BRICS LAW JOURNAL
Volume II (2015) Issue 2

ISSN 2412-2343 (Online)
ISSN 2409-9058 (Print)

Key title: BRICS law journal (Print)
Abbreviated key title: BRICS law j. (Print)
Variant title: BRICS LJ

Contacts: bricslaw@gmail.com

Frequency of Publication: biannually

Published by
LLC V. Em Publishing House,
92 Lobachevskogo str., Moscow,
Russia, 119454

Subscription enquiries should be directed to Statut Publishing House

BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

It is published in English and appears two times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

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CHIEF EDITOR'S NOTE ON GROUP LITIGATION LEGISLATION IN BRICS COUNTRIES

DMITRY MALESHIN,

Lomonosov Moscow State University
(Moscow, Russia)

Recommended citation: Dmitry Maleshin, *Chief Editor's Note on Group Litigation Legislation in BRICS Countries*, 2(2) BRICS LJ (2015).

BRICS countries belong to different legal systems: civil law as well as common law. This makes it interesting to compare the group litigation legislation of these countries.

Brazil was one of the first civil law countries to introduce class action. The Brazilian class action system aims to protect the environment, consumers, cultural patrimony, economic and antitrust rights.

The first Brazilian act dealing with class action was the Public Civil Suit Act, enacted in 1985. In 1988 the new Constitution created the '*mandado de segurança coletivo*,' a type of collective action. In 1989 and 1990, three statutes for the protection of handicapped people, investors in the stock market, and children were enacted. In 1990, the Consumer Code was enacted. The new Civil Procedure Code of 2016 establishes another proceeding to solve numerous pending claims that involve the same issue of law and require a unanimous court decision. This proceeding commences with the selection of one or more pending lawsuits involving the same issue of law and requiring a unanimous decision. After this selection, all other pending lawsuits involving the same issue of law will be suspended until the judge issues a decision.

The Model Code of Collective Actions for Ibero-America, approved by Ibero-American Institute of Procedural Law in 2004, was drafted by Brazilian scholars. It is a model code, but is a source of inspiration for legislators in several South American countries.

In *Russia*, only public and organizational group actions are possible.

Public group litigation has existed in Russia since the Soviet period. The 2003 Civil Procedure Code (CPC) provides for special regulation. According to Art. 45

the attorney-general can go to court to defend the interests of an indefinite group of persons. Organizational group actions are regulated in the same manner. For example, the Consumer Protection Law of 1992 (Art. 46) and the Securities Law of 1999 (Art. 19) contain similar rules designed to protect consumer rights. The problem is that the law simply stipulates the right for the attorney-general or organizations to sue. Specific (procedural) rules are not provided.

At the same time, there is a vibrant academic discussion regarding the introduction of private group actions. This discussion was conducted along with the beginning of judicial reform in the 1990[5]. The need to improve the group rights protection mechanism, or mechanism of protection of an unspecified number of persons is accepted by the majority of procedure scholars.

Several steps are required to introduce private group actions in Russia. In July 2009, amendments to the *Arbitrazh* (Commercial) Procedure Code were enacted and they introduced *quasi* private group actions. Special provisions (Ch. 28.2 'Consideration of Cases of Protection of the Rights and Legal Interests of a Group of Persons') regulate the proceedings in such cases.

Unlike the classical Anglo-Saxon model of the private class action where the participants of the group do not always have to be specifically defined during the hearing, the Russian *Arbitrazh* (Commercial) Procedure Code establishes a necessary condition – formation of a group prior to judicial proceedings – at the preparatory stage. Such regulation changes the nature of the classical construction of the class action.

Therefore, on the one hand, the established procedure makes it possible to create a group, but, on the other hand, the participants of this group have to be listed prior to the case hearing. The differences between this system and joinder of parties are minimum. The established rules of formation of a group do not contradict the norms of joinder of parties. Therefore, this procedure is not an innovation of the *Arbitrazh* (Commercial) Procedure Code.

The new Russian Administrative Procedure Code was adopted in 2015. Such a code has never existed in Russian legal history. One of the things it introduces is regulation of group litigation. The Code consists of special Article 42 'Collective Administrative Claim.' According to this article, a court should initiate group proceedings if at least 20 persons have joined the claim. They must indicate a person will participate in the proceedings on behalf of a group. If somebody has filed a similar claim with a similar subject-matter and grounds, the court shall propose such person join the collective claim. This procedure cannot be defined as group litigation because it requires an exact number of parties. It should be considered as a joinder of parties.

Therefore, Russian current legislation only consists of organizational and public class actions. There have been a few attempts to introduce private class actions, but they failed.

In *India*, class actions are presented mainly in the form of Public Interest Litigation and Representative Suits. The Civil Procedure Code of 1908 regulates Representative Suits. Similar provisions are set out in several acts: the Consumer Protection Act of 1986, the Industrial Disputes Act of 1947, and the Competition Act of 2002. Public Interest Litigation is based on the Constitution and decisions of the Supreme Court. The Companies Act of 2013 introduced 'pure' class actions but only in relation to the affairs of companies. It operates the concept of 'specialized class actions' by company shareholders and depositors. Class action lawsuits must be initiated before the National Company Law Tribunal (NCLT).

Class actions in *China* are regulated by the Civil Procedure Code of 1991. China borrowed its class action system from both the Japanese type of representative action and the US model of class action. Similar provisions are set out in several acts: the Environmental Protection Law of 1989 and the Consumer Protection Law of 1994.

In *South Africa* the Constitution of 1996 provides that any person can act as a member of a class in approaching a court. Apart from the Constitution, the class action system is set out in several acts: the Companies Act of 2008, the Consumer Protection Act of 2008, and the National Environmental Management Act of 1998. Moreover, in 1998, the South African Law Reform Commission (SALRC) proposed the draft 'Public Interest and Class Actions Act,' but this act has not yet been enacted.

Therefore, all BRICS countries have regulations on class action litigation. There are different types of such litigation, but all of them recognize class actions as an effective form of protection of collective rights.

ARTICLES

THE PRINCIPLES OF TRANSPARENCY AND INCLUSIVENESS AS PILLARS OF GLOBAL GOVERNANCE: THE BRICS APPROACH TO THE UNITED NATIONS

CHRISTIAN GUILLERMET FERNÁNDEZ,

Permanent Mission of Costa Rica in the United Nations in Geneva
(San José, Costa Rica),

DAVID FERNÁNDEZ PUYANA,

Permanent Mission of Costa Rica in the United Nations in Geneva
(Barcelona, Spain)

The transparency of governance is not only a necessary and sufficient condition for bringing about accountability, but also the basis for the possibility of democracy in the global sphere. Although there is no automatic progress from transparency to democratic global governance, this principle helps to create more democratic, open and fair societies. Recently, the importance of inclusiveness, transparency and procedural safeguards has emerged as a critical theme. The practical implementation of fair global governance mechanisms, procedures, and institutions will always depend on the level of participation, contestation, or solidarity among the different stakeholders represented at the local, national or international level. Recent years have clearly shown a trend towards increasing transparency and inclusiveness in international organizations' activities and operations, in contrast to opaqueness or lack of transparency which was a very common practice in diplomacy during past centuries. The inclusion of transparency and inclusiveness elements in the decision-making rules of an international organization are fundamental for these norms to be considered not only 'more legal,' but also to have a higher level of legitimacy. The General Assembly decided in its Resolution 60/251 of 2006 that the methods of work of the Human Rights Council should be transparent, fair and impartial and should enable genuine dialogue. Finally, the role played by the BRICS countries at the Security Council and the Human Rights Council is critical in regards to its working methods.

Keywords: transparency and inclusiveness; diplomacy; global governance; League of Nations; United Nations; diplomatic negotiations; Human Rights Council; Security Council; BRICS countries.

Recommended citation: Christian Guillermet Fernández & David Fernández Puyana, *The Principles of Transparency and Inclusiveness as Pillars of Global Governance: The BRICS Approach to the United Nations*, 2(2) BRICS LJ (2015).

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1. Introduction

This paper will analyze how diplomacy passed from being a secret affair to have a more public exposure in society. In particular, from the establishment of the League of Nations until today the principles of transparency and inclusiveness have occupied a central role in diplomacy, which has been considered as a revolutionary change of paradigm in international relations.

Additionally, a legal approach to the notion of transparency and inclusiveness will be studied, in the context of the current trend which demands more transparent and inclusive institutions and procedures at the international level. At this moment there is not an international treaty defining the notions of transparency and inclusiveness. In fact, the difficulties of defining these concepts are due, in the eyes of some, to the view that transparency, and also inclusiveness, are a 'myth.'

A reflection about the role played by transparency and inclusiveness in diplomatic negotiations, and in particular the contemporaneous preoccupation with legitimacy by international organizations will be provided, concluding with an emphasis that transparency and inclusiveness are indispensable elements of global governance. Currently, international democracy and global governance strongly requires more

transparency in the decision-making process and the participation of non-State actors in the elaboration of rules and norms.

Finally, the principles of transparency and inclusiveness will be analyzed in light of methods of work and the working culture of the Human Rights Council and the Security Council. In particular, the role played by the BRICS countries will be taken into account. All States are oblied to practice, as far as possible, the principles of transparency and inclusiveness during the negotiation process of any resolution or even a new international instrument.

2. From Secret to Open Diplomacy

The modern system of diplomacy, since its inception in the time of the Renaissance to the last part of the 19th century, was considered as a clandestine affair. For many centuries diplomacy was conducted secretly. The French elaborated in the 17th and 18th centuries a conception of diplomacy based on ceremonial processes, secrecy and professionalism.[1]

Since diplomacy is integrally linked to national interests, it was then believed that it was wiser to conduct diplomatic endeavor in secret for the benefit of the nation. The causes for secret diplomacy were national interest and war-time exigencies.[2]

It has been suggested that most wars in recent centuries have been caused because of the vanity of Heads of State to maintain in a thoughtless way the combative instinct of their peoples. All the glorious and provocative exhibitions of force and war have developed in the minds of the human population through the conquest of other territories.[3] In three thousand years, from 1,500 BC to 1860, 8,000 peace treaties have been signed.[4] Consequently, 'peace has always conducted to a war.'[5]

Historically, there are some noted examples of secret treaties in international politics, such as the Reinsurance Treaty of June 1887 between the German Empire and the Russian Empire, the Berlin Congress Treaty of 1878, the Sykes-Picot Agreement of 1916 between Russia and France or the 'Entente Cordiale' of 1904 between France and Britain.[6]

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1 Annek Chatterjee, International Relations Today: Concepts and Applications 78 (Pearson 2010).

2 Christer Jönsson, *Ch. 11. Diplomacy, Bargaining and Negotiations*, in Handbook of International Relations 212, 215 (Walter Carlsnaes et al., eds.) (SAGE Pub. 2002).

3 Louis Eichner, La paix des peoples ou essai d'une Confédération Internationale 33–34 (Librairie Marcel Rivière 1922).

4 George Valbert, *La guerre et la paix perpétuelle*, 1894(122) Revue des Deux Mondes 692, available at <http://fr.wikisource.org/wiki/La_Guerre_et_la_Paix_perp%C3%A9tuelle> (accessed Feb. 1, 2016); Jönsson, *supra* n. 2.

5 Gaston Bouthoul, Huit mille traités de paix 12–13 (René Julliard 1948).

6 Chatterjee, *supra* n. 1, at 78.

From the first half of 20th century, the demand for open diplomacy gained space in international politics. People and nations started to denounce secret diplomacy for two key reasons: the spread of democratic ideas and the hatred that a nation incurred due to secret diplomacy.[7] Open diplomacy has two features: firstly, rejection of the conclusion of secret treaties; and secondly, conducting of diplomatic negotiations in full public view.[8]

This shift came about following World War I. In the wake of this War, 'the secretiveness of the old diplomacy came to heavy criticism, and the entire diplomacy system was held responsible for the failure to prevent the outbreak of war.'[9]

After the Russian Revolution of 1917 the Soviets came to power. Trotsky disclosed that the Tsarist government had signed with the Entente powers, the Treaty of London and the Constantinople Agreement. He proposed the abolition of secret diplomacy.[10] This move caused embarrassment and 'a strong, sustained reaction against secret diplomacy.'[11]

Additionally, US President Woodrow Wilson was a strong opponent of secret diplomacy, because he viewed this practice as a clear threat to peace. In the speech delivered to Congress on January 8, 1918, he focused his attention to the abolition of secret diplomacy in the first point of his Fourteen Points, as follows:[12] 'Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.'

The Fourteen Points were based on a draft paper prepared by Walter Lippmann. His task was

> to take the secret treaties, analyze the parts which were tolerable, and separate them from those which we regarded as intolerable, and then develop a position which conceded as much to the Allies as it could, but took away the poison . . . It was all keyed upon the secret treaties. That's what decided what went into the Fourteen Points.[13]

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7 Chatterjee, *supra* n. 1, at 78.

8 *Id.*

9 Jönsson, *supra* n. 2, at 215.

10 Charles M. Dobbs & Spencer C. Tucker, *Brest Litovsk, Treaty of (3 March 1918)*, in Encyclopedia of World War I: A Political, Social, and Military History 225 (Spencer C. Tucker, ed.) (ABC-CLIO 2005).

11 Charles Lipson, *13. Why Are Some International Agreements Informal? (1991)*, in International Law and International Relations: An International Organization Reader 293, 329 (Beth A. Simmons & Richard H. Steinberg, eds.) (Cambridge University Press 2007).

12 Glenn P. Hastedt, Encyclopedia of American Foreign Policy 170–71 (Facts on File 2004).

13 Godfrey Hodgson, Woodrow Wilson's Right Hand: The Life of Colonel Edward M. House 160–63 (Yale University Press 2006).

President Wilson repeated his Fourteen Points at the Versailles peace conference of 1919, which created the League of Nations. In accordance with its Preamble of the Peace Treaty of Versailles, the promotion of international cooperation and the achievement of peace and security in the world should be achieved by the following means: firstly, the acceptance of the obligation not to resort to war; secondly, the prescription of open, just and honorable relations between nations; thirdly, the firm establishment of the understandings of international law as the actual rule of conduct among Governments; and fourthly, the maintenance of justice and a scrupulous respect for all treaty obligations.[14]

The Wilsonian proposal about the obligation of States to promote an open diplomacy was codified in Art. 18 of the Covenant of the League of Nations, which provided:

> Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

The objective of this provision is to ensure that all treaties remain in the public domain and thus assist in eliminating secret diplomacy. This led to the rise of the treaty registration system, 'although not every treaty that would have been subject to registration was duly registered.'[15] Among these secret treaties, it should be recalled that one of the most infamous secret treaties in history was the secret additional protocol to the Molotov–Ribbentrop Pact of August 23, 1939, between the Soviet Union and Nazi Germany.[16]

After World War II, the registration system that had begun with the League of Nations was continued through the United Nations.[17] Article 102 of the Charter of the United Nations, based on Art. 18 of the Covenant of the League of Nations, provides:

> (1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
>
> (2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

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[14] Christian Guillermet Fernández & David Fernández Puyana, *Building Human Rights, Peace and Development within the United Nations*, 3(1) RLJ 63 (2015).

[15] Helmut Tichy & Philip Bittner, *Article 80. Registration and Publication of Treaties*, in Vienna Convention on the Law of Treaties: A Commentary 1339, 1340 (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer 2012).

[16] Chris Bellamy, Absolute War: Soviet Russia in the Second World War 50–56 (Vintage Books 2007).

[17] Tichy & Bittner, *supra* n. 15, at 1340.

The legal implications of Art. 102 are the following: firstly, each Member State has a legal obligation to register all international agreements / treaties concluded after the coming into force of the Charter; secondly, this obligation does not preclude international organizations with treaty-making capacity or non-Member States from submitting for registration treaties entered into with Member States; and thirdly, the Secretariat is mandated to publish all agreements registered.

Similarly, Art. 80 of the Vienna Convention on the Law of Treaties, which entered into force in 1980, requires:

> (1) Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.
>
> (2) The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

According to Dörr and Schmalenbach's commentary on the Vienna Convention on the Law of Treaties, 'the fact that today secret treaties do not play an essential role is less a result of [Art. 102 of the UN Charter] than of an overall change in the conduct of international relations.'[18]

Consequently, we could conclude that after the creation of the League of Nations the principle of transparency opened a new era based on a different conception about international relations. Despite difficulties, this new path about how conducting diplomacy at all levels has continued until today and is also considered a revolutionary change of paradigm.

3. The Notion of Transparency and Inclusiveness under International Law

3.1. Definition

In all major fields of international law[19] demands for more transparent and inclusive institutions and procedures have recently been voiced by civil-society actors, by states, and within the international institutions themselves. All of them consider that these principles positively contribute to global governance.[20]

It is not an easy task to define transparency and inclusiveness properly. The definition must, at the same time, be broad enough to cover many different situations

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18 Tichy & Bittner, *supra* n. 15, at 1341.

19 Environmental law, trade and investment law, human rights law, international humanitarian law, health law, or peace-and-security law.

20 Anne Peters, *20. Towards Transparency as a Global Norm*, in Transparency in International Law 534, 607 (Andrea Bianchi & Anne Peters, eds.) (Cambridge University Press 2013).

and precise enough to find application in practice.[21] The difficulties of defining this concept are due in the eyes of some to the view that transparency is a 'myth.'[22]

At this moment there is not a general international treaty defining or even recognizing transparency and inclusiveness, and such a codification would probably not be feasible. The question is to know whether a customary international law principle of transparency and inclusiveness exists, in accordance with Art. 38 of the Statute of the International Court of Justice.

In order that the notion of transparency and inclusiveness becomes a norm in light of international law requires two fundamental preconditions: firstly, it must be sufficiently precise to generate an obligation and to assess its implementation; and secondly, it must have an obligor and an obligee. Both conditions are not easily fulfillable with regard to the transparency buzzword. As a result, it would seem difficult to argue that currently transparency as such is a norm of hard international law.[23]

The right to information could function as a catalyzer for the consolidation of the transparency principle. This right is foreseen in all regional and universal human rights agreements. It is today no longer interpreted exclusively as a governmental negative obligation not to mount obstacles to the diffusion of information which is already present in the public space, but as a positive right.[24]

The European Court of Human Rights for example has derived from the provision of Art. 10 of the European Convention on Human Rights (the freedom to receive or to communicate information and ideas) an individual right of access to public documents.[25]

The Human Rights Committee in its General Comment No. 34 on Art. 19 of the Covenant on Civil and Political Rights of 2011 goes along these lines. It offers an important, extended reading of the human right to information, and understands it as encompassing a right of access to official documents held by States, and to documents held by functionally public actors.[26]

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21 Laurence B. de Chazournes, *Concluding Remarks. Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 International Organizations Law Review 655, 659 (2009), available at <http://papers.ssrn.com/abstract_id=2090895> (accessed Feb. 1, 2016). doi:10.1163/157237409X477734

22 Jacques Chevallier, *Le mythe de la transparence administrative*, in Information et transparence administrative 239 (François Rangeon et al., eds.) (PUF 1988), available at <https://www.u-picardie.fr/curapp-revues/root/21/chevallier.pdf> (accessed Feb. 1, 2016).

23 Anne Peters, *The Transparency Turn of International Law*, 1 The Chinese Journal of Global Governance 3, 6 (2015), available at <http://booksandjournals.brillonline.com/content/journals/10.1163/23525207-00000002?crawler=true&mimetype=application/pdf> (accessed Feb. 1, 2016) [hereinafter Peters, *The Transparency Turn*].

24 Peters, *The Transparency Turn*, *supra* n. 23, at 6.

25 *Gillberg v. Sweden*, ¶ 93, no. 41723/06 (Eur. Ct. H.R., Apr. 3, 2012).

26 *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, U.N. GAOR, Hum. Rts. Comm., 102nd Sess., U.N. Doc. CCPR/C/GC/34 (2011), at <http://www2.ohchr.org/english/bodies/hrc/ docs/gc34.pdf> (accessed Feb. 1, 2016).

3.2. Regulation

The notion of transparency and inclusiveness also focuses its attention and increasing demands on the transparency of those actors who play an active role in global governance. In particular, the international instruments and institutions in which the notion of transparency and inclusiveness has widely been elaborated are the following:

> At the regional level, we could stress that the UN Economic Commission for Europe adopted in 1998 the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[27] Additionally, it is important to remember the European Union adopted in 2001 the Regulation of the European Parliament and of the Council regarding Public Access to European Parliament, Council and Commission Documents.[28] Finally, we should recall that the Council of Europe adopted in 2009 the Convention on Access to Official Documents.[29]

At the United Nations level, the UN Human Rights Council adopted in 2012 the Framework Principles for Securing the Human Rights of Victims of Terrorism.[30] With regard to the World Trade Organization [hereinafter WTO], the Sutherland Report devoted an entire section to the debate on improving the transparency of the WTO and civil society involvement.[31] Also the World Bank issued its 'The World Bank Policy on Access to Information.'[32]

A final example to be recalled is the initiative of the 'Small 5' (a group of small states)[33] of 2012, which suggested a draft resolution 'Enhancing the Accountability,

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[27] Preamble, para. 12: 'Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings . . .'

[28] Summary: 'The purpose of this Regulation is to make access to the documents of the European institutions easier for citizens.'

[29] Preamble, para. 5: 'Considering the importance in a pluralistic, democratic society of transparency of public authorities . . .'

[30] *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. GAOR, Human Rights Council, 25th Sess., Agenda Item 3: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/20/14 (2012) (Special Rapporteur: Ben Emmerson), at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf> (accessed Feb. 4, 2016).

[31] Peter Sutherland, The Future of the WTO: Addressing Institutional Challenges in the New Millennium: Report by the Consultative Board to the Director-General Supachai Panitchpakdi ¶¶ 183–205 (World Trade Organization 2004), available at <http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf> (Feb. 1, 2016).

[32] *The World Bank Policy on Access to Information (July 1, 2013)*, <http://documents.worldbank.org/curated/en/2013/07/17952994/world-bank-policy-access-information> (accessed Feb. 1, 2015).

[33] Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland.

