 were needed in order to enter into force.[51]

The Paris Agreement

The global community, realizing that this perceived imbalance between developed and developing countries could undermine the entire effort, started working immediately on a new approach to combating climate change. At the UNFCCC 2015 COP21 meeting in Paris France, member states finalised and committed to a new framework. It was signed by 175 world leaders on Earth Day in 2016, and a total of 186 states ratified the agreement.[52] Nations were brought together under a common cause to combat climate change and adapt to its effects, while support was also provided for developing countries to participate.[53]

The main goals of the Paris Agreement, according to Article 2, were: a) keep global temperature rise below 2°C above pre-industrial levels and to work towards keeping it below 1.5°C, b) increase adaptation and resilience to the adverse impacts of climate change (while promoting sustainable development and the protection of food production), c) facilitate consistent investment into 'low greenhouse gas emissions and climate resilient development.'[54]

Implementation of the Paris Agreement goals is to be achieved through a combination of initiatives and mechanisms, which can be divided into two categories. On the one hand, there are initiatives that have to be reported to the UN Climate Change Secretariat and all the other UNFCCC parties, like Mitigation (Art. 4), Adaptation (Art. 7), Technology Transfer (Art. 10), and Capacity Building (Art 11). On the other hand, mechanism like Forests Sinks and Reservoirs (Art 5), Market Cooperative Mechanisms (Art 6), and Loss and Damage (Art 8), don't have to report by member states for the Article 13 'peer-review' process.

In particular, the Paris Agreement encourages parties to pursue national policies that progressively mitigate the rise of carbon emissions, enhance their adaptive capacity to climate change, and address loss and damage caused by extreme and slow weather events. Parties are to do that through a 'ratcheting up' process, in five-year increments, through enhanced Nationally Determined Contribution's (NDC's). In order to help with this process, parties should use forest conservation and enhancement of carbon capture methods (like carbon sinks and reservoirs), that can help offset their carbon emissions.[55] Furthermore, the

[51]See UNFCCC (2020b).
[52]See United Nations (2019).
[53]See United Nations (2019).
[54]Article 2, Section 1 of Paris Agreement (2015).
[55]Article 5 of Paris Agreement (2015). Carbon sinks remove greenhouse gases from the air by a process, activity, or mechanism. Reservoirs are any place carbon is stored within the carbon cycle, such as the ocean, limestone, coal, oil, and the atmosphere. See IPCC (2014) at 127; National Oceanic and Atmospheric Administration (2019).

agreement encourages parties to engage in 'voluntary cooperation' through the use of 'internationally transferred mitigation outcomes' (carbon market mechanisms).[56]

Even though the Paris Agreement is still very understanding of the inability of developing countries to reduce emissions without additional (technical or financial) assistance, all parties (including developing countries) are expected to honour their commitments made in their respective NDC's. Therefore, Article 9 of the agreement encourages developed countries to provide financial resources to developing countries, either through voluntary contributions or through the three financial mechanisms available: the Financial Mechanism of the Convention, the Adaptation Fund from the Kyoto Protocol, and the Green Climate Fund.[57] Furthermore, to better facilitate mitigation and adaptation on the part of developing countries, the agreement encouraged 'technology development and transfer' through a Technology Framework.[58] Finally, the agreement expects cooperation on the part of all parties, to 'enhance the capacity of developing country Parties,' in order to implement the goals of the Paris Agreement in a sustainable way.[59]

Overall, the Paris Agreement revolves around "nationally determined contributions" (NDCs), which require national governments to create, maintain, and communicate plans to lower greenhouse gas emissions according to both the agreement goals and their national priorities.[60] Therefore, parties must report on their efforts to reduce carbon emissions (with NDC's every five years, officially starting in 2020), submit Biennial Transparency Reports (BTRs) on national levels of greenhouse gases and the 'information necessary to track progress in implementing and achieving' their NDC's (starting in 2024), and participate in a Global Stocktake process where global progress will be accessed every five years (starting in 2023).[61]

This focus and commitment on information gathering, sharing, and reporting is the greatest innovation of the Paris Agreement. For the first time under the UNFCCC, public awareness, education, and access to information were included.[62] The Paris Agreement provides a requirement for countries to be transparent and clear in their commitments and actions, while still allowing flexibility for the

[56]Article 6 of Paris Agreement (2015).
[57]The Financial Mechanism of the Convention is the Global Environment Facility (GEF), which is an independent international financial institution with goals that align to the Paris Agreement, except that only parts of their funds are allocated toward climate change mitigation. It receives funding from its member states and works with its partners to assist developing countries. See Lattanzio (2015). The Adaptation Fund of the Kyoto Protocol receives funding through its emissions trading mechanisms and elective contributions that go directly to developing countries for assistance in their efforts toward the Paris Agreement. See Leggett (2020). The Green Climate Fund was created by the UNFCCC to organise and direct funds towards developing countries for lowering greenhouse gas emissions and enhancing their mitigation and adaptation efforts (especially for those most vulnerable to the effects of climate change). The funds are supplied by developed countries and any other state or government body that have the ability to contribute. See Green Climate Fund (2020).
[58]Article 10 of Paris Agreement (2015).
[59]Article 11 of Paris Agreement (2015).
[60]See Fuertes & Harries (2019) at 11.
[61]See UNFCCC (2019b).
[62]Article 12 of Paris Agreement (2015).

differing capacities of the parties. Therefore, in order to improve upon previous international emissions reduction endeavours, the Paris Agreement established an 'enhanced transparency framework' complete with a peer-review compliance mechanism.[63]

However, it was not until COP24 in Katowice, Poland, in December 2018, that the parties agreed to many of the guidelines and processes for reporting and transparency.[64] The 'Katowice Package' clarified some ambiguities of the Paris Agreement, by adopting the Enhanced Transparency Framework (ETF), which provides guidelines for parties to report their NDC's.[65] The ETF is a tool to monitor progress and includes an expert review process in which the comprehensive reports of parties are reviewed for consistency with their NDC and the goals of the Paris Agreement. By promoting greater environmental transparency, integrity and robust accounting in relation to international cooperation, nations can greatly improve results in the fight against climate change.[66]

In particular, the ETF requires reporting greenhouse gas emissions and NDC progress tracking, technical reviews of the reports by independent Technical Expert Review Teams for advisement purposes, and multilateral facilitative consideration (transparency to the international community for the purpose of accountability and sharing best practices).[67] The ETF also includes a 'transparency rulebook' (called "Transparency MPGs – Modalities, Procedures, and Guidelines"), which along with the BTRs will go into force in 2024.[68]

The lesson from Kyoto was that one cannot compel sovereign nations to act without their consent. Inevitably, mandatory carbon emissions requirements were set at levels that could be easily achieved, leading to 'weak action' on the part of national governments, which allowed them to be 'compliant' nonetheless. Moving forward, a more important goal is accurate and honest action on the part of nations, even if it is not ideal. On the other hand, an indirect expectation of the Paris Agreement was to get the largest carbon emitters (China, US, EU, India, Russia, Japan) to commit to action, and therefore set an example for all other nations (and for each other).

Comparing the Kyoto Protocol and Paris Agreement

The process of reducing greenhouse gas emissions is complex and difficult, requiring transitioning economies which rely heavily on carbon to more carbon-free sources. Therefore, international environmental agreements could possibly be more successful if they provide guidelines for policies and include more definitive projected outcomes. While the Kyoto Protocol set specific targets for carbon emission reductions, and the Paris Agreement required states to set their own

[63]Article 13 of Paris Agreement (2015).
[64]See Fuertes & Harries (2019).
[65]See Hanle, Gillenwater, Pulles & Radunsky (2019).
[66]Article 6, Section 2 of Paris Agreement (2015).
[67]See May (2019).
[68]Fuertes & Harries (2019) at 18-21.

specific targets based on their national abilities, the responsibility on how these targets will be met fell on the states in both instances. Neither agreement reached nor is projected to reach its goals in their respective time frames, which is problematic due to the worsening effects of climate change as the concentration of greenhouse gases in the atmosphere continues to rise.

While the Kyoto Protocol established legally binding emissions reduction targets with penalties for noncompliance, it only applied to developed nations (thus excluding developing nations who were becoming major contributors of global emissions and who were in the process of industrialisation). Since the Kyoto Protocol only applied to developed countries, who were historical polluters, it was seen as unfair because of its exclusion of newly industrialised nations like China, currently the largest carbon emissions contributor.

