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AN EXAMINATION ON JURIES' INDEPENDENCE FROM THE INFLUENCE OF PROFESSIONAL JUDGES IN KOREAN JURY SYSTEM

Jong-Sik Choi[*]

The System for Citizen Participation in Criminal Trials (hereinafter referred to as the "CPCT") introduced to Korea in 2008 is known as a mixture of the U.S. jury system and European lay judge systems. It is apparent that, it has superficially more in common with the former than with the latter. When viewed from behind the scenes, the Korean system shows a greater resemblance to the lay judge system. The current CPCT contains a number of factors that might pose a serious threat to the jury's independence due to the influence of professional judges. The purpose of the Act ultimately depends on the autonomy and independence of the jury. A criminal trial system that welcomes citizens' participation is indispensable for judicial reform in Korea. However, to raise "democratic legitimacy" and "confidence" in criminal trials, a pure "jury system" is, in the opinion of the author, more effective and appropriate for Korea than the lay judge system. It would better serve the original purpose of the CPCT to never allow judges to be present at deliberations by jurors. Verdicts should be given "legal binding power", rather than only ambiguous "practical binding power". It is not necessary that, jurors take part in discussions on sentencing after verdicts.

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INTRODUCTION

The system for citizen participation in criminal trials was introduced to Korea in 2008, and bears a strong resemblance to Japan's jury system that was maintained nearly until the end of WWII (1928-1943). Based on the concern that, the participatory trial system would be contrary to the Constitution of the Republic of Korea, the government stubbornly insists on maintaining the existing law that adopts the principle of defendant application and does not recognize verdicts as legally binding. As such, there is no denying that, the Korean system could end up following the same path as the Japanese jury system prior to the end of WWII.

Korea's system for citizen participation in criminal trials (hereinafter referred to as the "CPCT") is known as a mixture of the U.S. jury system and the lay judge systems of Germany and France, but it is apparent that, it has superficially more in common with the former than with the latter. This is evident from the facts that, citizens participating in criminal trials are collectively referred to as a "jury" in the Act on Citizen Participation in Criminal Trials (hereinafter referred to as the "Act"), and that within the courtroom seats for the jury are separate from those for judges. When viewed from behind the scenes, however, the Korean system appears to bear a greater resemblance to the lay judge system. Regardless, the CPCT has assumed an experimental and transitional character, and does not appear to be a fully mature system. Furthermore, the proposed revision, or the final form plan[1], which is being put before the National Assembly, is no different from the existing law. Should this revision bill be passed, it would be difficult for the CPCT to recover from its tarnished image as a mediocre and experimental system at best.

[1] For details, *see* Jong-Sik Choi, *Kankokuniokeru Kokumingsangyosaibanseidono Saisyukeitai—Kokumingsabeopchamyoiinnkaino Saisyukeitaianwo Chusinntosite (The Final Form of the System for Citizen Participation in Criminal Trials in Korea: A Study of the Final Form Plan by the Committee for Citizens' Participation in the Judicial System)*, 85(10) HŌRITSU JIHŌ REV. 88-94 (September 2013).

Such being the case, the current CPCT contains a number of factors that might pose a serious threat to the jury's independence due to the influence of professional judges. The success of Article 1[2] of the Act ultimately depends on the autonomy and independence of the jury. Should their autonomy and independence be compromised, the very meaning of the system's existence would be diluted. The single largest factor in the current CPCT that would be most likely to hinder a jury's autonomy and independence is the influence on the jury's deliberations and verdicts exerted by judges who are involved in the same trials. This is because judges are allowed to participate in deliberations by the jury and to state their opinions, and because they are able to reject any verdict that the jury might have reached.

This paper is intended to provide a brief overview of the CPCT and how it is being applied, to review issues involving the independence of the jury's deliberations and verdicts, and to present a plan to improve them.

I. SYSTEM OVERVIEW

A. Requirements for Eligible Cases[3]

1. The Case Must Involve a Crime Stipulated by Law[4]

Eligible Cases for a participatory trial are as follows: (i) cases falling under the jurisdiction of a collegiate panel under Article 32 (1)[5] (excluding subparagraphs 2 and 5) of the Court Organization Act; (ii) cases of attempting, abetting, aiding, preparing, or conspiring to commit an offense among cases falling under (i) above; or (iii) cases falling under (i) or (ii) above and also those falling under Article 11 of the Criminal Procedure Act, which are consolidated for trial as a single case[6].

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[2] (Purpose) The purpose of this Act is to clarify the power and responsibilities of citizens who take part in criminal trials under the participatory trial system that is hereby adopted to raise democratic legitimacy and confidence in judicial process and to provide for special cases for trial procedure and other necessary matters.