Transparency and Effectiveness of the Security Council' that was ultimately not adopted by the UN General Assembly.[34]

3.3. The Role Played by Transparency and Inclusiveness in Diplomatic Negotiations

Both transparency and accountability are eventually part of the contemporaneous preoccupation with legitimacy of international organizations. The quest for legitimacy in international law has been discussed quite extensively. A norm produced by an organization, through a transparent procedure, will have higher legitimacy.[35]

Transparency is a requisite for ensuring an adequate level of accountability. The channels of transparency may vary. Most of the time transparency will be directed to the authority to which the institution is accountable.The institution is required to justify its actions and decisions towards the authorities and, bear the consequences of these acts in the case of eventual misconduct, but also in relationship to other actors in a more general manner due to its 'public exposure.'[36]

Accountability is an element of legitimacy, because it forces the policy makers to respond to the needs and interests of individuals. Transparent procedures contribute to the legitimacy of standards. This means that agendas, proposals, votes in committees, minutes of sessions, and drafts for standards should be generally publicized.[37]

One of the biggest problems related to transparency concerns the field of international law-making which traditionally is the result of diplomatic negotiations. In fact, confidentiality is deemed to be a fundamental feature of the diplomatic arena.[38] In addition, some experts add that 'there are countervailing legitimate interests, such as security, privacy, and business or trade secrets which must be balanced against the benefits of transparency.'[39]

Tensions between confidential or transparent, and private or inclusive, are not easily resolved. Not all diplomatic negotiations can be considered private / confidential or transparent / inclusive in an absolute sense. What is required is a balancing of competing values that takes into account the circumstances of the negotiation in each situation.[40]

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[34] *Enhancing the Accountability, Transparency and Effectiveness of the Security Council: Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: Revised Draft Resolution*, U.N. GAOR, 66th Sess., Agenda Item 117: Follow-Up to the Outcome of the Millennium Summit, U.N. Doc. A/66/L.42/Rev.2 (2012), at <http://csnu.itamaraty.gov.br/images/26._A_66_L_42_Rev.2_Small-5.pdf> (accessed Feb. 1, 2016).

[35] Chazournes, *supra* n. 21, at 664.

[36] *Id.* at 662.

[37] Anne Peters et al., *18. Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters*, in Non-State Actors as Standard Setters 492, 516 (Anne Peters et al., eds.) (Cambridge University Press 2009). doi:dx.doi.org/10.1017/CBO9780511635519.019

[38] Peters, *The Transparency Turn*, *supra* n. 23, at 8.

[39] *Id.* at 9.

[40] Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration* 2, <http://papers.ssrn.com/abstract_id=1618843> (accessed Feb. 1, 2016).

Many negotiation processes frequently lacks transparency, inclusiveness and equal participation of stakeholders and the public. The negotiations should be conducted, as far as their nature makes it possible, in an open and transparent manner. They should allow for participation by all stakeholders in the negotiations that are potentially affected by the agreement in an open and nondiscriminatory manner.

Today, it is generally assumed that the participation of other stakeholders, including civil society, in a negotiation process, coupled with safeguards for the protection of the principle of inclusiveness, is the best guarantee to secure the overall legitimacy of the legal standards adopted by the international organizations. At the end of the process, this new rules should guide and structure peoples' lives and thus should affect their needs, interests, and rights.

Transparency may be achieved by greater proximity between international organizations, non-State actors and individuals. Transparency, access to information and public participation in an inclusive manner are more and more intertwined. In this context, mechanisms allowing non-State actors to participate in decision-making processes can be seen as a form of transparency and inclusiveness.[41]

The general public should assume the function of an arbiter and therefore, they should also observe international negotiations. In this line, transparency seems to be an indispensable element of global governance. The more the international legal processes are open to the public in general, the more negotiations are compatible with publicity and transparency.[42] Consequently, transparency and inclusiveness have matured into primary pillars of good governance.[43]

Global governance and democracy needs transparency. The classic statement in this regard was tendered by James Madison, who stated:

> A popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: [a]nd a people who mean to be their own Governors must arm themselves with the power which knowledge gives.[44]

Transparency might also have positive effects on diplomatic negotiations. One of these positive effects is what John Elster has called 'the civilizing force of hypocrisy.' Transparency could lead law- and decision-makers to base their positions on socially

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41 Chazournes, *supra* n. 21, at 660.

42 Peters, *The Transparency Turn*, *supra* n. 23, at 11.

43 Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15, 37–42 (2005), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1361&context=lcp> (accessed Feb. 1, 2016).

44 James Madison, *Letter to W.T. Barry (August 4, 1822)*, The Founders' Constitution 9:103–09 (Philip B. Kurland & Ralph Lerner, eds.) (University of Chicago Press 1987).

accepted norms. Social pressure would lead them to justify their positions by taking into account the general interest and not their selfish interests.[45] However, some authors say that 'total transparency of international law is neither appropriate nor realistic. International law- and policy-makers should treat transparency as a variable of institutional and legal design.'[46]

An example of an attempt to render diplomacy more transparent is the process of recent climate negotiations. The Conference / Meeting of the Parties of the UN Framework Convention on Climate Change and Kyoto Protocol held in Cancún in 2010 was explicitly conducted under the heading of transparency and inclusion.[47]

The Mexican conference's President gave 'full commitment to the principles of transparency and inclusiveness. There will be no parallel or overlapping discussions and I will continue ensuring that all positions are taken into account.'[48] In an informal meeting, the President also said on December 5, 2010: 'The Mexican Presidency will continue to work with full transparency and according to established United Nations procedures.'

4. Transparency and Inclusiveness within the United Nations

4.1. Human Rights Council

On July 15, 2014, BRICS approved at the 6th Summit the Fortaleza Declaration in Brazil by which they pledged to foster dialogue and cooperation on the basis of equality and mutual respect in the field of human rights both within BRICS and multilaterally, including the UN Human Rights Council where all BRICS states serve as members in 2015. They also agreed 'to continue to treat all human rights, including the right to development, in a fair and equal manner, on the same footing and with the same emphasis.'[49]

In the Ufa Declaration, which was adopted in Russia on July 9, 2015, BRICS countries undertook to strengthen coordination of their positions on the issues of mutual interest within the UN human rights institutions, including the Human Rights Council and the Third Committee of the UN General Assembly. In particular, they undertook to support the universal periodic review carried out by the UN Human Rights Council and constructively contribute to its work (¶ 10).

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45 Jon Elster, *Deliberation and Constitution Making*, in Deliberative Democracy 97, 111 (Jon Elster, ed.) (Cambridge University Press 1998).

46 Peters, *The Transparency Turn*, *supra* n. 23, at 13.

47 *Id.* at 11.

48 *UNFCCC Informal Stocktaking Plenary, Statement by Her Excellency Mrs. Patricia Espinosa COP 16/CMP 6 President, 8 December 2010*, <https://unfccc.int/files/meetings/cop_16/statements/application/pdf/101208_cop16_st_espinosa.pdf> (accessed Feb. 3, 2016).

49 *Sixth BRICS Summit: Fortaleza Declaration* ¶ 28 (Jul. 15, 2014), at <http://www.brics.utoronto.ca/docs/140715-leaders.html> (accessed Feb. 3, 2016) [hereinafter *Fortaleza Declaration*]

In accordance with the UNGA Resolution 60/251 of 2006, the methods of work of the Human Rights Council should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness (Art. 110).

Additionally, the methods of work provide:

> At least one informal open-ended consultation should be held on each draft resolution and / or decision before it is considered for action by the Council. Consultations should, as much as possible, be scheduled in a timely, transparent and inclusive manner that takes into account the constraints faced by delegations, particularly smaller ones (Art. 113).

The statement by the President PRST 29/1 'Enhancing the Efficiency of the Human Rights Council' of 2015 stressed the importance of respecting the principles of transparency and inclusiveness, in the following terms:

> *Stresses* the need to respect and implement the provisions in 5/1 and 16/21 relating to the working culture of the Human Rights Council, including the need for early notification of proposals, early submission of draft resolutions and decisions by the end of the penultimate week of a session as well as early distribution of all reports, and to observe the principles of transparency and inclusiveness with regard to the consultation process.[50]

As of today, the only instruments on human rights adopted by the Human Rights Council[51] and after, by the General Assembly are the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008[52] and also the UN Declaration on Human Rights Education and Training in 2012.[53] These texts have been classified as models of transparency and inclusiveness, because not only

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[50] *Enhancing the Efficiency of the Human Rights Council: Statement by the President*, U.N. GAOR, Human Rights Council, 29th Sess., Agenda Item 1: Organizational and Procedural Matters, U.N. Doc. A/HRC/29/L.34 (2015), at <https://www.google.ru/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwj2kLCjiNzKAhVEEHIKHT36BFoQFggzMAM&url=http%3A%2F%2Fwww.universal-rights.org%2Fwp-content%2Fuploads%2F2015%2F07%2FEnglish-oral-revision.docx&usg=AFQjCNGoZFGuN92cnRimo3N35tVtyC5pyw&sig2=Ggwhdm8KITEp-wmljd9dPw&bvm=bv.113034660,d.bGQ> (Feb. 3, 2015).

[51] *United Nations Declaration on Human Rights Education and Training*, U.N. Human Rights Council Res. 16/1, U.N. Doc. A/HRC/RES/16/1 (April 8, 2011), at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/124/78/PDF/G1112478.pdf?OpenElement> (Feb. 3, 2016).

[52] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UNGA Res. 63/117, U.N. Doc. A/RES/63/117 (December 10, 2008), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/477/81/PDF/N0847781.pdf?OpenElement> (Feb. 3, 2016).

[53] *United Nations Declaration on Human Rights Education and Training*, UNGA Res. 66/137, U.N. Doc. A/RES/66/137 (February 16, 2012), at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/467/04/PDF/N1146704.pdf?OpenElement> (accessed Feb. 3, 2016).

a cross regional group of countries was set up, but also large networks of civil society organizations actively participated in all negotiation processes.

Consequently, all States are obliged to practice, as far as possible, the principles of transparency and inclusiveness during the negotiation process of any resolution or even a new international instrument. A norm produced by the Human Rights Council, through a transparent procedure and inclusiveness, will have always higher legitimacy.

Therefore, if a negotiation or consultation process lacks transparency, inclusiveness and equal participation of all stakeholders, States will fail in their obligation of implementing properly the methods of work and the working culture specially envisaged for the efficiency of Human Rights Council.

4.2. Security Council

In the 3rd BRICS Summit, which took place in Sanya on the island of Hainan, China, on April 14, 2011, the five heads of state and government from the BRICS states called for 'comprehensive reform of the UN, including its Security Council.' China said it would endorse the aspirations of India, Brazil and South Africa for permanent membership of the Security Council. Coincidentally, in 2011 the five countries were all members of the Security Council, China and Russia as permanent members and the other three non-permanent.

The Fortaleza Declaration, which was adopted by BRICS on July 15, 2014, in Brazil, stressed the need for a comprehensive reform of the UN, including its Security Council, with a view to making it more representative, effective and efficient, so that it can adequately respond to global challenges. Both China and Russia reiterated the importance they attach to Brazil, India and South Africa's status and role in international affairs and support their aspiration to play a greater role in the UN.[54]

Also the Ufa Declaration, adopted by BRICS countries in Russia on July 9, 2015, reaffirmed the need for a comprehensive reform of the United Nations, including its Security Council (¶ 4).

In the context of the 70th Session of the General Assembly held in September 2015 in New York, the foreign ministers of BRICS countries endorsed UN Security Council reforms saying it was necessary to make it 'more representative and efficient' putting China and Russia publicly on the side for reorganization.[55]

This statement should be understood in light of the Security Council reform, which formally started in the 90s. In particular, on December 3, 1993, the General Assembly adopted Resolution 48/26 'Question of Equitable Representation on and

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[54] *Fortaleza Declaration*, *supra* n. 49, ¶ 25.

[55] *BRICS Foreign Ministers Endorse UN Security Council, IMF Reforms*, Firstpost (Sep. 30, 2015), <http://www.firstpost.com/world/brics-foreign-ministers-endorse-un-security-council-imf-reforms-2450154.html> (accessed Feb. 3, 2016).

Increase in the Membership of the Security Council' by which it recognized 'the need to review the membership of the Security Council and related matters in view of the substantial increase in the membership of the United Nations, especially of developing countries, as well as the changes in international relations' and decided 'to establish an Open-ended Working Group to consider all aspects of the question of increase in the membership of the Security Council, and other matters related to the Security Council' (Art. 1).

In the UN Millennium Declaration, heads of state and government resolved to intensify their efforts to achieve comprehensive reform of the Council in all its aspects.[56] Additionally, in the 2005 World Summit Outcome of 2005, heads of state and government expressed support for early reform of the Security Council.[57]

The 'Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council' stressed that 'an all-encompassing solution, is not possible, and that only a realistic approach that allows agreement on what is achievable in the near term, without excluding any preferred option to be revisited at an agreed time through a mandatory review, is the way to move forward.'[58]

In Resolution 62/557 of 2008 entitled 'Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters,' Member States stressed that the intergovemmental negotiations should be based on five key issues, namely: categories of membership; the question of the veto; regional representation; size of an enlarged Security Council and working methods of the Council; and the relationship between the Council and the General Assembly.

In this process of the Security Council reform, the transparency of its working methods has played an important role. As an Annex XII of the 'Report of the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council' (A/54/47), the Bureau on the working methods of the Security Council and transparency of its work prepared a conference room paper on this matter. On October 30, 1998, the President of the Security Council stressed in a statement[59] the importance of continuing to enhance the transparency of the methods of work of the Council.

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[56] *United Nations Millennium Declaration* ¶ 30, UNGA Res. 55/2, U.N. Doc. A/RES/55/2, at <http://www.un.org/millennium/declaration/ares552e.pdf> (accessed Feb. 3, 2015).

[57] *2005 World Summit Outcome* ¶¶ 153–54, UNGA Res. 60/1, U.N. Doc. A/RES/60/1, at <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> (accessed Feb. 3, 2016).

[58] U.N. GAOR, 62nd Sess., Supp. No. 47, ¶ 30, U.N. Doc. A/62/47 (2008).

[59] *Note by the President of the Security Council*, U.N. Doc. S/1998/1016, at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/sub%20bodies%20s%201998%201016.pdf> (accessed Feb. 3, 2016).

On May 15, 2012, a group of five countries, among them Costa Rica and others,[60] presented before the General Assembly a resolution entitled 'Enhancing the Accountability, Transparency and Effectiveness of the Security Council'[61] by which they invited 'the Security Council to consider the measures contained in the annex to the present resolution, in order to further enhance the accountability, transparency and inclusiveness of its work, with a view to strengthening its effectiveness and the legitimacy and implementation of its decisions' (Art. 2).

Among the measures identified by the five small countries are the following highlights: firstly, relationship with the General Assembly and other principal organs; secondly, effectiveness of decisions; thirdly, operations mandated and on-site missions carried out by the Security Council; fourthly, governance and accountability; and fifthly, the use of veto. In particular, they proposed '[r]efraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity' (Art. 20).

Switzerland withdrew the Draft Resolution during the General Assembly which was aimed at improving the Security Council's working methods in order to avoid 'politically complex' wrangling. The sponsors of the Draft, which focused on improving the Security Council's working methods and included an annex with 20 recommendations, had come under increasing pressure. The Swiss Ambassador said the five powerful permanent members – China, France, Russian Federation, United Kingdom and the United States – feared that the proposals could be 'divisive or be used against them.'

5. Conclusion

Since the inception of the League of Nations in 1919 diplomacy passed from being a secret affair to have a more public exposure in society. The new open diplomacy rejected the conclusion of secret treaties and demanded that diplomatic negotiations be conducted in full public view. After World War II, the registration system that had begun with the League of Nations was continued through the United Nations, ensuring that transparency and inclusiveness occupies a central role in diplomacy.

Currently, there is a trend demanding more transparent and inclusive institutions and procedures at the international level. At this moment there is not an international treaty defining the notion of transparency and inclusiveness. In fact, for many scholars, practitioners and politicians full transparency and inclusiveness is a 'myth.'

Transparency and inclusiveness are indispensable elements for global governance. International democracy strongly requires more transparency in the

[60] Jordan, Liechtenstein, Singapore and Switzerland.

[61] *See supra* n. 34.

decision-making process and the participation of non-State actors in the elaboration of rules and norms. Both transparency and accountability are eventually part of the contemporaneous preoccupation of legitimacy of international organizations. A norm produced by an organization, through a transparent and inclusive procedure, will have higher legitimacy.

Finally, the principles of transparency and inclusiveness have been included in the methods of work and the working culture of the Human Rights Council and the Security Council. In accordance with the current international legal system, all States should pay special attention, as far as possible, to the principles of transparency and inclusiveness during the negotiation process of any resolution or even a new international human rights instrument. In this context, the role played by the BRICS countries in both UN bodies is critical in regards to its working methods.

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Acknowledgments

We would like to devote this paper to Finn Church Aid, World Council of Churches, UniversityAbat Oliba CEU and Foundation Peace without Borders for all their support and engagement.

Information about the authors

Christian Guillermet Fernández (San José, Costa Rica) – Deputy Permanent Representative of Costa Rica to the United Nations in Geneva and Chairperson-Rapporteur of the Working Group on the Right to Peace (23 Rue de France, Geneva, 1202, Switzerland; e-mail: christian.guillermet@ties.itu.int).

David Fernández Puyana (Barcelona, Spain) – Ph.D. (European Mention), Legal Assistant of the Chairperson-Rapporteur at the Permanent Mission of Costa Rica in the United Nations in Geneva (23 Rue de France, Geneva, 1202, Switzerland; e-mail: costaricanmissionpeace@gmail.com).

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Information about the authors

Nikolay Zhiltsov (Moscow, Russia) – Rector of the International Law Institute (4 Kashenkin Lug str., Moscow, 127427, Russia; e-mail: dir@lawinst.ru).

Oleg Cherdakov (Moscow, Russia) – Vice Rector of the International Law Institute (4 Kashenkin Lug str., Moscow, 127427, Russia; e-mail: olegmui@mail.ru).

THE DESTRUCTIVE INFLUENCE OF TERROR IDEOLOGY ON LEGAL SYSTEMS

NIKOLAY ZHILTSOV,

International Law Institute (Moscow Russia),

OLEG CHERDAKOV,

International Law Institute (Moscow Russia)

The influence of terror ideology on religious, continental and Anglo-Saxon legal systems is described in this article. The article sets out the specifics of modern terror ideology, its distribution mechanisms, the degree of danger of terrorism to certain states and the need for the creation of an interstate anti-terror ideology protection system. In order to achieve effective research results, it was based on a combination of the various methods accepted in domestic law, including the general, general scientific, interdisciplinary and special methods.

Keywords: legal system; terrorism ideology; ideological interventions of a terrorist orientation; religious legal system; traditional Islam; continental and Anglo-Saxon legal systems; tolerance.

Recommended citation: Nikolay Zhiltsov & Oleg Cherdakov, *The Destructive Influence of Terror Ideology on Legal Systems*, 2(2) BRICS LJ (2015).

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1. Introduction

Terrorism, as a policy and ideology of achieving objectives through violence, physical destruction and fear, is not compatible with law and its civilized understanding. Terror, as an instrument of terrorism ideology, leads to a sense of justice transformation, to an aberration of the ideological and psychological perception of legal values, and to a formation of a distorted understanding of legality and legal order. As a consequence, this can promote an emergence of a new subculture based not on legal regulations that protect rights and freedoms and ensure the stability of the lives of citizens, but on a policy of the fracturing and destruction of the main human values, including a form of legal thinking, legal ideology and developed legal institutions.

Legal ideology, as a motivating element for the development of a sense of justice, is part of a state's legal system's structure. It influences the quality of other parts of a functioning system: legal entities; precepts and principles of law; legal relations; legal behavior; legal practice; and also interaction between the aforementioned. Altogether those parts define the legality and the legal order.

Unlike legal ideology, ideology can broadly be interpreted as a system of understandings and ideas expressing interests, outlooks and ideals of various subjects of policy. A basis of ideological reflection in reality is a certain public interest expressed as political, legal, religious, ethical, aesthetic and philosophical views. The ideology of terror is the distorted form of the reality. Specifically, the ideology gives a legitimate basis for violent acts for the sake of political goals. Characteristic features of terror are organized chaos and systematic acts of violence. The ultimate goal of terror is to create a situation of destabilization, depression and fear in society. Therefore, the ideology of terror in a philosophical sense has to prove the expediency and inevitability of physical repression for the implementation of certain political projects.

The ideology of terror is based on destructive factors, it is capable of having a destructive impact on all components of the legal system, and, therefore, the consequences of such process can have an irreversible character.

The specifics of the modern ideological concepts of a terrorist orientation consist of substantial content and maintenance of a powerful Internet presence through social networks, specific websites, programs and network games. The most vulnerable environment in this respect is the legal environment as a part of a state legal system. This is explained by several reasons; one of them is the conservatism of the law. Unlike other social norms, it is less easy to change and demands significant time resources for the creation of the precepts of law directed at concrete legal relationship management. The law does not manage to react to the calls for change from society. Especially in the case of the Internet, which has become an ideal platform for preachers of terror.

The modern ideology of terror is focused on specific consumers wishing to change their existence by any means. In the World Wide Web the promoters of terror have

gained a powerful tool allowing them to orient themselves rather quickly in relation to the domestic social and legal policy of the state and to influence the mentality and consciousness of various segments of the population with the maximum result.

'Terror,' 'violence' and 'repression' are analogous concepts, however, in dependence on political goals and tasks they gain various semantic values. 'Terror' by means of violence and repression can express the will of separate groups, as was the case in 1793–94 in France when the Jacobins actively destroyed the counterrevolutionaries, or states, *e.g.* the red terror at the beginning of Soviet power in Russia, or the will of a certain individual, *e.g.* of Pol Pot directing Khmer Rouge in Cambodia.

Terrorism is generally directed against political and class opponents with the application of violence and physical destruction. Terror cannot arise from scratch. In order for it to manifest itself, a corresponding social and political environment must exist that allows those claiming power to turn on the system through a series of violent acts used by terrorist organizations or groups for achievement of their political purposes.

The concepts 'terror' and 'terrorism' are not defined in international or Russian law. A. Schmid's works 'Political Terrorism: A Research Guide to Concepts, Theories, Databases and Literature'[1] and, in a coauthorship with A. Yongman, 'Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories and Literature'[2] are unique among foreign research papers for their contribution to the interpretation of the above definition. Having analyzed more than 100 definitions by terrorism specialists they have offered two approaches to defining terrorism, *i.e.* a consensus definition and a short definition.

The essence of the consensus definition is reduced to the following:

> Terrorism is perceived as the method of repeating violent acts that cause anxiety, which are carried out by persons, groups and state actors, acting secretly or semi-secretly, for idiosyncratic, criminal or political goals, where – unlike in murder – direct objects of violence are not the main objects. Direct human victims of violence are picked out at random (accidental victims) or are selected (the representative, or symbolic victims) from a target section of the population and the attack on such victims serves as a message from those implementing the acts of terror. The threat and violent communication process are used by terrorists (or the terrorist organization) against the direct victims and main targets in order to manipulate the target audience, turning it into an object of terror, depending on the terrorists' original aims: to intimidate; compel or propagandize.[3]

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[1] Alex P. Schmid, Political Terrorism: A Research Guide to Concepts, Theories, Databases and Literature (Transaction Pub. 1983).