On the other hand, the Paris Agreement differs in that all countries were required to create NDCs to lower emissions. The NDC requirement of the Paris Agreement allows it to be fairer, as it applies to all nations without making hard targets. Because the Paris Agreement has no language that forces parties to make unfeasible commitments, it is considered more flexible than the Kyoto Protocol. However, this also means that the Paris Agreement has no penalties for noncompliance so that developing countries which could not reach their targets are not discouraged from attempting to do so by ratifying the text anyway. Where the Paris Agreement encourages compliance is in its requirements for monitoring, reporting, and regular reassessment of targets with a goal of moving towards the agreement's broader objectives of keeping temperature change below 2°C.[69]

Unfortunately, progress by the Paris Agreement in keeping the temperature change below 2°C has been determined insufficient by recent studies.[70] If major emitters keep their current commitments, global warming is estimated to reach between 2.7 and 3.7°C by the end of this century, which would have massive negative effects on the world's ecosystems and human life.[71] Reports prior to 2020 by the UN show that there is no sign of emissions peaking in the near future as they continue to steadily increase.[72] Scholars are also sceptical of the long term viability of the Paris Agreement, siting concerns that it is not binding and therefore there is no guarantee that parties will both honour their NDC commitments and keep 'ratcheting up' their efforts. There is also doubt whether the 'peer-pressure' from the 'pledge-and-review' component of the Global Stocktake process will work.[73] Nonetheless, the Paris Agreement is not static and like the whole UNFCCC process is designed to adapt and evolve over time.

[69]Article 2, Section 1a of Paris Agreement (2015).
[70]Peters, Andrew, Canadell et al. (2017) at 118-122; See Kuramochi, Fekete, Luna et al. (2018).
[71]See Denchak (2018).
[72]See Hook (2019c).
[73]Sachs (2019) at 865.

Implementation of the Paris Agreement by the EU and China

Currently, the Paris Agreement is what is driving the UNFCCC effort to combat climate change at a global scale. Although the US was one of the original signatories, the Trump administration announced in 2017 that it would withdraw, despite the US being one of the biggest greenhouse gas emitters. President Trump claimed that implementing the existing US NDC would negatively affect the economy and therefore make the country less competitive against China and the EU. China and the EU however, ratified the agreement and plan to adhere to their commitments.

China, the US, and the EU are the three largest greenhouse gas emitters, respectively. In 2018, China accounted for 29.7% of emissions, the US 13.9%, and the EU 9.1%.[74] They also lead in cumulative emissions since 1750. The US has produced 25% of total emissions, the EU about 22%, and China 13%.[75] Since these nations have contributed the most greenhouse gases, and continue to do so, their actions regarding the Paris Agreement are imperative.[76] Of course, it's worth noting that carbon emissions numbers look different from a per-capita accounting. Per capita emissions are much larger in industrial countries like Canada, Australia and the US, as well as wealthy kingdoms of the Arabian Peninsula.[77]

All parties to the UNFCCC submitted 'Intended Nationally Determined Contributions' (INDC's) for the COP21 in Paris (before or after the conference). The Paris Agreement requires that parties submit their NDC's by 2020, therefore almost all of the submitted INDC's become NDC's.[78] Consequently, the first official NDC's are due in 2020. They could be identical to the existing ones, updated in some way, or 'enhanced' (further pledges on greenhouse gas emission mitigation).[79] Overall, what is most important currently is that the parties continue to report under the Paris Agreement requirements and expectations to keep better track of their progress on the dangers and the reduction of global carbon emissions.

While the world awaits the official NDC reports due in 2020, several non-government organisations do collect and analyse information on the progress of government climate action and the commitments of each Party to the Paris Agreement.[80] Independent scientific analyses can show the sufficiency of legislation

[74]Crippa, Orregionni, Guizzardi et al. (2019) at 9; See Levin & Lebling (2020).
[75]See Center for Climate and Energy Solutions (2020).
[76]Furthermore, according to a recent EU report: "In 2018, China, the United States, India, the EU28, Russia and Japan - the world's largest CO2 emitters - together accounted for 51% of the population, 65% of global Gross Domestic Product, 80% of total global fossil fuel consumption and emitted 67.5% of total global fossil CO2." Crippa, Orregionni, Guizzardi et al. (2019) at 9, but by numbers the order should be China, US, EU28, India, Russia, Japan.
[77]In particular, Saudi Arabia, Australia, and Canada have higher per capita carbon emitters than the US. For a list of the top per-capita carbon emitters see: Union of Concerned Scientists (2020).
[78]Fuertes & Harries (2019) at 13.
[79]See Fransen, Mogelgaard, Northrop & Levin (2017).
[80]Some of these organisations include: Climate Action Tracker (https://climateactiontracker.org/), the International Carbon Action Partnership (https://icapcarbonaction.com/en/), the Global Carbon Project (https://www.globalcarbonproject.org/), and the Climate & Development Knowledge Network (https://cdkn.org/?loclang=en_gb)

based on projections. In general, national government action is considered insufficient if their NDC and legislation do not lead to substantial collective emissions reductions to keep global temperature rise below 2°C, the goal of the Paris Agreement.

In the absence of the US from the Paris Agreement, the actions of China and the EU seem to matter the most in the fight to reduce global carbon emissions and lower rising temperatures. Because China accounts for almost 30% of current carbon emissions, their actions and their example are of paramount importance. The EU on the other hand, stands as the largest emitter from all the industrialised nations of the world. The Europeans most certainly have a legacy obligation to be responsible and it appears that they are taking the right steps.

China's Nationally Determined Contributions and Implementation of Commitments

China submitted its first NDC to the UNFCCC in 2015, which included many categories but broadly covered energy, industrial systems, construction and transportation, carbon sinks and a variety of capacity building initiatives.[81] Overall, the Chinese government committed to peak carbon emissions in 2030 and decreasing emissions per unit of GDP by 60-65% from 2005 levels by the same year.[82] They also plan to increase the share of non-fossil fuel sources of energy consumption to 20%, and increase forest stock volume by 4.5 billion cubic meters from the 2005 level.[83]

To implement these goals, China's 2015 NDC plan included policies in "regime building, production mode and consumption pattern, economic policy, science and technology innovation and international cooperation."[84] China's plans strengthen regulations to reflect climate objectives and create regionalised, differentiated targets. They will expand renewable energy development and develop a circular economy through recycling. Low-carbon energy will be promoted in the agriculture, service, transportation, and building industries.[85] They also plan to increase carbon sinks through afforestation, educate citizens, optimise water sources for climate resilience, and fund science and technology research.[86] Overall, China's NDC is thorough and wide-ranging from governmental to individual action, which should promote reducing greenhouse gas emissions.[87]

[81]China's NDC also showed how some of their climate related goals had already been achieved, and their emissions per unit of GDP were 33.8% lower than in 2005. Additionally, non-fossil fuels make up 11.2% of energy consumption, forested area was increased 21.6 million hectares, and installed capacity of hydro power, on-grid wind power, and solar power increased by 2.57, 90, and 400 times, from 2005 levels. PRC Department of Climate Change (2015) at 3.
[82]Denchak (2018).
[83]PRC Department of Climate Change (2015) at 5.
[84]PRC Department of Climate Change (2015) at 5.
[85]PRC Department of Climate Change (2015) at 8-9.
[86]PRC Department of Climate Change (2015) at 11.
[87]For more information on Chinas continuing efforts to address its Paris Agreement commitments, see Ministry of Ecology and Environment of the People's Republic of China (2019).

China's greenhouse gas emissions are primarily due to coal. China uses more coal then the rest of the world combined, accounting for 50.5% of world coal consumption in 2018.[88] China's uses coal for both energy production and for heating, and its low cost has greatly contributed to its economic growth. However, coal is a major contributor to climate change, and in 2018 roughly 20% of global carbon emissions were from Chinese combustion of coal.[89]

Between 2013 and 2016, when China submitted its NDC, carbon emissions were steady. According to the Columbia University Centre on Global Energy Policy that was due to a variety of reasons, including structural shifts, cyclical market downturn, and slower economic growth.[90] Another great contributor to the stabilisation of China's carbon emissions during that period, was the increased use of renewable energy, due to large subsidies by the government.

Although China is the world's largest fossil fuel burner, it's also the world's largest renewable energy user. China leads the word in renewable energy capacity, and in 2018 it accounted for 43% of the renewable energy capacity added globally.[91] Renewable energy sources (hydropower, wind, and solar) have grown significantly this decade, providing 26% of all electricity generated in China in 2018.[92] Finally, China had the largest market in electric vehicles (EVs), as there were 2.3 million on the roads in 2018.[93] Part of their efforts to adhere to their NDC includes regulation and financial incentives toward the improvement of motor vehicle efficiency.[94]

However, in the past couple of years, the Chinese government has reversed on some of the policies that contributed to the stabilisation of its carbon emission. In particular, the government suspended its subsidies on solar and wind projects in 2018 and 2019, lifted a previous ban on new coal-fired power plant construction and authorised the construction of new coal power capacity, terminated subsidies for electric vehicles (in 2020), and delayed the full implementation of the national carbon trading scheme to 2021 (which was expected to launch in July 2017).[95] Loss of government subsidies in the last two years for solar and wind projects has led to dramatic decline in investment in renewable energy.[96] Despite China's better efforts to decrease carbon emissions, new coal fired plants are still being built.[97] This is most likely due to the demand for coal that is still required for such a large developing country, as there are simultaneous goals of increasing GDP and alleviating poverty.[98]

China is currently in the transition process to a national carbon emissions trading market for their power-generation sector, which will cover 40% of their

