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Complexities of Contemporary Legal Systems

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Keynote Speaker

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Abstract
Following the explanatory coordinates proposed by system theorists like Niklas Luhmann, some of the challenges faced by the legal system and contemporary justice will be addressed within the context of an increasing complexity of the social. In particular, this paper will attend the irritations derived from the phenomena of world acceleration, the current economic crisis, irritations that come from the media system, the relations between subject and technology and those derived from the course of the equality versus equity debate. The objective is to aim at a more complex account of the operation of the legal system in contemporary societies and the identification of the more pressing social/juridical dilemmas.

I. Introduction

As stated by Niklas Luhmann, Modernity is characterized by a growing differentiation and by the emergence of functionally differentiated systems. That means that there are increasingly specialized social subsystems (Luhmann, 1996). My intention in this paper is to weigh in the challenges confronted by the legal system in the context of a growing complexity of the social. This complexity reflects four main predicaments, as follows: 1) the phenomenon of world acceleration, 2) the intertwined relationship among sciences, the individual, and the progressive technology, 3) the centrality of the media systems and 4) the contemporary economic, political and social crises.

It is important to note that the more complex a system, the more difficult its conscious management (Grün, 2010: 31). Everything is happening at the same time and the individual, in its singularity, cannot account for all the progress of the social. Hence, the reflections presented here rest in a particular mode of observation and depend on the observations of this audience.

Niklas Luhman, among other theorists, applied a second-generation systems' theory for the reflection on the human and the social. This theorizing field provides us with some conceptual tools for analyzing the relationship between the legal system and the social system as a whole. Concepts such as communication, irritation, re-entry, structural coupling, and decoupling are among the most relevant (Luhmann, 1996). According to Luhman, Modernity, in its initial stage, expressed a less problematic structural coupling between the legal and the social system as a whole compared to contemporaneity: “Under the current conditions of mass print and TV …. changes in orientation happen much faster than in a time when the adjustment of law to the conditions of capitalist economy was involved” (Luhmann, 2004:119)

At present, we could say that the legal system grows in complexity due to an increasing internal and external differentiation. Within the legal system, new distinctions arise. For example, we can observe distinctions between 1) text and interpretation, 2) text and context, 3) the verbal or literal meaning or the letter of the law and the intent, 4) an increasing and substantial bodies of legislation, and 5) the distinction of particular portions of the law (public, private, and criminal, etc.), among others. The legal system also confronts the complexity of the economic, political, moral systems, as well as the social system as a whole. Complexity produced many and intricate irritations to the legal system. From the perspective of the Systems' theory, these multiple irritations come both from other subsystems and the social system as a whole. They can only be recognized by the legal system if these irritations pass through the system in the form of a legal
communication. In this sense, communication from the systems theory perspective appears as a complex phenomenon and not as a mere relationship of "input and output."

At present, the relationship system/environment is a more complex one on account of the global society. In the words of Jenny Martinez, there are "more than fifty international courts, tribunals, and quasi-judicial bodies --most of which has been established in the last 20 years ...(Martinez, 2003:430) Also, and at present, Martinez continues "the increasing flow across borders of so many things-good, services, people, pollutants, culture, and information has increased the interdependence of nations" (Martínez, 2003: 437). In this sense, contemporary legal system constitutes itself in an evolving complex and self-organizing system (2003:444). This complexity requires the production of more distinctions at different levels: legal system/society (national and subsystems); national legal system/global society; global legal system/global society, and all of this in the context of an increasingly accelerated world.

II. World Acceleration

World acceleration is a phenomenon that transforms the social at large dimensions. Consider for example categories such as children and youth. For Jacques Baudrillard (1997) in his essay “The black continent of childhood”, the child has disappeared because the social conditions that led to the phenomenon of childhood have disappeared as well. Ulf Bothius (1995) poses that the transit from agricultural to industrial society’s causes that youth as a category underwent major transformations. This category was previously linked to stages more or less fixed in the trajectory of personal and social growth and then becomes an undetermined phenomenon. From the fixed to the fluid categories, the systems confronted an increasing difficulty in adjusting to this growing systemic trend. Luhmann gives the example that the laws are changing all the time to the point that, at present, a law is valid "until further notice." Therefore, there is a threat to the consistency in the application of the law or what has been recognized as a central requirement of the system’s operation. This trend exacerbates in those cases where political party systems change legislation in every election. It is worth noting that the consistency of laws is also affected by the complexity of the social itself: "The more multifaceted are the facts of life that appear under the gaze of the legal system, the more difficult it becomes to maintain consistency." (Luhmann, 2004:61)

At this moment, the predominance of the executive power in democracies expressed a governance tendency through the executive orders. Some of these executive orders are not necessarily aligned with the established law. This governance trends in democracies represent an attempt of colonization of the law, an irritation to its autopoietic operations. For example, the executive order of President Donald Trump -- that established a ban for 90 days to individuals from seven mainly Islamic countries-- is emblematic of this trend. Meanwhile, the decision of the Court of Appeals, denying the legitimacy of that order, illustrates both the response of a legal system that, as a system, do not give way to that irritation from the political. Also, it demonstrates the ways in which the independence of judges preserves the autonomy of the legal system. (State of Washington vs. Trump, 2017) and (Luhmann, 2004:95)

In turn, the phenomenon of world acceleration and its effect on social complexity also provokes that the legal system produces more legislation ever in less time as a way of creating regulations in line with this trend. The paradoxical effect is that the intent to regulate have the opposing effect, the system produces an excessive number of laws, norms, and procedures that the population perceived as an attempt to colonize the entire life world.

III. The trajectory of the relations between science and technology

The trajectory of the relations between science and technology has led to the emergence of novel and unique problems that do not have any juridical shelter. To name a few, we have 1) the reproductive technologies that created new conflicts in the definition of motherhoods and fatherhoods, and 2) the phenomenon of the
Internet and cyberspace as a disputed field over the scope and legitimacy or otherwise of the displacement of the law to that area (Hughes, 2003). Cyber-crimes provoke new dilemmas for the exercise of control and surveillance. The emergence of the post-biological world places us in front of the question about how we relate to our products (the subject of cloning, the subject of the cybernetics). Within the enormous range of sensitive issues and disputes, I would like to focus on the ways in which, as stated by Hughes (2003), the largest area of conciliation with respect to the phenomenon of the internet is linked to 1) the constitutional right to free expression, 2) the matter of greatest tension being, from the referent of the global society, and 3) the conflicts among online jurisdictions. About cyber-crimes, I put the focus on the ubiquity of surveillance along with the ways in which, from the point of view of the states, these become the main problem of national security. Regarding the post-biological world, I privileged the ways in which this phenomenon leads to the urgency to produce new understandings of the legal person. All of the above appears as new opportunities for what constitutes a trend in the legal system as a whole: the tendency of the legislation to put more fields under its jurisdiction and never give up to an area already occupied by the law itself.

At another level of reflection, and for a long time, many of the court decisions rested on what is represented the present state of science knowledge (Poovey, 1992: 245). At this moment, science has become a highly complex and differentiated system. In the words of Luhmann, the non-unitary character of science has already been set in motion. Different parties come to the courts with their studies and their evidence, therefore, aiming at competing with equal legitimacy to prevail. While the legal system rests on the possibility of producing the juridical truth, this has been a very complicated task in the context where two entirely opposing arguments can be certain (Mires, 1996). We can quote William Rash (2002:33) who states that there is not an elephant to which six people look in a different manner; the reality is that there are six elephants.

IV The media system

Mass media is a system that provokes another set of irritations. For years now, Jean Baudrillard (1996) stated that we are confronted today with the world and its parallel reflection or its double with the paradox that we have decided to stay with its double. We do not know what to do with that embarrassing residue named as reality. At present, as it is raised by Shoshana Felman (2002), the legal cases are consumed by large audiences as any other cultural product. As the media discussed legal cases with large audiences, justice has other meanings to the point that court decisions are contested by a diversity of sectors particularly when these decisions do not coincide with their sense of what is justice. To the decoupling among justice imbricated trajectory with the legal, and the social system, we have now added the ways in which justice acquires a polysemous dimension.

In Puerto Rico, for example, the discursive phrase "I do not believe in justice" set forth by large segments of the population is illustrative of this trend. This phrase may also refer to a process of de-legitimization of the law as Yves Michaud posit in 1980. For Michaud, this entails the nakedness of the law as the recognition that law is violence among many others, the empty form of law, the classist and discriminatory treatment. At the same time, the phrase "I do not believe in justice" now means that it is contrary to my opinion or the public opinion produced by the media system. The predicament with the media systems and the law is that we do not know if legal decisions are an expression of the blind operation of the law or a triumph over public opinion that is in open conflict with the state of law. Either the legal system cannot operate without evidence, or it cannot get out of itself.

In all parts of the world, the trend is to analyze trials, especially criminal trials, as a mass media phenomenon. The literature and analysis of mass media trials show the challenges that pose a “not guilty” acquittal. There is a popular notion that "not guilty," in media trials, reflects the failure of the criminal justice system when the media is against the defendant, and the defendant is already guilty in the eyes of
the media and the audience. In this sense, and as we all know, the right to information, the right to a fair trial, and the right to privacy collide in open conflict with the preponderance of the media phenomenon.

At the same time, and this is the paradox, it is the law itself the device that society needs to change public opinion into a legal form (Luhmann, 2004:119) For Luhmann, justice appears as a formula for the contingency of the system. The world becomes increasingly contingent, and this same contingency is what account for the tendency of justice to be seen as a permanently open problematic, or, as Jacques Derrida states, as a non-deconstructive imaginary.

V. Economic and social crises

At this moment, the legal system derives the most significant irritations from the political arena, particularly from efforts to deepen the democracy. As stated by Fernando Savater (2003), the most neuralgic problem of modern democracies is the rights of the difference and the rights of the minorities. That is, the need to extend the freedoms and privileges enjoy by significant segments of world population to those who enjoy them in its diminished modalities. The identity politics is an example of all sorts of struggles that take a form of right claims, especially the rights to recognition. I agree with Zygmunt Bauman (2001) with the fact that this trajectory of struggles has resulted in the entrenchment of the combatants and the absolutization of the differences. This absolutization is an imaginary that rested in that there is an absolute other and there is an absolute “I.” Therefore, canceling the reflection on the game of the similarities and the differences is the deep appreciation that the other is a constitutive part of the “I.” From the legal system, this trajectory of struggles has led to an entire constellation of irritations. The legal system has responded with increasingly differentiated legislation to address specific right claims and with intense debates about the implications of legislating by identities. Also, there is a debate about if it is possible or desirable to legislate all kinds of differences and about the tensions between equality and equity as important signifiers at the time of legally meeting these demands. To the above complexities, we would have to add the analysis of contemporary struggles, which combine old and new cultural issues. For example, present struggles refer to cultures within so-called national culture, claims of sovereignty within that of the nations, right to the earth, to name a few. They are present in the demands of rights of the Native American Indian nations, in the United States, against the construction of gas pipelines in their sacred land. As it was raised by one of the leading members of the Yakama and Colville nations of the northwestern United States: “Trump seems to have forgotten that the Native Americans we are sovereign peoples and our laws are well above those of its Government” … Other said: "When Trump has authorized the construction of the pipelines, which came to say was that doesn't care about our rights, our land, and our water." (EFE, 2017)

As we know, the concept of equality includes two aspects: formal equality before the law and real equality, which provides for unequal treatment of those who are unequal:

In theory, gender equity and equality are two principles are closely related, but different. Equity introduces an ethical principle of justice in equality. Equity requires us to consider the objectives that we need to move forward to a more just society. A society that equality of absolute way will be an unjust society, as it does not take into account the differences between individuals and groups.

(“especialistaenigualdad.blogspot”, 2017)

It is important to note that, as a tendency, there is no semantics of equity within the legal system. Rather, most of the demands you can think of about rights related to the issue of equity are invoked under other rights such as the right to privacy/intimacy that is to the equality of rights or the subjective rights, considered by Luhmann as the most important development in the modern legal system. However, the demands on equity are still knocking at the door of the legal system. It is precisely the recognition that there are irreducible differences that the discourse of equal rights cannot solve. Because of this irresolution, there is
a motion in search of a legal communication capable of apprehending the semantics of the rights of the difference.

Immigrants represent the contemporary icon of the irritations deriving from the political and the attempts to deepening democracy. As we know, this is an issue that touches upon the question as to the legal/policy solvency of the concept of citizenship in a context in which the common denominator of broad segments of the population across the length and breadth of the planet is their status of non-citizens, undocumented refugees. The present legal system grants rights to the people by their citizenship. However, to paraphrase the discussion of Tigar and Levy (1981) on the subject of the Roman law, citizens’ rights do not serve us much in the relation with non-citizens. Note that the inside and outside in this enunciation illustrates the deep relationship between the self and the other “non-citizen.” All of us live at a time where, precisely because of the intensity of the migratory flows, we all have the possibility of settling in another country at any time. The proposal is to replace the notion of citizenship by that of “inhabitant” (of the city). The discursive phrase “right to the city” and its semantics show the citizen/non-citizen struggle to find a place in the legal system. For Vicente Ugalde and thinking about this right for Mexico City stated: “What would have to weigh is the chaining of official decisions by which the right to the city could find their way in the legal system in force.” According to Ugalde, at present, the “right to the city” is not a legal concept known as an individual or collective right in the legal system in force in Mexico City. For Ugalde, this should not necessarily be a problematic element of the legal system in force since its apprehension as a right could be advanced not only recognition but, through the enforcement and exercise of other rights that are associable (2015)

At another level of analysis, the global economic crisis and the diversity of its local expressions also constitute a significant irritation for the legal system. In the words of many scholars, this crisis has led us to see something that so far might appear to many as a hidden matter: the violence of the economy or as it was pointed out by the late Zygmunt Bauman (2015), an economy that literally kills. The order of the day has been, and still is, the creation and modification of legislation to address the crisis, to accommodate to the crisis, and reorganize the economy regarding the crisis. For better and for worse, many of these laws result in an accommodation/response to the requirements of big capitals. Paradoxically, they are an expression of the lack of protection under the law and the condemnation of broad segments of the population as their quality of life are naked, as life without juridical shelter (Giorgio Agamben, 1995).

In Puerto Rico, from 2005 to 2014, there has been created a total of 19 laws of economic adjustments to the local debt (now monitored by a Federal Supervisory Board). These laws confirm the dogma of "less government, less State, less spending, less work, less wages, less social rights, expropriation and more … insecurity, more inequality, more poverty" (Muniz, 2015). In the words of Joseph E.Stiglitz, the Nobel Memorial Prize in Economic Sciences in 2001, on the situation of Puerto Rico:

"The Board actually predicted that its proposals would turn Puerto Rico’s recession into a depression of the magnitude seldom seen anywhere: a 16.2% decline in the GNP in the next fiscal year (a to further decline the year after) which is comparable to the experience of countries undergoing civil wars, or that of crisis-ridden Venezuela."

(Stiglitz and Guzmán, 2017)

In this sense, the movement unleashed by the Foundation Baltazar Garzon is a legal and political response to this economy that kills. Paradoxically, it expresses the ambivalence of a law that, in its systemic operation, kills and redeems at the same time. Foundation Baltazar Garzón (in favor of Human Rights and Universal Jurisdiction) promotes the regulation of international crimes: 1) crimes against the environment and 2) crimes against populations, especially, when financial speculation put at risk the lives of millions of people. As stated by Garzón, "What would happen if the oil spill of a multinational company with long-term consequences on the environment could be equated to genocide? Or if you may be able to claim
internationally the responsibility of banks receiving capital escaping from a country on the verge of bankruptcy?" (2015) It is important not to underestimate the political impact of a movement that, for the first time, weigh in to make the violence of the economy (the economic crimes) as the crime against humanity at the level of the juridical. In this sense, it is as if the legal system is fighting violence within itself.

Besides, Andrea Pitasi (2015) states that the legal system can be central to a global reorganization in which a new reading of the citizenship (not necessarily would have to call it by that name) will promote a cosmopolitan, scientific, democratized knowledge. It could be able to erode the “reptile brain” of humanity still tied to forms of power that threaten the humanity that is being. For Pitasi, this humanity that is being, the reentry of the human to the human, has led to the production of new distinctions (human, posthuman and hyper-human). These distinctions constitute new irritations to a legal system still align with a semantic of the human that refers only to the embodied individual.

VI. Final Comments

As stated by Luhmann, "the social relevance of law is indisputable. However, its integrative function is very much in doubt". That is, the increasing complexity of the social and of the different subsystems has provoked a gradual decoupling of the systems. This decoupling is also related to the most significant development in the modern legal system. That is the subjective/individual rights, which not only account for freedom under the law but freedom from the law, that is, disobedience of law. In this sense, the trajectory of the legal system coincides with its erosion. Perhaps, the semantics of the constitutionalism could become a sort of meta-communication that ties the global operations of the system by promoting the expansion of rights in the direction of the rights of the difference and sustainable development in those places on the planet where this is not yet a reality for broad sectors of populations. The semantics of constitutionalism requires abandoning the paradigm of the disjunction and the embracing of the complexity of maintaining the semantics of constitutionalism as a juridical horizon. Like any other complex system, the legal system could be threatened by all sorts of strange attractors (nations, totalitarian persuasions, the entropic tendencies of different social, political and economic crisis). That is, these tendencies drive the system away from the most powerful force that emerged from conditions of complexity: liberty itself.
References


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Child Soldiers: Who’s Responsibility to Protect?

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Introduction

The paper involves a study of the international norm of ‘The Responsibility to Protect’ (R2P) and the relationship it bears to children in war zones and more particularly to the use of child soldiers in the contemporary world’s many conflicts.¹ One of the many illegal acts to which children fall victim is recruitment by armed forces and armed groups and, with some of the Western world undergoing a dramatic shift in thinking, this group of children becomes even more at risk. As a consequence, it would seem not only appropriate but essential to remind ourselves of the national and international humanitarian law and legal principles that exist for children in conflict that have been fought for not so long ago.

The Responsibility to Protect states that citizens must be protected in cases of human atrocities, war crimes, ethnic cleansing and genocide where states have failed or are unable to do so. Recruiting and using children under the age of 15 as soldiers and wilfully causing great suffering or serious injury to a child's body and health is prohibited under international humanitarian law – treaty and custom – and is defined as a war crime by the International Criminal Court (ICC). While teenagers are frequently targets of recruitment because they have advantages over young children in regard to size, strength, and cognitive ability, there are many exceptions and many armed conflicts exploit even younger children. (Wessels, 2006) Thus, when it comes to children, their conscription or enlistment into armed forces or groups or their use as active participants in hostilities constitutes not only violation of human rights, but also violation of international humanitarian law.

On the one hand, various conventions have been introduced at the international level that provide different kinds of protection for child soldiers depending on age (i.e., age 15 or 18). On the other hand, in spite of these laws and conventions, Dallaire tells us in 2010 that the child soldier “has become the weapon of choice in over thirty conflicts around the world, for governments and non-state actors alike.” (Dallaire, 2010: 2)

And this remains true in contemporary conflicts around the world. In 2010 the greatest geopolitical area where child soldiers were found was Africa (around 100,000 children at that time). They were also in Guinea, the Ivory Coast, the Democratic Republic (DR) of Congo, Chad, Sudan, Somalia, Uganda, Rwanda and Burundi and Asia, Myanmar, Sri Lanka (Tamil Tigers), Middle East: Israel, the Palestinian Territories, Iraq, Latin America and Colombia. (He et al, 2010) These children are regularly encouraged to commit suicide attacks or used as human shields.

The Coalition to Stop the Use of Child Soldiers (now Child Soldiers International) continues to deliver research findings and policy in its efforts to promote the adoption and implementation of international legal standards. In 2016 Child Soldiers International published A Law unto Themselves? Confronting the recruitment of children by Armed Groups which provides a legal analysis of progress made so far in engaging with armed groups about child recruitment and use. The Report informs us that, although progress is being made, greater attention needs to be given to the safe release and reintegration of child soldiers whose numbers remain in the tens of thousands.

This paper argues at the outset that the Responsibility to Protect should be called upon to protect children before, during and after armed conflict. While much of prevention exists in the form of international law,
treaties and covenants, R2P transcends individual human rights laws to remind the international community of its obligation to take action when states are unable or unwilling to do so.

A number of different theoretical approaches can be used to frame the issue of children in armed conflict. Certainly, projects like this one underscore one of the important problems of international relations (IR) theory i.e. the relationship between 'ethics' and 'security' or 'nationalism'. Given the changes since the end of the Cold War in the conception of what constitutes security, internationalists argued that the realist approach no longer provided an adequate framework for foreign relations. Structural realists were generally dismissive of ethical considerations in International Relations (IR). Ethical codes, however, lie behind much of the discourse about children and armed conflict. Thus, a more humanitarian constructivist and multidisciplinary approach is needed to consider the child soldier phenomenon. In the first instance, this approach privileges the individual's security needs over that of the states. Secondly, it focuses on humanitarian norm creating and norm building as a useful way of devising a means of protecting children affected by war.

Preventing the recruitment of children and their participation in hostilities is by far the best way of protecting them. The International Committee of the Red Cross (ICRC), therefore, places a great deal of emphasis on prevention. Ensuring respect for the rights of children is a top priority. Providing a secure environment where children can find ways of being safe, well fed and properly clothed that do not involve carrying a gun is something to which all of us can and must contribute. But it is states that bear the primary responsibility for creating this environment. (Barstad, 2009)

The Paris Principles on the Involvement of Children in Armed Conflict (2007) state that a child soldier can be defined as follows:

“A child associated with an armed force or armed group refers to any person below 18 years of age who is, or has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.”

Human rights law also declares 18 as the minimum legal age for recruitment and use of children in hostilities.

The purpose of this paper is to increase attention toward the fact that the immorality of these perpetrators will not be stopped unless awareness is increased, and robust mandates at the international and national levels continue to be approved and, even more importantly, supported and the political will to accept state responsibility needs to be there on the part of all nations and must not be pushed aside or forgotten.

The paper is divided into three parts: Part I. Recruitment and Retention - A number of factors contribute to the recruitment and retention of child soldiers and these are discussed; Part II The Responsibility to Prevent: The International Law Protecting Child Soldiers; and Part III Transitional Justice and Reintegration which ends the analysis by considering the matter of punishment or reintegration of child soldiers into society after the conflict has ended.

Part I.

Recruitment and Retention

A number of factors contribute to the recruitment and retention of child soldiers.
Civil wars

The current climate of civil war contributes to the phenomenon of child soldiers in this century. Civil wars are often “the product of failed or failing governments that have poor capacity and are cobbled by crime and corruption. The eruption of war worsens this situation, plunging society into a downward spiral of increased poverty and increased inability to meet basic needs”. (Wessels, 2006)

Civil wars are far more common than international wars and are fought between governments and one or more non-state actors. There are large numbers of civilian casualties. In the failed states and war-plagued regions of the globe, young recruits are available to be forced, coerced or seduced into serving at the will of armed groups. (Dallaire, 2010: 2) Children are vulnerable and easy prey to be drawn into the midst of war.

Children and Small Weapons

Most wars today are fought in poor, developing countries with small, lightweight weapons, another contributing factor in the use of child soldiers. In earlier times young children lacked the necessary size and strength to handle larger weapons. Today, however, AS-47 (Kalashnikov) assault rifles can be purchased in Africa for the price of a chicken or goat and can be handled easily by young children. The profusion of light weapons such as rifles, rocket-propelled grenades, light mortars, light machine guns, and land mines has increased the easy availability of small, low-cost weapons and has increased accessibility of use by young children in conflict situations.

In April 2008, the UN Secretary General’s report on small arms and light weapons was presented to the Security Council. The report noted that

small arms facilitate a vast spectrum of human rights violations, including killing and maiming, rape and other forms of sexual violence, enforced disappearance, torture, and forced recruitment or use of children by armed groups or armed forces. More human rights abuses are committed with small arms than with any other weapon. (Machel, 1996)

Voluntary versus Non-voluntary Recruitment

Children both join armed groups ‘voluntarily’ or are forced into them, becoming child soldiers through their abduction or force. The boundaries between choice and coercion, however, are frequently blurred. The causes of soldiering are contextual, vary across individuals, and are embedded in wider systems of exploitation and violence. (Wessels, 2006) Many children who 'choose' to join are desperate and lack options. Young children are not only pliable, they are seen as expendable. Once in, leaving the armed group becomes impossible, (Wessels, 2006: 33) and they are frequently controlled through terror and brutality.

Forced recruitment

Figures are difficult to obtain on abduction since the practice is illegal. In some cases the abduction is organized and in other cases opportunistic. “When mass recruitment is the goal, the method of choice for many commanders is press ganging, a form of group abduction wherein soldiers sweep through market places or streets, rounding up youths like fish in nets, or raid institutions such as orphanages or schools.” (Wessels, 2006: 41)
Internally displaced persons (IDPs) and refugee camps are also favored targets for press ganging. Sometimes local authorities are forced to act as agents and are given a quota to meet. Compulsory recruitment also occurs as well as the abduction of children. (Barstad, 2009)

**Voluntary recruitment**

With armed groups attacking and plundering villages, the security of children is at risk and some children choose to join an armed group as a route to survival. In reality, children’s choices rarely are influenced by only one motive. Adolescents are very impressionable and may be willing to identify with social, religious or nationalistic causes. We can conclude therefore that children join armed forces or non-governmental armed groups for a variety of reasons, including the following: War, Poverty, Security, Access to education, Family and friends, Ideology, and Revenge.

Such motivating factors, of course, raise the question of the use of the term ‘voluntary.’

**The Experience of Child Soldiers**

Children have been thrown into firefights with little training, have been used as mine detectors, and sent unprotected into minefields to reduce the damage to adult troops. Child soldiers are often deprived of the most basic needs, including food and rest. Children are beaten for making mistakes, creating trouble, or trying to run away. Often the children are forced to kill or rape, and are exposed to drugs, violence and sexual offences. (Whitman, 1994) “In Myanmar (Burma) children were ordered to make frontal assaults against highly fortified positions, creating a field of slaughter.” (Wessels, 2006) Commanders also use rewards to sculpt new attitudes and values. For example, children who show exceptional motivation and obedience are often given command posts with privileges and greater access to food or health care. In spite of this, there tends to be an omnipresent fear and threat of death for the children. As well, the torture and violence they see around them increases their fear of what will happen to them. “In many armed groups, crying itself is a punishable offense. Cut off from their family and feeling overwhelmed by their painful situation, some child soldiers commit suicide.” (Wessels, 2006: 63)

**Sexual exploitation**

Child soldiers often experience different forms of sexual abuse and exploitation. And, for them, there is no escape.

Large numbers of children, mostly girls but also boys, are exploited sexually in war zones. Rape is perhaps the most publicized form of sexual exploitation, but more hidden forms of sexual violence are also widespread. (Wessels, 2006: 27)

**Drug use**

Drugs such as amphetamines, which may be mixed with alcohol and other substances, are used by the groups to force children to commit heinous acts which they would be unwilling and unable to perform under normal circumstances. Such drugs can induce recklessness and suspend normal inhibitions by impairing judgment and other cognitive functions.
Moral Values and Psychological Changes

Moral transformations also occur in war and children learn new values. War tends to reverse the views on fighting and killing as undesirable and children often fail to develop “a full sense of the sanctity of human life”. (Wessels, 2006: 44) To survive, children are often forced to commit unspeakable acts that their morals and values would have prohibited in civilian life. (Wessels, 2006: 57). Extremist forms of religion also influence children. Ideology also provides a moral buffer against feelings of guilt and offers a way of dehumanizing the enemy. Child soldiers are taught to devalue human life and to dehumanize themselves. Eventually the horrific is made to seem normal.

Part II.

The Responsibility to Prevent

The International Law Protecting Child Soldiers

Although this paper is intended to make clear that the problem of child soldiers has not been eradicated, it is worthwhile recognizing that progress has been made in the international legal arena and that these laws and conventions should be implemented when we speak of ‘States’ responsibility to protect child soldiers’. Certain authorities are responsible for ensuring that international humanitarian law (IHL) is adopted and obeyed, including international bodies in the case of multinational forces, traditional institutions, clan leaders, armed groups and States. In order for them to be effective, States need to sign the relevant treaties, and adopt and implement the relevant laws governing child recruitment.

PART III

Transitional Justice and Reintegration

Restoring Normalcy

The paper argues, overall, that “Children who participate in conflict must be viewed as victims of institutionalized child abuse who have suffered human rights violations and psychosocial harm.” Jareg (2005) recommends a number of methods of restoring normalcy, including

restoring family relationships, community participation, health services including mental health, organized learning opportunities, vocational or income-generating training and recreational activities, modified according to the different cultural, social and political contexts one is working in. (Jareg, 2005 in Kimmel, : 759)

Not all child soldiers are wanted by families or society, however, which increases the possibility that they will become prime targets for re-enrolment.

At the stage of transitional justice, there is often a thin line between child soldiers being judged as either victims or perpetrators. Siegel defines transitional justice as the study of the choices made and the quality of justice rendered when states are replacing authoritarian regimes by democratic state institutions. (Siegel, 1998: 431) While the protectionist view of children as passive victims who are vulnerable tends to be the most common, and one that I feel is closest to the reality, there are some proponents who see children as autonomous actors, bearing criminal responsibility for heinous crimes by having killed, maimed or tortured their victims. And the minimum age of criminal responsibility (MACR) remains highly uncertain under international children’s rights law. Article 40 of the CRC obliges states to establish a MACR but does not
specify at what age and the MACR varies greatly across countries. Before the ICC, prosecution below the age of eighteen was excluded through Art. 26 of the Rome Statute. (Derluyn et al 2015)

**Protecting the rights of child soldier refugees and those internally displaced**

Children may seek access to refugee states pursuant to Article 1(F) (a) of the Refugee Convention if they have been used as child soldiers and commit international crimes. At the same time, many countries are opposing the number of refugees seeking asylum. As a result, regulations are being tightened in many countries and it becomes even more difficult for refugees to benefit from the *1951 Convention Relating to the Status of Refugees* (Refugee Convention). The focus of this is Articles 1(A) (2) and 1 (F) (a) of the Refugee Convention (also referred to the inclusion clause) which outlines the criteria that an individual must meet to be recognized as a refugee. (Maystre, 2014: 976)

**Conclusion**

In conclusion, I have presented the case for the protection of some of the most vulnerable persons in conflict; i.e., child soldiers. What the study shows is that children may or may not become child soldiers of their own free will. In fact, the evidence suggests that children are most often forced or abducted into violent groups seeking their help. And, even if they are considered to be joining on a voluntary basis, the question of what is considered ‘voluntary’ is consistently under debate. Children in combat situations often find themselves without family, without food or shelter, without safety or security or education and see the fighters as a form of security and hope. Once in, they are often subject to numerous forms of abuse and exploitation including beatings, drugs, and sexual assault and are forced to commit heinous crimes for fear of their own lives.

The study has addressed the matter of the international community’s responsibility to prevent this from happening, to protect vulnerable children and to consider what happens to them when the fighting stops. The international community has worked hard to develop norms that cover all these areas and those norms have been referred to in the paper. The study also looks further into the predicament of the child soldier as refugee and any existing regulations or laws that have been developed to help the child soldier integrate into a new country when returning to their own family and society is not an option. I remind the reader of the relevant national and international humanitarian laws in a world where the immigration and refugee crisis appears to be hardening prospects of entry. And, I write to impress upon the reader the situation for children at risk and the efforts the international community has made to alleviate or prevent their suffering and to reintegrate them into society as contributing members with a legitimate, and safe, status. I argue that they must not be forgotten in the rush to put national security ahead of humanitarian principles or concerns.

**BIBLIOGRAPHY**


Coalition to Stop the Use of Child Soldiers (2016) *A Law Unto Themselves? Confronting the recruitment of children by Armed Groups*

Dallaire, Romeo (2010) *They fight like soldiers They die like Children* Vintage Canada


UN Secretary General’s Report on Small Arms https://childrenandarmedconflict.un.org/publications/MachelStudy-10YearStrategicReview_en.pdf


Brazilian Attorney Fee-Shifting in Civil Procedure: A Unique and Controversial Way

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Abstract

In Brazil, under the former Code of Civil Procedure (CPC)/1973, there was provision for the conviction of the unsuccessful party in payment of “attorney's fees of loss” to the winning party as a way of reimbursing the expenses incurred by the latter by the hiring of its lawyer. However, the new CPC (2015) determined the change of its ownership to the lawyer of the winning party, and no longer to the party itself, thus losing its indemnity nature. As for the justification for such a change, the doctrine finds difficulties and is divergent; defending to treat itself from punishment, penalty; compensatory penalty; reward or premium, up to, for some critics of the change, rather as a corporate tax. Furthermore, Brazil's Bar Association (BBA) states that lawyers are obliged to respect the minimum rates when charging fees to their clients in each procedure, and the current jurisprudential position is in the sense that such values are not subject to liability of refund. This gives rise to two premises: (i) the lawyer of the winning party will always receive double payment (that which is charged to the client and that which the losing party must pay in the title of "attorney's fees of loss"); (ii) in order for its right to be recognized in court, the winning party will inevitably suffer material damages about the amounts paid to its lawyer.

Keywords: Attorney fees; Shifting; Reimbursement.

Introduction

In studies of comparative law, as to attorney fee shifting between the litigant parties in a civil proceeding, legal systems are normally identified by two rules considered as ideal-types on the matter: "the American Rule" and "the English Rule," also known, respectively, as the rule of non-indemnity and indemnity (Hodges, Tulibacka & Vogenauer, 2009; Reimman, 2012).

According to the American Rule (rule of non-indemnity), each party remains responsible for the payment of the attorney fees of his/her hired lawyer, regardless of the outcome of the legal action, while the English Rule (rule of indemnity) determines that the expenditures and fee charges incurred by the successful party as attached to his/her lawyer must be reimbursed by the losing party at the end of the process.

Thus, to the extent that the attorney fees are, for the most part, the larger share of the expenditures involving a process (Hodges, Vogenauer & Tulibacka: p. 35; Reimman, 2012: p. 30), the discussions about which of those rules would be the fairest, or even about the influences, from the perspective of Legal Economic Analysis, triggered by the adoption of each with respect to the behaviour of the litigants, are widely studied by international doctrine (Shavell, 1982; Maxeiner, 2010; etc).

Hence, the necessity to inquire about the rule adopted by the Brazilian Civil Procedure regarding attorney fee-shifting, since any legal-economic studies of comparative law on the financial aspects of the Brazilian Civil Procedure have as a presumption, the due understanding of the legal systematics of that rule.
Nevertheless, the new discipline on attorney fee-shifting brought out by the Code of Civil Procedure/15 have peculiarities which make it difficult for its compression and consequently, its framing as close to the American Rule, or of English Rule, besides generating serious doubts about its reasonability.

Therefore, it will be compared to the rule of attorney fee shifting between winning and losing parties as adopted by CPC/73 in the face of the current regulation brought out by CPC/15, which, from the premises extracted from this comparative analysis, evinces the uniqueness and the controversy of the current legal system.

**Method**

The method used is that of the comparative, viewed as being opposed to the legal system of attorney fee shifting as envisaged by CPC/73 with the current system brought out by CPC/15, which will be extracted from assumptions in order to verify, also, to the proximity with the American rule or the English rule, which will be accomplished by the inductive method. In addition, we shall address an outcome with solid arguments, by "mapping all sets formed by legal Argumentation for all admissible sets of arguments", as proposed by Brasil, Jr. (2002, p. 20).

**Attorney Fees in the Brazilian Civil Procedural System**

In the Brazilian legal system, there are two kinds of attorneys’ fees: those contracted for and those awarded in judgment from the defeat in the loss of the suit, called “attorney fees of loss”.

Contracted attorneys' fees have the same meaning as in other legal systems around the world: corresponding to the agreed remuneration for that portion attached to the lawyer in relation to the consideration of the legal services offered by the final legal billings, which are covered and comprised, in general form, by the freedom of contract, which may be adopted to various practices, such as hours worked, judicial prosecution of a suit with success, etc.

