ISSN 2545-5982
VOLUMEN V
MMXX

RYD

REPÚBLICA Y DERECHO
Revista Jurídica

Dossier: Tackling Human Rights Issues Around the World

Prologue: Madan B. Lokur

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RYD
REPÚBLICA Y DERECHO
Revista Jurídica

Revista RYD República y Derecho
ISSN 2545-5982

VOLUMEN V
Diciembre de 2020
Mendoza - Argentina

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RYD
REPÚBLICA Y DERECHO
Revista Jurídica

ISSN 2545-5982

VOLUMEN V

Diciembre de 2020

Mendoza - Argentina

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Revista RYD República y Derecho / ISSN–L 2525–1937 / Volumen V (2020)
Facultad de Derecho / Universidad Nacional de Cuyo / Mendoza – Argentina
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Revista RYD República y Derecho / ISSN-L 2525–1937 / Volumen V (2020) / Dosier
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Preface

Seven decades have passed since the Universal Declaration on Human Rights was enacted. Yet, all around the world, people from different countries continue to struggle to fulfill these rights.

While the characteristics of this fight vary from continent to continent and from country to country, the objective is always the same: to live in a place where the enjoyment of all human rights is not just an aspiration but a reality.

This publication consists of ten articles that explore various human rights related issues that are of special concern in selected countries. We hope that this dossier will serve as a reminder that promoting and encouraging respect for human rights remain a matter of the highest priority for the global community.

We are very grateful to the experts who contributed these articles and for their on-going commitment to advancing human rights; to the external peer reviewers for assessing the manuscripts; to Justice Madan B. Lokur, former Judge of the Supreme Court of India, for his exceptional Foreward to this dossier; and, finally, to the project coordinator, Maria Cristina Alé, for the expertly facilitating the collaboration between contributing authors and peer reviewers, as well as her exceptional attention to detail.

María Laura Farfán Bertrán
RYD Editor–in–chief

Prefacio

Han pasado siete décadas desde que se firmó la Declaración Universal de Derechos Humanos, sin embargo, en todo el mundo, personas de diferentes países continúan luchando por lograr la plena vigencia de estos derechos.

Si bien las características de esta lucha varían de un continente a otro y de un país a otro, el objetivo es siempre el mismo: vivir en un lugar donde el disfrute de todos los derechos sea una realidad y no una simple aspiración.

El dosier que estamos presentando es un ejemplo de este desafío. Se trata de una publicación que consta de diez artículos que exploran distintos temas relacionados con algunos derechos humanos, que son de especial preocupación en los países seleccionados.

Agradecemos a los autores que contribuyeron con artículos de excelencia, por sus aportes y su compromiso continuo con la promoción de los derechos humanos; a los evaluadores externos por su generoso trabajo en la revisión de los manuscritos; al juez Madan B. Lokur, ex juez de la Corte Suprema de la India, por su excepcional prólogo; y, finalmente, a María Cristina Alé, por coordinar la colaboración entre los autores y revisores, así como por su profesional atención a cada detalle.

Esperamos que el presente dosier sirva para recordar que, la promoción y protección de los derechos humanos sigue siendo una cuestión de máxima prioridad para la toda la comunidad internacional.

María Laura Farfán Bertrán
Directora RYD

Tackling Human Rights Issues Around the World

Foreword

Any discussion on the subject of human rights must be predicated on the acknowledgement that human rights are dynamic and not static. Some human rights are basic, fundamental and inalienable such as the freedom of speech, the right to non–discrimination, the right to equality, the right to life and liberty and so on. These are clearly enunciated in several international instruments beginning with the Universal Declaration of Human Rights. Similar basic rights have been recognized in the African Charter on Human and People's Rights, the American Convention on Human Rights, the ASEAN Human Rights Declaration and many others. The essence and spirit of these fundamental rights is the same, though the vocabulary might change. But it is clear that these instruments accept that, we as a people, are born with these rights and they are not handed down to us by declarations and conventions.

Some human rights fall in a grey area –are they basic and fundamental human rights or are they acquired human rights? Included within this sphere are privacy rights, the right to communication, the right to data protection and a few others. Some of these rights have been recognized over the years, not having been given importance earlier, others have suddenly become significant due to technological changes that were perhaps not visualized decades ago. For example, the right to access internet and social media was not imagined in the 1950s or soon thereafter. If access to internet is cut–off or limited, it would certainly violate a right to communication. But suppose, the download speed is deliberately slowed down, would it violate the right to communication? Similarly, shutting off access to social media or limiting it would violate the right

to communication as also the right to freedom of speech. Today, it is possible to transmit the health status of an individual through the internet in the event of a medical urgency. This might appear as a violation of the right to privacy, but can that violation be overlooked on the ground of urgency or the more important fundamental right to life? Such examples can be multiplied to include different aspects of life –physical life or juristic life as in the case of corporates. There is a need to identify these grey area rights and work on them.

Passage of time has also invited us to consider a few specialized dimensions of human rights. For example, issues of gender justice have gained tremendous traction all over the world. Women are not always treated equally as one would expect. Their wages are lower despite doing the same work as men in several parts of the world. The care and upbringing of children, cooking meals gathering firewood and water is almost exclusively their responsibility in many households, with little contribution from the male members of a family. The inequality faced by the female gender is beset with problems that should not have really existed. And so, the human rights of women as a class have come to be recognized and protected by instruments such as the Convention on the Elimination of All Forms of Discrimination against Women and Declaration on the Elimination of Violence against Women.

Children –girls and boys– have little or no voice in decision or policy making in society. Resultantly, their rights have taken a comparatively back seat. While acting in the best interests of the child is a dogma that is generally accepted, the reality is that children are neglected in many respects. Child labour, child sexual abuse and trafficking are matters of serious global concern, and because children are in a vulnerable position, their exploitation is much easier than other sections of society, including women. Global opinion has acknowledged that children too have rights resulting in the Convention on the Rights of the Child and later the Protection of Children and Co–operation in Respect of Intercountry Adoption or the Hague Convention.

Similarly, there are large sections of society that are neglected and their rights ignored in what is referred to as economic or infrastructure development. I am referring particularly to indigenous and tribal people who have been inhabiting vast areas before modern civilization encroached on their land and resources. These people have their cultural and social norms that they have

been following while cohabiting with nature for centuries. Modern civilization has displaced millions of them with the use of arms and heavy machinery to feed a resource hungry industrialized society. A few years ago, an international mining company sought to displace a tribal population in India from an area that housed their gods! Fortunately, better sense prevailed and the mining company withdrew. Similar situations, though perhaps not as direct as in India, have arisen in other parts of the world also only with a view to exploit the natural resources. In a gross violation of basic human rights, many of these activities have taken place without the participation of the indigenous or tribal population, as if their opinion is irrelevant. To an extent, the United Nations Declaration on the Rights of Indigenous Peoples seeks to remedy the injustices over the centuries and only time will test the efficacy of the Declaration. One of the significant developments that has taken place in recognition of the rights of the indigenous and tribal peoples is that some countries have now reacted by claiming damages for the violation of the human rights of their people, including damages for environmental pollution, from international conglomerates through international arbitrations. This is a developing human rights jurisprudence and is a check, at least to some extent on the adverse impact on indigenous and tribal populations.

Other sections of society whose human rights have drawn attention are persons with disabilities. Their human rights have been recognized through the Convention on the Rights of Persons with Disabilities, including rather significantly, their right to dignity. Similarly, progress has been made towards arriving at a Convention on the Rights of Older Persons. The General Assembly of the United Nations passed Resolution 47/135 on 18th December, 1992 being a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. These are all welcome developments and assert a commitment of the international community to human rights that will eventually make for better living and a better life for all of us.

Some of these international human rights instruments have in–built oversight mechanisms or have led to the creation of mechanisms that strive to ensure effective implementation of the articles and clauses of the conventions or declarations. Their operational reality is a different story altogether, mainly because these bodies essentially recommend steps that ought to be taken, but

they cannot enforce compliance. It is then left to the State Parties to devise internal structures that promise implementation. The effectiveness of human rights commissions across the world depends largely upon the will of the government of the day. To introduce objectivity in the enforcement of human rights, some geographically proximate nations having somewhat similar concerns and understanding of one another's requirements, social, cultural and economic have established commissions that enable them to strategize collectively in a spirit of cooperation. The ASEAN Commission on Human Rights and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, the African Commission on Human and Peoples' Rights are some of these effective bodies discussed in this Dossier. The impact of the Declaration on the Rights of Indigenous Peoples is also a subject of enlightened discussion here.

As already mentioned, several human rights –not necessarily basic or fundamental– get recognized or draw attention as society develops. Access to justice has been recognized as one such right in all jurisdictions and this has several facets and nuances. The right to a hearing and the right to be represented are all facets of justice delivery. Another such right that has come to be recognized is the right of the consumer of goods and services. All of us are consumers at some level, whether it is food or utilities or facilities. We pay for what we get and expect adherence to certain minimum standards by the supplier of goods or services. What if there is a deficiency in the quality of services or goods? Every grievance cannot be dealt with by the formal or conventional justice delivery system of courts and yet the rights of consumers must be enforced. From the adoption of the United Nations Guidelines for Consumer Protection in 1985 till the revised version in 2015 several changes have taken place, including online resolution of disputes. It is the recognition of such rights and mechanisms of grievance redressal that confirms my belief that human rights are dynamic and constantly evolving.

The right to life and liberty is basic and fundamental. But even this right can be taken away through various methods and measures. The easiest method is by filing trumped up charges resulting in imprisonment of the alleged offender. The poor and underprivileged who are the usual victims, cannot stand up to the might of the police when it takes the law in its hands. But far worse are

laws dealing with extreme situations –do extreme situations always require an extreme response? True, insurgents and terrorists must be firmly dealt with, but is it not possible to comply with minimum human rights standards while dealing with them? This is a question that arises from time to time and the debate will continue eternally. Many countries have shown that in conducting a trial, it is possible to adhere to basic standards of justice and fair play. Security measures for the court and prosecution need to be provided and the alleged offender can be provided with a lawyer of his or her choice. The problem arises when public opinion turns against mercy to the alleged offender and desires instant justice to be meted out. This results in stringent and often draconian laws that shift away from the rule of law and basic human rights standards.

Acceptance of draconian laws has the potential of emboldening a powerful State, including a democratically elected government, to use such stringent laws to stifle dissent and impose extreme punishments for dissent. In such situations, any meaningful discussion or debate ends even before it begins. A democratically elected government claims that its actions have the backing of the people, while an autocracy needs no such excuse. The rule of law collapses and human rights, including the right to liberty gets gradually extinguished. Only mass movements can turn the clock back, but that is possible only after the people suffer years of untold misery. A second consequence of accepting draconian laws is the emboldening of the State to go a step further and endanger life itself. Several examples of this are available for discussion.

Enforced disappearances are common enough to have prompted the International Convention for the Protection of All Persons from Enforced Disappearance. Article 1 of this Convention states: No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. The gravity of enforced disappearance has been accepted in international law as a crime against humanity. And yet, there are frequent instances of such unexplained disappearances. In the case of anti–terrorism laws, there is at least some modicum of access to justice, but in a case of enforced disappearance there is no recourse to justice, with the family and friends not having any idea of where the victim could be. In the common law world, courts can come to the rescue of such unfortunate victims through the remedy of a

writ of *habeas corpus* but that is infrequent given the dependence of the court on information provided by the State and the power that the State exercises in making enforced disappearances possible.

Equally terrible are extra–judicial executions. Reports given by the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council make for sorry reading and clearly indicate the impunity with which some States carry out extra–judicial killings, which are nothing short of State sponsored murder. The victims are usually those who either commit a heinous crime and a conviction is difficult to establish or persons who are believed to be hardened criminals without any possibility of reformation and rehabilitation. On occasion, when called upon to do so by the human rights commission or a similar authority, the justification given by the State is one of self–defence, that is to say that the victim needed to be shot (or killed) because a grave danger was posed to the life of the law enforcement authorities at that moment. This excuse is really a fig leaf or an attempt to cover up a cold–blooded murder. Human rights activists have been concerned by such extra–judicial executions and fake encounters but little has been achieved by way of stopping such killings.

In the preservation and protection of human rights and liberties, civil society and established NGOs play a very crucial and vital role which should not be overlooked. NGOs engaged in operational activities are, in a sense, field workers and in touch with ground realities through grassroot workers. Effectively, they are like intelligence agencies when it comes to issues of social justice. They provide the necessary facts and evidence that may, sometimes, not be available even to seasoned bureaucrats and law makers. The information available with and provided by NGOs can enable the government to take an informed decision on framing a policy and implement policy decisions that impact large sections of society. Advocacy NGOs can and do spread the message of human rights and bring about awareness of rights, particularly among those who are socially, economically and educationally disadvantaged. They play an extremely important role in the actual implementation of policies and their role too cannot be underestimated or played down. Concerns of human rights are not a citizen and State issue, but a larger and complex amalgam of interests of different sections of society and if implementation methodologies do not involve

all sections of society (many of whom are represented by NGOs) some human and other rights will rest as matters of academic debate.

As I write this, the world is reeling under the impact of Covid–19 caused by a corona virus. To check the spread of the disease and minimise its adverse consequences, including death, some governments have assumed extraordinary powers so that health measures can be implemented. While the implementation of health measures is absolutely necessary, in several instances, it has been at the cost of human rights. For example, the limits of free speech have been narrowed down so that news and information, which can sometimes cause panic, is not disseminated. The right of assembly has also been curtailed so that social distancing is practised and person–to–person contact is eliminated to avoid the spread of the virus. Indeed, in some countries a lockdown, which is in the nature of a mild curfew has been imposed, again in the interest of the health of the people. How long the impact of Covid–19 will be felt and the impact of presently justifiable restrictions imposed as precautionary measures are a matter of debate and discussion. What impact they will have on some other rights is again a matter of debate and discussion. Do we need Nature's fury to remind us that though we are born with some basic and fundamental rights, we need to channelize our efforts, through these rights, for the benefit of humanity, with compassion and social justice being key ingredients?

Madan B. Lokur
Retired Judge
Supreme Court of India

15th April, 2020

Enfrentando desafíos de Derechos Humanos en el mundo

Prólogo

Todo debate o discusión en torno a los derechos humanos, debe basarse en el reconocimiento de que estos derechos son dinámicos y no estáticos. Algunos derechos humanos son básicos, fundamentales e inalienables como la libertad de expresión, el derecho a la no discriminación, el derecho a la igualdad, a la vida y a la libertad. Estos derechos están claramente enunciados en varios instrumentos internacionales, comenzando por la Declaración Universal de Derechos Humanos. Similares derechos han sido reconocidos en la Carta Africana sobre los Derechos Humanos y de los Pueblos, la Convención Americana sobre Derechos Humanos, la Carta Asiática de Derechos Humanos y muchos otros. La esencia y el espíritu de estos derechos fundamentales es el mismo, aunque el vocabulario puede cambiar. Pero está claro que estos instrumentos reconocen que, nosotros como personas, nacemos con estos derechos, y no nos los transmiten declaraciones o convenciones.

Algunos derechos humanos caen en una zona gris: ¿son derechos humanos básicos y fundamentales o son derechos humanos adquiridos? Se incluyen dentro de esta esfera el derecho a la privacidad, a la comunicación, a la protección de datos, entre otros. Algunos de estos derechos han sido reconocidos a lo largo de los años, sin que se les haya dado demasiada importancia, otros han cobrado relevancia repentinamente debido a cambios tecnológicos que quizás no se visualizaban décadas atrás. Por ejemplo, el derecho de acceso a Internet y las redes sociales no se imaginó en la década de 1950 o poco después. Sin embargo, si actualmente se cortara o limitara el acceso a Internet, sin duda se violaría el derecho a la comunicación. Pero supongamos que la velocidad de descarga se reduce deliberadamente, ¿violaría esto el derecho a la comunicación? Del mismo modo, cerrar el acceso a las redes sociales o limitarlo, violaría el derecho a la

comunicación, y a la libertad de expresión. En la actualidad, es posible comunicar el estado de salud de una persona a través de Internet en caso de una urgencia médica. Esto podría parecer una violación del derecho a la privacidad, pero ¿se puede pasar por alto esa violación por motivos de urgencia o por considerar el derecho fundamental a la vida como más importante? Estos ejemplos pueden multiplicarse para incluir diferentes aspectos de la vida –física o jurídica, como en el caso de las empresas–. Es necesario, entonces, identificar los derechos ubicados en esta zona gris, y trabajar en ellos.

El paso del tiempo también nos ha invitado a considerar algunas dimensiones especiales de los derechos humanos. Por ejemplo, la justicia de género ha ganado una tremenda tracción en todo el mundo. No siempre se trata a las mujeres con el mismo trato que se debe esperar. Sus salarios son más bajos a pesar de realizar el mismo trabajo que los hombres en varias partes del mundo. Las tareas de cuidado y de crianza de los niños, la preparación de las comidas, la recolección de leña y agua, en muchos hogares son tareas de responsabilidad casi exclusiva de las mujeres, con poca contribución de los miembros masculinos de la familia. La desigualdad que enfrenta el género femenino está llena de problemas que realmente no deberían haber existido. Y así, los derechos humanos de las mujeres –como clase– han llegado a ser reconocidos y protegidos por instrumentos como la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer y la Declaración sobre la Eliminación de la Violencia contra la Mujer.

Por su parte, los niños y niñas, tienen poca o ninguna voz en la toma de decisiones o diseño de políticas en la sociedad. Como resultado, sus derechos – comparativamente – se han mantenido en un segundo plano. Si bien actuar en el interés superior del niño es un dogma generalmente aceptado, la realidad es que se descuida a los niños en muchos aspectos. El trabajo infantil, el abuso sexual infantil y la trata son problemas de mucha preocupación mundial y, dado que los niños se encuentran en una posición vulnerable, su explotación resulta –lamentablemente– mucho más fácil que en otros sectores de la sociedad, incluidas las mujeres. La comunidad internacional ha reconocido los derechos de los niños en la Convención sobre los Derechos del Niño y –más tarde– en la Convención de la Haya sobre la Protección de Menores y la Cooperación en materia de Adopción Internacional.

De manera similar, hay grandes sectores de la sociedad que son desatendidos y sus derechos ignorados en lo que se conoce como desarrollo económico o de infraestructura. Me refiero, particularmente, a los pueblos indígenas y tribales que han habitado vastas áreas antes de que la civilización moderna invadiera sus tierras y recursos. Estos pueblos tienen sus propias normas culturales y sociales, las cuales han respetado durante siglos, en convivencia con la naturaleza. La civilización moderna ha desplazado a millones de ellos con el uso de armas y maquinaria pesada para alimentar a una sociedad industrializada hambrienta de recursos. ¡Hace unos años, una empresa minera internacional intentó desplazar a una población tribal en la India, de un área que albergaba a sus dioses! Afortunadamente, prevaleció el sentido común y la empresa minera se retiró. Situaciones similares, aunque quizás no tan directas como en el caso de la India, han surgido en otras partes del mundo, con el solo fin de explotar los recursos naturales. En una flagrante violación de los derechos humanos básicos, muchas de estas actividades han tenido lugar sin la participación de la población indígena o tribal, como si su opinión fuera irrelevante. Hasta cierto punto, la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas busca remediar las injusticias ocurridas a lo largo de los siglos, y solo el tiempo pondrá a prueba la eficacia de la Declaración. Uno de los desarrollos significativos que se han producido recientemente –en reconocimiento de los derechos de los pueblos indígenas y tribales– es la reacción de algunos países que han reclamado daños y perjuicios por la violación de los derechos humanos de sus pueblos, incluidos los daños por contaminación ambiental a los conglomerados internacionales, a través de arbitrajes internacionales. Si bien se trata de una jurisprudencia de derechos humanos en desarrollo, constituye un control –al menos en cierta medida– del impacto adverso sobre las poblaciones indígenas y tribales.

Otros sectores de la sociedad cuyos derechos humanos han llamado la atención son las personas con discapacidad. Sus derechos humanos han sido reconocidos a través de la Convención sobre los Derechos de las Personas con Discapacidad, incluido de manera significativa, su derecho a la dignidad. Del mismo modo, se ha avanzado en la elaboración de una Convención sobre los derechos de las personas mayores, y de la Declaración sobre los Derechos de las Personas Pertenecientes a Minorías Nacionales o Étnicas, Religiosas y Lingüísticas (adoptada por la Asamblea General de las Naciones Unidas mediante Resolución

47/135 el 18 de diciembre de 1992). Todos estos son avances bienvenidos que afirman el compromiso de la comunidad internacional con los derechos humanos, el cual eventualmente contribuirá a una mejor calidad de vida para todos.

Algunos de estos instrumentos internacionales de derechos humanos tienen mecanismos de supervisión incorporados, o han dado lugar a la creación de mecanismos que se esfuerzan por asegurar la implementación efectiva de los artículos y cláusulas de las convenciones o declaraciones. Su realidad operativa es una historia completamente diferente, principalmente porque estos organismos esencialmente recomiendan los pasos que deben tomarse, pero no pueden imponer el cumplimiento, dejando a los Estados Partes la tarea de diseñar estructuras internas que prometan su implementación. Por lo que la eficacia de las comisiones de derechos humanos en todo el mundo depende, en gran medida, de la voluntad del gobierno de turno. Para introducir objetividad en la aplicación de los derechos humanos, algunas naciones geográficamente próximas que tienen preocupaciones similares y comprenden los requisitos sociales, culturales y económicos de los demás, han establecido comisiones que les permiten elaborar estrategias colectivas con un espíritu de cooperación. La Comisión Intergubernamental de Derechos Humanos de la ASEAN (AICHR), la Comisión de la ASEAN sobre la Promoción y Protección de los Derechos de las Mujeres y Niños, y la Comisión Africana de Derechos Humanos y de los Pueblos, son algunos de estos órganos eficaces que se examinan en este Dosier. También el impacto de la Declaración sobre los Derechos de los Pueblos Indígenas es un tema de debate ilustrado en este Dosier.

Como ya se mencionó, varios derechos humanos, no necesariamente básicos o fundamentales, son reconocidos o atraen la atención a medida que la sociedad se desarrolla. El acceso a la justicia ha sido reconocido como uno de esos derechos en todas las jurisdicciones y este tiene varias facetas y matices. El derecho a una audiencia y el derecho a ser representado son aspectos de la administración de justicia. Otro de esos derechos que se ha llegado a reconocer es el derecho del consumidor de bienes y servicios. Todos somos consumidores en algún nivel, ya sea de alimentos, servicios públicos o instalaciones. Pagamos por lo que obtenemos y esperamos que el proveedor de bienes o servicios cumpla con ciertos estándares mínimos. ¿Qué pasa si hay una deficiencia en la calidad de los servicios o bienes? Todas las quejas no pueden ser tratadas por

el sistema de administración de justicia formal o convencional de los tribunales y, sin embargo, se deben hacer cumplir los derechos de los consumidores. Desde la adopción de las Directrices para la Protección del Consumidor de las Naciones Unidas en 1985 hasta la versión revisada en 2015, se han producido varios cambios, incluida la resolución de disputas en línea. Es el reconocimiento de tales derechos y mecanismos de reparación de agravios lo que confirma mi creencia de que los derechos humanos son dinámicos y en constante evolución.

El derecho a la vida y la libertad es básico y fundamental. Pero incluso este derecho puede verse sustraído. Lamentablemente uno de los métodos más utilizados, ha sido inventar cargos que resultan en el encarcelamiento del presunto delincuente. Los pobres y desfavorecidos usualmente resultan ser las víctimas que no pueden hacer frente al poder de la policía, cuando toman la ley en sus manos. Peores aún resultan las leyes que tratan con situaciones extremas: ¿las situaciones extremas siempre requieren una respuesta extrema? Es cierto que los insurgentes y los terroristas deben ser tratados con firmeza, pero ¿no es posible cumplir con las normas mínimas de derechos humanos al tratar con ellos? Esta es una pregunta que surge de tanto en tanto, y el debate continuará eternamente. Muchos países han demostrado que, al llevar a cabo un juicio, es posible adherirse a los estándares básicos de justicia y juego limpio. Es necesario proporcionar medidas de seguridad para el tribunal y el enjuiciamiento, como asimismo proporcionar al presunto delincuente un abogado de su elección. El problema surge cuando la opinión pública se vuelve en contra de la piedad del presunto delincuente y desea que se haga justicia instantánea. Esto da como resultado leyes estrictas y, frecuentemente, draconianas que se alejan del estado de derecho y de los estándares básicos de derechos humanos.

La aceptación de leyes draconianas tiene el potencial de envalentonar a un Estado poderoso, incluido un gobierno elegido democráticamente, a utilizar leyes muy estrictas para reprimir la disidencia e imponer castigos extremos a la disidencia. En tales situaciones, cualquier discusión o debate significativo termina incluso antes de comenzar. Un gobierno elegido democráticamente afirma que sus acciones cuentan con el respaldo del pueblo, mientras que una autocracia no necesita tal justificación. El estado de derecho colapsa y los derechos humanos, incluido el derecho a la libertad, se extinguen gradualmente. Solo los movimientos de masas pueden hacer retroceder el reloj, pero eso solo es posible después

de que el pueblo sufre años de incalculable miseria. Una segunda consecuencia de aceptar leyes draconianas es el envalentonamiento del Estado para dar un paso más y poner en peligro la vida misma. Varios ejemplos de esto están disponibles para la discusión.

Las desapariciones forzadas son lo suficientemente comunes como para haber dado lugar a la Convención Internacional para la protección de todas las Personas contra las Desapariciones Forzadas. El artículo 1 de esta Convención establece: En ningún caso podrán invocarse circunstancias excepcionales tales como estado de guerra o amenaza de guerra, inestabilidad política interna o cualquier otra emergencia pública como justificación de la desaparición forzada. La gravedad de la desaparición forzada ha sido aceptada en el derecho internacional como un crimen de lesa humanidad, y, sin embargo, siguen siendo frecuentes. En el caso de las leyes antiterroristas, existe al menos un mínimo de acceso a la justicia, pero frente a un caso de desaparición forzada no hay recurso alguno, y la familia y amigos permanecen sin saber nada de la víctima. En algunos sistemas, los tribunales pueden acudir al rescate de estas desafortunadas víctimas mediante el recurso de *hábeas corpus*, pero eso es poco frecuente dada la dependencia del tribunal a la información proporcionada por el Estado y la facultad que éste ejerce para hacer posibles dichas desapariciones.

Igualmente terribles son las ejecuciones extrajudiciales. Los informes presentados por el Relator Especial sobre ejecuciones extrajudiciales, sumarias o arbitrarias al Consejo de Derechos Humanos son una lectura lamentable, e indican claramente la impunidad con la que algunos Estados las llevan a cabo, resultando ser nada menos que asesinatos patrocinados por el Estado. Las víctimas suelen ser quienes han cometido algún crimen atroz cuya condena es difícil establecer, o bien personas que se cree que son criminales sin posibilidad alguna de reforma y rehabilitación. En ocasiones –cuando así lo requiere la comisión de derechos humanos o una autoridad similar–, la justificación que da el Estado es la legítima defensa, es decir, que la víctima debió ser fusilada (o asesinada) por haber puesto en peligro la vida de las autoridades encargadas de hacer cumplir la ley. Esta excusa muchas veces es un intento de encubrir un asesinato a sangre fría. Los defensores de derechos humanos se han preocupado por estas ejecuciones extrajudiciales, pero poco se ha logrado para detenerlas.

En la preservación y protección de los derechos humanos y las libertades,

la sociedad civil y las ONG desempeñan un papel crucial y vital que no debe pasarse por alto. Las ONG involucradas en actividades operativas son, en cierto sentido, trabajadores de campo en contacto con las realidades del terreno a través de trabajadores de base. Efectivamente, son como agencias de inteligencia cuando se trata de cuestiones de justicia social. Proporcionan los hechos y las pruebas necesarias que, a veces, pueden no estar disponibles ni siquiera para los burócratas y legisladores experimentados. La información disponible y proporcionada por las ONG muchas veces permite al gobierno tomar una decisión informada sobre la elaboración de políticas e implementar decisiones que impacten a grandes sectores de la sociedad. Las ONG tienen el poder de difundir el mensaje de los derechos humanos y concientizar sobre los derechos, especialmente entre aquellos que se encuentran en desventaja social, económica y educativa, desempeñando un papel extremadamente importante en la implementación real de las políticas, que no puede subestimarse ni minimizarse. La preocupación por los derechos humanos no es una cuestión exclusivamente de ciudadanos y Estados, sino que involucra una amalgama amplia y compleja de intereses de diferentes sectores de la sociedad. Y si las metodologías de implementación no incluyen a todos los sectores (muchos de los cuales representados por ONG), algunos derechos humanos quedarán relegados al mero debate académico.

Mientras escribo esto, el mundo se tambalea bajo el impacto del Covid–19 causado por un virus corona. Para controlar la propagación de la enfermedad y minimizar sus consecuencias adversas, incluida la muerte, algunos gobiernos han asumido poderes extraordinarios a fin de poder implementar medidas sanitarias. Si bien la implementación de medidas sanitarias es absolutamente necesaria, en varios casos ha sido a costa del respeto de los derechos humanos. Por ejemplo, se han reducido los límites de la libertad de expresión para evitar que se difundan noticias e información, que a veces pueden causar pánico. También se ha limitado el derecho de reunión para garantizar el distanciamiento social y evitar el contacto de persona a persona que propaga el virus. De hecho, en algunos países se ha impuesto un bloqueo, que tiene la naturaleza de un toque de queda leve, nuevamente en interés de la salud de la población. Por cuánto tiempo se sentirá el impacto de Covid–19 y de las restricciones actualmente justificables –impuestas como medidas de precaución– es un tema de debate y discusión. Al igual que el impacto que tendrán en algunos otros derechos. ¿Ne-

cesitamos que la furia de la naturaleza nos recuerde que, aunque nacemos con algunos derechos básicos y fundamentales, debemos canalizar nuestros esfuerzos, a través de estos derechos, en beneficio de la humanidad, siendo la compasión y la justicia social ingredientes clave?

MADAN B. LOKUR
Ex Juez de la
Corte Suprema de la India

15 de abril de 2020

The Rights of Women and Children Under Article 18(3) of the African Charter on Human and Peoples' Rights

Los derechos de las mujeres y los niños en el artículo 18(3) de la Carta Africana sobre los Derechos Humanos y de los Pueblos

Received: 04/18/2019 – Accepted: 09/05/2019

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Abstract

Human and peoples' rights as argued under the African Charter on Human and Peoples' Rights apply to everybody, including women and children. However, compared to other regional and international human rights treaties, the African Charter does not address in more details the specific rights of women and children, except under article 18(3) which enjoins State parties to ensure the protection of the rights of women and children as stipulated in international declarations and conventions. Therefore, the present study investigates the extent to which women's and children's rights, as stipulated in other international declarations and conventions, may form part of the African Charter on Human and Peoples' Rights.

Keywords: Women's rights; Children's rights; African Charter on Human and Peoples' Rights.

Resumen

Los derechos humanos y de los pueblos, como surge del texto de la Carta Africana sobre los Derechos Humanos y de los Pueblos, se aplican a todos, incluidos las mujeres y los niños. Sin embargo, en comparación con otros tratados regionales e internacionales de derechos humanos, la Carta Africana no aborda con más detalle los derechos específicos de las mujeres y los niños, excepto en el artículo 18(3), que ordena a los Estados parte garantizar la protección de los derechos de las mujeres y niños estipulados en declaraciones y convenciones internacionales. El presente estudio investiga hasta qué punto los derechos de las mujeres y los niños, como se estipula en otras declaraciones y convenciones internacionales, pueden formar parte de la Carta Africana sobre los Derechos Humanos y de los Pueblos.

Palabras clave: Derechos de las mujeres; Derechos del niño; Carta Africana sobre los Derechos Humanos y de los Pueblos.

Summary

1. Introduction

Article 18(3) of the African Charter on Human and People's Rights[2], which enjoins State parties to "also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions" entails some implications of practical relevance. First, it extends the list of protected rights under the African Charter to include women's and children's rights that are stipulated under both international declarations and conventions. Unlike the African Charter, other international and regional human rights treaties and declarations such as the International Covenants on Civil and

2 African Charter on Human and Peoples' Rights (hereinafter the African Charter), 1986.

Political Rights[3], the International Covenant on Economic, Social and Cultural Rights[4], the European Convention on Human Rights[5], the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) the American Convention on Human Rights[6], the 1948 Universal Declaration of Human Rights[7] and the 1959 Declaration of the Rights of the Child, expressly provide some specific rights of both women and children, including equality between spouses. Except by reference through article 18(3), the African Charter does not mention children's rights to measures of protection, special protection to mothers and children, prohibition of death penalty upon children and pregnant women or child's right to nationality. Secondly, article 18(3) can be interpreted as a third way of protecting human rights under the African Charter alongside the two well–known traditional ways[8], namely the explicit enumeration of some protected rights under articles 1 to 27 of the Charter and the implicit protection of some rights as part of those explicitly protected rights[9]. Therefore, it partly fills in some of the gap in the Charter's protection of some rights[10]. Thirdly, article

3 International Covenant on Civil and Political Rights (hereinafter the ICCPR), 1976, arts. 6 (5), 18 (4), 23 and 24.

4 International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR), 1976, art 10.

5 European Convention on Human Rights, 1950, arts. 5 (d) and 12.

6 American Convention on Human Rights, 1978, arts. 4 (5), 12 (4), 17 and 19.

7 Universal Declaration of Human Rights, (hereinafter UDHR), 1948, arts. 16 and 25.

8 SSENYONJO, M. *The protection of economic, social and cultural rights under the African Charter*. In D. Chirwa and L. Chenwi, eds. The protection of economic, social and cultural rights in Africa: international, regional and national perspectives, Cambridge University Press, 2016, 91–120, pp. 95 and 117. YESHANEW, Sisay Alemahu. *Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives*, African Human Rights Law Journal, 2011, Vol. 11 (2), 317–340, pp. 318 and 336.

9 Although not expressly recognised by the African Charter, the African Commission has interpreted arts. 14, 16 and 18 (1) of the Charter as impliedly protecting the right to housing, while the right to food is impliedly recognised through arts. 4, 16 and 22 of the Charter. See Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights against Nigeria (hereinafter SERAC case), 2001, paras.. 60 and 64.

10 For instance, the African Charter does not expressly provide for some rights such as the rights to adequate

18(3) extends the State's obligations by making women's and children's rights, as protected under both international declarations and conventions, an integral part of the African Charter. Fourthly, and last, article 18(3) extends the jurisdiction of both the African Commission on Human and Peoples' Rights (African Commission)[11] and the African Court on Human and Peoples' Rights (the African Court)[12] to deal with women's and children's rights protected under international conventions and declarations as part of the African Charter.

The present paper is a contribution to some existing scholars' works on article 18(3) of the African Charter, which read this provision both restrictively[13] and broadly[14]. However, unlike the existing scholars' works on article 18(3) that do not consider the practices of State parties, the African Commission and that of the African Court[15] with respect to this Charter's provision, the present study interprets this provision in light of some State's practices in terms

standard of living, adequate food, right to consent to marriage and equality of spouses during and after marriage.

11 African Charter on Human and Peoples' Rights, arts. 30 and 45.

12 Protocol to the African Charter on Human and Peoples` Rights on the establishment of an African Court on Human and Peoples` Rights (hereinafter the African Court Protocol), 2004, art 3.

13 KAIME, Thoko. *The African Charter on the Rights and Welfare of the Child: a socio–legal perspective*, Pretoria University Law Press, 2009, p. 22, SSENYONJO, M. *Culture and the human rights of women in Africa: between light and shadow*, Journal of African Law, 2007, 51 (1), 39–67, pp. 43–44, CHIRWA, D.M. *Combating child poverty: the role of economic, social and cultural rights*, in SLOTH–NIELSEN, J., ed. Children's rights in Africa: a legal perspective, Aldershot: Ashgate, 2008, 91–108, p. 96.

14 MURRAY, Rachel. *Human rights in Africa from the OAU to the African Union*. Cambridge: Cambridge University Press, 2004, p. 152, LIOYD Amanda. *A theoretical analysis of the reality of children's rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child*, African Human Rights Law Journal, 2002, Vol. 2 (1), 11–32, p. 13, CHIRWA D. *Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights*, Netherlands International Law Review, 2006, 53 (1), 63–96, p. 70, SLOTH–NIELSEN, J. *Children's Rights in Africa,* in SSENYONJO, M., ed. The African Regional Human Rights system: 30 years after the African Charter on Human and Peoples' Rights, Leiden–Boston, 2012, 155–176, pp. 157–158.

15 Unlike the African Commission, there was no Court judgement on article 18(3) available to us as to August 2019.

of periodic reports[16] and the practice of the African Commission in terms of communications[17] and concluding observations[18]. Thus, using these practices as focal points, this study argues that women's rights and children's rights, whether generally or specifically, as provided under international declarations and conventions form part of article 18(3) of the African Charter. Therefore, non–compliance with these rights is a violation of the African Charter itself[19], rather than just a violation of an international declaration or convention. It must be recalled that, while the African Court may simultaneously find violations of any other relevant human rights instruments ratified by the State party concerned[20], both the African Commission and the African Court have no jurisdiction to assess violations of international declarations or non–ratified conventions. Article 18(3) is of most use to a State that is not a signature party to those conventions and treaties expressly providing women and children's rights, such as the CEDAW and the 1990 Convention on the Rights of the Child (CRC). Therefore, making violations of international declarations and conventions also violations of article 18(3). In addition to this article's general conclusion (6.), the present analysis deals respectively with protected women's and children's rights under the African Charter (2.), the relevance of article 18(3) (3.), State's practice in respect with this article through some State's periodic reports (4.),

16 Republic of Djibouti combined initial and periodic report under the African Charter on Human and Peoples' Rights (hereinafter Djibouti Report), 2013, paras. 216–251. See also Republic of Rwanda, the 11th, 12th, and 13th periodic reports on the implementation status of the African Charter on Human and Peoples' Rights and the initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (hereinafter Rwanda Report), 2009–2016, paras. 146–142.

17 Communication 227/99: Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 2003 (hereinafter the DRC case). Communication 323/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, 2011 (hereinafter the Egypt case).

18 African Commission Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, 2012 (hereinafter Sudan Concluding observations). African Commission: Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius, 2009 (hereinafter Mauritius Concluding observations).

19 Communication 227/99: Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 2003, para. 86.

20 African Court Protocol, arts. 3 (1) and 7.

and the practice of the African Commission through the examination of some communications and the issues of some concluding observations (5.).

2. Protected women's and children's rights under the African Charter

Under the African Charter, protected women's and children's rights comprise those expressly enumerated by the Charter itself (2.1) and those provided under international conventions and declarations through article 18(3) (2.2).

2.1 Expressly protected women and children's rights

Following the principle of non–discrimination, the African Charter entitles every individual, including men, women, adults and children to all its expressly protected human and peoples' rights[21]. This is further supported by the neutral language of the African Charter, which respectively refers to the rights–holders as "every individual, every human being, no one, every citizen, non–national, the aged and disabled, the family and all peoples"[22] the use of this neutral language seems to ignore the particularity of women[23] and children[24] who need special protection. That is, the neutral language does not contribute to distinguish between human rights that can be enjoyed by everyone and those specific rights for women[25] and children[26]. Moreover, there are no expressly set limitations to protect children from the exercise of some rights. For instance, article 15 of the African Charter discussing everyone's right to work does not provide children protection from being admitted to employment before an appropriate minimum age[27]. To fill

21 African Charter on Human and People's Rights, art 2.

22 African Charter on Human and People's Rights, Chapter I.

23 See for instance, the need to deal with women's rights through specific human rights treaties such as CEDAW.

24 According to principle 2 of the 1959 Declaration of the Rights of the Child, a child shall enjoy special protection.

25 See for instance, special protection to be accorded to mothers during a reasonable period before and after childbirth. ICESCR, art 10 (2).

26 For instance, the child's right to be registered immediately after birth and to have a name. ICCPR, art 24 (2).

27 See principle 9 of the 1959 Declaration of the Rights of the Child and art 10 (3) ICESCR.

in this gap, the African Charter opted to expressly include the clause requiring State parties to ensure the protection of the rights of women and the children as stipulated in international declarations and conventions as discussed below.

2.2 Women's and children's rights under international declarations and conventions as part of article 18(3) of the African Charter

According to article 18(3) of the African Charter, "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". Compared to other Charter's provisions, article 18(3) does not expressly list the rights of women and children it refers to. Instead, it refers to these rights as stipulated in international declarations and conventions. That is, article 18(3) neither limits the rights it refers to, nor does it limit international conventions and declarations providing for these rights.

Indeed, various international declarations and conventions deal with a panoply of women's and children's rights. These include inter alia, the 1924 Geneva Declaration on the Rights of the Child, the UDHR, the 1959 Declaration of the Rights of the Child, the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1993 Declaration on the Elimination of Violence against Women, 1995 Beijing Declaration and Platform for Action, the 1954 Convention on the Political Rights of Women, 1964 Convention on the Consent of Marriage, Minimum Age of Marriage, and Registration of Marriages, the ICCPR, the CESCR, CRC and CEDAW. Examples of women's rights herein protected include: inter alia; women's equal rights as to marriage; during marriage and at its dissolution; special care and assistance to motherhood[28]; right to appropriate services in connection with pregnancy; confinement and the post–natal period; the right to be free from all forms of traffic[29]; as well as conditions for safe abortion in circumstances where abortion is not against the law[30].

Protected children's rights in these international declarations and

28 UDHR, art 25 (2), CEDAW, art 16 (1).

29 CEDAW arts. 6, 11, 12, 13, 16. See also art 10, ICESCR.

30 Beijing Declaration, para. 106 (K).

conventions include among others, special care and assistance to childhood, equal social protection to all children born in and out of wedlock, children's right to free education in the elementary and fundamental stages[31], the right to know and be cared for by his or her parents[32], the right to have a name, the right to necessary protection after dissolution of the parents' marriage[33], protection from economic and social exploitation[34], the right to love and understanding, as well as the priority to be among the first to receive protection and relief in all circumstances[35]. Taken together, protected women´s and children's rights in these international declarations and conventions supplement each other. Moreover, as will be discussed below, all these rights enjoy the same status irrespective of their protection through binding human rights instruments or non–binding human rights instruments such as international declarations.

3. Relevance of article 18(3) of the African Charter for women and children's rights in Africa

Out of the 26 articles of the African Charter dedicated to human rights, article 18(3) is the only one to expressly use the words "women and children", and to expressly address the specific protections given to the rights of women and children, although other Charter's provisions on human rights apply to women and children as well. Therefore, article 18(3) may be interpreted to cover all human rights not expressly protected under the African Charter, whether general[36] or specific to women and children, as provided by both general and specific declarations and conventions, adopted before or after the coming into force of the African Charter. As far as international conventions are concerned, in addition

31 UDHR, arts. 25 (2) and 26 (1).

32 CRC, art 7.

33 ICCPR, art 24.

34 ICESCR, art 10 (3).

35 Principles 2, 3, 6, 8 and 9 of the 1959 Declaration of the Rights of the Child.

36 General rights such as the rights to social security, adequate standard of living and food not expressly provided by the African Charter are incorporated through article 18(3) with the only restriction that they cannot be claimed by "adult men".

to not being expressly subject to the clause of ratification by State parties, they should be understood to include both human rights treaties and other conventions dealing directly or indirectly with women's and children's rights. The same applies to international declarations which are not subject to ratification. Taken together, article 18(3) may be interpreted as providing broad protection to the rights of women and children. To this, Chirwa rightly points out that, "the Charter allows scope for the recognition of a wider range of women's rights than is often supposed by its critics. For example, article 18(3) can be construed to mean that States are bound to implement the rights of women as articulated in international covenants to which they are parties or not, as well as declarations adopted both before and after the adoption of the Charter. The effect of this would be that virtually all rights recognised in the international declarations and treaties including the CEDAW can be enforced under the African Charter"[37]. Therefore, it can be argued that, human rights protected under international declarations and conventions form part of the African Charter, especially its article 18(3). Moreover, as part of the African Charter, these rights can be enforced before both the African Commission and the African Court.

However, there are some criticisms of article 18(3) at hand. For instance, it is argued that, in addition to only protecting women's rights in the context of the African family[38] which represents an oppressive environment within which serious human rights abuse against women and children are committed[39], article 18 falls short by not expressly providing for some specific women's rights, such as the right to consent to marriage and equality of spouses during and after marriage[40]. To counter this criticism, one may argue that, the right to consent to marriage and equality of spouses form part of "the rights of the woman as stipulated in international declarations and conventions" article 18(3) refers to. Moreover, Kaime writes that,

37 CHIRWA D. *Reclaiming (Wo)manity: the merits and demerits of the African Protocol on Women's Rights*, op. cit., p. 70.

38 SSENYONJO, M. *Culture and the human rights of women in Africa: between light and shadow*, op. cit., pp. 43–44.

39 CHIRWA, D.M. *Combating child poverty: the role of economic, social and cultural rights*, op. cit, p. 96.

40 SSENYONJO, M. *Culture and the human rights of women in Africa: between light and shadow*, op. cit.

> "A debate ensued regarding whether, by virtue of this provision, State parties to the African Charter became legally bound by the provisions of the 1959 United Nations Declaration and subsequent instruments that dealt with women's or children's rights. Whilst some authors sought to give a generous interpretation to the article, it is difficult to see how States could become bound by these declarations or conventions without formally submitting to the prescribed ratification process of the concerned instruments. Indeed, the Vienna Convention on the Law of Treaties which is considered the definitive statement on the law of treaties, would not regard the situation envisaged under article 18(3) of the African Charter as evincing an intention to become legally bound by subsequent instruments"[41].

This quote calls for some comments. To begin with, the author falls short by not expressly highlighting that international declarations are not subject to the Vienna Convention's provision on the ratification of international conventions. Moreover, reaffirming a State's primary obligation to implement the rights of women and children stipulated in international declarations and conventions, Julia Sloth–Nielsen rightly points out that,

> "… if reference to international declarations meant to refer intentionally to the prior Declaration on the Rights and Welfare of the African Child, adopted a mere two years earlier by the very same body (although an argument is to be made that cross–reference included the 1959 UN Declaration on the Rights and Welfare of the Children), such deduction would imply that the Declaration by definition a non–binding instrument, acquires by incorporation a degree of legal status"[42].

One may argue from this quote that, article 18(3) incorporates women's and children's rights protected under international declarations, thereby giving the rights a degree of legal status. Furthermore, with respect to the ratification

41 KAIME, Thoko. *The African Charter on the Rights and Welfare of the Child: a socio–legal perspective*, op. cit., p. 22.

42 SLOTH–NIELSEN, J. *Children's Rights in Africa,* op. cit., pp. 157–158.

issue, it must be stressed that State parties are bound to the provisions of article 18(3) rather than to that of other international conventions. To this end, the Vienna Convention expressly provides that every active treaty must be binding upon the signatory parties and must be performed by them in good faith, and a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its objectives and purpose[43]. In other words, the provision of article 18(3) of the African Charter, which has been in force since 1986 is binding to all State parties to the Charter. To this end, the African Commission ruled that,

> "… the African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, States Parties to the Charter are legally bound to its provisions. A State not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a State must abide by the law in the same way an individual must"[44].

Moreover, article 18(3) must be interpreted in a compatible manner with the African Charter, which itself does not make any reference to ratified conventions. This is supported by the preamble to the African Charter, where State parties reaffirm their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions, and other instruments adopted by the Organization of the African Unity (OAU) and the United Nations (UN).

It must be emphasized that, although article 18(3) only talks about the obligation to protect human rights, all human rights under the African Charter give rise to the State's obligation to protect, promote, and fulfil[45]. Moreover, as part of chapter I of the African Charter dedicated to "human and peoples' rights", article 18(3) is subject to the general obligation of article 1, which enjoins

43 See arts. 26 and 31 (1) of the Vienna Convention.

44 See Communication 137/94–139/94–154/96–161/97: International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights against Nigeria, 1998, para. 116.

45 Communication 323/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, 2011, para. 273.

State parties to adopt legislative or other measures that give effect to them[46], as discussed in the next section.

4. States' practices towards article 18(3): an illustration of State's reports from Rwanda and Djibouti

Article 62 of the African Charter enjoins all State parties to submit a report every two years on the legislative, or other measures taken to promote the rights and freedoms herein protected. When applied to article 18(3), article 62 implies that State parties are required to report on adopted legislation and other measures that give effect to the rights of women and children as stipulated in both international declarations and conventions. It must be emphasized that State's practices regarding such measures are not uniform. That is, while some States do not refer at all to any international conventions or declarations[47], some refer either to some international declaration, such as the Millennium Development Goals[48], to some specific ratified treaties such as the CEDAW or CRC[49] or to both "international declarations and conventions" in general and some specific ratified conventions[50]. Moreover, some States´ report on adopted measures that promote some specific women's and children's rights not expressly provided by the African Charter, such as protection of women's

46 LIOYD Amanda. *A theoretical analysis of the reality of children's rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child*, op. cit., p. 13.

47 The Republic of Angola, 6th and 7th combined periodic reports to the African Commission on Human and Peoples 'Rights, 2017, para. 105–107, Republic of Botswana, 2nd and 3rd periodic reports to the African Commission, 2015 and Democratic Republic of the Congo 11th, 12th, and 13th Periodic Reports to the African Charter on Human and People 'Rights, 2015, paras. 53–57.

48 Nigeria 6th Periodic country report: 2015– 2016 on the implementation of the African Charter on Human and Peoples' Rights, chapter 16.

49 See a combination of Report of Burundi to the African Commission on Human and Peoples 'Rights covering the period of 2002 to 2008, 2010.

50 United Republic of Tanzania, the consolidated second to tenth periodic report submitted to the African Commission for Human and People's Rights, 2006.

integrity, dignity and liberty, and children's protection against sexual abuse[51]. Taken together, these State's practices suggest that State parties are under a treaty's obligation to actualize women´s and children's rights that article 18(3) refers to. For illustrative purposes, this article's focus will be on reports submitted by Rwanda and Djibouti.

Like the African Charter itself, State's reports from Rwanda and Djibouti make a distinction between the rights of women and children and all human rights as adopted measures aiming at giving effect to article 18(3) are concerned[52]. Accordingly, they provide information on women's and children's rights as argued under ratified human rights treaties expressly dedicated to the rights of both women and children[53]. These include inter alia, the protection of women and children from human trafficking[54], the incorporation of the CRC's principle of the "best interests of the child" into the family law[55] as well as the incorporation of a minimum age for certain things in line with the International Labour Organization Minimum Age Convention[56]. Read in the light of article 18(3) of the Charter, the above suggests that by mentioning ratified treaties on the rights of women and children, State parties understand article 18(3) as entitling those women and children living within their jurisdictions to the rights protected by the provision. Therefore, like these State's reports, women and children in these two countries can also submit complaints and communications based on article 18(3) of the Charter before both the African Commission and the African Court for violations of their rights recognised under these ratified treaties. The same argument may apply to all State parties to the African Charter that have ratified other conventions providing for women's and children's rights. Moreover, the above expressly mentioned

51 Ibidem.

52 See Rwanda Report, paras. 145–154 and Djibouti Report, paras. 216–251.

53 These include inter alia, CEDAW, the African Women Protocol, the CRC and its additional protocols, the African Charter on the Rights and Welfare of the Child. See Rwanda Report, paras. 145–146 and Djibouti Report, paras. 217 and 219. Djibouti Report, paras. 241, 243 and 248 and Rwanda Report, para. 150.

54 Djibouti Report, paras. 219 and 221.

55 See Djibouti Report, para. 241.

56 Ibídem, para. 243.

women's and children's rights materialise the abstract nature of article 18(3) which does not enumerate the rights it refers to. However, by reporting only on the implementation measures of the women's and children's rights protected under ratified treaties, State parties seem to adopt a reductionist and minimalist approach which excludes women's and children's rights protected under international declarations and non–ratified conventions. The shortcomings of such a minimalist approach have been partly addressed by the African Commission as discussed below.

5. African Court and African Commission's understanding of article 18(3)

Using some selected cases, the present section aims to illustrate the African Commission's understanding of article 18(3) of the African Charter through the examination of some communications from States[57] (5.1), other communications[58] (5.2), and State's reports[59] (5.3).

5.1 Communications from States and article 18(3) of the African Charter: the DRC's case

The Democratic Republic of the Congo (DRC) case was submitted by the DRC in 2003 against Burundi, Rwanda, and Uganda charging them with violations of inter alia and, some provisions of the African Charter[60]. It is worth mentioning that, the communication itself does not expressly mention the violation of article 18(3), although it contains information on rape and killings of both women and children[61]. Such omission could be justified by the fact that the communication already referred to the violation of article 2 of the African Charter, which proscribes discrimination based on inter alia, sex, birth or other status. However, the African Commission did not interpret article 2 from a

57 African Charter, arts. 47–54.

58 Ibidem. arts. 55 to 59.

59 Ibidem, art 62.

60 These include articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter. Communication 227/99: Democratic Republic of Congo v. Burundi, Rwanda, Uganda, 2003, para. 8.

61 Ibidem, para. 5.

woman's or child's perspective, in that it only established discrimination based on the national origin of the victims[62].

However, a closer look at the case reveals that, the African Commission also dealt with women's and children's rights in isolation from article 2 of the Charter. To this end, it argues that, "the raping of women and girls, as alleged and not refuted by the respondent States, is prohibited under article 76 of the first Protocol Additional to the Geneva Conventions of 1949, which provides that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault. It also offends against both the African Charter and the CEDAW. And on the basis of articles 60 and 61 of the African Charter the African Commission finds the Respondent States in violation of inter alia, article 18(3) of the Charter"[63]. Contrary to some views that the African Commission has never decided any case concerning women's rights under the African Charter[64], this case is an illustration of the Commission's ruling on both women's and children's (girls) rights. Moreover, the African Commission confirms that women's and children's (girls) right to special respect and to special protection against rape, forced prostitution and any form of indecent assault protected under the Vienna Convention and CEDAW, are all part of the African Charter. Most importantly, the Commission ruling addresses the issue of ratification of international conventions in two ways. First, although the Respondents States were already parties to the CEDAW[65], the African Commission ruled that non–compliance with women's and children's right to special protections as protected under both the CEDAW and the Protocol to the Vienna Convention constitutes a violation of article 18(3) of the Charter. As shown, the African Commission made no reference to the impact of a such ratification for State parties. Secondly, by using the 1949 Vienna Convention

62 Ibidem, para. 80.

63 Ibidem, para. 86.

64 MANJOO, Rashida. *Women's human rights in Africa*. In SSENYONJO, M., ed. The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights, Leiden–Boston, 2012, 137–154, p. 143.

65 All the Respondents were already parties to the CEDAW which they ratified respectively in 1981 (Rwanda), 1985 (Uganda) and 1992 (Burundi).

without considering whether it had been ratified or not by respondent States, the African Commission understands article 18(3) to also include international conventions adopted before the coming into force of the African Charter. In sum, from the African Commission ruling, one can argue that when dealing with women's and children's rights before the African Commission and the African Court, international conventions and declarations referred to in article 18(3) should serve as source of inspiration and interpretation that should help to specify the content of this Charter's provision as argued under articles 60 and 61 of the African Charter.

5.2 Other communications and article 18(3) of the African Charter: The Egypt case

The Egypt case was brought on behalf of the victims on May 2006 by the Egyptian Initiative for Personal Rights and INTERIGHTS and explicitly alleged violations of inter alia, article 18(3) of the African Charter. That is, it alleges that the victims were subject to incidents of insults, violence, intimidation, and sexual harassment that occurred in the presence of high–ranking officers of the Ministry of Interior and the Riot police who failed to protect them[66]. Unlike the DRC case, the Commission, decided to deal with both articles 2 and 18(3) of the African Charter together, since they both have an element of discrimination[67]. It further read these Charter's provisions in the light of inter alia, the African Protocol on Women's Rights and the CEDAW[68], and concluded that the violence against the victims constituted a form of discrimination against women. To this end, it ruled that, "sexual assaults against the victims were acts of gender–based violence, perpetrated by State actors, and non–state actors under the control of State actors, that went unpunished. The violations were designed to silence women who were participating in the demonstration and deter their activism in the political affairs of the Respondent State which in turn, failed in its inescapable responsibility to take action against the perpetrators. For these reasons, the African Commission finds the Respondent State in violation of articles 2

66 Communication 323/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, 2011, paras. 4–140–141.

67 Ibídem, para. 115.

68 Ibídem, paras. 121–123.

and article 18(3) of the African Charter"[69]. The following points can be drawn from the Commission's observations. First, protecting women from gender–based violence in terms of sexual assaults, which is not expressly provided by the African Charter, falls within the list of women's rights protected under article 18(3) of the African Charter. Secondly, like in the DRC case, one can argue that using its power to draw inspiration from other human rights instruments under article 60 of the African Charter, the African Commission uses both the CEDAW and the African Women's Protocol to not only interpret article 18(3) of the African Charter, but also to fill in and specify its content. This is because, although Egypt has ratified the CEDAW since 1981[70], the African Commission has no jurisdiction to rule over other human rights treaties such as CEDAW. Therefore, it could only find a violation of article 18(3) of the African Charter.

5.3 African Commission's concluding observations to Sudan and the Republic of Mauritius in respect of article 18(3) of the African Charter

It is worth mentioning from the beginning that, in the African Commission's concluding observations of Sudan and Mauritius, the African Commission does not expressly refer to article 18(3) of the African Charter. However, a close look at its practice suggests that it considers women's and children's rights in three ways. First, it expressly addresses them in terms of both "areas of concern" and "recommendations"[71]. Secondly, although it does not expressly provide the impact of the ratification of some treaties, such as CEDAW, African Protocol on Women's Rights and the CRC, the African Commission either commends[72] or recommends[73] their ratification. Thirdly, it recommends the implementation of some women's and children's rights not expressly provided by the African Charter but recognised by other international conventions whether ratified or not as well as international declarations. For instance, although Sudan is not

69 Ibidem, 165–167.

70 Egypt has ratified the CEDAW in 1998.

71 See for instance, Sudan Concluding Observations, paras. 34 and 69.

72 See Mauritius Concluding Observation, paras. 12 and 47.

73 For instance, Sudan is recommended to ratify both the African Women Protocol and CEDAW. See Sudan Concluding Observation, paras. 72–73.

party to both the CEDAW and African Women Protocol, the African Commission recommends it to take legislative and other measures that address rape, the low level of literacy among the girl–child, women's participation in the political affairs of the State, child labour and recruitment of child soldiers, female genital mutilations, and violence against women[74]. Moreover, while not stressing on the ratification by Mauritius of some treaties on women's and children's rights, the Commission recommends the Mauritius government to inter alia, take urgent measures to address the high number of children who are victims of drug abuse, especially street children, implement the recommendations of the UN Committee on the Rights of the Child regarding discrimination against children with disabilities, aid children affected and/or infected by HIV/AIDS and children from disadvantaged families, and review laws relating to abortion for unwanted pregnancies by expunging the punitive provisions imposed on women who undergo abortions in accordance with the Beijing Declaration and Platform for Action[75]. Taken together, the above suggests that these identified rights of women and children as protected under other international human rights treaties form part of the African Charter. Thus, article 18(3) of the Charter is the only legal basis that can justify the legality and legitimacy of the Commission's recommendations resulting from its concluding observations. Moreover, although the African Commission encourages State parties to ratify some treaties on women's and children's rights, it also recommends them to implement these rights irrespective of whether they are provided by ratified treaties or not. Finally, by invoking the State party's consideration of inter alia, the Beijing Declaration and Platform for Action with respect to the issue of abortion, the African Commission affirms the Charter's prescription that State parties shall ensure the rights of women and children stipulated under international declarations as well.

6. Conclusion

Contrary to the view that the African Charter provides inadequate protection for women and children and that the African Commission fails to consider

74 Ibídem, paras. 74–79.

75 Mauritius Concluding Observation, paras. 62–66.

their position, article 18(3) of the Charter, is broad enough to allow for a more dynamic use of the Charter to promote and protect the rights of women[76] and children. That is, all women's and children's rights protected under international conventions and declarations are part of article 18(3) of the African Charter, which all State parties must protect, respect, and fulfil. The violation of any of these rights by State parties entitles women and children, or their representatives to utilize both the African Commission and the African Court for any violation of article 18(3) of the African Charter. Regarding the rights of women and children, if the African Commission and the African Court determine that a State party's behaviour is not compliant with any women's or children's rights protected under one of the international declaration and convention, they shall find a violation of article 18(3) of the African Charter, rather than a violation of these international instruments, which are simply be used to fill in and specify the content of article 18(3) of the African Charter. This is the legal consequence following the ratification of a biding human rights instrument such as the African Charter.

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ASEAN Human Rights Mechanism: Weaknesses and the Way to Move Forward

El mecanismo de protección de la Asociación de Naciones del Sudeste Asiático (ASEAN): debilidades y formas de avanzar

Received: 20/04/2019 – Accepted: 05/11/2019

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Abstract

This article provides a general assessment of the Association of Southeast Asian Nations (ASEAN) human rights mechanism. First, this article will provide general information about the ASEAN and the human rights situation in this region. Then, it will dive deeper into the ASEAN human rights mechanism, particularly the two central bodies of this mechanism –the ASEAN Commission on Human Rights (AICHR) and the ASEAN Commision on the Promotion and Protection of the Rights of Women and Children (ACWC). Specifically, this article provides an analysis and assessment of the limitations of the ASEAN human rights mechanism and offers some suggestions on short and long–term solutions to improve this mechanism.

Keywords: ASEAN; ASEAN Human Rights Mechanism; Human Rights; Southeast Asia.

Resumen

Este artículo propone un análisis general sobre el mecanismo de protección de la Asociación de Naciones del Sudeste Asiático (ASEAN). Primero, proporciona información general sobre la ASEAN y sobre la situación de los derechos humanos en la región. Luego, profundiza en el mecanismo de protección de los derechos humanos, particularmente en sus dos cuerpos centrales: la Comisión de Derechos Humanos de la ASEAN (AICHR) y la ASEAN para la Promoción y Protección de los derechos de las mujeres y los niños (ACWC). Específicamente, el trabajo proporciona un análisis sobre las limitaciones del mecanismo de la ASEAN y ofrece algunas sugerencias de mejora a corto y largo plazo.

Palabras clave: ASEAN; Mecanismo de Derechos Humanos; Derechos Humanos; Sudeste de Asia.

Summary

In 1967, five countries in Southeast Asia established the ASEAN. This intergovernmental organization later expanded and currently has ten Member States. Although the ASEAN's original goal was only to promote economic development, cooperation, and to maintain regional stability and peace, the purpose of protecting and promoting human rights is then later also agreed upon. The ASEAN has established a human rights mechanism –the only sub–regional human rights mechanism in the Asia Pacific region. Despite this, the ASEAN human rights mechanism is said to be "toothless" or "built with teeth but refuse to bite"[2].

2 The ASEAN Declaration Bangkok on 8th August 1967. Available at: https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/ [last viewed August 10, 2019].

This article aims to analyze the weaknesses of the ASEAN human rights mechanism and suggest proposals for improvements to this mechanism. This article will be divided into the following main sections.

Part 1 of the article will provide comprehensive information about the ASEAN and the condition of the ASEAN's human rights based on various sources of information. Meanwhile, part 2 of the article will carefully analyze the ASEAN human rights mechanism through an assessment of the organizational structure and performance of the AICHR and the ACWC. The assessment will be based on the essential characteristics for a regional human rights mechanism and comparison with other human rights systems/mechanisms around the world.

Based on the information and assessments in part 2, part 3 of this article will focus on clarifying the substantive and procedural limitations of the ASEAN human rights mechanism. This section will also provide some suggestions that would effect both the short and long–term future to help the ASEAN human rights mechanism effectively promote and protect human rights in the future.

While analyzing and assessing the weaknesses of the ASEAN human rights mechanism, this article also acknowledges that the stronger commitments and political will of each ASEAN member state play an especially important role in the process to improve this mechanism.

1. Overview of the ASEAN and the condition of human rights in ASEAN Member States

1.1 Overview of the ASEAN

The ASEAN is a regional intergovernmental organization established on August 8, 1967 under Bangkok Declaration. The ASEAN was originally established with five founding Member States, including Thailand, Malaysia, Indonesia, Singapore, and the Philippines. Brunei, Vietnam, Lao, Myanmar, and Cambodia took turns in 1984, 1995, 1997 and 1999 respectively. As set out in its Bangkok Declaration, the ASEAN aims to:

(i) accelerate economic growth, social progress, and cultural development in the region;

(ii) promote regional peace and stability;

(iii) foster active collaboration and mutual assistance on matters of common interest;
(iv) provide assistance to each other in the form of training and research facilities in the educational, professional, technical, and administrative spheres;
(v) collaborate more effectively for the higher utilization of their agriculture and industries, the expansion of their trade;
(vi) promote Southeast Asian studies; and
(vii) maintain close and beneficial cooperation with other international and regional organizations[3].

Thus, initially the establishment of the ASEAN was primarily for economic cooperation and regional peace stabilization. Member States have not directly addressed the aspect of promoting and protecting human rights, but it is arguable that such an aspect is included in the aim of promoting justice and the rule of law. In 2007, the ASEAN Member States signed a binding instrument –the ASEAN Charter[4]– to recognize the ASEAN as a legal person. All the aims noted in the Bangkok Declaration are re–stated at the Charter. Additionally, the ASEAN Member States agreed on the aim specifically to promote and protect human rights and fundamental freedoms (article 1(7) of the ASEAN Charter).

Principles

The ASEAN Charter stipulates the fourteen principles of the ASEAN, including a number of principles that lay the foundation, and affect the promotion and protection of the following human rights in the ASEAN, namely:

(1) respect for the independence, sovereignty, equality, territorial integrity, and national identity of all ASEAN Member States;
(2) non–interference in the internal affairs of ASEAN Member States;
(3) respect for the right of every Member States to lead its national existence free from external interference, subversion, and coercion;
(4) respect for fundamental freedoms, promotion, and protection of human rights and promotion of social justice.

3 The Charter of the Association of Southeast Asian Nations. Available at: https://asean.org/storage/2012/05/The–ASEAN–Charter–26th–Reprint.pdf [last viewed August 10, 2019].

4 Ibídem, Preamble, p. 2.

Although article 2 of the ASEAN Charter does not directly acknowledge the principle of consensus, it is a core principle of the ASEAN. The principle is addressed at the beginning of the Charter as follows: "We are, peoples of Member States of ASEAN... respect the fundamental importance of... the principle of [...] consensus..."[5]. Through practice, this principle is interpreted as all the ASEAN decisions are made only when all ASEAN Member States agree upon. Article 21(2) of the ASEAN Charter provides an exception to the principle of consensus, under which the formula of flexible participation, including the formula of the ASEAN minus X, can be applied to the implementation of economic commitments. However, this provision is only applicable for economic commitments and the formula of flexible participation is only applied when the consensus of the Member States is obtained. Consequently, the consensus principle is criticized as a constraint to the decision making of the ASEAN, especially on sensitive issues that are likely to have a substantial effect on economic, social, and political interests of one or more Member States[6].

Organizational structure

The apparatus of the ASEAN is defined from Chapter IV to Chapter X of the ASEAN Charter, and includes the following agencies:

(1) The ASEAN Summit consists of heads of state or heads of government of Member States. The ASEAN Summit is a biannual meeting in which the supreme policy–making body of ASEAN consider, giving directions to, and decide critical issues related to the realization of ASEAN goals and the benefits of ASEAN Member States. The ASEAN Summit regularly convenes

5 Further reading: VILLANUEVA, Kevin H.R., et al., *ASEAN Consensus: The Intangible Heritage of Southeast Asian Diplomacy*, ASEAN@50, 2017, Vol. 4 Building ASEAN Community: Political – Security and Socio – cultural Reflections (20), pp. 88–122; NGUYEN, Hong Hai, *Time to reinterpret ASEAN's consensus principle*, East Asian Forum (e–journal), 2012, Available at: https://www.eastasiaforum.org/2012/07/27/time-to-reinterpret-asean-s-consensus-principle/ [last viewed March 7, 2019]; and LUQMAN, Nik, *Is ASEAN Consensus A Blessing or Curse – or Both?*, in Reporting Asian (e–journal), 2015. Available at: http://www.aseannews.net/asean-consensus-blessing-curse/ [last viewed March 7, 2019].

6 ASEAN Charter, art. 7.

twice a year or for extraordinary meetings according to the agreements of member countries[7].

(2) The ASEAN Coordinating Council composed of ASEAN Foreign Ministers, which is in charge of preparing for ASEAN Senior Meetings, and coordinating the implementation of the Summit's agreements and decisions. The Coordinating Council also monitors all of ASEAN activities with the assistance of the Secretary–General of ASEAN. The ASEAN Coordinating Council meets at least twice a year[8].

(3) The ASEAN Community Councils include ASEAN Political–Security Community Council and ASEAN Socio–Cultural Community Council. Each Council has its own purview and be responsible for ensuring the implementation of relevant decisions of the ASEAN Summit as well as coordinating the work of different sectors under its purview[9].

(4) The ASEAN Sectoral Ministerial Bodies are ASEAN Ministerial Conferences in all areas of cooperation, which are responsible for implementing agreements and decisions of the ASEAN Summit, and petition Community Councils concerned with solutions to implement and actual implementation of the decisions of the ASEAN Summit[10].

(5) The Secretary–General of ASEAN and ASEAN Secretariat are the most permanent bodies of ASEAN, tasked with implementing ASEAN decisions and agreements, support and monitor the progress of ASEAN agreements and decisions, and submit annual reports on ASEAN activities to the ASEAN Summit[11].

(6) The Committee of Permanent Representatives to the ASEAN consists of a Permanent Representative with the Ambassador's mandate in the ASEAN, located in Jakarta, and is tasked with representing the countries' executives of the ASEAN's daily affairs. The function of the ASEAN Standing Committee is to support Coordinating Councils and Sectoral Ministerial

7 Ibídem, art. 8.

8 Ibídem, art. 9.

9 Ibídem, art. 10.

10 Ibídem, art. 11.

11 Ibídem, art. 12.

Conferences, coordinate activities with the national ASEAN Secretariat and Sectoral Ministerial Conference, coordinate with the ASEAN Secretary–General and the ASEAN Secretariat on all relevant issues, support ASEAN foreign affairs, and receive other duties entrusted by the Coordinating Council[12].

(7) The ASEAN National Secretariats are the Member States' focal points for coordination, in general, and specifically coordination of ASEAN cooperation within each country[13].

(8) In 2009, based on article 14 of the ASEAN Charter, the AICHR was appointed the task of promoting human rights awareness in the ASEAN strata and increasing cooperation between the governments of ASEAN Member States to protect human rights[14]. The functions, tasks, and activities of this agency will be clarified later in this article.

(9) The ASEAN Foundation supports the ASEAN Secretary–General and cooperates with relevant ASEAN agencies to assist the construction of the ASEAN Community via raising awareness of ASEAN identity, the interactions between people, and close cooperation in business, civil society, researchers, and other groups in the ASEAN[15].

1.2 The condition of human rights in ASEAN

An assessment of the status of human rights in the ASEAN is never an easy task due to the recognition, assurance, and protection of human rights, as well as how differently each country and region respond to violations of rights affected by various factors, including, but not limited to, the economic, social,

12 Ibídem, art. 13.

13 Art. 14 of the ASEAN Charter is the legal basis for the establishment of the ASEAN Human Rights Body which will promote the protection of human rights and fundamental freedoms. According to art. 14(2), the status, working methods, etc., of such a body will be determined by the ASEAN Foreign Minister Meeting.

14 ASEAN Charter, art. 15.

15 BEYER, Wictor, *Assessing an ASEAN Human Rights Regime: A New Dawn for Human Rights in Southeast Asia?,* Lund University, Faculty of Law, Master thesis, 2011, p.15. Available at:
https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1979974&fileOId=1981167 [last viewed August 10, 2019].

and political situation. Also, the ASEAN is a region with a large population and is one of the most diverse areas in the world. Therefore, an assessment of the status of human rights in this region will only be relative. However, within the scope of this article, the condition of human rights in the ASEAN region will be assessed based on the level of participation of ASEAN Member States in basic international human rights conventions and reports, and evaluations from non–governmental organizations to ensure certain human rights in the ASEAN Member States.

In general, in the international context, the condition of human rights in the ASEAN Member States has always attracted much attention. In the recent cycles of Universal Periodic Review, ASEAN Member States have still received a relatively large number of recommendations, of which they usually choose to accept a portion of (Table 1).

TABLE 1

ASEAN Member State	Date of latest UPR appearance	Number of Recommendations	
		Accepted	Noted
Brunei	May 2014	97	78
Cambodia	January 2019	Data not yet available**	
Indonesia	May 2017	167	58
Lao PDR	January 2015	18	80
Malaysia	November 2018	Data not yet available**	
Myanmar	November 2015	135	146
Philippines	May 2017	103	154
Singapore	January 2016	118	120
Thailand	November 2016	187	62
Viet Nam	January 2019	Data not yet available**	

* Updated 28 February 2019

** Countries were reviewed very recently, but their summaries on recommendations were not available yet

Furthermore, none of the ASEAN Member States have ratified/acceded to all nine core international instruments on human rights. Most ASEAN Member States have ratified/acceded between seven and nine of the treaties while two out of ten Member States have only ratified/acceeded two treaties. Three

ASEAN Member States have not ratified the International Covenant on Civil and Political Rights (ICCPR), and two of them also have yet to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, all ASEAN Member States have ratified the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). This fact reflects the ASEAN's selective approach to human rights that will be further explained later in this article (Table 2).

TABLE 2

ASEAN Member State	CERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ICMW	CPED	CRPD	Total ratification
Brunei				X	O	X			X	3/9
Cambodia	X	X	X	X	X	X	O	X	X	8/9
Indonesia	X	X	X	X	X	X	X	O	X	8/9
Lao PDR	X	X	X	X	X	X		O	X	7/9
Malaysia				X		X			X	3/9
Myanmar			X	X		X			X	4/9
Philippines	X	X	X	X	X	X	X		X	8/9
Singapore	X			X		X			X	4/9
Thailand	X	X	X	X	X	X		O	X	7/9
Viet Nam	X	X	X	X	X	X			X	7/9
Percentage of ratification	70	60	70	100	60	100	20	10	100	

X signifies signed and ratified

O signifies signed only

CERD – Convention on the Elimination of All Forms of Racial Discrimination

ICCPR – International Covenant on Civil and Pilitical Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

CAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CRC – Convention on the Rights of the Child

ICMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

CPED – International Convention for the Protection of All Persons from Enforced Disappearance
CRPD – Convention on the Rights of Persons with Disabilities

According to the Fund for Peace (Fragile States Index), from 2006 to 2014, the human rights situation in ASEAN Member States is not getting better when the proportion of human rights violations of most ASEAN Member States is quite high despite a downward trend in recent years[16]. Notably, in a few ASEAN Member States, human rights violations tend to increase, such as Brunei, Thailand, Vietnam, etc. (Picture 1, on page 12).

Meanwhile, the protection of necessary moral rights from violations in ASEAN States is also not getting better (Picture 2, on page 13). The protection of human rights in a few States has experienced positive changes but nothing significant. Based on the analysis of Our World in Data, the overall human rights scores of ASEAN States are not impressive. There are eight countries that have scores under 0 and two others have scores 1.98 and 1.70 (the values range from around –3.8 to around 5.4, and the higher is better)[17].

PICTURE 1[18]

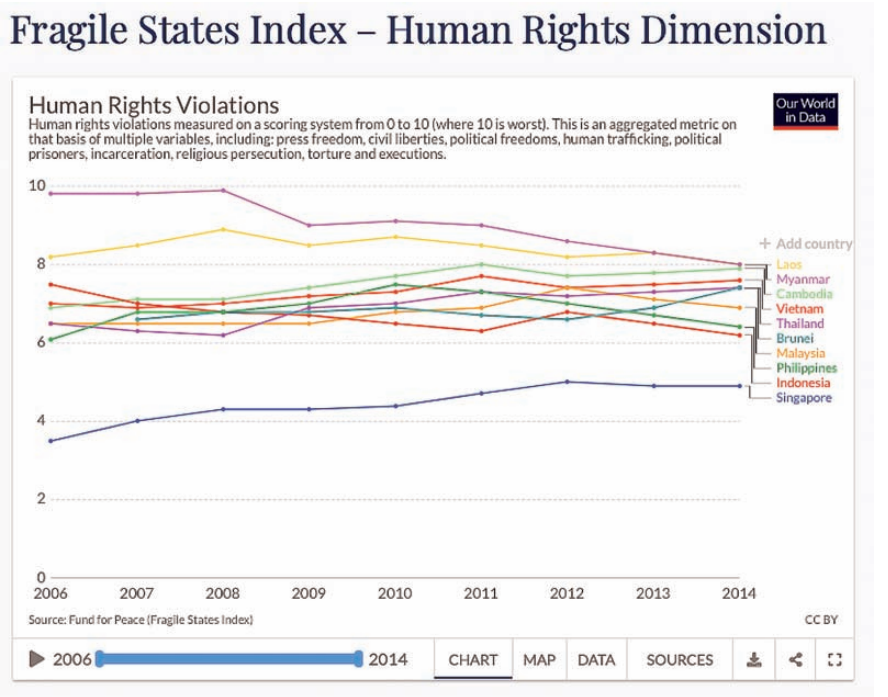
In 2018, Freedom House published a report on political rights and civil liberties which concluded that half of all ASEAN States are ranked as not free,

16 The Fragile States Index provides analysis relating to economic, political, and social issues in countries all over the world. In the political sphere, the Fragile States Index contains human rights and rule of law indicators, which reflect the relationship between the state and its population, insofar as fundamental human rights are protected and freedoms are observed and respected. Similarly, the Our World in Data provides comparative data and analysis in several fields, including violence and rights. See: Fragile States Index (2019), Comparative Analysis of ASEAN Member State. Available at: https://fragilestatesindex.org/comparative-analysis/ [last viewed August 10, 2019]; and Our World in Data, Human Right Violations. Available at: https://ourworldindata.org/grapher/human-rights-violations?tab=chart&time=2006..2014&country=BRN+KHM+IDN+LAO+MYS+MMR+PHL+SGP+THA+VNM [last viewed August 10, 2019].

17 Our World in Data, Human Rights Scores. Available at: https://ourworldindata.org/grapher/human-rights-scores?tab=chart&country=VNM+LAO+KHM+IDN+MMR+MYS+PHL+BRN+SGP+THA [last viewed 10th August 2019].

18 Fragile States Index (2019), Comparative Analysis of ASEAN Member State. Available at: https://fragilestatesindex.org/comparative-analysis/.

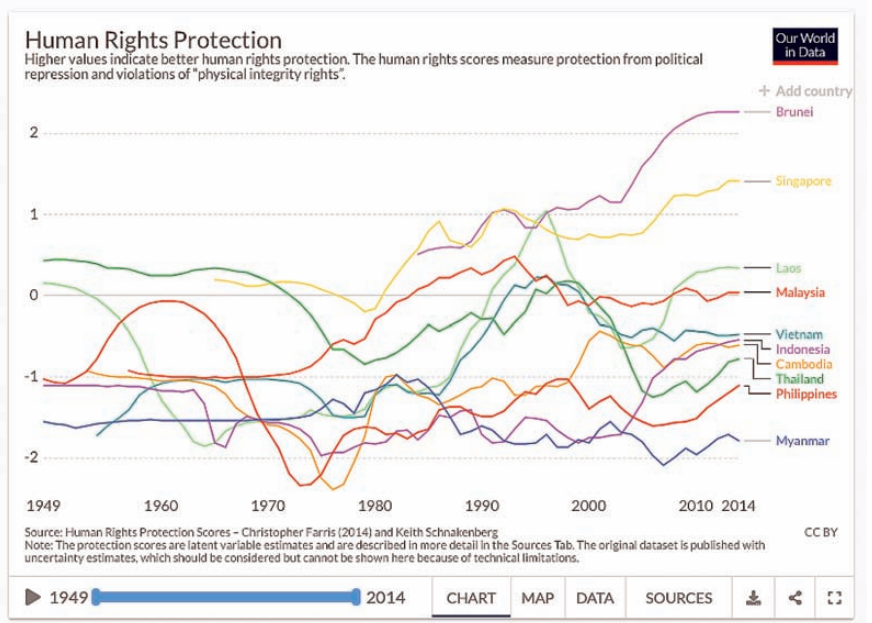
while the rest are classified as only partly free. Thus, the proportion of ASEAN



States ranked as "not free" account for 50%, which is higher than the overall 21% rate of the entire Asia Pacific region[19].

19 Feedom House, *Freedom in the World 2018, Democracy in Crisis* (Asia–Pacific). Available at; https://freedomhouse.org/report/freedom-world/freedom-world-2018 [last viewed March 3, 2019]); and Freedom House (2018), Freedom in the World 2018 – Table of Country Scores. Available at: https://freedomhouse.org/report/freedom-world-2018-table-country-scores [last viewed March 3, 2019].

PICTURE 2[20]



2. The ASEAN human rights mechanism

2.1 Regional human rights systems

Regional human rights systems consist of regional instruments which localize international norms and standards, and regional human rights mechanisms that enforce those norms and standards[21]. Therefore, regional human rights systems can respond quickly to the condition of human rights in the region and play an important role in the promotion and protection of human rights. It is clear that there is no "universal" form of a regional human rights mechanism; and in fact, there should not be just one form since each region has its own

20 Idem.

21 Office of the United Nations High Commissioners for Human Rights, *An Overview of Regional Human Rights Systems*. Available at: https://bangkok.ohchr.org/programme/regional-systems.aspx [last viewed March 3, 2019].

characteristics with varying degrees of human rights conditions. However, the United Nations' Office of High Commissioner on Human Rights introduced the "ideal" regional human rights mechanism with the following minimum responsibilities, power, and structure[22]:

(1) monitoring: to observe the overall condition of human rights in the region through the Member States submitted reports and on–site visits; to issue and publish the periodic reports; and to develop the early warning system for the prevention of gross violations of human rights and other international crimes, such as genocide, crimes against humanity, etc.;

(2) Communications: to receive, investigate, and decide on communications from individuals and non–governmental organization; if necessary, to adopt precautionary measures to prevent irreparable harms to persons; to give recommendations, including appropriate remedies, to the Member States in cases where human rights violations are found; and to help ensure their compliance via reporting mechanisms;

(3) Capacity building and education: to provide and contribute to human rights training programs; to raise public awareness on human rights; to respond to requests for advice from Member States and advise them; to conduct promotional country visits; to encourage ratification or accession of international human rights treaties; to cooperate and consult with international, regional, national and local institutions; non–governmental organizations that are competent in the field of promotion and protection of human rights; and publicize the reports on human rights; and

(4) Composition and support: the regional human rights mechanism shall be independent of the ASEAN governments and provided adequate resources and a certain level of privileges and immunities in order to conduct its activities effectively.

The above characteristics can be found in most regional human rights systems, including those in Europe, America, and Africa.

22 Office of the United Nations High Commissioners for Human Rights, *Principles for Regional Human Rights Mechanism* (non–paper). Available at: https://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx [last viewed March 28, 2019].

European system

The oldest regional human rights system was established in Europe under the European Convention on Human Rights and Fundamental Freedom in 1951 (ECHR). The system originally consisted of the part–time European Court of Human Rights (ECtHR); the European Commission of Human Rights, which later reformed to become the full–time ECtHR;[23] and the Committee of Ministers of the Council of Europe. The ECtHR has jurisdiction to: (1) decide on individual complaints related to violations of the protected rights under the ECHR allegedly committed by the Member States; (2) consider inter–state complaints; and (3) give advisory opinions on the interpretation of the ECHR and its protocol[24]. The Committee of Ministers of the Council of Europe monitors the execution of the ECtHR's judgments[25]. However, the jurisdiction of the ECtHR on the economic, social, and cultural rights is limited[26] since the ECHR does not contain those rights.

However, under the Council of Europe, there are also the Committee of Social Rights (CSR) and the European Committee for the Prevention of Torture (ECPT). The CSR examines the State Members' annual reports on

23 Under the ECHR, the ECtHR does not have power to receive individual complaints directly. These complaints shall be submitted to the European Commission of Human Rights to decide whether it is well-founded before transferred to the ECtHR. However, under Protocol 11 of the ECHR, which came into force in 1998, the European Commission of Human Rights no longer exists, and the ECtHR has the full power to directly receive and consider all individual complaints related to violations of civil and political rights. Further information at: Council of Europe, Historical background: The European Convention on Human Rights of 1950. Available at: https://www.coe.int/en/web/tirana/european-court-of-human-rights [last viewed April 10, 2019].

24 The ECtHR only has advisory jurisdiction from August 2018 under Protocol 16 of the ECHR.
See: DZEHTSIAROU, K., & O'MEARA, N., *Advisory jurisdiction and the European Court of Human Rights: A magic bullet for dialogue and docket-control?,* Legal Studies, Volume 34, Issue 3 September 2014, 444–468.

25 See: Council of Europe, About the Committee of Ministers. Available at: https://www.coe.int/en/web/cm/about-cm [last viewed August 10, 2019].

26 EUROPEAN PARLIAMENT, *The role of regional human rights mechanisms*, 2010, p. 15. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf [last viewed August 10, 2019].

the implementation of the Charter and considers the individual complaints concerning the violations of social rights recognized under the Charter. Meanwhile, the ECPT only focuses on setting up regular visits to detention facilities within the Member States that ratified the European Convention for the Prevention of Torture[27].

Related to composition, the ECtHR includes judges nominated by the Member States and selected by the Parliamentary Assembly of the European Council.

The Inter–American system

In the Americas, the Organization of American States was founded in 1948 and led to the establishment of the Inter–American Commission on Human Rights in 1959. Since 1961, the Commission has the authority to review complaints of individuals and conduct country visits to the Member States. In 1969, under the American Convention on Human Rights, the Inter–American Court of Human Rights (IACtHR) was established to carry out adjudicatory and advisory functions. Relating to adjudicatory functions, the IACtHR examines cases referred to it by either the Commission or a State party of the Convention. The IACtHR also has advisory jurisdiction over the interpretation of the Convention, its protocols, and other treaties regarding human rights in the American States. The advisory opinions of the IACtHR may be requested by all Member States of the Organization of America States[28].

The African system

In 1987, African countries established the African Commission on Human Rights (ACHR), based on Africa's Charter of Human and Peoples' Rights (Banjun Charter). The ACHR is a semi–judicial body with the capacity to review periodic reports of Member States' individual and inter–state complaints. Additionally, in 2004, the African Court on Human and Peoples' Rights (ACtHPR) established under the Protocol of the Banjun Charter. The ACtHPR complements

27 RAMCHARAN, Robin, *ASEAN's Human Rights Commission: Policy Considerations for Enhancing its Capacity to Protect Human Rights*, UCL Human Rights Review, Volume 3, 2010, pp. 211–212.

28 CIUCA, Aurora, *Comparative View on Regional Human Rights Protection Mechanisms*, 2012, p.3. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089486 [last viewed August 10, 2019].

and supports the ACHR in promoting and protecting human rights throughout the complaint and advisory procedure[29].

Different from the ACHR, the ACtHPR only considers complaints against the Member States of the Protocol referred by the ACHR, the African Union, individuals, or non–governmental organizations. However, since the Banjun Charter contains not only civil political rights, but also economic, social, and cultural rights; rights to solidarity; rights of refugees; and rights of peoples, as well as obligations of individuals (to family, society, state, community), the jurisdiction over individual complaints of the ACHR and the ACtHPR are actually broader compared to the ECtHR and the IACtHR[30]. Related to the composition, eleven members of the ACHR are also the judges in the ACtHPR[31].

2.2 The ASEAN human rights mechanism

Unlike other regions, although the idea to establish an independent regional human rights system came early[32], to date, there is no such system in Asia. Since 1982, the United Nations has organized a seminar, "National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region", to discuss the establishment of a human rights system in Asia[33]. However, this idea was too ambitious and unfeasible for Asian Pacific countries. Therefore, in subsequent discussions, the idea of building a regional human rights mechanism

29 RAMCHARAN, Robin, *ASEAN's Human Rights…,* Op. Cit., pp. 218–219.

30 CIUCA, Aurora, Comparative View on…, Op. Cirt., p. 2.

31 Idem.

32 In the 1960s and 1970s, the United Nations Commission on Human Rights set up a study group to research the establishment of a regional human rights commission in all parts of the world, including Asia. The United Nations General Assembly also passed resolutions on the regional arrangement for the promotion and protection of human rights, for example the United Nations General Assembly, Resolution A/RES/32/127 (1977).

33 The seminar was organized by the United Nations in Colombo, Sri Lanka, in 1982. The representatives of nineteen countries, organizations, and United Nations agencies attended the seminar.
More information in: KO SWAN SIK, et al (1993), *Asian Yearbook of International Law*, Volume 3, s.l: Martinus Nijhoff Publishers, 1994, p.389; and DHALIWAL, Shveta, Human Rights Mechanism in South Asia, s.l.: Routledge, 2016, Chapter 4.

turned into a regional human rights cooperation, and finally narrowed as the sub–regional human rights mechanisms developed[34]. This solution is considered reasonable to gradually build the regions' human rights system in the future[35]. The ASEAN's human rights mechanism is set up based on such a suggestion.

2.2.1 The ASEAN Intergovernmental Commission on Human Rights (AICHR) Objectives and principles

As mentioned in 1.1, the AICHR was established based on article 14 of the ASEAN Charter to promote and protect human rights. However, the ASEAN Charter does not have specific regulations on the organizational structure or specific working methods of the AICHR to "promote and protect human rights". These

34 During the period of 1982 to 2007, various seminars and workshops were organized to discuss the arrangement of a regional human rights system in Asia, including the Manila Workshop (1990), the Seoul Workshop (1994), the Kathmandu Workshop (1996), the Amman Workshop (1997), the Tehran workshop (1998), the Beijing Workshop (2000), the Bangkok workshop (2001), etc.

In workshops before 1994, the main objective of the discussion was regional arrangements. However, in the Seoul Workshop in 1994, the Chairman concluded that regional cooperation should begin at sub–regional initiatives and development of a regional arrangement should be through a "building blocks" approach. In 1996, the conclusion of the workshop in Kathmandu included that *"any regional arrangement would need to be based on the needs, priorities, and conditions prevailing in the region"* and *"the diversities and complexities of the region would require extensive consultations among states in the regions"*. In the Tehran Workshop in 1998, some participants expressed concerns that no currently existing regional arrangement (as in Europe and the Americas) could serve as an appropriate model for Asia Pacific due to the diversity of the region. Therefore, participants agreed that technical cooperation aimed at national capacity building should be the foundation toward the establishment of a regional mechanism. The turning point was taken place in the New Delhi Workshop in 1999, when the United Nations expressed the new aim as setting up a *"regional Cooperation"* instead of *"regional arrangements."* In 2002, Asian States reviewed the initiatives for the development of regional or sub–regional arrangement for the promotion and protection of human rights. Later, the initiatives taken by the ASEAN and the South Asian Association for Regional Cooperation endeavored for the protection and promotion of human rights.

Further reading at: CHIAM, Sou, *Asia's experience in the quest for a regional human rights mechanism*, Victoria University of Wellington Law Review, Volume 40, Issuse 1 (2009): pp. 127–148, pp. 133–137.

35 EUROPEAN PARLIAMENT, *The role of regional human rights mechanisms*, 2010, Op. Cit. p. 82.

contents are indeed defined at the Term of Reference of the AICHR (TOR)[36]. Since the AICHR is an agency that was established based on article 14 of the ASEAN Charter, the primary purpose of this agency is to "propagate and protect human rights". This purpose is specified in article 1 of the TOR, including:

> "1.1 To promote and protect human rights and fundamental freedoms of the peoples of ASEAN;
>
> 1.2 To uphold the right of the peoples of ASEAN to live in peace, dignity, and prosperity;
>
> 1.3 To contribute to the realization of the purposes of ASEAN as set out in the ASEAN Charter to promote stability and harmony in the region, friendship, and cooperation among the ASEAN Member States, as well as the well–being, livelihood, welfare, and participation of ASEAN peoples in the ASEAN Community building process;
>
> 1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural, and religious backgrounds, and taking into account the balance between rights and responsibilities;
>
> 1.5 To enhance regional cooperation to complement national and international efforts on the promotion and protection of human rights; and
>
> 1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which the ASEAN Member States are parties".

In general, the purposes mentioned above are detailed and consistent with the primary purpose of the Charter. However, it is worth noting that article 1.6 of the TOR stipulates that one purpose of the AICHR is

> "… [t]o uphold international human rights standards", while article 1.4 recognizes another purpose is "[t]o promote human rights within the

36 Term of Reference of ASEAN Intergovernmental Commission on Human Rights. Available at: https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf [last viewed August 10, 2019].

regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds…".

The TOR has no other provisions that address the priority of the above purposes. Therefore, there is arguable possibility that the AICHR and its Member States may use "regional particularities" or "Asian values" to justify human rights violations committed in the region. This concern has been addressed by many scholars and civil societies[37], including the Solidarity for ASEAN Peoples' Advocacies (SAPA) –a joint platform for advocacy of regional and national civil society organizations. Further, in their 2008 report named *A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights*, the SAPA recommended that the AICHR should "adhere to international human rights law and standards"; and article 1.4 should give way in the event that there is a clash between national and regional particularities, binding international human rights law, or universally recognized standards.

Related to principles, article 2 of the TOR reiterates most of the ASEAN's principles as stated in the ASEAN Charter, in particular:

(1) respect for the independence, sovereignty, equality, territorial integrity, and national identity of all the ASEAN Member States;
(2) non–interference in the internal affairs of the ASEAN Member States;
(3) respect for the right of every Member State to lead its national existence free from external interference, subversion, and coercion;
(4) adherence to the rule of law, good governance, the principles of democracy, and constitutional government;
(5) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
(6) upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by the ASEAN Member States; and

37 Solidarity to Asian Peoples' Advocacy/Task Force on ASEAN and Human Rights (2010), Hiding Behind Its Limits – A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR), p. 3. Available at: https://www.forum-asia.org/uploads/books/AICHR@1_web.pdf [last viewed August 10, 2019].

(7) respect for different cultures, languages, and religions of the people of the ASEAN, while emphasizing their shared values in the spirit of unity in diversity.

Additionally, article 2(3) of the TOR provides that the ASEAN Member States have a primary responsibility to promote and protect human rights and fundamental freedoms.

Based on these above mentioned principles and the status of the AICHR, it can be understood that the AICHR will not be able to carry interventional activities to ensure the fulfillment of the obligation to promote and protect human rights within the Member States.

Status

Article 3 of the TOR states that the AICHR is an integral part and consultative body of the ASEAN organizational structure. Further, article 4 of the TOR stipulates fourteen mandates and functions of the AICHR. These mandates and functions can be divided into the following groups:

(1) To develop strategies, action programs, and cooperation framework for human rights in the region;

(2) To enhance awareness of human rights in the ASEAN region and improve the capacity to fulfill obligations under international human rights conventions that the ASEAN States are members of;

(3) To promote accession and fulfill all members' obligations of international and ASEAN regional treaties on human rights;

(4) To consult or engage in dialogues with international and regional organizations, non–Member States, other ASEAN bodies, civil society, etc., on issues related to the promotion and protection of human rights; to collect information from the Member States to develop research reports and conventional approaches and positions on human rights in the ASEAN; and

(5) To give advisory opinions or technical assistance on human rights matters requested by other ASEAN bodies; to issue annual reports on AICHR activities; to perform other tasks assigned by the Ministerial Conference.

Although there is no definition of the "consultative body" and what mandates such body should have, in his research, Gorawut Numnak suggested that a consultative body shall have three characteristics: (i) need to be able to issue

reports and make complaints; (ii) can be consulted and make recommendations; and (iii) need to consult and reach consensus among its members before making decisions[38]. Since the AICHR has no mandate or ability to make complaints relating to human rights violations to the ASEAN Summit or other international human rights protection mechanisms, it is not actually qualified as a competent "consultative body" in human rights field.

Composition

Under article 5 of the TOR, the AICHR includes one representative from each Member State; and these representatives must be selected on the basis of their qualifications and prestige in the field of human rights, including gender equality. These members will work for a term of three years and may be appointed one more consecutive term. Moreover, according to article 5.9 of the TOR, the AICHR Chairperson is a representative appointed by the country holding the ASEAN chairmanship (alternating between the ASEAN States). Additionally, article 5.4 of the TOR stipulates that "Member States should consult, if required by their respective internal processes, with appropriate stakeholders in the appointment of their Representatives to the AICHR".

However, to date, only a few States have appointed AICHR representatives through "open process" while most other countries have appointed government officials who may not have resigned from their current position after the appointment[39]. In the first term of the AICHR, only Indonesia and Thailand publicly recruited and appointed two independent human rights experts as representatives of the AICHR. The other representatives in the same term were appointed through the unpublic process, and some of them did not have

38 NUMNAK, Gorawut, et al, *'The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights'*, Freidrich Naumann Stiftung Für die Freihet, 2009, Hintergrundpapier, Nr. 14/ December 2009, p. 6.

39 There is no published information on the appointment procedure for AICHR representatives in the ASEAN Member States, except for Indonesia and Thailand.

Further information: Solidarity for Asian Peoples' Advocacy/ Task Force on ASEAN and Human Rights (2016), A report on the performance of the ASEAN Human Rights Mechanism in 2016: Have they passed the litmus test?, p.6. Available at: https://www.forum-asia.org/uploads/wp/2017/12/Performance-Report-AICHR-2016-FORUM-ASIA-2.pdf [last viewed August 10, 2019].

enough experience in the human rights field[40]. In the 2016–2018 term, among ten AICHR representatives, there were four members who were government officials, two former ambassadors, two independent experts, one lawyer, and one national human rights commissioner[41]. Gender equality is also not seriously considered or guaranteed during the appointment process. Since the AICHR's establishment in 2007, only about thirty percent of the total representatives have been women.

Thus, unlike other human rights systems in other regions, members of the AICHR may still be tied to the country that nominated them. Consequently, the AICHR is not entirely independent and effective.

Financial guarantee and other support

According to articles 8.3–8.6 of the TOR, the budget of the AICHR is funded by the States (both in the form of voluntary contribution and in the form of obligation) and other sources from non–ASEAN States. The AICHR must prepare and submit a yearly budget plan which must be approved by the ASEAN Foreign Minister Meeting based on the recommendation of the ASEAN Committee of Permanent Representatives.

There is no official information on the funds that are contributed by ASEAN States or the support of non–ASEAN States. According to the AICHR's 2017 annual report, from 2011 to 2016, the AICHR only uses 71.68% of its annual budget[42] and in its annual report in 2018, the AICHR shortly stated that the

> "AICHR has improved on the utilisation of its budget, by strengthening accountability and good governance, improving budget management processes, and enhancing its external relations"[43].

40 Ibídem, p. 5.

41 Ibídem, p. 15; and AICHR, AICHR Representatives 2016–2018. Available at: https://aichr.org/aichr-representatives-1/ [last viewed March 3, 2019].

42 ASEAN, *The ASEAN Intergovernmental Commission on Human Rights* (AICHR) Annual Report 2017, July 2017–June 2018, p.5.

43 ASEAN, *The ASEAN Intergovernmental Commission on Human Rights* (AICHR) Annual Report 2018, July 2017–June 2018, p. 13.

However, according to some sources, at the time of the establishment of the AICHR, each member state contributed $20,000 as the seed funding of the AICHR. This amount is negligible compared to the operating budget of the Council of Europe (437 million EUR in 2019)[44]; the Organization of American States (85 million USD in 2018)[45]; and the African Union (515 million USD in 2018)[46].

Additionally, under articles 8.1–8.2, the AICHR is not entitled to access or use this fund. The five year cycle and the annual budget plans of the AICHR must be vetted by the Committee of Permanent Representatives before being submitted to the ASEAN Ministers Meeting for final approval.

Under article 7.2 of the TOR, the AICHR does not have its own secretariat. It states that all activities of the AICHR will be supported by the ASEAN Secretariat. It was not until 2010 that the ASEAN established the Assistant Director for Promotion and Protection of Human Rights –a team under the ASEAN Secretariat– to support the work of the AICHR. This group is indeed responsible for other ASEAN bodies besides helping the AICHR.

Therefore, it is reasonably concluded that the AICHR does not have the financial autonomy and support needed to carry out its tasks.

2.2.2 The ASEAN Commission on Women and Children (ACWC)

As mentioned in section 1.2 of this article, all ASEAN States have joined the CEDAW and the CRC. Therefore, the establishment of a body for rights of women and children in the ASEAN takes place more conveniently and quickly

44 According to published information, since 2012, the Council of Europe has adopted a biennial Program and Budget. The Budget is voluntarily contributed by the Member States. The money is used to implement the Program, which is structured around three pillars: human rights, rule of law, and democracy. The budget for human rights takes 43% of the overall budget. Further reading: Council of Europe in Brief, Budget: https://www.coe.int/en/web/about-us/budget [last viewed March 3, 2019].

45 Council on Foreign Relations, The Organization of American States. [Available at: https://www.cfr.org/backgrounder/organization-american-states [last viewed March 3, 2019].

46 Institute for Peace and Security Studies (2018), 'Amid reforms, AU announces record low 2019 budget" [Available at: http://ipss-addis.org/news/news_and_events/amid_reforms-_au_announces_record_low_2019_budget.php [last viewed March 3, 2019].

than establishing an independent body for promoting and protecting human rights, like the AICHR.

The idea of establishing a separate agency for ASEAN women and children was first introduced in 2004 within the framework of the Vientiane Action Plan and officially included in the ASEAN community's plan in 2009 (2009–2015 Roadmap for the ASEAN Community). After that, the ASEAN Social–Cultural Community adopted the Terms of Reference of Commission on Women and Children (TOR–ACWC). The ASEAN Commission on Women and Children (ACWC) was officially established on April 7, 2010, and had its first meeting in 2011 to nominate ACWC representatives. Thus, unlike the AICHR, the ACWC was established based on a non–legally binding document. On the other hand, while the AICHR is an independent agency under the ASEAN Charter, the ACWC is placed under the socio–cultural pillar (under the ASEAN Social–Cultural Community Council).

The purposes, principles, status, mandates and functions, and funding of the ACWC will likely resemble those of the AICHR. Accordingly, the ACWC is a consultative body to promote and protect women's and children's rights, taking into consideration the different historical, political, sociocultural, religious, and economic context in the region and the balances between rights and responsibilities (article 2.1). The ACWC also aims to promote the well–being of women and children, along with their development, empowerment, and participation in the ASEAN Community (article 2.3). Under article 8 of the TOR–ACWC, the ACWC's five year cycle and annual budget plan shall be submitted to and approved by _the ASEAN Ministerial Meeting on Social Welfare and Development (AMMSWD).

In terms of composition, each Member State will appoint one representative of children's rights and one representative of women's rights. Like representatives of the AICHR, representatives of the ACWC must have sufficient qualifications in the field that they represent, selected based on gender equality. Unlike the AICHR's representatives, according to article 6.4. of the TOR–ACWC, representatives of the ACWC shall be appointed through an open, transparent, selective, and inclusive process.

There is currently no specific information on the process of selecting representatives of ACWC member countries. However, according to

statistics, the female representation in the ACWC is much higher than in the AICHR[47].

2.2.3 The performance of the ASEAN human rights mechanisms

The effectiveness of the ASEAN human rights mechanism can be assessed through the execution of the AICHR and the ACWC, and the effectiveness of cooperation among these bodies.

According to the TOR, the AICHR issues work plans for each five year cycle[48]. Based on those work plans, every year the AICHR organizes many annual or special meetings to approve the annual program of activities or concept notes for the thematic studies of the AICHR. Based on these plans, the AICHR carries out activities that are mainly workshops and training courses. Additionally, the AICHR also has constructive engagements with the ASEAN agencies, such as the ASEAN Ministers, the ASEAN Secretariat, the Committee of Permanent Representatives of ASEAN, the ACWC. The AICHR also organizes dialogue sessions with other regional countries or organizations and conducts several consultations with civil society organizations.

The number of the AICHR's annual activities is quite impressive considering the lack of support. For example: in 2017, the AICHR organized three regular meetings and three special meetings, twelve seminars, five meetings and consultations with ASEAN agencies, five meetings with external partners, and three meetings with CSOs[49]; in 2018, the AICHR held three meetings, one special meeting, and sixteen conferences and seminars on specific topics. For over ten years of operation, the AICHR's greatest achievement was the successful draft of the ASEAN Human Rights Declaration (AHRD) in 2012. The AHRD was

47 Currently, the ACWC has sixteen female representatives out of a total of twenty representatives. Some Member States, such as Cambodia and Laos, have female respentatives in both fields of women's and children's rights.

Further information: ASEAN, Resumes of the (ACWC) Representatives [Available at: https://acwc.asean.org/resources/other-documents/resumes-of-the-acwc-representatives/ [last viewed March 3, 2019].