[88]Sandalow (2019) at 57.
[89]Sandalow (2019) at 57.
[90]Sandalow (2019) at 17.
[91]Sandalow (2019) at 66.
[92]Sandalow (2019) at 66.
[93]See China Power Team (2020).
[94]See Leggett (2015).
[95]See Climate Action Tracker (2019a).
[96]See Hook (2019b).
[97]See Hook (2019a).
[98]Xiaoguang (2017) at 3.

total emissions.[99] Once fully implemented, it will almost double the global carbon emissions trading market. The Chinese carbon trading market, that was supposed to launch nationally in July 2017, has only been operating in eight pilot regions, and is now not expected to be nationally implemented until 2021.[100]

Finally, China is also financing projects abroad that will increase greenhouse gas emissions. China's "Belt and Road Initiative" (BRI) has funded billions of dollars' worth of foreign oil and coal projects since 2000, but the government is now being pressured to switch that funding to green initiatives to help with overall climate commitments.[101] They currently back 60 overseas projects that are facing economic difficulties from the Covid-19 recession, and environmentalists are strongly suggesting that the Chinese government not provide them further support.[102] It would benefit China greatly to reallocate the funds for the coal-fired power plants and palm oil plantations to renewable sources of energy instead, since they will become cheaper in the long run. China's decision on this matter will impact several developing countries efforts to reduce their carbon emissions, and greatly affect the world's ability to meet international carbon emissions reduction goals.[103]

Based on projections of current policy initiatives, China is expected to reach its NDC targets. Greenhouse gas emissions are expected to peak around 2030 but rise steadily from now until then (which will make the needed decline that much steeper). Renewable energy sources are expected to reach 23% to 29% share of total primary energy consumption by 2030, and carbon intensity of its GDP is to be reduced by 68% compared to 2005 levels.[104] However, according to the Climate Action Tracker, China's rating is "highly insufficient," which means that even if fully implemented, these goals are insufficient in holding global warming below 2°C. That means that the 'Initial NDC' was not ambitious enough, and therefore China will have to submit an 'enhanced NDC' in 2020.

Overall, China laid out a detailed account of the plans to implement actions to meet the goals of the Paris Agreement and showed potential to follow through with a national carbon market and regulations with incentives to decrease emissions in multiple sectors. However, big issues remain, such as the recent reduction in government subsidies for renewable energy, increase in the use of coal again, and the implications of BRI domestically.

EU's Nationally Determined Contributions and Implementation of Commitments

The member-countries of the EU jointly submitted their first NDC in March of 2015, and they committed to collectively reduce greenhouse gas emissions 40% by the year 2030 compared to 1990 levels.[105] Their NDC covers the sectors of energy, industrial processes and product use, agriculture, waste, and land use and

[99]See Baker (2019).
[100]See Temple-West (2020).
[101]See Sheperd (2020).
[102]See Sheperd (2020).
[103]See Sheperd (2020).
[104]See Climate Action Tracker (2019a).
[105]See European Union (2015).

forestry (LULUCF), with many specific subcategories.[106] The EU's NDC, though short on details, made it clear that they plan to reduce all types of greenhouse gases, and enhance their carbon capture efforts, by creating new laws and regulations before 2020.[107] However, unlike China, the EU was able to peak its greenhouse gas emissions by 1979, and has been steadily reducing its output since then, but at low rates each year.

The EU already has legislation in place to meet its NDC commitments, most of which was updated recently. Between May 2018 and May 2019, the EU adopted its new energy rulebook, called the "Clean Energy for all Europeans." This is a comprehensive package that includes eight legislative acts, covering a wide range of efforts to transition away from fossil fuels and towards cleaner energy. In particular, it includes a directive on Renewable Energy mandating the increase in use of eclectic power for transportation vehicles, a directive on Energy Performance in Buildings mandating the decarbonisation of existing building stock, and a regulation on the role of land use and forestry in emissions reduction.[108] The main one is the EU Regulation on the Governance of the Energy Union and Climate Action, which applies the Paris Agreement framework domestically, and consolidates all past 'climate change' related governance regulations.[109]

The EU is on track to reduce emissions at least 40%, if not almost 48% by 2030.[110] Even though plans for coal phase outs by EU member states mean that 43% of installed coal power will still be in use by 2030, the 2018 EU Renewable Energy Directive committed to a goal of 14% share of renewables for the EU in the transport sector by 2030.[111] Finally, overall natural gas consumption in the EU is decreasing, despite some member states attempting to develop natural gas infrastructure. The European Investment Bank stopped funding investment in this infrastructure, preventing natural gas development and working towards the Paris Agreement goals.

Perhaps one of the greatest successes of the EU so far in fighting climate change is its Emissions Trading System (ETS). Launched in 2005, it covers 31 countries, it's a cap-and-trade carbon market that limits emissions from over 11,000 energy-intensive installations and companies and covers over 45% of the EU's greenhouse gas emissions.[112] According the EU Commission, the ETS is on track to lower emissions from covered sectors by 21% (2005 levels) by 2020. By some estimates, the value of the global carbon market in 2018 was $164 billion, with the EU ETS accounting for about 90% of that.[113]

Despite all that, the EU also has an insufficient rating from the Climate Action Tracker scale, meaning again that although they are meeting their goals, that is still not enough to keep global temperatures from rising above 2°C. The EU had

[106]See European Union (2015).
[107]See European Union (2015).
[108]See Climate Action Tracker (2019b); Kezee, Archick & Leggett (2020); European Commission (2020c)
[109]See European Union (2018)
[110]See Climate Action Tracker (2019b).
[111]See Climate Action Tracker (2019b); European Commission (2020c)
[112]See European Commission (2020a)
[113]See Twidala (2019).

ambitious goals of reducing emissions by 40% of 1990 levels by 2030, but the governmental bodies of the EU are working towards increasing it to a 55% reduction, which is expected to be committed to in a new NDC for 2020.[114] Criticism of the NDC for the EU is that they could easily reach 48% by 2030 if they improve their already adopted policies and take action that is congruent with their level of economic development.[115]

Finally, in April 2020, the EU Commission submitted for comments its proposed new regulation (European Climate Law) to achieve 'climate neutrality by 2050.[116] This 'European Green Deal' is the most ambitious European effort yet, promising to completely transform the EU market and society over the next 30 years. If adopted, it could cost the EU between €4.6-5.0 trillion over the next 30 years, in order to transform such industries like agriculture and transportation to zero carbon emitters.[117] The 'European Green Deal' also includes strategy for adaptation and transitioning to circular economies.[118] This proposed legislation is moving in the right direction, as it is full of ambition that correlates with the Paris Agreement. It prioritises both the economy and wealth of the member states and the health of the planet, which makes it a good example to follow.[119]

Overall, although the EU's NDC is less thorough than that of China, EU laws supporting the goals of the NDC are already in place and being improved upon. The new 'European Green Deal' to be carbon-neutral by 2050, could however face real challenges, as some member-states rely heavily on coal and might require even more funding than proposed to decarbonise their economies.[120] Although the EU is not increasing its emissions and continues to be an example for reducing them, the success of its lofty goals remains to be seen.

Conclusion (Post Covid-19 Implications for Climate Change)

Climate change is one of the most pressing issues of our times, with a growing effect on the natural environment and human life. While the science behind the issue has been highly debated, research shows with extremely high certainty that man-made activities have been both responsible for the rise in global temperatures, and that there will be major consequences to the ecosystem and human life for not reducing carbon emissions. Therefore, international efforts to deal with climate change began with the UNFCCC, and continued through the subsequent Kyoto Protocol and the Paris Agreement, which provided the most comprehensive action plans for reducing emissions.

[114]See Climate Action Tracker (2019b).
[115]See Climate Action Tracker (2019b).
[116]See European Commission (2020b).
[117]See Mathiesen (2020).
[118]A large amount of funding is set aside for the Just Transition Mechanism for those dependent on carbon-intensive economies. Also included are plans for a "carbon border adjustment mechanism" to reduce competitiveness between members and prevent shifting emissions from one member-state to another, to keep the EU united in this matter. See Kezee, Archick & Leggett (2020).
[119]See The Economist (2019).
[120]See Kezee, Archick & Leggett (2020).

The Kyoto Protocol set binding targets with consequences for noncompliance in terms of carbon emissions - a type of "command and control" approach to dealing with carbon emissions. However, its applicability to only developed countries, and its exclusion of the largest carbon emitters (like the US and China), doomed the Kyoto Protocol from the start. The lesson for the global community was to let each country pursue its own policies and efforts in reducing its own carbon emissions, with goals to meet UNFCCC targets.

The Paris agreement on the other hand asks each country to do "whatever they can" - as long as they report it and actually try to do what they say. The implication being that the 'safe operating space' is shrinking fast, and therefore we need to know precisely what is the current levels of greenhouse gas emission in the atmosphere, where are they coming from, how fast are they growing (or not), and precisely what actions are taken by national governments to reduce their carbon emissions. The more the global community knows, the better/faster we can all respond/adopt to dramatic climate changes to come.