[2] Alex P. Schmid & Albert J. Jongman, Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories and Literature (Transaction Pub. 1988).

[3] Schmid, *supra* n. 1.

The short definition of terrorism is the equivalent of a war crime in peace time. Both approaches are useful, but they have a shortcoming. The authors do not consider that, in many cases, modern terrorism is used not only by individuals or organizations, but also by states for the purpose of establishing political or economic influence as a consequence of the planned and executed chaos in the terrorized state. This is confirmed by the way terrorist organizations are used in Africa, Afghanistan, and the Middle East by third countries.

The are some other useful definitions of terrorism. J. Thackrah, in his 'Encyclopaedia of Terrorism and Political Violence,' has offered about 50 definitions of this concept, based on international, criminal, philosophical and other approaches.[4] In the work called 'Eyelids of Terrorism,' U. Laker presented a short definition of terrorism which drew the attention of many theorists.[5]

In Russian academic literature, opposite judgments concerning the definition of terrorism have formed, the authors generally being divided according to their field of competence. Political scientists and lawyers have different understandings of this category; they look at the nature of terrorism differently.

2. Legal Systems as an Object of Terror Ideology

Legal systems emphasize the specifics of historical traditions, legal culture, legal mentality and conditions of emergence, formation and development of law in the concrete state.

However, in the legal space which has developed in the modern world, there is no single, universal definition of a 'legal system.' It is considered that H. Kelsen was the first to define it in 1946.[6] Subsequently, J. Raz presented a differentiation between instant and non-instant legal systems[7] which was used in the works of J. Harris[8] and J. Finnis.[9]

In recent years, scholars have moved from theoretical research into legal systems towards studying the criteria of classification. In scientific publications, the approach

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4 John R. Thackrah, Encyclopedia of Terrorism and Political Violence (Routledge & Kegan Paul 1987).

5 Cited in: Brian M. Jenkins, *The Study of Terrorism: Definitional Problems*, in Behavioral and Quantitative Perspectives on Terrorism 3 (Yonah Alexander & John M. Gleason, eds.) (Pergamon Press 1981).

6 Hans Kelsen, General Theory of Law and State 11 (Anders Wedberg, trans.) (2nd ed., Harvard University Press 1946).

7 Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of a Legal System 1 (Clarendon Press 1970).

8 J.W. Harris, Law and Legal Science: An Inquiry into the Concepts Legal Rule and Legal System (Clarendon Press 1979).

9 John M. Finnis, *Revolutions and Continuity of Law*, in Oxford Essays in Jurisprudence: Second Series 44 (Alfred W.B. Simpson, ed.) (Clarendon Press 1973).

to assessment of legal systems from positions of national culture was defined.[10] The critical analysis of earlier published comparative and legal works was outlined.[11] Some researchers have begun to be engaged in the modernization of existing classifications of legal systems. It is possible to separate the work of U. Mattei, in which the author presents the original classification, from this list of experts.[12]

Despite the plurality of the approaches which has developed in foreign jurisprudence, it is possible to state the absence of certain classification criteria which allow allocate the patrimonial signs of the legal system.

The development of the classification legal systems remains a weakness of Russian jurisprudence. The greatest problem is allocation of the general features characterizing legal systems for their further systematization by categories, groups, and families. In our opinion, this is caused by a number of factors: first, the absence of universal criteria which serve as the basis for classification; secondly, the difference between sources of law value assessment; and thirdly, the ambiguity of interpretation of legal system-forming components.

Therefore, it is possible to note that the weak point of any legal system is the ideological component as its substantial content can be exposed to destruction due to its integration of terror ideology.

3. Ideology of Terror as a Destabilizing Element of the Religious Law System

In the legal system of a state, active components, such as the law, legal ideology, judicial (legal) practice, *etc.* constantly interact. The ideology influences the formation of the mentality of the society and therefore is the key category promoting the integration of new ideological concepts into the social and legal environment. The law does not always prevail in a society, sometimes the ideology makes an essential impact on it by means of which the functionality of a legal system decreases.

Submission of the law to religious ideology leads to the complete exclusion from certain legal systems of the fundamental moral and legal ideas and principles that are the basis of natural law theory. This, in turn, promotes a mood of protest which is favorable to the formation of terror ideology, which begins competing with the legal ideology.

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[10] Roger Cotterrell, *Law in Culture*, 7(1) Associations: Journal for Social and Legal Theory (2003); Mark van Hoecke, *Western and Non-Western Legal Cultures*, 33 Rechtstheorie 197 (2002).

[11] John C. Reitz, *How to Do Comparative Law*, 46 Am. J. Comp. L. 617 (1998); Ugo Mattei, *The Comparative Jurisprudence of Schlesinger and Sacco: A Study on Legal Influence*, in Rethinking the Masters of Comparative Law 238 (Annelise Riles, ed.) (Hart Pub. 2001); Basil Markesinis, Comparative Law in the Courtroom and Classroom: The Story of the Last Thirty-Five Years (Hart Pub. 2003).

[12] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the Worlds Legal Systems*, 45 Am. J. Comp. L. 5 (1997), available at <http://works.bepress.com/ugo_mattei/19/download/> (accessed Feb. 4, 2016).

The system most susceptible to ideological interventions of a terrorist orientation still remains the religious legal system, especially a particular subsystem of Islamic law.

A state with a religious legal system is characterized by the recognition and provision of religious instructions at the level of state regulations. This fact makes the revisionist ideological impact on the state especially dangerous where the system of the religious law dominates. The radical ideological changes introduced to a religious sense of justice promote not only its transformation, but also a change in the settled religious norms and rules of life. In religious legal systems, the ideology of terrorism makes a massive ideological, propaganda, moral and psychological impact on the population for the purpose of intimidating it and demoralizing resistance. In some cases, the ideology of terror is presented as a protective reaction to challenges of globalization and expansion of Western civilization and as an alternative model of development.

The impact of terror ideology on religious legal systems combines multidirectional motives, first and foremost, strategic and psychological. Terrorists connect achievement of the final result with violent total or partial change of the political, economic and legal systems of the state, by means of replacement of the secular power with the religious. Creation of an independent state or achievement of partial changes in the provision of the corresponding social or religious elements is welcomed.

Sometimes terror is presented as protection against the spread of the American world order. More often, the ideology of terror is presented as an ideology of a fair fight of the poor against the rich. The latter is successful in relation to religious legal systems as, by means of terrorist pressure, the illusion of a war of the poor against the rich for a 'fair structure of the state' is created. It establishes a belief that certain social opportunities will be created, despite the anti-humane ways of achieving the same.

At the end of the 20th century in the Islamic world, the ideology of terror was considered a synonym of the ideology of Pan-Islamism and religious fundamentalism. Islam is presented as the alternative project of globalization, as the answer to 'westernization,' as an opposition the Western ideology of a 'consumer society.' Manipulations of the Islamic self-actualization are an attempt to justify a new way of developing society. Ideologists try to present radical Islamic missionaries as competitors against world globalization.

4. Influence of Terror Ideology on the Continental and Anglo-Saxon Legal Systems

An ideological expansion of terror is being carried out in the continental and Anglo-Saxon legal systems. At the same time, the ultimate goals and results differ from the results that the ideological paradigm has set up for religious legal systems.

The principal ideological doctrines of terrorism directed against the above legal systems are the doctrine of revolutionary war; the doctrine of destruction of

the developed system's state's structure and the civil society relations by means of physical elimination of government institutions, representatives and total intimidation of the population; the doctrine of a return to 'true values;' the doctrine of overcoming alienation; *etc.*

Ideological intimidation of disloyal persons and the civilian population are used to achieve specific goals of impact on these legal systems. In this context, individual and mass terror is meant. It is possible to distinguish widespread methods: physical impacts; material influence; psychological influence; blackmail; intimidation of authorities and populations with danger of the people's death.

Opponents of the European social and legal life, and the cultural and religious traditions which developed in the Anglo-Saxon and continental legal systems actively conceive the ideology of terror based on the violent statements of other values. The tolerance expressed by Europeans and the British allowed terror ideology to spread among the foreign laborers who arrived in Europe and the United Kingdom from African, Asian and former Soviet Union states in a very short period of time.

Some researchers present the present terror as a subculture, extending and occupying considerable space in modern legal systems. The terror ideology is a manifestation of the polarization of two cultures: the culture of fundamentalism and the culture of tolerance, but terrorism is a technology generated by different situations.

The information and technological cover allows the terror ideology to exist in the form of a peculiar subculture, it extends through the Internet and makes a destructive impact on concrete legal systems.

The terroristic ideology is integrated into network games, music clips, advertizing and other socially interesting and significant programmes. The created product has specific addressees such as social consumers and adherents of certain subcultures who try to resist to the functioning legal system when they are consumed by the terrorist ideology.

The result of such communication on adherents of terror ideology is a change in behavior models. This is achieved by the social and psychological adaptations of a person who absorbs information from the most readily available sources. One such source is the Internet, especially social networks.

Receiving a sufficient amount of data is a motivational condition for making concrete solutions of a behavioral character. R.K. Merton set out some forms of individuals' social adaptation: conformism, innovation, ritualism, and mutiny. We believe that mutiny is an expression of social adaptation for a certain group of people. It is a rejection of the traditional ends and means, and the replacement of settled principles with new principles based on ideas of terror.

The subculture of terror has a destructive impact on the systems mentioned above through the youth environment which is most subject to radicalism. This is confirmed by cases of participation by youth from England, France, Germany, Finland

and other countries in terrorist groups. Opposing the law and order developed in the European countries, supporters of terrorism destroy the bases of the developed legal regimes, which often causes a very rigid response from the states. This further aggravates the situation, moving it into an antagonistic phase.

A situation then arises where the state legal system starts functioning in an atypical manner. The highest levels of a security threat are declared, counterterrorist operations are carried out, and additional law-enforcement actions are approved. The populations of such states are ready to vote for a toughening of domestic law-enforcement policy, for restrictions on freedoms, for giving the state special powers to access individual information, wiretapping, electronic correspondence control and other usually unpopular safety methods. All this finally results in a change of some legal system components.

5. Conclusion

As demonstrated above, the destructive impact of terror ideology on legal systems is obvious. Every year, the number of adherents of terrorism is growing and, according to experts, the 'social strategy of fighting against terrorism is not simple prevention, it also involves counteraction by designing new social norms. The logic of the fight against terrorism is the logic of anti-terror, and as history shows, this logic cannot win. At the same time, the logic of tolerance is a logic not against terrorism, but rather for it.'[13] Tolerance is devoid of pragmatism, but exclusively pragmatic actions are the cornerstone of terror.

The fight against ideology of terror has to consider the changes happening to social life which are directly connected with the processes of globalization and gradual integration of legal systems. Today, the need to counteract terror ideology by all available methods and means has brewed, starting with the restriction on filling Internet space with the ideological terrorist concepts and finishing with a network information war as a measure of counterterrorist activity.

Global terrorism poses a real threat to legal systems, and the fight against it is possible only through unified interaction between law-enforcement bodies, *ad hoc* bodies and civil society. It is necessary to strengthen counterpropaganda activities, even by going as far as a legislative ban on distribution of information of an extremist or terrorist nature.

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[13] Общественный диалог и толерантность – способ противодействия терроризму и религиозному экстремизму [*Obshchestvennyi dialog i tolerantnost' – sposob protivodeistviya terrorizmu i religioznomu ekstremizmu* [*Public Dialogue and Tolerance – a Way to Counteract Terrorism and Religious Extremism*]], *Nauka i obrazovanie protiv terrora* (Jan. 20, 2010), <http://scienceport.ru/news/obshchestvennyy-dialog-i-tolerantnost-sposob-protivodeystviya-terrorizmu-i-religioznomu-ekstremizmu/> (accessed Feb. 4, 2016).

INTERACTION OF EUROPEAN AND RUSSIAN LEGAL CONSCIOUSNESS

ALEXEY TYRTYSHNY,

Russian New University (Moscow, Russia),

STANISLOVAS TOMAS,

Russian New University (Moscow, Russia)

This article provides an overview of certain ideologemes of Western (European) and Russian legal consciousness – prominent works of Ivan Ilyin and Duncan Kennedy are taken as examples. The article analyzes the tabula rasa principle and its place in legal consciousness. We use legal scholarship, judicial practice and opinion polls to examine the relationship between legal consciousness and the lack of trust in Russian courts, as well as their inefficiency from the point of view of public opinion. There are a number of shocking cases of torture of innocent people by the Russian police. Why is this so? The answer lies in the legal consciousness of police officers and of judges. This is something that has been inherited from the Soviet period. It is completely different from the Western legal consciousness, one of the key features of which is denial of authority. The critical legal studies branch of American legal realism almost denies the very existence of law, and, perhaps for this reason, American culture is less open to abuses like torture. At the same time, there is no possibility to shift legal consciousness immediately, the tabula rasa principle does not work. The final objective of the article is to provide a perspective on the reform of higher legal education and its relation to legal consciousness and legal anthropology. We propose that a greater part of the university curriculum is devoted to legal anthropology.

Keywords: justice; legal culture; legal consciousness; theory of state and law; practice and jurisprudence; psychology of law; legal education.

Recommended citation: Alexey Tyrtyshny & Stanislovas Tomas, *Interaction of European and Russian Legal Consciousness*, 2(2) BRICS LJ (2015).

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1. Introduction

The topic of legal consciousness is rather well developed in Russian scholarship in the framework of law and state theory, especially scholarship from the pre-Soviet and Soviet periods. In the pre-Soviet period, there were three branches of development of Russian legal consciousness theory:

1) Ivan Ilyin's ideas on 'healthy legal consciousness;'[1]

2) Leon Petrażycki's theory of psychological motivation in legal behavior[2]; and

3) Mikhail Reisner's avant-garde theory of socialist legal consciousness.[3]

The key ideas of the socialist legal consciousness theory were developed by Reisner during the pre-Soviet period, and were completed in the works of Isaak Farber,[4] Valentin Sapun,[5] Valery Zorkin,[6] and others. Therefore, Russian scholarship and practice at the end of the 20th and beginning of the 21st century was based on a well-developed conception of legal consciousness, the key ideas of which were the dependence of the content of popular legal consciousness on the dominant socialist

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[1] *Ильин И.А.* О сущности правосознания [Ilyin I.A. *O sushchnosti pravosoznaniya* [Ivan A. Ilyin, On the Essence of Legal Consciousness]] 147–158 (Rarog 1993).

[2] *Петражицкий Л.И.* Очерки философии права [Petrażycki L.I. *Ocherki filosofii prava* [Leon I. Petrażycki, Essays on the Philosophy of Law]] 234 (Tipografiya Yu.N. Ehrlich 1900).

[3] *Рейснер М.А.* Общественное благо и абсолютное государство // Вестник права. 1902. Т. XXXII. № 9–10 [Reisner M.A. *Obshchestvennoe blago i absolyutnoe gosudarstvo // Vestnik prava.* T. XXXII. Nos. 9–10 [Mikhail A. Reisner, *Public Good and Absolute State*, 32(9–10) Law Review (1902)]].

[4] *Фарбер И.Е.* Правосознание как форма общественного сознания [Farber I.E. *Pravosoznanie kak forma obshchestvennogo soznaniya* [Isaak E. Farber, Legal Consciousness as a Form of Public Consciousness]] 198–200 (Yuridicheskaya literatura 1963).

[5] *Сапун В.А.* Современное правопонимание и инструментальные свойства права // Зарубежный опыт и отечественные традиции в российском праве [Sapun V.A. *Sovremennoe pravoponimanie i instrumental'nye svoistva prava // Zarubezhnyi opyt i otechestvennye traditsii v rossiiskom prave* [Valentin A. Sapun, *Contemporary Legal Consciousness and Instrumental Features of Law*, in Foreign Experience and Homeland Traditions in Russian Law]] 56 (St. Petersburg State University Press 2004).

[6] *Зорькин В.Д.* Кризис международного права: современный контекст // Российская газета. 2014. 20 июня [Zorkin V.D. *Krizis mezhdunarodnogo prava: sovremennyi kontekst // Rossiiskaya gazeta*. 2014. 20 iyunya [Valery D. Zorkin, *Crisis of International Law: Contemporary Context*, Russian Gazette, Jun. 20, 2014]].

ideology, the domination of public interest over the personal interests of citizens, and the citizens' predominantly secular (atheist) perception of the world, *etc.*

The legal consciousness of the post-Soviet period could be characterized as an eclectic mixture of pre-Soviet, Soviet and post-Soviet ideologemes. The works of Alfred Zhalinsky,[7] Nikolay Sokolov, Igor Sorokotyagin[8] and others are dedicated to the research of legal consciousness theory and practice in contemporary Russia. The leading ideologemes in today's Russia are faithfulness to traditions of Soviet times (*i.e.* collectivism, secularism, and a positive attitude towards ideology), reestablishment of pre-Soviet traditions (*i.e.* spirituality, religiosity, and psychology), and the import of Western ideologemes (*i.e.* the primacy of human rights, democratic values, and humaneness).

This paper is dedicated to the analysis of the current post-Soviet developments in legal consciousness theory that still has to overcome the ideological limits of the socialist understanding of legal consciousness through critical reassessment of Russian and foreign experience.

The issues of time and space are essential for determining the place and character of regulation of complex social processes. As far as one of the key themes of the contemporary theory of law and state is concerned, *i.e.* the problem of legal consciousness, space and time patterns play the role of methodological keys that allow analysis of approaches developed in Russian and Western legal scholarship, as well as finding adequate solutions to the challenges of the time.

The objective of this article is to present tendencies within European and Russian legal consciousness from our perspective and to perceive them within a broader vision of education strategy in Russia.

2. Russian and Western Legal Consciousness Narratives

In April 2014, when talking about the Russian state and legal reality and its reflection in legal consciousness, Valery Zorkin, the Chairman of the Constitutional

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[7] *Жалинский А.Э.* Уголовная политика: актуальные задачи, субъекты и механизмы реализации // Современная уголовная политика: поиск оптимальной модели: Материалы VII Российского конгресса уголовного права (31 мая – 1 июня 2012 года) [Zhalinsky A.E. *Ugolovnaya politika: aktual'nye zadachi, sub'ekty i mekhanizmy realizatsii // Sovremennaya ugolovnaya politika: poisk optimal'noi modeli: Materialy VII Rossiiskogo kongressa ugolovnogo prava (31 maya – 1 iyunya 2012 goda)* [Alfred E. Zhalinsky, *Criminal Policy: Actual Objectives, Subjects and Implementation Mechanisms*, in Contemporary Criminal Policy: Searching for an Optimal Model: Materials of the 7th Russian Congress of Criminal Law (May 31 – June 1, 2012)]] 67 (Vladimir S. Komissarov, ed.) (Prospekt 2012).

[8] *Сорокотягин И.Н.* Психологическое содержание уголовно-правовых понятий УК РФ // Российский юридический журнал. 2004. № 1 [Sorokotyagin I.N. *Psikhologicheskoe soderzhanie ugolovno-pravovykh ponyatii UK RF // Rossiiskii yuridicheskii zhurnal.* 2004. No. 1 [Igor N. Sorokotyagin, *Psychological Content of Criminal Law Concepts from the Criminal Code of the Russian Federation*, 2004(1) Russian Juridical Journal]].

Court of the Russian Federation, described that reflection as the 'current absence of rights,' and further notes:[9]

> And then when we return to the construction of law as one of genuine foundations of human existence, we will have to ask ourselves – don't we find the *tabula rasa* principle in the foundations of the current absence of rights; isn't there, in its foundation, some kind of terrible theoretical mistake producing the degeneration of contemporary Western civilization? Or, at least, a mistake supporting this degeneration? Perhaps von Leibniz was profoundly right in saying that there is that natural idea denying the use of *tabula rasa* in any of the spheres of our life: in anthropology, in culture, in analysis of the state, the law and politics.

In other words, the attempt by Western leaders, scholars and ideologists of contemporary Western civilization to present human and societal development as moving under the principle of *tabula rasa* (blank slate) is a 'terrible theoretical mistake.' Furthermore, Zorkin provides an extended argument for overcoming this mistake, however, we will not present this argument in full here as we are going to focus on a single and essential point. The Chairman of the Russian Constitutional Court denies the idea that human consciousness is a blank slate and agrees with Leibniz that the human understanding develops via the interdependence of experience and the mind. He calls for an in-depth examination of the purpose of the state, and legal and political opportunities on the basis of this statement of Leibniz, especially in relation to the fact that 'starting from scratch means neglecting everything that came before.'

This is the key idea criticized by Zorkin. In the quoted article, he reduces the negative consequences of treating human consciousness as a 'blank slate' (empty cabinet, blank sheet of paper, *etc.*) to the area of deformation of international law, limiting the sovereignty of Russia in the choice of state structure and governance by imposing those non-retrograde values cumulatively defined by Zorkin as 'Westernizing liberalism.' In renouncing the idea of *tabula rasa* as being key to human consciousness, Professor Zorkin proposes to agree with von Leibniz on the existence of a certain natural idea responsible for determining the development of anthropology, culture, statehood, jurisprudence and politics.

Following the narrative proposed by Zorkin, in the framework of which he placed anthropology and jurisprudence together, it is worth summarizing the responses of contemporary legal doctrines on how to overcome one of the distinguishing features of the Russian reality – the 'current absence of rights.'

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[9] *Зорькин В.Д.* Цивилизация права // Российская газета. 2014. 13 марта [Zorkin V.D. *Tsivilizatsiya prava // Rossiiskaya gazeta*. 2014. 13 marta [Valery D. Zorkin, *Civilization of Law*, Russian Gazette, Mar. 13, 2014]] [hereinafter Zorkin, *Civilization of Law*].

It is interesting to note that the question of overcoming the terrible theoretical mistake producing, according to Zorkin, the degradation of nothing less than contemporary Western civilization is raised against the backdrop of analysis of the international context of state and law life, especially the relations between Russia and the West after Crimea was returned to Russia on March 18, 2014. However, in light of globalization processes and the universality of certain theoretical legal ideas, we propose using this approach to examine the Russian state and legal reality. In other words, to consider the reasons for the 'current absence of rights' and 'civilizational regeneration,' according to Zorkin, in the context of legal anthropology and legal consciousness.

Please note that the discussion of the peculiarities of the Russian legal consciousness and the way it differs from the Western and Oriental legal consciousness has already been going on for many centuries.