48 Art. 8.1 Term of Reference of ASEAN Intergovernmental Commission on Human Rights.

49 ASEAN, The ASEAN Intergovernmental Commission on Human Rights (AICHR) Annual Report 2017, July 2017–June 2018, p. 4.

later adopted at the meeting of ASEAN States on November 18, 2012. Despite the criticism of CSOs at the time of adoption, it is undeniable that the AHRD also promotes human rights[50]. It is worth noting that the AHRD is one of the rare human rights instruments that explicitly stipulates rights not yet recognized under the Universal Declaration of Human Rights, such as the right to safe water and sanitation (article 28.e.); the right to a safe, clean, and sustainable environment (article 28.f.); protection from discrimination in treatment for people suffering from communicable diseases, including HIV/AIDS (article 29); the right to development (article 36); and the right to peace (article 30).

Similar to the operations of the AICHR, over the years, the ACWC has organized various workshops and seminars, as well as issued dozens of thematic reports that it set up in its two five year cycle work plans. For example, in 2016, the ACWC carried out four meetings; launched a Regional Review on Law, Policies, and Practices; and published a thirty page guideline on how to handle victims of human trafficking. However, the performance of the ACWC work plans is not appreciated[51]. Limited by the TOR–ACWC, these activities are only aimed at promoting human rights, leaving the protection aspect largely ignored.

Under the ASEAN Charter, the AICHR can coordinate and consult with other ASEAN agencies, including the ACWC. Similarly, under article 7.7 of the TOR–ACWC, the ACWC shall cooperate with the AICHR and other sectorals related to women and children matters. However, no information is known about the coordination between these two commissions. In the AICHR's Annual Report of 2018, cooperation activities between the AICHR and the ACWC

50 Immediately after the ADHR was adopted, fifty civil society organizations issued a joint statement showing their opposition to the Declaration. These organizations argued that the ADHR failed to recognize the universality of human rights, contrary to the common standards that the international community was recognizing and protecting. Many scholars also agree with the views of these CSOs. See: Reporting ASEAN, Around the Region: Critics slam adoption of 'flawed' ASEAN Rights Declaration [Available at: http://www.aseannews.net/critics-slam-adoption-of-flawed-asean-rights-declaration/ [last viewed February 28, 2019]. DAVIES, Mathew, *An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of the Regional Identity in Southeast Asia*, Journal of Current Southeast Asian Affairs, Vol.3/2014, pp. 107–129.

51 NUMNAK, Gorawut, et al, *'The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights'…*, Op. Cit., pp. 22–34.

are briefly mentioned. Accordingly, by the middle of 2018, the AICHR and the ACWC organized their first joint activity called the AICHR–ACWC Training Workshop on the CRC[52]. To date, there is still no information on the coordination between the AICHR and the ACWC.

3. What is needed to move forward

3.1 What the ASEAN Human Rights Mechanism lacks

3.1.1 Substaintive limitations

Firstly, the ASEAN's approach to human rights is based on particularism and relativism.

Despite the significant differences in economic, social, and political systems, ASEAN States have a common view of "Asian values". Asian values have greatly influenced how these countries view human rights issues, and these values are the weaknesses that lead to the inefficiency of the human rights protection mechanism in this region. There is currently no exact explanation for the content of Asian values. However, Asian values can be interpreted as a respect for the common interests of the community rather than the interests of individuals. Accordingly, individuals are

> "… not able to be, but a member of a nuclear, family, clan, neighborhood, community, nation, and state […] Asian whatever they do or say they must keep in mind the interests of others […] [T]he individual tries to balance his interests. Consequently, Asian individuals have a higher sense of community than Western countries; Asians work hard for the common good of society and accept that social stability and harmony are more important than individual rights"[53].

52 Ibídem, p. 10.

53 KOH, Tommy, *The 10 values which undergird east Asian strength and success*, International Herald Tribune, December 11–12, 1993, p.6; See also: SUNG-JOO, Han (ed.), *Asean Values: An Asset or a Liability?,* Changing Values in Asia: Their Impact on Governance, 2003, pp. 63–71 (e–journal). Available at: http://www.jcie.org/researchpdfs/global_gov/8_H%20Sung-Joo.pdf [last viewed August 8, 2019].

See also the comments of KUAN YEW, Lee, *"Society vs. the Individual"*, Time, 14 June 1993; FAREED

Such behavior of Asian people is said to be motivated by the idea that when social order is placed higher than individualism, all individuals of the community can live safely and enjoy life to the fullest; the state is responsible for ensuring such an environment. The existence of "Asian values" is reflected in the fact that ASEAN States often choose to accede to a number of human rights such as the CRC, the CRDP, instead of the ICCPR or the ICESCR.

While endorsing Asian values, the ASEAN also supports the "particularism" and "cultural relativism" of human rights. According to the theory of "particularism" and "cultural relativism", human rights are not universal but rather are differentiated on the grounds of national and/or regional particularities[54].

Consequently, both the TOR–AICHR and the TOR–ACWC contain multiple purposes, including the promotion and protection of human rights, taking into consideration the "national and regional particularities"; the balancing of rights and duties; upholding national security, public order, public health, public safety, and public morality. The refusal of the universalist approach of human rights by the ASEAN is also express through article 7 of the ADHR, which states:

> "… the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds".

One of the supporters of the particularism approach of human rights argues that "… it is necessary for a developing society to first succeed in economic development before it can attain the social and political freedom that is found in […] developed countries"[55]. In contrast, in "Human Rights and Asian Values: A Defense of 'Western' Universalism", Jack Donnelly expresses his concern that such

Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, Foreign Affairs, 73, no. 2 (1994).
As cited in Takashi INOGUCHI, Edward NEWMAN (1997), Introduction: *"Asian values" and democracy in Asian* (e–journal), Available at: http://archive.unu.edu/unupress/asian–values.html#INTRODUCTION [last viewed August 10, 2019].

54 **HIEN, Bui,** *The ASEAN Human Rights System: A Critical Analysis*, Asian Journal of Comparative Law, 11 (2016), p. 120.

55 **MAHBUBANI, Kishore,** *Can Asian Think?* (s.l.: Marshall Cavendish International Asia), 2010, p. 90.

thinking might sacrifice economic and social rights since the realization of these rights requires greater economic resources[56]. Some others point out that there is no study that could give statistics support to the claim that fundamental freedoms and economic development are in conflict. The particularism approach to human rights also "allow[s] human rights violations in the name of pursuing economic flourishing"[57].

The concerns over the ASEAN's particularism relating to human rights are reasonable since the condition of human rights in the regions has not been improved over the years.

The ASEAN's principle "non–interference of internal affairs" and "consensus"

The non–interference principle is one of the ASEAN's core principles that is stipulated in the ASEAN Charter and most of instruments of the region. The non–interference principle is considered a strict limitation on the States ability to comment on the domestic affairs of other States so as to maintain the regional order. It raises doubt that States are not responding toward regional issues because they are unable to do so, or they are not willing to act against the problems with the principle as a justification[58]. To fulfill the obligation under the principle of non–interference, ASEAN States have to guarantee:

(i) refraining from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of governments a basis for deciding their membership in the ASEAN;

(ii) criticizing the actions of states which were deemed to have breached the non–interference principle;

(iii) denying recognition, sanctuary, or other forms of support to any rebel

56 The view of Jack Donnelly on the particularism is analyzed by HIEN, Bui, *The ASEAN Human Rights System…*, Op. Cit., p. 101.

57 KINGSBURY, Damien and BARTON, Greg, *Difference and Tolerance: Human Rights issues in Southeast Asia*, Australia: Deakin University Press, 1994, pp. 2–3, cited in HIEN, Bui, *The ASEAN Human Rights System…*, p. 124.

58 TOBING, Dio Herdiawan, *Conference Paper: The limits and possibilities of the ASEAN Way: the case of Rohingya as humanitarian issue in Southeast Asia*, 2016, p.153.

group seeking to destabilize or overthrow the government of a neighboring state;

(iv) providing political support and material assistance to the Member States in their campaign against subversive and destabilizing activities[59].

Adherence to the above mentioned limitations under the principle of non–interference might limit the ASEAN States in their making–decision process of specific controversial issues, including State's sovereignty and human rights.

Additionally, the principle of consensus in decision–making goes hand–in–hand with non–interference. According to the principle, no decision of the ASEAN or its bodies can be approved without the consensus. The principle of consensus is a "double–edged sword". On the one hand, the consensus has helped the ASEAN maintain internal unity in dealing with critical issues and ensuring equal rights and responsibilities of the Member States. On the other hand, since ASEAN Member States have diverse interests, the principle prevents the ASEAN from making decisions in controversial or sensitve matters. In cases where the ASEAN States cannot agree upon a matter, they agree to make no decision and follow their own interests[60].

Consequently, over the years, the ASEAN has remained silent on its regions' various conditions of human rights which have been pointed out by the international community, such as extrajudicial killings for drug crimes in Philippines, the humanitarian crisis in Myanmar, the application of the death penalty over homosexual activities in Brunei, etc.[61].

3.1.2 Procedural limitations

Lack of independence

59 ACHARYA, Amitav, *Constructing a security community in Southeast Asia,* London: Routledge, 2009, 2nd ed. p.72. Available at: https://fmc90.files.wordpress.com/2010/05/constructing-a-security-in-asean.pdf [last viewed March 3, 2019].

60 NARINE, Shaun, *ASEAN into the twenty-first century: Problems and prospects*, The Pacific Review 1999, pp. 357–380. Available at: http://dx.doi.org/10.1080/09512749908719296 [last viewed August 10, 2019].

61 SINGH, Ananya, *ASEAN's silence on human rights violations spells doom for Southeast Asia,* 2017. Available at: https://qrius.com/aseans-silence-human-rights-violations-spells-doom-southeast-asia-2/ [last viewed April 10, 2019].

In general, independence is a critical factor for human rights mechanisms, including regional human rights mechanisms. The human rights mechanism, irrespective of its form –the court, the committee, or the like– can only be reliable and effective when it is independent of political bodies. Here, independence should be understood as institutional, compositional, and financial independence. It is clear that the ASEAN's human rights mechanism is not independent for the following reasons:

Firstly, as stated in 2.2.2 and 2.2.3 of this article, both the AICHR and the ACWC depend on the ASEAN States since they have the power to approve or deny their action and budget plans.

Secondly, representatives of the AICHR and the ACWC are not wholly independent due to a significant number of these representatives continuing their roles as government officials even when designated as representatives.

Weak protection mandate and lack of cooperation

Both the AICHR and the ACWC are soley consultative agencies. Consequently, the activities of these commissions in particular, as well as the ASEAN human rights system in general, are primarily aimed at promoting human rights but cannot yet fulfill their purpose of protecting human rights. Additionally, the AICHR and the ACWC only focus on promoting certain types of rights that are considered less controversial. Some of the objectives set out in the action plans are not implemented in practice. While the AICHR was established under the ASEAN Charter –a binding instrument– the ACWC was based on a non–binding one and put under the socio–cultural pillar. Therefore, the action plans of the two commissions are drafted independently and approved by two different bodies of the ASEAN. Although the terms of references of both commissions stipulate the ability to cooperate between them, in reality, the cooperation is negligible. Thus, there are possible gaps or overlaps in the activities of the two commissions, leading to the inefficiency of the ASEAN human rights system.

3.2 Suggested solutions

3.2.1 To establish a human rights court

Finding solutions to the development of the ASEAN human rights mechanism is not a simple task as it requires substantive and procedural redress of the current mechanism.

One of the most mentioned solutions is the establishment of an ASEAN human rights court[62]. This suggested court, like the existing successful human rights courts in other parts of the world, will serve as the ASEAN human rights protection body. It will have jurisdiction over individual complaints as well as intergovernmental complaints. This solution seems to make sense as all human rights systems in other regions are based on human rights courts. In fact, since 1995, when the ASEAN set up the Working Group for an ASEAN Human Rights Mechanism, the establishment of a court which could render binding decisions was one of the options[63]. However, some scholars argue that the establishment of an ASEAN human rights court is too ambitious and too challenging for the ASEAN States for the following reasons[64]:

First, it is difficult to find a suitable position for an ASEAN human rights court to ensure its independence and effectiveness. As in the human rights system in the Americas and Africa, human rights courts exist in tandem with human rights committees. While the committees are in charge of monitoring and promoting human rights, the courts can issue binding decisions and give advisory opinions to protect the rights[65]. Since ASEAN has not yet agreed upon

62 See: DE JONGE, Alice, *Book Review: A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia*, Australian Journal of Asian Law, 2014, Vol. 15, No. 2; YORDAN, Gunawan & TAREQ MUHAMMAD AZIZ, Elven, (2017), *The Urgency of ASEAN Human Rights Court Establishment to Protect Human Rights in Southeast Asia* (Conference Paper), Available at: https://www.researchgate.net/publication/330652193_The_Urgency_of_ASEAN_Human_Rights_Court_Establishment_to_Protect_Human_Rights_in_Southeast_Asia [last viewed August 10, 2019]); and KOSHY, Shaila (2016), *Baby steps towards an Asean court* (e–journal), Available at: https://humanrightsinasean.info/article/baby-steps-towards-asean-court.html [last viewed March 15, 2019]; QURATUL–AIN BANDIAL (2013), *Call to set up ASEAN human rights court*, The Brunei Time/Asia News Network (e–journal). Available at: https://www.asiaone.com/asia/call-set-asean-human-rights-court [last viewed March 15, 2019]; and YEE, Jovic (2017), *Civil Society Groups push for ASEAN human rights court*, Inquirer.Net (e–journal), Available at: https://globalnation.inquirer.net/155778/civil-society-groups-push-asean-human-rights-court [last viewed March 15, 2019].

63 Working Group for an ASEAN Human Rights Mechanism. Available at: https://www.aseanhrmech.org/aboutus.html [last viewed August 10, 2019].

64 HIEN, Bui, *The ASEAN Human Rights System: A Critical Analysis*…, Op. Cit., pp. 134–139.

65 Ídem.

a binding instruments on human rights, the possibility to establish a human rights court within ASEAN is unclear.

One of the few scholars who directly mentioned the institutional difficulty of establishing a human rights court in the ASEAN is Phan Duy Hao. In his research, Phan Duy Hao proposes to establish a human rights court outside of the ASEAN that has jurisdiction over the entire region rather than limited to the ASEAN States. It likely that the ASEAN will not able to create a court due to the principles of non–interference and consensus, the proposal of Phan Duy Hao is reasonable. The establishment of a court for the whole Asia region will no longer be hindered by the mentioned principles of the ASEAN. However, this proposal is also questionable. The promotion of the establishment of a human rights system in Asia was initiated in the 1980s, but there was no progress. To date, there are still no binding instruments for human rights in the ASEAN. Therefore, establishing a regional human rights court with the power to issue binding decisions and creation of a mechanism that guarantees the effectiveness of such decisions would take a long time.

Second, much progress is needed in order to facilitate an ASEAN human rights court. A human rights court cannot perform effectively if it is not established based on a binding document. Further, the court can only really act as a human rights protection body when it has enough tools to do so. For example, the ECtHR was established based on, and to ensure, the rights enshrined in the ECHR. In light of the Convention, the ECtHR has the power to receive direct petitions, review them, and issue binding decisions[66]. Since the ASEAN currently has no binding human rights instruments, the construction of a binding instrument is the first required move to create a substantive basis for a human rights court. However, the principles of non–intervention and consensus can become significant obstacles.

3.2.2 Other options

In addition to the suggestion of establishing a national human rights court, many other proposes have been made to improve the ASEAN human rights mechanism, such as[67]:

66 European Convention on Human Rights, arts. 19–51.

67 RAMCHARAN, Robin, *ASEAN's Human Rights Commission: Policy Considerations for Enhancing its Capacity*

(1) establishing a reporting mechanism;
(2) creating a human rights body to promote and protect economic, cultural, and social rights;
(3) establishing a human rights body to provide country visits to the Member States, including visits to their detention facilities;
(4) establishing a human rights body to provide a system of special rapporteur; and
(5) to set up a mandate to existing human rights bodies to provide advisory service and technical assistance to the Member States.

In addition to the long–term solutions outlined above, this paper presents some feasible short–term solutions to improve the ASEAN human rights mechanism as follows:

(1) Consider amending the TOR–AICHR and the TOR–ACWC

The TOR–AICHR and the TOR–ACWC should be revised to (i) add mandates to the AICHR and the ACWC to protect human rights; and (ii) add more detailed regulations on the experience and independence requirements of the representatives of the AICHR and the ACWC.

This option is feasible due to article 9.6 of the TOR–AICHR and article 10.2 of the TOR–ACWC which stipulate the review of amendments to these instruments. The amendments shall focus on strengthening the protection mandate of the AICHR and the ACWC. Additionally, the establishment of a mechanism for monitoring and giving recommendations on certain human rights situations in Member States is suggested[68]. In fact, in the ASEAN's operational orientation to 2025 called "ASEAN 2025: Forging Foward Together", research towards the

to Protect Human Rights…, Op. Cit., pp. 221–223.

68 In 2009, a Filippo lawyer sent a petition to the AICHR to request consideration of the Maguindanao massacre. In 2012, the Malaysian Government was also reported to the AIHCR by civil groups for the poor treatment of the Bersih demonstrators. Those cases reflect the need to create a mechanism in which the ASEAN and the AICHR can express their concerns of human rights issues.

Read: EBY HARA, Abubakar, *The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR)*, Revista Brasileira de Politica Internacional, 2019, Vol. 62 No. 1 (e–journal). Available at: http://www.scielo.br/scielo.php?pid=S0034-73292019000100211&script=sci_arttext [last viewed October 20, 2019].

revision of the TOR–AICHR has been put forward[69]. Such a plan should also be set for reviewing the TOR–ACWC.

(2) Strengthen activities that promote accession to the United Nations' core human rights instruments.

Over the years, the AICHR has done an excellent job promoting the ratification of international human rights conventions. Since 2012, ASEAN States have signed/ ratified many international human rights instruments, such as the Committee Against Torture (CAT), the CRPD, etc. However, some core human rights instruments seem to be ignored, such as the ICCPR, the ICESCR, the International Convention on the Protection of the Rights of all Migrant Workers and Families (ICMW), and the CEDAW, while some of them are essential foundations for the respect, protection, and fulfillment of human rights. Recently, the AICHR has had several activities to promote ASEAN Member States to join the CAT[70] –a convention deemed "sensitive". Therefore, the addition of activities to promote the ratification of core international human rights instruments, such as the ICCPR and the ICESCR, is feasible in the coming period. Ratification of core international instruments of human rights also helps each ASEAN State, and the ASEAN as a whole, gradually change its particularism approach on human rights. Consequently, the other options, such as to adopt a binding human rights instrument or to establish a human rights court will be more realistic.

(3) Strengthening cooperation between the AICHR, the ACWC and other stakeholders

As stated previously in this article, the collaboration between the AICHR and the ACWC is still fragile regardless what their TORs allow each of them to do. In 2018, the AICHR and the ACWC had publicized joined activities[71], which

69 ASEAN, 2015, *ASEAN 2025: Forging Foward Together*, p. 27.

70 See: ASEAN, 2016, *ASEAN Regional Plan on the Elimination of Violence against Children*, p.14; ASEAN, 2018, *ASEAN authorities brush up on anti–torture practices*: https://asean.org/asean-authorities-brush-anti-torture-practices/ [last viewed March 3, 2019]; and APT, 2013, *Fostering regional cooperation for torture prevention in ASEAN,* https://apt.ch/en/news_on_prevention/fostering-regional-cooperation-for-torture-prevention-in-asean/ [last viewed March 3, 2019].

71 NUMNAK, Gorawut, et al, *'The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights'…*, Op. Cit.

could be considered as the beginning for more effective cooperation in future. Additionally, civil society does not have an open environment to engage in all cooperation activities with the ASEAN States' governments. In the "ASEAN's structured engagement of civil society organizations", Askabea Fadhilla comments concerns that "ASEAN officials viewed civil society as subversives and dissidents, in a similar way to how they were seen in their home countries"[72]. Recently, the ASEAN planned to cooperate more with civil society for the promotion and protection of human rights[73]. It is expected that the AICHR and the ACWC can exchange information, receive recommendations, and organize joined activities with civil society.

4. Conclusion

The ASEAN is the earliest established sub–regional organization in Asia. The organization's contributions to peace and regional development are undeniable. The ASEAN has also created a mechanism to promote and protect human rights with its own characteristics. This article has provided information on the establishment and operation of the ASEAN human rights mechanism based on comparing the standards and patterns of regional human rights systems to assess weak points of this mechanism.

Based on the above information and analysis, it can be concluded that the ASEAN's human rights mechanism is not as effective as expected. From a policy perspective, the ASEAN may consider the following issues.

Firstly, in the short term, the ASEAN should consider amending the TOR of the AICHR and the ACWC; strengthen coordination between these agencies, as well as between them and international organizations and civil society; and adding activities to promote accession to basic human rights conventions, especially that ICCPR and the ICESCR.

72 FADHILLA, Askabea, *ASEAN's structured engagement of civil society organizations*, ASEAN Studies Progam. Available at: https://thcasean.org/read/articles/202/ASEANs-Structured-Engagement-of-Civil-Society-Organizations [last viewed August 10, 2019].

73 ASEAN, 2015, *ASEAN 2025: Forging Foward Together,* Op. Cit., pp. 26–28.

Secondly, in the long term, the ASEAN should change its approach to human rights and develop binding human rights documents, including documents laying the foundation for the establishment of a regional human rights court.

To achieve improvements of the ASEAN's human rights mechanism, the ASEAN States which have obligation to respect, protect and fulfill human rights, needs to show stronger commitments and political will.

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Consumer Rights as Human Rights: Legal and Philosophical Considerations

Los derechos del consumidor como derechos humanos: consideraciones legales y filosóficas

Received: 19/04/2019 – Accepted: 01/09/2019

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Abstract

This paper analyzes the interrelation of consumer rights and human rights. A wide range of philosophical and legal arguments support the necessity of consumer protection in order to ensure human dignity. Consumer rights are human rights and must be enforced as such. The unanimous adoption of the United Nations Guidelines for Consumer Protection reveals international concern about the theme.

Keywords: Consumer protection; Consumer rights; Human rights; Pure practical reason; Human dignity; United Nations Guidelines on Consumer Protection.

Resumen

Este artículo analiza la interrelación entre los derechos del consumidor y los derechos humanos. Una amplia gama de argumentos filosóficos y legales respaldan la necesidad de la protección del consumidor para garantizar la dignidad humana. Los derechos del consumidor son derechos humanos y deben ser exigidos como tales. La adopción unánime de las Directrices de las Naciones Unidas para la Protección del Consumidor revela la preocupación internacional sobre el tema.

Palabras clave: Protección del consumidor; Derechos humanos; Razón práctica pura; Dignidad humana; Directrices de las Naciones Unidas para la Protección del Consumidor.

Summary

1. Introduction and Methodological Approach

Consumer relations are permeated with several issues that deserve full attention: mass production, sustainable consumption, "adhesion" contracts, e–commerce. A globalized and digital era is accentuating the imbalance between consumers and providers. Consumers are continually vulnerable and must be protected accordingly.

The unanimous adoption of the United Nations Guidelines on Consumer Protection, by the United Nations General Assembly, demonstrated solid international recognition of the importance of consumer rights, and several States around the world have already included consumer rights in their national constitutions and local laws.

Given that consumption is a universal necessity of every individual, consumer protection is crucial to achieve and maintain human dignity. That is why consumer rights are interconnected and interrelated to several human rights. But are consumer rights human rights? Furthermore, are consumer rights recognized as human rights?

In order to provide adequate answers to these questions, the first two sections of this paper provide a general panorama of consumer rights and human rights, respectively. The following topics present philosophical considerations

and legal arguments that might support the relationship between consumer rights and human rights.

Throughout this paper, facts and practical issues are also presented in order to support the research towards a substantial conclusion. Therefore, the overall methodological approach of this paper was qualitative, but some quantitative aspects were also analyzed, conferring a threefold approach to the research: legal, philosophical and practical.

The legal analysis was guided by a number of factors, such as the nature of human rights, their higher hierarchical status, and their connection with consumer rights. Philosophical considerations were also essential to assess the hypothesis of the relationship between human dignity and consumption, especially nowadays when giant companies' revenues are bigger than the Gross Domestic Product (GDP) of some European Countries. Practical aspects, such as the growing United Nations (UN) debates about consumer rights and the increasing number of countries recognizing the fundamental nature of consumer rights, allowed the assumption that consumer protection is interrelated to human rights.

In order to research for this topic, diverse sources were used, including legal doctrine, scientific articles, and philosophical works of several authors of different nationalities and backgrounds.

2. Consumer Rights

Consumer protection finds its milestone in President John F. Kennedy's speech on 15 March 1962. In this "special message to the Congress of the United States of America on protecting consumer interests" he stated that:

> "Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two–thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized, whose views are often not heard… We cannot afford inefficiency in business or government. If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if consumers are unable to choose on an informed basis, then [their] dollars

> are wasted, [their] health and safety may be threatened, and the national interest suffers"[2].

Although trades and markets have always been present in human history, the necessity of consumer protection is a fairly modern concern. There are intrinsic disparities in the consumer–supplier relationship that need to be addressed. In order to guarantee rights and sustain functional market economies, public and private actors are coming to the conclusion that it is imperative to correct verified imbalances in the consumer relations.

However, the correction of these imbalances requires a modern view of the theory of contracts. The traditional standards, i.e. autonomy of will and *pacta sunt servanda*, must be limited by the social role of contracts. Factors such as bargaining power and knowledge, reveal a clear inequality of the factors involved in consumer–supplier relations[3]. Therefore, consumer protection has undoubtedly influenced the modernization of the traditional contract theory, replacing the blind compliance of unjust and dysfunctional contracts.

In this regard, even if the contract does not explicitly mention them, providers have intrinsic obligations towards consumers, such as transparency, information, and objective good faith[4]. Given the informality of many consumer contracts, even some pre–contractual elements must be binding to providers[5], e.g. advertisement. For example, a provider may not advertise a product for a price and charge a higher price for the exact same product.

This modern and dynamic view of contracts responds to socioeconomic changes on the society as a whole, including consumer relations. The digital era highlights the importance of consumer protection even more. Mass consumer relations have substantially diminished the number of "customized" contracts, which had given place to the so–called "adhesion" contracts. These "adhesion"

2 UN Conference on Trade and Development (UNCTAD), Manual on Consumer Protection, 30 January 2019, UNCTAD/DITC/CPLP/2017/1/Corr.3, p. 2.

3 Ídem.

4 MIRAGEM, B., Curso de Direito do Consumidor, 7 ed. rev. atual. – São Paulo: Thomson Reuters Brasil, 2018, p. 259.

5 Ibídem, p. 262.

contracts were conceived to fit an unidentified consumer and given to almost every client who the provider comes to conquer. "Adhesion" contracts offer little or no space for negotiation. Fixed terms narrow the consumer's choice to a "take it or leave it" decision.

The internet age provides another modality to the already problematic "adhesion" contracts: the electronic "adhesion" contracts. As very well stated by Consumers International specialists "… it is a matter of `tick, click and hope for the best"[6]. There is no need for a scientific study to come to the conclusion that most people will never read the electronic contract before checking the little box which states: "I have read and agree with the terms of this contract". In fact, even if the person overcomes the temptation of lying and reads the book–length contract, it is very difficult to understand the terms.

It is also very important to emphasize that consumer protection is not limited to the preservation of economic rights. Consumer protection also guarantees the implementation of social, cultural, and even civil rights. In extreme situations, consumer rights deprivation may lead to serious diseases and even life–threatening situations. Just to mention an example on how important the topic is, the United Nations Conference on Trade and Development (UNCATAD) made clear that consumer protection is an essential tool to reach distributive justice, as follows:

> "The development of rights to consumer protection, especially in the developing world, can now be seen as part of a strategy to eradicate poverty and to bring socioeconomic justice to the underprivileged. In this regard, one of the advantages of consumer protection is that it does not only focus on the income of the poor, but also on their expenditure"[7].

Given the importance of these rights, who is responsible for consumer protection after all? States, of course, but not exclusively. President John F. Kennedy's speech affirms that consumers affect and are affected by the economy of any market society. Therefore, their protection must be carried out by a

6 UN Conference on Trade and Development (UNCTAD), Manual on Consumer Protection… Op. Cit., p. 4.

7 Ibídem, p. 5.

complex net, which encompasses both public and private bodies. Examples of the latter are consumer associations and self–regulation councils. While private bodies play an essential role to implement consumer rights, their ultimate protection and enforcement must be guaranteed by the State through administrative and legislative instruments.

The content of consumer protection laws will certainly depend on the reality and needs of each State. However, the internet age created a borderless global market, easily accessible worldwide. Nowadays, a Brazilian resident may purchase a product from a Chinese provider in a matter of minutes. Therefore, there are many challenges to drafting consumer protection laws. Fortunately, the United Nations General Assembly anticipated this dilemma and adopted the United Nations Guidelines for Consumer Protection in 1985 (revised in 1999 and 2015), which has provided the basis for the framework of consumer protection laws in many countries[8]. Maybe now it is time to take a step further towards a binding instrument, such as an International Covenant on Consumer Rights.

The United Nations Guidelines for Consumer Protection (hereinafter UNGCP) affirms to be "… a valuable set of principles […] on consumer protection legislation"[9]. The fact that it was adopted by all members of the United Nations's General Assembly, demonstrates an international recognition on the importance of consumer protection and an international will to gather forces to achieve this goal. The document's preface states that the UNGCP "… help promote international enforcement cooperation among Member States and encourage the sharing of experiences in consumer protection"[10]. Although a binding instrument would be more effective in terms of enforcement, the choice of words in the preface clearly indicates an intention towards international enforcement.

International cooperation is of great importance in the UNGCP. It dedicates the entirety of Section VI to set an extensive framework on how the Member States should make joint efforts to achieve consumer protection. Guideline 95 determines that the institutional machinery will be provided by

8 Ibídem, p. 16.

9 UN Conference on Trade and Development (UNCTAD), United Nations Guidelines for Consumer Protection, New York and Geneva, 2016, UNCTAD/DITC/CPLP/MISC/2016/1, p. 3.

10 Ibídem, p. 8.

an intergovernmental group of experts on consumer protection law and policy under the auspices of the UNCTAD[11]. The 2013 Implementation Report on the United Nations Guidelines on Consumer Protection concluded that the UNGCP have been widely implemented by Member States[12].

3. Human Rights

Human rights are defined as rights inherent to all human beings. In the precise words of Marek Piechowiak, they are "… rights which belong to any individual as a consequence of being human…"[13]. Therefore, the existence of human rights does not rely on acts of law, they are beyond legal recognition. What we now know as human rights were early recognized by the Theory of Natural Law, whose roots are found in Sophocles play, Antigone (441 B.C.)[14].

The theory of Natural Law evolved to the Human Rights Theory, and, in 1948, the Universal Declaration of Human Rights (hereinafter UDHR) was proclaimed by the United Nations General Assembly. Its preamble states that recognition of inherent dignity and inalienable rights are the foundation of freedom, justice, and peace. This milestone document was a response to the barbarous acts which resulted due to disregard for human rights. Therefore, it did not bring a new set of rights, but recognized they existed and highlighted their crucial role of achieving dignity and equality among the "human family".

The UDHR, although non–binding, was followed by two binding Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Alongside other international treaties, these documents recognize and enforce human rights. But do they contain all human rights or could others be added? On this matter, it is pertinent to briefly recall the division of human rights in generations.

11 UN Conference on Trade and Development (UNCTAD), Manual on Consumer Protection… Op. Cit., p. 15.

12 Ídem.

13 **PIECHOWIAK, M.,** *What Are Human Rights? The concept of human rights and their extra–legal justification*, in: HANSKI, R. and SUKSI, M., *An Introduction to the International Protection of Human Rights*, 2 ed. rev. – Turku: Institute fo Human Rights Abo Akademi University, 1999, p. 12.

14 GUSMÃO, P. D., Introdução ao Estudo do Direito, 39 ed.– Rio de Janeiro: Forense, 2007, p. 56.

In 1977, Karel Vasak divided human rights into three generations[15]. This threefold view is widely accepted by most modern scholars, but it requires a careful analysis. The word "generations" might give the idea of time periods, but regarding the study of human rights, the analysis goes beyond chronology, also embracing the substance of these three groups of rights. In other words, generations indicate historical transitions and qualitative shifts equally[16]. According to Derek G. Evans, the emerging rights do not make the former obsolete, instead they expand the overall framework[17].

The first generation refers to civil and political rights and was formally acknowledged in the ICCPR (1966). Also known as "basic principles"[18], they are a set of "negative rights" which prevented the State from interfering with individual liberties[19]. Liberty and equality are the pillars of this group of rights which limit the power of the State. Historically, the recognition of the rights of this generation seems to point at a period between the end of World War II and the founding of the United Nations[20]. Evans clarifies that:

> "This first generation was very conscious that it was working to establish human rights as a new language and ideology in an international context emerging from the ruble of global war and mass genocide"[21].

The second generation congregates the economic, social, and cultural rights, and their most emblematic binding expression is the ICESCR (1966). This generation requires positive action by the State. In this sense, the State must act to implement the rights. That is, they require institutional support to be fully

15 **VASAK, K.,** *A 30–year Struggle – The sustained efforts to give force of law to the Universal Declaration of Human Rights*, in: The UNESCO Courier, 30th year – Paris: November, 1977.

16 **EVANS, D.G.,** *Four Generations of Practice and Development*, in: ABDI, A. A. and SHULTZ, L., Educating for Human Rights and Global Citizenship – Albany: State University of New York Press, 2009, p. 2.

17 Ídem.

18 Ídem.

19 VASAK, K., A 30–year Struggle – The sustained efforts to give force of law… Op. Cit., p. 29.

20 **EVANS, D.G.,** *Four Generations of Practice and Development…* Op. Cit.

21 Ibídem, p. 3.

guaranteed. From a chronological point of view, during the 1960s, 1970s and 1980s, a massive awareness led to binding documents –such as covenants, treaties, and, conventions– known today as the International Human Rights Law. The moral force of the UDHR was translated into legal instruments.

The third generation of human rights was described by Vasak as solidarity rights[22]. The implementation of these rights requires collective effort. In other words, they may only be effectively guaranteed and protected by the combined work of States, individuals, and public and private institutions[23]. They are often described as emerging rights, because they were conceived during a time in which humanity was engaged in debates regarding "new" affairs, such as environmental protection, humanitarian aid, and common heritage of mankind.

Lately, scholars have discussed an upcoming fourth generation of human rights and it is very likely that other generations will follow. The dynamism of human rights theory clearly indicates that the recognition of new rights is a response to socio–economic changes. In this context, it would be inaccurate to state that new human rights may arise. They may indeed be recognized because, as already established, human rights are not "created," they simply exist.

However, although possible, there is a considerable resistance to the admission of new human rights. On this regard, Sinai Deutch states the following:

> "It has been argued that admission of new rights could create a damaging climate in terms of the value and validity of existing human rights. Thus, the proclamation of new human rights can be justified only when the need is sufficiently great and when the chance of acceptance by the international community is strong"[24].

After these considerations about consumer protection and human rights, complex questions arise: are consumer rights human rights? Furthermore, are consumer rights already admitted as human rights?

22 **VASAK, K.,** *A 30–year Struggle – The sustained efforts to give force of law…* Op. Cit, p. 29.

23 Ídem.

24 **DEUTCH, S.,** *Are Consumer Rights Human Rights?,* in: Osgood Hall Law Journal 32.3: 1994, p. 540.

4. Consumer Rights as Human Rights – Philosophical and Juridical Arguments

In order to categorize consumer rights as human rights, it is mandatory to go through a variety of arguments conceived from many standpoints. This complex study extrapolates the standpoint from the legal perspective. For this reason, before starting a legal examination, this paper proposes some philosophical reflections.

4.1 Brief Philosophical Considerations

In his book entitled "Justice"[25], philosopher Michael Sandel proposes moral and political reflections that are also suitable to guide a study about human rights and consumer protection. In chapter 5, the Harvard professor presents Prussian philosopher Immanuel Kant's approach regarding human rights. According to the Prussian philosopher, the protection of rights must be motivated by the idea that we are rational beings, worthy of dignity and respect. Kant acknowledges that morality is about respecting the human being as an end and never only as a means. His idea has heavily influenced both eighteenth–century revolutionaries, especially concerning what they called rights of man, and what in the early twenty–first century was conceived as universal human rights[26]. In the words of Sandel: "Kant's emphasis on human dignity informs present–days notions of universal human rights"[27].

Kant offered a *sui generis* perspective regarding justice and morality. He was a powerful criticizer of the utilitarian approach. Furthermore, although Christian, he also disagreed with the idea of morality based on divine authority. For him, the supreme principle of morality is only achieved through a process called "pure practical reason"[28]. In order to comprehend Kant's view, it is worthy to briefly go through the ideas of the two other main chains, i.e., utilitarianism and libertarianism.

Utilitarians believe that there is a happiness principle which directly

25 **SANDEL, M. J.,** *Justice: what's the right thing to do?*, 1 ed – New York: Farrar, Straus and Giroux, 2009.

26 Ibídem, p. 104.

27 Ibídem, p. 105.

28 Ídem.

establishes morality. For Jeremy Bentham and his followers, a person's sovereign masters are pain and pleasure. In Sandel's words:

> "We all like pleasure and dislike pain. The utilitarian philosophy recognizes this fact, and makes it the basis of moral and political life. Maximizing utility is a principle not only for individuals, but also for legislators. In deciding what laws or policies to enact, a government should do whatever will maximize the happiness of the community as a whole… Citizens and legislators should therefore ask themselves this question: if we add up all of this policy, and subtract all the costs, will it produce more happiness than the alternative?"[29].

Alternatively, Immanuel Kant refuses to accept simply empirical considerations to support a whole justice and moral system. He correctly affirms that desires and preferences of people vary from time to time, thus they may not support universal and timeless moral principles such as universal human rights[30].

The libertarianism is another chain which establishes a link between justice and freedom, affirming that we own ourselves. For them, for example, the ideal scenery would be an unfettered market, which would determine by itself a just distribution of wealth. Sandel explains that libertarians are in favor of a minimal state, whose role is limited to enforcing contracts and protecting private property from theft[31]. This approach does not seem to be the most appropriate because, as already exposed in this paper, contracts, especially consumer contracts, may not be enforced without a previous analysis on the socio–economic inequalities of the parts. In other words, the autonomy of will and *pacta sunt servanda* are limited and should not justify a "blind" enforcement of any contract. Kant's fierce criticism of utilitarianism may give the impression that he advocates the opposite philosophical chain: libertarianism. However, he has a *sui generis* notion of freedom. Sandal gives an example to explain the Kantian concept of freedom. It is about an advertising slogan of a soft drink: "obey your thirst".

29 Ibídem, p. 34.

30 Ibídem, p. 105.

31 Ibídem, p. 60.

The professor affirms this slogan inadvertently contains a Kantian insight, i.e. when you drink the soft drink it is an act of obedience to your desire, which you did not choose. Sandal claims that:

> "People often argue over the role of nature and nurture in shaping behavior. Is the desire for Sprite (or other sugary drinks) inscribed in the genes or induced by advertising? For Kant, this debate is beside the point. Whenever my behavior is biologically determined or socially conditioned, it is not truly free. To act free, according to Kant, is to act autonomously. And to act autonomously is to act according to a law I give myself – not according to the dictates of nature or social convention"[32].

Therefore, freedom is not the absence of obstacles to doing what you desire, but the ability to go through a path towards an end you chose. Only human beings have this ability, because it is based on a rational standpoint. Desires may be driven by instinct, but true freedom is related to the ability to make decisions autonomously. This logic is universal; it does not vary from time to time. It is intrinsic to human nature. This is the Kantian principle of "pure practical reasons", based on the idea that reason can be sovereign. Only this autonomy may confer moral responsibility.

This notion of freedom and recognition of human beings as rational creatures should have a profound application on legislative initiatives. The ability to act autonomously gives human lives extraordinary value; it is what distinguishes people from things[33]. For Kant: "… man, and in general every rational being, exists as an end in himself not merely as a means for arbitrary use by this or that will"[34]. That means justice will only prevail if people have intrinsic value, i.e. if they have their dignity recognized, respected, and enforced as an absolute value.

Hence, the Kantian logic solidly sustains the modern idea of universal human rights, but does it also sustain the recognition of consumer rights as human rights? The answer to this question is in the affirmative. The Kantian

32 Ibídem, p. 108.

33 Ibídem, p. 110.

34 Ibídem, p. 122.

notion of freedom, or the lack of it, is directly related to modern consumer relations in which the consumer is vulnerable, because the provider detains the technical information about the product and the expertise to advertise it in a manner that generates desire and restricts a truly rational choice. In this case, the consumer, as a human being, has his dignity threatened.

Regarding Kant's understanding of human freedom, Michael Sandel explains that:

> "[T]he idea of freedom he puts forth is demanding – more demanding than the freedom of choice we exercise when buying and selling goods on the market. What we commonly think of as market freedom or consumer choice is not true freedom, Kant argues, because it simply involves satisfying desires we haven't chosen in the first place"[35].

Nowadays, sales and marketing techniques are so advanced that consumers' vulnerability might be increasing. There are countless experts, whose main goal is to make consumers buy products and hire services. Of course, it would be an inaccurate generalization to say that all marketing and sales departments are working to deprive consumers from their freedom and consequently attacking their dignity. However, selling strategies may involve creating desires and necessities that do not exist.

The digital transformation brought many sensitive questions regarding data collection and the use of algorithms to induce consumers. For example, the advertisements displayed on the screen when a person accesses his or her social networks are often customized. Computer robots are very effective to induce people to buy products they do not need, maybe even more effective than salespeople.

At this point in history, it would be naive to believe that a completely unfettered market is the best option. Information is essential to a truly free choice and it is also a consumer right. But in many cases, providers manipulate and omit information in order to sell their products. They may do that, for example, by using difficult language on contracts. For these and many other

35 Ibídem, p. 106.

reasons the law must regulate consumer relations as a means of protecting universal human rights.

Some of the most intense philosophical discussions about justice are related to the role of markets. Therefore, they directly or indirectly involve debates about consumer relations. As incoherent as it may sound, a free market does not guarantee freedom to consumers. Sandel asks: "Is the free market fair?"[36] And "[h]ow free are the choices we make in the free market?"[37].

Libertarians will evoke individual liberty to sustain the free market. For them, people must be left to their choices and their voluntary exchange will determine the distribution of wealth. They believe that a State's interference on the market violates individual liberties. Utilitarians also defend the free market, but based on the argument of general welfare. They understand that when people make deals, everybody wins[38].

Based on the Kantian theory, the market's conceptions of both chains are questionable. Libertarians are right to establish a connection between market intercourses and liberty, but fail to comprehend the concept of liberty. Utilitarians, on the other hand, have the ultimate argument of welfare, which also fails because it is not timeless and universal. Conceptions of welfare may vary in different cultures, places, and periods.

Therefore, the Kantian approach leads to a third idea. The State must regulate the market guided by human freedom and dignity. Thus, given the panorama of a global economy, consumer protection is a universal human right that must not be left to the free–flowing waves of a free market. It is important to notice that when the State rightfully regulates the economy, it may be good for both consumers and providers (for example, establishing good competition policies and laws). However, it is not enough. The State must legislate and act to directly enforce consumer rights as it should do regarding any other human right.

36 Ibídem, p. 75.

37 Ibídem, p. 101.

38 Ibídem, p. 75.

5. Legal Arguments

In the past, human rights and consumer rights were seen as different fields of law with little interaction, but lately more and more scholars have proposed reflections about their convergence[39]. In 1994, Sinai Deutch presented a comprehensive study about the theme, entitled "Are Consumer Rights Human Rights?"[40]. At the time, he concluded the following:

> "This paper proposes a novel thesis, which may be received with some skepticism by the reader. It suggests an initial acknowledgement of consumer rights as soft human rights, leading finally to full recognition as human rights"[41].

If this topic arose back in the 1990s, then that means that nowadays, with the rapid advances of technology and internet, it requires special attention. Today a global market is established and there is no return. There has never been a time when consumer relations were more highlighted as part of human life and dignity than they are now. The importance of acknowledging consumer rights as human rights resides on the fact that they have to receive special protection to counterbalance the abusive market behaviors which directly affect human beings.

As previously stated in this paper, the main international human rights covenants did not mention consumer rights. However, recalling the study of human rights in generations, it is possible to infer that the third generation congregates emerging rights or "new" rights. For Deutch, third generation rights "attempt to extend the scope of human rights beyond those found in the Universal Declaration and two international covenants"[42].

These rights emerge as a response to socio–economic changes that demand new modalities of protection. Consumer rights, as human rights, originated in

39 HOWELLS, G., RAMSAY, I and WILHELMSSON, T., *Handbook of Research on International Consumer Law*, 2 ed. – Uk and USA: Edward Elgar, 2018, p. 16.

40 DEUTCH, S., *Are Consumer Rights Human Rights?…* Op. Cit.

41 Ibídem, p. 577.

42 Ibídem, p. 555.

response to the growing power of States and business corporations[43]. Regarding the word "new", it is important to notice it does not refer to emerging rights *per se*, because human rights simply exist, for they are intrinsic to human beings. Therefore, what is "new" is their recognition, triggered by cultural and socio–economic changes.

Carlos Eduardo Tambussi illustrates that human rights are part of a pre–normative category and as such they have a concept that is open to social developments[44]. He states that the consumer right is "el más cotidiano de los derechos [The most recurrent of all rights]"[45]. Therefore, it is possible to conclude that consumer rights are third generation rights. They certainly are solidarity rights, for they are closely connected to global development and the preservation of the environment.

However, this assessment must be based on substantial arguments, because reckless and inconsequent admission of "new" human rights may lead to the trivialization of the already established ones. That is why, this paper will now present an analysis founded on three formal human rights characteristics that may be used as guidelines to conclude whether consumer rights are human rights. First, universality and international acceptance. Second, the acknowledgment of human beings as the primary concern. And third, protection against governments and business organizations[46].

5.1 Universality and International Recognition of Consumer Rights

To be characterized as human rights, consumer rights must be universal. And they are. Every person is a consumer. These rights do not belong to specific groups of people, they are individual rights that apply to all. Some may argue against this universality, saying that there are people isolated from market economies, who live in isolated places, planting and harvesting everything they need to survive, so they would not need to purchase products.

43 TAMBUSSI, C. E., *Los Derechos de Usuarios y Consumidores son Derechos Humanos*, in: Lex n. 13 – año XII, 2014, p. 95.

44 Ídem.

45 Ibídem, p. 93.

46 DEUTCH, S., *Are Consumer Rights Human Rights?…* Op. Cit, p. 551.

However, there are other human rights that are exercised for even less people than consumer right. For example, the right to peaceful assembly or association. Certainly, many people who are reading this paper have never exercised this right, but it is still a human right recognized on the UDHR and the ICCPR. Moreover, many people have never formed or joined trade unions, but they still have this human right envisaged on the UDHR and on the ICESCR. Hence, universality does not mean every single human being will exercise these rights, but it means every single person is entitled to these rights.

Regarding universality, it is also important to evoke the Kantian notion that human rights are not linked to society or culture, but are intrinsic to a human being. Consumer rights fit perfectly with this idea, for they are guided by general principles suitable to every person, regardless of their country, language, or culture. This is especially true in times of globalization, marked by mass production and a global market. For example, an Argentinian may easily purchase a product from a Hong Kong based provider. Or a Russian resident may hire online English lessons from an Australian Language School. Even these relations that are established among people of different cultures and social backgrounds demand consumer protection. Therefore, consumer rights are a universal and international concern.

The United Nations Guidelines on Consumer Protection (UNGCP) were the first international document regarding the theme and it revealed an international willingness to acknowledge and enforce these rights. While not binding, the UNGCP's unanimous approval by the United Nations General Assembly inspired many States around the world to enforce its principles. Deutch infers that:

> "Although the UNGPD is not a mandatory international document, it is not fully voluntary and it does have an effect on national and international consumer protection law"[47].

Esther Peterson, cited by Sinai Deutch, shortly after the approval of the UNGCP, enthusiastically affirmed the following:

47 Ibídem, p. 569.

> "International guidelines can serve as a Charter of Human Rights in the consumer area. That does not mean that every nation would scrupulously obey and implement these principles. Many may not. But the existence of a UN–sponsored Charter of Consumer Rights can simply not be ignored by any nation which wishes to be considered civilized"[48].

Peterson's words might have seemed a little too optimistic in 1986, but 30 years later she was proved to be right by the innumerous legal and practical initiatives around the world. Several countries adopted consumer protection laws inspired by the UNGCP. In 2008, as many as 26 countries had constitutional provisions about consumer rights[49]. Some of these countries went even further and conferred fundamental status to consumer rights. According to the UNCTAD, "in many cases consumer protection has been constitutionally enshrined and some countries have recognized consumer rights as human rights"[50].

In the Brazlian Constitution, for example, consumer protection in expressly mentioned in article 5, XXXII, under Title II – Fundamental Rights and Guarantees[51]. According to Bruno Miragem:

> "[A] caracterização dos direitos do consumidor como direitos humanos, revela o reconhecimento jurídico de uma necessidade humana fundamental, que é a necessidade de consumo [The characterization of consumer rights as human rights, reveals the legal acknowledgment of a fundamental human necessity, which is the necessity to consume]"[52].

In Latin America, Argentina, Brazil and Mexico are known to have comprehensive consumer protection laws. All three have consumer protection

48 Ibídem, p. 570.

49 UN Conference on Trade and Development (UNCTAD), Manual on Consumer Protection… Op. Cit., p. 17.

50 Ídem.

51 According to most scholars, the term "fundamental rights", used by national laws, refers to human rights, the latter being fundamental rights recognized in international treaties. Therefore, essentially speaking, there is no difference.

52 MIRAGEM, B., Curso de Direito do Consumidor… Op. Cit., p. 64/65.

explicitly mentioned in their national constitutions, along with Colombia, Costa Rica, Ecuador, Paraguay, and Peru[53].

The complexity of constitutional amendments creates an obstacle to including consumer protections in more national constitutions. That is why the ideal legal instrument would be an internationally binding treaty. Besides the inherent importance of such an instrument, it would facilitate the inclusion of consumer protections in more constitutions, because many States' legal systems receive international treaties on human rights as constitutional provisions.

While the United Nations has not yet recognized consumer rights as human rights, several Member State around the world have constitutional consumer protection provisions. And many others, although not explicitly mentioned, protect consumer rights through other provisions enshrined in their constitutions. Therefore, it is possible to affirm that there is, to say the least, a strong tendency to admit consumer rights as human rights. In any case, the numerous constitutional provisions in almost every region of the world are another solid expression of the universality of consumer rights.

5.2 Consumer Protection and the Individual as the Primary Concern

Human dignity is a universal value. In philosophical terms, dignity demands the recognition of humanity as an end in itself. From a legal point of view, the law must guarantee basic rights that recognize and enforce the intrinsic worth of a human being. Thus, human rights are based on the notion of the individual as the primary concern. In order to guarantee human dignity, all human rights must be respected because they are indivisible, interdependent, and interrelated. There is no hierarchy. If one is breached, the others will consequently be denied.

Therefore, to be considered human rights, consumer rights must be connected to other rights, ensuring human dignity. And they are. Consumer rights are part of this protective legal system. They are interrelated not only to economic rights, but to many others, including the right to life, health, and property, to mention a few. In reference to this, Deutch explains:

53 HOWELLS, G., RAMSAY, I and WILHELMSSON, T., *Handbook of Research on International Consumer Law...* Op. Cit., p. 21 – footnote 25.

> "In a consumer society, protection of the individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to a fair contract, and the right of access to courts, a person's dignity is disregarded"[54].

A good example of this idea is the civil right to privacy (article 17, ICCPR), which is currently at stake on consumer relations. The UNGCP n. 11 (e) affirms that "businesses should protect consumers' privacy through a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of personal data". Therefore, an online provider is forbidden, for example, to collect personal information of customers and sell them to others without consent. The words "control" and "security" might also mean that providers are responsible for the protection of personal data and must guarantee they are safe, for instance, from hacker attacks.

Moreover, the first legitimate need which the UNGCP intend to meet is: "access by consumers to essential goods and services" (UNGCP, 5 (a)). Then, consumer protection is essential to fulfill the social right of an adequate standard of living, including adequate food, clothing, and housing (article 11, ICCPR), because to enjoy these rights, a person must purchase several products and services.

Consumer protection is also very important to guarantee equality. According to guideline 11 (a), "[b]usinesses should avoid practices that harm consumers, particularly with respect to vulnerable and disadvantaged consumers". In other word, a provider must not take advantage of consumers' ignorance, illiteracy, or inexperience while attempting to sell their products or services. Through disclosure and transparency (UNGCP, 11 (c)) businesses must provide all the information needed in order to give the consumer the opportunity to make a free and conscious choice.

Although not expressly mentioned in the UDHR, the ICCPR, or the ICESCR, consumer protection is essential to guarantee many of the first and second generation rights. Moreover, the interdependence of consumer rights with third generation rights is evident. Under the category named solidarity rights, consumer rights also aim to protect the society as a whole.

54 **DEUTCH, S.,** *Are Consumer Rights Human Rights?…* Op. Cit., p. 552.

For instance, there is a clear link between sustainable consumption and the right to development (UNGCP, 49–60). "Sustainable consumption includes meeting needs of present and future generations for goods and services in ways that are economically, socially and environmentally sustainable" (UNGCP, 49). All development must be human–centered; indicating the human being is the paramount reason of development[55]. In the words of Tambussi:

> "El crecimiento no es el fin del desarrollo humano, sino un medio. Ambos están estrechamente ligados… así, el uso de servicios y productos relacionados que responden a las necesidades básicas y conllevan una mejor calidad de vida debe realizarse minimizando el uso de recursos naturales y materiales tóxicos así como también la emisión de residuos y contaminantes sobre el ciclo de vida [Growth is not the goal of human development, but a means to it. Both are closely connected […] hence, the use of related products and services, that meets the basic needs and brings a better quality of life must minimize the use of natural resources and toxic materials as well as the emission of waste and pollutants upon the life cycle]…"[56].

Thus, consumer rights are interdependent and interrelated to several other human rights, for they are also based on human dignity. Therefore, as a human right, consumer protection plays a crucial role on placing the individual as the primary concern.

5.3 Protection Against Governments and Business Organizations

Traditionally accepted human rights, as already stated in this paper, are negative (civil and political–first generation) and positive (economic, social, and cultural–second generation). Under the third generation rights, it is not possible to place consumer protection under negative or positive labels. Hence, States must refrain from arbitrary infringements as well as take measures to protect the individual against big business organizations, multinational corporations, and monopolies[57].

55 **TAMBUSSI, C. E.,** *Los Derechos de Usuarios y Consumidores son Derechos Humanos…* Op. Cit., p. 101.

56 Ibídem, p. 102.

57 **DEUTCH, S.,** *Are Consumer Rights Human Rights?…* Op. Cit., p. 552.

The State is the supplier of public services. Many governments establish public corporations to provide these services. Resolution 124/96 of the Southern Common Market (Mercosur) concerning consumer rights, establishes an adequate provision of public services[58]. In Brazil, for example, according to the Consumer Protection Code, public corporations might fit within the definition of a provider[59]. Also in Argentina, the National Constitution determines that authorities must ensure the quality and efficiency of public services[60]. These cases exemplify the Government as a provider, which, as such, must refrain from arbitrary infringements on consumer rights.

58 TAMBUSSI, C. E., *Los Derechos de Usuarios y Consumidores son Derechos Humanos…* Op. Cit., p. 98/99.

59 ARTIGO 3º Fornecedor é toda pessoa física ou jurídica, pública ou privada, nacional ou estrangeira, bem como os entes despersonalizados, que desenvolvem atividade de produção, montagem, criação, construção, transformação, importação, exportação, distribuição ou comercialização de produtos ou prestação de serviços [Article 3. A supplier is any physical person or corporate entity, of a public or private nature, domestic or foreign, as well as other involved in the activities of production, assembly, creation, construction, transformation, importing, exporting, distribution, or commercialization of products or services].

60 Artículo 42. Los consumidores y usuarios de bienes y servicios tienen derecho, en la relación de consumo, a la protección de su salud, seguridad e intereses económicos; a una información adecuada y veraz; a la libertad de elección y a condiciones de trato equitativo y digno. Las autoridades proveerán a la protección de esos derechos, a la educación para el consumo, a la defensa de la competencia contra toda forma de distorsión de los mercados, al control de los monopolios naturales y legales, al de la calidad y eficiencia de los servicios públicos, y a la constitución de asociaciones de consumidores y de usuarios. La legislación establecerá procedimientos eficaces para la prevención y solución de conflictos, y los marcos regulatorios de los servicios públicos de competencia nacional, previendo la necesaria participación de las asociaciones de consumidores y usuarios y de las provincias interesadas, en los organismos de control [Article 42. As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights, the education for consumption, the defense of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations and of the interested provinces in the control entities].

Deutch makes an interesting analogy about providers and States. For him, the structure of a big business organization is similar to a government in the sense that both have the capacity to control private consumers[61]. In other words, consumers cannot bargain with them on equal terms. Just to mention a few examples, Walmart's revenue in 2017 was bigger than Belgium's Gross Domestic Product (GDP) and if Apple was a country, it would be the 47th in the world by GDP[62].

The most recurrent cases involve the State as the consumer's protector against providers. The UNGCP n. 4 states that "member States should develop, strengthen or maintain a strong consumer protection policy…"[63]. This should be done through legislative and administrative measures. Tambussi wrote that:

> "El consumo es una dimensión esencial del ser humano, que involucra derechos fundamentales que deben ser protegidos por el Estado, de ahí que deba prodigarse al consumo también una tutela de la más alta jerarquía [Consumption is an essential dimension of the human being, which involves fundamental rights that must be protected by the State, hence a protection of the highest hierarchy must be conferred to consumption]…"[64].

While legal protection is crucial, it must not be the sole measure. Administrative steps must be taken to protect consumers. Many times administrative measures are more accessible and less expensive to consumers. The UNGCP encourages governments to establish consumer protection agencies[65] who might act not only after a breach has occurred, but also take preventive actions, such as consumer education. In Brazil, for instance, there is a federal government

61 **DEUTCH, S.,** *Are Consumer Rights Human Rights?…* Op. Cit., p. 552/553.

62 https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7#apples-revenues-in-2017-were-higher-than-portugals-gdp-23, accessed on 19 April 2019

63 UN Conference on Trade and Development (UNCTAD), United Nations Guidelines for Consumer Protection…, Op. Cit., p.7

64 **TAMBUSSI, C. E.,** *Los Derechos de Usuarios y Consumidores son Derechos Humanos…* Op. Cit., p. 96.

65 UN Conference on Trade and Development (UNCTAD), United Nations Guidelines for Consumer Protection…, Op. Cit., p. 15.

agency, SENACON[66], which coordinates a consumer protection system composed of numerous provincial agencies called PROCONS[67].

States must always stimulate the development of mechanisms to address consumer complaints. Alternative dispute resolution, such as conciliation attempts by administrative agencies, might be very effective and shall be encouraged. Nevertheless, the State must always guarantee to the consumer the right of access to justice, regardless of the prior attempts of administrative organs.

To sum up, consumption is an essential part of human life and totally necessary to guarantee dignity to every human being. Punishment to perpetrators of consumer abuses are necessary, but consumer protection goes far beyond that. It requires the empowerment of consumers themselves. It is unrealistic to expect the State to control every single consumer relation, so it is crucial that the consumer is well educated about his rights. Conscious consumers are able to identify breaches of their rights, avoid abusive contracts, and report violations to authorities.

6. Conclusion

In essence, consumer rights are human rights and must be protected as such. This conclusion in based on philosophical and legal arguments presented throughout this paper. It is important to acknowledge that regardless of formal recognition, human rights exist simpy because they are intrinsic to every human being.

However, there is a massive international recognition of the crucial importance of consumer rights. Several States around the globe have already incorporated consumer protection in their constitutions and national laws. Although the United Nations has not yet explicitly conferred to consumer rights the status of human rights through a binding instrument, the UNGCP contains several principles that connect both fields.

66 SENACON – Secretaria Nacional do Consumidor, under the Brazilian Ministry of Justice.

67 UN Conference on Trade and Development (UNCTAD), Manual on Consumer Protection…, Op. Cit., p. 25.

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Counter–Terrorism and International Human Rights: An Assessment from the Ethiopian Anti–Terrorism Law Perspective

Los derechos humanos y la lucha contra el terrorismo: una evaluación desde la ley antiterrorista etíope

Received: 18/04/2019 – Accepted: 02/10/2019

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Abstract

The 2009 Ethiopian Anti–Terrorism Proclamation (ATP)[2] was framed to prevent and punish the ever–growing terrorist threat. However, since its inception, the ATP has been widely criticized for bypassing the internationally accepted human rights standards and being applied to unduly punish opposing voices. The ATP has been argued to leave in Ethiopia a background for governmental repression. The purpose of this article is to assess the ramifications of the ATP on human rights by addressing them from the human rights approach. This article assesses the ATP and its impact on civil liberties, such as protection against arbitrary detention and freedom of expression, association, and access to justice. In conclusion, this article outlines approaches as to how to balance the government's security measures and the respect and protection of human rights.

Keywords: International Terrorism; Ethiopian Anti–Terrorism Proclamation; Human Rights; Security.

Resumen

La Proclamación Antiterrorista Etíope (ATP) de 2009 fue diseñada para prevenir y castigar la creciente amenaza terrorista. Sin embargo, desde su inicio, la ATP ha sido ampliamente criticada por obviar los estándares internacionales de derechos humanos, y por ser aplicada para castigar indebidamente a las voces opositoras. Se ha argumentado que el ATP deja en Etiopía un contexto para la represión gubernamental. El propósito de este artículo es evaluar las ramificaciones del ATP en materia de derechos humanos, desde una perspectiva de derechos humanos. Este artículo evalúa el ATP y su impacto en las libertades civiles, como la protección contra la detención arbitraria y la libertad de expresión, asociación y acceso a la justicia. En conclusión, este artículo describe los enfoques sobre cómo equilibrar las medidas de seguridad del gobierno y el respeto y la protección de los derechos humanos.

Palabras clave: Terrorismo internacional; Ley antiterrorista; Etiopía; Derechos humanos; Seguridad.

2 Anti–Terrorism Proclamation of Ethiopia (ATP) No. 652/2009 (Hereinafter known as ATP, 2009).

Summary

Terrorism is one of the most serious threats to peace and security on global, regional, and national levels in the 21st century. Terrorism doesn't only destroy human rights, but it also jeopardizes the political stability of states[3], healthy economic development[4], the welfare of populations, expansion of democracy, and possibly the survival of civilization itself. A study carried out on the atrocities committed in the Middle East by Isis and in West Africa by Boko Haram terrorist organizations, revealed that

3 See ASONGU, S. and NWACHUKWU, J. World Development. Vol. 99, Issue C. 2017, pp. 253–270.

4 BANDYOPADHYAY, S. SANDLERY, T and YOUNASZ, J. *Foreign direct investment, aid, and terrorism* Oxford. Economic Papers, 2014, p. 25.

the right to life, the right to liberty, personal security, and the right to freedom of religion or belief become profoundly dishonored[5].

Given the adverse effects of terrorism, the Draft Comprehensive International Convention against Terrorism considers terrorism to be a threat that risks innocent lives, jeopardizes fundamental freedoms, and severely impairs the dignity of human beings[6]. According to this argument, without the guarantee of personal, national, and existential security, individuals are prone to coercion or threats that can paralyze and prevent the exercising of their rights[7]. Immediately following the atrocious 9/11 attack on the U.S., without defining terrorism comprehensively, the United Nations (UN) Security Council recalled the threat of terrorism for international peace and security requiring states effectively to take counter–terrorism measures[8]. The ground was visualizing of a new, unknown, expanding danger that may not be attributed to specific offenders individually, but emanating from an incredible network of terror[9]. The counter–terrorism measures have gained momentum through the UN Security Council Resolution 1373 even though it was followed with little institutional human rights scrutiny or follow–up[10]. Concerns have been raised that the reluctance of governments to comply with human rights treaties on the pretense of security have been justified and legitimized through a simple reference to article 103 of the UN Charter[11]. The UN Security Council Resolution 1373 is often used as a pretext by states to militarize laws and limit the practice of human rights. In 2002,

5 OCHAB, E and ZORZI, K. *Terrorism effects on human rights REPORT*. 23 Sept. 2016.

6 See UN Doc. A/59/894, 12 Aug. 2015.

7 AMATRUDO, A and BLAKE, L. W. *Human Rights and the Criminal Justice System: A grass Haus Book*, Routledge, 2014. p. 106. Traditionally, security of the people was linked to sovereignty, state borders, and natural resources.

8 See the UN Security Council Resolution 1373. S/RES/1373, 28 Sep. 200.

9 See LEPSIUS, O. *Freiheit, Sicherheit und Terror: Die Rechtslage in Deutschland*. Leviathan. Vol. 32, Issue 1, 2004.

10 CLAPHAM, A. *Terrorism, National Measures and International Supervision*, in: A. BIANCHI, ed. Enforcing International Law Norms Against Terrorism, Graduate Institute of International Studies, Oxford and Portland Oregon, 2004, pp. 295–304.

11 Ibídem, p. 303–304.

the UN Secretary–General expressed his concern that human rights were under substantial pressure in various countries as a result of counter–terrorism measures[12]. Among other things, the principle of legality, conditions of treatment in pre–trial detention, freedom from torture, fair trial rights, and due process guarantees were under threat. Some writers consider the clash between security and human rights to be a major dilemma[13].

Ethiopia enacted the first ATP No. 652/2009 on 28 August 2009[14]. The Ethiopian government holds the idea that Ethiopia has faced "a clear and present danger of terrorism"; nonetheless the substantive and procedural laws in place are not capable of averting such threats[15]. With the ATP, the Ethiopian government declared a formal battle against international terrorism with the objective of guaranteeing peace and security[16]. The Ethiopian government and other exponents of the ATP argue that the main features of the proclamation are similar and better than those of the anti–terrorism legislation in western countries, particularly referring to Austria, England, and Canada. In spite of widespread mainstream fear due to terrorism on a global level, opponents of the ATP assert that the Ethiopian government used the ATP as a device to carry out its development agenda in lieu of the fundamental human rights and freedoms[17]. The opponents of the ATP complained that the law has been used to abolish dissidents and threaten independent journalists, members and supporters of various national movements across Ethiopia, members of legally registered opposing political parties, religious leaders, and other independent voices regarding the

12 UN Secretary–General. Report. A/58/266. 8 Aug. 2003, p. 12–13.

13 See OWEN, J. J. *The Tolerant Leviathan: Hobbes and the Paradox of Liberalism*. Vol. 37, No. 1, Fashion for Democracy, 2005. General Comment No.29, 2001, para. 16 of the United Nations High Commissioner for Refugees (UNCHR) states that the principles of legality and the rule of law require the basic criteria for a fair procedure in a state of emergency to be complied with.

14 ATP, 2009.

15 See GEBREWOLD, B. *Ethiopian Nationalism: An Ideology to Transcend All Odds*, Africa Spectrum. Vol. 44, No. 1, 2009. p. 89.

16 Ethiopian Growth and Transformation Plan I (2010/11–2014 / 15) and Plan II (2015/16–2019/20).

17 AMNESTY INTERNATIONAL, Ethiopia: 25 Years of Human Rights Violations, 2 Jun. 2016.

protection and enforcement of human rights within the country[18]. Moreover, it has been argued that the ATP paved the way for the security apparatuses of the country to abuse its power by going beyond what is necessary[19].

Until early 2018, the secessionist rebel group and ethnically oriented political party called the Tigray People Liberation Front (TPLF), in collaboration with other racially oriented groups, ruled the country for twenty–eight years under the shield of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF)[20]. Over time, the legal, socio–economic, and political factors sparked a massive dissatisfaction from the public across the country. One basic element of the protest was the narrow political playing field created by the ruling party to gain vengeance against opposing groups by using freedom restricting laws on terrorism, media, and civil and political organizations since 2005[21]. In April of 2018 where deprivation of socially conditioned expectations, exploitation, an authoritarian, a racist and sectarian social order have reached at its peak, everything starts to fall apart in a cascade and a vibrant act of social movement and resistance was broken out, which in turn caused a fraction or disagreement among the coalition of the EPRDF. Especially, it was the alliance of the Oromo Democratic Party (ODP) and Amhara Democratic Party (ADP) that brought the incumbent Prime Minister Abiy Ahmed to the epicenter of power. Following this, the Ethiopian government expressed its sincere willingness to reform the ATP. On 18 May 2019, the Council of Ministers approved the new anti–terrorism

18 Ídem.

19 HUMAN RIGHTS WATCH, World Report, 2018.

20 The Ethiopian People's Revolutionary Democratic Front (EPRDF) was the coalition of the Tigray People's Liberation Front (TPLF), the Amhara Democratic Party (ADP), the Oromo Democratic Party (ODP) and the Southern Ethiopian People's Democratic Movement (SEPDM). The Afar National Democratic Party (ANDP), the Benishangul–Gumuz People's Democratic Unity Front (BGPDUF), the Ethiopian Somali People's Democratic Party (ESPDP), the Gambela People's Democratic Movement (GPDM) and the Hareri National League (HNL). On 1 Dec. 2019 Prosperity Party was established as a successor to the EPRDF by incumbent Prime Minister Abiy Ahmed. MAMDANI, M. *The Trouble with Ethiopia's Ethnic Federalism*. The Network Times, 3 Jan. 2019.

21 See HUMAN RIGHTS WATCH, World Report, 2019.

bill and submitted and approved by the federal parliament in 1 January 2020[22]. The revised ATP modified the ATP to some extent, although it still contains controversial provisions similar to those of the previous ATP[23].

In a nutshell, the objective of this article is to give a general overview of international terrorism and assess the legal basis of the fight against terrorism in Ethiopia. Particular focus is placed on the ATP and its impact within the last decade on the perceived violations of selected human rights from the perspective of international human rights obligations. This article clarifies to some extent why terrorism is still fundamentally controversial, and which legal discourses have triggered the legal reform in contemporary Ethiopia.

From this perspective, this article addresses the following questions: What are the legal regimes of counter–terrorism in Ethiopia at the international level? How does the ATP affect freedom of expression, liberty, and the right to association, as well as the access to justice in Ethiopia? How can balance be brought to security and human rights in Ethiopia?

This article has six major parts. The first part introduces the concept of terrorism in general. The second part addresses the link between human rights and the crime of terrorism vis–à–vis security. The third part offers some initial ideas regarding the legal regime governing counter–terrorism in Ethiopia. The fourth part analyzes the human rights implication of the ATP. The fifth part deals with the new draft of anti–terrorism law of Ethiopia. Finally, the sixth part focuses on different approaches that must be considered in balancing the security agenda of the Ethiopian government and the protection of human rights.

By analyzing laws and best practices, this article argues that the ATP falls short of delivering an accurate test for determining the type of conduct that may be regarded as terrorism. Consequently, due to its imprecision, the ATP has reinforced the disregard of human rights by casting the ethos of fear. Additionally, this article identifies a broad discrepancy between what has been regarded as human rights on paper and human rights in practice. This article proposes

22 Council of Ministers Approves Anti–Terrorism Law, 21 May 2019, available at <https://ethiopianembassy.be/2019/05/21/council–of–ministers–approves–anti–terrorism–law/> [accessed on 25 Aug. 2019].

23 See Ethiopia approves new Anti–Terrorism Law, available at <http://apanews.net/en/news/ethiopia–approves–new–anti–terrorism–law> [accessed on 08 Mar. 2020].

the need for the redefinition of terrorism in the ATP to make it suitable for a human–friendly counter–terrorism project.

1. Defining Terrorism

1.1 Background

Terrorism is the term that exists mostly *inter alia* in the political discourses of colonialism, socialism, capitalism, and Islamic fundamentalism[24]. The act of terrorism is not associated with any specific religion, nationality, or civilization. The history of terrorism embraces such issues as the pre–modern use of terror in ancient Rome, medieval Europe, and the French Revolution; as well as the jihadist violence, state terrorism, the Red Brigades in Italy, the Red Army Faction in Germany, the Israeli–Palestinian conflict, Northern Ireland, anarchist terrorism, and the Ku Klux Klan; along with lesser–known movements in Uruguay and Algeria[25].

Perceptibly, terrorism is a complex, multi–faced, and divergent political dimension that cannot merely be attributed to a mono–causal cause–and–effect relationship[26]. No one explanation, theory, or discipline will ever fully account for all terrorists' actions and their motives.[27] The contending attitudes of states on terrorism lead to the no one–size–fits all definition of terrorism. It has been estimated that there are well over 100 different definitions of terrorism in scholarly literature[28]. The perplexity stems from the differences in social, cultural,

24 See for example JALATA, A. *Terrorism from Above and Below in the Age of Globalization*. Sociology Mind. Vol. 01, No. 01, 2011.

25 See SÁNCHEZ–CUENCA, I. *The Historical Roots of Political Violence Revolutionary Terrorism in Affluent. Countries*. Cambridge University Press, 2019. See LAW, R.D. *Terrorism: A History* (Themes in History). 2. Aufl, 2016.

26 See SAUL, B. *Defining Terrorism in International Law*. Oxford University Press, 2008. Bundeskriminalamt, ed. Netzwerke des Terrors–Netzwerke gegen den Terror. BKA–Herbsttagung 2004, Band 30, Luchterhand, 2005, p. 22.

27 CANTER, D, ed. *The Faces of Terrorism: Multidisciplinary Perspective*. Chichester: Wiley, 2009, p. 1.

28 COADY, C. A. J. *Terrorism, Morality, and Supreme Emergency*, in: I PRIMORATZ. Ethics, Symposium on Terrorism, War, and Justice. Vol. 114, No. 4. The University of Chicago Press, 2004, p. 38. UN Human

political, and ideological attributes of states[29]. This skeptical attitude is in no way groundless. In fact, analysis of more than 500 state reports to the Counter–Terrorism Committee, established by the UN Security Council Resolution 1373, revealed that there were states with very broad and vague definitions for terrorism[30]. The vagueness and broadness of the definitions cast doubt on the compatibility of the respective anti–terrorism laws with human rights standards.

The controversy surrounding terrorism both on local and international levels[31] is also due to how difficult it is to draw a line between the scope of the application of terrorism with other contending concepts such as violent extremism and the legitimate struggle for self–determination. Apart from non–state actors, it is arguable whether terrorism shall also include state's violent repression against its own citizens. The blurred political picture of terrorism makes it prone to be weaponized by governments against contending domestic democratic forces[32]. There remains only a limited consensus on the question of whether the motives of terrorism are limited to politics, ideology, religion, or ethnicity. With the prospect of creating an internationally shared standard, the UN General Assembly has established Ad Hoc Committees and working groups on multiple occasions[33]. On 13 December 2016, Resolution 71/151 of the UN General Assembly established a working group to finalize the Comprehensive Draft Convention on International Terrorism[34]. Although a binding interpretation of the term terrorism is still missing on an international level, the 2004 UN Security Council Resolution 1566 currently serves as the working definition. It defines terrorism as:

Rights Council Panel Discussion on the Human Rights Dimensions of Preventing and Countering violent extremism, 2016.

29 SUTER, K. *September 11 and Terrorism: International Law Implications*. Australian Journal of International Law, 2001, p. .27.

30 SAUL, B. *Defining Terrorism in International Law…* Op. Cit., p. 20.

31 COADY, C. A. J. *Terrorism, Morality, and Supreme Emergency…*, Op. Cit., p. 38.

32 See LUTZ, J. M. and LUTZ, B. J. *Democracy and Terrorism*. Perspectives on Terrorism. Vol 4, No. 1, 2010.

33 Ad Hoc Committee established by General Assembly Resolution No. 51/210 of 17 Dec. 1996.

34 Ídem.

> "… a criminal act with the intent to cause death or bodily injury, or taking of hostages with the purpose to provoke a state of terror or intimidate a population or compel a government or international organization to do or to abstain from doing any act, which constitutes offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or other similar nature"[35].

Broadly interpreted, terrorism can be commonly understood as a deliberate actual or threatened use of force to victimize[36], injure, cause death, or cause destruction of property by individuals, nationals, or subnational groups against non–combatants, states, or international organizations to obtain political, ideological, or religious objectives through coercion using psychological warfare against a broad audience beyond its immediate victims in order to change the status quo[37]. Terrorism is motivated by "political, philosophical, ideological, racial, ethnic, religious, or other similar acts", which consists of causing death or injury, or taking hostages to provoke a state of terror, intimidate a population, or force a government or international organization to act or refrain from any action.

1.1.1 The Ethiopian Case

The ATP defines neither terrorism nor terrorist acts. Instead, article 3 of the ATP lists several acts of terrorism that result in rigorous imprisonment ranging anywhere from fifteen years to life or death. Article 3 of the ATP explains 'terrorist acts' as follows:

35 UN Resolution No. S/RES/1566, 8 Oct. 2004. European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, 2001/931/CFSP.

36 See. PARKIN, W.S. *Victimization Theories and Terrorism*, in: G LA FREE and J D. FREILICH, eds. The Handbook of the Criminology of Terrorism. John Wiley & Sons, Inc, 2017.

37 See International Convention for the Suppression of the Financing of Terrorism adopted in New York on 9 Dec. 1999 and enacted 10 Apr. 2002. See Chapter Thirteen, article 21 and 22. Ethiopia has been a party to the Convention since 20 Mar. 2012.

> "Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country causes a person's death or serious bodily injury; creates serious risk to the safety or health of the public or section of the public; commits kidnapping or hostage taking; causes serious damage to property; causes damage to natural resource, environment, historical or cultural heritages; endangers, seizes or puts under control, causes serious interference or disruption of any public service; or threatens to commit any of the acts stipulated under sub–articles (1) to (6) is punishable with rigorous imprisonment from 15 years to life or with death"[38].

The Objective Material Element and Subjective Mental Condition

As to the objective material element, article 3 of the ATP positively sets a "seriousness" qualification for material damages. Still, there are risks to punishing individuals for every serious intentional damage to property or other serious interference or disruption of essential public or private services. In other words, the "seriousness" qualification cannot cause every serious interference or disruption of public services to be labeled as terrorist acts because it makes the applicable domain of the law too broad[39]. Moreover, the requirement of "seriousness" is not equally applied concerning others acts such as damage to natural resource, environment, historical or cultural heritage.

Article 3 of the ATP falls short of delivering detailed information as to the means and the kinds of activities that qualify as terrorist activities, except for the vague catchall coercing or intimidating the government and destabilizing or destroying the fundamental…social institutions of the country. The terminologies employed have inherent vagueness making the application of the meaning of terrorism indeterminable. Basically, pressuring a government to adopt or abandon a standpoint is the manifestation of a well–functioning democratic society. If inducement of a government is performed forcefully, it

38 ATP, 2009, article 3.

39 ATP, 2009, article 2(7).

qualifies as domestic criminal violence, but that lacks the essential element to be perceived as terrorism.

The subjective element of terrorism is emulated in creating terror and fear[40]. Most definitions have no substantial divergences in this regard. Nevertheless, the degree of the influence of its interpretation regarding government decision making may vary. For instance, the definition of terrorism in the UN Security Council Resolution 1566 made the subjective element of terrorism open–ended to include political, philosophical, ideological, racial, ethnic, religious or other similar nature. Unlike the African Union Anti–Terrorism Convention, the Ethiopian ATP has an exhaustive list of the kinds of motives that must lead to a given terrorist act[41]. The ATP states that a terrorist act must be committed with the intention of advancing a political, religious, or ideological purpose.

Ethnic–Based Terrorism

The ATP consists of no express ethnic–based terrorism. As D. Bymann noted, ethnic terrorism differs from other terrorist activities carried out for religious, ideological, or financial motives[42]. Ethnically motivated terrorists often seek to influence their constituencies or identities more than the country as a whole and target any who would otherwise potentially compromise their identity[43]. Ethnic based terrorism uses violence in order to make a statement for a particular national identity. In doing so, they create fear among other rival groups, but the counterattack by a state can create a secessionist insurgency tendency of this group[44]. They claim there exists a nation with an explicit and distinct character, and the interest and values of that nation have priority compared to others. By bringing different justifications into light which support them, ethnic based terrorists claim political independence (political sovereignty)

40 Organization of African Unity (OAU). Convention on the Prevention and Combating of Terrorism, 14 Jun. 1999.

41 The 2008 Anti–Terrorism Act of Ghana added to the intention category a terrorist act committed based on 'a racial or ethnic cause.

42 BYMANN, D. *The logic of ethnic terrorism*. Studies in Conflict & Terrorism. Vol. 21, Issue 2, 1998.

43 Ídem.

44 Ídem.

even if they do not have such a claim, and they do so by using terrorist acts to manipulate and marginalize other minorities[45]. Similarly, case studies on political and ethnic nationalism in the Irish Republican Army (IRA) in Northern Ireland, Euskadi Ta Askatasuna (ETA) in the Basque Country, Frontu di Liberazione Naziunalista Corsu (FLC) in Corsica, Ushtria Çlirimtare Kosovës (UCK) in Kosovo, Teyrêbazên Azadîya Kurdistan (TAK), Kurdischen Arbeiterpartei PKK (PKK) in Turkish Kurdistan, and Imarat Kavkaz (IK) in Chechnya collectively show the link between terrorist tactics and the need for political independence, which have led to considerable bloodshed[46].

In Ethiopia, where eighty different languages are spoken, ethnically motivated terrorism is not a new phenomenon and its threat shall also not be underestimated in the future. According to the Internal Displacement Monitoring Center and the Displacement Tracking Method of the International Migration Organization (IMO), Ethiopia is currently the number one country in the world when it comes to internal displacement[47]. The reasons for that, among other things, are ethnic–based engagements. Article 46 the 1995 Ethiopia's Constitution draws the border of regional states on the basis of language and ethnicity. In today's Ethiopia, the ownership of land lies with the nations, nationalities, and people of the individual nine regional states[48]. The constitutional structure of some regional states shows that ownership of the land of the regional states lies with certain indigenous groups[49]. This, combined with socio–economic deprivation, has intensified ethnic fundamentalism, exclusion, hatred, and the struggle for natural resources as minorities and non–native other ethnic groups from different regional states have been marginalized and described as settlers. Article 39 of Ethiopia's Constitution, which corresponds to Woodrow Wilson

45 See BUKER, H. *A Motivation Based Classification of Terrorism*, Forensic Research & Criminology International Journal. Vol 5, No. 2, 2017.

46 DUERR, G. M. E, ed. *Secessionism and Terrorism: Bombs, Blood and Independence in Europe and Eurasia* (Political Violence). Taylor & Francis Ltd, 2018.

47 DTM. Ethiopia, 2019, available at <https://www.globaldtm.info/category/east–africa/ethiopia/>, [accessed on 23 Aug. 2019].

48 The question of who are the nation, nationality and people in Ethiopia remains a subject of dispute.

49 See for Example the Constitution of Harari Regional state of Ethiopia.

and Lenin's thesis that self–determination consists of succession and statehood, also enshrines the rights of external succession through the self–determination of these ethnically organized regional states and encourages dissatisfied people to promote and press for new statehood[50]. There has been a vigorous push towards sovereign status based on ethnic identity, and the modus operandi these dissatisfied people use is militancy and insurrection to live up to their claim when they think the legal path is implausible[51]It suffices to argue that punishing ethnic–based terrorism would deduce the political radicalization[52] and the racial tension in the country, however, it might also paradoxically question the whole framework of ethnic federalism (which is the structuring of federal units in line with ethnicity)[53]. Ethnic federalism is believed to reinforce the sectarian ideology and the ethnic party–oriented sentiment to the detriment of the Ethiopian values of social cohesion. Racial terrorism can naturally follow the implementation of the ethnicity–based federalism. Thus, punishing ethnic–based terrorism can only be credible as far as the right to secession and language, and ethnicity–based border division can be re–corrected in Ethiopia's Constitution. The Constitution should therefore reflect the values of humanity to live together, regardless of race, culture, or religion, based on the foundation of genuine human unity in the form of unitary federalism[54] and possession of the same human nature, idea, reason, and free will.

50 See AYANO, G.H. *A Reflection on the Dam at the Blue Nile River: Yesterday and Today*, Abay Media, 2017

51 See KHOBRAGADE, V. *Ethnicity, Insurgency and Self–Determination: A Dilemma of Multi–Ethnic: A Case of North–East India*. The Indian Journal of Political Science. Vol. 71, No. 4, 2010, pp. 1159–1174. See also GETACHEW (2017), A Reflection on the Dam at the Blue Nile River: Yesterday and Today, Abay Media.

52 See MCCAULEY, C and MOSKALENKO, S. *Mechanisms of Political Radicalization: Pathways toward Terrorism*. Terrorism and Political Violence, Vol. 20, Issue 3, 2008.

53 ABBINK, Jon. *The Ethiopian Revolution after 40 Years (1974–2014); Plan B in Progress?* Journal of Developing Societies. Vol 31, No. 3, SAGE Publications, 2015, p. 351.

54 See for example STURM, R. *Unitary Federalism–Germany Ignores the Original Spirit of its Constitution*, REAF–JSG 28, 2018. See also ADENEY, K and BHATTACHARYYA, H. *Current challenges to multinational federalism in India*. Regional & Federal Studies. Vol. 28, Issue 4, 2018.

1.2 Domestic and International Terrorism

The crime of terrorism has domestic and international facets. One of the varying purposes for making a distinction between terrorism in its legal domestic and international sense is the desire to delineate and define specific conducts in their material terms, and identify the actors to determine the criminal proceedings, punishments, and forum[55]. While the state's jurisdiction over a criminal matter requires a specific link to the crime regarding the territoriality, the extraterritorial nature of the offense gives the state the power to prosecute the individuals using universal jurisdiction[56] only when the criminal is within its territory[57]. Another important distinction between domestic and international terrorism is a state must enforce duties imposed by international law directly on the international offender for the breach of a provision of national legislation and implement the treaty[58].

Accordingly, terrorism is international when the attack has a foreign element, and the opposite is true for domestic terrorism. On 18 December 1972, the UN General Assembly Resolution 3034 established an early understanding of international terrorism. It proclaimed that "…international terrorism endangers or takes innocent human lives or jeopardizes fundamental freedoms". It further provides that "the underlying causes of those forms of terrorism and acts of violence lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes…"[59]. The UN General Assembly Resolution 3034 holds that terrorist acts –including those involving states directly or indirectly– which spread violence and terror resulting in loss of life and

55 See WISE. E.M. *International Crimes and Domestic Criminal Law*. De Paul Law Review. Vol. 38, Issue 4, 1989. See DRAGAN, R, *Addressing Human Rights in the Court of Justice of the Andean Community and Tribunal of the Southern African Development*, UNU–CRIS Working Paper, 2014.

56 BASSIOUNI, M. C. *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, Va. J. Int'l L. Vol. 42, No. 81, 2001–2002.

57 WISE. E.M. *International Crimes and Domestic Criminal Law…*, Op. Cit.

58 Ídem. See also DRAGAN, R. *Addressing Human Rights in the Court of Justice of the Andean Community and Tribunal of the Southern African Development*. UNU–CRIS Working Paper, 2014.

59 UN General Assembly Resolution No. A/RES/3034 (XXVII), 18 Dec. 1972.

property and jeopardize the normal functioning of international relations, constitute a threat to peace, global security, and friendly relations between states[60]. The UN Security Council Resolution 1373 (2001) reaffirms that international terrorism constitutes a threat to international peace and security and calls on states to prevent and combat acts of terrorism on their territory, taking into account international instruments. The report of the UN General Assembly of the Sixth Working Party of the Committee on Measures to Combat International Terrorism, referred to in article 5, states that if a terrorist offense is committed within a single state, the alleged offender and the victims are nationals of that state, the alleged offender is found within the territory of that state, and no other state has any basis in the case, then the international convention may not apply[61].

R. Kolb wrote that an international terrorist act results when either the act takes place in more than one state, or the act take place in a space where no state has exclusive national jurisdiction. The other scenarios resulting in international terrorism are when the offender and victim are citizens of different states, the acts affect citizens of more than one state, the acts affect targets having an international status, or the effects of the terrorist act are felt in a third states[62]. International terrorism, therefore, has a cross–border dimension, regardless of which actors are involved in the threat to international peace and security. In this context, the definition of cross–border/international terrorism in the relevant domestic anti–terror legislation is a critical factor for the efficacy of international counter–terrorism measures. In the United States of America (U.S.), international terrorism deals with terrorist activities beyond one national boundary concerning the methods used, the people that are targeted, or the places from which the terrorists operate. The European Parliament resolution on the prevention of radicalization and recruitment of European citizens by

60 Ídem.

61 UN General Assembly. Measures to eliminate international terrorism, Report of the Working Group, Sixty–fifth session Sixth Committee Agenda item 107. A/C.6/65/L.10, 2010.

62 See KOLB, R. *The exercise of criminal jurisdiction over international terrorists*. In: A. BIANCHI. Enforcing international law norms against terrorism. Oxford: Hart, 2004, pp. 243–244. See also article 7 of the 1999 International Convention for the Suppression of the Financing of Terrorism.

terrorist organizations shows the cross–border complexity of terrorist acts[63]. Identification with, participation in, or a *link* to cross–border terrorist organization, including but not limited to, the Islamic State of Iraq and Syria (ISIS), Al–Qaeda, Al–shabaab, and Boko Haram, are acts that have been associated with international terrorism[64].

Domestic terrorism is when all perpetrators, methods, and targets are limited to being within the domestic territory of a country. Domestic terrorism involves groups based in and operating entirely within a country and its territories, without foreign country direction[65]. In Germany and the U.S., there are a growing number of threats from groups such as domestic right–wing racist autonomous groups, Islamist and foreign extremists, and radical left groups, which has created the need for a clear and precise definition of the level of participation needed to be regarded as an active member in these groups and the line where extremism ends and terrorism begins[66]. In Germany, the Criminal Code punishes creating and financing terrorist associations. Similarly, the Federal Constitutional Protection Act creates the necessary security facilities for the liberal–democratic order to protect itself without distinction from all forms of extremists and radical actions, including terrorism, which endangers the peaceful coexistence of people[67]. In the U.S., terrorism has a domestic connotation when violence is committed within the U.S. jurisdiction against the civilian population or the infrastructure of a nation, often by citizens of that nation, and usually to intimidate, coerce, or influence national politics[68]. The U.S. authorities classify domestic terrorists

63 See the European Parliament Resolution No. 2015/2063(INI), 25 Nov. 2015.

64 See Terrorism Act 2000 of England, Part II. HOME OFFICE, Proscribed Terrorist Organizations, 12 Apr. 2019.

65 See Domestic Terrorism in the United States.

66 SROKA, A, et als. *Radicalism and Terrorism in the 21st Century: Implications for Security*. Peter Lang AG, 2017. See also BOURNE, A and BÉRTOA, F. C. *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)*. European Constitutional Law Review, Vol. 13, Issue 2, 2017, pp. 221–247.

67 See para. 129 of the German Criminal Book.

68 Rand Corporation. Domestic Terrorism, available at <https://www.rand.org/topics/domestic–terrorism.html>, [accessed on 23 Aug. 2019]. See DESHPANDE, N and ERNST, H. Countering Eco–Terrorism in the United

as religious and racial supremacy or intolerance based or anarchistic or anti–government political and unique special interests based groups[69]. Article 141 of the Croatian Criminal Code of 1997 punishes an act of anti–state terrorism within the territory of the Republic of Croatia or against its citizens with a term of imprisonment of at least three years. On the other hand, as per article 169 of the Croatian Criminal Code, a terrorist attack on a foreign state or international organization may be punishable by prison terms ranging from a minimum three years, five to ten years, or a long–term prison sentence depending on the seriousness of the crime. Especially, the criminal proceedings of international terrorism need the approval from the State Attorney of the Republic of Croatia[70].

In Ethiopia, pursuant to the preamble of the ATP, the fundamental purpose of the Ethiopian counter–terrorism law is to fight against terrorism in cooperation with governments of other parts of the world that have anti–terrorism objectives, as well as the enforcement of international agreements. The UN Security Council Resolution 1566 defines international terrorism as

> "… criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent

States: The Case of 'Operation Backfire': Final Report to the Science & Technology Directorate, U.S. Department of Homeland Security, 2012. The eco–terrorism in the U.S., which is often committed by domestic actors, creates an immense loss of the nature.

69 See PRESLEY, S.M. *Rise of Domestic Terrorism and Its Relation to United States Armed Forces*. Research Paper, 1996.

70 See CRIMINAL CODE CROATIA. 1 "Narodne novine" – The Official Gazette of the Republic of Croatia. No. 110/ Oct. 21, 199, article 141 and 169.

such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature"[71].

Under the ATP a terrorist act against a government is punishable. Article 2(9) of the ATP defines the term "government" as the Ethiopian government, a foreign state, or an international organization which makes it resemble to the criminal targets or objects listed under UN Resolution 1566. In this respect, the Organization of African Unity (OAU) Convention on Terrorism does not fully illustrate what constitutes a terrorist act, and rather it prohibits the participation of member states in terrorism under article 4(1). The assumption of jurisdiction for international terrorism depends on the individuals involved, the territory, and the targets. Correspondingly, whereas the commission of a terrorist act under article 3 of the ATP by individuals or groups leads to a rigorous detention of fifteen years to death, article 7 of the ATP penalizes the participation in a terrorist group with a rigorous detention ranging from five years to lifelong detention depending on the level of participation.

As a reaction to the monarchical system, which had remained in place until the fall of Emperor Hailesellasie in the second half of the 19th century, a new form of Afro–Marxist–Leninist oriented organization took the political stage in various phases through coup d'état and civil war. In other words, while the first phase took place during the militaristic regime in Derge from 1974–1987, the second phase had begun when the EPRDF had taken power in 1991 through a civil war. According to a book written by Semahagn G. Abebe, published in 2016, Ethiopia has been described since 1991 as "the last post–Cold War socialist federation" after the collapse of the Soviet socialism[72]. Given the uncertainty associated with the controversial political, socio–economic and psychological nature of extremist groups, there is no robust culture in Ethiopia, other than the political orientation of the party[73], to categorize various organized or armed

71 See the UN Security Council Resolution 1566, S/RES/1566, 2004, para. 3.

72 ABEBE, S. G. *The Last Post–Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia*. Routledge, 2016. See also MCCLOSKY, H and CHONG, D. *Similarities and Differences between Left–Wing and Right Wing Radicals.* British Journal of Political Science. Vol. 15, No. 3, 1985.

73 See PETROS, Y. *A Survey of Political Parties in Ethiopia*. Northeast African Studies. Vol. 13, No. 2/3, 1991,

groups strictly as right–wing, left–wing, anarchist or autonomous from domestic terrorism. Instead, a radical position in Ethiopia has a specific significance that can be associated with religion or ethnicity. Originally, nationalism was the central political idea of the legitimacy of European states since the French Revolution. European colonialism and the outbreak of World War I were the culmination of European *physical* imperialism in the twentieth century. Also, this period in time marked the beginning of the peak of nationalism by gaining and consolidating political power through identity formation and boundaries within a nation–state territory[74]. However, considering Ethiopia's centuries old shared values, the politics of remembrance of the ethno–cultural self–understanding remain inextricably linked with the general claim to humanity for togetherness and the avoidance of temporal cultural experiences of contingency. Irrespective of the Ethiopian shared societal bondage, the ideological orientations and practices of politically organized groups are diffused. As a result, the exact categorization of those groups as politically right or left becomes blurred[75].

In Ethiopia, for example, some groups claim to have been colonized by "the Ethiopian Empire" and also accuse the Ethiopian historical elite leadership of domination and exploitation[76]. These groups, some of which were established primarily during the communist Derg military government of Ethiopia and believed in armed struggle, include the Tigray People's Liberation Front, the Ogaden National Liberation Front, and the Oromo Liberation Front. These groups present the thesis of *national oppression* at the forefront of their efforts to explain either their autonomy, their stronger claim of entitlement, or how

pp. 141–164.

74 See DANN, O and DINWIDDY. J. *Nationalism in the Age of the French Revolution*. Hambledon Press, 1988.

75 See the Global Terrorism Database. The Tigray People's Liberation Front (TPLF) was listed four times from 1983–2016 in the Global Terrorism Database for committing the crime of terrorism on private citizens and property, religious figures/institutions and non–governmental organizations (NGOs). Similarly, the Oromo Liberation Front (OLF) is listed five times from 2000–2015 for committing terrorist acts against government officials, military, private citizens, and properties. The Ogaden National Liberation Front (ONLF) is listed eight times from 2007–2014 for committing terrorist acts on the military, private citizens and property, business centers, public utilities, and government officials.

76 See MARCUS, H.G. *A History of Ethiopia*. Berkeley: University of California Press, 1994.

they need to deconstruct Ethiopia and restructure it in their way[77]. The *national oppression* rhetoric identifies a given historical enemy and justifies any behavior against the enemy group[78]. The teachings are used to psychologically influence their mass groups to institute an egoistic and hamster–oriented political and economic ideology. These groups systematically use, and abuse, the term *colonialism* to convince or justify their reactionary activities or violent separatist reaction towards the international community, because international law permits the right to self–determination of the *colonized nation* by foreign actors. Even if these groups lean in favor of imported ideologies such as *communism* and use *colonialism* as a pretext to seize power and conquer territory, their tolerance of *others* or *members of other ethnic groups* has been criticized for being too narrow.[79] At the other end of the spectrum, the former Ginbot 7 idea and Ethiopian unity oriented movement, which had camped in Ethiopia and Eritrea, led an armed struggle against the former Tigray People's Liberation Front (TPLF) ran Ethiopian government. Ginbot 7 for Justice, Freedom, and Democracy was founded after the *hijacked* Ethiopian national election of 2005[80]. The government described it as a terrorist organization until the Federal Parliament canceled its record after the election of the new Prime Minister in 2018.

Furthermore, although the ATP does not explicitly and in detail define the scope of the standard of a dichotomy between *international* and *domestic terrorism*, the Ethiopian courts do distinguish between the two. In practice Ethiopian courts punish those suspected of being associated with the Al–Shabaab and the Islamic State of Iraq and the Levant (ISIS) as being international terrorists, while those alleged to have a connection or involvement in banned home

77 They identified the Amhara ethnic leadership as their historical enemy.

78 See for example PAXTON, R.O. *The Five Stages of Fascism*. The Journal of Modern History. Vol.70, No. 1, 1998.

79 See for example FUKUYAMA, F. *Identity: The Demand for Dignity and the Politics of Resentment*. 1st ed. Farrar, Straus and Giroux, 2018. GEBREGZIABHER, T. N. *Ideology and Power in TPLF's Ethiopia: A Historic Reversal; In The Making?* African Affairs. Vol. 118, No. 472, 2019, pp. 463–484.

80 See http://www.ginbot7.org/.

organizations[81] are punished as being domestic terrorists[82]. Indeed, the issue that has to be mentioned here is that in response to international terrorism the ATP has frequently been invoked by Ethiopian courts to hold accountable those suspected of terrorist activity against Ethiopian citizen operating solely within the country and its territories without considering the distinctive features and motives of each of the different cases and their degree of association with other cross–border organizations[83]. The fact that the ATP uses the same definition as is used internationally to punish domestic acts of terrorism by Ethiopian citizens as equivalent to international terrorism implies[84], on the one hand, the fact that terrorism is becoming a monolingual or common global criminal concept that every suspect must be convicted of regardless of his or her background. On the other hand, the lack of a consensual definition of terrorism at an international level has allowed states such as Ethiopia to expand the law in order to stifle domestic dissension.

It follows that whereas the strict demarcation of terrorism as national or international terrorism has been controversially discussed due to the increasing mistreatment or unequal treatment of terrorist suspects and the rapid emergence of the world as a global community, still a jurisdiction for cross–border terrorism or terrorism against other states must be defined and acquired on *good faith* and based on the standards of classical international criminal justice. Despite what has been said, the dichotomy between national and international terrorism is facing strong headwinds due to the fading picture of domestic terrorism given the gravity of globalization and its susceptibility to abuse. For Joseph B. Steinberg, in spite of the difficulty of arguing that the division of the foreign and domestic dimensions of counter–terrorism in itself is undesirable, it is necessary to weigh the costs and benefits of integration and bifurcation against

81 See the next discussion on proscription and the right to association in Ethiopia in a nutshell.

82 See KIBRET, Z. *The Terrorism of 'Counterterrorism': The Use and Abuse of Anti–Terrorism Law. The Case of Ethiopia.* European Scientific Journal (ESJ). Vol. 13, No. 13, 2017.

83 See KASSA, W.D. *Examining some of the raison d'être for the Ethiopian anti–terrorism law*. Mizan Law Review. Vol. 7. No.1, 2013. pp. 49–66. KIBRET, Z. *The Terrorism of 'Counterterrorism': The Use and Abuse of Anti–Terrorism Law, The Case of Ethiopia*…, Op. Cit., pp. 529–530.

84 See KASSA, W.D. *Examining some of the raison d'être for the Ethiopian anti–terrorism law*…, Op. Cit. p. 66.

civil liberties, the need to pursue other policy objectives that may be affected by the consolidation of counter–terrorism measures at home and abroad, and bureaucratic as well as political costs[85].

Regarding U.S. law, Shirin Sinnar argued that the legal dichotomy of terrorism that exists can be seen as against a background of implicit associations linking Muslims, foreigners, nonwhites. For U.S. citizens, she points out that the *international terrorism* propaganda to the divide evokes images of violent, dark–skinned Muslims threatening U.S. citizens at home and abroad, while the *domestic terrorism* category conveys a very different social meaning: if one can predict a small fraction like the white supremacists[86]. The existence of different legal norms for national and international terrorism has led to a considerable gap in the investigation, prosecution, and condemnation of terrorism. In other words, the dichotomy has given the executive branch broad power and strengthened the elastic application of the international category to unequal treatment of immigrants and other minority groups with limited international ties. The dichotomy brought severe punishments and intensive surveillance of those who are considered international as opposed to domestic terrorists, such as white supremacist and neo–Nazis, although they, too, have international associations. Therefore, Sinnar proposes, among other things, the abolition or reduction of the formal distinction between national and international terrorism in the existing laws, guidelines, and practices in terms of oversight and accountability. She suggests that focus must be predominantly on the specific intention[87] of a defendant to support the illegal activities of a foreign organization instead of mere marginal international relations. This would set a higher threshold for

85 STEINBERG, J.B. *Erasing the Seams: An Integrated, International Strategy to Combat Terrorism*. Report. Brookings, 2006.

86 SINNAR, S. *Separate and Unequal: The Law of "Domestic" and "International" Terrorism.* Michigan Law Review. Vol. 117, Issue 7, 2019. p. 1396.

87 CHENOWETH, E and LOWHAM, E. *On Classifying Terrorism: A Potential Contribution of Cluster Analysis for Academics and Policymakers.* Defense and Security Analysis Vo. 23, No. 4, 2007, pp. 345–357. CHENOWETH and LOWHAM also observed that terrorist attacks between groups with seemingly different motives and locations provides insights into the dynamics of terrorism in the past, suggesting a preventive classification based on motives and their tactics, as these groups monitor and learn from each other's activities.

international terrorism by requiring some showing of the defendant being "an agent of a foreign power" or having "substantial/meaningful relations" with the foreign organization, which would diminish the risk of a general suspicion of all foreigners[88].

1.3 Exemption Clauses

The nature of an actor and their motive in terrorism are crucial factors to differentiate terrorism from other things, such as forms of organized criminal acts, war, guerilla fighting, and other struggles for freedom[89]. Terrorism is likewise delineated from war crimes, genocide, and other serious criminal acts against humanity based on factors such as the intention, means, method, and target. On the basis of the four Geneva Conventions[90], the protection of civilians and other broad directions are well defined and must be followed in terms of *jus ad bellum and jus in bello* during a war or in national liberation movements[91]. Combatants cannot be designated as terrorists for acts in accordance with international humanitarian law and the Protocol to the Geneva Conventions[92]. Thus, the pursuit of self–determination from oppression and the use of force in time of national liberation movements are allowed and not defined as terrorist acts. However, the UN Security Council Resolution 1566 of 2004 in its respect considers those activities of self–determination that involve violence to force

88 SINNAR, S. *Separate and Unequal: The Law of "Domestic" and "International" Terrorism…*, Op. Cit., pp. 1402–1404.

89 See KRAUS, L, in: B. SAUL, ed. Counter–Terrorist Detention and International Human Rights Law. Research Handbook on International Law and Terrorism. Edward Elgar, 2014.

90 See RATNER, S.R, et als. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*. Oxford, 2009.

91 See KAPITAN, T. *Can Terrorism be Justified?* In: in R. FUMERTON and D JESKE, eds. Readings in Political Philosophy. Broadview Press, 2011, pp. 1068–1087. See also Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Convention relating to the Treatment of Prisoners of War, 12 August 1949; Convention relating to the Protection of Civilian Persons in Time of War, 12 August 1949.