There are limitations, however, when it comes to fixing the minimum value, which is regulated administratively by means of a Table of Chargeable Fees as defined in each Sectional Council of the Bar Association of Brazil (Art. 58, V, Statute of the OAB (EOAB), i.e., of the Brazilian Bar Association (BBA)), where minimum charges are established for each procedural undertaking. Any charging of attorney fees below the limit as set by the Table of Chargeable Fees (Art. 48: Paragraph 6, of the EOAB), is considered as an improper practice, liable to disciplinary sanctions, which was even made the subject of a scientific article by the president of the Federal Council of the OAB (BBA), (2016/2018 term). (Lamachia, 2016).

From the instant, fees awarded from defeat in the loss of the suit (i.e., the defeated party’s fees) were originally designed by CPC/73 as a way to order the losing party to reimburse/indemnify the successful party exactly in relation to expenditure. Nonetheless, the legal system has undergone profound changes with CPC/15, which will be demonstrated as stemming from a comparative contouring to the reformed statute, namely, CPC/73.

By way of clarification, despite the legislature having adopted the criterion for the defeated party’s fees, that is, the "objective fact of defeat" (Chiavenda, 1969: p. 207) to identify the responsible party for the payment, under both CPC/73 as CPC/15, the true criterion identifying is the objective fact of which gave
rise to the cause existing in the proceeding, which almost always coincides with the losing party (Dinamarco, 2004: p. 648).

In face of such an exceptional nature and as a source for improved education, in the course of the article the losing party will always be regarded as one that gave cause to the proceeding, and, therefore, liable for payment of the legal fees and costs awarded in judgment from the defeat in the loss of suit. (i.e., the defeated party’s fees).

The Legal System for Attorney Fees and Costs from the Defeated Party Pursuant to CPC/73

According to Art. 20 of the CPC/1973 the defeated party’s fees should be fixed at the end of the proceeding along the allocation of responsibility for procedural costs to the losing party, with the objective of ordering this to amount to be viewed as a reimbursement to the winner with regard to the expenditures combined with his/her lawyer.

Regarding the discharge by payment, the legislature determined that the value of the defeated party’s fees should be objectively calculated as between 10 to 20% of the value of the judgment, and the discretion between such minimum and maximum percentages determined in accordance with the criteria of equity listed, which also serve in definition for those lawsuits of incalculable value (Art. 20, § 3 and § 4, CPC/73).

CPC/73 – “Art. 20. The award in judgment shall order the losing party to pay to the prevailing party those accelerated expenses and attorney's fees. This sum shall be payable, also as to fees, in cases where the lawyer functions in his/her own suit. § 3 The fees shall be fixed at between a minimum of ten per cent (10%) and a maximum of twenty per cent (20%) of the value of the award in judgment, in consideration of: a) the degree of professional zeal; b) the place of rendering the service; c) the nature and importance of the case, the work performed by the lawyer and the time required for the service. § 4 In those cases of lesser value, in those of incalculable value, in those in which there is no award in judgment or the losing party is the Public Treasury, and the executions thereof, whether challenged or not, the fees shall be fixed according to equitable assessment by the judge, in consideration of the statutory sections found in (a), (b) and (c) of the preceding paragraph ”.

Therefore, under the auspices of CPC/73, the losing party, at the end of the proceeding, will be ordered to pay the procedural costs and the defeated party’s fees for losing the case, of which is ultimately destined to the victorious party as a way to compensate him/her for the cost of having had to hire a lawyer.

In this way, note that the defeated party’s fees were designed and adopted by CPC/73 as a procedural method able to recompose the patrimonial sphere of the party which had the notion of the recognized right, since "the operation of the law should not represent a patrimonial decrease for its favor to become effective" (Chiovenda, 1969: p. 207) this citation being literally reproduced by the legislature in its Statement of Recitals to CPC/73 regarding the justification of the existence of the defeated party’s fees,. (Buzaid, 1973: p. 26).

That is, the defeated party’s fees were not designed as a type of payment to share the consideration of the legal services of any of the parties, as induced by the conclusion of the phrase "attorney fee shifting or
aid in judgment as to the payment of attorney fees”, but rather as a compensatory method to the winner precisely as to the value of the type of incurred expenditures of the lawyer.

In this way, affirmation of the rule of attorney fee shifting as envisioned by CPC/73 would be close to the English Rule, in which the losing party reimburses, in whole or in part, the victorious party regarding the expenditures of his/her lawyer. And such reimbursement was proceduralized, precisely in anticipation of an award in judgment of the loser to pay the fees of the winner.

The Legal Framework for Attorney’s Fees from the Defeated Party Pursuant to CPC/15

Nevertheless, with the enactment of the CPC/2015, the systematization and the proper scope for which the fees from the defeated suffered major design changes in relation to the provisions in the statute of the previous civil procedure.

This is because, currently, as provided pursuant to Art. 85, despite the defeated being awarded in judgment for the payment of fees in defeat, the holder of this credit is no longer the prevailing party, but is the lawyer: CPC/15-"Art. 85. The judgment will award the loser to pay the attorney fees of the winner."

Note that since EOAB/94 (of the BBC) had the legal provisions found in its Arts. 22 and 23 regarding this change of ownership of the fees from the defeated to the attorney of the prevailing party. However, this change has only been peaceably accepted through doctrine and jurisprudence from the promulgation of CPC/15, though until then still hovering doubts about the effectiveness of those available to EOAB/94 (BBC) in confrontation with what CPC/73 establishes.

Therefore, to the extent that the right to the fees in defeat do not lend themselves more to the reimbursement of the expenses previously incurred by the successful party with the hiring of its lawyer, the loss of the nature of legal indemnity is clear.

In this scenario, the doctrine goes on to discuss what would be the new legal character, indicating, divergences, such as having (i) a “punitive” nature, since imposing upon the losing party the payment of such amount (Mello, 2009: p. 103); (ii) a nature of "compensatory sanction” under the point of view similar to the previous, but in order to compensate, and not to punish (Lopes, 2008: p. 19); (iii) the nature of an award (Nogueira Sobhie, 2009: p. 58) or reward (Silva, 2015: p. 418), because it would be a kind of bonus for having been victorious in the proceeding; (iv) some, more critical of the change in the ownership for the benefit of the lawyer, seemingly as a corporate tax (Gimenes, 2015).

Note that there are major problems and disagreements about the justifications for such a change of ownership of the creditor of attorney fees and costs from the defeated, since, a priori, subsequently to be viewed in what follows, it just seems to have benefited a class of lawyers, to the loss of the winning party.

Practical Consequences of the Adoption of the New Legal System as to the Attorney Fee Shifting as in Payment of Attorney Fees and Costs as Provided Pursuant to CPC/15

From this procedural context in which the winning party is no longer compensated by the opposing party, there are doctrinal theses (Nogueira Soubhie, 2009; Prisco, 2010; etc) and precedent case law (Superior Court of Justice (STJ), REsp n. 1.134.725, 14/06/2011) as to whether to order the loser to compensate the expenses expended by the winner combined together with those of the attorney, the holder of pecuniary damages, pointing out the principle of full redress as a legal basis for such.
In other words, it would be the hypothesis of the loser to be ordered to pay, in addition to the attorney fees of loss to the prevailing’s attorney party and the proceeding costs, also the contractual fee of that attorney in way of reimbursement the winner’s party, to be supplemented by the expenses with your own attorney.

However, on the grounds of prematurity and divergence that hover over on the subject, it is understood that the forensic practice and a majority case law (STJ, AgRg in Resp n. 1507864, 17/09/2015) serve still in this sense, to be an impossibility for this compensation.

Such understanding is corroborated by the fact that there does not exist any legal provision providing for such a hypothesis; the adoption of this thesis would require specific rules relating to procedure whereby such compensation would occur, as a means of capable proof of verifying the lawyer’s expenses, in addition to the criteria and limits for fixing the amount refundable. Furthermore, such a discussion is prior to the promulgation of CPC/15, in that the legislature was silent with respect to the matter, giving to understand, so, for such impossibility.

Note that such problems were provoked exclusively by the change of ownership of the creditor of the fees by the defeated party, since the former systematic procedure of CPC/73 of such institute, satisfactorily fulfilled the function of compensation of the costs incurred by the successful party together with those of the lawyer.

Therefore, considering the current legal system on attorney fee shifting, noted that if the lawyer was championed victorious in the proceeding, beyond the receipt of fees in defeat from the adversarial party, obligatory would also be to the creditor, the contractual fees due from the client.

Necessarily to say, as seen, the charging of fees to the contracting party require they be that of at least the minimum levels as set by the Table of Chargeable Fees of the OAB (BBA), which allows to infer, therefore, to be prohibited, are the rendering of legal assistance by lawyers based only on the expectation of receiving the payment of attorney fees of loss by the losing party.

And from the perspective of the victorious party, the expenditures by the lawyer came to be constituted themselves as indispensable fixed costs in order to have one’s rights acknowledged in a legal proceeding, in so far as, they are not likely to be reimbursed by the loser, being charged, in the best of cases, based on the minimum rates as provided by the Table of Chargeable Fees of the OAB (BBA).

**Conclusions**

Before all the above about the shifting of attorney fees and costs to the defeated party, verifying what was once an institute design with the scope of indemnification of the prevailing party of incurred expenditures with the lawyer, transmuted to the institute whose objective is to solely benefit the lawyer of the winning party with a second source of remuneration beyond what he/she was necessarily entitled to receive from the client under the heading of contracted fees

In conclusion then, that with the promulgation of CPC/15 the victorious parties have lost the right to the recovery of the expenses of their lawyer, while the lawyers have won a second source of remuneration, and the losing party will continue paying the attorney fees and costs in defeat in the same way as was under the aegis of CPC/73, only having changed the creditor.
It should be stressed that this questionable change of ownership of the creditor for this attorney fee shifting occurred without any satisfactory legal-economic-political explanation, and its current legal nature still remains unclear, although there are some definitions bringing in a diverging mode by the doctrine, as seen.

In consideration of all the above, this gives rise to two premises: (i) the lawyer for the winning party will always receive a double payment (that which he charged his client and that which the losing party must pay under the heading of “attorney's fees of loss”); (ii) in order for its right to be recognized in court, the winning party will inevitably suffer material damages about the amount paid to its lawyer, since such values are not likely to redress and will exist at least at the minimum level laid down in the Table of Chargeable Fees of the OAB (BBA).

Finally, with a view to such premises, note that the controversial rule of attorney fee shifting as adopted by CPC/15 has unique peculiarities, not nearly approaching: (i) not the English Rule, since, although the loser is being penalized by the payment of attorney fees and costs in defeat, this will not reimburse the prevailing party, but yes, its lawyer; (ii) nor the American Rule, since as to this, although there does not exist any reimbursement of attorney fees, at least the losing party shall not be obliged to pay “attorney fees of loss” to the attorney of the prevailing party.


De-centralising the Feminist Agitation - Post Modern Feminist Jurisprudence

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Abstract

The current advocacy for feminism which encapsulates the totality of the philosophy, vision and mission of women emancipation, equity and equality in modern societies has put the question of women position in the front burner of politics and economies of all modern states in contemporary times. The feminist agitation, beyond seeking the ‘equality of the sexes’ has evolved into a branch of law ie Feminist jurisprudence, a dynamic flow which encapsulates the unique experiences and peculiarities of the female sex to ensure a balanced view and application of law. This ensures the achievement a certain ‘sensitivity’ which takes proper cognisance of the normalcy of female experiences despite same not being experienced by the opposite sex. This paper therefore analyses the various streams of feminist jurisprudence and how the various categories intersect with gender, the jurisprudential schools of thought, and the importance of postmodern feminism in achieving the de-centralisation of the feminist agitation into mainstream practice of law applicable to all humans. It also highlights the criticisms of feminist jurisprudence. It concludes that feminism is not about replacing all the male values with female values but rather about being inclusive of women, and of all people who differ from the norms of the law as it is today.

Keywords: Feminism, De-centralisation, Feminist Jurisprudence, Postmodern feminism

Introduction

Gender issues in whatever form discussed are as interesting as they are controversial and the current advocacy has put the question of women position in the front burner of politics and economies of all modern states.

Contemporary feminist jurisprudence consists of many differing feminist legal theories which are united by two common features: a belief that the law perpetuates patriarchy and a goal to improve the position of women in relation to, and through, the law. Feminism is not a concept easily pinned to a specific and defined structure, it is a dynamic flow which encapsulates the unique experiences and peculiarities of the female sex. Thornton further clarifies this position as feminism is not susceptible to a simple definition but rather it possesses many strands, and feminists themselves differ widely regarding issues of substance and method. In ‘de-centralising the feminist agitation’ within the field and practice of law, feminism has evolved and progressed through various theories until postmodernism which culminate into feminist jurisprudence as it exists today. Thus, to better appreciate the concept and reality of feminist jurisprudence as it were, it will be necessary to examine the evolution of the various schools of thought or theories which feed into its essence, from modernist (liberal and radical) feminism on to postmodern feminism.

Feminist Jurisprudence

Jurisprudence does not have a precise definition but involves manifold ways of theorising about law. This theorisation has been conducted at a high level of abstraction and has been understood largely as the prerogative of a few highly esteemed men, such as the well-known legal positivists, Hart, Kelsen and Dworkin. The conventional model of jurisprudence (mainstream masculinist) creates what may be likened to a public-private divide where the societal values which include respect for equality, freedom, and autonomy, have been conventionally understood as concepts that have meaning only in the public sphere.
Usage of the term ‘feminist jurisprudence’ was first recorded in 1978 and was intended to question, from a feminist perspective, the completeness of a jurisprudence that is not responsive to specifically female concerns (for instance; pregnancy). It argues that we must look at the norms embedded in our legal system and rethink the law. From the inception of what has come to be known as ‘feminism’ and the classification of same as a significant ‘theory of law’ hence its being regarded as ‘feminist jurisprudence’, there have been criticisms ranging from its being regarded as ‘selfish and one-sided’ to being absolutely relegated as a ‘conceptual anomaly.’ Professor Robert West in her article opines that, the virtual abolition of patriarchy—a political structure that values men more than women is the political precondition of a truly un-gendered jurisprudence and until that fact changes, feminist jurisprudence is a political impossibility and a conceptual anomaly.

This position mirrors that of Catharine MacKinnon who states that ‘she (the “female”) cannot articulate her own definitions now “because his foot is on her throat”’. Despite these seemingly insurmountable obstacles to the emergence of a feminist jurisprudence as an ‘authentic’ field of law, the question remains as to how ‘mainstream jurisprudence’ can be said to be about the relationship of human beings to law that is, neutral and unbiased, when females who are an absolute part of the human race are not particularly taken into cognisance in the operation and implementation of the law. According to Juergens, feminist jurisprudence points out that what is neutral or natural for one person is a distortion for another person. In buttressing this point, she highlights normal, female biological functions such as pregnancy, child rearing and other care giving activities which are treated in the workplace as peculiar occurrences, rather than what they are: common place functions that serve the larger good. This then makes clear the reality that the workplace was designed largely from a traditional male viewpoint.

Instances of non-consideration of female realities by mainstream jurisprudence and the influence of feminist jurisprudence on the interpretation and implementation of the law have been brought to the fore essentially to ensure that females are not denied benefits because of their natural biological functions which incidentally are not a reality or real-life, normal experiences for the patriarchal leaning and perspective of the law.

Beyond mere theorisations, feminist jurisprudence has challenged the views and judgments of law courts in the United States. The Missouri court in 1987, upheld state laws which disqualified women from unemployment insurance benefits when they left a job because of childbirth, whilst a person laid off because of a broken leg or refusing to work on a religious holiday would be eligible. However, in 1999, the Minnesota Court of Appeals took the real facts of a woman’s life seriously in a precedent-setting case. In McCourtney v. Imprimis Technology, Inc. the court acknowledged that it may not always be possible to keep care-giving responsibilities at home separate from the workplace. The judges decided that a woman who was fired for missing too much work to care for a chronically sick baby had not shown a lack of concern for her job and was therefore eligible for unemployment insurance.

Also, the parochial, discriminatory culture of male-entitlement that precluded females from inheritance of property has been recently overturned by the Supreme Court of Nigeria by upholding the right of female inheritance of property. The court was emphatic in its pronouncement that, ‘A custom of this nature is punitive, uncivilised and only intended to protect the selfish perpetuation of male dominance which is aimed at suppressing the right of the women folk in the given society.’

**Modern Feminism**

**Liberal and Radical feminism** are the major streams which constitute the modernist theories of feminism. Other subsets of the modernist theory such as Cultural and Eco feminism though acknowledged in this section will not be addressed in detail for the purposes of this paper. The radical feminists believe that men (as a class) use social systems and other methods of control to keep women suppressed. Radical feminists also believe that eliminating patriarchy, and other systems which perpetuate the domination of one group over another, will liberate everyone from an unjust society. This theory was however criticised because the liberalist argument on the basis of women’s similarity to men merely assimilates women into an unchanged
male sphere and this did not necessarily address the fundamental concern of why law is made and applied through the narrow prism of masculinity under the guise of gender neutrality.

Liberal feminism is the support for liberal values which include respect for equality, freedom, and autonomy with central core aspects of rationality, individual choice, equal rights and equal opportunities for women. It emphasises the belief that women were as rational as men and therefore equal rights bearing and autonomous human beings. Liberal feminists push towards giving women an equal connotation as men in relation to status and individual rights. This was the dominant theory behind *Reed v Reed* and *Bradwell v Illinois*, where the Supreme Court held that a law that discriminated against women violated the Constitution.

**Postmodern (Post Structural) Feminism and Its Major Postulations**

Postmodern Feminism is a particular kind of feminist theory that has become prominent in feminist thinking over the last couple of decades. In order to understand it, first we must examine postmodernist epistemology in general, and then compare postmodern feminism to other feminist perspectives. While there are many critics of postmodernism, it provides a very useful theoretical perspective.

Postmodernism, means a new organising principle in thought, action, and reflection, connected to many changing factors in modern society. The term was first applied, around 1971, to a new architectural style which combined old, classical forms with modern pragmatism and scientific engineering. Since then, the postmodernist advocates have used the term to describe their movement as a reaction to the wholesale failure of modernity. This movement is not a rejection of modernism; rather it is an effort to combine the best of the modern world with the best elements of the traditions of the past, in an organic way that eliminates the worst parts of both.

Postmodern feminism may be regarded as the antithesis of the modernist theories evolved around the modernist polarities of liberal feminism and radical feminism. Postmodern feminists engage with the philosophical rejection of grand theories, such as those within traditional jurisprudence; it eschews the idea of a ‘unitary truth’ and of objective reality and is rather concerned with multiple, subjective identities. In other words, each unique female experience counts rather than the single whole designation of ‘women’ which failed to capture the entire essence of all who make up that ‘whole’ as stated earlier. Put succinctly, Thornton opines that ‘Post-modem feminism cannot be defined in terms of a single theory, for it includes a range of perspectives that reject universality, objectivity and the idea of a “single truth”’. Arising from the alleged fundamental flaws in the thesis of the other feminist theories such as the radical and liberal feminists, postmodern feminists have built on the ideas of Foucault, de Beauvoir, as well as Derrida and Lacan and despite their variations there is also some common ground. Postmodern feminists accept the male/female binary as a main categorising force in our society. Following Simone de Beauvoir, they see the female as having being cast into the role of the other. They criticise the structure of society and the dominant order, especially in its patriarchal aspects. Postmodern Feminism is the ultimate acceptor of diversity, multiple truths, roles and realities as part of its focus.

Postmodern Feminism aims to prove that 'Men' and 'Women' are matters of language, socially constructed entities having no biological and gender differences as men and women. Postmodern feminism seeks to right a lot of the wrongs that old feminism set up. A lot of people think of feminism as a very liberal bad idea that seeks to elevate women above men, but the truth of postmodern feminism is that it is simply striving for equality. This newer way of thinking, rather than focus solely on white women of a certain class, includes any woman in need, whether or not she was born biologically a woman and regardless of race or class.

**4.1 Criticisms of Postmodern Feminism**

A major critique of Postmodern Feminism is its seeming identification of women with the feminine and the biological body. Many view Postmodern Feminists as valorising women and the feminine over male and
the masculine. Thus, ‘the idea that we should embrace the feminine, or “mime the mimes men have imposed on women” feels awfully similar to the pressure to be feminine from the dominant society. However, most of the criticisms in this vein simplify postmodern feminism. As we have seen, there are widely varying viewpoints within this theoretical framework. While this diversity is seen as empowering by some feminists, many are concerned with the potential loss of feminist community. With no essential philosophy accepted by all feminists, it is difficult to make political action.

One of the most prevalent criticisms of postmodern feminism, and postmodernism in general is its apparently nonsensical writing. Much of the writing of postmodernists rejects linear construction in their writing. And so accusations of elitism have been leveled at the postmodern feminism as a whole. Critics contend that only few academics can participate because the jargon is so thick, and that ‘true’ feminists address issues of political import. Considering that postmodernists reject essentialist, there is an obvious lack of conceptual understanding of postmodern feminism reflected in these criticisms. Also, because linear, normal speech and writing are viewed as part of the propaganda of the dominant order, breaking down the linguistic power structure is, in their philosophies, an important part of undermining that power. So in fact, being obtuse and chaotic is their way of introducing change and therefore offering new meanings. Postmodernism too, is 'grounded' in the epistemological problem of grounding itself, of the idea of identity as essential or truth as absolute.

Postmodern theory increasingly draws on a highly idealised and generalised notion of femininity as 'other' in its search for a space outside the disintegrating logic of modernity; it rarely talks about actual women or even about feminism as a political practice. Butler criticised postmodern feminism for offering no clear path to action. Butler herself rejects the term "postmodernism" as too vague to be meaningful.

**De-centralising Feminist Agitation with Nigerian Perspectives**

*5.1 Feminist Agitation*

The feminist agitation derives from gender essentialism which is the idea that men and women have inherent, unique, and natural attributes that qualify them as their separate genders. Claims about essentialism and gender roles often go hand in hand, with one justifying the other. Gender roles are behaviours that are prescribed based on what biological sex you have, and essentialism as the claim that behavioural attributes can be attributed to the same biological process that creates your biological sex.

Feminist agitation highlights women’s injuries and actual harm such as rape and treatment of rape victims. It also highlights a critique of the epistemology of Jurisprudence where everything is seen from the male perspective. Some scholars in this area have argued that the construction of our understanding and knowledge of law is the product of patriarchal relations at the root of our society, thereby asking the government to become stakeholders in the interests of women. Discrimination against women persists in both public and private spheres in times of conflict and in peace. It transcends national, cultural and religious boundaries and is often fuelled by patriarchal stereotyping and power imbalances which are mirrored in laws, policies and practice.

It highlights also the ideals of Western rationality where for instance, Rule of Law distorts and leaves partial our understanding of the nature of social relationships. In this case the claim that maleness is the organising form of what is accepted as the ‘normal’ and that most forms of equality legislation are not vehicles for a true equality between men and women but rely upon making women as men.

It also highlights Listening to the ‘voices’ which have been excluded from the meta narratives of modernity, that is the silence on women ‘projects the female at the place of patriarchy’s ‘Other’ (view or treat a person or group of people as intrinsically different from and alien to oneself)

Feminist agitation also highlights a critique of essentialist functional categories where specific characteristics or properties which any entity of that kind must possess are ignored. That is ignoring the fact that all things can be precisely defined or described.

In a very broad sense feminist philosophy of law is one put forward by women identifying the pervasive and all-encompassing influence of patriarchy on all spheres of life be it public or private, legal, political,
social, cultural etc. It demonstrates the effects of patriarchy on the material condition of women and girls and develops reforms to correct gender injustice, exploitation or restriction, etc.

5.2 De-centralisation and Nigerian Perspectives
De-centralisation is making the knowledge available to all. i.e women, men and children alike, through mass media, electronic media, social media, curriculum, legislation, policies, etc.
De-centralisation thinks about sociological dynamics in terms of information channels and cybernetics. It rejects the assumption that hierarchies are ‘optimal’ for any purpose, but considers them, on the contrary, arbitrary structures.
The Protocol to the Africa Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted on 11 July 2003 by the AU, takes into consideration the provisions of other international instruments on human rights that touch on women’s rights, the need for equality and freedom from discrimination. It also takes into consideration the peculiar circumstances of women in Africa and their vital role in development. The protocol certainly could have been the key to a new dawn for Nigerian women, but the sad thing is that the reality seems like a far cry because of non-implementation of most of the provisions.
The obligation of the Nigerian government under the protocol focuses on de-centralisation strategies, and includes ensuring that women enjoy the rights provided through enactment of appropriate legislation, education integrating gender perspective etc. The Nigerian government has taken some positive actions in adopting certain laws and policies such as a gender policy in 2007, the Trafficking in Person’s (Prohibition) Law Enforcement and Administration Act and a national policy on HIV/AIDS, reproductive health and female genital mutilation. The government has also established science schools for girls; women development centers and a national agency for the prohibition of trafficking in persons.
However, there are persistent negative practices in Nigeria which hinder the rights of women such as the patriarchal structure of Nigerian society; failure of the National Assembly to pass the Abolition of All Forms of Discrimination against Women in Nigeria and Other Related Matters Bill and failure to pass a national bill prohibiting violence against women. There are several laws and practices that limit the freedom of women to choose; such include provisions against abortion in the Criminal and Penal Code Acts, provision permitting the chastising of wives by their husbands in the Penal Code Act. Women are also mostly limited in political participation and representation in decision making processes. Some other problems include: exclusion of women in marriage and property rights and the perpetration of harmful and repugnant cultural practices; inadequate economic and social welfare; domestic and workplace violence; Access to Justice and Equal Rights and the non-justifiability of the Right to a Sustainable Environment and Development.
The questions that come to mind are: Why then did the Nigerian government sign the protocol? Did the government sign as a mere formality, knowing that the protocol could be frustrated by non-domestication by virtue of Section 12 of the Constitution? Or is there just a divorce between the arm of government that signs international instrument and the arm that domesticates these agreements?

Recommendations and Conclusion
In light of the current realities, government should redeem its image and show its commitment by:
Domesticating the African protocol and CEDAW
Passing the bill on violence against women
Reviewing laws on women’s property rights
Adequate budget to issues that promote women’s rights and bridge gender gaps;
Integrating women’s right issues and education into the school curriculum.
It must be made clear that feminist jurisprudence is not just for women. It is not about replacing all the male values with female values. It is about being inclusive of women, and of all people who differ from the
norms of the law as it is today. Thus, it is essential that feminist jurisprudence is not treated as a separate optional subject but is integrated into the law curriculum. Postmodern feminism has resulted in some of the most ground breaking research in the last twenty years. Its major technique, discourse analysis has been used in many different fields to ask many different questions. As a logical progression of postmodern theory, it has revitalised feminism by questioning many assumptions that were previously unexamined. While as of yet it has not been a major presence in the field of law and information studies, the number of studies utilising it is steadily increasing and should be encouraged. This would help decentralise feminist agitation, by achieving a buy-in from every segment of the society.

The Nigerian experience of a patriarchal society leaves a lot to be desired in the perception, protection and promotion of female persons. Reference may be made to the decision of the Supreme Court on the female right to inheritance, and positive a step as it may seem, enforcement may well be a mirage. This therefore makes it imperative that the theories and ‘spirit’ of feminist jurisprudence be studiously incorporated into mainstream jurisprudence for the benefit of the excluded members of the human species, the female.

Cases cited:

*Bradwell v. Illinois* 83 U.S. 130 (1872)

*Hoyt v. Florida* 368 U.S. 57 (1961)

*Reed v. Reed* 404 U.S. 71 (1971)

*Ukeje v Ukeje* (2014) 11 NWLR part 1418 at page 384


References


Hope, Olson. 1996. ‘The Power to Name: Marginalizations and Exclusions of Subject Representation in Library Catalogues’. Unpublished dissertation UW-Madison


Michelle Trainer, 2014,’Critiquing Postmodern Philosophies in Contemporary Feminist Jurisprudence’
The Western Australian Jurist 5, p.261


Judicial independence VS Judicial responsibility: An empirical study of the working nature of legal rules related to Ethics in Federal courts of Ethiopia

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Abstract:

If we had a machine that would interpret laws and give judgments, we would gladly use it for equal justice and we wouldn’t need to walk the thin line between judicial independence and judicial responsibility. Judge’s ruling depends on variables such as morality, ethics, compassion and other human values. The aim of this paper is to strength the judiciary branch of government starting from stages in judicial appointment, judicial behavior to court administration. The paper further focuses on what is currently happening in federal courts of Ethiopia; Identify gaps of the working nature of legal rules by observing and investigating randomly selected court rooms and case fills, to address factors that influence judge’s ruling. In conclusion, however the law is rich and it is on the right track the writer argues how rudimentary the legal system is and how parties in court of law lost faith in the judiciary system.

Keywords: Equal Justice, Judiciary, Court room

Introduction

For many years civilization of a country is characterized by the existence of justice. Judges play the central role in the interpretation of the law and therefore secure justice. Judges are the living part of the court, which upholds the rule of law and guarantees justice for everyone. Judicial independence must be independent of any external influence. Different countries have different ways of nominating potential and assigning judgeship. Some countries like Ethiopia use their judicial administration council to nominate potential judges and the parliament approves and assigns the judges. Even though the judicial system is in place and effective and if exists institutional independence, how can the court guarantee equal justice for all, when there are factors influencing the overall implementation of law? Equal justice is an ideal aspiration. There is no such thing as perfect judgment, unless all individuals are perfectly similar in every aspect. Humanism entails respecting and valuing beings, it is concern with morality in general but also the needs, interests, and welfare of individuals. In another word people who possess humanism will always give better judgment, and be complete (Edwords, 2015). This paper will try to address the fundamental factors that influence the judge rulings by assessing the following: criteria of judicial appointment, behavior of judges and court administration.

Federal court of Ethiopia, client satisfaction, report 2008 shows:

To the question whether courts respects human dignity 57% of the judges respond in positive while 34% say in the opposite. 9% say both Yes and No.

Practitioner’s participants on competence and diligence for the judges 52% they are competent and diligence 35%. Independence of the judgeless both individually and institutionally 29.9 % replied they are independent and 62 % said they are not independent. Existence of Speedy trial for practitioner was answered positive 27% and 64.86 % said no for speedy trial by the court. Contingency of laws by the court and court administrative body 29.7% said it has contingency while 56.75% said it has no contingency. when it come
reasons given by practitioners for the absence of judicial behavior is because 51% said parties at court initiate corruption to the judge, about 24% commented that judge are corrupted at the first place and 42.56% corruption by supporting stuff.

How a legal rule is workable is highly dependent on a judge behavior, judges’ ethics being another dependent variable to uphold justice, Judges are not exemplifying with respect to judicial independence nor upholding the higher standards of ethics. While the law is the same for every one the not having predictability of actions in court of law is a lot higher than predictability, this shows absence of same ruling for the same case. English legal scholar, formulated “the rule of law” as embracing two fundamental ideas. First “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.” Second, it entails “the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts” and excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the ordinary tribunals. (Dale A. Nance, Law and Justice, cases and reading on the American Legal System, second edition, 1999 (page 42-43).

Method and Material

This paper aims to strengthen the judicial branch of the government by assessing the process of judges’ appointment; judges’ behavior and the support units and staffs of the court. To assess these factors, both primary and secondary data was selected and different data gathering techniques such as review of important documents, interviews, observation and focus group discussion were used.

Data was collected from first instant court, high court and Supreme Court of Ethiopia. A total of 35 courtrooms and their judges were observed for this purpose. This experimental observation was conducted to evaluate judges’ behavior and attitude in light of judicial code of conduct of 2012. Therefore, judges’ interact with clients and supporting staff as well as actions in following the procedures of the court.

Interviews were conducted with 10 judges to further understand their attitude towards justice and assess the current position Ethiopian justice system has in regard to independence.

The draft manual for the merits of judicial nomination was reviewed to understand the major requirements of nomination, examination and appointment of judgeship.

Questionnaires were distributed and data was gathered from 82 judges in order to pinpoint judges’ perspective on diligence, competency, and institutional independency of judicial administration council. Focus group discussion and interviews were conducted with support staffs to assess the working environment and the challenges of working with judges.

Discussions

Judgeship Appointment
The merit selection was done on the basis of qualification but not on the basis of political and social merits. The judicial administration council submitted the names of highly qualified applicant to the parliament. From this we can see how hard it is to ensure total elimination from politics or influences of the executive power. However, the merit of selection will minimize the influence of other bodies.

Review of merits of indicate that judges
Judicial behavior/ethics of judges

Background of the Respondents

To evaluate judges’ behavior and attitude as well as understand their perspective a structured questionnaires was developed. Judicial independence, judicial appointment process and ethics of judges were the main focus of the questionnaire and the finding indicates the following. From the total of 216 questionnaires distributed randomly among federal judges (first instance courts, high courts and Supreme Court) data was collected from only 82 judges.

Table 1 indicated the age groups of the respondents. The majority of the judges (42.7%) fall into the first age group (25-35 years of age), followed by 36-45 years and with only 2.4% of age 56 and above. From the table the researcher can generalize that the age level for judgeship is low. This may mean most judges have relatively less experience.

<table>
<thead>
<tr>
<th>Age</th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
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<tbody>
<tr>
<td>25-35</td>
<td>35</td>
<td>42.7</td>
<td>42.7</td>
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<tr>
<td>36-45</td>
<td>32</td>
<td>39</td>
<td>39</td>
<td>81.7</td>
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<tr>
<td>46-55</td>
<td>13</td>
<td>15.9</td>
<td>15.9</td>
<td>97.6</td>
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<tr>
<td>&gt;56</td>
<td>2</td>
<td>2.4</td>
<td>2.4</td>
<td>100</td>
</tr>
<tr>
<td>Tot.</td>
<td>82</td>
<td>100</td>
<td>100</td>
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</table>

Table 2 indicates the years of experience the respondents have as a judge. The majority of the judges (34.1%) fall into the 16 and above years of experience. The finding indicates that most of the judges are experienced.

<table>
<thead>
<tr>
<th>Year of Experience</th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
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<tbody>
<tr>
<td>&lt;5</td>
<td>15</td>
<td>18.3</td>
<td>18.3</td>
<td>18.3</td>
</tr>
<tr>
<td>From 6 -10</td>
<td>27</td>
<td>32.9</td>
<td>32.9</td>
<td>51.2</td>
</tr>
<tr>
<td>From 11 -15</td>
<td>12</td>
<td>14.6</td>
<td>14.6</td>
<td>65.9</td>
</tr>
<tr>
<td>&gt;16</td>
<td>28</td>
<td>34.1</td>
<td>34.1</td>
<td>100</td>
</tr>
<tr>
<td>Tot.</td>
<td>82</td>
<td>100</td>
<td>100</td>
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</table>

Table 3 Establishment of an independent legal personality (Judicial Administration council by 684/2010) Its beneficiary to institutional and judicial independence.

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>78</td>
<td>95.1</td>
<td>95.1</td>
<td>95.1</td>
</tr>
<tr>
<td>No</td>
<td>4</td>
<td>4.9</td>
<td>4.9</td>
<td>100</td>
</tr>
<tr>
<td>Tot.</td>
<td>82</td>
<td>100</td>
<td>100</td>
<td></td>
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</tbody>
</table>
Table 3 indicates as of law, almost all 95% of judges have positive response to the proclamation giving legal personality to the administration council.

Table 4 indicates Independence of judges and Institutional Administration independence

<table>
<thead>
<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
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<tbody>
<tr>
<td>Yes</td>
<td>53</td>
<td>64.6</td>
<td>64.6</td>
<td>64.6</td>
</tr>
<tr>
<td>No</td>
<td>29</td>
<td>35.4</td>
<td>35.4</td>
<td>100</td>
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<tr>
<td>Tot.</td>
<td>82</td>
<td>100</td>
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Table 4 indicates the years of experience the respondents have as a judge. The majority of the judges (64.6%) fall into that there is independent of judges and institutions. The finding indicates that most of the judges independent with the remaining of 35%. Another indication is that about 35% judges replied that they are not independent.