Over 50 years ago, the legal theorist Ivan Ilyin presented a formula in his work 'Our Tasks' for a comparison of the European and Russian legal consciousness: the Russian one is formless, good-natured and fair. A European who is up brought in Rome secretly holds other peoples (other Europeans, too) in contempt and desires to dominate them, and, for that reason, requires formal 'freedom' within his state as well as formal 'democracy.'

Furthermore, on the basis of a space continuum of Russian legal consciousness, Ilyin continues:

> The Russian always took pleasure in the freedom of his space, liberty of private life and separation from the state, and the pretence of his internal individualization; he always wondered at other peoples, genially lived with them and hated only enslaving invaders; he appreciated *the freedom of spirit* higher than *formal legal freedom* – and if other nations and little peoples didn't trouble him, did not disturb in his enjoyment of life, he would never take up arms and seek authority over them.[10]

These words of the Russian scholar reflect realities of European and Russian legal consciousness in the middle of the 20th century. This is an example of a deep analysis of Russian legal consciousness, of its determination, not only by political and ideological factors, but by predominantly time and space factors. Ilyin concludes that '[a]ll this evolved into a deep difference between Western and Eastern Russian cultures. *All* our culture is *different* – everything is *our own* . . . [D]ifferent medicine, different courts, a different attitude towards crime, a different perception of classes, a different relationship with our heroes, geniuses and tsars.'[11]

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[10] *Ильин И.А.* Против России // *Ильин И.А.* Наши задачи. Статьи 1948–1954 гг. Т. 1 [Ilyin I.A. *Protiv Rossii* // Ilyin I.A. *Nashi zadachi. Stat'i 1948–1954 gg. T. 1* [Ivan A. Ilyin, *Against Russia*, in Ivan A. Ilyin, 1 Our Tasks. Articles of 1948–54]] 86, 87–88 (Airis-press 2008).

[11] *Id.* at 88.

Given the difficulty in finding an exit from the contemporary international crisis, the methodology of analysis of differences and similarities of Western and Russian legal consciousness remains important and necessary on a practical level.

In the 21st century, according to a number of Western ideologemes, liberal values and traditions are generally believed to be signs of unequivocal legal progress, and the Russian reversion to conservative ideas is seen as a degradation as regards the development of state and law. Such a perception of the value of law in time and space does not eliminate the contradictions existing in the consciousness of Europeans and Russians. Moreover, these are particularly the differences in choices in relation to the scale of values, especially in the current crisis in the relationship between Europe and Russia, which are both searching for methodological keys for the preparation of new doctrinal ideas and approaches.

In contemporary Russia, the role of psychological legal motivators is played by ideas that are revolutionary in modern times but eternal for philosophical anthropology, such as the abolition of death penalty, liberalization of the grounds of private life, the humanization of the penal legal sphere – all of this is expressed by many authors in relation to the global humanization of positive law of the 21st century.

Moreover, the following tendencies can be observed, and, in our opinion, serve as common ideologemes of legal consciousness at the end of the 20th and beginning of the 21st century:

1) global humanization of positive law;

2) cross-cultural (multicultural) discourse in the anthropology of law;

3) strengthening of ethno-psychological and religious aspects of influence on the mechanism of legal regulation and stability of legal systems;

4) the increase of the part played by human rights in the framework of the functioning of the legal regulative mechanism (particularly the sharp expression of the rights of those of a non-traditional sexual orientation, sexual upbringing, and bioethical rights), which is considered as a sign of legal progress and social value;

5) a lowering of the influence of patriotism, traditional family values, general and legal culture on forming the legal consciousness of citizens, *etc.*

In many of those tendencies, one may see an influence of what could be conditionally called Western legal culture. There is the law of equity or human rights – certain grounds common for all human beings, which are obligatory despite state law and that allow one not to follow the state law, and even to use violence against the state in the name of that higher equity.

This idea is so important for the Western legal culture that even the text on a US$100 banknote says that in spite of the state law, everyone has the right to equality, life, liberty, the pursuit of happiness and an armed revolt against the Government. The French national anthem calls for the defence of human rights and equality with the words: 'Arise, children of the Fatherland, the day of glory has arrived!' which is followed by '[t]o arms, citizens, form your battalions.'

This element of Western legal culture produces such phenomena as the violence in Ferguson in November 2014, the student protests in Paris in 2006 (when 230,000 rioted in the city, breaking windows and attacking policemen), and revolts in Greece in 2008 and 2014. The French President Nicolas Sarkozy was attacked four times with cake being thrown at him from a very short distance.

However, this particular element is, according to our view, a key factor in the contemporary functioning in the West of the 'state under the rule of law.' The refusal of the population to believe in hypocrisy and absoluteness of state law, and absence of respect *vis-à-vis* authorities, lead to a more efficient control by the authorities.

Contemporary legal anthropology as a study of the phenomenon of humans existing in a system of regulatory relations still analyzes the crisis in the legal consciousness of postindustrial society using hypertrophy of law, legal formalism, the vulnerability of the human before legal experiences, bureaucracy of law, and imposing alien moral ideals and values through law.

3. Public Trust in Justice Administration

Today, together with the economic and political difficulties suffered by Russia in relation to the Ukraine crisis, sociologists have noted a substantial increase in patriotism, the spiritual unity of Russian society, and huge trust in the Russian President.

However, this particular trust raises doubts in Western society as to the state of democracy and rule of law in Russia. In the United States, the difference between the popularity of the two main political parties is just several percent, and, in Europe, an electoral gain of 15 percent of the vote is considered an unbelievable success. We leave open the question of whether the level of the Russians' trust in their national political elite could be possible in a society based on freedom of speech and choice.

It is too early to talk about overcoming the crisis of legal consciousness, it is also too early from a strategic perspective. It is mistaken, as Zorkin writes, 'mistaken in terms of civilization and tragedy.'[12] The intensification of the crisis phenomena in the legal consciousness of contemporary society strengthens the civilizational, state and legal risks in the development of both Europe and Russia. We need conceptual responses to conceptual questions of the present:

1) what is the influence of the crisis in legal consciousness on serious deformities in the legislature, the application of law and law enforcement;

2) how is it possible to maintain a balance between the continuous globalization of law and establishment of Russian national sovereign jurisdiction;

3) how is it possible to keep the best traditions of the national higher legal education in the conditions of modernization of higher education (Bologna process, *etc.*);

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[12] Zorkin, *Civilization of Law*, *supra* n. 9.

4) what shall become of the methodological ground for the content of contemporary legal theory and practice;

5) what ideologemes (pre-Soviet, Soviet, post-Soviet) will play the role of psychological drivers that might lead us out of the crisis of legal consciousness?

It is necessary to note that one of the key challenges to the Russian state's legal reality is a fall in the confidence of citizens, and what is particularly important is the fall in confidence of lawyers in institutions such as, for instance, legal proceedings in Russia. The opinion polls of attorneys-at-law made by researchers of the National Research University – Higher School of Economics show that a substantial proportion of professional lawyers (attorneys-at-law) distrust the law enforcement and judicial systems in Russia. They noted that the activity of law enforcement and judicial institutions is of a repressive nature, and that the officers of those institutions themselves take no serious steps to reestablish breached rights or to provide access to justice in order to defend those rights. Moreover, 28 percent of attorneys-at-law remarked that the officers of prosecution often breach the rights of their clients, 50 percent made claims against investigators, and about 60 percent against police officers.[13]

Such an attitude towards law-enforcement institutions might be easily explained. The European Court of Human Rights periodically receives applications regarding torture by Russian law-enforcement institutions.

For instance, two suspects were arrested in the *Mikheyev v. Russia* case. The first one immediately pleaded guilty to having raped and murdered a young lady with his friend, and indicated the place where the dead body had been hidden. However, his friend refused to plead guilty. The investigator connected electric cable to the ears of the latter, and began administering electric shocks. When the investigator threatened to connect the cable to the man's penis, Alexey Mikheyev made a sincere self-accusatory declaration. After the cables were removed, he jumped from the window in order to commit suicide. He failed to die but broke his vertebral column and became paralyzed for life. After the jump from the window, the family of the young lady called and informed the police that she was safe and in good health, having just come back home. She had been staying at the flat of some friends of hers for nine nights. However, two men had already pleaded guilty to having raped and killed her.[14]

In another case, *Maslova and Nalbandov v. Russia*, a 19-year-old young woman was invited as a witness to a police station. The investigator suggested she plead guilty. She refused. Then she was handcuffed and three officers raped her five times.

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[13] Что показал опрос адвокатов [*Chto pokazal opros advokatov* [*What Did the Opinion Poll of Attorneys-at-Law Show*]], *Institut analiza predpriyatii i rynkov Vyshchei shkoly ekonomiki* (May 20, 2014), <http://iims.hse.ru/news/123530206.html> (accessed Feb. 4, 2016).

[14] *Mikheyev v. Russia*, no. 77617/01 (Eur. Ct. H.R., Jan. 26, 2006).

She was electrocuted through her ears and her mouth and nose were blocked with a gas-mask.[15]

The Russian judicial system ignored both Mr. Mikheyev and Ms. Maslova. In the case of the latter, none of the police officers was convicted under criminal law. Neither Mr. Mikheyev, nor Ms. Maslova received even a cent for damages from the Russian legal system.

Fortunately, they took their cases to the Strasbourg Court. However, the very fact that it is impossible to win such a case on Russian territory not only reduces the confidence of people in the internal judicial system, but also represents an example of very deep and serious problems at the level of legal consciousness of Russian judges and prosecutors. This is not the legal culture society wants.

In response to the question of the reasons behind charges in Russian court judgments, 72 percent of those interviewed answered that the courts do not have real independence. About 38 percent relate that tendency to a historically developed tradition.[16]

This opinion is shared by Kirill Belsky, partner at *Koblev & Partners* Law Firm:

> The reason for the charging tendency of the Russian courts is the inquisitional nature of its work inherited from the Soviet system. The judges continue to see themselves as a continuation of the punitive function of law-enforcement bodies, and not as independent arbiters. Unfortunately, too many of the judicial staff have an educational and experience background in structures of the Ministry of Interior, the Investigative Committee and prosecution, and not in the private law business or the Bar as in countries with a serious legal history.[17]

Another problem in revealing deformations of legal consciousness while applying law is the necessity of critical assessment of a series of legislative initiatives undertaken in the interest of making criminal law more humane, but which actually resulted in making it possible to directly breach the rights of persons under criminal prosecution. Sergey Mironov, leader of the political party 'A Just Russia,' discusses this problem. He proposes annulling the prejudicial meanings of statements given by convicted persons who agreed to special proceedings and concluded an agreement with prosecution. In other words, the Investigative Committee has to verify and re-verify those statements. The authors of this initiative anticipate: 'As a result, the

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[15] *Maslova and Nalbandov v. Russia*, no. 839/02 (Eur. Ct. H.R., Jan. 24, 2008).

[16] *See supra* n. 13.

[17] *Терехова А.* Три четверти адвокатов не видят независимого суда в РФ [Terekhova A. *Tri chetverti advokatov ne vidyat nezavisimogo suda v RF* [Alina Terekhova, *Three Quarters of Attorneys-at-Law Do Not Consider Russian Courts Independent*]], *Nezavisimaya gazeta* (Apr. 22, 2014), <www.ng.ru/economics/2014-04-22/4_advocates.html> (accessed Feb. 4, 2016).

conviction in the main case may be pronounced, in fact, merely on the basis of a statement by the convict in the isolated case.' They insist that this is contrary to the fundamental provision of criminal proceedings, according to which no evidence has a pre-established power (Art. 17(2) of the Russian Code of Criminal Procedure). Moreover, Art. 77(2) of the same Code provides that a conviction may not be based on statements of the accused that are not supported by other evidence.[18]

It is for this reason that the authors of the initiative propose annulling the prejudicial status of the verdicts entered following this special order. The authors of the initiative believe that the main principle of justice is impartiality guaranteed by the blindness of Themis who is indifferent regarding whom she sees before her, *i.e.* what matters is balancing evidence. Today there is often nothing to balance. Neither qualifications, nor experience, nor independence are essential for making judgments, since, as in Soviet times, confessions have become the key form of evidence.

Another problem that reflects the crisis of confidence in the Russia judicial system is that the way it works (*modus operandi*) is peculiar to the criminal justice system developed in contemporary Russia. This manner to act is a reflection of legal consciousness of Russian judges, or at least of an important part of the judiciary. This is a conclusion made by the authors of the investigation, Kirill Titaev and Mariya Shklyaruk, from the National Research University – Higher School of Economics, whose data was published in the *Vedomosti* newspaper on November 13, 2014.[19]

As a poll by the Institute for the Rule of Law showed after interviewing over 2,000 judges, the average Russian judge spends half as much time studying case data as in judicial hearings. Every fourth judge spends as much or more time working with data than in hearings. According to the authors of the survey, the reasons for Russian society's and the judicial community's attitude to justice are myths and delusions about the role of a judicial hearing in criminal cases:

> It seems that the key decisions are made precisely in the courtroom. This feeling is largely created and affirmed by TV shows about judicial proceedings. In reality, however, the main ground for a judge making a decision is not the course of the judicial hearing taking place in the courtroom, but the criminal case, *i.e.* previously gathered, prepared and even pre-interpreted evidence, and facts that are described and documented in a strictly defined manner.[20]

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[18] *Самарина А.* Сделка с правосудием – палка о двух концах [Samarina A. *Sdelka s pravosudiem – palka o dvukh kontsakh* [Aleksandra Samarina, *A Deal with the Justice System – a Double-Edged Sword*]], *Nezavisimaya gazeta* (Apr. 11, 2014), <www.ng.ru/politics/2014-04-11/3_kartblansh.html> (accessed Feb. 4, 2016).

[19] *Титаев К., Шклярук М.* Судебный процесс как работа с бумагами [Titaev K., Shklyaruk M. *Sudebnyi protsess kak rabota s bumagami* [Kirill Titaev & Mariya Shklyaruk, *Judicial Proceedings as Paperwork*]], *Vedomosti* (Nov. 13, 2014), <www.vedomosti.ru/opinion/articles/2014/11/13/bumazhnye-dela> (accessed Feb. 4, 2016).

[20] *Id.*

The prevailing manner of thinking and acting by Russian judges is shown by the following poll data according to which judges put more trust in statements by participants in proceedings that were made during the pre-trial investigation. Among the judges considering criminal cases, over 52 percent are more likely to trust the victims' pre-trial statements, and 56.4 percent prefer data provided by witnesses during the pre-trial investigation over what they say in court.

Those accused, in their turn, are usually considered liars. 70.6 percent of judges prefer to base their decisions on what the person charged said to the investigator, and to the court. Russian judges pay much more attention to evidence, which is more difficult to obtain in court. In general, the judge does not assess the presentations by the attorney-at-law and the prosecutor. Only 4 to 9.2 percent of judges indicated that this is one of three preferable sources of information.[21]

Therefore, for a judge, a criminal case is not generally a consideration of a hypothetical situation that may have happened at a certain stage, but in the most pragmatic sense it is a package of documents gathered by the investigator and approved by the prosecutor. It is for this reason that Russian judges often interrupt witnesses, deny motions of attorneys, *etc.* – everything necessary for entering the judgment is already on file.

Experts recognize this problem and have come up with a number of different models for reforming the judicial system. The keyword for supporters of rebirth of the role of the court as an independent branch of power is *deformalization*. However, this point of view is not the only one held by legal professionals and, even more so, in the judicial community. Some jurists propose getting rid of oral hearings and to pass to written judicial consideration. Russian society does not participate in the discussion. In order to participate in this discussion, citizens would have to understand how this mechanism works today. According to the opinion of the authors of the survey, and we fully agree with them, the main objective of the current public and professional debate is to ensure this understanding, and demythologize the judicial hearing space.

However, the implementation of this task, as we have said previously, is impeded by a series of methodological and worldview problems.

4. Anthropologization of Legal Education

In our opinion, the Russian legal doctrine is still dominated by a profoundly developed Soviet normative / positivist approach. Some attempts, nevertheless, to establish certain doctrinal ideas of natural rights have been observed. In this context, the conception of integrative law where legal anthropology has, in principle, an important role, is the least demanded. The experience of the development of post-Soviet law shows that the reorientation of constitutional sources and foundations of the legal system towards the human being (his interests and needs), has, until now, been unsuccessful.

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[21] Titaev & Shklyaruk, *supra* n. 19.

At the same time, it is quite difficult to talk about a school of legal thought that dominates in the US and Europe. There are many approaches to legal research and perceptions of law. It would be more correct to talk about impressions concerning certain tendencies. In this respect, the school of American legal realism or French legal postmodernism which has a rather sceptical attitude towards the very existence of law are quite strong. The decrease in faith in judicial decisions could be quite a positive tendency in Western legal culture. It is quite difficult to preview judicial decisions on the basis of professional qualification. The research of Professor Stanislovas Tomas distinguishes 100 techniques of interpretation, which are used in the practice of the European Courts. A technique of interpretation is an intellectual structure that is used in order to take a step from point A to point B. The problem consists in the fact that one technique leads to point B, another leads to point C, and a thirty-third technique will lead to point Z. Nonetheless, this road is always presented in an intellectually dishonest manner as independent from the judge. All 100 techniques are presented as objectively interacting, with the final result being the only possible one.[22]

The main ideas that took root during the Soviet period of the doctrine of socialist (revolutionary) law and legal consciousness were those of Mikhail Reisner, author of avant-garde jurisprudence. For Reisner, as for any true avant-garde modernist, the positions of those theorists who tried to find compromise between new and old was unacceptable. He was against any synthesis of proletariat ideas with bourgeois ideas in categorical terms, thinking that the dictatorship of proletariat should not be dressed in, as he put it, 'rusty armour of old bourgeois law.' Strongly expressed secularism is a characteristic of all forms of legal modernism. In contrast with thinkers in traditional societies who support the functioning of the legal system in close alliance with religious church institutions, modernist legal scholars seek to separate religion and the church from participation in disciplinary regulation of social relations and in the establishment of new forms of social order.

At the same time, legal postmodernists and realists go even further – they compare law to religion, and they call it shamanism. Professor Duncan Kennedy from Harvard has become a founder of legal atheism. In the past, Jean-Jacques Rousseau wrote that if people lost their belief in God, then they would start to murder each other at every single street corner. According to the Western liberal approach, people lost belief in God but the human rights situation improved as a result. The idea of American legal realism, and particularly of its radical branch – Critical Legal Studies – consists in a belief that the lost faith in state law also leads to positive change.[23]

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[22] Stanislovas Tomas, Le raisonnement judiciaire de la Cour européenne de justice et de la Cour européenne des droits de l'Homme dans la perspective chamanique proposée par les études critiques du droit 851 (Université Paris 1 Panthéon-Sorbonne 2010).

[23] Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 Nova L. Rev. 909 (1995), available at <http://duncankennedy.net/documents/Photo%20articles/American%20Constitutionalism%20as%20a%20Civil%20Religion.pdf> (accessed Feb. 4, 2016).

Key questions in the light of searching for answers to the methodological and law application problems considered above are what to consider as a sufficient or developmental level of legal consciousness, how to measure that level, and what standard should become the starting point: a 'healthy' standard as suggested by Ilyin, a 'socialist (revolutionary)' standard as proposed by Reisner or the 'global humanity' one as according to certain contemporary, primary Western, authors.

The following is a Soviet definition:

> Legal consciousness is a sphere of public or individual consciousness that includes certain legal knowledge, attitudes *vis-à-vis* law and activity of applying law. In its turn, law and the practice of its application have an impact on the content of public and individual legal consciousness. The decisive role in the development of individual and group legal consciousness is played by political, social and economic conditions of the life of the society. Individual legal consciousness is formed under the influence of education, upbringing, traditions and the moral climate of the environment where the person finds himself.

In this 'canonical' definition for official Soviet ideology and for the frameworks of social sciences, the role of human personality is reduced to a subject to influence from the side lines of the 'correct' environment.

5. Conclusion: Towards a Reform of Russian Legal Education

In this respect, one of the basic theses of critical legal studies (one of the Western traditions) is an affirmation that contemporary legal education at university level is designed to reproduce social hierarchy. Teaching law as we might teach shamanism or magic liberates the intellectual potential of a student, switches on her creative thinking, demolishes her fear of authorities and destroys social hierarchy.[24] Certain people think that this approach is far from practice, but in fact it is the most practical one. Criminal law, civil law, financial law, human rights, and constitutional law may be taught as forms of shamanism – we can research their spirits, their rituals, and their magic formulae that sometimes work, and sometimes do not.[25]

Analysis of the implementation of programme papers in the sphere of overcoming the crisis in Russian legal education shows that the practical steps of the state

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[24] Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic against the System (AFAR 1983).

[25] Stanislovas Tomas, *Theory of Judicial Shamanism*, in Logic, Argumentation and Interpretation / Logica, Argumentacion e Interpretacion: 5 Proceedings of the 22nd IVR World Congress Granada 2005 (= 110 ARSP Beiheft) 125 (Josep Aguiló-Regla, ed.) (Steiner Verlag; Nomos 2007).

institutions and education community are hardly coordinated on a conceptual level, and often have a contradictory character. Such programme decisions are dominated by economic and political reasons for improving legal education, and not particularly by educational, psychological and anthropological ones. For instance, the following requirements for qualifying with a Bachelor of Laws are indicated in the Federal State Education Standard:[26]

1) to be aware of the importance of one's future profession, to have a sufficient level of professional legal consciousness (OK-1);

2) to have the ability to perform professional activity on the basis of developed legal consciousness, legal thinking and legal culture (PK-2).

Obviously, such characteristics of lawyers' legal consciousness as *developed* and *sufficient level* are mentioned in the content of the competences, but the normative and methodological dispositions of the standard under consideration do not disclose how to ensure the achievement of the high objectives declared at a conceptual and technical level. It seems that we need a serious methodological reworking of all the complex of measures for overcoming the crisis of legal consciousness of contemporary lawyers in order to achieve the results of education required by the Federal State Education Standard.

An approximate educational programme in law at LL.B. and LL.M. levels leads us to use the following techniques for achieving the educational result: a matrix of competences, calendar plans, traineeship programmes, IT and methodological provision, interactive technologies, and a competent approach. These measures are justified and arranged in a formal manner, giving them a normative character.

At the same time, it is particularly the issues of the methodology of contemporary legal education that are the least developed and require more attention in the current context of state and law development in Russia. Such methodological calculations have a character, in our opinion, of legal theoretical and state practical risk management. In other words, legal theoretical risks in the sphere of research on legal consciousness manifest themselves in the presence of contradictory vectors (differences in attitudes *vis-à-vis* the *tabula rasa* principle as a methodological ground for legal consciousness – as explained by Zorkin) of such conceptions: from the ideas of traditionalism to revolutionary avant-garde and modern integration approaches.