92 Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 Jun. 1977.

impose their political agenda on government or an international organization can fall under the definition of terrorism. The UN Security Council Resolution 1566 encourages states to punish international terrorism in their domestic jurisdiction. For countries, the concept of national liberation movements lies between the use of force as a first resort and the use of force as a last resort[93]. This distinction has become so controversial that national liberation struggles have often provided moral or legal justification for terrorist acts[94]. While individual terrorists intend to revolutionize or overthrow the system, the actions of governments, by and large, are deliberately calculated to preserve the status quo or even return things to the *status quo ante*[95]. The state in question may involve itself in counter–terrorism to protect the life of citizens and its status in the governance[96]. In other words, governments may use terrorism as an armed political resistance against the status quo, which necessitates a counterterror act. [97] For individuals, who seek to defend one's freedom, the term terrorism is used as a label to punish and circumvent their opponent's activities[98]. As can be seen, there are still differences in the international conventions on the fight against terrorism between counties and academics with regard to the actors, the nature of the acts, the motives, and the consequences of terrorism. The underlining standard does not justify terrorism, because terrorism is a violence against civilians that is wrong[99]. In the absence of a joint international human rights

93 See FRIEDLANDER, R.A. *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs.* Case Western Reserve Journal of International Law. Vol. 13, Issue 2, 1981.

94 Ibídem, p. 282.

95 PILGRIM, C. M., *Terrorism in National and International Law*, Penn St. Int'l L. Rev., Vol. 8, No. 2, 1990, 147, p. 153.

96 Ídem.

97 See HIGGINS, N. *International Law and Wars of National Liberation*. Oxford Bibliographies in International Relations, 2014.

98 PILGRIM, C. M., *Terrorism in National and International Law,* Op. Cit.

99 DE BEER, A. C. *The Prohibition of Terrorism under International Law,* Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism. Brill, 2019. As to the conditions under which terrorism can be morally justified see CORLETT, J. *Can Terrorism Be Morally Justified?* Public Affairs Quarterly. Vol. 10, No. 3, University of Illinois Press, 1996, pp. 163–184.

enforcement mechanism, the presence of "terrorist elements" in the collective defense of fundamental human rights under the UN Charter may be "illegal but justified"[100]. Since self–defense, necessity, etc., are typical of international criminal law, here as in Ethiopia a justified claim also arises to recourse the violation of an international obligation analogous from the law of state responsibility, which can excuse terrorist behavior[101]. With regard to the progressive denationalization of aggression, Markus Krajewski accentuated that since non–state actors constitute a threat to world peace under article 39 of the UN Charter, they can be regarded as *aggressors* within the meaning of article 51 of the UN Charter, which authorizes the right to self–defense[102]. The right to self–defense enshrined in the UN Charter entitles the attacked state to take defensive measures against the non–state actor, provided that the violence emanating from the non–state actor assumes intensity comparable to forms of state aggression[103].

According to article 3 of the OAU Convention on Prevention and Combating of Terrorism, struggle waged by the people for their liberation or self–determination under the principle of international law is justified[104]. The

100 SAUL, B. *Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law*. Australian Yearbook of International Law. Vol. 25. Sydney Law School Research Paper No. 08/122, 2006.

101 Ídem. See also, UN General Assembly resolution 56/83 of 12 December 2001, Responsibility of States for Internationally Wrongful Acts. See Consent (article 20), self–defense (article 21), countermeasures (article 22), force majeure (article 23), distress (article 24) and necessity (article 25).

102 See KRAJEWSKI, M. Selbstverteidigung gegen bewaffnete Angriffe nichtstaatlicher Organisationen – Der 11, September 2001 und seine Folgen. Archiv des Völkerrechts 40. Bd., No. 2. Mohr Siebeck GmbH & Co. KG, 2002, pp. 213–214.

103 Ídem. He underlined "the territorial integrity of the state of residence falls back for targeted measures against the non–state aggressor, but further measures against the state of residence of terrorists are prohibited as they do not fall under the right to self–defense". See for example UN Resolution No. 2444 (XXIII), 19 Dec. 1968. Within the framework of the definition of combatants under international humanitarian law, those who qualify, especially armed conflict targeting terrorist fighters who are directly involved in hostilities or targeting military objectives, such as terrorist camps and weaponry warehouses, will generally be considered lawful.

104 In other jurisdictions like Ghana, an act in an armed conflict cannot be labeled as a terrorist act if it complies with the international humanitarian law. See article 4 (2) of Ghanaian Terrorism Act.

post–colonial conflicts of self–determination continue today and demand that the 1977 Additional Protocol I to the Geneva Conventions of 1949 article 1 paragraph 4 be enforced, which states that international armed conflict situations include armed conflicts in which people exercise their right to self–determination against colonial rule, foreign occupation, and racist regimes, even though this legal framework has turned out to be weak and limited. Moreover, states are unwilling to apply the current legal system except in an ad hoc and unpredictable manner[105].

The ATP is silent with regard to the national liberation movement, which falls under the provisions of international humanitarian law. It can be argued that any ideologically motivated, violent force, and violent self–determination activity of a group can be described as a terrorist act. In other cases, it has to be maintained that the criminalization of acts –which are not inherently violent or unlikely to cause severe damage to life, bodily integrity, or property of a person– under the cover of terrorism appears non–defensible for human rights reasons[106]. Unlike Ethiopia, it is this conviction that made some other jurisdictions reconsider and provide an exemption for advocacy, protest, dissent, or industrial action without intentions to cause *serious* physical harm to a person or a serious risk to the health and safety of the public or a section of the society[107].

2. Counter–Terrorism and Human Rights

2.1 International Laws on Counter–Terrorism

Throughout history, terrorist activities have shown that people of all religions, men and women, people living under tyranny or freely in democracies, and people who have clear or vague objectives, have all participated in

105 See HIGGINS, N. *International Law and Wars of National Liberation*. Oxford Bibliographies in International Relations, 2014.

106 See MCCULLOCH, J. *Counter–terrorism, Human Security and Globalization–from Welfare to Warfare State?* Current Issues in Criminal Justice. Vol. 14, 2002–2003, p. 285.

107 See section 100.1(3) of the Australian Criminal Code and Australia Terrorist Act (2005) and article 2s(2) of the Ghanaian Anti–Terrorism Act.

some form of terrorism[108]. Among other things, the terrorist incidents between 1968 and 1979 produced the bulk of the contents on international terrorism, including case histories of more than 4,000 terrorist incidents[109]. In particular, the abduction of Jewish athletes by the Palestinian Liberation Organization (PLO) during the 1972 Olympic Games in Munich demonstrated the mounting danger of sabotage and terrorism. In the U.S., the 1970s are deemed to be the golden age of terrorism, because during this period nationalist and ethnic terrorists, religious zealots, and anti–war militants killed 184 people and injured more than 600 others[110]. Afterwards, the UN General Assembly Resolution 3166 (XVIII) of 14 December 1973 established the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Article 3 of that Convention allowed states to establish jurisdiction where the crime is committed in their territory or in cases where their citizens are involved.

Upon the fall of the Berlin Wall, conventional wars as a threat to sovereignty became inconsequential and the rapid globalization tendency since the late twentieth century created new cross–border terrorist *threats* and new *enemies* to fight[111]. Due to globalization, one of the new threats to the structure of the international system is disastrous terrorist bombing, financial terrorism, and the threat of nuclear destruction. Globalization implies the ability of an otherwise small actor to alter the course of history by deploying extreme direct outrage[112]. Coupled with the "New World Order" thesis of U.S. President George H. W. Bush in 1991, it has been argued that the crucial role in this new scenario has changed from national to international actors; it is believed that through the rule of law, a "World Government" will emerge and the Kantian dream of

108 CANTER, D, ed. *The Faces of Terrorism: Multidisciplinary Perspective*, Chichester: Wiley, 2009, p. 2.

109 See MICKOLUS, E.F. *Transnational Terrorism – A Chronology of Events, 1968–1979*. Greenwood Publishing Group, 1980.

110 BERGEN, P. *The golden age of terrorism*, CNN, 21 Aug. 2015.

111 SÁNCHEZ–CUENCA, I. *From a Deficit of Democracy to a Technocratic Order: The Postcrisis Debate on Europe*. Annual Review of Political Science. Vol. 20, 2017, p. 233.

112 WILDE, J. D. *Speaking or Doing Human Security?* In: M DEN BOER and J DE WILDE, *The Viability of Human Security.* Amsterdam University Press, 2008, p. 235.

"perpetual peace" will ensue[113]. In the "New World Order", security is closely linked to peace, being largely a means to this end, and implies a stable situation both from a foreign point of view and the internal security of states[114]. A testament of which was a historic ratification of the Oslo Accords in Washington, D.C., in 1993, and Taba, Egypt, in 1995 between Israel and the Palestine Liberation Organization (PLO)[115]. The Oslo Accords was remarkable in that the PLO agreed to officially recognize the State of Israel and Israel again allowed the Palestinians a form of limited self–government in Gaza and the West Bank even though recurring conflicts have been continually displayed[116].

Broadly, the desire to ensure peace and security, as well as peaceful international coexistence, brought about instruments for a new scenario of multilateral actions by the international community[117]. The counter–terrorism measures that signify a peaceful international coexistence have been accompanied by legally binding instruments and strategic guidelines to multilateral institutions and regional structures whose coherence is alleged to be weak. Since 1963, nineteen international legal instruments have been designed to combat terrorist acts[118]. The UN and the International Atomic Energy Agency (IAEA) developed these instruments and made participation available by all member states[119]. These measures include: instruments regarding civil aviation, the protection of international staff, the taking of hostages, the nuclear material, the maritime navigation, explosive materials, terrorist bombings, and the financing of terrorism and nuclear terrorism[120]. In other cases, however, member states of the

113 SÁNCHEZ–CUENCA, I. *From a Deficit of Democracy to a Technocratic Order…*, Op. Cit., p. 234.

114 Ibídem, p. 235.

115 See Oslo Accords. History.com Editors, 21 Aug. 2018, available at< https://www.history.com/topics/middle–east/oslo–accords>, [accessed on 25 Aug. 2019].

116 Ídem.

117 SÁNCHEZ–CUENCA, I. *From a Deficit of Democracy to a Technocratic Order…*, Op. Cit., p. 234. SCOTT, G.M. et als. *Debated Issues in World Politics*. Pearson Education, Inc, 2004.

118 UN Office of Counter Terrorism, available at <https://www.un.org/en/counterterrorism/>, [accessed on 24 Aug. 2019].

119 Ídem.

120 Ídem.

terrorism conventions are obliged to take the necessary measures to prevent the commission of terrorism, punish acts that are deemed to be criminal, and protect their citizens and properties as well as other countries' citizens and properties by applying the universal jurisdiction principle to try perpetrators in their domestic courts[121]. While duly taking into account the states' responsibility under the principle of *pacta sunt servanda*[122], the punishment of crimes in treaties, however, depends on whether the state party transposes them through its national criminal legal order.

The International Criminal Court (ICC), established by the Rome Statute Italy on 17 July 1998, has jurisdiction and is responsible for deciding on criminal issues relating to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[123]. These offences constitute a violation of a rule of international law, whether in customary law or in contract law[124]. For an offense to be considered a violation of international criminal law, it must constitute a violation of a rule protecting essential values and result in serious injuries for the victim and serious consequences for the individual criminal responsible for violating the law[125]. Although different forms of terrorism are governed by different treaties, which regard terrorism as a serious threat to the international community, the lack of precision of terrorism based on political or ideological backgrounds is evidence of the lack of consensus within the

121 See for example article 5 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; article 3 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons; article 6 of the 1997 International Convention for the Suppression of Terrorist Bombings; and article 7 of the 1999 International Convention for the Suppression of Financing of Terrorism. See RANDALL, K.C. *Universal Jurisdiction under International Law*. 66 Tex. L. Rev. 785, 1987–1988.

122 Article 26 of the Vienna Convention on the Law treaties (VCLT) entered into force on 27 Jan.1980 states that, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

123 See article 5 of the Rome Statute of the ICC entered into force on 1 July 2002.

124 The political nature of terrorism makes the identification of terrorism under the status of the international customary law difficult.

125 ICTY–Prosecutor v. Dusko Tadic. A/K/A "Dule". Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 1995.

international community regarding the precise definition of an international crime of terrorism[126]. In the majority of cases, terrorism is committed by a non–state actor who is not the subject of public international law. Due to the politicized tone and the lack of a uniform and generally accepted definition of the notion of terrorism, the ICC has excluded terrorism from its jurisdiction[127]. The 1999 African Convention against Terrorism, the 2004 Additional Protocol to that Convention, and the 2002 Inter–American Convention against Terrorism also do not classify terrorism as an international crime against humanity[128]. Given the existence of various conventions on terrorism and the absence of a generally accepted definition of terrorism, states are thus in a position to prosecute international terrorism cases before national courts. It should also, however, be noted that the extreme form of terrorism by non–state actors can be considered a war crime or a crime against humanity, which is therefore directly punishable under international law[129].

2.2 Human Rights Obligations while Countering Terrorism

The post 11 September 2001 anti–terrorism legislation cover a wide range of activities beyond the formerly privileged status of politically and ideologically motivated violence into behavior deemed to be particularly dangerous and therefore eligible for increased penalties and incarceration[130]. A large number of states

126 Ídem.

127 HOYOS, M. C. *Including the Crime of Terrorism within the Rome Statute: Likelihood and Prospects*. Global Politics Review. Vol. 3, No. 1, 2017, pp. 25–38.

128 See ROHT–ARRIAZA, N. *Guatemala Genocide Case. Judgment No. STC 237/2005*. American Journal of International Law, Vol. 100, Issue1, 2006, pp. 207–213. Universal jurisdiction provides for a national court to prosecute individuals for serious crimes against international law that may harm the international community.

129 ISANGA, J.M. *Counter–Terrorism and Human Rights: The Emergence of a Rule of Customary International Law from United Nations Resolutions*. Denver Journal of International Law and Policy. Vol. 37, No. 2. 2009. See also AMBOS, K and TIMMERMANN, *A. Terrorism and Customary International Law*, in: B SAUL, ed. Research handbook on international law and terrorism. Elgar, 2014.

130 ALBRECHT, H.–J., and KILCHLING, M. *Victims of Terrorism Policies: Should Victims of Terrorism be Treated Differently?* In: M. WADE, & A. MALJEVIĆ, eds. A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications, Springer, 2010. p. 222–223.

often view human rights as interests that compete with or compromise national security[131]. As time passes, the balance between liberty and security has begun to shift more towards security. The interplay between human rights jurisprudence and the crime of terrorism include the effects of terrorism on human rights, the classification of terrorism as human rights violation, the human rights implications of defining terrorism, the value of a holistic approach toward terrorism, and the applicability of human rights norms to traditional strategies to combat terrorism. As terrorist acts affect human rights, state's counter–terrorism may also have a damaging outcome for human rights.

The protection of human rights requires not only the prevention of direct interference from individual terrorists but also a response to the threat of intervention. Therefore, freedom from fear can be seen as human rights protected by international instruments and domestic laws. Article 55 of the UN Charter acknowledged the four freedoms concerning the respect of human rights as well as economic and social progress and development. These four freedoms are freedom of speech and worship, including freedom from want and fear. Among the four specified freedoms, one is the freedom from fear[132]. The concept of freedom from fear also applies to the prohibition of the use of aggression between states, the threat to peace and the violation of order, as affirmed in article 39 of the UN Charter.

Learning from the horrible and outrageous consequences of the World War II, the Preamble of the Universal Declaration of Human Rights acknowledges (UDHR) "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want as the highest aspiration of the ordinary people"[133]. Regarding the freedom from fear, the UDHR states that human beings shall enjoy the freedom of speech and belief and freedom from fear and want.

131 See HOVELL, D. *Dangerous evasions: enforcing limits on government actions in the war on terror*, in: J. HOCKING, Counter–Terrorism and the Post–Democratic State. Monash Studies in Global Movements. Edward Elgar, 2007, p. 117.

132 The original tenet of freedom from fear in the Four Freedoms Speech (1941) of Franklin D. Roosevelt stood for a "worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor".

133 UN General Assembly, Universal Declaration of Human Rights (UDHR). 10 Dec. 1948, 217 A (III), Preamble.

Few among many, the International Covenant on Civil and Political Rights (ICCPR)[134], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[135], the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[136], and the Convention Against Torture (CAT)[137] accredited and institutionalized the four freedoms and confirmed that freedom from fear could only be achieved if conditions were created in which every person could enjoy the rights in both the ICCPR and the ICESCR[138].

The obligation of human rights necessitates the protection of human rights between citizens and in their relationship to states. Non–compliance with international human rights obligations in a state's law is unacceptable under article 27 of the 1969 Vienna Convention on the Law of Treaties. States are responsible when violations are committed directly by their organs, and/or disregard their responsibility to protect human rights when the direct source of a breach is private persons (in cases of terrorist acts)[139]. Apart from that, the states are responsible when their duty to fulfill has become futile due to lack of due diligence to take decisive action to facilitate the enjoyment of human rights. The obligation of states to protect, respect, promote, and fulfill human rights is a justiciable matter[140]. A particular feature reflected in the African Charter

134 UN General Assembly, International Covenant on Civil and Political Rights (ICCPR). 16 Dec. 1966, article 2 (1) and (2). See also the Office of the United Nations High Commissioner for Human Right (OHCHR). Human Rights Handbook for Parliamentarians N° 26, 2016.

135 UN General Assembly. International Covenant on Economic, Social and Cultural Rights (ICESCR). 16 Dec. 1966, article 2 and United Nation Human Rights Commission (UNHRC) General Comment 3, 14 Dec.1990, para. 1.

136 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 Dec. 1979.

137 UN General Assembly. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), 10 Dec. 1984.

138 The right to security is associated with the meaning of the right to be protected against fear. Albeit, the exact meaning of the freedom to fear is a disputed concept.

139 DE SCHUTTER, O. International Human Rights Law Cases, Materials, Commentary. Cambridge University Press, 2010. p. 248.

140 Ídem.

of Human and Peoples' Rights is that it imposes responsibilities, not only on member states but also on persons having certain rights under the Charter, to discharge obligations between citizens and to discharge obligations between the citizen and the state of their nationality[141]. In other words, human rights obligations entail the protection of human rights horizontally between citizens and vertically in relations between states and their citizens.

Ethiopia has been a member of the UN since 1945 and a member of the African Union since 1963, and has signed numerous international fundamental rights agreements, regional human rights instruments, and treaties to prevent terrorism and other crimes[142]. Article 9 (4) of the Ethiopian Constitution declares all international agreements ratified by Ethiopia as an integral part of the laws of the land[143]. Pursuant to article 15 of the ICCPR, an individual may be found guilty of an act or omission which constituted a criminal offence at the time it was committed, not only under the relevant national law, but also under the international law in force. However, any measure, including countering terrorism, must be in line with the underlying international legal framework for the protection of human rights. Broadly, enforcing the fundamental constitutional human rights in Ethiopia takes into account the Universal Declaration of Human Rights and other international human rights instruments assumed as a frame of reference for interpretation[144].

In Ethiopia, anti–terrorism policy is primarily regarded as an expression of a state's obligation to protect human rights. The multilayer obligation, as

141 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, Preamble.

142 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21 Dec. 1965 in 1976, CETAW in 1983, CRC in 1991, ICCPR and ICESCR in 1993, CAT in 1994.

143 It is not clear whether the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution follows an adoptive monist as formulated by Judge and parliamentarian William Blackstone or a hybrid dualist approach as in the case of Germany. Article 71 (2) of the Ethiopian Constitution obliges the President of the country to proclaim laws and international agreements approved by the House of Peoples' Representatives as per the Constitution in the Federal Negarit Gazeta. See WOLDEMARIAM, *The Place of International Law in the Ethiopian Legal System*. Ethiopian Yearbook of International Law, 2016, pp. 61–93.

144 FDRE Constitution, 1995, article 13.

imposed by the FDRE Constitution on different stakeholders, demonstrates security as a prerequisite for lasting peace. The preamble of the FDRE Constitution aspires to build a political community founded on the rule of law that is capable of ensuring lasting peace, guaranteeing a democratic order, and advancing economic and social development[145]. The basic principles of the most recent Ethiopia's Policy and Strategy on Foreign Affairs and National Security (2012) stresses peace and security as the alpha and omega value to ensure national existence. Similarly, it aspires to establish a democratic order through the respect of people and individual rights, affirm good governance, and assure stable working and living conditions[146].

Beyond the promise of peace and security, the FDRE Constitution guarantees fundamental human and democratic rights[147]. A few of these rights include the right to liberty (article 17), the prohibition against inhumane treatment (article 18 and 28), the rights of the arrested and accused individual (article 19 and 20), freedom of expression (article 27 and 29), and freedom of association (article 31). Article 10(1) and (2) of the same Constitution stipulates that human rights and liberties emanate from the fundamental human nature and are inviolable and inalienable. Article 13(1) and (2) of the same Constitution impose duties on all government organs to respect and enforce those human rights provisions. Similarly, article 9(2) of the same Constitution imposes duties on all citizens, political organizations, other associations, as well as their officials to ensure observance of the provisions of the Constitution. However, for each human rights provision the FDRE Constitution contains a far–reaching limitation clause that constitutes uncertainty in the analysis of the legality and appropriateness of human rights restrictions. Furthermore, there is still a risk that the absence of material conditions to which the limits relate may lead to constitutional guarantees being subordinated to the discretion of the legislature[148].

145 Ibídem, Preamble.

146 The Federal Democratic Republic of Ethiopia Foreign Affairs and National Security Policy and Strategy, Ministry of Information Press & Audiovisual Department, 2002.

147 Even though the clear line between human and democratic rights is absurd, the distinction between human and democratic rights does not change the innate contents of human rights.

148 See ABEBE, A. K. *Limiting Limitations of Human Rights under the Ethiopian Constitution*, Ethiopian

3. The Laws on Counter–Terrorism in Ethiopia

In 2009, Ethiopia adopted a special anti–terrorism law: the ATP. The ATP was justified by Ethiopia's obligation to counter–terrorism under international law, and also on the claim that the country is exposed not only to terrorism on account of its geographical position in the volatile horn of Africa but also by armed domestic rebel groups. Following the claim that the jihadist Union of the Islamic Courts of Somalia declared war on Ethiopia in 2006–2007[149], the Ethiopian government used the *status quo* to intervene in Somalia in 2006. In May 2008, shortly before the adoption of the ATP, a bomb explosion by a Somali Islamist group in a minibus killed three people in Addis Ababa[150]. Since then, another Islamic terrorist group was formed, i.e. the Al–Shabaab, networked with Al–Qaida, and committed several terrorist attacks in Somalia, Uganda, and Kenya. Herewith, the Ethiopian government considers the ATP as the appropriate instrument in the fight against international terrorism[151].

Structurally, the ATP is divided into seven parts. The first deals with the general definition. Part two governs terrorism and related crimes. These include terrorist acts (article 3), planning and preparation, conspiracy, incitement and attempt of a terrorist act (article 4), rendering support to terrorism (article 5), encouragement of terrorism (article 6), and participation in a terrorist organization (article 7). Part three consists of preventive and investigative measures or provisions on arrests and searches of suspected terrorists. Part four addresses evidentiary and procedural rules including the admissibility of hearsay and intercepted information and the inapplicability of the statute of limitation for

Constitutional Law Series 4, 2011.

149 See YIHDEGO, Z.W. *Ethiopia's Military Action against the Union of Islamic Courts and Others in Somalia: Some Legal Implications,* International and Comparative Law Quarterly. Vol. 56, No. 3. Cambridge University Press, 2007, pp. 665–676.

150 MALONE, B, TADESSE, T. *Explosion rocks Ethiopian capital, three dead: police*. Reuters, 20 May 2008. See also POWELL, A. *Somali Islamist group claim responsibility for deadly attack in Ethiopia*. Associated Press, 29 May 2008.

151 HOME OFFICE. Newly, the rise and expansion of Islamic State (ISIS) from the Middle East to Africa posed also a threat to Ethiopian citizen, 2017. In 2015, the ISIS killed 30 Ethiopian citizens in Libya.

terrorism cases. Part five regulates measures to the proscription of terrorist organizations and freezing or forfeiture of their property. While part six deals with institutions that follow up cases of terrorism, the seventh part lists the miscellaneous provisions.

Although the ATP embodies new rules on substantive and procedural paradigms of criminology, the 2004 Ethiopian Criminal Code, the 1961 Criminal Procedure Code (to the extent that they are compatible with the ATP), and the ATP are used to prosecute terrorism in Ethiopia[152]. The special part of the Ethiopian Criminal Code punishes criminal activities that have been regarded as terrorist activities in diverse terrorism conventions[153]. The Ethiopian Criminal Code also punishes violations of international humanitarian law or public international law[154]. What makes the legal regime of the Ethiopian anti–terrorism sketchy is the lack of uniformity on its legal constructs.

4. Selected Provisions of the ATP and their Adverse Impact on Human Rights

4.1 Detention and the Right to Liberty

Liberty is the primary necessity of physical human existence. Liberty and security of every human in a sense that freedom from injury to the body and the mind, or bodily and mental integrity are protected in the form of freedom from arbitrary arrest and detention and the right to habeas corpus (article 9 – 11 of the ICCPR). Article 9 of the ICCPR forbids arbitrary deprivation of liberty for the prevention of terrorism[155]. Arbitrariness includes elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements

152 ATP, 2009, article 36.

153 See the 2004 Ethiopian Criminal Code on crime against public security, peace, and tranquility. See also KRAUS, M. *Rechtsstaatlichem Terrorismusbekämpfung durch Straf und Strafprozessrecht*. Augusburger Studien zum Internationalen Recht. Band 9, 2011.

154 See Criminal Code of Ethiopia, 2004, article 170.

155 See WEISSBRODT, D and MITCHELL, B. The United Nations Working Group on Arbitrary Detention, 2016. Arbitrary detention includes: deprivation of liberty without legal justification, deprivation of liberty resulting from the exercise of universal human rights, grave violations of the right to a fair trial, and prolonged administrative custody deprivation of liberty as a violation of international and anti–discrimination standards.

of reasonableness, necessity, and proportionality[156]. Article 6 of the African Human Rights Charter reiterates that liberty can only be deprived upon the existence of pre–established laws that outline the reasons for detention[157]. The 2014 General Comment Nº 35 of the UNHRC declared "liberty and security of person are precious for their own sake, and also because deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights"[158]. Article 17(1) and (2) of the FDRE Constitution confirms that liberty of an individual can only be restricted for reasons and in accordance with the procedures laid down by law. The FDRE Constitution prohibits arbitrary arrests in any form. In addition, it declares that a detained person is to be brought to justice within forty–eight hours of arrest. Administrative preventive detention for the preservation of public order has become legally accepted[159]. Nevertheless, evidence shows that the preventive or pretrial detention to counter terrorism and the respect for rights to liberty are at a crossroads across the globe[160]. Common law system countries afford large scope for police investigatory power in their adversarial system. Civil law system countries tend to grant court oversight and investigatory power. According to article 5(3) of the European Court of Human Rights (ECHR)[161], full "judicial control" is required in undertaking pretrial detention. As per the 2003 Australian Terrorism Act, the longest possible time for preventive detention under the Commonwealth is forty–eight hours, whereas the state and territory laws prescribe fourteen days. That can only be possible where there is a threat of an "imminent terrorist" attack, or immediately after a terrorist attack has occurred[162]. In England, the

156 UNHRC. General Comment No.35. CCPR/C/GC/35, 2014.

157 African Commission on Human and Peoples Rights, 2014, article 6.

158 UNHRC, General Comment No.35 – article 9: Liberty and Security of person, CCPR/C/GC/35, 16 Dec. 2014.

159 UNHRC, General Comment No. 8, 30 Jun. 1982.

160 See CASSEL, D. *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law.* Journal of Criminal Law and Criminology, Vol. 98, No. 3. Springer, 2008.

161 See A. and others v. the United Kingdom. ECtHR. Judgment. App. 3455/05, 19 Feb. 2009. See DE LONDRAS, F. Counter–Terrorist Detention and International Human Rights Law, B SAUL, ed. Research Handbook on International Law and Terrorism. Edward Elgar, 2014.

162 TOLLEY. M.C. *Australia's Commonwealth Model and Terrorism*, in VOLCANSEK, Mary L. and STACK, John

2008 Counter–Terrorism Bill lifted the pretrial detention from twenty–eight up to forty–two days[163]. However, pre–trial detention beyond twenty–eight days must pass rigorous phases of oversight by the parliament, Home Secretary, independent reviewer, and more importantly, the court which approves the necessity of additional time at least every seven days[164]. Furthermore, an extension of pretrial detention can only follow by looking at the threshold where the investigation is highly complex or involves multiple plots or links with various countries[165]. In the Federal Republic of Germany, article 17 and 20 of the draft Police Task Act (PAG) of Bayern Land on preventive detention has allowed the police to extend the preventive detention every three months on account of the threshold "imminent danger" created by the suspect[166]. The criticism is that the probability threshold for the "imminent danger" is demonstrably below the "sufficient probability" for settlement, which endangers the constitutional principle of certainty[167]. Subsequently, the measure triggered a popular legal action to the Constitutional Court of Bavaria for the potential adverse effects of the PAG on human rights. This class action is entreated among other things to challenge the imbalance in proportionality created between individual liberty and public security[168]. The class action emphasized that the encroachment on

F. Jr, *Courts and Terrorism: Nine Nations Balance Rights and Security*, Cambridge University Press, 2011. According to Tolley, in Australia "the introduction of new counterterrorism powers and the High Court's decisions in Al–Kateb (2004) and Thomas (2007), upholding the legality of indefinite detention of asylum seekers and the imposition of control orders, have cast doubt on Parliament's ability to safeguard fundamental rights and freedoms. In the absence of a federal bill of rights, there is little that the judiciary can do to invalidate the antiterrorism laws enacted by Parliament".

163 England Counter–terrorism Bill, 2008, article 23.

164 Ibídem, article 30 and 31.

165 See the Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session 2006–07 Hl Paper 157, HC 394.

166 Global Internet Forum to Counter Terrorism. netzpolitik.org, 2018.

167 Nue Richtervereinigung, 2018, available at <https://www.neuerichter.de/details/artikel/article/die–drohende–gefahr–im–polizeirecht–574.html>, [accessed on 23. Aug. 2019].

168 FEICHTNER, I and KRAJEWSKI, M. Popularklage gem. Art. 98 Satz 4 der Bayerischen Verfassung, 3 May 2018, p. 29.

the right to liberty based on danger justification has the inherent potential to lower the threshold and thus make it disproportionate[169]. The reason is that the aforementioned low probability test can come close to a mere dangerous guess[170].

In Ethiopia, "a police officer, having reasonable grounds to believe that a terrorist act has been or is being or will be committed, may take 'any measure' to prevent or reduce the danger…if necessary, by using 'compelling measures'"[171]. Again, article 19(1) of the ATP authorizes pretrial detention by the police for the prevention of terrorist acts on a "reasonable ground". Article 20(3) of the ATP purports that "the suspect of terrorist activity remains in detention be a minimum of 28 days; provided, however, that the total time shall not exceed four months". Suspects are kept even after the lapse of the four–month period of remand. In practice, an investigating police officer is able to ask the courts for a remand until credible shreds of evidence are found. The police detain suspects of terrorism even after the expiry of the four–month period without giving individuals in custody an afforded notice to challenge the detention[172].

A general study carried out on arbitrary detention, including cases based on the ATP carried out between 2011 and early 2018 in Somali Regional State, revealed that the special police unit of the region detained suspects arbitrarily and mishandled cases[173]. It is not very uncommon for the police in Ethiopia to continue to detain a suspect, even if it is actively defying a court order for the suspect's release[174]. In 2012, Alemayehu G. Mariam wrote "Soviet state terrorism was intensified in the 'Gulag' prison called 'meat–grinders' because of the extremely harsh and inhumane conditions–torture, physical abuse by prison guards, solitary confinement, inadequate food rations and officially instigated

169 Ídem.

170 Ídem.

171 ATP, 2009, article 13 (1) (e).

172 See also OHCHR Human Rights Report, 2016 and 2017 and AMNESTY INTERNATIONAL. Annual Report, 2014, 2017, and 2018.

173 HUMAN RIGHTS WATCH. Torture and other Human Rights Abuses in Jail Ogaden, Somali Regional State. Ethiopia, 2018.

174 See ABRAHA, S. Freedom and Justice in Ethiopia. Signature Book Printing, 2009, p. 92.

inmate–on–inmate violence"[175]. He added, "Ethiopia's prison system today is reminiscent of the Soviet gulags in their abuse and mistreatment of political and other prisoners"[176]. Even though the 2018 political change caused one of the most notorious prison facility called Makaelawi in Addis Ababa, the capital city of Ethiopia, to be closed, the country has to go far to close all private detention centers. According to the 2019 Human Rights Watch Report, in Ethiopia, many detention centers run by regional administrations –some well–known for ill–treatment, rape, torture, and lack of access to medical and legal aid– remain unaffected by the reform efforts[177]. The new government faced security problems from across the country, either in the form of ethnic violence, internal displacement, the murder of government officials, or armed fighting, which made the use of ATP unavoidable. Although the new government has made progress in protecting human rights, including the release of those arrested before the 2018 state of emergency and other prisoners of conscience, the continued unnecessary use of the ATP on members and supporters of opponents has been criticized[178]. The acute threat is the lack of a standard test for arresting a person for terrorist reasons.

4.2 Encouragement or Incitement, and Freedom of Expression

Freedom of expression is a necessity for the realization of the principles of transparency and accountability[179]. It means the right of individuals to have, build, and express ideas. The protection of freedom of expression extends to

175 MARIAM, A. G. Political Prisoners inside Ethiopia's Gulags Posted in Ethiopia News. Zehabesha, 2012.

176 Ídem.

177 See HUMAN RIGHTS WATCH, World Report on Ethiopia, 2019.

178 See FREEDOM HOUSE. Ethiopia Country Report, 2019. See HUMAN RIGHTS WATCH. Ethiopia: Abiy's First Year as Prime Minister. Review of Freedom of Assembly, 2 Apr.2019. See also <https://www.amnesty.org.uk/press–releases/ethiopia–five–journalists–held–terrorism–charges–should–be–released> , <https://cpj.org/2019/08/ethiopian–authorities–arrest–journalist–mesganaw–g.php> , <http://www.xinhuanet.com/english/2019–09/22/c_138412789.htm,> <https://www.amnesty.org/en/latest/news/2019/10/ethiopia–release–of–coup–suspects–without–charge–follows–continued–abuse–of–anti–terrorism–law/>

179 UNHRC. General Comment No. 34. CCPR/C/GC/34, 2011, article 19, p. 1.

ideas which offend, shock, or disturb the state or any sector of the population[180]. Freedom of expression constitutes the basis for the full enjoyment of a wide range of other human rights and is the foundation of every free and democratic society[181]. Dieter Grimm claimed that there is no democracy without public discourse and no public dialogue without freedom of speech, freedom of media, and freedom of information[182]. According to John Stuart Mill, an individual is sovereign over him/herself and shall be protected against the tyranny of political rulers. The only purpose for which power can be rightfully exercised over any member of a civilized community against his/her will is to prevent *harm* to others[183].

While article 19(1) of the ICCPR grantees the right to hold opinions without any limitations, article 19(2) covers the scope of the freedom of expression of every human or entity. It includes information and ideas of all kinds and the freedom to seek and receive information regardless of frontiers and in whatever medium: orally, in writing, in print, in the form of art, or through any other media[184]. Article 19(2) and (3) of the ICCPR entrusts states with specific obligations and responsibilities to respect, protect, and fulfill the freedom of expression, while allowing states freedom of expression as a qualified right to impose a restriction. A look at article 17 and 19(3) of the ICCPR shows that the freedom of expression can be restricted for the rights or reputations of others and the protection of national security, public order, public health, or public morals. In this respect, General Comment No. 16 of the UNCHR expresses that article 17(2)

180 EUROPEAN COURT OF HUMAN RIGHTS, Handyside v. The United Kingdom. Appl. No. 5493/72 Judgment. No. 5493/72, 7 Dec. 1976.

181 UNHRC. General Comment No. 34, 2011, p. 1.

182 GRIMM, D. *Freedom of speech in a Globalized World*, in: HARA, I and WEINSTEIN, J, eds. Extreme Speech and Democracy. Oxford University Press, 2009, p. 11.

183 See Mill, J.S. On Liberty. Hacket Publishing Company, Inc, 1978.

184 UNHRC. General Comment No. 10. Freedom of expression, 1983, article 19. Freedom of expression is also guaranteed in article 13 of the American Convention on Human Rights, article 10 of the European Convention on Human Rights (ECHR), and article 9 of the African Charter on Human and Peoples. In the African case, freedom of expression is guaranteed "by law", which makes them vulnerable to being contained in any kind of law and thus restricted.

of the ICCPR bounds countries under an obligation to provide adequate legislation to protect every person against unlawful attacks on honor and reputation[185]. Again, article 20(2) of the ICCPR provides that any advocacy for national, racial, or religious hatred which constitutes incitement to discrimination, hostility, or violence in any form shall be prohibited by law. According to UNCHR General Comment No. 34, a law restricting the freedom of expression must not endanger the right itself. The General Comment emphasizes the necessity to formulate a law so precisely that everyone can act accordingly, and it is unacceptable for a law to leave the full right to restrict the freedom of expression to the enforcement officer[186]. Freedom of expression should be restricted only if the restrictive legislation is certain and clear as to the reasons for the restriction and justified by necessity in a democratic society (proportionality). Security Council Resolution 1624 adopted on 24 September 2005, after a bomb attack in London, considered hate speech and extremism as the main drivers of terrorism, and therefore democracy shall be understood as being more violent towards those who do not believe in it (militant democracy)[187]. According to this Resolution, an incitement to terrorism has been committed, without the requirement of causation, simply by proper transmission of the information directly to the audience with the intention to cause harm. This Resolution does not refer to the word "public." This Resolution reminds states of the protection of international human rights.

In Ethiopia, the rights of everyone to hold and express opinions, thoughts, and their religion, as well as freedom of press without interference has a constitutional base[188]. This guarantee is in accordance with the rights embodied in the ICCPR[189]. Article 29(5) of the FDRE Constitution holds the position that freedom of expression and information may not be limited on account of the content or effect of the expressed point of view. Any propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to

185 UNHRC. General Comment No. 16, 1988, article 17.

186 See UNCHR. General comment No. 34. CCPR/C/GC/34, article 19.

187 See ROACH, K. *The 9/11 Effect: Comparative Counter–Terrorism*. Cambridge University Press, 2011, p. 57.

188 FDRE Constitution, 1995, article 27 and 29.

189 ICCPR, article 18 and 19.

discrimination, hostility, or law is prohibited[190]. To a certain extent akin with the ICCPR, article 29(5) of the FDRE Constitution indicates the possibility by which individual rights may be limited on the basis of general laws for the well–being of the youth, personal honor, prevention of propaganda of war, and the violation of human dignity[191]. However, the FDRE Constitution has still failed to mention specifically public policy or national security and morality as grounds for restricting freedom of expression. In other words, an argument to limit freedom of expression on account of national security would arguably be unconstitutional, even though the ATP itself is justified to limit the freedom of expression based on public order.

The limitation of freedom of expression in the framework of terrorism prevention for public order is a contentious matter since the scope of the limitation, for example with regard to indirect incitement to terrorism, varies as the countries and their legal, social, and political circumstances vary. Typically, supporting and encouraging the dissemination of racist statements under international and national law violates the right to freedom of expression. The publication of racist statements through the interview and production of television or radio programs may also constitute a criminal offense. This can occur when a person makes a statement or other communication to the public acting with the intention of making it widely available, threatens, insults, or humiliates a group of persons because of their race, color, national or ethnic origin, or belief. Likewise, a derogatory expression is legally questionable if it is disproportionate to the public's right to information and to the rights of persons who are affected.

The implication of the ATP on freedom of expression because of incitement or encouragement is anomalous and multidimensional since it poses the issue of prior censorship. Article 3 of the ATP distinguishes the act of terrorism from other minor crimes. Nevertheless, the imprecise motive to advance a political, religious, or ideological objective, as a ground of criminal responsibility, can come to collide with the constitutionally protected freedom of expression and endanger those who share political, religious, or ideological views with potential

190 ICCPR, article 19(3) and 20. See also UN Security Council Resolution No. 1624, 14 Sept. 2005.

191 See ICCPR, article. 19(3). See also WILKINSON, P. Terrorism versus Democracy: The Liberal State Response. Frank Cass Publishers, 2005, pp. 174–183.

terrorists[192]. Article 4 and 6 of the ATP penalizes incitement and encouragement of terrorism. The Ethiopian government censors not only the online platforms but also the communication devices which makes it difficult to differentiate a "terrorist" message from "normal" speech that breeds a culture of widespread self–censorship[193]. When it relates to terrorism, the ATP empowers the executive to investigate journalistic sources, thus undermining the confidentiality of journalists' sources and dissuading people from expressing their views freely on matters of public concern.

As per the ATP, the incited offense does not need to be attempted[194]. Preparation alone is punishable. Likewise, article 6 of the ATP punishes "anyone who publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement…of terrorism from 10 to 20 years of imprisonment"[195]. For Téwodros W. Workneh the outcome of this provision warrants a scenario of arbitrary interpretation, jurisprudence, and execution of the law. He argued, "by keeping the law as vague and broad as possible, the

192 In 2014, two members of the bloggers of Zone 9, who wrote on public issues, were charged with destabilizing the nation with the motive of committing terrorism. Similarly, for his articles, Eskindir Nega, a prominent Ethiopian journalist, was arrested on a charge that he was affiliated with a terrorist labeled organization until he was free in 2018. See SCC, R. v. Khawaja, Judgment (SCC 69, 3 SCR 555), 14 December 2012, para. 57–58. The Canadian Trial Court indicated in the case between R. v. Khawaja that the motive clause of the criminal act is crafted overly broad. Care should be paid by the classification of terrorist activity by ideology not to characterize an entire population ideological movement as violent or predisposed to use terrorist tactics to advance ideological beliefs. See Amnesty International. Ethiopia: Release journalists arrested on unsubstantiated terrorism charges, 4 October 2019.

193 See WORKNEH, T. *Counter–terrorism in Ethiopia: manufacturing insecurity, monopolizing speech*. Internet Policy Review. Journal on internet regulation. Vol. 8, Issue 1, 2019, p. 13.

194 ATP, 2009, article 6.

195 OTENG, E. Jail term of Ethiopian activist, Yonatan Tesfaye reduced by three years. African News.com, 27 Nov. 2017. "The former 'Blue Party' spokesperson Yonatan Tesfaye was initially charged and sentenced for six years under the encouragement of terrorism (article 4 of the ATP). He was indicted for being a member of the forbidden group – the Oromo Liberation Front (OLF) and posting politically charged statements against the Government on Facebook."

government can choose to use it haphazardly in order to stamp out legitimate acts of political expression and dissent"[196].

In so far as incitement is concerned, the ATP is comparable with the United Kingdom's (UK) Terrorism Act of 2006 Section 1 and 2 and the approach followed by the Council of Europe Convention on the Prevention of Terrorism article 5 (1) and (2)[197]. The UK approach to encouragement in Section 1 adds a threshold concerning further justification or glorification of terrorism, clarifying the meaning of indirect encouragement and terrorist publication[198]. Terrorist acts in general and the dichotomy between direct and indirect encouragement, in particular, remains controversial in the UK[199]. Still, the Ethiopian approach to "direct or indirect encouragement" does not provide any clue regarding the kind of statements or expression that can be understood by members of the public as either direct or indirect encouragement. The wording "members of the public to whom the statement is published" has no convincing standard to test the gravity of the statement. The specific members of the public to whom the publication relates is also uncertain. Again, the ATP does not mention the intention of the person suspected of encouragement. In other words, the offense created here is not comprised of saying or disseminating something that might have the effect of encouraging persons to engage in terrorism. Preferably, what is published or said must have contained the danger that people might be encouraged to engage in terrorism. The core aim of the ATP from the central conception of freedom of expression is its ramification to criminalize not only clear cases of direct or indirect encouragement of terrorism through the

196 WORKNEH, T. *Counter–terrorism in Ethiopia: manufacturing insecurity, monopolizing speech…*, Op. Cit., p. 11.

197 COUNCIL OF EUROPE, Treaty Series – No. 196, Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16.V, 2005.

198 See Broadly, in the UK, the subversive advocacy beyond the ambit of constitutional protection is speech as urging the commission of a specific crime, offensive speech, and speech articulating anti–democratic norms. Cram (2009), p. 85.

199 UKSC 64, *R v. Gul (Appellant).* 2013, p. 11, para. 26; TRAPP, K., *R v Mohammed Gul: Are You a Terrorist if You Support the Syrian Insurgency?,* EJIL:Talk! Blog of the European Journal of International Law, 14 Mar. 2012.

media[200], but also anything likely to be understood as such by the public, or a part thereof for whose consumption the publication was made. Any campaign for a peaceful demonstration or a political rally would also qualify for punishment under this provision[201]. In the case between Tigray Regional State Public Prosecutor v. Ato Bushra Yahiya[202], Mr. Yahiy recorded his speech on a CD underlining the fact that "the al–haqash is not a government–owned institution rather it requires a new religion that wants to flourish". Additionally, he stated "mejlis is a Government cadre; the Government interferes in the affairs of religion"[203]. The Tigray Regional State Supreme Court, the one which has initially entertained the matter, decided against Mr. Yahiy for possessing materials of terrorism, though the defendant was regarded as free in the Federal Supreme Court Cassation division[204].

In summation, the incitement provision in the ATP is broad and imprecise. The ATP's approach to incitement punishes the content or the point of view expressed. This has the effect of subjectivity that is likely to erode the international and constitutional commitment to freedom of expression[205]. Therefore,

200 However, see Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 01 Nov. 1996, article 19. Principle 6 provides that expression may be punished as a threat to national security only if a government can demonstrate that: the expression is intended to incite imminent violence, it is likely to incite such violence, and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

201 SEKYERE, P and ASARE, B. *An Examination of Ethiopia's Anti –Terrorism Proclamation on Fundamental Human Rights*. European Scientific Journal January. Vol. 12, Nº 1, 2016, p. 362.

202 ETHIOPIAN FEDERAL SUPREME COURT CASSATION DIVISION, *Ato Bushra Yahiya v. Tigray Regional State*. Judgement, 2016.

203 Ídem.

204 In the same case the Federal Supreme Court Cassation division found the judgment stated above erroneous as there is no evidence showing the intention of the defendant to commit through those material terrorist acts. In another case, in 2013, Asfaw Berhanu, a journalist, was accused and sentenced to two years and nine months in prison for spreading false rumors and thereby creating a danger of public disturbances under article 486/1 of Ethiopia's 2004 Criminal Code.

205 ICCPR, article 29 (4), GORDON, L, ed. *Ethiopia's Anti–Terrorism Law a Tool to Stifle Dissents*. The–Oakland–Institute, 2015. AMNESTY INTERNATIONAL, Report, 2011 and 2014.

the prohibition of incitement should be applied in the way it attains the test of certainty on account of the "immanence of the danger and direct incitement to the commission of terrorism"[206]. The encouragement or advocacy of the commission of a terrorism offense should be restricted to a higher threshold for active incitement or "any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offenses…or counsels the commission of a terrorism offense"[207].

4.3 Prohibiting a Terrorist Organization and the Right to Association

In Ethiopia, freedom of association is protected not only by various international human rights[208] accords but also through the FDRE Constitution. Article 31 of the FDRE Constitution assures every person the right to freedom of association for any cause or purpose. Alternatively, 'organizations formed in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited'[209]. It is evident that establishing an association with terrorist objectives or a promotion thereof is illegal making its prohibition lawful and justified[210].

Proscribing terrorist organizations and the freezing, seizure, and forfeiture of their assets is an obligation of states endorsed by the UN Charter[211]. The Security Council Resolution 1267 (1999), which first targeted Osama Bin Laden, allowed states to establish a range of terrorist designation mechanisms at a national level[212].

206 See RONEN, Y. *Terrorism and Freedom of Expression*, in: B SAUL, ed. Research Handbook on Terrorism and International Law. Hebrew University of Jerusalem Research Paper No. 07–12. Edward Elgar, 2013.

207 See the Canadian Anti–Terrorism Act, 2015.

208 See for example article 22 of the ICCPR.

209 FDRE Constitution, 1995, article. 31; See BOURNE, A and BÉRTOA, F. C. *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies…*, Op. Cit., pp. 440–465. Troubled by the rise of Nazism and deficiencies of the Weimar Republic, the 1949 German Basic Law laid the foundations for a "militant democracy" by placing the limit of "democratic order."

210 See the Ethiopian Revised Political Parties Registration Proclamation, Proclamation No. 573/2008.

211 UN Security Council Resolution, No. 1373, 2001.

212 See for example the Global Terrorism Index.

Article 25(2) of the ATP stipulates that an organization shall be proscribed as a terrorist organization if it directly or indirectly commits acts of terrorism, prepares to commit acts of terrorism, supports or encourages terrorism, or is involved in terrorism[213]. For the purpose of designation, the ATP follows a certain definition of international terrorism. In the ATP, the catchphrase "encouraging or participation in terrorism" as a ground for suspension has been left to the executive and legislature to deliver meaningful interpretation[214]. The Ethiopian Federal House of Peoples' Representatives has the power, upon proposal by the government, to proscribe and de–proscribe an organization as a terrorist organization[215]. In 2005, the House designated Al–Qaida and Al–Shabaab as terrorist groups, along with other domestic armed rebel groups, namely the Oromo Liberation Front, the Ogaden National Liberation Front, the Arbegnoch–Ginbot 7, and the Ethiopian Patriotic Front. In June 2018, in the framework of reform by the new Prime Minister, the Ethiopian parliament removed the above three domestic–armed groups from the list of terrorists upon an agreement of peace[216].

Notably, in line with the international human rights instruments[217], the FDRE Constitution embraces due process and the right of everyone to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power[218]. However, the crux of the matter lies in the fact that the ATP confers the Federal Parliament with the authority to proscribe an alleged terrorist organization. That would authorize the parliament to decide on individual criminal responsibility[219]. At this juncture, it

213 See ATP, 2009, article 2(4) and article. 25(1).

214 HUMAN RIGHTS WATCH, World Report, 2012.

215 ATP, 2009, article 25, article. 25(1).

216 See MAMDANI, M. *The Trouble with Ethiopia's Ethnic Federalism*…, Op. Cit.

217 See article 7 of the UDHR, article 2(1) of the ICCPR, and article 7 of African Charter on Human and Peoples' Rights.

218 FDRE Constitution, 1995, article 37(1). The pre–designation may hamper the success in blocking terrorist's preparation as well as financial assets, however, the post–designation should be re–evaluated under due process to ascertain whether there is change.

219 As a matter of comparison see for instance TOLLEY, M.C., *Australia's Commonwealth Model and Terrorism*, in VOLCANSEK, M. L. and STACK, JR, J. F., Courts and Terrorism: Nine Nations Balance Rights and

cannot reasonably be construed that the House of Peoples' Representatives has any judicial powers whatsoever; neither can it be denied that the proscription process has justiciable elements in it[220]. The legality of an association shall be ascertained by an independent judiciary; not by the law–making organ, which tends to be open for abuse. The membership to the designated groups alone (irrespective of the intention), as per the ATP, is enough to prove the person is a terrorist. The said ban makes not only the justifiability of the proscription unassailable[221], but it also may lead to a far–reaching punishment for a mere and unintentional membership which might in turn put the constitutional maxim *presumption of innocence* under question[222].

The power of constitutional interpretation falls under the scope of the House of the Federation[223]. As per article 62(1) and 83(1) of the FDRE Constitution, the House of the Federation has the authority to decide on all constitutional disputes. Hence, a declaration deeming an organization to be terrorists could be challenged as unconstitutional before the House of the Federation. However, the House has not passed a decision on this matter. Primarily, members of this institution are elected political representatives of each regional state which naturally makes it subject to partisan politics and partiality[224].

In Australia, the Minister for Home Affairs can sort–out terrorist organizations as may be necessary together with the Parliamentary Joint Committee on Intelligence and Security[225]. The High Court of Australia is vested with the power to see the constitutional validity of laws and decisions[226]. In the UK, the

Security, Cambridge University Press, 2011, p. 144 –149. Accordingly, the present Australian approach to counter–terrorism is influenced immensely by the UK's Prevention of Terrorism Act of 2005.

220 The right to association and access to justice are justiciable.

221 United Nations Counter–Terrorism Implementation Task Force, 2014.

222 In that relationship, unlike the Ethiopian ATP, article 102.3 of the 1995 Australian Criminal Act situates intention as a prerequisite for criminal liability for membership in a terrorist organization.

223 The FDRE Constitution, 1995, article. 83.

224 See MGBAKO, C et al. *Silencing the Ethiopian Courts: Non–Judicial Constitutional Review and its Impact on Human Rights*, Fordham International Law Journal. Vol. 32, Issue 1, 2008.

225 Australian Criminal Code Act, 1995, article 102.2.

226 Australian Government Attorney–General's Department, Australia's counter–terrorism laws, Questions and

2006 Terrorism Act has bestowed the power to proscribe political organizations to the Home Secretary[227]. In the UK, the affected individual may also appeal to the Court of Appeals as a last resort[228]. In Ethiopia, the Federal High Court can cancel or dissolve political parties acting in violation of the provisions of the laws of the country[229]. Otherwise, courts have no role whatsoever in challenging the decision to proscribe or de–proscribe an organization as terrorists. The Ethiopian courts can neither declare an organization unconstitutional nor can they review the constitutionality of the actions of the government and the legislation of the parliament[230].

With the above in mind, it suffices to argue that the absence of judicial participation in the proscription of organizations as terrorists has severe impacts on the access to justice, the right to be presumed innocent, and the freedom of association. Since the court of law is expected to be the defenders of human rights, establishing an independent Constitutional Court with oversight ability will also make a significant difference in the protection of human rights.

5. The Draft Anti–Terrorism Law

Due to the non–availability of the bill online, efforts will be made to provide information on the new draft anti–terror law by tracing secondary sources. The draft bill is known as "a Proclamation to Prevent and Suppress Terrorist Crimes" (Bill)[231]. Regarding the compatibility of the Bill with generally accepted human rights standards, the UNHRC Special Rapporteurs have proposed improvements to the Bill based on the principle of counter–terrorism

Answers Pamphlet, p. 6.

227 UK Terrorism Act, 2006.

228 UK Terrorism Act, 2000, Section 6 (1).

229 See Ethiopian Political Parties Registration Proclamation No 573/2008, article 40.

230 See generally, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities, Proclamation No. 251/2001.

231 ABIYE, Y. Gov't tables draft bill to repeal maligned anti–terrorism bill. The Reporter, 8 Jun. 2019, available at https://www.thereporterethiopia.com/article/govt–tables–draft–bill–repeal–maligned–anti–terrorism–bill [accessed on 08 Mar.2020].

in accordance with UNHRC Resolutions 34/18, 32/32, 37/2, 37/2, 40/10 and 40/16[232]. The Bill consists of six parts with a total of forty–seven articles. It contains new provisions on definitions and provisions relating to human rights and administrative issues. According to the available evidence, the preamble of the draft law aims to prevent and combat terrorism crimes, bring terrorists to justice, and punish them for the extent of their crimes. The Bill also aims to protect human rights, including victim's rights and democratic principles, by ensuring peace and security for the population and the government[233]. Unlike the ATP, which only allows federal courts to prosecute terrorism–related cases, the draft Bill provides state courts jurisdiction to hear cases of terrorist allegations. However, apart from the issue of efficiency, the question of the ability and credibility of state courts to apply the Bill and adequately prosecute suspects poses a potential warning signal.

The Bill defines terrorism as "spreading fear among the public or a section of the public or coercing or compelling the government" to "advancing political, religious, or ideological causes". While the OHCHR considers the intention part to be unclear and imprecise, it argued that the objective element is in line with international standards. As already mentioned, the term *compelling the government* can, however, collide with democratic civil activity aimed at putting pressure on the government to change its policy. Moreover, terrorism is considered a "serious threat to peace and security affecting both individuals and property" and therefore, "the government should take strong precautionary and preparatory measures focusing on the nature of the crime"[234]. Although the *seriousness* threshold implies a human rights *friendly* nature of the provision, the burden of proof and the legal basis for adverse consequences for individuals to rights and freedoms with regard to precautionary measures are not based on concrete and proven action[235]. *Intimidation or coercion* to commit terrorism has also been made a crime as similar to that of the ATP. Nonetheless, the OHCHR considers

232 OHCHR. Internal Communication Clearance Form. Reference: OL ETH 3/2019, available at <https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL_ETH_3_2019.pdf>.

233 Ibídem, p. 3.

234 Ídem.

235 Ídem.

intimidation as unclear in the sense that the acts which would rise to the level of intimidation creates the possibility of overreach[236]. Unlike the ATP, the draft Bill includes a provision on "false threat of a terrorist act." Similarly, due to its uncertainty, the punishment of "false threat" can endanger human rights.

Unlike the term *encouragement* in the ATP, the new Bill includes *direct or indirect support* to terrorism. In the OHCHR's view, *indirect support* for terrorism may cover a range of activities that cannot be adequately or fairly described as a terrorist act. The terminology, in particular, may impede routine work, mere communication, or storage of material or content unless there is an intention to incite a terrorist act[237]. The Bill also refers to extremism and the government's role in the prevention of extremism[238]. However, the term extremism has not been regulated under binding international legal standards. Extremism as a criminal offense is incompatible with the principle of legal certainty and is *per se* incompatible with the exercise of certain fundamental human rights[239].

With regard to the authority in the draft Bill to outlaw a terrorist organization and the requirements of article 19(3) of the ICCPR, the OHCHR claimed that the Bill represented a broad and expanded interpretation. The OHCHR expressed its concern about a clear and potential violation of the right to associate under article 22 of the ICCPR. According to the draft Bill, no detailed confidential information can be collected; however, the collection of general information on confidential information is allowed. According to the OHCHR, the use of secret information in proceedings not only entails risks of false outcomes but also jeopardizes the right of access to information and freedom of expression[240]. At this juncture, based on the procedure and freedom of access to information under article 19(2) of the ICCPR, the draft does not adequately protect human rights, the rights of organized groups, and in particular, the rights of individuals.

236 Ibídem, p. 5.

237 Ídem.

238 Extremism is the term used to imply activities against democratic and constitutional state.

239 OHCHR. Internal Communication Clearance Form, Reference: OL ETH 3/2019…, Op. Cit., p. 8.

240 Ídem.

Thus, with the ATP, the draft Bill gives the legislator the power to ban an organization as terrorists without involving the judiciary. As to affiliation, the Bill added the terms "should have known" as a threshold for negligent membership in a terrorist group. However, this is criticized for being a very controversial provision and for showing no necessity or clarity[241]. In summation, the draft Bill leaves open questions on the obligations of states to protect the right to liberty and security, the right to privacy, and the freedom of association under articles 9, 17 and 22 of the ICCPR[242].

6. Balancing Counter–Terrorism with Human Rights: Lessons for Ethiopia

6.1 Approaches

Balancing public security with human rights has become the focus of international organizations and laws. International laws such as the UN Security Council Resolution No. 1456 (2003), 1624 (2005), and 2395 (2017)[243]; the 2004 African Protocol to the 1999 Convention;[244] the 2005 Global Strategy against Terrorism[245]; and the African Commission on Human and Peoples' Rights Resolution on Terrorist Acts espouse the balance that must be kept between security and human rights. The recent UN Security Council Resolution A / 73 / L.88 (29 May 2019) reaffirms the strengthening of international cooperation in support of victims of terrorism in a national criminal justice system. It bases the criminal justice system on respect for human rights, and declares the rule of law, due process, and security as the best ways of effectively combating terrorism and ensuring accountability. According to the UN Office of Counter–Terrorism, terrorism can be defeated only when the principles of the UN Charter and international standards of law are respected and enforced[246].

241 Ídem.

242 Ibídem, p. 9.

243 Opening statement by the High Commissioner for Refugees at the Thirty–Seventh Session of the Executive Committee of the High Commissioner's Program, 6 Oct. 1986.

244 Opening statement by the High Commissioner for Refugees, 6 Oct. 1986.

245 See the UN Security Council Resolution No A/RES/60/288, 8 Sep. 2006.

246 The Counter–Terrorism Implementation Task Force (CTITF) and the UN Counter–Terrorism Centre.

Similarly, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms affirms that "compliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of states, but it is also an indispensable part of a successful medium– and long–term strategy to combat terrorism"[247]. The Special Rapporteur provided guidelines for states in line with best practices in countering terrorism. Given the profound implications of anti–terrorism legislation, the UN Special Rapporteur on terrorism declared that states have to ensure the broadest possible political and popular support for counter–terrorism laws through an open and transparent process[248]. The OHCHR Fact Sheet 32 and the African Commission Resolution 88 (2005) on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism oblige the member states to ensure that the measures taken to combat terrorism fully comply with their obligations under the African Charter on Human and Peoples' Rights and other international human rights treaties[249].

The 2015 Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa[250] highlights that the legal principles such as legal certainty and clarity as well as legal consistency and principles of criminal law, such as legality and the presumption of innocence, are the integral parts of the rule of law that must be adhered to[251].

Nevertheless, given the nature of human rights, balancing freedom of individuals and the security of the public or the government's ability to set policies and laws is problematic. Since economic, social, cultural, civil, and political rights are interrelated, indivisible, and universal, it may not be plausible to balance one right at the cost of the other[252]. The above is derived

247 UN Human Rights Commission, Resolution No. A/HRC/16/51, 22 Dec. 2010, p. 6.

248 See UN Resolution A/HRC/16/51, 22 Dec. 2010, p. 7.

249 The African Commission on Human and Peoples' Rights. Meeting at its 37th Ordinary Session held in from 21st November to 5th Dec. 2005, Banjul, the Gambia.

250 It was adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia, 21 Apr. to 7 May 2015.

251 See General Assembly Resolution No. 60/288, 8 Sept. 2006 Annex.

252 See YASENCHAK. M, A. GIGLIO, J. PAXSON, M. National Security and Human Rights: Conference Proceed-

from the idea that the protection of one right shall not threaten the protection of another.

6.2 Proportionality

Article 2(1) of the ICCPR stipulates that where a state makes any restrictions on a Covenant right, without impairing the essence of the right, it must demonstrate its necessity and proportionality to the pursuance of legitimate aims in order to ensure effective protection of the Covenant rights[253]. Regarding freedom of expression, a combined reading of paragraphs 21(1)–34 of the General Commentary No. 34 of the OHCHR shows that any law restricting human rights must have a legitimate aim and must not allow unfettered limitations of human rights, and that the law must be subject to precise and proportionate control[254]. The state has the burden of proof. The state must "demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat"[255]. Broadly, any restrictions on rights by the application of counter–terrorism law must be necessary, impinge only minimally on rights, demonstrate proportionality between the means used and the clearly stated objective, be consistent with other fundamental rights, and non–discriminatory in purpose and practice[256]. According to the OHCHR, any measures limiting human rights must be provide the aforementioned together with the scope of application.

The proportionality principle is an important principle that impacts positively not only on the interpretation of constitutional and human rights issues,

ings: Moscow, Russian Federation, Kennan Institute, 29 Jun. 2006. The interrelatedness of human rights is recognized in the Universal Declaration on Human Rights and the 1993 Vienna Declaration and Plan of Action. It was noted that in some regional instruments, such as the African Charter, no differentiation is made between the two sets of rights.

253 See also ICESCR, article 2(2).

254 See OHCHR. Internal Communication Clearance Form. Reference: OL ETH 3/2019

255 See https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

256 OHCHR. Internal Communication Clearance Form. Reference: OL ETH 3/2019.

but also regarding the legislative and adjudication process[257]. The principle helps to strike a balance between the essential international human rights standards and public security so that citizens are not exposed to the unlimited and arbitrary power of the state[258]. Human rights are determined to be in congruence with the legitimate aims of a given government measure only when the aims are acceptable in a democratic society. Whether something is acceptable in a democratic society is determined by using suitability (in which the measure must be appropriate to achieve the aim), necessity (the measure must be absolutely necessary and there should not be other milder means to achieve the aim), and proportionality tests (the search for a balance in weight of private and public interest or the extent of the burden on the individual rights must be proportionate to the benefits to the public at large)[259]. In other words, the lower the value of individual rights would mean that the more intensive the interference with the fundamental right of the individual can be justified. As the value of the rights becomes higher, their limitation can only reasonably be expected to be strictly justified. The proportionality test prohibits the excessive exercise of power during the promulgation and the application of laws, including the daily inspections by security personnel on the streets.

Whether the ATP is a milder legal measure than Ethiopia's existing penal code, which can be used to criminalize terrorism, is a matter of dispute. Nevertheless, the question must be whether the ATP is a deviation from the constitutionally guaranteed fundamental rights and does it harm individual freedom disproportionately to the security interests of the general public. Despite the fact that the ATP is not proclaimed in response to an imminent terrorist threat to

257 See also YORK, J. C. Proposed Anti–Terror Law in France Would Erode Civil Liberties. Electronic Frontier Foundation, 12 Sept. 2014. See also RAUE, F. Müssen Grundrechtsbeschränkungen wirklich verhältnismäßig sein? Archiv des öffentlichen Rechts. Vol. 131, No. 1, 2006, pp. 79–116. The proportionality principle is well developed in German administrative and constitutional law. As per article 20 (3) of the Basic Right, in Germany, proportionality principle is binding for all authorities in the country. See BVerfGE, 15 Dec. 1965 and BVerfGE, 5 Mar. 1968.

258 See BVerfGE 194 June 10, 1963.

259 The execution of the ATP must be abridged to the protection of democratic principles and the sovereign rights of individuals.

the life of the nation and its existence is officially proclaimed, as provided for in article 4 of the ICCPR, it nevertheless reveals a profound deviation from the substantive and procedural content of existing laws in Ethiopia. Unlike derogations as per article 4 of the ICCPR that temporarily suspend individual rights in situations of public emergency proclaimed by law[260]; the FDRE Constitution consists of perpetual limitation on almost all rights. Furthermore, it does not deal with proportionality as a fundamental principle of the state function. These are limitations on individual rights by laws and deviations from specific human rights provisions. What makes the situation difficult to make use of the proportionality principle is the fact that the FDRE Constitution embodies the "claw–back" clauses which are namely a method of limiting human rights obligations in the FDRE Constitution by giving the parliament higher latitude and flexibility. The right to life, liberty, bail, privacy, freedom of expression, and freedom of association can be curtailed within the phrases such as "in accordance with specific laws", "as are prescribed by the law"[261] or "as established by the law"[262]. The "claw–back" clauses create the difficulty of having different grades of justification being presented to limit different categories of rights differently. It follows that the clause may lead parliament to arbitrarily restrict constitutional rights categorically by law (i.e., a parliamentary dictatorship). Importantly, however, when proportionality takes place, the kind of human right at stake is essential. Some human rights are not subject to relativism. These include the right to life, protection against torture and slavery, the principle of legality, and freedom of thought[263].

260 During exceptional circumstances, article 4 of the ICCPR and article 93 of the EPRDF Constitution ordain that an action of the state shall not go beyond what is necessary to the goal that must be achieved.

261 See for example the FDRE Constitution, article 27(5).

262 See in the African context MAPUVA, L. *Negating the Promotion of Human Rights Through "Claw–Back" Clauses in the African Charter on Human and People's Rights*. International Affairs and Global Strategy. Vol 51, 2016.

263 HUMAN RIGHTS WATCH, 23 Feb. 2018. Following Prime Minister Hailemariam Desalegn's decision to resign, the state of emergency suspends fundamental rights guaranteed in the Constitution, the African Charter on Human and Peoples' Rights (the African Human Rights Charter), and International Human Rights Treaties. During the previous state of emergency, which lasted from October 2016 until August 2017, security forces

6.3 Human Dignity

The absolute protection of human dignity is another mechanism crafted to balance the need to guarantee security and the protection of human rights. The origin of human dignity goes back to the view that the human being is created in the image of God and any outrageous act susceptible to reducing the parable of God's quality shall be prohibited. Immanuel Kant's principle of treating a person as an end, not as a means, has been accepted by moral and political philosophy as the basis for the concept of human rights. The attainment of human dignity is the highest goal of human rights assertion. No man should be treated or regarded as an *instrument* or *object*. The *object formula* indicates that the human dignity is injured, "when a human being is degraded to the object, to a mere means, to a justifiable grade"[264].

The UDHR's preamble proclaims that "the recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world". Article 1 of the UDHR stipulates once again that "all human beings are born free and equal in dignity and rights"[265]. The preambles of ICCPR and ICESCR have also mentioned the concept of human dignity. Its primary purpose is embodied in the preamble of major human rights instruments to make it serve as the prime guiding principle. Human dignity has intersectional value for being situated at the center of all other human rights[266]. The respect of the dignity inherent in a human being has also been anchored under article 5 of the 1986 African Charter on Human and Peoples' Rights.

The FDRE Constitution does not denote the term human dignity until article 21(2) on the rights of persons in custody and article 29(5). This does not, however, mean that human dignity is not a supreme good of the FDRE Constitution. To some extent, human dignity is contained in the expression of inviolable

arrested more than 20,000 people and committed widespread rights violations.

264 See MARHAUN, A. Menschenwürde und Völkerrecht. Mensch, Gerechtigkeit, Frieden. Broschiert. Medienverlag Köhler; 1. Aufl, 2001. See NETTESHEIM, M. Die Garantie der Menschenwürde zwischen metaphysischer Überhöhung und bloßem Abwägungstopos. Archiv des öffentlichen Rechts. Band 130, 2005.

265 See UDHR, article 1.

266 However, the right to dignity as an independent human right is controversial.

and inalienable right to life, the prohibition of torture and inhuman treatment, the prohibition of slavery, and the right to physical and mental security[267]. Mindful of the above assertions, pursuant to the ATP, security officers can take "'any measure' that enables to prevent or reduce the danger […] if necessary". Such a compelling measure questions not only the subjective quality of the suspects, but also the general people in the supposed crime scene. A legal authorization to take any wary measures to neutralize a danger on *reasonable grounds* turns human beings into mere objects of state operation for the protection of others. Over the past few decades, Ethiopia has lost thousands of its citizens to gunshots on the streets by security forces both during regular time and during state of emergencies[268]. It is, therefore, essential that respect for human dignity be the yardstick for all executive actions. In Ethiopia, even if the determination of a particularly serious measure or factors influencing the judgments of a police officer depends on the state of the nature of the individual case, there must be a matrix or unbiased threshold. Furthermore, there must be training with which the police officer can believe or accept what is right/honest, beyond a mere idea of the realization of a particular crime. State or judicial supervision should also be integrated into the scheme.

7. Conclusion

In summation, adopting measures to address national security procedures and the protection of human rights leaves many questions unanswered. The attitude of governments in downgrading human rights arises not only from the control of different laws, but also from the socio–legal strategies deployed to create a "culture of fear"[269].

The ATP has resulted in expanded power for the executive that brings it into conflict with the object and purpose of both the FDRE Constitution as

267 See FDRE Constitution, 1995, Chapter Two.

268 See VOA News, Ethiopia Arrests Ex–Head of Army Firm as Crackdown Targets Security Services, 13 Nov. 2018.

269 Similarly see for example Cheng, 2004, p. 6. See also ALTHEIDE, D. L. Terrorist and the Politics of Fear, 1st ed, Oxford. Altamira Press, 2006.

well as the international human rights obligations pertaining to freedom of expression and association, right to liberty, access to justice, and the protection against torture[270]. Due to the normative inadequacy, fear as a manifestation of the anti–terror law, and accompanied by a lack of accountability, it has been a long time since Ethiopia has embattled the free press or obstructed the domestic opposition with the help of anti–terror legislation[271]. The snowball effect of the vagueness of the ATP poses enormous threats to human rights. Although these weaknesses have overarching implications for different categories of human rights, their negative impact on the expression of the right to object is noteworthy and requires separate treatment, as terrorism is not a purely legal concept, but rather a political hybrid concept. An authorization of the state machinery to take whatever measure it wants on account of "reasonable grounds" denies the respect of people as a subject of responsibility. Such a possibility has also created a far–reaching menace on other rights, such as the protection against torture[272].

Against this background, unless the current counter–terrorism legal framework is framed adequately by defining the crime of terrorism clearly and concisely, the state's power to ensure peace and security can be misused evermore. That calls for a law to be framed clearly and precisely and applied consistently and accountably for the intended legitimate purpose[273]. Bearing in mind the crucial controlling and monitoring role of the UN Human Rights Committee and the UN counter–terrorism bodies, namely the Security Council and the General Assembly, the compliance with international human rights obligations is more responsive to domestic forces such as the existence of independent courts

270 The Ethiopian government has confirmed the fact that arbitrary detention and torture are a major problem in Ethiopia.

271 See AMNESTY INTERNATIONAL. Ethiopia: Release journalists arrested on unsubstantiated terrorism charges, 4 October 2019. See also MATFESS, H. *Ethiopia: Counter–Terrorism Legislation in Sub–Saharan Africa*. Small Wars Journal, available at https://smallwarsjournal.com/jrnl/art/ethiopia–counter–terrorism–legislation–in–sub–saharan–africa, [accessed on 06.10.2019].

272 The new Prime Minister of Ethiopia, Dr. Abiy Ahmed, confirmed the fact that arbitrary detention and torture are a major problem in Ethiopia. See PM Dr Abiy Ahmed Speech in Parliament – FULL, available at https://www.youtube.com/watch?v=wJnC2aX4jP8.

273 The UN Human Rights Commission Resolution No. A/HRC/16/51, 2010, p. 7.

and the national constitutional culture than to any global culture pressing for compliance with international human rights norms[274]. The core problem lies not only with the weakness of laws but also a weak commitment to abide by the law in good faith[275]. Besides having a firm stance to amend the ATP, forming an independent judiciary and a responsible legislature and executive organ play the first–hand role in hampering the violation of human rights. The prudent application of laws depends upon the government's institutional commitment to act legitimately and accountably. It is also advisable, to have public and private institutions that can identify, educate, and treat the process of radicalization. Finally, this article suggests for a wise deployment of peremptory human dignity, principles of the rule of law, and a careful application of the proportionality principle in balancing security measures with human rights.

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274 See HENKIN, L. *International Law: Politics, Values and Functions*, in: STEINER, H.J. and ALSTON, P. *International Human Rights Context: Law, Politics, Morals*; Text and Materials, Clarendon Press. Oxford, 1996, pp. 350–354.

275 See Amnesty International's Report, 8 Jun. 2018.

The Right to Food and Private Voluntary Food Standards

El derecho a la alimentación y las normas alimentarias privadas y voluntarias

Received: 23/04/2019 – Accepted: 06/08/2019

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Abstract

The right to food is a human right stipulated in different human rights treaties. It demands availability, accessibility, sustainability and adequacy of food supplies to be realised. Private voluntary food standards govern international food chains. They define procedures and conditions under which food is produced. These standards have multiple impacts on all actors in the food chain. They may support the fulfilment of the right to food, in particular concerning food safety and other human rights, but they also might negatively affect the income of small–scale farmers. This article argues that home state governments and host state governments governed of the private standards are obliged to mitigate the negative effects on human rights. There are multiple avenues for mitigation because states have a margin of appreciation regarding the realization of the right to food and the effectiveness of different options depends on the context of the particular standard in question.

Keywords: Right to food; Food standards; Human rights; Global food governance; Voluntary standards; Food safety.

Resumen

El derecho a la alimentación es un derecho humano estipulado en diferentes tratados internacionales de derechos humanos. Exige disponibilidad, accesibilidad, sostenibilidad y adecuación de los suministros de alimentos. Las normas alimentarias privadas y voluntarias rigen las cadenas alimentarias internacionales. Definen procedimientos y condiciones bajo las cuales se producen los alimentos. Estas normas tienen múltiples impactos en todos los actores de la cadena del sector alimentario. Pueden apoyar el cumplimiento del derecho a la alimentación, en particular en relación con la seguridad alimentaria y otros derechos humanos, pero también pueden afectar negativamente los ingresos de los pequeños agricultores. Este artículo argumenta que los gobiernos de los estados de origen y los gobiernos de los estados receptores regidos por los estándares privados, están obligados a mitigar los efectos negativos sobre los derechos humanos. Existen múltiples vías para la mitigación porque los estados tienen un margen de apreciación con respecto a la realización del derecho a la alimentación y la efectividad de las diferentes opciones depende del contexto del estándar particular en cuestión.

Palabras clave: Derecho a la alimentación; Estándares alimentarios; Derechos humanos; Gobernanza alimentaria mundial; Normas voluntarias; Seguridad alimentaria.

Summary

1. Introduction

Neoliberal reforms in the last third of the 20th century, in particular the foundation of the World Trade Organization (WTO), have encouraged globalization in the food industry. This has resulted in a massive growth of trade in food and agricultural products. Moreover, supermarkets now face fewer barriers to entry into the trade of food and agricultural products and are able to operate in markets that had previously been closed off. The new trade regime of the revised General Agreement on Tariffs and Trade (GATT) from 1994 and other agreements of the WTO (particularly the Sanitary and Phytosanitary (SPS) Agreement and the Technical Barriers to Trade (TBT) Agreement) offered them opportunities to internationalise. Previously, tariffs and quotas, different regulations, and laws made it difficult, if not impossible, to source and distribute food globally. However, after the new trade regime was introduced, supermarkets were able to reorganise their supply chains and distribution systems and gained greater market power largely based on their power of demand[2]. At the same time, supply chain governance changed because, after eliminating quotas and tariffs, many trade possibilities

2 BUSCH, L., *Quasi–states? The unexpected rise of private food law*. In: B. M.J. van der Meulen (Edit.): Private Food Law, Wageningen Academic Publishers 2011, p. 54.

arose but issues such as specifications, standards, quality, and safety were not yet addressed at an international policy level. Therefore, companies set up their own governance structures in the form of standards, accreditations, and certifications to be able to realise the trade potential[3]. Indeed, many different kinds of voluntary private standards developed in various sectors as a result of this, particularly in the agri–food sector[4].

These standards set requirements for the products and the methods of production in various ways. Several of the standards are concerned with sustainability issues in a very broad sense, covering social, ecological, and economic aspects and are viewed as tools to promote production conditions that respect human rights[5]. Others are specifically designed to tackle food safety. These kind of standards have proliferated over the years, particularly in the wake of the bovine spongiform encephalopathy (BSE) scandals in Europe in the late 1990s. This article focuses on how these private voluntary standards interact with the right to food, which is recognised in international and national law as a fundamental right.

This article will first demonstrate the basic obligations from the various treaties in which the right to food can be found. It will then briefly explain the features and attributes of private voluntary food standards, followed by a review of the impact of private voluntary standards, with a particular focus on the right to food follows. It then addresses the question of the legal responsibility for the impacts of those standards. This is of particular interest given that the private voluntary standards are defined by the fact that they are set by private entities. The question to be asked in relation to the impact of such standards on human rights is two–fold: Firstly, are such impacts the responsibility of the standard setter or the standard user? Secondly, are states that allow the use of the standards responsible, or is it the state in which the standard is developed or demanded by private actors? Due to the fact that human rights obligations

3 Ibídem, p. 59.

4 HENSON, S., HUMPHREY, J. – *Understanding the Complexities of Private Standards in Global Agri–Food Chains as They Impact Developing Countries*, Journal of Development Studies (2010) 46 (9) 1628, p. 1628.

5 UNFSS, Meeting Sustainability Goals – Voluntary Sustainability Standards and the Role of Government, 2nd Flagship Report of the United Nations Forum on Sustainability Standards, p. viii.

target primarily states, the second question will be mainly addressed in this paper. I conclude this article with my findings and highlight some open questions requiring further research.

2. Sources of the Right to Food and its Content and Obligations

2.1 International and regional human rights treaties containing a right to food

According to a study from 2011, the right to food is implicitly or explicitly recognised by 56 states in their national constitution[6] and it is stipulated in different international human rights treaties, such as article 25 of the Universal Declaration of Human Rights (UDHR) and article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to food is also found in treaties protecting particular vulnerable groups. Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stipulates the right of pregnant and lactating women to special protection with regard to adequate nutrition. The Convention on the Rights of the Child (CRC) recognises in article 25 the right to the highest attainable standard of health, and in article 27 the right to an adequate standard of living, both of which include articles food and nutrition. Furthermore, article 28 of the Convention on the Rights of Persons with Disabilities stipulates the right to food as part of a right to an adequate standard of living in article 28.

Regional human rights treaties (such as article 12 of the Protocol of San Salvador) contain the right to food as well. According to a decision by the African Commission on Human and Peoples' Rights, SERAC v. Nigeria (2001), there is also a right to food in the Banjul Charter that is included in its provisions on the right to life (article 4), right to health (article 16), and right to development (article 22).

2.2 The normative content of the right to food

According to article 11 of the ICESCR, the right to food contains two different kinds of rights to food. In article 11.1 of the ICESCR, the right to

6 KNUTH, L., VIDAR, M.; *Constitutional and Legal Protection of the Right to Food around the World*, Food and Agriculture Organization of the United Nations, 2011, p. 22.

adequate food is stipulated as a relative standard, whereas the right to be free from hunger in article 11.2 of the ICESCR is an absolute right and the only one that is qualified as "fundamental" in the ICESCR and the International Covenant on Civil and Political Rights (ICCPR)[7]. In order to determine the content more precisely, in particular the right to adequate food, the General Comments (GC) No. 12[8] of the Committee on Economic Social and Cultural Rights (CESCR), which is said to be "the most authoritative interpretation of the right to food within the [United Nations] human rights system"[9], is helpful. The important status of the GC has been reassured in resolutions of the United Nations (UN) General Assembly[10]. In the GC, the CESCR has set out what is understood regarding the right to food. Apart from the ideal that at all times everyone has sufficient food as it is proclaimed in the GC[11], there are four elements that the CESCR identified for the right to adequate food to be fulfilled: the availability, accessibility, sustainability and adequacy of food supplies have to be realised.

According to the GC, "food has to be available in a quality and quantity sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture"[12]. In order to fulfil the requirement of availability, there either has to be a well–functioning system of food distribution, or people must be able to feed themselves from natural resources. Furthermore, this sets some requirements regarding quality as the "dietary needs" have to be meet, which means that the food must contain all nutrients being necessary for physical and mental development and maintenance. Likewise, food has to be safe for consumption, meaning that it must contain no toxins and must be free from other contaminations. In addition to these scientifically measurable

7 NARULA, S., *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 Colum. J. Transnat'l L. 691 (706).

8 CESCR, General Comment No. 12 (1999): The right to adequate food (article 11 of the Covenant).

9 SÖLLNER, S., *The "Breakthrough" of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food*, In: Max Planck UNYB 11, 2007, p. 391.

10 UN General Assembly, Resolution on 17 December 2018, A/RES/73/171, para. 44.

11 CESCR, General Comment No. 12 (1999): The right to adequate food, para. 6.

12 Ibídem, para. 8.

requirements, there is the requirement that food has to be acceptable from a cultural standpoint[13].

Moreover, the GC states that the accessibility of such kinds of food has to be provided "in ways that are sustainable and that do not interfere with the enjoyment of other human rights"[14]. Accessibility is meant in two ways here. First, from an economic point of view, everybody, including particular vulnerable groups with low or no income, must have the financial capabilities to buy the adequate food to cover their basic needs. Secondly, there has to be a physical possibility for everybody to access the adequate food[15]. The meaning of sustainability in this context is that the accessibility and the adequacy of food needs to be provided not just on a short term basis, but also in the long term, for future generations[16].

As this sets out the normative content of the right to food, it is necessary to determine the obligations following from that to see finally, whose responsibility mitigating the impacts of private voluntary food standards on the right to food is.

2.3 Obligations from the right to food

Article 11.2 of the ICESCR stipulates a core obligation of states to take necessary actions against hunger[17]. In addition to that, according to the CESCR, states have the "principal obligation […] to take steps to achieve *progressively* the full realization of the right to food"[18]. In order to fulfil this principal obligation, three different obligations, which the right to adequate food imposes on state parties, can be differentiated. Firstly, the obligation to respect existing access to adequate food. Secondly, the obligation to protect individuals against any threats by businesses or individuals to interfere with their access to adequate

13 EIDE, A., *Adequate Standard of Living*, In: MOECKLI, D., SHAH, S. and SIVAKUMARAN, S. (Edit.): International Human Rights Law, 2018, p. 191.

14 CESCR, General Comments No. 12…, Op. Cit., para. 8.

15 Ibídem, para. 13.

16 Ibídem, para. 7.

17 Ibídem, para. 6.

18 Ibídem, para. 14. Original emphasis.

food and, finally, the obligation to fulfil, which can be split into the obligation to facilitate adequate food and the obligation to provide adequate food. Here, to facilitate means to strengthen the existing possibilities of access but also to facilitate activities that guarantee food security and people's livelihood. By contrast, the obligation to provide adequate food specifically tackles situations in which people themselves are unable to enjoy their right; for example, in the case of a natural catastrophe[19]. Thus, a violation of the right to food might be any kind of legislation that leads to a denial or a suspension of access to food, as well as a failure to regulate private businesses and hold them accountable for acts that restrict people's access to food, prevent people from earning a livelihood, or allow the trade of unsafe food[20]. As these obligations hold the state parties ultimately accountable, the CESCR also clearly states that all parts of society have the responsibility to recognize the right to adequate food. Additionally, it explicitly refers to the national and transnational business sector obligation to conduct business in a way that respects the right to adequate food[21]. In that regard, it is interesting to see how private voluntary standards work because it may be that some of them provide helpful function for the realization of the right to food but the opposite is likewise possible. However, before turning to see how private voluntary standards affect the right to adequate food, it is important to clearly define what is meant by these standards.

3. Private Voluntary Standards

Mostly, when the term "voluntary private standards" is used in literature it means a standard that is backed up by a certification that proves whether the standard is met or not. This covers a wide variety of standards but they have several things in common. First, they are not legally binding, but they may be required as de facto standard to enter a supply chain[22]. Second, private actors such as companies, non–governmental organizations (NGOs), associations of

19 Ibídem, para. 15.

20 Ibídem, para. 19.

21 Ibídem, para 20.

22 WTO, World Trade Report 2012, p. 14.

companies, or a multi–stakeholder entity set these standards, not governmental agents. Consequently, this article excludes ISO–standards since the International Organization for Standardization (ISO) is not strictly private because some members are public organizations.

The issues the standards are concerned with are very diverse but, in general, it is possible to differentiate two functions; first, the management of risks and, second, the differentiation products. In addition to that, two different aims of standards can be found. Those are food safety on the one hand, and attributes not related to food safety on the other hand. Thus, there are four possible combinations of the two functions and the two goals[23]. The ones covering attributes not related to food safety are often concerned with different aspects of sustainability, such as workers' rights, environmental protection, and fair trade conditions.

As the standards pursue different aims and serve different functions, they differ in several ways from one another.

Usually standards are invisible to the consumers but have high importance in business–to–business (B2B) relations when they are meant to cover food safety and are used as risk management tools. Due to efficiency issues, these kinds of standards are predominantly set collectively by retailers who have a strong interest in maintaining the consumers' trust in the safety of the food they sell. From the perspective of the retailers, it is more efficient to share the costs for developing the standards since these standards are not meant to cause competition against other retailers[24]. Instead, they set standards for the whole value chain that the suppliers to the retailers have to meet and, hence, increase the competition between the suppliers.

Other standards set by retailers are used for product differentiation, which means these standards promote certain characteristics of the product or its production process that consumers are willing to pay for. Labels and certificates show these standards to consumers. Often the characteristics are related to fair trade or sustainability issues. There are also standards that mix food safety

23 HENSON, S., HUMPHREY, J. – *Understanding the Complexities of Private Standards in Global Agri–Food Chains as They Impact Developing Countries*, Journal of Development Studies (2010) 46 (9) 1628, p. 1636.

24 Ibídem, p. 1637.

attributes and other attributes for product differentiation. Individual firms, NGOs, or multi–stakeholder initiatives usually set standards like these[25]. Working conditions or environmental safety can be covered by standards without being meant for product differentiation, but only for the use in B2B relations, so they are invisible to the final customer. There are not many of those standards but, for example, a national group of producers might set them to compete against other groups of producers[26].

Standards that use food safety for product differentiation are rare because it is an attribute that consumers already expect to be fulfilled and they are not willing to pay a price premium for over–achievements. Nevertheless, some groups of producers have developed such standards, specifically after food scandals such as BSE, to restore consumers' trust[27].

In sum, the requirements of flexibility, quality, and delivery of food have constantly risen, which increases costs for producers. As a result, smallholders are especially affected since they usually lack both opportunities to use economies of scale and proximity to the market, both geographical and in regard to the information side of the given market. Additionally, smallholders' standard of education is often quite low, which means they are reluctant to use new technologies and have difficulties obtaining capital and information. Thus, they often are weak in negotiations. Smallholders are also more risk–averse because they lack large amounts of savings and are often placed on inferior land without access to irrigation[28]. In addition to that, due to bad infrastructure such as roads and lacking cooling facilities close to the farms, smallholders cannot guarantee stable quality, which makes them unattractive as suppliers for large retailers[29]. Standards differentiating the products are visible to the consumers and usually

25 Ibídem, p. 1638.

26 Ibídem, p. 1639.

27 Ibídem, p. 1638.

28 JAFFEE, S., HENSON, S., DIAZ RIOS, L.– *Making the grade: Smallholder farmers, emerging standards, and development assistance programs in Africa, a research program synthesis*, World Bank Documents & Reports, No. 62324–AFR (2011), p. 27.

29 WORLD BANK – *Horticultural Producers and Supermarket Development in Indonesia*, Report No. 38543–ID (2007), p. vii.

set by multi–stakeholder initiatives, NGOs, groups of producers, or individual firms, specifically retailers. By contrast, groups of retailers or producers usually set standards that are used in B2B relations. Thus, the participation in the standard setting is very different, as well as the market level in which competition is increased by the standards. Standards that are used in B2B relations usually increase the competition on the producer level while visible standards in the business–to–consumer (B2C) relations increase the competition on the retailer level. Regardless of which level the competition is increased by the standards, the costs for their implementation is mostly passed on to producers because retailers have the market power due to their power of demand[30], and thus the standards they demand can be de facto mandatory, even if they are legally voluntary. How this and other effects of private voluntary standards affect human rights and especially the right to food is covered in the next section.

4. Impacts of Private Voluntary Standards on the Right to Food

As the private voluntary standards are usually certified, there are five different steps to perform a standard, which may affect the right to food.

First, the process of setting the standard in the beginning, meaning one or more entities discussing certain rules and requirements for procedures and putting a final version down in writing;

Second, is adoption of the standards, meaning that an entity which may be the same as the entity that has set the standard has decided to use the standard. For example, a retailer that wants to satisfy the consumers' demand for organic production, or an association of exporters from a country wants to protect the image of the product or brand from exporters that use forced labour;

Third, is implementation, meaning the application of the rules and procedures, usually down the supply chain of the entity that has adopted the standard;

The fourth step is conformity assessment, which is to verify whether the

30 FAO, *The State of Agricultural Commodity Markets – Trade and food security: achieving a better balance between national priorities and the collective good*, 2015, p. 32.

implementation of the entities was successful, so that only those who comply with the standard can make this claim. Usually third party audits are used, which means that an accredited body assesses the entity against the set standard.

Finally, step five is the enforcement of sanctions against those certified who do not comply with the standard in reality. This usually takes the form of an opportunity to align production procedures with the standard and if this is not done in a certain time or is a severe breach of the standard, the recognition and the certification is withdrawn[31].

The right to food is affected in different ways by these steps. The process of standard setting differs from case to case and so does the participation of stakeholders. There are standards that include smallholders, civil society, and companies, but there are also standards that are set by corporations with market power alone or only producer groups.

The consequences of the implementation of standards might have outcomes or impacts on different human rights. For example, a standard may prevent child labour or a standard to reduce fertilizer can have positive impacts on water resources. Likewise, there might be positive effects on the right to food. Some standards ensure food safety for exported food in order to guarantee the right to food to the final consumers[32]. Most of these standards are not visible to northern consumers but are B2B standards developed to coordinate the supply chain and manage food safety risks. European retailers are aware of the fact that food safety is not an attribute that should be used to compete against other retailers because it may lead to a general erosion of consumers' trust in retailers[33]. Those standards usually do not increase the income of the producers.

31 HENSON, S., HUMPHREY, J. – *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries…*, Op. Cit., p. 1631.

32 HALABI, S. F., LIN, C.-F., *Assessing the Relative Influence and Efficacy of Public and Private Food Safety Regulation Regimes: Comparing Codex and Global GAP Standards*, 72 Food & Drug L.J. 262 (2017), p. 278 ff.

33 HENSON, S., HUMPHREY, J., *Codex Alimentarius and private standards*. In: B. M.J. van der Meulen (Edit.): Private Food Law, Wageningen Academic Publishers 2011, p. 161.

By contrast, producers usually carry the lion's share of the costs[34]. Nevertheless, it is possible that producers benefit from such standards as well, if the standard helps to improve the quality of the product. As a result, the producers can get a better price which leads to an increase of income for farmers[35]; thus, to a more secure access to food. Similar effects are achieved by standards that pay price premiums to farmers; mostly standards that refer to aspects of social and economic sustainability. These standards and improved trading relationships based on these standards benefit the stability of access to food because long–term trade relations allow better planning and help to mitigate the effects of price volatility[36]. Gaining information on markets, training, and skills can increase the quality of products, the efficiency, and the yield of farmers, which all contribute to secure the income necessary for the access to food[37]. Since some standards demand that farmers group together in an organization, this can also improve the farmers' situation because they gain bargaining power and might be able to reduce costs by sharing machinery or gaining access to financial and technical support[38]. In sum, private voluntary standards can be beneficial for farmers to improve their income, thus improving their access to food. They can also be beneficial for consumers because they provide food safety, which means consumers can enjoy their right to adequate food.

However, the consequences of the implementation of standards might also have negative effects. In particular, the high costs to implement the standard are problematic. Some smallholders cannot afford all the necessary changes, which means they will fail to comply with the standard. As the standard is a requirement to enter the supply chain, the failure to comply with the standard would result in the loss of their livelihood. This means that implementation of standards creates the risk that some smallholders lose their access to adequate food. The problem with high costs also relates to the fourth step, the conformity

34 BLACKMORE, E., KEELEY, J.– Pro–poor certification – Assessing the benefits of sustainability certification for small–scale farmers in Asia, IIED, 2012, p. vi.

35 Ibídem, p. 7 f.

36 Ibídem, p. 8.

37 Ibídem, p. 10.

38 Ibídem, p. 8 ff. w.f.r.

assessment. The costs of these audits can be a problem, especially for smallholders[39]. As smallholders likely live in poverty, their livelihood and their access to food depend strongly on the global value chains of which they are a part off [40].

To sum it up, private voluntary standards affect the right to food for two different groups: the consumers of the food and the producers of the food. For consumers, private voluntary standards can help provide access to safe food, which relates to the aspect of quality and safety in the right to food. For producers, the focus is more on the access to food. The implementation of private voluntary standards can improve the income farmers generate from their land, and thus strengthen their access to food. Private voluntary standards can also impinge the right to food by way of the high costs for the implementation and conformity assessment, resulting in some farmers, in particular small–scale farmers, losing income which means they lose access to food.

Hence, private voluntary standards can improve and worsen the situation concerning the right to food, especially the access to food. As the states are primarily obliged to guarantee access to food, the next section will deal with the states possible avenues to mitigate the negative effects of private voluntary standards, and then discuss what obligations the private entities have that develop, use, and enforce the standards.

5. Obligations and options to mitigate negative effects

Primarily, the right to food creates obligations of the states. Since the states do not set the standards themselves, the obligations are not about the duty to respect the standards, but more the duty to protect individuals against the violation of their rights by private actors. Due to these obligations, states have to create a legal framework that allows individuals to enjoy their right to food. Thus, states have the duty to regulate the private voluntary standards. However, this may be not as easy as it sounds for the following reasons.

The countries in which the negative effects of the private voluntary standards occur are the ones in which the producers are based. Because the producers

39 Ibídem, p. 12.

40 FAO, *The State of the Agricultural Commodity Markets*, 2015–16, p. 33.

voluntarily, from a legal point of view, accepted the standards, it is difficult for the countries to implement regulations. To ban the use of private voluntary standards would not help, because the retailers would just change their supply sources. Hence, the result would be the same or even worse as all producers then lose their income, and therefore access to food. Furthermore, it would also destroy the positive effects the standards may have on some producers in the country. Therefore, to prohibit the use of the standards is not sensible for less developed countries. However, there are some options that the governments have. The governments could try to use the standards in their development policy. Several countries have chosen this approach: Chile took the Global G.A.P. standard and benchmarked its own standard against it. Around 2000, different organizations such as the Fruit Development Foundation (a research institution founded by Chilean exporters–growers of fresh fruits), the Chilean Fresh Circuit Association (CFFA), and the Association of Exporters (ASOEX) in Chile lobbied the Chilean Ministry of Agriculture to support Global G.A.P. As a result, in 2003, Chile GAP was launched, which is a national certification standard[41]. The private and the public sector in Chile worked together to support and to develop this national standard to harmonise USA and European requirements, thus making market access to industrialised consumer markets easier by lowering the costs. Fulfilling Chile GAP is legally binding according to Chilean law but the certification is voluntary. Even if the Chilean government is not actively involved in the certification process, it supports growers and exporters to meet international standards and regulations. It also set up a program helping particularly small–scale farmers to fulfil the standards' requirements and to become certificated. Nevertheless, there remain some challenges with the standard relating to the high implementation costs[42]. Launching programmes that help small–scale farmers to fulfil the standards' requirements by providing financial support is also one option for countries to protect the right to food. However, since not all countries have the financial abilities, it is not a silver bullet to solve the problem. Furthermore, the lack of information farmers have on the

41 CARRERA, A.C., *Global G.A.P. and Agricultural Producers: Bridging Latin America and the European Union*, 21 Drake Journal of Agricultural Law 155 (2016), p. 170.

42 Ibídem, p. 171 f.

different standards is also an issue that governments can mitigate by providing information to farmers who can then engage in a dialogue with the standard setters to lobby their producers' interests; in particular, if producers are not formally part of the standard setting process.

However, while the governments in which the producers lose income –and therefore access to food– can financially support producers, make sure producers know about the standards' requirements, and lobby for producers on the international level to create multiple options in which to sell their products, these governmental actions are not really regulating the standards. As the standard operators are usually not based within the jurisdiction of these countries, this is not possible.

Voluntary private standards are usually developed by a legal entity in the global north. For example, Global G.A.P. is registered in Germany as a private company, the Marine Stewardship Council is registered as private company in London, and the Social Accountability International (SAI), which sets the SA8000 standard, is registered as an NGO in the USA. Therefore, the states that would have to regulate these standard developers are Germany, the UK, and the USA. Taking a closer look, their legal framework eventually demanded, or at least incentivised, the development of the private voluntary standards[43]. Making the retailers liable for the food they sell, put pressure on them, which they try to evade by setting up compliance structures in the form of standards and certifications. As the reasons for this kind of regulation was to prevent food scandals, and therefore to make sure that the sold food is safe for human consumption[44], this can be seen as protecting the consumers in the global northern countries right to food. Simultaneously, it affects small–scale producers in the global south. This raises the question of whether these northern states also have an obligation to protect the right to food beyond their jurisdiction.

From a logical point of view, that would be the easiest answer to the problems that southern countries face because they cannot regulate the standards themselves. By contrast, the northern states in which the standards are based could regulate them in various ways. They could oblige the entities that develop

43 HENSON, S., HUMPHREY, J., *Codex Alimentarius and private standards…*, Op. Cit., p. 153 ff.

44 HENSON, S., *Private Standards in Global Agri–Food Chains*. MARX, A., MAERTENS, M., SWINNEN, J., WOUTERS, J. (Edit.): Private standards and global governance, Edward Elgar Publishing 2012, p. 104 ff.

the standards to carry out human rights assessments, so that the standard setters are aware of the effects their work has, particularly on those who are not using their standards. In addition, an obligation to include the affected parties in the standard setting process could help, as this would offer the possibility to tailor standards to the needs of the producers *and* the retailers. Being aware of the potential problems their standards cause for smallholders, some standards have introduced programmes tailored to the needs of smallholders. Such programmes can include financial support for the investments, the possibility of group certifications, and trainings[45]. Making impact assessments and supporting instruments mandatory for standard setters could help to avoid negative impacts on the right to food. The same potential regulations could be applied to retailers that are not concerned with standard setting but only adopting a given standard. For example, a German food retailer that might use the Marine Stewardship Council standard, which is based in the UK.

However logical and practical these suggestions might be, the question remains as to whether there exists any obligation for these states to implement such procedures and programmes because the northern states do not typically experience a potential restriction of access to food in their jurisdiction.

The Human Rights Committee has encouraged Germany to stipulate clear rules to respect human rights to all businesses based in Germany[46]. Concerning Canada, the Committee used even stronger language:

> "The State party should(a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad"[47].

45 FIORINI, M., SCHLEIFER, P., TAIMASOVA, R. *Social and environmental standards: From fragmentation to coordination*. International Trade Centre, Geneva 2017, p. 11.

46 CCPR, Concluding Observations on Germany, CCPR/C/DEU/CO/6, 12 November 2012, para. 16.

47 CCPR, Concluding Observations on Canada, CCPR/C/CAN/CO/6, 13 August 2015, para. 6.

This seems to lead to the conclusion that, in principle, home states have a duty to protect individuals from being harmed by domestic businesses operating abroad. Yet, this refers to the ICCPR and not the ICESCR but the statement in article 2(1) that states have to progressively realise the rights of the ICESCR individually and through international cooperation, can be read as meaning that states should step away from anything that impinges these rights because that would not help in realising the rights and be anti–cooperative[48]. Reading this as an obligation of the home states of voluntary private standards to respect human rights means that these states have to consider extraterritorial human rights in their actions. That could suggest that home states should refrain from setting standards that impinge human rights abroad or support businesses that set such standards, e.g. by subsidising them or promoting the standards through development agencies. From the point of view that human rights are deemed to be universal, and the fact that the right to food is essential to enjoy any other right in the long term, it makes sense to say that there is at least a duty to respect the right to food extraterritorially.

According to the CESCR, state parties also have a duty to protect rights in other states because in General Comment 15, regarding the right to water, it says that states should "prevent their own citizens and companies from violating the right to water of individuals and communities in other countries"[49]. As food is as fundamental to the existence of humans as water, this should be transferred to the right to food as well. Thus, home states of standard setters and standard users have to make sure that businesses that use their standards avoid negative effects, also on those who are not using the standards. Providing assistance to producers and their governments through state aid or developmental aid, e.g. by financing a programme of the International Trade Centre that supports smallholders' certification, is also a way in which home states could assist in avoiding the negative effects of private voluntary standards[50].

48 JOSEPH, S., DIPNALL, S., *Scope of Application*. In: MOECKLI, D., SHAH, S. and SIVAKUMARAN, S. (Edit.): International Human Rights Law, 2018, p. 126.

49 CESCR, General Comment No. 15: The Right to Water (articles. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para. 33.

50 See http://www.intracen.org/news/Kenyan–avocado–farmers–receive–GlobalGAP–certification/ [accessed on

Stating that there also exists a duty to fulfil ICESCR rights extraterritorially is very controversial because that would mean that rich states must support poorer states. The CESCR sees a duty of the states to assist other states if they are capable, but to determine the exact conditions of this duty is almost impossible[51]. Yet, the 2030 Agenda of Sustainable Development[52] and the Declaration on the Right to Development[53] can be read as if there were such a duty, while still leaving open the question of what exactly is a rich country and how it has to support whom.

The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights are not binding and cannot be signed by states but should be seen as guidance and moral argument[54]. According to principle 9 of the Maastricht Principles, states are responsible under certain conditions:

> "A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
>
> a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
>
> b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
>
> c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law".

17 April 2019].

51 JOSEPH, S., DIPNALL, S., *Scope of Application…*, Op. Cit., p. 127.

52 UN General Assembly Resolution 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (21 October 2015).

53 UN Declaration on the Right to Development, particularly article 4.

54 JOSEPH, S., DIPNALL, S., *Scope of Application…*, Op. Cit, p. 128 w.f.r.

According to this, home states of standard setters and users have extraterritorial duties because they could mitigate negative effects on the right to food by regulating the standards and financially supporting affected people.

In sum, there are good reasons to argue that also those states, where the retailers and the standard setters are based, have obligations to mitigate the negative effects of private voluntary food standards.

6. Conclusion

Private voluntary food standards are a double–edged sword in terms of the enjoyment of the right to food. As positive as some of the standards' effects may be – improved traceability and thus improved food safety – there are also potentially negative effects that could deprive smallholders of their access to food. Yet, private voluntary food standards are not designed to violate the right to food. In contrast, they are meant to be tools that help promote the right to food for some. However, they can also have negative effects on the same right for others. Thus, in some cases, private voluntary food standards may promote and impinge the right to food at the same time. It should be possible to design private voluntary food standards in such a way that small–scale farmers can use them to improve their production, and thus improve their access to food. Providing information on the existence and requirements of the standards, giving financial support, or using them as development tools are just some possible options to mitigate potential negative effects. While there are standards that already have some of these features, from a human rights perspective, some standards still have to improve. If the standard setters do not see this demand or are not willing to change the standard, it is the states' obligation to take steps to change this. Because there is a margin of appreciation regarding the states' options to promote the right to adequate food[55], taking the context in which the standards operate into account, coordination and exchange of information is particularly important to reach positive results.