Table 5 indicates Merits of nomination and standards of qualities for selecting judges

<table>
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<tr>
<th></th>
<th>Frequency</th>
<th>Percent</th>
<th>Valid Percent</th>
<th>Cumulative Percent</th>
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</thead>
<tbody>
<tr>
<td>Yes</td>
<td>40</td>
<td>48.8</td>
<td>48.8</td>
<td>48.8</td>
</tr>
<tr>
<td>No</td>
<td>42</td>
<td>51.2</td>
<td>21.2</td>
<td>100</td>
</tr>
<tr>
<td>Tot.</td>
<td>82</td>
<td>100</td>
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Table 5 indicates Merits of nomination and standards of qualities for selecting judges. The majority of the judges (51.2%) fall into the nomination and standards do not have qualities in picking the best judges.

**Inspection of cases and court rooms**

Out of 35 expert inspections of court room and case fills, almost all were found to be problematic. The weight of the problem may be small, mediums and large. The researcher being one of the experts, other than judicial appointment and judicial behavior the researcher argues majority of problems occurred because of courts administration. Specially with regards to making the judge responsible with relate to their ethics, impartiality of the judges, corruption or any other reasons court administration plays an important role. 85% of the court appointment cancelled for a reason of work load and unrelated issues which are not be reason to appoint the parties.

The numbers of judges are not equal with the number of case fill flow and standards were made for the judges to do a minimum of 80 cases on months. The researcher/observer argues making standards on judicial work is against judicial independence. Some chambers entertain a number of case files more than the capacity of the judge. Ethiopia uses inquisitorial system of court which means major activities, investigation on the evidence, ruling on proceeding of the court and witness hearing, writing everything which is important to the case, issue, order, it is very tiring and court administration did not minimize the work load as it should have been. The other is lack of court rooms to entertain cases, the court administration
gave the judge’s to use their chambers as court room but this power is being abused by most judges, the right of the public hearing in an open court will be at stake and power judges will be easily abused or even corruption. (Inspection and Judgment Investigation Directorate, Federal Supreme Court, Addis Ababa, Ethiopia

**Court Administration**

Court administration plays an important role of supporting. It administrates the court physically by supporting the stuff member and judges in providing equipment useful for the court in general. Court administration also manages the court though human resource units which play an important role in minimizing work lodes of judges.

**Conclusion**

One of the variables that is directly and indirectly affecting the justice system is court administration, court administration is not creating a workable system. It is not creating an environment that feels safe for the judges, the parties and supporting stuffs.

Judicial Administration council is not strong enough to ensure the independence of the judge and the institution. Merits of nomination for judgeship are not clear as it should be. Lack of strength of the council brought the nomination of some unfit judges. Court Administration are not creating a workable environment both for judges and supporting stuffs. Consequently most experienced judges leave the judiciary because of unsuitable environment. Yong and Inexperienced judge’s numbers are high. System of federal courts easily be broken and opened for corruption. Even though it is open for corruption it is hard to implement the judge ethically responsible because of the system. Currently parties in court of law lost faith in the judiciary, if fact majority of parties in a court of law initiate corruption thinking the only way to get justice though corruption.

Ethiopia is one of the least developing countries in the world, and for a development pre-requisite should be assured one of pre-requisites is to insure judicial independent. Create strong Judicial Administration council and unbreakable system which is independent from external influence.
Reference

(ECOSOC, 2006/23 Bangelor principles)
(Books, Law and Justice, Dale A nance, 1999)
Positive Breach of Contract: A Case-By-Case Alternative to the Traditional Notion of Default

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**Abstract:**
The concept of obligational relations as understood today no longer ends in a classical concept of debt and credit. On the contrary, it is endowed with a multiplicity of adjoining duties, which meet interests and expectations that go well beyond the traditional notion of performance as the simple fulfillment of the central content of an obligation. Therefore, at the same time that the idea of credit and debit no longer reflects the reality of complex obligational relations, neither the notions of a debtor in arrears nor the concept of absolute default as a total inability of performance are sufficient to exhaust the scope of liability from default of those same complex obligations. Thus, the interpreter must find a way to safeguard situations in which, although they do not fit into the aforementioned predefined concepts of default, they frustrate expectations and related duties that likewise require accountability. Indeed, it is using Karl Larenz and his notes on the complexity of relations that the present essay, using the dialectical method of research, faces the insufficiency of the traditional notion of obligational liability. Furthermore, by making use of Hermann Staub's positive breach of contract, proposes a case-by-case alternative (the synthesis) to the limited concepts that translate default; incapable of exhausting all circumstances in which there is actual default even with the fulfillment of the main obligation.

**Keywords:** positive breach of contract; default; performance.

**Introduction**

With the maturing of the institutions of civil law, came the commencement to perceive, within an obligational relationship, duties which not only those connected to the credit itself, but to the support of the expectations and motivations that led to the genesis of that affiliation. By utilizing the model of good faith as a vector for the interpretation and integration of obligations, it is then revealed a more complex structure than that given by that concept of a simple obligational relationship, in which there only exists credit and debt. In addition, related to these two notions, it was delimited the existence of several *finalistic* beams - benchmarks of a new conception of default. At this time, the designs of impossibility of performance and of delay - that would exhaust the scope of responsibility - appears not to have ripened in the same way as the relationship that it was proposed to protect, by contemplating only credit obligation, ignoring those others equally capable of, at the same time, perpetrating harm to individuals. In response, the doctrinal solution was the accidental proposal of a third regime, which, in understanding the existence of a complex obligational relationship and its various influxes, suggests a conception able to easily embrace the violation of other obligational duties which cannot conceptually correspond with the traditional dichotomy. The purpose of this essay is to precisely demonstrate the insufficiency of the traditional treatment of obligational responsibility and (re-) propose an alternative to the default genus, with the particular attention to the role of the courts as to its construction.

**Methodology**

By means to envision the justification for the insufficient treating of the staunch systems of civil liability and the consequential proposition of a third modality type of default, it will be made use of the dialectical method of research. For this purpose, the analysis starts with a *thesis* - positive proposition, which in this case translates to the assertion that the already proposed systems are insufficient to treat every form of default. Subsequently, focusing on criticism of the *Staubian* structure, it is suggested the unecessity of another construction based on the grounds that the mentioned systems would already solve the issues of the so-called positive breaches of contract - *antithesis*. However, argumentative reflection
erects the synthesis, a double negative that builds a superior positive proposition (Lakatos; Marconi, 2004, pp. 81) – the research results, which ends the essay. Furthermore, basing upon a theory of argumentation allows the construction of coherent and uncontroversial argumentative synthesis, as the ranges of arguments that form it refute those who would attack it without indirectly sustaining the prior proposition. (Brasil Jr., 2002, p. 20)

The Lateral Duties of a Complex Obligational Relationships and the Insufficiency of the Concepts of Absolute and Relative Default

Technically, obligation is the term utilized in order to designate a species of the juridical duties genre, correlated to the existence of a right of credit, which is the active aspect of the so-called obligational relationship (Gomes, 2007, pp. 17-18). In turn, this is formed from the existence of a jural relation – which refers to subjection to the law, differentiating it from those eminently ethical (Enneccerus; Kipp; Wolff, 1933, pp. 5) - established between a creditor and a debtor through the existence of a duty to perform – object and passive aspect of the relationship. This is, therefore, the jural relation in which two or more individuals are bound and provide debtor-creditor rights to require agreed performance (Larenz, 1964, pp. 18).

Accordingly, in the existence of a transaction subject to the Right, and, therefore, juristic, present, at the same time, an obligational relationship empowered with the right of credit (= main obligation) to be satisfied by its object, the corresponding debt (= duty to perform). The failure to comply with the duty to perform results in the power to enforce its execution - content of the obligation (Gomes, 2007, pp. 16) - translated by the notion of civil obligatory liability - not just contractual, since what matters in this case is the non-performance of a voluntary obligation, whatever the source; contractual or not (Gomes, 2007, pp. 182).

The compliance of the duty to perform, which embodies the obligation is called payment, which in turn, further strengthens the notion of how the bond is seen under a credit, quasi-mathematical, perspective. If payment occurs in its agreed manner, or at least as expected, there is performance. Otherwise, there is an objective situation of non-compliance of the debt (Varela, 1999, pp. 60) - the default, which therefore carries liability. The existence of credit and debt – the imbalance that guides the duty to perform and the fulfillment of this duty or not, was what defined the existence of liability.

Drawing on these fundamental notions, arisen out of Roman law and enhanced by Italian and Germanic civil law, the Brazilian Civil Code, more specifically in articles 389 and 394, adopted the classic dichotomy of civil obligatory liability system by using the given models of absolute non-performance and relative default.

The absolute default is characterized by the occurrence of two hypotheses: the impossibility of performance or a lack of interest by the creditor. In the first, due to some reason incidental to the agreement, there is an inability to fulfill its object. It is not about excessive difficulty, but rather a real impossibility of compliance (Varela, 1999, p. 68). This is what happens, for example, in a loan contract when the debtor culpably permits the destruction of the item that should be reimbursed.

In the other case, disregarding the possibility of the fulfillment of the duty to perform, the obligation no longer is of interest to the creditor, for motives imputable to the debtor. An example is what happens if the individual hires a business to perform catering services for a particular event, but the contractor simply does not show up at the occasion. Already after the date of the event, the fulfillment of that obligation after the agreed term is now useless to the creditor, who sustained the applicable damage or loss.

In another way, the relative default is traditionally connected to the figure of delinquency¹ – the untimely performance of the obligation attributable to the debtor. However, in this case, despite the delay, there is still interest in the maintenance of the obligational relationship, by requiring compliance with the

¹ It is appropriate to point out that Brazilian law also considers relative default the hypotheses in which the duty to perform occurs at odds with the expected place and mode. These are anomalous situations that are not to be confused with arrears, but which refer to a novel species of the genus of relative default endowed with its same effects. They do not preclude, albeit, the application of the positive breach of contract, once connected to the duty of performance and not to the lateral duties derived from the complex obligation, parallel and independent of the first, for which the notions of relative and absolute default are sufficient.
**duty of performance** without prejudice to the compensation for any damages arising from the delinquency. The duty of rendering performance is not fulfilled in whole, but there is still the possibility of it, and this possibility interests the creditor.

This traditional dichotomy works very well when one thinks of an obligational relationship as a closed abstraction singularly built upon rational credit logic, namely, the existence of an impervious bond whose sole purpose is exercising the subjective right to credit by the fulfillment of the legal obligation of the immediate corresponding debt. (Martins-Costa, 1999, pp. 383)

Nevertheless, when this juristic act is extracted from an academic setting, inserting it into a realistic perception of the motivations that underlie the obligation, it is then verified the existence of a more complex figure than that of the relationship merely attached to the **duty of performance**. Even because the bond arises from the need to attend to a real demand derived from expectations, social motivations, and intentions; moral or economic (Ribeiro Faria, 2001, pp. 129). The obligation is endowed, therefore, with a purpose, materialized as a result of these criteria, so that if not satisfied, despite the performance of the **duty to perform**, in a likewise manner thwarts the subjective rights of the creditor. Thus, well beyond credit and debt there exists a plurality of variables and elements with autonomous evaluating content that permeate the juristic bond, so that the obligation assumes a character of composite reality (Menezes Cordeiro, 2001, pp. 586), no more individualized only by that **duty to perform**, but by the fulfillment of the purpose intrinsic to the obligation to meet the interests of the creditor, among which is included the duty to render performance in the agreed manner.

Under such conception, it is possible to affirm that not necessarily is the fulfillment of the **duty to perform** able to guarantee real material satisfaction to the creditor. Abandoning the concept of an obligational relationship as a credit equation requires understanding performance not just interrelated to the notion of payment – credit discharge, but that the rendering of such performance serves the motive and purpose that led the creditor to contract in first place. Hence, the purposes inherent to the obligation assume autonomy to alter the notion of that as true performance, once these other variables also integrate the passive aspect, alongside the **duty to perform**, of a complex obligational relationship.

Much of this concept comes from Karl Larenz’s contribution to the law of obligations. According to the author, the obligational bond has to be understood, in principle, as a structure (Gefüge), endowed with elements of individual evaluative capacity. Such structure (the obligational relation) does not represent just the sum of its parts, as if they were disassociated; on the contrary, it would evidence beams indistinctly connected to the satisfaction of the **purpose** of the relationship - the only required consequence by virtue of this global concept (Larenz, 1982, pp. 26-27).

According to Larenz (1982, pp. 28), this would guarantee **totality** to the idea of the obligational bond, endowing it with unique dynamism. It would also be explained the maintenance of the relationship even if some of its legal standings were lost due to the will of the parties (Menezes Leitão, 2014, pp. 78) or even due to limitation. In fact, the complex obligational relationship, when understood as a structure, can also be viewed as a process (Prozeß), since the extinction of certain beams of its structure would not alter the identity of the relationship nor the possibility to reach the final objective of the **obligational procedural march**, that is to say, the arrival at its end, with the consequent satisfaction of the creditor’s interests and motivations (Couto e Silva, 2007, p. 20). Reaching the purpose of the obligation becomes more important than the nuances that occur in the structure since it is the end that guarantees coherence to the existence of the elements contained therein. Existing any form of default, invariably there is the frustration to those purposes, which is why there is a need to impose damages to whom who give cause.

Thereby, existing, at the core of the obligational relationship, diverse elements that, together with the fundamental **duty to perform** meet the **purpose** of the obligation, the mere fulfillment of the debt no longer corresponds to the total concept of performance. Thus, as a way to translate this diversity of **finalistic** beams in a tangible way, the civil law appropriates another figure which although always integral to the obligational relationship as an open clause, allows for concurrency from the judge for the creation of the norm (Martins-Costa, 1999, p. 326-327), exhaustible only in means of a specific case, able to, in the interim,
reflect, on a case-by-case basis, the normative content of these obligational finalistic elements individual to each hypothesis. This is, of course, the objective good faith.

The institute, which is a complex historical legal construction whose in-depth analysis, not owing to the limits of which this essay proposes, should be at least understood as a compulsory legal norm; existing as a principle or by operation of law; inherent to all juristic bonds as an "organic clause" that invariably invokes a duty of appropriateness to a juridical standard that translates the archetype by which a particular conduct should be interpreted (Martins-Costa, 1999, pp. 411).

The imposition of this clause to any obligational relationship entails creation, by the praxis, of a model of social behavior to be observed in juristic relations, rightfully in order to preserve the purposes of those bonds and to enforce compliance the lateral duties that emerge from the notion good faith. The greater the acquiescence of objective good faith by the courts, the more it fosters the perception of a wide range of definable conducts that proposes offense to archetypes that are required in different situations – what is expected of the individual in a particular relation (Pinto, 1982, pp. 346-347), more so, because different binding relationships undergo diverse inflows of objective good faith (Rosenvald, 2005, pp. 73), being essential a concrete individualization in such a way as to give greater understanding of the content of the standard.

Thus, assuming that the obligational relationship should follow its procedural march in compliance with the good faith verifies the emergence of consequent duties of not doing (Stoll, 1932, pp. 228-289; 291), i.e., to act in compliance with the concepts of protection, clarification, and loyalty (Menezes Cordeiro, 2001, pp.604) derived from the standard. Hence, it is possible to assume that good faith commits heteronomous rules that establish autonomous duties of compliance with the duty to perform, but also inherent to the bond, which, considering the relationship of trust natural to each particular case, reflects the protection given to the finalistic beams of the obligational relation (Pinto, 1982, pp. 339). To comply with these duties also ensures the fulfillment of the purpose of the obligation, without concomitantly damaging any of the parties.

It should be noted, that the obligatory content of good faith and its lateral duties are not to be confused with that of the duty to perform, immanent to the credit obligation. On the contrary, intended is the imposition of compliance with obligations arisen from a model of social conduct built from the recognition of its extension and consequences by the courts and that guarantee, beyond just the fulfillment of credit performance, the interests, and purposes inherent in complex obligational relationships. In short, violating good faith is not the same as violating the main obligation, although invariably, the former certainly configure a manner of default.

In the case of duties of diverse obligational content, such as reported above, nothing impedes the fulfillment of the duty to perform, thus satisfying the credit obligation, however, at the same time, violating lateral duties; frustrating the expectation of the creditor; requiring unacceptable sacrifice of the debtor; leading to drift of the conduct typically required or simply rendering the obligation faulty. In summary: not meeting the standard imposed by good faith on the behavior expected from both parties and, therefore, not reaching the purposes which Larenz mentions.

Since the treatment given by the traditional dichotomy of the theory of default relates to credit performance, it ends up ignoring the genesis of the perception of autonomous duties to the original duty to perform, derived from good faith that is impassable to be framed with symmetry in the logic of absolute or relative default. Conducts that violate these types of lateral duties of loyalty or protection cannot be invariably remitted to the delay and impossibility of credit performance, for example; precisely for the autonomy between the duty to perform and those lateral duties, which makes it possible to actually fulfill the credit but at the same time ignore the satisfaction of the purposes of the obligation, as occurs in a defective or injudicious provision or performance. The exegesis of good faith reveals the presence of a gap in the accountability of conducts that equally consists in a manner of default, but which are relative to anomalous duties not covered by the classical dichotomy.

Fortunately, the Germanic doctrine, with Hermann Staub’s concept of positive breaches of contract (positive Vertragsverletzungen) and his critics, ended up propounding a satisfactorily alternative that would
provide the solution to the incongruence of the complex obligational relation, of good faith and its lateral duties with the theory of default.

**Positive Breach of Contract and a Case-By-Case Overcoming of the Classical Dichotomy of Obligational Liability**

Karl Larenz himself defined, in his treatise on the law of obligations, two specific examples in which, the traditional designs, based on absolute and relative default, would be insufficient to respond to this atypical form of non-performance.

The first of them consists in which can be conveniently called the defect in the performance. That is to say; there would exist performance. However, it would also be imperfect, flawed. In this kind of example, the debtor would fulfill the core content of the obligation – that main obligation –, but this defective compliance would in itself bring damage to the creditor (Larenz, 1982, pp. 335). This is the case, for example, in the hiring of an Internet service provider that, despite actually providing Internet access, allows constant connection failures or sudden slowdowns. Clearer is the case of buying perishables, which, although delivered at the agreed time, are of inferior quality.

The second example, broader than the first, is connected to the debtor’s (or creditor’s) disregard to a burden of omission or cooperation, even if only implicit, arising from the obligational relationship (Larenz, 1982, pp. 335). Going back to the Internet service provider example; imagine that the failures cited are carried out with the fact that the provider knows that the contracted speed is not possible to be obtained at the address of the consumer. Thinking of a most prominent example, conceive the buying and selling of an apartment wherein the purchaser is not informed of the existence of various problems with the plumbing and infiltrations. On the other hand, where there is the duty of omission, it can be cited the case of a lease of a store in shopping center to open a pizzeria, where the lessee contracts with the lessor specifically because in the mix of stores presented, it was listed only one other pizzeria, i.e. only one competitor. However, during the course of the contract, the lessor permits three more pizzerias to be installed at the same venue; culpably increased the lessee’s competition, and, of course, evidenced unjust trade losses to his commercial establishment.

Note that these are conducts impassable of being framed, without enlargements and alterations in the traditional molds of absolute or relative default (Menezes Cordeiro, 2001, pp. 601). The nucleus of the default existent in violation to lateral duties cannot, in any way, integrate the logic of absolute default or delay - after all, defective compliance may even no longer be to the approval of the creditor (Menezes Cordeiro, 2001, pp. 601). The reason for this is that there is, in these cases, fulfillment of the duty to perform; symmetrical to the main obligation, but with specificities that offend total satisfaction of the creditor.²

It was by verifying the existence of this gap in the Bürgerliches Gesetzbuch (German Civil Code) that the lawyer Hermann Staub, starting from an illustrative analysis, ascertained the existence of instances of positive violations in the bond that, despite occasioning damages and, therefore, requiring compensation, had no correspondence in the predictions of default, absolute or relative (Staub, 1913, pp. 5–6; 39). In his view (Staub, 1913, p. 24), the mere indemnity also would not be sufficient to resolve the damage, by reason of the possibility of the obligation still being of interest to the creditor, which is why it was argued that it should be applied the effects pertaining delinquency: maintenance of the obligation with compensation subject to each singular breach; a global indemnity for the violation, or contractual termination. He thus coined the figure he called positive breach of contract (Staub, 1913, p. 24).

Staub initially proposed the application of the positive breach of contract in some original examples: in breach of an obligation of not to do; in the fulfillment of an obligation which still causes damages to the creditor; in the defective fulfillment of the duty to perform of a single or a deferred treatment obligation. From these examples, the German doctrine criticized the apparent lack of unity (Stoll, 1932, pp. 262; 314) in the Staubian construction, which would aggregate different contexts under the same spectrum (Lehmann, 1905, pp. 92), which would all invariably refer to a notion of breach of duties in a general aspect

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² The extension of the concept of delinquency by Brazilian law, while making mention of the place and mode also does nothing to resolve this problem as it aims to the main performance and not to the violations of lateral rights arisen from good faith.
or the occurrence of circumstances in which the fulfillment of the obligation would no longer make sense (Lehmann, 1905, pp. 77), solvable through the means of either delay or absolute default.

However, the material criticisms of the device created by Staub only served so as to better define the scope of the application of the institute. Such digression required to try to refute the Staubian construction evidenced the inevitable difficulty to linearly accustom the various modalities proposed to the traditional dichotomy. This stems from the fact that, in spite of the critics recognizing the differentiation between the duty of performance and the lateral duties resulting from good faith, the latter is impassable from simple integration to the logic of absolute default and delinquency, since its content is diverse. As such, the framework developed by Staub proposes a better-viewed alternative, in comparison to that offered by his critics, which would require an unsafe hermeneutic enlargement to rules regarding default so as to encompass circumstances which are considered to have violated lateral duties of good faith. At one point, it was even suggested that the regulations concerning non-contractual, Aquilian, liability, should be applied to cases of positive breach of contract. (Kipp, 1903, pp. 255-256) The bigger problem reports to the need for a regime (Menezes Cordeiro, 2001, pp. 601) to precisely frame the violations raised and not the eventual option of constructing variables of delay or absolute default whose effects would expand to those referred offenses that certainly deserve equal accountability (Menezes Cordeiro, 2001, pp. 601).

Therefore, vivified is the notion of better maintaining the classic paradigm to credit duties – main obligation – with which reports direct correlation. To the obligational lateral duties, arising from good faith and, consequently, to the flawed fulfillment of the main obligation, it is most useful adopting the positive breach of contract (Menezes Cordeiro, 2001, pp. 602), which proposes a visibly intelligible conceptual framework. In other words, it is neither the conduct nor the type of obligation that will demand a third classification, but the nature of the duty wherein the specific case is violated (Silva, 2002, pp. 223), whether a duty of performance or lateral duties. In this case, the importance of absolute or relative default is not denied, but a third way is proposed: a third regime, specifically applicable to obligational breaches that target lateral duties derived from objective good faith. Its applicability and the effects that will best serve the creditor, however, as intimately associated with good faith – which will be built precedent after precedent along with the delimitation of its lateral duties, by the courts – will only be acknowledged in specific; on a case-by-case basis, where it will be possible to verify, with unparalleled conviction, if one is faced with the violation of these same lateral duties whose conformability with the concepts of delinquency and absolute default are unequivocally unsatisfactory.

**Conclusion**

As did Hermann Staub, this essay proposed, at least, to demonstrate undeniable problems which, following the example of Brazilian law, still subsist in other legal systems, despite the fact that a viable alternative has existed for over a hundred years (Staub, 1913). Understand that the problem is conceptual. In the classical theory, there are no linear means of framing the aggression to the lateral duties - arisen from the maturing of the concept of good faith – in the mathematical and staunch systems of absolute and relative default. Doing so would entail an uncomfortable extension of the concept and applicability of delay and the impossibility of performance; that is what the own critics to the Staubian design accidentally proposed. Rather than confining itself to traditional concepts, with a consecrated sphere of applicability, one must permit the theory of default to evolve in the same way that the importance which is given to good faith and its interlocution with obligations has matured. Staub’s proposal, whose concept keeps immediate correspondence, non-existent in the traditional dichotomy, with the context of the violation of duties, stemming from good faith, alien to the duty to perform, constitutes the first step in doing so. To the local courts, however, is imposed the task of delimiting, in particular, its effects and the domain of its applicability, when faced, in specific, with breaches other than the traditional duty to perform.

**References**


ENNECCERUS, Ludwig; KIPP, Theodor & WOLFF, Martín. (1933). Tratado de Derecho Civil, t. 2. Derecho de Obligaciones, I. Barcelona: Bosch.


KIPP, Theodor. (1903). Das Reichsgericht und die positiven Vertragsverletzungen. Deutsche Juristen-Zeitung. 8 (11), 253-255.


Legal Protection on Genetic Resources and Traditional Knowledge as Business in Patent Law to Prevent Biopiracy

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Abstract

Genetic resources and traditional knowledge is the wealth of a country. The wealth of a country that is derived from genetic resources and traditional knowledge is also invaluable in number. Many people want to develop and commercialize genetic resources and traditional knowledge. Exploitation and development of genetic resources is sometimes misused. Appear a variety of cases from around the world regarding the misuse of genetic resources and traditional knowledge. Abuse of this kind is known as biopiracy. In the event of biopiracy, genetic resources and traditional knowledge is no longer used for local people who are all the time already having it. One for the protection of genetic resources and traditional knowledge this is the protection in the field of intellectual property rights. Genetic resources and traditional knowledge move into the realm of patent law. One of the Act are trying to accommodate from genetic resources and traditional knowledge is the Law of the Republic of Indonesia No. 13 of 2016 on Patent.

Keywords: Genetic Resources, Traditional Knowledge, Patent

Introduction

Knowledge is growing very rapidly once. There are two kinds of knowledge developed that knowledge really created new and never before and the second is the knowledge that already exists but has not been terekplorasi. Knowledge of this second type are usually the property of a circle or a local community of an area, or better known as genetic resources and traditional knowledge.

World Intellectual Property Organization provides a definition of traditional knowledge. Traditional knowledge (TK) is a living body of knowledge passed on from generation to generation within a community. Often it forms part of a people's cultural and spiritual identity. WIPO's program on TK Also addresses genetic resources (GRS) and traditional cultural expressions (Tces).³

One example of a country that has the genetic resources and traditional knowledge is also very much, rich and diverse is Indonesia. Indonesia has a wealth that has been given the hereditary and continues to be used until now. Indonesia has a lot of natural resources and immense knowledge. Traditional knowledge alive and growing in Indonesia is the intellectual outcome of the work of predecessors Indonesia. It is often used by local people in their daily lives.

In the explanation of the Law of the Republic of Indonesia No. 13 of 2016 on Patent said that Indonesia is a country which has a wealth of genetic resources and traditional knowledge that is often used by Inventor and abroad to generate new Invention. Therefore, in this Act contains a provision regarding the mention in a clear and honest materials used in the invention if related and / or derived from genetic resources and / or traditional knowledge in the description.

³ http://www.wipo.int/tk/en/
Examples of genetic resources and traditional knowledge Indonesia is the red fruit (buah merah) of Papua. With the knowledge of traditional communities in Papua, oil of red fruit can be anti-oxidants for the human body and have a fairly expensive in overseas markets. Both are cases of H5N1 virus (bird flu). In the body of the bird, the virus does not react because the bird is a carrier or carriers of the virus. However, when the virus has moved into birds, found many cases of poultry deaths due to bird flu and become very dangerous when birds affected by the bird flu spread in humans. Some of the genetic resources and traditional knowledge that exist in Indonesia has a unique diverse and not shared by other regions because it is unique in the region, but it has many benefits when used for the community.

Implementation of the use of genetic resources and traditional knowledge is often the case of abuse. Abuse is usually done by outsiders from the area so that the local community had been able to use be able to use these things. It has been referred to as biopiracy. Lots of misappropriation of genetic resources and knowledge also occur in various parts of the world. An example is the Neem tree which has for centuries exploited Indians US Company WR Grace patented (European Patent No. EP 436 257) In other cases, namely Basmati Rice is rice from India Basemath area i, the use of Turmeric (turmeric) from India patented America. Yacon plant species of tuber from Peru that can be used as material to make a low-calorie artificial sweetener, Plasma nutfahnya has studied Japanese experts, and has been cultivated on a large scale farmers’ melibih of Peru itself. Yellow Bean (Phaseolus vulgaris) of Mexico has been patented by POD_Ners. Plc, Amirika (US Patent No. 5,984,479) and it is precisely this patent is used to sue the Mexican Company.

In Indonesia itself also happened several times violations in the use of genetic resources and traditional knowledge that is Tantono Subagyo collecting Japanese Patent (40 patents) that uses plant materials pharma Indonesian origin, such as: brotowali, breadfruit leaves gondopuro, bitter, chili Java, etc. Finally, there is a portion of the patent dtarik itself by Shiseido Company. Furthermore, the shocking news in 1991 of course we still remember that Balinese craftsmen once sued in District Court in New York on motif products namely nagadan motif bracelet motif necklace Borobudur.

Method and material

The method used in this research is normative juridical a study that deductive initiated an analysis of the clauses in the legislation governing the above problems. Legal research in juridical means research refers to the study of existing literature or of secondary data used. While the normative mean legal research aims to gain knowledge about the relationship between the normative regulations with other regulations and application in practice.

Here we see a discussion of the rules regarding patent law, especially in Indonesia were discussed and hold genetic resources and knowledge traditional. Laws in Indonesia regarding the patent is the Law of the Republic of Indonesia Number 13 Year 2016 About the Patent Law of the Republic of Indonesia Number 11 Year 2013 concerning the Ratification of the Nagoya Protocol On Access To Genetic Resources

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7 [http://prasetyo hp.staff.hukum.uns.ac.id/hki-dan-perlindungan-pengetahuan-tradisional-di-indonesia/hki-dan-perlindungan-pengetahuan-tradisional-di-indonesia/]  
8 [http://lp3madilindonesia.blogspot.co.id/2011/01/divinisi-penelitian-metode-dasar.html](http://lp3madilindonesia.blogspot.co.id/2011/01/divinisi-penelitian-metode-dasar.html)
And The Fair And Equitable Sharing Of Benefits Arising From Their Utilization to The Convention On Biological Diversity.

**Result**

Legal issues mentioned above are a shared problem. Local people who use every day and also the memamng it was found by his ancestors many centuries ago and was given hereditary or also the result of giving Almighty for the abundant natural resources can be put on and use it again. Genetic resources and traditional knowledge need to be protected so that no misuse of use and its development.

The purpose of this study was carried out to know and understand the factors of implementation of biopiracy and legal protection to deal with the issues of biopiracy. Furthermore, the purpose of this article is to support the protection of genetic resources and traditional knowledge, so that local people are supposed to have and use of genetic resources and traditional knowledge still has its advantages though genetic resources and traditional knowledge have been developed and used for business purposes.

**Discussion**

History records many cases of biopiracy done at the international level, especially from developed countries (colonizers) to developing countries (colonies). Henry Wickham, adventurous botany of the United Kingdom in the late 19th century by openly admitted stealing seeds of Hevea brasiliensis, the rubber tree from the Amazon jungle to be mass produced in the Kew Royal Botanical Garden, but when the rubber is a commodity of nature’s most valuable because it is much needed in electricity, transport and war machine. Another case was Richard Spruce, from the United Kingdom successfully collected cinchona tree seeds, which end the monopoly of the Andean community on drug quinine.

This is an emotional issue for developing countries. After the issuance of a patent by the US patent office will turmeric aimed at researchers from the University of Mississippi Medical Center in 2005, the Government of India must fight in order to prove that the Indian community has long recognized the medical benefits of turmeric. They succeeded after a long legal battle.

Based on the history of Nagoya protocol then be made by several countries. Indonesia is one country that does ratification of the Nagoya protocol is an agreement complementary Nagoya. Protokol Convention on Biological Diversity (CBD). This protocol provides a framework for the implementation of a transparent legal and equitable sharing of benefits and equal arising from the use of genetic resources. The Nagoya Protocol was adopted on October 29, 2009 and will apply to all countries in the world 90 days after ratification to 50. There are now only 29 countries that ratified this protocol.

In general, the intent and purpose of the Nagoya Protocol are:

1. provide access and benefit sharing of the utilization of genetic resources and traditional knowledge related to genetic resources;
2. Access to genetic resources is still promoting the country's sovereignty and adapted to the national law on the basis the principle of prior informed consent; and
3. prevent theft of genetic resources (biopiracy).

While the benefit to be derived from keangotaan the Nagoya Protocol are:
1. assert state control over natural resources and strengthen the sovereignty of the regulation of access to genetic resources and the needs of indigenous people and their local communities, in line with Article 18 and Article 33 of the 1945 Constitution;
2. prevent theft and unauthorized use of biodiversity;
3. ensure the sharing of benefits (financial and non-financial) fair and balanced on the utilization of genetic resources; and
4. creating opportunities to access technology on the conservation and sustainable use of biodiversity.\(^9\)

According to the Oxford dictionary, biopiracy is the practice of commercially exploiting naturally occurring biochemical or genetic material, especially by obtaining patents that restrict its future use, while failing to pay fair compensation to the community from which it originates.\(^{10}\)

In Article 26 of Law No. 13 of 2016 on Patent say that If Invention relates to and / or derived from genetic resources and / or traditional knowledge, should be clearly and correctly origin of genetic resources and / or traditional knowledge in the description, Information on genetic resources and / or traditional knowledge stipulated by official agencies recognized by the government. The division results and / or access to genetic resources and / or traditional knowledge are implemented in accordance with the legislation and international agreements in the field of genetic resources and traditional knowledge. May also require the elimination of patents based on court decisions do if Patents derived from genetic resources and / or traditional knowledge does not meet the provisions of applicable legislation.

**Conclusion**

Indonesia as one of the countries that have a diverse wealth one form of genetic resources and traditional knowledge has made every effort to protect genetic resources and traditional knowledge. One of them by ratifying the protocol Nagoya and also make the Law of the Republic of Indonesia No. 13 of 2016 on Patent that genetic resources and traditional knowledge is not misused.

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**References List**

\(^{9}\)http://anafisipunpad13.blogspot.co.id/2014/10/biopiracy-dan-ancamannya-terhadap.html

\(^{10}\)https://en.oxforddictionaries.com/definition/biopiracy
http://www.wipo.int/tk/en/

http://www.greeners.co/berita/indonesia-masih-minim-perlindungan-dan-penelitian-sumber-daya-genetik/


http://lp3madilindonesia.blogspot.co.id/2011/01/divinisi-penelitian-metode-dasar.html

http://anafisipunpad13.blogspot.co.id/2014/10/biopiracy-dan-ancamannya-terhadap.html

https://en.oxforddictionaries.com/definition/biopiracy
The law of evidence - a separate branch of law or merely a research method? A perspective within chosen legal systems

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Abstract
Evidence is an important aspect of legal practice, influencing the outcome of a particular case in judicial, administrative and other procedures. Put simply: winning or losing depends on evidence. This paper addresses the problem of the law of evidence. The expression "law of evidence" is defined differently in the Polish legal literature, being usually seen as a set of legal provisions or norms that form part of procedural law, concerning evidence, and in particular evidentiary procedure. The law of evidence, however, is sometimes considered not a separate branch of law, but, at best, a certain scientific and didactic discipline that deals with evidence-related matters. There is no single, universally embraced definition of the law of evidence in Polish law. On the other hand, German law assumes, in principle, that the law of evidence consists of legal norms which, in a given area, govern evidence activities in court. Although it is recognized as part of procedural law, its relationship with substantive law is nonetheless emphasized. The laws of the United Kingdom and the United States, both belonging to common law, take the law of evidence to be a separate area of law and science. In contrast, in the legal literature on European Union law and international law, it is understood as part of procedural law concerned with evidence. The understanding of the law of evidence differs among particular legal orders, which is why the expression should be used with caution and be accompanied by an explanation of the meaning it is ascribed.