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[26] Приказ Минобрнауки России от 4 мая 2010 г. «Об утверждении и введении в действие Федерального государственного образовательного стандарта высшего профессионального образования по направлению 030900 Юриспруденция (квалификация (степень) «Бакалавр»)» [*Prikaz Minobrnauki Rossii ot 4 maya 2010 g. 'Ob utverzhdenii i vvedenii v deistvie Federal'nogo gosudarstvennogo obrazovatel'nogo standarta vyshchego professional'nogo obrazovaniya po napravleniyu 030900 Yurisprudentsiya (kvalifikatsiya (stepen') "Bakalavr")'* [Order of the Ministry of Education and Science of the Russian Federation No. 464 of May 4, 2010, 'On the Approval and Entry into Force of the Federal State Education Standard in Higher Professional Education in the Field of Law 030900 (qualification (degree) of Bachelor of Laws)']], at <минобрнауки.рф/документы/1879> (accessed Feb. 4, 2016).

Pursuing the aims of forming the legal consciousness of lawyers as provided by the Federal State Education Standards may be, in our point of view, orienting research and teaching of jurisprudence according to anthropological imperatives. A particular place in the anthropologization of legal education, according to our opinion, is occupied by disciplines of legal theory: philosophy of law, history and methodology of legal science, theory of state and law, deontology, legal psychology, anthropology of law, *etc.*

A key methodological problem in the implementation of the ideas of the anthropologization of legal education is the absence of a unique conception of contemporary pedagogical legal anthropology. Please note that, from a historical (time) perspective, such a conception existed at a certain time in the Russian theory of state and law. For instance, among the main particularities of pedagogical anthropology of Ilyin, one may distinguish the following educational principles:

1) traditionalism: upbringing is aimed at harmonious integration with the social and cultural tradition;

2) solidarity: upbringing shall not be based on individualist principles, but, on the contrary, it should affirm the ideas of healthy collectivism and nationalism;

3) hierarchism (idea of classes) and authoritarianism;

4) ethical values, *i.e.* the domination of spiritual and moral values in the motivational complex of personal self-realization.

However, from the point of view of the need to recognize contemporary reality, this conception needs updating in order to take into account both historic experience (the time factor), and foreign experience (the space factor). A certain experience of introducing the anthropological approach in the Department of Law of our University shows that it is reasonable to apply a complex approach as a method of creating the sense of anthropology in legal education. For this purpose, the programme of the course 'Theory of State and Law' now includes two topics: *The Social, Psychological and Moral Foundations of Creation of the State and the Law* in the *Methodology of Theory of State and Law* chapter, and *Anthropology of the State and Law* in the *Legal System and Legal Life* chapter.

The *Deontology* course includes topics dedicated to the social nature of the lawyer's profession and ethical problems of the lawyer's professional activity as a socionomic profession. The *Legal Psychology* course programme implements an anthropological approach to topics related to the legal socialization of personality, analysis of reasons of criminal behavior and criminal personality, psychology of communicative activity of the investigator and the court, ethics and psychological problems of lawyers' professionalization. The programme of the elective course, *Anthropology of Law*, is developed for LL.M. students, and its content is mainly focused on defining the place of the human in the system of traditional law and European positive law, contemporary family law, human rights in the context of bioethics, morality and religion.

The anthropological imperative in analyzing the codependence and interaction of European and Russian legal consciousness plays the role of a contemporary academic basis for research of issues concerning integration and differentiation of Europe and Russia, and their legal systems.

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Information about the authors

Alexey Tyrtyshny (Moscow, Russia) – Ph.D. in Psychology, Associate Professor of Law (Russia), Professor and Dean of the Department of Law, Russian New University (22 Radio str., Moscow, 105005, Russia; e-mail: atyrt@mail.ru).

Stanislovas Tomas (Moscow, Russia) – Ph.D. in Law (Sorbonne), Attorney-at-Law (Principality of Andorra), Professor of Law at Russian New University (22 Radio str., Moscow, 105005, Russia; e-mail: stanislovas.tomas@gmail.com).

DEVELOPMENT OF LAW RELATING TO FACTORIES IN INDIA

MANJEET KUMAR SAHU,

National University of Study and Research in Law
(Ranchi, India)

The rapid growth of industrial town and factories has paved the way to develop our industrial legislation accordingly. The Government of India never expressed their interest in framing separate legislation vis-à-vis factories which resulted in implementation of the same statute which was enacted pre-independence. It was done by virtue of Art. 372 of the Constitution of India. However, the Constitutional Lawmakers created vacuum for the implementation of new statute in accordance with the demand of society by inserting scope under the Directive Principles of State Policies. However, in the 67 years history of Indian Republic, there are unprecedented developments of law relating to factories in India.

The Government of India, with the adoption of existed statute, made an effort to incorporate the welfare legislation but it never developed along with the change in time. It is to be noticed that as far as existing statutes are concerned, the development is an effect of judicial pronouncement or some tragic incident like Bhopal Gas Tragedy. This paper succinctly describes the history of factory legislation, the constitutional validity of the previous statute and necessary amendment which have already been done and / or on the verge of being amended. It will further discuss contribution of judiciary in developing the law relating to factories, scope of industrial jurisprudence in promoting the development of factory legislation. The primary focus of the research project is to reflect upon the areas where factory legislation has developed, so that proper yardstick could be made in order to put emphasis on those areas which have been remained untouched.

Keywords: factory; development; contribution; jurisprudence; legislation.

Recommended citation: Manjeet Kumar Sahu, *Development of Law Relating to Factories in India*, 2(2) BRICS LJ (2015).

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1. Introduction

Nothing in this world remains stationary, the only constant is change. Law is a dynamic subject. The developments of law relating to factories in India trace its origin from factories legislation of United Kingdom. The movement for the regulation of factories was the outcome of a new attitude of mind towards industrial questions. The application and industrial jurisprudence of UK legislations provided skeletal in order to shape the factories legislation in India.

The rapid growth of industrial town and factories has paved the way to develop our industrial legislation accordingly. The Government of India never expressed their interest in framing separate legislation *vis-à-vis* factories which resulted in implementation of the same statute which was enacted pre-independence. It was done by virtue of Art. 372 of the Constitution of India. However, the Constitutional Lawmakers created vacuum for the implementation of new statute in accordance with the demand of society by inserting scope under the Directive Principles of State Policies. However, in the 65 years history of Indian republic, there are unprecedented developments of law relating to factories in India.

The primary objective of the factory legislation in India is as follows:
1) to hinder the diversion of the nation's industry into such unprofitable channels;
2) to maintain a healthy minimum in the standard of life;
3) to prevent any person being employed under conditions inimical to social health;
4) to prescribe conditions of existence below which population shall not decline.

2. Origin of Factory Legislation

It will be remembered that the Elizabethan Poor Law of 1601 had directed that destitute children and orphans should be apprenticed to some trade. Houses of industry for instructing these children in spinning and weaving were a favorite charitable hobby in the 17th and 18th centuries, and the children were subsequently bound apprentice to employers. There is a considerable literature on this subject, sometimes giving a roseate description of the interiors of these industrial schools which does not always convey to the modern reader an impression as favorable as the writer intended.[1]

Later, the Factory Act of 1802 may be regarded rather as an extension of the old Poor Law[2] than as the conscious assumption of control over industry,[3] The year 1802 is marked by the passing of the first of long series of structures regulating the hours and conditions of labour, commonly known as the Factory Acts. These acts have been framed with the definite and avowed object of protecting the health of the younger and weaker workers from injury by overwork or unwholesome conditions and it is this, their motive and purpose, rather than the actual matter of the regulation, that forms their distinguishing characteristic and marks them out as a novelty and new departure from previous legislation. There is little or no analogy between these and the medieval labour statutes or the ordinance of the craft guilds.[4]

Although Bengal must be credited with the first cotton mill opened about the year 1818. It was not till the second half of 19th century that the introduction of power spinning and weaving made any progress. In Bombay, the first mill was established in 1851. By 1879–80 (the first year for which complete authentic official records are available), there were 58 cotton spinning and weaving mills in India with an aggregate of 13,307 looms and 1,470,830 spindles and a daily average employment of 39,537 persons. The first jute mill was started in 1855, the first power loom being

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1 B.L. Hutchins & A. Harrison, A History of Factory Legislation 2–3 (2nd ed., P.S. King & Son 1911), available at <https://archive.org/details/ahistoryfactory01spengoog> (accessed Feb. 5, 2016).

2 The Health and Moral of Apprentices Bill introduced in the Parliament was passed without any difficulty and was regarded as poor law.

3 J.C. Kydd, A History of Factory Legislation in India (Calcutta University Press 1920), available at <https://archive.org/details/historyoffactory00kydduoft> (accessed Feb. 5, 2016).

4 Hutchins & Harrison, *supra* n. 1, at 3.

introduced in 1859. Though at first progress was slow, by the year 1879–80, 22 jute mills existed in India with 4,946 looms and 70,840 spindles and employing an average of 27,494 persons daily. It was the growth of the cotton industry in Bombay, however, which at first chiefly attracted attention.[5]

The period of this early expansion in India was a time in the United Kingdom when interest in the whole question of factory legislation was considerable. In the early part of 1873 Dr. Bridges and Mr. Holmes conducted an enquiry at the instance of the Local Government Board into the health of women, children and young persons engaged in textile manufacture. The last act dealing with this matter was that of 1847 and they recommended a review of the situation considering 10.5 hours of monotonous, unceasing labour, even under favorable conditions, as too long to be consistent with the health of young persons between 13 and 18 years of age and of women generally. They urged in consequence, a reduction of the working week from 60 to 54 hours.[6]

In 1874, under the Conservative Government which came into power in that year was passed the act thus entitled 'An Act to Make Better Provision for Improving the Health of Women, Young Persons and Children Employed in Manufactures and the Education of Such Children and Otherwise to Improve the Factory Acts.'

It can be noticed that the Factory Acts did not deal with industry as a whole. Legislation had been gradually extending from industry to industry and as a result certain elements of inequality and unnecessary complexity existed in the body of the Factory Laws.[7] In consequence of the realization, a committee was appointed in 1875 to inquire into the conditions of factory work in the country. This committee had favored some kind of legal restrictions in the form of factory laws.

During Lord Ripon;s time, the first Factories Act was adopted in 1881. This enactment primarily focused on children:[8]

1) that no child should be employed in factory if under the age of 7 years;

2) that no person under the age of 12 years, should be actually employed in any factory more than nine hours in any one day;

3) that every child was to have four whole holidays in the month;

4) that children were not to be employed in certain dangerous work.

Following this act, a Factory Commission was appointed in 1885. There was another Factories Act in 1891, and a Royal Commission on Labor was appointed in 1892. The result of these enactments was the limitation on the factory working hours. This was an answer of the Government to the pathetic conditions of the

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5 Kydd, *supra* n. 3, at 12.

6 *Id.*

7 *Id.*

8 D.A. Barker, *Factory Legislation in India*, 21(84) The Economic Journal 643 (1911).

workers in the factory, wherein, only when a laborer exhausted, new labourer was to take his / her place.[9]

The legislation was projected as the panacea for all the ills that plagued factory and industrial administration in India. It limited endless working hours, stipulated the minimum ages of those to be employed, and tried to ensure that there would be some gubernatorial safeguard in place for the conditions of the workers in factories. It was designed to protect children[10] and provide measures for the health and safety of the workers.[11]

In India various committees and commissions were appointed from time to time by the Government of India to inquire into the problems of health of industrial workers. In 1929 the Royal Commission on Labor noted that in a number of factories due to manufacturing processes a large amount of dust is deposited and that arrangements for its elimination were mostly defective. In October 1943 the Government of India appointed Health Survey and Development Committee to consider and suggest broad objectives of health and medical care in the country. Later, the Labor Investigation Committee set up under the Chairmanship of Shri D.D. Rege by the Government of India emphasized in its report, submitted in 1946, the responsibility of the employer to provide for medical and health facilities.

With the high speed growth of various industries in India, regulation became necessary and hence, accordingly fashioned all the factories legislation of United Kingdom with suitable modification.

3. Scope of Industrial Jurisprudence in Developing Factory Legislation

Jurisprudence teaches legislators how to make laws which will promote social and economic welfare.[12] The primary concern of industrial jurisprudence is to maintain peace among the various parties and ensure the contentment of the workers. Both jurisprudence and economics aim at the betterment of the lives of the people. There are laws relating to workmen's compensation, factory legislation, laws relating to labour, insurance, maternity welfare, bonus, leave facilities and other concessions given to workmen. There are laws for the benefits of the agriculturists such as the Zamindari Abolition Acts, Agricultural Debtors Relief Acts, Acts preventing the fragmentation and sub-division of agricultural holdings and regulation of agricultural

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9 <http://www.gktoday.in> (accessed Feb. 5, 2016).

10 Barker, *supra* n. 8.

11 Kirthi Jayakumar, *The First Labour Statute*, myLaw (May 4, 2012), <http://version1.mylaw.net/index.php/Article/The_first_labour_statute/> (accessed Feb. 5, 2016).

12 Lellala Vishwanadham, *Jurisprudence in Relations with Other Social Sciences*, 3(5) VSRD Technical & Non-Technical Journal (2012).

labour. Both jurisprudence and economics help each other in furthering the welfare of society. The intimate relation between economics and jurisprudence was first emphasized by Karl Marx.[13]

3.1. Concept of Social Welfare Legislation: Derivative of Indian Constitution

The principle of International Labour Organization [hereinafter ILO] have already been incorporated under the Constitution of India.[14] The Constitution of India in its Preamble provided a framework for securing to all its citizens, *inter alia*, social justice which has been amplified and elaborated in Pt. IV of the Constitution 'Directive Principles of State Policy.'

These Directive Principles provide for securing the health and strength of employees, men and women,[15] that the tender age of children are not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength,[16] just and humane conditions of work and maternity relief are provided,[17] that the Government shall take steps, by suitable legislation or in any other way, to secure the participation of employee in the management of undertakings, establishments or other organizations engaged in any industry,[18] for ensuring that no child below the age of 14 is employed to work in any factory or mine or engaged in any other hazardous employment.[19]

3.2. Jurist Opinion

The development of labour law remains in a large part in the period when industrial production was introduced. The formation and development of factory legislation is regarded as the seed of the creation of labour law. Several authors have though claimed that the legal regulation of labour relations does not originate solely from the development of factory legislation but the modern labour law has several connections with Roman private law and the modern employment contract has, in fact, evolved as a result of the classification of contracts found in Roman law.[20]

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13 Dennis Lloyd, Introduction to Jurisprudence (4th ed., Stevens & Sons 1979).

14 Article 39.

15 *Fifth India-EU Seminar on Employment and Social Policy 'Occupational Safety and Health' (New Delhi – September 19–20, 2011)*, <http://labour.nic.in/upload/uploadfiles/files/Divisions/LC%26ILAS/Background%20note.pdf> (accessed Feb. 5, 2016) [hereinafter *Fifth India-EU Seminar*].

16 *Supra* n. 14.

17 Constitution of India, Art. 42.

18 *Id*. Art. 43A.

19 *Id*. Art. 24.

20 Gaabriel Tavits, *The Position of Labour Law in the Private Law System. The Past, Present and Future of Estonian Labour Law*, 5(1) Juridica International (2000), available at <http://www.juridicainternational.eu/public/pdf/ji_2000_1_124.pdf> (accessed Feb. 5, 2016).

Robert Owen's idea of fixing a 'national minimum' in the standard of life, below which, in the common interest , no one is to be permitted to sink.[21]

Dr. Thomas Bedford in his report 'The Health of the Industrial Worker in India' (1946) drew the attention of the authorities, *inter alia*, to the inadequacy of protection given to Indian factory workers from dangerous dusts and to the importance of keeping a careful watch on industries in which organic solvents and radioactive materials were used.[22]

4. Development of Factory Legislation

4.1. Legislative Development

Regulation of employment contract and labour relations under law of obligations or outside it is not a legal and political decision. Rather, it is a question of legislative technique.[23]

Early Legislations:

1) the First Indian Factory Act, 1881;

2) the Bombay Factory Commission of 1884–85;

3) interest in Indian factory labour in the United Kingdom; the Indian Factory Commission of 1890 and the Act of 1891;

4) controversy between trade rivals; night work; the Textile Factories Labour Committee of 1906;

5) the Indian Factory Labour Commission of 1908 and the Act of 1911.

The original colonial legislation underwent substantial modifications in the post-colonial era because independent India called for a clear partnership between labour and capital. The earliest Indian statute to regulate the relationship between employer and his workmen was the Trade Dispute Act, 1929 (Act VII of 1929). Provisions were made in this act for restraining the rights of strike and lock out but no machinery was provided to take care of disputes.

The legislations can be categorized as follows:

1) labour laws enacted by the Central Government, where the Central Government has the sole responsibility for enforcement;

2) labour laws enacted by Central Government and enforced both by Central and State Governments;

3) labour laws enacted by Central Government and enforced by the State Governments;

4) labour laws enacted and enforced by the various State Governments which apply to respective States.

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21 Hutchins & Harrison, *supra* n. 1.

22 N.S. Nankiker, *Working Conditions in Factories Referred in Government of India: The Conference of Chief Inspectors of Factories Held at New Delhi* 26 (1968).

23 Tavits, *supra* n. 20.

4.2. Judicial Development

At present one must admit that labour law is increasingly treated as judicial matter.[24] While delineating the scope of constitutional provisions, Justice K. Ramaswamy in his dissenting judgement in *Calcutta Electricity Supply Corp. v. Subhas Chandra Bose & Ors.*[25] observed that health is a human right enshrined in the Universal Declaration of Human Rights (Arts. 22–28) and International Covenant on Economic Social and Cultural Rights. Further, it is a fundamental right to workmen. The 'maintenance of health is a most important constitutional goal.' Health does not mean 'the absence of disease or infirmity' but 'a state of complete physical, mental and social well-being.'

In *Consumer Education & Research Centre & Ors. v. Union of India & Ors*.[26] a three-judge bench of the Supreme Court held that the jurisprudence of personhood or philosophy of the right to life envisaged in Art. 21 of the Constitution enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. The expression 'life' assured in Art. 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. The health of the worker is an integral facet of the right to life. Denial thereof denudes the workman the finer facets of life violating Art. 21. Medical facilities, therefore, is a fundamental and human right to protect his health. In that case health insurance, while in service or after retirement was held to be a fundamental right and even private industries were enjoined to provide health insurance to the workmen. In this case the Supreme Court observed that in the light of the rules '[a]ll safety in the use of asbestos' issued by the ILO, the same shall be binding on all the industries.

The aforesaid view was reiterated in *Kirloskar Brothers Ltd. v. Employees' State Insurance Corp*.[27] The Court observed that in expanding economic activity in a liberalized economy Pt. IV of the Constitution enjoins not only the State and its instrumentalities but even private industries to ensure safety to the workman and to provide facilities and opportunities for health and vigor of the workman assured in relevant provisions in Pt. IV which are integral part of the right to equality under Art. 14 and the right to life under Art. 21 which are fundamental rights to the workman.

The Court has also directed all the industries large, medium, small, mines milling units, *etc.* to cover their workers by health insurance.[28]

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[24] Tavits, *supra* n. 20.

[25] (1992) 1 S.C.C. 441.

[26] (1995) 3 S.C.C. 42.

[27] 1996 S.C.C. (L&S) 533.

[28] S.C. Srivastava, *Occupational Health of Workers in India Law and Practice*, 31 Ban. L.J. 11, 18 (2002), available at <http://www.bhu.ac.in/lawfaculty/bljvol31.html> (accessed Feb. 5, 2016).

The Supreme Court in *M.C. Mehta v. Union of India* (December 20, 1986)[29] evolved a new concept of liability to deal with problems of hazardous and inherently dangerous industries. The court held that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the heath and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has under taken. The enterprise engaged in such nature of activity should indemnify all those who suffer on account of the carrying on of such activity regardless of whether it is carried on carefully or not.[30]

The Supreme Court in *M.C. Mehta & Anor. v. Union of India & Ors.* (February 17, 1986)[31], where tanneries were discharging effluents into the river Ganges prevented the tanneries *etc*., from discharging effluents into the river Ganga, directed establishment of primary treatment plats *etc*., and ordered the closure of industries not complying with the directions[32].

In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*,[33] a large scale pollution was caused by lime stone quarries adversely affecting the safety and health of the people living in the area. On the suggestions of the Committee appointed by the Supreme Court, the Court ordered the closure of certain lime stone quarries[34].

In *Municipal Corp. of Delhi v. Female Workers (Muster Roll) & Anor.*,[35] it was declared that the maternity benefit is applicable to casual workers and daily wage workers also.

Moreover, in plethora of judgments,[36] the Supreme Court have endeavored to enforce equal pay for equal work which is also enshrined under the Indian Constitution. The judicial encroachment in the form of judicial activism in order to fill the gap and lend the ears to the public have greatly helped in the development of the factory legislation. The cat of judiciary as a watchdog of the executive and legislature is truly commendable.

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29 A.I.R. 1987 S.C. 1086.

30 Application of Polluter Pays Principle.

31 A.I.R. 1987 S.C. 965.

32 Application of Precautionary Principle.

33 A.I.R. 1988 S.C. 2187.

34 Application of Precautionary Principle.

35 A.I.R. 2000 S.C. 1274.

36 *Peoples Union for Democratic Rights v. Union of India*, 1982 Lab. IC 1646, 1658; *Randhir Singh v. Union of India*, A.I.R. 1982 S.C. 879; *Sanjit Roy v. State of Rajasthan*, A.I.R. 1988 S.C. 328; *Food Corp. of India v. Shymal K. Chatterjee*, 2000 L.L.R. 1293 (S.C.); *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa & Anor.*, A.I.R. 1987 S.C. 1281; *S. Nagaraj & Ors. v. State of Karnataka & Anor.*, (1993) Supp. (4) S.C.C. 595, 620; *Vijay Kumar & Ors. v. State of Punjab & Ors.*, A.I.R. 1994 S.C. 265; *State of West Bengal & Ors. v. Pantha Chatterjee & Ors.*, A.I.R. 2003 S.C. 3569; *Union of India v. T.R. Das*, A.I.R. 2004 S.C. 852.

4.3. International and Regional Conventions

Most of the factory legislations in India have been inspired either by the international conventions or the regional conventions. Some traces of all these conventions can be easily traced in the Indian legislation. Contribution of such valuable inputs around the globe cannot be ignored.