There is also a need for further research. Although some standards have

55 MÈGRET, F., *Nature of Obligations*. In: MOECKLI, D., SHAH, S. and SIVAKUMARAN, S. (Edit.): International Human Rights Law, 2018, p. 02 f.

been subject to case studies, meta–studies on the effects of the different features of various standards are widely missing, making comparing standards a difficult task. Most of the case studies focus on the potential exclusion of smallholders from the supply chain, yet often not from a legal perspective. Moreover, studies systematically assessing the impacts of different forms of standards on the human rights situation apart from the exclusion of smallholders are widely missing. Indeed, the right to food is not the only human right that those standards can have an impact on. Thus, another open field for further research is to assess the standards against other human rights and see what options exist to mitigate potential negative effects. As the standards are constantly evolving and changing, research sees particularly indicated.

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Enforced Disappearance in Argentina: a Human Rights Approach on the Case of Luciano Arruga[1]

Desapariciones forzadas en Argentina: un enfoque de derechos humanos en el caso de Luciano Arruga

Received: 19/08/2019 – Accepted: 07/11/2019

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1 The present text is the result of extensive conversations with Prof. Dr. Laura Clérico and filmmaker Ana Fraile. On one occasion we were invited to participate in the screening of the Film, *¿Quién mató a mi hermano?* (Who killed my brother?), during the Lateinamerikafilmtage in Nuremberg, Germany on the 9th of February 2019. See: Creating Rights, Who killed my brother?, The story of Luciano Arruga, 6 February 2019, available in: https://creatingrights.com/tag/luciano-arruga/, last visited 2 August 2019, also for more information see: www.quienmatoamihermano.com. Also, the present article received the valuable comments by Rainer Huhle and Shona Walter.

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Abstract

This article seeks to present a general overview of the provisions of international human rights law that are relevant to better understanding the case of Luciano Arruga´s enforced disappearance in Argentina. First, this article describes a summary of the emergence of the term "enforced disappearance", the context of Argentina in relation to such a crime, and the factual and judicial process of the Luciano Arruga case. It also analyzes United Nations (UN) jurisprudence in order to study the causes and consequences that could have led to Luciano Arruga's enforced disappearance. In addition, this article focuses particularly on the elements of enforced disappearances, children´s rights, and economic, social, and cultural rights, to better understand Luciano Arruga's case. In order to achieve the mentioned objectives, this article studies relevant academic literature, newspaper articles, Non–governmental Organization (NGO) reports, and the UN reports. The argument put forward is that the case of Luciano Arruga is a contemporary form of enforced disappearance.

Keywords: Human Rights; Enforced Disappearance; Luciano Arruga; Economic, social and cultural rights.

Resumen

Este artículo busca presentar una visión general de las disposiciones más relevantes del Derecho Internacional de los Derechos Humanos, para comprender mejor el caso de la desaparición forzada de Luciano Arruga en Argentina. Primero, describe el surgimiento del término "desaparición forzada", el contexto de Argentina en relación a dicho delito y el proceso fáctico y judicial del caso. En particular, analiza la jurisprudencia de las Naciones Unidas (ONU) para entender mejor las causas y consecuencias de su desaparición forzada. Asimismo, centra su análisis en los derechos del niño y los derechos económicos, sociales y culturales. A fin de lograr los objetivos mencionados, este artículo analiza bibliografía relevante, artículos periodísticos, informes de organizaciones no gubernamentales (ONG) e informes de la ONU. El argumento central es que el caso de Luciano Arruga es una forma contemporánea de desaparición forzada.

Palabras clave: Derechos humanos; Desaparición forzada; Luciano Arruga; Derechos económicos, sociales y culturales.

"Everything is etched in our memory
A thorn of life and history
Memory punctures until it makes
Bleed the people who don't let it run free
And not let loose free like the wind".
Leon Gieco (Argentine folksinger and songwriter).

Summary

1. Preliminary considerations

The objective of the present article is to understand the practice of enforced disappearance as a violation of numerous human rights, and this article defines it as a complex crime[1] that needs to be

1 The Working Group on Enforced or Involuntary Disappearances expressed that among the legal obligations of the States, not only should the analysis be focused on the causes of enforced disappearances, but it should also be focused on the context where the crime unfolds. In addition, States should also adopt measures in order to address the structural context in terms of vulnerability that lies beneath the disappearance. See Involuntary disappearances and economic, social, and cultural rights, 9 July 2015, A/HRC/30/38/Add.5, para. 6, See also E/CN.4/1986/Add.1, paras. 42–44.

addressed in connection with economic, social, and cultural rights, as well as children´s rights[2].

2. General overview of the emergence of the term "enforced disappearances" and its scope

Enforced disappearances are widely understood as one of the most serious human rights violations and are also considered by their very nature a crime against humanity[3]. "To disappear" is commonly defined as an act of someone or something ceasing to be visible. The term also relates to synonyms such as dying out, death, extinction, coming to an end, ending, and passing away, among others. It is a concept that can also closely describe what occurs when an external force acts to make the existence of a particular individual invisible. It can also be characterized as a step before becoming dead, slowing fading away. Enforced disappearances not only affects the person who goes missing but also the family members who dedicate their lives to the search for their loved ones. Families,

2 This line of investigation has been elaborated by Clérico and Aldao who argue the urgency to integrate the interpretation of article 19 with article 75, paragraph 23 of the Constitution of Argentina while analyzing the relationship between enforced disappearance and social rights on articles that work with gender and poverty. The article opens the debate between the concepts of autonomy (article 19) and social inequality (article 75 para. 23). See ALDAO, Martín; CLÉRICO, Laura, *Autonomía Hora Cero. Artículo 19 (Autonomía) Ramal Artículo 75, inciso 23 CN (Desigualdades),* en Autonomía y Constitución. El artículo 19 de la Constitución Nacional en debate, ALVAREZ, Silvina; GARGARELLA, Roberto; IOSA, Juan (Coords), Ed. Rubinzal Culzoni, Santa Fe, 2019 (en edición).

3 WGEID: General Comment, Enforced disappearances as a crime against humanity, Preamble, p. 1, available at: https://www.ohchr.org/Documents/Issues/Disappearances/GCas_crime_against_humanity.pdf, last visited, 21. March 2019. Enforced disappearance is also in a provision in the Rome Statute of the International Criminal Court adopted in 1998 and coming into force in 2002 (A/CONF.183/9/1998). Enforced disappearances are enshrined in article 7, 1 (i) and are defined as follows: "enforced disappearances of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time".

while searching for the missing, lose their will to find their whereabouts. The act of making somebody invisible is considered to be one of the worst human rights violations an individual could suffer.

From a historical perspective, the term "enforced disappearances" is generally associated with the dictatorships in Latin America during the 1960s, 1970s, and 1980s. Particularly in the Southern Cone countries, Argentina and Chile[4], due to, among other factors, the proliferation of such practices that resulted in alarming statistics and the unprecedented fight of family members in order to find the whereabouts of their loved ones[5]. Nevertheless, and according to various scholars[6], the origins of disappearances can be traced back to World War II[7]. In particular, the Night and Fog Decree (*Nacht und Nebel Erlass*)[8] issued on

4 According to scholars, the term disappearance was "coined in Chile, because a tone point those of us working for the Peace Committee notice that we were no longer receiving information concerning the whereabouts of some prisoners we were representing. Colleagues from the Peace Committee´s Information Department came to us and said: there are 131 people who have disappeared. And we started using that term". See The emergence of Disappearances as a Normative Issue, Presentation by José Zalaquett, University of Michigan, October 2010, available at: http://humanrightshistory.umich.edu/files/2012/07/Zalquette1.pdf, last visited 20 March 2019.

5 Specifically, long–term military governments which controlled the nations for the following periods between 1964 to 1990: Ecuador, 1963–1966 and 1972–1978; Guatemala, 1963–1985 (with an interlude from 1966–1969); Brazil, 1964–1985; Bolivia, 1964–1970 and 1971–1982; Argentina, 1966–1973 and 1976–1983; Peru, 1968–1980; Panama, 1968–1989; Honduras, 1963–1966 and 1972–1982; Chile, 1973–1990; Uruguay, 1973–1984; and El Salvador 1948–1984.

6 KYRIAKOW, Nikolaus, *An Affront to the Conscience of Humanity: Enforced disappearance in international human rights law*, European University Institute, 2012, p. 25.

7 Nevertheless, and according to scholars, enforced disappearances can also be found under the regime of Stalin, see: see VRANCKX, A.*'A long road towards universal protection against enforced disappearance',* International Peace Information Service (IPIS), 2007, section 2; FINUCANE, B., *'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War'*, The Yale Journal of International Law, 2010, 1 pp. 171–198, at p. 172; KIKHIA, J. *'Enforced Disappearance in International Law: Case Study of Mansur Kikhia'*, XXVII Journal of International Politics and Economics, 2009, pp. 27–39, at p. 28.

8 According to Wilhelm von Ammon, the expert who supervised the Night and Fog program (or in german is understood as "Nacht und Nebel Erlass" with the abbreviation NN) expressed: "the essential point of

the 7th of December 1941 by Adolf Hitler. The decree under this codename was directed against people considered to be political offenders and also members of the national resistance that were secretly transported to Germany. Consequently, these people vanished without leaving a trace and no information was given about their whereabouts[9].

In order to better understand the origins of such a crime, it is also important to mention the General Assembly Resolution 33/173. This Resolution states how enforced disappearance is analysed as a universal issue that has affected different parts of the world[10]. This Resolution called upon the Human Rights Commission "to consider the question of disappeared persons with a view to making appropriate recommendations"[11] and also called upon states to "devote appropriate resources to searching for such persons and to undertake speedy and impartial investigations"[12]. Consequently –after the adoption of a number of Resolutions by the UN Economic and Social Council (ECOSOC), the Commission on Human Rights, and the Sub–Commission on Prevention of Discrimination and Protection of Minorities[13]– the Working Group on Enforced or Involuntary Disappearances (WGEID) was created.

The WGEID was the first UN human rights mechanism with a universal

the NN procedure, in my estimation, consisted of the fact that the NN prisoners disappeared from the occupied territories and that their subsequent fate remained unknown". See: Trials of War Criminals before the Nuremberg Military Tribunals under control council law N. 10 at 1042 (1949). See also HUHLE, Rainer, *Noche y Niebla, Mito y significado, Desapariciones forzadas de niños en Europa y Latinoamérica*, CASADO, María y LÓPEZ ORTEGA, Juan José (cords.), Universidad de Barcelona (2017).

9 SCOVAZZI, T; CITRONI, G., The struggle against enforced disappearance and the 2007 United Nations Convention, 2007, p. 4.

10 UN General Assembly Resolution 33/173, Disappeared persons, 1978. See KYRIAKOU, *An affront to the conscience of humanity: enforced disappearance in international human rights law*, European University Institute, Department of Law, Florence, June 2012, p. 40.

11 UN General Assembly Resolution 33/173, Disappeared persons, 1978, para. 2.

12 Ibídem, para. 1.

13 ECOSOC adopted the Resolution 1979/38, the Commission on Human Rights Resolution 20 (XXXVI), and the Sub–Commission Resolution 5B (XXXII). See also: KYRIAKOU, N., *An affront to the conscience of humanity: enforced disappearance in international human rights law*. Op. Cit., p. 41.

mandate. Furthermore, the WGEID was created with the primary aim of assisting the families in determining the whereabouts of their family members who had disappeared[14]. Presently, the WGEID is responsible for monitoring States in achieving their obligations agreed to under the Declaration on the Protection of All Persons from Enforced Disappearance[15]. In addition, and based on the last WGEID Report presented at the Human Rights Council[16], the WGEID has processed a total of 57,149 cases from 108 States. Those, which are still unresolved, are 45,499 from ninety-two countries and only 404 cases have been resolved[17].

In terms of the progressive development of criminalizing enforced disappearances, it can be said to be concentrated in three core international human rights instruments that focus on this particular issue: the 1992 Declaration on the Protection of All Persons from Enforced Disappearances[18]. the 1994 Inter–American Convention on Forced Disappearance of Persons[19], and the 2006

14 The WGEID was established by the Commission on Human Rights Resolution 20 (XXXVI).

15 See KYRIAKOU, N., An affront to the conscience of humanity: enforced disappearance in international human rights law. Op. Cit., p. 41-47.

16 The United Nations Human Rights Council "is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva. The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly. The Human Rights Council replaced the former UN Commission on Human Rights", available at: https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx, last visited 8 October 2019.

17 WGEID Report, Human Rights Council, A/HRC/39/46, 30 July 2018, note by the Secretariat, p. 1; UN News, Increasing cases of enforced disappearances, just the tip of the iceberg, UN experts group warns, 16 September 2016, available at: https://news.un.org/en/story/2016/09/539172-increasing-cases-enforced-disappearances-just-tip-iceberg-un-experts-group, last visited 14 March 2019.

18 Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly, Resolution 47/133, A/RES/47/133, December 1992.

19 Inter–American Convention on Forced Disappearance of Persons, June 1994. It is important mentioning that this particular instrument has been adopted at the regional level even before the ratification of the UN Convention. In this respect, this event reflects the particular context of the region. The instrument was

International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED)[20]. Another important body that needs to be mentioned is the Committee on Enforced Disappearances (CED) which was established as a monitoring treaty body to supervise the implementation of the rights and obligations of the ICPPED[21].

The complexity of enforced disappearances makes it necessary to understand it in the light of other human rights violations[22]. For example, other rights that may be infringed upon in the course of disappearances are the following: the right to being recognized as a person before the law; the right to liberty and security of the person; the right to not be tortured or subject to other cruel, inhuman, or degrading treatment or punishment; the right to life in cases where the disappeared person is killed; the right to an identity; the right to a fair trial and to judicial guarantees; the right to an effective remedy; the right to know the truth[23]; the right to protection and assistance to the family; the right to an

created to provide specific mechanisms in order to protect the human rights of its population.

20 International Convention for the Protection of All Persons from Enforced Disappearances, General Assembly Resolution A/RES/61/177, UN Doc. A/HRC/RES/2006/1, December 2006. See also CITRONI, Gabriella, *Short–term enforced disappearances as a tool for repression*, Diritto Internazionale Pubblico, 2016.

21 The UN Convention was adopted on 20 December 2006 by the UN General Assembly and entered into forced on 23 a December 2010 "The CED is a body of independent experts which are monitoring the implementation of the Convention. See OHCHR, Committee on Enforced Disappearances. As at 13 August 2019, 98 States had signed and 60 are parties of the Convention, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en, last visited 11 August 2019.

22 As a way of illustration, the connection between enforced disappearances with crimes against humanity can be traced to the Resolution 666 of the General Assembly of the OEA (or OAS–Organization of American States). Particularly, it expresses "that the practice of forced disappearances of persons in the Americas is an affront to the conscience of the hemisphere and constitutes a crime against humanity". See OEA, General Assembly, Proceedings Volume 1, OEA/Ser. P/XIII 0.2. Washington, 1983, p. 69. Examples of these connections can be found in: the Inter–American Convention on Forced Disappearances of Persons, 6th Preambular paragraph; artícle 18 of the 1996 International Law Commission draft Code of Crimes Against Peace and Security for Mankind; article 7, para 1 of the Rome Statute that established the International Criminal Court; article 5 of the UN Convention on the Protection of All Persons Against Enforced Disappearances.

23 The analysis on the right to know the truth is not in the scope of the present article. Nevertheless, in

adequate standard of living; and the right to health and to education[24]. This leads to the following section, which describes Luciano Arruga´s contemporary form of enforced disappearance[25] and how other human rights violations affect and influence the understanding of such a crime.

3. Argentinian context: the case of Luciano Arruga

Argentina during the military rule is known as a notorious example of enforced disappearances due to the on–going trials[26] to prosecute the perpetra-

the particular case of study, the right to know the truth constitutes a relevant factor for further academic research to be considered upon. See: Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearances, A/HRC/16/48.

24 Office of the UN High Commissioner for Human Rights, Fact Sheet No. 6/REV.3, Enforced or Involuntary Disappearances, pp. 3–4.

25 The concept was used by the Committee on Enforced Disappearances in its Concluding observations on the report submitted by Argentina, 12 December 2013, CED/C/ARG/CO/1, para. 15. In addition, "the [Inter–American Commission on Human Rights] and the UN Working Group express their deep concern over the fact that the serious crime of forced disappearances has continued in the era of democratic governments in the region, as well as over the metamorphosis of the phenomenon. While forced disappearances used to be part of "national security" strategies employed against so–called subversive or terrorist groups in the context of serious and massive human rights violations, currently these serious crimes are taking place in other contexts. Organized crime groups such as drug cartels and human trafficking organizations are using disappearances, in some cases in collaboration with State agents, which constitutes forced disappearance". See Inter–American Commission on Human Rights, forced Disappearances: significant progress and major challenges in the region. August 2015, available in: http://www.oas.org/en/iachr/media_center/PReleases/2015/098.asp. In addition, the concept of social disappearances, analyzed by Gatti, explores forms of disappearances in ordinary situations such as being invisibilized, forgotten in contexts of extreme poverty or in situations of human trafficking or slavery. See: GATTI, G., IRAZUZTA, I., y MARTÍNEZ, M., 2019. Introducción. *La desaparición forzada de personas: circulación transnacional y usos sociales de una categoría de los derechos humanos*. Oñati Social Legal Series [online], 9 (2), 145–154. Available at: https://doi.org/10.35295/osls.iisl/0000-0000-0000-1018

26 According to Human Rights Watch Events of 2018, the Attorney General's Office reported 3,007 people charged, 867 convicted, and 110 acquitted of crimes allegedly committed by Argentina's last military junta.

tors responsible for the enforced disappearances while in dictatorship[27]. On the other hand, the Argentinian international relevance and its distinct characteristics are related to the brutal dictatorship that involved human rights violations such as disappearances, summary executions, torture, and unlawful deprivation of freedom. Particularly, and as central features of the repression, the military regime is being blamed for the abduction of young people and infants, some born during the captivity of their mothers[28]; the massive repressions; and the creation of 365 clandestine detention centres[29].

These atrocities provided a fertile ground for the emergence of numerous human rights organizations, such as Grandmothers and Mothers of Plaza de Mayo, Ecumenical Movement for Human Rights (MEDH), Centre for Legal and Social Studies (CELS), Relatives of Political Detainees–Disappeared Persons (Familiares), whose aim is finding the whereabouts of the disappeared. The

Of 599 cases alleging crimes against humanity, judges had issued rulings in 203. […] As of November 2018, 128 people who were illegally taken from their parents as children during the 1976–1983 dictatorship had been identified. Many were reunited with their families. See Human Rights Watch, Event of 2018, available at: https://www.hrw.org/world-report/2019/country-chapters/argentina

27 Argentina's willingness to address enforced disappearances is shown by being one of the first signatory member States of the UN Convention. In addition, according to scholars, the prosecution of the perpetrators is the result of the following elements: "strong HROs (Human Rights Organizations), executives who support human rights, a significant amount of judges willing to prosecute, sensitivity to the international human rights law and to regional developments and IAHR (Inter–American Human Rights) system and effective memory policies". See BALARDINI, Lorena, CELS – Universidad de Buenos Aires, Prepared for delivery at the 2014 Congress of the Latin American Studies Association, Chicago, IL May 21–24, 2014, p. 20.

28 According to Kirsten Weld, "In Argentina, pregnant women detained in torture centres like the Navy School of Mechanics […] (ESMA), were kept alive long enough to give birth, whereupon their infants were taken away and placed with army families in order to 'eradicate the seed' of subversion". See: WELD, Kirsten, *Forced Disappearance in Latin America, Because they were taken alive*, Revista, Harvard Review of Latin America, available at: https://revista.drclas.harvard.edu/book/discovering-dominga, last visit 20 March 2019. See also: BYSTROM, Kerry; WERTH, Brenda, Stotel Children, Identity Rights and Rhetoric, Berlin, available at: http://www.jaconlinejournal.com/archives/vol33.3/2Bystrom.pdf, last visited 10 March 2019.

29 See CONADEP, Nunca más report and indictment in case N 2637/04 Vaello, Orestes Estanislao y otros s/ privación ilegal de la libertad agravada.

Permanent Assembly for Human Rights (APDH) and the Argentine League for the Rights of Mankind (LADH) existed before the military coup. Their primary roles were to find the whereabouts of the disappeared, their prompt release, international reporting, and the peremptory request for criminal accountability for past human rights violations during the military era. The symbolism and activism of social movements were, during that time and at present, transcendental key players in forming the public discourse and shaping the memory of the Argentinian population[30].

Since December 1983, Argentina has had an elected government and its democracy has slowly reinstituted. In terms of truth[31] and justice[32], prosecutions of former officials implicated in crimes were possible due to a series of actions promulgated by the Congress, the Supreme Court, and federal judges annulling amnesty laws of "full stop" and "due obedience"[33]. Confronting past abuses resulted in 3007 people charged, 867 convicted, 110 acquitted of crimes allegedly committed by Argentina´s last military

30 As Huneeus describes it, "the human rights movements of the 1980s, which focused on the violations of fundamental rights such as torture and disappearances, did not spill over into other areas of rights. The dictatorship–era nongovernmental organizations have only in recent years taken on new kinds of causes, "such as the ones who assisted in the search of Luciano Arruga".

31 President Alfonsín, immediately after winning the 1983 election, organized the National Commission on the Disappearances of Persons (CONADEP) in order to investigate the disappearances and deaths that occurred during the military dictatorship.

32 See FILIPPINI, Leonardo, *La persecución penal en la búsqueda de justicia*, in Hacer justicia: nuevos debates sobre el juzgamiento de crímenes de lesa humanidad en la Argentina, 1 ed. Buenos Aires: Siglo Veintiuno Editores, 2011; VERBITSKY, Horacio *Entre olvido y memoria*, in ANDREOZZI, G. (coord.), *Juicios por crímenes de lesa humanidad en Argentina*, Atuel, Buenos Aires, 2011; FERNANDEZ MEIJIDE, *La historia íntima de los derechos humanos en Argentina*, Sudamericana, Buenos Aires, 2009, among others.

33 "The three–judge appeals panel unanimously affirmed a March 6 decision by Federal Judge Gabriel Cavallo that found the 1986 and 1987 amnesty laws to be unconstitutional and contrary to Argentina's international human rights obligations. The Federal Court ruling allowed the first trial since 1987 of an officer for torture and 'disappearances' committed during Argentina's so–called dirty war to proceed, and opened the door to further prosecutions". See Human Rights Watch, Reluctant Partner: the argentine Government´s Failure to Back Trials of Human Rights Violations, January 2006.

dictatorship. Out of a total of 599 cases of crimes against humanity, 203 had rulings issued by judges[34].

Despite the redemocratization of Argentina over the last thirty–six years, human rights violations such as torture, disappearances, and murder still persist[35]. Those practices, which were also conducted under the military dictatorship, still continue to affect the Argentinian population. By way of illustration, and according to the CELS and the Coordinator Against Police and Institutional Repression (CORREPI)[36], more than 200 people have disappeared by cause of security forces in Argentina between 1983 and 2018[37]. Approximately 6564 people have been killed by the State and its security forces since the democratic era from 1983 to February 2019[38].

For the purpose of this article, after describing the context of Argentina from a historical perspective, it is necessary to analyse the case of Luciano Arruga. The push for addressing his disappearance can be attributed not only to the context where the crime took place but it can also be attributed to a strong network of human rights organizations and his family who together played a key role in searching for the truth in the pursuit of justice[39].

34 See Human Rights Watch, Events of 2018, available at: https://www.hrw.org/world-report/2019/country-chapters/argentina, last visted 12 August 2019. See also, FILIPPINI, Leonardo, *La persecución penal en la búsqueda de justicia*…, Op. Cit., p. 21.

35 See LESSA, F. *Beyond transitional justice: exploring continuities in human rights abuses in Argentina between 1976 and 2010,* Journal of human rights practice, 3(1), 25–48, 2011.

36 CORREPI means Coordinadora contra la Represión Policial e Institucional (Coordinator Against Police and Institutional Repression).

37 CORREPI, 2012. Informe anual de la situación represiva. Available at: http://correpi.lahaine.org/?p=1165, last visted 10 August 2019, also see CORREPI, A las calles contra la represión, Antirrepresivo 2018, informe de la situación represiva nacional, p. 29.

38 CORREPI, A las calles contra la represion…, Op. Cit., p. 21. See also CELS (Centre for Legal and Social Studies) Derechos Humanos en Argentina Informe 2019. Buenos Aires: Siglo Vientiuno.

39 As a consequence of their exposure, they have often been subject to reprisals and harassment not only by the security forces but also from the people of Luciano Arruga´s neighbourhood.

4. The case of Luciano Arruga

Despite the fact that the Judiciary of Argentina has not held anyone responsible for the disappearance of Luciano Arruga, the case is considered a crime of enforced disappearance[40]. Due to many reasons, which will be described in the following section, there is strong evidence presented in the judicial case that he was illegally deprived of his liberty by police agents of Lomas del Mirador followed by the refusal to provide information of his whereabouts[41]. Before his disappearance, and in order to better understand the case, Luciano Arruga's background and the event leading up to the case will be reconstructed in the following paragraphs.

Luciano Arruga, a 16–year–old boy, was last seen on the 31st of January 2009, at around 1:30 am close to his house. Luciano Arruga lived in a 6 square meter brick house with his mother and two brothers in Lomas del Mirador, La Matanza, Buenos Aires Province. Luciano Arruga´s house, among other necessities, did not have a toilet[42]. Consequently, Luciano Arruga, in order to

40 "The case of Luciano Arruga has been recognized by the three branches of the State as a case of enforced disappearance", see CELS, 24 April 2014, Habeas Corpus por la desaparición forzada de Luciano Arruga.

41 See CELS, Extracto del habeas corpus presentado por el Centro de Estudio Legales y Sociales en representación de Luciano Arruga. Also, see: FERNÁNDEZ, Bettina; ENCINA, Diego, *Desaparición forzada de persona: una herida que Vuelve a sangrar,* Pensamiento Penal, also see: CFCP, Sala IV, 11/07/2014, "ARRUGA, Luciano Nahuel s/ recurso de casación", causa N°19327/2014, Reg. N°1447/14. The Judge Juan Carlos Gemignani expressed in Luciano Arruga's case that "in cases such as this one, in which serious human rights violations can be observed, Argentina is internationally obliged to clarify the facts and to identify those responsible, punish such atrocious acts and grant compensation to the families, especially in such a case of enforced disappearance". He also argued that "the State needs to adopt measures with the aim at complying with the international standards and promptly investigate the cause and conditions of the disappearance of the minor Luciano Nahuel Arruga, while informing his family members, who have the right to know the truth and punish those responsible for such acts." Likewise, Judge Gustavo M. Hornos also argued that "the Argentinian State is obliged to investigate and sanction those responsible whenever there are reasonable grounds to suspect that a person has been subjected to enforced disappearances".

42 Quién oyó gritar a Luciano Arruga?, Revista Mu, 28 October 2019, available at: http://www.lavaca.org/mu29/quien-oyo-gritar-a-luciano-arruga/, last visited 2 August 2019.

use a restroom[43], used to go to the petrol station nearby (the same place where police officers used to stop)[44], or alternatively to his sister, Vanesa's, house which was ten blocks away from his house. The neighbourhood "12 de Octubre" is considered to be quiet, residential, and have good infrastructure. One of the "two exceptions" is "La Villa 12 de Octubre", where Luciano Arruga´s house is specifically located. "La Villa 12 de Octubre"[45] has been described as a small and informal shantytown, with a very high population density and narrow streets and houses when compared to the entire area of Lomas del Mirador[46]. The neighbours from the wealthier areas demanded more security, and in order to fulfil their wishes, a separate police force was created[47].

According to his older sister, Vanesa, and mother, Mónica Raquel Alegre, on numerous occasions the police offered Luciano Arruga to work for them

43 CELS, Extracto del habeas corpus presentado por el Centro de Estudios Legales y Sociales en representación de la familia de Luciano Arruga, p. 2, available at: http://www.cels.org.ar/common/documentos/HC%20Luciano%20Arruga.pdf, last visited 2 August 2019.

44 The corner between the streets of Avellaneda and Mosconi, is the location of the Petrol Station that Luciano Arruga used and was also frequently used by the police officers. Based on a witness statement: "in January 2009 various police cars were stopping by the petrol station. There were so many that it actually looked like a Police Station" (Victorio Sequeira, fs. 3522).

45 The CESCR defines poverty as: a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other economic, social, and cultural rights". See: CESCR, Poverty and the International Covenant on Economic, Social and Cultural Rights, para. 8, Statement adopted by the CESCR on 4 May 2001, E/C.12/2001/10.

46 Portal Argentina, Barrio 12 de Octubre (Lomas del Mirador), available at: https://nuestraciudad.info/portal/Barrio_12_de_Octubre_(Lomas_del_Mirador). La_Matanza.BA, last visited 2 August 2019. To better understand the social context of Lomas del Mirador, see Rodríguez Alzueta, La vecinocracia, el punitivistmo de abajo, expression antipolítca de la democracia, 10 February 2019, El cohete a la luna, Also see: RODRIGUEZ ALZUETA, Esteban, Vecinocracia, Olfato Social y linchamientos, Universidad de Quilmes, 2019.

47 On the 28th of December 2011, the police station was finally closed and transformed a month later into a Memory space as a symbol of the defense of human rights. See ANRed, Cierre del Destacamento policial de Lomas del Mirador, 28 December 2011, available at: https://www.anred.org/?p=21626, last visted 2 August 2019.

"illegally", but he refused to do so. As a consequence of his denial, the police arrested him on at least two occasions. The first time he was arrested was on the 22nd of July 2008, where he was taken to the police station in Don Bosco. The second time he was arrested, exactly two months later, was on the 22nd of September 2008. On this occasion, he was taken to the police station in Destacamento de Lomas del Mirador, and based on his sister´s statement, he was beaten up while she was waiting for him to be released[48]. After the incident, the same police officers stopped Luciano Arruga repeatedly. It is worth mentioning that the police station in Destacamento de Lomas del Mirador where Luciano Arruga was arrested and taken to was at that time not authorized to detain persons, therefore in that respect, there was no legal framework to have Luciano Arruga deprived of his liberty.

To better understand the context of Luciano Arruga´s disappearance, according to CELS in terms of national security in the Buenos Aires Province and Capital Federal, there was an increase in the criminalization of poorer sections of the population. For example, people from excluded neighbourhoods, boys of poorer sectors, and also the homeless were targeted by official repressive policies, especially during 2009[49].

According to the judicial case, the day Luciano Arruga disappeared, his mother, Mónica, filed a missing person's report at the police station in Lomas del Mirador, where they processed it as "determination of the fate and whereabouts" of a missing person[50]. That morning Mónica started looking for her son at 5am, not only in the "12 de Octubre" neighbourhood, but also in various hospitals and police stations in the area.

Meanwhile, on the same day of Luciano Arruga's disappearance, at 3:21am

48 On the 7th of January 2013, Julio Diego Torales was arrested because of his involvement in the first detention and torture suffered by Luciano Arruga in 2008.

49 Garber, Carolina, Pol, Luciana, Violencia institucional y políticas de seguridad: refuerzo de las corporaciones y estigmatización de los secotres más vulnerables de la sociedad, CELS, Informe 2010, Derechos Humanos en Argentina, p. 125.

50 Not only did Luciano Arruga not have an identification card when he was victim of torture, but he also did not have one when he was killed the night of the 1st of February 2009, see Télam, Luciano Arruga, el chico que nadie quiso buscar, 28 December 2014.

a car on the highway (in the crossing of General Paz and Emilio Castro) hit Luciano Arruga[51]. As a result of the accident, he was taken to the Santojanni Hospital. According to the driver who was involved in the accident, Luciano Arruga "was running desperate, disoriented, as if he was escaping from somebody"[52]. Another witness at the scene, also mentioned in the judicial case that even though he saw a police car, the police agents stayed away from the scene[53]. The same night of the accident, Luciano Arruga´s family was also at the hospital where he was placed. Unfortunately, they were informed that there was only one man who entered the hospital, between the ages of twenty–five and thirty, who was run down by a car. Because the age did not match, the family kept looking elsewhere. Luciano Arruga died on the 1st of February 2009 at 5:30 am, and neither the family, nor the three branches of the State were aware of it[54]. Because he did not have any kind of personal document for identification[55], he was initially registered in the hospital without a name. Subsequently, Luciano Arruga´s fingerprints were taken and he was finally buried in May of 2009 in the Chacarita cemetery in an unmarked grave. As Luciano´s identity was unknown at his burial, the family continued the search of his whereabouts.

In February of the same year, Mónica filed a habeas corpus petition arguing the disappearance of her son during the early morning hours of the 31st of January was unlawful. Furthermore, the mother also claimed the constant

51 According to the person who hit Luciano, "he was running desesperated, as if he was escaping from someone". See: La Nación, Reconstruyeron el momento en el que Luciano Arruga fue atropellado, 4 December 2014.

52 Télam, Luciano Arruga, el chico que nadie quiso buscar, 28 December 2014.

53 Ídem. See also: La Nación, Reconstruyeron el momento en el que Luciano Arruga fue atropellado, 4 December 2014.

54 The three branches of the State of Argentina are the Executive, the Legislative, and the Judicial Powers

55 According to Infojus Noticias, Luciano Arruga did not renovate renew his identification card or his passport when he became 8 years old. He only had a birth certificate but it was without his fingerprints. See: Infojus Noticias, Paso a paso cómo identificaron el cuerpo de Luciano Arruga, 18 October 2014, available at: http://www.archivoinfojus.gob.ar/nacionales/paso-a-paso-como-identificaron-el-cuerpo-de-luciano-arruga-6097.html, last visited: 2 August 2019.

harassment and death threats Luciano Arruga received from the police officers months before his disappearance were also unlawful[56]. The Guarantee Court N 5 of La Matanza rejected Mónica's habeas corpus petition. At the same time, the missing person's report filed by Mónica at the police station in Lomas del Mirador was still in active. After five days, the case was referred to Roxana Castelli in the Investigation Unit (UFI N7), who delegated the case to the police suspected of his disappearance. For the next forty–five days, the members of the police who were searching for Luciano Arruga were the same who have been accused of his disappearance[57].

After the delegation of Luciano Arruga's case to the suspected police, the general Prosecutor of La Matanza, Patricia Ochoa, decided to delegate the criminal case to Prosecutor Celia Cejas[58]. In order to investigate the fate of Luciano Arruga, Prosecutor Cejas conducted an investigation with dogs and concluded that he had been at the police station N 8a (Comisaría 8a)[59] and in one of the patrol cars[60]. After four years and numerous irregularities regarding Luciano

56 Poder Judicial de la Nación, Cámara Federal de Casación Penal – Sala 4, 4 FSM, 19327/2014/CFC1, Registro.

57 According to CELS, "the registration books and the patrol cars were cleaned with bleach in order to hide information", see CELS: habeas corpus por la desaparición forzada de luciano arruga, 24 April 2014, available in: https://www.cels.org.ar/web/2014/04/habeas-corpus-por-la-desaparicion-forzada-de-luciano-arruga/

58 The reason for the delegation was due to the violation of the Resolution 1390 of the General Prosecution that states the obligation to not delegate the investigation to the suspected police in these types of cases.

59 The Clandestine detention centre, commonly known as Sheraton or Embudo (1976–1978) was the place where kidnappings and homicides occurred. Among the kidnapped were: Mercedes Joloidovsky, Juan Carlos Guarino, Marcela Patricia Quiroga (she was twelve years old at that time), Juan Carlos Scarpati, Paula Elena Ogando Schuff, Julia Estela Sarmiento, Delia Bisutti, and María Cristina Ferrario. También estuvieron secuestrados y permanecen desaparecidos Adela Esther Candela de Lanzillotti, Pablo Bernardo Szir, Luis Salvador Mercadal, Juan Marcelo Soler Guinard and partner Graciela Moreno, José Rubén Slavkin, Héctor Daniel Klosowski, Roberto Eugenio Carri and partner Ana María Caruso de Carri and Héctor Germán Oesterheld. See CELS, comienza el juicio por el Sheraton, un centro clandestino que funciona en la matanza, memoria, verdad y justicia, 10 November 2017, available at: https://www.cels.org.ar/web/2017/11/comienza-el-juicio-por-el-sheraton-un-centro-clandestino-que-funciono-en-la-matanza/, last visted, 2 August 2019.

60 The family of Luciano Arruga at that point in the investigation were also investigated for a year and a half by the judge and the prosecutor, as suspects of the disappearance. See: CELS: habeas corpus por la

Arruga´s disappearance, in January 2013, the investigation changed to "enforced disappearance" and was transferred to the Federal Court of Judge Salas. This was, among other reasons, due to the statements of Luciano Arruga´s friends that helped build the leading theory of public authority participation which qualified it as an enforced disappearance[61].

The family, with the help of the APDH in La Matanza and CELS, once again filed a habeas corpus petition. After the rejections of the First Instance and the Second Instance Court, the Court of Cassation granted the appeal and concluded that "the criminal investigation doesn´t prevent or replace the Habeas Corpus, since the constitutional action is the ideal legal instrument to guarantee the right of Luciano Arruga´s relatives to obtain the information…"[62]. In addition, the judges stressed the State to ensure the adoption of all possible measures in order to determinate what happened to Luciano Arruga[63]. Among other actions coordinated by the National Ministry of Security, fingerprint comparisons were used. Months after the submission of the habeas corpus petition and after five years and eight months of his search, the body was finally rediscovered on the 17th of October 2014[64]. Presently, the Judiciary of Argentina has yet to determine who is responsible for the enforced disappearance of Luciano Arruga.

In that respect, even though those responsible for Luciano Arruga´s enforced disappearance have not been found, the State of Argentina is bound to

desaparición forzada de luciano arruga, 24 April 2014, available at: https://www.cels.org.ar/web/2014/04/habeas-corpus-por-la-desaparicion-forzada-de-luciano-arruga/

61 Página 12, giro en el caso de la desaparición de Luciano, 10 January 2013.

62 CIJ, Centro Información Judicial, La Cámara de Casación hizo lugar a una acción de hábeas corpus por la desaparición forzada de Luciano Arruga, 12 July 2014, available at: https://www.cij.gov.ar/nota-13735-La-C-mara-de-Casaci-n-hizo-lugar-a-una-acci-n-de-h-beas-corpus-por-la-desaparici-n-forzada-de-Luciano-Arruga.html, last visited 2 August 2019.

63 Ídem.

64 After the body of Luciano Arruga was found, the family requested the impeachment of the prosecutors Castelli and Cejas along with the impeachment of the Judge Banco which the Jury for the Prosecution of Magistrates approved" in August 2015.

respect, protect, and fulfil human rights[65]. Consequently, when the domestic legal proceedings fail to address human rights abuses, international human rights standards are available not only at the regional level, but also at the international level in order to ensure the implementation, respect, and enforcement of those human rights standards at the domestic level. Consequently, the following section will attempt to briefly describe Argentina´s domestic legal system while also analysing the international framework that is related to the case of Luciano Arruga.

5. Analysis of the International Human Rights normative framework in the case of Luciano Arruga

International human rights provide a framework of norms, which could shed some light on the case study. In this section, three elements or features are highlighted to better understand the components of the case, such as enforced disappearances, children´s rights, and economic, social and cultural rights[66]. While this section attempts to address the legal framework applicable to Luciano Arruga's case, the scope of this article is not to analyze the entire spectrum of human rights[67].

65 "By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect, and to fulfil human rights". See: the Foundation of International Human Rights Law, available at: https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html, last visited 1 November 2019.

66 The obligation of States to economic, social, and cultural rights, according to Abramovic and Courtis can be described as the following: to take immediate measures, to guarantee minimum essential levels of rights, the obligation of progressivity, and the prohibition of regressivity. See: ABRAMOVICH, Victor, COURTIS, Christina, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales*, p. 34. Available at: http://www.oda-alc.org/documentos/1366995147.pdf, last visited 10 August 2019. See also: PINTO, M.; SIGAL, M, *Influence of the ICESCR in Latin America* in MOECKLI, D.; KELLER, H.; HERI, C. (eds.) *The Human Rights Covenants at 50: their past, present and future*, Oxford University Press, 2018.

67 The scope of this article was not to analyse the regional system of human rights protections, even though the Latin American region was the forefront not only for the debates that led to the adoption of the UN

Nevertheless, it is worth mentioning that in 1994, Argentina incorporated into its Constitutional reform nine international human rights treaties and two human rights declarations that have constitutional standing[68]. Consequently, ordinary law cannot trump international human rights norms. The Constitution functions as a mirror regarding the scope, norm, and substance of these human rights treaties. Roberto Gargarella describes how the new Constitution embraced a strong commitment to human rights and, as a sign of recognition, increased protections of basic human rights. The Constitution assigned human rights treaties the same level of authority as the Constitution itself, sharing its supremacy while also defining its position over the laws[69]. The adoption of international

Declaration on the Protection of all Persons from Enforced disappearance in 1992, but also for its own jurisprudential doctrine and its unique historical context. See GARCÍA RAMIREZ, Sergio, in BURGORGUE–LARSEN, Laurence and UBEDA DE TORRES, Amaya, *Les grandes decisions de la Cour intermericaine des droits de l'homme,* Bruzlant, Bruxelles, 2008, p. XXI; see also CRENZEL, Emilio, *La historia política del Nunca Más. La memoria de las desapariciones en la Argentina*. Siglo XXI, Buenos Aires, 2008; DULITZKY, Ariel, *The Latin–American Flavor of Enforced Disappearances*, Chicago Journal of International Law, 2019. The Interamerican Court's most notorious cases of enforced disappearances are Velasquez–Rodriguez v. Honduras (I/A Court H.R., *Case of Velásquez–Rodríguez v. Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4.), Case of Godínez–Cruz v. Honduras, Merits, Judgment of January 20, 1989. Series C No. 5., Case of Caballero–Delgado and Santana v. Colombia Merits, Judgment of December 8, 1995. Series C No. 22.; Chitay Nech and others v. Guatemala. Analysing the jurisprudence of the Human Rights Committee was also not within the scope of this article.

68 Article 75, inc. 22: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child. See also: ABRAMOVICH, Victor, COURTIS, Christina, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales*, p. 30. Available at: http://www.oda-alc.org/documentos/1366995147.pdf, last visited 10 August 2019.

69 GARGARELLA, Roberto, *Lo "Viejo del "Nuevo" constitucionalismo latinoamericano*, Yale University p. 19,

human rights treaties also means the acceptance of human rights international bodies and their interpretation in the international sphere[70]. In addition, the application of international human rights law in Argentina, as Leonardo Filippini describes it, can also be understood as "the recognition of a constitutional practice that acknowledges the existence of principles and rules not written in the text of the Constitution"[71]. The mentioned recognition of human rights treaties by the Constitution can also be understood as challenges in terms of implementation and impact. This is despite the fact that Argentina´s internalization of human rights instruments is internationally recognized in prosecuting those who committed crimes against humanity during the military dictatorship[72].

In terms of international law, enforced disappearances are defined by article 2 of the International Convention for the protection of all persons from enforced disappearance "as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law". The UN Convention[73] is the first internationally binding

available at: https://law.yale.edu/system/files/documents/pdf/SELA15_Gargarella_CV_Sp.pdf, last visted 16 August 2019. According to Clérico and Novelli, the strong connection between international human rights law and domestic law is not only due to the constitutional framework, but also to the domestic case law giving meaning to this relationship and "the role of human rights movements, organizations, and defenders who have strengthened the effectiveness of human rights norms and the compliance with the decisions of international human rights bodies…". See CLÉRICO, Laura; NOVELLI, Celeste *"Argentina: The implementation of international human rights and the quest of compliance",* in: GORTE, Rainer, MORALES, Mariela, PARIS, Davide, in: Research Handbook on Compliance in International Human Rights Law, Edward Elgar, Londres (2019) (aceptado en edición), p. 4.

70 ABRAMOVICH, Victor, COURTIS, Christina, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales*…, Op. Cit. p.p.. 30/31.

71 FILIPPINI, Leonardo, *La persecución penal en la búsqueda de justicia*…, Op. Cit., p. 21.

72 Ídem. Also see: KECK, M.E.; SIKKINK, K., *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornel University Press, Ithaca–London, 1998.

73 International Convention for the Protection of All Persons from Enforced Disappearance.

document that focuses on enforced disappearances. State parties are obliged to prevent such a practice (article 17, 21 and 23), investigate and sanction those responsible (articles 3, 8, 12 and 24.6), while also adopting measures to ensure protection and victim´s rights (articles 12, 18, 19, 20 and 24). In addition, the instrument states that the practice of enforced disappearance as widespread or systematic crime constitutes a crime against humanity (article 5). Article 25 (a), of the UN Convention concerns the "wrongful removal of children who are subjected to enforced disappearances". Fact Sheet No. 6 of the Office of the United Nations High Commissioner for Human Rights (OHCHR) clearly refers to children who are subjected to enforced disappearances as individuals[74], and the document states that "Children can also be victims of enforced disappearances, both directly and indirectly"[75].

In regard to the scope of the Convention on the Rights of the Child (CRC) and according to the General Comment No. 7, there are general principles identified by the Committee on the Rights of the Child hat provide a framework for the implementation and interpretation of all rights within the UN Convention[76]: the right to be heard, which is the right to freely express their views with due weight (article 12); the best interest of the child must be a primary consideration in all actions involving children (article 3.1); the right to life, survival, and development, which should be understood in a broader sense taking into account social, spiritual, psychological, and emotional development of the child, such as the right to an adequate standard of living (article 6, including article 27 the right to play and article 31); and the right to equality or non–discrimination, which places an obligation on the State to apply all the rights of the Committee on the Rights of the Child to all children at all times (article 2).

The Committee on the Rights of the Child established that States are required to provide appropriate assistance to parents in the development of their child–rearing responsibilities (articles 28.3 and 18.3), which also includes assisting parents in "providing living conditions necessary for the child´s development (article 27.2) and to ensure children´s protection and care (article

74 OHCHR, Enforced or Involuntary Disappearances, Fact Sheet No. 6/REV.3, p. 9.

75 OHCHR, Enforced or Involuntary Disappearances, Fact Sheet No. 6/REV.3, p. 4.

76 Committee on the Rights of the Child, General Comment No. 7, 2005, CRC/C/GC/7/Rev.1.

3.2)"[77]. Of special interest is Article 19 which addresses all forms of violence against children (physical and mental), and requires States to implement social, administrative, and educational measures to protect children, especially those who are in more vulnerable situations (article 20, 22, and 23). The enforced disappearance of a child, as the WGEID General Comment No. 12 expressed it, "constitutes an exacerbation of the violation of the multiplicity of rights protected by the Declaration…"[78].

Furthermore, the WGEID expresses the intrinsic connection between enforced or involuntary disappearances and economic, social, and cultural rights. A study conducted by the WGEID explicitly states the indivisibility, interdependency, and interrelation of civil and political rights, as well as economic, social, and cultural rights. In other words, the violation of one set of rights usually means the violation of the other. While enforced disappearances are normally understood as violations against civil and political rights, they should also be analysed through the lenses of economic, social, and cultural rights, which provide a more comprehensive approach in examining Luciano Arruga's case. The WGEID, from its foundation, has highlighted the connection between enforced disappearances; economic, social, and cultural rights; and the means of affecting such rights of the disappeared person as well as his family and others[79].

Regarding the legal obligations of States, the WGEID takes into consideration the analysis of the causes of enforced disappearances and the context in which the crime takes place[80]. According to the Declaration on the Protection of All Persons from Enforced Disappearances articles 2 and 19, States are obligated to prevent, eradicate, and seek those responsible for the enforced disappearance

77 Ibídem, para. 20.

78 General Comment on children and enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety–eight session (31 October – 9 November 2012), A/HRC/WGEID/98/1, 14 February 2013, preamble. See also: United Nations study on violence against children (A/61/299, 29 August 2006).

79 See E/CN.4/1492, para.165, E/CN.4/2006/56/Add.1, para. 59, A/HRC/22/45, para. 51, A/HRC/WGEID/98/2, A/HRC/WGEID/98/1.

80 Involuntary Disappearances and Economic, Social and Cultural Rights, 9 July 2015, A/HRC/30/38/Add.5, para. 6, See also E/CN.4/1986/Add.1, para. 42.

and provide reparation, social assistance, and rehabilitation to the family affected. It should be noted that those measures by the State should also address the structural context in terms of the vulnerability that lies beneath the disappearance in order to secure the "prevention, eradication, investigation, punishment, reparation and guarantees of non–repetition of enforced disappearances"[81].

The people, especially those in vulnerable situations, who file a criminal case of enforced disappearance, have the right to an impartial investigation conducted by an independent State authority. This is done in order to identify those responsible for the crime (article 13 of the Declaration), and effectively criminalize them in the domestic legal system (article 4 of the Declaration). The obligation to investigate the crime should also contemplate the analysis of the economic, social, and cultural rights affected, as well as the context in which the crime took place[82]. In regard to reparation, all rights that have been violated should be taking into consideration, such as legal and social rehabilitation, and the restoration of personal liberty, family life, citizenship, employment, and property, among others[83]. The family affected should also be supported by the State and count on social benefits such as health care, special education programmes, and psychological assistance[84]. States are obliged, when the enforced disappearance takes place, to provide immediate, adequate, and effective reparation to victims[85].

What is of particular interest to Luciano Arruga's case is the circumstance of living in extreme poverty in which victims of enforced disappearances typically live in. As the WGEID expressed, "those extreme poverty conditions are considered both as a cause and a consequence of enforced disappearances"[86].

81 Ibídem, para. 44.

82 Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Study on enforced or Involuntary disappearances and economic, social and cultural rights, 9 July 2015, A/HRC/30/38/Add.5, para. 6, see also E/CN.4/1986/Add.1, para. 54.

83 See E/CN.4/1998/43, para. 68 and A/HRC/22/45, paras. 46.

84 Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Study on enforced or involuntary disappearances and economic, social and cultural rights, 9 July 2015, A/HRC/30/38/Add.5, para. 60. Also see A/HRC/22/45, paras. 53–54 and 59.

85 Ídem.

86 Ibídem, para. 2, See also (E/CN.4/1986/18/Add.1).

In other words, the dissatisfaction with economic, social, and cultural rights is a transcendental component that influence or contributes to enforced disappearances[87]. The Committee on Economic, Social and Cultural Rights defines the concept of poverty as multidimensional and as

> "… a human rights condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights"[88].

The lack of effective enjoyment of economic, social, and cultural rights within a society can be caused by the limited legal access to claim other human rights violations. When such poverty conditions prevailed and those impoverished people cross paths with the criminal justice system, the result is that they are not able to question or contest the criminal justice process they come up against (in terms of arrest, trial, conviction, detention, and release)[89]. It is important to mention that States are obliged to respect, protect, and fulfil the right to an effective remedy,[90] regardless of the economic, cultural, and social stance

87 Ibídem, para. 6. See also E/CN.4/1986/Add.1, paras. 93–100 and 110.

88 CESCR: Poverty and the International Covenant on Economic, Social and Cultural Rights, para. 8, Statement adopted by the CESCR on 4 May 2001, E/C.12/2001/10.

89 Report of the Special Rapporteur on extreme poverty and human rights, Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, 9 August 2012, A/67/278.

90 See Universal Declaration of Human Rights artocle 8; International Covenant on Civil and Political Rights, article 2.3; Convention on the Elimination of All Forms of Racial Discrimination, article 6; Convention against Torture, article 13 and 14); the right to a fair trial (e.g., Universal Declaration of Human Rights, article 10; International Covenant on Civil and Political Rights, articles 14–15); and the right to equality and equal protection of the law (e.g., Universal Declaration of Human Rights, article 7; International Covenant on Civil and Political Rights, article 26); the right to equality before the courts and tribunals (e.g., International Covenant on Civil and Political Rights, article 14.1); the right to legal assistance (e.g., Universal Declaration of Human Rights, article 11.1; International Covenant on Civil and Political Rights, article 14.3 (b)–(d)).

of the person affected[91]. Impunity, which often prevails in cases of enforced disappearances, is the result of a lack of accountability and, as a consequence, may contribute to the future recurrence of such crimes. The lack of economic resources means that the people who cannot afford legal assistance are not able seek justice to search for their loved ones. Reasonable access to justice is vital to a society in order to exercise all human rights as a whole.

On the other hand, not only does the State need to provide reasonable access to justice, it must also eradicate any obstacles that might interfere with the normal course of the investigation[92]. Furthermore, the fear of reprisal of actors (such as the police or other authorities) and general mistrust of the justice system are key factors for persons living in poverty to be averse to relying upon formal legal processes[93]. The fear of repercussions by authorities that may be involved in such a crime, may be a key factor that leads to the relocation of the affected family to a more secure place. In addition, due to the lack of State presence in certain areas, such as marginalized neighbourhoods, police forces tend to operate with less control than in more affluent areas. Second class citizens[94] are systematically discriminated against by a State that continues to justify the lack of information on the whereabouts of the disappeared.

91 The principle of non–discrimination is found: Universal Declaration of Human Rights, article 2; International Covenant on Civil and Political Rights, article 2; International Covenant on Economic, Social and Cultural Rights, article 2); the right to seek and receive information (e.g., International Covenant on Civil and Political Rights, article 19.2); and the right to recognition as a person before the law (e.g., Universal Declaration of Human Rights, article 6; International Covenant on Civil and Political Rights, article 16; Convention on the Elimination of All Forms of Discrimination against Women, article 15; Convention on the Rights of Persons with Disabilities, article 12).

92 Involuntary disappearances and economic, social and cultural rights, 9 July 2015, A/HRC/30/38/Add.5, para. 6. See also E/CN.4/1986/Add.1, para. 55. Also see: A/67/278, para. 12.

93 Report of the Special Rapporteur on extreme poverty and human rights, Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives, 9 August 2012, A/67/278, para. 21.

94 According to the Collins dictionary, a second class citizen can be defined as "a person whose rights and opportunities are treated as less important than those of other people in the same society", available at: https://www.collinsdictionary.com/dictionary/english/second-class-citizen

According to a UN study on children, police brutality and the lack of reasonable access to justice is often found in societies affected by violence[95]. Consequently, governments, in order to control crime and gang violence, adopt repressive measures such as large–scale detention related to "arbitrary, inefficient and violent law enforcement" which directly contributes to increased violence and the stigmatization of disadvantaged youth[96]. The violence within a community, which in Luciano Arruga's case is conducted by the police, is also a significant factor that affects marginalized children such as those living on the streets. Common findings in the UN study were verbal harassment, rape, sexual violence, torture, and disappearance[97].

The right to adequate housing, which is understood as a source of protection against enforced disappearances and it was a crucial factor in the development of Luciano Arruga's case, is directly removed when the access to adequate housing a is not been fulfilled[98]. Children who live in poverty and are not able to go to school, are especially susceptible to becoming victims of enforced disappearance. Those living or working on the streets are in even more likely to become victims[99].

95 Human Rights Watch, Easy targets: Violence against children worldwide, New York, 2001.

96 See UN General Assembly, Rights of the child, promotion and protection of the rights of children, A/61/299, 29 August 2006, para. 73.

97 See: WERNHAM, M, *An outside chance: Street children and juvenile justice – An international perspective*, London, Consortorium for Street Children, 2004. Also see: UN General Assembly, Rights of the child, promotion and protection of the rights of children, A/61/299, 29 August 20106, para. 76. Among the conclusions and recommendations of the UN study are the following: the distant reality between the international commitments to protect children from violence and the inaction in the national level; measures to address violence against children are in general "reactive, focusing on symptoms and consequences and not causes" to develop a framework to respond to cases of violence against children; the prohibition of all violence against children; prioritizing prevention; to ensure accountability and end impunity; to develop systematic data collection; to reduce social and economic inequalities, among others. See UN General Assembly, Rights of the child, promotion and protection of the rights of children, A/61/299, 29 August 2006, para. 90.

98 See CHR, Report of the Working Group on Enforced or Involuntary Disappearances – Mission to Colombia, E/CN.4/2006/56/Add.1, para. 30 and CHR, Report by the Special Rapporteur on adequate housing, E/CN.4/2004/48, paras. 35–37.

99 HRC, General comment on children and enforced disappearances adopted by the Working Group on

According to articles 18 and 27 of the CRC, and as the Committee on the Rights of the Child in the General Comment No. 13 expresses, "State parties have a positive and active obligation to support and assist parents and other caregivers to secure, within their abilities and financial capacities and with respect for the evolving capacities of the child, the living conditions necessary for the child´s optimal development"[100]. Regarding the right to adequate housing and according to article 11 (1) of the International Covenant on Economic, Social and Cultural Rights, the State parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". As General Comment No. 4 expresses, the right to housing should be interpreted as the right to live somewhere in "security, peace and dignity".

The right to housing should be ensured to all persons regardless of their economic situation. It should also be interpreted not merely as the right to housing but more specifically the right to *adequate* housing. That means the Committee selected certain factors that play a key role in order to satisfy the right to adequate housing in any particular context[101]. These factors include: legal security of tenure (all persons should have a degree of security of tenure that protects them against any threats); availability of services, materials, facilities, and infrastructure (adequate housing should "have safe water, energy and cooling, heating and lighting, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services")[102]; affordability (the household costs should not compromise other basic needs); habitability (the house should have an adequate space which is protected from heat, cold, rain, wind, and dampness, among other factors); accessibility (disadvantaged groups should be prioritized in the housing sphere); location (the house must be in a place with

Enforced or Involuntary Disappearances at its ninety–eighth session, A/HRC/WGEID/98/1, (31 October – 9 November 2012), 14 February 2013, para. 3.

100 Convention on the Rights of the Child, General comment No.13 (2011), the right of the child to freedom from all forms of violence, CRC/C/GC/13, para. 5.

101 CESCR, General Comment No. 4: the right to adequate housing (art. 11 (1) of the Covenant), sixth session (1991), para. 8.

102 Ibídem, para. 8 (b).

access to health care, employment, and schooling, among others); and cultural adequacy (the cultural identity and diversity of housing should be respected in terms of building materials and the policies supporting it)[103]. States are obligated under the CRC to demonstrate all steps to ascertain the full extent of inadequate housing within their jurisdiction[104].

Furthermore, many victims of enforced disappearances are deprived of their liberty in secret places where they could be subject to torture and degrading treatment or punishment, among others things. As a result, the right to health, not only physical health but also psychological integrity, is also disrupted[105]. When it comes to the health of the victim's family members or close relatives, the absence of the person victim creates a constant strain. The WGEID have described the effects as "a drawn–out shock, a state of latent and prolonged crisis, in which the anguish and sorrow caused by the absence of the loved one continues indefinitely." A number of rights of the victims of enforced disappearances and their families are also affected, such as the right to education, the right to a cultural life, the right to social security, the right to property, the right to family life, and the right to housing, among others[106].

According to article 3 of the Declaration on the Protection of All Persons from Enforced Disappearances, states are obligated to prevent enforced disappearances by taking effective, administrative, legislative, and judicial action. According to article 9 of the Declaration, prevention can be understood as the need to determine the whereabouts or the state of health of the person deprived of liberty and/or to identify the authorities who carried out the arrest. Another form of prevention by states can be to take effective measures to alleviate

103 Ibídem, para. 8.

104 Ibídem, para 13. In this regard, states should provide detailed information about those groups within their society that are vulnerable and disadvantaged with regard to housing. Specifically, those without basic amenities, living in "illegal settlements" […] and low–income groups.

105 See article. 12 International Covenant on Economic, Social and Cultural Rights.

106 HRC, Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Study on enforced or involuntary disappearances and economic, social and cultural rights, 9 July 2015, A/HRC/30/38/Add.5, para. 6, See also E/CN.4/1986/Add.1, para. 23.

poverty[107]. States should take legislative measures in order to guarantee that social security benefits can also be reached by those in need. Judicial, political, and administrative mechanisms can be implemented to enable people from poorer areas to participate in cultural life where their voices can be heard in the public sphere; while at the same time these disadvantaged people can challenge the inequalities and diverse vulnerabilities they face, in order to acknowledge their own needs and contribute to their healing. By way of illustration, measures can be understood as cultural interventions to make the victim more visible[108].

6. UN Special Procedures and Treaty Body visits to Argentina

The following section of this article will analyze the recommendations made to Argentina from the UN Special Procedures[109] and Treaty Bodies since January 2009[110] in order to better understand the context of where the enforced

107 HRC, Involuntary disappearances and economic, social and cultural rights, 9 July 2015, A/HRC/30/38/Add.5, para. 6, See also E/CN.4/1986/Add.1, para. 48.

108 See A/HRC/25/49, paras. 47 and 66.

109 The UN Special Procedures Reports on their Mission to Argentina were chronologically the following: Special Rapporteur on Trafficking in Persons, Especially Women and Children, 24 May 2011, A/HRC/19/53/Add.1; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non–discrimination in this context, 21 December 2011, A/HRC/19/53/Add.1; Special Rapporteur on the rights of indigenous peoples, 4 July 2012, A/HRC/21/47/Add.2; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, 2 April 2014, A/HRC/25/50/Add.3; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Argentina, 18 April 2017,A/HRC/35/41/Add.1; Special Rapporteur on violence against women, its causes and consequences, on her mission to Argentina, 12 April 2017, A/HRC/35/30/Add.3; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on his mission to Argentina, 9 April 2018, A/HRC/38/43/Add.1. See: View Country visits of Special Procedures of the Human Rights Council since 1998, OHCHR, available at: https://spinternet.ohchr.org/_layouts/15/SpecialProceduresInternet/ViewCountryVisits.aspx?Lang=en&country=ARG, last visit 1 August 2019.

110 The UN Treaty Bodies concluding observations to Argentina are the following: Human Rights Commit-

disappearance of Luciano Arruga occurred. According to the Office of the UN High Commissioner for Human Rights, on the 3rd of December 2002, Argentina extended a standing invitation, which means that the State announced their willingness to accept requests from all UN Special Procedures[111].

The Committee on Economic, Social and Cultural Rights on the fourth periodic report of Argentina, found it unacceptable that the State, considering its level of development, still remains with a structural poverty at a floor of twenty–five to thirty per cent of the population, especially in greater Buenos Aires and in the north of the country[112]. In the words of the Committee, "more than 5 million children and adolescents are living in poverty and that current devaluation and inflation have had an adverse impact on poverty and inequality"[113]. The Committee was also concerned with the great increase on rates of basic services such as water, gas, electricity, transportation, and medicine affecting people in situations of vulnerability. They recommended to the State "to adopt and implement a comprehensive, long–term poverty reduction

tee, 2010, CCPR/C/ART/CO/4; Committee on the Elimination of Racial Discrimination, 2010, CERD/C/ARG/CO/19–20; Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography, 2010, CRC/C/OPSC/ARG/CO/1; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2010, CRC/C/OPAC/ARG/CO/1; Committee on Migrant Workers, 2011, CMW/C/ARG/CO/1; Committee on the Rights of Persons with Disabilities, 2012, CRPD/C/ARG/CO/1; Committee on Enforced Disappearances, 2014, CED/C/ARG/CO/1; Human Rights Committee, 2016, CCPR/C/ARG/CO/5; Committee on the Elimination of Discrimination against Women, 2016, CEDAW/C/ARG/CO/7; Committee on the Elimination of Racial Discrimination, 2017, CERD/C/ARG/CO/21–23; Committee against Torture, 2017, CAT/C/ARG/CO/5–6; Committee on the Rights of the Child, 2018, CRC/C/ARG/CO/5–6; Committee on Economic, Social and Cultural Rights, 2018, E/C.12/ARG/CO/4. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=7, last visited 2 August 2019.

111 United Nations Human Rights Office of the High Commissioner, available at: https://spinternet.ohchr.org/_layouts/15/SpecialProceduresInternet/StandingInvitations.aspx, last visit 5 August 2019.

112 CESCR, Concluding observations on the fourth periodic report of Argentina, 1 November 2018, E/C.12/ARG/CO/4, para. 43.

113 Ídem.

strategy with specific, measurable targets and human rights approach"[114]. The Committee also pointed out the increase in informal settlements without access to basic services. There are more than 4000 informal settlements; of those, over ten per cent have no running water and over thirty per cent have no wastewater services. Particularly, Committee on the Rights of the Child raised its concerns regarding the current high level of multidimensional poverty and particularly children living in poverty, where these people are living in situations such as housing of substandard quality and limited access to basic services[115].

In addition, the Committee on the Rights of the Child reviewed Argentina in its concluding observations, and expressed specifically on Luciano Arruga´s disappearance:

> "The Committee is also concerned at a case of enforced disappearance of a child (L.A.) in the province of Buenos Aires during police detention in January 2009, and that the investigation into the allegations was not launched promptly. Moreover, the Committee is concerned at the absence of any information on prompt investigations into these allegations, their results, including sentencing of those responsible, and on putting an end to the practice"[116].

The media in Argentina, according to the Special Rapporteur on racism, reproduces sociocultural patterns, which contributes to exclusion and inequalities. Consequently, some social groups are excluded by the media, affecting the equal exercise of the right to freedom of expression. The media not only emulates the already existing social inequalities but it also amplifies them, and as a result, obstructs social and political participation in a way that "has a silencing effect since the voices and demands of these marginalized groups are devalued by mainstream media, thereby further entrenching the invisibility of

114 Ibídem, para. 43–44.

115 CRC, Concluding observations on the combined fifth and sixth period reports of Argentina, 1 October 2018, CRC/C/ARG/CO/5–6, para. 35.

116 CRC, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Argentina, 21 June 2010, CRC/C/ARG/CO/3–4, para. 42.

their condition"[117]. The Committee on the Rights of the Child in its concluding observations in 2010, expressed its concerns regarding the stigmatization of affected adolescents living in poverty in urban centres[118]. The Committee on the Rights of the Child, in its last concluding observations, critically observed the violence used by the security forces in cases of disadvantaged children and adolescents in police custody, the impunity of perpetrators of violence against children in detention centres, the lack of information on remedies for children affected by violence, and abuse and neglect under the State responsibility, among others[119]. As a consequence, the Committee on the Rights of the Child recommended to the State

> "… to adopt a comprehensive strategy to end all abuse of children in institutional care settings, to systematically monitor the situation of children in institutions and to prioritize investigations into all instances of violence, ensuring the identification and immediate removal of staff members responsible for violence and abuse; […] To investigate thoroughly and impartially all allegations of torture, violence, harassment and abuse, including by the police, and to ensure that perpetrators are prosecuted and, if convicted, punished commensurately with the seriousness of their acts…"[120].

The mentioned recommendations have also been shared by the Human Rights Committee in its concluding observations, pointing out the necessity to investigate all perpetrators who committed the acts of torture, and/or ill treatment, and bring them to justice[121].

117 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Argentina, A/HRC/35/41/Add.1. 18 April 2017, para. 82.

118 CRC, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Argentina, 21 June 2010, CRC/C/ARG/CO/3–4.

119 CRC, Concluding observations on the combined fifth and sixth period reports of Argentina, 1 October 2018, CRC/C/ARG/CO/5–6, para. 21.

120 Ibídem, para. 22.

121 Human Rights Committee, Concluding observations on the fifth periodic report of Argentina, 10 August 2016, CCPR/C/ARG/CO/5, para. 14.

Furthermore, the Committee Against Torture (CAT) in its concluding observations, expressed its concern with the frequent use of torture and ill treatment within the security forces and the prison staff, "who still operate within the militarized corporate structure of the past"[122]. In addition, the Human Rights Committee attributes such institutional violence in prisons to the existence of a self–governance system, the very few convictions of those who commit acts of violence, and the small penalties that they receive because of those acts[123]. The CAT recommends to the State to

> "... take urgent steps to assess the practice of torture and ill–treatment in federal and provincial detention facilities with a view to developing the necessary prevention policies and control mechanisms [...] and investigates without delay, thoroughly and impartially all cases of violence committed in detention facilities and assess whether the States officials or their superiors are responsible"[124].

These recommendations have also been shared by the Human Rights Committee, while adding that the State should ensure that those who are affected by such a crime receive appropriate reparation such as health and rehabilitation services, and to also

> "... expedite the adoption of the necessary legal measures to ensure that the national preventive mechanism is established in all regions of the country, [...] and ensure that this mechanism is provided with sufficient human and financial resources to enable it to function efficiently"[125].

122 Committee against Torture, Concluding observations on the combined fifth and sixth periodic report of Argentina, 24 May 2017, CAT/C/ARG/CO/5–6, para. 11.

123 Human Rights Committee, Concluding observations on the fifth periodic report of Argentina, 10 August 2016, CCPR/C/ARG/CO/5, para. 13.

124 Committee against Torture, Concluding observations on the combined fifth and sixth periodic report of Argentina, 24 May 2017, CAT/C/ARG/CO/5–6, para. 12–14.

125 Human Rights Committee, Concluding observations on the fifth periodic report of Argentina, 10 August 2016, CCPR/C/ARG/CO/5, para. 14.

Specifically, the Committee on Enforced Disappearances expressed its awareness of cases which have not been correctly investigated, and recommends that the State make certain that all cases of enforced disappearances are "investigated in a complete, impartial, diligent and effective manner, even in the absence of a formal complaint, and that those investigations be pursued until the fate or the whereabouts of the disappeared person have been established"[126]. The CED also noted that within the existing norms of the country, it is not clear how to prevent those suspected of committing enforced disappearances from obstructing the normal course of the investigations. In that respect, the CED expressed its awareness of reports where the judicial authorities did not keep the suspected people away from the investigations[127].

The CAT, in its concluding observations, was also concerned about the federal and provincial security forces use of violence and arbitrary behaviour in cases concerning socially marginalized children and adolescents deprived of their liberty without a court order[128]. The Human Rights Committee in this particular matter, raised its concerns about "taking people into custody without a warrant in order to verify their identity and then detaining them for lengthy periods of time without bringing such persons before a judge or other officer authorized by law to exercise judicial supervision of their detention (article 9)"[129].

Such violent patterns by security forces could lead to attempted murder, enforced disappearances, and acts of torture. In terms of the investigation of claims of torture and ill treatment, the CAT raised its concerns regarding the reports that impunity still persists. Reasons for the concern include

126 Committee on Enforced Disappearances, Concluding observations on the report submitted by Argentina under article 29, paragraph 1, of the Convention, 12 December 2013, CED/C/ARG/CO/1, para. 16–17.

127 Committee on Enforced Disappearances, Concluding observations on the report submitted by Argentina under article 29, paragraph 1, of the Convention, 12 December 2013, CED/C/ARG/CO/1, para. 22.

128 Committee against Torture, Concluding observations on the combined fifth and sixth periodic report of Argentina, 24 May 2017, CAT/C/ARG/CO/5–6, para. 13.

129 Human Rights Committee, Concluding observations on the fifth periodic report of Argentina, 10 August 2016, CCPR/C/ARG/CO/5, para. 17.

inadequate judicial investigations, tendencies of judicial officials to support the official version given by security forces, and categorizing such acts as lesser offenses[130].

In its concluding observations, the CED found it promising that the State had made progress in the prosecution of those who were responsible for enforced disappearance during the military dictatorship. Nevertheless, the CED expressed its concerns about the new "cases of enforced disappearance in recent times, particularly targeting young persons in situations of extreme poverty and social marginalization; the disappearances are characterized by police violence and arbitrary detention and are being used to cover up crimes and escape punishment (articles 6 and 12)"[131]. In that respect, the CED recommends eradicating these contemporary forms of enforced disappearances and promoting a security forces reform to investigate, prosecute, and punish those officials who commit such offenses[132].

Moreover, even though there are no longer any secret detentions in Argentina, the CED observed that persons could be deprived of their liberty in administrative detentions with no evidence an offense had been committed, without a warrant or judicial review[133]. Regarding the diverse laws of reparation to victims of human rights violations suffered during the military dictatorship, the CED found there is no law that covers victims of enforced disappearances after December 1983. It also points out that the State is obligated to provide reparation for the victims and seek the truth regarding the circumstances of such a crime[134].

130 Committee against Torture, Concluding observations on the combined fifth and sixth periodic report of Argentina, 24 May 2017, CAT/C/ARG/CO/5–6, para. 29.

131 Committee on Enforced Disappearances, Concluding observations on the report submitted by Argentina under article 29, paragraph 1, of the Convention, 12 December 2013, CED/C/ARG/CO/1, para. 14.

132 Ibídem, para. 15.

133 Ibídem, para. 24.

134 Ibídem, para. 34.

7. Final remarks

This article attempts to analyse the case of Luciano Arruga as a contemporary form of enforced disappearances while looking at elements between enforced disappearances, children´s rights, and economic, social and cultural rights. Presently, such a crime should not only be studied as a matter of the past under the so–called "national security" strategies of states but should also be found in the era of democratic governments such as in Argentina. The fact that enforced disappearances are occurring in diverse contexts is something the international community urgently needs to address.

As the WGEID expressed, states are not only obligated to analyse the causes of enforced disappearances but also the structural context that lies beneath them. The obligation to investigate should take into account peoples' economic, social, and cultural rights. These rights can also be transferred to those affected by these conditions, such as the state of families in terms of health, education, and assistance. When it comes to enforced disappearances of victims in situations of extreme poverty, those conditions should be understood as a cause, and as a consequence, of the crime.

In that respect, key factors that could be derived from poverty conditions should be taken into account when enforced disappearances occur. These include the limited access to the judicial system, impunity, fear of reprisal by the official authorities, the recurrence of the crime, mistrust of the justice system, systematic discrimination of persons as second class citizens, arbitrary detentions, torture, disruption of health, lack of State presence in marginalized areas, lack of accountability within the police forces, limited access to adequate housing and a basic standard of living, and limited access to participation in cultural life and education, among others.

Particularly, regarding the context of Luciano Arruga´s enforced disappearance, Argentina´s structural poverty, and it´s level of development, should not be acceptable. Additionally, the UN human right´s mechanisms observed that the following circumstances that should be addressed by Argentina within the near future: the increased number of informal settlements with limited access to basic services, the role of the media in contributing to exclusion and discrimination while devaluating the voices of the marginalized groups and the stigmatization

of adolescents living in poverty in urban centres, the use of violence by security forces in cases of disadvantaged adolescents in police custody and their impunity, the frequent usage of torture and mistreatment by the security forces who still operate within arbitrary detentions, inadequate judicial investigations, or the military structure of the past.

Argentina, being a State party of the ICPPED, the CRC, the CESCR, and numerous other human rights treaties, is obligated to prevent, investigate, and sanction those responsible for enforced disappearances. Argentina must also adopt administrative, legislative, and judicial measures to ensure the protection of the victims of enforced disappearances. In particular, the ICPPED considers children who can be subjected to such a crime, and the CRC requires the State to provide appropriate assistance to parents in the child´s development and ensure his protection and care, especially those who are in a more vulnerable situations.

Despite the obligation of the State to ensure that detention of children be used only as a measure of last resort under the article 37 of the CRC, the detention of Luciano Arruga was not used as an exception but rather as means of discipline by the police forces. Additionally, according to the CRC provisions[135], the State should have separate facilities for apprehended children in order to prevent abuses by adults. The detachment facility where Luciano Arruga was held did not have any separate holding area for children, nor was the facility authorized by the law to make arrests at that time.

Even though international human rights instruments can be seen as a form of protection from human rights violations and as vital legal frameworks that contain large numbers of rules and principles aimed at preventing enforced disappearances, in Luciano Arruga´s case, those principles were not enough to initially find Luciano Arruga and to subsequently seek those responsible for committing the enforced disappearance. It took factors to become involved to shedding light on Luciano Arruga´s case, such as the fight of his family to seek the truth and seek justice and the push from the human rights movements.

Corrupt institutions, gross irregularities within the investigation, independency of the police without any independent control, marginalized areas with

135 See UN General Assembly, Rights of the child, promotion and protection of the rights of children, A/61/299, 29 August 20106, para. 63.

limited access to basic rights, and Luciano Arruga´s refusal to work illegally for the police forces are among the factors that played crucial roles in Luciano Arruga case. In that respect, cases like this generate important questions within a democratic society. How can society be safe if their own police force conducts crimes of enforced disappearances? Why did the judiciary delegate the case to the police officers suspected of the crime? How many Luciano Arrugas could be missing? Is there a *continuum* of enforced disappearances between the times of military dictatorship and the existing period of democracy? If states are obligated to respect, protect, and fulfil the human rights of its people, how can Luciano Arruga's case be explained in current democratic times? Where is the justice for Luciano Arruga´s enforced disappearance?

Second class citizens are systematically discriminated against by a State that justifies the lack of information to know the whereabouts of the disappeared. The aim is to transform the system and give a voice to the invisible people that live in the peripheries of society. Unfortunately, the only way for marginalized groups to be addressed by the State is through abnormal ways, such as participating in criminal activities, deprivation of liberty, torture, enforced disappearances, institutional violence, and the list could go on. The response to inequality should never be repression, and instead the response should be the access to basic rights such as those considered by the International Covenant on Economic, Social and Cultural Rights.

The last dictatorship and its legacy was a brutal and traumatic period that lasts to this day in the memory and cultural identity of Argentinian society. Luciano Arruga´s enforced disappearance can be understood as a clear sign that Argentina's dark past has still not been left completely behind, and still lingers in the present in forms of contemporary atrocities such as the case of study.

8. Annex

Argentina´s Status of International Treaty Ratifications[136]

Treaty Description	Signature Date	Ratification Date, Accession (a), Succession (d) Date
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	04.Feb.85	24.Sep.86
Optional Protocol of the Convention against Torture	30.Apr.03	15.Nov.04
International Covenant on Civil and Political Rights	19.Feb.68	08.Aug.86
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	20.Dec.06	02.Sep.08
Convention for the Protection of All Persons from Enforced Disappearance	06.Feb.07	14.Dec.07
Convention on the Elimination of All Forms of Discrimination against Women	17.Jul.80	15.Jul.85
International Convention on the Elimination of All Forms of Racial Discrimination	13.Jul.67	02.Oct.68
International Covenant on Economic, Social and Cultural Rights	19.Feb.68	08.Aug.86
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	10.Aug.04	23.Feb.07
Convention on the Rights of the Child	29.Jun.90	04.Dec.90
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	15.Jun.00	10.Sep.02
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	01.Apr.02	25.Sep.03
Convention on the Rights of Persons with Disabilities	30.Mar.07	02.Sep.08

136 OHCHR, available in: https://tbinternet.ohchr.org/. Last visited 5 August 2019.

Treaty Description	Acceptance of individual complaints procedures	Date of acceptance/ non acceptance
Individual complaints procedure under the Convention against Torture	YES	24.Sep.86
Optional Protocol to the International Covenant on Civil and Political Rights	YES	08.Aug.86
Individual complaints procedure under the International Convention for the Protection of All Persons from Enforced Disappearance	YES	11.Jun.08
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	YES	20.Mar.07
Individual complaints procedure under the International Convention on the Elimination of All Forms of Racial Discrimination	YES	05.Feb.07
Optional protocol to the International Covenant on Economic, Social and Cultural Rights	YES	24.Oct.11
Individual complaints procedure under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	N/A	
Optional Protocol to the Convention on the Rights of the Child	YES	14.Apr.15
Inquiry procedure under the Convention against Torture	YES	24.Sep.86
Inquiry procedure under the International Convention for the Protection of All Persons from Enforced Disappearance	YES	14.Dec.07
Inquiry procedure under the Optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women	YES	20.Mar.07
Inquiry procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	N/A	

Inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child	YES	14.Apr.15
Inquiry procedure under the Convention on the Rights of Persons with Disabilities	YES	02.Sep.08

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The Prohibition of Ritual Slaughter Vs. the Freedom of Religion of National, Ethnic and Religious Minorities

A Case Study of Poland[1]

La prohibición de la matanza ritual vs. la libertad de religión de minorías nacionales, étnicas y religiosas

Un estudio de caso de Polonia

Received: 18/04/2019 – Accepted: 02/10/2019

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Abstract

In this essay, through legal analysis, the author assesses whether the prohibition of ritual slaughter complies with international law (and with regional European law), which allegedly limits the freedom of religion of persons belonging to national, ethnic, and religious minorities. Based on the example of the so–called "blanket ban" on ritual slaughter, which was enforced in Poland between 01 January 2013 and 12 December 2014, the author discusses its ramifications for ethnic, national, and religious minorities. In this analysis, it is demonstrated that ritual slaughter is a recognizable part of the religious rites secured by legal provisions enshrined by the freedom of religion, and protected in various international human rights documents, especially concerning the freedom to manifest religion by national, ethnic, and religious minorities.

Keywords: Ritual slaughter; Freedom of religion; National, ethnic, and religious minorities; Animal welfare.

Resumen

En este ensayo, a través de un análisis legal, el autor evalúa si la prohibición de la matanza ritual cumple con el derecho internacional (y con el derecho regional europeo), que supuestamente limita la libertad de religión de las personas pertenecientes a minorías nacionales, étnicas y religiosas. Basado en el ejemplo de la llamada "prohibición absoluta" de la matanza ritual, que se hizo cumplir en Polonia entre el 1 de enero de 2013 y el 12 de diciembre de 2014, el autor analiza sus ramificaciones para las minorías étnicas, nacionales y religiosas. En este análisis, se demuestra que la matanza ritual es una parte reconocible de los ritos religiosos garantizados por disposiciones legales que consagran la libertad de religión, y protegidos en varios documentos internacionales de derechos humanos, especialmente aquellos relacionados con la libertad de manifestar la religión por minorías nacionales, étnicas, religiosas.

Palabras clave: Matanza ritual; Libertad de religión; Minorías nacionales, étnicas y religiosas; Bienestar animal.

Summary

1. Introduction

In this essay, through legal analysis, the author assesses whether the national law of the Republic of Poland that establishes a general prohibition of ritual slaughter and allegedly limits the freedom of religion of persons belonging to national, ethnic, and religious minorities complies with international law (and regional European law).

However, in this paper, the author does not assess issues concerning occurrences of Anti–Semitism and Islamophobia surrounding the discussion of ritual slaughter. Moreover, this paper will not discuss whether animals are adequate 'holders' of rights, e.g., when it comes to the limitation of rights the European Convention on Human Rights (ECHR), "for the protection of the rights and freedoms of *others*" (article 9, para. 2). Alternatively, if in any sense, an animal can be perceived as the "other" aforementioned by the ECHR. *Nota bene*, in the case of *People*

v. Frazier, the California Court of Appeal explained that "despite the physical ability to commit vicious and violent acts, dogs do not possess the legal ability to commit crimes"[3]. Hence, *stricto facto* they cannot also be holders of rights.

Nevertheless, in regard to issues of discrimination and various discriminatory comments targeting Jews and Muslims surrounding the discussion of ritual slaughter, we should be reminded of a statement by Rabbi Jehiel Jacob Weinberg during the outbreak of Nazism in Europe. Rabbi Weinberg stated:

> "Devoted Jews […] would rather suffer and go hungry than defile themselves by eating beef slaughtered by the method prescribed by their evil persecutors […]. The Jews in Germany must stand this ordeal for our holy religion and for the sake of our brethren all over the world. If God forbids, we rule to be lenient regarding this type of slaughter, we would endanger Jewish kosher slaughter all over the world. We have to show the world that we are prepared to suffer for our religion, and when our enemies see that the prohibition of kosher slaughter does not divert Israel from religion, perhaps they would let it go"[4].

It is also important to mention that the Nazi–German Governor–General, Hans Frank, prohibited ritual slaughter on the occupied territory of the former Polish Second Republic, on 29 October 1939[5]. Before the outbreak of the Second World War, the Polish parliament was attempting to pass a blanket ban on ritual slaughter[6]. This action was discontinued by the war,

3 California Court of Appeal, *People v. Frazier,* 173 Cal. App. 4th 613 (Cal. Ct. App. 2009).

4 LERNER, Pablo and MORDECHAI RABELLO, Alfredo. "The Prohibition of Ritual Slaughtering (Kosher Shehita and Halal) and Freedom of Religion of Minorities". In: Journal of Law and Religion, Vol. 22, No. 1 2006/2007.

5 ENGELKING, Barbara, LEOCIAK, Jacek, and LIBIONKA, Dariusz, Prowincja noc. Życie i zagłada Żydów w dystrykcie warszawskim [in English: Province night. Life and Extermination of Jews in the Warsaw District]. IFiS PAN: Warsaw, 2007, p. 649.

6 Proposed Amendment to The Bill on the Protection of Animals, from 17 April 1936, Dz. U. from 1936, No. 29, pos. 237.

after the proposed bill of law went to the Senate[7]. The author in this analysis demonstrates that ritual slaughter is a recognizable part of the religious rites that are secured by the legal provisions that enshrine the freedom of religion, which are protected in various international and national human rights documents, especially concerning the freedom to manifest religion by national and religious minorities.

It is essential to point out the dilemma of assessing the issue of ritual slaughter. What is being evaluated is the *lex lata*, not the *lex feranda*, and with this in mind, the assessor should not be 'accused' of lacking empathy towards animals. The appropriate perspective for assessing anti–ritual slaughter is the suffering of natural persons who suffer in husbandry with suffering animals; however, as current laws do not adequately protect animals, that argument is being stricken in favor of promoting the freedom of religion.

1.1 Minorities in Poland

The Constitution of the Republic of Poland from 02 April 1997, in article 35, para. 1, guarantees Polish citizens who belong to national and ethnic minorities the freedom to maintain and develop their own language, customs, and traditions as well as to develop their own culture[8]. Moreover, article 25 enshrines equal rights for religious associations and article 53 stipulates that freedom of conscience and religion shall be ensured to everyone.

Polish domestic law defines national minorities based on article 2, para. 2. of the Bill on national and ethnic minorities (passed 06 January 2005), and on the following regional languages (alphabetically): Armenians, Belarusians, Czechs, Germans, Jews, Lithuanians, Russians, Slovaks, and Ukrainians. Additionally,

7 ŻEBROWSKI, Rafał. "Ubój rytualny" [in English: Ritual Slaughter]. In: Jewish Historical Institute [viewed 03 October 2018], available at: https://www.jhi.pl/psj/uboj_rytualny.

8 The Constitution of the Republic of Poland, from 02 April 1997, Dz. U. from 1997, No. 78, pos. 483: Article 35, para. 1: The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture. Para. 2: National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.

para. 4., stipulates the existence of ethnic minorities including Crimean Karaites [Pol.: *Karaimi*], Lemkos [Pol.: *Łemkowie*], Roma, and Tatars [Pol.: *Tatarzy*][9].

1.2 Ritual slaughter in Poland

Ritual slaughter is the slaughter of animals without previously stunning them, followed by specific stipulations. It is a fundamental practice of harvesting *kosher* and *halal* meat that is used by many members of Jewish and Muslim Communities, and constitutes their religious obligation –a religious *conditio sine qua non*. This condition is termed *dhabiha* slaughter by Muslims the *shehitah* slaughter by Jews[10] and prescribes the consumption of meat, which is a subject of exsanguination since "[the stunning] impairs the perfection of the animal"[11]. This type of slaughter rises an ethical concern by animal rights advocates who advocate for the protection of animal welfare and claim that slaughter without previous stunning causes "unnecessary pain and suffering"[12].

9 In 1977, Francesco Capotorti, the Special Rapporteur of the United Nations Sub–Commission on the Prevention of Discrimination and Protection of Minorities defined minority as: "A group numerically inferior to the rest of the population of a State, in a non–dominant position, whose members –being nationals of the State– [carry] ethnic, religious or linguistic characteristic differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (E/CN.4/Sub.2/384/Rev.1,para. 568). Nonetheless, in General Comment No. 23, the Human Rights Committee has noted that migrant workers or even visitors in a State Party constituting such minorities are entitled to those rights. Furthermore, the existence of an ethnic, religious or linguistic minority in a given State Party does not depend upon a decision by that State party, but requires establishment by objective criteria. Human Rights Committee, General Comment 23, Article 27 (Fiftieth Session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38, 1994.

10 The Torah forbids the consumption of blood, since blood is the medium of life and life must not be absorbed with flesh but poured on the earth like water (Deut. XII, 23 and 24; DYNARSKI, Kazimierz and Maria PRZYBYŁ. Biblia Tysiąclecia [in English: The Millennial Bible], Poznań: Pallottinum, 2002.

11 LERNER, Pablo and MORDECHAI RABELLO, Alfredo. "The Prohibition of Ritual Slaughtering (Kosher Shehita and Halal) and Freedom of Religion of Minorities", Op. Cit, p. 16.

12 TVN24, "Spór o Ubój Rytualny" [in English: The dispute over Ritual Slaughter], [viewed on 03 October 2018], available at: http://www.tvn24.pl/raporty/spor–o–uboj–rytualny, 702.

The tradition of Jewish ritual butcheries on Polish soil dates as far back as the 11th century. In 1264, the Statute of Kalisz gave the Jewish community legal rights to conduct *shehita*[13], and later regulations also conferred these rights to other religious communities inhabiting Poland[14]. On 06 June 2002, the parliament of Poland [in Polish: *Sejm*] passed the amendment to the *Bill on the Protection of Animals* (from 21 August 1997), stipulating that slaughter for food in Poland can only take place after previously stunning the animal[15]. This amendment, *ipso facto*, established a general prohibition of ritual slaughter in Poland (without any exceptions given to national, ethnic, and religious minorities). On 09 September 2004, a decree by the Polish Minister of Agriculture (Wojciech Olejniczak) changed this provision to allow for an exception: ritual slaughter for religious purposes[16]. This Decree was held unconstitutional on 27 November 2012 (due to procedural reasons) by the Constitutional Tribunal that prolonged the validity of the Decree till 31 December 2013. After this date, the prohibition of slaughter, without previous stunning, was reestablished[17], causing protests by Jewish and Muslim communities. Leaders of minority religious groups claimed that such a 'blanket ban' violated religious minority rights to freedom of religion guaranteed by the Polish Constitution and human rights law within the European regional system for the protection of human rights, especially article 9 –Freedom of Thought, Conscience and Religion– enshrined in the ECHR[18].

13 DAVIES, Norman. Złote ogniwa: Polska–Europa [in English: The Golden Links: Poland–Europe], Warsaw: Rosikon Press, 2004, pp 147–154.

14 TVN24, "Spór o Ubój Rytualny", Op. Cit.

15 The Bill on the Protection of Animals, from 06 June 2002, Dz. U. from 2002, No. 135, pos. 1141.

16 The Decree of the Minister of Agriculture and Rural Development of the Republic of Poland on qualifications of the people allowed for professional slaughter; circumstances and methods of slaughter and killing of animals, from 09 September 2004, Dz. U. No. 205, pos. 2102 with further changes.

17 The Judgment of the Polish Constitutional Tribunal from 27 November 2012, sygn. akt U 4/12 (Dz. U. from 2012 r., pos. 1365).

18 TVN24. "Zakaz uboju do Trybunału Konstytucyjnego…" [in English: The prohibition of ritual slaughter goes to the Constitutional Tribunal], from 30 August 2014 [viewed 03 October 2018], available at: http://www.tvn24.pl/wiadomosci–z–kraju,3/zakaz–uboju–do–trybunalu–konstytucyjnego–skarga–gmin–zydowskich,350900.html.

2. Legal Analysis

2.1 Freedom of Religion, Religious Minorities, and Ritual Slaughter under International and Regional European Law binding on Poland

2.1.1 Main Sources of Law

Freedom of Religion and Religious Minorities

The freedom to practice religion is an impartial and interdependent right within the scope of the human rights protection system and a cornerstone of a democratic society. It is stipulated in the non–binding Universal Declaration of Human Rights (UDHR), article 18, and legally–binding International Covenant on Civil and Political Rights (ICCPR), article 18. Furthermore, according to article 4, para. 2 of the ICCPR, it is a fundamental right. Thus, no deviation from it is allowed even in times of "*public* emergency"[19]. Moreover, regarding persons belonging to national minorities, their right to manifest or exercise religion, enshrined in article 27 is even more extensive than for persons of the 'main' population because it does not contain the limitations of article 18, para. 3 of the ICCPR[20], which are necessary for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. In article 30 of the Convention on the Rights of

19 Poland ratified the ICCPR on 18 March 1977. Para. 1: The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant. Human Rights Committee, General Comment No. 22, Article 18 (Forty–eighth Session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35, 1994.

20 Article 18: para. 1. stipulates that: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of […] choice, and freedom, either individually or in community with others and in public or private, to manifest […] religion or belief in worship, observance, practice, and teaching […]. Para. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, Vol. 999, 1–14668.

the Child, we find an equivalent provision for a child belonging to a national minority. Furthermore, article 9 of the ECHR stipulates that freedom of religion is a general human right. Additionally, article 7 and article 8 of the Framework Convention for the Protection of National Minorities (FCNM) recognizes freedom of religion, especially for persons belonging to national minorities[21].

Moreover, broadly understood, freedom of religion "include[s] not only ceremonial acts but also such customs as the observance of dietary regulations"[22].

21 Article 1: The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co–operation. Article 5 (1): The parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. Article 7: The parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression and freedom of thought, conscience and religion. Article 8: The parties undertake to recognize that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organizations and associations. Article 19: The Parties undertake to respect and implement the principles enshrined in the present framework Convention making, where necessary, only those limitations, restrictions or derogations which are provided for in international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, in so far as they are relevant to the rights and freedoms following from the said principles [ECHR, article 9, para. 2.: [..] limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. What is left is also the definition of the last word "others" as it may entitle those who suffer from the unnecessary suffering of animals. Framework Convention for the Protection of National Minorities (FCNM), 01 February 1995, ETS No. 157.

22 In Para. 4, the Human Rights Committee has stated that: "The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief […]. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations". Human Rights Committee, General Comment No. 22, Article 18 (Forty–eighth Session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35, 1994.

The Human Rights Committee, in its General Comment regarding article 27 of the ICCPR, pointed out that positive measures should be taken by the State to

> "… protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group"[23].

However, the Committee also noticed that

> "… [the States] may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria". Besides, para. 9 pointed out that "protection of [the rights] is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of the society as a whole"[24].

Another document is the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities from 1992. It safeguards the rights of persons belonging to the aforementioned minorities (article 2, para. 1) to "enjoy their own culture, [and] to profess and practice their own religion"25. Although it is a non–legally–binding declaration, passed by the

23 Human Rights Committee, General Comment 23, Article 27 (Fiftieth Session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994). Besides, there are: General Comment 22, regarding the Article 18 Freedom of Religion, Human Rights Committee, General Comment 22, Article 18 (Forty–eighth Session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

24 Furthermore, in para. 7, the Committee stated: "[W]ith regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources […]. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

25 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities

UN General Assembly without a vote, it puts a political obligation on the states. In article 4, para. 2 we find:

> "States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their […] religion, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards".

The words, "except where", give the State a margin of appreciation to decide if any "practices" violate international and national law.

Ritual slaughter does not violate international provisions nor those within most European countries, in or the United States[26]. What is remaining, however, is the possibility to yet exercise the margin of appreciation by limiting religious freedoms, or even putting dietary restrictions on minorities.

Within the European Union (EU), the Reform Treaty of Lisbon states in its article 2: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to national minorities". Moreover, the Charter of Fundamental Rights of the EU, from 12 December 2007, enshrines the rights of freedom of religion (article 10 and article 21, Non–discrimination). Poland and the United Kingdom, in the infamous "British–Polish Protocol", claimed reservation from Title IV of this Charter –"Solidarity"– and refused

(1992), A/RES/47/135.

26 On the human methods of slaughter, Act 7 U.S.C.A. § 1902 stipulates: "No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane: (a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or (b) by slaughtering in accordance with the ritual requirements of the Islamic and Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering".

to accept the full jurisdiction of the European Court of Justice (ECJ) in regard to the Charter[27].

Among the Organization for Security and Cooperation in Europe (OSCE) member states, the *Copenhagen Document on the Human Dimension* covers issues of religious freedom of minorities. Since the OSCE lacks legal personality, the document is non–binding. However, it constitutes the most 'far–reaching' *coverage* of religious minority rights within the international legal framework[28].

Ritual Slaughter

Within the scope of the legal framework of the Council of Europe, regarding the provision of ritual slaughter, exist several legally–binding Polish documents. Among them is the European Convention for the Protection of Animals for Slaughter of 1979 that states in article 17: "[E]ach Contracting Party may authorize derogations from the provisions concerning prior stunning in the following cases: slaughtering in accordance with religious rituals […]"[29]. Further documents of the Council of Europe include the European Convention for the Protection of Animals kept for Farming Purposes and the Recommendation of

27 Joined cases N.S. v. Home Secretary, No. C–411/10 and M.E. v. Refugee Applications Commissioner, No. C–493/10, 2011, EUECJ C–411/10, the judgment of 21 December 2011; and BEUNDERMAN, Mark, "Poland to join UK in EU rights charter opt–out", In: EUobserver, from 07 September 2007 [viewed 08 March 2014], available at: http://euobserver.com/institutional/24723.

28 The Document stipulates, among others, in 9.4: Everyone will have the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom to manifest one's religion or belief, either alone or in community with others, in public or in private, through worship, teaching, practice and observance. The exercise of these rights may be subject only to such restrictions as are prescribed by law and are consistent with international standards […]; 32. Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempt as assimilation against their will. 32.3 [The right] to profess and practice their religion, including the acquisition, possession and use of religious materials, and to conduct religious educational activities in their mother tongue.

29 The European Convention for the Protection of Animals for Slaughter, 10 May 1979, L 137, 02/06/1988, pp. 0027 – 0038.

the Committee of Ministers to Member States on the Slaughter of Animals –allowing similar exception from the general rule of stunning[30].

In the same spirit, the EU developed its laws, which encompass both regulations and directives[31], all allowing the exception of ritual slaughter for religious purposes[32]. Among them is the Directive 93/119/EC of 22 December 1993 which stipulates that "at the time of slaughter or killing animals should be spared any avoidable pain or suffering; Whereas, however, it is necessary

30 The European Convention for the Protection of Animals kept for Farming Purposes, 10 March 1976, CETS No. 087; Recommendation No. R (91) 7 of the Committee of Ministers to member States on the slaughter of animals (adopted by the Committee of Ministers on 17 June 1991 at the 460th meeting of the Ministers' Deputies) stipulating that "Whereas […] the practice of stunning animals by appropriate recognized techniques should be generalized; whereas, however, it is necessary to take account of the particular requirements of certain religious rites." Article 4 of the Directive provides: "The present Directive does not affect national provisions related to special methods of slaughter which are required for particular religious rites".

31 Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ L 303, 18.11.2009, pp. 1–30: the 18th point of this Regulation stipulates that: "Derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by Directive 93/119/EC. Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in article 10 of the Charter of Fundamental Rights of the EU". In addition, there is the Regulation (EC) No. 853/2004 of 29 April 2004 laying down specific hygiene rules for food of animal origin, OJ L 139, 30.4.2004, pp. 55–205.

32 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26; Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, OJ L 340, 31.12.1993, pp. 21–34; Council Regulation (EC) No. 1099/2009, p. 1–30; 78/923/EEC: Council Decision of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes, OJ L 323, 17.11.1978, pp. 12–13.

[...] to take account of the particular requirements of certain religious rites"[33]. One should keep in mind that the EU regulations are immediately binding on all of the EU member states and do not require any implementation by the state[34].

2.1.2 Auxiliary Sources of Law

Opinio Juris

The ECtHR has developed a broad jurisprudence concerning article 9 –Freedom of thought, conscience and religion– and article 9 in conjunction with article 14 –Prohibition of Discrimination– as well as various adjudicated cases in which these articles were concerned in relation to national and religious minorities. The ECtHR pointed out that "only a true democracy could be based on the principles of pluralism and broadmindedness"[35]. Although 'definitions' of what expressions of religiosity and beliefs mean differ between European states[36], the ECtHR, in numerous cases, reiterated that article 9 enshrines multiple ways that the right to freedom of religion or belief can be exercised through "worship, teaching, practice, and observance"[37]. The ECtHR, in its jurisprudence, that

33 WILKINS, David B., ed. Animal Welfare in Europe: European Legislation and Concerns. London: Kluwer Law International, 1997, pp. 45–46.

34 WOJTASZCZYK, Konstanty Adam, ANIOŁ, Włodzimierz, BIENIADA, Rafał, and CHOLAWO–SOSNOWSKA, Kamila. Encyklopedia Unii Europejskiej [in English: The Encyclopedia of the European Union]. Warsaw: Wydawnictwa Szkolne i Pedagogiczne [in English: School and Pedagogical Publishers], 2004, pp. 70–71.

35 Sahin v. Turkey, para. 100; and in para. 104: "[A]s enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".

36 Otto–Preminger–Institut v. Austria, App. No. 13470/87, ECHR of 20 September 1994 (merits), para. 50; and Dahlab v. Switzerland, App. No. 42393/98, ECHR 2001–V of 15 February 2001 (decision on inadmissibility).

37 Kalaç v. Turkey, App. No. 20704/92, ECHR 1997–IV of 01 July 1997 (merits and just satisfaction), para. 27.

article 9 encompasses religious dietary restrictions, including ritual slaughter[38], primarily through its landmark cases: *Cha'are Shalom Ve Tsedek Jewish Liturgical Association v. France*[39] and *Jakóbski v. Poland*[40].

In para. 73 of the judgment in *Cha'are Shalom Ve Tsedek v. France*, the Court stated that

> "… ritual slaughter, as indeed its name indicates, constitutes a rite […] whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion". In the case of Jakóbski v. Poland, respondent State's representatives (of the Republic of Poland) in front of the Court stated that "in principle they did not contest that religious precepts relating to a diet might be considered an essential aspect of the practice of one's religion and as such covered by the right to manifest one's religion within the meaning of article 9 of the Convention"[41].

This was later reconfirmed by the Court[42]. Notwithstanding, the Court pointed out that "[article 9] does not protect every act motivated or inspired by a religion or belief"[43], and "the State's duty of neutrality and impartiality, as defined in the Court's case–law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs"[44]. In the case of Cha'are Shalom Ve Tsedek v. France, the French Government –likewise the Polish one–

38 Jakóbski v. Poland, Cha'are Shalom Ve Tsedek v. France; including the outside of the ECtHR jurisprudence, among others: Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah, 508 U.S. 520 (The Supreme Court of the United States of America).

39 Cha'are Shalom Ve Tsedek Jewish Liturgical Association v. France, App. No. 27417, ECHR 2000–VII of 27 June 200 (merits) [GC].

40 Jakóbski v. Poland, Op. Cit., App. No. 18429/06, ECHR of 07 December 2010 (merits and just satisfaction).

41 Ibídem, para. 37.

42 "Observing dietary rules can be considered a direct expression of beliefs in practice in the sense of article 9" Cha'are Shalom Ve Tsedek v. France, para. 73–74.

43 Sahin v. Turkey, App. No. 31961/96, ECHR of 25 September 2001 (merits and just satisfaction), para. 78.

44 Ibídem, para. 107.

> "… did not contest the fact that Jewish dietary prohibitions and prescriptions formed part of the practice of Judaism by its adherents, but argued that although the religious rules imposed a certain type of diet on Jews they did not, by any means, require them to take part themselves in the ritual slaughter of the animals they ate"[45].

Hence, the import of such meat would be sufficient to satisfy the state obligations enshrined in article 9 of the Convention.

Nevertheless, there is a margin of appreciation, given to the State, to define its own limitations that "are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others"[46]. Regarding the "protection of the rights and freedoms of others", as was discussed beforehand, animals whose rights are protected at the time of slaughter and prior to it, are not the subject of this provision[47]. However, it has not yet been concluded whether those natural persons who are concerned with animal welfare might become a subject of this provision concerning ritual slaughter. *Nota bene*, a Canadian philosopher and legal scholar, Leonard Wayne Sumner, argued that the reason we protect animals is "not because they have rights", but because we are protecting feelings

45 Cha'are Shalom Ve Tsedek v. France, Op. Cit., para. 64.

46 Jakóbski v. Poland, Op. Cit., para. 47: "In this respect, the Court reiterates that whether the case is analyzed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under para. 1 of article 9 or in terms of an interference by a public authority to be justified in accordance with para. 2, the applicable principles are broadly similar. In both contexts, regard must be [given] to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of article 9, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance." In addition, similar ruling concerning the margin of appreciation can be found in the case of Hatton and Others v. The United Kingdom, App. No. 36022/97, ECHR 2003–VIII of 08 July 2003 (merits and just satisfaction) [GC], para. 98.

47 People v. Frazier, 173 Cal. App. 4th 613 (2009), the California Court of Appeal.

of those humans who suffer from the suffering of animals. Moreover, we can read that those who hold the "choice theory of rights", believe that in order to have rights, an entity must have the capability of conscious choice between options for action and intentionally implement this choice. For them, an animal cannot choose; therefore, it has no rights[48].

Furthermore, it was stated by the ECtHR that "an ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by article 9 of the Convention"[49]. Therefore, Muslim and Jewish organized communities inhabiting Poland can be parties to this debate[50].

Finally, in its judgment from 29 May 2018, the ECJ stated that the freedom of belief has two aspects: internal (having religious conviction) and external (extrinsic observance of own religion)[51]. Thus, ritual slaughter as a particular religious rite falls into the ambit of article 10 of the Charter of Fundamental Rights of the EU. In the light of regulation no. 1099/2009, slaughter without previous stunning is not yet prohibited and is allowed as an exception; however, only if the animal is put to death in a slaughterhouse that has obtained respective permissions form a regulating institution, in accordance with the regulation no. 853/2004.