Keywords: law of evidence, research method, branch of law

Introduction
Indubitably, evidence is an important part of legal practice. Practically every type of trial – whether civil, penal or administrative – relies on evidence. It is evidence that allows the parties to demonstrate circumstances which result in beneficial legal effects for them. It should therefore not be surprising that practitioners and representatives of legal doctrine alike focus their attention on evidence. The scientists' interest in evidence is plainly visible in all sorts of texts concerning procedural law. Some papers even use the term “law of evidence”. The law of evidence is, thus, subject to scientific considerations (in many legal cultures and therefore varied legal systems), the fact which raises a number of questions: What exactly is this “law of evidence”? Is it a separate branch of law, such as civil law is, or is it merely a scientific/research method related to evidence in law? An analysis of available literature on the subject does not seem to yield conclusive answers to the above questions, applicable within every legal system. This paper aims to present how “law of evidence” is understood in different legal systems, using Polish law, German law, international law and common law as examples.

The Law of Evidence within Polish Law
Analysis of the Polish legal literature leads to the conclusion that the science of law in Poland has yet to develop a coherent and universally embraced meaning of the term "law of evidence". Depending on the linguistic context, it tends to assume different meanings that are often distant from each other, thus making "law of evidence" an ambiguous term (even for lawyers).
Some legal scholars link "law of evidence" with a set of rules singled out by the subject matter of the regulation, which is evidence. Such concept of the law of evidence is presented by K. Marszal, who explains it as all evidence-related provisions (Marszal, 1988). It should be noted that K. Marszal spoke on the law of evidence in the context of penal proceedings, while detailing that rules constituting that law are the ones "contained in the Code of Penal Procedure". Accordingly, it seems possible to refer such understanding to the overall system of law, to each of the procedures, not limited to penal proceedings alone. M. Cieslak, meanwhile, describes the law of evidence as rules governing evidence matters in proceedings (Cieslak, 1955). The author explains that the law of evidence forms part of procedural law (penal civil, administrative law). He also points out that standards of evidence in certain proceedings vary, "they are distinguished by their distinctiveness, depending on the nature and function of the branch of law they comprise". The term "law of evidence" is defined in more detail by S. Kalinowski, who takes it to be, in general, the rules governing evidentiary proceedings, the methods and conditions of search, the protection of evidence, and the conduct and evaluation of evidence by court (Kalinowski, 1971). A similar concept is proposed by A. Gaberle, who describes the law of evidence as a set of laws governing the search, collection, conduct, protection, consolidation as well as verification and evaluation of evidence (Gaberle, 2010). It should be noted that the above-mentioned meanings have been worked out in legal literature in the field of law and penal procedure. As it turns out, in Poland, it is precisely the representatives of penal law who most frequently refer to the law of evidence.

In the literature on law and civil proceduer, as well as law and administrative procedure, the definition of “law of evidence” is rare. However, when analyzing civil law literature, it was possible to notice that formulation of the concept of that law was attempted by Ł. Błaszczak, who saw in it a group of evidence-regulating provisions, such as taking, examining and evaluating evidence. Ł. Błaszczak goes on to stress that the law of evidence concerns civil procedure rules and is therefore part of procedural law. The author argues at the same time that the law of evidence is made up of the norms of the law in force (procedural law) that interfere with evidence directives. He also points out that the law of evidence governs the matter of evidentiary proceedings (Błaszczak, 2015). It should be noted there is some inconsistency in Ł. Błaszczak’s consideration as he alternately indicates that the law of evidence consists of provisions, and on other occasions - of norms. It seems, therefore, the distinction between provisions and norms was not accounted for, and it should be emphasized that the former cannot be used interchangeably with the latter. The distinction between legal norms and legal provision (and their relationship) was made by Z. Ziembinski in the Polish science of theory of law. Z. Ziembinski states that "norms are the content of provisions". Legal provisions (descriptive level) express legal norms (normative level), which should be read in the process of legal interpretation (Ziembinski, 1960). This distinction has been universally accepted by legal scholars. On the other hand, in papers relating to administrative procedure, it can be noted that A. Szopieraj-Kowalska defines the law of evidence as an entirety of legal norms regulating the process of establishing the basis of factual solutions by means of evidence-gathering (Szopieraj-Kowalska, 2012).

It is also worth noting that the expression "law of evidence" is the subject of some academic papers. It is the title of a book edited by R. Kmiecik, in which he explains the law of evidence is the name of a didactic subdiscipline (Kmiecik, 2005). At the same time, R. Kmiecik points out that the law of evidence is the law regulating evidence procedure, i.e. evidentiary proceedings (Kmiecik, 2005a). The law of evidence as a certain didactic subdiscipline is also mentioned by P. Gorecki. He explains it as a subject included in the curricula of law courses at certain universities, with the lectures being designed so as to supplement other subjects such as civil, penal or administrative procedures. On the other hand, P. Górecki indicated the law of evidence could be said to be a newly emerging interdisciplinary research field, not only related to certain branches of law, but also to other areas of knowledge. For the law of evidence understood as such, it is nevertheless important to clarify what evidence, evidentiary procedure and rules of the law of evidence are. In this sense, the law of evidence goes beyond the rigid framework of judicial and administrative procedures (Górecki, 2011).
P. Czarnecki attempted to systematize the definition of “law of evidence”, stating that formulation of its precise definition proved extremely difficult (Czarnecki, 2014). Analyzing the views of other scholars, he noted one common ground, namely the fact that the law of evidence comprised regulations, and therefore norms, defining both the catalog of evidence and the manner of evidence procedure. As he pointed out, that was the essence of the law of evidence, which was specifically regulated by statutory law, independently of the source and hierarchical nature of the normative act. The content of these provisions, and more specifically the content of the norms developed on the basis of these provisions in relation to the stage of evidence verification, most often refers to non-statutory criteria (indications of knowledge, life experience, principles of sound reasoning), albeit these criteria have been set out in the act itself (Czarnecki, 2014). Then, considering whether the law of evidence constituted a separate branch of law, P. Czarnecki concluded it could not be regarded as an autonomous branch of law. In his view, it is impossible to precisely define the circle of addressees of the rule of law (subjective criterion) since provisions governing the law of evidence concern a wide range of subjects - both judicial authorities and other parties involved; it is also problematic to indicate the subject of regulation (objective criterion) given the law of evidence regulates all that is evidence-related, whereby the very term evidence is ambiguous. Finally, it is impossible to indicate a particular method of regulation (regulation method criterion) because it recognizes no autonomy of the parties (as in the case of civil law) or subordination of the subjects (in administrative law) (Czarnecki, 2014). It should be stressed that these considerations are based on the assumption that the separation of branches of law is determined by: the subjective criterion (determining which specific categories of entities exist in respect to particular legal relations governed by a particular set of rules), the objective criterion (defining the type of relationship regulated by a particular branch of law - this criterion is not autonomous as it regulates relations falling within different branches of law), and the method of regulation (indicating characteristic features of a given branch and the way it regulates legal relations that distinguish it from the other branches of law). Additionally, the author stated the other criteria – including normative act type criterion, case-determining body criterion, or other functional criteria - were less commonly embraced. The above observations were used by P. Czarnecki as the basis for the statement according to which the law of evidence was neither a particular branch of law nor a legal discipline. He believes, however, it constitutes a kind of scientific (didactic) discipline regarded as a structured set of theorems, scientific facts and interpretations of these facts in a clearly distinct area of matters, which allows to conduct a scientific inquiry in order to independently explore or expand the researcher’s knowledge or its presentation to a specific auditorium. This is confirmed, in his view, by the fact the law of evidence is the subject of lectures in law course curricula at some universities and the subject of special postgraduate studies. In his remarks, P. Czarnecki also mentioned “the law of evidence” was "undoubtedly a lapidary expression (key word), extremely useful in legal discourse or in procedural literature" (Czarnecki, 2014).

In light of the absence of a uniform concept of the law of evidence in Polish law, it is worth mentioning briefly the relevant views of foreign legal orders, as it is necessary to determine how "law of evidence" is defined in other legal systems. At this point, it should be noted that R. Kmiecik argues it is difficult to predict whether in the future the law of evidence will become an independent branch of law in Poland, and the theory of evidence – a science that is either trans- or inter-disciplinary (Kmiecik, 2005).

The Law of Evidence within German Law
The name "law of evidence" (German: das Beweisrecht) appears frequently in the German-language legal literature (much more frequently than in the Polish literature), although it is usually not defined. Detailed analysis of the literature, however, makes it possible to find an explanation of how "law of evidence" is understood within German law. As H. Ohletz points out, the law of evidence belongs to the subject matter of procedural law (Ohletz, 2006). However, such unequivocal codification of the law of evidence into procedural law is not shared by all representatives of the doctrine. To put forward an example, A. Piekenbrock is in favor of a different understanding, explaining that the law of evidence "oscillates between procedural law and substantive law" (Piekenbrock, 2012). H. Prütting also argues the law of
evidence is not exclusively procedural law and has a bearing on substantive law (Prütting, 2016. Prütting 2016a). The German legal literature suggests the law of evidence consists of such legal norms which govern evidentiary proceedings (German: Beweistätigkeit) in a given area of law (German: Rechtsgebiet) in court. The law of evidence forms part of procedural law because it applies independently of a specific dispute and of its substantive legal status. Nevertheless, the law of evidence seems to be related to the provisions of substantive law that determine the evidential situation of the parties, including distribution of the burden of proof (German: der Beweislast) (Ohletz, 2006. Prütting 2016).

The Law of Evidence within Common Law and International Law
The meaning of “law of evidence” seems to be the most coherent and systematized in the legal literature of states belonging to the legal culture of common law. Both in English law and American law, the law of evidence is considered a separate area of law (i.e. separate from a specific procedure – penal, civil, administrative). As such, it is a legal area in itself. In addition, the law of evidence is considered a separate branch of the science of law (Karolczyk, 2013. Kmiecik, 2005. Landsman, 1990. Buckles, 2003. Freer, 2006. Keane, 2008).
In the legal literature on international law and European Union law, the expression "law of evidence" is understood as part of procedural law concerning evidence-related matters (Prütting 2016. Crotogino, 2016).

Conclusions
The analysis of the legal literature on evidence helps observe that it contains the expression "law of evidence" which is often unexplained. This applies not only to the Polish literature but also to the German, English and American literature. It is therefore important to determine the meaning of the term "law of evidence".

Within Polish law, the term "law of evidence" is, without a doubt, an ambiguous expression whose understanding varies. It seems that the most detailed analysis of the concept in question was made by P. Czarnecki, who rightly indicates the impossibility of speaking of the law of evidence as of a separate branch of law. Thus, the law of evidence is merely a particular scientific and didactic discipline that deals with evidence matters. It is neither a set of legal provisions, or legal norms, but rather a discipline of science concerned with legal norms of specific branches of law insofar as they relate to evidence. Currently, in Poland, the first papers on the law of evidence in different procedures can be found - especially noteworthy in this regard is the publication of R. Kmiecik, who - incidentally – debates whether the law of evidence could evolve in the future and attain the status of an independent branch of law, and the science of evidence theory – the status of a separate scientific field.

While German law is not entirely consistent in the understanding of the law of evidence, there is nonetheless no dispute as to its relationship to both procedural and substantive law. Within the German system, it is a set of legal norms governing evidence-related matters in court. In the legal systems belonging to common law, the law of evidence is a separate area of law and science. Meanwhile, European Union law and international law tend to understand the law of evidence as part of procedural law that governs evidence-related matters.

The analysis of the meaning of the expression “law of evidence" in specific legal orders makes it possible to observe that the term in question assumes a number of meanings. In particular, its understanding differs in the legal literature concerning individual legal orders (Poland, Germany, where there is no single definition of the law of evidence). Consequently, the expression should be used with caution and be accompanied by an explanation of the meaning it is ascribed.

REFERENCES
Błaszczak, Ł. 2015. *Metodologiczne podstawy teorii dowodów w postępowaniu cywilnym*. In: Ł.


The Battle Against) International Human Trafficking and Sexual Exploitation

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Abstract

International Human Trafficking began with the commercialization of slaves, and nowadays, it is a form of organized crime constituting a serious violation of human rights and sexual freedom. As a consequence of the process of globalization, International Human Trafficking has made, not only immediate victims, but it has also impacted upon the social and economic structures of society. In what involves crimes against sexual dignity, there is the conduct of abuse and the taking advantage of the good faith of children and women with the sole purpose of fostering the sex trade industry. Due to their vulnerability, they become the main victims of such crimes. Having in mind the serious nature of this problem, as well as the need to promote and strengthen international cooperation to help tackling transnational organized crime, the United Nations has established the Palermo Convention. Thereby, its Member-States have committed themselves to adopt a set of actions against this type of transnational organized crime. For instance, in Brazil some important measures were taken in order to fight against International Human Trafficking.

Keywords: International Human Trafficking, Sexual exploitation, International Law.

Introduction

International Human Trafficking is a phenomenon that has developed quietly and has spread-out over much of the various countries of the world. Criminal activity is extremely profitable and is driven by powerful international trafficking networks.

In recent decades, human trafficking has intensified through a combination of factors, including those of an economic, historical, social and cultural variety. From that, nowadays, it is not easy to determine the real dimension of this problem, moreover due to its own illicit nature.

The theme, principally, attracts a group of vulnerable people, such as children and women, who predominantly, are subdued to sexual exploitation, with the sole purpose of promoting the sex trade industry. Hence, this article aims at addressing those international instruments on trafficking and combating the sexual exploitation of women and children, as well as the advances in Brazilian legislation.

From this issue, it is worthy of questioning, of which shall serve to guide this present research, the following query: To what extent does international legislation contribute to the battle against the sexual abuse of children and women, as victims in the international trafficking of people?

This research was chosen, owing to the existence of the lack of financial incentive for the combatting and prevention of the subject matter herein, and mainly, to address a frontal violation of the right to sexual dignity as a fundamental human right, which had been upheld by national and international legislation.

It is worthy to note, that in addition to the importance of the academic point of view, this research has as its purpose, to contribute to a particular reflection hereof, on the proper social nuances of the issue; in light of, the increasing number of victims of this crime, who are often helpless, terrified and uninformed, as well as the awareness of jurists to the problem of trafficking in persons.
Method and Materials

The methodology used in the article is descriptive and exploratory, with an interpretative analysis based on the bibliography and documents, considering scope analysis of the historical evolution of the international regulatory system, and of the Brazilian legislation for the protection given to women and children in the ambit of fighting against human trafficking for sexual exploitation.

Furthermore, there is argumentative structure based on skeptical semantics, of which for Brazil (2002, pp. 19), “is a mapping of all ranges formed by legal argumentation, for all allowable arguments, i.e. a function that brings back the allowable range, within those acceptable arguments that integrate, in a minimum fixed point of argumentative structure”.

Discussion

1. International Human Trafficking in Present-Day Context

International Human Trafficking developed by becoming a silent and cruel phenomenon, in which are traded and sold incalculable numbers of human beings for the purposes of exploitation, sexual exploitation, prostitution, forced services, slavery or practices similar to slavery, servitude, or the removal of human organs.

Criminal activity is widespread throughout most of the countries in the world, and it can equally happen within a country, between border countries and on different continents. It is worth highlighting that historically, the International Human Trafficking began predominantly in the northern hemisphere towards the southern hemisphere, i.e. from the richest countries to the least developed among them. Currently, this predominance there, of the trafficking, driven by the accelerated process of globalization, happens in all directions in the world (ILO, 2006).

Recently, with the publication of the report, "A Global Alliance against Forced Labour", the International Labour Organization (ILO) estimated that approximately 2.4 million people in the world, who have been trafficked, are subjected to forced labour. The ILO estimates that 43% of these victims are subjected to sexual exploitation and 32% to economic exploitation — the remaining (25%) are trafficked in a combination of these ways or for reasons undetermined (ILO, 2006).

Still, it is estimated that the profit of the criminal networks involved in the business of illegally transporting a human being from one country to another reaches $13,000.00 dollars per year and may reach $30,000.00 dollars in international trafficking, according to estimates of the United Nations Office on Drugs and Crime (UNODC).

International Human Trafficking is characterized by being an activity of low risks and high profits. The low risk that this criminal activity represents to the traffickers can be illustrated by the negligible numbers of convictions for this crime. This is, above all, the potentiation of the trafficking in vulnerable human beings, of the scenario confronting women and children.

Women are particularly vulnerable to trafficking because of factors such as poverty, underdevelopment and unequal opportunities. It turns out that currently there are many circumstantial factors favoring trafficking, underscored through the effects of: globalization; gender discrimination; political, economic and civic instability in regions of conflict; domestic violence; undocumented emigration; sexual tourism; corruption in public administration and deficient laws.

Thus, just as women, children and adolescents are vulnerable victims to trafficking, predominantly subjugated to commercial sexual exploitation. This phenomenon is defined as a relationship of mercantilization and the abuse of the bodies of children and adolescents that are not advanced for sexual activity and who are without the capacity to provide informed consent.

2. The Production of Legislation for the Protection of Children and Women on an International Scope
From the twentieth century, human trafficking has been the object of numerous international treaties geared to this vulnerable group. Initially in Paris, the Agreement for the Repression of the Trafficking of White Women was signed, ratified in convention in 1910. In Geneva in 1910 the International Convention for the Repression of the Trafficking in Women and Children took place, and in 1933 the Convention for the Repression of the Trafficking in Greater Women. The latter of which was achieved as a Protocol for an Amendment to the International Convention for the Repression of the Trafficking in Women and Children. (Amaral, Carvalho, & Felix, 2013, pp. 123)

Furthermore, and apart, the International Labour Organization (ILO/OIT) was created in 1919 as part of the Treaty of Versailles, which ended World War I. The ILO/OIT was founded on the primary conviction that universal and permanent peace can only be based on social justice. Consequently, it was responsible for the formulation and application of international labour guidelines (conventions and recommendations). The conventions once ratified by the sovereign decision of a country, become part of their legal system.

Among the diversity of the conventions, there was the concern about the protection of human rights in the employment-labor market of the world; deserving emphasis is Convention No. 182, approved in 1999, which established that any Member State that ratifies it, should adopt immediate and effective measures to ensure the prohibition and elimination of the worst forms of child labour, as a matter of urgency.

Additionally, with the creation of the United Nations, an international organization formed by countries who have united voluntarily to work for worldwide peace and development, concern about human trafficking beings and the sexual exploitation of women and children has become global in scope.

In accordance with Trindade (1997, pp. 167-168), the international instruments of human rights protection that are produced by the United Nations 'have, in effect, constituted the backbone of the universal system of human rights protection, and should not be in an isolated form or compartmentalized, but rather be related to each other.

Therefore, the rights should relate within the ambit of the legal system and derive from those of other systems. Supporting this arrangement, the (International) Convention on the Rights of the Child (CRC/UNCRC) was established in 1990. The Convention outwardly covered all areas of Human Rights: Civil, Political, Economic, Social, Cultural Rights and virtually, all countries.

One of the mentioned sources of external law aimed at combating International Human Trafficking arena, worthy to highlight, is the Rome Statute (of the International Criminal Court) with its disposition of crimes to the jurisdiction of the International Criminal Court (ICC), which embodies the list of crimes against humanity as defined as: "the exercise, in relation to a person, of a power or a set of powers that translate a right of ownership over a person, including the exercise of that power in the context of trafficking of persons, in particular women and children ".

In the international sphere, the Palermo Convention, also known as the United Nations Convention against Transnational Organized Crime (UNTOC), is the primary tool to transnational organized crime. It was adopted by the UN General Assembly on November 15, 2000, the date assigned to disposition for the signatures of the Member States and which came into force on September 29, 2003.

The concern of the United Nations for the protection of women and children, through Resolution No. 53/111 of the General Assembly, of December 9, 1998, was to establish a special intergovernmental committee, of an open structure, to an international convention of global proportions against transnational crime and to examine the possibility of elaborating an international device to crackdown on trafficking in women and children, as human trafficking is focused on these vulnerable groups.

Henceforth, the more adopted concept on trafficking in people is that contained in the Article 3 of the a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter "the Protocol in Trafficking of Persons"), which provides:
"the term 'trafficking in persons' signifies the recruitment, the transport, the transfer, the accommodation or the receipt of persons invoking the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of authority or the situation of vulnerability or delivery or the acceptance of payments or benefits to obtain the consent of a person having authority over another for the purpose of exploitation. Exploitation shall include, at a minimum, exploitation by the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."

The Palermo Convention, which is an apparatus originating in this intergovernmental special committee to combat human trafficking, is supplemented by three protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

In Brazil, in addition to the ratification of the additional Protocols to the Protocol of Palermo, in 2004, Law 13,344/2016 was enacted, on October 7, 2016, which stiffened the penalties for national and international trafficking of people. The proposal originated in the Parliamentary Committee of Inquiry (CPI) of National and International Trafficking of People in Brazil, which has worked in the Senate between 2011 and 2012; and constituted adaptation of the Brazilian law to the Palermo Convention.

The text includes the Criminal Code of the crime of trafficking in persons, typified by the actions to manage, recruit, transport, purchase and accommodates persons through threats, violence, fraud or abuse, for the purpose of subjecting them to conditions of slavery, illegal adoption, sexual exploitation and removal of organs, tissues or body parts.

The imposed sentence of punishment is expected to be from four to eight years in prison, plus the payment of a fine. The penalty can be increased if the crime is committed by a civil servant or against children, adolescents and the elderly. The penalty can also be aggravated if the victim withdraws from the national territory.

From the analysis of the legal texts, it remains clear that the international legislative authority has imposed protective measures, international assurances for the personal intangibility of the victims of the trafficking in persons, however, it still remains as an object of discussion if these attributes, in fact, attain the protection of children and women and sexual abuse. Therefore, in the face of this, it is worthwhile to ask the following question: To what extent does international law contribute to the battle against sexual abuse of children and women who are the victims of the international trafficking in people?

3. Trafficking of Women and Children for Sexual Exploitation

For some time now, the victim of the human trafficking has joined the realm of the concerns of scholars of contemporary political-criminal problems and has also become distinct in the academic universe. The crime evades the deplorable situation of the violation of the human rights of its victims, as it profiles a patent disregard for the principle of human dignity, already proclaimed in the Universal Declaration of Human Rights (UDHR) of 1948.

Isolated by exclusive processes of globalization, poor families are forced to leave their past certainties and social references and enter into the dependence of employers who take advantage of imperative needs. Consequently, woman, child or pre-teen become a household worker, aggregated, disposable and vulnerable to the many different forms of exploitation, such as the commercialization of sex.

Child trafficking and people for sexual exploitation are highly detrimental to women and children who are subjected to slave labor. Around the world, this activity is conducted with a low rate of impunity. Phinney (pp. 01) albeit discusses that:
“Sex trafficking is more than an issue of crime or migration; It is an issue of human rights, a manifestation of persistent gender inequality and the subordinate status of women globally. Around the world most trafficked people are women and children of low socio-economic status, and the primary trafficking. The demand aspect of sex trafficking remains the least visible. When demand is not analyzed, or is rarely mentioned, it becomes easy to forget that people are trafficked into the sex industry to satisfy not the demand of the traffickers, but that of the purchasers, who are mostly men. The insatiable demand for women and children in massage parlors, strip shows, escort services, brothels, pornography and street prostitution is what makes the trafficking trade so lucrative.”

According to Ary and Maia (2008, pp. 502) human trafficking removes the victim’s freedom and security using them to be traded as commodities in a subsequent exploitation scenario, that delineates a kind of slavery in the 21st century. In addition, it threatens both the internal order of States as an international system itself, which affects the principles of good global governance, such as the protection of Human Rights and the integrity of democratic institutions.

Moreover, many practices, related to the crime of human trafficking are strongly repudiated. Before effectuation, protection measures should include, as appropriate, effective procedures for the establishment of social programs capable of providing adequate assistance to women and children, as well as to the people in charge of their care. Further, other forms of prevention are necessary for the identification, notification, transparency, investigation, treatment and follow-up of subsequent cases.

Henceforth, it is imperative that trafficking should be treated by the international community as something urgent and of a priority, including in the face of the sexual violation of children and women. Thereby, necessitating the need to construct international policy measures aimed at terminating this criminal activity and, especially, safeguarding the rights of these victims.

In this regard, Ekberg (2004, p. 1189) highlights that:

"prostitution is a serious problem that is harmful, in particular, not only to the prostituted woman or child but also to society at large. Therefore, prostituted women and children are seen as victims of male violence who do not risk legal penalties. Instead, they have the right to assistance to escape prostitution. Pimps, traffickers, and prostitution buyers knowingly exploit the vulnerability of the victims caused by high rates of poverty, unemployment, discriminatory labor practices, gender inequalities, and male violence against women and children. On a structural level, Sweden recognizes that to succeed in the campaign against sexual exploitation, the political, social, and economic conditions under which women and girls live must be ameliorated by introducing development measures of, for example, poverty reduction, sustainable development, and social programs focusing specifically on women."

In face of this reality, it is necessary to have international rules to guide the offended either in preventive form when there is an effective redress, or on the grounded mainstay of bringing about a criminal system of social reality in order to achieve a balance between worldwide interests and the victim, from which prejudice has resulted to the accused.

Therefore, to the direct eye of displayed victims, there is the necessity for greater protection and effectiveness of their rights, in short, the needed care of the offended. In this regard, it is necessary to have an intervention with those grounded mainstays based upon the sources of law now cited by the international
community, in order to satisfy the real necessities and expectations of children and women victims of human trafficking for the crime of sexual exploitation, and from that, plot a criminal policy that responsibly ensures a rational orientation for the victim, paralleling their protection, redress, reaffirmation of the validity of the penal norms, and also, for the preventive effect of normative protection.

Conclusion

International human trafficking is the trading in human beings for the greater intended purpose of sexual exploitation. This illicit activity violates human rights to human dignity since this conduct exploits and abuses the good faith of children and women, who are the main victims of this crime, due to their condition of vulnerability, allowing the promotion of the sex industry.

By analyzing the historical process of the development of International Human Rights Law (IHL), one can observe a gradual expansion of the protection of a category that by its vulnerability, demands such attention: women and children. Seen in these terms, the conferences of the International Labour Organization, the conventions and treaties of the United Nations, as well as the Palermo Protocol stand out. Nevertheless, dilemmas and challenges to the implementation of the rights of women and children, among them, the process of awakening evokes a more global consciousness to the issue of vulnerability of this group.

It is a modern form of slavery in which the process of globalization of the economy and of communications brings out the billion-dollar business in trafficking of this vulnerable group for sexual exploitation. In this way, the international community seeks, through the means of international agreements and global actions to form an incisive protection to stand guard of the interests of these victims.

It is important to emphasize that there is still a long way to be pursued until the righteous respect and safeguarding of the rights of women and children from any violence are totally reached. In that way, it is necessary to outline programs, projects and actions at governmental and non-governmental levels with a public policy focused on the eradication of human trafficking, exploitation and sexual abuse.

Finally, this research argues for the training of professionals working in the fight against transnational crime networks along with the cooperation of local agencies. Furthermore, the participation of society, social media must also be taken into account as a means of information, prevention and the halting of criminal activity.

List of References


A Lesson from the Nuclear Agreement with Iran: International Participatory Democracy; a Legitimate End to Middle East Wars

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Abstract

This paper considers the effectiveness of intensive democratic negotiations of belligerents in Middle East wars as a workable conflict resolution model. This is effective because of two reasons; first, through intensive negotiations, participatory democracy is conducted and therefore belligerent states have the equal opportunity to discuss their proposals and directly engage in law-making process. Second, laws, norms, and normative values elicited and recognized by belligerents during a course of negotiation of a conflict resolution are intrinsically legitimate because states party to that resolution have directly engaged in law-making process on a consensus-based model. As an example, the nuclear agreement with Iran is concluded on the basis of participatory democracy whereby parties to a multilateral negotiation had the equal opportunity to participate, discuss and flesh out an agreement rather than vote for or against a protocol already designed out of their intuitive consent—adversarial law-making methods. The proposed research is composed of three major parts; first, the necessity and effectiveness of the participatory democracy in international law-making is highlighted and the main critique is made against current adversarial democracy in international law-making. Second, addressing Nuclear Agreement with Iran as an revolutionary transition from adversarial democracy and particularism to egalitarian participatory democracy in international law-making, this research puts emphasis on the democratic negotiation model as a workable conflict resolution mechanism to current Middle East wars and conflicts.

I. Introduction

International law is a very special field of legal studies that has for many centuries been under the conceptual question of whether it is genuinely law, for it purportedly suffers from lack of harmonization of standards from the prospects of traditional legal theory. In detail, international law is based on contradictory promises of its actors and unsettled norm-identification formulas which suffer from a considerable degree of arbitrariness and indeterminacy.\(^{11}\) International law’s indeterminacy coupled with its decentralized horizontal political system have brought about institutional illegitimacy of its organizations; the failure of the United Nations Security Council to authorize a collective armed intervention to stop genocidal mass murder in a given territory is indicative of its dysfunctional posture in posing a rule of obligation in international law. Also, the proper function of international courts and tribunals in seeking to give weight and effect to identified values has seriously been under a debatable question. For instance, the jurisdiction of International Court of Justice being voluntary ‘is undoubtedly a major flaw of the international legal order, since it gives leeway for states to act as judges in their own cause’.\(^{12}\)

The conceptual skepticism towards international law stems mainly from assessing international legal theory within the terms and scope of the traditional concept of law theorized for domestic legal systems. Domestic societies are of a vertical structure marked by hierarchical centralized political power while international law is of a non-compulsory jurisdiction where political power is decentralized and horizontally distributed. So, it is of a crucial importance to note that ‘if international law does not fit the

\(^{11}\) See (Koskenniemi 2006)

\(^{12}\) (de Almeida Ribeiro 2015) 39.
criteria of the concept of law used at the domestic level it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves'.

International law is in fact a fluid field of law for international law-making apparatus enjoys cognitive advantages over their subjects in determining what the latter have reasons to do. James Crawford persuasively described international law in practice with intellectual activities carried out for practical purposes. Given his ideas, the structure of international law is intellectual rather than material. So, international law is as fluid as human intellect. And the only mechanism to march dynamically with the fluidity of international law is to define a dynamic theory of democracy which effectively submits itself to a developing international law.

Strengthened transnational bonds and partial fusions have overtly necessitated extension of the reach of the principle of democracy beyond the notion of the nation-states or the governance of the states. Given the fluidity of international law-making, it is recognizable that the sense and notion of democracy needed for a particular domain of public international law does not necessarily follow the same pattern in other domains. For example, democracy needed for the matters of laws of war and, perhaps, also military intervention of intergovernmental organizations is not the same for those of WTO or decision-making methods in international financial institutions. Being said that, the proposed research makes effort to conceptualize a dynamic theory of democracy based on egalitarianism and equality en route to plot a legitimate end to Middle-East wars and conflicts. The Iran nuclear deal framework agreed upon in 2015 between Iran and permanent members of the United Nations Security Council plus Germany is, in this article, considered as a democratically legitimate model in reaching agreements for Middle-Eastern inter-State calamities. The participatory perspective of democracy, as a workable solution to Middle-East wars, is narrated in the second part with a particular emphasis on Iran nuclear deal as a symbol of such a model of law-making. In the third part the necessity of adopting a democratically legitimate conflict resolution model for Middle East is highlighted. At the end, final remarks of this article are emphasized.

II. Participatory Democracy; Iran Nuclear Deal Model

Manifestations of representative democracy in international norm-making process are different degrees of adversarial law-making methods such as veto procedure, weighted voting, majority principle, and unanimity, whereby minorities or non-dominant international subjects are not voiced determinatively and rarely do they find a room to deliberatively pursue their interests and participate in making norms on international plane. Even when an agreement is reached by unanimity on a resolution, via adversarial decision-making methods, it is reached ‘on a wording which enabled the minority to abstain rather than vote against the resolution’.

In other words, through adversarial norm-making, there is a room for dominant states actors to practically compel non-dominant ones to keep in pace with their proposals. This is why Professor Tammes likened the abstention of the minorities in voting procedure as what was the case in medieval communities. In other words, given the bilateral nature of the adversarial international law-making process, representative democracy is an instrument of assuring a statist/hegemonic structure of a world order that had been preceded in thought and practice by a medieval conception that is intrinsically associated with various heterogeneous forms of political control. This is why through representative democracy in transnational arena, the basic notion of democratic governance- which is participation- is

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13 (Besson & Tasioulas 2010) 8.
14 See (Tasioulas 2010)
15 See (Crawford 1994)
16 See (Held 1995)
17 See (Movsisyan 2008)
18 (Sohn 1974) 440.
19 See (Tammes 1958)
20 See (Falk 2002)
wiped out\(^{21}\) and this is why it has been argued that international law suffers from and grapples with the democratic deficit of its normative processes.\(^{22}\)

On the other hand, participatory perspective of democracy requires public participation of all personalities of the entire international community, whether it be states, non-state actors or individuals, in law-making process, and it seeks an egalitarian multilateralism -- governance of many -- where substantively unequal actors can have the equal opportunity to participate, discuss their proposals, and make their voice heard in a course of fleshing out an agreement.\(^{23}\) Based on this, all parties to a multilateral convention hold the same right and opportunity to discuss, negotiate, and balance their proposals and reach an agreement rather than just vote for or against a proposal. This is why, participatory democracy is an ideal sense of a democratically legitimate international legal order, whereby inequality of actors in international norm-making is not tolerable. Thinking of an ideal legitimate international law which is participation of all state and non-state actors in international law-making process, one can possibly feel what a cosmopolitan democracy could taste.\(^{24}\) It has rightly been argued that egalitarian multilateralism in international law-making can only be based on participation of all to generate a democratic character, beyond the governmental sphere, upon which more formal democratic processes then rely.\(^{25}\) This objective is best backed by the ‘Rousseaurian premise that through participation, there is likely to be greater acceptance of collective decisions’.\(^{26}\)

Participatory democracy is supposed to meet three standards in order to be a workable means of reaching true egalitarianism in international law-making; cosmopolitanism, publicity and balancing of interests. Put forward by Thomas Christiano, cosmopolitanism characterizes the necessity of equal advancement of the interests of all—pursuit of the good of all persons instead of a common good, and publicity requires attachment to the principle of cosmopolitanism once it is implemented in actual institution, balancing of interests, which is of a reciprocal character, requires equal balancing of proposals during a course of negotiation. By the latter, once a party admits a proposal rendered by the counterpart, holds a right to have its proposal admitted.\(^{27}\) In other words, participants in a negotiation course cannot get an acceptance for their proposals unless they accept or cooperate with other’s proposals. This method of law-making is content-independently legitimate because it is fleshed out based on the intuitive grounds of the parties to negotiation of a convention and therefore, agreement drawn out of participatory democracy is intrinsically legitimate because it is made by the affected parties. These laws and agreements are content-independently legitimate for their content is nothing but the balanced interest of parties. Iran Nuclear agreement, reached through intensive negotiations, marks a revolutionary step towards global democratic identity based on egalitarianism, participation, and cosmopolitan democracy.