[3] For details, *see* Jong-Sik Choi, *Korean Citizen Participation in Criminal Trials: The Present Situation and Problems*, 42 INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE 89-92 (2014).

[4] Article 5 of the Act.

[5] Cases subject to capital punishment, life or short-term (one year or longer) imprisonment with or without prison labor (exceptions may apply).

[6] Cases where two or more offenses have been committed by one person, cases where two or more persons have jointly committed the same offense, cases where two or more persons have committed individually offenses at the same time and at the same place, offenses of harboring an offender, suppression of evidence, perjury, false expert testimony or interpretation, or offenses relating to the stolen goods, and the principal offences thereof.

2. The Defendant Needs to Apply for a Participatory Trial[7]

In Korea, no case will proceed to a participatory trial unless the defendant applies for one (the principle of defendant application). The Act[8] declares that, "Every person has a right to a participatory trial, as provided by this Act" but, as it has become clear in actual practice, only a small percentage of defendants apply for it. Given the present situation in which defendants may choose not to exercise this right or, even if they do, the court may reject the application, there is a natural limit to this system. It is often said that, the principle of defendant application was introduced to avoid infringement of "the right to be tried … by judges qualified under the Constitution and the Act" in Article 27 (1) of the Constitution, yet this is the primary factor obstructing the purpose of the CPCT. While adhering to the principle of defendant application in the existing law, the revision bill submitted to the National Assembly in June, 2014 allows for forced implementation of a participatory trial upon application by a prosecutor; however, this cannot serve as a fundamental solution to the issue. Because it is to be implemented forcibly, there remains room for disputes over possible violation of the Constitution. Furthermore, there is no small chance that prosecutors might not exercise their right of compulsion fairly or will abuse their authorities.

3. Absence of a Court Decision to Exclude[9]

Even if a defendant takes advantage of his or her right to apply for a participatory trial, such a trial will not be held if the court decides to reject the application, meaning that, the court is granted considerable leeway in relation to its right to reject such applications even when such participatory trials are recognized as the defendant's right. This is the second factor that hinders the original purpose and objectives of the CPCT. Looking at the actual situation, the number of applications rejected by the court is equivalent to 42.5%[10] of the number of participatory trials granted. Given that about 78% of the applications were rejected on the grounds of the provision[11], which is rather abstract and thus allows the court to

[7] Article 5 (2) of the Act.
[8] Article 3 (1).
[9] Articles 9 and 11 of the Act.
[10] Daebeopwon Sabeopjiwonsil [Legislation Support Center of the Supreme Court], 2008 NYEON ~ 2014 NYEON GUNGMINCHAMYEOJAEPAN SEONGGWABUNSEOG (ANALYSIS REPORT OF CITIZEN PARTICIPATION TRIALS FOR 2008-2014) 6 (May 31, 2015).
[11] Article 9 (1) 4 of the Act.

comprehensively reject applications, one might suspect that, the court is abusing its authority. Despite these circumstances, far from reducing the reasons to make rejection decisions, the revision bill under discussion at the National Assembly seeks to add even more reasons and to establish the right of prosecutors to request rejection decisions. Needless to say, for the CPCT to be put to better use, it is necessary that, the scope of the court's right to reject defendants' applications be kept to a minimum.

B. Number of Jurors

The number of jurors differs depending on the type of statutory punishment involved[12]. Nine jurors participate in participatory trials for an eligible case where the statutory punishment is the death penalty or life imprisonment with or without prison labor, while seven jurors participate in all cases other than those set forth above, provided that, a court may have five jurors if the defendant or defense counsel admits essential elements of prosecuted facts during the preparatory proceedings. Notwithstanding the foregoing, a court may make a decision on its own to determine the number of jurors, either seven or nine, only if it finds that extraordinary circumstances exist in view of the substance of a case, and if the prosecutor and the defendant or defense counsel give their consent. The revision bill suggests that, the five-juror system be abolished with only the nine- and seven-juror systems being retained, given the fact that, the five-juror system is being adopted for less than 10% of all cases in actual practice.

C. Deliberation and Verdict

The presiding judge must, upon closing the pleadings and arguments, explain to jurors in court about essential points of prosecuted facts, applicable provisions of Acts, essential points of pleadings and arguments of the defendant and defense counsel, admissibility of evidence, and other significant matters[13]. In such cases, an explanation about essential points of evidence may be also given, if necessary. Jurors taking part in a trial then begin to deliberate on whether the defendant is guilty or otherwise after hearing the aforementioned explanations, and may deliver a verdict if it has been reached unanimously. At that time, if a majority of jurors requests it, the jury may hear the "opinions" of the judges who have taken part in the trial.