Scholars Opinion

Asbjørn Eide, a former Norwegian member of the UN Sub–Commission on the Promotion and Protection of Human Rights, in his Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities concluded that:

48 SUMNER, Leonard Wayne. The moral foundation of rights. Oxford: Clarendon Press, 1987, pp. 203–204.

49 Canea Catholic Church v. Greece, App. No. 25528/94, ECHR 1997–VIII of 16 December 1997 (merits and just satisfaction), para. 31.

50 It is important also to point out that: "The Court's jurisdiction is […] subsidiary and its role is not to impose uniform solutions, especially with regard to the establishment of the delicate relations between the Churches and the State", Cha'are Shalom Ve Tsedek v. France, para. 84.

51 Liga van Moskeën en Islamitische Organisaties Provincie Antwerpen VZW and others v. Vlaams Gewest (Global Action in the Interest of Animals GAIA) VZW (C–426/16) of 29 May 2018, para. 44.

> "The formulation in the Minority Declaration makes it clear that these rights often require action, including protective measures and promotion of the condition for their identity (article 1). Article 4 also requires specified, active measures by the state. Therefore, it is not enough that the state abstains from interference or discrimination, it must also ensure that individuals and organizations of the larger society do not interfere or discriminate"[52].

In opposition to this view stand scholars who are mostly philosophers; one such scholar is Peter Singer[53]. Most of the facts discussed in the divagations on ritual slaughter are based on principles of ethics, morality, or veterinary and animal physiology, rather than international legal standards. There are some particular views that are similar to those of the late British philosopher Brian Barry. In Culture and Equality, Barry stipulated that the general prohibition of ritual slaughter did not infringe upon the freedom of religion, but rather "the ability to consume meat"[54]. Although the unnecessary suffering of any being should be avoided at all cost, within the current legal framework, the 'human right' to observe one's religion–with everything it entitles, e.g., rites and customs–prevails.

Thus, keeping all the above in mind, the Republic of Poland should secure in its legislature protection for religious customs for its minorities, which are legally defined and protected by the Polish Constitution. Also, Poland should not become a 'discriminator' of its own minorities by imposing limits on their religious customs and practices which undoubtedly encompass the dietary needs of certain minorities.

52 EIDE, Asbjørn. Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. 04 April 2005, E/CN.4/Sub.2/AC.5/2005/2, para. 7.

53 SINGER, Peter. Animal liberation. New York, N.Y.: New York Review of Books, 1990, pp. 7–8.

54 BARRY, Brian. Culture and equality: An egalitarian critique of multiculturalism. Cambridge: Harvard University Press, 2001, pp. 35, 40.

2.2 Freedom of Religion, Religious Minorities, and Ritual Slaughter under National Law of the Republic of Poland

2.2.1 Main Sources of Law

Article 25 and article 53 of the Polish Constitution enshrine the freedom of religion and article 35 enshrines the protection of national and ethnic minorities. Moreover, the *Bill on the Guarantees for the Freedom of Conscience and Religion* from 17 May 1989 secures the freedom of religion for national minorities[55].

Poland also has separate bills regulating its relations with national minorities, including *The Bill on the Relations between the State and the Muslim Religious Association in the Republic of Poland* (from 21 April 1936), *The Bill on the Relations between the State and the Crimean Karaites Religious Association in the Republic of Poland* (from 21 April 1936), *The Bill on the Relations Between the State and the Jewish Communities in the Republic of Poland* (from 20 February 1997), and *The Bill on National and Ethnic Minorities, and on Regional Languages* (from 06 January 2005) –enshrining the right to ritual slaughter[56]. As a matter

55 In the Polish Constitution, it is stated in article 53 that: "Freedom of conscience and religion shall be ensured to everyone. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of article 48, para. 1 shall apply as appropriate. The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defense of State security, public order, health, morals or the freedoms and rights of others. No one shall be compelled to participate or not participate in religious practices. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief" The Constitution of the Republic of Poland, from 02 April 1997, Dz. U. from 1997, No. 78, pos. 483.

56 The Bill on the Guarantees for the Freedom of Conscience and Religion, from 17 May 1989, Dz. U. from 2005, No. 231, pos. 1965 with later changes. The Bill on the Relations between the State and the Muslim

of fact, *The Bill on the Relations between the State and the Jewish Communities in the Republic of Poland*, from 20 February 1997[57], explicitly states in article 9, para. 2 that it is a duty of the Union of the Jewish Communities to provide its adherers with *kosher* food and to facilitate ritual slaughter.

These acts of law have deep roots in the long history of protecting minorities on Polish soil. In 1264, Prince Bolesław the Pious [in Polish: Bolesław Pobożny] proclaimed the first minority rights granted to the Jewish Community inhabiting Poland, including (indirectly) the protection of ritual slaughter[58]. Moreover, the former Kingdom's legislation did not shun itself from protecting animals. It dates as far back in time as to the first Polish King, Bolesław I the Brave [in Polish: Bolesław Chrobry], in the 11th century, when the rights of animals were legally protected on Polish soil, e.g., with the prohibition of hunting for beavers[59].

However, in accordance with article 35(1) of the *Bill on the Protection of Animals* (amended on 28 September 2002), "killing, putting to death animals, or slaughtering an animal in violation of article 34(1) (obligating to stun animals before killing) [became] a criminal offense subject to a fine, restriction of liberty or imprisonment up to two years"[60].

On 09 September 2004, Polish Minister of Agriculture Wojciech Olejniczak (Polish agriculture minister between 02 July 2003 and 31 May 2005) issued a

Religious Association in the Republic of Poland, from 21 April 1936, Dz. U. 1936, No. 30, pos. 240. The Bill on the Relations between the State and the Crimean Karaites Religious Association in the Republic of Poland, from 21 April 1936, Dz. U. 1936, No. 30, pos. 241. The Bill on the Relations between the State and the Jewish Communities in the Republic of Poland, from 20 February 1997, Dz. U. from 1997, No. 41, pos. 251. The Bill on National and Ethnic Minorities, and on Regional Languages, from 06 January 2005, Dz. U. from 2005, No. 17, pos. 141.

57 The Bill on the Relations between the State and the Jewish Communities in the Republic of Poland, from 20 February 1997, Dz. U. from 1997, No. 41, pos. 251.

58 The Statute of Kalisz of 16 August 1264 given to the Jews by Prince Bolesław Pobożny.

59 WDOWIŃSKA, Jacqueline and WDOWIŃSKI, Zdzisław. Tropem bobra [in English: The beaver trails]. Warsaw: Powszechne Wydawnictwo Rolne i Leśne [in English: State Publishing House of Agriculture and Forestry], 1975), p. 27.

60 The Bill on the Protection of Animals, 2002.

decree allowing ritual slaughter by registered religious communities[61]. However, Minister Olejniczak went *ultra vires* (as it was stated in the judgment of the Constitutional Tribunal of 27 November 2012) by allowing, in this decree, an exemption for religious ritual slaughter without adequate legal competence. For this reason, on 27 November 2012, the Constitutional Tribunal of the Republic of Poland held Olejniczak's decree unlawful and unconstitutional due to a lack of competence by the Minister, rather than the incompatibility of religious slaughter with the Polish Constitution, which was not the subject of the Tribunal examination at that moment[62]. The judgment was validated on 01 January 2013 establishing *de facto* and *de iure* the general prohibition of ritual slaughter in Poland.

On 12 July 2013, the Polish parliament rejected the governmental draft amendment of the Bill of law on the *Protection of Animals*, including a new article allowing ritual slaughter in Poland, *ipso facto* reestablishing the general prohibition of ritual slaughter on the territory of Poland and causing protests by Jewish and Muslim communities inhabiting Poland. Among others, the Polish Mufti, Tomasz Miśkiewicz stated that:

> "In the 600–years of the history of Islam in Poland there was not a single situation when the freedom of practicing the religion of Muslims had been limited. This situation is not serving democracy, undermines the principles of respect and tolerance, and causes nationalistic and racist outcomes"[63].

61 The Decree of the Minister of Agriculture and Rural Development of the Republic of Poland on qualifications of people allowed to professionally slaughter animals; and circumstances and methods of slaughter and killing of animals, from 09 September 2004, Dz. U. No. 205, pos. 2102 with further changes. MINISTERSTWO ROLNICTWA I ROZWOJU WSI RP. Informacja o Uboju według Szczególnych Metod Wymaganych przez Obrzędy Religijne [in English: Information about slaughter according to religious rituals], [viewed 08 March 2014], (available from: http://www.minrol.gov.pl/pol/Ministerstwo/Biuro-Prasowe/Informacje-Prasowe/Informacja-o-uboju-wedlug-szczegolnych-metod-wymaganych-przez-obrzedy-religijne).

62 The Judgment of the Polish Constitutional Tribunal, Op. Cit.

63 GAZETA WYBORCZA, "Muzułmański duchowny krytykuje zakaz uboju rytualnego" [in English: A Muslim clergyman criticizes the ban on ritual slaughter], from 15 July 2013 [viewed 08 March 2014], (available from: http://bialystok.gazeta.pl/bialystok/1,35241,14281028,Muzulmanski_duchowny_krytykuje_zakaz_uboju_ry-

Furthermore, some of the Polish meat–producers, along with the organizations representing religious minorities, made their complaint to the European Commission claiming violation of Regulation No. 1099/2009 of 24 September 2009 on *the protection of animals at the time of the killing*[64].

On 05 March 2014, the Speaker of the Polish Parliament, Ewa Kopacz, received the project of a new bill presented by the public sector amending the Bill *on the protection of animals*, which would allow the slaughter of animals performed according to specific methods prescribed by religious rites. Alas, no consensus has been reached for the future of this new bill[65]. On 10 December 2014, The Constitutional Tribunal stated that a general prohibition of ritual slaughter is in violation of the Polish Constitution. This judgment entered into force two days later, *de facto* reestablishing ritual slaughter in Poland. What is more, on 06 March 2018, new amendments were passed to the *Bill on the protection of animals*; yet, none changed any provisions regarding ritual slaughter.

2.2.2 Auxiliary Sources of Law

Opinio Juris

On 27 November 2012, the Constitutional Tribunal denounced the decree of the former Polish Minister of Agriculture *de facto* prohibiting ritual slaughter

tualnego.html#ixzz387IB6RJP). Moreover, in regard to this situation the international Jewish Community intervened even at the Holy See: TVN24, "Papież zaniepokojony zakazem uboju rytualnego w Polsce" [in English: The Pope is concerned about the ban on ritual slaughter in Poland], from 02 September 2013 [viewed 03 October 2018], (available from: http://www.tvn24.pl/wiadomosci-ze-swiata,2/papiez-zaniepokojony-zakazem-uboju-rytualnego-w-polsce,351650.html).

64 PULS BIZNESU, "Polscy producenci mięsa skarżą się KE na zakaz uboju rytualnego" [in English: Polish meat producers complain to the EC about the ban on ritual slaughter], from 27 November 2013 [viewed 03 October 2018], available at: http://www.pb.pl/3446270,70336,polscy-producenci-miesa-skarza-sie-ke-na-zakaz-uboju-rytualnego.

65 TVN24, "Ubój rytualny wraca do Sejmu. Politycy podzieleni" [in English: Ritual slaughter returns to the Sejm. Politicians divided], from 08 June 2014 [viewed 03 October 2018], available at: http://tvn24bis.pl/informacje,187/uboj-rytualny-wraca-do-sejmu-politycy-podzieleni,437073.html.

in Poland. It is important to point out the statement made by the Public Persecutor in its application:

> "The basic principle of the treatment of animals in Poland is their humane treatment providing care and protection. The Bill on the Protection of Animals stipulates that an animal, as the living being, is not an object, and a human should give to it respect, protection, and care. No one can abuse animals, and their killing can only be justified in prescribed by law instances and executed in a legal way. One of these instances is the need for food harvesting (we speak then about the slaughter). According to the rule stipulated by article 34 of the Bill on the Protection of Animals, all vertebrate animals before the killing, both in slaughterhouses and at homes, have to be previously stunned"[66].

The ruling of the Tribunal, however, was only on the legality and validity of the ministerial decree and did not stipulate on ritual slaughter *per se* and its legality within the Polish Constitution. The Minister of Agriculture, by allowing on 09 September 2004 the exception for ritual slaughter for religious purposes[67], violated article 92 para. 1 of the Polish Constitution (on issuance and legality of the executive power decrees in the Republic of Poland) because his decree went beyond provisions enshrined in *The Bill on the Protection of Animals*, from 06 June 2002[68], and beyond the scope of the power of the minister, the decree was held unconstitutional[69].

What is more, the Polish District Courts and the Offices of District Persecutors, in many instances, refused to investigate accusations of "illegal" ritual slaughter (based on provisions of the Polish Penal Code) allegedly "committed" by religious minorities[70], as well as various delations lodged by animal rights

66 The Judgment of the Polish Constitutional Tribunal, Op. Cit.

67 The Decree of the Minister of Agriculture and Rural Development of the Republic of Poland, 2004.

68 The Bill on the Protection of Animals, from 06 June 2002, Dz. U. from 2002, No. 135, pos. 1141.

69 The Judgment of the Polish Constitutional Tribunal, Op. Cit.

70 The Penal Code of the Republic of Poland, from 06 June 1997, Dz. U. 1997, No. 88, pos. 553.

advocates[71] between the years of 2004 and 2008 (due to lapse) and between 2008 and 2012 (due to the lack of offense).

On 30 August 2013, the Union of Jewish Communities in Poland filed a complaint to the Constitutional Tribunal for the lack of allowance of ritual slaughter by religious minorities in Poland[72]. This application, as well as another case, was referred to the Tribunal by the District Court in Białystok (regarding ritual slaughter committed on 12 March 2013 by the Union of the Jewish Communities in Tykocin)[73]. In its judgment on 10 December 2014, the Constitutional Tribunal stated that a blanket ban on ritual slaughter, encompassed with criminal penalties for those committing it, infringes the freedom of religion. Moreover, the Tribunal adjudicated that imposing such a ban did not serve any purpose for securing values enshrined in the Polish Constitution, including the interest of morals and public order (article 31 para. 3.). Furthermore, the Tribunal highlighted that at that moment, it was impossible to prove that ritual killing was a more ferocious form of slaughter than other types of slaughter performed in Poland[74].

Scholars Opinion

Among scholars, Marek Chmaj, a respected Polish constitutional law scholar, stated (regarding the blanket ban on ritual slaughter) that:

> "Poland does not allow to implement EU regulations fully as well as does not respect the Polish constitution, which is guaranteeing the freedom

71 GAZETA WYBORCZA, "Ubój rytualny był legalny" [in English: The ritual slaughter was legal], from 07 October 2013 [viewed 08 March 2014], available at: http://bialystok.gazeta.pl/bialystok/1,35241,14734591,Uboj_rytualny_byl_legalny__Prokuratura_nie_miala_kogo.html#TRrelSST#ixzz387HytWM4.

72 TVN24, "Zakaz uboju do Trybunału Konstytucyjnego…," Op. Cit.

73 GAZETA WYBORCZA, "Naukowcy z niedowierzaniem o opinii episkopatu w sprawie uboju rytualnego" [in English: Scientists in disbelief about the opinion of the Episcopate regarding ritual slaughter], from 14 October 2013 [viewed 08 March 2014], available at: http://bialystok.gazeta.pl/bialystok/1,35241,14774798,Naukowcy_z_niedowierzaniem_o_opinii_episkopatu_w_sprawie.html#TRrelSST#ixzz387HK73l5.

74 The Judgment of the Polish Constitutional Tribunal from 10 December 2014, sygn. akt K 52/13 (Dz.U. from 2014 pos. 1794).

to profess religion to churches and religious associations"[75].

According to him (based on EU Regulation No. 1099/2009)[76], Poland was supposed to implement adequate law allowing ritual slaughter till the end of 2012, and since it has not done so, ritual slaughter at this moment is actually permitted in Poland due to the validity of the EU Regulation[77].

Another respected Polish scholar, late Piotr Winczorek commented that:

> "In Poland, constitutionally–guaranteed is the freedom of religion; however, when it comes to the rights of animals, such are guaranteed by the Bill of rights only. The Polish Constitution does not mention animal rights at all. However, possibly in the future, it should so. Therefore, at this very moment, the general prohibition of slaughter without stunning should be a principle, yet with the exception made for religious groups. In deciding about this case, the Constitutional Tribunal will have to look at the possible limitation to this freedom in regard to the public morality"[78].

Nevertheless, in some instances, the freedom of religion for minorities can be outweighed by the margin of appreciation given to the State in fulfillment of the principles that are fundamental to a particular country. As Nihal Jayawickrama, a distinguished Sri Lankan legal scholar, pointed out:

> "The legislature may interfere […] with the freedom to manifest one's religion or belief. […] Limitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be

75 PULS BIZNESU, "Polscy producenci mięsa skarżą się KE na zakaz uboju rytualnego", Op. Cit.

76 Council Regulation (EC) No. 1099/2009, pp. 1–30.

77 PULS BIZNESU, "Polscy producenci mięsa skarżą się KE na zakaz uboju rytualnego", Op. Cit.

78 JABŁOŃSKI, Marcin, "Zakaz uboju rytualnego wymaga zmiany konstytucji. Bez tego nie obowiązuje?" [in English: The prohibition of ritual slaughter requires a change to the Constitution. Can it apply without this?]. In: GAZETA WYBORCZA, from 20 October 2013 [viewed 08 March 2014], available at: http://bialystok.gazeta.pl/bialystok/1,35241,14810516,Zakaz_uboju_rytualnego_wymaga_zmiany_konstytucji_.html#ixzz387IiRbOc.

> imposed for discriminatory purposes or applied in a discriminatory manner. [...] The protection of 'public order' has been invoked [...] to require a person wishing to perform the ritual slaughter" [79].

Moreover, two scholars with broad legal expertise on the freedom of religion: Pablo Lerner and Alfredo Mordechai Rabello, concluded that:

> "The debate over the prohibition against the use of religious symbols in French public schools, such as the hijab for Muslim girls, only goes to show that the fundamental principles of a particular society (in this case, the principle of laicité that shapes the secular character of France) are able to outweigh the principles of freedom of religion"[80].

3. Discussion & Conclusion

Many European countries permit slaughter under regulations which include stunning, but also enable religious communities, among them Jewish and Islamic ones, to slaughter animals in accordance with their religious specifications. This approach of adapting the law to the special needs of a minority group is commonly embraced as the most suitable way to keeping a balance between religious freedom and protecting animals, e.g., in France or Italy. At this moment, a margin of appreciation is given to states to regulate animal welfare within their jurisdictions is used among others in Sweden and Denmark, where ritual slaughter is banned[81].

The Advisory Committee to the Council of Europe on the Framework Convention for the Protection of National Minorities (FCNM) has noticed the issue of generally prohibiting ritual slaughter in Poland. During the third

79 JAYAWICKRAMA, Nihal. The judicial application of human rights law national, regional and international jurisprudence. Cambridge: Cambridge University Press, 2002, p. 659.

80 LERNER and RABELLO, Op. Cit., p. 18.

81 THE WORLD JEWISH CONGRESS. "Danish government bans kosher slaughter". From 13 February 2014 [viewed 03 October 2018], available at: http://www.worldjewishcongress.org/en/news/14440/danish_government_bans_kosher_slaughter.

cycle of periodic review of the Republic of Poland, the committee pointed out its concerns regarding article 8 of the FCNM –*An individual's right to manifest religion*[82]. Among the statements, in para. 91, the Committee "[noticed] with regret that at the end of 2012, ritual slaughter of animals, in accordance with the *kosher* rules in Judaism and *halal* rules in Islam, became effectively illegal in Poland". In para. 95 of the Report, the Committee asked Polish authorities "to adopt a religiously sensitive approach to the question of ritual slaughter of animals and consider, in consultation with those concerned, solutions, which take into account religious freedom"[83].

After all, the need to safeguard ritual slaughter for national, ethnic, and religious minorities comes with EU law (primarily in regard to the aforementioned regulations and directives) and with other regional and international obligations, as well as with Poland's own Constitution and its bills regarding national and religious minorities. The lack of ability to conduct ritual slaughter for minorities is in clear violation of article 53 (Freedom of Religion) and article 35 (Protection of National Minorities) of the Constitution.

Although the Decree of the Polish Ministry of Agriculture, allowing ritual slaughter, from 09 September 2004[84], was issued in violation of Polish law, content–wise it was in accordance with regional legislation, including the Convention for *The Protection of Animals for Slaughter* of 1979 and the Directive 93/119 of 1993, *The Protection of Animals at the Time of Slaughter or Killing*. The latter defines "stunning as the proper method of killing animals with the exception of religious slaughter". The intention of that decree was to allow national and religious minorities to fulfill their religious obligations as well as

82 Para. 71: Finally, it is with regret that the Advisory Committee notes that the public debate on the issue of ritual animal slaughter, including in the media and the political arena, has at times been characterized by intolerant attacks against persons defending this practice. Arguments of "medieval," "primitive," and "barbaric" nature of ritual slaughter at times revealed the anti–Semitic and Islamophobic sentiment of some of the most vocal proponents of the ban. In: Advisory Committee on the Framework Convention for the Protection of National Minorities, The Third Opinion on Poland, adopted on 28 November 2013, ACFC/OP/III (2013)004.

83 Ídem.

84 The Decree of the Minister of Agriculture and Rural Development of the Republic of Poland, 2004.

to secure the stake of the Polish meat industry in the global and local market of *halal* and *kosher* food[85].

Additionally, in this analysis, we can move as far as to the landmark case of *Minority Schools in Albania*, and to the opinion of the former Permanent Court of International Justice (PCIJ) on the closure of all private schools in Albania encompassing both the majority and minorities. The PCIJ stated that this move constituted a disproportionate treatment of minorities[86], and "highlighted that the core of minority rights protection was to ensure for the minority elements suitable means for the preservation of their traditions and characteristics"[87]. We can observe a similarity concerning the Polish case where the general ban on ritual slaughter applied to all of Poland, but harmed only the members of religious minorities. After all, this matter is about one's religious identity[88], and about the freedom of religion, which cannot be easily compromised, and any attempt to compromise it constitutes a legal violation of fundamental human rights.

There is one aspect of this debate yet remaining, which can be enclosed in the words of Peter Singer, an Australian ethicist: "all the arguments to prove [hu]man's superiority cannot shatter this hard fact: in suffering, the animals are our equals"[89]. Ritual slaughter that leaves the animal conscious while bleeding to death, might not be better than the "industrial" manufacturing of meat or hunting, yet surely it adds "unnecessary" suffering to the process of meat production. Allowing the use of ritual slaughter by the Jewish and the Muslim communities inhabiting Poland, and other minorities who might be in need of such product is a crucial aspect, which is hard to be outlawed. However, the multi–million–euro meat industries that use the methods of ritual slaughter

85 Production of halal and kosher meat in Poland amounts to 2.5 billion złotych (PLN), about 600 million EUR, in: PULS BIZNESU, "Polscy producenci mięsa skarżą się KE na zakaz uboju rytualnego", Op. Cit.

86 Minority Schools in Albania Opinion (1935) P.C.I.J., Ser. A/B, No. 64.

87 PENTASSUGLIA, Gaetano. Minorities in international law: an introductory study. Strasbourg: Council of Europe Pub., 2002, p. 50.

88 As Sikhs can be exempted from wearing helmets on motorbikes in certain jurisdictions, Muslims and Jews should be permitted to perform ritual slaughters for their halal and kosher meat, in: KYMLICKA, Will. Politics in the vernacular nationalism, multiculturalism, and citizenship. Oxford, UK: University Press, 2001, p. 210.

89 SINGER, Peter. Animal liberation… Op. Cit., pp. 7–8.

should be a subject for further examination, scrutiny, and legal regulations, since they go beyond the scope of minority rights protection, and definitely beyond the needs of the minuscule minorities inhabiting Poland.

What is more, the author is concerned about the lack of participation of the Republic of Poland in the EU project on religious slaughter (improving knowledge and expertise through dialogue and debate on issues of welfare, legislation and socio–economic aspects called "DIALREL"), that looked at the legal framework encompassing ritual slaughter and future possibilities for the European Communities[90].

To conclude, the author considered the rights of religious and national minorities in light of Polish law establishing the general prohibition of ritual slaughter. Concerning the legal protection of minorities, the author notices the shortcomings in the existing system of regional protection in Europe and postulates its enhancement as well as drafting of an adequate Additional Protocol to the ECHR, exclusively dedicated to the rights of minorities. Moreover, the case of ritual slaughter and the compatibility of its ban has to be reviewed on a broader international arena since the rights of minorities more or less "reflect the customary law in *statu nascendi*"[91].

Prohibiting, with no exceptions, ritual slaughter remains in violation of international law and violates human rights obligations of the Republic of Poland to safeguard and respect national and religious minorities. It is in opposition to provisions coming from internationally and regionally recognized acts of law that are binding on the Republic of Poland, such as the ICCPR and the ECHR, and to Poland's own Constitution.

90 The full name of the Project: Religious slaughter: improving knowledge and expertise through dialogue and debate on issues of welfare, legislation, and socio–economic aspects, DIALREL. Country Legislation [viewed 08 March 2014], available from: http://www.dialrel.eu/dialrel-results/country-legislations.

91 EUROPEAN CENTRE FOR MINORITY ISSUES. Mechanisms for the implementation of minority rights. London: Council of Europe Pub., 2004, p. 19.

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Human Rights Committee, *General Comment No. 23*, Article 27 (Fiftieth Session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38, 1994.

International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, Vol. 999, 1–14668 [Poland ratified the ICCPR on 18 March 1977].

Universal Declaration of Human Rights, General Assembly Res. 217A (III), U.N. Doc. A/810 at 71, 1948 [not–legally binding].

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Council of Europe (Poland has been a member State of the Council of Europe since 26 November 1991)

European Convention on Human Rights, Council of Europe Treaty Series, No. 5 (ECHR), 04 November 1950; 213 UNTS 221 [Poland ratified the *ECHR* on 19 January 1993].

European Convention for the Protection of Animals kept for Farming Purposes, 10 March 1976, CETS No. 087 [Poland ratified the *Convention* on 20 February 2008].

European Convention for the Protection of Animals for Slaughter, 10 May 1979, L 137 , 02 June 1988, pp. 0027 – 0038 [Poland ratified the Convention on 03 April 2008].

Framework Convention for the Protection of National Minorities (FCNM), 01 February 1995, ETS No. 157 [Poland ratified the Convention on 20 December 2000] and the Advisory Committee's *Third Opinion on Poland,* adopted on 28 November 2013, ACFC/OP/III(2013)004.

92 In order to determine the ratification status of each document, author used the following sources: The United Nations Treaty Collection and The Council of Europe Treaty Office [viewed 08 March 2014], (available from: http://treaties.un.org/pages/ParticipationStatus.aspx and http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG).

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Regulation (EC) No. 1099/2009 of 24 September 2009 on *the protection of animals at the time of killing,* OJ L 303, 18 November 2009, pp. 1–30 [binding on Poland with the power of EU regulation][93].

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the *European Community,* 13 December 2007, 2007 OJ (C 306) 1, especially article 13 of the Treaty on the Functioning of the European Union – Respect for national customs with regard to religious rites [Poland ratified the *Treaty* on 10 October 2009].

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93 WOJTASZCZYK et al., ref. 31, pp. 70–71.

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The Bill on the Relations between the State and the Crimean Karaites Religious Association in the Republic of Poland, from 21 April 1936, Dz. U. 1936, No. 30, pos. 241.

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Chassagnou and Others v. France, App. No. 25088/94; 28331/95; 28443/95, ECHR 1999–III, 29 April 1999 (merits and just satisfaction) [GC].

Canea Catholic Church v. Greece, App. No. 25528/94, ECHR 1997–VIII, 16 December 1997 (merits and just satisfaction).

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6. List of Abbreviations

App.	Application
CETS	Council of Europe Treaty Series
DIALREL	European Union Project on Religious slaughter: improving knowledge and expertise through dialogue and debate on issues of welfare, legislation and socio–economic aspects
Dz. U.	Dziennik Ustaw [Eng.: The Journal of Laws of the Republic of Poland]
EC	European Communities
ECtHR	European Court of Human Rights

ETS	European Treaty Series
OJ	The Official Journal of the European Union
pos.	Position (in The Journal of Laws of the Republic of Poland)
Sygn. Akt	Sygnatura Akt [Eng.: The Signature of Acts]
UN	United Nations
UNTS	United Nations Treaty Series

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Democratic Control of Armed Forces: A Legal Overview of the Imbalance of Power in Overseeing Armed Forces of Tajikistan

Control democrático de las Fuerzas Armadas: una descripción legal del desequilibrio de poder en la supervisión de las Fuerzas Armadas de Tayikistán

Received: 13/04/2019 – Accepted: 18/11/2019

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Abstract

The 2018 law amendments to the Law of Tajikistan on the Security Council has utterly subordinated the Security Council to the Presidential Apparatus of Tajikistan, thereby, reaffirming ultimate presidential power over this security body. This article conducts a legal analysis of the Tajik legal frameworks on the controlling and supervising of armed forces of Tajikistan by the President, the Parliament, and the Ministry of Defense. The analysis traces the wide competencies and authorities of the President and the feeble role of Parliament in the declaring and maintaining of the state of emergency and martial law. This article pays particular attention to the role of Parliament in the assessment and monitoring of the military budget and expenditures.

Keywords: Democratic control; Armed forces; Organization for Security and Cooperation for Europe; Parliament; Ministry of Defense; State of emergency; Martial law; State budget.

Resumen

Las enmiendas de 2018 a la Ley de Tayikistán sobre el Consejo de Seguridad han subordinado completamente el Consejo de Seguridad al Aparato Presidencial de Tayikistán, reafirmando así el máximo poder presidencial sobre este órgano de seguridad. Este artículo lleva a cabo un análisis de los marcos legales de Tayikistán sobre el control y la supervisión de las fuerzas armadas de Tayikistán por parte del Presidente, el Parlamento y el Ministerio de Defensa. El análisis rastrea las amplias competencias y autoridades del Presidente y el débil papel del Parlamento en la declaración y el mantenimiento del estado de emergencia y la ley marcial. Este artículo presta especial atención al papel del Parlamento en la evaluación y el seguimiento del presupuesto y los gastos militares.

Palabras clave: Control democrático; Fuerzas armadas; Organización para la Seguridad y la Cooperación para Europa; Parlamento; Ministerio de Defensa; Estado de emergencia; Ley marcial; Presupuesto estatal.

Summary

1. Introduction

After the collapse of the Soviet Union, one of the newly independent states, Tajikistan, plunged into a five–year bloody civil war (1992–1997). The war came to an end following the conclusion of a peace treaty between the then Islamic opposition group and the Tajikistan government thanks to the mediating role played by some states and international organizations, such as the United Nations and the Organization for Security and Cooperation of Europe (OSCE). The OSCE remained a vital actor in post–conflict Tajikistan, mainly in assisting the country's transition towards building and maintaining democracy, the rule of law, security, and human rights. While the

OSCE launched its mission in Tajikistan in 1994, a draft of the OSCE Code of Conduct on politico–military aspects of security (the Code of Conduct) had been the subject of a long and intense discussion among the OSCE member–states in Vienna. Drafters believed that a new document on security in the OSCE region after the fall of the Iron Curtain should provide countries in transition with fundamental provisions to build their security sector based on principles of democracy, the rule of law, and human rights.

The Code of Conduct is a revolutionary politically binding document, as it contains the principles of democratic control over armed forces. It

> "... elevated into the realm of international law and cooperation, and the consequence of this is that it creates international soft law in an area of state power and sovereignty hitherto considered as a taboo in international affairs: the security sector"[2].

Although twenty–four years have passed since the adoption of the Code of Conduct, little on the subject has been achieved in introducing consolidated legislative and practical measures that are compatible with the standards cemented in this landmark document in Tajikistan. The OSCE and other international donors have been investing a considerable amount of financial and technical assistance on projects focusing on border management and police reform in Tajikistan. Permission rendered to foreign donors to deal with the border management was based on the observation that the Tajikistan government could not enhance border control by itself. Police reform was not as successful as expected. To the contrary, some "agencies have become even more corrupt and aggressive toward the population"[3]. The Police reform packages lacked the introduction of

2 LAMBERT, Alexandre. The Starting Point of the Code: From Negotiation to Adoption in 20 Years of OSCE Code of Conduct on Politico–Military Aspects of Security: A Commemorative Study on the History, Development, Achievements and Outreach of the OSCE Key Document for Politico–Military Norms and Principles on Armed and Security Forces, Swiss Armed Forces, Armed Forces Staff, International Relations D, 2015, p. 27.

3 MARAT, Erica, OSCE Police Reform Programmes in Kyrgyzstan and Tajikistan: Past Constraints and Future Opportunities, Nº 27 – October 2012, EUCAM, EU–Central Asia Monitoring. Available at: https://eucentralasia.eu/2012/10/osce-police-reform-programmes-in-kyrgyzstan-and-tajikistan-past-constraints-and-future-

democratic control, which should have aimed to develop an accountable, transparent institution with a policy of not threatening the population but protecting constitutional values and rights. The aforementioned detrimental consequences were a result of a lacking political will to re–install the police system in a way where police were not beholden to a particular group, or body, which provides power and money.

The Tajikistan armed forces remained as a sector lacking the political motivation to instill reform, and its first–generation reform of civil–military relations was left without adequate consideration and development. Biljana Vankovska argues that "without the rule of law, a democratic form of government may be no more than a cloak for authoritarian practices where the role of the armed forces is strongly emphasized"[4]. Hence, thorough legal research is critical to identify the legal discrepancies and incompatibilities with that of the principle of the democratic control over the armed forces provisioned in the Code of Conduct and Tajikistan national legislation. The current legislation of Tajikistan regulating armed forces was adopted in the mid–1990s and the beginning of the 2000s. The subsequent amendments were mostly related to the President's powers over the armed forces.

This article is aimed at examining the competency of the Tajikistan Parliament and the President, as the head of the government branch, with regard to oversight of the armed forces of Tajikistan. Furthermore, this article investigates the gaps and misbalance of power that exists in the Tajikistan legislation concerning states of emergency and maritime law. Moreover, the competency of the Ministry of Defense, as well as parliamentary oversight over the military defense budget, are examined to explore whether legal provisions comply with the principle of democratic control over armed forces.

opportunities/, last accessed on 25th October 2019.

4 VANKOVSKA, Biljana. Introduction in Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies. Published by: Geneva Centre for the Democratic Control of Armed Forces 2001, p. 10. Available at: http://www.bezbednost.org/upload/document/legal_framing_of_the_democrati.pdf.

2. Primacy of the Democratic Control over Armed Forces under the OSCE Code of Conduct on Politico–Military Aspects of Security

The OSCE Code of Conduct was adopted in 1994 at the 91st Plenary Meeting of the Special Committee of the OSCE Forum of Security Cooperation by 52 member States[5]. It entered into force on 1 January 1995. France initiated the idea of codifying obligations of the member states on security matters in 1992[6]. As the proposal was declined by United States and other NATO member states aliens, except Germany, which proposed to develop a politically binding instrument, as a "Code of Conduct of Security relationship among participants" that was officially presented together with France to the Helsinki Follow–Up Meeting in 1992[7].

The four core aspects stipulated under Sections VII and VIII of the Code of Conduct are: the primacy of democratic civilian control over armed forces, respect of human rights and freedoms of the armed forces personnel, observance of international humanitarian law by armed forces, and internal use of armed forces in security matters[8]. Paragraph 20 of the Code of Conduct states that:

> "Participating States consider the democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police to be an indispensable element of stability and security. The

5 Tajikistan, as four other Central Asian countries (Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan), became a member of the OSCE on the 30th of January 1992.

6 DEAN, Jonathan, '*The OSCE "Code of Conduct on Politico–Military Aspects of Security": A Good Idea, Imperfectly Executed, Weakly Followed–up*', OSCE Yearbook, Vol.1–2, 1995/96, p. 292.

7 GHEBALI, Victor–Yves, *The OSCE Code of Conduct on Politico–Military Aspects of Security: A Paragraph–by–Paragraph Commentary on Sections VII–VIII (DEMOCRATIC CONTROL AND USE OF ARMED FORCES)*, DCAF Document Nº 3, Geneva, 2003. p. 2. The Code proposed by Germany and France was submitted to the Helsinki Follow–Up Meeting with the co–sponsorship of eleven other participating states (Belgium, Bulgaria, Estonia, Greece, Ireland, Russian Federation, Romania, Spain and Kyrgyzstan), Kyrgyzstan was the only Central Asian country among the aforementioned countries.

8 Ibídem, p. 8.

participating States will further the integration of their armed forces with civil society as an important expression of democracy"[9].

While Paragraph 20 of the Code of Conduct cements democratic political control over armed forces as a key element of stability and security, Paragraph 21 of the Code of Conduct further elaborates the question of who has to provide such control. It stipulates that democratic political control has to be maintained and provided by "constitutionally established authorities" vested with "democratic legitimacy". This Paragraph of the Code of Conduct is the essence of the democratic control of armed forces as it proclaims the primacy of constitutionally established authorities vested with democratic legitimacy over armed forces[10]. It also states that authorities constitutionally tasked to control armed forces must operate in a system of true "separation of powers"[11].

There is no single, unanimously accepted and definitive normative model for democratic control over armed forces. Hence, the model of democratic control over armed forces has to be elaborated by the state itself based on its political regime, historical background, culture, and other factors.

Andrew Cottey, for example, describes democratic control as the political control of the military by the state's democratically elected authorities, including certain limitations on: the use of armed forces by the government, parliamentary oversight over armed forces and military defense policy, freedom of discussion of military defense issues, and the engagement of the civil society[12].

Similarly, Simon Lunn defines democratic control over armed forces as decisions made by democratically elected authorities and scrutinized by the

9 OSCE Code of Conduct, 1994, Section VII, paragraph 20.

10 GHEBALI, Victor–Yves and LAMBERT, A. *'The OSCE Code of Conduct on Politico–Military Aspects of Security: Anatomy and Implementation'*, The Graduate Institute of International Studies, Volume 5, Martinus Nijhoff Publishers, Leiden, Boston, 2005 p. 65.

11 GHEBALI, Victor Yves, *'Revisiting the OSCE Code of Conduct on Politico–Military Aspects of Security'* (1994), HÄNGII, Heiner, and WINKLER, Theodor (Eds.), Challenges of Security Sector Governance, Münster (LIT), 2003, pp. 85–117, p., 92; LAMBERT, Alexandre. Op. Cit. 2005, p. 28.

12 COTTEY, Andrew, *'Democratic Control of Armed Forces in the OSCE Area: Problems and Challenges'*, The OSCE Yearbook, 2001, p. 286.

parliament to ensure legitimacy; "the ultimate aim being to ensure that armed forces serve the societies they protect and that military policies and capabilities are consistent with political objectives and economic resources"[13]. This includes decisions on organization, deployment and use of armed forces, military defense allocations, defining roles, and responsibilities of the military.

Apart from proclaiming the Geneva Center for Democratic Control over Armed Forces (DCAF) as the main framework for intra– and inter–state relations, the Code of Conduct falls short of providing a uniformly applicable model of the DCAF. Hence, it becomes sensible to identify elements of the DCAF based on theories and practices of democratic civilian control over armed forces. In this regard, Andrew Cottey, Timothy Edmunds and Anthony Foster underlined some of the fundamental elements for effective democratic control over armed forces. Included among them are:

a) Constitutional and legal frameworks outlaw involvement of the military as an institution in politics;
b) A clear chain of command headed by civilian authority;
c) Civilian Ministry and Minister of Defense with consist of military and civilians, where civilians are in decision–making positions; subordination of the General Staff to the Ministry of Defense and;
d) Transparency of the military defense budget[14]. Parliamentary oversight must also preside over other military defense issues through its committees[15].

These elements are fundamental but not exhaustive. Interpretation of the security and military defense norms can be extended because of rapidly changed security concerns, new challenges and threats. Mainly their interpretation can

13 LUNN, Simon, '*The Democratic Control of Armed Forces in Principle and Practice*', in BORN, Hans, FLURI, Philipp H., LUNN, Simon (eds.) "Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector and its Reform: A Collection of Articles on Foundational Aspects of Parliamentary Oversight of the Security Sector", DCAF and NATO Parliamentary Assembly, Brussel/Geneva, 2003, p. 83.

14 COTTEY et al, "Introduction: Democratic Control of Armed Forces", in edited by COTTEY, Edmunds and FOSTER, "Democratic Control of the Military in Post–Communist Europe: Guarding the Guards", Palgrave Macmillan, 2002, p. 7.

15 BETZ, David J., "Civil – Military Relations in Russian and Eastern Europe", Routledge Curzon, 2004, p. 13.

be extended with regard to the OSCE Code of Conduct because "the Code is expected to change en route and to gather increasing relevance and additional value as a kind of normative compass for the OSCE comprehensive security regime"[16].

3. Parliamentary Oversight of the Armed Forces of Tajikistan

Parliamentary oversight of the armed forces plays a crucial role in maintaining democratic control. Paragraph 22 of the Code of Conduct states that each participating state will provide legislative approval of military defense expenditures and will exercise restraint in its military spending by ensuring transparency and public access to information related to the armed forces. Paragraph 22 reaffirms the importance of parliamentary adoption of the military defense budget as a normal democratic procedure. Parliamentary oversight ensures the democratic nature of the armed forces, as Parliament is a publicly elected body presenting the public's interests and concerns about security and military defense, as well as ensuring a balance of power and control over the effectiveness of the armed forces in maintenance of security and military defense. In support of this, Hans Born, states that parliamentary oversight constrains the power of the government and thereby a head of State provides the proper maintenance of checks and balances and better represents the interests of people[17].

During the Soviet Union era, the Soviet military defense budget was considered the most confidential and secretly handled issue from the populace, as were almost all key military defense decisions. The planning and review of the military defense budgetary process were under the total control of the Communist Party, as were all military defense policies and activities.

The collapse of the Soviet Union and the subsequent transition of the many newly emerged states to democracy did not change the situation in Tajikistan.

16 DE NOOY, Gert, *'Summary of Main Conclusions'*, in DE NOOY., Gert, Cooperative Security, the OSCE and its Code of Conduct, Nederlands Instituut Voo Internationale Betrekkigen (La Haye), Martinus Nijhoff Publishers, Hague, 1996, p. 141.

17 BORN, Hans, et al, 'Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices', DCAF & Inter–Parliamentary Union, 2003, pp. 18–19.

On the contrary, Tajikistan inherited the Soviet Union approach of keeping the military defense budget secret, arguing that revealing such information would represent a threat to national security.

Parliamentary oversight ensures democratic oversight, while the government usually exercises civilian control over the armed forces. It is important to distinguish between democratic oversight and civilian oversight, as these two concepts function differently. Democratic oversight is performed in conformity with democratic principles, the rule of law, and legitimacy, while civilian oversight does not require democratic elements and can be effectively exercised even in authoritarian and totalitarian countries, as was the case during the Soviet Union era[18].

There are three fundamental functions of Parliament in overseeing a state budget: namely, the adoption of legislation, controlling the budget, and overseeing the government.

3.1 Parliamentary oversight of the military defense budget

Since 1999, the Parliament of Tajikistan has been operating in a bicameral structure. It has two chambers – Majlisi Milli (the National Assembly – upper chamber) and Majlisi Namoyandagon (the Assembly of Representatives – lower chamber). The National Assembly consists of a total of thirty–three members where twenty–five members are elected on the basis of territorial interests, and the remaining eight members are appointed by the President. The Assembly of Representatives should consist of sixty–three deputies, which are elected directly by the people. A state budget is determined solely by the lower chamber of the Parliament, i.e. by the Assembly of Representatives.

The main law regulating the state budget is the Law of Tajikistan "On State Finance of Tajikistan", which was adopted on the same day as the Law on Audit Chamber of Tajikistan. The Law of Tajikistan "On State Finances of Tajikistan" lays down the five stages of the budgetary process: 1) preparation;

18 VAN EEKELEN, Wim F., Democratic Control over Armed Forces: The National and International Parliamentary Dimention, Geneva Center for Democratic Control over Armed Forces (DCAF), Occasional Paper Nº 2, Geneva, October 2010. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/op02_democratic–control.pdf

2) review; 3) approval; 4) implementation; and 5) control. The control process is also regulated by the Law of Tajikistan "On State Financial Control". If budget preparation and implementation are under the remit of the government (executive), review, approval, and control are within the power of the lower chamber of the Parliament.

3.1.1 Preparation of state budget

Tajikistan's "budget preparation" stage is carried out by the government and this process is closed off to public and expert discussions. The budget preparation process happens explicitly within ministries and committees of the government, notably the Ministry of Finance (MoF). The preparation process consists of two stages. In the first stage, the MoF develops the main areas of financial, budgetary, and tax policy for the whole period of budgetary planning and submits information to the temporary budgetary commission under the government of Tajikistan. The law stipulates to the kind of information that has to be included. This information has to be considered and approved by the government, and it may be published if the government chooses to present it for public scrutiny. However, the law does not oblige the government to publish this information.

During the second stage of the preparation process, the Main Administrators of Budget Allocations (MABAs)[19] prepare a mid–term strategy of budget allocations of the respective sectors and submit the strategy to the MoF; it also divides budgetary allocations based on budget classification and submits them to the MoF. Based on the collected information and documents, the MoF drafts the state budget and provides this to the government no later than 20 September each year. If the government approves the draft budget, the draft law is presented to the lower chamber of Parliament. The Law of Tajikistan "On State Finance of Tajikistan" prescribes that review of the draft law for the next financial year, and its approval, are regulated by present law. Unfortunately, the law does not stipulate any procedures or mechanisms for reviewing the budget.

3.1.2 Reviewing of the state budget

19 Under the *Law on State Finances*, amendments made in 2008, MABAs as public authorities represented by ministries, state committees, committees, and agencies authorized to allocate budget resources to subordinate budget entities.

The second stage of the budgetary process is to review. As noted by Hans Born, one of the reasons for the Parliament's lack of interest with regard to the budget of political parties is that political parties, which are represented in government, are not eager to criticize their governmental counterparts and, as a result, the practices and tools of parliamentary oversight are seldom used, except during scandals or in emergencies[20]. The "review" of military defense budget allocations is undertaken by the Committee on Legal Order, Defense and Security[21], and the Committee on Economy and Finance of the lower chamber of the Parliament (Majlisi Namoyandagon of Majlisi Olii Tojikiston). The Committees have a chairperson, a deputy head, and five members. There is no balance between political parties in the Committee, which leads to a lack of debate and criticism of the policies and draft laws submitted by the government. Forty–four out of the sixty–three deputies of the lower chamber of the Parliament are members of the ruling party, the National–Democratic Party of Tajikistan (NDPT).

In accordance with the Standing Order (Reglament) of the lower chamber of the Parliament of Tajikistan, the two abovementioned Committees have a right to invite experts and representatives of public associations[22] and mass media to its sessions[23]. Although the Reglament grants the committees such authority, in practice the committees have been unwilling to involve these groups in their sessions, even if in order to critically and effectively review the budget, the committee needs different points of view that could contribute to constructive dialogue and make an essential impact on efficient spending and the achievement of military defense policies. For instance, the military defense budget contains not only allocations to strengthen military capacities, but also

20 BORN, H., '*Learning from Best Practices of Parliamentary Oversight of the Security Sector*' in BORN, H., FLURI, Ph. and LUNN, S., (Eds.), 'Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector, Geneva Centre for the Democratic Control of Armed Forces', 2010, p. 35

21 Article 23 of Standing Order of the House of Representatives (*Majlisi Namoyandagon*) of Tajikistan (lower chamber).

22 Article 18 of the Standing Order of House of Representatives (*Majlisi Namoyandagon*) of Tajikistan (lower chamber).

23 Article 16 of the Standing Order of House of Representatives.

allocations for social protection and guarantees of the rights and freedoms of military personnel. It is crucial to involve representatives of military unions, non–governmental organizations, and mass media to better understand the situation concerning the social rights of military personnel. In most cases, social guarantees and protections are either inappropriate or are not provided at all.

Another essential aspect of the Parliament's adoption of the state budget is the time frame for review and approval of the military defense budget. As far as regular and long–term policy issues are concerned, the Parliament should have sufficient time to analyze and debate the budget expenditures for military defense. The Parliament should have forty–five days to three months[24] in order to conduct all necessary debates on, and improvements to, the draft state budget. Under Tajikistan's Law "On State Finance of Tajikistan", the government submits the draft law to the Parliament by no later than 1st November. The last five state budgets were adopted by the Parliament within eight to nineteen days upon their receipt. No parliamentary hearings were held or participated in by external experts or civil society. For instance, the 2013 state budget was submitted to the Parliament on 8th November, which is a violation of the Law of Tajikistan "On State Finance of Tajikistan". The draft law was adopted and signed by the President on 19th November, although the Law of Tajikistan "On State Finance of Tajikistan" provides two months (1 November–31 December) for review and approval of the state budget. It is worth mentioning that when the Parliament adopts the budget, this does not immediately mean that the law is ratified. It is enforced only after official publication. Before this, the law has to be signed by the President, who has the right to veto. If the President does not agree with the law, he sends the law to the lower chamber of the Parliament with his proposed amendments. If the lower chamber adopts the law for a second time, the President must sign it. After which it is officially published.

The report prepared by the International Monetary Fund's (IMF) fiscal transparency mission which reviewed Tajikistan's compliance with the IMF's financial transparency code noted that the Parliament approves the budget

24 **BORN, Hans,** *'Security and the Power of the Purse'*, in BORN, Hans, FLURI, Philipp and JOHNSSON, Anders B. (eds), Parliamentary oversight of the security sector: principles, mechanisms and practices / [publ. by: Inter–Parliamentary Union; Geneva Centre for the Democratic Control of Armed Forces., 2003.

through broad functional categories. Still, actual allocations are made to individual spending units during the year administratively by the MoF.

Since Tajikistan gained independence, budget allocations for the security sector have remained opaque to the extent that it "hinders the effectiveness and efficiency of armed forces"[25]. The Budget Open Survey conducted by the International Budget Partnership in 2012, scored Tajikistan's state budget a mere seventeen out of a possible one hundred, with neighboring states scoring higher: Kazakhstan (48), Kyrgyzstan (20), Russia (74), and Afghanistan (21). An analysis of the budgets from 2007 to 2013 shows that budget allocations for military defense have quadrupled. In 2007, the total allocation for military defense was almost USD 32 million; in the 2014 state budget, the military defense expenditure reached USD 110 million.

The Law of Tajikistan "On State Finance of Tajikistan" demands transparency of the budget, which means that the publication of the state budget and the dissemination of information about its implementation in mass media are mandatory. Furthermore, the law stipulates that the completeness of data on the implementation of budgets and the accessibility of other information about budgets –except for information constituting a state secret or other secret protected by law– has to be published[26]. In 2008 and 2012, state budgets lacked any information about allocations for military defense and, even when budget allocations were indicated, the budgets show the total sum marked as "not for publication". A secretive military defense budget means allocation depends on the decisions of the MoF and the Ministry of Defense.

3.1.3 Monitoring of state budget implementation

One of the most significant stages in the budget process is the control of the implementation of the budget. The Parliament has minimal monitoring power over the budget process and the government's financial management.

25 Transparency International UK, "*The Transparency of National Defense Budgets: An Initial Review*", 2011, p. 8 Available at https://ti-defence.org/wp-content/uploads/2016/03/2011-10_Defence_Budgets_Transparency.pdf (last visit November 3rd, 2019).

26 Article 8 of the Law of Tajikistan "On State Finance of Tajikistan," adopted on June 28, 2011, # 723.

Article 60 of the 1994 Tajikistan Constitution, article 26 of the Law of Tajikistan "On State Finance of Tajikistan", and article 37 of the Constitutional Law of Tajikistan "On Majlisi Olii of Tajikistan" stipulate that the lower chamber of the Parliament has the authority to control implementation of the budget. However, there are no legal frameworks with precise mechanisms and procedures to control budget implementation. In 2010, the Parliament adopted amendments and additions to the Constitutional Law of Tajikistan "On Majlisi Olii of Tajikistan", notably article 37, which states that the lower chamber hears reports of ministries, state committees, and other state authorities due to its control over budget implementation. In 2011, the new Law of Tajikistan "On State Finance of Tajikistan" granted the lower chamber of the Parliament the authority to approve the reports on the implementation of the state budget, which are submitted by the MoF.

Neither the amendment made in 2010 nor the Law of Tajikistan "On State Finance of Tajikistan" developed a system of effective parliamentary control over spending of budget allocations. The amendment made in 2010 on the Constitutional Law on Majlisi Oli of Tajikistan does not authorize the Parliament to request reports from government authorities. It only grants the Parliament the authority to hear reports, which is inefficient with regard to controlling the effectiveness and efficiency of spending because the assessment of spending has to be conducted by an independent organ authorized to conduct the audit. It is worth noting that the last reports submitted by the MoF do not contain any detailed information about defense spending. Moreover, the MoF reports a lack of analytical research on spending by some sectors.

Until 2011, the Parliament did not have any independent auditing office which could monitor the spending of the defense budget and prepare analytical reports on how the budget was spent, whether allocations were spent on defined programs and policies, whether there were any corruptions or financial losses, and make recommendations on how the efficiency of spending could be enhanced.

In 2008, the government established an agency for financial control and fighting against corruption (hereinafter the Anti–Corruption Agency). The Anti–Corruption Agency is entitled to manage financial control over the effective usage of state resources and state properties to help ensure the economic security

of Tajikistan[27]. However, the Anti–Corruption Agency is not an independent institution and is wholly subordinate to the President. Furthermore, there is no public trust in this Anti–Corruption Agency to fight against corruption in the country; the Anti–Corruption Agency prosecutes only low–ranking authorities.

3.1.4 Accountability of the government to the Parliament

The accountability of the government before the Parliament is weak. Although the government submits annual reports about the implementation of the state budget[28], and the budget has to be approved by the Parliament[29], this does not ensure the effectiveness of such procedures. Although the report on the implementation of the state budget is submitted by 15th July, the Parliament considers and approves the report in November. At the same time, the Parliament also approves the state budget for the following year. Until now, all reports were passed without any parliamentary findings as to whether the budget was implemented efficiently. In short, the approval of the report has taken on a purely decorative character, granting legitimacy to all spending in the military defense sector. It is worth noting that neither the parliamentary committee on economy and finance, nor the committee on defense, have any competence to assess the report of the government. Even if they did, these committees do not have sufficient human resources and mechanisms to accomplish this task, not to mention the lack of will to proceed with such reviews due to the strong power of the National Democratic party's influence in the Parliament.

4. Presidential control over armed forces of Tajikistan

Complying with public international law and international human rights obligations while adopting constitutions and passing legislation after the collapse of the Soviet Union was an essential part of the democratization for Tajikistan. Proclamations of democracy and human rights in fundamental legal documents

27 Article 1 of the Law of Tajikistan "On Agency on State Financial Control and Fighting against Corruption of Tajikistan", 20 March 2008, #374.

28 Article 64 of the Law of Tajikistan "On State Finance of Tajikistan", 28 June 2011, # 723.

29 Article 66 of the Law of Tajikistan "On State Finance of Tajikistan".

had been recognized as an indicator of the country's level of democracy. Even now, more than twenty years after the collapse of the Soviet Union, the legislation of Tajikistan remains one of the main markers of democratic governance and the rule of law. Regrettably, the rule of law with regard to armed forces personnel and democratic control over armed forces is undermined, and democracy could not be legitimately proclaimed without the proper establishment and maintenance of the rule of law[30].

Tajikistan's constitutional framework is of particular importance when it comes to democratic control over the armed forces, and better implementation of the OSCE Code of Conduct. Considering the civil war that had destabilized the situation in the country, the 1994 Constitution assigned absolute control over the armed forces to the President.

Under the Tajikistan Constitution, the President is the Head of state and government, the Chairperson of the Security Council, and the Commander–in–Chief. The President is also empowered to appoint and dismiss the Minister of Defense with the approval of the lower and upper chambers of the Parliament, and to appoint and dismiss the Head of General Staff and military commanders. He or she is also responsible for establishing the Security Council and the Council of Justice. At the same time, the President is also entitled to declare martial law and a state of emergency, use the armed forces abroad with the consent of both chambers of the Parliament, appoint judges of military courts, and cancel and suspend acts of government bodies in cases where they conflict with the Tajikistan Constitution[31].

Except for constitutionally prescribed affairs, the Law of Tajikistan "On Defense" grants the President a wide range of competences in defense policy. Since the adoption of the Law "On Defense" in 1997, eight amendments have been adopted by the Parliament. In 2000**,** the President was granted the authority to determine state policy in the military sphere.

Since 2005**,** the President has been authorized to order the deployment of the armed forces and other military formations in the event of armed con-

30 VANKOVSKA, Biljana ed., Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies, (Geneva Centre for the Democratic Control of Armed Forces, 2001), pages 8–9

31 Article 69 of the Tajikistan Constitution, 1994.

flicts, or where the threat of such conflicts could arise within the territory of Tajikistan; to protect territorial integrity and the constitutional form of government, following the approval of such orders in joint sessions of the upper and lower chambers of the Parliament; to declare war, universal and partial mobilization, and martial law over the whole country or in some parts of the country upon the prompt submission of these issues for approval to a joint session of the lower and upper chambers of the Parliament; to order the establishment, reconfiguration, and abolition of military units and military compounds within the limits set by the lower chamber of the Parliament; to appoint and dismiss Ministry of Defense officials and issue decrees related to the office to be submitted to a joint session of the lower and upper chambers of the Parliament; and to order the permanent or temporary transfer of military formations to the operational control of the General Staff of the Armed Forces of Tajikistan.

Later in 2007, the President was further mandated to approve regulations on the general staff of Tajikistan, the procedure of administration of the military oath, liabilities of armed forces personnel for damage caused to the State; to govern other issues directly prescribed in law; to draw up a list of positions for ranking officers; and to appoint and dismiss the head of the general staff of the armed forces and the commanders of the armed forces.

4.1 Security Council of Tajikistan

Under article 60 of the 1994 Tajikistan Constitution, the President establishes and is head of the Security Council. The 2006 Military Doctrine of Tajikistan and the Statute on the Security Council prescribes that the Security Council is the constitutional body of joint leadership over military defense and security issues for making decisions to implement internal and external policies for sustaining the national security, territorial integrity, state sovereignty, and constitutional structure of Tajikistan.

The Security Council staff consists of a Chairperson (the President), Secretary of the Council, permanent members, and members of the Council. Permanent members are the President, chairpersons of both chambers of the Parliament, the Prime Minister, and the Secretary of the Security Council of Tajikistan. The President appoints and dismisses the Secretary of the Security

Council[32]. Members of the Council can be heads of ministries and departments of economy and trade, finance, international affairs, justice, internal affairs, security, protection of the environment, health, and/or other officials.

Members of the Security Council enjoy equal rights in the decision–making process; a simple majority vote makes decisions. However, the decision–making process overall is unequal due to strong influence by the President. With a lack of independence among chairpersons of both chambers, their votes do not make a significant difference. The President appoints the chairperson of the upper chamber[33], while the chairperson of the lower chamber is a member of the People's Democratic Party, which is headed by the President. The Secretary of the Security Council is directly accountable to the President and the Prime Minister is appointed by the President to whom he is also accountable.

Permanent members of the Security Council are the representatives of the government bodies under the control of the President. The parliamentary opposition is absent in the Security Council which might otherwise have contributed greatly to the development of military defense policies and helped spur electoral interest in defining future security and military defense measures and policies. Although the majority of the members of the Security Council are civilians, decision–making and voting processes lack democratic oversight. Neither the protocols of the Security Council, nor the presidential decrees based on decisions of the Security Council, are open to public scrutiny. Additionally, the Security Council, as an institution, is not accountable to the Parliament. On the 3 August 2018, the Security Council became a structural subdivision of the Executive Office of the President of the Republic of Tajikistan[34].

Under paragraph 3 of the Statute of the Security Council, the Security

32 The present Security Council Secretary is Abdurahim Kakhharov since January 2012. From 2009 until 2012, he was a Minister of Internal Affairs of Tajikistan.

33 The chairperson of the upper chamber of the Parliament is Mahmadsaid Ubaidulloev. He has presided in the upper chamber since 2000. From 2000 to 2007, he occupied the position of the Mayor of Dushanbe, the capital of Tajikistan. The present Mayor of Dushanbe is Rustami Emomali, the son of the current President Emomali Rahmon.

34 Law of Tajikistan on "Amendments and additions to the Law of the Republic of Tajikistan "On Security"", 3 of August 2018, Nº 70.

Council is tasked with elaborating, implementing, and assessing the effectiveness of a national security concept (NSC). Since the establishment of the Security Council, this concept has not been adopted. The legislation of Tajikistan does not stipulate which authority is responsible for adopting a NSC. The law is ambiguous as to what kind of security threats are possible and how the government should respond to these threats. There is also a lack of clarity on what roles should be played by constitutionally established authorities, the armed forces, and military formations, as well as law enforcement bodies. The absence of a NSC can lead to misuse of armed forces and other military formations, ineffective coordination of security organs, and a lack of oversight on the work of the Security Council. The Security Council is beyond parliamentary oversight as it remains under the direct control of the President.

4.2 Internal use of armed forces and international military operations

Under article 7 of the Law on Defense, the President is authorized to give orders to the armed forces and other military formations, upon further approval of the decree in a joint session of the upper and lower chambers of the Parliament, in cases of armed conflicts, whenever there is a threat that armed conflicts may arise within the territory of Tajikistan, or whenever there is a threat to Tajikistan's territorial integrity and the constitutional form of the government. In order to deploy the armed forces in the aforementioned situations, there is no need to announce an emergency situation or declare martial law. While armed conflict may somehow be clearly defined, the definition of the threat of such conflict originating can vary and can therefore be interpreted in different ways. Furthermore, the military defense legislation of Tajikistan does not state any time frame within which the Parliament has to approve a presidential decree about using the armed forces.

Article 57 of the Tajikistan Constitution and article 6 of the Law on Defense stipulate that the Parliament (both Chambers) approve any deployment of the armed forces of the Republic of Tajikistan to carry out the international commitments of Tajikistan abroad. However, neither the Tajikistan Constitution nor any legislation outlines the procedure for seeking parliamentary approval. It is neither clear as to the time frame for the decree to be presented to the Parliament, nor is it stipulated as to what kind of information has to be submitted.

5. A State of Emergency and Martial Law: Roles of the President and the Parliament

A state of emergency is regulated by the Constitutional Law of Tajikistan "On a State of Emergency" (Law on a State of Emergency) adopted in 1995[35]. In accordance with article 1 of this Law, a state of emergency is announced upon the onset of the following situations:

a) Natural calamities, accidents and catastrophes, epidemics threatening the life and health of the population;
b) Mass violation of public law bearing towards an actual threat to the rights and freedoms of the population;
c) Attempts to seize state power or change the constitutional law of Tajikistan by force;
d) Threat to the territorial integrity of the State leading to a change of the state borders;
e) Necessity to restore the constitutional law and the functioning of the state bodies.

Under article 2 of the Law on a State of Emergency, a presidential decree declaring a state of emergency has to be immediately submitted to the Parliament, which should be considered in a joint session of both chambers, and then voted on by both separately. Parliamentary approval of a state of emergency has to be granted within seventy–two hours.

The declaration of a state of emergency needs formal approval from the Parliament. However, the cancellation or prolongation of a state of emergency is entirely under the authority of the President[36]. The Law on the State of Emergency does not specify how long a state of emergency may be extended by the President or how many times it can be renewed. The Law on the State of Emergency also does not require the President to explain any decision to extend or cancel a state of emergency. The Law on the State of Emergency allows for the extension of a state of emergency if "necessary" but does not clarify the conditions that would render an extension "necessary". In so doing,

35 Last amendments to the Law of Tajikistan "On Defense" were made in 1997, 2002, 2005 and 2008.

36 Article 3 of the Law of Tajikistan "On a State of Emergency", 3 November 1995, Nº 94.

it provides excessive leeway for interpretation, thereby granting the President discretion to decide for himself what falls under the meaning of "necessary". Accordingly, there is no guarantee that a state of emergency may not be used to eliminate political opposition, introduce unwarranted restrictions on human rights and freedoms, postpone elections, or other self–serving purposes that would be more difficult to realize under normal circumstances. Therefore, there is a pressing need for clarification and the adoption of relevant amendments into the legislation.

Under the Law on the State of Emergency, the President is authorized to: reverse any decision of representative organs and officials in districts where there is a state of emergency[37]; appoint any number of persons necessary during a state of emergency[38]; and repeal actions of special forms of management after the determined expiry, or prolong the terms of the actions, under the circumstances that were the basis for their initial introduction into practice[39]. The does not give constitutionally authorized bodies the power to make a decision regarding the use of armed forces during a state of emergency, though armed forces are mentioned in articles 7 and 9 of this same legislation. Section 2 of article 7 of the Law on the State of Emergency stipulates that:

> "... persons breaching order indicated in Section 1, article 7 will be arrested by police and **military patrol** until end of curfew, those who do not have identification card will be detained until their identity is established, but no longer than three days. Detained undergo a body search and inspection of their personal effects" (emphasis added).

Similarly, article 9 of the Law on the State of Emergency also commends that:

> "... dissemination of provocative rumor, exercising actions, which provoke violation of public order or incitement of national hatred, active

37 Article 5 of the Law of Tajikistan "On a State of Emergency".

38 Ibídem, article 18.

39 Ibídem, article 15.

> impeding of citizens' and officials rights and interests as well as malicious disobedience to an order of police men, **armed forces personnel** and others, performing official or public duty to maintain a public order or any such actions that violate public order and tranquility of citizens, or violation of the rules of administrative supervision committed in areas where a state of emergency declared, are punishable…" (emphasis added).

Based on the two provisions mentioned above, the armed forces can be deployed during a state of emergency. However, the legislation does not prescribe who should authorize the use of the armed forces, the specific role of the armed forces, and the conditions necessary for their deployment[40].

6. Martial Law

On 20 May 2019, the Law of Tajikistan "On martial law" (hereinafter Martial Law of Tajikistan) was adopted for the first time since the independence of the country. Article 4.1 of the Martial Law states that martial law can be declared in the case of a grave threat to the security of the state. It further provides that "grave threats to the state security" are threats to the integrity of the state border and the use of force against Tajikistan, including aggression, intelligence, terrorism, and sabotage activities of special services, foreign organizations, and individuals aimed at undermining the national security of Tajikistan. In comparison with martial laws of the Russian Federation, Kyrgyzstan, and Ukraine, the Martial Law of Tajikistan has an extensive list of circumstances under which martial law could be declared. The three aforementioned post–Soviet states can declare martial law only in the situation of aggression. Acts of aggression under the laws of these states reflect acts defined under article 3 of the United Nation General Assembly Resolution 3314[41]. Circumstances

40 The use of armed forces is prescribed in the Law of Tajikistan "On Protection of Population and Territories from Emergency Situation of Nature and Technogenic Character". Article 8 of this Law stipulates that the President has the authority to use armed forces in emergency situations. Article 15 of this Law states that the procedure to use armed forces is determined by the President and the legislation of Tajikistan.

41 Article 3 of the United Nations General Assembly Resolution 3314 declares that any of the following acts,

listed in the Martial Law of Tajikistan have broader coverage, which may lead to disproportionality of declaration of a martial law to a committed act. For instance, a single act of intelligence related crime committed by an individual may suffice, in and of itself, as a legal reason to declare a martial law. Martial law, along with a state of emergency, leads to restrictions in almost all areas of life and rights of the population. Such unrestrained discretion may allow room for misuse and pretextual application of the law to derogate human rights, eliminate political opponents and activists, and legitimize every arbitrary measures of the government.

As stated above, martial law is declared through a presidential decree that has to be further endorsed by both chambers of the Parliament. Similar to a state of emergency, prolongation and cancelation of the martial law is under an ultimate discretion of the President.

The Tajikistan Constitution legitimizes measures of derogation of human rights and freedoms only in the case of a state of emergency. However, article 14 of the Martial Law of Tajikistan states that derogation of human rights and freedoms can be pursued based on provisions of the Constitutions and other Tajikistan laws. This provision guarantees that limitations of human rights and freedoms provisioned by article 47 of the Tajikistan Constitution[42] will be executed during martial law in the same manner as they are stated fora state of emergency. Article 4.2 of the International Covenant on Civil and Political Rights (ICCPR)[43] guarantees rights and freedoms, which cannot be derogated

regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: armed invasions or attacks, bombardments, blockades, armed violations of territory, permitting other states to use one's own territory to perpetrate acts of aggression, and the employment of armed irregulars or mercenaries to carry out acts of aggression.

42 Non–derogable rights during a state of emergency guaranteed by article 47 of the Tajikistan Constitution: article 16, 17 (equality before a court, equality of women and men), 18 (right to life), 19 (right to a fair trial), 20 (deprivation of a house), 22 (protection of privacy), 25 (accessibility of information of political parties, state authorities and officials, and social association) and 28 (right to association).

43 Right to life (article 6); not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment (article 7); not to be held in slavery or servitude (article 8); not to be imprisoned for failure to perform a contractual obligation (article 11); not to be subject to retroactive penal measures (article

during a state of emergency. Article 47 of the Tajikistan Constitution does not contain freedom from torture; freedom from cruel, inhuman, or degrading treatment or punishment; freedom from slavery or servitude; freedom of thought, conscience, and religion or belief; freedom from imprisonment for failure to perform a contractual obligation; or freedom from being subjected to retroactive penal measures.

7. Ministry of Defense of Tajikistan (MoD)

Tajikistan did not have its own Ministry of Defense (MoD) during the Soviet Union era. All military issues during the Soviet Union era were decided by the ministry in Moscow and the local military district (Turkestan Military District) in Tashkent, which was fully headed by military personnel, and the Slav officers had almost entirely been in charge of the leadership roles.

Under the Soviets, the Minister of Defense and other high–ranking officials had to obey the orders of, and were accountable to, the Communist Party. The Communist Party left military issues entirely under the control of uniformed personnel, and there was a great shortage of civilians with any military defense expertise. Furthermore, the Communist Party represented the only controlling mechanism over the MoD and the armed forces, which resulted in a lack of democratic principles and separation of powers.

The MoD of newly independent Tajikistan faced a number of challenges after the collapse of the Soviet Union. Tajikistan did not inherit armed forces and was susceptible to threats by the well–equipped Islamic opposition. Even the military formations which were subordinate to the Ministry of Interior and State Security Committee, did not fall under the control of the newly established MoD. On the contrary, these military formations were used against the post–Soviet communist government during the civil war. Disloyalty among the security sector pushed the then President Nabiev to involve the criminal underworld as well as other countries when taking military action against opponents. One of the semi–formal local militia was

15); to be recognized as a person before the law (article 16); to freedom of thought, conscience, and religion or belief (article 18).

the Popular Front of Tajikistan, an armed group consisting mostly of civilians, led by Sangak Safarov, which "represented the main military power in Tajikistan at the time"[44].

A Tajikistan military expert said that the MoD had been established without an army and with a serious shortage of qualified military personnel having the necessary experience to lead and manage the MoD[45]. In order to establish a new defense institution, the MoD was created as a prototype of the Soviet Union's MoD, inheriting Soviet institutional structure, processes, and behaviors. The establishment of the MoD in 1993 was driven by the military leadership of the Russian Major General Alexander Shishlyanikov, who headed the Tajikistan MoD until 1995.

Since the establishment of the Tajikistan MoD, the Minister of Defense has never been headed by a civilian. In 1995, Colonel General Sherali Khairulloev was appointed Minister of Defense of Tajikistan and was reappointed by presidential decree on 1 December 2006 before being dismissed on 20 November 2013 after eighteen years as head of the MoD.

During that eighteen–year period under Sherali Khairullaev, the armed forces of Tajikistan achieved some positive changes. However, Sherali Khairullaev failed to conduct the necessary reform to strengthen management within the MoD and local defense authorities, as well as failing to strengthen their relationship with the Parliament, civil society, and the mass media. Corruption, human rights violations, hazing and inappropriate conditions in military units, and weak social protection of military personnel worsened during this time and are still far from being resolved today.

After the presidential elections of 6 November 2013, the President established a new cabinet of ministers and appointed a new Minister of Defense, General Sherali Mirzo, who had been the commander of border troops since 2006, and was subordinate to the State Committee on National Security[46].

44 ATKIN, Shirin, "Tajikistan: Disintegration or Reconciliation?", Royal Institute of International Affairs, Russia and Eurasia Programme, 2001, p. 52.

45 Interview with Muzaffajon Babajanov, former military commissar of the Military Commissariat of Kairakkum, Tajikistan, 4 December 2013.

46 As the commander of border troops, Mirzo was a deputy head of the State Committee on National Security.

Under article 69 (4) of the Tajikistan Constitution, the President appoints the Minister of Defense of Tajikistan with the approval of the Parliament. Although the appointment of the Minister of Defense depends on the consent of the Parliament, his or her dismissal is at the discretion of the President, as the Parliament does not have any authority to dismiss the Minister of Defense until the President submits a relevant decree. Additionally, the Parliament does not have the authority to initiate the dismissal of any minister of the executive branch.

The role of civilians within the Tajikistan MoD is insignificant. Almost all decision–making positions are occupied by military personnel and, in cases of interactions with civilians, the military dominates. Civilians working in the MoD mostly work in accounting, the information technology department, and human resource registration. Essentially, they work in positions that do not require involvement in development policies and decision–making processes. There is a stereotype in Tajikistan believed and perpetuated by uniformed personnel that civilians do not have the required adequate skills and knowledge when it comes to military defense issues, and that they could be national security hazards. However, these fears are unjustified.

Civilianization of the MoD of Tajikistan has never been on a state agenda, though appointments of civilians on the decision and policy making positions are prescribed in the Law of Tajikistan "On Armed Forces of Tajikistan", which stipulates that civilians can be appointed to the positions of Minister of Defense, deputies, and other officials of the armed forces of Tajikistan, in "exceptional cases"[47]. From a legal point of view, this means that the positions mentioned above primarily have to be occupied by the military, and only in exceptional cases will civilians be assigned to hold these positions. Additionally, this Law does not define what constitutes an "exceptional case". The lack of such a definition makes the appointment of civilians almost impossible. It is clear that this provision was not enacted to integrate civilians into the MoD but was instead a response to disloyalty within the military.

Another problem with the civilianization of the MoD is the skepticism

Before joining the border troops, he was a deputy of the Minister of Defense of Tajikistan.

47 Article 7 of the Law of Tajikistan "On the Armed Forces of Tajikistan".

and unwillingness of the Minister of Defense to appoint civilians, because of the assumption that civilians do not have the sufficient skills and knowledge to make decisions on military defense matters, and that such competence requires specific defense and military expertise.

The MoD of Tajikistan is a central governmental body that exercises leadership of the armed forces of Tajikistan and local military authorities. It is responsible for the armed forces' development and their ability to carry out defensive tasks. The MoD prepares and issues defense policies and ensures compliance with military defense legislation and effective functioning of military authorities[48].

The MoD is one of the largest spending ministries in Tajikistan and the most unaccountable and non–transparent ministry in terms of budget spending. The main legal document regulating the MoD is the governmental decree "On Ministry of Defense of Tajikistan" adopted in 2006.

The competences of the MoD are stated both in the Law of Defense and the Statute on the MoD. Some competences stipulated in the Statute on the MoD are similar to those in the Law on Defense.

7.1 The General Staff of the Armed Forces and the MoD

The General Staff of the armed forces (the General Staff) is the main institution for operative control and management of the armed forces of Tajikistan. The President appoints and dismisses the head of the General Staff upon the proposal of the Minister of Defense, and exercises control over the General Staff[49]. Under the Statute on the General Staff, the head of the General Staff is also the first deputy of the Ministry of Defense[50]. Under article 9 of the Law on Defense, the government appoints deputies of the Minister of Defense. Neither the presidential decree on the appointment of the head of the General Staff, nor the government decree on the appointment of the first Minister of Defense could be found in official legal databases. It is unclear how the appointment of one person to two positions is resolved in practice.

In 1997, the Tajikistan President adopted the Statute on the Main Staff

48 Governmental Decree "On the Statute of the Ministry of Defense of Tajikistan", 28 December 2006, #601.
49 Paragraph 6 of the Regulation 'On the Main Staff of Tajikistan', Presidential Decree, 5 June 1997, # 736.
50 Ídem.

(known as the General Staff after 2009). Interestingly, the Statute on the Main Staff is adopted by the President, while the government adopts the Statute on the MoD. There are legal consequences in cases of contradictions. Under the Law of Tajikistan on Legal–Normative Acts, legal norms adopted by the government are, in the hierarchy of law, lower than a presidential decree, which means that in the case of an overlap, the presidential decree will prevail[51].

The Statute on the Main Staff prescribes the tasks of the General Staff, and the competences of the General Staff. The General Staff has the competences to: provide operational control of the armed forces of Tajikistan, support combat readiness of the armed forces of Tajikistan, assess politico–military situations and determine the level of military threat, organize operational–tactical training of staff and troops, organize and conduct military intelligence in the interest of defense and security of Tajikistan, and ensure the preservation of state secrecy in the armed forces of Tajikistan.

Under the Statute of the Main Staff, the General Staff is subordinate to the Ministry of Defense[52]. However, this Statute stipulates that control over the General Staff is exercised by both the President and the Minister of Defense.

8. Conclusion

Through analyses of the main authorities tasked to control and manage military defense institutions and armed forces, this article argues that Tajikistan has not made any tangible steps toward democratization of their armed forces. On the contrary, any steps to integrate the concept of the DCAF are rejected as posing a threat to the power of an authoritarian ruler.

Therefore, in order for Tajikistan to bring legal frameworks and practice into compliance with the Code of Conduct of DCAF, the country has to take several important steps. The first steps must be strengthening parliamentary control of armed forces and develop and adopt effective legal frameworks and policies on military defense, which could guarantee security and stability in the country. It is also essential to disclose the defense budget and make it

51 Article 7 of the Law of Tajikistan "On Normative Legal Acts of Tajikistan", March 26, 2009, # 506.

52 Paragraph 8 of the Statute "On General Staff".

accessible to the public. Similarly, Tajikistan needs to strengthen the institutional accountability and transparency of their military defense organs at the various levels. Additionally, the task of integrating civilians and military personnel within the MoD should be a priority of the human resource reform aspect of the institutions. On top of that, the existing normative gaps in the state of emergency and martial law legislation of the country need to be revisited and amended. Furthermore, the roles and missions of the armed forces should be clearly defined in order to avoid misuse of the army or usurpation of power by the military. Plus, Tajikistan needs to cooperate closely with think tanks, military and civilian experts, and civil society in order to thoroughly analyze civil military relations in Tajikistan, and to execute and launch reforms. In this regard, non–state actors can be useful in implementing Tajikistan's commitments under the Code of Conduct. Moreover, preventing violations of civilians' rights and freedoms and strengthening the link between the armed forces and the civil society should be seriously considered by the government. Finally, in order for these recommendations to have a genuine meaning and effect, they have to be implemented in collaboration with the OSCE and United Nation institutions, the European Union, and diplomatic missions which provide technical and financial support to Tajikistan in the area of military defense. The DCAF must be an integral part of the security sector reform and governance policies and programs.

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Reviewing Pressing Human Rights Issues of Indigenous and Tribal Peoples

Revisando cuestiones urgentes de derechos humanos de los pueblos indígenas y tribales

Received: 20/04/2019 – Accepted: 20/07/2019

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Abstract

Throughout history, indigenous peoples have been excluded, marginalized, mistreated and disregarded. The United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention, C169 tried to emphasize the need to grant them protection that is both broader and more appropriate while taking their particular characteristics into consideration. However, these protections are insufficient and ineffective in the face of current problems related to expansion of the extractive frontier in its varied forms, which mostly end in controversies among the indigenous communities present in the territories at stake, the States, and the companies who perform such activities. Three interconnected and interrelated cardinal issues that are the most affected are: the principle of non–discrimination, the right to land and natural resources, and the right to participation and consultation.

Keywords: Participation and consultation; Land and natural resources; Extractive industries; Prior and informed consent; Environmental and social impact assessment.

Resumen

A lo largo de la historia, los pueblos indígenas han sido excluidos, marginados, maltratados y desatendidos. La Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas y el Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales, trataron de enfatizar la necesidad de otorgarles una protección más amplia y apropiada, teniendo en cuenta sus características particulares. Sin embargo, estas protecciones son insuficientes e ineficaces frente a los problemas actuales relacionados con la expansión de la frontera extractiva en sus diversas formas, que en su mayoría terminan en controversias entre las comunidades indígenas presentes en los territorios en cuestión, los Estados y las empresas que realizan tales actividades. Los tres problemas cardinales interconectados e interrelacionados más afectados son: el principio de no discriminación, el derecho a la tierra y los recursos naturales, y el derecho a la participación y consulta.

Palabras clave: Participación y consulta; Tierra y recursos naturales; Industrias extractivas; Consentimiento libre, previo e informado; Evaluación de impacto ambiental y social.

Summary

1. Introduction

Although the colonial period has been underway across the world for 500 years, it concluded –in the majority of cases– in the period after the Second World War (WWII). However, it has been affirmed that colonial relations are ongoing on in diverse ways. Even where the rule of law reigns at its highest, imposition of ways of life and consequential forced assimilation is imposed by the majorities and ruling elites –national and international– towards other subjugated groups. Such is the case of indigenous communities.

Indigenous peoples constitute about five percent of the world's population, nearly 370 million people spread across over 70 countries. Not only are they legitimately endowed with special rights due to historical reasons, as acknowledged by international law, but in the current context of global ecological crisis, their work of care towards the Earth's ecosystems and biodiversity is vital for humanity as a whole[2].

At present, however, they are literally on the front line in the struggle for their right to live, as well as for their cultural and economic survival, in the face of extractive activities carried out in territories where they live and use. With this in mind, I will try and sketch a general tour of the most urgent rights that are presently facing the gravest violations, with the aim of a) providing a broad vision of the most vulnerable indigenous peoples' rights, b) how those rights have been interpreted in light of available international norms, and c) the flaws of rules that will be presented. In this sense, and after having clarified some key concepts and differences, I will focus on three key pillars: the principle of non–discrimination, the right to land and natural resources, and the right to participation and consultation. Before concluding, I will refer to the responsibility that concerns the main stakeholders who impact the rights of indigenous peoples.

2. Differences between minorities, people and indigenous people

2.1 Minorities

Article 27 of the International Covenant on Civil and Political Rights (ICCPR)[3] institutes the rights of minorities. The Human Rights Committee (HR Committee) –an organ for interpreting the scope and meaning of the articles of the Covenant– in General Comment No. 23 on the implementation of article 27[4] emphasizes the performance of the States' parties with regard to the rights

2 International Labour Organization, Indigenous and tribal peoples. Available at: https://www.ilo.org/global/topics/indigenous–tribal

3 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

4 Human Rights Committee, General Comment 23, article 27 – Fiftieth session (1994) in Compilation of

accorded to minorities: on the positive side, they formally recognize minorities' rights; on the negative side, they fail to effectively grant those rights. In this regard, article 27 expounds the latter side in the following:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

Along these lines, there are two criteria to take into consideration regarding to the rights of minorities: the objective element, which corresponds to shared ethnic, cultural, national, religious and/or linguistic characteristics of the group that are different from other groups; and the subjective element, which refers to self–identification by individual members of the minority group, that is, that members see themselves as belonging to a group that is distinct from other groups and want to preserve those differences.

Accordingly, the term minority refers to a social group that is considerably inferior in number than other people within the same State, are not dominant in the population of the state, and are different in ethnic, linguistic, religious and/or cultural terms in relation to the rest of the State's population. It is relevant that, as in all the groups, there may exist minorities within a particular group –e.g., women, children, disabled people, the elderly, or sexual minorities.

Even though "human rights means equal enjoyments of basic rights for everybody, whereas minority rights can be described as a special right recognized to the exclusive benefit of minority groups"[5], these rights are not privileges; rather, they present a form of positive discrimination which justifies the differential treatment of a specific group of people who exhibit similar characteristics in order to protect the effective recognition of particular rights, and refers to actions positively aimed at reducing, or ideally eliminating,

General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38.

5 PENTASSUGLIA, Gaetano, Minorities in International Law, 1st edition, Strasbourg: Council of Europe, 2003, part 1, p. 48.

discriminatory practices against historically excluded sectors, with the primary objective of seeking to equalize their living conditions with those of the general population.

2.2 Peoples' rights

Peoples' rights, which have been identified as third generation or third dimension rights, comprise the right to peace, the right to development, the right to a safe environment and the right to self–determination. The concept of "people" used to be identified with that of "nation", or even with "the rights of collectivities"; however, eventually, the territorial criterion developed by the Special Rapporteur of the Sub–Commission on Prevention of Discrimination and Protection of Minorities prevailed. It states the following:

a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;
b) it implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population; and
c) people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the ICCPR. Peoples' rights are national rights which have the special characteristic of being collective rights[6].

Not only has it been recognized as *ius–cogens* of colonial people[7] but also as an international *erga–omnes* obligation[8].

The right to self–determination, as part of peoples' rights, has been vastly recognized in international legal instruments[9]. As such, it relies on the singularity

6 CRISTESCU, Aureliu, Special Rapporteur of the Sub–Commission on Prevention of Discrimination and Protection of Minorities, Study "The Right to Self–Determination. Historical and Current Development on the Basis of United Nations Instruments", in: UN Doc. E/CN.4/Sub.2/404/Rev.1, 19981, para. 279.

7 UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV), art. 2.

8 ICCPR art. 1; UN General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, art. 1.

9 UN–Charter (art. 1 no. 2 and art. 55) 26.06.1945; Declaration on the Granting of Independence to Colonial

of being a collective right, recognized as a legal norm of international law since it came into force via the United Nations (UN) Covenants, which are recognized as a peremptory norm of international law, part of the *ius cogens* only for colonial purposes and recognized as an *erga omnes* obligation in international law.

The right to self–determination enshrines two facets: the external facet and the internal facet. The external facet is the right to a sovereign state and can be applied both to a population with a sovereign State of its own and to those without one. In the latter case, it comes into tension with the principle of sovereignty because it potentially involves a violation of the territorial integrity of another State. As a result, it might take the form of a secession or an association with a neighboring State. The driver of this facet has always been the concept of decolonization, which began its ascendance after WWII. Conversely, the United Nation General Assembly expanded the scope of the right to a second, internal facet[10]: internal self–determination, which encompasses the right of a people within a State to develop from an economic, social and political perspective, as well as to freely determine their political status, without the goal of becoming an independent State[11].

The distinctiveness of the right to self–determination is that it cannot be claimed from a juridical perspective at the international level. This denotes a weakness in terms of its exercise and its limited *locus standi* in this regard: on the one hand, only States can present an action before the International Court of Justice[12]; on the other hand, only individuals are able to present claims before the HR Committee[13].

Countries and Peoples 14.12.1960; ICCPR art. 1; ICESCR art. 1; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; CSCE Final Act of Helsinki CSCE/OSCE; African Charter on Human and Peoples' Rights, art. 20.

10 UN General Assembly, The right of peoples and nations to self–determination, 16 December 1952, A/RES/637

11 See: GRIFFIOEN, C., Self–determination / Utrecht: Science Shop of Law, Economics and Governance, Utrecht University. Supervised by the Institute of International, Social and Economic Public Law ISBN: 978–90–5213–196–2; MCCORQUODALE, Robert, Self–Determination: A Human Rights Approach. International and Comparative Law Quarterly, 1994, 43. 857 – 885. 10.1093/iclqaj/43.4.857, p. 863–864.

12 United Nations, Statute of the International Court of Justice, 18 April 1946, art. 34 I.

13 UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19

2.3 Indigenous peoples

2.3.1 Concept

Indigenous peoples and tribal groups present singularities which differentiate their rights from both those of minorities[14] and from peoples' rights.

Even though the Indigenous and Tribal Peoples Convention, C169 (ILO Convention)[15], establishes that indigenous peoples are descendants of populations "which inhabited a country or geographical region during its conquest or colonization or the establishment of present state boundaries" and they "retain some or all of their own social, economic, cultural and political institutions"[16], the UN system has not arrived at a universal legal definition of indigenous people. There have been efforts in that direction, but never a consensus. It has been stated that "a definition of indigenous shall cover as widely as possible all of the aspects that each indigenous peoples consider fundamental to their identity"[17], but a question which arises is –given the particular features of the diverse contexts and ways of life– who could determine an overall framework that defines them? Additionally, is the issue of non–indigenous peoples trying to arrive at a definition of what constitutes indigeneity. This was noted by the former Chairperson of the Working Group on Indigenous Populations, Erica Daes, who said that "indigenous peoples have suffered because of definitions imposed on them by others"[18].

A definition proposed by the HR Committee understands indigeneity as referring to those groups "composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when

December 1966, United Nations, Treaty Series, vol. 999, p. 171.

14 There are some States where indigenous people are majorities such as Bolivia, where they represent 62% of the population, according to the United Nation Development Program (2006).

15 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169 (ILO Convention).

16 ILO Convention art. 1.a.

17 Translation by the author of the present paper. PLIEGUE, Thomas y ARRIGO, Mariano, "Historia y desarrollo de los pueblos indígenas. Criterios jurídicos para la definición de «indígena»", BID América (1999).

18 E/CN.4/Sub.2/AC.4/1995/3 Note by the UNWGIP Chairperson–Rapporteur on criteria which might be applied when considering the concept of indigenous peoples, p. 4.

persons from a different culture or ethnic origin arrived there from other parts of the world"[19], but this definition tends to be partial and insufficient. Although the most accepted and cited definition in the doctrine was given in 1972 by the Special UN Rapporteur Mr. Martínez Cobo, it has been criticized for focusing more on the historical background than on current survival issues[20]. It states:

> "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non–dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant"[21].

The definition was then broadened by incorporating the principle of self–identification, which is when an individual identifies himself or herself as indigenous (subjective definition) and has been accepted by the group or community as one of its members (objective definition)[22]. This is an expression of the self–determination principle[23].

The main criteria for identifying a group as indigenous was given by the

19 Commission on Human Rights, Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Populations, Doc. E/CN.4/Sub. 2/L.566 [1972], Chapter II, para. 34.

20 See: COATES, K. S. (2004). A global history of indigenous peoples: Struggles and survival. New York: Palgrave Macmillan, p. 9.

21 E/CN.4/Sub.2/1986/Add.4.

22 COBO, J. M. (1986) Study on the Problem of Discrimination Against Indigenous Populations. Report for the UN Sub–Commission on the Prevention of Discrimination of Minorities, E/CN.4/Sub.2/1986/7/Add.l.

23 The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions (2013) HR/PUB/13/2 Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights August, p. 7.

Chairperson–Rapporteur of the Working Group on Indigenous Populations:

a) Priority in time, with respect to the occupation and use of a specific territory;
b) The voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
c) Self–identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether these conditions persist or not[24].

Additionally, it clarifies that these elements should be admitted as a general framework rather than as part of a strict definition[25]. Representants of Asian and African countries raised concerns that these factors should not be emphasized as determinant conditions for "aboriginality"[26].

2.3.2 Legal protection

The General Assembly approved the UN Declaration on the Rights of Indigenous Peoples (UN Declaration)[27] on 27th September 2007 after a deep, extensive and complex debate between States and the representants of the indigenous and tribal communities. As an international instrument it has served as a framework to be observed by States and provided minimum standards for the implementation of their respective national norms. It must also be comprehended and interpreted in relation to other international and regional rules and norms on the matter, which are being gradually accepted by States and seem to be likely sources of international customary law.

24 E/CN.4/Sub.2/AC.4/1996/2, para. 69.

25 E/CN.4/Sub.2/AC.4/1996/2, para. 70.

26 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005), pp. 92–93.

27 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

The ILO Convention[28] is the main international legally binding instrument on the matter. It was adopted on 27 June 1989 and came into force on 5 September 1991. Its essential approach has been settled in the preamble, which expresses the need to abandon the assimilationist orientation of early standards[29], recognizes and condemns discrimination on the enjoyment of fundamental human rights, and recognizes as legitimate the aspirations of indigenous peoples to gain control over their way of life and their institutions, within the institutional framework of the State they live in, as well as admit their contribution to the cultural diversity and to the social and ecological harmony of humankind. The Convention's articles lay down the principles of non–discrimination, the right to participation and consultations, and the protection of their cultural identity and values, while also mentioning explicitly the State responsibility of taking measures aimed at offering opportunities for developing, respecting their integrity and protecting their rights[30]. Sadly, to date only 23 countries have ratified the ILO Convention.

Although indigenous peoples are the subjects of a specific category of rights, they are also bearers of all civil, political, economic, social, and cultural rights, as well as fundamental freedoms recognized as human rights. This was reaffirmed by the ILO Convention because indigenous peoples have been victims of exploitation, marginalization, discrimination, ethnocide or even genocide throughout history, and currently their fundamental rights are also being violated[31]. Given their particular characteristics, there are some human rights with special relevance for individuals of indigenous origin. Among them are civil rights such as the right to participation, free association, and freedom of

28 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169.

29 See, for example: International Labour Organization (ILO), Indigenous and Tribal Populations Convention, C107, 26 June 1957, C107.

30 See also: YUPSANIS, Athanasios. ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview. Nordic Journal of International Law 79 (2010) pp. 433–456.

31 International Labour Organization, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169) 2013*. Handbook for ILO Tripartite Constituents / International Labour standards Department. International Labour Organization. – Geneva.

expression or access to justice. Furthermore, most economic, social and cultural rights are essential to indigenous peoples, and those related to natural resources and land are key, i.e. the right to health, water, a healthy environment, housing, work, education services, among others. In addition, the principle of non–discrimination is a core principle that holds relevance when it comes to protecting and respecting their rights.

Further in cases where they qualify as such, indigenous peoples are also bearers of rights that protect minorities, not only under article 27 ICCPR –as individual rights but with collective or group aspects– but also under special norms such as those applying to children, women, etc. In this regard the HR Committee has issued concluding observations and rendered decisions in the matter[32]. In General Comment N° 23 on article 27[33], paragraph 7, it states explicitly how States must conduct positive actions in the protection of cultural identities:

> "With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".

In addition, indigenous people are, collectively, bearers of the third dimension (or third generation rights), namely peoples' rights. The cornerstone here is the right to self–determination, which is normally only exercised in its internal facet of autonomy or self–government[34]. In this sense, the HR Committee has

32 See: UN Human Rights Committee, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, 26 March 1990; *Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

33 UN Human Rights Committee, CCPR General Comment No. 23: article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.

34 UN Declaration on the Rights of Indigenous Peoples, art 3 and 4.

expressed that the right to self–determination under article 1 of the ICCPR provides a close connection to the interpretation of article 27 of the ICCPR, when stating that it exercises significant influence in cases where decision–makings affects indigenous peoples' natural environment, culture, and means and manners of subsistence[35]. The external facet of self–determination is only exercisable in extreme cases of massive and systematic human rights violations. This last restriction is due to the principle of sovereignty, which is not subordinate to the principle of self–determination[36].

As with all conventions, with the spirit and aims derived from them, the applicability of article 31, paragraph 1 of the Vienna Convention on the Law of Treaties[37] reminds us that the provisions of the treaties must be interpreted in good faith in accordance with its object and purpose. Hence, States obliged by these treaties should abide by the terms of the convention in order to avoid consequent responsibilities.

3. Pressing human rights issues

3.1 Non–discrimination and equality

International and regional human rights systems are built on principles of non–discrimination and equality, which are like two sides of the same coin. They are transversal concepts in the realization of human rights[38]. Equality

35 UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America, 18 December 2006, CCPR/C/USA/CO/3/Rev.1.

36 In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co–operation among States, the Charter of the United Nations, the General Assembly resolution 2625 (XXV), among other resolutions of the United Nations General Assembly CRISTESCU, Aureliu, Special Repporteur of the Sub–Commission on Prevention of Discrimination and Protection of Minorities, Study "The Right to Self–Determination. Historical and Current Development on the Basis of United Nations Instruments", in: UN Doc. E/CN.4/Sub.2/404/Rev.1, 19981, para. 279.

37 Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Pag. 331.

38 Constitution of the World Health Organization, adopted by the International Health Conference, 22 July 1946. UN General Assembly, Entry into force of the constitution of the World Health Organization, 17

does not mean identical treatment to all people, but instead, consideration of the necessities and particularities of diverse social groups[39].

The HR Committee, in General Comment N°18, explains that:

> "The term *discrimination* […] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"[40].

The principle of non–discrimination would be violated whenever any constraint, segregation, or difference is made affecting the most fundamental freedoms and entitlements, such as equality. Because the non–discrimination principle is also enshrined in the Universal Declaration of Human Rights (UDHR)[41], and some of its rules are customary international law, the principle applies to all situations, including those beyond the scope of the international and regional human rights treaties.

The term non–discrimination does not signify the necessity of uniform treatment (when there are significant differences in situations) between one person or group and another, as long as there is a reasonable and objective justification for differential treatment. Equitable treatment of groups objectively different also constitutes discrimination[42]. In this regard, the UN Committee on the Elimination of Racial Discrimination institutes that discrimination is not

November 1947, A/RES/131.

39 UN Office of the High Commissioner for Human Rights (OHCHR), "Fact Sheet No. 34, The Right to Adequate Food", p. 20.

40 UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non–discrimination, 10 November 1989, para. 7.

41 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

42 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32, para. 8.

simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference"[43].

Discrimination can assume different forms. Direct discrimination (or disparate treatment) is produced when a person is treated, has been treated, or would be treated in a less favorable manner as compared to another, based on grounds such as gender, marital status, family status, sexual orientation, religion, age, disability, or race. Continuing on this train of thought, the Economic Social and Cultural Rights Committee (ESCR Committee), in General Comment Nº 20 concerning non–discrimination (article 2.2 ICESC)[44], states that if direct discrimination arises from a law, a constitution, or public documents, it constitutes a form of "formal discrimination" (or discrimination *de iure*). Indirect discrimination (or disparate impact/effect), in turn, is produced when there is an apparently neutral or impartial norm, criterion, or practice –namely the ground is unprohibited– but its application entails detrimental or disadvantageous effects as compared with other persons or groups under the same ground, unless that provision, criterion or practice is objectively justified. Hence, in this case the different treatment is manifested in the outcome or the effect, without being the main motivation of the norm.

The legal dimension confirmed by the ESCR Committee[45] explicitly refers to "everyone" as right–holders. An action (or omission) by the State may involve some grade of indirect discrimination on the grounds of either property[46] and/or the economic and social situation, thus conceding a privilege to a group –companies, producers, investors, etc.– in detriment of the vast population[47]. This could

43 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32, para. 7.

44 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non–discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para. 10.a.b.

45 See ICESCR, art. 11– art. 12.1.

46 The Committee explains in General Comment 20, para. 25 that "Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g., land ownership or tenure) and personal property (e.g., intellectual property, goods and chattels, and income), or the lack of it".

47 Art.2.2 ICESCs states the grounds, but the list is not exhaustive: "The States Parties to the present Covenant

also involve a systematic discrimination against such affected groups, which is outlined as "legal rules, policies, practices, or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups"[48].

With regard for indigenous peoples, the point of departure related to the concept of discrimination was 1971 –when the Special Rapporteur to the Sub–Commission on the Prevention of Discrimination and the Protection of Minorities, Martínez Cobo, started leading a comprehensive study on discrimination against indigenous populations[49]. The study recommended urgent action for eliminating all forms of discrimination against indigenous people. It was considered a seed for the foundation of international human rights system (mechanisms, special bodies and instruments) with focus on indigenous concerns.

From a legal perspective, both the ILO Convention and the UN Declaration present principles of non–discrimination and equality as transversal principles. The ILO Convention aims at overcoming discriminatory practices that vulnerate, affect or violate the rights of indigenous peoples, especially on aspects in which they are either more vulnerable or are significantly affected. This implies that these rules are articulated with the universal normative body of fundamental rights and freedoms, with the aim of ensuring an effective protection of fundamental rights for them and other members of society. In this regard, "indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms, without hindrance or discrimination. The provisions of the Convention shall be applied, without discrimination, to male and female members of these peoples"[50]. Likewise, the UN Declaration[51] affirms that: "… indigenous

undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

48 Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non–Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009), para. 12.

49 See: UN, Economic and Social Council: Study of the problem of discrimination against indigenous populations, 1982, 1st sess.: New York (E/1982/34).

50 ILO Convention, art. 3.1.

51 See: UN Declaration on the Rights of Indigenous Peoples, art. 2.

peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity".

The enjoyment of these rights must be guaranteed to indigenous people not only as individuals, but also as a collective[52].

In this context, the right to equality and non–discrimination is viewed as offering dual protection. On one hand, it focuses on the conditions inherently required to maintain indigenous peoples' way of life and, on the other, on actions that exclude or marginalize indigenous peoples from the society[53]. Accordingly, the Committee on Racial Discrimination has drawn attention towards discerning permanent rights from temporal measures –the latter being understood as those plans, programs and preferential regimes carried out by the State for the benefit of disfavored groups. It explicitly points out that those permanent rights include indigenous peoples' rights to lands, and that States should carefully observe the distinctions between "special measures" and permanent human rights in their law and practice[54]. In this respect, a structural, "substantive", or "de facto" discrimination, given in a certain society must be mitigated, not only from legislation (which sometimes arrives after the conflict has come to light), but also through cross–cutting structural, substantive, and systemic policies. In this sense, States, under international human right law, are under the obligation to mitigate both the causes and effects of these inequalities[55].

52 See: UN Declaration on the Rights of Indigenous Peoples, art. 1 "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law".

53 OHCHR, A Manual for National Human Rights Institutions: The United Nations Declaration on the Rights of Indigenous Peoples, August 2013, p. 18.

54 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, 24 September 2009, CERD/C/GC/32, para. 15.

55 See, for example: *Saramaka People v. Suriname*, Inter–American Court of Human Rights, Judgement of 28 November 2007, Series C No. 172; *Yakye Axa Indigenous Community v. Paraguay*, Inter–American Court of Human Rights, Judgement of 17 June 2005, Series C No. 125; *the Mayagna (Sumo) Awas Tingni Com-*

3.2 Land and natural resources

3.2.1 Concept

The evolution of indigenous peoples' rights over lands they have traditionally occupied has passed through different stages. During the 16th Century, the Spanish School of International Law, with Francisco Suarez, Francisco de Vitoria, Francisco Suarez and Bartolomé de las Casas as its most prominent speakers, had already recognized these rights, but over the years that acknowledgment lost intensity[56].

Even though in recent years indigenous peoples have gained international and regional attention, this does not translate into practice, since the concept of "development" pursued by the States where they live often subordinates the rights of indigenous peoples, making them vulnerable, especially with regard to the development of extractive industries in regions like Africa or South–America: mining, forestry, oil and natural–gas extraction and large hydroelectric projects have all affected the lives of indigenous peoples[57].

Protecting environment, especially the relationship between land and natural resources, is vital for both the material subsistence and cultural integrity of indigenous peoples[58]. The constraint of access to land and nature leads to a deprivation of self–determination and their most fundamental rights. In this regard, it is crucial to understand concept of land and its scope, given that this is always the point of departure for the main conflicts between the indigenous

munity v. Nicaragua, Inter–American Court of Human Rights, Judgment of 31 August 2001, Series C No. 79. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and People's Rights, 276/2003 (4 February 2010), para. 196.

56 MARK, G.C., *Indigenous Peoples in International Law: The significance of Francisco and Bartolomé de las Casas*, Australian Year Book of International Law 13 (1993), pp. 1–51.

57 UN, Human Rights Council, Report to the Human Rights Council. Summary of activities. Extractive industries operating within or near indigenous territories. A/HRC/18/35, para. 22.

58 Inter–American Commission on Human Rights, Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter–American Human Rights System (OEA/Ser.L/V/II. Doc. 56/09, 2009), para. 56.

communities, States and other non–State actors. At a glance, the term land comprehends the surface above and the natural resources underneath it within a given territory. However, this broad conceptualization leaves room for difficulties and needs to be refined.

Firstly, the territory is not limited to the inhabited land, but covers also the surrounding areas which provide natural resources for subsistence. Worth mentioning is the fact that those areas and natural resources may be used or occupied seasonally or sporadically where indigenous peoples have historically had access for practicing their traditional activities and in order to obtain their subsistence[59].

Secondly, the ways of life and subsistence of indigenous groups are intimately linked with recognition of the land they have traditionally inhabited, including their respective ecosystems[60], and the possibility of passing it from generation to generation[61]. Under international law, a traditional occupation confers a right to land even when that right is not recognized by the State[62], the use and the enjoyment of the property being an integral part of the right to property granted[63].

Thirdly, indigenous groups can legally be removed from their lands as an exceptional measure, but only when free, prior, and informed consent (FPIC) which will be discussed in the next Section, is provided, and with the right of receiving compensation and equivalent lands, when the eventual return to their land is not possible[64].

59 These clarifications have been developed and supported by the Inter–American Court of Human Rights in cases such as: *Saramaka People v. Suriname*. Preliminary objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 114. IACHR, Report N. 40/04, Case 12.053, Maya indigenous communities of the Toledo District (Belize), October 12, 2004, para. 129; Case of the *Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 120. ILO Convention, art. 14.1.