### A. Iran Nuclear [Democratic] Deal

Iran’s nuclear program started in 1950s with a direct support of the United States under the terms of the Atoms for Peace program. After the 1979 revolution of Iran which ended the 2500 years of Kingdom and established the Islamic Republic of Iran, international nuclear cooperation with Iran had been ceased while Iran resisted on its nuclear program as a right. In 1990s, after several international negotiations held on Iran’s nuclear program, Russia supported Iran’s nuclear program and provided Iran with Russian experts and technological means. But the fear of uranium enrichment of Iran had not been felt until the International Atomic Energy Agency carried out an investigation in 2003 and eventually found no evidence that Iran’s activities are threats to peace. The EU-3 (Germany, France and the UK) talks with Iran as a diplomatic initiative concluded in Tehran Declaration in October 2003 allowing both parties to reach their balanced

\(^{21}\) See (Kelly 1999)
\(^{22}\) See (Wouters et al. 2003)
\(^{23}\) See (Buzan 1981)
\(^{24}\) See (Patomäki 2005)
\(^{25}\) See (Moraru et al. 2013)
\(^{26}\) (Roughan 2007) 408.
\(^{27}\) (Christiano in Besson & Tasioulas 2010)
proposals based on transparency, publicity, and peace-keeping. But Iran’s purported refusal to permit IAEA agencies to inspect Iran’s nuclear activities caused growing concerns and doubts on Iran’s good will and peace-keeping activities. Consequently, The United Nations Security Council and the United States National Intelligence Estimate, almost simultaneously, reached an outcome in 2006-7 that Iran does not comply with the terms of the treaty on Non-Proliferation of Nuclear Weapons. And later in 2011, IAEA concluded that Iran had been conducting experiments aimed at designing a nuclear bomb. Of the most tragic inhumane unilateral sanctions against Iran are spread in various resolutions of UN Security Council’s that did shaken Iran to the core and caused loss of 500 Billion Dollars to Iran’s Economy. These sanctions included, but not limited to, oil embargo, frozen assets, travel bans and trade and financial ones.

These calamities necessitated a resumption of new negotiations on Iran nuclear program with new literature, new rhetoric, and new diplomacy. Very intensive negotiations was held between Iran and 5+1 countries (the United States, the United Kingdom, Russia, France, and China plus Germany) and after a prolonged course of negotiations, discussion, and balancing of interests, an agreement was reached and the Joint Comprehensive Plan of Action was fleshed out on 14 July 2015 in Vienna. Based on this agreement, all parties are committed to mutually balance their interests and comply with the international rule of law in four phases of reducing enrichment, restraining reprocessing, providing with enhanced monitoring mechanisms by Iran, and termination of nuclear-related economic and financial sanctions against Iran.

Due to deep-rooted political tensions and hostilities between Iran and the US, very few could have thought that Iran and the United States would sit on a table, negotiate, and reach a mutual agreement on Iran’s nuclear activities. But a new rhetoric and literature made the impossible possible. This agreement was reached on the basis of participatory democracy; the parties to this agreement fleshed out the agreement based on their intuitive grounds and therefore, gave an intrinsic legitimacy to the agreement. The criteria of cosmopolitanism, publicity, and balancing of interests were building blocks of JCPA because it was firstly based on the pursuit of the good of all parties rather than a common good and secondly the balancing of interests whereby parties to the agreement find their balanced proposals fulfilled. This revolutionary agreement is indicative of how egalitarianism and participatory democracy makes room for a table of negotiation between hostiles or potential belligerents with deep-rooted political conflicts. Accordingly, this method of law-making is perhaps the only workable solution or at least propitiating means for Middle-East wars and conflicts.

III. Middle-East Wars and Participatory Democracy

Middle-East has for a long time been experiencing rise of different group of religious and political extremisms that pursued their political ends through violence, blood shedding, and terrorism. Of the most egregious invasions and massacre in Middle East are the ongoing Israeli Occupation of Palestine, the dreadful Syrian Civil War starting from 2011, and the establishment of the Daesh terrorist group. These political communities have all one thing in common; they are mentally persuaded to sacrifice millions of lives, including their own lives, for achievement of the political ends of the community they belong to—they are called Fundamentalism. Fundamentalism refers to a commitment of ideas and values seen to be basic or foundational. The extreme believers and followers of these concepts resort to violent or non-violent means to fulfill their ideological axioms with success. ‘Although this concept was developed in the heart of the Western world as a proud and positive self-definition, it is now being used to brand the ‘Barbarians’ who [mostly] live outside of the Western world, and who prefer to call themselves Islamists’. So, extremist is a label used for those individuals and groups, who generally resort to violence in order to impose their beliefs, ideology or moral values on others.
For the purpose of this paper, the author does not go deeply into fundamental concepts the above-stated political entities have adopted and rather makes effort to sketch a workable mechanism for international law to cease ongoing gross massacre and violation of basic human rights in the region. It has been too late to dissect the region’s upheavals to see who has contributed the most to the emergence and armament of these extremist political communities. At the moment they exist simply because they exist. The most important matter in these conflicts is nothing but the fact that so many innocent people have been, and are being killed, every single day in the region. Hundreds of Holocausts have been, and are being, occurred in the region. This article argues that now is the time for international law to pragmatically, proactively, and legitimately provide workable mechanisms to cease mass ethnic cleansing and massacre in Middle East wars. The model this papers renders is to set up negotiations between hostiles and potential belligerents in the region under the rules of participatory perspective of democracy; cosmopolitanism, publicity, and balancing of interests.

Negotiations between parties to a war do not necessarily follow the same rules in negotiations held among parties to financial, economic, or environmental pacts. Parties to a war are mentally persuaded and driven to sacrifice lives of thousands even millions including themselves’ en route to reaching their political desires with success. So, international law and intergovernmental organizations are supposed to intervene as an intercessor and set up democratic negotiations on the basis of participation, cosmopolitanism, and balancing of interests. It is extremely urgent for international law to set up obligatory norms or even incentives for violent political entities to participate in intensive negotiations and cease fire during the time a negotiation takes place. Once negotiation starts, all parties must be guaranteed of advancement of their balanced political interests to the extent they accept the counterparties’ proposals. If the interests of the parties are literally contradictory, their interests are necessarily to be balanced. In other words, Thomas Christiano’s criteria of cosmopolitanism, publicity, and balancing of interests are the mere workable conflict resolution model for Middle East wars. If the parties find their interests pursued by international law, though balanced, they will respect the terms obligated by international law because they simply have interests in complying with them, and this will grant an inherent institutional legitimacy to intergovernmental organizations holding a given negotiation of a convention. If cosmopolitanism, publicity and balancing of interests become the criteria of democratic entitlement for peaceful negotiations in Middle East, a contractual consensus will be drawn out as a model of democratic negotiations on the basis of participation, egalitarianism, and cosmopolitanism.34 In international legal scholarship, consensus has been put forward as a means of opposing with unilateralism in international law-making35 that, based on the arguments of this paper, if coupled with the criteria of cosmopolitanism, publicity and balancing of interests, can be a pragmatically workable resolution model for Middle East conflicts.

One may put forward a serious question that does the above-stated model mean international law must give voice to highly controversial leaders such as that of North Korea or Syrian Assad? The answer is yes. International law has no other alternative other than proactively negotiating with controversial leaders who are battling with internal protests and external terroristic troops, and even guaranteeing them with preservation of their balanced interests. Undeniably the controversial leaders, dictators, and even violent protestors are a part of our cosmos, and if we argue in favor of cosmopolitan democracy, we are to make their voice heard. But does this make room for compliance of international law rules with political ends of the controversial leaders and dictators? The answer is of course no. This is in fact a pragmatic workable model of coping with political tensions and potential extremism in Middle East. A subtle though extremely important harvest of this model is marginalization of potential dictators who normally base their ideological axiom on expansionism and annexation of other territories. In other words, by giving voice to such leaders, international law can, in longer run, to some extent, marginalize potential dictators from

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34 See (Berridge 2010)
35 See (Buzan 1981)
igniting potential wars against possibly their neighbors or hostiles, and at last but not the least, lives of the myriad of innocent people will be saved from manslaughter and ethnic cleansing.

IV. Conclusion

In the light of the fluidity of international law, where intellectuality is the focal tenet of its legal structure, a dynamic theory of democracy is of a critical importance for the upcoming international law agenda. What this paper emphasizes is necessitating participatory perspective of democracy in making laws in regard to Middle East conflicts and potential wars in the region. In conceptualizing participatory democracy in law-making in regard to laws of war, Thomas Christiano’s criteria of cosmopolitanism, publicity, and balancing of interests can be a fresh, well-ordered, and convincing orientation in sketching a workable conflict resolution model for Middle East wars. Such an upheaval can lead to advancement of the contractual consensus model that in the longer run can bring about a hurdle for potential wars and conflicts in Middle East. Iran nuclear deal achieved in 2015 is a revolutionary example of a new notion of democracy in international law-making process whereby parties to a multilateral negotiation, notwithstanding many political dislikes, reach a legitimate win-win agreement through participation, egalitarianism, and balancing of interests.

With no doubt, passing unilateral heavy resolutions and sanctions against a given State not only does not provide a preventive mechanism but also brings about hostility, hatred, and war-creation. Although it may seem in short term that the preventive figure of such sanction has worked, but in long term, it will succumb to war-creation or at least deep conflicts. And after this hatred converts into a war, the UN Security Council with its post-war posture finds itself only capable of discussing the conflict, enumerating the death tolls, threatening the already well-determined belligerents with further sanctions, with no proactive pre-war intervention. Now is the time for international law to change its the approach, literature, and posture and provide a workable mechanism to Middle East wars with proactive engagement of its organizations in the conflicts. Through bringing war-creators into a democratic negotiation process and guaranteeing the pursuit of their balanced political desires, in short term, the lives of the myriad of the people will be saved, and in long term, war-creators will be marginalized. In sum, the marginalization of war-creators in Middle-East is not possible unless their participation in law-making is guaranteed. This is in fact what cosmopolitan democracy entails in it.

References

31–46.


Movsisyan, S., 2008. Decision making by consensus in international organizations as a form of negotiation. *21st Century*, (1 (3)).


Education for Immigrant Women in Brazil

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Abstract
This article intends to debate the situation of immigrant women in Brazil by analyzing their access to educational opportunities and by observing how integration structures are still elaborated for migrant men. It was based on official data, relevant literature and on field research analysis, beginning with a brief explication of the migratory process in Brazil. Next, it demonstrates how the right to education is solidified in national law and, later, highlights important facts about the reality of vocational education in Brazil and the troubles immigrant women face when trying to access it. The closing remarks point out the condition of Brazilian women in general and the intersectionality of prejudice that immigrant women are submitted to in this country.

Introduction
Brazil has always been a country of migrants. Since its time as a Portuguese colony, men and women arrive in Brazilian soil to start new lives, be it due to slavery, in order to escape from war, natural disasters, drought or hunger or due to optional migration.

Beginning at its independence and after the first republic, Brazil experienced a migratory wave, which historians call “as Grandes Migrações” or the Great Migrations36. A period that began during the last twenty-five years of the 19th century an extended throughout the first three decades of the 20th century.

At this moment, the government’s goal was to “whiten” the population and, in search for ways not to absorb the newly freed manpower of African descent, it claimed the need for manpower in coffee plantations.

In the beginning of the 21st century, Brazil has gone through a new wave of migration. The arrival of mass flows of migrants, especially in the first decade of the century, which consisted of large number of Latin Americans, such as Bolivians, Columbians and Paraguayans, changed the migratory scenery of the country, especially in the City of São Paulo.

Migration, previously treated as a past historical fact, static and finished, has once again become an important debate topic, mainly because the stereotype of white European immigration does not characterize the current paradigm, since new participants have partaken in Brazilian society.

Since the beginning of the 21st century, Brazil has been changing its outlook on migratory movements and has especially tried to separate itself from the immigration paradigm of national security.

Examples of this change can be found in the Agreement of Free Transit and Residency for Citizens signed by countries belonging to MERCOSUL (Southern Common Market), which was established in 2002 and began to have complete validity in 2009, along with the expansions of this agreement to associated States,
such as Bolivia, Colombia, Chile, Ecuador and Peru. This meant facilitation in permanence and document normalization for these immigrants in Brazil, along with guaranteed access to education and healthcare.

Additionally, it is important to highlight that Latin American immigration in Brazil has two different axes: the first, called qualified immigration, is aimed at doctors, dentists, engineers and professors who decide to look for new work opportunities in the biggest and richest country in the continent, and who arrive in the country with at least some of their own economic support. The second, is aimed at people who arrive in the country in vulnerable situations, such as those running away from misery, violence or lack of future perspectives for their children. These people come to Brazil because it is close, because they don’t have the financial resources to migrate to Canada or the United States or because they believe that the language barriers will not be as difficult to overcome as in non-Latin countries.

This paper’s objective is to have a debate about these immigrants, especially focusing on women immigrants, who arrive in Brazil with the hope of achieving better lives, which, put simply, consists of finding better work conditions.

Methods and Material:

This paper was elaborated based on bibliographical research, official data and field research analysis performed by the project Feminicidade, freely translated as “feminicity”, from the non-governmental organization ATADOS, located in São Paulo, SP, Brazil. The official data was provided by the Brazilian Government and by international agencies, such as UN women, UN refugee agency (UNHCR), Interamerican Development Bank (BID).

Brazil and the Right to Education

Education is a constitutional right in Brazil. Article 06 of the 1988 Brazilian Federal Constitution lists the social rights it guarantees, starting with the right to education. This aspect is one by which the minimum wage should be based on, and should enable workers to provide his or her family access to education, regardless of social condition, region or religion.

Article 205 of the Federal Constitution highlights that education is everyone’s right, an obligation of the State and of families and that Brazilian educational values are: I) equal conditions for educational access and permanence; II) freedom to learn, teach, research and propagate thinking, art and knowledge; III) pluralism of ideas and pedagogical conceptions, and coexistence of public and private educational institutions; IV) gratuity of public education in official establishments; V) appreciation of education professionals; VI) democratic management of public education; VII) guarantee of standard quality; and VIII) the establishment of a minimum wage specific for public education professional.

Such values demonstrate the intention of the legislator in creating free public education, plural and capable of educating individuals committed to the society in which they live in. Brazilian education was designed based on the wish of building a free, fraternal, equal and developmental society.

Paulo Freire, one of the greatest Brazilian educators, emphasizes that:

*Education is an answer to the finitude of the infinitude. Education is possible to man, because he is unfinished and he acknowledges himself as unfinished. This leads his to his perfection. Therefore, education implies a search performed by a subject which is man.*
Man should be the subject of his own education. He cannot be the object of it. That is why nobody educates anybody. (FREIRE, 2014)

Brazilian education should be an instrument of integration for society, taken care of by the social and democratic state of law, in order to consolidate constitutional principles, such as equality, fraternity, justice, pluralism and pacific solution of conflicts. To do so, a structure that includes all individuals is essential.

The fact that Brazil is a federation is an important aspect to highlight, thus, the responsibilities of the State are divided among the Union, the States and the Counties. Regarding education, the Union is responsible for establishing its guidelines, but all entities of the federation are concomitantly responsible for the means to access it, in other words, all entities are responsible for the execution of public policies for education that guarantee everyone’s access to it.

The competencies are divided into infant/toddler and elementary school education, which is the counties’ responsibilities, and Junior High and High School education, which is responsibility of the States and Union. Additionally, the Union is also responsible for determining general schooling and higher education (college and university level) guidelines.

However, states and counties can also attend to other educational niches, which are the cases of State and County universities, such as The University of The State of São Paulo (UNESP) and the Municipal University of São Caetano do Sul.

Additionally, the Union provides a few primary and secondary schools, like Pedro II High Schools that exist since the end of the XIX century and some universities’ model schools.

Women in Brazil, since the creation of formal education, were always authorized to study, but, in the beginning, boys and girls were taught different contents. Girls were taught disciplines that were relevant to the social role that was reserved for them, that is, basically domestic and maternal skills.

Equality among men and women was only established as unquestionable when the Constitution of 1988 was implemented, which explicitly determined equality for both genders.

In parallel, formal and unpaid education available for boys and girls alike, made it possible for Brazilian girls to enter and remain in school, despite the troubles historically and presently experienced by women to fully exercise this right. Currently, women are majority in all educational levels, including higher education, as shown by the Brazilian Institute of Geography and Statistics (IBGE, 2015).

Concerning immigrant education, it is important to point out that the federal constitution understands that education is a universal law and does not differentiate national and foreign citizens, regardless of documental regularity.

This precept makes some of the rules established by the Foreign Statute (Estatuto do Estrangeiro), a national law elaborated during the dictatorship, which regulates the legal situation of foreigners in Brazil, non-receptive to the constitution. An example of this contradiction between laws is the obligation of documental regulation for those who look to enroll in educational establishments. Therefore, formal education in Brazil, especially primary education, should be a fundamental law guaranteed to all, regardless of nationality and the manner in which immigrants arrive in the country.
There is no doubt that Brazilian law, in its essence, considers education a fundamental human right, which is not bound by status of citizenship, even if the judiciary and executive powers don’t always recognize and guarantee its execution.

**Vocational education in Brazil and reality for immigrant women**

When we think of education for immigrants, we usually concentrate on the children who will be formally educated in a new country, who will learn a new language, have time to make friends and social bonds and later, when totally integrated, begin their professional lives.

Immigrant children, integrated to the Brazilian educational system, have similar opportunities of Brazilian children when they begin their search for vocational education. What determines their success are their families’ financial conditions and regions where they live, and not their nationalities.

However, concerning the adults that arrive in the country and urgently need to start working, professional qualification is scarce and usually linked to manual labor and low salaries, as, for example, the case of Bolivians who work in clothing production in São Paulo. Souchaud explains, “A particularity of Bolivian immigration in São Paulo resides in the immigrants’ professional specialization. A large part of the active immigrants, 44.1%, work in the ‘production of clothing garments and accessories’” (SOUCHAUD, 2010).

Vocational education, capable of teaching a craft and providing a specialized professional to the work market, still suffers resistance in Brazil. In this country, humanistic education that shapes citizens and leaders is still a privilege of the rich and, in contrast, the workers are destined to attend vocational courses that are quick and focused on repetitive and low paying work.

Brazilian universities are still only occupied by immigrants who have more comfortable economic conditions and come to Brazil with the intention of studying. There are no inclusion policies for immigrants that come to the country with the intention of simply obtaining better life conditions.

Despite the various governmental programs that try to modify this academic dichotomy and create a “single initial humanistic and formative school of general culture, which balances equanimously the development of the manual work capabilities (technical and industrial) and the development of intellectual work” (Gramsci, 1995, p. 118), Brazil still lives in this dualism.

When we observe the courses available to immigrants in the city of São Paulo, it is possible to notice that the options are limited, especially for courses offered to women. These courses still reaffirm the domestic role historically attributed to women, as if their only possible functions were washing, cooking, sewing and taking care of children.

The sexual division of labor, so present in Latin America, is reinforced in Brazil when receiving immigrant men and women. The scarce opportunities of professional development offered to them are still shadowed by a masculine perspective and does not consider the specificities of women who arrive in the country.

São Paulo’s City Hall, through agreements with civil organizations, offers Portuguese courses to immigrants with the objective of helping them with their integration. Vocational courses are exclusively offered by civil society institutions, churches and international agencies.

A clear example of this sexual labor separation could be observed, when, in 2015, a program called “empowering refugee women” was created to qualify and employ these women and exclusively offered
sewing courses. These courses were organized by the UN Refugee Agency (ACNUR), in association with Rede Brasil de Pacto Global (Brazil Network of Global Agreement) and UN Women (UNHCR, online).

Besides the lack of specific courses, the generic courses that do exist and that provide professional education to Brazilians and immigrants do not have the adequate structure to host women, especially immigrant women.

SENAI, national service of industrial learning (Serviço Nacional de Aprendizagem Industrial) offers several professional courses in different technological segments, such as automation, mechatronics and electronics. However, the institution requires a few legal documents from the candidates, like proof of completion of primary or secondary education, which hinders immigrants from applying.

Another obstacle that immigrant parents suffer is time availability for their studies. SENAI does not offer daycare service and does not provide weekend classes, which impedes these people, especially women who have difficult schedules due to domestic and professional work, from enrolling. In many cases, men have availability to take care of children on weekends, permitting women free time for professionalizing.

The sexist approach to vocational education in Brazil is easily observed in the advertising campaigns used to propagate the availability of the courses. SEBRAE – Brazilian support service for small and micro companies (Serviço Brasileiro de Apoio a Micro e Pequena Empresa) offers online courses and each course link exhibits a picture of a professional. The leadership course is represented by a white male wearing a suit and tie, and the quality service course is represented by a woman dressed as a waitress.

Obviously, these discriminations are not exclusively directed against immigrant women, they, on the contrary, are manifestations of structuralized sexism in Brazil, but due to the added vulnerability of migrant women, this type of repression complicates this group’s integration process, education and emancipation even more.

Brazil is a difficult country for all women. In 2013, 13 women were killed per day, the highest rate in the world (MAPA DA VIOLÊNCIA, 2015). Additionally, on average, men earn 30% higher wages for doing the same work, the highest discrepancy in Latin America (IBP, 2009).

In general, Brazilian women are, almost exclusively, responsible for the domestic work and for the care of children, elderly and the ill (IBGE, 2015) and, although they are usually better educated, they are still have trouble achieving leadership ranks.

Still, education does still have an emancipatory role, as pointed out by Adorno:

[…] the only effective concretization of emancipation consists of those few people, who are interested in going this direction, focusing all their energy so that education is one of contradiction and resistance (ADORNO, 1995, p. 182-183 freely translated).

Education, for Brazilians, foreigner, immigrants, refugees or any other group of women, has been a way of obtaining autonomy, empowerment and the possibility of reflection and of making independent decisions without the tutelage of men or the State.

Final Considerations
Despite the inequalities that women suffer, education has been considered an important factor in aiding their daily struggle for freedom, quality of life and autonomy. These aspects are so important that two of the UN’s 8 goals for the millennium are to guarantee quality education for all and equality for men and women.

As initially stated in this paper, Brazil has guaranteed education as a universal and fundamental right and recognizes in its legal instruments and in the international agreements it has diplomatically signed that education is one of the pillars to a just and democratic society.

According to data provided by IBGE, in Brazil in 2013, a worker with higher education earned 220% more than a worker without it. Therefore, even with the inequality of gender, education has been an essential component to bettering the income of all workers, including women. This group has embraced education, and as stated previously, is now a majority in universities.

In this context, human rights institutions, student movements and other organizations have promoted preparation courses for vestibular a mandatory test candidates must take to enroll in the Brazilian universities. Some social projects, such as the “Mafalda” preparatory course, offer Portuguese classes to immigrants, who can later join low income Brazilian students in the general vestibular preparation classes.

However, these opportunities are scarce and dispersed in the third largest city in the world. Therefore, the reality of immigrant women in São Paulo is that of underemployment and low wage unqualified manual labor, in combination with parenting and domestic responsibilities.

When female immigrants and refugees arrive, they come across one of the Brazil’s worst facets, sexism and gender inequality. They come to experience the intersectionality of immigrant and sexist prejudice.

Education, on the other hand, which should offer them mechanisms that potentially, could free themselves from the symbolic and economic oppression, by which they are submitted, is not fulfilling its role, possibly because it reinforces many of the messages of the traditionally sexist Brazilian culture.

Jobana Moya, a Bolivian women’s rights activist, settled in Brazil, states, in the Feminicidade project, that she had always lived surrounded by ingrained sexism in her native country and that when she arrived in Brazil, noticed that many of the migrant women were going through similar situations, but were afraid of speaking up, especially because of being in another country.

Over time, I joined other voluntary immigrant women and, currently, we form the base team Warmis – Convergence of Cultures (convergência de culturas). We want to spread information so that women can organize and empower themselves, know where to ask for help in case of violence, and where they can go if they find that they cannot return to their homes. I see that women are invisible. And the immigrant women is even more invisible (JOBANA MOYA).

In order to fulfill our constitutional commitment of building a democratic and fraternal society, the inclusion of immigrants, which includes the recognition of gender differences and access to education, must become a priority.

REFERENCES

FEMINICIDADE PROJECT. *Jobana Moya*, 2015.


IBGE. *Diretoria de Pesquisas, Coordenação de Trabalho e Rendimento, Pesquisa Nacional por Amostra de Domicílios*, 2015.


The Status of Foetal Rights under the Indian Legal System

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Abstract

Foetal rights are explained as moral or legal rights of a human foetus under both natural and civil law. It is the right of any unborn foetus which normally develops into a human approximately eight weeks from conception. Historically both the English common law and the US law had not recognized the foetus as a person having full rights. In fact the mother was the recipient of all rights as the foetus was considered a part of her. The term ‘foetal rights’ became prominent after the case Roe v. Wade which decision made abortion legal in the US. In India, social norms, mindset would be parents and the dowry system practised from centuries has become the bedrock of Indian culture. It persists despite measures taken by the state to abolish it. Tough legislation in recent times has enabled the authorities to raid pre-natal clinics to peruse the records for evidence of illegal sex selection of the foetus. Since pre-natal scans for checking the foetal abnormalities are legal it becomes difficult to gather evidence. Many Public Interest Litigations have been filed in the Supreme Court of India by health activists. This paper explores the origin of the practice of female foeticide in India as well as analyzes measures taken by the Supreme Court of India to protect the female foetal rights and control this menace.

Key Words - Foetal rights, Pre-natal Clinics, Sex Selection

Introduction

Back in the old days a foetus was at times was provided protection through restrictions on abortion. Some versions of the Hippocratic Oath indirectly protected the foetus by prohibiting abortifacients.[1] Until approximately the mid-19th century philosophical views on the foetus were influenced in part by Aristotelian concept of delayed hominization.[2] The concept states that human foetuses very gradually acquire their souls and in the beginning stages of pregnancy the foetus is not totally human. Relying on examinations of miscarried foetuses, Aristotle believed that male foetuses that male foetuses acquire their basic form at around day 40 and female foetuses at day 90.[3] The Ancient law did not recognize foetal right to life before the ritual acknowledge of the child.[4] The law however allowed to postpone the execution of a sentenced pregnant woman until a baby was delivered.[5]

With Christianity spreading in the world there emerged a question i.e. whether it was allowed to baptise a pregnant woman prior to the birth of the child. The Synod of Neo-Caesarea decided that the baptism of a pregnant woman in any stage of gestation did not include the foetus.[6] In the middle ages the foetal rights were closely associated with the concept of ensoulment and in certain cases the foetus could inherit and also be in line of succession. In 1751 a pamphlet “The petition of the Unborn Babies to the Censors of the Royal College of Physicians of London” by Frank Nicholls was published advocating foetal right to life and protection. The pamphlet anticipated many of the arguments of the 21st century’s pro-life movement.[7] In 1762, English jurist and judge William Blackstone wrote that an “infant in its mother’s womb” could benefit from a legacy and receive an estate as if it were actually born. [8]

Several Hindu texts on ethics and righteousness such as Dharmashastra give foetus a right to life from conception although in practice such texts are not always followed.[9]
Meaning of Foetal Rights

Foetal rights are explained as moral or legal rights of a human foetus under both natural and civil law. It is the right of any unborn foetus which normally develops into a human approximately eight weeks from conception. Historically both the English common law and the US law had not recognized the foetus as a person having full rights. In fact the mother was the recipient of all rights as the foetus was considered a part of her. The term ‘foetal rights’ came into wide usage after the landmark case Roe v. Wade that legalized abortion in the United States in 1973.[10] The concept of foetal rights has evolved to include the issues of maternal drug and alcohol abuse.[11] International human rights instruments do not speak of a foetus as a person in terms of human rights. However there is only a single international treaty which specifically deals with foetal rights i.e. the American Convention of Human Rights. While various constitutions and the civil codes of many countries have conferred several rights on the foetus yet many legal luminaries across the world have expressed the idea that there is an ever increasing need to define the legal status of a foetus. During the twentieth century and especially post the second World War foetal rights issues continued to develop. In 1948 the Declaration of Geneva was adopted and which advised physicians to “maintain the utmost respect for human life from the time of its conception”. [12]

Backdrop in India

In Indian culture a girl child denotes beauty, prosperity and auspiciousness on the one hand and on the other hand the same Indian society considers the girl child as a curse. Gender bias is embedded in the Indian mindset and the notion that a girl child is a lost proposition. The Chinese firmly believed that bringing up a girl child is like watering somebody’s field because the girls get married into other families. The society looks down upon the girl child as a liability and the male child as an asset. One major reason for the dislike of the girl child is the fear of giving dowry at the time of marriage and loosing property in favour of the girl’s in-laws. The practice of dowry has spread its roots into all castes and even to communities which never practiced this system earlier. In a majority of cases law has no deterrent effect on the practice of dowry. It is estimated that a dowry death occurs every 93 minutes in India.[13] In the Indian scenario the rights of a female foetus are more violated than the rights of a male foetus.

Medical Science an Instrument for foeticide

The view that science is a boon for mankind is very true but, science also has an ugly face for it can be misused. As far as foeticide is concerned, science plays the role of a devil in the promotion of this evil practice. The rapid advances made in the field of medical science and technology such as ultrasound sonography, amniocentesis, in-vitro fertilization, sex determination tests, assisted reproductive technology and many more techniques have actually enabled the perpetrators of this crime to send the unborn girls back to heaven. One of the deadliest inventions that science has created is female foeticide.

Foetal Rights under Indian Law

Right to Life

The Indian Constitution provides two rights i.e. Right to equality under Article 14 and Right to life and liberty under Article 21. Sex detection tests clearly violate both these rights. It is a fact that Right to life is a well established right and is recognized as such by several international instruments. The question before us is whether a foetus enjoys this right? There is no concrete answer and on the international front constitutions of several countries recognize the sanctity of life yet, they have failed to provide protection to the life of the foetus. The Constitution of India guarantees right to life to every person but the concept of personhood denies this right to a foetus and further complicates the position of the legal status of a foetus. Even the courts of law have shied away from addressing this question because issues of a complex nature prevent the courts in defining this question. A question such as when does the foetus attain personhood,
has puzzled the courts all over the world. There is an acute need for the courts of law to come clear on this vital issue and recognize the rights of the foetus.

Article 21 of the Constitution of India guarantees the life and liberty of every person but it is doubtful whether the Article includes the life of a foetus as the meaning is confined to the use of the word ‘person’. The right of the girl child should be construed in a broad spectrum and should mean, firstly Right to be born and not to be aborted. Secondly Right to remain alive after birth and not to be killed at any time after birth.

The Medical Termination of Pregnancy Act (MTP) 1971 provides for a limited and restricted right to terminate the pregnancy when the life of the mother is in danger or there is considerable risk to the life of the child. The fact to be noted is that the MTP Act does not recognize the right of the mother to go for abortion as this right is vested with the registered medical practitioner. Apart from the above protection to the foetus some states in India have enacted special legislations to provide special protection to the life of a foetus. The Nuclear Installation Act, 1965 imposes liability for compensation to be paid in the event of any injury or damage caused to an unborn child through an act involving nuclear radiation or emission of ionizing radiation.

The Code of Criminal Procedure in India has made it mandatory to the High Courts to order execution of capital punishments or sentences on a pregnant woman to be postponed or to commute the sentence to imprisonment for life.[14] The section indirectly recognizes the right to life of a foetus and it would be only futile to deny the right to life to a foetus saying that it is not a person. The concept of personhood is a myth and a creation of law. This legal notion should not deny the conferring of rights on the foetus and failure to recognize the rights of a foetus would be discriminatory and thereby violating right to equality enshrined in the Indian Constitution.[15] On a perusal of the laws operating in other countries it is found that the abortion laws indeed confer on the woman the right to conceive and respect her autonomy through liberal laws that strike the right string. In Australia abortion law is a state subject and is legal and there is absolutely no need for the consent of the spouse or counselling.[16] In countries like Canada, France and South Africa there is absolutely no legal restriction and the decision to abort is the sole prerogative of the woman.

**Right of Foetus versus Right of Mother**

The Bombay high court in a recent judgment has clearly lain down that the right of women to make choices i.e. whether or not to get pregnant and stay pregnant – is an inalienable natural right. This has strengthened the demand for making amendments to the law regulating termination of pregnancy to give more freedom to women over their bodies. Though it is legal to terminate pregnancy till the twentieth week, the Medical Termination of Pregnancy Act, 1971 permits abortion when a woman makes a request and only when the pregnancy poses a risk to the health of the woman or where there is a risk of the child being born with disabilities. However, the law, as it stands today, does not give the woman a free choice to abort even during the initial stages of pregnancy. The need for extending the 20-week deadline in view of advancement in medical technology is an issue which is totally different and calls for a complete revamp of the law.

The 20-week deadline for termination of pregnancy has created practical problems, frequently requiring the intervention of the courts of law to rectify the lacunae in law. Although the main concern was to ensure that there is no conflict in law which, on the one hand, allows women to abort and prevent the birth of children with abnormalities whereas on the other hand, certain congenital defects can be observed only after 20 weeks. The judiciary has totally emphasized in a number of recent judgments that the purpose of the law on termination of pregnancy was not just to save the life of a prospective child but also to protect
the coveted right of women to make reproductive choices. The imbalance between the two competing rights that is of the mother and that of the prospective child and the rigidity of the law can have disastrous consequences.

In 2012, a dentist of Indian origin died in Ireland because the doctors did not allow her to abort her foetus due to the strict pro-life approach and attitude of the country. In 2008, the trauma of a woman carrying an abnormal baby resulted in miscarriage as the Bombay High Court refused to allow her to abort without giving any credence to the fact that the defect found in the foetus can be detected only after the twenty weeks deadline. Apart from the above issues there are several cases of rape victims approaching the courts of law for abortion after the 20-week deadline.

While the law seems to have a pro-life approach, judiciary has often laid emphasis on the fact that the right to make reproductive choices flowed from the fundamental right to life and personal liberty guaranteed under Article 21 of the constitution. Even though the courts have made an attempt to strike a balance, the pro-life approach of the law often overrides a woman’s right to decide what to do with her own body, including the question whether or not to get pregnant and stay pregnant.

The 1971 law classifies pregnancy into two categories in respect of abortion, firstly up to 12 weeks and secondly between 12 and 20 weeks – but does not entitle a pregnant woman the right to abort even during the initial stages of pregnancy up to 12 weeks. Abortion is permitted only when a medical practitioner is of the opinion that there is a risk to the life or health of the pregnant woman or a risk of the child being born with physical or mental abnormalities. While the opinion of one doctor is required for pregnancy up to 12 weeks, a foetus between 12 and 20 weeks can be aborted only after opinion from two doctors. (Another emergency provision, which has nothing to do with the request of a woman, allows doctors to terminate pregnancy at any stage to save the life of the woman.

The Indian law which is based on UK’s Abortion Act of 1967, does not entitle a woman to seek abortion even in the initial stages of pregnancy. But two years after India enacted the law, the US Supreme Court in Roe Versus Wade held that the right of a woman to seek an abortion during the early stages of pregnancy came within the constitutionally protected ‘right to privacy’. In 2009, The Supreme Court of India also held the right to make reproductive choices to be a fundamental right but stressed that the conditions aimed at protecting the life of the prospective child were reasonable restrictions on the right.

“There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating,” the Supreme Court observed in the 2009 judgment. The observation was made while setting aside an order by the Punjab and Haryana High Court directing abortion against the wishes of a mentally retarded rape victim.

Coming to the Bombay High Court judgment delivered on September 19, the observations supported the pro-choice approach but the court clearly stressed that though section 3 of the 1971 Act restricted the right to reproductive choice, it protected the right of a woman to say no to pregnancy if her mental or physical health was at stake.

“If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman’s bodily integrity and aggravates her mental trauma which would be deleterious to her mental health,” the High Court observed. The law, which the court subsequently sought to justify, however, does not give an unqualified right to women to seek abortion.

Further, demeaning the pro-life approach projected by the law, the High Court observed: “According
to international human rights law, a person is vested with human rights only at birth, an unborn foetus is not an entity with human rights.” Even explanation 3 to section 299 of the Indian penal code supports the above view by stating that causing the death of a child in the mother’s womb is not homicide. The High Court judgment attached great significance to the right of women to make reproductive choices by stressing that it was a natural right which is inalienable.

The Supreme Court while delivering the judgment in 2009 attempted to justify the pro-life approach of the law and at the same time accepting the fact that the right of women to seek abortion could not be ignored. “However, in the case of pregnant women there is also a ‘compelling state interest’ in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled,” the court observed.