Unfortunately, the very nature of international law, which requires consensus and lacks the capacity to compel action on the part of sovereign nations, dictates that the best we can get right now in terms of dealing with climate change is a non-binding 'Paris Agreement' type of action. Reporting through NDC's and reviewing of national implementation might be our last best hope for achieving meaningful reduction in carbon emissions.

As of 2019, what we have seen in terms of actions, at least from China and the EU, has been insufficient: in curbing the growth of greenhouse gas emissions and peaking carbon emissions, or in reducing the rising in global temperatures. Based on the Paris Agreement, 2020 was going to be the year when parties where expected to either submit their official NDC's or submit 'enhanced NDC's.' The annually scheduled COP in Glasgow, Scotland, in November 2020 would have tested the long-term viability of the Paris Agreement.[121] Unfortunately, Mother Nature had different plans.

The global pandemic that has infected millions of people, killed hundreds of thousands, and completely disrupted the global economy, has also led to a significant reduction in carbon emissions in 2020 (as a result of the near global lockdown imposed by national governments in combating the spread of the corona virus).[122] As a result of the Covid-19 global lockdown, by April 2020, daily emissions had on average decreased by 17% compared to the 2019 mean, almost half of which was due to decreased surface transport.[123] Projections for 2020 (depending on the lockdown extend) range from 4% to 7% reduction in carbon emissions.[124] For the first time in post industrialised human history, we have an actual live case of what life would be like without excessive use of energy (for transportation, production, and consumption).

The Covid-19 pandemic can have several implications for the Paris Agreement and climate change. First, 2020 NDC reporting deadlines might not be honoured,

[121]COP26 was postponed to October 2021, due to Covid-19.
[122]Le Quéré, Jackson, Jones et al. (2020) at 1.
[123]Le Quéré, Jackson, Jones et al. (2020) at 1.
[124]Le Quéré, Jackson, Jones et al. (2020) at 1.

understandably. Second, dealing with Covid19 could push climate change commitments from the forefront of national policy priorities. Finally, just like in the case with of the 'European Green Deal', fighting climate change could become a means for alleviating the economic recession caused by Covid-19.

The ultimate result of Covid-19 on developed societies, where social distancing has led to dramatic drops in energy consumption (which emits carbons), while at the same time has not led to the total collapse of western civilisation, can be a new impetus for global action to combat climate change. Therefore, the implication of the Covid-19 pandemic is that there is an opening for parties to update and/or reconsider their NDC, even if they do not have to submit new ones.

This is the perfect time for national governments to both craft a post Covid-19 action plan on how to reduce their carbon emissions (along with other polices that combat climate change), and communicate such plans to the rest of the world (for 'review' and evaluation/emulation).[125] National governments are expected to submit their second NDC's by the end of 2020, thus presenting an opportunity for a new and more in depth look into ways to deal with climate change. If we all know what we are all planning to do and what impact it will have, it should help the global community to properly respond to the most pressing issue of our times.

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[125]Already, both the US and the EU are considering how to re-build their Covid-19 damaged economies, through 'green – emissions reduction' friendly legislation.

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Eradicating Corruption in Public Service Entities through Ethical Leadership

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This paper investigates the need to eradicate unethical practices in the public service. It responds to high levels of corruption in the public service and explains why ethical leadership is critical to engaged ethical employee outcomes. When there is ethical leadership, the work engagement of employees is higher and they view their roles as being meaningful. The values associated with the public service need to be ethically driven and self-interest must have no place. There is no doubt whatsoever that corruption in the public sector has a hugely negative impact on a country's service delivery quality. In South Africa, despite a carefully crafted superior legislative framework and stratagems to combat corruption in the public sector, it is on the increase and invariably affects the poor the most. This is a predominantly worrying phenomenon in developing nations like South Africa where billions of dollars are required to make a success of a country. Needed resources are stolen by corrupt individuals and this means that the much needed socio-economic and developmental plans are scuppered and not achieved as planned. The apparently weak application of legislation promotes corruption and is exacerbated by a meritocratic mindset and seeming lack of political will. The public sector urgently need to lay stress on nurturing ethical leadership and motivate employees to act ethically through effective recruitment and selection, training, codes of ethics and a sense of significance in what they do at work. The oversight mechanisms also need to be carefully administered. The public service needs to nurture ethical leadership which role-models desired behaviours and stimulates employees to act ethically. An ethical stance will reduce corruption, improve the integrity of governance, public values, and also improve the societal perception of the public service.

Keywords: *Accountability; Administrative responsibility; Ethical practice; Ethical leadership; Work engagement.*

Introduction

Corruption is a practice which is eroding the fabric of public sector ethics globally and it threatens the sustainability of nations and the fundamentals of the global economy. This conceptual study is the result of considering that corruption in any shape or from hugely undermines the development goals of South Africa while also negatively impacting the most on the most vulnerable millions of impoverished people inhabiting the country. South Africa currently

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ranks 70th on Transparency International's latest Corruption Index[1]. It is an indictment on the ruling party, the African National Congress (ANC) that after a quarter of century in power, they have been unable to stop the ransacking of state resources by unscrupulous individual operating inter alia in the public service. Corruption is a world-wide problem[2] which clearly undermines both the authority and the trustworthiness of the government and all its employees. What are the reasons for corruption and what challenges are faced in the fight to eliminate it as far as possible.

The paper concludes by making some recommendations and suggesting strategies on how to resolve the scourge of corruption. Cultivating ethics in any organisation, requires good role modelling by those in the upper echelons of the organisation including top management.

Since the advent of democracy in South Africa 1994, the recruitment system in the public service is open in that all posts, including promotion posts, are advertised inside and outside the public service. Selection committees are involved in the process and job specifications are set which will specify the various tasks included in a position and the skills and knowledge required. The minister of a department establishes a job description and job title that indicate:

> "(a) the main objectives of the post or posts in question, (b)the inherent requirements of the job, (c)the requirements for promotion or progression to the next salary range, in accordance with a relevant career path. (Public Service Regulations, Chapter 1, Part III, Section I.1). Specific requirements for specific categories of jobs are laid down for certain occupational categories or in 'occupational specific dispensations' or for the middle and senior management service, but in many cases the discretion for setting the job specifications rests with the relevant minister. Determining job specifications, within the broad parameters set by the Minister for Public Service and Administration, has been decentralised to departments."[3].

Once a job is advertised a selection committee is constituted and applicants are shortlisted and then interviewed. The selection committee makes recommendations on appointments to posts. The selection committee shall make a recommendation on the suitability of a candidate after careful consideration[4]. Subsequent to considering the recommendation of the selection committee, the minister of the relevant department, or one to whom power of appointment has been delegated, makes the appointment. Ministers or Members of the Executive Councils on provincial levels have a direct role in the appointment of DGs, other HoDs and DDGs. Candidates for posts of DG and DG are recommended by a selection panel, which comprise ministers and deputy ministers. DGs are appointed by the President with the agreement of the Cabinet while DDGs are appointed by Ministers after consensus with the Cabinet.

The authority of appointment in South Africa is allocated by section 3(7) of the Public Service Act to ministers on national level or members of the executive

[1]Businesstech, 22 April 2020.
[2]Soliman & Cable (2011).
[3]Public Service Regulations - Chapter 5.
[4]Public Service Regulations 1/VII/D.5.

council at provincial levels. Ministers are able to delegate power to officers within their departments. The justification for having this in 1994 was the necessity to transform the apartheid regime's public service. It is noted that the African National Congress (ANC) as the ruling party is under very strong criticism for their policy of cadre deployment which has also bolstered corruption[5]. Maladministration and the erosion of morals and also values are on the rise[6]. It is commonplace that municipal and other public service appointments are used to reward political cronies, which disheartens talented employees and ultimately undermines institutional performance. In such situations it is common for corruption, fraud, maladministration and mismanagement find a fertile breeding ground which very often lead to service delivery protests.

Public service training courses are unfortunately not established as a condition for permanent appointment; nevertheless compulsory initiation has been introduced for new public servants. If the public service and its National School of Government (NSG) can develop effective training courses and programmes to bridge the gap between theoretical and the practical demands of the public service, as it is done in various other countries is unclear at this stage, except to say that corruption is increasing. It is apparent from reading daily media reports that the public service is failing to place people with the right skills and competencies in the right positions.

"Generally, no specific continuous professional development requirements are set either as probation or promotion requirements. Thus, not only are there doubts about the rigour of the selection process but there are also no compulsory prescribed training courses or other compulsory development requirements that candidates must meet after appointment to address skills gaps"[7]. Such practices allow corruption to grow and structural inequalities increasingly describe and exemplify the post-apartheid South Africa. Consequently, strong anti-corruption efforts are critical in endorsing good governance and in all efforts to prevent maladministration and reduce fraud and other unethical acts. Corruption in the public sector is due to the unethical conduct of a small minority of persons but it has the potential to become a raging wildfire as people exploit the system for their own personal advantage.