Article 5(2) the Asbestos Convention, 1986, requires that the '[n]ational laws or regulations shall provide for the necessary measures, including appropriate penalties, to ensure effective enforcement of and compliance with the provisions of this Convention.'

Article 8 obliges '[e]mployers and workers or their representatives [to] co-operate as closely as possible at all levels in the undertaking in the application of the measures prescribed pursuant to this Convention.'

The inspector is empowered to take sufficient sample of any substance used or intended to be used in the factory, which in his opinion is likely to cause bodily injury to, or injury to the health of, workers in the factory.[37] This provision has been inserted to give effect to Art. 12 of the Labour Inspection Convention, 1947. The Maternity Protection Conference in 1919 set out the scope for the Maternity Benefits Act, 1961.

The concern felt by the ILO for providing medical and health care resulted in several ILO conventions and recommendations. As early as in 1927 the ILO adopted Convention No. 25 concerning sickness insurance and Recommendation No. 29 relating to general principles on sickness insurance. Further, in 1944 the Philadelphia Convention adopted Recommendation No. 69 which laid down norms of medical care. Again, in June 1953, the ILO adopted Recommendation No. 97 concerning the protection of health of workers in places of employment. The Recommendation laid down that employment for occupations involving special risk to the health of workers should be on the condition that (i) medical examination is carried out shortly before or after a worker enters employment, and (ii) periodical medical examination is done after he has joined the employment. In 1959, the ILO adopted another recommendation concerning occupational health services. The Recommendation envisages that 'occupational health services' should be established in or near a place of employment for (i) protecting the workers against any health hazard arising from work or conditions in which work is carried on, (ii) contributing towards the workers' physical and mental adjustment, and (iii) contributing to establishment and maintenance of the highest possible degree of physical and mental well-being of workers.

Time and again, the ILO has expressed its concern about increased hazards from radiation processes, as a result of fast changes in industrial technology. Thus, in June 1960, it adopted Recommendation No. 114 and Convention No. 115 concerning the protection of workers against ionizing radiation. The same year witnessed the

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[37] Factories Act, 1948, Sec. 91.

passing of the Radiation Protection Convention, 1960.[38] This was followed by several other important conventions such as Benzene Convention, 1971,[39] Occupational Cancer Convention, 1974,[40] Working Environment (Air Pollution, Noise and Vibration) Convention, 1977,[41] and Occupational Safety and Health (Dock Work) Convention, 1979.[42] The ILO being alive to the problems of enforcement set standards by adopting Occupational Safety and Health Convention, 1981, providing for the enforcement of law and regulation concerning occupational health and requiring adequate and appropriate inspection machinery. Despite the existence of aforesaid ILO conventions and recommendations, the problems of occupational health of workers continues and commissions to cause concern.

The role of the World Health Organization [hereinafter WHO] in order to improve the condition of the work place has also helped immensely in developing the factory legislation in India. In 1973, WHO defined the *Scope and Extent of Occupational Health Programmes* to identify and bring under control at the workplace all chemical, physical, mechanical, biological and psychological agents that are known to be or suspected to be hazardous and to discover and improve work situations that may contribute to the ill health of workers in order to ensure that burden of general illness in different occupational groups is not increased over the community level.[43]

5. Areas to Be Developed under Factory Legislation

The legislative as well as the administrative action is truly commendable in order to satisfy all the need of labour industry. Their contribution in order to uplift the industry and provide clean environment for the workers could be noticed through the recent development and amendment in Indian laws. However, there are still certain areas that need to be developed under factory legislation.

5.1. Social Security of Workers (emphasis on female workers)

Even after 25 years, WHO programmes have benefited only a minuscule of women workers in developing countries. Approximately 2.5 billion persons work worldwide and only 15 percent of the workforce live in what may be called as rich or high income countries. The pattern of employment in different countries is vastly

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38 Article 12.

39 Articles 9 and 10.

40 Article 5.

41 Article 11.

42 Article 36.

43 Aruna Dewan, *Occupational and Environmental Health of Women*, <http://www.un.org/womenwatch/daw/csw/occupational.htm> (Feb. 6, 2016).

different.[44] In India unlike USA there is no statute providing protection to women from reproductive hazards in the work place.[45] One of the primary objective of factory legislations are to enable the women to enjoy equally as men a fuller and richer life, to increase their efficiency, to increase their participation in useful services to ensure their antenatal, prenatal care and infant welfare and to provide equal pay for equal work.[46]

They work under extreme climatic conditions and the nature of their heavy manual work often results in miscarriages or restarted foetal growth. A large number of women work in the tobacco processing industry. Besides the usual chest diseases, it is suspected that tobacco dust is affecting the menstrual cycle of women and lactation in young mothers. The extensive use of pesticides in cotton growing areas has resulted in, amongst other afflictions, stunted growth of farm workers' children.[47] Occupational health problems of women are a major thrust area for the institute and the country. A number of such occupations have been identified and studies have been initiated in collaboration with the Self Employed Women's Association (SEWA). Examples are Agarbatti workers (incense stick makers), salt workers, scrap cleaners, screen printing workers and agricultural labourers exposed to pesticides.[48]

In *Wright v. Olin Corp.*[49], the court characterized foetal protection as a valid business concern. In *Hayes v. Shelby Memorial Hosp.*[50] the court held that firing of an employee because she is pregnant is discriminatory under the Pregnancy Discrimination Act.

Judiciary has played a significant role in protecting the interests of the female. In *B. Shah v. Presiding Officer, Labour Court, Coimbatore & Ors.*[51] the Supreme Court pointed out:

> Performance of the biological role of the childbearing necessarily involves withdrawal of a women from the workforce for some period and she cannot

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44 Dewan, *supra* n. 43.

45 Srivastava, *supra* n. 28, at 38.

46 *See* C.B. Mamoria & Satish Mamoria, Industrial Labour, Social Security and Industrial Peace in India 136 (Kitab Mahal 1984); Renu Jamwal & Deepti Gupta, *Work Participation of Females and Emerging Labour Laws in India*, 2(1) Asia-Pacific Journal of Social Sciences (2010), available at <https://www.researchgate.net/publication/265925959_Work_Participation_of_Females_and_Emerging_Labour_Laws_in_India> (accessed Feb. 6, 2016).

47 Anil Agarwal & Sunita Narain, The State of India's Environment, 1984–85: The Second Citizens Report 247 (Centre for Science and Environment 1985).

48 Dewan, *supra* n. 43.

49 697 F.2d 1172 (1982).

50 726 F.2d 1543 (11th Cir. 1984).

51 (1977) 4 S.C.C. 384.

work for her medical expenses also. In order to enable the woman worker to subsist during this period and to preserve her health, the law makes a provision for maternity benefit so that the women can play both her productive and reproductive roles efficiently.

5.2. Safety Measures

Increasing number of accidents involving workers has drawn our attention towards safety measures in the factories. Accidents not only affect workers loosing their livelihood but also employers in terms of compensation to be paid to the workers. Accidents are a significant cause of dispute between workers and management.[52] The Factories Act, 1948, has laid down certain measures for the safety of workers employed in the factories.

In accordance with the specific provisions for ensuring occupational safety and health for working population in the Constitution of India, several legislations have been framed dealing with the safely, health and welfare of the workers employed in the organized sector.[53]

On the basis of these Directive Principles and international instruments, the Government of India declares its policy, priorities, strategies and purposes through the exercise of its power. The Government is committed to regulate all economic activities within the country with a view to ensuring that every working employee is provided with safe and healthful working conditions. Accordingly, Government of India enacted the statutes relating to occupational safety and health at workplaces namely: the Mines Act, 1952, and rules and regulations framed thereunder; the Factories Act, 1948, and Rules framed thereunder; Dock Workers (Safety, Health and Welfare) Act, 1986, and regulations and rules framed thereunder; the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, and rules framed thereunder; the Dangerous Machines (Regulation) Act, 1983, and rules framed thereunder; the Insecticides Act, 1968, and rules framed thereunder; the shops and establishments acts of State Governments; the Beedi and Cigar Workers' (Conditions of Employment) Act, 1966; the Municipal Solid Waste (Management and Handling) Rules, 2000, notified under the Environment (Protection) Act, 1986; the Manufacture, Storage & Import of Hazardous Chemicals Rules, 1989; the Electricity Act, 2003; *etc.* These are some of the important statutes covering occupational safety and health aspects of workers.[54]

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[52] *Safety Measures in Factories*, <http://download.nos.org/srsec319/319-39.pdf> (accessed Feb. 6, 2016).

[53] *Report of the Working Group on Occupational Safety and Health for the Twelfth Five Year Plan (2012 to 2017)*, Government of India, Ministry of Labour and Employment (August 2011), at <http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wg_occup_safety.pdf> (accessed Feb. 6, 2016) [hereinafter *Report*].

[54] *Id.* ¶ 1.3.

5.3. Health and Hygienic Conditions

'The Ministry of Labour & Employment, Govt. of India & Labour Departments of the States and Union Territories are responsible for the safety & health of the workers.'[55] The modernization and innovation in industries and rapid increase in chemical, hazardous, and polluting industries in recent years has not only resulted in unsafe working conditions but has created problems of occupational health hazards.[56] Work related hazards is changing with the introduction of new chemical substances which pose a threat to community and workers alike.[57] It is, therefore, essential to take effective measures to protect the workers from such risks and dangers.

The following measures needs to be implemented in the work places to enhance occupational health:[58]

- identify and involve workers in assessing workplace risks;
- assess and consider employees' needs when planning and organizing work;
- provide advice, information and training to employees, as well as mechanisms for employee feedback such as a suggestion scheme;
- occupational health surveillance and occupational health audit;
- to develop a system of creating up to date data base on mortality and morbidity due to occupational diseases especially those occurring due to asbestos and silica exposure in these categories of workers and use it for performance monitoring of the same;
- extending support to the state government for effective enforcement of the health provisions stipulated under Sec. 41F of the Factory Act by equipping them with work environment monitoring technologies.

It is essential that promoting occupational health at work places should be resorted and the following are the benefits of such measures:[59]

- injury and illness prevention;
- enhanced occupational health of the workers;
- reduction in occupational illness and diseases;
- legal compliance;
- lower absenteeism;
- improved relationships with customers and suppliers;
- improved productivity;
- reduced staff turnover;
- sensitization of stake holders to adopt low cost dust control appliances to ensure safety and health protection of weaker sections especially migrant workers in dusty trades;

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55 *Report*, *supra* n. 53.

56 Srivastava , *supra* n. 28, at 11.

57 *Id*.

58 *Fifth India-EU Seminar*, *supra* n. 15, at 29.

59 *Id.* at 30.

- technical assistance to state health department to set up diagnostic centres of international standards and evolve a system of periodic health surveillance of such workers on a regular basis;
- generate adequate numbers of Associate Fellow of Industrial Health [hereinafter AFIH] qualified doctors through increasing the number of accredited medical colleges to start AFIH courses to maintain the supply chain of qualified medical officers competent to tackle the problems;
- the deliverables like standards, codes of practices, guidelines, posters, and films on key occupational health issues are generated and utilized as tools for raising awareness levels of key stake holders for promoting safety and health standards of the vulnerable groups of workers.

5.4. Proper Infrastructure

The need for further development in factory legislation in India is an open one, no doubt exists either in the minds of the employees of labour or in the minds of the informed public of the importance of improving the general conditions under which factory lives.[60] It is to be noted that the rooms on the ground floor are often pitch dark and possess very little in the way of windows. The question of housing for workers are still acute which could be remedied through better transport services

5.5. Remedies

The National Commission on Labour has laid considerable emphasis on continuous study of new problems with a view to suggesting remedies to suit the changing environment and to avoid health hazards.[61] The institutions of governance at grass root can monitor the policies, programmes and laws to ensure protection of labour interests and rights. Gram Panchayat can play a responsible role in identification of the projects in the Gram Panchayat areas and allocate employment opportunities to the needy.

The rehabilitation of a worker disabled should be one the most beneficial objectives of the Workmen's Compensation Act, 1923, or the Employees' State Insurance Act, 1948. If the disabled worker can be rehabilitated and returned to useful productive capacity, the cost saving in future benefits can move. This is also desirable from social view point. However, this benefit has not so far been provided under the labour legislation particularly in the Workmen's Compensation Act, 1923, or the Employees' State Insurance Act, 1948. In the absence of any legislative nor, the Supreme Court played a creative role to protect the interest of workers for premature incapacitation to do the required work due to occupational disability. Thus in *Anand Bihari v. Rajasthan State Road Transport Corp., Jaipur*[62] the Court, *inter alia*, was called

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60 Kydd, *supra* n. 3.

61 Srivastava, *supra* n. 28, at 11.

62 (1991) Lab. I.C. 494.

upon to decide whether the order of termination of service of drivers (over 40 years of age) for developing weak or sub-normal eyesight or losing required vision on account of their occupation as drivers of the corporation was proper, equitable and just. If not what should be done?

Some of the direction that can be given to the legislative and administrative actions are as follows.

5.5.1. Periodical Review of the Inadequacy of Existing Legislation

One of the main reason for dissatisfaction with legislation is that it accommodates multiple proceedings and different statutes for different industries. It is, therefore, a need to periodically review the growth of industries in the covered area and the inadequacy of existing facilities as suggested by the Planning Commission report and the Law Commission report.

5.5.2. Preventive Measure

There is a need to shift the emphasis to prevention of occupational diseases. The most important and effective means of prevention of diseases is periodical medical check up. All the workers covered over the Employees' State Insurance Act, 1948, and the Workmen's Compensation Act, 1923, on their entry into regular services should be required to undergo a medical check up and thereafter at least once in three years. This should be done particularly in those cases where workers are liable to contract occupational diseases.

5.5.3. Effective Steps for Identification of Occupational Diseases

There is a need to take more effective steps for proper identification of occupational diseases in each industry.

5.5.4. Revision of the List of Occupational Diseases

The current list of occupation diseases given in the Third Schedule of the Employees' State Insurance Act, 1948, and the Factories Act, 1948, and the Workmen's Compensation Act, 1923, should as far as possible be uniform and the list of diseases should be reviewed and revised in the light of the list of occupational diseases laid down in the current ILO Convention on the subject taking into account the nature of industries and occupations prevalent in the country. The government / corporation has already got power to add new diseases to the schedule.

6. Conclusion

Unless there are socially conscious policies in the country, the policies won't make that much of a difference. It is still true that things are not very good for labour. Labour rights need to be actively respected rather than simply acknowledged and

we must admit that more than the passage of laws and publicizing the same to stimulate the kind of debate in such a way that leads to attitudinal change.

There is need to create community monitoring system through their effective participation in the Gram Sabha and other local bodies. Strengthening community participation in the whole process by way of conducting regular social audits of all the programmes is a prerequisite.

There are comprehensive safety and health statutes for regulating safety and health of persons at work exists but the approach in statutes is to lay down specific and detailed requirements to prevent risk of injuries in specific operations or circumstances. This lacks uniformity and a well-coordinated approach to safety and health in all sectors of the economy. There is a strong need for a general (umbrella) legislation covering safety and health aspects of workers employed in all sectors of economy irrespective of the number of employees employed in those units.[63]

The gravity of situation may be gauged from the observation made in 1992 by Justice Ramaswamy that 'in three minutes somewhere in the world one worker dies and in every second that passes at least three workers are injured,' and in India 'on average every day 1,100 workers are injured and three are killed.'[64]

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Information about the author

Manjeet Kumar Sahu (Ranchi, India) – LL.M. (Constitutional and Administrative Law) Student at National University of Study and Research in Law (Ranchi, India) (Ward No. 11, Shanti Nagar, Palkot Road, Gumla, 835207, Jharkhand, India; e-mail: manjeetsahu2009@gmail.com).

COMMENTS

LEGAL AID IN INDIA: RETUNING PHILOSOPHICAL CHORDS

SUSHANT CHANDRA,

Jindal Global Law School (Sonipat, India),

NITYASH SOLANKI,

Jindal Global Law School (Sonipat, India)

Legal aid in India has evolved over the last few decades since 42nd Amendment to the Indian Constitution. This paper attempts to provide philosophical underpinnings suggesting how legal aid model has evolved over the years and excogitate a newer trajectory for its future evolution. It delves into weighing Kant's imperfect duty justifying a charity based regime and marks a transition to utilitarian model suggesting requirement of institutional need to address issues of basic liberty of 'access to justice.' It also spells out Rawls' principles of justice and attempts to explore their applicability in the Indian context, to chart out a road map for future. While contrasting different models on legal aids, it makes a finding that, India doesn't accord priority to liberty of access to justice. The Indian Supreme Court has emerged as a bastion of liberty but the finer details of the enactment has been messed up by the Indian lawmakers. The lower compensation to lawyers and lack of alternative incentives in attracting established litigators, testifies this. There is a convergence in Kantian duty of benevolence and Rawls' liberty principle but in the world of moral relativism, a fair compensation must precede before imposing any obligation on lawyers to take up pro bono matters, as doing so, is likely to compromise their 'true needs.'

Keywords: legal aid; Immanuel Kant; John Rawls; Indian Supreme Court; principle of fair equality of opportunity; liberty of access to justice.

Recommended citation: Sushant Chandra & Nityash Solanki, *Legal Aid in India: Retuning Philosophical Chords*, 2(2) BRICS LJ (2015).

> Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in a benefit by its impartiality and fairness.
>
> *Justice Brennan*

1. Introduction

Until 1945 in United Kingdom, legal aid was seen as part of charity. United States saw its first independent institution dealing with legal aid in 1964. Article 39A of the Indian Constitution provides free legal aid as a directive principle of state policy but not as part of individual's liberty. This was clearly in view of conceiving access to justice as a week liberty and avoiding fiscal burden on the newly formed state. It was only through the untiring efforts of the Indian Supreme Court that free legal aid could be brought within the larger sweep of liberty clause under Art. 21 of the Constitution.[1]

The journey of legal aid philosophically could be viewed as a trajectory manifesting a movement from Kant's deontology to Rawlsian welfare principles through the phase of utilitarianism. Kant's imperfect duty of beneficence creates a moral obligation to help others. This may be viewed in a narrow or a broader sense. A narrow view might offer greater latitude to a lawyer in extending help to a client and not getting into queries like 'when' to help or 'how many' to help. However, a broader view necessitates understanding 'true need' of the client and extending help until 'true need' of the client conflicts with that of a lawyer. Given the systemic need of the people to have 'access to justice' characterized with absence of any legal obligation on lawyers to provide the same, led to a dent in fair equality of opportunity in 'access to justice.' This led states to resort to utilitarian model which espoused the view that the state's duty to provide legal assistance exists to the extent that legal aid maximizes the general welfare. This institutional structure led to creation of legal obligation on lawyers as opposed to moral obligation, but failed to account for individual liberty of 'access to justice.' This article takes a view that liberty of 'access to justice' must not be constrained by utilitarian principles and should be guaranteed under principles of equality and difference as propounded by John Rawls.

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[1] *See Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*, A.I.R. 1979 S.C. 1369; *see also Khatri & Ors. v. State of Bihar & Ors.*, (1981) 1 S.C.C. 627.

The National Legal Services Authorities Act, 1987, creates a concurrent duty on existing judicial machinery to dispose of legal aid matters. This burdens the existing machinery without creating any additional incentive for expeditious disposal. It is manifestly evident that the state doesn't accord priority right to liberty of 'access to justice' which is clearly reflected in the micro- as well as macro-allocation of resources. The statute also flops in attracting talented lawyers to take up briefs of people from vulnerable section, depriving them of fair equality of opportunity. A middle path has to be forged, somewhere reconciling a fair compensation with talented lawyers taking up such briefs with a fair equality of opportunity to such people. What we argue here is, not to hire the best talent for representing such people, but to hire reasonably talented lawyers so that requirement of fair equality of opportunity is fulfilled in spirit.

2. Immanuel Kant: Imperfect Duty of Beneficence and Its Impact on Legal Aid in India

Kant's distinction between perfect and imperfect duty might shed some light on the prospective discourse related to legal aid in India. The ethical code creates moral obligation of the highest order to provide legal aid. We say moral obligation because no sanction is riveted to such an obligation. This could be loosely understood in terms of how largely Immanuel Kant's imperfect duty is understood across. We wish to argue that this general understanding of Kant's imperfect duty is a flawed assessment of moral obligation which a member of a profession owes to another member of the community. We would also argue that the 'latitude' associated with Kant's imperfect duty must be guided by terse norms which must categorically provide for a clear response in a given situation.

Kant's imperfect duty provides:

> The duty of beneficence is a wide imperfect duty. Agents are required to adopt the maxim of beneficence, but they have considerable latitude in choosing the individual actions that manifest their commitment to the maxim.

The latitude offered by imperfect duty is enormous. This is quite poignantly brought out by Brad Hooker and David Cummiskey. Hooker writes:

> Underneath the surface plausibility of the imperfect duties view, however, lurk serious problems! Suppose I am faced with two strangers who each need help, but one of whom has greater needs and can be helped a lot more than the other. According to the imperfect duties view, I can simply choose which to help. But that answer seems wrong. Other things being equal, I should

help the needier one. The imperfect duties view leaves too much room here for arbitrary choice.

Or suppose I saved someone's life this morning and now I can save someone else's life at no cost to myself. Is it really morally optional whether I go on to save the second person? Surely not![2]

It is this latitude which fails to account for truer understanding of Kant's imperfect duty. The account given by Barbara Herman which narrows down the latitude and offers a plausible account on imperfect duty. She writes:

> The duty of mutual aid is thus based in the duty of respect for rational agency. Failing to meet someone's true needs in circumstances where I could do so without sacrificing any true needs of my own constitutes a rejection of her standing as a member of the moral community. As such, meeting the true needs of others when I can is strictly required of me.

Having said this she also doesn't want to obliterate the distinction between virtue of kindness and duty of mutual aid. She suggests that both have a different moral structure:

> So if someone needs help changing a tire, a helpful person, in the absence of pressing demands of his own, will help. There is no moral requirement that he do so; it is not impermissible not to help. If, however, the person who needs this help is in great distress (someone on the way to the hospital, an elderly person who cannot tolerate exposure to bad weather), it is no longer an act of kindness but a duty to help. When if help is not given, a life will be in jeopardy or gravely diminished, then changing a tire is addressing someone's true need. It is not the action (its strenuousness, and so on) but the nature of the need to be met that determines whether it is an occasion where helping is required of us. I am not saying that kindness and benevolence are without moral structure or content (they are not 'mere inclinations'). The claim is rather that they have a different moral structure, one that parallels the difference between interests and true needs.[3]

The duty of mutual aid is grounded in the necessity of seeing ourselves as members of a community of dependent beings. Until 1945 in UK, 1964 in US and

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[2] Brad Hooker, Ideal Code, Real World: A Rule-Consequentialist Theory of Morality 161 (Oxford University Press 2000); *see also* David Cummiskey, Kantian Consequentialism 105–22 (Oxford University Press 1996).