These provisions might have been included lest deliberations by jurors

[12] Article 13 of the Act.
[13] Article 46 of the Act.

reach a standstill, but they also allow judges to participate in the deliberations by stating their "opinions", rather than providing mere "explanations". As such, there is a risk that, they could have a decisive influence on the jurors' decision-making process. This is the third factor that can seriously impair the independence of participatory trial jurors. Nevertheless, the revision bill does not make any changes except that, the "opinions" of judges participating in deliberations are replaced by "explanations".

It can be thought of as an inevitable consequence of such a system that, judges are not bound by the verdict of the jury. This is definitive evidence indicating that, this is still an experimental system, and that the law does not recognize the independence of jurors. Nevertheless, the revision bill makes only an ambiguous alteration ("verdicts shall be respected") and still fails to render verdicts legally binding.

Ⅱ. PRESENT STATE

A. Implementation

Table 1 shows how the CPCT has been implemented from 2008 to 2014[14]. The number of participatory trials has been gradually increasing with each passing year. The number of decisions by the court to exclude, on the other hand, has decreased gradually, but the total number of such decisions was still about half the number of participatory trials granted. Another conspicuous point here is that, the number of withdrawals by applicants was almost equal to the number of participatory trials granted. In most of the cases, defendants withdrew their applications due to a lack of understanding of the system or out of fear that such trials might be to their disadvantage[15].

B. Verdicts

Table 2 shows verdicts given by jurors. Unanimous verdicts account for 68.5% (1,003 cases) of the total, with 61.6% (902 cases) being guilty verdicts and 6.9% (101 cases) being not guilty verdicts. The percentage of "not guilty" verdicts was more than 10% during the seven-year period, but increases to 28.5% if "partially not guilty" verdicts are included. This is a very high percentage relative to the approximately 3% of "not guilty" verdicts in first trials of general sessions. Even allowing for the fact that, as

[14] Choi, *supra* note 3, at 94-98.
[15] Dong-Hee Lee, *Gungminchamyojaepanwei Seongkawa Gwajei—Cheoijongheongtaeane Daehan Pyonggawa Jeonwel Pohamhayeo (Achievements and Issues of Civil Participation Trials—With Evaluation and Recommendations on the Final Form Plan)*, 146(3) JEOSUTIS (JUSTICE) 75 (2015).

high as 65.2% of cases eligible for participatory trials during the seven years were cases in which defendants denied the charges, one can say from this relatively high percentage that, "democratic legitimacy" and "confidence"[16] in the judicial process as stated in Article 1 (Purpose) of the Act have been achieved to some degree. The percentage of "not guilty" verdicts was the highest for "sexual offenses," which is inversely proportional to the lowest percentage of "guilty" verdicts in such cases. This is presumably due to stricter enforcement of sex crime laws in recent years.

Table 1 Applications for the CPCT and actual implementation (2008-2014, cases)[17].

Received		Processed				Not settled
		Subtotal	CPCT	Excluded by court	Withdrawn by defendant	
2008	233 (100.0%)	215 (92.3)	64 (27.5)	61 (26.2)	90 (38.6)	18 (8.1)
2009	336 (100.0%)	308 (91.7)	95 (28.3)	75 (22.3)	138 (41.1)	46 (10.5)
2010	438 (100.0%)	414 (94.5)	162 (37.0)	75 (17.1)	177 (40.4)	70 (16.0)
2011	489 (100.0%)	494 (101.0)	253 (51.7)	63 (12.9)	178 (36.4)	65 (13.3)
2012	756 (100.0%)	676 (89.4)	274 (36.2)	124 (16.4)	278 (36.8)	145 (19.2)
2013	764 (100.0%)	797 (104.3)	345 (45.2)	118 (15.4)	334 (43.7)	112 (14.7)
2014	608(100.0%)	611(100.5)	271(44.6)	107(17.6)	233(38.3)	109(17.9)
Total	3,624 (100.0%)	3,515 (97.0)	1,464 (40.4)	623 (17.2)	1,428 (39.4)	-

* From 2009, numbers included cases carried forward from the previous year.

Table 2 Distribution of verdicts (2008-2014, cases).

Crime	Persons	Guilty		Not guilty		Guilty + Not guilty (Not classified as "unanimous" or "majority vote")		
		Unanimous	Majority vote	Unanimous	Majority vote	Concurrent crimes	Primary (not guilty) Secondary (guilty)	Others
Murder	387 (100.0%)	291	37	8	5	21	3	22
Robbery	268 (100.0%)	141	21	19	4	48	7	28
Bodily injury	74 (100.0%)	50	6	5	2	4	1	6
Sexual offense	244 (100.0%)	95	39	42	24	29	1	14
Others	491 (100.0%)	325	41	27	15	69	2	12
Total	1,464 (100.0%)	902 (61.6%)	144 (9.8%)	101 (6.9%)	50 (3.4%)	171 (11.7%)	14 (1.0%)	82 (5.6%)

[16] Choi, *supra* note 3, at 84-89.
[17] Source of Tables 1-3: Daebeopwon Sabeopjiwonsil (Legislation Support Center of the Supreme Court), *supra* note 10.