The Department of Public Service and Administration (DPSA) stated[8] that it will build a disciplinary database that will seek to track and monitor all government officials and public servants under investigation for fraud and corruption. DPSA minister Senzo Mchunu said that corruption and fraud investigations are the sole mandate of the South African Police Service (SAPS), while discipline management falls under the directive of the individual heads of governmental departments. Nonetheless, terms of section 15 of the Public Administration Management Act, misconduct originating from criminal investigations is a DPSA responsibility. Thus he said "It is therefore envisaged that the newly established Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit will

[5]Ruhiiga (2009); Areff (2012).
[6]De Waal (2012).
[7]Public Service Regulations - Chapter 5.
[8]Businesstech, 22 April 2020.

establish a central disciplinary database to monitor, track and record public servants under investigation for misconduct which may include corruption and fraud"[9].

The Role of Ethical Leadership

Corruption has developed into a leading topic of discussion amongst the public and it is ever-present in the popular media and in civil society organisations as well as the private sector[10].

Hassan, Wright and Yukl[11] explored a study on various aspects including ethical leadership, willingness of the employees to report ethical problems, organisational commitment and absenteeism of public sector employees. The study employed a survey research by means of questionnaires. The study showed that there is a positive relationship between all dimensions, an increase in reporting ethical problems that arises to management, commitment to the organisation and reduction in occurrences of absenteeism by employees of the public sector. This informs that ethical leadership plays an important role in an organisation.

Ethical leadership has three components that are essential, a role model that is ethical to others, fair treatment of people and management of ethics within the organisation actively. Leaders that have ethics take cognisance of moral implications when choices are made. In some cases absenteeism is not caused by employees who are ill or family emergencies. Ill-treatment, stress or a decline in morale at a workplace causes some form of absenteeism due to an employee's refusing to be compromising personal values and work ethics. When an environment is conducive[12], it is not only about implementing ethical standards or codes. When an organisation has ethical leaders, that is leaders whose behaviour is supportive and procedures that are fair, this can create an organisational climate that is safe for employees to be able to feel comfortable in addressing and reporting ethical problems[13]. Reporting of any behaviour that is not ethical will have a positive impact in the organisation and discourages the continuance of unethical behaviour due to the confidence employees have in the leadership of the organisation's ability to appropriately take corrective action when required. The success of an ethical environment and compliance of ethical standards or codes is dependent on the leaders of the organisation[14].

It is of critical importance to promote ethical behaviour by managers in the public sector organisations and reduce unethical practices. This is realised by implementing guidelines and ethical standards that are set out clearly. Employees should be part of the process and be provided with an opportunity to seek advice

[9]Businessstech, 22 April 2020.
[10]De Graaf (2007).
[11]Hassan, Wright & Yukl (2014).
[12]Hassan, Wright & Yukl (2014); Nicolaides (2019).
[13]Nicolaides (2013); Nicolaides & Duho (2019).
[14]Nicolaides (2009); Nicolaides (2014); Nicolaides (2016); Nicolaides (2017); Nicolaides & Duho (2019); Hassan, Wright & Yukl (2014).

on dealing with ethical matters[15]. Ethical training affords a chance for employees to know and understand what is ethical and how to deal with ethical dilemmas. Good ethical leadership is equally important and development programs in leadership must include awareness in ethics, influence of employees attitude and behaviour by creating trust relationships and good ethical behaviour modelling.

Cohen & Eimicke, D'Aleo, Lokman & Talib, Nicolaides and Plant [16] provided an overview and the analysis of practical problems that are encountered when codes of ethics are developed and implemented. The dimensions that were explored are

1. What are public ethics and where do they come from?
2. What are the central ethical issues facing public administrators?
3. Are there practical tools and guidelines to assist public servants to be both ethical and effective public managers?

The articles indicate in varying degrees how public ethics differs in relation to personal ethics because of values and guiding principles. It suggests that public ethics does not only consider right and wrong or action and performance when making judgements, rather it looks at action-based judgements. However, public administrators must be guided on how to be able to make those judgements. This is encouraged through concepts such as responsibility, professional lenses, a good perspective of humanity in general, values, agency goals and personal view. In an African context this would be very much in line with the notion of Ubuntu[17]. Ubuntu should inform practice in African business. Ubuntu is an African communitarian philosophy which should be used to transform management practices in the public and private sectors in African nations. The relationship between society and business must invariably be viewed from an Afro-centric perspective. Consequently, the indigenous phenomenon of Ubuntu should be informing business activities such as the codes of ethics that are created to maintain a 'moral compass' in organisational activities. This will hopefully improve the current situation in the public service sector where there is scant attention paid to seriously serving others[18].

Cohen & Eimicke, D'Aleo, Lokman & Talib, Nicolaides, and Plant[19] show a different view in terms of development and implementation of codes of ethics. It revealed that public administrators do not have a problem with following what the guidelines of regulations stipulate, however, when there are no legal guidelines that are clear, the public administrators experience a problem in dealing with situations that are perceived to be complex. D'Aleo[20] and Nicolaides[21] say that codes of ethics or standards may be developed, however, it important to ensure

[15]Hassan, Wright & Yukl (2014).
[16]Cohen & Eimicke (1995); D'Aleo (2018); Lokman & Talib (2016); Nicolaides (2009); Nicolaides (2014); Nicolaides (2017); Plant (2018).
[17]Nicolaides (2014).
[18]Nicolaides (2014).
[19]Cohen & Eimicke (1995), D'Aleo (2018), Lokman & Talib (2016), Nicolaides (2009), Nicolaides (2014), Nicolaides (2017), Plant (2018)
[20]D'Aleo (2018).
[21]Nicolaides (2019).

that they are implemented and are enforced by some form of prescripts. Furthermore, for those who violate ethical practices there should be consequences. Unethical behaviour is detrimental as it can affect the community, foreign investment and destabilise the reliability of public institutions. In the same breath for those employees who display positive behaviour over and above the call of duty, there must be a reward, recognizing good ethical behaviour. Cohen and Eimicke[22] and Nicolaides[23] state that training is another important dimension in encouraging behaviour that is of a high moral nature. Furthermore, the leaders of an organisation are important in ensuring that ethical practices persist irrespective of the nature of the environment. When the leadership is not acting as a role model, this tends to make the employees steer away from complying with the necessary standards that have been implemented to deal with ethics[24]. It is not difficult for the public service to distinguish right from wrong. Role models and reward systems that are appropriate enable ethical behaviour. The dilemma lies where public servants are prevented from executing their duties in the right manner due to obstacles such as lack of training on ethical aspects of work. Ultimately it is the responsibility of each public servant that is assigned a task to decide which tasks he or she is willing to execute[25] even though the tasks are provided by superiors. To maintain good ethical practices in the public service requires one with steadfast moral principles in both the personal and professional spaces.

According to Mansouri[26] the Volkswagen scandal that unfolded in 2015 was due to the installation of "defeat devices" in order to comply with the United States new set of stringent regulations on emissions. It was revealed that a number of employees from managerial to non-managerial to the rank and file workforce, were part of the employees who played a role in the execution of the unethical action that occurred. The culture of Volkswagen's environment was that of avoiding discussions and dissent with management at all costs.

Prior to the scandal, Volkswagen was praised as one of the organisations that has an outstanding ethical business approach and received an 'Ethics in Business Award. However, with the implementation of stringent new requirements on emission and the inability to initially comply by the date set by Volkswagen, made Volkswagen vulnerable and they then resorted to committing an act that is unethical. Volkswagen's culture is known to be autocratic rather than democratic.[27] The culture of an organisation affects the level of compliance with ethical codes or standards[28]. When an organisational environment is such that employees are not free to express their own opinion or be involved in decision-making processes, it results in them acting in a manner that is not ethical to meet the organisations goals. This shows how organisations that are well established

[22]Cohen & Eimicke (1995).
[23]Nicolaides (2016).
[24]Nicolaides (2009).
[25]Plant (2018).
[26]Mansouei (2016).
[27]Aurand, Finley, Krishnan, Sullivanm, Abresch, Bowen, Bowen, Rackauskas, Thomas & Willkomm (2018).
[28]Nicolaides (2016)`Nicolaides (2017) ; Nicolaides (2019).

can falter from conducting ethical to unethical business practices to advance sales. The success of codes of ethics requires a combination of ethical leadership, training to enhance moral behaviour[29]. A democratic environment where every employee is able to freely express and discuss any matter pertaining to the organisation is also crucial[30]. Ethical business practices apply both in the public and the private sectors. This is despite the fact that he public sector is generally not about profit again whereas the private sector is. The public sector still suffers immense organisational losses through unethical conduct and corruption.

Sayeed[31] conducted a study that revealed that ethical values of public officials have an impact on accountability and that the ability of public officials to perform their duties is guided by moral values principles and rules. The study defines "public service ethos" as set of values that are meant to provide guidance and motivation for public servants while practicing their profession". An organisation's ethics and value system must stem from the leaders in the organisation[32]. It also reinforces the fact that an organisations main goal is to create a common identity to establish codes of conduct. The leaders in the organisation are critical in ensuring that standards and professionalism is maintained. In any event, the Constitution of the Republic of South Africa 1996 prescribes the rudimentary principles that are required to serve as guiding tools for public functionaries in executing their duties. Public servants are to promote and maintain a high standard of professional ethics must be prioritised (Section 195 of the Constitution of the Republic of South Africa, 1996). Codes of conduct, ethos in the public service and training programmes are tools that should be considered in finding solutions[33]. Further, Sayeed[34] notes that integrity training is one other element that was identified as being important and must be incorporated to form part of the programmes. This will assist in raising moral awareness, reasoning and quality pertaining to actions that needs to be taken.