60 ILO Convention, art 13.2.

61 Ibídem, art. 14.1.

62 CEACR, 73rd Session, 2002, observation, Peru, para. 7.

63 This concept was developed by the Inter–American Court of Human Rights, when interpreting the scope of art. 21 of the American Convention of Human Rights. See for example: IACrtHR, Case *Salvador Chiriboga v. Ecuador*. Preliminary Objections and Merits. Judgment of May 6, 2008. Series C No. 179, para. 55.

64 ILO Convention, art. 16.

Regarding the natural resources placed in their lands, the ILO Convention explicitly states that they will be "especially safeguarded"[65]. This provision is of transcendental importance, since the livelihood of indigenous people usually depends on the use, management, conservation and consumption of natural resources. Even though this has been recognized extensively in all regions of the world, there is a key exception that effectively breaks with this right and constitutes the seed of most of the present conflicts regarding indigenous peoples: when the State retains the ownership of minerals or sub–surface resources, or the right to other natural resources[66]. This is the classic example of extractive industries, where the private sector obtains the licenses or concessions from the State to explore and exploit a given geographical area.

In this case, the ILO Convention establishes a series of measures in order to safeguard the rights of indigenous peoples. The obvious measure is consultation, requiring FPIC, in order to proceed with any project affecting their access to the natural resources in their legally recognized territories. Another possibility is offering them benefits from the activities of exploration and exploitation of the natural resources[67], as well as to receive compensation for any damages. Because the ILO Convention expressly clarifies that the receival will be realized "wherever possible", it provides the States with a discretional criterion to comply with this rule.

3.2.2 Protection of identity

The cultural identity of indigenous peoples is one of the core aspects enabling not only their cultural reproduction, but also their physical existence; thus, it is recognized and protected by law[68].

65 Ibídem, art. 15.1.

66 Ibídem, art. 15.2.

67 Ibídem, art. 15.2.

68 See: STAVENHAGEN, R. *"Cultural Rights: A social science perspective",* in H. Niec (ed.), Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights, Paris and Leicester, UNESCO Publishing and Institute of Art and Law. Culture is (a) "the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and

The ILO Convention has been established in order to protect indigenous and tribal peoples, not only in terms of their own ways of life and identities, languages and religions, but also in their own institutions.

The same spirit is depicted in the UN Declaration, which states that indigenous peoples have the right to maintain and strengthen their spiritual relationship with their traditional lands and resources in order to uphold their responsibility towards future generations as well as the right to "own, use, develop and control the land, territories and resources they acquire by reason of traditional ownership"[69].

The protection of cultural identity has been recognized to fall within the scope of article 27 ICCPR by the HR Committee[70] and by regional organisms[71].

In this sense, article 27 ICCPR has been widely invoked and interpreted diversely by the HR Committee. For example, in *Lubicon Lake Band v. Canada*[72]

beliefs" (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) "in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate" (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) "covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development" (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions); (d) "the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behavior and social relationships in everyday life".

69 UN Declaration on the Rights of Indigenous Peoples, articles 25 and 26.

70 UN, Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.

71 See also: Case No. 7615 Inter–America Commission Res. No 12/85 OAS Doc. OEA/Ser.L/V/(March 5,1985); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya* (Endorois case) 276/2003 African Commission on Human and Peoples Rights (Feb 2010).

72 UN Human Rights Committee, *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, CCPR/

found that article 27 ICCPR was violated because enjoyment of the Band's ethnic, religious and linguistic culture was impeded since their land was expropriated for commercial interests –oil and gas exploration– and destroyed, thus depriving the people of their means of subsistence and their ways of life.

In another case, *Länsman v. Finland*[73], the HR Committee held a similar interpretation of article 27 ICCPR –that is was protective of access to and control of traditional economic livelihoods or cultural life therefore, affirming that States were limited by article 27 ICCPR when pursuing economic development through the granting of permits to private enterprises.

The Interamerican Commission of Human Rights, in the *Yanomami`s Community case*[74], drew reference to article 27 ICCPR and the protection of traditional culture and ways of life, compromising access to and control over the Yanomami's traditional land. In this case, Brazil failed to take timely and effective measures to protect the Yanomami community's human rights when granting mining licenses to a private company, which permitted the building of a road trespassing indigenous lands.

The cornerstone of the right to cultural identity is an integration between cultural and sustainable environmental practices, insofar as the roots of a given culture are embedded in the environment where this culture has developed. Safeguarding the right to cultural identity thus requires measures which enable indigenous and tribal peoples to keep their ways of life as relating to their respective environment[75]. Accordingly, the Convention on Biological Diversity addresses the need to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities"[76].

C/38/D/167/1984, 26 March 1990.

73 UN GAOR, *Länsman et al v Finland*, Communication No. 511/1992, 52nd Session, UN Doc. CCPR / C / 52D / 511 / 1992, opinion approved 8 November 1994.

74 Inter–American Commission on Human Rights: Brazil, Yanomami`s Community. Case Nº 7615. Report Nº 12/85.

75 METCALF, Cherie, *Indigenous Rights and the Environment: Evolving international law*, Ottawa L. Review, 2004, pp.101 and 107.

76 UN Convention on Biological Diversity United Nations, Treaty Series, vol. 1760, Pag. 79. art 8 (j).

3.2.3 Environmental and social impact assessment

The rule of article 7.3 of the ILO Convention shows that conducting an environmental and social impact assessment (ESIA) before approving any economic project is essential in granting effective realization of indigenous peoples' rights. The same article affirms that "studies [must be] carried out, in co–operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities". Thus, the process must be carried out, on the one hand, with the participation of the peoples concerned, and, on the other hand, the studies must be made from a holistic perspective –social, spiritual, cultural and environmental. This implies that studies that focus only on environmental aspects would not fulfill the norm. Furthermore, cooperation with the peoples concerned, in the form of participation and consultation, should be carried out in all phases of planned activities –exploration and exploitation– and prior and prospective ESIA should be required[77].

The ESIA –recognized also by the Inter–American Court of Human Rights[78]– must be carried out by "independent and technically capable entities, with State supervision" and with the purpose "… to preserve, protect and guarantee the special relationship"[79] that indigenous peoples have with their lands, and prior to granting concessions to the company being evaluated, in order to give full grant to the right to information and effective participation by indigenous people. This also means that if the State must grant all the consequent rights involving the ESIA, the process is a duty of the State which must be performed or supervised by itself, precluding the intervention of the company interested in the making of the ESIA.

Regarding its content, the internationally accepted standard, proposed by the World Bank, says that the ESIA must "identify and assess the potential

77 ILO Convention, art. 7.3.

78 Inter–American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 129.

79 Inter–American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 129.

environmental impacts of a proposed project, evaluate alternatives, and design appropriate mitigation, management, and monitoring measures" and refers to the need of adopting an integrative approach in its content[80]. Additionally, the Inter–American Court of Human Rights affirmed that the most comprehensive and international standards need to be observed[81].

Compliance with both the rules related to the process and the results obtained from it are key for the State and for interested third parties. As article 7.3 of the ILO Convention reads: "The results of these studies shall be considered as fundamental criteria for the implementation of these activities", which means the ESIA is not merely a formality to fulfill the requirements of the convention before a planned project; on the contrary, it has the capacity to jeopardize, postpone, or even cancel a business license if indigenous peoples rightfully invoke their rights as being violated.

3.3 Participation and consultation

The right to participation must be respected as a human right in itself, but also as a means towards the fulfillment and development of other human rights.

This provision is included in several universal legal instruments. As mentioned above, article 27 of the ICCPR does not explicitly include this right, but in General Comment N° 23, paragraph 7, the HR Committee established that it is vital to enable the exercise of cultural rights, especially –in the case of indigenous peoples– over the use of land resources. In this regard, the HR Committee states that "the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them"[82]. Therefore,

80 World Bank, Operational Policy 4.10, Annex A: Definitions, para. 2.

81 Inter–American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, par. 41. In the footnote No.23 refers explicitly to the "Akwé: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities".

82 UN, Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities),

it may be said that article 27 of ICCPR, which contains the core of the rights of minorities, tacitly includes the abovementioned provision.

Additionally, the provision is recognized in the UN Declaration, article 18; in the ILO Convention, articles 6.1, 6.2, 7 and 15; in the International Convention on the Elimination of All Forms of Racial Discrimination, article 5.d.VI; and in the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, article 2.

Legal compliance with international and regional norms has profound implications in sensitive topic–areas regarding the exploration, exploitation, and extraction of minerals in territories inhabited by indigenous populations. This situation is common in countries in the global south, which present a vast area of natural resources and focus their economic activities in extractive industries, therefore producing confrontations between private and public interests, and those of indigenous peoples'. In this respect, the mechanisms established by governments for the participation of indigenous peoples must be timely, in conformity with the law, effective, and with the goal of allowing them real opportunities to influence the outcome of the process.

3.3.1 Dimensions, content and divergencies of the rights to participation and consultation

The right to participation is multidimensional; hence it is necessary to unravel its scope. It is possible to establish three main external dimensions in which the right may be exercised. The first–dimension deals with political participation in general public, local affairs. The second dimension is the participation of indigenous peoples in making decisions on issues that affect them directly or indirectly. The third dimension is participation in international affairs.

Alongside the external dimensions above, there is an internal aspect of the right to participate that refers to the autonomy of indigenous peoples in their development as well as decisions concerning their internal affairs. This aspect is closely with the right to self–determination[83].

8 April 1994, CCPR/C/21/Rev.1/Add.5. Par. 7.

83 UN – General Assembly–Situation of human rights and fundamental freedoms of indigenous people – Annual Report, 2010, para. 39–46.

By putting this right into practice, the State where indigenous peoples live has the duty to take affirmative measures, not only from a formal perspective (such as the compliance of national legislation with international standards and obligations), but also in ensuring the implementation and effectiveness of these dimensions through public policies. Accordingly, it is essential to distinguish participation from consultation. The former requires no consent but rather representation in order to exercise the right, while the latter requires both representation and consent.

In a report by the committee in charge of examining a claim alleging Argentina did not observance the ILO Convention, the governing body explained the principle of representativity[84]. The claim concerned questions of representation and consultation at the national level in the Province of Río Negro, lands and discrimination against the performance of traditional activities by the Mapuche people in the province of Río Negro. One of the claims was based on a lack of representativity because some communities had not been duly convened to the consultation. The Committee made it clear that the criterion of representativeness is an essential requirement of the consultation and participation procedures foreseen by the Convention, and it should be understood as a right of the different indigenous peoples and communities to participate in these procedures through their own representative institutions. Therefore, State authorities must ensure that all organizations arising from the indigenous peoples' own deliberation processes must be convened to the consultation and participation procedures, and that the different positions and sensitivities are represented[85].

Following the General Observation (CEARC) adopted by the Committee of Experts regarding the right to consultation, the concept can be disaggregated in three main points: a) the subject matter of consultation and/or participation; b) the authority responsible for carrying it out; and c) fulfillment of the elements consent in order to carry out a consultation[86].

84 ILO, Governing Body on a representation concerning Argentina alleging violation of ILO Convention 169 (2008) GB 303/19/7.

85 Ibídem, para. 76.

86 General Observation (CEACR), Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Adopted 2010, published 100th ILC session (2011).

The particular issues subject to consultation are those related to administrative and legislative matters that affect indigenous populations directly[87]; in particular a) those permitting or undertaking programs for exploration or exploitation of mineral or surface resources over the land where they live[88]; b) those related to their capacity to alienate their lands or transmit their rights outside their community[89]; c) those related to educational matters[90]; and d) those related with vocational training programs[91].

The responsibility for the consultation lies with the State[92]. Hence, it falls within the State obligations, with consequent responsibility as a result of non–compliance, even when its implementation has been delegated to other actors.

The process of consultation must be "formal, full and exercised in good faith, there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord"[93]; as well as "undertaken with the objective of reaching agreement or consent to the proposed measures"[94]. It is noteworthy that simply providing information does not fulfill the legal requirements. Thus, the right to consultation is collective in nature and is enjoyed by the indigenous peoples themselves who decide which institution or persons will legitimately represent them in order to exercise their right to participation[95].

The mechanism given by the ILO Constitution under article 24 about tripartite committees established by the Governing Body has been used in

87 ILO Convention, art. 6.1. a.

88 Ibídem, art. 15.2.

89 Ibídem, art. 17.2.

90 Ibídem, art. 27.3 and 28.1.

91 Ibídem, art. 22.

92 Ibídem, art. 2 and 6.

93 General Observation (CEACR) – Indigenous and Tribal Peoples Convention, Op. Cit., p. 10.

94 Idem.

95 BENAVENTE, Javier, MEZA–LIMA, Rocío, "Derecho a la Participación y a la consulta previa en Latinoamérica–Análisis de experiencias de participación, consulta y consentimiento de las poblaciones afectadas por proyectos de industrias extractivas", 2010, p. 56. Edición: RED MUQUI – Red de propuesta y acción – Fundación Ecuménica para el Desarrollo y la Paz – FEDEPAZ – Perú.

different cases regarding the features of fulfilling the right to consultation and the exploitation of natural resources.

In a case filed against Ecuador in 2001, the Tripartite Committee stated that "the spirit of consultation and participation constitutes the cornerstone of the ILO Convention on which all its provisions are based"[96], and remarks on the importance that the consultation process be carried out in an adequate and effective manner, both in the face of exploitation and exploration of natural resources, "as early as possible and including in the preparation of environmental impact studies"[97]. The Tripartite Committee emphasized, in a case filed against Colombia, that meetings or consultations conducted for merely informative purposes or after an environmental license has been granted do not meet the requirements of articles 6 and 15(2) of the ILO Convention[98]. Another case, filed against Brazil, was reported by the Tripartite Committee, which, after declaring again the main features of an adequate and effective consultation process, pointed out that:

> "… consultation, as envisaged in the Convention, extends beyond consultation on specific cases: it means that application of the provisions of the Convention must be systematic and coordinated, and undertaken with indigenous peoples…"[99].

3.3.2 Consent

The process of consulting also implies pursuing the objective of achieving a FPIC, which also means setting in motion a process of dialogue and genuine exchange between the parties, to be carried out in good faith, regardless of whether they reach an agreement[100]. Then the consent must be *free*, which means that it should be carried out without coercion, intimidation, manipulation or any other external intervention; it must be *prior* to the authorization of any

96 ILO, Governing Body, 282/14/2, para. 31.

97 Ibídem, para. 38.

98 ILO, Governing Body, 282/14/3, para. 90.

99 ILO, Governing Body, 304/14/7, para. 43.

100 ILO, Governing Body, 303/19/7, para. 81.

activities resulting from the above referenced decisions and with enough time to allow the indigenous decision–making process; and it needs to be *informed*, which means that the parties must have been notified all data necessary to enable actual participation provided in local languages, culturally adequate forms of communication and provide all needed information to understand the nature, size, grounds and effects of the project[101].

The right to FPIC is also linked to the right to self–determination (explained above) and to the concept of ethno–development[102] –understood as the mode of defining development in accordance with each cultural context and cultural frameworks, which may result in differing notions of development[103].

Even though some international and regional institutions have recognized the FPIC, the position of the World Bank –as an international economic institution which, among other things, finances projects that often affect indigenous communities– has been questioned since its policy on indigenous peoples promotes a simple "consultation" process which explicitly names "free", "prior" and "informed" consultation, omitting the term "consent"[104].

Conversely, and leaving aside its not legally binding status, the UN Declaration is a valuable instrument since governments require its use in order to obtain indigenous peoples' FPIC about the following topics: relocation (article 10), administrative measures that affect them (article 19), the storage of hazardous materials inside Indigenous land (article 29) and utilization of their resources (article 32).

The ILO Convention, on the other hand, leaves it up to States to define the mechanisms of consultation, but to counterbalance this discretional power on the part of the State, it defines minimum standards to activate the consultation

101 Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, UN Doc E/C.19/2005/3, endorsed by the UNPFII at its fourth session in 2005.

102 STAVENHAGEN, R. Etnodesenvolvimento: Uma dimensao ignorada no pensamento desenvolvimentista [Ethno development: an ignored dimension on developmentalist thinking], Anuário Antropológico/1984/1985. Rio de Janeiro. 84: 13–5.

103 See: HANNA, Philippe & VANCLAY, Frank, Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent, Impact Assessment and Project Appraisal, 31:2, pp. 146–157, DOI: 10.1080/14615517.2013.780373.

104 World Bank, Operational Manual 4.10 on Indigenous Peoples, July 2005.

mechanism as well as the content of consent[105]. This has raised some questions about the scope, the implications and binding effect of consent, and the possibility of veto power in case of a negative evaluation by the indigenous people. The conclusion reach was that veto power is not allowed because it would amount to privileging this right above the sovereignty of State.

Implications of the requirement of consent can be found within the norm when it illustrates that it should be achieved "in a form appropriate to the circumstances, with the objective of achieving [the] agreement or consent [of the peoples concerned] to the proposed measures"[106]. Additionally from a teleological interpretation of the preamble, the body of the text and the *travaux preparatoires,* it could be concluded that the aim of this requirement for consent is to promote genuine dialogue and give indigenous people the chance to participate effectively and influence issues that concern them. This has also been affirmed by the Tripartite Committee in a case filed against Colombia:

> "… while article 6 does not require consensus to be obtained in the process of prior consultation, it does provide that the peoples concerned should have the possibility to participate freely at all levels in the formulation, implementation and evaluation of measures and programs that affect them directly"[107]. It further says that: "…the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith and the sincere desire to reach a consensus. A meeting conducting merely for information purposes cannot be considered as consistent with the terms of the Convention"[108].

105 ILO Convention, art. 15.

106 Ibídem, art. 6.2

107 Report of the Committee Set Up to Examine the Representation Alleging Non–Observance by Colombia of the Indigenous and Tribal Peoples Convention 1989 (No.169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union and the Colombian Medical Trade Union Association, Document: GB. 277/18/1, Document: GB. 282/14/4, Geneva, 14 November 2001, para. 61.

108 Report of the Committee Set Up to Examine the Representation Alleging Non–Observance by Colombia of

3.3.3 Regional experiences

While the abovementioned ILO Convention does not give the right to a veto option, regional experiences go one step further in terms of both the meaning and the content of the right to consultation, on the one hand, and the possibilities to the right to veto, on the other.

Within the InterAmerican regional system of human rights, the American Convention of Human Rights grants the possibility of expanding "the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention to which one of the said states is a party"[109]. In this sense, the Inter–American Court of Human Rights ruled upon the scope of application of the American Convention[110]. In the *Saramaka* case, the Court affirmed that the ILO Convention is applicable under the scope of the American Convention[111]. The plaintiffs petitioned the court to enjoin the activities carried out by mining and logging companies on their territory based on concessions granted by the State without consultation. The Court remarked that "the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions"[112]. Moreover, the Court went beyond this, affirming that "the Court considers that the difference between 'consultation' and 'consent' in this context requires further analysis"[113]. Beyond the fact that the Court left this affirmation open without any other clarification, it denotes a hint of concern about the content of both concepts –consent and consultation–;

the Indigenous and Tribal Peoples Convention 1989 (No.169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union and the Colombian Medical Trade Union Association, Document: GB. 277/18/1, Document: GB. 282/14/4, Geneva, 14 November 2001, para. 90.

109 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 7 July 1978), art. 29, section 2.

110 See, for example Inter–American Court of Human Rights, Case of the *Yakye Axa Indigenous Community v. Paraguay* (Ser C) No. 125.

111 Inter–American Court of Human Rights, Case of the *Saramaka People v. Suriname* (2007) (Ser C) No. 172, para. 92.

112 Ibídem, para. 134.

113 Idem.

furthermore, the word "consent" is understood in other juridical contexts as a synonym of acceptation, permission, affirmation, or authorization. The Court found that article 21 of the Convention was violated to a degree when the State failed to supervise the prior ESIA before granting its concession to the activities at issue[114].

Another landmark decision concerning Ecuador was reaffirmed of the prevalence of the right to FPIC as well as "the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are about to be affected"[115]. The background of this decision was a claim by the Kichwa indigenous town of Sarayaku because their communal land had been subjected to oil exploration by a private company authorized by the state of Ecuador without prior consultation. The community had also suffered threats and violence against some of its members, destruction of sacred sites, deforestation, pollution of the community's drinking water, among others.

Considering that the possibility of exercising the right to veto remains unclear, a report from the Interamerican Commission establishes that consent from the people is mandatory in the following situations[116]:

a) When the development of investment plans implies a displacement or permanent relocation from their traditional lands.
b) When the execution of development or investment plans or concessions for the exploitation of natural resources deprives indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.
c) In cases of storing or disposal of hazardous materials in indigenous lands or territories.

Within the African System of Human and Peoples' Rights, the African

114 Inter–American Court of Human Rights, Case of the *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 154.

115 Inter–American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations. Judgment of June 27, 2012. Series C No. 245, para. 164, 165, 166 and 167.

116 Inter–American Commission on Human Rights, Report Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09 30 December 2009 para. 334.

Charter on Human and Peoples' Rights[117] does not contain any special article regarding the right to FPIC, but it could be derived from other norms such as the right to property –individual and collective. The African Commission of Human Rights, on the other hand, has in some cases referred to participation by communities without explicitly mentioning the right to FPIC[118]. However, the *Ogoni* case ruled in conformity with the right to a healthy environment, and the *Endorios* case was framed from the perspective of the right to development. Moreover, in 2012, the African Commission issued a resolution that called on States "to ensure participation, including the free, prior and informed consent of communities"[119].

This is to be carried out in the context of participation in decision–making process regarding the governance of natural resources, and not only is it limited to indigenous people, but also to all those affected by natural resource projects. Additionally, the only case regarding indigenous people that reached the African Court in 2017 was a case about the Ogieks Community which was evicted from the Mau Forest in Kenya. The Court held that Kenya failed to act in conformity with due effective consultation[120]. In this regard, even though the Court has not been sufficiently specific regarding the precise scope of such right, it has taken a great step towards the clarification and content development of this right within the African System[121].

117 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

118 See: *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria* (2001) AHRLR 60 (ACHPR 2001) and *Centre for Minority Rights Development & Others v. Kenya* (2009) AHRLR 75 (ACHPR 2009).

119 African Commission on Human and Peoples' Rights, 224: Resolution on a Human Rights–Based Approach to Natural Resources Governance (May 2012).

120 *African Commission on Human and Peoples' rights v. Republic of Kenya*. Application No.006/2012. Judgment of 26 May 2017, para. 210.

121 See also: ROESCH R. *'The story of a legal transplant: The right to free, prior and informed consent in sub–Saharan Africa',* African Human Rights Law Journal, 2016, Vol.16, No. 2, pp. 505–531. http://dx.doi.org/10.17159/1996-2096/2016/v16n2a9

4. Human rights obligations of the state and the private sector

The State –both as a guarantor of human rights and as subject of international law– has the obligation to respect, protect and fulfill human rights. Regarding the unique situation of indigenous people, the bulk of the conflicts are mainly related to extractive industries and collisions between their operations and indigenous peoples' rights. This implies that third parties are also part of the map of actors: in this case, the commercial enterprises that acquire the licenses or certificates from the State in order to carry out their activities.

The State has legally binding primary obligations and must take concrete steps in order to comply at a national level with the provisions of the international obligations. Private sector actors must be forced to comply through national legislation as well as through monitoring instruments, regulations, implementation of international standards, etc.

Private companies –beyond the fact that they are not bound by international instruments, thus the responsibility to enforce law remains with State– should comply with the soft law and the international standards of human rights developed in recent years, on the matter.

The standards in matters of business and human rights lie on the following pillars: 1) the responsibility of the State to protect human rights from potential violations by third parties; 2) the corporate responsibility to respect human rights, including due diligence in their acts; and 3) the access of victims to effective remedies[122].

Continuing this idea, the International Finance Corporation of the World Bank (IFCWB)[123] developed a guideline for the private sector, providing advice and explanations concerning the ILO Convention. It remarks that:

122 UN Human Rights Council, Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5; A/HRC/14/27 and Organization for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, 27 June 2000.

123 See: World Bank. 2007. ILO Convention 169 and the private sector: questions and answers for IFC clients (English). IFC Quick Notes; IFC E&S. Washington, D.C. World Bank Group.

> "In order to minimize risk, companies would be advised to satisfy themselves that the government has fulfilled its responsibilities. Specifically, companies should look into whether:
>
> – the process used for identifying indigenous and tribal peoples' lands is consistent with the requirements of Convention 169,
>
> – legal or other procedures for resolving indigenous peoples' land claims and disputes are acceptable and have been subject to consultation by those affected,
>
> – if title to land has derived originally from indigenous peoples, this title was properly obtained in accordance with the law, and without taking advantage of [a] lack of understanding of laws on [the] part of the affected stakeholders in order to secure possession,
>
> – the relevant government authorities have recognized the indigenous peoples' rights to natural resources,
>
> – appropriate consultation takes place prior to the granting of exploration and exploitation licenses,
>
> – mechanisms are in place to enable the communities concerned to participate in the benefits of the project and to compensate them fairly for their losses. This due diligence should form part of a social and environmental assessment…"[124].

Given the fact that companies do not have legally binding international norms and can only fulfill soft laws with the consequent due diligence and the so–called corporate social responsibility, the International Finance Corporation of the World Bank has precisely specified items to take into account that the State –as guarantor of the human rights– must comply with in order to avoid unnecessary risks when enterprises carry out their activities. Notwithstanding the desirability of economic development, the HR Committee still highlights the State's responsibility to protect, and refers to its legally stipulated limitations:

> "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to

124 ILO Convention 169 and the Private Sector: Questions and Answers for IFC Clients, p. 6.

> be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27…"[125].

Hence, the HR Committee affirms that the legal stipulations should cover all substantial activities that effectively deny the right to enjoy cultural rights. Then, the HR Committee clarifies which non–derogable substantial activities are that cannot be surrendered to economic activities: 1) traditional activities such as hunting, fishing or reindeer husbandry; and 2) measures that must be taken to ensure the effective participation of members of minority communities in decisions that affect them[126].

Regarding the right to be consulted and the obligation of the State to do this, the Special Rapporteurs have made clear that the State keeps the duty and responsibility of carrying out and ensuring the consulting process even when it delegates implementation to private actors or to another authority. The Special Rapporteurs have also affirmed that the processes are not to be conducted by the private companies at stake since the objectives and interest of both actors –indigenous peoples and private companies– are usually opposed. This is because private companies` interests "are principally lucrative and thus cannot be in complete alignment with the public interest or the best interests of the indigenous peoples concerned"[127].

125 *Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994), para. 9.4 and 9.5.

126 Idem.

127 UN – Human Rights Council – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc. A/HRC/12/34, 15 July 2009, para. 54–55, 72.

5. Conclusion

The specific normative framework that protects indigenous people presents two major drawbacks. First, as a binding norm, ILO Convention 169 has to date been ratified by only twenty–three States. However, this shortcoming could be compensated, although not ideally and only partially, through the application of article 27 of the ICCPR, whose Convention has been ratified by 172 States. It is also paradoxical that within the ILO system –from which Convention 169 stems, and whose objective is to empower and protect indigenous people– does foresee protection mechanisms for the stakeholders to present their claims, be it in the form of individual communications or as collective complaints (with the exception of workers or employers' associations). Second, since the UN Declaration is not legally binding, it does not hold the legal force of a treaty and is thus insufficient in terms of ensuring compliance and enforcement, but it does grant a legal framework of minimum standards to be fulfilled by the States and other actors.

Regarding the principle of non–discrimination, the central principle of human rights and therefore transversal to all the regulations on the subject, is mainly affected in two ways: indirectly, through public policies carried out by States, which systemically structure the development of their economies (e.g. tax policy, promoting certain economic industries) and directly, insofar a social sector is consistently privileged to the detriment of another sector of the population –in this case, the indigenous communities.

Land and natural resources are vital for both the material subsistence and the cultural integrity of indigenous peoples. A constraint of land and nature ends in deprivation of self–determination and of their most fundamental rights. This happens from the moment that there is no due protection for the cultural identity of indigenous peoples, be it as a result of the structural organization of the economy or/and because priority given by the States to some social groups over others (indirect or direct discrimination), or/and in the case of the deterioration of the natural environment in territories that are directly affected by the exercise of economic activities –mostly by the extractives industries– taking place without adequate and effective compliance with the ESIA.

Regarding the right to participation, it must be respected both as a human

right in itself, and as a means of fulfilling and developing other human rights. It has been shown here that most of the relevant legal cases address problems concerning the lack of participation and consultation accorded to indigenous communities on issues affecting them. Effective participation and consultation are affected, for example, when the representation of indigenous communities is vitiated, which on the other hand, is often the manifestation of a structural and systemic deficit on the part of the States in matters of census, communication, et cetera. As a result, the right to consultation is violated in most cases.

Furthermore, since the requirement of consent is normally considered fulfilled when a dialogue with the affected party has been held and the required information has been provided, the traditional meaning and substantial use of the term, understood as assent, approval or authorization of a matter to be resolved, is not applicable. On the other hand, when the objective pursued by the requirement of consent is to give the affected party the ability to exert some level of influence on a decision–making process by the State –assuming this has not been already tacitly made–, at the very minimum, it ignores the imbalance or asymmetries of power between the actors involved in the process. Hence, the legal requirement of consent is fundamentally vitiated, as long as it is conceived of more as a formality than as a matter of substance.

The system of human rights responsibilities is an obligation of the State. This system is becoming obsolete since, in recent decades, economic factors have played a fundamental role in the framework of human rights. It is well known that many developing countries depend economically on extractive resources as well as on commodities. This economic dependence strengthens bonds between big economic actors and States, to the detriment of other social groups that may be affected in their rights.

Although for several years institutional initiatives have been underway to try and extend binding human rights liability to private companies, and NGOs with some lawyers are trying to push the change of the system through the use of all possible legal and non–legal tools provided by the international, regional and national systems (e.g. the use of strategic litigation), there is still a long way to go. For now, apart from the minimum standards of compliance and the expectation of good faith on the side of private actors, obligations to respect, protect, and fulfill human rights still reside with the State alone. However, this

does not preclude the responsibility of private actors to abide by human rights standards, even in their own self–interest. Indeed, in the event of conflict with indigenous communities, the failure to comply with human rights obligations on the part of the State does not exonerate private actors from their own responsibility, for example by alleging "lack of legal security". Rather, in such cases private actors might be confronted with a presumption of bad faith, negligence, and lack of due diligence on their part, because they know or should have known both about the pertinent State obligations in the matter and about the soft law in human rights and environmental matters.

In the mode of a concluding word, it is worth recalling the foundation stone of the human rights system: The Preamble of the Universal Declaration of Human Rights states that every person and all organs of society are obliged to promote and protect human rights. Whether it is the State, the members of the civil society, or the private sector –each from the standpoint of their particular responsibilities and capabilities– all are included in the view of the spirit and goal of the human right system: the protection of fundamental rights and human dignity.

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Grassroots Social Movements: A New Narrative on Human Rights in Africa?

Movimientos sociales de base: ¿Una nueva narrativa sobre los derechos humanos en África?

Received: 23/04/2019 – Accepted: 29/08/2019

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Abstract

Recent geopolitical developments worldwide have led to a paradigm shift in both the context and strategies of doing human rights work in Africa. Grassroots social movements from Algeria to Zimbabwe are increasingly allowing citizens to take center stage and in some cases to circumvent traditional actors in the promotion and protection of human rights, both from the bottom up, and as a conversation space through which citizens realize their own power to make a difference. This article investigates the extent to which grassroots efforts –which are mostly intertwined with other issues such as governance, anti–corruption, and politics– could significantly resonate at the broadest possible level, shaping resilient futures and empowering communities to assert their rights. This article aims to shine new light on the interfacing and intersectionality of grassroots social movements and the human rights discourse in Africa as a potential new frontier for safeguarding and entrenchment of human rights.

Keywords: Africa; Vernecularization; Clicktivism; NGOization; Grassroots Social Activism.

Resumen

Los recientes desarrollos geopolíticos en todo el mundo han llevado a un cambio de paradigma tanto en el contexto como en las estrategias para hacer que los derechos humanos funcionen en África. Los movimientos sociales de base desde Argelia hasta Zimbabwe están permitiendo cada vez más a los ciudadanos tomar el centro del escenario y, en algunos casos, eludir a los actores tradicionales en la promoción y protección de los derechos humanos, tanto de abajo hacia arriba, como un espacio de conversación a través del cual los ciudadanos se dan cuenta de su propio poder para hacer la diferencia Este artículo investiga hasta qué punto los esfuerzos de base –que están en su mayoría entrelazados con otros temas como la gobernanza la anticorrupción y la política– podrían resonar significativamente en el nivel más amplio posible, configurando futuros resilientes y empoderando a las comunidades para hacer valer sus derechos. Este artículo tiene como objetivo arrojar nueva luz sobre la interfaz y la interseccionalidad de los movimientos sociales de base y el discurso de los derechos humanos en África como una posible nueva frontera para salvaguardar y afianzar los derechos humanos.

Palabras clave: África; Vernacularización; Clictivismo; ONG–ización; Activismo social de base.

Summary

1. Introduction

By way of introduction, it is important to highlight that Africa has been late to join the human rights bandwagon. To some of its former leaders, rights, especially civil and political, were viewed as a western construct with limited applicability. The path along which human rights initiatives evolved might be partly accountable for this situation[2]. In recent years, global economic and political power is perceived to be shifting, particularly the United States and Europe's economic and political power appear to be in decline, which are the strongest forces behind human rights enforcement. Indeed, it can be argued further that this shift in geopolitics could lead to new human rights narratives in the African continent.

2 FOOT, Rosemary, *"The Cold War and human rights"* in Melvyn Leffler and Odd Arne Westad (eds), The Cambridge History of the Cold War, Cambridge University Press 2010.

But first, it is important to point out that the perceived global power shift is only one of many trends that are shaping the 21st century, and arguably may not be of primary importance when considering the future of human rights. In his analysis in *Global Trends and the Future of Human Rights Advocacy*, David Petrasek noted that other factors such as "trends in the areas of population growth, migration, education, poverty levels, women's empowerment, global economic integration, urbanization, technological development and many more will all shape profoundly the future of human rights"[3].

This article will critically evaluate the current human rights scholarship and practice in Africa to determine the future of human rights scholarship. Let it be made clear that there are five sub–regions in Africa, each one of them with different human rights experiences. As recently confirmed by the world's most celebrated indices which measure the levels of human rights enjoyment, there have been cases of both progress and retrogression in Africa[4].

Therefore, this article will focus on the general trends of human rights and not impose a pattern. Rather, it allows a pattern to emerge from the few examples chosen because they represent the different historical, economic, and political aspects of contemporary Africa. It is also worth mentioning that although predictions of human rights are often fiercely contested, this has not discouraged scholars from coming up with a number of studies to present the likely scenarios that pose both opportunities and challenges for the protection of human rights[5]. Thus, the purpose of this article is to summarize trends identified

3 PETRASEK, David, *"Global Trends and the Future of Human Rights Advocacy",* SUR – International Journal On Human Rights, v. 11, n. 20, Jun./Dec. Available at <https://sur.conectas.org/en/global-trends-and-the-future-of-human-rights-advocacy/, accessed 16 March 2019.

4 Amnesty International, "State of the World's Human Right Report 2018" (Amnesty International Ltd, 2018). <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> accessed 22 March 2019; Freedom House, "Freedom in the World 2019 Democracy In Retreat" <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat> accessed 22 March 2019; Human Rights Watch, "World Report 2018" (Human Rights Watch, 2019) <https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf> accessed 22 March 2019.

5 BURKE, Roland, Decolonization and the Evolution of International Human Rights, University of Pennsylvania Press, 2010.

in a range of studies, and draw out points that are likely to be of high interest to those considering the future of human rights on the African continent.

The overall structure of this article is divided into five sections beginning with and including this introduction. Next, this article gives a brief background of the history of human rights in Africa in the second section. The third section will then go on to discuss the emergence and role of non–governmental organisations (NGOs) in Africa. The fourth section discusses the main ideas of the article which will focus on two main elements, namely the local promotion of human rights and the use of technology. Finally, the last section presents the implications of the findings of this article on future research and provides a number of conclusions.

2. A Brief History of Human Rights in Africa

In Africa, as stated in the introduction, the idea of human rights is a comparatively recent phenomenon. For instance, the 1963 Charter establishing the Organization of African Unity (OAU) imposed no explicit obligation on Member States to further the protection of human rights[6]. The OAU's founding Charter only required Member States to have due regard for human rights as set out in the Universal Declaration of Human Rights (UDHR) in their international relations[7]. At that juncture, most members of the OAU prioritized socio–economic development, territorial integrity, and state sovereignty to human rights protection. As claimed by Ahmed El Obaid and Kwado Appiagyei Atua, the discussion of human rights in Africa must be grounded in its political and ideological history and, more importantly, in the continent's history of nationalism and anti–colonialism[8].

The principal human rights instrument, the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) was adopted by the OAU

6 See in general MURRAY, Rachel, *Human Rights in Africa: From the OAU to the African Union,* Cambridge University Press, 2004.

7 ACHPR, A Guide to The African Human Rights System, Pretoria University Law Press, 2016.

8 AHMED EL OBAID and KWADO APPIAGYEI ATUA, *"Human Rights in Africa A new Perspective on Linking the Past to the Present"* (1996) 41 McGill L.J. 819.

Assembly in 1981[9]. Thus, between 1961 and 1979 African jurists, experts, and governments were preoccupied with the debate on how to develop a system for human rights protection in Africa[10]. Regrettably, during the long period it took for them to negotiate a human rights treaty, repression and corruption led to massive human rights violations under the gamut of ideologies such as, socialism, one–partyism and pan–Africanism. This may have contributed to the widely held image of Africa as a global hotspot for major human rights violations.

Today, in addition to the Banjul Charter, the African Union (AU), the successor to the earlier OAU, has adopted numerous treaties further elaborating human rights as well as a plethora of soft law declarations. It is important to note that law is meant to change behavior, and international treaties (including human rights conventions) are typically designed to change the behavior of the states that have signed and ratified them[11]. That said, there is a considerable amount of literature by socio–legal scholars that suggests that state commitment alone is not sufficient. For instance, one of the socio–legal studies reveals that "international human rights laws do not succeed by themselves but only when there is an active global civil society promoting those rights abroad and a vibrant national civil society advocating for those rights on the ground"[12].

It is unsurprising that although by the early 1980s human rights in Africa was already a topic of discussion was an idea whose time has come, many governments did not play a major role in promoting them. This may have been due to the fact that the majority of African governments either did not have domestic human rights institutions in place or in those that had, the mechanisms were still nascent and evolving. Consequently, the human rights promotion and protection gap was filled in by international NGOs and their local branches[13].

9 Entry into force: 21 October 1986.

10 B. OBINNA OKERE, *"The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems"*, Human Rights Quarterly, Vol. 6, No. 2 (May, 1984), pp. 141, 144.

11 NEUMAYER, Eric, *"Do International Human Rights Treaties Improve Respect for Human Rights?"*, The Journal of Conflict Resolution, 2005, 49 (6), p. 925.

12 MEYERS, Stephen, *"NGO–Ization and Human Rights Law: The CRPD's Civil Society Mandate"*, MDPI, 2016.

13 SHIMAN, David, Teaching Human Rights, Center for Teaching International Relations Publications, U of Denver,

Since the 1990s, the non–profit sector in Africa has grown rapidly. For example, South Africa alone has an extensive and lively non–governmental sector which boasts roughly 100,000 registered NGOs and an estimated 50,000 unregistered ones[14]. The NGO sector is worth over $1 trillion a year globally[15]. It employs millions of workers, not to mention countless volunteers[16]. According to statistics from 2006, NGOs spend about the same amount of money on development each year with the World Bank[17]. What is more, NGOs have become key actors not only in promoting rights but also democracy and economic development. Yet not everyone agrees they should extend their work to issues outside human rights, as this may be "a tall order for any actor to fulfil"[18]. As shall be seen below, the massive influx of NGOs in Africa has wide implications on the development of human rights.

3. NGOization and Human Rights in Africa

NGOs are at the heart of our understanding of the human rights trajectory on the African continent. It is necessary here to clarify exactly what is meant by the term NGO.

> "The term non–governmental or non–profit is normally used to cover the range of organizations which go to make up civil society. Such organizations are characterized, in general, by having as the purpose of their existence something other than financial profit. However, this leaves a huge multitude of reasons for existence and a wide variety of enterprises and activities. NGOs range from small pressure groups on, for example, specific environmental

1993, 6–7.

14 JANKELOWITZ, Lauren, "*Managing South African nonprofit organisations for sustainability*", Unpublished thesis University of the Witwatersrand, Johannesburg, 2007.

15 HALL JONES, Peter, "The Rise and Rise of NGOs", Global Policy Forum, 2006, available at: https://www.globalpolicy.org/component/content/article/176-general/31937.html, accessed 23 March 2019.

16 Ídem.

17 Ídem.

18 DICKLITCH, Susan, The Elusive Promise of NGOs in Africa. Lessons from Uganda, Palgrave Macmillan, 1998, 98.

> concerns or specific human rights violations, through educational charities, women's refuges, cultural associations, religious organizations, legal foundations, humanitarian assistance programs –and the list could continue– all the way to the huge international organizations with hundreds or even thousands of branches or members in different parts of the world"[19].

Returning briefly to the *modus operandi* of NGOs, until the late 1980s, a specific model of transnational activism was consolidated within the human rights movement. This model established a division of labour in the movement whereby local NGOs worked to collect reports on human rights violations in their countries, while international NGOs sought to give them greater visibility and force on the global scene[20]. In a study, which illuminates the influence of NGOs on human rights, Claude E. Welch identified six principal strategies of NGOs, namely education, empowerment, enforcement, documentation, democratization, and development[21].

Further, NGOs have used the medium of publicity to attract international attention, particularly the attention of member states of the United Nations that are expected to exert pressure on the rogue states to comply with human rights or face consequences[22]. Eric A. Posner puts it rather bluntly that the popular belief is that governments should promote the well–being of all people in their countries, and that in the cases of failure, other countries should intervene and replace governments that fail to comply with this duty[23].

19 Council of Europe, "Manual for Human Rights Education with Young People", available at: https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos, accessed 08 July 2019.

20 CHILLIER, Gastón and BRANDÃO TIMO, Pétalla, *"The Global Human Rights Movement in the 21st Century"*, SUR, 2014, 20. Available at: https://sur.conectas.org/en/the-global-human-rights-movement-in-the-21st-century/, accessed 23 March 2019.

21 See in general WELCH, Claude E., *Protecting Human Rights In Africa: Strategies and Roles of Non–Governmental Organizations,* University of Pennsylvania Press, 1995.

22 CARISCH, Enrico , RICKARD–MARTIN Loraine and MEISTER, Shawna R. , *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights,* Springer, 2017.

23 POSNER, Eric A., *The Twilight of Human Rights Law*, Oxford University Press, 2014.

More recent attention has however focused on whether the aforementioned strategy of NGOs has been successful[24]. Factors that may have contributed to poor performance of NGOs have been studied under the NGOization theory within development studies, which offers a framework for analyzing the potential unintended consequences of donors[25]. The most succinct definition of NGOization has been offered by Aziz Choudry and Dip Kapoor who defined it as the professionalization and institutionalization of social actions by NGOs[26]. Choudry and Kapoor argued that NGOization has long been a hotly contested issue in grassroots social movements and communities of resistance[27]. In their conclusion, the struggles over knowledge and power are intrinsic to movements for social change, and as a result, alternatives arise from struggle, active engagement, reflection, and action[28]. The next section will discuss how grassroots social movement can articulate alternative ideas of human rights where the need for direct action has led them to by–pass traditional NGOs.

4. The Rise of Grassroots Social Activism

Regrettably, the field of human rights lacks a comprehensive and rigorous conceptualization of the role that civil society plays in human rights narratives[29].

24 BUKOVSKÁ, Barbora, *"Perpetrating good: Unintended Consequences of International Human Rights Advocacy"*, SUR, 2008, 5. Available at: http://www.surjournal.org/eng/conteudos/pdf/9/bukovska.pdf, accessed 23 March 2019; See also POSNER, Michael, *"Human Rights and Non–Governmental Organizations on the Eve of the Next Century"*, Fordham Law Review, 1997, 66, 627.

25 CHOUDRY, Aziz and KAPOOR, Dip (eds), *NGOization: Complicity, Contradictions and Prospects*, Zed Books; New ed., 2013 ; CHAHIM, Dean and PRAKASH, Aseem, *"NGOization, Foreign Funding, and the Nicaraguan Civil Society"*, Voluntas: International Journal of Voluntary and Nonprofit Organizations, 2014, 25, 487.

26 CHOUDRY, Aziz and KAPOOR, Dip (eds), *NGOization: Complicity, Contradictions and Prospects,* Zed Books, 2013.

27 Ídem.

28 CHOUDRY, Aziz, "Global Justice? Contesting NGOization: Knowledge Politics and Containment in Antiglobalization Networks" in CHOUDRY, Aziz and KAPOOR, Dip (eds), Learning from the Ground Up, Palgrave Macmillan, 2010, 17, 32.

29 For example, in relation to democratisation, see DIAMOND, Larry, "Toward Democratic Consolidation", Journal

What is more, it has been reported that the dynamics, politics, and richness of knowledge production within social movements and activist contexts are often overlooked in scholarly literature, and sometimes even in the movements themselves[30]. This article will refer to a modest emerging body of critical literature on NGOs' implications in the professionalization of social change, and the present author's own activist engagement, to help illuminate the rise of grassroots social activism.

Whilst it is not the intention of this article to provide a detailed description of criticisms that have been presented against the NGO sector, a brief discussion is useful in order to have a clear understanding of the rise of grassroots social movements. Critics have argued that there are widespread fears that NGOs are increasingly taking on a corporate character, due to the requirements of funding[31]. Specifically, there are widely shared views that corporatization has caused NGOs to favor donors over the impoverished communities whom they are meant to be helping[32]. As a result, it is possible that NGOs lost the community trust as they were seen as only providing short–term, so–called *Band–Aid* solutions sustaining poverty at a systemic level[33].

Augusta Dwyer's book *Broke but Unbroken* reveals how grassroots movements distinguish themselves from NGOs. She argues that NGOs typically work on one very tangible project, while grassroots social movement engages in long–term issues that can have a lasting impression[34]. For instance, grassroots social

of Democracy, 1994, 5, 4–17, and MERCER, Claire, "NGOs, Civil Society and Democratization: A Critical Review of the Literature", 2 Progress in Development Studies 5, 2002; with regard to development see HOWELL, Jude and PEARCE, Jenny, Civil Society and Development: A Critical Exploration, Lynne Rienner, 2002.

30 CHOUDRY, Aziz and KAPOOR, Dip (eds), Learning from the Ground Up, Op. Cit., 1.

31 See in general, VAN HUIJSTEE, Mariette et al., "Challenges for NGOs Partnering with Corporations: WWF Netherlands and the Environmental Defense Fund", Environmental Values, 2011, 20 (1), 43.

32 KUMAR, Pradeep, *Pushpa Sundar: Foreign Aid for Indian NGOs: Problem or Solution?*, VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations, 2012, volume 23, pages 837–839.

33 See in particular MARTLEW, Nick, *Band Aids and Beyond: Tackling Disasters in Ethiopia 25 Years After the Famine*, Oxfam International, 2009.

34 DWYER, Augusta, Broke But Unbroken: Grassroots Social Movements and Their Radical Solutions to Poverty, Fernwood Publishing, 2011.

movements are often formed as a result of one particular problem, but they do not, as Dwyer observed, simply desert a project once they have achieved their goals. Grassroots social movements continue to fight for others and this is what distinguishes grassroots social movements from NGOs[35].

The present author recalls how at a local NGO expo passers–by were lamenting that NGO personnel were spending too much money and resources showcasing their work and on their administrative needs rather than the actual business of assisting people in need. These passers–by bemoaned the lack of "activists" who they said have now been replaced by "career civil society practitioners". This may be quite a fitting critique of NGOs as it conforms to the common perception of elitism in the NGO sector. However, the central contention of this section is not to lay bare the limitations of NGOs as such. The primary aim of this section is to show how NGOs' shortcomings may have accelerated the rise to a new form of grassroots social movement activism.

It will be too easy and misleading to attribute the rise of grassroots social activism to "institutionalized" NGOs. The emergence of grassroots social movement can also be understood from the malaise and failure of national politics and mobilization strategies by African governments. A long op–ed entitled *NGOs vs. Grassroots Movements: A False Dichotomy* warned that blame should not be directed "neither on the outside donors who do what they do, nor on the national organizations who may be supported by them"[36]. As one fervent defender of NGOs, the author cautioned about the over–simplified juxtaposition of pitting the presumed donor–driven globalized agendas of NGOs against the more homegrown national agenda of popular social movements[37].

Hence in this article, the present author argues for a more nuanced view that is based on the shift in the global geopolitics which may have diminished the role of NGOs to a greater extent. To give an illustration, look at the case of the Chinese model of development combining political repression and

35 Ídem.

36 AZZAM, Fateh, *"NGOs vs. Grassroots Movements: A False Dichotomy"* Al–Shabaka, 6 February, 2014. Available at: https://al-shabaka.org/commentaries/ngos-vs-grassroots-movements-a-false-dichotomy/, accessed 27 March 2019.

37 Ídem.

economic liberalism, which has attracted numerous admirers in Africa. With this in mind, consider on the other hand, how the traditional champions of human rights –Europe and the United States– have floundered. For example, according to Human Rights Watch in 2017, the United States moved backward on human rights at home and abroad[38]. Similarly, "Europe has turned inward as it has struggled with a sovereign debt crisis, xenophobia towards its Muslim communities and disillusionment with Brussels"[39].

An implication of this is the possibility that grassroots social movements have gained traction. Social movements that originate in the grassroots of society often contain the potential to change the narratives. A useful example would be the movements of the 1960s which reshaped politics and society in the United States, Western Europe, and beyond. It may be argued that their impact resonates even today and was what is now being witnessed across Africa. These new actors are acting in the same way a variety of earlier movements did by giving a voice to the interests of the poor and neglected (for example labor, farmer, populist, religious, and anti–slavery movements throughout the United States and other nations)[40]. As shall be seen below, although grassroots efforts in Africa may be intertwined with other issues, such as governance, anti–corruption, and politics, the effects resonate at the broadest possible level, shaping resilient futures and empowering communities to assert their rights.

4.1 Senegal

Senegal is widely held as one of Africa's most stable democracies. In terms of civil and political rights, the government's respect for civil liberties has improved over time, and the country is known for its relatively independent media and public freedom of expression. Thus, in 2011, there was a political uprising when former President Abdoulaye Wade attempted to amend the Senegal

38 Human Rights Watch, *"Country Summary, United States"*, 2017, 1.

39 POSNER, Eric, *"The Case Against Human Rights",* The Guardian, 4 December 2014. Available at: https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights, accessed 29 March 2019.

40 VAN TIL, Jon, HEGYESI, Gabor and ESCHWEILER, Jennifer, *"Grassroots Social Movements and the Shaping of History"* in CNAAN, Ram and MILOFSKY, Carl (eds) Handbook of Community Movements and Local Organizations, Springer, 2008.

Constitution and abolish term limits against the political will of the majority. Two grassroots social movements, Y'en a Marre ("Enough–is–Enough") and Movement 23 ("June 23 Movement"), played a critical role in preventing former President Abdoulaye Wade's attempt to amend the constitutional provision on term limits and hang on to power. These grassroots social movements acted without the backing of the long–established, and once extremely important, Senegalese human rights organizations to defend their civil and political rights. NGOs were rendered virtually irrelevant, as they were not always present on the streets, and were not consistently able to use the moment to give their causes new visibility[41].

4.2 Burkina Faso

There is robust academic evidence that shaming can have a positive impact on the human rights situation in targeted states[42]. However, research further points out that the success of shaming can largely depend on international actors as an important remedy against deadlock when the space for domestic opposition is not conducive[43]. With this in mind, a look may be had at Burkina Faso, a small country with a tiny population and internal politics which most foreign correspondents tend to find somewhat pedestrian. Unsurprisingly, it receives only little attention, despite its poor socioeconomic rights record that made it one of the least developed countries in Africa and its citizens desperately poor. In 2014, a grassroots movement mobilised rapidly and powerfully against the long–time Burkina Faso president, Blaise Compaoré. One of them, a social movement called Balai Citoyen (the Citizen's Broom), proved to be especially

41 NADER, Lucia and AIDOO, Akwasi, *"Africa's social movements present opportunities, not threats, for rights groups"*, Open Global Rights, 2015. Available at: https://www.openglobalrights.org/africas-social-movements-present-opportunities-not-threats-for-rights-groups/, accessed 1 May 2019.

42 KINZELBACH, Katrin and LEHMANN, Julian, *"Can Shaming Promote Human Rights? Publicity in Human Rights Foreign Policy", A Review and Discussion Paper*, European Liberal Forum, Available at: https://www.gppi.net/media/Kinzelbach_Lehmann_2015_Can_Shaming_Promote_Human_Rights.pdf, accessed 2 May 2019.

43 KINZELBACH, Katrin and LEHMANN, Julian, *"Can Shaming Promote Human Rights? Publicity in Human Rights Foreign Policy"*, A Review and Discussion Paper, European Liberal Forum. Available at: https://www.gppi.net/media/Kinzelbach_Lehmann_2015_Can_Shaming_Promote_Human_Rights.pdf, accessed 2 May 2019.

instrumental using the symbol of a broom to convey the idea of sweeping away the corrupt presidential clan[44]. Most traditional local human rights NGOs were taken completely by surprise. The experiences from Burkina Faso illustrate how an immediate threat of deteriorating political conditions can unite different actors against a repressive regime[45]. Further, despite the presence of opposition parties and civic activists who often serve as watchdogs against the actions of the government, mobilization remains crucial when the political landscape is about to deteriorate or become even more repressive[46].

4.3 Zimbabwe

Zimbabwe´s gross human rights violations are widely documented, including attempts of military intervention by the United Kingdom[47]. However, after years of human rights documentation and litigation by NGOs, which has largely failed to secure immediate human rights protection, in April of 2016 thousands of protestors took to the streets of the capital, Harare, demanding the resignation of Robert Mugabe as president, accusing him of political misrule and economic mismanagement. Zimbabweans protested against government repression, poor public services, high unemployment, widespread corruption, and delays in civil servants receiving their salaries. A national strike, named "stay–away day", began on the 6th of July and subsequent protests took place across the country and diaspora. This social movement was founded overnight through a Facebook video by a lesser known preacher which he called "ThisFlag", creating a campaign that went viral. Although the campaign did not remove Mugabe at that time, in November of 2017 thousands of Zimbabweans took to the streets alongside

44 WIENKOOP, Nina–Kathrin and BERTRAND, Eloïse, *"Popular Resistance to Authoritarian Consolidation in Burkina Faso"*, Carnegie Endowment for International Peace, 16 May 2018. Available at: https://carnegieendowment.org/2018/05/16/popular-resistance-to-authoritarian-consolidation-in-burkina-faso-pub-76363, accessed 2 May 2019.

45 Ídem.

46 Ídem.

47 SMITH, David, *"Tony Blair Plotted Military Intervention in Zimbabwe, Claims Thabo Mbeki"*, The Guardian, 27 November 2013. Available at: https://www.theguardian.com/world/2013/nov/27/tony-blair-military-intervention-zimbabwe-claim, accessed 4 May 2019.

the army and forced Mugabe to resign. While Zimbabwe's grassroots social movement has not solved all the country's human rights challenges, it remains a tangible reminder that populations can demand human rights when diverse groups in society pull together to create or use suitable conditions for change.

The above case studies demonstrate how with all the geo–political changes occurring at the beginning of this century, some international actions and grassroots social movements actors have emerged as a viable alternative to NGOs. There are two important issues emerging from the above case studies, namely the need for the transition of human rights to meet the local conditions and the significant role played by social media which has not only allowed a broader majority to disseminate cases of human rights, but also to change the human rights narratives in Africa. These two issues are discussed below.

5. Vernacularization

So far this article has incidentally referred to how social groups have mushroomed to satisfy the need to make human rights more locally relevant, particularly in the context of changing the geopolitical environment. This section will discuss in detail how human rights can be made more locally relevant by interpreting existing global norms in the light of needs identified by community organizations. Further, it will discuss the efforts by grassroots social movements to interpret human rights on a local level through the process of vernacularization.

The concept of vernacularization was developed by the political scientist and historian Benedict Anderson to explain the process of the migration done by European states from the original Latin language to languages based on the Latin alphabet (which led to a ground for, and justification of, nationalist sentiments among the citizen of those European countries)[48]. There has been an increase in usage of the concept by human rights scholars to refer to a process of appropriation and local adoption of human rights. To put it in other words, vernacularization describes how human rights can take on some

48 ANDERSON, Benedict, Imagined communities: Reflections on the origin and spread of nationalism, Revised edition, Verso, 2006.

of the ideological and social attributes of a place, but also retain some of their original formulation[49]. The concept of vernacularization is used in the context of the present article as the process in which human rights are extracted from the universal setting to make them meaningful and fitting in the local social and cultural setting.

It is important to note from the onset that, by arguing in favor of the localization/vernacularization[50] of human rights, this article does not intend to dismiss the validity of the UDHR or other major human rights conventions as a catalogue of universal human rights norms. That point has been subject to intense debate[51], which is still open[52].

Having said that, despite a growing body of literature on regional interpretations of human rights in other parts of the world[53], little research has been conducted on human rights discourse in Africa, where the study of human rights remains rooted in law and largely divorced from the social practice of human rights as performed by civil society groups[54]. Therefore, it is possible that despite the term "human rights" being increasingly popular language of civil society advocacy internationally, it is also possible that this "common language" is being

49 MERRY, Sally Engle and LEVITT, Peggy, *"The Vernacularization of Women's Human Rights"* In S. Hopgood, J. Snyder, & L. Vinjamuri (Eds.), Human Rights Futures (pp. 213–236). Cambridge: Cambridge University Press, 2017, 219.

50 Note in this section the terms localization/vernacularization are used interchangeably. Moreover, local in this sense refers to all the normative orders below the global one such as regional, subregional, and national.

51 For arguments on cultural relativism of human rights, see in general DONNELLY, Jack *"Human Rights and Human Dignity: An Analytic Critique of Non–Western Conceptions of Human Rights",* The American Political Science Review, 1982, 76, 303; CERNA, Christina M, *"Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio–Cultural Contexts",* 16 Human Rights Quarterly, 1994, 740.

52 DE FEYTER, Koen *"Localizing Human Rights"*, Institute of Development Policy and Management Discussion Paper 2006, 2. Available at: http://www.ua.ac.be/objs/00152976.pdf, accessed 22 March 2019.

53 See WIESSALA, George, *Re–Orienting the Fundamentals: Human Rights and New Connections in EU–Asia Relations,* First Edition, Routledge, 2006; CESARINI, Paola and HERTEL, Shareen *"Interdisciplinary Approaches to Human Rights Scholarship in Latin America",* Journal of Latin American Studies, 2005, 37, 793.

54 VILJOEN, Frans (ed), International Human Rights Law in Africa, 2nd Edition, Oxford University Press, 2012.

used to reflect distinct concepts drawing on local perspectives and traditions[55].

Consequently, some African human rights scholars and practitioners are now seeking answers on the role indigenous concepts play in assimilating and shaping human rights. Questions have been raised on the exact relationship between African customs, for example: what is the relationship between ubuntu –a concept of reciprocal humanity, and human rights, a common international language of advocacy and accountability[56]? These questions are explored below, with reference to Botswana, a country where rights are often depicted as foreign and where the local concept of *botho* (also widely known as *ubuntu*) has deep social and cultural resonance.

As mentioned earlier, despite ongoing debates about whether it is possible to have regional or culturally located conceptions of human rights[57], significant intra–continental variation, and high levels of ratification of international human rights treaties, there are indications of broad but distinct African approaches to human rights. For instance, in comparison with the dominant international discourse highlighting individual civil and political rights, African human rights documents and discourse give greater prominence to reciprocity, collective rights, and socioeconomic rights[58].

5.1 Botswana

In many African societies, human rights are observed in relation to the community rather than the individual. Contrary to domestic government and media, human rights activists in Botswana increasingly view *botho* as a local translation of human rights. In doing so, they are tentatively building a culturally specific understanding of human rights including international components such as universality, but also highlighting culturally important traits such as

55 KENYON, Kristi Heather, *"Localizing the Global/Globalizing the Local: Reconciling Botho and Human Rights in Botswana"* in PRUCE, Joel (ed), The Social Practice of Human Rights, Palgrave Macmillan, 2015.

56 Ibídem, p 101.

57 VILJOEN, Frans (ed), International Human Rights Law in Africa, 2nd Edition, Oxford University Press, 2012.

58 KENYON, Kristi Heather, *"Localizing the Global/Globalizing the Local: Reconciling Botho and Human Rights in Botswana"...*, Op. Cit.

reciprocity[59]. Botswana is a classic example of how indigenous concepts can play a role in assimilating and shaping human rights narratives. Semantically speaking, the concept of *botho* can make human rights messages more comprehensible and palatable in the domestic context.

By using this concept, grassroots social movements are increasingly able to promote human rights in light of local knowledge and situated in a social and cultural context rather than as a foreign concept. The example of Botswana illustrates what Kristi Heather Kenyon forcefully argued, that "human rights are no longer, if indeed they ever were, 'owned' by lawyers, the UN, or the global north. Instead they are reinterpreted and reinvented in different settings, existing as a multitude of hybrids drawing on both global and local points of origin"[60].

6. Clicktivism

The English Oxford dictionary defines the term as "the practice of supporting a political or social cause via the Internet by means such as social media or online petitions, typically characterized as involving little effort or commitment"[61]. Clicktivism involves non–activists taking action –often in spheres traditionally engaged only by activists or professionals (governments, NGOs, international institutions, etc.). Put in other words, clicktivism "is an encroachment of politics and civics into people's everyday worlds which tend to be dominated by mundane concerns of day–to–day existence or dominated by the consumerism transmitted through traditional media"[62]. Clicktivism has also made inroads into the area of the professionalized human rights advocacy, changing its contours as the examples below illustrate[63].

59 Ibídem, 118.

60 English Oxford Dictionary online https://en.oxforddictionaries.com/definition/clicktivism, accessed 22 February 2019.

61 Clicktivist, "Clicktivism breakdown, What Kony 2012 Says about Clicktivism" (Clickitivist, Mar 7 2012) http://www.clicktivist.org/posts/2015/11/clicktivism-breakdown-what-kony-2012-says-about-clicktivism, accessed 22 March 2019.

62 Ídem.

63 DRUMBL, Mark A., *"Child Soldiers and Clicktivism: Justice, Myths, and Prevention",* Journal of Human

6.1 Uganda

The *Kony 2012* campaign, conducted under the auspices of an American advocacy group called Invisible Children, brought to the international platform atrocities allegedly committed by the so–called Lord's Resistance Army (LRA). Through the use of social media and a short documentary, the campaign highlighted the plights of child soldiers to the international fora and raised approximately $16 million in support of Ugandan communities and raised awareness of the LRA's atrocities by reaching an estimated 100 million people. Invisible Children influenced the meeting of a global summit discussing the LRA and the occurrence of a Washington DC, rally attracted thousands of *Kony 2012* supporters, including world leaders and influential activists. The *Kony 2012* campaign stridently encourages the LRA's leader, Joseph Kony's, capture and transfer to the International Criminal Court (ICC) to face an array of charges, including the war crime of unlawful recruitment, enlistment, or active use in hostilities of children under the age of fifteen[64].

6.2 Nigeria

Bring Back Our Girls (BBOG) is a unique example: initially meant to be a one–day march, it has now entered its fifth year. The campaign was made in response to the kidnapping of 276 Nigerian school girls from a secondary school by a terrorist group known as Boko Haram. Outraged by the violation of human rights and subsequent lack of western media coverage, the hashtag *#bringbackourgirls* was retweeted 4 million times by ordinary citizens. The BBOG made significant headway in terms of social awareness and government interaction. As a result, the United States and British government pledged to send a team, including military personnel, intelligence, and hostage negotiators, to assist the Nigerian government. BBOG also promoted various feminist qualities across Nigeria; the public empowerment of women's rights activists by the campaigns has drawn the attention needed to urge Nigeria to adopt national laws

Rights Practice, Volume 4, 2012, p. 481, 482.

64 NAGARAJAN, Chitra, *"#Bringbackourgirls hasn't brought back Chibok's girls, but it has changed Nigeria's politics",* The Guardian (14 April 2015). Available at: https://www.theguardian.com/commentisfree/2015/apr/14/nigeria-women-activists-boko-haram, accessed 22 March 2019.

against violence against women[65]. The BBOG explicitly distinguishes itself from NGOs in that it does not accept funding from either foreign or local donors. The leadership believes that funding may shift BBOG's focus from pressurizing government and they also fear that once they start accepting private funding, they could be seen as partisan[66].

6.3 Cameroon

The ongoing monitoring of human rights violations in Cameroon using open source investigation methodologies and digital crowdsourcing also illustrate how ordinary people can use technology in the promotion and protection of human rights. Using their phone cameras, volunteers have been able to expose human rights abuses in Cameroon. Amnesty International provided assistance by carrying out forensic analysis of the videos, which helped to expose human rights abuses by the security forces, a fact that has been denied by the government. The use of mobile phones by citizens made it not only possible for NGOs to use meticulous open source investigation methodologies to corroborate by testimonies from the ground. For instance, NGOs such as Amnesty international relied on various sources of evidence such as geolocation of the video, expert analysis of the uniforms and weapons used, and linguistic and other contextual clues in the speech that gave away the identities and ranks of the soldiers. The results were then utilized to expose the violations as well using the new information to counter the official propaganda. In the case of Cameroon, ordinary citizens using basic technology have managed to provide irrefutable evidence showing Cameroonian security forces committing human rights atrocities, including extra judicial execution of civilians[67].

65 OJEBODE, Ayo et al*, "How Bring Back Our Girls went from hashtag to social movement, while rejecting funding from donors"* (Oxfam Blogs, 10 October 2018) https://oxfamblogs.org/fp2p/how-bring-back-our-girls-went-from-hashtag-to-social-movement-while-rejecting-funding-from-donors/, accessed 22 March 2019.

66 MARIN, Milena, *"Beyond Clicktivism: Using Tech To Expose Human Rights Violations".* https://imaginebelfast.com/events/beyond-clicktivism/, accessed 22 March 2019.

67 ADHIKARI, Anindita et al, *"Grassroots Reform in the Global South Research and Innovation" Grants Working Papers Series,* (21 September 2017) https://www.usaid.gov/sites/default/files/documents/1866/Grassroots_Reform_in_the_Global_South_-_Research_and_Innovation_Grants_Working_Papers_Series.pdf,

7. Way forward

The case studies above show that technology can strengthen grassroots social movements and allow those citizens outside the formal human rights industry to compete for space to shape and determine human rights narratives. Yet, as noted in the introduction, identifying trends does not necessarily translate into predicting a definitive outcome. The emerging practice in this article might have either beneficial or detrimental consequences for human rights, and most likely will be a combination of both.

In closing however, it is noteworthy that NGOs and grassroots social movements often have similar objectives at their core. They are both seeking to end poverty, empower individuals, address human rights challenges, and reduce inequalities. As argued earlier, a growing donor–dependency complex among NGOs, as well as their short–term, project–oriented, and top–down nature, the agenda and political outlook of many NGOs are necessarily affected and even subjugated, and their links to the community are weakened. Is it time for civil society to move away from "NGOization" towards some idealized form of mobilized movement committed to the primary needs of the grassroots?

The answer lies in a collaboration between NGOs and grassroots social movements. There is a clear need for longer–term efforts to: bring new actors into human rights movements, take on the issues that communities perceive as priorities, and emphasize action at the local level. The co–existence of NGOs alongside grassroots social movements can create a diverse civil society which can effectively promote human rights NGOs to work in solidarity with grassroots and social movements. For instance, NGOs could act as facilitators, advocates, and educators of existing movements founded by impoverished communities. There is well–documented evidence of local and international NGO partnerships. This suggests that the two can work as complements to one another rather than supplements.

Donors play a central role in ensuring that local needs are addressed by investing in the work of locally–rooted organisations and trusting community leaders to set their own agenda. Too often these agendas have been set by

accessed 2 May 2019.

human rights funders rather than local communities. It is therefore a welcome development that certain development partners are working on finding ways to fund grassroots movements directly[68].

Turning to the use of technology, it is clear that grassroots activism has been enhanced through the use of modern technology. It is to be stressed that clicktivist campaigns are gaining ground within society, as evidenced for instance by the Ugandan *Kony 2012* and the Nigerian BBOG case studies above. Succinctly, both examples illustrate the effectiveness of clicktivism; the highly disseminative power which has allowed widespread participation in international spheres, resulting in the increased awareness of social issues. Through innovative use of both participatory and symbolic actions, clicktivism has made a significant impact on the human rights impact in African social systems and has facilitated measurable social change.

That said, clicktivism cannot replace the personal connection cultivated through traditional protesting techniques. Although the majority of young people in Africa are associating with online campaigns in order to support human rights, online action is often limited only to an international audience. What clicktivism truly represents is the next tool for international political evolution; one which in its ubiquitous and mobilizing power can strengthen human rights campaigns not only in Africa but globally[69]. As an estimated half a billion Africans are connected online, international organizations should utilize this opportunity[70].

There is no denying the fact that the cultural setting of an environment to a large extent influences the ways in which human rights are promoted and protected. There is a strong need to localize global human rights as a target, rather than as a description of current practice, that is to say a means of resistance to

68 MUIR, Jesse Max, *"The Effectiveness of Clicktivism in Grassroots Political Campaigns".* https://jessemaxmuir.wordpress.com/2015/09/22/the-effectiveness-of-clicktivism-in-grassroots-political-campaigns/, accessed 20 May 2019.

69 Internet World Stats, *"Internet Usage and Population Statistics".* https://www.internetworldstats.com/stats1.htm, accessed 22 May 2019.

70 BAXI, Upendra, The Future of Human Rights, Oxford University Press, 2002, 1; DE FEYTER, Koen *'Localizing Human Rights Institute of Development Policy and Management",* Discussion Paper 2006, 2 http://www.ua.ac.be/objs/00152976.pdf, accessed 22 March 2019.

abusive power[71]. As Koen De Feyter argues in his seminal article, there is a need for more popular participation in human rights, particularly at a time when decisions on economic globalization are taken at levels remote from the people affected by them .

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Artículos

Mucho más que pasteles: *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018) y el debate sobre la libertad religiosa en los Estados Unidos de América[1]

More Than Just Cakes: *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018) and Religious Freedom Debate in the United States of America

Recibido: 29/07/2019 – Aceptado: 09/12/2019

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1 El ensayo es producto del trabajo realizado en el Proyecto de Investigación IUS, Libertad religiosa: la objeción de conciencia institucional o el derecho de autonomía de las instituciones y el acomodamiento razonable. Una mirada desde la jurisprudencia nacional y el derecho comparado (UCA), dirigido por la Dra. Débora Ranieri. Agradezco a los Dres. Santiago Legarre, Analía Pastore y Estela Sacristán por sus generosos comentarios en el periodo de elaboración.

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Resumen

El presente artículo analiza *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) desde dos perspectivas. El caso permite, por un lado, comprender el dilema que afrontan los objetores de conciencia en la sociedad secular posmoderna. Pero, además, con su decisión la Corte Suprema de los Estados Unidos comenzó a fijar directrices para la resolución de futuros conflictos.

Palabras clave: Libertad religiosa; Primera Enmienda; Igualdad; Libertad de expresión; Tolerancia.

Abstract

This paper addresses the analysis of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) from two perspectives. First, the case shows the dilemma objectors of conscience face in postmodern secular societies. Secondly, in this decision the Supreme Court of the United States begins to establish guidelines for the resolution of future conflicts.

Keywords: Religious Liberty; First Amendment; Equality; Freedom of speech; Tolerance.

Sumario

1. Introducción

Jack C. Phillips, dueño de *Masterpiece Cakeshop, Ltd.*, se hizo conocido cuando la Comisión de Derechos Civiles de Colorado lo condenó por discriminación. El pastelero, cristiano practicante, se había rehusado a diseñar una torta de boda para la celebración de un matrimonio entre personas del mismo sexo, lo cual se oponía a sus creencias religiosas[3].

3 Tanto *Masterpiece Cakeshop, Ltd.* como su dueño (Phillips) solicitaron la revisión de su caso por la vía del

El caso llegó a la Corte Suprema de los Estados Unidos, que el 4 de junio de 2018 se pronunció a favor de Phillips. Para decidir, consideró que el pastelero no había recibido el trato respetuoso y neutral que merecía[4].

Lejos de ser un suceso aislado, episodios de este tenor se repiten a menudo. Quienes poseen convicciones religiosas se niegan a participar de celebraciones u otros hechos que las contrarían. Las objeciones provocan rechazo en ciertos sectores que consideran a la religión una excusa, empleada para evadir el cumplimiento de leyes de carácter general. Las desavenencias entre unos y otros alimentan las nuevas discusiones sobre la libertad religiosa.

El caso del pastel posee todos los ingredientes de ese difícil entramado. Merece la pena emprender su estudio a partir de dos premisas.

Primera*, Masterpiece* refleja el grave dilema que sufren los creyentes que –enfrentados a normas que propician transformaciones profundas– se aferran a las convicciones morales más fuertes. Los planteos de Phillips y sus vivencias permiten comprender por qué es necesario proteger a los objetores de conciencia.

Segunda, la sentencia trae algunas novedades en la materia. En *Masterpiece*, por primera vez luego de *Obergefell v. Hodges* (2015)[5], la Corte Suprema enuncia y aborda los problemas vinculados con la objeción de conciencia. Con su decisión, comienza a delinear algunas reglas para la resolución de futuros conflictos.

Propongo a tales fines el siguiente plan de exposición. Destinaré las líneas iniciales a analizar los antecedentes fácticos y jurisprudenciales de *Masterpiece*. A continuación, repasaré la cuestión jurídica involucrada en el caso, así como el contexto social en el que éste se ha desarrollado.

writ of certiorari. Se referirá indistintamente a uno u otro, salvo cuando del contexto se infiera lo contrario.

4 Cfr. CSJ EE.UU. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018); salvo aclaración en contrario, las traducciones son propias. La sentencia se encuentra publicada en español en CSJ EE.UU. Masterpiece Cakeshop, Ltd., et al. c. Colorado civil rights commission et al. 04/06/2018. En: La Ley online: US/JUR/2/2018. [Fecha de consulta: 10 de diciembre de 2019].

5 CSJ EE.UU. Obergefell v. Hodges 26 de junio de 2015. 135 S. Ct. 2584 (2015). [Fecha de consulta: 25/10/2018] Disponible en: https://casetext.com/case/obergefell-v-hodges

Más adelante, abordaré los fundamentos de la sentencia. Distinguiré los razonamientos de la mayoría. Me detendré en los argumentos de los votos concurrentes y de la minoría.

Masterpiece servirá como puntapié para reflexionar acerca del fenómeno religioso en la sociedad secular posmoderna. Con eso en miras, buscaré determinar las causas de las nuevas controversias. Me concentraré especialmente en los problemas vinculados con la objeción de conciencia. Seguidamente, evaluaré las consecuencias de la decisión de la Corte Suprema. Al final, compartiré algunas conclusiones.

2. Hechos y antecedentes del caso

2.1 La denuncia

En 2012 Charlie Craig y David Mullins ingresaron a *Masterpiece Cakeshop, Ltd.* para encargar el pastel de su boda. En ese momento la legislación del Estado de Colorado no contemplaba el matrimonio entre personas del mismo sexo.

Jack C. Phillips, cristiano practicante y dueño del local[6], les explicó amablemente que no podía tomar el pedido. Sus creencias religiosas le impedían preparar una torta que celebrara un matrimonio contrario a las enseñanzas de la Biblia. Ofreció, no obstante, venderles otros productos.

Los clientes frustrados presentaron una denuncia ante la División de Derechos Civiles de Colorado (Colorado Civil Rights Division). Sostenían que el pastelero había violado la *Colorado Antidiscrimination Act* (CADA)[7].

6 La pastelería era un negocio familiar pequeño, Phillips y su esposa eran los únicos dueños.

7 COLORADO REVISED STATUTES. [Fecha de consulta: 25/10/2018] Disponible en: CO Rev Stat § 24–34–601 (2016). § 24–34–601(2) (2016): "(a) Es una práctica discriminatoria e ilegal para una persona, directa o indirectamente, rechazar, rehusar a prestar, o negar a un individuo o grupo, debido a una discapacidad, raza, credo, color, sexo, orientación sexual, estado civil, origen nacional o ascendencia, el disfrute pleno e igualitario de los bienes, servicios, instalaciones [facilities], privilegios, ventajas, o ubicaciones (*accommodations*) de un lugar público (*of a place of public accommodation*) […]".

2.2 Antecedentes

Concluida la investigación, y fracasada la conciliación, la Comisión de Derechos Civiles de Colorado asignó el caso al juez administrativo [*Administrative Law Judge*; *ALJ*], que apoyó la denuncia de la pareja y condenó a *Masterpiece Cakeshop, Ltd.* por discriminación.

El juez administrativo ordenó a su dueño que vendiera tortas de boda (o cualquier otro producto que preparara para parejas heterosexuales) a parejas entre personas del mismo sexo; que entrenara al personal de la pastelería para actuar del mismo modo; y que reportara todos los pedidos rechazados, por cualquier razón, por un periodo de dos años[8].

La Comisión de Derechos Civiles de Colorado adoptó ese criterio en su totalidad (*in full*). Recurrida la decisión, la Corte de Apelaciones (*Colorado Court of Appeals*) confirmó lo resuelto por el órgano administrativo.

A su turno, la Corte Suprema de Colorado se negó a revisar el caso. Derrotado en todas las instancias, Phillips ocurrió[9] ante la Corte Suprema de Justicia de los Estados Unidos por la vía del *writ of certiorari*[10].

3. Sobre la libertad religiosa y sus alcances

Conviene precisar cuál era la cuestión jurídica involucrada en el caso. Para ello referiré los fundamentos expresados por las partes en las presentaciones

8 SCJ EE.UU. *Petition for a Writ of Certiorari, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290, No. 16–111, 2016 WL 3971309 (U.S.22/7/2016). [Fecha de consulta: 25/10/2018] Disponible en: https://www.SCOTUSblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf.

9 Phillips recibió asesoramiento de los abogados de Alliance Defending Freedom. La pareja fue patrocinada por American Civil Liberties Union Foundation of Colorado (ACLU).

10 El writ of certiorari se rige por la Regla 10 de la Corte Suprema de Justicia de los Estados Unidos (Rule 10. Considerations Governing Review on Certiorari), que dispone: "*La revisión en un* writ of certiorari *no es un tema de derecho, sino de discreción judicial. Una petición para un writ of certiorari solo será concedida cuando existan razones de peso* (only for compelling reasons)". Rules of the Supreme Court of the United States. [Fecha de consulta: 25/10/2018] Disponible en: https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf.

remitidas a la Corte Suprema[11]. Asimismo, haré algunas consideraciones sobre los antecedentes jurisprudenciales y sociales relevantes.

3.1 La cuestión jurídica

Phillips formuló su petición a partir de dos argumentos centrales. Invocó la Primera Enmienda[12] y sostuvo que el Estado de Colorado no podía obligarlo a crear pasteles de boda que contrariarían sus más íntimas convicciones, ni forzarlo a enviar un mensaje con el que no estaba de acuerdo[13].

El pastelero rendía honor a Dios con su trabajo. Consecuentemente se rehusaba a prestar sus talentos artísticos para crear expresiones opuestas a sus creencias[14]. Tampoco diseñaba tortas para *Halloween* o con mensajes anti–americanos, contrarios a la familia, racistas, vulgares o profanos[15].

Con fundamento en la Decimocuarta Enmienda[16], Phillips comparó el tratamiento que la Comisión de Derechos Civiles de Colorado había dado a su caso, con lo resuelto por ese mismo órgano en otras ocasiones[17]. Explicó que

11 Los hechos materiales del caso no estaban en disputa. SCJ EEUU. *Petition for a Writ of Certiorari*. Op. cit., pág. 4.

12 ESTADOS UNIDOS DE AMÉRICA. Constitución de los Estados Unidos. La Primera Enmienda (1791) establece: *"El Congreso no hará ley alguna por la que adopte una religión como oficial del Estado o se prohíba practicarla libremente, o que coarte [abridging] la libertad de palabra o de imprenta, o el derecho del pueblo para reunirse pacíficamente y para pedir al gobierno la reparación de agravios".*

13 SCJ EE.UU. *Petition for a Writ of Certiorari.* Op. cit., pág. 2.

14 Ibídem, págs. 5 y 11.

15 Ibídem, págs. 5 y 6.

16 ESTADOS UNIDOS DE AMÉRICA. Constitución de los Estados Unidos. La Decimocuarta Enmienda (1868), en su parte pertinente, dice: *"Sección 1. […] Ningún Estado podrá dictar ni dar efecto a cualquier ley que limite los privilegios o inmunidades de los ciudadanos de los Estados Unidos; tampoco podrá Estado alguno privar a cualquier persona de la vida, la libertad o la propiedad sin el debido proceso legal; ni negar a cualquier persona que se encuentre dentro de sus límites jurisdiccionales la igual protección de las leyes […]".*

17 La Comisión consideró, al menos tres veces, la negativa expresada por otros pasteleros laicos (que se habían rehusado a diseñar tortas que desmerecían el matrimonio entre personas del mismo sexo). En esos casos, concluyó que los comerciantes habían actuado legítimamente. SCJ EE.UU. *Petition for a Writ*

la decisión que lo condenaba evidenciaba la hostilidad del órgano hacia sus creencias sobre el matrimonio[18].

En la vereda opuesta, Craig y Mullins señalaron que el pastelero había rechazado el pedido solo por la orientación sexual de la pareja[19]. Dijeron que la CADA no regulaba la expresión [*speech*] de los comerciantes sino su conducta, sin exigirles demostraciones de apoyo al matrimonio entre personas del mismo sexo[20]. Afirmaron que la norma requería a los vendedores acomodamientos [*public accommodations*[21]] que aseguraran que los grupos protegidos –en el supuesto, las parejas entre personas del mismo sexo– recibieran igual tratamiento [*equal treatment*][22].

Los denunciantes advirtieron los riesgos de admitir excepciones a la aplicación de normas antidiscriminatorias por motivos religiosos[23]. Según dijeron el caso debía resolverse bajo la doctrina de *Emp't Division v. Smith* (1990)[24], porque la CADA era una ley neutral y general [*neutral law of general applicability*[25]] y porque existía un interés legítimo [*legitimate interest*] del Estado en su aplica-

of Certiorari. Op. cit,. pág. 7.

18 Ibídem, pág. 29.

19 SCJ EE.UU. Brief in Opposition, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n. Charlie Craig, and David Mullins. Petition for a writ of certiorari to the colorado court of appeals. *No. 16–111, 2016 WL 7011418,* pág. 3 [Fecha de consulta: 27/6/2019] Disponible en: http://www.SCOTUSblog.com/wp-content/uploads/2016/12/16-111-BIO-mullins-and-craig.pdf.

20 Ibídem, pág. 6.

21 El término accommodations tiene diversos significados. Puede referir a un lugar donde vivir o quedarse, especialmente en vacaciones o para estudiantes en la universidad; a los acuerdos entre grupos que tienen distintas opiniones o al proceso para llegar a un acuerdo [arrangements]. Pero también puede aludir a los "arreglos especiales" que se adoptan para una persona o grupo que tiene necesidades diferentes. En esta oportunidad, este último parece ser el más adecuado. CAMBRIDGE UNIVERSITY PRESS, *Cambridge Advanced Learner's Dictionary & Thesaurus*, online dictionary. [Fecha de consulta: 3/7/2019] Disponible en: https://dictionary.cambridge.org/dictionary/english/accommodation.

22 SCJ EE.UU. *Brief in Opposition*. Op. cit., pág. 7.

23 Ibídem, pág. 11.

24 SCJ EE.UU. Div. Empleo v. Smith., 494 US 872 (1990) 494 U.S. 872 (1990).

25 SCJ EE.UU. *Brief in Opposition*. Op. cit., pág. 19.

ción[26]. Más aún, indicaron que había un interés superior [*compelling interest*] del Estado tendiente a erradicar la discriminación. Lo propio dijo la Comisión de Derechos Civiles de Colorado[27].

En respuesta, Phillips profundizó sus novedosos argumentos. Enfatizó que la Primera Enmienda impedía al gobierno imponer a un artista el contenido de sus obras[28]. Añadió que obligarlo a celebrar aquello que su fe le prohibía poco contribuiría a la tolerancia[29].

3.2 Un conflicto repetido

El 26 de junio de 2017 la Corte Suprema de los Estados Unidos aceptó escuchar los planteos de Phillips[30]. El tema acaparó la atención del público inmediatamente.

Los medios de comunicación siguieron de cerca el proceso[31]. Se publicaron

26 Ibídem, págs. 19 y 25.

27 La Comisión de Derechos Civiles de Colorado requirió el rechazo de la petición porque: el caso no constituía el vehículo apropiado para resolver las reclamaciones del pastelero sobre la libertad de expresión; los tribunales [*jurisdictions*] del país coincidían con la posición adoptada por las Cortes del Estado de Colorado y la decisión de la Corte de Apelaciones de Colorado seguía los precedentes de la Corte Suprema de los Estados Unidos, sobre la libertad de expresión y la cláusula del libre ejercicio [*compelled speech and free exercise*]. SCJ EE.UU. *Brief in Opposition*. Op. cit., pág. 8.

28 Los planteos sobre la libertad de expresión del pastelero dividieron a la doctrina (y luego a la Corte); cfr. WERMIEL, Stephen. "SCOTUS for law students: Splitting the free speech community". SCOTUS blog. 8 de diciembre de 2017 12:20 pm. Disponible en: https://www.SCOTUSblog.com/2017/12/scotus-law-students-splitting-free-speech-community/. Fecha de consulta: 25/6/2019.

29 SCJ EE.UU. R*eply of Petitioners, Masterpiece Cakeshop, Ltd. v. Colo.* Civil Rights Comm'n, 137 S. Ct. 2290, No. 16-111, 2016 (U.S. 12/12/2016), págs. 1 y 2. [Fecha de consulta: 27/6/2019]. Disponible en: https://www.supremecourt.gov/DocketPDF/16/16-111/21265/20171122130523511_Petitioners%20Reply%20Brief.pdf.

30 CSJ EE.UU. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 137 S. Ct. 2290 (2017). [Fecha de consulta: 27/6/2019]. Disponible en: https://www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf

31 LIPTAK, Adam. "Justices to Hear Case on Religious Objections to Same–Sex Marriage". *The New York Times.* 26 de junio de 2017. Fecha de consulta:19/3/2019. Disponible en: https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html.

notas, editoriales, columnas de opinión y numerosos artículos académicos[32]. Más de cien amigos del tribunal aportaron sus argumentos, ya sea para apuntalar al pastelero o a la pareja denunciante[33].

El caso de Phillips no era un asunto más. El problema era (y todavía es) reiterado: comerciantes y otros actores de la vida pública se niegan a participar de celebraciones u otros hechos opuestos a sus creencias religiosas.

De a poco los conflictos se judicializaron. Los tribunales estatales emitieron algunos pronunciamientos, que usualmente inclinaron la balanza en contra de los objetores.

En 2014 la misma Corte Suprema de los Estados Unidos rechazó revisar la decisión de la Suprema Corte de Nuevo México[34], que había condenado a *Elane Photography, LLC*. Su dueña se negaba a tomar fotos en la celebración de un matrimonio entre dos mujeres[35].

32 En Argentina el caso fue seguido por: BANDIERI, Luis M. "La torta de bodas de la discordia –y la Corte Suprema de USA llamada a decidir– «Masterpiece Cakeshop vs. Colorado Civil Rights Commission»". Editorial Albremática. el Dial.com – DC24B7, del 5/3/2018. Disponible en: https://cutt.ly/urwibLp

33 El propio Departamento de Justicia de los Estados Unidos apoyó a Phillips; cfr. U.S. Department of Justice (DOJ), *Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16–111, 2017 WL 4004530 (U.S. 7/9/2017). Fecha de consulta: 25/5/2019. Disponible en: https://www.justice.gov/sites/default/files/briefs/2017/09/08/16-111tsacunitedstates_0.pdf.

34 SCJ EE.UU. *Elane Photography, LLC v. Willock,* 134 S. Ct. 1787 (2014). Fecha de consulta: 25/5/2019. Disponible en: https://www.leagle.com/decision/insco20140407a56.

35 Los episodios continuaron. En 2017, Barronelle Stutzman, dueña de *Arlene´s Flowers, Inc.* solicitó a la Corte Suprema de los Estados Unidos la revisión de su caso. La florista había rechazado preparar los arreglos florales para una boda entre dos hombres, por ser contraria a sus creencias religiosas. La Suprema Corte de Washington confirmó lo decidido en la instancia anterior y determinó que Stutzman había incurrido en discriminación por la orientación sexual de los clientes, según lo dispuesto por la ley antidiscriminatoria de Washington (*Washington State Law Against Discrimination*; *WLAD*); cfr. SCJ Washington. *State v. Arlene's Flowers, Inc.*, 187 Wash. 2d 804, 856 (2017). Aaron y Melissa Klein, cristianos practicantes y dueños de la pastelería *Sweet Cakes by Melissa*, se rehusaron a diseñar una torta de bodas para la celebración de matrimonio entre dos mujeres, que los denunciaron. El *Oregon Bureau of Labor and Industries (BOLI)* determinó: que los pasteleros habían discriminado, pues le habían negado el servicio a una persona por su orientación sexual (cfr. ORS 659 A.403); que habían violado la ley antidiscriminatoria de Oregón,

Un año después llegó *Obergefell, supra*. La Corte Suprema de los Estados Unidos admitió el "derecho" de las parejas entre personas del mismo sexo a contraer matrimonio[36]. Pero prometió resguardar a quienes opinaban distinto.

Así dejó establecido que

> "[m]uchos de los que consideran que el matrimonio homosexual es incorrecto llegan a esa conclusión basada en premisas religiosas o filosóficas decentes y honorables, y ni ellos ni sus creencias son menospreciados […]"[37]. Y luego aseguró que: "[…] las religiones, y aquellos que adhieren a las doctrinas religiosas, pueden continuar abogando con su máxima, sincera convicción que, por preceptos divinos, el matrimonio entre personas del mismo sexo no debe ser permitido. La Primera Enmienda garantiza que las organizaciones y personas religiosas reciban la protección adecuada cuando buscan enseñar los principios que son tan satisfactorios [*fulfilling*] y centrales para sus vidas y creencias, y para sus aspiraciones profundas de continuar la estructura familiar que por mucho tiempo han reverenciado. Lo mismo es verdadero de aquellos que se oponen al matrimonio entre personas del mismo sexo por otras razones"[38].

al comunicar su intención de discriminar en el futuro [*by communicating an intention to unlawfully discriminate in the future*]; y que debían cesar y desistir de realizar dichas manifestaciones (cfr. ORS 659.A.409). Además, los penalizó con una multa de USD 135.000, en concepto de daño moral a favor de las denunciantes. La Corte de Apelaciones de Oregón mantuvo lo decidido en sede administrativa, salvo lo referido a que los Klein habían manifestado la intención de discriminar en el futuro; cfr. SCJ EE.UU. *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507 (2017). La Suprema Corte del Estado de Oregón se negó a escuchar sus planteos. Los dueños de *Sweet Cakes by Melissa* peticionaron a la Corte Suprema la revisión de su caso; cfr. SCJ EE.UU. *Petition for Writ of Certiorari, Klein v. Oregon Bureau of Labor & Industries,* No. 18–547 (S. Ct. 19 de octubre de 2018). Fecha de consulta: 25/5/2019 Disponible en: https://cutt.ly/prwi3Dv.

36 CSJ EE.UU. *Obergefell v. Hodges.* Op. cit. pág. 2608.

37 Ibídem, pág. 2602.

38 Ibídem, pág. 2607.

Con esos antecedentes la Corte Suprema anunció que iba a escuchar los planteos del pastelero[39]. Unos y otros aguardaron expectantes la decisión final.

4. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*: argumentos, análisis y consecuencias de una decisión moderada

4.1 El fallo de la Corte Suprema de los Estados Unidos

El 4 de junio de 2018, con 7 votos contra 2[40], la Corte Suprema de Justicia de los Estados Unidos falló a favor de Phillips[41]. Para resolver, estimó que la Comisión de Derechos Civiles de Colorado no había considerado el caso del pastelero con la neutralidad religiosa que la Constitución Norteamericana exigía[42]. Vale la pena desmenuzar los argumentos de la sentencia.

39 El 31 de agosto de 2017, *Masterpiece Cakeshop, Ltd*. presentó sus argumentos de fondo. Cfr. SCJ EE.UU. *Brief of Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.* No. 16–111,31/8/2017. Fecha de consulta: 18/11/2019 Disponible en: *https://www.SCOTUSblog.com/wp-content/uploads/2017/09/16-111-ts.pdf.* El 23 de octubre de ese mismo año, Craig y Mullins presentaron su contestación. Cfr. SCJ EE.UU. *Brief for Respondents Charlie Craig y David Mullins, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.* No. 16–111, 23/10/2017. Fecha de consulta: 18/11/2019. Disponible en: *https://www.SCOTUSblog.com/wp-content/uploads/2017/11/16-111_bs-cc-and-dm.pdf.* Lo propio hizo la Comisión de Derechos Civiles de Colorado. Cfr. SCJ EE.UU. *Brief for Respondent Colorado Civil Rights Commission, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.* No. 16–111, 23/10/2017. Fecha de consulta: 18/11/2019. Disponible en: *https://www.SCOTUSblog.com/wp-content/uploads/2017/11/16-111bs-ccrc.pdf.* El 5 de diciembre de 2017 la Corte Suprema escuchó los argumentos orales del caso. Fecha de consulta: 21/6/2019. Disponible en: https://www.supremecourt.gov/oral_arguments/audio/2017/16-111.

40 Kennedy redactó el voto de la mayoría, al que se adhirieron Roberts, Breyer, Alito, Kagan y Gorsuch. Kagan redactó un voto concurrente, que Breyer acompañó. Gorsuch redactó su concurrencia, a la que adhirió Alito. Thomas elaboró su propio voto, concurriendo en parte y concurriendo en el juzgamiento con la mayoría, al que se adhirió Gorsuch. El voto de la minoría fue redactado por Ginsburg y contó con la adhesión de Sotomayor.

41 La Suprema Corte de los Estados Unidos revocó [reversed] la sentencia de la Cámara de Apelaciones de Colorado, que había confirmado la sanción impuesta por la Comisión de Derechos Civiles de ese Estado.

42 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1724.

4.1.1 El voto de la mayoría

Las declaraciones generales

La Corte Suprema efectuó una serie de declaraciones iniciales[43]. Reafirmó que las leyes y la Constitución pueden –y muchas veces deben– proteger a las personas y a las parejas homosexuales en el ejercicio de sus derechos civiles[44]. Sostuvo, a la vez, que las objeciones religiosas o filosóficas al matrimonio entre personas del mismo sexo constituían visiones protegidas [*protected views*] y, en ocasiones, formas protegidas de expresión [*protected forms of expression*][45]. Añadió que, generalmente, tales objeciones no habilitaban a los comerciantes a denegar el igual acceso a bienes o servicios a las personas protegidas por una ley neutral y de aplicación general sobre lugares públicos[46].

Antes de continuar, la Corte Suprema aclaró que:

> "[c]uando se trata de bodas, se puede suponer que un miembro del clero que se opone al matrimonio gay por motivos morales y religiosos no puede ser obligado a realizar la ceremonia sin negar su derecho al libre ejercicio de la religión. Este rechazo sería bien entendido en nuestro ordenamiento constitucional como un ejercicio de la religión, un ejercicio que las personas homosexuales podrían reconocer y aceptar sin una seria disminución de su dignidad y valor"[47].

Como sea –rápida de reflejos– la mayoría destacó que las excepciones debían ser limitadas[48].

43 La minoría compartió algunas de estas declaraciones generales; cfr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1748.

44 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 727.

45 Ídem, con remisión a *Obergefell*, *supra.*

46 CSJ EE.UU. *Masterpiece,*138 S. Ct. Op. cit., pág. 727. Con cita de: CSJ EE.UU. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) y CSJ EE.UU. *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995).

47 CSJ EE.UU. *Masterpiece,*138 S. Ct. Op. cit., pág. 1727.

48 Ídem.

El dilema del pastelero

Formuladas esas enunciaciones, la Corte Suprema admitió que Phillips enfrentaba un dilema comprensible. En especial recordó que en 2012, cuando acontecieron los hechos, el Estado de Colorado no reconocía la validez del matrimonio homosexual (y tampoco se había resuelto *United States v. Windsor,* 2013[49]*,* ni *Obergefell, supra*)[50].

De todos modos, explicó que cualquier decisión a favor del pastelero tendría que haber sido "reducida [*sufficiently constrained*]"[51]. Pero, en todo caso, remarcó que Phillips tenía derecho a una consideración neutral y respetuosa de sus objeciones[52].

La hostilidad hacia las creencias religiosas

Sentado aquello, la Corte Suprema analizó cómo había sido abordado el caso de Phillips. Y afirmó que:

> "[e]l tratamiento que la Comisión de Derechos Civiles [de Colorado] ha dado a su caso tiene elementos de una clara e impermisible hostilidad hacia las sinceras creencias religiosas que motivaron su objeción"[53].

Dicha hostilidad emergió en las audiencias públicas y se concretizó en las reiteradas declaraciones de los miembros del órgano decisor[54]. La ma-

49 CSJ EE.UU. United States v. Windsor, 570 U.S. 744 (2013). Fecha de consulta: 26/6/2019 Disponible en: https://supreme.justia.com/cases/federal/us/570/744/.

50 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1728.

51 Ídem. La Corte Suprema aseguró que no podía permitirse que los objetores del matrimonio homosexual colocaran carteles para indicar que no venderían bienes o servicios para ese tipo de bodas. Esa solución impondría "*un grave estigma en las personas homosexuales"*; CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., págs. 1728 y 1729.

52 CSJ EE.UU. Masterpiece, 138 S. Ct. Op. cit., pág. 1729.

53 Ídem.

54 Ídem. En varias oportunidades, señaló la Corte, los comisionados sostuvieron que las creencias religiosas no podían ser traídas a la esfera pública, implicando que los creyentes eran "menos bienvenidos" para el comercio en la comunidad del Estado de Colorado.

yoría destacó que en una de las audiencias uno de los comisionados había manifestado:

> "… La libertad religiosa y la religión han sido usadas para justificar toda clase de discriminación a lo largo de la historia, ya sea la esclavitud, ya sea el holocausto, ya sea –quiero, decir nosotros– nosotros podemos hacer una lista de cientos de situaciones en las cuales la libertad religiosa fue utilizada para justificar la discriminación. Y para mí es una de las piezas más despreciables de la retórica que las personas pueden usar para–para usar su religión para lastimar a otros [sic]"[55].

Para la Corte Suprema semejantes afirmaciones arrojaban" […] *dudas sobre la justicia e imparcialidad* […]"[56] de la decisión [*adjudication*] de la Comisión de

55 Ibídem. La cita corresponde a la declaración de uno de los miembros de la Comisión de Derechos Civiles de Colorado (del 25/7/2014). La Corte Suprema reprodujo esos dichos en su sentencia y señaló que tales sentimientos eran inapropiados para los funcionarios responsables de aplicar la ley antidiscriminatoria en forma neutral. Destacó también que ninguno de los comisionados había objetado los comentarios.

56 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1730. Kennedy reflexionó sobre los desacuerdos de los integrantes de la Corte Suprema en el fallo CSJ EE.UU. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–542, 558 (1993). Puntualmente, se cuestionó si las declaraciones de los legisladores [*lawmakers*] debían ser tenidas en cuenta para determinar si una norma discriminaba intencionalmente por razones religiosas [*in determining whether a law intentionally discriminates on the basis of religión*]. *Church of Lukumi* era una iglesia de la Santería, religión que involucra el sacrificio de animales como forma de devoción. En abril de 1987, la iglesia anunció sus planes de establecerse en Hialeah, Florida e inició los trámites correspondientes. La noticia preocupó a los miembros de la comunidad. El *city council* de Hialeah adoptó una serie de medidas [*resolutions and ordinances*], que, en líneas generales, prohibían (o pretendían erradicar) el sacrificio de animales cuando fuera hecho "*en forma innecesaria o cruel*". *Church of Lukumi* inició un reclamo judicial para impugnar esas regulaciones. El caso llegó a la Corte Suprema, que invalidó esas normas por ser contrarias a la cláusula de libre ejercicio; cfr. *Church of Lukumi Babalu Aye*, Inc,*.*508 U.S. Op. cit., pág. 524. Kennedy, que también había redactado el voto de la mayoría, incluyó una serie de valoraciones sobre las motivaciones expresadas por los miembros del *city council* de Hialeah, al momento de aprobar las normas impugnadas, Ídem, págs. *540–542.* Scalia, que había votado como Kennedy en lo demás, no adhirió a esos fundamentos y plasmó su criterio por

Derechos Civiles de Colorado en el caso. También reparó en la diferencia de tratamiento que recibieron las objeciones de Phillips, en contraste con aquellas invocadas por otros pasteleros que, como él, habían rechazado ciertos pedidos por cuestiones de conciencia[57].

En este sentido, señaló que –al menos en tres ocasiones[58]– la División de Derechos Civiles de Colorado consideró legítima la negativa de otros pasteleros, que se habían rehusado a diseñar tortas con imágenes que desaprobaban [*conveyed disapproval*] el matrimonio entre personas del mismo sexo[59]. Esa disparidad de tratamiento era otro indicio de la hostilidad hacia las convicciones religiosas de Phillips[60].

separado. Para Scalía dichos argumentos se apartaban del análisis del objeto de las normas en cuestión, para considerar las motivaciones subjetivas de los legisladores [*lawmakers*]. A su criterio, resultaba virtualmente imposible determinar el motivo singular de un cuerpo legislativo colectivo; *Ibídem,* p. 558. Al considerar las expresiones hostiles de los comisionados en *Masterpiece,* Kennedy recordó aquel voto de Scalía y marcó un distingo. De ese modo, destacó que en el caso del pastelero las manifestaciones hostiles habían sido hechas por un órgano administrativo [*by an adjudicatory body*], que decidía un caso particular; cfr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1730.

57 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1730.

58 Los casos referidos eran: *Jack v. Gateaux, Ltd*., Charge No. P20140071X, *Jack v.Le Bakery Sensual, Inc.*, Charge No. P20140070X y *Jack v. Azucar Bakery, Charge No. P20140069 X*.

59 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1730. La Comisión de Derechos Civiles de Colorado había sostenido que el mensaje del pastel requerido por Craig y Mullins sería atribuido a los clientes y no a Phillips. La Corte Suprema resaltó que este aspecto no había sido tratado por el órgano administrativo al decidir en los otros casos. Además, la Comisión de Derechos Civiles de Colorado había considerado irrelevante que Phillips estuviera dispuesto a vender pasteles de cumpleaños, *brownies*, galletas, u otros productos a la pareja denunciante. Llamativamente, en los demás, casos dijo que los pasteleros no habían discriminado, en parte, porque estaban dispuestos a vender otros productos a los clientes rechazados. *Ídem.*

60 Ibídem. Phillips había cuestionado la disparidad de tratamiento en su apelación. Pero la Corte de Apelaciones de Colorado justificó el distingo entre los casos. Según indicó, para la División de Derechos Civiles de Colorado los demás pasteleros no habían discriminado, pues consideró que habían rechazado los pedidos por la "*la naturaleza ofensiva*" del mensaje requerido (contrario al matrimonio homosexual). En *Masterpiece,* la Corte Suprema recordó lo dicho por la Corte de Apelaciones de Colorado y destacó que no correspondía a los funcionarios del Estado prescribir o juzgar qué era ofensivo, con cita de CSJ

La Corte Suprema asentó su decisión en la doctrina de *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, supra*. En *Masterpiece* recurrió a ese precedente *y* reiteró que el gobierno no podía imponer regulaciones hostiles a las creencias religiosas de los ciudadanos, ni juzgar o presuponer la ilegitimidad de determinadas creencias o prácticas religiosas[61].

En virtud de los antecedentes, estimó que la Comisión de Derechos Civiles de Colorado no había sido tolerante ni respetuosa con las creencias del pastelero. El órgano administrativo dio "*toda la apariencia*" [*gave every appearance*] de que su decisión se había fundado en una valoración negativa de las objeciones de Phillips y de su fundamento religioso [*religious grounds*][62].

Sobre esa base, la Corte Suprema resolvió que la hostilidad de la Comisión de Derechos Civiles de Colorado era inconsistente con la garantía de neutralidad religiosa y que el pastelero tenía derecho a un órgano decisor neutral [*was entitled to a neutral decisionmaker*], que considerara en forma justa y completa sus objeciones religiosas, en las circunstancias del caso[63].