[3] Barbara Herman, *Mutual Aid and Respect for Persons*, 94 Ethics 577 (1984).

1976 in India, it was Kant's imperfect duty of beneficence that guided the conduct of lawyers. However, with growing needs of people from vulnerable class to avail easy access to justice, led the policy makers to scratch existing mechanisms on legal aid with a view to adopting a new model which creates valid legal obligations on lawyers and not merely moral obligations. This new movement was marked with the spirit of utilitarianism. A conspicuous illustration of the same is Art. 39A of the Indian Constitution which was adopted as a directive principle and not as an extension of liberty.

2.1. Nature of 'Justice' and an Imperfect Duty of Mutual Aid

Justice as a foundational pillar of any society has never been contested. The opening words to this essay by Justice Brennan solemnly reaffirm this view. In such a situation access to justice assumes significant importance. Rawls admits it to be a primary social good.[4] Now to what extent Kant's imperfect duty of beneficence be extended to provisions of free legal aid is what we wish to explore next.

The obligation of the State to offer free legal aid is beyond the scope of this section. In this section it is intended to offer some guidance on the attitude of a lawyer towards vulnerable clients in need of legal aid. It is amply clear that the latitude in Kant's imperfect duty might be interpreted to the prejudice of vulnerable class as pointed out by Hooker and Cummiskey. Let's take few situations to sense its limitations.

1. A who is a recent graduate from a premier law school starts practicing law. A is approached by a B – a client who qualifies for a free legal aid but wants to bet on A rather than going with State machinery. A refuses to take up B's case as he was advised by his senior to spend his spare time in reading recent cases decided by the court.

2. Let's assume, in situation illustrated above, A takes up B's matter and gets it decided in B's favor. Many others from vulnerable section approach A for fighting their cases *pro bono* and A refuses them saying that he has already decided a case *pro bono* and he is done for the month.

3. In our third situation, let's assume A has become a big lawyer and on record he hasn't lost a single *pro bono* matter. Should he devote his time for *pro bono* matters only?

The above three situations get to the heart of whole debate. As seen above, a narrow understanding of Kant's imperfect duty would suggest that A must do *pro bono* matters but 'which one,' 'how many' and 'when' are absolutely at the discretion of A. Such a reading might justify A not having any obligation under any of the above three situations. Now, if we offer the 'true need' test as proposed by Barbara Herman, we might get altered responses. In situation 1 the reason for not taking up B's matter was reading new case laws by A. In such a situation B's 'true needs' clearly trump A's

[4] John Rawls, A Theory of Justice 62 (Harvard University Press 1971).

desire to read up cases. In situation 2 the reason for not taking up matters of other people from vulnerable section was A's belief that 'he did his bit.' Now clearly a belief can't survive the test of 'true needs.' In such a situation, A's decision must be based on his true needs and not his beliefs. There should be a perpetual quest on the part of a lawyer to satisfy her moral duty towards the community.

It is situation 3 which is slightly tricky. Now, A's taking up *pro bono* matters would mean compromising on his personal matters. Whether personal matters constitute true needs? How to reconcile personal matters with *pro bono* matters without compromising the welfare of A? Should A take up any *pro bono* matter at all if there seem to be a conflict of interest? These are few question which might be responded either ways. As part of this paper, it is argued that a more holistic interpretation of Kant's imperfect duty must create a moral obligation on the lawyers to take up matters *pro bono* unless it clearly assails her own 'true needs.'

In situations 1 and 2 provision for reasonable compensation may be created for the services rendered by the lawyers. However, from practical perspective, it would be difficult to impose obligation on any lawyer simply because she is new or doesn't have conflict of interest. Thus a proper scheme may be envisaged wherein expression of interest may be solicited from lawyers who may be able to spare time for fighting cases of people from vulnerable section. Herein we move from imperfect duty to a perfect one wherein obligation is specified and legally enforceable. This institutional scheme may be traced through under the utilitarian model. This is premised on the view that the state's duty to provide legal assistance exists to the extent that legal aid maximizes the general welfare.[5] Marshall further writes[6]:

> Consideration of social utility govern the amount and kind of services provided and the choice of persons to receive it. Under this theory, the provision of legal assistance is an instrumental good, and its significance stems from the results achieved through the services provided.

In situation 3 since there exists an ever increasing chances of conflict in true interest of a lawyer and the client. Such a situation must admit a rational choice on behalf of such a lawyer and she may be allowed to charge her regular fee from the State for compromising her true interest in taking up briefs of client from vulnerable section. However, this may be easily countered, as this approach is likely to put excessive burden on few exceptionally good lawyers and burden on the exchequer. In the hindsight, this model is likely to compromise the public value of fair equality

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[5] Marshall J. Berger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. Rev. 281, 287 (1982), available at <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1588&context=scholar> (accessed Feb. 6, 2016).

[6] *Id.*

of opportunity. But an alternative model must admit of a situation envisaging a handsome compensation to all the lawyers who take up legal aid matters and must be constrained from appearing in private matters, due to conflict of interest.

The models of legal aid in United States, United Kingdom and India reflect the arrangements seen in situations 1, 2 and 3.

Given that 'access to justice' is primary social good, a differential system of its enforcement sounds morally wrong. A utilitarian model fails as notions of liberty ought to be protected beyond welfare notions.

3. John Rawls: Envisaging His Response on Legal Aid[7]

Kantian deontology has often been found hard pressed in being subsumed cogently within institutional framework, given its moral rigor. The plausible drawback while creating an institutional framework for imperfect duty of benevolence would be determining if reasonable pay would enable lawyers in defending clients from vulnerable section or a higher fee would be required, creating a plum incentive for them. This is often constrained by theory of utilitarianism, asserting minimal emphasis on notions of individual liberty of 'access to justice.' In this section we wish to argue that 'access to justice' satisfies both Rawlsian principles: equality as well as difference. Rawls' equality principle provides:

> Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

'Access to justice' is a primary social good[8] and any institutional framework must not only reflect this but also safeguard this in strongest possible terms. This must justify an aggressive effort on the part of the state in safeguarding liberty of 'access to justice' and further justifying a higher fee to the lawyers in taking up briefs of people from vulnerable section. Though this paper wouldn't touch upon issues related to micro- and macro-allocation of resources but it must be emphasized that 'true needs' of people must be kept in mind and 'access to justice' must be seen as an inalienable part of an individual's liberty.

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[7] Rawls, *supra* n. 4, at 239. However, Rawls hasn't written in explicit terms on legal aid but he was strongly in favor of having a counsel in a well ordered legal system.

[8] *Id*. at 62: '[P]rimary goods [are] things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth . . . These are primary social goods.'

Rawls' difference principle which affirmatively asserts on allocation of social and economic inequalities with a view to benefit the least advantaged person would justify payment of higher fees to those lawyers who take up briefs of those belonging to vulnerable section.

The aforesaid principles could be reaffirmed when looked through from the original position behind the veil of ignorance. Without knowing where one might land up once veil is lifted, one would certainly want a fairer institutional mechanism which could effectively safeguard an individual's liberty and benefit the least advantaged person offering fair equality of opportunity to all.

4. Model of Legal Aid in United States, United Kingdom and India: A Comparative Study

Traditionally there are two views on providing legal aid. Traditional view provides that a litigant has the freedom to choose litigator of her choice and if a litigant is unable to pay for her services then the State would subsidize such services by paying the litigator. This approach is popularly called as 'legal aid' or 'judicare' and has been followed in UK since 1949.[9] The underlying philosophy of this approach rests on the stated belief that it provides the best means of allowing equal access for all to the same service, without restricting in any way the independence of the lawyer.[10] Though this method does satisfy Rawlsian difference principle ensuring fair equality of opportunity but failed to account for micro- and macro-allocation of resources. The chord needed to be touched somewhere in between reconciling the fiscal burden on the state along with ensuring fair equality of opportunity to the people.

This led United States to explore alternative arrangement which involved employing lawyers on salaries and making them work with paralegals in offices situated in the poor community.[11] This model, experimented through neighborhood law offices [hereinafter NLO's], formed the heart of legal aid movement in United States since 1965.[12] Following this, in a more limited capacity, neighborhood law centre (equivalent to NLO's) started functioning in UK since 1970.[13]

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[9] The Legal Aid and Advice Act 1949 contained most of the recommendations offered by Rushcliffe Committee. It is interesting to note that the Act also provided for the setting up of offices employing full time salaried legal aid solicitors, which was never activated.

[10] Jeremy Cooper, *The Delivery Systems Study: A Policy Report to the Congress and the President of the United States. The Legal Services Corporation June 1980*, 44 The Modern Law Review 308 (1981), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1981.tb01631.x/epdf> (accessed Feb. 6, 2016). doi:10.1111/j.1468-2230.1981.tb01631.x

[11] *Id.*

[12] Economic Opportunities Act of 1964, 42 U.S.C. §§ 2701–2995.

[13] The first law centre began operating in North Kensington in 1970. Now their numbers have swollen.

Indian model largely seeks its inspiration from the United States. The lawyers are empaneled and paid retainership fees besides an additional fee on a case basis.[14] This system hasn't worked very well for India. Reason is obvious: lower remuneration has failed to generate any interest among the established private practitioners to proactively receive briefs of poor clients. This is largely our situation 3 while failure in not realizing situations 1 and 2 is largely due to lack of recognition by the bar for taking up *pro bono* work, lack of adequate incentives and failure in generating a *pro bono* culture in the country amongst others.[15] This moral relativism reflects a classical drawback of Kantian deontology. Thus, those who get empaneled as lawyers for free legal aid are mostly briefless counsels who take up the position to make adequate connections in the administration and judiciary with a view to improve their practice.[16]

5. Indian Model of Legal Aid: Legal Services Authorities Act, 1987, and Its Contours

The genesis of free legal aid in India could be traced back to 42nd Constitutional Amendment Act, 1976, which introduced Art. 39A[17] to the Indian Constitution. This strived for dispensing away 'economic or other disabilities' from availing what is

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[14] Regulation 17 of the National Legal Service Authority (Legal Aid Clinics) Regulations, 2011, provides: 'Honorarium for the lawyers and para-legal volunteers rendering services in the legal aid clinics. – (1) Subject to the financial resources available, the State Legal Services Authority in consultation with the National Legal Services Authority may fix the honorarium of lawyers and paralegal volunteers engaged in the legal aid clinics: Provided that such honorarium shall not be less than Rs. 500/- per day for lawyers and Rs. 250/- per day for the para-legal volunteers.'

Regulation 8(9) of the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, provides: 'The honorarium payable to Retainer lawyer shall be, –

(a) Rs.10,000 per month in the case of Supreme Court Legal Services Committee;

(b) Rs.7,500 per month in the case of High Court Legal Services Committee;

(c) Rs.5,000 per month in the case of District Legal Services Authority;

(d) Rs.3,000 per month in the case of the Taluk Legal Services Committee:

Provided that the honorarium specified in this sub-regulation is in addition to the honorarium or fee payable by the Legal Services Institution for each case entrusted to the Retainer lawyer.'

[15] Needs Assessment Study of the Legal Services Authorities in the States of Madhya Pradesh, Jharkhand, Bihar, Uttar Pradesh, Odisha, Rajasthan and Chhattisgarh (Department of Justice, Government of India and UNDP India 2012), available at <http://www.in.undp.org/content/dam/india/docs/DG/needs-assessment-study-of-selected-legal-services-authorities.pdf> (accessed Feb. 6, 2016).

[16] In an interview with the District Judge of Allahabad, U.P. which was later reiterated by the District Judge of Samastipur, Bihar, India.

[17] 'Equal justice and free legal aid. – The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.'

justly due to one under the wider sweeps of justice. This provision was effectively put to function in *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*[18] where Supreme Court chastised the State for treating under trials for minor offences as mere *ticket numbers* on account of being poor and ordered the state machinery to bring life to Art. 39A by compulsorily providing lawyers to such people. By stretching the principle in *Maneka Gandhi v. Union of India*[19], Justice Bhagwati observed:

> This Article also emphasizes that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.

Almost couple of years later, in *Khatri & Ors. v. State of Bihar & Ors.*,[20] Supreme Court in absolute clear terms rejected the utilitarian argument proposed by the State of Bihar, and in spirit, adopted the Rawlsian principle of equality. In this case, while rejecting an argument espousing financial constrain as a reason in failing to provide free legal aid to the accused, Justice Bhagwati observed:

> We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary for this purpose, has to be done by the State.

The Indian Supreme Court has, in umpteen judgments, unequivocally asserted on free legal aid. The assiduous efforts of the Indian Supreme Court led the Parliament to enact Legal Services Authorities Act in the year 1987.

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18 *Supra* n. 1.

19 A.I.R. 1978 S.C. 597.

20 *Supra* n. 1.

5.1. Statutory Scheme on Legal Aid in India

Present model of legal aid in India is set out in Legal Services Authorities Act, 1987.[21] Unlike United States or United Kingdom, legal aid in India is linked with the various judicial offices across the country operating at different levels. There is one National Legal Services Authority[22] at the national level, headed by the Chief Justice of India as its Patron-in-Chief[23] and a Judge of the Supreme Court, immediately next in seniority to the Chief Justice of India as its Executive Chairperson.[24] This model is replicated in all states and bodies so constituted are referred to as State Legal Services Authority.[25]

Devising policies,[26] framing effective and economic schemes for the deprived section,[27] conducting legal aid camps for generating awareness amongst the deprived sections of the society about their rights and various governmental schemes to which they are entitled to,[28] encouraging settlement of disputes through Lok Adalats,[29] promoting out of the court settlements – through negotiations, conciliations and arbitrations,[30] providing grant in aid to various social institutions which are working on specific schemes envisaged under the provisions of this statute,[31] monitoring and evaluating the functioning of State Legal Service Authorities, District Legal Service Authorities, Taluka Legal Service Authorities and other social institutions working under the mandate of this legislation[32] are the functions which National Legal Service Authority is entrusted with.

Offering legal aid to economically deprived section,[33] expediting the disposal of cases,[34] devising strategic and preventive legal aid programmes[35] are some of the functions State Legal Services Authorities are invested with.

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21 *Supra* n. 1.

22 Legal Services Authorities Act, 1987, Sec. 3.

23 *Id.* Sec. 3(2)(a).

24 *Id.* Sec. 3(2)(b).

25 *Id.* Sec. 6.

26 *Id.* Sec. 4(a).

27 *Id.* Sec. 4(b).

28 *Id.* Secs. 4(e), (i).

29 *Id.* Sec. 4(e).

30 *Id.* Sec. 4(f).

31 *Id.* Sec. 4(j).

32 *Id.* Secs. 4(i), (n).

33 *Id.* Sec. 7(2)(a).

34 *Id.* Sec. 7 (2)(b).

35 *Id.* Sec. 7(2)(c).

Similarly, functions of the District Legal Services Authorities and Taluka Legal Services Authorities includes coordinating the activities of legal services within their jurisdiction,[36] organizing Lok Adalats[37] and perform such other functions as the State Legal Services Authority.[38]

5.2. Legal Services Authorities Act, 1987: Spelling out Procedures

Every person who is qualified[39] under the statute may avail the benefits of free legal aid under the provisions of the statute, provided the concerned legal authority is satisfied that such a person has a *prima facie* case to defend or prosecute.[40] Procedurally, a person is only required to produce an affidavit stating under what category he falls so that benefit should be conferred upon him.[41] However, the concerned authority may disbelieve such affidavit, if it has reasons to believe so.[42] Thus, a person who is indigent and qualifies under the regulation framed by the State for legal aid, may avail legal aid by providing an affidavit stating his status and expressing his desire to avail such aid. Once the legal service authority decides to support claim of any such person, he would not incur any expense towards the litigation.

Further, 'legal service' includes the rendering of any service in the conduct of any case or other legal proceedings before any court or other authority or tribunal and

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[36] Legal Services Authorities Act, 1987, Secs. 10(2)(a), 11B(a).

[37] *Id*. Secs. 10(2)(b), 11B(b).

[38] *Id*. Secs. 10(2)(c), 11B(c).

[39] Section 12 'Criteria for Giving Legal Service:' 'Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is –

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;

(c) a woman or a child;

(d) a mentally ill or otherwise disabled person;

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of § 2 of the Immoral Traffic (Prevention) Act, 1954; or in a juvenile home within the meaning of clause (j) of § 2 of the Juvenile Justice Act, 1986; or in a psychiatric nursing home within the meaning of clause (g) of § 2 of the Mental Health Act, 1987; or

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.'

[40] Legal Services Authorities Act, 1987, Sec. 13(1).

[41] *Id*. Sec. 13(2).

[42] *Id.*

offering of advice on any legal matter.[43] The word 'court' where such a person may avail such services has been given an expansive connotation and for purposes of this Act, 'court' is a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions.[44]

The National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, sets out the varied processes for availing legal aid. All Legal Services Authorities shall have a front office which should be manned by one panel lawyer and at least one paralegal volunteer.[45] An application by an aggrieved party should be generally made in Form-I.[46] However, oral applications[47] or applications through e-mails are also accepted.[48] Legal Services Authority shall evaluate application of the applicant and forward it to the Committee constituted under the regulation for said purposes.[49] He may also provide other kinds of legal services from such office.[50] Such Committee shall screen the application and then take a decision on whether such applicant be offered legal aid or not.[51] The Committee is under a statutory obligation to come out with a decision within eight weeks from the date of receipt of application.[52] If the Committee decides not to provide free legal aid to the applicant then the Committee may provide the applicant with a list of lawyers or other organizations which provide free legal aid either voluntarily or under some scheme.[53] If any person is aggrieved by such order or decision of the Committee then he may prefer an appeal before the Chairman of Legal Services Institution and his decision shall be final.[54]

For the empanelment of lawyers, applications shall be called in from members of the bar.[55] Only those lawyers who have had an experience of minimum three years of practice are eligible to apply.[56] While appointing panel lawyers, competence,

43 Legal Services Authorities Act, 1987, Sec. 2(1)(c).

44 *Id*. Sec. 2(1)(a).

45 Regulation 4.

46 Regulation 3(1).

47 Regulation 3(5).

48 Regulation 3(7).

49 Regulation 7.

50 Regulations 4(2), (3) ('The panel lawyer in the front office shall render services like drafting notices, sending replies to lawyers' notices and drafting applications, petitions, *etc.*').

51 Regulation 7.

52 Regulation 7(4).

53 Regulation 7(5).

54 Regulation 7(7).

55 Regulation 8(1).

56 Regulation 8(3).

integrity, suitability and experience of such lawyers shall be taken into account.[57] After assessing a lawyer on the criterions laid above, selection of the panel lawyers shall be made by the Executive Chairman or Chairman of the Legal Services Institution in consultation with the Attorney General (for the Supreme Court), Advocate General (for the High Court), District Attorney or Government Pleader (for the District and Taluk level) and respective President of the Bar Associations as the case may be.[58] The Executive Chairman or Chairman of the Legal Services Institution may maintain separate panels for dealing with different types of cases like, Civil, Criminal, Constitutional Law, Environmental Law, Labour Laws, Matrimonial disputes *etc.*[59] and the lawyers should provide their areas of preference while making an application before the Committee at the initial stage only.[60]

5.3. Critique of the Indian Model

In this part we wish to argue that though Indian Model has transposed from a charity based model to a utilitarian model on legal aid with Rawlsian remnants, still falls short of crease in realizing Rawlsian principles. It is also argued that liberty of 'access to justice' is offered an inferior position under the wide array of liberties entrenched under the Indian Constitution. The empathetic expressions of the Indian Supreme Court haven't found adequate space under the statutory scheme conceived by the Parliament. The Indian story fails to narrate effective discourses on equality principle as well as difference principle. This section delves into shedding light on highlighting such lackadaisical attitude.

Firstly, Indian model fails to fine tune an effective balance between values of efficiency and quality disposal. It appears 'justice' has been forsaken from 'access to justice.' This could be illustrated through the functioning of the Lok Adalats.[61] They have emerged as case disposal mechanism, entirely inconsistent with the purpose for which they were created – which was speedy delivery of justice.[62] In its pursuit of speedy disposal of cases some serious compromise in quality disposal and unsolicited matters being dealt by Lok Adalats, is not unknown.[63]

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57 Regulation 8(4).

58 Regulation 8(2).

59 Regulation 8(5).

60 Regulation 8(1).

61 Institutions created under the Legal Services Authorities Act, 1987, for speedy disposal of compoundable cases.

62 *Report on the Study of National Legal Services Authorities Act in the State of Gujarat (November 2008)* 27, <ftp://ftp.solutionexchange-un.net.in/public/gen/cr/res13011201.pdf> (accessed Feb. 6, 2016) [hereinafter *Report*].

63 *Id.*: 'In the Lok Adalats pre litigation cases are taken which as per Gujarat rules are out of purview. In Permanent Lok Adalats, pre litigation cases of public utility are taken up. Data shows cases of criminal, civil and MACP cases being taken up. Either there is confusion in providing the data or there has been mixing up of cases taken up in regular lok adalats and permanent lok adalats.'

Secondly, to realize Rawls' difference principle a more equitable scheme of incentives for lawyers needs to be implemented. Individual liberty of 'access to justice' is likely to be significantly compromised in absence of adequate incentives for lawyers to take up briefs of people from vulnerable section.

Thirdly, paralegals are placed at the heart of legal aid scheme under the Legal Services Authorities Act, 1987. 'Paralegal volunteer' means a paralegal volunteer trained as such by a Legal Services Institution.[64, 65] The irony is, the eligibility criterions, responsibilities, training and remuneration of paralegals are either not provided in the Act / Regulations or provided extremely poorly. Indian Institute of Paralegal Studies attempted to define the functions of paralegals which go on to show their greater significance in the entire functioning of legal aid in the country.[66]

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[64] Regulation 2(f) of the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010.

[65] *Report*, *supra* n. 62, at 4, defines paralegal as:

'A Paralegal bridges the gap between community, lawyers and judicial system. She / he helps in dissemination of legal information; follow up cases, etc. She / he can help in pre-litigative work, which is very crucial and if not done well, can affect the entire case adversely.

Most of the times, a common person finds it very difficult to understand the technical legal procedure. Not knowing the procedure, not having information of law and tear of judiciary leads to people suffering in justice and not fighting for their rights. A paralegal has the knowledge of law and the procedures and attempts to simplify them.