The Constitution has established what is denoted to as Chapter nine (9) institutions including the Offices of the Public Protector and the Auditor General (AG). Their determination is to promote democracy by protecting the public sector against unethical and corrupt practices. In addition, the South African public sector, civil society groups and business launched a concerted effort in 2011 to establish a National Anti-Corruption Forum (NACF) to combat growing corruption. While some efforts are being made corruption is increasing. Corruption and inefficient government bureaucracy are substantial dangers in the public services sector. It is not uncommon for irregular payments and bribes to be frequently exchanged and nepotism and cronyism are also very common problems to deal with while corruption in public procurement is a high risk for businesses operating in South Africa (South Africa Corruption Report, May 2019). Preferential treatment in the decisions of government officials is apparently very

[29]Nicolaides (2019).
[30]Mansouri (2016).
[31]Sayeed (2016).
[32]Nicolaides (2017).
[33]Nicolaides and Duho (2019).
[34]Sayeed (2016).

common, and public funds are frequently diverted due to corruption[35].The Broad-Based Black Economic Empowerment (BBBEE) strategy seeks to grow the involvement of black citizens in the economy but has been criticised both for providing too much privileged treatment in the awarding of government contracts to wealthy black elites and for promoting increased corruption in public procurement and there is also a lack of monitoring and assessment, maladministration, difficulties in registering companies under BBBEE, and poor accountability[36].

South Africa, despite its good legal framework for curbing corruption, still has disturbingly growing corruption levels. Laws such as The Prevention and Combating of Corruption Act 12 of 2004 (PCCA) criminalise corruption in public and private sectors and codify specific offenses. This was intended to make it easier for courts to prosecute corrupt crimes. The Act explicitly criminalises corruption, extortion, active and passive bribery, bribing a foreign official, abuse of office and money laundering, and it obliges public officials to report corrupt activities (South African Government, 2004). In addition, The Public Finance Management Act 29 of 1999, addresses unauthorised government expenditure and there are also numerous other legislations of note but the problem of corruption remains[37].

South Africa has sanctioned the United Nations Convention against Corruption, as well as the African Union Convention on Preventing and Combating Corruption and the OECD Anti-Bribery Convention but corruption keeps growing.

Good moral values allow one to make decisions without difficulty and be able to perform set out activities with integrity. Employees require to be held accountable for the decisions that are taken in the process of executing activities. Implementation of codes of conduct is not sufficient, enforcement influences good ethical behaviour to strive[38]. An additional view that is shown in the study is that there has to be a division that is responsible for overseeing ethical standards in an organisation. This is a unit that has the responsibility to ensure all the rules and guidelines are adhered to. The unit has to have a strong arm and action be taken for those who violate behaviour that threatens the climate of the organisation. Furthermore, introduce reward compliance for employees that execute and behaviour ethically in all aspects of their duties.

Krisnajaya[39] investigated the "Institutionalisation of ethical principles to overcome ethical dilemma in the Public Sector". In the study it became apparent that personal virtue and public virtue inconsistencies contribute to public sector's ethical problems. The ability to be able to distinguish right or wrong alleviates the dilemma of making the right decisions. Public sector ethics are about stringent adherence to protocols, rules and organisational procedures. In the public sector there tend to be dilemmas that are often caused by politics as power is

[35]GCR.
[36]Shava (2016).
[37]Treasury.gov.za (1999).
[38]Cohen & Eimicke (1995); D'Aleo (2018); Krisnajaya (2018); Nicolaides (2019).
[39]Krisnajaya (2018)

overly exercised in some instances[40]. These are in contradiction with the ethics principles that should be observed in the organisation. The study also revealed that a leader must be someone that the employees will look up to and must have strong ethical principles as this will assist the organisation in accelerating the establishment of ethical principles in the organisation[41]. The implementation of institutionalisation of ethical codes or standards should be followed with effective enforcement and the institution of consequences for non-compliance in order to minimise the risk of unethical behaviour. For the improvement of ethical conduct, ethical codes must not ambiguous but clear, and within the legal framework, system for accountability in the public service, and there should be transparency and accountability in the decision-making processes. Employees must act ethically and show ethical behaviour at all times, and there must be adequate consequences for transgressors[42].

Wright, Hassan and Park[43] conducted a study to investigate whether the public service ethic encourages ethical behaviour, public service motivation, ethical leadership and the willingness to report ethical problems. It was discovered that there is a positive relationship in all the dimensions that were investigated, that is, public service managers with a high public service motivation (PSM) show greater ethical leadership than managers with low PSM. Those leaders will have subordinates who have a higher PSM and are willing to report any violations of ethical behaviour observed in the organisation, and often do so as whistleblowers.

Role Modelling desired Behaviour

Leaders who encompass ethical values are expected not only to conduct themselves as to bring awareness through communication and enforcement of ethical behaviour, but also through their actions. Monitoring of employees and ethical training has been associated with codes of practice adherence, reduction in violations, in appropriate use of sick leave and an increase in reporting of ethical violations. Employees observe what happens in their organisation and if the organisation affords rewards to those employees who show an ethical behaviour, and sanctions violations of ethical conduct, this will separate those employees have strong moral and professional values[44]. Those with strong ethical values will tend to model their behaviour around that of their leader and the opposite applies for those who do not have strong values. Employees are often also faced with the dilemma in an organisation due to the environment that deprives them of a sense of freedom to express themselves. Employees in some cases resign or are consistently absent from work because of such conditions. When leaders show their subordinates that there is consistency of fairness in dealing with ethical and unethical behaviour, employees will be encouraged to remain in the organisation.

[40]Nicolaides (2019).
[41]Krisnajaya (2018).
[42]Nicolaides (2009).
[43]Wright, Hassan & Park (2016)
[44]Wright, Hassan & Park (2016).

Yeboah-Assiamah, Asamoah, Bawole and Buabeng [45] studied leadership and ethics in the public sector subordinates. The study revealed that subordinates emulate the behaviour that is shown by their leaders. When leaders in an organisation display a behaviour that is unethical, the subordinates will not uphold good ethics. In some cases the subordinates will take the blame for the unethical behaviour because of the relationship between the individuals and the supervisor, or even perhaps because of fear of retaliation from the supervisor if the unethical action(s) is not carried out.

This study sought to establish whether public service managers with public service motivation (PSM) that is high, exhibit leadership that is more ethical than those with low public service motivation. Managers with high public service motivation, subordinates will have high public service motivation and that employees with high public service motivation have the willingness to report unethical behaviour when observed in the organisation. The study revealed that there is a positive link between public service motivation of the supervisor and leadership that is ethical. Subordinates with a high PSM are willing to report any unethical conduct to their superiors[46].

Unethical behaviour that is in the organisation sometimes flows into the field of work. For instance, where there are allegations of public servants who are responsible for conducting roadside inspection, committing acts of unethical behaviour in the process of executing their responsibilities the supervisors are aware and may even support such behaviour. They may even expect the officials to return with 'sales' although the responsibilities of officials do not include 'sales'. This involves unethical behaviour by collecting money when for example, conducting roadside inspections. When a leader does not display a behaviour that is ethical, subordinates will emulate that behaviour, hence, the behaviour will persist to exist as management is permitting it to endure by not reprimanding unethical conduct. The decay of an organisations moral system from top-management makes policies that are implemented ineffective and the leaders that are supposed to be role models are not setting good example to the subordinates to whom they are responsible[47].

When top-management embraces ethical behaviour, it will probably tend to cascade down to the rest of the organisation, and when an organisation embraces unethical behaviour, it will affect the whole organisation negatively and lead to its non-sustainability. Yeboah-Assiamah, Asamoah, Bawole and Buabeng [48] state that organisational recruitment processes need to be expanded to include mechanisms that will assist in making sure that candidates that are recruited are indeed ethical and moral individuals. Training must be part of the process in the organisation to provide all employees with knowledge about unethical conduct and the negative consequences thereof. Although there are supervisors, individuals need to be aware of consequences of unethical behaviour conduct. Any individual is not exonerated for unethical behaviour because of their supervisor's being aware of it

[45]Yeboah-Assiamah, Asamoah, Bawole & Buabeng (2016).
[46]Wright, Hassan & Park (2016).
[47]Nicolaides (2016).
[48]Yeboah-Assiamah, Asamoah, Bawole & Buabeng (2016)

or even their part in unethical conduct. Consequences must be severing for all those who conduct unethical behaviour. In most cases top-management do not experience any adverse consequences due to their connection within the organisation and with their political cronies. In the public service, the middle management are mostly the individuals that are found guilty of sever malpractice and unethical conduct.