The court unequivocally held that the right to make reproductive choices was a fundamental right guaranteed under Article 21. Though courts of law have stressed that restrictions could coexist with the right, only fair, just and reasonable limitations on the right can be justified. In 1996, South Africa created a balance between pro-life and pro-choice approach by giving absolute freedom to women to go for abortion up to the 12th week of pregnancy. A draft amendment circulated by the government in 2014 proposes to create a similar balance while extending the deadline for abortion taking into account advancement in medical technology. The sooner the amendments are made the better.

**Right to Property**

To determine the legal personality of an unborn (Foetus) it is necessary to understand the legal concept of ‘person’ or ‘personality’ which revolves around possession of rights and the capacity to discharge legal duties. Therefore natural persons being human beings are the prime claimants of legal personality.

**Transfer of property to an Unborn (Foetus)**

Indian Transfer of Property Act states as follows[23] “Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transfer in the property.”

Section 13 gives effect to the general rule that a transfer can be effected only between two living persons (inter vivos). Hence there cannot be a direct transfer to a person who does not exist or is unborn. This is precisely the reason why section 13 uses the expression transfer ‘for the benefit of’ and not transfer to ‘unborn person’. A child in the mother’s womb (foetus) is considered to be a competent transferee. Therefore the property can be transferred to a child (foetus) in the mother’s womb simply because of the fact that the child (foetus) exists at that point of time but not to an unborn person who does not even exist in the mother’s womb. For transfer of property for the benefit of an unborn (foetus) person two conditions must be created.

1. Prior life interest must be created in favour of a person in existence at the date of transfer.
2. Absolute interest must be transferred in favour of unborn person.

The above discussion clearly indicates that a foetus certainly possesses a right to property provided the foetus whether legitimate or illegitimate is the product of a sexual intercourse between a man and a woman whether married or unmarried. A glance at the provisions of the Indian Evidence Act will speak exactly the opposite. There is a presumption in the Indian Evidence Act[24] that for a foetus to be legitimate, it must result from a sexual intercourse between man and woman. This would clearly deny a foetus, the right to property if it is in the womb of a surrogate mother. In surrogacy sexual intercourse between man
and woman is absent as the sperm is injected into the woman through a process known as Assisted Reproductive Technology (ART).

Legislations for the Control and Prevention of Foeticide

The parliament of India has enacted several legislations to control, regulate and prevent foeticide. Legislations such as: Firstly, the Medical Termination of Pregnancy Act (MTPA) – 1971. The said Act is in line with the Abortion Act of 1967 of U.K. According to the Act abortions are legal if they are performed for any of the several specified reasons within a limited period after conception by a designated specialist and under prescribed conditions. The Act provides legal protection to the doctors for any damage caused or likely to be caused by anything done or intended to be done in good faith for the purposes of termination of pregnancy.[25] However, if found guilty of negligence he shall be held liable for criminal negligence.[26]

Secondly the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (PNDT) – 1994. The Act has two aspects i.e. regulatory and preventive. Its objective is to regulate the use of pre-natal diagnostic techniques for legal and medical purposes and prevent the misuse for illegal purposes. The Act regulates the techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders. The Act prohibits the use of the techniques for determination of sex of the foetus. Since the use of the techniques for scanning the foetus for the above mentioned abnormalities is legal, if the doctor at the time of scanning the foetus determines the sex of the foetus as female and informs the mother, then the mother would be compelled to go for abortion due to pressure from not only the husband but also the in-laws resulting in foeticide.

Conclusion

The Supreme Court of India and the High Courts have taken cognizance of the crime of foeticide particularly that of the female. The rate of female foeticides in India had reached alarming proportions resulting in an imbalance in the male-female ratio. In India, social norms, mindset would be parents and the dowry system practised from centuries has become the bedrock of Indian culture. It persists despite measures taken by the state to abolish it. Tough legislation in recent times has enabled the authorities to raid pre-natal clinics to peruse the records for evidence of illegal sex selection of the foetus. Since pre-natal scans for checking the foetal abnormalities are legal it becomes difficult to gather evidence and punish the wrongdoers. Many Public Interest Litigations have been filed in the Supreme Court of India by health activists. The Government, Media, Medical Professionals, Non-Governmental Organizations, Counselling centres and even the use of scientific techniques have to play a major and positive role in bringing about a change in the mindset of the general public particularly that of the Hindu community. The practice of the Dowry system should also be controlled if not totally prevented in order to protect the female foetus. The foetus certainly has rights and the Indian law certainly recognizes those rights however, the protection of foetal rights in India is far from being effective when compared to other western countries.

References:


3. Ibid.


15. Article 14 of the Constitution of India.

16. In India a woman has a right to conceive and it was unequivocally affirmed by the Madras High Court decision in V. Krishnan vs G. Rajan (1994) ILW (cri) 16 (Madras).

17. R vs Davidson 1969 VR 667 see generally, the abortion law Reform Bill 2008 (Australia).

18. Section 3(2)(i) of the Medical Termination of Pregnancy Act.


25. Section 8 of the MTP Act 1971.

26. Section 7(3) of the MTP Act 1971.
Strict Liability of Companies in Corruption Cases

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Abstract

The biggest corruption trial of Brazil's history, named "Lava-Jato" operation, is ongoing. Its main focus revolves around private companies that, throughout the State licitatory process, monopolize overpriced public contracts, which results in public money misappropriation and poor contract execution. In 2013, Brazilian Congress approved law n. 12.846, the Anti-Corruption Act, which revisited old mechanisms to inhibit corruption practices, as well as presented new ones. Its most controversial innovation was to stipulate private and administrative strict liability of companies whose employees perpetrated corruption practices. Furthermore, the legal consequences to such practices go from significant fines to extreme penalties, even resulting in the company dissolution. This study aims to evaluate the practical application of the Anti-Corruption Act in major corruption cases, its legal implications as well as its effectiveness in comparison to other Anti-Corruption Acts, such as the FCPA (USA) and the Bribery Act (UK).

Keywords: Strict Liability, Corruption Practice

Introduction

One of the major legal themes discussed in international community during the 1990’s was the countermeasures governments could take to prevent corruption practices. The theme presented various difficulties, such as how to address not only domestic corruption practices, but international ones as well, and how to inhibit individuals, and most of all, companies from incurring in such felony. From this discussion, and based in the already existent anti-corruption legislations, several international conventions arose, for example the Interamerican Convention Against Corruption (1996), the Criminal and Civil Conventions Against Corruption of the European Council (1999) and the UN’s own Convention Against Corruption Practices in 2003.

With the evolution of the discussion, new alternatives were presented in order to provide a more efficient way to inhibit corruption practices, one of them, being to stipulate the Strict Liability of Companies whose employees got involved in the felony. From this new perspective resulted the United Kingdom’s Bribery Act ("BA"), known as the world’s most rigorous anti-corruption legislation.

Two years later, the Brazilian’s Law n. 12.846 of 2013, referred to as the Anti-Corruption Act, was approved, and presented itself as a midway between the extremely strict UK’s legislation and the previous ones which not resorted to the strict liability mechanism.

Methodology

The present study is based on the inductive approach method, relying in comparative analysis over Brazilian’s, US’ and UK’s anti-corruption acts, as well as an analysis over Brazilian’s major corruption trial, the Lava Jato Operation, to establish the importance and effectiveness the Strict Liability of Companies whose employees are involved in corruption practices, addressed in the most recent legislations, has in inhibiting and as a countermeasure against this practice.

By comparing and testing the admissibility and validity of the arguments constructed from the referred comparative analysis (Brasil Jr., 2002), the study aims to provide some answers over the efficiency of this controverted, alas useful, mechanism, that is the Strict Liability.

1 – Historical Background – Corruption crime in Brazilian Legal System
Prior to the approval of Law n. 12.846/2013, the Anti-Corruption Act, Brazilian Legal System already had norms to prevent and punish the practice of corruption. The referred norms are within Brazilian Criminal Code in its articles 317 and 333, which defines the passive and active corruption practices and the penalties applied to the ones who incurred in it.

Unfortunately, Brazilian Criminal Code articles 317 and 333 do not state penalties for companies which incurred in such practices, limiting the law application to individuals.

Although one could try to prove the company’s involvement in the felony by means of analog law and hold it responsible in the civil and administrative areas (due to a prohibition to extensively apply criminal law), penalties would not be proportional to a company’s structure and financial status, which could deem the referred penalty completely ineffective – in fact, turning the judicial trial an affordable option.

In order to change the present scenario, Law n. 12.846 was approved in August 1st, 2013, versing mainly over the civil and administrative liability of companies due to practices against public administration, either domestic or foreign.

The referred law not only stated the crime of corruption practice to be applied to companies, but also resorted to the Strict Liability mechanism, in order to hold said companies accountable for such practices.

The present article will now explain the concept of Strict Liability and then proceed to a better analysis of the Brazilian Anti-corruption Act.

2 – Strict Liability Concept

In Brazilian legal system, the concept of Civil (Administrative or even Criminal) Liability falls within holding someone responsible for damages suffered due to an illegal practice, which originates an obligation to repair such damage, as stipulated by article 927 of the Brazilian Civil Code.

Liability is the direct consequence of the violation of a legal duty, which results in an illegal practice (Cavalieri Filho, 2012). Illegal practices are defined by article 186 and 187 of the Brazilian Civil Code, which determines the one, by action of voluntary omission, negligence or imprudence, violate the law and, due to this violation, inflict damage to someone, has committed an illegal practice.

Usually, liability is configured from the combination of four elements: (i) the fact itself, which is constituted by the action or omission configured as an illegal practice; (ii) occurrence of damage; (iii) the cause-effect relation between the practice and the damage, which proves that the damage derives from said practice; and finally (iv) Fault lato sensu.

Fault, in a broad concept – lato sensu, upholds both fault stricto sensu and intent, which will be, in most cases, a deciding factor in order to verify the extension of liability attributed to the one held responsible and the compensation he will have to grant.

However, Strict Liability doesn’t resort to the fault factor. It holds someone accountable only by verifying the first three factors – if the one held responsible practiced and illegal act, if it inflicted damage to someone, and if the damage cause was such illegal practice.

Due to its rigorous and potentially damaging nature, it can only be applied in cases that the law determines it to, and held someone accountable when he’s responsible for an activity whose nature presents a risk to others legal rights. The biggest example are State branches and offices who are held strictly responsible for public servants’ acts, as well as private companies which operates a public service, which are responsible for their own employees acts – as determined by article 37, paragraph 6th, of the Brazilian Federal Constitution, and by article 927’s sole paragraph, of the Brazilian Civil Code.

3 – Law n. 12.846, from August 1st, 2013
Brazilian Law n. 12.846/2013 is referred to as the Anti-Corruption Act, for its focus being to state that companies shall be held responsible for corruption practices, and the penalties that shall be applied to the ones which incur in this felony.

The biggest innovation of such law was to apply Strict Liability to companies which fall under corruption charges. As stated above, before such innovation, one of the major problems of Brazilians Legal System was to convict private companies under corruption charges, due to the impossibility of determining the if the company had acted on intent or if was due to a simple fault.

And by granting a written norm that determines the illegal nature of corruption practices by companies and its felonies, it prevented a scenario that, to compensate the legal absence of such penalty, started to accept a dangerous sanction-focused legal system, where judges could liberally choose and determine which sanction to apply to punish and inhibit such practices. Without a norm to determine the extension of the conviction and of the penalty to apply, it could result in damaging sentences and in a general insecurity regarding legal application (Corrêa, 2014).

The Anti-corruption act then determines that companies shall be held responsible due to Civil and Administrative Strict Liability if found to concur in corruption practices, either domestic or foreign. If convicted, the penalty includes not only returning the money deviated or repairing the damage caused due to its illegal practice, but may also receive a fine that may vary from 0.1% to 20% of the company gross billing – or, in case such criteria may not be applied, from R$ 6,000.00 to R$ 60,000,000.00.

And, although it already determines the possibility of a huge economic penalty, it also determines that, in the most severe cases, its activities may be suspended or even the closure of the company itself.

Lastly, the Anti-Corruption Act presents a more dynamic way to advance in corruption trials, and an alternative to the convicted company to lighten its penalty: the leniency agreement. It that the referred company may uphold agreements with the judiciary system, in which it agrees to not only cooperate, but actively help in investigations regarding corruption practices.

3.1 – Comparison with foreign anti-corruption legislations

The Brazilian Anti-Corruption Act suffered a great deal of influence of other international legislations, of which the greatest the American and British laws.

3.1.a – Foreign Corruption Practice Act

In 1977, after the Watergate scandal, the United States of America enacted one of the world's first Anti-Corruption laws, the Foreign Corruption Practice Act (“FCPA”).

It’s main focus, in accordance to its paragraph 78dd-1, was to criminalize the practice of payments (including offers, promises or authorizations of payments, not limited to money itself) made by any company, which fell under American law or listed in American stock market. It’s prohibition also included individuals acting on behalf of companies, foreign state authorities, foreign political parties or any individual who shall transfer the payment to any foreign authority or political party, aiming to acquire some advantage from it.

In other words, the FCPA prohibits any kind of non-registered payment to foreign authority or political party, directly or indirectly, done in order to acquire undue advantage.

Although its application made use of the ordinary liability mechanism in criminal and civil convictions, it determined that in accountability practices, the criteria would be of strict liability.

Its influence is enormous, due to its being one of the first Anti-Corruption Legislations of the World, and by acting in the international sphere.

Brazilian Anti-Corruption Act, due to being a more recent legislation, shows a wider range of application, not being limited to foreign practices but also domestic ones. Even more, by determining the application of Strict Liability in both Civil and Administrative context, it grants a better prospect to convict
and held responsible companies that practiced corruption acts, avoiding the ineffective and impossible fault or intent analysis of the company’s intent or fault.

3.1.b – Bribery Act

In 2010, the United Kingdom, under influence of the OCDE, enacted the most severe Anti-Corruption Legislation ever created: the Bribery Act (“BA”).

This title was given after it determined that companies could be held responsible through Strict Liability not only regarding Civil and Administrative offenses, but also in Criminal Law.

It defines four types of offenses, which are (i) payment, offer or promise of undue advantage; (ii) acceptance or demanding undue advantage; (iii) payment, offer or promise of undue advantage to foreign authority; and, the most severe one (iv) the company failing to prevent corruption.

The last hypothesis of conviction is its most innovative feature, being determined by BA’s article 7, in which states that the company is held responsible if a third party, being an individual or a company, that is associated with it by any means, practices any kind of illegal payment, offer or promise in order to grant the company some kind of undue advantage.

The only possible defense the company has resides in the 2nd paragraph of article 7, which is to prove that the company acquired and established adequate procedures and mechanisms to prevent corruption practices.

Although being an abstract defense provision, it resulted in a lot of companies contracting specialized services which monitors the companies’ activities and shows any kind of problematic or unusual patterns that may indicate irregular practices (FTI, 2014).

Another big difference between the BA and the FCPA, rests in the companies that fall under its jurisdiction: the FCPA is mainly restricted to American companies, where the BA applies itself to any company that practices economic activities in the UK.

To end its analysis, it’s interesting to notice that the BA’s penalties, in accordance to its title of the world’s most severe Anti-Corruption Legislation, are as severe, determining the application of fines without maximum limit – in other words, an unlimited fine conviction over the company – not to mention a maximum of 10 years of incarceration to the individual held responsible for the corruption practice.

Compared to the Bribery Act, the Brazilian Anti-Corruption Act presents itself as a more moderate legislation, by not determining the controversial Criminal Strict Liability - widely criticized by many criminal law studies, due to the great damage and legal insecurity it may cause – and by limiting its, although elevated, penalties through a more objective and precise analysis of its applications hypothesis and aims.

4 – Analysis of the Strict Liability mechanism in Anti-Corruption Laws

After comparing the Brazilian Anti-Corruption Act, enacted in 2013, with US’s FCPA of 1977 and UK’s Bribery Act of 2011, it becomes clear that the determining Strict Liability became a pattern in Anti-Corruption legislations.

After comparing the limited Strict Liability application to corruption practices in accountability cases, as determined by the FCPA, to a wider application englobing Civil and Administrative law, as determined by Bribery Act the Brazilian Anti-Corruption Act, it seems clear that it provides Corruption trials to be more efficient by disregarding a long and completely abstract analysis over the intent of the company regarding the corruption practice.

The Strict Liability in Civil and Administrative law acknowledge that the company may not ignore its employees, staff and board members’ actions and its implications, and expect not to be held accountable, especially if perceives any undue advantage.

It determines that the company is responsible for their actions and has a duty to exercise a certain degree of control over them, being held responsible if they incur in any corruption practice.
However, it seems to us that determining the failure in preventing corruption practices as a crime, as stipulated by Bribery Act’s article 7, presents itself as vague stipulation, falling under a way more abstract and subjective analysis than a criminal norm should be, which may present itself as excessive, since there’s no objective parameter to understand how to protect the company.

If dealing with a large and multinational company, for example, it may be held disproportionately accountable for an irresponsible and isolated act from some of its board members or employees.

Thus, although proving to be beneficial to Corruption Trials, it seems clear that if the Strict Liability is applied on wide, vague and abstract norms, it may present itself as more damaging that beneficial, not to mention if they are applied to criminal laws.

It can be concluded that Criminal Strict Liability is a far too extreme measure, which may result in massively damaging convictions.

Also, it must be noted that determining a wide range of convictions possibilities, with objective and precise application standards, allows the legislation to adapt itself to any case that may present itself, without being excessively severe or ineffectively light.

The problem legislations such as the Bribery Act may present is a huge insecurity over the legal application, for the criteria is far too abstract, presenting a considerable possibility of an unjust conviction and a damage most companies would not be able to support.

The lack of definition of the criminalized conduct, not to mention the means to avoid it, lays the company fate under a discretionary analysis of the judge, which fails to provide a sense of security and may incur even in unjust decisions.

5 – Anti-Corruption Act Application – Strict Liability Effects

Although we did a comparative analysis with other Anti-Corruption legislations to verify the objective and to possible effectiveness of Brazilian Anti-Corruption Act, it may be studied analyzing its potential application over a real case.

A clear example is the Lava Jato Operation, the biggest corruption investigation and, afterwards, trial of Brazil’s history. It revolves under a series of active and passive corruption practices, involving many politicians, public figures and companies which specialized in operating State services that were earned through acquisition process. Although being governed by Brazilian law n. 8.666/1993, many acquisition processes ended up being biased through a series of negotiations and agreements, which resulted in a massive corruption scheme.

The Anti-Corruption Act still hasn’t been applied in any of the Lava Jato Operation trials for a simple reason: Brazilian law stipulates the non-retroactivity of criminal, whose only exception admitted, is when it presents itself to be more advantageous to the accused. Most of the crimes that are on trial were practiced before even the enactment of the Anti-Corruption Act in 2013, not to mention the fact that only took effect in 2014 (the regular one year period of vacatio legis stipulated by Brazilian law).

But, although not being applied in the Lava Jato Operation, it already influenced some decisions in it, as it is also the reflex of the most innovative reasoning within criminal law jurisprudence.

One example is the admittance of leniency agreements. Some judges already admit the practice of leniency agreements, which wasn’t common in Brazilian jurisprudence.

Thanks to it, the Lava Jato Operation, which investigated a giant and well planned corruption scheme, which covered a numerous series of transactions, money occultation and deviation, biased acquisition processes, undue financings, amongst numerous others crimes, could advance in a steady pace.

The so called white collar crimes are hard to investigate, due to an intricate scheme built to protect the money trail and reinsert it in the marker through an apparently legal way. The active and passive corruption practices held in the Brazilian context, at least the major ones, all had protective procedure, to avoid being caught.
But, through leniency agreements, which granted the collaboration of some convicted individuals, the investigation could proceed and gain information and evidence needed to finally build a case and go to trial.

However, it must be noted that, if the Brazilian Anti-Corruption Act had been applied in any case of the Lava Jato Operation trials, it would have had a huge impact.

Firstly, because, it incorporates some controversial institutes, such as the Strict Liability, leniency agreements and penalties vary from large fines to the company closure, which haven’t been completely accepted by Brazilian jurisprudence and doctrines.

Secondly, it would ease the procedure of holding the companies which participated in the acquisition processes frauds and other crimes involving corruption practices accountable, through Civil and Administrative Strict Liability. That means that the trials wouldn’t fall prey to the long, abstract and mostly impossible analysis over the intent of the company in practicing such felonies.

Not to mention, it would be able to, regardless of determining the return of the money deviated, apply fines proportionate to the company’s gross billing, which would certainly inhibit corruptions practices through a more efficient and adequate sanction, and motivate leniency agreements.

6 – Final Considerations

After analyzing the Strict Liability applied to Anti-Corruption laws throughout different extensions, from the lightest and restricted to the most severe and expansive application, and analyzing its potentials effects in a real case, it is possible to conclude the importance of such mechanism.

The benefit brought by Civil and Administrative Strict Liability lies in providing a more objective analysis of the company role in the corruption practice in detriment of the subjective analysis of its intent, thus providing corruption trials to become efficient.

Also, through an efficient trial, with proportionate penalties, it is possible to present alternatives for the convicted company, which may prove to be an incentive to collaborate with the judiciary system in order to lighten its penalty through leniency agreements, which, by its turn, will benefit other corruption trials.

That being said, it should always be noted that to determine Strict Liability application means to ignore the analysis over the intent which, in some very specific cases, may prove to be beneficial and efficient. But an exaggerated application may result in harmful, damaging and unjust decisions, which is far from what it should seek – especially when dealing with criminal law.

In order to apply reasonably the institute of Strict Liability, it is prudent to limit it to Civil and Administrative areas, and implement it together with well-defined norms that shall limit the discretionary analysis and application to the extent of some objective parameters and finalities.

BIBLIOGRAPHY


Da Luz, Yuri Corrêa. O Combate à Corrupção entre Direito Penal e Direito Administrativo Sancionador. 2011, Artigo disponibilizado pela Editora Revista dos Tribunais-RT.

De La Torre, Ignacio Berdugo Gómez; CERINA, Giorgio D. M.. Sobre la Corrupción entre Particulares Convenios Internacionales y Derecho Comparado. 2011, Artigo disponibilizado pela Editora Revista do Tribunais-RT.


Pinto, Gustavo; SPERCEL, Thiago. FCPA - Concerns for Investment in Brazil. 2013, Artigo disponibilizado pela Editora Revista dos Tribunais-RT.


The Cultural Impact of Refugees in Host Countries

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Abstract
This article aims to analyze the cultural impact of refugees and their culture in host countries. Extremist groups, dictatorial governments, wars and violence are everyday realities in the lives of people in various countries of the Middle East, leading to an intense movement of immigration from people to countries, mainly Europeans and the United States. In search of security, peace and better life opportunities, refugees change their country and find themselves in social environments totally different from those in their country of origin. The difference of customs, principles and values can be a profound cultural impact and even an obstacle to the full social integration between the refugee and the host country, often provoking prejudice and xenophobia. Moreover, because of the low birth rate of some countries and the constant migratory movement, the foreign population may overlap with the original population of that country, and the culture of these host countries may gradually disappear. Given this scenario, this article aims to analyze the cultural impact that the insertion of a refugee – with distinct cultural values – can cause in the social context of the host country and in its culture that can gradually be lost.

Keywords: Immigration; Cultural Impact; Refugees.

Introduction
The rights and obligations granted to citizens by constitutions or state documents aim to not only organize a society, preventing violence, abuse and social chaos, but as well, safeguarding the rights inherent to the condition of human beings, guaranteeing that a society can interact in a healthy and prosperous way.

One of the essential elements that make up the social identity of a people – and is also protected by the State – is its culture, in understanding of religion, customs, values, principles and traditions. The culture of a society, with its specific characteristics, is what distinguishes it from others, allowing its people to develop, perpetuating its typical values and principles.

Terrorism, extremist groups, dictatorial governments and wars are everyday realities in the lives of people in certain countries, especially those found in the Middle East. This constant violence promotes a strong movement of immigration to other countries, mainly European countries and the United States.

However, the inclusion of refugees in social environments with different values from those of the country of origin may represent an obstacle to full social integration between the refugees and the host country, generating, often, prejudice and xenophobia.

Thus, it is essential to analysing not only the cultural impact of a refugee in a host country, but above all, a way to insert these immigrants and their original culture into other countries without a culture clash, so intense, that it harms their adaptation in the country that has decided to receive them.

In other words, it is essential to find a balance between the various cultures present in the same country – albeit arising from distinct States – without this cultural difference hampering the development of a society or a minority group of immigrants.

In light of the foregoing, it becomes imperative to re-discuss the question about cultural impact in the insertion of a refugee – with distinct cultural values – can cause in the social context of the host country and its culture, seeking ways to strike a balance and multicultural coexistence.

1 Methodology
The methodological procedures are, in short, the first step to drafting of any scientific work, since it explains how the methods were employed depending on the object of the search.
Hence, the present study uses the dialectical method, which seeks to establish reasoning by means of the exhibition and analysis of competing ideas in order to reach a synthesis of the case.

Furthermore, it is important to highlight the argumentative method as a way of development of this research, since the argumentation that provides a reasoned analysis and discussion on the various aspects of the object of the research.

An argument is consistent (coherent) if and only if each extension is also a stable extension. For this purpose, the combined permissible arguments must produce founded attacks to each argument that do not belong to the maximum allowable set of acceptable arguments. In other words, if a set of arguments can attack all the arguments of that attack, the argument is consistent.

(BRASIL JR. 2002, p. 20)

2 The Importance of National Culture for the Maintenance of People

It is difficult to define which factor, exactly, is responsible for defining and distinguishing a society from others, since, in reality, what compose the social identity of a people is the amalgamation of several elements – such as country, political system, internal legal system, geographical location, mother tongue, among others.

However, one of the essential components of the constitution and distinction of one society over others is its culture, composed of values, principles, traditions and any behavior or set of such knowledge typical of that society. Thus, the national culture of a country – with social values intrinsic to it – is a right of that people, and also is essential to their maintenance.

The culture of a people is transmitted so much by the social and family contexts in which that individual is included, as must also be learned from the school environment, in order to perpetuate — and appreciate — those customs and traditions, as well as to convey the culture of that society for future generations. It is at school and in daily contact with fellow countrymen that the roots of that society are observed, such as national songs, folklore, literature, etc.

Meanwhile, when a person changes his/her country and is inserted into a different social context, naturally the contact with his/her roots and cultural identity becomes more scarce and precarious, because only part of the people that live together on a daily basis share the same culture, as well as the school and of the values taught there are distinct, as they are from another country.

Globalization – disregarding its values and positive aspects – is a phenomenon that leads to the homogenization of cultures and the reduction of cultural differences, since it brings markets and people from different countries closer together, as well as promoting a capitalist expansion of worldwide basis.

Thus, gradually, due to globalization, immigration – including refugees in host countries – or any other reason, the national culture of states is getting lost, which generates a forfeiture of the cultural identity of these people, an element so important for cultural diversity and for the prosperity of those societies.

3 Immigration as an Escape from Violence and Social Chaos

Extremist groups, dictatorial governments, terrorism, war and violence are daily realities in the lives of people in certain countries, mainly, those in the Middle East. This constant violence promotes a strong movement of immigration to other countries, principally, European countries and the United States. Over the course of the next five years, Syria would descend into a terrible civil war, chaos would engulf Libya, and the number of people in the world forced from their homes would match the scale of the Second World War. The people on the move hoped that Europe would remember its own history, and would have learned the lessons from the darkest days of its past. But very quickly, the hypocrisies at the heart of the EU would be exposed by the million or so desperate souls seeking a little help from...
one of the richest regions in the world. Children would be tear-gassed on the soil of a union which preached human rights for all. (MCDONALD- GIBSON. 2016. p. 4)

In search of peace, security and better opportunities, foreigners change their country and fall into completely different social contexts from those of their country of origin, as much by the language and culture, as by customs and traditions. Despite having lost everything that used to define them – home community, livelihoods – refugees like Doaa refuse to lose hope. But what choices were left to Doaa and her family? To remain a refugee in Egypt, with little opportunity for education or meaningful work? To return to a war zone where the future was even bleaker and, on top of that, dangerous? Or to take a risk by taking to the sea on a so-called boat of death to seek safety and better opportunities in Europe? (FLEMING. 2017. p. 256)

The suffering and danger they are exposed to as refugees during their displacement to the host countries is extreme, as they are submitted to, very often, subhuman conditions, risking their own lives and those of whom they love. The second time Doaa nearly drowned, she was adrift in the center of a hostile sea that had just swallowed the man she loved. She was so overcome with grief that if not for the two tiny baby girls in her arms, barely alive, she would have let the sea consume her. No land was in sight. Just debris from the shipwreck, a few other survivors praying for rescue, and dozens of bloated, floating corpses. (FLEMING. 2017. p. 1)

Without question, that change to a new country also represents a psychological blow to the refugee, because if on the one hand, the one who has immigrated feels relief because he/she will have chances to live normally, on the other hand, there is anguish for relatives and friends who have remained behind in their country and are constantly being exposed to dangers and uncertainties is also constant, this when there is no confirmation of deaths. Every day, they watch the news of their hometowns and cities being reduced to rubble and learn about the deaths of friends and loved ones, which has a profound psychological impact. (FLEMING. 2017. p. 257).

Albeit the culture shock and the difficulty in leaving friends and family behind is prodigious, for some, immigration remains as the only way to survive. A new life was on its way. [...] Delina. Our Delina. Sina and her husband Dani had already chosen his name. [...] Sina had not always been so sure. Living with her parents in Eritrea, bonded to the military, earning around $30 a month, and watching friends and relatives disappear into the country’s vast underground prison system, she could hardly imagine bringing another soul into such a world. Then suddenly she was pregnant and all that mattered was getting this tiny speck of life to a place where he would never know the shadow of a dictatorship, and where his parents could see him grow up free. (MCDONALD- GIBSON. 2016. p. 1)
Many refugees, when they are able to flee, no longer maintain any hope of life and future in their homeland, because often there is no longer any work, home, food, nor items essential to the routine of anyone.

For most refugees, there is nothing left to return home to. Their houses, businesses, and cities have been destroyed. Since the crisis in Syria began in 2011, fighting has progressively engulfed all regions, and the economy and services are in a state of general collapse. Half of the Syrian population (almost five million people) has been forced to flee their homes in order to save their lives. (FLEMING. 2017. p. 256)

Regardless of the reason which motivated the change of country, common elements in this migratory movement of refugees are the breakout of violence, social chaos and, especially, constant violations to human rights.

At this point, it is worth clarifying that human rights – provided for in various international treaties – are those rights considered as essential to people, which aim to protect and safeguard their dignity. Human rights must be understood within two perspectives: (I) as positivized rights that will go to protect people in the face of possible abuses and excesses committed by state power; and (II) as standards that determine minimum human conditions of life and of development.

Evident that the lives of people who live in States with tyrannical governments, countries that are involved in a civil war, food shortages, among other drastic situations, not only do not have minimum conditions of life and development, but also are subjected to constant abuses of power and violence. For these people, immigration is the solitary alternative to survive.

The simple truth is that refugees would not risk their lives on such a dangerous journey if they could thrive where they were. Migrants fleeing grinding poverty would not be on those boats if they could feed themselves and their children at home or in bordering host countries. (FLEMING. 2017. p. 259)

Paramount, still, is to mention to the origin of human rights on the international scene, which emerged and gained notoriety primarily after World War II, as a result of the horrors committed by Hitler and the Nazis.

Modern international human rights law is largely a post-World War II phenomenon. Its development can be attributed to the monstrous violations of human rights committed during the Nazi era and to the belief that these violations and possibly the war itself might have been prevented had an effective international system for the protection of human rights existed in the days of the League of Nations. (BUERGENTHAL; SHELTON; STEWART. 2009. p. 29)

In the light of the above, it is verified that the migratory movement and the move of refugees to host countries are due to violence, social chaos, human rights violations and lack of opportunities in their countries of origin, consequently, immigration – many times – is the lone option of life.

4 The Cultural Impact of Refugees in Host Countries and Ways to Resolve the Problem

In general, when refugees arrive at host countries, they do not speak the language of that country, they do not know anyone in the country nor even the customs of that country to which they have immigrated to, hindering communication in their host country, searching for employment and their inclusion into that social context.
The plight can still be further aggravated when a large family migrates along to another country and, in order to keep their traditions and culture, refuses to modify some habits to suit the new country or to learn the local language. Thereby, the family maintains its social circle restricted and at a maximum, having contact with the natives in those locations such as the workplace or school.

Besides that, as aforementioned, either by reason of religious beliefs, traditions or a willingness to maintain their cultural identity, may occur that many refugees do not attend parties, events or activities typically belonging to that of the host country, hindering their adaptation and acceptance of the venue of their new residence. It is not an easy process to change many aspects of a person’s daily – e.g., new language, new dwelling, new social context and new traditions, all therein, belonging to that community, etc.

These behaviors – often stem from impacts generated by the adaptation process – can generate a feeling of antipathy by the natives, and therefore, serve as prejudice against the refugees and create xenophobia, resulting in barriers to the full social integration of those fleeing individuals and, in some cases, even violence.

Therefore, it is essential to come up with ways to resolve this problem, in order to facilitate the full social integration of the refugees in their host countries and to allow for multicultural coexistence in order to avoid prejudice, xenophobia and violence.

It is worth emphasizing that various factors may influence the adaptation of the refugee and his/her acceptance in the community where he/she will reside. Among these factors, it is worthy to note how the local government welcomes and deals with these refugees (if it helps in the search for employment, residence and language learning), the information transmitted to local residents (expose positive or negative points about the immigrants) and the news broadcast by the media.

Unfortunately, sometimes the means of communication and the information transmitted in the media are distorted and only contain negative aspects on the arrival of the refugees, including using derogatory terms to refer to them. This type of media behavior negatively influences the way they are viewed before society, hindering chances of work, developing social relations with the natives and even of life.

For the record, since we started delving into the European refugee crisis, we have seen countless examples of ostensibly intentional media spin. It is a miracle that anyone can see through the densely crafted smoke screen. [...]

We authors [...] were happily consuming major media versions of the European refugee crisis for literally years until, quite independently, we ran into an internet story, or blogpost, or video that didn’t match the “official” version one bit. Intrigued, we dug further. The more we dug, the more we unearthed stuff that didn’t match the “approved” version of events we were reading off the newsstands and watching on television. (RICHMOND. 2016. p. 13)

There is no objective answer, let alone a ready-made solution to the difficulties involving the reception of refugees, however, there are some measures that can be taken to assist in their adaptation and to facilitate their acceptance in the community.

Among the measures that can assist in this process, it is worth quoting the lectures and discussions in schools and neighborhoods explaining to the local population important information relative to the reception of refugees, ways to help them to enter into the community and to learn a little about the culture and the language. Thus, it is essential to raise the awareness of the natives about the situation of the refugees and to highlight the positive aspects of their arrival – as a viable source of labor available for work, cultural diversity, etc.
On the other hand, it would also be valid to have discussions with the refugees in order to shed light on the culture of the host country, its rules and promote lessons, so that, they have the opportunity to learn the local language and obtain gainful employment.

In addition, to avoid the loss of culture from their countries, specific dates or events for promotion and celebration of festivities, typical of the refugees countries could be organized, allowing local residents to have closer contact with another culture.

Worthy of mentioning, is that as currently occurs with several Middle Eastern countries, Europe also has faced wars, plagues and other drastic situations that have resulted in a strong movement of immigration to other countries.

*Between 1914 and 1945 roughly 100 million Europeans died from political causes: war, genocide, purges, planned starvation, and all the rest. That would be an extraordinary number of deaths anywhere and any time.*

(FRIEDMAN. 2016. p. 15)

Finally, to prevent a particular country from being overwhelmed with immigrants – focusing on a single country all the people that are in desperate situations and need help – one alternative would be to stipulate certain parameters so that various countries could contribute to the reception of refugees, in a way such as to facilitate a multicultural balance.

Considering the above, it remains clear that the integration and adaptation of refugees in host countries is no easy task – under the analysis of various aspects such as language, culture, traditions, etc. – however, measures can be taken to assist in the process, reduce the cultural impact of this situation and, above all, avoid prejudice and xenophobia from developing in that community.