Unlike many people, who think going to the court will got them justice, a paralegal knows what the court can do and what they can't. Therefore she / he approaches alternate forums like national human rights commission etc. She / he understands the strength and limitation of the legal system. She / he knows how to strategically use the system for maximum benefit.

People find it difficult to articulate their problem from a legal perspective. Law does not deal with injustices, it deals with illegalities. The courts intervene only if there is a violation of a law. Merely that there has been an injustice done to me will not move the legal machinery. A paralegal adds a legal perspective to social issues. She / he has the ability to convert a social problem into a legal case.

Most people find it very frustrating to deal with lawyer. While lawyer is interested only in a legal case the common person except someone to help them through their problem. A paralegal is the link between common persons and the community and the lawyer. He identifies with the community in just-unjust framework and juxtaposes it to lawyer in the legal-illegal framework.'

[66] *Report*, *supra* n. 62, at 4–5. Functions as set out in this report are provided hereinafter:

'**1. Delivery of services (pre-litigative work and follow up)**

A paralegal is trained into doing the pre-litigative work like support in investigation and fact finding, out of court settlement with a right's perspective, filling of F.I.R. etc. Also, once a court order has been obtained she or he is involved in ensuring proper implementation of the order and takes necessary steps for the same.

2. Education and awareness

A paralegal is involved in bringing about legal awareness in the masses through means like community, education programs. She or he educates people about what their rights are and motivates them to fight for their rights.

3. Updating community dispute resolution system

A paralegal place a role in revamping the existing dispute resolution mechanism and adds a legal and rights perspective to it.

Fourthly, any right is obsolete without knowing what 'it' is. Conducting legal aid camps is a cardinal function entrusted on Legal Institutions under the Legal Services Authority Act, 1987. However, studies highlight parochial ways in which these camps are conducted.[67] No record keeping, topics being aberrations, having no connect with the purpose of conducting such camps, no list of beneficiaries and slapdash frequency of conducting these camps, characterize their functioning across different places.[68] If the camps are conducted on effete topics which have no bearing on in dispensing legal aid to vulnerable class, the entire purpose of conducting such camps would be impotency at play.

6. Conclusion

The Indian regulations on ethics display Kant's duty of beneficence, however, it in clear terms argues for a narrow interpretation than a broader one. Kantian duty of beneficence premised on 'true needs' converge with Rawls' liberty principle but due to moral relativism it may not be possible to evoke an institutional duty on part of lawyers without addressing their 'true needs.' These notions of 'true needs' are not only fiscal but also cultural. India has a long way to trod in forging this convergence and striking that balance between fair equality of opportunity and true needs of the lawyers.

4. Adding social perspective to court room lawyering

A paralegal adds a social perspective to standard court room lawyering. Usually typical lawyer gets caught in the technicalities of law and does not pay attention to the social angle of the case. Paralegal plays an important role in sensitizing the lawyer to social issues.

5. Research and data collection

Paralegal also does research and data collection on sociolegal issues. He is constantly studying the impact laws have on lives of people, interrelationship between the judicial system and people, where laws need change, water the emerging areas where a fresh laws is needed and what are the pitfalls and drawbacks of implementation of a particular law.

6. Negotiation, counselling and conciliation

A paralegal also is involved in counselling with the rights perspective or issue based perspective and out of court settlements.

67 *Report*, *supra* n. 62, at 15–16.

68 *Id.* These awareness camps get people to know about their rights and they register for availing such free legal aid. Pointing to few districts, this reports suggests that either no application or very few were filed to avail such services, which basically suggests that these camps failed to cater to their purposes. *Report*, *supra* n. 62, at 18, broaching to one of the districts in the state of Gujarat goes on to say: 'Dahod, in fact, presents a highly interesting case in point. After conducting 800 legal literacy camps from 2006–2008, the Dahod DLSA has received only 40 applications and has a panel of 20 lawyers for free legal aid. This leaves an approximate of 2 cases per lawyer. This is also highly suspect as a lawyer on the free legal aid panel then has been able to reach only 2 beneficiaries. This is also inextricably linked to the awareness campaign and the legal literacy camps which have been conducted by the district Legal services Authorities. This case study shows that the whole structure of legal literacy and of cases received is in fact null and void because the DLSA is unable to reach the masses it is meant for.'

To cater to contemporary predicament of extending effective representation to the clients from vulnerable section, Art. 39A of the Constitution and the Supreme Court's judgments have been *sentinel on the qui vive*. However, the kind of shoddy free legal services offered to such clients is not unknown. Until adequate arrangements are made to effectively incentivize the lawyers who take up briefs of such clients and attract bright lawyers to bar, Rawls' first principle of equality which argues for extending lexical priority to liberty rights (here liberty of access to justice) can't be realized. Indian Supreme Court has been the bastion of rights but the Parliament in its attempt to offer a statutory attire, messed with finer details.

It was beyond the scope of this essay to evaluate finer nuances of micro- and macro-allocation of resources but without excogitating the same, a holistic understanding of finer details in implementing the Legal Service Authorities Act, 1987, may not be possible.

There are limitation of a charity based regime, precisely, in its inability to create legal obligations on the stakeholders in performing the desired act. It is indeed glaring how India has recognized the liberty of 'access to justice' as part of liberty clause under Art. 21 of the Constitution but to offer it a position at par with other liberties, should be her aspiration.

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Information about the authors

Sushant Chandra (Sonipat, India) – Bachelor of Civil Law (University of Oxford), Assistant Professor and Assistant Director (Clinical Programme) at Jindal Global Law

School (Office No. 321, T-1, Third Floor, Jindal Global Law School, O.P. Jindal Global University, Sonipat, 131001, Haryana, India; e-mail: schandra@jgu.edu.in).

Nityash Solanki (Sonipat, India) – LL.M. (George Washington University, University of Manchester), Senior Research Associate at Jindal Global Law School (Research Associate Office, T-1, Third Floor, Jindal Global Law School, O.P. Jindal Global University, Sonipat, 131001, Haryana, India; e-mail: nsolanki@jgu.edu.in).

BOOK REVIEW NOTES

ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS[1]

NATALIYA BOCHAROVA,

Lomonosov Moscow State University
(Moscow, Russia)

Recommended citation: Nataliya Bocharova, *Arbitration in China: A Legal and Cultural Analysis*, 2(2) BRICS LJ (2015).

1. Introduction

Undoubtedly we live in the age of arbitration. Arbitration is the preferred method of the international dispute resolution. But when we think over arbitration, its history, development, core and nature we usually refer to Western experience such as Roman *jus civile* or *lex mercatoria* in Europe, when the Roman principle *pacta sunt servanda* determines the possibility to deliver a dispute to arbitration. Among variety researches on international arbitration one can barely find complete and adequate analysis of the Asian experience in this field. China legal tradition lacks for a notion of private law. Dispute resolution in China was influenced by the Confucian idea of an avoidance of the conflicts. But over the past 30 years international arbitration become far the most popular mechanism for resolving international commercial disputes in the Asia-Pacific region.[2] How these mechanisms have been developing, what they are based on and what is the future of arbitration in China are examined by Dr. Kun Fan in her thorough study 'Arbitration in China: A Legal and Cultural Analysis.'

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[1] Reviewed book: Kun Fan, Arbitration in China: A Legal and Cultural Analysis (China and International Economic Law Series) (Hart Pub. 2013).

[2] Simon Greenberg et al., International Commercial Arbitration: An Asia-Pacific Perspective 1 (Cambridge University Press 2011).

The author conducts research of current arbitration in China in the global context of the changing economic, social, cultural and legal structure of Chinese society.

The book explains contemporarily arbitration law and practice in China from an interdisciplinary perspective and with a comparative approach. 'Book addresses an important theoretical question on the interaction between globalization of law and local culture and legal traditions' (p. 7). The author not only positively describes arbitration institutions and legislation but finds the ways of harmonization and coexistence of the historical and the contemporarily; of the West and East.

2. Chapter Summaries

China is the world's second biggest and fastest growing economy and one of the main countries for foreign investments. China has the world's largest wealth funds and remains one of the most stable economies in the face of the European economy crisis, which plays significant role in the international commercial and financial markets. The growth of the foreign investments to China economy and international deals with Chinese element has caused interest to the China legal frame and its possible flexibility to adapt coherent and habitual Western legal mechanisms including mechanisms of dispute resolution. Professor Arthur Gemmel claims that there is historical 'arbitral chain' that linked the stages of the development of arbitration in the West.[3] But the question is if this 'chain' has its continuance in the East. To what extent it is possible to use Western arbitration in such non-confrontational culture as China society. The answer to these questions can be found in reviewed book. The author calls China 'a legislative laboratory since 1978 . . . when a vast array of laws and rules has been promulgated to establish institutions that did not exist before the start of economic reforms' (p. 47). That reminds the situation in Russia during the past 20 years, when legislation in some fields was only a translation of the foreign legislation which leads to the huge gap between positive law and practice.

The book starts to examine the contemporary law and practice of the arbitration system in China. In Ch. 1 the author views the Chinese legal framework and arbitration system. According to the Constitution of the PRC and Organic Law of People's Courts the people's courts has four levels and two instances. The most significant arbitral institution in China is the China International Economic and Trade Arbitration Commission [hereinafter CIETAC], which rules were adopted in 1956 by the China Council for the Promotion of the International Trade. The CIETAC is the most old arbitral institution in China but nowadays it faces increasing competition from other (more than 200) arbitral institutions. One of such competitors is the Beijing

[3] Arthur J. Gemmel, Western and Chinese Arbitration: The Arbitral Chain 79 (University Press of America 2008).

Arbitration Commission (BAC) which was established in 1995. *Ad hoc* arbitration is not recognized in China.

There are two national laws that directly applicable to international arbitration: Arbitration Law 1995 and Civil Procedure Law 1991. Supreme People's Court has power to provide judicial interpretation of acts and a number of such interpretations concerning arbitration were issued in 1987, 1995, 1996, 1998, 1999, 2000, 2005, 2006. In 1986 China adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Also China has entered into bilateral investment treaties with nearly all of its most important trading partners (excluding USA and Russia).

Before Arbitration Law 1995 the domestic and foreign arbitration in China were developing quite separately. The government promoted domestic arbitration and mediation, but the author mentions that arbitration system was lacking independence, autonomy and binding force of awards. It is interesting that the foreign-related arbitration has its roots in the Protocol for General Conditions of Delivery Goods signed between China and Soviet Union in 1950, which provides that any dispute should be settled by means of arbitration. China did not have arbitration institution and the Foreign Trade Arbitration Commission [hereinafter FTAC] (now the CIETAC) was established to conform to mentioned condition of the treaty. The FTAC was established by the Decision of the Government Administration Council and this decision served as the first regulation of the arbitration in China.

Further, in her book, Dr. Fan examines the laws of arbitration and court practice in China in comparison with international standards in terms of the arbitration agreement (Ch. 2), the arbitral institutions (Ch. 3) and the enforcement of arbitral awards (Ch. 4).

For Russian scholars and experts would be interesting to learn that the Arbitration Law 1995 *de jure* recognizes the transnational principle of the autonomy of the arbitration agreement, but in practice 'the core of the principle has not always been fully appreciated by the courts at all levels in different regions in China' (p. 67) and usually the binding effect of the arbitration clause on the transferee is denied. The similar situation we observe in Russia.

The author explains that the requirements concerning the validity of arbitration agreement in China differs from transnational standards and the legislation creates doubts as to the enforceability of awards rendered in China under the auspices of foreign arbitration institutions (particularly *ad hoc* ones).

What arbitration tribunals are concerned the author points out that the Chinese approach deviates substantially from transnational standards. The core principle of 'competence-competence' is absent in legislation of China. The power to decide on jurisdiction does not lie within the arbitral tribunals but the state court and arbitration institutions. It means that in China arbitration institutions (which are administrative bodies) decide over jurisdiction matters. Also according to transnational standards, even when a jurisdictional challenge is filed before the court, the arbitral tribunals

are generally allowed to continue with the arbitral proceeding. On the contrary, the Chinese approach grants the people's court a prevailing power over the arbitration institution.

One more feature of the Chinese arbitration system, mentioned by the Dr. Fan, brings together the Chinese and Russian arbitration. That is the considerable complexity and obstacle in the field of the recognition and enforcement of arbitral awards.

Chapter 5 turns to the practices of arbitration institutions in China. In Ch. 6 the author discusses so called *arb-med* (the combination of mediation and arbitration) which seems to be one of the features of the Oriental world with its strong mediation culture. The author insists that in China combined mechanism of mediation and arbitration is used 'frequently and enjoys a high degree of success' (p. 153). The CIETAC Rules 1989 provided that the CIETAC and its tribunals may mediate cases accepted by the CIETAC. On the heels of the CIETAC Rules the Arbitration Rules also permits the combination of the mediation and arbitration. The author in detail analyses the pros and cons of such approach.

Based on the analysis in previous chapters, in Ch. 7 the author highlights the unique features and the legal obstacles to arbitration in contemporary China. The author emphasizes the following features of the arbitration in China: 1) deficiencies in the legislation; 2) inconsistences in the implementation of the law; 3) administrative intervention; 4) conceptual differences between Western consensual arbitration and Chinese administrative character of arbitration. All named features can also characterize Russian arbitration, which arrive us to the conclusion that the roots of the arbitration in China are not in ancient Confucian ideas, but in recent plan-based economy and contemporarily state ideology.

In the Chs. 8 and 9 the author analyzes cultural influences on these 'Chinese characteristics' of arbitral practice, looking for explanations from traditional Chinese legal culture (Ch. 8) and legal reception and legal modernization in China (Ch. 9). The author describes three periods of Chinese legal history: 1) the period of traditional Chinese legal system; 2) the period of legal reception; and 3) the period of the construction of the socialist legal system. Dr. Fan describes two kinds of legal norms: 1) *li* advocated by Confucianism (moral rules, rituals) and 2) *fa* advocated by Legalism (positive law) and the relation between the two. The interaction between *li* and *fa* results a wide gap between the written laws and implementation. The Arbitration Law 1995 defines that in arbitration, disputes shall be resolved on the basis of facts, in compliance with law and in a fair and reasonable manner. The author shows that the principle of fairness is more important than the law in the decision-making process of the arbitration tribunals. Other cultural feature that influences arbitration in China is the protection of the government power and social interest is more important than the protection of individual rights and private interests.

Modern legal system in China is shaped by ideas from China's historical experience, on the one hand, and 'models based on the experience of Western countries' (p. 199),

on the other hand. In Ch. 9 the author argues if this modernization process continues or discontinues from China's traditions and how this modernization process reflects arbitration law and practice.

Finally, the author attempts to foresee how China will react to the movement of transnational arbitration and, in the other direction, what impact China may have on arbitration law and practice elsewhere (Ch. 10).

3. Conclusion

The author has chosen a comparative approach and examined the arbitration practice in transnational context. Also she analyzes arbitration law from historical and cultural point of view. The main value of the monography is the author has used mixed research method. A reader can learn how China's culture has influenced the development of contemporary China's legal framework and its arbitration law and practices. Also the book will help to learn how China arbitration differs from arbitration law and practice in the United States, Switzeland, France and other Western countries. The book clarifies the history of the arbitration in China and what has influenced its development. And finally one can find clear comparison between 'paper law' and real practice of arbitration institution and state courts concerning arbitration in China.

The author introduces the idea of so called 'glocalization of law,' when '[o]n the one hand, global scripts are localized when domestic actors translate and conceptualize the borrowed concepts in accordance with local norms – "localized globalism;" on the other hand, local ideas, practices and institutions may be globalized when they are projected to the global arena – "globalized localism"'.[4]

The reviewed book will be useful for arbitrators, practitioners in arbitration and international commercial arbitration; scholars specialized in comparative law, alternative dispute resolution. Anyone who is interested in contemporary China, the globalization of law, or developments in dispute resolution will find this book valuable.

Information about the author

Nataliya Bocharova (Moscow, Russia) – Associate Professor at Faculty of Law, Lomonosov Moscow State University, Executive Editor of the *Russian Law Journal* (1 Leninskie Gory, bldg. 13-14, Moscow, 119991, GSP-1, Russia; e-mail: nbocharova@mail.ru).

[4] Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China*, 18 Harv. Negot. L. Rev. 175, 175, available at <http://papers.ssrn.com/abstract_id=2177562> (accessed Feb. 7, 2016).

CONFERENCE REVIEW NOTES

THE CONFERENCE OF SOUTHERN COMMON MARKET (MERCOSUR) MEMBER STATES: DISCUSSING A LEGAL INTEGRATION AGENDA

PAUL KALINICHENKO,

Kutafin Moscow State Law University
(Moscow, Russia)

Recommended citation: Paul Kalinichenko, *The Conference of Southern Common Market (MERCOSUR) Member States: Discussing a Legal Integration Agenda*, 2(2) BRICS LJ (2015).

The Conference of Southern Common Market (MERCOSUR) Member States was held in the framework of the 5th St. Petersburg International Legal Forum on May 28, 2015.

MERCOSUR is an important political and economic partner for Russia in the Latin America region. Russia and MERCOSUR countries share approaches to global political and economic issues and key international problems, including spreading the rule of law, crisis management, and answers to new challenges. Economically they have a great potential for development both in mutual trade and investment activities.

The conference covered the following issues:

– evolution of MERCOSUR: establishment of the Southern Cone common market and institutional and legal framework for the whole bloc and for each member country particularly;

– relevant problems and future of integration within MERCOSUR;

– integration processes aimed at harmonization of national legislation within MERCOSUR;

– potential ways for cooperation between Russia and MERCOSUR countries in a global legal framework;

– the future of MERCOSUR foreign affairs regarding the legal context in terms of cooperation with third parties and such integrated alliances as the Eurasian Economic Union, European Union, and the North American Free Trade Area.

The Russian Minister of Justice Alexander Konovalov gave welcome remarks on the Conference. He stressed the importance of the 5th St. Petersburg International Legal Forum as a bridge between lawyers from different countries. The Minister pointed out the relevant role of integration both within the Latin America and the Eurasian space. He noted a growing importance of cooperation between Russia and South American countries in legal matters.

Professor of the Department of Civil and Labor Law of the People's Friendship University of Russia Ksenia Belikova, who was a moderator of the Conference, pointed out that South American economy-in-transition countries are joining forces in the framework of the MERCOSUR. Despite the fact that they share a common economic space, they do not have common borders. It follows the experience of European integration, which is a catalyst and a model for MERCOSUR.

Markets of developing countries have been sustainably growing for the last 10–15 years, so we can observe a positive context for trade and financial exchange between South American countries. MERCOSUR is not the only, but definitely a promising organization of integration in this region that aggregates strong potential economies and markets and is considered to be an extremely important raw material sector. MERCOSUR includes now five Member States (Argentina, Brazil, Uruguay, Paraguay, and Venezuela). Some other countries of South America have an associated status in this alliance. Participation in the MERCOSUR international project is a foreign policy priority for its Member States. However, the Member States are making efforts not only in economic fields. Creation of a common market demands to integrate legal orders.

The next speaker was the Minister of Justice and Human Rights of Argentina Julio César Alak. He emphasized that the MERCOSUR had arisen within the framework of trade negotiations taking place since the early 1990s. Although the present activity of MERCOSUR involves many other aspects, this integration alliance still focuses its objectives mainly on economic issues. The Minister stressed the importance of this economic alliance for the national interests of Argentina. The MERCOSUR has made important steps to strengthen its own institutions and to establish joint interacting principles.

Judge of the Supreme Court of Brazil Mrs. Marina Freire took floor afterwards. She particularly stressed that being the most developed country of the bloc, Brazil was taking the lead to keep the bloc organized and evolving. Given that all the MERCOSUR nations are close neighbors, many of them tend to share the same roots. Brazil understands that it is easier to create a cooperation environment among those who are near and may share common interests. Of course, there's much discussion going and the results are far from ideal, but as the nations develop economically and

socially, all efforts will prove to be rightful. The legal and judicial integration is still very incipient, but Brazil has already started to apply the rule of law principle formulated in the Inter-American Court decision's, especially on the Human Rights issues.

Elena Rafalyuk, a Russian researcher from the Institute of Legislation and Comparative Law under the Government of the Russian Federation, emphasized similarities and differences between integration processes in Latin America and within the former Soviet Union republics. In her opinion, integration in Latin America is a special type of integration. MERCOSUR is a one of the most interesting integration projects of the Southern part of the World. It differs from European integration as well as Eurasian integration. It takes different forms and favors cooperation rather than supranational actions.

To sum up, all participants enjoyed a vibrant atmosphere and challenged the speakers with numerous questions.

Information about the author

Paul Kalinichenko (Moscow, Russia) – Professor at Integration and European Law Department, Kutafin Moscow State Law University (9 Sadovaya Kudrinskaya str., Moscow, 125993, Russia; e-mail: paulkalinichenko@mail.ru).

PERSONALIA

IN MEMORIAM: PROFESSOR SESHAIAH SHASTHRI VEDANTAM (1963–2015)

Recommended citation: *In Memoriam: Professor Seshaiah Shasthri Vedantam (1963–2015)*, 2(2) BRICS LJ (2015).

Seshaiah Shasthri Vedantam (India), *BRICS Law Journal* Editorial Board member (2014–15), Professor and Additional Dean, Faculty of Law, National Law University, Jodhpur (2001–15), passed away on peacefully on August 31, 2015, at Care Hospital, Banjara Hills, Hyderabad, India, leaving a huge contribution in the areas of international humanitarian law, refugee law, and protection to women and children in armed conflicts, *etc.*

Dr. Shasthri was a senior academician, administrator and was associated with distinguished roles and assignments in the University. Dr. Shasthri also made many substantial contributions to the National Law University, Jodhpur, by making collaborative programs with ICRC, UNHR, UNDP, UNFPA, CRY, *etc.* He succeeded in promoting the 'Save the Girl Child' sensitization programme in the region of Western Rajasthan, India.

Dr. Shasthri will always be remembered as a humble and down to earth person. He has always spread his infectious affection and concern to all. He was a fair and visionary Professor, and a kind human being.

BRICS Law Journal

Volume II (2015) Issue 2

Редактор *Павел Савкин*
Оформление и компьютерная верстка: *Виола Самойлова*

Подписано в печать 16.02.2016. Формат 70x100 $^{1}/_{16}$. Объем 7 п.л.
Цена свободная.
Заказ №

Наш адрес: ООО «Издательский дом В. Ема»,
119454, г. Москва, ул. Лобачевского, 92, корп. 2.
Тел.: (495) 649-18-06