Las cuestiones de fondo

En cuanto a los temas de fondo, la Corte Suprema reconoció que *Masterpiece* presentaba problemas complejos sobre la correcta "*reconciliación de principios*" constitucionales[64]. Pero difirió su tratamiento para más adelante.

La mayoría solo indicó que

> "[e]l resultado de casos como este en otras circunstancias debe esperar

EE.UU. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Ídem.

61 CSJ EE.UU. *Masterpiece*, 138 S. Ct. Op. cit., pág. 1731.

62 Ídem. En *Church of Lukumi Babalu Aye, supra,* la Corte Suprema había establecido que "*[l]a cláusula de libre ejercicio compromete al propio gobierno a la tolerancia religiosa, y ante una ligera sospecha de que las propuestas de intervención estatal provienen de la animosidad hacia la religión o de la desconfianza hacia sus prácticas, todos los funcionarios deben hacer una pausa para recordar su propio deber con la Constitución y con los derechos que asegura* […]. *Los legisladores no pueden idear mecanismos, abiertos o disfrazados, diseñados para perseguir u oprimir una religión o sus prácticas […]*"; Ídem, pág. 547.

63 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1732.

64 Ver CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág., 1723 y 1732.

> mayor elaboración [*further elaboration*] en las cortes, todo en el contexto de reconocer que estas disputas deben resolverse con tolerancia […]"[65].

Los *Justices* se explayaron sobre algunas de estas cuestiones en sus votos. Gorsuch avanzó un poco más y contempló que en el futuro la Comisión de Derechos Civiles de Colorado dispusiera reglas generales para esta clase de hechos[66].

4.1.2 Los votos concurrentes

La concurrencia de Kagan

Kagan ahondó en el análisis de los casos considerados por la Comisión de Derechos Civiles de Colorado. Para el *Justice* el órgano administrativo no había sido neutral al valorar el caso de Phillips[67]. Pero, a su criterio, lo "inquietante" era que había razones obvias para marcar ese distingo [*distinguishing*[68]].

Según observó, los demás pasteleros –que rechazaron diseñar una torta que denigraba al matrimonio homosexual– no habían violado la CADA, pues no hubieran vendido esa clase de pastel a ningún cliente. En cambio, sostuvo que Phillips se había negado a hacer un *"simple pastel de bodas"*[69], que sí hubiera preparado para una pareja heterosexual[70].

En fin, Kagana firmó que el Estado de Colorado sí podía tratar distinto a los pasteleros que discriminaban, respecto de aquellos que no lo hacían, pero solo si esa decisión no se encontraba infectada por la parcialidad u hostilidad hacia la religión[71].

65 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1732.

66 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág., 1740. Concurrencia de Gorsuch.

67 Ibídem, pág., 1732.

68 Ibídem, pág., 1733.

69 Ídem, ver nota al pie.

70 Ibídem, pág., 1733. Concurrencia de Kagan.

71 Ídem.

La concurrencia de Gorsuch

Gorsuch adhirió a lo resuelto por la mayoría en su totalidad. Pero escribió por separado y cuestionó fuertemente el doble criterio de la Comisión de Derechos Civiles de Colorado.

Destacó que –en todos los casos– los comerciantes se habían rehusado a tomar los pedidos para honrar sus convicciones personales [*intending only to honor a personal conviction*][72].

> "Para estar seguros, los pasteleros sabían que su conducta prometía el efecto de dejar a un cliente en una clase protegida sin ser atendido [*unserved*]. Pero no hay indicio de que los pasteleros *realmente tuvieron la intención [actually intended]* de negar el servicio debido a la característica protegida de un cliente"[73].

A su juicio, era el tipo de torta lo que había motivado a los comerciantes a rechazar el pedido en cada caso[74]. Con agudeza resaltó que la Comisión de Derechos Civiles de Colorado no había sido neutral al decidir[75]. El órgano presumió que Phillips había tenido la intención de discriminar, en razón de los previsibles resultados de su conducta; pero descartó esa posibilidad respecto de los demás pasteleros, aun cuando las consecuencias eran igualmente previsibles (en todos los casos, los comerciantes rechazaron a un cliente que poseía una característica protegida, ya sea por su orientación sexual o por su religión)[76].

Para Gorsuch el problema era que no podía aplicarse un estándar legal más generoso a las objeciones seculares que a las religiosas[77]. En el caso, parecía que la Comisión de Derechos Civiles de Colorado había querido condenar a

72 Ibídem, pág., 1735. Concurrencia de Gorsuch.

73 Ídem; el resaltado pertenece al original.

74 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1736. Concurrencia de Gorsuch.

75 Para explicar su punto, se valió de la distinción entre efectos queridos [*intended effects*] y efectos conocidos [*knowingly accepted effects*] de las conductas. *Ídem.*

76 Ídem.

77 CSJ EE.UU. *Masterpiece*, 138 S. Ct. Op. cit., pág. 1737. Concurrencia de Gorsuch.

Phillips por expresar el tipo de mensaje "irracional" u "ofensivo" que los otros pasteleros se habían rehusado a respaldar [*endorse*]. Recordó, en este punto, que no correspondía a las autoridades seculares juzgar las creencias religiosas, sino proteger su libre ejercicio[78].

El *Justice* se apartó expresamente de lo que habían escrito Kagan y Ginsburg. Analizó los argumentos de sus colegas y corroboró que el órgano administrativo no había actuado en forma neutral, ni con el mismo nivel de generalidad, al evaluar los distintos casos que se le presentaron[79].

Gorsuch adicionó unas breves reflexiones bajo la doctrina de *Smith, supra*. Si se seguía ese precedente un vendedor no podía escapar a una ley de lugares públicos solo por cuestiones religiosas. Aunque, para cumplir con la Primera Enmienda y con *Smith, supra,* esa ley

> "… debe aplicarse de manera tal que [se] trate a la religión con respeto neutral. Eso significa que el gobierno debe aplicar el mismo nivel de generalidad a través de los casos –y eso no ocurrió aquí"[80].

78 Ídem.

79 Para el juez "no podía rescatarse" a la Comisión de Derechos Civiles de Colorado de su error. Gorsuch indicó que, aun cuando no contuviera palabras y cualquiera fuera el diseño, un pastel de bodas celebraba un matrimonio, y si era entre personas del mismo sexo, entonces "*celebraba un matrimonio entre personas del mismo sexo*". En definitiva, según dijo, correspondía mirar más allá de las formalidades y proteger todo acto religioso sincero. Por otro lado, señaló que si se entendía que el pastel requerido a Phillips "*era un pastel*" tampoco podía justificarse la decisión del órgano administrativo. Si tal era el criterio, también debería haber ordenado a los demás pasteleros que preparan los pedidos que les habían solicitado. Del mismo modo, si el órgano decisor estimaba que los casos versaban sobre "*pasteles que transmitían un mensaje sobre el matrimonio entre personas del mismo sexo*", tendría que haber respetado la negativa de Phillips, tal como lo había hecho respecto de los otros pasteleros. Cfr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., págs. 1737 **y** 1739. Concurrencia de Gorsuch.

80 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 739. Concurrencia de Gorsuch. El resaltado pertenece al original.

La concurrencia de Thomas

Thomas escribió por separado[81] para desarrollar el problema de la libertad de expresión que la mayoría había omitido[82]. Fue el único que abordó en forma específica el tema (algo ya había insinuado Gorsuch).

El juez retomó la distinción entre regulaciones de expresión [*regulations of speech*] y regulaciones de conducta [*regulations of conduct*][83]. Expuso que –como principio general– las leyes de lugares públicos [*public accommodations*] no se dirigían hacia la expresión [*do not "target speech"*], pero sí prohibían actos discriminatorios en la venta de bienes y servicios al público. Indicó que, en ocasiones, las aplicaciones particulares de estas normas podían limitar expresiones protegidas. Aseguró que cuando la propia expresión se convertía en el acomodamiento [*public accommodation*] requerido por la ley la Primera Enmienda regía con toda su fuerza[84].

Para explicar su posición, Thomas examinó por qué diseñar tortas de boda personalizadas era una conducta expresiva[85]. Detalló que Phillips se consideraba a sí mismo un artista y que creaba cada uno de sus encargos poniendo excepcional cuidado[86]. También rescató el valor simbólico de dichas tortas y determinó que "*[e]l propósito del pastel [de boda] es marcar el comienzo de un nuevo matrimonio y celebrar a la pareja*"[87].

81 Thomas señaló que –más allá de las "declaraciones perturbadoras" de los miembros de la Comisión de Derechos Civiles de Colorado– la sola aplicación discriminatoria que se había hecho de la CADA bastaba para violar los derechos de Phillips. Cfr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1740. Concurrencia de Thomas.

82 Ídem.

83 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1741. Concurrencia de Thomas.

84 Ídem. Para explicar el concepto de conducta expresiva Thomas remitió a *Hurley,* supra. Ídem.

85 Cfr. CSJ EE.UU. *Masterpiece,*138 S. Ct. Op. cit., pág. 1742. Concurrencia de Thomas. En su análisis, recordó que la Corte Suprema reconocía una "*amplia gama de conductas que pueden calificar como expresivas* […]" Ídem. Para ello se requería que la conducta en cuestión "[…] «*tuviera la intención de ser comunicativa*» *y [que],* «*en el contexto, pudiera ser razonablemente entendida por un observador como comunicativa*»"; *ibídem.*

86 *Ibídem*.

87 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1743. Concurrencia de Thomas.

En consecuencia, obligar al pastelero a preparar pasteles de boda personalizados, para parejas del mismo sexo, requería que éste aceptara que esas uniones eran "matrimonios" y que debían ser celebradas. Justamente el mensaje que su fe condenaba[88]. Como la conducta en cuestión era expresiva, la ley del Estado de Colorado debía "pasar" el estricto escrutinio (verificación que la Corte de Apelaciones de Colorado no había realizado al resolver en el caso)[89]. En esa misma dirección, agregó que los Estados no podían

> "… penalizar expresiones protegidas porque algunos grupos las encuentran ofensivas, dolorosas, estigmatizantes, irrazonables o indignas…"[90],

y que no le correspondía a los funcionarios del gobierno prescribir qué era ofensivo[91]. El *Justice* recordó que

> "[l]a Primera Enmienda concede a los individuos el derecho de estar en desacuerdo con la corrección [*about the correctness*] de Obergefelly la moralidad del matrimonio entre personas del mismo sexo"[92].

En sus palabras de cierre, trajo a colación aquello que había vaticinado en ese fallo –sobre las inevitables tensiones que esa decisión acarrearía– y aseveró que los conflictos ya habían emergido[93]. Sugirió, por último, que

> "… la libertad de expresión podría ser esencial para prevenir el uso de Obergefell 'para apagar todo vestigio de disenso…'"[94].

88 Idem.

89 Thomas observó que, a pesar de todo, para la Corte de Apelaciones de Colorado no había una "conducta suficientemente expresiva" y se mostró crítico con esas conclusiones. CSJ EE.UU. *Masterpiece,* 138 S. Ct. págs. 1744, 1746. Concurrencia de Thomas.

90 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1746. Concurrencia de Thomas.

91 Ídem.

92 Ibídem, pág. 1747. Concurrencia de Thomas.

93 Ídem.

94 Ibídem, pág. 1748. Concurrencia de Thomas.

4.1.3 El voto de la minoría

La minoría, liderada por Ginsburg, sostuvo que *Masterpiece* era un caso sobre discriminación. Para la juez, Phillips había rechazado el pedido solo por la orientación sexual de la pareja ["*for no reason other than their sexual orientation*"]. Los demás pasteleros, por el contrario, no hubieran vendido esas tortas a ningún cliente, sin importar cuál era su religión[95].

Concluyó que los casos eran difícilmente comparables[96]: lo relevante era que Phillips no había vendido a Craig y Mullinsun producto que sí hubiera vendido a una pareja heterosexual[97]. Destacó que la Corte de Apelaciones de Colorado había marcado un distingo entre los casos, precisamente, porque el Estado de Colorado garantizaba una vigorosa protección contra la discriminación en estos supuestos[98].

Ginsburg también observó que las declaraciones de los miembros de la Comisión de Derechos Civiles de Colorado resultaban insuficientes para revocar la sentencia de la Corte de Apelaciones, pues el proceso de decisión había implicado varias instancias independientes[99].

4.2 Reflexiones

4.2.1 La libertad religiosa en tiempos posmodernos

Las cuestiones ventiladas en *Masterpiece* invitan a reflexionar acerca del fenómeno religioso en la sociedad secular posmoderna. Ya insinué que el caso de

95 CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1750. Disidencia de Ginsburg.

96 Ídem.

97 Ídem. Ginsburg resaltó que Craig y Mullinshabían encargado un simple pastel de bodas, sin mencionar ningún otro detalle sobre el diseño que lo diferenciara de las tortas de boda que CSJ EE.UU. *Masterpiece Cakeshop Ltd.*vendía a otros habitualmente; cfr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., pág. 1749. Disidencia de Ginsburg.

98 Ibídem, pág. 1751.

99 Ídem. Disidencia de Ginsburg. Para la minoría, el caso de Phillips se encontraba "muy lejos" [*thus far removed*] de aquello que se había debatido en *Church of Lukumi Babalu Aye, Inc., supra.* En esa oportunidad, la acción del gobierno contraria al principio de neutralidad involucraba a un único órgano decisor, el *city council de Hialeah*. *Ibídem.*

Phillips no era un asunto aislado. Incidentes análogos se presentan en relación con otros tópicos. El aborto, los anticonceptivos, la educación y –por supuesto– el matrimonio provocan contra puntos profundos. Las diferencias subyacen a las acaloradas discusiones sobre los alcances de la libertad religiosa en el marco de las llamadas "guerras culturales"[100].

Los recientes enfrentamientos se han reavivado a partir de una serie de cambios normativos. El punto más conflictivo refiere a la objeción de conciencia y a la posibilidad de admitir exenciones respecto de ciertas leyes de carácter general [*religious exemptions*][101]. Koppelman apunta que la libertad religiosa se "volvió tóxica" desde que los "conservadores fueron demasiado lejos" en temas vinculados con la anticoncepción y el matrimonio homosexual[102].

No puede negarse que las novedades en dichas materias han traído secuelas. Me atrevo a decir, empero, que el problema tiene raíces más profundas. Trataré de rastrear sus causas en los próximos acápites.

4.2.2 Autonomía de la voluntad, "nuevos derechos" y "guerras culturales"

En las últimas décadas en los Estados Unidos –y en general en todas las

100 Sobre las guerras culturales resulta ineludible la referencia a HUNTER. Sus observaciones son acertadas para comprender el conflicto, aunque no puedo tomarlas sin beneficio de inventario en todos los casos. HUNTER, James D. "The Culture War and the Sacred/Secular Divide: The Problem of Pluralism and Weak Hegemony". *Social Research*. Vol. 76, No. 4, The Religious-Secular Divide: The U.S. Case (WINTER 2009), págs. 1307–1322.

101 En rigor, la objeción de conciencia en estos casossupone problemas morales que sobrepasan la cuestión estrictamente religiosa. Cfr. PUPPINCK, Grégor. "*Conscientious Objection & Liberal Societies"*. Intervención oral ante la OSCE *Office for Democratic Institutions and Human Rights (ODIHR)*. Viena 14 de diciembre de 2016. Fecha de consulta: 24/7/2019 Disponible en: https://eclj.org/conscientious-objection/osce/objection-de-conscience-et-socit-librale.

102 Cfr. KOPPELMAN, Andrew. "Masterpiece Cakeshop and how «religious liberty» became so toxic", VOX, 6/12/2017. Fecha de consulta: 28/3/2019 de https://www.vox.com/the-big-idea/2017/12/6/16741840/religious-liberty-history-law-masterpiece-cakeshop. Un criterio parecido adopta LAYCOCK, Douglas. "Religious Liberty and the Culture Wars". U. Ill. L. Rev., 2014, Forthcoming; Virginia Public Law and Legal Theory Research Paper No. 2013-23. Fecha de consulta: 28/3/2019. Disponible en: https://illinoislawreview.org/wp-content/ilr-content/articles/2014/3/Laycock.pdf.

democracias occidentales– los derechos humanos comenzaron a interpretarse enclave de autonomía[103]. Con velocidad proliferaron los "nuevos derechos" centrados en los deseos de realización personal y en la libertad[104]. La consagración de esta nueva visión impulsó una verdadera crisis cultural.

> "Muchos de los «nuevos derechos» son factor de grandes transformaciones en materia de ética pública: aquellos que pertenecen a esferas como el ámbito familiar, la moral sexual, los actos de disposición del propio cuerpo, el uso de la tecnología en materia de protección de la salud, las determinaciones sobre el fin de la vida, los límites de la investigación científica –por ejemplo– expresan una cultura liberal, permisiva, destinada a eliminar límites y obstáculos al libre despliegue de las elecciones individuales"[105].

La "construcción" del plan de vida, sobre la base de decisiones "privadas", adquirió dimensiones antes impensadas[106]. Entendida en sentido absoluto, la autonomía de la voluntad se convirtió en regla y medida de todos los actos[107].

103 Sobre el fundamento de los derechos humanos: GLENDON, Mary A. "Foundations of Human Rights: The Unfinished Business". 44 Am. J. Juris. 1, 1999. Fecha de consulta: 26/6/2019. Disponible en: https://academic.oup.com/ajj/article-abstract/44/1/1/163248?redirectedFrom=fulltext.

104 Ver GLENDON, Mary A. *Rights talk: the impoverishment of political discourse*. New York, *Free Press*, 1991, págs. 76 y siguientes. Y CARTABIA, Marta. "The age of «new rights»". *Straus Working Paper*. New York School of Law, 2010. Fecha de consulta: 26/6/2019. Disponible en: http://www.law.nyu.edu/sites/default/files/siwp/Cartabia.pdf.

105 CARTABIA, Marta. "Leggi positivi e libertà religiosa in una società pluralistica in Benedetto XVI". Conferencia Magistral del 24/4/2019. Argentina: Facultad de Derecho de la Pontificia Universidad Católica Argentina, EDUCA, 2019, con traducción de la Dra. Débora Ranieri de Cechini, pág., 17.

106 Esa concepción sobre la privacidad se encuentra plasmada en CSJ EE.UU. *Roe v. Wade*, 410 U.S. 113, 152–156 (1973). Por otra parte, la autonomía resulta esencial en CSJ EE.UU. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

107 La autodeterminación, por ejemplo, es indispensable para la perspectiva que postula la "performatividad" del género. Cfr. BUTLER, Judith, *Deshacer el género*, Buenos Aires, Paidós, 2018, traducción de Patricia Soley–Betran. También es fundamental para quienes argumentan a favor de la eutanasia. V. gr. DWORKIN, Ronald. *Fritz B. Burns Lecture: Euthanasia, Morality and the Law–Transcript*, 31 Loy. L.A. L. Rev. 1147 (1998).

Se llegó a plantear, incluso, que podríamos tener un "derecho moral" de hacer algo malo[108]. Las controversias no tardaron en llegar[109]. Se despertaron interrogantes éticos sobre la dignidad humana, la libertad individual y sus límites[110]. Se cuestionó la (in)conveniencia de la "inflación" cuantitativa de derechos frente a una inminente "deflación" cualitativa[111].

El problema no fue puramente especulativo. La multiplicación de "derechos" requería de normas que los resguardaran y promovieran. Así los desencuentros se agudizaron a fuerza de cambios legislativos y jurisprudenciales aprobados en forma intempestiva[112].

4.2.3 La libertad religiosa y los "nuevos derechos"

Coronados los "nuevos derechos", los desacuerdos se trasladaron a otros ámbitos. Sin quererlo, la libertad religiosa quedó convertida en rehén de las "guerras culturales".

Como decía, comerciantes y otros actores de la sociedad se rehúsan a tomar parte en hechos que violentan sus sinceras convicciones morales o religiosas. La negativa les ha valido sendas denuncias por discriminación u otras muestras de hostilidad más o menos violentas.

Con el tiempo, los casos se judicializaron y los tribunales fueron llamados a decidir. La misma Corte Suprema ya había tenido que revisar los alcances de la cláusula del libre ejercicio en otras ocasiones[113]. Pero el problema no parece acabar.

Fecha de consulta: 3/12/2019 Disponible en: https://digitalcommons.lmu.edu/llr/vol31/iss4/3.

108 WALDRON, Jeremy. "A Right to Do Wrong". Ethics. University of Chicago Press. 1981, Vol. 92, núm.. 1, Special Issue on Rights, págs. 21–39.

109 Los debates sobre el aumento de derechos aparecen enunciados en: WELLMAN, Carl. *The proliferation of Rights. Moral Progress or Empty Rhetoric?*. New York: Routledge, 2018, pág. 7.

110 Sobre qué es la dignidad humana: GLENDON, Mary A. "The Bearable Lightness of Dignity". *First Things*, May 2011. Fecha de consulta: 18/11/2019 Disponible en: https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity.

111 Cfr. SMITH, Steven D. "The Deflation of Rights".*Law & Liberty*. 24 de julio de 2014. Fecha de consulta: 15/11/2019 Disponible en: https://www.lawliberty.org/2014/07/24/the-deflation-of-rights/.

112 CARTABIA, Marta. Op. cit., pág. 17.

113 CSJ EE.UU. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014); *Obergefell, supra*.

De un lado, quienes poseen convicciones religiosas reclaman libertad para vivir y expresar los contenidos de sus creencias, así como exenciones religiosas frente a aquellas normas que avasallan los principios morales más básicos[114].

Del otro, estas posturas provocan indignación. Los partidarios de los "nuevos derechos" ven en la religión una excusa que habilita a los creyentes a discriminar[115]. Con suspicacia, advierten los peligros de ampliar las exenciones: "*las creencias religiosas, después de todo, pueden ser sobre cualquier cosa*"[116].

Estos sectores sienten que los objetores de conciencia los atacan y que con sus reclamos buscan cercenar, cuando no abolir, derechos que consideran fundamentales para desarrollar su proyecto de vida[117]. Renuentes a aceptar posiciones distintas, se concentran en los "daños" que sufren aquellos que no comparten la visión sde los objetores[118].

114 Resulta interesante el abordaje del tema propuesto en: GARNETT, Richard W. "Religious Accommodations And –And Among– Civil Rights: Separation, Toleration, and Accommodation". 88 S. Cal. L. Rev. 493, 2015. Fecha de consulta: 26/6/2019. Disponible en: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2211&context=law_faculty_scholarship.

115 V. gr. CHEMERINSKY, Erwin. "Chemerinsky: Is the right to discriminate in the Constitution? The answer's a piece of cake".*Athens Banner Herald*.3de diciembre de 2017. Fecha de consulta: 24/4/2019. Disponible en: https://www.onlineathens.com/opinion/2017-12-03/chemerinsky-right-discriminate-constitution-answer-s-piece-cake.

116 MARSHALL, William P. "Extricating the Religious Exemption Debate from the Culture Wars", 41 HARV. J.L. & PUB. POL'Y 67, 2017. Fecha de consulta: 26/6/2019 de http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2018/01/Marshall_FINAL.pdf, pág. 69. El autor analiza y reivindica, con una visión particular, el voto de la mayoría redactado por Scalía en *Smith, supra.*

117 Antes del fallo, Koppelman apuntaba que: "*[e]l problema tanto en los casos de anticoncepción como de discriminación no es que no haya una plausible reclamación sobre la libertad religiosa [plausible religious liberty claim]* […]. *El problema es que en estos casos, la reclamación debe ser derrotada por los derechos de otras personas*". KOPPELMAN, Andrew. Op. cit.

118 V. gr. NEJAIME, Douglas y SIEGEL, Reva. "Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism".*The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality.* MANCINI, Susanna y ROSENFELD, Michel, (dir.). Cambridge University Press, United Kingdom, 2018, págs. 187–219. Fecha de consulta: 28/4/2019 de https://law.yale.edu/sites/default/files/documents/faculty/papers/nejaime_siegel-conscience_wars_in_transnational_perspective.pdf.

Debe notarse que

> "… muchos proponentes de los nuevos derechos sostienen un concepto de libertad como liberación de cualquier límite en orden a perseguir la realización personal individual. Tienen dificultades en entender a aquellos que buscan la libertad religiosa en orden a cumplir [*fulfill*] obligaciones sagradas…"[119].

La contradicción es ostensible. La libertad para autodeterminarse es "bienvenida"[120] cuando se trata de "construir" el plan de vida bajo los nuevos cánones. Pero,

> "[a]l mismo tiempo, la libertad de conciencia se niega intensamente si apoya la convicción moral más fuerte, que dejó de ser inequívocamente respaldada por las reglamentaciones legales contemporáneas a pesar de ser un fundamento ético para la vida social"[121].

Las desavenencias en torno a estos puntos se tradujeron en una progresiva desconfianza hacia el fenómeno religioso, ahora percibido como un obstáculo para la transformación (o "progreso") social[122]. No es de extrañar que junto con ello crecieran las muestras de intolerancia.

Los defensores de los "nuevos derechos" tienen visiones muy despectivas

119 GLENDON, Mary A. "Making the Case for Religious Freedom in Secular Societies". *Journal of Law and Religion*. 2018, vol. 33, no. 3, págs. 329–339. DOI 10.1017/jlr.2019.3.

120 He tomado la expresión de STEPKOWSKI, Aleksander. "Contemporary Challenges to Conscience and Their Specificity". *Contemporary Challenges to Conscience. Legal and Ethical Frameworks for Professional Conduct*. STEPKOWSKI, Aleksander, Berlin, PETER LANG (dir,) 2019, pág. 11. El libro reúne trabajos sobre la objeción de conciencia en el área de la salud. Estas observaciones se pueden extender a otros aspectos del conflicto como los aquí tratados.

121 Ídem.

122 Cfr. MCCONNELL, Michael W. "God is Dead and We Have Killed Him: Freedom of Religion in the Post–Modern Age". *Brigham Young University Law Review* 163, 1993, pág. 187. Fecha de consulta: 10/4/2019 Disponible en: https://cutt.ly/LrwAl7i.

de los creyentes, a los que consideran extremos, irrazonables[123] y poco comprensivos. Glendon señala con preocupación que la hostilidad hacia la religión se ha vuelto común entre ciertos académicos y que, lamentablemente, esas ideas se han expandido hacia otros sectores de la sociedad[124].

La situación es cada vez más tensa[125]. Se ha cuestionado, sin reparos, la necesidad de proteger la libertad religiosa. Se ha llegado a decir que

> "[p]oco se perdería si la cláusula de libre ejercicio [*Free Exercise Clause*], tal como se interpreta actualmente, fuera quitada de la Constitución"[126].

En este contexto la religión es percibida con antipatía. Como remedio,

123 Así se indica en LAYCOCK, Douglas. Op. cit. pág. 870. Laycock propone que los conservadores se concentren solo en defender su libertad como objetores (Ibídem págs. 839 y 879). Aunque –con honestidad– admite que en el caso del aborto el lema "*vive y deja vivir*" ["*live and let live*"] difícilmente pueda funcionar (Ibídem, pág. 878). Ideas similares desarrolla en LAYCOCK, Douglas. "The Wedding–Vendor Cases". 41 Harv. J. L. & Pub. Pol'y 49, 2018. Fecha de consulta: 30/5/2019 Disponible en: http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2018/01/Laycock_FINAL.pdf. En esta postura "moderada" se ubican también BERG Thomas C. y FRETWELL WILSON, Robin. En realidad, la estrategia que auspician es compleja. Y es que si se establece una norma general, aunque se admitan exenciones, se habrá elegido una postura "oficial". Ver la crítica de SMITH, Steven D. "Die and Let Live"? The Asymmetry of Accommodation". *Southern California Law Review*. 2015. Vol 88, 703, págs. 703–726. Fecha de consulta: 11/11/2019. Disponible en: https://cutt.ly/KrwAFpu.

124 Cfr. GLENDON, Mary A. "Religious Freedom –A Second– Class Right?" 61 Emory L.J. 971, 2012. Fecha de consulta: 26/6/2019. Disponible en: http://law.emory.edu/elj/_documents/volumes/61/4-special/lectures/glendon.pdf, págs. 973 y 979, 981.

125 Luego de *Masterpiece*, *Yale Law Federalist Society* invitó a un representante de *Alliance Defending Freedom* a exponer sobre su experiencia. La convocatoria recibió la condena de varios grupos de estudiantes. Koppelman dedicó un posteo al tema en el que instó al diálogo. Cfr. KOPPELMAN, Andrew. "Friends with odious beliefs".*Balkinizationblog*. 22 de marzo de 2019. Fecha de consulta: 26/6/2019 dehttps://balkin.blogspot.com/2019/03/friends-with-odious-beliefs.html.

126 TUSHNET, Mark. "The Redundant Free Exercise?" 33 Loy. U. Chi. L. J. 71, 2002. Fecha de consulta: 26/6/2019 Disponible en: https://lawecommons.luc.edu/luclj/vol33/iss1/4, pág. 84. Según Tushnet, si se garantiza la libertad de expresión y la libertad de asociación proteger la libertad religiosa resultaría redundante.

se pretende una libertad religiosa y de conciencia acotada y reservada al fuero privado[127]. Parecería, entonces, que algunas opiniones valen más que otras[128]. Algún tiempo atrás McConnell describía esta paradoja en términos "*nietzcheanos*":

> "«¡Dios ha muerto! ¡Dios permanece muerto! ¡Y nosotros lo hemos matado!» Si disputas ese hecho, tienes el derecho inalienable de cantar, llorar, reír y mascullar, en tanto lo hagas en privado. Esa es la libertad religiosa de la era post–moderna"[129].

4.2.4 Un mensaje necesario

En este estado de las cosas, parece ineludible evaluar las consecuencias de *Masterpiece*. Me concentraré en dos observaciones, sin perjuicio de otras que pueden hacerse.

En primer lugar, los planteos del pastelero permiten apreciar la difícil disyuntiva que afrontan los creyentes, cuando se enfrentan a normas que buscan consagrar transformaciones sociales radicales. Las alternativas son, en todos los casos, gravosas para quienes defienden sus convicciones religiosas o morales.

El margen de maniobra para los creyentes es mínimo. Los objetores deben elegir entre "adaptarse" y renunciar a su conciencia; o vivir según sus creencias

127 V. gr. MARSHAL, William P. "The Other Side of Religion"44 Hastings L.J. 843, 1993. Fecha de consulta: 26/6/2019 Disponible en: https://repository.uchastings.edu/hastings_law_journal/vol 44/iss. 4/3.

128 Antes de la sentencia, McConnell comparaba los planteos de Phillips con el caso de los diseñadores que no querían que Melania Trump usara sus vestidos. Señalaba que era común que los norteamericanos evitaran hacer negocios con quienes tenían desacuerdos morales o ideológicos y que nadie había objetado la decisión de los modistos. Cfr. MCCONNELL, Michael W. "Dressmakers, Bakers, and the Equality of Rights". *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, ESKRIDGE, William N. Jr. & FRETWELL WILSON, Robin (dir.) New York: Cambridge University Press, 2019, Part VII, Cap. 28, págs. 378–384. Fecha de consulta: 30/3/2019 de https://law.stanford.edu/publications/dressmakers-bakers-and-the-equality-of-rights/,pág. 379.

129 MCCONNELL, Michael W. "God is Dead and We Have Killed Him: Freedom of Religion in the Post–Modern Age". *Brigham Young University Law Review* 163, 1993. Rescatado 10/4/2019. Disponible en: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12581&context=journal_articles; pág. 188 (el resaltado pertenece al original).

y someterse a las pesadas consecuencias. Para Phillips esa decisión implicó por muchos años perder gran parte de su trabajo[130]. Para otros, dejar las tareas que durante largo tiempo y con gran esfuerzo han llevado adelante[131].

Por eso, al escuchar el caso, la Corte Suprema envió un mensaje muy fuerte. En *Masterpiece* reconoció que los problemas de los creyentes son relevantes y que merecen ser considerados respetuosamente[132]. Ello me lleva a un segundo punto.

Una valoración adecuada del fallo requiere algunas precisiones adicionales. Resulta obvio a estas altura que la decisión en *Masterpiece* fue modesta, aunque no por ello menos importante. Me explicaré.

Kennedy, fiel a su estilo, preparó una receta equilibrada que le permitió lograr acuerdos. A cambio, claro está, resignó definiciones clave.

La sentencia no ofreció respuestas concretas a los planteos más complejos. No definió los alcances de la objeción de conciencia de los creyentes. Ni siquiera se pronunció respecto de la libertad de expresión [*free speech claims*] del pastelero. Todavía más, los argumentos esbozados en las concurrencias y en el voto minoritario evidenciaron en qué medida el debate se había colado entre los miembros del tribunal.

La Corte Suprema, por otra parte, dio alcance acotado a su decisión [*narrow scope*]. En efecto, hizo constar (reiteradas veces) que resolvía solo para el caso y en virtud de las circunstancias[133].

130 Cfr. CSJ EE.UU. *Reply of Petitioners,* pág. 26.

131 V. gr. recientemente, la ciudad de Filadelfia no renovó el contrato anual con *Catholic Social Services (CSS),* dependiente de la Arquidiócesis de Filadelfia. La agencia, por su ideario religioso, no podría proporcionar avales a matrimonios homosexuales para constituirse en padres sustitutos [*foster parents*]. Por el momento, opera con un contrato transitorio y solo respecto de aquellos niños que ya fueron acogidos en hogares. CSS ya había demandado a la ciudad para impedir que terminara la relación que las unió durante décadas. Ahora, solicita a la Corte que revise su caso. Cfr. SCJ EE.UU. *Petitionof Certiorari*, *Sharonell Fulton, et al., Petitioners v. City of Philadelphia, Pennsylvania, et al*, No.19–123, presentado por Sharonell Fulton y otros (25/7/2019). Fecha de consulta: 14/11/2019 Disponible en: https://www.supremecourt.gov/docket/docketfiles/html/public/19-123.html.

132 V. gr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. op. cit., págs. 1728 y 1729.

133 Cfr. CSJ EE.UU. *Masterpiece,* 138 S. Ct. Op. cit., págs. 1724 y 1732.

Como era de esperarse, *Masterpiece* generó reacciones de lo más variadas. Algunos de los que apoyaron al pastelero lamentaron que la Corte Suprema esquivara los planteos de fondo[134] y hasta calificaron de "*minimalista*"[135] a la sentencia. Otros, más optimistas, resaltaron el triunfo de Phillips[136].

Los partidarios de la pareja condenaron que se desaprovechara la oportunidad para dejar en claro que la Primera Enmienda no permite discriminar[137]. Pero celebraron que no se admitieran expresamente exenciones religiosas[138] y que se fijaran límites para "… *prevenir daños a otros ciudadanos que no comparten la visión del objetor*"[139].

Para muchos la decisión tuvo sabor a poco. Sin embargo, *Masterpiece* sentó un precedente significativo: la Corte Suprema reafirmó que no hay lugar

134 V. gr. CLARK, Elizabeth A. "Symposium: And the winner is … pluralism?". *SCOTUS blog*. 6 de junio de 2018. Fecha de consulta: 3/4/2019 Disponible en: https://www.SCOTUSblog.com/2018/06/symposium-and-the-winner-is-pluralism/.

135 Cfr. EPSTEIN, Richard A. "Symposium: The worst form of judicial minimalism – Masterpiece Cakeshop deserved a full vindication for its claims of religious liberty and free speech". *SCOTUS blog*. 4 de junio de 2018. Fecha de consulta: 3/4/2019 Disponible en: https://cutt.ly/srwAIbz.

136 Cfr. LAYCOCK, Douglas y BERG, Thomas C. "Symposium: Masterpiece Cakeshop – not as narrow as may first appear". *SCOTUS blog*. 5 de junio de 2018. Fecha de consulta: 3/4/2019 Disponible en: https://www.SCOTUSblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear/.

137 Cfr. CHEMERINSKY, Erwin. "Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission".*ABA Human Rights Magazine*. Vol. 43, núm. 4, *The ongoing Challenge to Define Free Speech,* 2018. Fecha de consulta: 3/4/2019 Disponible en: https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/.

138 Cfr. GOLDSTEIN, Jared A. "RWU First Amendment Blog: Jared Goldstein's Blog: Masterpiece Cakeshop Ruling: No Constitutional Right To Discriminate (For Now) 06–05–2018"; LawSchoolBlogs. 492, 2018. Fecha de consulta: 3/4/2019. Disponible en: https://docs.rwu.edu/law_pubs_blogs/492/.

139 NEJAIME, Douglas y SIEGEL, Reva. "Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop".*128 Yale Law Journal Forum*. 2018, págs. 201–225. Fecha de consulta:8/4/2019. Disponible en: https://www.yalelawjournal.org/pdf/NeJaimeSiegel_t7ffwsct.pdf, pág. 202. En igual dirección: SAGER, Lawrence G. y TEBBE, Nelson. "The Supreme Court's Upside–Down Decision In Masterpiece". *Balkinizationblog*. 7 de junio de 2018. Fecha de consulta: 3/4/2019. Disponible en: https://balkin.blogspot.com/2018/06/the-supreme-courts-upside-down-decision.html.

para la hostilidad hacia las sinceras creencias religiosas[140]. Una fórmula sencilla, pero necesaria. Por lo demás, varias cuestiones quedaron pendientes[141]. Y más temprano que tarde los problemas volvieron a aflorar.

4.2.5 *Masterpiece Cakeshop* bis

Después del fallo de la Corte Suprema, la División de Derechos Civiles de Colorado determinó que había suficiente evidencia para apoyar una nueva denuncia por discriminación contra *Masterpiece Cakeshop, Ltd.* [*probable cause determination*][142].

Esta vez el personal de local se había negado a diseñar una torta coloreada azul por fuera, rosa por dentro, para Autumm Scardina que celebraba el aniversario de su cambio de género[143].

Notificados formalmente, *Masterpiece Cakeshop, Ltd*. y Phillips iniciaron un reclamo civil contra los oficiales del Estado de Colorado, ante las Cortes Federales. Solo esperaban que se detuviera la persecución en su contra[144].

Los demandados presentaron una moción para desestimar la demanda [*Motion to Dismiss*]. Argumentaron, entre otras cosas, que el juez debía abstenerse de ejercer su jurisdicción, por existir un proceso administrativo en curso (en el que se investigaba la denuncia de Scardina)[145]. El juez federal de Distrito

140 Cfr. MCCONNELL, Michael W. "Justices Confound Expectation in Colorado Wedding Cake Case" *SLSBLOGS*. 4 de junio de 2018. Fecha de consulta:3/4/2019 Disponible en: https://law.stanford.edu/2018/06/04/justices-confound-expectation-in-colorado-wedding-cake-case/.

141 El 25 de junio de 2018 la Corte Suprema dejó sin efecto [*vacated*] la decisión del Superior Tribunal de Washington en *Arlene's Flowers, Inc. v. Washington,* 138 S. Ct. 2671 (Mem) (2018) y devolvió la causa para que fuera reconsiderada a la luz de lo resuelto en *Masterpiece*.

142 Cfr. *Scardina v. Masterpiece Cakeshop Inc*., Charge No. CP2018011310, at 4 (Colo. Civil Rights Div. 28/6/2018). Fecha de consulta: 28/5/2019 Disponible en: http://www.adfmedia.org/files/MasterpieceCakeshopProbableCauseDetermination.pdf.

143 Ídem. Phillips creía que el sexo era otorgado por Dios y definido biológicamente.

144Solicitaron el dictado de medidas cautelares [*injunctive relief*], una sentencia declaratoria y una compensación económica. Cfr. *Order Denying Motion to Dismiss*, del 4/1/2019, *Masterpiece Cakeshop v. Elenis*. Fecha de consulta: 19/3/2019. Disponible en: https://cutt.ly/IrwAAhY, pág. 3.

145 Cfr. *State Oficial Rule 12(b)(1) Motion to Dismiss*; *Masterpiece Cakeshop v. Elenis*, del 10/10/2018. Fecha

de Colorado, Wiley Y. Daniel, denegó parcialmente la moción. Para resolver, remitió a lo establecido por la Corte Suprema. Así, concluyó que la decisión de perseguir [*pursue*] los cargos de discriminación había ocurrido luego de *Masterpiece,* circunstancia que corroboraba la existencia de mala fe de los demandados [*supports the existence of bad faith*][146]. Phillips quedó habilitado para proseguir su reclamo. En el camino se descubrieron pruebas decisivas de la hostilidad de la Comisión de Derechos Civiles de Colorado hacia las creencias del pastelero[147].

Probablemente esas revelaciones impulsaron a las partes a lograr un entendimiento[148]. La resolución del caso, de común acuerdo[149], demostró que *Masterpiece* no era tan acotado como se creía.

5. Comentarios finales

En las últimas décadas los derechos humanos comenzaron a interpretarse en clave de autonomía. Con velocidad proliferaron los llamados "nuevos derechos", centrados en los deseos y en la búsqueda de la realización personal.

Pronto los cuestionamientos éticos sobre la libertad y sus límites comenzaron a asomar. Las controversias recrudecieron a fuerza de cambios normativos intempestivos que provocaron hondas divisiones en la comunidad[150].

La libertad religiosa quedó en medio de esos enfrentamientos. El punto más álgido refiere a la objeción de conciencia: quienes se aferran a las con-

de consulta: 19/3/2019. Disponible en: https://cutt.ly/PrwAWg2 pág. 10.

146 *Order Denying Motion to Dismis,*pág. 23.

147 Dave Williams, miembro [*State representative*] de la *Colorado General Assembly*, declaró que uno de los comisionados le había confesado que "*creía que había prejuicio anti religioso en la Comisión [de Derechos Civiles de Colorado]*". Cfr. WILLIAMS, Dave. *Declaration of Dave Williams*, *Masterpiece Cakeshop v. Elenis* (18/2/2019). Fecha de consulta: 1/4/2019. Disponible en: https://cutt.ly/erwARJE.

148 Cfr. ALLIANCE DEFENDING FREEDOM, "Victory for Jack Phillips as overwhelming evidence of govt hostility emerges", 5/3/2019. Fecha de consulta: 1/4/2019 Disponible en: https://cutt.ly/IrwAY08.

149 Cfr. OFICINA DEL FISCAL GENERAL DE COLORADO. "State of Colorado and Masterpiece Cakeshop agree to end all litigation". 5 de marzo de 2019. Fecha de consulta: 26/6/2019. Disponible en: https://coag.gov/press-room/press-releases/03–05–19.

150 Cfr. CARTABIA, Marta. Op. cit. pág. 17.

vicciones religiosas o morales más íntimas se resisten a tomar parte en hechos contrarios a su conciencia. Mientras, los defensores de los "nuevos derechos" desconfían del fenómeno religioso, al que perciben como un obstáculo para la transformación social.

Masterpiece refleja las diversas aristas del conflicto. Ciertamente, el pastelero encarna el grave dilema que a menudo afrontan los creyentes en la sociedad secular posmoderna. Los planteos de Phillips, además, invitan a reflexionar desde perspectivas que revaloricen la dimensión religiosa y trascendente del ser humano[151]. Esa tarea exige la apertura de canales de comunicación, que fomenten el diálogo respetuoso entre opuestos. Como enseña Glendon:

> "… [e]l hecho es que la preservación de la libertad religiosa depende en última instancia de la construcción de un apoyo cultural"[152].

Alcanzar soluciones definitivas, sin dudas, requerirá hornear otros pasteles[153]. En este panorama incierto, la Corte Suprema envió un mensaje importante.

En *Masterpiece* reafirmó que la hostilidad hacia la religión es reprochable[154]. Una pauta esencial para la resolución de casos futuros[155]. Y un llamado a recuperar la tolerancia[156].

151 Ver la propuesta de GARNETT, Richard W. Op. cit.

152 GLENDON, Mary A. Op. cit. pág. 338.

153 Por lo pronto, la Corte Suprema –en su nueva conformación– concedió el *certiorari* a los dueños de *Sweet Cakes by Melissa*, Aaron y Melissa Klein. Como había hecho antes, revocó lo decidido por el Estado de Oregon y devolvió la causa para que fuera reconsiderada a la luz de *Masterpiece*. Cfr. *Klein v. Oregon Bureau of Labor & Industries, No. 18–547 (S. Ct. Oct. 19, 2018)*. Los documentos del caso se encuentran disponibles en la página oficial de la Corte Suprema: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-547.html (consultado el 7/11/2019).

154 MCCONNELL, Michael W. "Justices Confound Expectation in Colorado Wedding Cake Case". *SLSBLOGS*. 4 de junio de 2018. Fecha de consulta: 3/4/2019. Disponible en: https://law.stanford.edu/2018/06/04/justices-confound-expectation-in-colorado-wedding-cake-case/.

155 Sobre este punto ver el análisis de LAYCOCK, Douglas y BERG, Thomas C. Op. cit.

156 Se espera que la Corte Suprema de los Estados Unidos aborde varios casos relacionados con la libertad religiosa y sus alcances en el próximo año [*October term 2019*]. Una buena síntesis de lo que viene puede

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Responsabilidad civil en Internet por el uso de marcas en la publicidad

Civil Liability on the Internet by Trademark Use in Advertising

Recibido: 19/02/2019 – Aceptado: 08/08/2019

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Resumen

El presente trabajo se propone analizar la responsabilidad civil que puede acarrear el uso de términos coincidentes con marcas ajenas como *keyword* en campañas publicitarias en línea y cuáles son las facultades del titular marcario para dar protección a sus derechos inherentes. En vistas de lo anterior, en un primer momento se desarrolla brevemente el funcionamiento de la industria de la publicidad en línea, los paradigmas actuales y sus particulares efectos. Se examina la normativa que rodea el fenómeno y se analiza si es posible adaptarla a las nuevas tendencias y desafíos que propone Internet. A partir de allí, una vez identificados los actores principales y definida su actividad, se intenta determinar si esta atenta contra las funciones de la marca y si cabe algún reproche de responsabilidad. Para ampliar el panorama, se analiza jurisprudencia extranjera, que viene a echar luz a un asunto novedoso y de poco desarrollo doctrinario. Finalmente, se estudia el estado normativo y jurisprudencial de la materia en Argentina, que no resulta demasiado fecundo.

Palabras clave: Internet; Marcas; Responsabilidad civil; Publicidad; Keywords; Etiquetas; Referenciación.

Abstract

This article intends to analyze the civil liability that could be entailed by the use of keywords that are identical to commercial brands of third parties in online advertising campaigns and which privileges do trademark owners have in order to protect their inherent rights. Considering the afore mentioned, firstly, the functioning of on line advertising, the current paradigms and their particular effects are briefly developed. It examines the regulations concerning the phenomenon and tries to give answer to whether it is possible to adapt it to the new trends and challenges introduced by the Internet. Henceforth, once the main actors have been identified and their activity defined, an attempt is made to determine if it is liable to prejudice the functions of the trade mark and if there is any accusation as regards responsibility. In order to broaden the spectrum, international jurisprudence is analyzed so as to shed some light on a novel matter with limited doctrinaire development. Finally, the normative and jurisprudential status of the subject in Argentina is studied, which has proven to be scarce.

Keywords: Internet; Trademarks; Damage; Metatags; Keywords; Keyword advertising.

Sumario

1. Introducción

El fenómeno de Internet se ha instalado en nuestras vidas alejando, a diario, los límites que imaginábamos tenía. Esto ha significado un cambio de paradigma en numerosos campos de nuestro quehacer cotidiano, pero especialmente en lo referido al tráfico económico.

En esta oportunidad, analizaremos el menoscabo que puede significar la elección de términos coincidentes con marcas registradas como palabras claves en el marco de campañas publicitarias en línea, por parte de motores de búsqueda y anunciantes, en los derechos inherentes al titular marcario y los reproches de responsabilidad que puede acarrear.

Ponemos nuestro esfuerzo en reducir, aunque sea mínimamente, la siempre existente brecha entre la realidad y un derecho que la persigue, eternamente, unos cuantos pasos más lento.

2. Marco teórico

2.1 Publicidad en Internet

2.1.1 Palabras clave y metaetiquetas

Antes de adentrarnos en el análisis de los sistemas de publicidad y las consecuencias dañosas que de ellos pueden derivarse, es necesario definir dos herramientas esenciales para su funcionamiento: metaetiquetas y palabras clave.

Las metaetiquetas son parte de los parámetros ocultos que contiene una página web en su código fuente. Materialmente consisten en palabras que se ingresan en dicho código y que hacen alusión a los tópicos más representativos del sitio. Sirven a los motores de búsqueda como factor para dar prioridad a un sitio por sobre otro en la lista de resultados naturales que luego se muestran al internauta.

Las palabras clave o *keywords* son términos que un editor o anunciante vincula a su sitio o anuncio para describir su contenido y volverlo más accesible a los usuarios, ya que también son analizadas por los buscadores para realizar la indexación.

Desde la perspectiva del editor, las palabras clave pueden ser positivas o negativas. Serán negativas cuando el editor indique que no quiere que su página sea asociada ante la consulta de tales términos.

Del lado del usuario, las *keywords* son los términos que ingresa al realizar una consulta en un buscador. Es aquello que se propone encontrar.

2.1.2 Definición y técnicas de los motores de búsqueda

Un motor de búsqueda es un programa informático que visita las páginas web y sus enlaces, de manera continua, e indexa su contenido utilizando las metaetiquetas y palabras clave presentes en el sitio[2].

Cuando un internauta efectúa una consulta, los resultados se muestran en la página web del buscador, mostrando la dirección del sitio y algunas indicaciones de su contenido.

Los resultados, en principio, se clasifican por orden decreciente de

2 IDENTO. Agencia de Marketing Online. Diferencias entre SEO y SEM. [en línea]. [ref. de 15 agosto 2017]. Disponible en: https://www.idento.es/blog/sem/diferencias-entre-seo-y-sem/

pertinencia. Algunos de los parámetros que se analizan son el lenguaje del sitio, su título y descripción, la coincidencia entre la palabra clave elegida por el internauta y el contenido de éste, el tráfico de la página (la cantidad de visitas). Cada buscador fija los criterios para arrojar el orden natural de sus resultados y son plasmados en un algoritmo que se pone en marcha con cada búsqueda de los usuarios.

Cada dirección de la lista de resultados permite al internauta conectarse directamente con el sitio seleccionado, gracias a un enlace (link). Los resultados que arroja el orden de pertinencia se denominan resultados naturales u orgánicos. Estos resultados suelen aparecer en la parte central de la página.

Los buscadores ayudan al internauta a encontrar una información o sitio en la red. Constituyen un elemento indispensable para la navegación, ya que la existencia de un sitio no tiene ningún impacto si no puede ser fácilmente encontrado.

Para mejorar el posicionamiento de un sitio web en lista de resultados naturales, sin acudir a un sistema de anuncios pagos, un editor web puede recurrir a técnicas gratuitas (mejorar calidad de sus contenidos y la pertinencia de sus palabras clave) o contratar alguna empresa que preste estos servicios. Es lo que se conoce como SEO, siglas en inglés de *Search Engine Optimization* (optimización en buscadores) o *Search Engine Optimizer* (optimizador de motores de búsqueda).

2.1.3 Los links comerciales

Si el dueño del sitio no ha logrado aparecer en la primera página del buscador en el orden de pertinencia, tiene la posibilidad de hacerlo contratando un servicio de "enlaces patrocinados", que no son otra cosa que anuncios. Estos aparecen a la vista del internauta como un resultado en la página del buscador, pero se muestran de manera separada e identificados como tales, generalmente por encima o por debajo de los resultados naturales o en el margen derecho de la página del buscador.

Google y otros buscadores han puesto en marcha un proceso automatizado para permitir la selección de palabras clave en la creación de anuncios (AdWords). Son los propios anunciantes quienes, tras redactar el mensaje comercial, dirigirlo a un público especifico e insertar un enlace hacia su sitio, seleccionan las palabras clave con que quieren que su anuncio sea vinculado.

Esa relación se desarrolla en el marco de un contrato de publicidad entre el sitio de indexación y el sitio indexado, por el cual el primero se obliga a hacer aparecer al segundo en la primera página del buscador, cuando un internauta utiliza ciertas palabras clave definidas previamente. También puede acordarse que los anuncios aparezcan en la red de *partners*, en formatos texto o display (anuncios multimedia).

Como contrapartida, el sitio indexado debe pagar un precio al prestador del servicio, en función al tráfico generado por ese camino (pago por clic). En Google AdWords, la remuneración dependerá del "precio máximo por clic" que el anunciante está dispuesto a pagar (fijado en el contrato) así como del número de clics efectuados en dicho enlace por los internautas.

Los buscadores limitan el número de espacios publicitarios que pueden aparecer en una página. Entonces los anunciantes compiten por aparecer en ellos en una especie de "subasta", cuyo objetivo es lograr vincular el anuncio con determinadas palabras clave ("comprar palabras clave").

Para establecer el orden en que aparecerán los anuncios, ante cada consulta, el buscador realiza un ránking teniendo en cuenta el precio máximo que cada anunciante está dispuesto a pagar por un clic (CPC máx.) y el nivel de calidad del anuncio, que tiene que ver con la pertinencia del anuncio y una buena elección de palabras clave.

Estos sistemas de promoción se conocen como SEM *(Search Engine Marketing)*.

2.2 Cuestiones normativas

En materia comercial, el buen nombre que una empresa ha sabido construir en el tiempo es tan valioso como su capital económico, ya que de él deriva la fidelidad de su clientela. Es por ello que la protección de la marca deviene esencial.

Pero los daños que pueden derivar del uso no autorizado de marcas de terceros en la publicidad no se relacionan exclusivamente con el régimen marcario, si no que están vinculados con otras cuestiones como la lealtad comercial, la defensa del consumidor, entre otras, que analizaremos brevemente a continuación.

2.2.1 Particularidades del régimen marcario

Si bien la Ley 22.362[3] de marcas y designaciones no la define, una marca es todo signo con capacidad distintiva, que los oferentes utilizan para diferenciar sus productos o servicios de los de la competencia.

La función primordial de la marca es garantizar a los consumidores la procedencia u origen empresarial de un producto o servicio. Pero no es la única. La marca también es garantía de calidad y cumple funciones de comunicación, de inversión y de publicidad.

Nuestra ley ha adoptado un sistema atributivo, en virtud del cual, la propiedad de una marca y la exclusividad de su uso en el tráfico económico se obtiene por el registro. El titular de una marca puede, respecto de los derechos que el registro le otorga, cederlos, transferirlos o incluso puede permitir su uso por terceros. La protección de la marca en Argentina es por el término de 10 años, renovable indefinidamente por períodos iguales, cumpliendo determinados requisitos.

Al analizar los conflictos que se vinculan con marcas, es importante tener en cuenta el principio de especialidad que es aquel por el cual la protección de una marca abarca sólo un determinado rubro de productos y servicios. Por lo tanto, otras personas podrían utilizar o registrar el mismo signo distintivo para designar bienes de un rubro diferente.

Respecto del uso de marcas en la web, uno de los problemas más importantes reside en el hecho de que los derechos de marca son de naturaleza territorial mientras que el alcance de Internet es mundial. Esto plantea problemas a la hora de dirimir conflictos entre personas o empresas que son titulares legítimos de marcas idénticas o extremadamente similares en países diferentes. La legislación en este campo aún está en fase de elaboración[4].

Nuestra ley prohíbe y pune:

3 ARGENTINA. Ley 22.362. Ley de marcas y designaciones. [en línea]. [Fecha de consulta: 15 agosto 2017]. Disponible en: http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/18803/texact.htm

4 INPI. El Secreto está en la Marca. [en línea]. Instituto Nacional de la Propiedad Industrial. [s.f.] [Fecha de consulta: 16 agosto 2017]. Disponible en: http://www.wipo.int/export/sites/www/sme/en/documents/guides/customization/

– La falsificación e imitación fraudulenta de una marca;
– El uso de marca falsificada o fraudulentamente imitada;
– La venta o puesta en venta de marcas falsificadas o fraudulentamente imitadas o auténticas pero pertenecientes a un tercero sin su autorización;
– La venta, puesta en venta o comercialización de productos o servicios con marca falsificada o fraudulentamente imitada.

En la Argentina, la marca registrada es propiedad del titular marcario y como tal puede ser dañada. Por lo tanto, la ley prevé la iniciación de acciones civiles para hacer cesar usos indebidos (cuando se menoscaban funciones esenciales) de ésta, sin necesidad de que constituyan delitos penales.

Aunque percibimos, en virtud de lo expuesto hasta aquí, que existe en la actividad desarrollada por anunciantes y proveedores del servicio de enlaces patrocinados, un uso no autorizado de la marca ajena (en violación al derecho exclusivo del titular marcario), esta actividad no parece encajar en ninguna de las infracciones enunciadas.

Por lo tanto, resta analizar si se menoscaban funciones esenciales de la misma cuando un competidor o prestador las utiliza en el marco de un servicio de referenciación, de modo que el titular pueda prohibir su uso u ordenar el cese del mismo.

2.2.2 Normativa sobre publicidad comercial y su aplicación en Internet

Argentina no cuenta con una ley que regule específicamente el ejercicio de la actividad publicitaria, pero existen algunas normas dispersas en el ordenamiento que pueden darnos algunas pautas de cómo debe hacerse un ejercicio regular de ésta.

La autorregulación publicitaria colegiada es un sistema adoptado por la industria, en la mayoría de los países del mundo, con el objeto de preservar la ética profesional y la práctica de una publicidad responsable en defensa de la libertad de expresión comercial, y nuestro país no es la excepción. El Consejo de Autorregulación Publicitaria (CONARP) funciona como entidad autónoma, tratando los casos en forma singular con relación a la letra y el espíritu de los principios, valores y normas consensuados en su Código de Ética y Autorregulación Publicitaria, el cual establece:

"EN DEFENSA DE LA LEALTAD Artículo 10º.– La publicidad debe evitar:

1. Hacer uso injustificado y/o denigratorio del nombre, símbolos institucionales o marcas de productos o servicios de terceros.

2. Todo aquello que implique descrédito o menosprecio a la competencia.

3. Todo lo que constituya plagio o una copia o imitación de logotipos, isotipos, textos, ilustraciones, imágenes o audio, de un motivo publicitario nacional o internacional creado por otro anunciante o por una agencia, en todo o en algunas de sus partes, o que pueda crear confusión en la mente del consumidor con marcas o productos competidores.

MEDIOS DIGITALES Artículo 39.– Marketing viral.

La publicidad deberá evitar toda práctica desleal y denigratoria que atente contra el buen nombre y la reputación de personas, entidades y marcas, exhortando a la opinión pública a no dar crédito a ningún tipo de versiones calumniosas escudadas en el anonimato, ni a hacerse eco de las mismas facilitando su difusión.

Los profesionales de la comunicación deberán encuadrar los contenidos de sus mensajes dentro de los parámetros del marketing y la publicidad responsables, dado que, ante la imposibilidad de aplicar en ellos ningún criterio de segmentación, los mismos llegan a menores y a personas que, por su grado de madurez, educación y nivel cultural, pueden adolecer de una capacidad de discernimiento suficiente para su correcta interpretación, lo que puede derivar en efectos y consecuencias no deseables.

Asimismo, se ratifica el respeto hacia las normas legales vigentes, la protección al menor, y las buenas costumbres, como se detalla previamente".

El código de ética de la CONARP, si bien no es una norma imperativa de alcance general, viene a ser un estándar de buenas prácticas publicitarias y puede ser de ayuda a la hora de calificar como reprochable la conducta de quienes explotan la actividad.

La aplicación de los procedimientos y sanciones previstos en el código de ética presuponen, por parte de los involucrados, el reconocimiento de la autoridad del CONARP en la materia. Claro está que, ante un conflicto de intereses en relación a mensaje publicitarios, siempre puede recurrirse a la autoridad jurisdiccional.

2.2.3 Protección de consumidor

La protección de los derechos de los consumidores y usuarios es de raigambre constitucional y ha tomado un nuevo impulso a raíz de la modificaciones introducidas a la Ley 24.240 y la incorporación del régimen tuitivo en el Código Civil y Comercial.

En la materia que nos convoca, es crucial la mención de la obligación que se le impone al anunciante de ser claro en la expresión de los términos de la oferta que propone, lo que incluye el deber de suministrar al consumidor la información en forma cierta y detallada, respecto de todo lo relacionado con las características esenciales de los bienes y servicios que ofrece, las condiciones de su comercialización y toda otra circunstancia relevante para el contrato.

Además el Código señala que está prohibida toda publicidad que:

> "a) contenga indicaciones falsas o de tal naturaleza que induzcan o puedan inducir a error al consumidor, cuando recaigan sobre elementos esenciales del producto o servicio;
>
> b) efectúe comparaciones de bienes o servicios cuando sean de naturaleza tal que conduzcan a error al consumidor;
>
> c) sea abusiva, discriminatoria o induzca al consumidor a comportarse de forma perjudicial o peligrosa para su salud o seguridad".

2.2.4 Lealtad comercial

La ley 27.442 de Defensa de la Competencia expresa en su artículo 1:

> "Están prohibidos los acuerdos entre competidores, las concentraciones económicas, los actos o conductas, de cualquier forma manifestados, relacionados con la producción e intercambio de bienes o servicios, que tengan por objeto o efecto limitar, restringir, falsear o distorsionar la competencia o el acceso al mercado o que constituyan abuso de una posición dominante en un mercado, de modo que pueda resultar perjuicio para el interés económico general.
>
> Se les aplicarán las sanciones establecidas en la presente ley a quienes realicen dichos actos o incurran en dichas conductas, sin perjuicio de otras responsabilidades que pudieren corresponder como consecuencia de los mismos.

> Queda comprendida en este artículo, en tanto se den los supuestos del párrafo anterior, la obtención de ventajas competitivas significativas mediante la infracción de otras normas".

Dejando en claro en su artículo 4, que dicha norma es de aplicación a toda persona física o jurídica, con o sin fines de lucro, que realice actividades en el territorio argentino o no, en la medida en que sus actos, actividades o acuerdos puedan producir efectos en el mercado nacional.

Entre las sanciones que prevé el régimen de defensa de la competencia encontramos: el cese de los actos o conductas dañosas, las multas, la suspensión del Registro Nacional de Proveedores del Estado. Además, la Autoridad de aplicación, podrá imponer el cumplimiento de condiciones que apunten a neutralizar los aspectos distorsivos sobre la competencia o solicitar al juez competente que las empresas infractoras sean disueltas, liquidadas, desconcentradas o divididas.

3. Jurisprudencia Extranjera[5]

Debido a la inexistencia de normas a nivel nacional relativas a la actividad de los buscadores u otros actores en Internet y los pocos pronunciamientos de la Corte al respecto, nos proponemos estudiar cómo estos conflictos han sido resueltos por tribunales extranjeros, para intentar aprehender soluciones compatibles con nuestro ordenamiento.

3.1 El fallo señero del TJUE

El Tribunal de Justicia de la Unión Europea (TJUE) se pronunció el 23 de marzo de 2010, respecto de una petición de la Corte de Casación Francesa[4] de interpretar las normas comunitarias para dar respuesta a cuestiones prejudiciales surgidas de tres casos concernientes a la empresa Google, vinculados con su servicio de AdWords. Previo al análisis de la decisión, presentaremos

5 INFOCURIA. Jurisprudencia del Tribunal de Justicia. Google France SARL y Google Inc. contra Louis Vuitton Malletier S.A. Sentencia del tribunal de justicia (Gran Sala). 23 de marzo de 2010. [Fecha de consulta: 10 septiembre 2017]. Disponible en: http://curia.europa.eu/juris/document/document.jsf?docid=83961&doclang=ES

sucintamente los casos que llevaron a la Corte Francesa a solicitarla y sus respectivas plataformas fácticas.

3.1.1 Google France, Google Inc. contra Louis Vuitton Malletier

Se acreditó que la introducción de marcas pertenecientes a Louis Vuitton en el motor de búsqueda de Google hacía aparecer en pantalla anuncios de sitios web que ofrecían versiones falsificadas de productos de esta marca. Asimismo se acreditó que Google ofrecía a los anunciantes la posibilidad de elegir a esos efectos no sólo palabras clave que corresponden a marcas, sino también dichas palabras clave en combinación con expresiones que denotan falsificación como "imitación", "réplica" y "copia".

Estos hechos dieron lugar a que Google fuera condenada por violación de derechos de marca, decisión que fue confirmada en apelación. Google interpuso entonces un recurso ante la Corte de Casación Francesa.

3.1.2 Google France contra Viaticum, Luteciel

En dicho litigio se acreditó que la introducción de marcas de Viaticum y Luteciel en el motor de búsqueda de Google hacía aparecer en pantalla anuncios de sitios web que ofrecían productos idénticos o similares. Asimismo se acreditó que Google ofrecía a los anunciantes la posibilidad de elegir a esos efectos palabras clave que correspondían a dichas marcas. Sin embargo, los productos vendidos en los sitios web anunciados no vulneraban dichas marcas ni eran falsificaciones, se comprobó que los productos eran propios de los competidores de Viaticum y Luteciel.

Esta diferencia fáctica con el caso anterior no impidió que Google fuera condenada por violación de derechos de marca y luego, en apelación, por coadyuvar a la violación de derechos de marca. Google interpuso entonces un recurso de casación.

3.1.3 Google France contra CNRRH, Pierre–Alexis Thonet, Bruno Raboin, Tiger, franquiciada de Unicis

CNRRH es titular de una licencia de la marca francesa "Eurochallenges", concedida por el Sr. Thonet, titular de dicha marca.

En este litigio se acreditó que la introducción de "Eurochallenges" en el motor de búsqueda de Google hacía aparecer en pantalla anuncios de sitios web que ofrecían productos idénticos o similares. Asimismo se acreditó que Google ofrecía a los anunciantes la posibilidad de elegir dicho término como palabra clave a tal efecto. En este caso los productos ofrecidos por los sitios que aparecían en el buscador tampoco violaban derechos de marca y fueron atribuidos a competidores.

Google, el Sr. Raboin y Tiger fueron condenados por violación de derechos de marca, decisión que fue confirmada en apelación. Google y Tiger acudieron a casación.

3.1.4 La decisión del TJUE

Con el objeto de resolver los recursos presentados por la sociedad Google y de precisar la naturaleza de su actividad, la Corte de Casación Francesa plantea, en resumen, los siguientes interrogantes al TJUE:

– ¿El uso por Google en AdWords de palabras clave que corresponden a marcas constituye en sí mismo una violación de derechos de marca?
– ¿Puede el titular de la marca excluir este uso?
– ¿El uso por los anunciantes en AdWords de palabras clave que corresponden a marcas constituye una violación de derechos de marca?
– ¿La exención de responsabilidad por prestación de servicios de alojamiento es aplicable al contenido ofrecido por Google en AdWords?

Al tratarse de marcas tanto comunitarias como francesas, en las cuestiones prejudiciales se solicita la interpretación de la Directiva 89/104, relativa a la aproximación de las legislaciones de los Estados miembros en materia de marcas, y del Reglamento nº 40/94, sobre la marca comunitaria. También se solicita una interpretación de la Directiva 2000/31, sobre los servicios de la sociedad de la información.

El TJUE finalmente resuelve:

> – que el titular de una marca está facultado para prohibir a un anunciante que, a partir de una palabra clave idéntica a la marca, que haya seleccionado sin consentimiento del titular en el marco de un servicio de referenciación en Internet, haga publicidad de productos o servicios idénticos a aquellos

> para los que se ha registrado la marca, cuando dicha publicidad no permite o apenas permite al internauta medio determinar si los productos o servicios incluidos en el anuncio proceden del titular de la marca o de una empresa económicamente vinculada a éste o si, por el contrario, proceden de un tercero (confusión);
>
> – que el prestador de un servicio de referenciación en Internet que almacena como palabra clave un signo idéntico a una marca y organiza la presentación en pantalla de anuncios a partir de tal signo no hace un uso de la marca que el titular pueda prohibir;
>
> – que la exención de responsabilidad se aplica al prestador de un servicio dereferenciación en Internet cuando no desempeñe un papel activo que pueda darle conocimiento o control de los datos almacenados. Si no desempeña un papel de este tipo, no puede considerarse responsable al prestador de los datos almacenados a petición del anunciante, a menos que, tras llegar a su conocimiento la ilicitud de estos datos o de las actividades del anunciante, no actúe con prontitud para retirarlos o hacer que el acceso a ellos sea imposible.

El TJUE en esta decisión precisa la noción de proveedor de alojamiento. Aclara que no es responsable quien presta en Internet un servicio puramente técnico, automatizado y pasivo, y que por lo tanto no tiene conocimiento ni control de las informaciones transmitidas o almacenadas o quien, luego de tomar conocimiento de la ilicitud de un contenido, actúa prontamente para retirarlas o volver su acceso imposible.

A pesar de este aporte, el tribunal no se pronuncia respecto de la responsabilidad de Google en estos casos, si no que estima que la jurisdicción francesa está en mejores condiciones de analizar si Google en su servicio de Adwords cumple o no los extremos para gozar de la exención de responsabilidad prevista para los proveedores de *hosting* (hospedaje de sitios web), sobre todo el requisito de pasividad.

Los casos vuelven al juez francés quien sigue, como era de esperar, la interpretación del TJUE exonerando a Google de responsabilidad por vulneración a derechos de marca, pero condenando a los anunciantes. El magistrado francés tampoco se pronuncia respecto del rol pasivo o no del buscador en su servicio publicitario.

3.1.5 Google France, Google Inc. contra Cobrason, Home Cine Solution

En un fallo del 11 de mayo de 2011 (Google France, Google Inc. contra Cobrason, Home Cine Solution) la Corte de Apelación de París consideró que Google a través de su sistema de sugerencia de palabras clave, contribuye técnicamente a generar confusión en el público, que puede provocar un desvío de la clientela como también un uso parasitario de la inversión que Cobrason había realizado a través de su sitio y sus campañas publicitarias.

En este caso se condena a Google en el terreno de la competencia desleal, sin indagar si le es aplicable o no el régimen de responsabilidad especial del proveedor de alojamiento y evitando la aplicación de las normas que había interpretado el Tribunal Europeo.

3.1.6 Interflora Inc. e Interflora British Unit contra Marks & Spencer plc y Flowers Direct Online Ltd.

La sentencia data del 22 de septiembre de 2011. La red de Interflora Inc. e Interflora British la forman floristas independientes a quienes los clientes pueden hacer pedidos por diversos medios. Es una marca de renombre tanto en EE.UU. como en Reino Unido y la UE.

M&S, es uno de los principales minoristas del Reino Unido. Vende al por menor una amplia gama de productos y presta servicios a través de su red de tiendas y de su sitio web. Una de sus actividades es la venta y envío de flores.

En el marco del servicio de referenciación "AdWords", M&S seleccionó como palabras clave la palabra "Interflora", así como las variantes derivadas de esa palabra con "errores leves" y expresiones que contienen la palabra "Interflora" (tales como "InterfloraFlowers", "InterfloraDelivery", "Interflora.com", "Interflora.co.uk", etc.).

En consecuencia, cuando los internautas introducían la palabra "Interflora" o alguna de aquellas variantes o expresiones como término de búsqueda en el motor de búsqueda de Google, aparecía un anuncio de M&S bajo la rúbrica "enlaces patrocinados"

Esta sentencia del TJUE es citada por el Cámara en el fallo "Organización Veraz S.A. c/Open Discovery S.A. s/Cese de Uso de Marca".

El Tribunal Europeo declara que el titular de una marca está facultado para prohibir que un competidor haga publicidad de productos o servicios idénticos

a aquéllos para los que la marca esté registrada, –a partir de una palabra clave idéntica a esa marca por medio de un servicio de referenciación en Internet, sin el consentimiento del titular– cuando dicho uso pueda menoscabar una de las funciones de la marcas notorias.

Y explica de qué modo se afectan estas funciones:

Se menoscaba la función de indicación del origen de la marca cuando la publicidad mostrada a partir de la palabra clave no permite o permite difícilmente al consumidor normalmente informado y razonablemente atento determinar si los productos o servicios designados por el anuncio proceden del titular de la marca o de una empresa vinculada económicamente a éste o si, por el contrario, proceden de un tercero.

Se menoscaba la función de inversión de la marca cuando la actividad supone un obstáculo esencial para que dicho titular emplee su marca para adquirir o conservar una reputación que permita atraer a los consumidores y ganarse una clientela fiel.

El tribunal entiende que en el marco de un servicio de referenciación de las características de Google AdWords no se menoscaba la función publicitaria de la marca, ya no se priva al titular de dicha marca de la posibilidad de utilizar eficazmente su marca para informar y persuadir a los consumidores.

El hecho de que el titular de la marca deba intensificar sus esfuerzos publicitarios para mantener o aumentar su visibilidad entre los consumidores no basta en todos los casos para declarar que se produce un menoscabo de la función publicitaria de esa marca.

Una segunda conclusión de TJUE atañe a la especial protección de que goza el titular de la marca de renombre y declara que los titulares de esas marcas están facultados para prohibir el uso por terceros, en el tráfico económico, de signos idénticos o similares a éstos, sin su consentimiento y sin justa causa, cuando ese uso se aproveche indebidamente del carácter distintivo o de la notoriedad de las mencionadas marcas o menoscabe su carácter distintivo o su notoriedad.

En particular, una publicidad realizada a partir de esa palabra clave menoscaba el carácter distintivo de la marca de renombre (dilución), si contribuye a que dicha marca se desnaturalice transformándose en un término genérico, es decir, cuando se debilita la capacidad de dicha marca para identificar los

productos o servicios para los que esté registrada. Al final del proceso de dilución, la marca ya no puede suscitar en la mente de los consumidores una asociación inmediata con un origen comercial específico.

Mientras que el perjuicio causado a la notoriedad de la marca, también denominado "difuminación", tiene lugar cuando los productos o servicios respecto de los cuales los terceros usan el signo idéntico o similar producen tal impresión en el público que resulta mermado el poder de atracción de la marca.

Por su parte, el concepto de provecho obtenido "indebidamente del carácter distintivo o de la notoriedad de la marca" –"parasitismo"– no se vincula al perjuicio sufrido por la marca, sino a la ventaja obtenida por el tercero del uso del signo idéntico o similar a ésta. Dicho concepto incluye, en particular, los casos en los que, gracias a una transferencia de la imagen de la marca o de las características proyectadas por ésta hacia los productos designados por el signo idéntico o similar, existe una explotación manifiesta de la marca de renombre.

De las características de la elección como palabras clave en Internet de los signos correspondientes a marcas de renombre ajenas resulta que, cuando no haya "justa causa" en el sentido de la normativa europea, esta elección ha de analizarse como un uso para el cual el anunciante se sitúa en la estela de una marca de renombre con el fin de beneficiarse de su poder de atracción, de su reputación y de su prestigio, y de explotar el esfuerzo comercial realizado por el titular de la marca para crear y mantener la imagen de ésta sin ofrecer a cambio compensación económica alguna y sin hacer ningún tipo de esfuerzo a estos efectos.

Cuando la publicidad que aparezca en Internet a partir de una palabra clave correspondiente a una marca de renombre proponga una alternativa frente a los productos o a los servicios del titular de la marca de renombre sin ofrecer una simple imitación de los productos o de los servicios del titular de dicha marca, sin causar una dilución o una difuminación y sin menoscabar por lo demás las funciones de la mencionada marca, procede concluir que este uso constituye, en principio, una competencia sana y leal en el sector de los productos o de los servicios de que se trate y, por lo tanto, se realiza con "justa causa".

Vemos que, a pesar de otorgarles una protección especial a los titulares de marcas notorias, el TJUE estima que existen usos de su marca notoria que el titular no puede prohibir.

Concretamente, la publicidad mostrada por sus competidores a partir de palabras clave correspondientes a dicha marca y que proponga una alternativa frente a los productos o a los servicios del titular de ésta sin ofrecer una simple imitación de los productos o de los servicios del titular de dicha marca, sin causar una dilución o una difuminación.

En el caso concreto declaró:

> "Por lo tanto, si el órgano jurisdiccional remitente llegara a la conclusión de que la publicidad engendrada por el uso del signo idéntico a la marca INTERFLORA por parte de M&S ha permitido al internauta normalmente informado y razonablemente atento captar que el servicio prestado por M&S es independiente del servicio de Interflora, esta última empresa no podría alegar válidamente, invocando las reglas enunciadas en los artículos 5, apartado 2, de la Directiva 89/104 y 9, apartado 1, letra c), del Reglamento nº 40/94, que dicho uso ha contribuido a que dicha marca se desnaturalice transformándose en un término genérico"[6].

3.2 La cuestión en EE.UU.

En los Estados Unidos ha habido fallos en uno y otro sentido, y un gran debate doctrinario. Siguiendo en este punto el análisis de Jorge Otamendi analizaremos brevemente las diversas posturas que han sido sostenidas por los tribuales norteamericanos.

> "Quienes han considerado que su utilización constituye una infracción a la marca desarrollaron la "teoría de la confusión por interés inicial" *(Initial Interest Confusion)*. "La confusión por interés inicial ocurre cuando el demandado usa la marca del actor en una manera calculada para capturar

6 INFOCURIA. Jurisprudencia del Tribunal de Justicia. Interflora Inc. e Interflora British Unit contra Marks & Spencer plc y Flowers Direct Online Ltd. Petición de decisión prejudicial: High Court of Justice (England & Wales), Chancery Division–Reino Unido. Sentencia del Tribunal de Justicia (Sala Primera). 22 de septiembre de 2011. [Fecha de consulta: 10 septiembre 2017]. Disponible en: http://curia.europa.eu/juris/document/document_print.jsf?doclang=ES&text=keyword+advertising&pageIndex=0&part=1&mode=DOC&docid=109942&occ=first&dir=&cid=111916#Footnote*

> la atención inicial del consumidor, aun cuando finalmente no se complete ninguna venta como resultado de la confusión"[7].

Esta confusión se daría cuando el internauta, al desplegarse la lista de resultados, encuentra en ella (otro u) otros vínculos a otras páginas que le ofrecen productos o servicios alternativos, con otras marcas distintas a las que escribió. El internauta es así "tentado" a ingresar a esos sitios y, si lo hace, puede terminar comprando lo que inicialmente no iba a comprar. Llegó a ese sitio sólo porque el competidor usó una *keyword* o un *metatag* para que el vínculo apareciese frente a él.

La doctrina del interés inicial ha sido y es muy criticada. Callman opina que la práctica:

> "… no parece ser infracción de marca ni competencia desleal, porque no confunde o cohesiona, o de otra manera re–direcciona la elección del consumidor, sino que meramente trae a la atención del consumidor una oportunidad de cambiar su opinión voluntariamente. Esa es la esencia de la competencia leal"[8].

Hay quienes adoptan una posición intermedia. Sólo habrá ilegalidad si la posibilidad de elección de otro sitio se le presenta al internauta de forma confusa. Si el consumidor elige seguir al sitio de un competidor totalmente consciente de que el sitio no está patrocinado por, o afiliado con, el titular de la marca, tal elección no debería ser sancionada.

Otros tribunales consideraron que la *Lanham Act* no era aplicable porque el uso de marcas en *keywords* y *metatags* no era uso de marca en los términos de dicha ley. "Porque era una función automatizada invisible que no comprendía el uso público de la marca en lugar alguno o en conexión con los productos"[9].

7 OTAMENDI, Jorge. El uso y otras cuestiones de la nueva ley de marcas. Revista Jurídica La Ley. Buenos Aires: LA LEY, 1981. Tomo 1981–D. [Fecha de consulta: 10 septiembre 2017]. Cita Online: AR/DOC/6018/2001.

8 CALLMAN, Rudolf. "Callman on Unfair Competition, Trademarks and Monopolies". West. 2001. p. 22–613.

9 OTAMENDI, Jorge. El uso y otras cuestiones de la nueva ley de marcas. Op. cit.

Aunque en el caso "J.G. Wentworth, S.S.C. Limited Parnership vs. Settlement Funding LLC Peachtree Settlement Funding"[10] la Corte rechazó la defensa de la demandada y concluyó que el uso de una marca ajena como keyword es un uso "en el comercio" que implica un ilícito marcario, conforme los términos del artículo 32 de la *Lanham Act*. En tal sentido, sostuvo que dicho uso no es análogo al uso interno alegado por el demandado y que se había cruzado la línea del uso interno al uso en el comercio bajo los términos de la *Lanham Act*.

Como puede advertirse, no hay una solución definitiva a esta cuestión por el momento en los EE.UU. ya que no ha habido aún una sentencia de la Corte Suprema que tenga por zanjado el asunto.

4. Responsabilidad por el uso de marcas en la publicidad en línea

La elección como palabra clave, de un término coincidente con una marca, para ser vinculado a un anuncio en línea ¿constituye, *per se*, un ilícito? ¿Representa un menoscabo a las funciones de la marca? ¿Qué daños ocasiona? ¿Quién debe responder por ellos? ¿Constituye un uso que el titular marcario puede prohibir?

Intentaremos responder estos interrogantes en este apartado.

4.1 El menoscabo a los derechos del titular marcario a través la publicidad en línea

Actualmente nadie discute que "todo" está en Internet y que gracias a los buscadores es fácilmente accesible. Las protagonistas de esta sociedad de la información son las palabras clave, que permiten la indexación y con ello, que nosotros podamos darle a todas nuestras preguntas una respuesta en fracciones de segundo.

¿Qué sucede cuándo la palabra clave elegida por el internauta reproduce una marca registrada? De seguro, los titulares de ésta, se contentaran por el hecho de que el público se interese en encontrarlos y de este modo, a través de sus sitios web, podrán difundir su oferta de bienes o servicios e incluso comercializarlos.

10 CORTE DE DISTRITO DE LOS ESTADOS UNIDOS, E.D. Pensilvania. "J.G. Wentworth, S.S.C. Limited Parnership vs. Settlement Funding LLC Peachtree Settlement Funding". Sentencia. 1 abril 2007. [Fecha de consulta: 10 septiembre 2017]. Disponible en: https://h2o.law.harvard.edu/cases/4388

Pero, ¿si la búsqueda arroja como resultado sitios que no pertenecen al titular de la marca, incluso mejor posicionados que las web oficiales?

El hecho de que no existan restricciones en la elección de palabras clave para ser usadas tanto como metaetiquetas como para referenciar los anuncios publicitarios, puede generar resultados de búsqueda que contraríen los intereses de los titulares marcarios.

Al ingresar en el buscador un término que reproduce una marca podemos obtener como respuesta: sitios web de competidores, páginas que venden imitaciones, falsificaciones, lo cual podría implicar un riesgo de confusión en el usuario, generar un desvío desleal del tráfico web, engañar al consumidor.

Ahora bien, no puede perderse de vista que existen usos de su propia marca que el titular no puede excluir, sobre todo aquellos que tienen fines legítimos y no se traducen en violaciones a las funciones esenciales de la marca.

Podemos mencionar como usos genuinos de la marca de terceros, entre otros, aquellos que tienen como finalidad describir productos o reseñarlos objetivamente, hacer publicidad comparativa de modo legítimo, realizar cotejos de precios, difundir noticias relacionadas, etc.

Es de remarcar la apreciación de Poires Maduro, Abogado general del TJUE: hay que evitar que la finalidad legítima de impedir determinadas violaciones de derechos de marca dé lugar a que todos los usos de las marcas sean prohibidos en el contexto del ciberespacio[11].

La línea entre un uso legítimo y una infracción parece ser delgada. Debemos analizar la actividad de cada uno de los actores que intervienen en el proceso que deriva en la exposición del anuncio y desentrañar si les cabe o no un reproche de responsabilidad.

4.2 Responsabilidad de los buscadores en el servicio de enlaces patrocinados

La Corte Suprema de Justicia de la Nación Argentina (CSJN) se ha pronunciado respecto de la responsabilidad de los Buscadores en su servicio de indexación. En el caso "Rodríguez, María Belén c/Google Inc. s/daños y

11 CONCLUSIONES DEL ABOGADO GENERAL Sr. POIARES, Maduro presentadas el 22 de septiembre de 2009. Asuntos acumulados C–236/08 a C–238/08. [Fecha de consulta: 10 septiembre 2017]. Disponible en: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:62008CC0236&from=EN

perjuicios" se estableció que el factor de atribución de la responsabilidad es subjetivo. Es decir, sólo pueden ver comprometida su responsabilidad "a partir del momento del efectivo conocimiento del contenido ilícito de una página web, al no procurar el bloqueo del resultado"[12] (desindexación). Pero la Corte no se ha pronunciado específicamente sobre la actividad de los motores de búsqueda en sus servicios de enlaces patrocinados.

No existe ninguna diferencia sustancial entre el uso que Google realiza de las palabras clave en su motor de búsqueda y el uso que de ellas hace en AdWords: muestra un determinado contenido en respuesta a una consulta vinculada con ellas.

Es cierto que a través de su servicio de enlaces patrocinados, el buscador proporciona a los sitios web de los anunciantes una exposición añadida, sin embargo, dichos sitios podrían figurar entre los resultados naturales de las mismas palabras clave en función de la relevancia que le asignen los algoritmos automáticos del motor de búsqueda.

Cabe resaltar, que en el supuesto de que se declarase que el uso de marcas como *keywords* por los servicios de enlaces patrocinados constituye una violación de derechos marcarios, puede ser difícil impedir que dicha declaración se aplique también al uso de palabras clave en el motor de búsqueda, lo que pondría en jaque el sistema y derechos de raigambre constitucional como la libertad de expresión y la no censura.

Es interesante analizar la postura de la Declaración Conjunta sobre Libertad de Expresión e Internet, adoptada por la ONU, la OEA, la OSCE y la CDHAP y tomarla como guía a la hora de juzgar la responsabilidad de los prestadores del servicio de enlaces patrocinados.

Ninguna persona que ofrezca únicamente servicios técnicos de Internet como acceso, búsquedas o conservación de información en la memoria caché deberá ser responsable por contenidos generados por terceros y que se difundan a través de estos servicios, siempre que no intervenga específicamente en dichos

12 CORTE SUPREMA DE JUSTICIA DE LA NACION. Sentencia Rodríguez, María Belén c/Google Inc. 28 de Octubre de 2014. [Fecha de consulta: 10 septiembre 2017]. Disponible en: http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-rodriguez-maria-belen-google-inc-otro-danos-perjuicios-fa14000161-2014-10-28/123456789-161-0004-1ots-eupmocsollaf

contenidos ni se niegue a cumplir una orden judicial que exija su eliminación cuando esté en condiciones de hacerlo ("principio de mera transmisión")[13].

También el Tribunal de Justicia de la Unión Europea, respondiendo a las peticiones de decisión prejudicial por parte de la Corte de Casación Francesa, en sentencia del 23 de marzo de 2010 se ha pronunciado sobre el tema, sentando las bases para juzgar la responsabilidad de los prestadores de este servicio en el marco de la normativa comunitaria europea.

El TJUE entiende que "crear las condiciones técnicas necesarias para que pueda utilizarse un signo y recibir una remuneración por este servicio no significa que el prestador del servicio haga por sí mismo uso del signo"[14], para que ello ocurra debe hacerlo para representar sus propios servicios.

La actividad que prestan los proveedores del servicio de enlaces patrocinados se desarrolla "tras bambalinas" y es totalmente ajena al público, creemos que no puede serle achacada ninguna infracción al régimen de defensa al consumidor ni de defensa de la competencia.

Además, el hecho de que el internauta obtenga como respuesta a su consulta la opción de ingresar a una web que no pertenece al titular marcario no hace más que brindarle más alternativas y ampliar la información de que dispone.

En lo que respecta a la lealtad comercial, el hecho de que el titular marcario deba esforzarse más para aparecer entre los primeros resultados no necesariamente implica deslealtad, se fomenta simplemente una sana competencia. Y la competencia es la esencia del mercado.

Finalmente, en cuanto a menoscabar derechos del titular marcario al "vender" palabras clave e incluso al sugerirlas, entendemos que no se configura ninguno de los ilícitos previstos por la ley de marcas ni tampoco se vulneran las funciones esenciales. Ni la muestra de resultados naturales ni la muestra de anuncios, mucho menos la vinculación de un mensaje a determinadas palabras

13 ORGANIZACIÓN DE ESTADOS AMERICANOS. Declaración Conjunta sobre Libertad de Expresión e Internet. 1 de junio de 2011. . [Fecha de consulta: 10 septiembre 2017]. Disponible en: http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=849&lID=2

14 INFOCURIA. Jurisprudencia del Tribunal de Justicia. Google France SARL y Google Inc. contra Louis Vuitton Malletier S.A.. Sentencia del tribunal de justicia (Gran Sala). 23 de marzo de 2010. [Fecha de consulta: 10 septiembre 2017]. Disponible en: http://curia.europa.eu/juris/document/document.jsf?docid=83961&doclang=ES

clave, generan un riesgo de confusión o asociación sobre la procedencia de productos o servicios, estos riegos residen en el anuncio propiamente dicho y en el contenido de los sitios web a que éstos nos direccionan, que no son propiedad ni han sido intervenidos por el buscador en sus servicios publicitarios.

4.3 Responsabilidad de los anunciantes

Todo fabricante, vendedor o prestador de servicios busca captar clientela. Para lograrlo procurará que su publicidad esté presente donde se concentre la mayor cantidad de consumidores o potenciales clientes.

Quienes ofrecen productos o servicios a través de sitios de Internet, intentan estar en la primera página de los buscadores, ya que por lo general el internauta no pasa de allí. Como dijimos, hay dos maneras de lograrlo. O porque el buscador, en virtud de sus mecanismos de búsqueda y detección ha interpretado que un sitio determinado es el que mejor satisface lo que busca el internauta y lo coloca en esta página, o porque el dueño del sitio ha pagado para que aparezca en ella[15].

Como dijimos, los anunciantes que contratan servicios de enlaces patrocinados, redactan ellos mismos un anuncio compuesto de un título, una breve descripción y un enlace hacia su sitio web. Luego seleccionan las palabras clave con que desean vincular su mensaje publicitario.

Pero la elección de las palabras clave es diferente de la publicación del anuncio, no sólo porque se produce después, sino también porque sólo ella se dirige a un público consumidor. Podríamos hacer un paralelo con el caso en que un vendedor solicite a su agente publicitario que su anuncio se coloque en la misma calle o en el mismo diario que los anuncio de la marca "x".

Es razonable y completamente lícito pretender aparecer junto a las marcas líderes o en los lugares donde se reúne la mayor cantidad de público. Para lograrlo se hace, inevitablemente, referencia a marcas de terceros. Pero, aunque existe un uso de la marca ajena en el tráfico económico, al no verse afectadas las funciones esenciales de la marca ajena, no se configura ilícito alguno.

Entendemos que la elección de palabras clave al no configurar ninguna de las infracciones previstas en el régimen marcario nacional y no generar, en sí

15 OTAMENDI, Jorge. Op. cit.

misma, un daño a las funciones esenciales de la marca, no existe un reproche de responsabilidad que hacer al anunciante por el hecho de referenciar sus mensajes comerciales con términos coincidentes a marcas ajenas.

Ahora bien, si además de utilizar estos términos para referenciar el anuncio, éste contiene en su encabezado o en el cuerpo del mensaje una alusión la marca ajena de modo que induzca al internauta a errores o pensar que existe una relación entre el titular marcario y quien publica el anuncio, constituye un acto de competencia desleal al configurar un acto de confusión, incluso generador de riesgo de asociación, y por lo tanto debiera hacer nacer en cabeza del anunciante la responsabilidad de sacar este anuncio de circulación y reparar los daños que pudo causar al titular marcario.

Si bien no existe una legislación específica, los titulares de las marcas no quedan totalmente indefensos. Pueden intervenir cuando los efectos son realmente perjudiciales, es decir, cuando los anuncios se muestran a los usuarios de Internet. Los titulares marcarios podrían prohibir el uso de marcas en el texto o encabezado del anuncio, como lo harían con una publicidad difundida por un medio tradicional si dicho uso menoscabara alguna de las funciones de la marca.

En mayo de 2018, llegó en apelación a la Cámara Civil y Comercial Federal–Sala III, una demanda contra un anunciante competidor de la actora, por ceses del uso de marca, en el marco de los servicios que analizamos. En el apartado siguiente realizaremos un breve análisis de la decisión tomada por la alzada y algunas críticas.

5. Fallo "Organización Veraz S.A. c/Open Discovery S.A. s/Cese de Uso de Marca"

La jurisprudencia nacional se ha expedido en un reciente fallo sobre la problemática, lo analizaremos en este apartado.

En las actuaciones de primera instancia quedó acreditado que la demandada contrató el servicio de enlaces patrocinados "AdWords" de Google, utilizando como palabra clave la marca de la actora "VERAZ"[16].

16 PODER JUDICIAL DE LA NACIÓN. Cámara civil y comercial federal–Sala III. Causa n° 1789/09. "Organización Veraz S.A. c/Open Discovery S.A. s/Cese de Uso de Marca". Juzgado n°2 Secretaría. N° 3. . [Fecha de consulta: 10 septiembre 2017]. Disponible en: http://www.palazzi.com.ar/wp-content/uploads/2018/05/

También se corroboró que del informe del perito informático surge que al insertar en el buscador de Google las palabras "VERAS"; "BERAZ" o "BERAS", aparecía la publicación de la accionada.

Sentado ello, el juez consideró que la demandada utilizó los términos "VERAZ" y "ORGANIZACIÓN VERAZ" como palabras clave para derivar –en su búsqueda– a los usuarios de Google hacia su sitio web, con la finalidad comercial de captar clientela para operar e interactuar en su propia plataforma *on line*.

El tribunal de primera instancia entendió que resultaba evidente que la accionada quiso aprovechar el prestigio de la parte actora y que su conducta (ilícita) conducía a la dilución de la marca en cuestión y a la confusión de la clientela.

Además, se indicó que la contratación de estos servicios de "*keywords*" o enlaces privilegiados revela una intencionalidad de la accionada de beneficiarse con la utilización de la marca ajena. Sostuvo que se produce así una asociación ideativa –en los consumidores– entre los servicios de Organización Veraz y de Open Discovery por la utilización como "palabra clave" de la marca notoria de la actora.

Concluyó que esta asociación causa un daño al titular de la marca en razón de la confusión provocada a través del signo notorio.

Así, tuvo por acreditado el uso indebido por parte de la demandada de las marcas de la actora y condenó a ésta última al cese de uso de las mismas y al pago de una indemnización por daños y perjuicios.

Ambas partes se consideran agraviadas por el fallo y recurren en alzada a la Cámara Civil y Comercial Federal–Sala III. La actora considera insuficiente la indemnización concedida por daños y perjuicios ($35.000), ya que el perito había fijado un monto enormemente superior (más de tres millones de pesos). Además se queja de que el juez omitió considerar que la demandada incurrió en competencia desleal.

Por su parte la demandada se agravia de la sentencia apelada en los siguientes términos:

1– El carácter genérico en que habría decantado la marca "VERAZ" en tanto sinónimo de informe comercial, lo que descarta de plano que sea una marca notoria.

Sentencia-camara-Veraz-v.-Open-discovery.pdf

2– Que la marca de la actora es un signo débil por cuanto se trata de una palabra de uso común altamente descriptiva del producto al que se la asocia.
3– La inexistencia absoluta de productos, avisos o servicios suyos en los que se haya exhibido la marca de la actora y la inexistencia de confusión por parte de los consumidores y,
4– que no existe infracción marcaria al utilizar una marca ajena como "palabra clave" en el sistema AdWords de Google, en la medida que no se ofrezcan meras imitaciones de productos y que dicho uso no menoscabe las funciones de la marca del competidor.
5– Por último, tilda la sentencia de arbitraria.

En primer término, la Cámara entiende que la imputación que se le formula al *a quo*, de haber resuelto el caso con "fundamentos aparentes" o arbitrariamente no comporta agravio atendible, por cuanto ha tratado los temas "conducentes" para la correcta dilucidación de la contienda y –en todo caso– cualquier defecto que se le pudiera achacar, es susceptible de ser superado por el examen amplio de todas las cuestiones por parte del Tribunal[17].

La Magistrada que vota en primer término, Doctora Graciela Medina, asevera respecto de los puntos 1 y 2:

> "Nótese que según la accionada la marca de la actora habría decantado en designación genérica en tanto "VERAZ" es sinónimo de informe comercial. Se advierte en dicha aseveración la confusión propia de quien navega sin brújula por las aguas del derecho marcario En efecto, si la marca "VERAZ" se ha transformado hoy en sinónimo de informe comercial o crediticio, lo es por haber adquirido luego de muchos años el carácter de marca notoria"[18].

Y remarcó que:

17 PODER JUDICIAL DE LA NACIÓN. Cámara civil y comercial federal–Sala III. Causa n° 1789/09. "Organización Veraz S.A. c/Open Discovery S.A. s/Cese de Uso de Marca". Juzgado N°2 Secretaría. N° 3. [Fecha de consulta: 10 septiembre 2017]. Disponible en: https://docplayer.es/109291440-Camara-civil-y-comercial-federal-sala-iii.html

18 Ídem.

> "Nada impide a un comerciante utilizar el sistema AdWords de Google (o cualquier otro) para promocionar sus productos y colocarlos como enlaces patrocinados cerca los resultados naturales de las búsquedas en los que aparecen sus competidores, pudiendo para ello elegir entre cientos de palabras clave o *keywords*, pero otra cosa muy distinta es montarse sobre la marca de una competidora y aprovecharse del envión que su notoriedad brinda. Esto último es absolutamente desleal y contrario a la buena fe comercial"[19].

En el fallo se hace foco en que la marca de la actora es notoria, y en virtud de ello, acreedora de una especial protección, como surge de la sentencia del TJUE Interflora, al cual cita.

Pero a pesar de ser expuesto como agravio por la demandada en los puntos 3 y 4, en el fallo no se hace ninguna referencia ni análisis del contenido del anuncio que se despliega en virtud del uso de la marca Veraz como *keyword*. Y, al parecer, se consideran irrelevantes las excepciones que plantea el TJUE en el caso Interflora, respecto de los usos que no puede prohibir el titular de una marca notoria, a pesar de citar dicha sentencia en los fundamentos.

La Cámara resuelve en el sentido de entender que el uso de una marca notoria como *keyword* representa una infracción a la ley marcaria y un acto de competencia desleal. Por lo que se ordena el cese del uso por la demandada y se ajusta el valor de la indemnización por daños al monto propuesto por el perito.

Este fallo resulta de gran relevancia, puesto que es el primero en nuestro país en tratar el tema bajo análisis. Pero creemos que es un desacierto juzgar como infracción marcaria el mero hecho de utilizar un término coincidente con marca notoria como *keyword*.

El tribunal, al desarrollar los fundamentos de la decisión, expresamente remarca que las definiciones de las funciones esenciales de marca y cómo pueden verse vulneradas, que proponen los fallos del TJUE se ajustan a nuestra legislación y a los que la doctrina ha sostenido a nivel nacional, y por lo tanto los utiliza de base en su fallo.

Pero cuando recurre al fallo Interflora, lo hace tomando solo los elementos que abonan la responsabilidad del anunciante competidor del titular de una

19 Ídem.

marca notoria, que contrata un servicio de enlaces patrocinados y no las excepciones que promueven un uso legítimo de la marca ajena.

El sólo hecho de la notoriedad de la marca de la actora, alcanzó en el caso para fundar la existencia de una actividad parasitaria por parte de la accionada al contratar el servicio AdWords, sin analizar el texto del anuncio o del sitio al que remitía.

Creemos que hubiese sido importante determinar si el anuncio o el sitio, impedían al internauta normalmente informado y razonablemente atento captar que el servicio prestado por la demandada es independiente del servicio de la actora o si se utilizaba la marca como un término genérico (dilución), o si existía un impacto en el usuario que generara una asociación negativa respecto de la marca notoria (difuminación) , o si se hacía alusión a las características del servicio prestado por la actora y se intentaba traspasarlos a los servicios de la demandada (parasitismo).

Si de este análisis resultara que simplemente se ponía al alcance de los usuarios del buscador un servicio alternativo, creemos que no debería condenarse a la demandada. Pero esto no fue analizado en la sentencia.

6. Conclusiones

En una sociedad donde accedemos (con una facilidad inimaginable hace apenas 20 años) a una diversa e infinita cantidad de información, el rol de los motores de búsqueda se ha vuelto imprescindible. Y la "magia" de los mismos reside simplemente en las palabras clave. A lo largo de este trabajo hemos dejado ver nuestra postura respecto del uso de términos que reproducen marcas como palabras clave. A modo de resumen, podríamos resaltar las siguientes conclusiones:

Considerar que la elección de una marca como palabra clave constituye, en sí misma, una violación de derechos marcarios, llevaría a excluir innumerables usos legítimos de la marca ajena, lo que no parece ser una solución acorde a las nuevas tendencias del intercambio, tanto de información como económico.

Entendemos que ni los buscadores prestando su servicio de enlaces patrocinados ni los anunciantes al contratarlos, hacen un uso de la marca que el titular pueda prohibir.

Por el contrario, éste se halla facultado para impedir que un anunciante, a

partir de una palabra clave coincidente a su marca, haga publicidad de productos o servicios si el contenido de su anuncio o del sitio al que remite puede generar riesgo de confusión o asociación o de algún modo vulnera las funciones de la marca. Si eso sucede, corresponde analizar el alcance de estas publicaciones y si infringen alguna normativa o generan daños fuente de responsabilidad civil por los que deban responder.

Los derechos de los titulares de marcas notorias, si bien deben ser acreedores de una protección reforzada (contra la dilución y el parasitismo), esta debe atender a ciertos límites, en pos de favorecer el normal juego de la sana y leal competencia.

En Argentina, las leyes y la jurisprudencia caminan lento detrás de una realidad que avanza a grandes zancos. Y es muy poca la doctrina que se encarga de los desafíos que supone el avance de las nuevas tecnologías en el mundo jurídico. Y aunque tendremos que esperar para conocer las respuestas definitivas a las problemáticas analizadas en este trabajo para nuestro país, esperamos hacer, aunque mínima, una contribución al efecto.

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Excepciones al derecho de autor proyectadas en favor de las bibliotecas argentinas

Exceptions to Copyright Projected in Favor of Argentine Libraries

Recibido: 04/04/2020 – Aceptado: 28/05/2020

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Resumen

De la investigación comparativa realizada entre los Proyectos de Ley Nº 7819–D–2010 –reingresado como proyecto 2064–D–2012– y Nº 5792–D–2015, se infieren ventajas y desventajas entre ambos respecto del efectivo cumplimiento del rol de las bibliotecas y el derecho de acceso a la información, al conocimiento y a la cultura.

Palabras clave: Misiòn de las bibliotecas; Excepciones al derecho de autor; Proyecto de ley.

Abstract

This article presents a comparative analysys of the Draft Law No. 7819–D–2010 and the Draft Law No. 5792–D–2015. It shows the advantages and disadvantages of both bills, and provides conclusions on its impact on the right to information, knowledge and culture, taking into account the fundamental role played by libraries.

Keywords: Role of Libraries; Copyright exemptions; Draft Law.

Sumario

1. Introducción. Exposición del problema

La investigación realiza un estudio comparativo entre los Proyectos de Ley Nº 7819–D–2010[2] –reingresado como proyecto 2064–D–2012– y Nº 5792–D–2015[3], que proponen la modificación del artículo 36 de Ley Nº 11.723 sobre Régimen Legal de la Propiedad Intelectual y la incorporación del artículo 36 bis (sobre exención del pago de derecho de autor a bibliotecas, archivos y museos); y la modificación del artículo 29 de la Ley Nº 25.446 sobre Fomento del Libro y la Lectura, con la finalidad de proteger el efectivo cumplimiento del rol de las bibliotecas y el derecho de acceso a la información, al conocimiento y a la cultura. Del análisis comparativo se desprenden conclusiones sobre las ventajas y desventajas de cada uno de los proyectos estudiados.

2 Congreso Nacional Argentino. Proyecto de Ley. Expediente 7819–D–2010. Disponible en: https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=7819–D–2010

3 Cámara de Diputados de la Nación. Proyecto de Ley. Expediente 5792–D–2015. Disponible en: http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=5792-D-2015

2. Justificación y relevancia

Las bibliotecas son instituciones culturales y científicas que suministran información como un bien público, ya que permiten el acceso a la educación, la investigación, la ciencia, la cultura. Son facilitadoras del conocimiento. La misión principal e indeclinable de las bibliotecas es garantizar el derecho de acceso a la información por parte de todas las personas que integran la comunidad a la cual sirven, y prestar un servicio que satisfaga las necesidades de información de sus usuarios. Asimismo, el acceso a la información se encuentra íntimamente ligado a la libertad de expresión necesaria para la formación de la opinión pública. Y por ello se puede afirmar que la misión y funciones de las bibliotecas contribuyen, en definitiva, al fortalecimiento de la sociedad y de la democracia.

Uno de los problemas que enfrentan las bibliotecas argentinas respecto de su misión y funciones primordiales, radica en el hecho de que realizan habitualmente tareas reñidas con la letra de la ley: verbigracia reproducir porque el libro está en malas condiciones y ya no se edita, reproducir un capítulo a un investigador, digitalizar el material en formato papel. Ello se debe a la tensión normativa que existe entre los derechos de autor y el derecho de acceso a la información, al conocimiento y a la cultura, entre otros.