**Final Considerations**

Analyzing the aforementioned, it is to be concluded that the culture of a people is essential to its maintenance and the ideal, is that each person is born and develops collectively together with his/her family and its roots, that is, on site – in the country of origin – that corresponds to the cultural identity, while member to certain people.

However, in some situations, in which people reside in countries undergoing drastic situations — such as terrorism, extremist groups, dictatorial governments and wars, – the permanence of a person in his/her native land becomes impossible, since he/she is exposed to a risk of daily life and with no conditions to develop a life in that country.

In these extreme cases, immigration becomes the only possibility for this person, since we cannot leave people that are in a continuous situation of danger at the mercy of one’s luck, only because of the difficulty of adaptation and insertion of that person in another country – although this process represents a cultural impact and should be performed with caution, demanding upon certain attitudes of the government, with regard to the refugees and of the community as a whole.

In view of the complexity and relevance of the topic, the results of the research conclude that there is no objective answer, let alone a ready-made solution, to resolve the issue, but there are measures that can be taken that will facilitate the adaptation of refugees in host countries, in order to avoid a cultural impact, so great, that may cause prejudice or xenophobia in the community.

So the real challenge is not how to prevent refugees from migrating to other countries, but how to create innovative and sustainable global models of refugee assistance and multicultural ways of existence without prejudice and violence.

**BIBLIOGRAPHIC REFERENCES**


RICHMOND, Col. Walter T. 2016. Hasta la Vista Europe!: What you’re not being told about the refugee crisis and how it’s destroying Europe. Create Space.
The New Brazilian Civil Code of Procedures as an Attempt of a More Democratic Judiciary

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Abstract
The new Brazilian Code of Civil Procedures is an expected actualization of the old procedural legislation, created during the dictatorial period in Brazil. This Code have a more democratic view of procedures, which empowers the parties and those affected by judicial decisions. This paper aims to point a few theories that supported the creation of the latter Code, and exemplify the democratic tools it have with excerpts of the Law. The methodology encompasses a bibliographical review on the democratic procedural theories and a documental research, searching the law for the parts where those theories are presented. It is visible that these itens are in consonance with the literature presented. Despite the Code incorporates it, there is still room for improvement. As long as such huge power difference between the State-Judge and the interested parties still exist, the democracy inside the judicial process is not complete.

Keywords: Procedural democracy. Participation. Process.

Introduction
Democracy is not a theme vastly discussed when the judiciary is involved. The participation in public decisions, in that branch of state, is cast aside to allow the judges to decide. But there are some modern theories that include this debate in the proceeding role of the judiciary, with the purpose to allow a more participant role to the parts, and, at the same time, granting a more democratic decision.

The power to solve conflicts in concrete cases has been, for quite a long time, a monopoly as a power of the state. However, new mechanisms to transfer this issue to the hands of the litigants have been created, with the objective of allowing the parts to solve their matters in a more private manner, excluding the figure of the judge as the voice of the truth.

There is a huge amount of expectation towards the new Brazilian Code of Civil Procedures. In 2015, it is published to replace the former Code, which precedes it circa 40 years. The former Code was built during the dictatorial period in Brazil and, in many aspects, focusing on solving the cases in point despite its repercussions over society itself. That Code places power almost exclusively in the figure of the State-Judge, who can determine the procedures and the individual powers of the parties.

The possibilities for an active participation in the former Code by the parties were very few. Amongst them can be pointed the evidence production and its fiscalization, and the presentation of statements in court. The process itself was very rigid, allowing a minimum of alteration – mostly by the State-Judge.

Also, only in exceptional cases parties not directly affected by its result could intervene in any way during the process. The possibility of opening participation for other parties is specially important with the rise of importance of the precedents in Brazilian procedural law (DIERLE, 2011). The opening of participation possibilities for indirectly affected parties allows those parties to affect in the creation of those precedents.

In such context, this paper intends to analyze a few theories that present a more democratic approach for Brazilian civil procedures, pointing excerpts from the Code that demonstrate the presence of those theories in its essence.
The methodology encompasses a bibliographical review on the democratic procedural theories and a documental research – demonstrating the insertion of those theories as a background to the creation of the new Code of Civil Procedures.

This paper is structured in four parts. First is presented this introduction pointing the objective, methodology, and context of the research. The second part is a bibliographical review on a few democratic theories that affected the Brazilian Code of Civil Procedures. Then this paper points out a few articles from the Code that exposes such theories. The final part concludes the paper, both presenting some directions for future research and the limits of this research.

Individual Democratic Procedural Theories that Support the Brazilian Code of Civil Procedures of 2015

The decision of merits in the judicial process must be constructed in a democratic model of the process, in which contradictory and full defense, principles of due process that are fundamental rights erected in the Federal Constitution of 1988, are respected.

It is necessary to move forward and conceive the process as a space to exercise the contradictory, full defense and isonomy, in which citizenship is always taken into account.

The theory of judicial process developed by Elio Fazzalari presents a model of process as a contradictorial procedure, theory that, even in Brazil, as explained by Aroldo Plínio Gonçalves (2001), already made a huge leap, considering that it broke with the instrumentalism of the Bülowian School.

The differences between process and procedure must be made. According to Gonçalves (2001), based on the doctrine of Elio Fazzalari, the process and procedure are not different if both are developed in contradictorial terms. However, if this specificity does not exist, the procedure is general in nature. Thus, PLINIO GONÇALVES (2001) expresses:

*By the logical criterion, the characteristics of the procedure of the process should not be investigated by means of finalistic elements, but should be sought within the legal system that disciplines them. And the normative system reveals that, before "distinction", there is an inclusion relation between them, because the process is a kind of procedure, and if it can be separated from it, it is by a specific difference, a property that possesses and makes it distinct, on the same scale as the distinction between genus and species. The specific difference between the procedure in general, which may or may not develop as a process, and the procedure that is process, is the presence in this element that specifies it: the contradictory. The process is a procedure, but not any procedure; Is the procedure in which those who are interested in the final act, of an imperative character, who is prepared by it, participate, but not only participate; Participate in a special way, in contradiction between them, because their interests in relation to the final act are opposite. It is evident that this conception works with a new concept of procedure and from it draws a new concept of process. [...] (GONÇALVES, 2001, p. 68)*

Elio Fazzalari recommends that all people should participate in a judicial process, that is, “those in whose legal area the final act is destined to develop effects: in contradiction, and so that the author of the act cannot obliterate his activities” (Fazzalari, 2006, p. 118-119).

This theory has already advanced in tracing the participation of the subjects in the process to achieve procedural merit.

It is not enough to adopt a theory of truth that logically supports the paths of the search for truth, it is necessary to provide how this path must be traversed in the process. Therefore, it is necessary to conceive
the process in the Democratic State of Right in which everyone has an equal right of interpretation, in order to reveal the truth in the process (LEAL, 2013, P.11).

Thus, the neoinstitutionalist theory of the judicial process developed by Rosemiro Pereira Leal outlines the equality (isomeness) in the process (LEAL, 2013). This theory developed from the studies of Sir Karl Raymond Popper, mainly of the third world understanding described by this author as autonomous and where there is the clash of theories (POPPER, 1999, p. 121).

Leal (2014) asserts that:

\[
\text{...}. \text{In democratic law, the theoretical-procedural language presents a relation of inclusion with the human ideas of life, freedom and dignity, hence not conceiving human life without concomitant openness to the contradictory, full defense and isonomy. Life would not be human if man is forbidden to describe and argue (PEREIRA LEAL, 2014, P. 68).}
\]

Leal (2014, p. 91) affirms that the neoconstitutionalist theory is supported by the due process, as a constitutional institution, as a "conjunction of principles-institutes", namely: contradictory, isonomy, full defense, right to a lawyer and procedural gratuitousness. In his words:

\[
\text{Therefore, my neoinstitutionalist theory of the Process is not a finished order of thought. Erige-e as a critical-participatory action of the parties legally entitled to the establishment of procedures in all areas of jurisdictionality. These would be the agents of permanent implementation or of a broader reconstruction of citizenship, through the exercise of rights in their constitutional fullness, adding social, economic and political transformations, using the principles of contradiction, ample defense and isonomy, for the achievement of the project Juridical constitution of leveling of all to the procedural resolution procedural of the conflicts (LEAL, 2014, P. 91).}
\]

Another procedural theory that can contribute to the construction of truth in the judicial process is the "Procedural polycentrism and Co-participation of procedural subjects" (NUNES, 2012).

That model of process developed by Dierle José Coelho Nunes (2012), in Brazil, rescues the role of the contradictory as “Developer and guarantor of the co-participation and the debate, when faced with normative perspective”. So, according to the author:

\[
\text{Thus it would have rescued its fundamental role in procedural sizing, in order to ensure the influence of the arguments raised by all procedural subjects and ensure that, in the decisions making, there were no grounds that had not been submitted to the public procedural space.}
\]

\[
\text{For its technical sizing in cognition, it would be necessary to perceive a biphasic structure, in which, in a first stage (preparatory phase), all the phatic and legal arguments to be discussed in the second stage (phase of discussion). And even a real windig up proceedings would be done, which would prevent unfair procedural activities from being triggered.}
\]

\[
\text{Methodical preparation would ensure a genuine dialogue between the procedural subjects and would ensure that all decisions would be the fruit of that debate, not of non-problematisable conceptions, solved by the judge, which imposes the increasingly common need for the use of appeals (NUNES, 2012, p. 258-259).}
\]
Based on Nicola Picardi, Nunes proposes, therefore, a "democratic model of the process based on polycentrism, a legitimate and constant participation of all the subjects who participate in the process, without the slightest hierarchical connotation" (Nunes, 2012, p. 19).

The democratic process model proposed by Nunes goes beyond the one developed by Elio Fazzalari, establishing nuances that conform with the Democratic State of Law, because it allows a "constitutional re-dimensioning of the procedural activity and the process" (Nunes, 2012, p. 260).

We also have to cite the constitutional model of the judicial process defended by Ronaldo de Carvalho Dias Dias ensures access to the jurisdiction. This author affirms that the possession of this right (the jurisdiction) is given by the "fundamental guarantee of the constitutional process", that is to say:

Constitutional guarantees, therefore, fundamental guarantees, differently, comprise the procedural guarantees established in the Constitution itself (due to constitutional process or constitutional model of the process) and forming an essential system of protection of fundamental rights, technically able to assure them full effectiveness (Dias, 2010, P. 72).

Dias affirms that the final provisions cannot be under the "prudent arbitrariness of judging or based on subjective considerations of the decision makers": In his words:

Therefore, in executing the jurisdictional function of the State, decisions, whatever their doctrinal or legislative qualifications, such as appointments, judgments, mandamus, judicial procedures, judgments or interlocutory decisions, emanating from the organs providing the jurisdiction, are acts State imperatives, which reflect manifestation of the political power of the state, exercised on behalf of the people. Hence, this power can never be arbitrary or exercised under the unconstitutional hermeneutic reference of the prudent criterion or prudent agency of the state judging organ, or based on subjective considerations of the decision-making public agents, but constitutionally organized, delimited and controlled power according to the prevailing directives of the Democratic State of Law, which we view as a constitutional principle (Federal Constitution, preamble, and article 1), to which the jurisdiction will always be bound (Dias, 2010, P. 73-74).

We can notice that all authors mentioned above are concerned with the formation of judicial decision making in accordance with the founding principles of the Democratic State of Law and in the words of Dierle José Coelho Nunes, "The process and its bundle of constitutional procedural principles constitute rights that guarantee the promotion of debate and constitutionally adequate provisions in a polycentric and co-participative perspective" (Nunes, 2012, p. 257).

In the words of Rosemiro Pereira Leal as well who rejects the subjectivities and clairvoyance of the judge when he decides: "It should be noted that the process does not seek" just decisions ", but assures the parties to participate isonomically in the construction of the provision, And idiosyncratic concept of ‘justice’ of the decision derives from the clairvoyance of the judge, his ideology or magnanimity "(Leal, 2014, p. 55).

The brief analyzes of the process models developed by the authors mentioned above were carried out to demonstrate that, in Brazil, the studies on judicial process are in a very advanced pattern, since some authors understand the process within the Brazilian constitutional model, which is supported by the Democratic State of Law.

The choice of the democratic model of the process to support this research was carried out in view of the philosophy of the language chosen to guide the research.
A More Democratic Code of Civil Procedures

A more important role of the procedural parties is an important part of the theories presented in this paper (NUNES, 2012; LEAL, 2014; DIAS, 2010). The new Brazilian Code of Civil Procedures augments the powers of the parties, aiming towards a procedural negotiation which is implemented in benefit of the whole procedure. Such powers can be exemplified in the article 190 of the Code:

Article 190. If the process verses on rights that admit self-composition, it is allowed to the fully capable parties to stipulate changes in the procedure to adjust it to the specificities of the cause and to convene on their procedural onus, powers, faculties and duties, before or during the process. (BRAZIL, 2015)

The excerpt, inexistent in the former Code, shows interest in empower the parties, especially on procedures that affect only partially the society. Called the “general clause of processual negotiation”, it augments the parties autonomy and emphacize the will of those parties (BANDEIRA, 2015; TAVARES, 2016).

The former Code was very strict on procedure, determining it and implementing severe sanctions for its noncompliance. It is a change that affects one of the core elements of procedural law prior th the new Code in Brazil

The 2015’s Code also brings two institutes with renewed importance: conciliation and mediation. Those are instruments that remove a vast array of powers from the judge, bestowing them on the parties or the third person chosen to decide. The stimuli and incentives to that form of conflict solving is clear in the law, as the article 3rd, paragraph 3rd specifies:

The conciliation, mediation and other methods of consensual conflict solving will be fomented by judges, lawyers, public defenders and members of the prosecution’s office, even in course of judicial process.

The self-composition of litigations is, thus, incentivated by the new Code. The possibility for the parties to deal with their issues in a more private way allows efficiency, celerity and unity to the solution; removing the judge form the higher place he once was to replace him as a part of the procedures, and not the keeper of truth in the process.

Another mechanism that shows a similar treatment of the State-Judge is the necessity of fundamentation in all decisions he utters. The article 489 defines the core elements of the decision, and it’s first paragraph points the need to justify those decisions – and what is not considered a justification. As exemples, can be cited as not fundamentations the use of indetermined concepts, without explaining them in the concrete case; the use of reasons that can justify any other decision; not follow a judicial precedent invoked by a party, without the proper overruling or distinguishing, among others.

Another aspect of the new Brazilian Code of Civil Procedures is a broadening of the possibility of participation of other parties, even if only indirectly affected by the decision. Nunes affirms that

The redemption of the role of participation in the public procedural space of all those involved (active citizens), from a polycentric and co-participative perspective, will allow the constitutional re-dimensioning of the procedural activity and process, in order to induce it to its real role as guarantor of a Public debate and fundamental rights, of a dialogically structured form of constitutionally adequate provision (NUNES, 2012, p. 260).

The Code uses the concept of the amicus curiae to allow a more participative procedure, providing other people interested in the litigation the possibility to intervene and present themselves in Court, to
expose their arguments and to point aspects of relevance to them. The *amicus curiae* are enrolled as third parties interventions, in article 138:

> The judge, considering the relevance of the matter and specificity of the theme object of the demand or the social repercussion of the controversy can, in a decision without possibility of appeal, by himself or requirement of the parties or whom intends to manifestate, ask for or admit the participation of a natural or legal person, organism or specialized entity, with adequate representativity, in a 15 days term since notified.

The *amicus curiae* are permission to the society, if the demand reaches it, to intervene and to be heard in the course of the process. The democratization of the procedures allows other interested parties to influence the process and to propose new aspects that could be overseen if they were not allowed to participate.

Among other, those instruments allow the parties to have a more incisive role in the decision-making process. The democratization of the process creates an arena to debate, decide and implement better procedures and decisions, with interested parties presenting their points of view and offering elements to decide more effectively.

**Conclusion**

The New Brazilian Code of Civil Procedures adopts parts of democratic procedure theories, being more adequate to the democratic Constitution it now obeys. There are several mechanisms in the Law that intends to equalize de participation of the interested parties and the State-Judge aiming a common goal – the final decision.

Among those mechanisms, there are a few that demand naming: the procedures negociation general clause; the more frequent and encouraged utilization of mediation and conciliation as tools for autocomposition, solving the conflict; the mandatory fundamentation of all decisions, in every point that is raised by the parties; the need for contradictory, even in decisions that can be made ex officio; and the broaden participation of the amicus curiae.

All of those point to a more democratic process, since they allow the participation of the interested parties, as long as maintain the rights granted in the 1988’s Constitution, such as the celerity, the contradictory and the obligatory fundamentation of decisions – determinant for the guarantee of rights and, therefore, the democratic rule of law itself.

It is visible that these items are in consonance with the literature presented. Modern theories of democratic procedurement have been incorporated to the Law 13.105/2015, but there is still room for improvement. As long as such difference in the State-Judge and the interested parties still exist, the democracy inside the process is still flourishing.

There is no denying that the State-Judge has to solve the controversy presented. But the tools to allow him to do so must be refined, and thus providing the parties with real tools to intervene in the process and submit their own view of the reality, be it legal or empirical ones.

As a main limitation to this paper, can be cited the literature analysed. Composed mostly by Brazilian authors, it was by desing, to contextualize the New Code and the theories closest to it. Also can be named the items chosed in the Code for the analysis.

Future works may extend this research, especially providing foreign theories over which the New Code of Civil Procedures can be analysed. This will be helpful to show convergences and divergences among the Brazilian doctrines and those foreign, providing new visions for the Code, and allowing an eventual evolution in the matter.

**REFERENCES**
BANDEIRA, Carlos Adriano Miranda. 2015. O papel do juiz no controle dos negócios jurídicos processuais e o art. 190 do novo código de processo civil. Revista Jurídica da Seção Judiciária de Pernambuco, n.8


Samarco's penal responsibility in Brazil’s largest environmental disaster

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Abstract
More than a year has passed, and the environment and social sphere still feels the harmful effects of the largest environmental disaster that has ever occurred in Brazil. There is, however, no conclusion on the accountability of major Brazilian mining company Samarco. This study aims to analyze the criminal environmental responsibility of this corporation in the light of the theory of the dominion over the fact, which is currently widely applied in the Lava Jato operation, considered to be the greatest investigation of corruption and money laundering in Brazilian history. For the satisfactory understanding of the topic, the economic and social relevance of Samarco in Brazil, focused on the city of Mariana, was initially analyzed. It was also proposed a reflection on the plurality of consequences resulting from the disaster, as well as on the subsequent conduct of the mining company. Finally, the criminal environmental responsibility of the corporation was determined according to the theory of the dominion over the fact, which generated an extensive debate in the National High Courts. In order to do so, it was chosen the method of case study, in particular, of the environmental disaster caused by Samarco, using the doctrinal bias to support the theory in question and the so-called factor of double imputation.

Keywords: Environmental criminal responsibility; Fact dominion theory

Introduction
The purpose of this article is to analyze the environmental incident occurred in the city of Mariana attributed to the mining company Samarco, as well as to jointly examine the environmental criminal responsibility of the corporation under Brazilian law. It is also intended, in order to explore a more efficient and fair means of accountability, to understand the case under the lenses of a Brazilian version of the theory of the dominion over the fact, as often supported by national courts, by reaching a more unified concept and scope.

For a satisfactory understanding of the topic, the economic and social relevance of Samarco in Brazil will initially be investigated. It will also be proposed a reflection on the plurality of consequences resulting from the disaster, as well as on the subsequent demeanor of the mining company. Finally, the criminal environmental responsibility of the corporation will be determined according to the theory of the dominion over the fact.

Methodology
In order to determine the criminal responsibility of Samarco for the largest environmental disaster that has ever occurred in Brazil, the dialectical method of research will be used, as well as a case study. That is to say; research starts with an initial overview called thesis - the principle of double imputation for purposes of accountability of a legal entity, which would be the claim of truth to be denied by the antithesis - in this case, the application of the theory of the dominion over the fact. The result of this dissension constitutes the synthesis, which becomes a new thesis - a positive superior proposition (Lakatos, Marconi, 2004, 81) - presented for the case, the conclusion of the current study. In addition, whilst guided by the syntactic of argumentation, solid arguments will be constructed from subjective propositions (Brasil Jr., 2002, p.20). In the semantic plane for skeptical reasoning, the “mapping of all sets formed by legal argumentation for all admissible sets of arguments will be carried out” (our translation) (Brasil Jr., 2002, p.19), in order to evaluate the application of the theory of the dominion over the fact as a means to directly
punish the legal entity who caused damages to the environment, thereby distancing oneself from the notion of the theory of double imputation.

**Social-Economic Relevance of Samarco in Brazil and Mariana City**

In 1977 was founded the company Samarco, known for acting in the mining market. Its shareholders are Vale, which is a world leader in the production and export of iron ore, and also in the production of other minerals such as copper, bauxite, aluminum, manganese, kaolin, among others; and the Anglo-Australian company BHP Billiton, known as the largest diversified mining company in the world (Samarco, 2014).

It should be noted that the iron ore pellets produced by Samarco are usually marketed to the steel industry in countries in the Americas, the Middle East, Asia and Europe, making it the tenth largest exporter in Brazil. In order to elucidate the significant performance of the mining company, it should also be noted that, in 2015, Samarco’s exploits were equal to 10% of the value indexed in the balance of trade, and that without the corporation’s exports, the deficit of the national trade balance would have tripled. Also, in the same year, the mining company’s export revenue was that of R$ 191.000.000 (one hundred ninety-one million reais) (Samarco, 2014).

In Brazil, the company has headquarters in Minas Gerais estate (Germânia unit, Mariana city) and in Espírito Santo state (Ubu unit, Anchieta city), as well as sales offices in the city of Vitória (capital of Espírito Santo), from where it disseminates its declared mission to develop technologies in order to intensively boost the use of natural resources and promote economic and social development, always on the basis of respect for the environment (Samarco, 2014).

It is evident to see, from the magnitude of the mining company, that it represents a prominent actor in the Brazilian economy, especially in the cities where its offices are based. However, the present study will focus on the context of Samarco in the city of Mariana, Minas Gerais, where the disaster occurred.

According to data provided by MDIC, IBGE, SEFAZ-MG, (IPVA + ICMS + ITCD), Agencia Brasil, and Samarco (Samarco, 2014), in the year 2014, R$ 50.000.000 (fifty million reais) were allocated to Minas Gerais’s municipalities where the company exerts direct influence.

Also, consider the factor that Samarco’s revenue impacts not only the GDP of Minas Gerais, but it becomes essential in the economy of certain municipalities, as it is in the case of Mariana city. The town has iron ore extraction as its primary industrial activity, which is the vital source of employment and public revenue (Prefeitura de Mariana, 2017). In fact, 80% of the municipality's income comes from mining activity (Em Economia, 2015).

With these aspects in mind, the influence of the mining company in the small town, where the population density is no more than that of 60 thousand inhabitants, is well-known, which increases the notion of dependence in the relation of its populace to the activities ran by the company, a bond that remained totally affected by the environmental disaster that occurred in 2015.

**The Consequences Arising From the Environmental Disaster Occurred in Mariana City – Minas Gerais**

On November 05, 2015, all national and international news broadcasts announced the largest environmental crime ever happened in Brazil. The historic city of Mariana was flooded by 34 million cubic meters of waste and mud due to the rupture of the Fundão dam resulting from Samarco’s exploration of iron ore.

According to the Preliminary Technical Report released by IBAMA (2015) on the environmental impacts of the disaster, there were confirmed deaths of company employees and residents of the affected communities; displacement of populations; destruction of public and private structures, as well as of agricultural areas; interruption of the electricity production and water supply; dismantling of areas of permanent preservation and native vegetation of the Atlantic Forest; high lethality to the aquatic biodiversity and terrestrial fauna; silting of watercourses; paralysis of fishing activities and tourism, among others.
It was also verified that the tailings of the sludge reached all the communities that cover the route between Mariana and the mouth of the Doce river. It is estimated that the mud overflowed the Carmo river bed in a stretch of 77km, which resulted in the complete destruction of bridges, roads, and other urban apparatuses.

It should be noted that all municipalities bathed by rivers affected by the toxic sludge were affected but in different intensity. Nevertheless, all were faced with the impossibility of using water, which persisted in several locations still a month after the calamity (Ibama. 2015, pp. 24-25). This impediment affected not only the supply for human consumption but also the watering of animals and irrigation of crops, for example (Ibama, 2015, pp. 28).

Disastrous were the marks of destruction, which circulated for 663.2km of water courses, reaching the coast of Espírito Santo (Ibama, 2016, pp. 28), which generated a series of environmental, economic and social impacts for that state as well.

In order to remedy the consequences of the rupture of the dam, Samarco sought to take immediate measures, such as accommodation of the now homeless populace in rented or temporary housing; delivery of financial aid cards to fishermen and river dwellers; revegetation of the banks of two of the affected rivers (Gualaxo and Doce rivers); reconstruction of a number of bridges, among others. Afterwards, Samarco, together with Vale and BHP Billiton, signed a Transaction and Adjustment of Conduct Agreement (TTCA in Portuguese) with the federal governments, the governments of the states of Minas Gerais and Espírito Santo and other governmental entities for the purpose to render valid measures of social, environmental and economic recovery in the localities affected by the disaster. This document organized forty-one programs for this purpose and provided for the creation of the Renova Foundation, which is responsible for the implementation of the mentioned programs.

Although only a brief synthesis of what occurred, as well a small digression on the subsequent conduct of Samarco, such considerations were woven just as a clarification to the reader. The present study does not focus on evaluating the effectiveness and sufficiency of the programs adopted, but only to promote the discussion about the criminal responsibility of the mining company since more than a year has passed and there is no conclusion on the accountability for the disaster.

**Samarco’s Criminal Environmental Responsibility in Light of the Theory of the Dominion over the Fact**

**The criminal liability of the legal entity in Brazilian law**

In Brazil, environmental responsibility is addressed in the Republic’s Federal Constitution in §3 of article 225, as well as in article 3, item IV, of Law n. 6.938/1981 (National Environmental Policy). Such norms have a collective nature in relation to those who have injured the environment, demonstrating the possibility of applying criminal and administrative sanctions, while civil liability is independent of these others.

In this context, it is satisfactory to meditate on the assertion that all who live in society are responsible for the environment since it is a common asset. That said, if a legal entity harms the environment to the point of causing it damages, it is possible to apply the institute of criminal environmental accountability.

What occurs is that it is necessary, for the criminal responsibility of the legal entity involved in the environmental damage caused, to identify and simultaneously condemn the natural person who would be responsible for the damage, not being possible to exclude it, since Article 5, item XLV of the Federal Constitution determines that criminal responsibility applies in a personal manner, enforcing the principle of personal responsibility or non-transcendence of the sentence. Moreover, the doctrine teaches that "the criminal responsibility resulting from a punishable fact is what it may be attributed to the moral person. Therefore, it's adopted the French theory of borrowed or ricochet liability." (our translation) (Prado, 2013, pp. 557)
In this segment, in Brazil, the aforementioned French theory has been used and is applied in the light of the theory of double imputation as a means to promote the environmental criminal responsibility of the legal entity, that is, the liability of the natural person incurs in the responsibility of the legal entity.

Given these considerations, it should be clarified that the double imputation is interpreted according to Article 3 of Law n. 9.605/1998 (Law of Environmental Crimes), from which it is extracted the understanding that environmental criminal responsibility of a legal entity is governed in the cases in which the transgression is caused by decision, in favor of the company, its contractual representative or its collegiate body. This means that the criminal act is committed by a natural person as in "that there will only be criminal prosecution against the legal entity if the act is practiced for the benefit of the company by a natural person closely linked to the legal entity, and with the aid of the power of the latter, the existence of a concurrence of persons must be verified." (our translation) (Shecaira, 1998, pp. 129).

In fact, it should be emphasized that the acts of the natural person must be directly related to their power granted by the legal entity. That is, there is a congregation of efforts, from which the necessity of double imputation is asserted, and therefore, there is undisputable co-authorship. (Shecaira, 1998, pp. 129-130).

To demonstrate the relevance of these factors, Gilberto Morelli Lima and Gustavo Senna Miranda conclude:

"When a representative, administrator or partner of a company practices a criminal typified conduct, and the responsibility for that act is sustained by the company, there is no rupture of the constitutional presupposition caused by the confirmation that the act, in fact, was actually an act of the company itself, only practiced through a representative.

The criminal act, in fact, is not an act of the natural person, but an act of the legal entity itself that is embodied through one of its managers, employees, partners or agents” (our translation) (Lima; Senna, 2014, pp. 1).

In short, Édis Milaré teaches that the double category of responsibility is related to certain criteria:

"(a) the violation of the environmental law result from the collective entity; (b) the perpetrator of the offense is bound to the company; (c) the infraction is practiced in the interest or benefits of the legal entity. The second, related to implicit criteria in the legal text, challenges that: (a) the author must have acted with the approval of the legal entity; (b) the action occurs within the scope of the company's activity; and (c) the legal entity must be private. (our translation)" (Milaré, 2014, pp. 477)

There are, however, a number of difficulties encountered when facing the theory of double imputation. The first obstacle arises when it is assumed, as a presupposition for the application of the environmental criminal responsibility of the legal entity, the need to individualize the natural perpetrators who practiced the injury in the name of the legal entity. The second setback relates to the fact that said responsibility is considered subjective, that means, being necessary to prove the existence fault, damage and causal link to the infraction committed. The third obstacle, however, includes the criticisms made in light of the unconstitutionality of the sole paragraph of art. 3, of Law n. 9605/98, which stipulates that individuals, authors, coauthors or participants who have caused the environmental damage cannot be excluded from the institute of legal, environmental responsibility, as directly opposing the provisions of §3 of Article 225 of the Brazilian Constitution, in which it is precisely determined the legal entity as a possible imputable person for damages to the environment.

When Brazil’s Supreme Court faced the topic of the necessity of double imputation, it concluded that such requirement hinders the application of criminal sanctions to legal entities and contributes to the impunity of these same entities regarding environmental crimes because of the difficulties of individualizing those responsible for the criminal acts. Thus, it was settled the understanding that the
constitutional provision on the criminal liability of the legal entity is not conditioned to the responsibility of the natural person.

In this context, it is imperative to question the possibility of applying a different theory to replace the theory of double imputation, since it presents several obstacles to the effective application of environmental criminal responsibility. Therefore, it is necessary to evaluate, in this case, the possibility of implementing the theory of the dominion over the fact, from a brazilianized perspective.

**The feasibility of applying the theory of the dominion over fact in the case under study**

At the beginning of the twentieth century, in what concerns the practice of a crime, Hans Welzel (2002, pp. 88) conceived the outline of an objective-material criterion, according to which he supported to be the ultimate dominion over the act (Busato, 2015, pp. 707) the typical requirement of authorship. That is, "the author accomplishes his will with meaning" (our translation) (Busato, 2015, pp. 707).

In order to develop the studies of Hans Welzel, Claus Roxin (2000) improved the theory of the dominion over the fact while understanding the insufficiency of the objective and subjective criteria in the identification of the perpetrators and participants of the crime, reason for which he sustained the necessity to add other components. With this, arises the notion of control over the consummation of the crime. According to Roxin (2000, pp. 305):

> "It becomes evident that between the two peripheral regions of the dominion over action and will, which unilaterally serves only the external doing or psychic effect, there is a wide space of criminal activity, within which the agent has no other class of dominion and nevertheless it should be raised his authorship, that is to say, the assumptions of active participation in the accomplishment of the crime in which the typical action is carried out by another" (our translation) (Busato, 2015, pp. 385)

In light of the theory of dominion over fact, the real control over the practice of offenses gains more relevance than the mere culmination of the nucleus of the defined criminal conduct. Although it is an inaccurate criterion, it is observed that it is "closer to the just, since the one who gives the last word on the offense is the one who can definitely be considered an author" (our translation) (Busato, 2015, pp. 710).

Such a theory was widely accepted in doctrine in general and, currently, after the necessary improvements, it is applied as a precept of identification of the author due to the power of decision and control over the crime.

It occurs that, due to the imprecision of the theory in question, several questions arise. Therefore, it should be emphasized, for the purposes of this study that, according to Roxin (2000, pp. 710), this theory must be applied to the offenses linked to the violation of a duty - when the responsibility arises not as a result of an action, but because of the burden to which the author is bound. In this sense, "it is certain that the responsibility for omission derives from the presence of a duty and that those who have a duty to act but don’t act are the main responsible for the production of the result. Thus, omissive crimes - proper or improper - are crimes whose essence for imputation lies not in the dominion over the fact, but in the violation of such duty.” (our translation) (Busato, 2015, pp 710)

Moreover, it should be noted, that the general notion of dominion over fact covers all forms of authorship, that is, direct authorship, mediate authorship, and co-authorship. The latter two forms are relevant to the present study, since the mediate authorship refers to when the subject does not necessarily perform the core of the typified criminal conduct, but has the mastery of the will of he who actually commits the crime, while in co-authorship, the coauthors possess functional mastery of the fact, glimpsed by functions that are distributed among them (Busato, 2015, pp. 709).

It happens that in Brazil, the theory of the dominion over fact has been applied anomalously. This form of enforcement came into evidence with the judgment of the Mensalão corruption scandal in 2005 but was adopted as one of the main ways of ruling during Operation Lava Jato (car wash), which
began in 2009, being considered the largest investigation of corruption and money laundering ever organized in Brazil.

After the judgment of the Mensalão and together with Operation Lava Jato, a national version of the theory of the dominion over the fact arose to allow a person to be condemned without there being unequivocal proof against it, provided that it is proven that he maintained under his dominion and control, with direct and immediate authorship, the practice of certain acts or even on the occasion that it had knowledge of such acts or necessarily should have had it. (Gonsales, 2016, pp. 38)

It should be remembered that, in the case under review, it was found that during the renewal of the license for the operation of the dam in 2013, a report was produced by the Prístino Institute, which was attached to the statement of the Ministério Público (Public Prosecutor’s Office) at the time, alerting the risks of rupture in the dam of Fundão, in Mariana. In view of the aforementioned report, the Ministério Público directed the preparation of studies and projects for the purpose of analysis in the event of breakage of the dam, in addition to presenting a contingency plan in case of accidents (Uol Noticias, 2015).

The weighting of these aspects makes it possible to assert that Samarco was aware of the risks and was instructed to monitor and develop countermeasures in the event of an accident. That is, it is evident its dominion and control over the situation. Nevertheless, showing the total neglect of the mining company and its administrators, there was the rupture of the Fundão dam, in which several environmental crimes were committed, which, due to their complexity and specificities, are hardly going to be ascertained. After all, more than a year has passed and the local population still feels the destructive effects of the largest environmental catastrophe that has ever occurred in Brazil, and there is still no conclusion on the mining company's accountability.

By having said that, it is contemplated the application of the theory of the dominion over the fact, considering that the criminal conduct is that of the one who exercises the control and has power over the result - in particular, the administrators of the mining company. In the judgment of similar circumstances, Justice Joaquim Barbosa asserted:

In the crime with the use of the company, the author is the manager or managers who can prevent the result from occurring. It dominates the fact which holds power to give up and change the course of the criminal action. An order from the person in charge would be enough so that there is no criminal behavior. In this is the final act. (our translation) (Barbosa, 2012, pp. 102)

Under the environmental bias, it is unnecessary to say that what happened has affected the entire environment and social life, and it is not possible to assess, at the moment, all the causes and damages generated by the rupture of the dam. In this case, the theory of the dominion over the fact appears as a proportional measure of the protection of the devastated environment, allowing the conviction of the mining company without any evidence of damage, causal link and fault; enough is the acknowledgment of the control of Samarco and its managers over the situation.