Nkyabonaki[49] explored the level of awareness of codes of ethics in the public service, contribution of the codes to deal with corruption and, ethics promotion and the level of incentives. There was no positive relationship on all the dimensions that were investigated. Evidence in the study reveals that the employees are not familiar with the contents of the codes of ethics, which renders the level of awareness inefficient. The implementation of the code of ethics did not yield positive a result because of the existence of behaviour that is corrupt induces the codes of ethics to be ineffective. On the level of incentive dimension, it was not found that there is a positive relationship. Underpayment demotivates public servants in the execution of their duties and responsibilities to serve in a manner that is diligent and impartial, and therefore codes of ethics are not adhered to as they should be and this is a problem in the African context[50].

Codes of Practice

The study states that ethics is about what is right or wrong, what is considered acceptable and not acceptable and the connection with the peoples value systems. Codes of practice outline the level between right and wrong in the public sector for the employees. This is the basis for the level of professionalism required for the public sector and promotion of principles of good governance and efficiency. Codes of practice will be rendered useless if there is lack of internal mechanisms that will support and promote the code. Leaders in the organisation needs to be role models and lead by example as this will likely promote positive behaviour by employees as they emulate what leaders do.

The public sector is divided into two levels, that is, the political and administrative level, where policy formulation and core decisions are taken; and then there is the implementation of policies and decisions respectively. These levels pose a challenge when synergy does not exist in terms of codes of practice, as in some cases, the political level will insist on activities that are not in line with the requirements of the codes of practice, however, the employee is instructed to carry out activities. Responsibility, transparency, non-existence of conflict of interest and efficiency are some of the virtues Nkyabonaki[51] believes ethics must be based on. The problem occurs when employees has conflict between private and professional work ethics or the culture of the organisation. Each individual needs to be held accountable for every action that is taken by them in the process

[49]Nkyabonaki (2019)
[50]Nicolaides (2014).
[51]Nkyabonaki (2019)

of performing work activities. Nkyabonaki[52] just like other researchers stresses the point of enforcement and an appropriate sanction for violators. It is believed that the political will for adherence to codes of practice and commitment thereof could be able to enhance compliance, through training and bureaucratic ethics.

Dodek's article[53] explored the future of ethics in the public sector. The study suggests that there are many challenges that are faced by accountability or ethics officers. What was found is that the accountability officers require strengthening due to political accountability failure. This means that individuals that exercise power through a political process should be held accountable for their actions. The ineffectiveness of legislature to discipline their members gave rise to accountability offices. The development of a framework is important, as it will provide proper guidance, consistency and fairness in matters relating to ethics, rules and regulations[54]. Accountability officers are required to have a dual role in performing advisory and enforcement functions instead of a mere unitary model. This will ensure effective and objective execution of functions. The study suggests that to improve ethical behaviour the toolkit used needs to include various levels. In dealing with ethics contravention, different and continuous mechanism needs to be developed to address the ethics regime. Sanctions for non-compliance need to be strengthened to deter political level and administration level from conducting unethical behaviour such as escalating penalties for those who continually offend and complex contraventions steep/serious penalties must be instituted. The system for accountability officers in the public sector needs overhaul and turn it into an active system and deal with promotion of ethical behaviour and not merely with deterring and punishing ethical misconduct.

According to Nicolaides[55], South Africa's basis for promotion of ethical conduct is prescribed in the Constitution. In 1997 the Public Service Commission commenced its role to promote a code of conduct. This was meant for national, provincial and municipalities public servants. All public servants are thus required to place their public interest ahead of their own and to act and behave in an ethical manner while executing their responsibilities. An organisational climate that is ethical is influenced by leadership that has a strong moral system in place. It is stated that South Africa instituted a process that will drive a culture that is ethically strong in order to allow the reduction of unethical conduct and eliminate the perception that the public service is unable to provide a moral and competent government. When a leader is a role model and has a good moral compass, people that are under his or her leadership will tend to follow suit[56].

There were various pieces of legislation that were implemented to promote values of accountability and transparency. Ethical frameworks also need to be established that will encompass policies, procedures and internal controls that are appropriate[57]. All public servants should be provided with training which will

[52]Nkyabonaki (2019)
[53]Dodek (2018).
[54]Dodek (2018).
[55]Nicolaides (2016).
[56]Nicolaides (2016).
[57]Nicolaides (2016).

impart information and the understanding of ethical issues in the organisation and how to they should be dealt with[58]. Public servants activities whether ethical or unethical have an impact on the country's business environment and public support for local initiatives[59]. The Public Service needs to invest in ethics education and governance for future generations to install the concept of doing what is right by providing knowledge on relevant ethical matters. The office Auditor General (AG) in its reports for 2010 to 2013 considered corruption to be a two way process that comprises both public and the private sector role-players, who together engage in illegitimate and unethical actions that reduce South Africa's economic prospects and break down the public service. Society then also requires greater education on the issue of doing what is right.

Wright, Hassan & Park[60] argue that ethical climate must be driven from the top management, with implementation of rewards system for ethical behaviour, and clear decision-making processes including a dimension of ethical value. Appropriate internal structures thus need to be implemented to oversee development of codes and their implementation, monitoring, enforcement, training provisions, regular educational and awareness on ethical matters[61]. For transgressions of any unethical conduct, there should be consequences for all involved. For an institution to succeed in its ethical journey, it needs an ethical culture that is strong and fully supported strongly by the leaders in the institution.

The Need for Effective Employee Induction and Training

Sebola[62] investigated ethical problems in the public service and training that is provided to students who are studying public administration. The study showed that the training that is provided to the students does not prepare the student adequately for the realities within the public service. Furthermore, the study suggests that politicians in public administration need to be made to respect rule of law and they must be held accountable for any unethical behaviour. The duty of politicians and public servants is to serve the interests of the people. Politicians and senior managers' are mostly implicated in not adhering to ethical codes, although these are the people who implement mechanisms to deal with unethical behaviour[63]. The constitutional principle requires that standards of professionalism and ethics be maintained and promoted at all times for operations in all government institutions and thus whatever is done must be done on ethical and moral grounds and this includes all municipalities and public entities. There are many laws that have been put in place, however, unethical behaviour still persists[64]. Despite a National Anti-Corruption hotline being created for

[58]Mafunisa (2007).
[59]Nicolaides (2016).
[60]Wright, Hassan & Park (2016).
[61]Sebola (2018) and Sayeed (2016).
[62]Sebola (2018).
[63]Sebola (2018).
[64]Mle & Maclean, 2011; Manyaka & Sebola (2013).

whistleblowers as a means to increase access to report wrong doing corruption in the South African public sector remains a foremost challenge[65].

Nicolaides and Duho[66] indicated that training is a solution to ethical problems, although, it seems that training has already been undertaken. There are positive results in inducing ethical behaviour[67] such as implementing strong anti-corruption capabilities in all public service departments and more effective use of the Prevention and Combating of Corrupt Activities Act, Act No. 12 of 2004.

The current President of South Africa, Cyril Ramaphosa, has undertaken to take action against corruption and has referred to the period under former president Jacob Zuma as "the lost decade", and a period marred by corruption allegations, nepotism, and 'state capture'[68]. The president on Monday stated on 20 January that "We are committed to end the practice of poorly qualified individuals being parachuted into positions of authority through political patronage. There should be consequences for all those in the public service who do not do their work"[69]. The proof of the pudding is in the eating thereof.

Perhaps what are needed are mechanisms and measures to have more effective training, and awareness workshops on an on-going basis so that gaps that still exists can be identified and mitigated.

The question is if the Service Commission has been mandated to ensure that professionalism and ethics of high standards are maintained and promoted by means of codes of ethics and guidelines, and through conducting of ethical workshops and training for both the national and provincial public servants. Is there recourse by the Service Commission for those public servants who have been implicated in an unethical conduct? This fact is not mentioned in the study. Sebola[70] states that the Service Commission role was that of a recommendatory function. The role of the Commission should be made that of an enforceable one to be able to deal with compliance of ethics in a more effective way. There are many politicians that have been implicated in unethical behaviour as well as managers. It is however mainly politicians who seems to be operating outside of the law in the process of implementing principles of public administration.

Ethical practices are important and standards have to be developed and implemented so that there is a guideline that gives direction to an organisation, its leaders and employees. There are similar commonalities and themes in all the literature that was reviewed. All the dimensions: ethical leadership, willingness of the employees to report ethical problems, organisational commitment and absenteeism of public sector employees; an overview and the analysis of practical problems that are encountered when codes of ethics are developed and implemented; further dimensions were explored. Questions included (1) what are public ethics and where do they come from? (2) What are the central ethical issues facing public administrators? And (3) Are there practical tools and guidelines to

[65]Manyaka & Sebola (2013).
[66]Nicolaides & Duho (2019).
[67]Nicolaides (2014), Nicolaides (2016) and Nicolaides (2017).
[68]Businesstech (January 2020).
[69]Businesstech (January 2020).
[70]Sebola (2018).

assist public servants to be both ethical and effective public managers, such as the installation of unethical conduct defeat devices or the institutionalisation of ethical principles to overcome ethical dilemmas in the Public Sector; Does the public service ethic encourage ethical behaviour, public service motivation, ethical leadership and the willingness to report ethical problems? Is leadership in the public sector showing good awareness of codes of ethics and their value in the public service, and does the contribution of the codes help deal with corruption and the promotion of ethics? Are incentives dealt with? The future of ethics in the public sector is very important and has a huge influence on how a nation is viewed. . An organisation needs structures to support an ethical climate. The implementation of law or codes alone is not enough to address unethical behaviour. This need to be reinforced by attending courses on ethical conduct as training has been found to stimulate moral behaviour in employees[71].