Resulta indispensable para el cumplimiento de la misión de las bibliotecas, una reforma legislativa integral y a la vez sectorial, que incluya excepciones a favor de las bibliotecas que les permitan realizar copias (mediante cualquier técnica) con fines de sustitución o conservación, copias totales para incluir en la colección una obra agotada, digitalización de obras para consulta en sala, copias parciales para estudio o investigación de los usuarios, la comunicación y difusión pública de las obras por medio de la recitación, la representación y la ejecución de obras musicales en actividades de extensión cultural, etc.

La última iniciativa legislativa en tal sentido, es el Proyecto de Ley Nº 5792–D–2015, por lo que su análisis resulta relevante respecto de la posibilidad de cumplimiento de la misión de las bibliotecas argentinas. Los fundamentos de dicho proyecto parten de la base de la existencia de una contraposición de intereses entre "los derechos de acceso a la información y al conocimiento, a la educación, la investigación científica y la cultura, que en síntesis constituyen el singular derecho de acceso a las obras producto de la creación humana", por una parte, y por otra

"el derecho de autor y los derechos conexos". El proyecto pretende velar a la par "por la subsistencia de ambos grupos de derechos, en condiciones de igualdad y sin discriminaciones de ninguna índole, conciliando el interés particular de los creadores de las obras intelectuales con el general de todos los seres humanos"[4].

Si bien ha perdido estado parlamentario, la importancia del Proyecto de Ley Nº 5792–D–2015 radica en que, de sancionarse una iniciativa semejante, el cumplimiento de las funciones del bibliotecario se realizaría dentro del marco legal, y ello redundaría en beneficio de los usuarios de las bibliotecas, quienes podrían acceder a la información, al conocimiento y a la cultura, a la par que se fortalecería –como se ha enunciado– la democracia.

3. Marco teórico y conceptual

El presente trabajo se basa en una selección de documentos académicos referidos al tema investigado, que surge de la tensión de derechos que obligan al bibliotecario a enfrentar la disyuntiva entre cumplir con la letra de la ley o cumplir con su misión de brindar acceso a la información que se presentan a las bibliotecas en el cumplimiento de su misión y funciones frente a la normativa vigente en Argentina sobre derechos de autor. El material documental principal utilizado son dos Proyectos de Ley presentados en el Congreso de la Nación, que no tuvieron trámite en ninguna de las Comisiones de la Honorable Cámara de Diputados, ni fueron tratados en el recinto.

Un estudio sobre las excepciones y limitaciones en favor de las bibliotecas y los archivos en la legislación de derechos de autor de los 188 países miembros de la Organización Mundial de la Propiedad Intelectual (OMPI), realizado por el Dr. Kenneth D. Crews[5], muestra que las disposiciones referidas a las excepciones son diversas en todo el mundo: mientras en 21 países no existen excepciones en absoluto para bibliotecas y archivos, en otros sólo existe una excepción general exclusivamente para las bibliotecas (27 países); en algunos países existe una

4 Cfr. fundamentos del Proyecto de Ley Nº 5792–D–2015.

5 CREWS, Kenneth, "Estudio sobre las limitaciones y excepciones al derecho de autor en beneficio de bibliotecas y archivos", 2008, WIPO. Disponible en: https://www.wipo.int/meetings/es/doc_details.jsp?doc_id=109192. Fecha de acceso: 30 de mayo, 2018.

excepción respecto de copias para investigación o estudio (74 países), o para preservación (72 países), o para reemplazo de los originales desgastados cuando no están disponibles para su compra (67 países). El estudio pone de manifiesto que las excepciones en favor de bibliotecas y archivos son esenciales para la prestación de los servicios bibliotecarios y para la consecución de los objetivos sociales de las leyes de derecho de autor.

Juan Carlos Monroy Rodríguez[6] presentó en una reunión del Comité Permanente de Derecho de Autor y derechos conexos, en Ginebra, un Estudio sobre las Limitaciones o Excepciones al Derecho de Autor y los Derechos Conexos en beneficio de las actividades educativas y de Investigación en América Latina y el Caribe, en el cual explica que la regla de los tres pasos[7] es el principio más importante en el tema de excepciones y limitaciones al derecho de autor, no sólo porque define su alcance y contenido, sino porque además orienta la tarea de los legisladores a la hora de regular la materia, así como la de los jueces al decidir sobre la aplicabilidad de una limitación o excepción.

En Argentina, las excepciones al derecho del autor de autorizar la recitación, representación y ejecución pública de sus obras, y su difusión pública por cualquier medio, están establecidas en el artículo 36 de la Ley N° 11.723 de Propiedad Intelectual[8]. A todas luces las limitaciones previstas son insuficientes para proteger el efectivo cumplimiento de la misión y funciones de las bibliotecas.

La Ley N° 11.723 no es la única ley argentina que se refiere al tema.

6 MONROY RODRÍGUEZ, Juan Carlos, "Estudio sobre las limitaciones o excepciones al derecho de autor y los derechos conexos en beneficio de las actividades educativas y de investigación en América Latina y el Caribe", 2009, *WIPO*. Disponible en: http://www.wipo.int/meetings/es/doc_details.jsp?doc_id=130303. Fecha de acceso 30 de mayo, 2018

7 Este principio fue consagrado por primera vez únicamente respecto del derecho de reproducción, en el Acta de Estocolmo de 1967, que revisó el Convenio de Berna. La regla de los tres pasos está establecida en los artículos 9.2 del Convenio de Berna; 13 del Acuerdo sobre los ADPIC (Acuerdo sobre Aspectos de los Derechos de Propiedad Intelectual Relacionados con el Comercio); 10 del TODA (Tratado OMPI sobre Derecho de Autor) y 16 del TOIEF (Tratado OMPI sobre Interpretación o Ejecución y Fonogramas). También se encuentra presente en los posteriores tratados tales como WCT y WPPT.

8 Sancionada el 26 de setiembre de 1933, promulgada dos días después, y publicada en el Boletín Oficial el 30 de septiembre de 1933.

También se encuentra vigente la Ley N° 25.446 de Fomento del Libro y la Lectura[9], cuyo interés primordial se encuentra descrito en el artículo 1: establecer una política integral del libro y la lectura, como base idónea e indispensable para enriquecer y transmitir cultura.

Sin embargo, de los 15 incisos del artículo 3 –que describen los objetivos fundamentales de la ley–, 10 de ellos se refieren a los derechos de las editoriales y sus autores, y sólo el inciso g) se refiere al acceso igualitario al libro. En mi opinión, este desbalance refleja que el interés primordial de la norma no se trasluce en los objetivos descritos.

Por otra parte, en el capítulo referido a las sanciones, se lee el artículo 29 que establece penas de multa –y hasta de prisión para reincidentes– para quienes reproduzcan en forma facsimilar un libro o partes de él, sin autorización de su autor y de su editor. Se prevé la aplicación de estas sanciones aun cuando la reproducción sea reducida o ampliada y siempre que el hecho no constituya un delito más severamente penado.

Más allá de lo enunciado, el problema neurálgico del artículo 29 de la Ley Nº 25.446 es que exige la autorización para las reproducciones totales o parciales de un libro no sólo al autor sino también al editor, complicando aún más el cumplimiento de la misión de las bibliotecas.

Por lo tanto, se puede afirmar que la Ley Nº 25.446 resulta insuficiente para resguardar el cumplimiento de los roles de las bibliotecas.

Dado el tráfico internacional de obras intelectuales, su regulación es abordada por los tratados internacionales que protegen el derecho de propiedad intelectual, dejando un margen a los países signatarios, un valioso instrumento para equilibrar el sistema, tutelando tanto a los autores como a los usuarios. Se trata de las excepciones y limitaciones a los derechos de propiedad intelectual, definidas por Fernández –Molina como "aquellos casos en que las obras pueden ser utilizadas sin permiso del propietario, ya sea de forma gratuita o con algún sistema de pago o remuneración"[10].

9 Sancionada el 27 de junio de 2001, promulgada parcialmente el 25 de julio del mismo año, y publicada en el Boletín Oficial el 26 de julio de 2001.

10 FERNÁNDEZ–MOLINA, Juan Carlos, "Derecho de autor y bibliotecas digitales: en busca del equilibrio entre intereses contrapuestos", 2008. TraslnformaÇão 20 (2):123–131. Disponible en: http://revistas.puccampinas.

En este sentido, la Ley argentina Nº 25.140[11], aprueba el Convenio de Berna para la Protección de las Obras Literarias y Artísticas, el Tratado de la OMPI sobre Interpretación o Ejecución de Fonogramas (TOIEF o WPPT) y el Tratado de la OMPI sobre Derecho de Autor (TODA o WCT), que "adoptan una terminología específica –siguiendo la tendencia del derecho comparado– para referirse a los derechos de que goza el titular (de reproducción, distribución, alquiler, comunicación al público)"[12]. Esta es una de las razones por las cuales debería reformarse la Ley Nª 11.723, para adecuar su vetusta terminología.

El Convenio de Berna establece que los autores de obras literarias y artísticas gozarán del derecho exclusivo de autorizar la radiodifusión de sus obras o la comunicación pública de estas obras, toda comunicación pública de la obra radiodifundida, y la comunicación pública mediante altavoz o mediante cualquier otro instrumento análogo transmisor de signos, de sonidos o de imágenes de la obra radiodifundida (artículo 11 bis. 1). El Convenio reserva a las legislaciones de los países que lo suscriben, la facultad de permitir la reproducción de esas obras en determinados casos especiales, con tal que la reproducción no atente contra la explotación normal de la obra ni cause un perjuicio injustificado a los intereses legítimos del autor (confrontar artículo 9.2). Esta facultad fundamental para el cumplimiento de la misión de las bibliotecas, denominada "regla de los tres pasos", no se ha incorporado en la legislación argentina, pese a encontrarse aprobado mediante Ley Nº 25.140 el Convenio de Berna.

El Convenio prescribe dos excepciones obligatorias a los derechos de autor, a saber: la presentación de informes de prensa (artículo 2.8) y las citas tomadas de una obra que se haya hecho lícitamente accesible al público (artículo 10.1). Las demás limitaciones y excepciones que determina son opcionales para los países, y se encuentran en los artículos 2.4; 2 bis. 2; 10. 2 y 10 bis. 1.

edu.br/transinfo/include/getdoc.php?id=592&article=262&mode=pdf. Fecha de acceso 10 de octubre, 2018

11 Sancionada el 4 de agosto de 1999, promulgada de hecho el 8 de septiembre de 1999, y publicada en el Boletín Oficial el 24 de septiembre de 1999.

12 MARZETTI, Maximiliano, "Análisis Económico del Derecho y reforma del Derecho de Autor: Aporte para un debate ecuánime", 2017, *The Latin American and Iberian Journal of Law and Economics* 3 (1). Disponible en: http://laijle.alacde.org/journal/vol3/iss1/5. Fecha de acceso 30 de mayo, 2018.

4. Estado del arte

La Subcomisión de Propiedad Intelectual, Acceso a la Información y Libertad de Expresión (PIAILE) de la Asociación de Bibliotecarios Graduados de la República Argentina (en adelante ABGRA), redactó y presentó en dos oportunidades en el Congreso de la Nación un Anteproyecto de Ley con el fin de modificar la Ley de propiedad intelectual Nº 11.723, incorporando excepciones a favor de las bibliotecas, archivos y museos, que les permitan cumplir con su rol de brindar acceso a la información y cumplir con las actividades de preservación. Se trata del Proyecto de Ley Nº 7819–D–2010, reingresado como proyecto 2064–D–2012[13].

Tres años después, ABGRA presentó un proyecto acordado con la Biblioteca del Congreso de la Nación, con la Biblioteca Nacional Mariano Moreno y con la Biblioteca Nacional de Maestros, ingresado en el Honorable Congreso de la Nación bajo el número de Expediente 5792–D–2015[14].

5. Metodología

5.1 Método

Luego de una búsqueda exhaustiva de información en las principales bases de datos bibliográficas argentinas se constató la inexistencia de análisis o estudios comparativos entre los dos proyectos de ley, y por ello, entre otras razones, se abordó en este trabajo. Esta investigación fue, por tanto, documental, y de análisis de fuentes.

Tras la elaboración del marco teórico y conceptual, el proceso de esta investigación consistió en analizar y tabular los datos comparativos de los proyectos de ley, comparándolos entre sí. Las variables involucradas en ambos proyectos se presentaron comparativa y detalladamente, a fin de determinar las ventajas y desventajas de los mismos. Ello así dado que el análisis comparativo consiste en

13 Congreso Nacional Argentino. Proyecto de Ley. Expediente 7819–D–2010. Disponible en: https://www.hcdn.gob.ar/proyectos/proyectoTP.jsp?exp=7819–D–2010

14 Cámara de Diputados de la Nación. Proyecto de Ley. Expediente 5792–D–2015. Disponible en: http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=5792–D–2015

la descripción y la explicación de las condiciones y los resultados semejantes y diferentes, entre dos o más unidades, para apreciar sus semejanzas y diferencias e indagar, en lo posible, sus causas.

La pretensión de alcanzar una imputación causal se consigue mediante una cuidadosa y rigurosa comparación, y un proceso lógico de inducción científica. En efecto, dado que este trabajo consistió en una investigación documental, se utilizó una metodología cualitativa, que emplea la inducción –razonamiento que permite pasar de un conocimiento de menor grado de generalidad a uno de mayor grado de generalidad. Así, esta investigación se inició desde lo particular: los dos proyectos de ley en comparación. Las particularidades de los proyectos analizados permitieron comparar las fortalezas y debilidades de los mismos.

5.2 Técnicas de recolección de datos e instrumentos

La técnica de recolección de datos fue la compilación y el análisis bibliográfico. Asimismo, se consultaron comentarios doctrinarios relacionados con los proyectos analizados.

Se utilizaron las siguientes fuentes:

a) Primarias. Legislación: se consultó la base de datos de Proyectos de Ley de la Honorable Cámara de Diputados de la Nación[15].
b) Secundarias. Bibliográfica: se consultaron libros, artículos académicos, informes, estudios.

5.3 Criterios para la selección de casos o unidades de análisis

Se eligió como criterio la temporalidad, es decir, se seleccionaron los dos últimos proyectos de ley presentados respecto de las excepciones y limitaciones al derecho de autor en favor de las bibliotecas. Se excluyó del estudio, por tanto, el Anteproyecto argentino de ley de Derecho de Autor, elaborado por la Comisión Reformadora, nombrada por resolución del Ministerio de Justicia Nº 82/74, citado en los fundamentos de los proyectos analizados.

15 Disponible en https://www.diputados.gov.ar/proyectos/index.html; y la base de datos de Información Legislativa y Documental de Infoleg, servicio prestado por el Ministerio de Justicia y Derechos Humanos de la Presidencia de la Nación en la web http://www.infoleg.gob.ar/.

6. Resultados

El análisis comparativo se plasma en el siguiente cuadro o tabla, donde se señalan las diferencias entre los proyectos respecto de la Ley Nº 11.723 vigente, con caracteres en itálica:

Ley Nº 11.723	**Proyecto de Ley Nº 7819-D-2010**	**Proyecto de Ley Nº 5792-D-2015**
Publicado en Boletín Oficial	Publicado en Trámite Parlamentario N° 161	Publicado en Trámite Parlamentario N° 149
Fecha: 30/09/1933	Fecha: 25/10/2010 Promovido por: *ABGRA	Fecha: 03/11/2015 Promovido por: *ABGRA *Biblioteca del Congreso de la Nación *Biblioteca Nacional Mariano Moreno *Biblioteca Nacional de Maestros
	Firmantes *HELLER, CARLOS *SALOMON (CABA - NUEVO ENCUENTRO POPULAR Y SOLIDARIO) *BASTEIRO, SERGIO ARIEL (BS AS - NUEVO ENCUENTRO POPULAR Y SOLIDARIO)	Firmantes *BIANCHI, MARIA DEL CARMEN (CABA - FpV) *RUBIN, CARLOS GUSTAVO (CORRIENTES - FpV) *BASTERRA, LUIS EUGENIO (FORMOSA - FpV) *GARCIA, ANDREA FABIANA (BS AS - FpV) *PARRILLI, NANCI MARIA AGUSTINA (NEUQUEN - FpV) *BARDEGGIA, LUIS MARIA (RIO NEGRO - FpV) *ZAMARREÑO, MARIA EUGENIA (BS AS - FpV) *GAGLIARDI, JOSUE (RIO NEGRO – FpV) *UÑAC, JOSE RUBEN (SAN JUAN – FpV) *VILARIÑO, JOSE ANTONIO (SALTA – FpV)

	Sumario SUSTITUCION DEL ARTICULO 36 E INCORPORACION DEL ARTICULO 36 BIS; SUSTITUCION DEL ARTICULO 29 DE LA LEY 24556 (LEY DE FOMENTO DEL LIBRO Y LA LECTURA)	Sumario REFORMA A LAS LEYES DE PROPIEDAD INTELECTUAL Y DE FOMENTO DEL LIBRO Y LA LECTURA. EXCEPCIONES A FAVOR DE BIBLIOTECAS, ARCHIVOS Y MUSEOS
Artículo sustituido por art. 1° de la Ley Nº 17.753, publicada en el Boletín Oficial del 03/06/1968 Artículo 36. - Los autores de obras literarias, dramáticas, dramático-musicales y musicales, gozan del derecho exclusivo de autorizar:	Artículo 1º.- Sustitúyese el artículo 36 de la Ley de Propiedad Intelectual N° 11.723, *el que queda redactado de la siguiente manera:* Artículo 36.- Los autores de obras literarias, dramáticas, dramático-musicales y musicales, gozan del derecho exclusivo de autorizar:	Artículo 1°. Sustitúyase el artículo 36 de la Ley de Propiedad Intelectual N° 11.723 *y sus modificatorias por el siguiente*: Artículo 36. - Los autores de obras literarias, dramáticas, dramático-musicales y musicales, gozan del derecho exclusivo de autorizar:
a) ...; b) …, la representación, la ejecución y la recitación de obras literarias o artísticas ya publicadas, en actos públicos organizados por establecimientos de enseñanza, vinculados en el cumplimiento de sus fines educativos, planes y programas de estudio,...	a) ...; b) …, la representación, la ejecución y la recitación o lectura de las obras literarias o artísticas ya publicadas, en actos públicos organizados por establecimientos de enseñanza, vinculados en el cumplimiento de sus fines educativos, planes y programas de estudio; *o por* bibliotecas, archivos y museos, *dentro de sus programas o actividades de extensión cultural,...*	a) ...; b) …, la representación y la ejecución de sus obras. Sin embargo, será lícita y estará exenta del pago de derechos de autor y de los intérpretes que establece el artículo 56, la representación, la ejecución y la recitación de obras literarias o artísticas ya publicadas, en actos públicos organizados por establecimientos de enseñanza, vinculados con el cumplimiento de sus fines educativos, planes y programas de estudio, *y por* bibliotecas, archivos y museos, *públicos o pertenecientes a instituciones sin fines de lucro,...*
Se exime del pago de derechos de autor..., *siempre que la reproducción y distribución sean hechas por entidades autorizadas.* *(Párrafo incorporado por art. 1° de la Ley N° 26.285, publicada en el Boletín Oficial del 13/09/2007)...*	Se exime del pago de derechos de autor..., *siempre que la reproducción y distribución sean hechas por entidades autorizadas...*	Se exime del pago de derechos de autor..., *siempre que las referidas acciones sean realizadas por bibliotecas, archivos y museos, públicos o pertenecientes a instituciones sin fines de lucro, o por entidades autorizadas conforme se define en este mismo artículo...*

	Artículo 2°. - Incorpóranse como artículos 36 bis de la Ley de Propiedad Intelectual N° 11.723, el siguiente:	Artículo 2°. Incorpórese como artículo 36 Bis de la Ley de Propiedad Intelectual N° 11.723 *y sus modificatorias:*
	"Artículo 36 Bis. - Se exime del pago de derecho de autor y de requerir la autorización a su titular: a) El servicio de préstamo de obras protegidas, que integren las colecciones de bibliotecas, centros de documentación o archivos; sean éstos públicos, o pertenecientes a instituciones sin fines de lucro, científicas o de enseñanza. b) La reproducción..., siempre que sea realizada por bibliotecas, *centros de documentación* y archivos, públicos o pertenecientes a instituciones sin fines de lucro, a instituciones científicas o a establecimientos de enseñanza, *en tanto la reproducción se limite al ejercicio de sus actividades y servicios*, y no afecte la explotación normal de la obra, ni cause un perjuicio injustificado en los intereses legítimos del autor. Se entenderá, a los fines de éste artículo, que no podrán afectar la explotación normal de la obra, ni causar un perjuicio injustificado en los intereses legítimos del autor, las reproducciones: a) íntegras con fines de conservación o preservación, o para incorporar el ejemplar de una obra no disponible en el mercado; b) íntegras de partituras y artículos de publicaciones periódicas, y parciales de otras obras, en tanto no excedan el 30% de cada una, siempre que se realicen a requerimiento de usuarios con fines de investigación y educación".	"Artículo 36 Bis. - Las bibliotecas, los archivos y los museos, públicos o pertenecientes a instituciones sin fines de lucro, a instituciones científicas o establecimientos de enseñanza, están exentas de pedir autorización al autor o titulares del derecho y del pago de derecho de autor y de los intérpretes que establece el artículo 56 de la presente ley, *siempre que la actividad que goce de la exención se dirija al cumplimiento de sus fines institucionales, y encuadre en alguno de los siguientes supuestos:* a) La reproducción ..., *en determinados casos especiales* y cuando no afecten la explotación normal de la obra, ni causen un perjuicio injustificado en los intereses legítimos del autor. A los fines de este inciso, se entiende que las reproducciones no afectan la explotación normal de la obra, ni causan un perjuicio injustificado en los intereses legítimos del autor cuando: 1) se realicen con fines de conservación o preservación, o para incorporar el ejemplar de una obra no disponible en el mercado; 2) se trate de partituras y artículos de publicaciones periódicas, siempre que se realicen a requerimiento de usuarios con fines de investigación y educación.; y 3) se trate de reproducciones parciales de otros tipos de obras en cuanto no excedan el 30% de cada una y siempre que se realicen a requerimiento de usuarios con fines de investigación y educación.

		b) La reproducción electrónica de obras de su colección para ser consultadas gratuita y simultáneamente, sólo en terminales de redes de las respectivas entidades autorizadas y en condiciones que garanticen -de no mediar autorización de su autor- que no se puedan hacer copias electrónicas de esas reproducciones. c) El servicio de préstamo de obras protegidas que integren sus colecciones. d) La traducción de obras originalmente escritas en idioma extranjero y legítimamente adquiridas, cuando se cumplieren tres años contados desde la primera publicación, o un año en caso de publicaciones periódicas en las que su traducción al castellano no hubiera sido publicada en la Argentina. La traducción debe ser realizada para investigación o estudio por parte de los usuarios de las entidades autorizadas en el primer párrafo de este Artículo, y sólo puede ser reproducida en citas parciales en las publicaciones que resulten de dichas traducciones. e) La copia de una obra en formato digital, con fines de preservación o para su compatibilización con las nuevas tecnologías. En caso de que dicha obra contenga medidas tecnológicas de protección, serán lícitas las actividades de ingeniería inversa que permitan su reproducción. Todo ello si la editorial no actualiza la tecnología de acceso. La copia así obtenida sólo podrá ser utilizada para su consulta dentro del ámbito de las entidades autorizadas. f) La reproducción y traducción para fines educativos cuando se trate de

		pequeños fragmentos de obras de carácter plástico, fotográfico o figurativo, excluidos los textos escolares y los manuales universitarios, cuando tales actos se hagan únicamente para la ilustración de las actividades educativas, en la medida justificada y sin ánimo de lucro, siempre que se trate de obras ya divulgadas y se incluyan el nombre del autor y la fuente.
Artículo 29 de la Ley de Fomento del Libro y la Lectura N° 25.446 "Artículo 29. - Quienes..., serán sancionados con multa de pesos setecientos cincuenta a diez mil...".	Artículo 3°.- Sustitúyese el artículo 29 de la Ley de Fomento del Libro y la Lectura N° 25.446, el que queda redactado de la siguiente manera: "Artículo 29. - *Quienes..., sin encontrarse comprendidos en ninguna de las excepciones previstas por la ley 11.723,* y sin autorización de su autor y de su editor, serán sancionados con multa de pesos setecientos cincuenta a diez mil...".	Artículo 3°. Sustitúyase el artículo 29 de la Ley de Fomento del Libro y la Lectura N° 25.446 por el siguiente texto: "Artículo 29. - *Quienes..., sin encontrarse en ninguna de las situaciones de excepción previstas en la ley 11.723 y sus modificatorias, complementarias y concordantes,* o sin autorización de su autor y de su editor, serán sancionados con *multas del 50% al 300% del valor mensual del salario mínimo vital y móvil vigente al momento de la constatación de la infracción... ".*
	Trámite previsto para las Comisiones: *Cultura *Legislación General *Legislación Penal *Presupuesto y Hacienda	**Trámite previsto para las Comisiones:** *Cultura *Legislación General

Al analizar la nómina de entidades promotoras de los proyectos, se observa que el Proyecto de Ley Nº 7819–D–2010 fue promovido por ABGRA, mientras que el Proyecto de Ley Nº 5792–D–2015 lo fue también por las bibliotecas argentinas más emblemáticas: la Biblioteca Nacional, la Biblioteca Nacional de Maestros y la Biblioteca del Congreso de la Nación. De ello se infiere que el segundo cuenta con mayor representatividad y apoyo de la comunidad de bibliotecas argentinas.

De la comparación entre los firmantes de ambos proyectos se constata que los diputados que suscribieron el primer proyecto de ley presentado pertenecen a la Provincia de Buenos Aires y a la Ciudad Autónoma de Buenos Aires, en tanto quienes suscribieron el segundo proyecto de ley pertenecen, además, a otras provincias argentinas –Corrientes, Formosa, Neuquén, Río Negro, San Juan y Salta–. De ello se infiere la mayor participación en número y representación geográfica de diputados en el segundo proyecto.

En cuanto a la pertenencia política partidaria, se observa que, en el primer proyecto presentado, los diputados firmantes pertenecen al bloque Nuevo Encuentro Popular y Solidario, integrado por los partidos Socialista, Solidario y Encuentro por la Democracia y la Equidad, cuya bancada está compuesta por los Diputados Carlos Heller, Ariel Basteiro, Vilma Ibarra, Jorge Rivas y Martín Sabbatella (Resumen de Labor Parlamentaria, 2010). En tanto, en proyecto del 2015, todos los firmantes pertenecen al Frente para la Victoria, del Partido Justicialista. Dado que el Frente para la Victoria cuenta con mayor cantidad de afiliados que los partidos Socialista, Solidario y Encuentro por la Democracia y la Equidad, que integran el bloque Nuevo Encuentro Popular y Solidario (Cámara Nacional Electoral, 2017), pero a la par el Frente para la Victoria se encuentra integrado por un solo partido político (el Partido Justicialista), de ello se infiere una mayor representatividad –medida en cantidad de afiliados–, y una menor representatividad –medida en cantidad de partidos políticos– en el segundo proyecto de ley. De todas maneras, desde las elecciones legislativas de 2009 y hasta las elecciones primarias, abiertas, simultáneas y obligatorias de 2015 –período que abarca la presentación de los proyectos de ley analizados–, el Partido Solidario se presentó en alianza electoral con el Frente para la Victoria.

El trámite previsto para Proyecto Nº 7819–D–2010 consistía en su giro a las comisiones de Cultura, Legislación General, Penal y de Presupuesto y Hacienda, en tanto respecto del Proyecto Nº 5792–D–2015 se había previsto su giro sólo a las comisiones de Legislación General y Cultura. Dado que el contenido de los proyectos analizados abarca diversas ramas del derecho –entre ellas, Derecho Constitucional, Derecho Civil y Comercial, Derecho Penal, Finanzas y Tributos–, el giro ordenado respecto del Proyecto Nº 7819–D–2010 hubiese permitido un examen más exhaustivo de la reforma propuesta, que el giro ordenado respecto del Proyecto Nº 5792–D–2015. Sin perjuicio de ello, cabe decir que, conforme

lo informado por la web de la Honorable Cámara de Diputados, ninguno de los proyectos fue efectivamente tratado en las comisiones.

De la comparación entre los encabezados del artículo 1 de los proyectos de ley analizados, surge que el proyecto presentado en 2010 ha omitido mencionar las normas modificatorias de la Ley N° 11.723, mientras que el proyecto presentado en 2015 contiene la expresión "y sus modificatorias".

Al respecto, cabe recordar que el artículo 36 de la Ley N° 11.723 fue modificado por las Leyes N° 17.753, N° 20.098, y N° 26.285. De ello se infiere que el proyecto presentado en el año 2015 refleja de modo más exhaustivo la vigencia del artículo que pretende sustituir.

El Proyecto de Ley N° 7819–D–2010 amplía el cuarto párrafo del artículo 36 de la Ley N° 11.723 vigente, y del art. 36 diseñado en el Proyecto de Ley N° 5792–D–2015, incorporando a la recitación, la variable "lectura" de las obras literarias o artísticas ya publicadas, en actos públicos organizados por establecimientos de enseñanza, vinculados en el cumplimiento de sus fines educativos, planes y programas de estudio.

Por otra parte, y respecto del mismo cuarto párrafo del artículo 36 de la Ley N° 11.723, ambas iniciativas legislativas proyectan la ampliación de la licitud y exención de pago de derechos de autor y de los intérpretes –previsto en el artículo 56 de la ley– para los actos públicos organizados por establecimientos de enseñanza. El Proyecto de ley N° 7819–D–2010 prevé como alternativa ampliatoria de la licitud y exención de pago a los establecimientos de enseñanza: "o por bibliotecas, archivos y museos, dentro de sus programas o actividades de extensión cultural", en lugar de la ampliación proyectada en el N° 5792–D–2015, a saber: "y por bibliotecas, archivos y museos, públicos o pertenecientes a instituciones sin fines de lucro". Del análisis comparativo de los proyectos en este punto se infiere que el Proyecto N° 7819–D–2010 es más amplio, al eliminar el requisito de carácter público de las bibliotecas, archivos y museos, o de su pertenencia a una institución sin fines de lucro.

Respecto de la redacción del sexto párrafo del art. 36 de la Ley N° 11.723, texto ordenado vigente, la eximición de pago de derechos de autor en obras plasmadas en sistemas especiales para ciegos y personas con otras discapacidades perceptivas, se encuentra prevista con el siguiente requisito: "siempre que la reproducción y distribución sean hechas por entidades autorizadas". La base de

datos de Información Legislativa y Documental de Infoleg informa en una nota que mediante el art. 1 de la Ley Nº 20.115, se determina que ARGENTORES tenga a su cargo "las autorizaciones determinadas en el presente artículo salvo prohibición de uso expresa formulada por el autor y la protección y defensa de los derechos morales correspondientes a los autores de dichas obras".

El Proyecto de Ley Nº 7819–D–2010 conserva la redacción vigente mientras que el Proyecto Nº 5792–D–2015 esboza una sustitución del requisito enunciado en el texto vigente, y amplía su redacción del siguiente modo: "siempre que las referidas acciones sean realizadas por bibliotecas, archivos y museos, públicos o pertenecientes a instituciones sin fines de lucro, o por entidades autorizadas conforme se define en este mismo artículo".

El artículo 2 de los proyectos de ley bajo análisis diseñan la incorporación de un nuevo artículo a la Ley Nº 11.723, que llevaría el número de 36 bis, y versaría sobre la exención de pago de derecho de autor y de requerir la autorización del titular para determinadas acciones llevadas a cabo por bibliotecas, archivos y museos, públicos o pertenecientes a instituciones sin fines de lucro, a instituciones científicas o establecimientos de enseñanza–conforme la enumeración del Proyecto Nº 5792–D–2015, que, respecto del Proyecto de Ley Nº 7819–D–2010, ha eliminado la mención de los "centros de documentación".

En cuanto a la enumeración de acciones del proyectado artículo 36 bis, el Proyecto de Ley Nº 7819–D–2010 menciona: "la reproducción, por cualquier medio, de obras científicas, literarias o artísticas", con la siguiente limitación: "en tanto la reproducción se limite al ejercicio de sus actividades y servicios, y no afecte la explotación normal de la obra", mientras que el Proyecto Nº 5792–D–2015 menciona las mismas acciones "en determinados casos especiales", especificando la limitación antes de desarrollar el punto a): "siempre que la actividad que goce de la exención se dirija al cumplimiento de sus fines institucionales, y encuadre en alguno de los siguientes supuestos"; agregando ambos proyectos a continuación: "y cuando no afecten la explotación normal de la obra, ni causen un perjuicio injustificado en los intereses legítimos del autor".

El artículo 29 de la Ley N° 25.446 establece sanciones de multa y prisión para penar la reproducción en forma facsimilar un libro o partes de él, sin autorización de su autor y de su editor. El artículo 3 de ambos proyectos de ley introduce un nuevo requisito para la conducta punible: no encontrarse comprendidos

en ninguna de las excepciones previstas por la Ley 11.723, y sus modificatorias, complementarias y concordantes. En tanto el proyecto presentado en el año 2010 mantiene el mismo monto mínimo y máximo de dinero a determinar por el juez en concepto de multa establecido por el artículo 29 vigente; el presentado en 2015 establece un porcentaje del valor mensual del salario mínimo vital y móvil vigente al momento de la constatación de la infracción, a fijar por el juez.

7. Conclusiones

La Ley Nº 11.723 no establece excepciones que permitan el cumplimiento de la misión de las bibliotecas en cuanto al acceso a la información y su preservación, y el abordaje de este problema es crucial.

En tanto atañe a su desempeño profesional, el bibliotecario debe estar presente en la redacción de proyectos de ley referidos al problema enunciado en el párrafo anterior, tal como ha sucedido con los proyectos de ley analizados en este trabajo.

Del análisis comparativo precedente se infieren las siguientes ventajas y desventajas de los proyectos de ley:

1. Que el Proyecto de Ley Nº 5792–D–2015 tiene la ventaja de contar con mayor representatividad y apoyo de la comunidad de bibliotecas argentinas respecto del Proyecto de Ley Nº 7819–D–2010.
2. La mayor participación en número y representación geográfica de diputados en el Proyecto de Ley Nº 5792–D–2015 es otra ventaja comparativa.
3. En cuanto a la pertenencia política partidaria, se infiere como ventaja una mayor representatividad –medida en cantidad de afiliados–, y como desventaja una menor representatividad –medida en cantidad de partidos políticos– en el Proyecto de Ley Nº 5792–D–2015 respecto del Proyecto de Ley Nº 7819–D–2010.
4. En lo referente al trámite parlamentario previsto para los proyectos de ley, se infiere que el giro ordenado respecto del Proyecto Nº 7819–D–2010 hubiese permitido un examen más exhaustivo de la reforma propuesta, que ordenado respecto del Proyecto Nº 5792–D–2015.
5. De la comparación entre los encabezados del artículo 1 de los proyectos de ley analizados, se infiere como ventaja del Proyecto Nº 5792–D–2015

respecto del Proyecto Nº 7819–D–2010 el reflejar de modo más exhaustivo la vigencia del artículo que pretende sustituir.

6. El Proyecto de Ley Nº 7819–D–2010 amplía el cuarto párrafo del artículo 36 de la Ley Nº 11.723 vigente, incorporando a la recitación, la variable "lectura" de las obras literarias o artísticas ya publicadas, en actos públicos organizados por establecimientos de enseñanza, vinculados en el cumplimiento de sus fines educativos, planes y programas de estudio. La ampliación implica una ventaja del proyecto presentado en 2015 –que no menciona esta variable de "lectura"–, respecto del presentado en 2010, ya que permite a las bibliotecas desarrollar más funciones de extensión.
7. Por otra parte y respecto del mismo cuarto párrafo del artículo 36 de la Ley Nº 11.723, se infiere como ventaja que el Proyecto Nº 7819–D–2010 es más amplio que el Proyecto de Ley Nº 75792–D–2015, al eliminar el requisito de carácter público de las bibliotecas, archivos y museos, o de su pertenencia a una institución sin fines de lucro.
8. Mientras que el Proyecto Nº 7819–D–2010 conserva la redacción vigente del sexto párrafo del art. 36 de la Ley Nº 11.723, el Proyecto de Ley Nº 5792–D–2015 amplía su redacción, y ello constituye una ventaja respecto del cumplimiento del rol de las bibliotecas.
9. El artículo 2 de los proyectos de ley bajo análisis diseñan la incorporación de un nuevo artículo a la Ley Nº 11.723, que llevaría el número de 36 bis. La enumeración del Proyecto Nº 5792–D–2015, es más precisa respecto del Proyecto de Ley Nº 7819–D–2010, al eliminar la mención de los "centros de documentación", que se asimilan a las bibliotecas.
10. Ambos proyectos de ley prevén en el artículo 3 la sustitución del artículo 29 de la Ley N° 25.446. El artículo 29 sustituido conserva la redacción del artículo anterior en cuanto a la descripción del tipo penal, y al editor como sujeto pasivo del delito, pero excluye de la configuración del tipo penal las excepciones incorporadas en los dos artículos anteriores proyectados. En cuanto al monto de la multa establecida como pena, la ventaja del proyecto presentado en 2015 es que el porcentaje del valor mensual del salario mínimo vital y móvil vigente al momento de la constatación de la infracción, a fijar por el juez, es un modo de paliar la desactualización del monto fijo debido a la inflación.

Más allá de las diferencias enunciadas, la sustancial modificación prevista en el proyecto de ley de 2015 radica en la extensa gama de excepciones que incorpora, no incluídas en el proyecto de 2012.

Para finalizar, cabe afirmar que la ausencia de excepciones en la legislación vigente pone en riesgo el derecho de acceso a la información de las personas, y dificulta y obstaculiza el cumplimiento de la misión de las bibliotecas. La legislación vigente debe ser revisada a la luz del cumplimiento del rol de las bibliotecas, garantes por antonomasia del derecho al acceso a la información por parte de la comunidad en la que se insertan y a la cual prestan servicios. En el mismo sentido, la misión primordial del bibliotecario es satisfacer las necesidades de información del usuario, pero debido a la legislación vigente, debe cumplirla en medio de una tensión permanente entre su obligación de dar acceso a la información a la comunidad de usuarios y su deber de cumplir con la legislación de propiedad intelectual.

La misión y funciones de las bibliotecas en tanto garantes del acceso a la información por parte de sus usuarios, contribuyen, en definitiva, al fortalecimiento de la sociedad y de la democracia, ya que el acceso a la información y la libertad de expresión son derechos reconocidos en tratados internacionales de derechos humanos con jerarquía constitucional –tal como lo dispone el artículo 75 inciso 22 de la Constitución Nacional– e íntimamente vinculados a la existencia plena de una sociedad democrática.

Por otra parte, la colisión que se produce en algunas situaciones que se presentan en las bibliotecas argentinas, entre la legislación vigente sobre los derechos de autor y el derecho al acceso a la información, podría producir una brecha social peligrosa entre las personas que obtienen de información y aquellas que no logran disponer de ella.

Por todo ello, es imperioso para la sociedad encontrar un equilibrio entre el efectivo acceso a la información por parte de los usuarios de las bibliotecas, y el ejercicio del derecho de propiedad intelectual. Asimismo la mentada ausencia de excepciones obstaculiza, cuando no impide la preservación a largo plazo de las colecciones de las bibliotecas, que tienen como otro de sus roles el custodiar la producción intelectual. Todo lo expuesto en estas líneas denota la imperiosa necesidad de una reforma legislativa en el sentido proyectado.

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9. Agradecimientos

Agradezco a la Prof. Mg. Lucía Pelaya y a la Lic. Silvia Torres.

El federalismo fiscal en Brasil: ¿realidad o ficción?

Fiscal Federalism in Brazil: Reality or Fiction?

Recibido: 26/02/2020 – Aceptado: 13/05/2020

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Resumen

Este artículo busca responder si existe, de hecho, un federalismo fiscal en Brasil, y si los mecanismos (fondos) hoy existentes, cumplen su papel de redistribuir recursos y combatir los desequilibrios fiscales y las disparidades socioeconómicas existentes en el país.

Palabras clave: Federalismo fiscal; Desequilibrios entre regiones; Criterios de distribución de recursos.

Abstract

This article aims to answer if there is a fiscal federalism in Brazil. Whether existing mechanisms (funds) fulfill their role of redistributing resources and combating fiscal imbalances and socioeconomic disparities in the country.

Keywords: Fiscal Federalism; Regional imbalances; Tax resources allocation; Criteria.

Sumario

1. Introducción

Desde 1889, con la proclamación de la República, Brasil ha adoptado la forma federativa como organización territorial de poder gubernamental. Antes, Brasil era una monarquía gobernada por Portugal hasta la declaración de su independencia en 1822.

Siempre se ha dicho que Brasil, por sus condiciones geográficas y continentales, tendría una vocación histórica hacia el federalismo. Sin embargo, el federalismo fue implantado de la noche a la mañana sin siquiera una discusión pública sobre su conveniencia.

Toda la tradición portuguesa buscaba la unidad territorial del país, enfrentando a los españoles, a los holandeses y a los franceses que querían conquistar Brasil y tomarlo de los portugueses y de los brasileños que habitaban en su territorio.

De todas maneras, el período imperial brasileño tenía conciencia de la vastedad territorial del país y la necesidad de poblarlo. El imperio convivía bien con los poderes locales y regionales. El poder público en Brasil siempre ha sido compartido por un poder central y por el gobierno de colectividades integrantes descentralizadas, las llamadas "capitanías", subordinadas al reino lusitano, pero independientes entre sí.

En aquella época (1500–1540), no había una unidad en Brasil, tan sólo colonias discontinuas subordinadas a la metrópolis. Brasil no tuvo una unidad política real en los primeros dos siglos de su existencia, a no ser en momentos transitorios.

La colonización portuguesa, al igual que la española, fue muy diferente de la colonización inglesa, pues esta última siempre se propuso probar el *self-government*, un grado relativo de autonomía política en sus colonias, habituándolas desde el comienzo a la práctica del gobierno representativo, mientras que la colonización lusitana se estructuraba sobre la base de la simple descentralización y autonomía administrativa, y no política.

Desde el punto de vista formal, solamente con la República, en 1889, las antiguas provincias que vivieron durante la larga existencia de dos reinados se transformaron en Estados miembros dotados de autonomía política y constitucional, asumiendo un papel preponderante en la Unión, con enorme influencia de los gobernadores, representando históricamente la tradición del capitán-mayor, pleno de poderes e influencia[2].

La federación brasileña fue creada a partir de las 20 provincias heredadas del sistema imperial unitario, contando hoy con 27 Estados (miembros), el Distrito Federal y 5.570 municipios distribuidos en 5 grandes regiones.

La federación brasileña es un sistema de 3 niveles. La Unión, los Estados y los Municipios son los integrantes de la federación, reflejando una larga tradición de autonomía municipal y de escaso control histórico de los Estados sobre las cuestiones locales.

Tiene razón Celina Souza[3] al enseñar que nuestra opción por el sistema federativo parece obedecer a la necesidad de acomodar demandas estatales y regionales en conflictos por recursos financieros en un país que ha nacido y crecido basado en la desigualdad tributaria entre sus unidades constitutivas, en particular entre estados y municipios.

2 FIGUEIREDO, Marcelo. "Federalismo x centralização. A eterna busca do equilíbrio – a tendência mundial de concentração de poderes na União. A questão dos governos locais". En: As novas fronteiras do federalismo. CAGGIANO, Monica Hermann (org.); RANIERI, Nina (org.). São Paulo: Imprensa Oficial do Estado de São Paulo, 2008. Pág. 117-135.

3 SOUZA, Celina. "Para entender a nossa barafunda federativa". Insight Inteligência. 2013, vol. 61, págs.60-70.

2. El federalismo tributario y fiscal en Brasil

Según se afirma corrientemente, todas las federaciones tienen el don de restringir el poder central, en función de la doble o triple autonomía del gobierno federal y de los gobiernos regionales y locales. Hay, sin embargo, gran diferencia entre las federaciones en lo que respecta al alcance de la autoridad del gobierno central.

Según Marta Arretche[4], frecuentemente se considera que la descentralización fiscal puede ser interpretada como una evidencia suficiente del poder de las elites regionales. Si ello fuera verdad, ¿cómo explicar que, por ejemplo, en Japón y Suecia –estados unitarios– la participación de los gobiernos locales en el total de los gastos sea superior a la de federaciones como Australia y Bélgica?

J. Rodden examinó una muestra de 29 países –federales y unitarios– y en ambos llegó a la conclusión de que hay una tendencia general hacia la descentralización fiscal. Más que eso, las federaciones no se distinguen de los estados unitarios en lo que se refiere a la dependencia de transferencias, o sea, en los casos en que un nivel del gobierno opera como recaudador sustituto de los demás. Por lo tanto, no hay nada sustancial en los sistemas tributario y fiscal de las federaciones que las distinga de los estados unitarios.

Para entender el federalismo fiscal en Brasil es preciso retroceder en el tiempo. Como hemos visto, Brasil adoptó el o régimen federativo en 1889, pero el diseño de un régimen de federalismo fiscal fue elaborado recién en 1963, por una comisión de especialistas instalada en la Fundação Getúlio Vargas (FGV), con la misión que le fue delegada por el Ministerio de Hacienda (MF) de presentar una propuesta de amplia reforma tributaria en el país.

Como informa Fernando Rezende[5], el diseño de dicho modelo pretendía combinar cuatro objetivos principales: eliminar la multiplicidad de imposiciones

4 ARRETCHE, Marta. "Quem taxa e quem gasta: a barganha federativa na federação brasileira". *Revista de Sociologia e Política*. 2005, núm.24, págs.69-85.

5 REZENDE, Fernando. "Federalismo fiscal e gestão pública". [en línea]. En: De Negri, João. Desafios da nacao apoio 2018. vol1.Cáp. 6 págs 203-228 [Fecha de consulta: 26 de febrero de 2020]. Disponible en: https://wiki.redejuntos.org.br/system/files/2018-05/180413desafiosdanacaoartigosvol1cap06.pdf

tributarias sobre una misma base económica; instituir un régimen de transferencias conducente a atenuar las disparidades en el reparto territorial de los ingresos públicos derivados de la concentración de la actividad productiva; fomentar la cooperación en la ejecución de una política de inversiones en la infraestructura y reforzar los instrumentos financieros destinados a disminuir las disparidades regionales. En suma, esta propuesta erigía una plataforma fiscal.

Según el autor, el pilar que sostenía el federalismo fiscal que surgió de ese modelo estaba representado por dos fondos creados para repartir los ingresos generados por los impuestos de competencia de la Unión a los estados y municipios: El Fondo de Participación de los Estados (FPE) y el Fondo de Participación de los Municipios (FPM). Los criterios que se adoptaron entonces de distribución de los ingresos de dichos fondos buscaban asegurar que los estados con nivel más bajo de desarrollo y los municipios de porte menor resultaran más beneficiados en el reparto.

En el caso de los estados, el índice que definía el monto que se debía entregar a cada uno era determinado con base en el tamaño de la población y el inverso de la renta *per capita* de los estados. En el caso de los municipios, la inexistencia en aquella época de un indicador que midiera la importancia de la economía local llevó a adoptar un procedimiento que se aproximase al objetivo pretendido. Dada la importancia de los municipios sede de las capitales estatales, se les reservó a éstos una cuota del 10% del respectivo fondo, cuyo reparto se hacía en proporción directa al tamaño de la población e inversa a la renta *per capita* de los respectivos estados. El 90% restante se repartía entre los municipios llamados en aquella época municipios del interior, con base en una regla que garantizaba proporcionalmente más recursos a los municipios con menos número de habitantes.

El complemento del modelo de federalismo fiscal era dado por la regla que determinaba la transferencia del 25% del ingreso del impuesto estatal (Impuesto sobre Circulación de Mercaderías – ICM), a los municipios de cada estado, con base en el valor adicionado en cada localidad.

El diseño de dicho modelo combinaba tres atributos importantes: la equiparación de los presupuestos estatales y municipales al tamaño de las poblaciones residentes en cada unidad federada; la autonomía en el uso de los recursos derivada del acceso al monto y de la naturaleza de las transferencias; y el ajuste

periódico de los coeficientes de reparto a los cambios operados en la ocupación económica y demográfica del territorio nacional[6].

Abajo, la afirmación de Fernando Rezende, con la que acordamos plenamente:

> "Con ajustes marginales operados durante la transición a la democracia en la etapa final del régimen militar, el modelo diseñado en 1963 funcionó satisfactoriamente por más de dos décadas, pero no logró sobrevivir a las profundas modificaciones adoptadas en 1988, por haber sido equivocadamente asociado a una obra del régimen militar que lo implantó prácticamente en la íntegra por medio de la Enmienda Constitucional (EC) n. 18/1965 y fue posteriormente incorporado a la Constitución de 1967[7]".

La adopción del federalismo fiscal implica la distribución de competencias constitucionales fiscales entre los distintos niveles de gobierno, para que cada uno, en carácter autónomo y en la medida de sus competencias y capacidad de financiación, pueda construir diseños institucionales capaces de disciplinar los procedimientos de contribución y gestión tributaria, transferencias fiscales, composición y dimensión del gasto público. En verdad, la distribución de competencias adoptada por la Constitución de 1988 resultó de la combinación de la técnica inherente al federalismo dual que se mantuvo hasta la promulgación de la Enmienda Constitucional de 1926 y la adopción del federalismo cooperativo. De allí surge la lección de Fernanda Dias Menezes de Almeida que reconoce la existencia de un sistema mixto de distribución de competencia:

> Un sistema complejo en el que conviven competencias privativas, repartidas horizontalmente, con competencias concurrentes, repartidas verticalmente,

6 REZENDE, Fernando. "Federalismo fiscal e gestão pública". Op. cit., pág. 205.

7 Idem."Com ajustes marginais processados durante a transição para a democracia na fase final do regime militar, o modelo desenhado em 1963 operou satisfatoriamente por más de duas décadas, mas não sobreviveu às profundas modificações adoptadas em 1988, por ter sido equivocadamente associado a uma obra do regime militar, que o implantou praticamente na íntegra por meio da Emenda Constitucional (EC) n. 18/1965 e foi posteriormente incorporado à Constituição de 1967".

> abriéndose espacio también para la participación de los órdenes parciales en la esfera de competencias propias del orden central, mediante delegación[8].

En materia tributaria, el constituyente brasileño se inspiró en el modelo norteamericano puesto que dotó a los entes federativos de competencias exclusivas.

Además, le concedió a la Unión competencia residual para crear tributos (artículo 154, I). Y en la estela del federalismo cooperativo, le concedió a los Estados miembros, al Distrito Federal y a los Municipios la participación en los ingresos tributarios de la Unión, e incluso de los Municipios en los ingresos tributarios de los Estados miembros (artículos 157 a 159 de la Constitución Federal de 1988).

3. El equilibrio federativo en Brasil – difícil ecuación

Con la promulgación de la Constitución Federal de 1988, se afirma que el Estado Federal brasileño se ha vuelto más descentralizado. ¿Será de veras posible sostener esta afirmación?; ¿en qué medida y en qué extensión?

La respuesta no es fácil. La federación brasileña ha sido marcada por políticas públicas federales que se imponen a las instancias subnacionales, pero que son aprobadas por el Congreso Nacional y por limitaciones en la capacidad de legislar sobre políticas propias, esta última también constreñida por decisiones del Poder Judicial.

Tiene razón Celina Souza[9] al afirmar que Brasil ha adoptado un modelo de federalismo simétrico en una federación asimétrica. Dos factores fortalecen aún más este modelo simétrico. El primero de ellos es que las reglas sobre las competencias, recursos y políticas públicas de las entidades subnacionales son

8 MENEZES DE ALMEIDA, Fernanda Dias. *Competências na Constituição de 1988*. São Paulo: Atlas, 1991. pág. 38. "Um sistema complexo em que convivem competências privativas, repartidas horizontalmente, com competências concorrentes, repartidas verticalmente, abrindo-se espaço também para a participação das ordens parciais na esfera de competências próprias da ordem central, mediante delegação".

9 SOUZA, Celina. Federalismo, desenho constitucional e instituições federativas no Brasil pós 1988. Revista de Sociología e Política. 2005, núm.24, págs.105-121.

capítulos detallados de la Constitución, que dejan poco margen de maniobra para iniciativas específicas.

El segundo es que el Supremo Tribunal Federal viene decidiendo sistemáticamente que las constituciones y las leyes estatales reflejen las disposiciones federales o son monopolios federales, lo que impone una jerarquía de las normas constitucionales y legales, a pesar de que la Constitución no explique tal principio. Como argumentan Oscar Vilhena y Werneck Vianna, todo derecho relevante es un derecho federal. Los estados acaban siendo casi apenas entes gestores del derecho federal.

En efecto, el Supremo Tribunal Federal, al juzgar, en el control abstracto, las demandas que abordan el funcionamiento del federalismo en Brasil, centraliza aún más el poder en la esfera federal, en detrimento del poder de los estados. Esta actuación causa importantes limitaciones a la autonomía dos Estados, garantía constitucional establecida en el artículo 19 de la Constitución Federal[10].

Las competencias de los estados son residuales en EE.UU. y en Brasil. En Brasil la Constitución Federal es muy detallada, lo que acaba vaciando el ejercicio de la competencia estadual, al contrario de lo que sucede en EE.UU., Australia y México.

Por otro lado, como apunta Fernando Rezende[11], el equilibrio federativo no se resume al reparto de la "torta" tributaria entre los entes federativos, que, además precisa ser revisado periódicamente para acompañar los cambios en el reparto de las responsabilidades. Cuanto más pronunciadas sean las disparidades socioeconómicas estatales y municipales, mayores serán los desequilibrios fiscales

10 Recuérdese que el artículo 125 de la Constitución Federal, en su § 2º, faculta a los Estados la posibilidad de procesar las causas de control abstracto de normas, a través de los Tribunales de Justicia, en el propio Estado cuando se trate de norma estatal o municipal que viola la Constitución Estatal. Sin embargo, incluso considerando que las Constituciones Estatales siguen los principios y repiten en gran escala las disposiciones de la Constitución Federal, dichas causas deberían tramitar en los tribunales estatales y no en el Supremo Tribunal Federal.

11 REZENDE, Fernando. "Federalismo fiscal – em busca de um novo modelo". En: OLIVEIRA, Romualdo Portela e SANTANA,Wagner (orgs). Educação e federalismo no Brasil: combater as desigualdades, garantir a diversidade. Brasília: Unesco, 2010. Págs. 71-88.

horizontales, o sea, aquellos que se manifiestan por medio de diferencias en la capacidad de financiación de estados y municipios.

Fernando Rezende señala, aún, una fuerte ampliación de los desequilibrios fiscales, tanto en lo que atañe a la dimensión vertical de dichos desequilibrios como a su dimensión horizontal. En el plano vertical, el principal destaque se refiere a la pérdida de posición de los gobiernos estatales en la división de los ingresos públicos.

Considerando los recursos efectivamente a disposición de cada nivel de gobierno, los estados perdieron lo que habían ganado en los cuatro primeros años de la década del 90, a raíz de la entrada en vigor de las nuevas disposiciones constitucionales, mientras que los municipios mantuvieron beneficios crecientes a lo largo del tiempo.

En lo que se refiere a los desequilibrios horizontales, las disparidades fueron creciendo frente al congelamiento de las tasas de prorrateo de los fondos constitucionales y de la multiplicación de otras fuentes de transferencias. Aunque la Constitución Federal de 1988 hubiera contemplado la edición de una Ley Complementar para revisar los criterios de distribución del FPE y del FPM, teniendo en vista la ampliación de los recursos atribuidos a dichos fondos, la ausencia de entendimiento al respecto condujo a una solución singular, adoptada en 1989: la sustitución de la regla preexistente por una tabla que fija la participación de cada estado en el FPE y la participación del conjunto de municipios de cada estado en el FPM.

Además del efecto directo, el resultado del congelamiento de las tasas de prorrateo del FPE también contribuyó para ampliar las disparidades intrarregionales, al abrir espacio para que los estados que de él se beneficiaron reforzasen el propio desarrollo mediante concesión de generosos beneficios fiscales a fin de atraer nuevas actividades económicas. En cierto modo, por tanto, la no revisión de los criterios del FPE contribuyó para fomentar la guerra fiscal.

En el caso de los municipios, la solución adoptada en 1989 para el prorrateo del FPM contrarió el principio que orientó la adopción de la regla original, que atribuía a los municipios de un mismo tamaño poblacional tasas de participación idénticas, sin importar la región o el estado en el que estuvieran situados. Con las nuevas reglas, la participación de los municipios pasó a depender de la dinámica demográfica interna y de las particularidades de cada estado con

relación al modelo de organización del territorio y de distribución geográfica de las respectivas poblaciones.

De un lado, por tanto, la "torta" a repartir con municipios situados en estados que ganaron población encogió, ya que éstos continúan compartiendo un monto definido con base en el número de habitantes que tenían hace veinte años, mientras que lo opuesto sucede en el caso de municipios situados en estados que perdieron población[12].

4. El federalismo fiscal y el combate a la desigualdad regional e interregional

Otro problema grave que nuestro federalismo busca enfrentar es la desigualdad, uno de los mayores obstáculos enfrentados en el mundo contemporáneo. Estudios de la OXFAM[13] (2017) apuntan que en 2015, apenas 62 individuos ostentaban la misma riqueza que 3,6 mil millones de personas –la mitad más afectada por la pobreza en la humanidad.

Los contrastes sociales personifican privaciones graves a la libertad, a la vida y a otros derechos fundamentales, individuales y sociales. No fue otra sino ésta la razón por la cual el artículo 3º de la Constitución Federal de 1988, III, propugna la disminución de las desigualdades regionales como uno de los objetivos fundamentales de la República.

A partir de las contribuciones de Amartya Sen y Mahbub Ul Haq, en las Naciones Unidas, pasamos a medir el desarrollo con varios criterios hasta llegar al IDH y al IDHAD (Índice de Desarrollo Humano Ajustado a la Desigualdad).

La posición relativa de Brasil en el *ranking* mundial cayó del 63º en 2005 al 79º puesto en 2017, evidenciando que el país no ha acompañado de forma proporcional la expansión del desarrollo humano en el mundo.

12 REZENDE, Fernando. "Federalismo fiscal – em busca de um novo modelo". Op. Cit., pág. 77.

13 Oxfam. Brasil. La distancia que nos une: un retrato de las desigualdades Brasileñas [en línea]. 24 Septiembre 2017. [Fecha de consulta: 26 de febrero de 2020]. Disponible en: https://www.oxfam.org/es/informes/la-distancia-que-nos-une-un-retrato-de-las-desigualdades-brasilenas.

Oxfam. Brasil. Uma economia para los 1%". [en línea]. 18 DE ENERO DE 2016. [Fecha de consulta: 26 de febrero de 2020]. Disponible en: https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp210-economy-one-percent-tax-havens-180116-es_0.pdf

Según Darcy Ramos da Silva Neto y Sybele V. Oliveira[14], el Índice de Desarrollo Humano Ajustado a la Desigualdad (IDHAD) demuestra que Brasil presentó, en 2017, una retracción de 0,759 de IDH a 0,578 tras la verificación del IDHAD, lo que representa una pérdida global de 23,9% en el índice.

A pesar de que los factores responsables de la desigualdad regional en el país no se restringen al ámbito del derecho financiero, ni éste los puede combatir aisladamente, es indudable que la inadecuada distribución de los recursos en el federalismo fiscal brasileño es una importante causa de dicha desigualdad.

En otras palabras, los fondos podrían ser un excelente instrumento de distribución y de redistribución de recursos, disminuyendo, por consiguiente, la desigualdad en Brasil, si considerasen criterios de equidad razonables.

Los especialistas no discrepan sobre este aspecto. Maurício Conti[15] resalta que el Fondo de Participación de los Estados y del Distrito Federal (FPE) y el Fondo de Participación de los Municipios (FPM) son los principales mecanismos del sistema brasileño e importantes instrumentos del federalismo fiscal, como asimismo del mantenimiento del equilibrio financiero entre las unidades que componen la federación.

El federalismo tiene la función de ser un instrumento de equidad interregional.

Sin embargo, los criterios de distribución adoptados no se muestran aptos para considerar las transformaciones que han sucedido a lo largo del tiempo, acarreando perjuicios a la disminución de los desequilibrios en la federación brasileña.

Quiere decir, es preciso que exista un federalismo fiscal que adopte como criterio una amplia descentralización financiera con equidad.

Fernando Facury Scaff enseña sobre el tema:

> En Brasil este tema es muy importante por la extremada desigualdad regional, y de la no menor desigualdad social. Se podría incluso pensar que

14 SILVA NETO, Darcy Ramos da; OLIVEIRA, Sybele V. "Políticas sociais e pobreza no Brasil: desafios en direção ao desenvolvimento humano". *Textos de Economia*. 2017, núm. 20(1), págs.51-71. [Fecha de consulta: 26 de febrero de 2020]. doi: https://doi.org/10.5007/2175-8085.

15 CONTI, Maurício. *Federalismo fiscal e fundos de participação.* São Paulo: Juarez de Oliveira, 2001.

> la dimensión *social y la regional* representan problemas estancos, lo que no es correcto. En Estados ricos, como São Paulo, existen ciudades con un PIB elevado, como en su capital, donde cohabitan favelas al lado de edificios de lujo, y ciudades pobres, pero con buena calidad de vida medida por el IDH. Exactamente por estas asimetrías es que no hay que pensar en *regional* como expresión conectada únicamente con las cinco grandes regiones de Brasil, pues en cada cual existe internamente gran desigualdad. Basta ver que en la Región Amazónica (todavía) existen vastos espacios territoriales de florestas, con reglamento ambiental específico, incluso en el ámbito constitucional (artículo 225, § 4º), pero al mismo tempo coexisten ciudades con problemas urbanos candentes, como tráfico congestionado y criminalidad, como en las dos metrópolis regionales, Manaus y Belém. Esto se repite en todas las cinco grandes regiones del país.

Es exactamente en virtud de este entrelazamiento que la Constitución (artículo 3º, III) establece como uno de los objetivos fundamentales de nuestra sociedad disminuir las desigualdades *sociales y* las *regionales*. *En Brasil* el federalismo ha de ser asimétrico, de manera que pueda haber un tratamiento desigual entre las regiones, así como internamente en ellas, que permita revertir las desigualdades sociales[16].

16 SCAFF, Fernando Facury. "O federalismo sem juízo que predomina no Brasil". *Revista Consultor Jurídico*. São Paulo, 2019, ago., págs.1-8. "No Brasil esse tema é relevantíssimo em razão da extrema desigualdade regional, e da não menor desigualdade social. Pode-se até pensar que a dimensão *social* e a *regional* representam problemas estanques, o que não é correto. Em Estados ricos, como São Paulo, existem cidades com um PIB elevado, como em sua capital, onde convivem favelas ao lado de condomínios de luxo, e cidades pobres, mas com boa qualidade de vida medida pelo IDH. Exatamente por essas assimetrias é que não se deve pensar em *regional* como expressão conectada apenas às cinco grandes regiões do Brasil, pois existe grande desigualdade internamente a cada qual. Basta ver que na Região Amazônica (ainda) existem vastos espaços territoriais de florestas, com regramento ambiental específico, inclusive no âmbito constitucional (artigo 225, § 4º), porém ao mesmo tempo coexistem cidades com problemas urbanos candentes, como congestionamento de trânsito e criminalidade, como nas duas metrópoles regionais, Manaus e Belém. Isso se repete em todas as cinco grandes regiões do país .Exatamente em razão desse entrelaçamento é que a Constituição (artigo 3º, III) estabelece ser um dos objetivos fundamentais

Ya hemos visto que el artículo 3º, III, de la Constitución Federal de 1988 enumera, entre los objetivos fundamentales de la República Federativa del Brasil, la disminución de las desigualdades sociales y regionales.

También el artículo 43 de la Constitución permite la institución de regiones a efectos administrativos y propicia la actuación de la Unión, con la finalidad de disminuir las desigualdades regionales y fomentar el desarrollo.

Asimismo el artículo 165 de la Constitución, en sus §§ 5º y 7º, dispone:

> Art. 165. Leyes de iniciativa del Poder Ejecutivo establecerán:
>
> § 5º La ley presupuestaria anual comprenderá:
>
> I – el presupuesto fiscal correspondiente a los Poderes de la Unión, sus fondos, órganos y entidades de la administración directa e indirecta, inclusive fundaciones instituidas y mantenidas por el poder público;
>
> II – el presupuesto de inversión de las empresas en que la Unión, directa o indirectamente, ostente la mayoría del capital social con derecho a voto;
>
> § 7º – los presupuestos previstos en el § 5º, I y II, de este artículo, compatibilizados con el plano plurianual, tendrán entre sus funciones la de disminuir desigualdades interregionales, según el criterio poblacional.

Así, las leyes presupuestarias y el presupuesto fiscal (incluyéndose los diversos fondos que el mismo contempla) deberán volcarse hacia la disminución de las desigualdades interregionales.

Finalmente, el artículo 170 de la Constitución Federal de 1988, que trata del orden económico, también se ocupa de la disminución de las desigualdades interregionales y sociales, ahora, como principio de obligado cumplimiento:

> Artículo 170. El orden económico, fundado en la valorización del trabajo humano y en la libre iniciativa, tiene como finalidad asegurar a todos una existencia digna, conforme a los dictámenes de la justicia social, observados los siguientes principios:

de nossa sociedade reduzir as desigualdades *sociais* e as *regionais*. No Brasil o federalismo há de ser assimétrico, de modo a permitir que haja tratamento desigual entre as regiões, bem como internamente a elas, visando permitir que as desigualdades sociais sejam revertidas".

I – Soberanía nacional;

II – Propiedad privada;

III – Función social de la propiedad;

IV – Libre competencia;

V – Defensa del consumidor;

VI – Defensa del medio ambiente;

VII – Disminución de las desigualdades regionales y sociales;

VIII – Búsqueda del pleno empleo;

IX – Tratamiento favorecido a las pequeñas empresas brasileñas de capital nacional.

Párrafo único – Se asegura a todos el libre ejercicio de cualquier actividad económica, sin depender de autorización de órganos públicos, salvo en los casos contemplados por la ley.

Se verifica que la disminución de la desigualdad regional asume una gran importancia en la Constitución brasileña. Constituye objetivo de la República y del presupuesto, como foco de la actuación regional de la Unión y principio del orden económico.

Brasil convive con la desigualdad desde su origen. En su obra clásica, Celso Furtado[17] atribuía el subdesarrollo brasileño, entre otros factores, al crecimiento asociado al mantenimiento de una estructura desigual, que implicaba la intensificación de las desigualdades regionales, como sucedió con la industrialización.

El renombrado economista intentaba entender el proceso de subdesarrollo basado en la historia, y no en abstracciones científicas, lo que se puede llamar método histórico-estructural. Así, además de los aspectos meramente económicos, tenía en cuenta las diversas características sociales, ambientales, culturales y políticas del lugar. En este sentido, al tratar sobre el subdesarrollo del Nordeste, por ejemplo, Celso Furtado no atribuye tal condición, simplemente, al clima árido, dando enfoque a la estructura de poder que allí se consolidó.

Las desigualdades regionales se consolidaron en Brasil como resultado de la incompetencia en las planificaciones regionales para el desarrollo efectivo de las

17 FURTADO, Celso. *Formação econômica do Brasil.* 32. ed. São Paulo: Companhia Editora Nacional, 2005.

regiones y la búsqueda de su equilibrio económico, debido a la falta de recursos financieros y por la mala gestión y corrupción en el trato de la cosa pública.

Según Ronald L. Watts[18], hay básicamente dos tipos de desequilibrios financieros en una federación: el vertical y el horizontal.

El vertical sucede cuando los ingresos constitucionalmente atribuidos a los entes no corresponden a las responsabilidades de gastos que constitucionalmente también se les atribuye. Este fenómeno ocurre básicamente por dos motivos. En primer lugar, por una cuestión de eficiencia de asignación de recursos (*eficiencia "alocativa"*). Se prefiere que los mayores poderes para tributar permanezcan con el gobierno federal, más enfocado en el desarrollo de una unión aduanera y de una unión económica, mientras que las responsabilidades más costosas, como salud y educación, permanecen como entes descentralizados.

En segundo lugar, porque no obstante el reparto en la Constitución brasileña, y su correlación con los gastos, con el transcurso del tiempo, tanto la importancia de la recaudación con determinados tributos se modifica, como los costos con gastos varían de manera imprevisible.

Con respecto al desequilibrio horizontal, éste sucede cuando las capacidades de recaudación de las unidades varían de modo que ya no son capaces de suministrar al ciudadano servicios del mism o nivel comparados con los niveles tributarios. Distintos factores como la diferencia entre las unidades en términos sociodemográficos, dispersión de la población, urbanización, composición social y edad afectan los costos para la oferta de los servicios, sumado a los factores físicos y económicos de la región y a la propia estructura administrativa.

La relativa fragilidad financiera de los estados brasileños contrasta con lo que sucede en Alemania, considerada la federación "ideal" desde el punto de vista de la distribución del ingreso público

En dicho país, el gobierno federal y los estatales administran porciones semejantes de recursos. Pero lo más importante es el sofisticado mecanismo de ecualización horizontal. El principio que rige dicho mecanismo es el de que los gobiernos subnacionales tienen capacidades desiguales de recaudación, y por lo tanto, de provisión de servicios. Estas capacidades desiguales están fuera de

18 WATTS, L. Ronald. *Comparing federal systems.* 4. ed. Institute of Intergovernmental Relations. Canadá: Kingston, 2009.

su control, y por ello, territorios con menores capacidades de recaudación son compensados vertical y horizontalmente.

En Brasil la ecualización todavía es muy tímida[19].

Además, en la Constitución Federal de 1988 hay un desequilibrio entre la división de competencias político-administrativas y la división de competencias tributarias. La Unión es el ente federativo con más competencias impositivas y mayor representación en el total de la recaudación.

Datos del año 2017 revelan que la Unión fue responsable del 68,02% del total recaudado, mientras que los estados y los municipios, respectivamente, del 25,72% y 6,26%; y además, del 32,43% del PIB que corresponde al total del ingreso impositivo, un 22,06% corresponde a tributos federales[20].

Esta división de competencias tributarias no logra asegurar la suficiencia de recursos para todos los entes, lo que afecta su autonomía financiera. Ello sucede también porque los criterios de dicha división consideran la eficiencia de asignación de recursos y no la cantidad de recursos recaudados tras el ejercicio de la competencia.

El desequilibrio vertical acarrea la deficiencia de la prestación de los servicios públicos e impide el desarrollo de los estados y de los municipios, lo que tiende a agravar la desigualdad regional ya sedimentada.

En Brasil, los principales mecanismos para organizar el Estado y mantener la autonomía financiera de los entes son la distribución de las fuentes de ingresos y el reparto del producto de la recaudación.

Tenemos aquí un sistema mixto, o sea, se conjugan los dos mecanismos. Los entes cuentan no sólo con tributos *exclusivos*, sino también con recursos oriundos de la *participación en la recaudación de otros entes*[21].

19 SOUZA, Celina. "Para entender a nossa barafunda federativa". Op.cit., págs.61.

20 Brasil. Tribunal de Contas da Uniao. Transferencias governamentais contitucianais. Brasília: TCU, Secretaria de Macroavaliacao Governamental, 2008. [Fecha de consulta: 26 de febrero de 2020].Disponible en: https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A8182A24D6E86A4014D72AC815C53B0&inline=1. MINISTÉRIO DA FAZENDA DO BRASIL. [Fecha de consulta: 26 de febrero de 2020].Disponible en: https://www.tesourotransparente.gov.br/consultas/transferencias-constitucionais-realizadas. Acesso em: 30 dez. 2019.

21 Las competencias tributarias se reparten a cada ente federado. En Brasil, por ejemplo, vemos, en el ámbito de los impuestos, la atribución de la Unión de los impuestos sobre el comercio exterior, IPI, IR, IOF, etc.;

No viene al caso detenernos en minucias sobre cómo se opera la participación en el producto de la recaudación, basta señalar que la Unión ejerce un federalismo cooperativo y solidario redistribuyendo los recursos financieros, cooperando para disminuir las asimetrías, combatiendo, así, la desigualdad interregional[22].

Los fondos de participación existen en Brasil desde la Constitución de 1946. Durante más de 20 años, la distribución del Fondo de Participación de los Estados se realizó conforme a la Ley Complementar n. 62/1989, destinándose el 85% del fondo a las unidades de la federación integrantes de las regiones Norte, Nordeste y Centro-Oeste, y el 15% a aquellas integrantes de las regiones Sur y Sudeste.

Hecha esta primera división, se debería observar los artículos 88, 89 y 90 del Código Tributario Nacional. Sin embargo, los coeficientes individuales pasaban a ser los fijados en el anexo de la Ley Complementar n. 62/1989.

Esta situación comenzó a generar discusiones e insatisfacciones por parte de los estados, en la medida en que usar coeficientes fijos para el reparto significa congelar en el tiempo la evaluación de las desigualdades.

Y, exactamente por ese motivo, los gobernadores de varios estados brasileños promovieron diferentes acciones de inconstitucionalidad ante el Supremo Tribunal Federal. Los argumentos centrales esgrimidos eran los siguientes: a) desobediencia al artículo 161, II, de la Constitución Federal, derivado de la fijación de criterios arbitrarios, que no reflejan las condiciones socioeconómicas, y

los estados se quedan con el ICMS, el ITCMD y el IPVA; y los municipios con el IPTU, ITBI y ISS. Brasil, como en otros países, dispone de un amplio y complejo sistema de transferencias llamadas "voluntarias". Son recursos a disposición principalmente de la Unión, y también, en menor proporción, de los estados y municipios, que se pueden entregar a otros entes federados, siguiendo criterios de conveniencia y oportunidad, vinculados a programas gubernamentales específicos.

22 Los que quieran profundizar sobre el tema, pueden consultar los artículos 153, § 4º, III; 157, 153, § 5º, 159, incisos y demás disposiciones del mismo artículo, especialmente el apartado II, todos de la Constitución brasileña. En Estados Unidos, según enseña Antonio María Hernández: "The states perceive taxes (approximately 50% of their revenues) from a share of sales taxes (less than 50%), property taxes (approx. 2%) and individual income taxes (approx 35%). In addition, states receive grants from the federal government for about 30% of their revenues".

por tanto, no atienden al ideal redistributivo; b) debería haber una ley específica, como exige el artículo 2º, § 2º de la Ley Complementar n. 62/1989.

El Supremo Tribunal Federal juzgó las demandas en conjunto, dando como resultado la declaración de inconstitucionalidad, sin pronunciamiento de nulidad, del artículo 2º, I y II, §§ 1º, 2º y 3º, y del Anexo Único, de la Ley Complementar n. 62/1989, asegurada su aplicación hasta el 31 de diciembre de 2012.

La decisión del Supremo Tribunal Federal fue importante porque reconoce que hubo omisión en los criterios de distribución del Fondo de Participación, fijándose únicamente el prorrateo en una tabla rígida, que ignora alteraciones y diferencias entre los estados, y no permite el reequilibrio de las finanzas y de las condiciones de gobernabilidad entre sus gobiernos[23].

Finalmente fue editada la Ley Complementar n. 143/2013, pero, al contrario de lo que se imaginaba, no se resolvió el problema. Y ello porque los antiguos coeficientes individuales fijos quedaron en cierto modo preservados, en la medida en que componen el monto corregido. Así, los criterios de población y renta *per capita* tendrán una actuación mínima, a saber, sobre la porción de diferencia entre el monto corregido y el distribuido.

De esta manera, el dinamismo del nuevo fondo parece muy estrecho. Incluso por este motivo el Estado de Alagoas promovió una nueva acción de inconstitucionalidad cuya materia aún no ha sido juzgada.

Finalmente, con respecto al Fondo de Participación de los Municipios (FPM), hay varios problemas hoy en Brasil que impiden la disminución de las desigualdades regionales e interregionales.

Los especialistas afirman que los criterios de distribución son inadequados. Por ejemplo, el criterio población pone esto en evidencia, principalmente cuando se tiene en cuenta la dinámica del FPM. Basta pensar en el fenómeno de las ciudades-dormitorio, que cuentan con gran población, pero abrigan personas, por lo general, de baja renta. Estas ciudades son descuidadas por el sistema de distribución.

Mientras el FPM Capital y la Reserva del FPM benefician a los municipios con más población y menos renta, el FPM Interior –al que se destina el 86,4%

23 ROCHA, Alexandre C. "O FPM é constitucional?". *Textos para discussão n. 124.* Núcleo de Estudos e Pesquisas do Senado Federal. Consultoria Legislativa, mar. 2013.

del FPM– privilegia los municipios pequeños, menos populosos, partiendo de la suposición de que cuanto más chico, más pobre es el municipio. Sucede que esta suposición está equivocada, pues hay municipios pequeños, pero ricos.

El reparto del FPM acabó fomentando la creación de municipios que no tienen siquiera la capacidad de realizar servicios públicos financiados por sus propios ingresos. Ello ha sucedido después de la Constitución Federal de 1988, con el aumento de los repartos municipales, junto con la ausencia de revisión de la fórmula de distribución de los recursos, la cual favorece regiones con índices de población más bajos, lo que estimula la creación desordenada de municipios.

Al privilegiar municipios pequeños, el FPM minimiza su capacidad de disminuir las desigualdades regionales, puesto que los municipios menos desarrollados no son alcanzados. Es muy baja la correlación entre el tamaño de la población y el Índice de Desarrollo Humano (IDH) del municipio, de modo que, aunque los de bajo IDH sean, mayoritariamente, los menos populosos, hay muchos de alto IDH y pequeña población, que paradojalmente perciben un monto elevado de recursos del FPM.

Finalmente, se llega a la conclusión de que el FPE y el FPM, en la forma como están estructurados actualmente, no son capaces de redistribuir los recursos a las regiones que, de hecho, necesitan de dichos recursos. Con ello, las pretendidas ecualización y disminución de las desigualdades regionales no son atendidas. Incluso resultan acentuadas, en la medida en que los recursos, muchas veces, favorecen regiones que ya están más desarrolladas que otras.

Por eso mismo estamos de acuerdo con Isabella Remaili Monaco, que en precioso trabajo monográfico presentado en la Facultad de Derecho de la Universidad de São Paulo, bajo la orientación del Prof. José Maurício Conti, afirma:

> Cada país encontrará em um mecanismo melhores resultados. No Canadá, por exemplo, os esforços para corrigir as disparidades horizontais se dão por meio do ajuste das diferenças entre as capacidades de receita das províncias. Já na Austrália, há grande preocupação em equalizar os desequilíbrios relacionados às despesas.
>
> Cada país encontrará en un mecanismo mejores resultados. En Canadá, por ejemplo, los esfuerzos para corregir las disparidades horizontales se manifiestan por medio del ajuste de las diferencias entre las capacidades

de ingresos de las provincias. Ya en Australia, hay gran preocupación en ecualizar los desequilibrios relacionados con los gastos[24].

Isabella Remaili Monaco menciona aún el sistema italiano[25] como un modelo que debe ser estudiado, teniendo en vista la creación del llamado *fondo perecuativo*, instrumento apto para redistribuir los recursos por medio de fondos, objetivando poner en práctica un federalismo fiscal solidario.

Fernando Rezende[26] también defiende un régimen de ecualización fiscal que venga en una reforma tributaria global con miras a lograr la equiparación del presupuesto de cada ente federado a la dimensión de las responsabilidades que tienen a su cargo los gobiernos de cada unidad que compone la federación.

Los casos más conocidos se refieren a los modelos adoptados en Alemania y en Canadá, donde los repartos intergubernamentales de recursos buscan disminuir las diferencias en los ingresos presupuestarios *per capita de los* gobiernos estatales. Una alternativa más ambiciosa es la que adopta Australia, en la que el régimen de ecualización adiciona elementos que buscan no sólo ecualizar los ingresos *per capita*, sino también ajustar la capacidad presupuestaria de las provincias a las diferencias cuanto a las necesidades y al costo de provisión de los servicios que demandan las respectivas populaciones.

5. Conclusiones

Siempre se ha dicho que Brasil, por sus condiciones geográficas y continentales, tendría una vocación histórica hacia el federalismo. Sin embargo, el federalismo fue implantado de la noche a la mañana sin que mediara la más mínima discusión pública sobre la conveniencia en adoptarlo.

La colonización portuguesa, al igual que la española, divergen bastante de la colonización inglesa, pues ésta siempre se ha propuesto probar el *self-govern-*

24 MONACO, Isabella Remaili. *Federalismo fiscal e desigualdade*. São Paulo, Faculdade de Direito: Universidade de São Paulo (USP), 2019.

25 Aunque Italia no sea un Estado Federal, sino regional, es bastante avanzada en términos de redistribución de recursos entre las regiones.

26 REZENDE, Fernando. "Federalismo fiscal e gestão pública". Op. cit., pág. 222.

ment, con un grado relativo de autonomía política en sus colonias, habituándolas, desde el comienzo, a la práctica del gobierno representativo, mientras que la colonización lusitana se estructuraba sobre la base de la simple descentralización administrativa, de autonomía administrativa y no política.

La federación brasileña es un sistema de tres niveles. Unión, Estados y Municipios son los integrantes de la federación, reflejando una larga tradición de autonomía municipal y de escaso control histórico de los estados sobre las cuestiones locales.

Tiene razón Celina Souza al enseñar que nuestra opción por el sistema federativo parece obedecer a la necesidad de acomodar demandas estatales y regionales conflictivas por recursos financieros en un país que nació y ha crecido con base en la desigualdad tributaria entre sus unidades constitutivas, en particular entre estados y municipios.

Todas las federaciones tienen el don de restringir el poder central, debido a la doble o triple autonomía –del gobierno federal y de los gobiernos regionales y locales. Hay, sin embargo, gran variación entre las federaciones en lo que respecta a la extensión de la autoridad del gobierno central.

Para comprender el federalismo fiscal en Brasil es preciso retroceder en el tiempo. Brasil adoptó el régimen federativo en 1889, pero el diseño de un régimen de federalismo fiscal sólo fue elaborado en 1963, por una comisión de especialistas instalada en la Fundação Getúlio Vargas (FGV), con la misión que le había sido delegada por el Ministerio de Hacienda (MF) de presentar una propuesta para una amplia reforma tributaria en el país.

Como informa Fernando Rezende, el diseño de dicho modelo buscaba combinar cuatro objetivos principales: eliminar la multiplicidad de imposiciones tributarias sobre una misma base económica; instituir un régimen de distribución destinado a atenuar las disparidades en el reparto territorial de los ingresos públicos derivados de la concentración de la actividad productiva; promover la cooperación en la ejecución de una política de inversiones en la infraestructura y reforzar los instrumentos financieros tendientes a disminuir las disparidades regionales. En suma, esta propuesta erigía una plataforma fiscal.

El pilar que sostenía el modelo de federalismo fiscal que emergió de dicho modelo era representado por dos fondos criados para repartir los ingresos de los principales impuestos de competencia de la Unión a los estados y municipios:

el Fondo de Participación de los Estados (FPE) y el Fondo de Participación de los Municipios (FPM).

En verdad, la distribución de competencias adoptada por la Constitución de 1988 resultó de la combinación de la técnica inherente al federalismo dual que se mantuvo en Brasil hasta la promulgación de la Enmienda Constitucional de 1926 y la adopción del federalismo cooperativo.

Brasil adoptó un modelo de federalismo simétrico en una federación asimétrica.

El Supremo Tribunal Federal viene decidiendo sistemáticamente que las Constituciones y las Leyes estatales reflejen los dispositivos federales o que son monopolios federales lo que no contribuye al fortalecimiento de competencias y autonomías estatales.

El equilibrio federativo no se resume al reparto de la "torta" tributaria entre los entes federativos, el que, además, debe ser revisado periódicamente para acompañar los cambios en la distribución de responsabilidades.

Tan importante como corregir los desequilibrios verticales es corregir los desequilibrios que resultan en función de la manera como se distribuye en el territorio la actividad productiva moderna, generadora de renta y empleo –los llamados desequilibrios horizontales.

Nuestro federalismo debe enfrentar la llaga de la desigualdad. La desigualdad es uno de los grandes problemas contemporáneos, sobre todo en los estados-periféricos. La inadecuada distribución de recursos en el federalismo fiscal brasileño es una importante causa de desigualdad.

En realidad, estamos lejos de tener un modelo justo de federalismo fiscal. Como destaca Fernando Rezende, lo que tenemos son sucesivos cambios operados a lo largo de los últimos 40 años que han causado enormes desequilibrios en el reparto de los recursos fiscales.

El Fondo de Participación de los Estados y el Fondo de Participación de los Municipios son los principales instrumentos o mecanismos del sistema brasileño para la práctica de la redistribución de recursos.

El federalismo tiene como función la de ser un instrumento de equidad interregional y la disminución de la desigualdad regional asume gran importancia en la Constitución brasileña.

Las desigualdades regionales se han consolidado en Brasil como resultado

de la incompetencia en las planificaciones regionales para el desarrollo efectivo de las regiones y buscar su equilibrio económico, por falta de recursos financieros y en virtud de la mala gestión en el trato de la cosa pública.

La Unión fue responsable del 68,02% del total recaudado en 2017, mientras que los estados y los municipios, respectivamente, del 25,72% y el 6,26%. Además, del 32,43% del PIB que corresponde al total del ingreso tributario, un 22,06% corresponde a los tributos federales.

La Unión procura ejercer, con defectos y anomias, un federalismo cooperativo y solidario, redistribuyendo los recursos financieros, cooperando para la disminución de las asimetrías, y combatiendo la desigualdad interregional.

Queda, sin embargo, un largo camino por recorrer para que logremos un federalismo fiscal en Brasil, con criterios claros, democráticos y transparentes de distribución de los recursos fiscales entre las unidades de la federación.

Actualmente, las transferencias voluntarias, más que instrumentos de perfeccionamiento del federalismo fiscal cooperativo, se han transformado en armas de destrucción de la autonomía financiera, y por ende, del federalismo brasileño, subordinando municipios y estados a la voluntad de la Unión.

La utilización de coeficientes fijos para el reparto ha significado congelar en el tiempo los recursos y perpetuar la evaluación de las desigualdades. Por ello, se han promovido varias acciones de inconstitucionalidad ante el Supremo Tribunal Federal.

El Supremo Tribunal Federal ha reconocido que el criterio de distribución de los Fondos ignora las diferencias entre los Estados y no permite reequilibrar las finanzas públicas y el desarrollo deseado.

Ya es a hora de una reforma tributaria y fiscal amplia, que busque equiparar el presupuesto de cada ente federado a la dimensión de las responsabilidades de cada unidad componente de la federación.

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Reseñas bibliográficas

Discursos de los gobernadores de Mendoza: un balance de la política y democracia provincial

Bustelo, Gastón

Mendoza.
Legislatura de Mendoza, 2019.

El libro de Gastón Bustelo (editado por la Legislatura de Mendoza) constituye una excelente oportunidad para reflexionar sobre el desempeño del gobierno republicano y representativo provincial. La vía seleccionada, los mensajes de los gobernadores a la Asamblea Legislativa desde la recuperación de la democracia a la actualidad, constituye un mirador o laboratorio de primer orden para desmenuzar claves y problemáticas de la agenda pública provincial, nacional y global.

La empresa intelectual realizada reúne un doble carácter; el olfato del periodista que mide e interpreta la urgencia de la coyuntura, y la aspiración de colocar ese difícil y vertiginoso oficio en una historia más larga que vertebra el funcionamiento democrático mediante las voces de quienes ejercieron la primera magistratura provincial. Un conjunto de voces que por las características de nuestra cultura política y constitucional no se replican ni siquiera por interregnos, en cuanto expresan el crucial papel de la alternancia en el ejercicio del cargo de gobernador a raíz de la restricción constitucional vigente desde mucho antes de 1916. Un rasgo que puesto en perspectiva comparativa con otras provincias argentinas se revela como distintivo de la cultura institucional mendocina, y que ha sobrevivido como principal contrapeso para evitar aquello que los padres fundadores del constitucionalismo provincial se propusieron erradicar: limitar por vías normativas e institucionales la formación de liderazgos personalistas o "caudillescos" con el fin de propender el fortalecimiento del gobierno republicano

y representativo basado en el principio rector de la política moderna inaugurado por las revoluciones atlánticas de finales del siglo XVIII y las primeras décadas del siglo XIX: la soberanía popular.

Esa fue la tónica de la primera constitución de 1854, bosquejada por la pluma de Juan Bautista Alberdi, recogida por la carta provincial de 1895 y vuelta a ratificar en la constitución de 1916 que sumó la prohibición de que los gobernadores pudieran saltar al Senado nacional una vez concluido su mandato. Un requisito diseñado con el firme propósito de restringir la poderosa influencia que podían llegar a alcanzar en ese recinto, y limitar la formación de círculos de poder estrechos que los políticos y publicistas enrolados en vertientes regeneracionistas definieron con el nombre o vocablo de larga tradición: la oligarquía.

Vale recordar que se trató de un fenómeno no sólo argentino o latinoamericano en tanto alentaba el debate que dio origen a complejos teórico-políticos de amplia gravitación en las ciencias sociales que tuvo como norte surtir de conceptos y herramientas para entender y corregir las desviaciones prácticas de los regímenes representativos liberales. Así, mientras que en 1915, el tembladeral abierto con la primera guerra mundial ponía en escena el influyente ensayo mediante el cual Robert Michels ofrecía evidencias e interpretaciones sobre el accionar de los partidos políticos en la oligarquización del poder y la política, el debate público en la provincia y en el país había gravitado en la reforma electoral que dotó de mayor legitimidad el régimen político, y señalaba con particular agudeza la creciente incidencia del poder presidencial y de los gobernadores en el entramado del sistema federal argentino.

El esfuerzo heurístico e intelectual realizado por Gastón Bustelo nos enfrenta a esa tradición. Porque al seleccionar los mensajes de los gobernadores a la Asamblea Legislativa, esto es, la sesión conjunta de ambas cámaras que recibe el juramento del gobernador y se convierte en el principal receptor de los mensajes anuales que dirige al cuerpo representativo, se ha propuesto reunir e interpretar la interacción entre el Poder Ejecutivo Provincial y el Poder Legislativo, y ponderar a lo largo de tres décadas el catálogo de problemas estructurales que vertebran el sistema político provincial. Su lectura ofrece numerosos vectores intermedios de suma eficacia para trazar genealogías, y reflexionar sobre el suelo común de concepciones políticas, señalar contrastes e identificar el ramillete de políticas públicas que encabezó la agenda gubernamental más allá de las ex-

tracciones partidarias que las impulsaron o implementaron. Ese catálogo ilustra continuidades y deslizamientos de la agenda gubernamental que incluye, entre otros temas de interés, la siempre vigente invocación a diversificar la matriz productiva, y la no menos regular intención de reformar la constitución provincial. Así también, esa agenda documenta las concepciones e instrumentos que pusieron en el centro del debate la reforma del Estado, la ola de privatizaciones que se disparó con GIOL y alcanzó las empresas públicas y bancos provinciales, y la gravitante prioridad que adquirió la problemática del trabajo formal e informal, el desempleo y el rol que adquirió la descentralización administrativa y territorial en la gestión de la pobreza estructural; un fenómeno que se hace patente en el discurso político junto al creciente papel que ocupó la problemática de la mujer en el organigrama oficial y en instrumentos o programas de gobierno; una agenda gubernamental en la que la educación pública y el ciclo de iniciativas de la era democrática generalmente resultan poco satisfactorias para mejorar la calidad de la enseñanza en las aulas mendocinas.

En la introducción, el autor y compilador de los mensajes de gobernadores, explicita los supuestos que lo condujeron a reposar su mirada en el denso corpus de discursos gubernamentales. Mediante esa reunión no sólo pretende recuperar el discurso político como artefacto central del ejercicio ciudadano; también propone restablecer y jerarquizar el plano institucional de la deliberación y de la representación política de cara a la revolución tecnológica que ha multiplicado las formas de comunicación y de formación de la opinión pública en las sociedades latinoamericanas y mundiales contemporáneas. En una reflexión reciente, Natalio Botana subrayó esas implicancias en la gestión de las democracias republicanas y recomendó reflexionar sobre su impacto en los canales de representación política. En el escenario actual de la región, el problema que vertebra el vínculo entre gobernantes y gobernados es más que evidente en tanto se ha hecho patente la desconexión entre los estados y las clases dirigentes ante las demandas y expansión de derechos ciudadanos.

Por tal motivo, la lectura de los discursos de los gobernadores del pasado reciente mendocino resulta doblemente estimulante al constituir un fecundo testimonio de memoria política e institucional, y porque permite trazar un balance sobre las conquistas y límites de la política y de la democracia en la escala del poder provincial. Un balance, en definitiva, que brinda la oportunidad de

promover el debate público, y evocar algo que aprendimos de Bobbio y de otros tantos especialistas de la historia política argentina contemporánea en torno a los valores y promesas incumplidas de nuestra democracia.

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Recibido: 17/12/2019 – Aceptado: 21/02/2019

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Kelsen versus Schmitt. Política y derecho en la crisis del constitucionalismo

Josu de Miguel Bárcena y Javier Tajadura Tejada

Madrid, Guillermo Escolar Editor. 2ª edición.
Año 2019. 301 páginas.

El término "crisis" ha representado, a partir de la explosión financiera de 2008, un malestar colectivo e insatisfacción generalizada hacia la democracia constitucional. Esta es una de las afirmaciones que introducen el libro de Josu de Miguel Bárcena y Javier Tajadura Tejada, autores españoles que ponen sobre la mesa el conflicto intelectual que sostuvieran Hans Kelsen y Carl Schmitt en un contexto convulsionado y con bastantes analogías con esta primera parte de nuestro siglo (p. 11).

El trabajo tiene como finalidad redescubrir a estos teóricos del derecho constitucional. El libro va explicando de forma general las distintas posturas y diferencias que tuvieron los autores respecto a ciertas posiciones jurídicas y políticas, profundizando las más importantes.

En el primer capítulo, titulado "Dos vidas que se cruzan (en Colonia)", se halla una reseña biográfica de ambos intelectuales y su breve pero trascendental contacto. Sin embargo, no todo fue diferencia: ambos pertenecieron a sus respectivos ejércitos desempeñando tareas administrativas durante la I Guerra Mundial y estuvieron cerca de los mecanismos de poder en momentos cruciales de la historia constitucional. Fueron "dos temperamentos opuestos que en ocasiones parecerían determinar su actitud final ante el derecho y el poder" (p. 21).

En cuanto a Hans Kelsen (1881–1973), los autores, además de hacernos un resumen de su vida y sus influencias intelectuales, nos muestran una faceta realista y poco conocida del mismo. Su crítica al iusnaturalismo consistía en

que el problema eterno del derecho natural era descubrir lo que hay detrás del derecho positivo, y "quien busque la respuesta, hallará, me temo, no la absoluta verdad de una metafísica […]. Quien levante el velo y no cierre los ojos se encontrará de frente a la cabeza de la Gorgona del Poder". Respecto a Carl Schmitt (1888–1985), los autores lo consideran como un "aventurero intelectual" y un "teórico de la crisis". Además, nos alertan de antemano que este trabajo no busca resolver su relación con el régimen nazi ni su antisemitismo. Es un jurista que se señala a sí mismo el último representante del Ius publicum Europaeum y afectado profundamente por los hechos históricos contemporáneos que le tocó vivir. Lo cual "obviamente le llevan a formular un derecho y un pensamiento sometidos a los cambios y las contingencias de la realidad" (p. 50).

Al final del capítulo, los autores mencionan lo que fue el affaire de Colonia: en mayo de 1932 Kelsen, junto con el resto de colegas de la Facultad de Derecho de la Universidad de Colonia, votó por unanimidad invitar a Schmitt a cubrir la Cátedra de Derecho Político. Pocos días después se produciría el arbitrario cese académico de Kelsen. Por unanimidad solo rota por Schmitt, el resto del profesorado se opuso a dicha medid. Ante esto, "Schmitt no solo se negó a apoyar la petición, sino que, en sus clases e intervenciones apoyó el nuevo contexto político" (p. 73).

El segundo capítulo, titulado "Ideas y conceptos para una conversación jurídica" nos da las pinceladas básicas sobre los contornos de la controversia jurídica que mantuvieron Kelsen y Schmitt. En cuanto a las similitudes intelectuales, hay que aclarar que fueron dos hombres modernos que formaron parte de la tradición de pensamiento que, una vez terminada la cristiandad, se plantea la necesidad de superar la polis aristotélica a partir del siglo XVI (p. 75). A su vez, ambos son racionalistas hobbesianos. Sin embargo, aquí comienzan las diferencias. Mientras que Kelsen va a ver un apoyo a su relativismo moral en Hobbes, Schmitt lo utilizará para desacreditar el positivismo jurídico de Kelsen. Las mismas divergencias ideológicas surgirán en cuanto a sus posicionamientos respecto a la Ilustración. Kelsen es un kantiano que tiene como premisa básica el individualismo metodológico (p. 77), mientras que Schmitt considera al romanticismo político como una degeneración de la modernidad, debido a que tal movimiento, que culmina en 1789 con la Revolución Francesa, consagrará al individualismo en el centro de la política (p. 78).

Otro de los desacuerdos fundamentales fue la cuestión de la soberanía. Kelsen pretendió atribuirle soberanía al ordenamiento jurídico; mientras que Schmitt entendió, con aquella frase conocida y lapidaria, que el soberano es el que decide en el estado de excepción (p. 82). A su vez, en este capítulo también explican, de manera sintetizada, las discrepancias en torno a la teoría de la norma y la consecución de la unidad jurídica. Prácticamente, Kelsen le dará prioridad a la normalidad jurídica, mientras que Schmitt volcará todo su interés en lo irregular es decir, en todas aquellas situaciones que el escenario institucional no puede desenvolverse con normalidad.

El tercer capítulo nos introduce en la relación entre Estado y Constitución. Para Kelsen, la función política de la Constitución es poner límites al ejercicio del poder, identificando el Estado con el ordenamiento jurídico (p. 114). También afirmará que "carecerá de soberanía aquella comunidad cuyo ordenamiento está situado bajo otro superior y encuentra en este su razón de vigencia" (p. 121), postura que repercutirá en su posicionamiento en cuanto al derecho internacional, que consideraba superior al nacional, ya que, para él, solamente un Estado mundial podría resolver el problema de la guerra entre las naciones. En cuanto al contenido, Kelsen tomó cierta distancia hacia una amplia constitucionalización a fin de preservar la legitimidad: "si los contenidos de una Constitución no pueden ser garantizadas en términos jurisdiccionales, su validez quedaría en entredicho como consecuencia de su ineficacia" (p. 129). Asimismo, fue crítico de la inclusión de cláusulas generales debido a que, a causa de que el Tribunal Constitucional debiera ser el intérprete, podía darle más poder del que correspondía, obligándolo a transformarse en legislador positivo cuando su función era ser legislador negativo.

Para Schmitt, el Estado es un medio para la creación del derecho y no debía haber límites jurídicos a la actuación estatal, sino medios institucionales para que el derecho permanezca. Los autores afirman que es un error pensar que a Schmitt no le interesóla normalidad, sino que "él es consciente de que dicho Estado está condenado a la inestabilidad como consecuencia de las transformaciones históricas" (p. 140), por lo que hay que pensar el derecho en términos no–normativistas. La Constitución vendría a ser el alma del Estado y lo fundamental de la misma es que permita al Estado afirmarse, no debilitarse mediante limitaciones inoportunas. La pretensión de someter al poder público

a un control práctico calculable, a través de normas fijadas en una Constitución soberana "le parece un intento de eliminar de la ecuación constitucional la noción de política, absolutamente necesaria para abordar las situaciones imprevistas en el ejercicio del poder" (p. 157). Asimismo, Schmitt introduce el concepto de "garantías institucionales", para diferenciarlo de los derechos fundamentales y poder construir una forma de pensar la libertad distinta a la propuesta por el liberalismo burgués.

El cuarto capítulo se titula "La democracia: dos alegatos". Los autores dirán que Kelsen se convierte en un defensor de la democracia representativa y parlamentaria; mientras que Schmitt, en su pretensión contrarrevolucionaria, transitará de un modelo de democracia de identidad hacia un modelo de democracia aclamativa. El primero considerará la libertad como el valor supremo; lo que lo llevó a postular un relativismo ético que no podía encontrar un punto intermedio con el absolutismo ético. El sujeto con competencia para decidir lo hace por mayoría para cerrar el debate parlamentario, evitando así un estado de indeterminación de manera perpetua. Sin embargo, en su defensa al parlamentarismo, no pretenderá excluir al pueblo de la toma de decisiones: por esta razón consideró necesario que se introdujeran mecanismos de participación directa como el referéndum constitucional. Este relativismo, que conlleva el Estado de Partidos, el principio de la tolerancia y la protección de las minorías, podría conducir a que la democracia fuera aniquilada por sus propios medios, por lo cual afirman los autores que "prefirió dar cierto pábulo a la posibilidad del suicidio democrático antes que renunciar al fundamento relativista de la democracia" (p. 186).

En cuanto a Schmitt, se lo caracteriza como un combatiente del pluralismo estatal. Para éste, el modelo liberal fue inadecuado para resistir el desorden político. Una democracia aplicada con todas las consecuencias llevaría a un presidencialismo autoritario, superador del modelo discutidor. Introduciéndonos en el concepto schmittiano de lo político, los autores prácticamente lo resumen en tres postulados: capacidad para distinguir amigo y enemigo, capacidad de la comunidad de decidir el caso decisivo y principio de dirección gubernativa que unifica las distintas esferas que conforman la realidad. Para el autor alemán, el liberalismo niega el Estado en tanto encarnación de lo político. La lógica contractual privada de compromisos e intereses no puede trasladarse a lo estatal y,

para alcanzar la verdadera representación política, Schmitt sostendrá que hay que desprenderse de los conceptos iusprivatistas que se aplican a lo político (p. 195). Por eso atacó al parlamentarismo acusándolo de ser algo distinto a la democracia. En las discusiones parlamentarias habrá transacción de intereses, no discusión racional, basadas en las pretensiones partidistas que "se guían por un impulso totalizador del Estado y quieren imponer un programa que discipline por completo la vida de los hombres desde la perspectiva económica, cultural o moral" (p. 203).

El quinto capítulo nos introduce en la polémica más conocida que tuvieron Kelsen y Schmitt, por eso se llama "La defensa de la Constitución: teoría y praxis". Prácticamente los modelos propuestos por ambos fueron consecuencia directa de su modelo de democracia. Kelsen buscó defender la legalidad constitucional con métodos jurídicos: si la anulabilidad de los actos inconstitucionales no estaba garantizada por la vía jurisdiccional, tampoco estaba garantizada la Constitución. Schmitt reaccionó contra esta postura afirmando que ningún Tribunal podía actuar como defensor de la Constitución, ya que destruía la base orgánica de la misma: la división de poderes. Más allá de que Schmitt plantea un problema real, cual es que un Tribunal Constitucional podría convertirse en legislador, los autores lo critican por plantear una ficción aún mayor: que el Jefe de Estado sea el defensor de aquella, convirtiéndose en un líder neutral y por encima de los partidos políticos.

Por último, en un muy interesante epílogo, los autores harán una lectura de ambos juristas a la luz del derecho contemporáneo. No hay dudas que Kelsen y Schmitt están destinados a ser clásicos del derecho constitucional. Claramente después de la Segunda Guerra Mundial Europa tomó conciencia del límite al que tenían que ser regulados los poderes públicos y privados, tomando como base el proyecto de Kelsen, en cuanto al normativismo constitucional, el control jurisdiccional y el cosmopolitismo jurídico. Sin embargo, los autores afirman que Schmitt no se ha quedado atrás: las Constituciones han regulado mecanismos de defensa frente a aquellos partidos que tiendan a destruir el régimen vigente y han articulado ciertas cláusulas de intangibilidad a los derechos fundamentales, debilitando el relativismo ético kelseniano.

Sin embargo, llaman la atención en cuanto a los problemas constitucionales que estamos viviendo, a raíz de que la libertad está cada vez más alejada del

principio de responsabilidad. Afirman que "los derechos ya no juegan el papel de guía y legitimación de la comunidad política en el sentido pensado por Schmitt, sino que aparecen como un sistema de adjudicación que aproxima la Constitución a un supermercado donde se consumen bienes jurídicos a la carta" (p. 280). Además, hacen referencia al estado de excepcionalidad permanente, la apelación a la política desnuda y a fin de cuentas, al desprecio hacia el Derecho en el que estamos inmersos.

Por último, los autores recomiendan a los jóvenes adentrarse en el pensamiento de Kelsen y Schmitt, advirtiéndonos, respecto a este último, que seamos prudentes y no caigamos en las trampas metodológicas que pueden terminar por demoler los cimientos de la ciudad política moderna. Le haríamos caso, con mucho gusto, si el día a día no invitara precisamente a demoler las tremendas injusticias de tal ciudad.

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Recibido: 18/04/2020 – Aceptado: 14/09/2019

editorial
qellqasqa

Se terminó de
componer e imprimir en
diciembre de 2018 en
Editorial Qellqasqa.
Mendoza, República Argentina.

editorial@qellqasqa.com.ar
www.qellqasqa.com.ar