Conclusions

With backing from the arguments supported in the present study, it is concluded the viability of the application of the theory of the dominion over the fact regarding the criminal responsibility on the largest environmental crime that has occurred in Brazil, since the result could be avoided due to the control exercised by the mining company and their managers, who were acutely aware of the risk of the breakage of the dam, but who acted negligently, leaving the environment at the mercy of luck. In view of this, the application of the debated theory provides greater security, justice, and celerity for the accountability for the sustained damages.

REFERENCES


The guarantee of access to justice for lower income citizens in countries where the *jus postulandi* right is limited

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Abstract
This paper aims to analyze how access to justice for lower income citizens is guaranteed in countries where the right to self-representation is limited and lawyers are considered essential to justice. The research clarifies the importance of technical defense for a fair trial, with attention to the impossibility to provide free legal aid to every citizen in need, especially in countries affected by social inequality. Therefore it is necessary to evaluate the (in)efficiency of current models in which the State provides assistance to people unable to afford legal representation. In this context, assuming that the social service provided is insufficient, the study addresses alternatives to solve social inequalities in the justice process scope and insure the fundamental right of access to justice.

Keywords: Access, Justice. Lower, Income. Citizens

Introduction
It is undeniable that the world’s legal community has, for some time, been living with a new perspective of law application, aimed at providing access to justice in its broader concept of allowing people to claim their rights in widely accessible models, so that the litigant obtains the fairest result.

In this context, the objective of this study is to address the issue of free legal assistance, especially to propose a broader approach to the right of access to justice for those lacking financial resources, when it comes to procedures in which lawyers are essential, demonstrating that in order to provide an effective fair trial it is viable for litigants to be defended by capable professionals, thus moving away from the idea of *jus postulandi* as a rule.

Firstly, we will deal with attempts by countries to institute free legal assistance, so that professionals act in favor of the financially impaired, by assigning this duty to private lawyers. We will demonstrate that this model did not contribute to the guarantee of access to justice.

In this way, we will discuss how this model was overcome, with the institution of public defenders, paid by the State, presenting, as a case study, the structure adopted in Brazil, with the creation of the Public Defender’s Office.

Finally, it is relevant to demonstrate that, especially in countries with social inequality, where the contingent of financially impaired is large, state institutions such as the Public Defender’s Office cannot assume, in a satisfactory way, access to justice for all those in need. Thus, from the need to establish free legal assistance, with the consequent limitations of the models used hitherto, it will be demonstrated that complementing the structure funded by the state with the use of private lawyers, when necessary, is a good solution, in order to demonstrate how this occurs in Brazil, with the characteristics of the adopted model.

Method And Materials
The research to be carried out in an analysis of the adopted models regarding the ways to promote free legal assistance to guarantee access to justice for lower income citizens, uses the inductive approach, understood to be the analysis of particular data, called premises, that lead to broad probable conclusions.

On the subject, in the words of Marina de Andrade Marconi and Eva Maria Lakatos (2003, p.86) a better conceptualization of the inductive approach is found, in the sense that “it can be said that the premises of a correct inductive argument sustain or attribute certain verisimilitude to its conclusion. Thus, when the premises are true, the best one can say is the conclusion is probably true”.

In the analysis of the guarantee of the right to access to justice, assured by legal norms adopted in many countries, as in Brazil, where free legal assistance for low income citizens is also guaranteed, the argumentative model will be used in relation to the production of effects from norms, since, according to Samuel Meira Brasil Jr. (2002, p. 9):

> The Science of Law, dissatisfied with the results of a formal theory of norms – not the formulation of the theory, but the lack of justification of the material content of the legal norms – has sought different perspectives as a solution to this problem, arising, among them, justification through topic and rhetoric, based on an argumentative model.

**Results and Discussion**

From the Pact of San José of Costa Rica, International Treaty of Human Rights, some countries assured the citizens the possibility to take legal action without being represented by a lawyer.

On the other hand, other western countries impose as a rule the representation by a legal professional, in order to institute the *jus postulandi* as an exception, admitted by law only in some cases. It is the case of Brazil, where de litigant may only advocate on his own behalf in some specific situations, expressly permitted by law.

The United States of America, for example, admits *jus postulandi* on a larger scale, since it recognizes the right of every citizen to advocate on his own behalf in civil cases in which property matters are discussed, whereas only for cases with imprisonment Compulsory representation by lawyer, from the 1960s, with the landmark case Gideon v. Wainwright.

The reflexes of *jus postulandi* in the perspective of access to justice are many and must be analyzed to guarantee it, because, if on the one hand it allows people to defend themselves in an efficient way, on the other hand, lower income citizens are harmed.

On what is meant by access to justice, Mauro Cappelletti (1988, p. 3) shows:

> The term "access to justice" is admittedly difficult to define, but serves to determine two basic purposes of the legal system - the system by which people can claim their rights and / or settle their disputes under the auspices of the state, which must first be really accessible to all; second, must produce results that are individually and socially fair.
It should be clear that access to justice, in this work, must be understood in this context (access to the judiciary system and the resolution of conflicts in a fair way), not abandoning the other concepts that surround this right.

In this sense, the possibility of eliminating representation in court by a lawyer is subject to several notes, and both its contribution to access to justice and its harm to this fundamental right can be defended. In other words, some authors argue that the problem of access to justice can be solved by *jus postulandi*, by allowing all citizens to take legal action on their own behalf, without the need to pay legal fees.

In this context it is worth mentioning the study by Tania Sourdin and Nerida Wallace (2014, p. 5), by which it is understood that “there is a perception that the number of SRLs (Self Represented Litigants) is increasing and has been increasing over the past 15 years, largely attributed in the literature to increased legal costs and changes to legal aid funding. Australia is not alone in reporting this perception, with other countries, such as the United States, New Zealand, Canada and the United Kingdom, reporting an increase in the population of SRLs”.

However, we hereby disagree with this view. Considering the existence of problems of access to justice related to the economic capacity of the litigants, those who do not have high financial and educational levels are in disadvantage in judicial litigation, since they will not be able to equitably express their rights, especially when the other party is under the care of a lawyer.

According to self-representation expert Bridgette Toy-Cronin, “there is a difference between access to courts and access to justice. Self-representation allows access to courts, but access to justice within the system is an entirely different matter. It is one thing to get in the door and another having the ability to get the necessary resources or advice to understand the legal system” (New Zealand Law Society, 2015).

Besides that, according to a study by Koshan & Yewchuk (2016, p. 5), self-represented litigants represent a high cost to the Canadian justice system, especially because of inadequate claims and appeals that are inefficient and waste time, which is also noticeable in other countries.

In addition, in the words of the Civil Justice Council (2011, p. 21), a self-represented litigant may feel at a disadvantage because other parties have lawyers and he or she does not. There are some things the Court can and should do in the name of equal treatment. But it may remain the truth, and not just the perception, that there is inequality of arms where one party is represented and another is not.

This discussion thus points to the importance of a technical defense in the present day. In most countries the indispensability of the lawyer is a consequence of the legal system adopted, with increasingly complex interpretations of laws and the need for very specific knowledge, in which only qualified professionals can act with skill. In this sense, the perceived inaccessibility is identified as a problem by the National Center for State Courts, in the "Need for the Project" section of the Narrative Program held in the United States (2002, p. 4):

*The volume of legal problems that are not being brought to the civil justice system is a measure of the public’s perception of the inaccessibility of existing civil processes. A majority of Americans report legal problems that they did not seek to resolve through the public court system, typically because of a fear of the costs involved*
or a view that “the justice system would not help.” (Consortium on Legal Services, 1994) The consequences of a lack of access are particularly acute for the poor because their legal needs relate to the essentials of life: “shelter, minimum levels of income and entitlements, unemployment compensation, disability allowances, child support, education, matrimonial relief and health care.” (Committee to Improve the Availability, 1991) Judges, court managers, and others attending the National Conference on Public Trust and Confidence in the Justice System ranked re-thinking the role of lawyers as the second highest priority for national action.

However, this presents a greater problem for access to justice when it comes to indigent litigants who cannot afford adequate technical and legal defense in a judicial process. That is why, this problem, as already stated, cannot be solved by simply extinquishing the need for technical defense in some procedures. The need arose, therefore, to provide legal services to those in need, based on free legal assistance.

Regarding the concept, free legal assistance in Brazil consists of the defense of the individual by a skilled professional, free of charges, including not only court costs and other expenses but also free legal counseling.

In this context, it should be noted that the Constitution of the Federative Republic of Brazil of 1988 brought, in its article 5, item LXXIV, the expression "integral and free legal assistance". In this regard, Kazuo Watanabe (1987, p.250) points out:

The term 'legal assistance' can be understood in several ways, and the scope of the service that may be established for its provision will be broader or narrower according to the concept adopted.
In the narrow sense it means technical assistance provided by a legally qualified professional, who is the lawyer, in court. At most, assistance provided before any legal action, but always directed to a demand and to person with a determined conflict of interest.
In the broad sense it has the meaning of legal assistance in or out of court, with or without specific conflict, including information and guidance service, and even critical study, by specialists in various areas of human knowledge, of the existing legal system, seeking solutions for its fairer explanation and, possibly, its modification and even repeal. More appropriate would be to call a service of such breadth of 'law assistance', rather than 'legal assistance'.

The broad meaning of free legal assistance is well suited to what we intend to portray in the present study, since, for an effective access to justice, it is necessary to guarantee the citizen a service of assistance in court and also outside it, with information and guidance due to the solution of your problem.

Mauro Cappelletti (1988, p. 12), called this first modern attempt to ensure access to justice, using free legal assistance, as "The First Wave", which, under his point of view was not sufficient at first because the provision of free legal assistance was reserved only for private lawyers and there was no positive action taken by the States to guarantee the right.
The improvement of this model occurred when it was noticed that private lawyers reserve much more time to paying clients than to those assisted free of charge. Therefore, the states started to remunerate the lawyers who assisted the needy, acting actively in this system. However, to date, many transformations have been determinant in free legal assistance, with gradual changes, ranging from the defense of only the particular causes of the needy to the view of the financially impaired as a group, a class, which could thus be represented in court, collectively.

As a result, many countries started to remunerate public lawyers as a career, like Brazil – used as a case study of the present research -, which created the Public Defender's Office, an autonomous institution with specific functions, focused on the defense of litigants who cannot afford the court costs nor the attorney fees without affecting their subsistence.

The Public Defender's Office emerged in Brazil based on a State's purpose, achieving the 1988 constitutional promise of integral and free legal assistance, translated in section LXXIV of article 5 of the Brazilian Federal Constitution.

In the words of Cândido Rangel Dinamarco (2013, p.722), the institution can be understood as follows:

*In order to systematically institutionalize such a function throughout the country and give it special dignity, the Federal Constitution included Public Defender Offices among agencies that perform essential functions of justice and attributed to them the natural duties of entities of that order, that is, guidance and defense of the needy before courts of all levels of jurisdiction.*

The institution plays a very important role in defending low income parties, also because it is from this function that other constitutional principles such as *audi alteram partem* are guaranteed.

Therefore, it is impossible to dissociate the analysis of the (in)sufficiency of the Public Defender's office from its activities and functions. This is because, with the creation of the institute of integral and free legal assistance, assigned to the institution, it is considered a state obligation to ensure the principle of access to justice, offering broad defense.

From this, the absence of public defenders would imply in restriction of rights and, therefore, in a State’s failure. Unfortunately, this is the reality of Public Defender Offices in a big portion Brazilian territory, since, mainly in small countryside districts, its performance is insufficient or nonexistent.

In view of this situation, it is possible to conclude that the State's failure to maintain the Public Defender's Office violates, in addition to the aforementioned, the right to Access to Justice, especially when analyzed under the bias of its organization, as discussed by Kazuo Watanabe (1988, pp. 134-135):

*The right of access to justice is therefore the right of access to a properly organized justice and access to it must be ensured by the instruments capable of effectively realizing the right. Thus, once justice is conceived as an institution fully adapted to the real needs of the country and in condition to realize fair legal order, access to it must be made available to all, and any obstacles of an economic, social or cultural nature must be properly removed.* [...]
Taking up the theme under discussion based on the author's analysis, access to justice would include access to the instruments capable of guaranteeing the right of all to access, with equality of arms, the fair solution of their conflicts.

In this context, considering state’s failure from the absence or insufficiency of the Public Defender’s Office in a big portion of its locations, Brazil adopts the practice of appointing private lawyers to meet this demand. Those professionals appointed in court to act in defense of needy litigants, who have not previously designated a lawyer, are called *advogados dativos* i.e. dative lawyers.

For a better understanding of the functions of dative lawyers, it is important to point out that the lawyer is appointed by the Judge, in situations in which the litigant does not have the financial conditions to bear with the court costs nor with attorney fees, and when, still, there are no public defenders in the region.

According to the teachings of Daniel Amorim Assumpção Neves (2015, p.163), the defense of those lacking economic resources is a typical function of the Public Defender's Office, so that the dative lawyers fill this role, which is typically assigned to the public defenders.

Under these conditions, it is recognized that the State has the duty to pay for the services provided by the professional, which was only designated due to a failure of the Public Administration itself. However, this is still discussed in the Brazilian Courts, and will not be discussed in this study.

At this point, it should be noted that free legal assistance can still be provided by pro bono lawyers, who do not fit either as public defenders or as dative lawyers. Pro bono advocacy, as it exists in other countries, is usually carried out by large law firms, which allocate part of their work to meet demands free of charge and receive no consideration for the service.

This differs from the work of the dative lawyer, who is also a private professional, since they are paid by the State, while pro bono lawyers act without payment.

The Brazilian structure represents a combination of models, using both private lawyers and public defenders in favor of free legal assistance, adopting, as a fundamental institution for the protection of lower income citizens, the Public Defender's Office.

**Conclusion**

Thus, as a representation of a country with evident social inequality, Brazil has several ways of promoting free legal assistance, not limited to a single model. This culminates in the guarantee of access to justice for lower income citizens, at least in terms of the availability of adequate means to guarantee access to the Judiciary and forms of conflict resolution, in a legal system in which technical defense is compulsory.

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**REFERENCE LIST**


State Liability regarding the use of force in popular demonstrations: a comparative study between the criteria set by the Inter-American Court of Human Rights and the Brazilian Legal System

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Abstract

This article aims to explore how the Brazilian Legal System and the Inter-American Human Rights System define their own criteria on the verification of a State's liability. From the perspective of a dialogue between different Courts, it emphasis that the analysis of whether a State has or not legitimacy to resort to the use of force during popular demonstrations. Social and political protests are rising all over the globe and specially in Brazil, so this article critics Brazilian Law, while comparing it to the judicial progress that the Inter-American Court of Human Rights has experienced so far. The basis is the precedents of the Court and the relativization of state sovereignty. Therefore, the article's main goal is to underline the necessity to set cohesive and well-defined criteria to verify a State's liability, so as to ensure an effective protection to Human Rights, especially regarding freedom and personal integrity.

Keywords: State. Liability, Protests, Use of force

Introduction

The way strength is used and why it is legitimated according to it State is related to many guidelines and international documents, especially as far as controlling popular mass in protests situation, whether they are political, economic or social, is concerned.

Although force appliance is tirelessly debated in international fields regarding placing responsibility onto the State shoulders, it is poorly handled on internal legislation, mainly in Brazil, that currently is going through a very deep crisis due to government conducts pointed to manipulate popular movements.

Against this outlook, it is clear that there’s an effectiveness problem and criteria definition concerning State responsibility when dealing with the use of strength and civil society. Regardless the pointed problem, there is no immediate nor conclusive pretensions, but tends to a solution encompassing different perspectives of (i) international state responsibility criteria; (ii) international principles application deficiency and executing international sentences; (iii) a dialogue between different Courts, considering the State sovereignty relativization and the need to implement mechanisms to concretize or compliance the judgements (Trindade, 2014).

The present paper as its core the analysis regarding Brazilian query and the International Court of Human Rights juristic submission – resorting the American Convention on Human Rights parameter –, without, however, setting aside cross-examination regarding a global perspective in general, as for example the European Court of Human Rights.

Method

The present paper development is based on an inductive approach method, regarding comparative content, as it was based on a casuistry analysis of popular protests and judicial decisions
to assign some kind of closure. Under the perspective of the argumentative method, the paper brings arguments that will be confronted to find a set of acceptable arguments. This set of acceptable arguments is “admissible”, where all the arguments are acceptable in relation to the others of the group (Brasil Jr., 2012).

1 Global Protest and State Reactions: Short Scenary

In all global history, local protests are an instrument able to clarify insatisfaction and promote social changes. The mainly causes featured in this paper for popular mobilization are diverse, but are interconnected for a mutual point: Insatisfaction regarding how the States actualize (or don’t) Fundamental Rights weather they are covered on internal mechanisms or an umpteen of international documents as far as the International System of Human Rights Protection.

According to a statistic research carried out by Burke (2014), using as parameter the interval between 2006 and 2013:

*The leading cause of all protests is a cluster of grievances related to economic justice and against austerity policies that includes demands to reform public services and pensions; to create good jobs and better labour conditions; make tax collection and fiscal spending progressive; reduce or eliminate inequality; alleviate low-living standards; enact land reform; and ensure affordable food, energy and housing.*

Analyzing recent social movements and its different causes, it is effortless to say that one of the biggest problems concerns the State use of strength in a repressive matter, causing unmeasured and nefarious consequences. On Brazil, a country that social movements grow stouter and more frequent since 2013, after June’s manifestation, the violence used by the State has become more common, almost as a rule, on mobilization contexts, in a clear mismatch regarding international guidelines according to the protest right intervention – which its essence is guided mostly by exceptionality.

Recently, on Russia, LGBTQs citizens and their representatives had their protest right numbed only because of their sexual orientation or represent this community who is daily violated (Batchelor, 2017). On United States, as the manifestation wave is rising among the country, some states are considering the possibility to criminalize the act of protest (Lee, 2017). Around the world there are lots violations according to the protest rights, as it was briefly explained.

This fact puts on evidence a very problematic global frame as far as the Human Rights effectiveness is concerned. Notoriously, internal state conducts, in a general perspective, seems to move in conceptual contrast to what international protection organisms seeks to consolidate. This article focuses on what is granted to the Brazilian situation and closer international jurisdiction to our country, such as the Inter-American System of Human Rights.

Nevertheless, considering the problem on a global scale a few elements from other jurisdictions will appear, so there can be a better comparative.

2 Strength Using and State Responsibility: Which Criteria Can Be Placed Regarding Regular Conductive Efectivation

In case of civil State responsibility from violating Human Rights, mostly related to reunion rights, free association rights, circulation rights, life rights, personal integrity rights, freedom of speech and personal rights, the discussions are placed at the Inter-American Court of Human Rights, following objective criteria of verifying responsibility. Chalifour (2012), when unraveling the *Velásquez Rodriguez vs. Honduras* Case – a leading case judged by the Inter-American Court on 1988 –, mentions that States possess four fundamental obligations within the scope of Human Rights
protection: violation prevention; violation investigation; sanction illicit conducts and assure proper reparation of the violations victims.

Therefore, since the trials pronounced not so recently, the Inter-American Court has been building solid and cohesive positioning regarding international State responsibility from violating rights protected by basic documents as far as human rights are concerned. The Court jurisprudential construction among the years gained some space in a system that principally values precedents e its supported by them.

Emphasizing the State use of strength in popular manifestations, the Inter-American Court, based on solid jurisprudential construction, has already pointed out on different cases that the strength usage e coercion instruments by security State staff must only happen exceptionally. So it must not be used as standard procedure, and always maintain proportionality, necessity and not discriminates means according to the situation. (Zambrano Vélez y otros vs. Equador, 2007; Fleury y otros vs, Haití, 2011; Familia Barrios vs. Venezuela, 2011; Montero Aranguren vs. Venezuela, 2006). The strength usage must be classified as a last and extraordinary measure, to call upon when all other means to resolve a conflict are dried out. The Court stated, according to popular manifestation presented on the Perozo y otros vs. Venezuela (2009) case:

In this aspect, the Court has established that the use of force by governmental security forces must be grounded on the existence of exceptional circumstances and that it can only be used once all other methods of control have been exhausted and failed, state agents must distinguish between persons who, by their actions, constitute an imminente threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat. In that respect, the Court deems absolutely necessary to emphasize the extreme care which States must observe when they decide to use their Armed Forces as a mean for controlling social protests, domestic disturbances, internal violence, public emergencies and common crime. [...].

Therefore, considering the State civil liability perspective from applying strength to minimize popular manifestations, the Inter-American Court has been given a great amount of contribution to international guidelines, but not develops alone. The European Court of Human Rights holds emblematic and recent conviction analysis by States for putting excessive force when handling protest situations (Andreou vs. Turkey, 2009; Taranenko vs. Russia, 2014; Kaspavor and others vs. Russia, 2013). The Organization for Security and Co-Operation in Europe (OSCE/ODIHR 2010) produced a study called “Guidelines on Freedom of Peaceful Assembly”, a document that indicates the conducts that the State must apply when handling a peaceful protest, respecting manifestation freedom and keeping the protesters united for their cause. The UN Human Rights Council has used scientific studies directed to crowd behavior which indicate, in a more boldly way than current court international jurisprudence does, that the doctrine of escalated force by the state must be replaced by the doctrine of negotiated management. (17th Session of Human Rights Council 2011).

The civilian organization society also seeks to influence guidelines according to the use of the State strength. International acting NGO’s (Non-Governmental Organizations), such as “Article 19” constantly produces documents appealing to States to apply reasonable conducts in order to guarantee fundamental rights in times of protests. This NGO put together an online platform called “Right to Protest”, which compiles many principles to the State follow when handling protests. (Right to Protest. Article 19: defending freedom of expression n.d.).

At the preamble of this principle letter, the NGO invokes the reader to “Call on all appropriate bodies at international, regional, national and local levels and private actors to undertake
steps to promote widespread acceptance and dissemination of these Principles and give effect and practical implementation to them in all situations”.

Beyond the civil responsibility sphere, putting on perspective the international criminal responsibility, the Rome Statute attending the International Criminal Court defines at the article 7, paragraph 1 and 2, crimes against humanity based on force appliance, among which violent intervention in protests might have place, especially regarding death or severe integrity of the protesters violation cases, in its most commands.

Thereby, considering the state intervention potential on popular mobilizations, it is possible to affirm that if this intervention is excessive, the state actions are capable of generate not only civil damages, but also crimes against humanity in light of the International Criminal Court jurisdiction. Chalifour (2009) notes that the Rome Statute, joint to the rising multiplicity of humanitarian actions (UN) reveals a growing need to take prevention measures and to sanctionate massive Human Rights violations.

It is possible to observe, however, that not only concerning the international jurisdiction of Human Rights, but also on the organized civil society, the State responsibility criteria by force usage against public manifestations is quietly defined and cohesive, as being object of frequent update and discussion in spite of different movements spreading all over the world. Having said that, there is a lack of the internalization process of such international references, leading to a frame that mostly state actions applied on public manifestations are driven into the abstract international plane but are not adopted in a concrete way.

Namwase (2016) made a scientific study concerning contradictions and challenges according to the force appliance on protests, on the Rome Statute. The author besides situating an analysis on contexts of nowadays protests, also realized that the Rome Statute imposition has become an illusion, which would explain the strength appliance a discretionary act from the State, regarding a complete absence of International Law articulation.

Considering Brazil’s situation, there’s innumerable registers of violent protest contention, mainly between 2013 and nowadays. In sight of international and civilian pressure, on 2010 an inter-ministerial ordinance (no. 4.266) established guidelines regarding force appliance concerning Public Security Agents. Nonetheless, the ordinance was followed at all, given the lack of normative character and deficient publicity.

Pronouncements from the Supreme Federal Brazilian Court, currently, are restricted to ratificate the right to protest, freedom of reunion and the State duty to guarantee security during manifestations. However, there aren’t enough verdicts referring to applied State violence on protests.

The civil State responsibility guarded on Brazilian legal order is liable to discussing objective or subjective theories (Velloso, 1987) and is submitted to a very uptight formal process, whereas, as it has already been analyzed according to review based on international protection organs, as a highlight to Inter-American Court of Human Rights, the process should be profoundly more intuitive and point to the effective protection of Human Rights (as a top system goal). States are undeniably responsible for actions and omissions, in an objective matter, once it is listed the four parameters of the State international liability and its jurisprudential perspective.

The explained problem goes beyond international criteria materialization. It reaches even insufficient applicability of international executions. Specifically on Brazil, once more compared to the Inter-American Court of Human Rights, Sant’ana (2001) forewarns against condemnations effectivity and its recommendations:

*In the light of above, the first criticism is about the brazilian slowness, since there is no concern about establishing specific rules for the internal implementation of the recommendations of the IACHR and the condemnatory sentences of the IACtHR. That is, by assuming the obligations of the ACHR and its monitoring and jurisdictional bodies, no*
prior study was made of the applicable internal rules to make such commitments effective. (free translation).

Due to lack of international criteria internalization, it is needed to highlight the unavailability to look into the Court dialogue perspective. Under this sight, International Courts of Human Rights protection concept does not necessarily constitute national jurisdictional hierarchy structure but organs capable of defining the minimum amount of protection regarding fundamental rights, which should be accepted by International Courts without sacrificing internal plurality of fundamental rights foreknowledge (Voßkuhle, 2014). It sums the idea as the International Courts as a mobile, not a pyramid (Voßkuhle, 2014).

To corroborate the judicial dialogue need, the majoritarian doctrine considering the relativization regarding State’s sovereignty, on a much larger context, as a globalized world (Trindade, 2006; Ramos, 2012). Trindade (2014) also describes a specific context analysis from the Inter-American Court on Human Rights that “domestic law measures need to be complemented by measures under international law, and particularly by the creation of a permanent mechanism of international supervision of the execution of IACtHR judgments […]”.

Thereby, as far as the amount the State’s strength usage on public manifestations situations, on an internal atmosphere there is a lack of cohesion between materialization rules and international directives. The intended goal – by demonstrating through the given emphasis on Brazil and the Inter-American Court on Human Rights – is the necessity to adequate internal legislations and protocols to international principles that concerns force appliance as well as the materialization and execution of this decisions issued by Human Rights protection organs.

3 Conclusion

This essay’s goal wasn’t to bring strict definitions which could be capable of resolving completely the strength usage by the State matter. The aim of this paper was to indicate recommendations as a consequence analysis according to its worldwide repercussions, even though only applied on the Brazilian and Inter-American systems.

Firstly, there is no doubt that protocols and internal legislations adopted by every jurisdiction must reach internationals principles regarding Human Rights protection claiming. Even more, they must attend to the guaranteed rights from international treaties, as far as individual freedom, freedom of expression and freedom of reunion are concerned.

Effective internal instruments whose conducts leads and foresees sanctions to excessive strengths manipulation or to not fulfilling institutional protocols must guide safety State’s member actions, in every scale. There is an urge to States realize civil society’s appeal and situate itself as guarantor concerning Human Rights Safety on popular manifestations situation, principally when they are pacific ones.

Secondly, according to Trindade’s (2014) reasoning, the need to implement a mechanism to supervise or execute condemnation sentences issued by international organs, mainly the Inter-American Court on Human Rights, as it happens on the European system, which among a Minister Committee to judgments implementation.
REFERENCE LIST


Battle of Giants: The Fundamental Principle of Solidarity x the People’s self determination

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Abstract:
The proposal of the present paper is an analysis of principles conflict in some contemporary issues. On one side, the fundamental principle of solidarity in attending refugees rights and on the other side the basis of democracy: principle of peoples’ right to self-determination. Moreover, this situation is a historical moment that occurs in Europe, which has not been seen since the post-Second World War. The legal-political-economic repercussions of this cultural conflicts moment go beyond the United Nations Convention of 1951 and the 1967 Protocol. Acts of violence and threats, coupled with religious persecution, end up overcoming legislation and unlocking European fortress frontiers. Nevertheless, as we will address, opposing feelings also arise as xenophobia fueled by the guarantee of rights to refugees in conflict with the rights of citizens from countries that receive large refugees populations. Questions about acculturation – or combining one culture with another – became the seed of a movement that create reasons for both sides in this cultural shock. Our pretension in this research is develop the theme of tensions involving principles that concern refugees rights and people’s right to self-determination around the world, especially Europe, and focusing on multiculturalism, intercultural legal theory and the concept of human rights. Therefore, applying legal reasoning as a methodology and focus on the democracy societies.

Keywords: International Law; Human Rights; Legal Reasoning

Introduction

The basis of the discussion is the analysis of two strong principles that has been used to support sovereignty in states since the historic period of European colonialism: people’s self-determination and fundamental principle of solidarity. In a context of international conflicts, it is necessary to reflect on arguments from both principles introducing the legal reasoning as a methodology.

The concepts and issues that involve these principles were initially discussed with the creation of the League of Nations (1919) and then, established as the International Declaration of Human Rights as universal guarantees. This document was stated after the end of World War II, as soon as establishment of the United Nations, during the 1951 Convention.

The United Nations created the 1967 Protocol, since Europe was divided in the period of Cold War under the post-war international issues. The international rights and guarantees to the thousands of refugee victims of violence were institutionalized. Although the creation of agency UNHRC (United Nations of High Commissioner for Refugees) was intended to be temporary, refugee families care became a permanent concern on the international agenda.

A large part of international law studies has been focused on supporting the reception of refugees, coming from situations of war, political persecution, as well as any threat to religious liberty, ethnic,
and gender. It has also been presenting the discussion and debate through two giants in the form of principles: solidarity and self-determination.

The present work aims to reflect on arguments, based on legal reasoning and argumentative, respecting the validity and effectiveness of the involved principles, reviewing the case with the peculiarity it deserves.

To this end, the semantics and the syntax of legal argument are fundamental to the pursuit of common places, paradigms, the intercultural dialogue of the involved principles which come to represent different cultures, ideas and international policies respecting self-determination and solidarity.

The principles are divided into layers (arguments), as well as visions (approaches) that tend to be political and directed, as well as the principles of self-determination and of solidarity.

Finally, the methodology and concepts will be presented below. The concepts presented by some international authors about their perspectives of each principle, analyzing whether the objective is in this work.

Methodology

The method of argumentation theory is the Foundation of research. It is more precisely the legal reasoning in argumentation theory practice of Phan Ming Dung (BRASIL JR., 2002). An application of the means of refutation of the arguments that support both the principles of self-determination and solidarity will be proposed. We will seek, without exhausting the subject, legal argument by using syntax and semantic structures in the conflict between standards, and in the case in question, the conflict between the principles of solidarity and self-determination.

In order to achieve that, we will work with the arguments brought by categorizing the principles within the syntax as self-defeating or sound, as well as ad absurdum and ground attacks. And completing the syntax field, adds Brasil Jr. (2002) the relationship of the standard behavior by denotation (identification) or connotation (subsumption), both elements make the semantic field of argumentation of the standards involved.

Results and Discussion

In this section we will demonstrate, through the arguments of authors advocate the principles of solidarity and self-determination, as relations between the arguments that make these standards be sustained or not within the semantic and syntax in legal reasoning.

Reasons of Self-Determination

Thornberry (1989) will present that “self-determination is a concept of liberation”. It starts in the colonialism period. It is enshrined by the United Nations Charter as the main argument that former European colonies used to substantiate and justify their shaping into States. However, they are marked by the lack of national unity and structure, due to their plural and complex multicultural societies, who’s growing disrespect for human rights are marked by intolerance to ethnic and religious minorities.

According to Thornberry, the absence of a fortiori argument to support inter-ethnic solidarity is corrupted and replaced by Government internal oppression with authoritarian and dictatorial character, in name of self-determination. Finally, the effects caused by the formation of States on behalf of self-determination are deep. They are soaked into hoc ergo propter hoc, which breaks the level of denotation, semantic element of the principle analyzed.
Weller (2009) by invoking historical hermeneutics, also alleges "that self-determination arises from a colonial context, where the more developed nations while colonizing areas controlled by tribes and without political and economic formation, introduced in these populations the sense of struggle for recognition, hence the struggles for independence.

Tomuschat (1993) presents arguments that also date back to colonialism. However, post-colonialism, keeps the arguments of Weller and Thornberry. Moreover, adds that “self-determination viewed as political claim, asserted on grounds of solidarity by all third world nations”. To contrario sensu, the same international principle would become an instrument that is used to justify the reasons why a state would disintegrate itself, for instance, Baltic Republics, Ukraine, Nigeria and Pakistan. In all these cases, without any exception, the International Convention on Civil and Political Rights is totally silent.

So, applying an attack grounded on the cited authors’ arguments, aiming to preserve the strongest argument. The practiced imperialism is no longer a solid argument, since the political instability of the young nations became the stronger and more solid argument. It affects directly the respect upon human rights and proves a different standard behavior by denotation.

**Reasons for Solidarity**

In a context of republican and democratic society that lives under a paradigm of communicative action, Habermas (1994) define solidarity “as a third source of social integration and the orientation to good common”. In other words, it is possible to highlight between the other two, the administrative power and individual interests.

It is a social experience in a liquid modernity (BAUMAN, 2000). In this century, being similar or different is not relevant, what matters is that social living became something essential for human survival, hence the importance of reflection on solidarity in modern societies that concern to reconcile public and private spaces.

Wellman (2000) named solidarity as a “new human rights should be thought of as solidarity rights”. Based on Vasak’s theory of rights generation, he classified solidarity rights like current legal status in the third generation of human rights. It gives a more evolved vision when compared to the first (civil e politic rights) and second generation (economic, social and cultural rights).

Brunkhorst (2007) argues that solidarity is a rule that cannot occupy a capitalist space. He signs a tendency to support communitarian movements as the only valid and effective in order to solidarity to be achieved. In this way, calling a fallacy element, false induction, when reduce only one reason without an empirical proof.

Juul (2013), in attempt to analyze the criteria of fairness, good judgment and recognition, works the reflective solidarity mode as means of reflection in order to bring new concepts of relationships to modern societies. He does not leave the legal rights legitimized. He gets support from Jodie Dean, who conceptualizes the reflective solidarity “as a mutual responsible orientation to relationships”. A high level of development, outperforming the other two weaker and less relevant ways: affectional and conventional solidarity.

Looking for defining concepts and limits to "we" and "the others", Juul (2013) also presenting Dean’s reflections. It is shown the reflective solidarity principal could lead us upon the complex problems we face in multicultural societies. The most interesting and optimistic from this approach is that this concept of solidarity (reflective) is the one that gets closer to the moral obligations (moral obligations), Kantian deontological ethics and is characterized as the more inclusive of solidarity,
which can be understood as a solid argument to support negotiations involving intercultural issues that discussed as paradigms for universal human rights. (ground)

Conclusions

The arguments from the authors cited are relevant enough, but that does not mean they cannot be rebutted, that is why the importance of methodology of legal reasoning. There is the presence of fallacies in the arguments supporting the principles of solidarity and self-determination. In spite of that, the fallacy that structures the argument and defines how the practical application of international standards of human rights will occur, strengthening or deconstructing arguments in conflict.

There is a strong argument especially in the special cases of refugees, it is not that often portrayed though: the violence practiced by bad intentioned people. It crosses borders to barbarisms. Hidden in a context refuge, claiming for rights, even though, they violate rights and disobey the rules of conduct in hostess countries. On the other hand, the reaction to acts of violence committed is the more violence through acts of xenophobia. Social crisis is established and feeds the spirit of disrespect for human rights.

The interpretation of these principles (self-determination and solidarity), each with its own importance and comprehensiveness, is to aim at their validity and effectiveness, the syntax and the semantics of the legal argument, striving above all good common sense and justice in human rights. If the culture, even outsider, acts as a barbarian, the rule must be obeyed or we are going to be back to times without any solidarity or self-determination.

The intention of this article was to present some polemic points regarding the discussion between solidarity and self-determination on international law. More precisely, in a sense of covering questions involving refugees; the consequences to receptor countries, xenophobia, the growth of violence and social crises.

While researching the correlation between the two giants’ principles, it was not possible to find in the in international doctrine many debates on the topic, so I hope I have reached the objective and collaborated for that discussion to be perpetuated. In order to do this, debate and dissent are essential, both guided and limited by elements of syntax and semantics of the legal reasoning.

Reference List


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