It is the responsibility of public employees to make sound moral judgements and demonstrate sound personal value in terms of the type of activities that they will perform. It is not easy to be a public administrator and at times personal values might be compromised due to the pressure of the environment. This is often caused by the threat of retaliation by unscrupulous parties. Employees with strong personal values face the prospect of being treated in an unfair manner by corrupt individuals with whom they work.. What is also of importance is to implement guidelines for consequences for those who contravene ethical standards or codes[72]. An organisation has to implement or appoint ethical agents to be the drivers of ethics initiatives and deal with issues of education and awareness. Leadership that is of an ethical nature has a positive impact on the ethical climate and therefore leaders must conduct themselves in a way that is exemplary and will encourage ethical behaviour and enhance desired ethical compliance amongst all employees[73].

Organisations are obligated to maintain the work environment conducive for personnel to report any illegal activities without being threatened or feel victimised by senior management or any superior. They also have an obligation to keep the environment safe in order to protect the community and their reputation from being tainted on media. Therefore, it is vital for the organisation to have systems in place that adhere to laws, regulations, standards, polices etc. that are effective in ensuring that all employees are aware of what is expected and the steps to take in accordance with anticorruption notions. Organisations must develop strategies to decrease the risk of illegal activities that might affect the business and environment by building a culture of ethical leadership, encouraging reliability and providing good business ethics due to the fact that ethical leadership promotes openness and safe communication. Ethical leadership eliminates the chances that an ethical dilemma that may occur which often leads to a manager to facing very difficult challenges that involve possible loss or gain or undeserved benefit which must be avoided in a business seeking to keep its reputation intact.

[71]Sayeed (2016).
[72]Krisnajaya (2018).
[73]Krisnajaya (2018).

Strategies to consider in efforts to Eliminate Unethical Conduct

There are strategies that are considered to be effective in improving ethics in an organisation that is under top management (moral management): board of directors, ethics programs, officer's realistic objectives, effective communication, training in ethics, corporate transparency, reporting mechanisms, and discipline of unethical conduct and codes of conducts.

a. Codes of conduct

It is arguable that a Code of Ethics is the most important document in the organisation. It forms an integral part of the ethics and compliance program[74]. Top management has to obtain the buy-in from all to make sure that the standards pertaining to behaviour are established and that the standards are communicated to all employees in the organisation and that this includes all managers. The purpose of the code is to provide direction as well as the meaning as to what exactly is meant by ethical business conduct.

Ethical behaviour may be influenced by the codes of conduct through metaphors that are viewed by the employees in the organisation or they may even be perceived as a rule book, signpost, mirror, magnifying glass, shield, smoke detector, fire alarm or even a club that employees belong to.

b. Organisational culture

Naidoo[75] maintains that the culture of the organisation involves values that are shared, and also the beliefs, behaviours and the way in which things are done. For an organisation to improve its ethical culture, the strategies thereof must come from all the levels of management within the organisation matrix[76]. The success and sustainability of business ethics is dependent on the support from top management including the board of directors and all employees must be involved[77].

c. Reporting mechanisms

Hassan, Wright and Yukl[78] suggest that proper mechanisms should be implemented for employees to able to know what to do should they witness unethical behaviour taking place. Reporting on such behaviour is dependent on those mechanisms such as support from the leaders and hotlines that may be available[79]. However, the organisation has to properly investigate the accusations

[74]Nicolaides (2016).
[75]Naidoo (2016).
[76]Nicolaides & Duho (2019).
[77]Mansouri (2016).
[78]Hassan, Wright & Yukl (2014)
[79]Wright, Hassan & Park (2016).

first in order to establish the truth before commencing on the process of taking action against the wrongdoer. Anonymity is important when it comes to reporting behaviours that are not acceptable because the person reporting will not be afraid of being victimised, as their identity will not be known.

d. Training in ethics

Hassan, Wright and Yukl[80] posit training goals for ethics must include learning about basics for business ethics, solving problems in ethics, ascertaining what causes unethical behaviour, what are common ethical managerial issues, how to report unethical behaviour and what are the risks of reporting, the development of the ethics code and how an ethical audit may be conducted within the organisation[81]. It is recommended that for ethics training to be effective, trainees should be exposed to a programme that has a lengthy duration to realise the improvements in the employee's moral development. All members of the organisation should be subjected to on-going training from the Minister in the public service or the CEO in the private sector, all the way down to the lower level so that the whole organisation is on the same wavelength on ethical norms and standards.

e. Ethics programs

The ethics programs invariably has features such as ethics conduct, training of employees on ethics in a working environment, ways in which employees are able to receive information or even advice on ethical standards, different ways of reporting misconduct in an anonymous manner, disciplinary processes for those employees that do not follow ethical standards that are set and having ethical conduct as part of the employees performance measurement[82].

f. Ethics officers

Dodek[83] asserts that ethics officers are tasked with the responsibility of overseeing the ethics programs in the organisation and implementing ethics initiatives. They also conduct risk and needs assessment activities. Furthermore they are to make sure that the organisation complies with all the regulatory requirements. On the issue of compliance the ethical officers will assess compliance in relation to the employee's ethical performance and the standards on ethics implemented by the organisation.

[80]Hassan, Wright & Yukl (2014).
[81]Nicolaides (2016).
[82]Krisnajava (2018).
[83]Dodek (2018).

g. Effective communication

Wright, Hassan and Park[84] argue that management must ensure that there is communication all the time on all ethical issues. The message that is delivered to employees must not be offensive and care should be taken when a decision is made on the kind of information that must be communicated. The information should also be accurate, true and faithfully detailed. The manager delivering the message is required to be fair and not be spiteful or cruel, and biased with, for example, communication .

h. Setting of realistic objectives

Objectives that are set by the manager should be realistic and not create a situation where the employee might unawares be led to engage in an unethical behaviour[85]. If the expectations are not realistic, that might cause employees to forget about ethical standards which they have to uphold. It is therefore important for managers to be sensitive in the way objectives are set so as to not make employees take short cuts while executing their duties. Ethical norms have to be established and communicated effectively to the entire organisation.

i. Discipline of unethical conduct

Management needs to take disciplinary action such as misconduct against all members (top management or lower level) who violate ethical norms and standards[86]. Before any disciplinary action can be taken, management must ensure that there has been effective communication on ethical standards of the organisation[87]. Failure to take action on those that do not abide by the set standards will make other employees not believe in the ethical climate and not take the standards that have been set and the rules seriously. Taking action will send a message to all members that the organisation will not tolerate anyone engaging in an unethical behaviour[88]. Establishing an ethical culture is non-negotiable and when investigating corruption, the public service must be able to take effective action at levels matching the corrupt cation perpetrated[89]. All resources stolen must be recovered and would be perpetrators must be clear in their minds that crime does not pay at all.

[84]Wright, Hassan & Park (2016).
[85]Mansouri (2016).
[86]Cohen & Eimicke (1995).
[87]Yeboah-Assiamah, Asamoah, Bawole & Buabeng (2015).
[88]Nicolaides (2016).
[89]Heath (2000).

Conclusion

Ethical conduct is very important for all organisations as it allows them to keep their core values and gives guidance in terms of the relationship between them and their stakeholders as well as other relevant role-players. The public service should have a set of non-negotiable issues and there must be zero tolerance to corruption at the highest political level. All leaders in government need to speak out and act out against corruption. Ethical conduct invariably needs to be binding on all employees within the service as well as with all service providers, agents or any other person linked to the public service whether they are contractors or have any other stake.

It is evident that in institutionalisation of ethics in an organisation requires both implicit and explicit forms. Explicit institutionalisation is a formalisation of clear ethical behaviour which includes policy manuals, codes of ethics, an ethics committee and ethical training materials. Implicit institutionalisation is an indirect expression of ethical behaviour. It involves ethical leadership, evaluation systems, an ethical climate and ethical incentive systems. These two forms are vital and cannot be implemented in isolation in order to realise the desired results. Would be perpetrators of corrupt acts must be made aware of nature of the very severe danger they pose to society through their intended corrupt actions. Corruption is a malady eroding the public service and society and an urgent and ethical communal approach considering the communitarian notion of Ubuntu is required to address the issue. In addition a strong and consistent political will is needed to combating corruption. Ethical leaders need to have a strong ethical dimension since they are also a major role modelling group and have an impact on the public service and all the employees that are part of it. When leaders are modelling a good ethical behaviour, this will likely cascade down to the entire organisation leading to a sustainable society.

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