Table 3 shows the rate of agreement between jury verdicts and the professional judge decisions. In nearly 93% of all cases, the two parties were in agreement, indicating that, judges respect jury verdicts. Of the cases where agreement was not reached, there were 97 cases in which the jury found defendants not guilty but the judges found them guilty[18]. The opposite was true for the remaining eight cases. If judges had accepted these 97 "not guilty" verdicts, the overall percentage of "not guilty" cases would have been higher at 16.9%.

Table 3 Agreement between jury verdicts and professional judge decisions(2008-2014).

	Total		Agreed		Disagreed	
	Cases	%	Cases	%	Cases	%
Cases	1,464	100.0%	1,359	92.8%	105	7.2%

Ⅲ. ISSUES RELATED TO JUROR'S INDEPENDENCE IN DELIBERATIONS AND VERDICTS

A. Realities of the CPCT

Deliberations and verdicts form the core of the CPCT. If, in the course of conducting deliberations or delivering verdicts, jurors are significantly deprived of their autonomy and independence, holding participatory trials becomes practically meaningless. If this is the case, how should the roles of jurors be understood within the present form of participatory trials? It is often pointed out that, the current system in Korea is a mixture of the jury system and the lay judge system, but that it borrows more heavily from the former than from the latter. However, this assumption needs to be scrutinized in light of a broader perspective of the CPCT.

The Korean system is similar to a jury system in that: a person who is selected to take part in a criminal trial is defined as a "juror"[19]; in courtrooms where participatory trials are conducted, jurors are supposed to take seats in a section completely separate from the judges' section in order to observe the selection process and trial from a third-party perspective, and thus are not directly involved in the trial procedures, at least superficially; and deliberations conducted and verdicts are reached by jurors alone, in principle. Up to this point, one might be safe in insisting that, the Korean

[18] Daebeopwon Sabeopjiwonsil (Legislation Support Center of the Supreme Court), *supra* note 10, at 21.
[19] Article 2.

system essentially resembles the jury system.

If we take a glance at what is hidden behind the scenes, however, things take on a different light. The very fact that judges are allowed to participate in deliberations, albeit as an exception, diminishes the original purpose of the jury system and brings elements of the lay judge system into relief. If the jury fails to reach a unanimous verdict as a result of its deliberations, the jurors must then hear the opinions of the judges as stipulated in the Act[20]; however, regardless of whether or not the jury has reached a unanimous verdict, the jury may invite judges to the deliberations to hear their opinions when a majority of jurors requests to do so, as provided in the Act[21]. This is very similar to how the lay judge system works. Furthermore, if a guilty verdict is delivered, jurors will not be released from trials, but instead will have to discuss sentencing with judges and express their opinions, as described in the Act[22]. Nevertheless, the Act states that, jury's verdict is not binding on the court[23]. This might mean that, judges are under no compulsion to be bound by verdicts because, as in the lay judge system, they have already discussed the sentencing together with the jurors, but this is conclusive evidence that the jury lacks true independence under the CPCT system.

As explained thus far, at first glance, the current CPCT in Korea may superficially appear to bear a strong resemblance to the jury system; however, on digging a little deeper, it immediately becomes apparent that, it is in fact a lay judge system. One may well argue that, it is somewhat unavoidable for the Act to allow judges to participate in deliberations or to make verdicts not binding since the system is still on its test run. That being said, if these two points are not improved, chances are that the CPCT system in Korea may end up losing its meaning and ultimately exist in name only.

When a participatory trial system was still being designed, it must have been concluded that, a jury system would have a higher degree of freedom from the influence of judges than the lay judge system, and that in order to raise "democratic legitimacy" and "confidence" in the judicial process[24], a "jury" would be more desirable than "lay judges". However, might then wonder, why it was necessary to resort to "lay judge" approaches in the resulting system. The CPCT has been hailed as the "first reform" in the history of the Korean judiciary system, but is this not a testament to the fact

[20] Article 46 (3).
[21] Article 46 (2).
[22] Article 46 (4).
[23] Article 46 (5).
[24] Article 1 of the Act.

that, its deepest intentions are not to give any real power or authority to the system for "citizen participation in criminal trials?" Put differently, is it not because the "jury system," which is more essential in nature, is harder to control than the "lay judge system?" These concerns are still evident in the revision bill, which was put before the National Assembly last year, but is nearly identical to the original bill.

B. Independence during Deliberations

Issues relating to the independence and autonomy of jurors' deliberations and verdicts in participatory trials mainly arise from the jurors' relationships with judges[25]. As a system that combines both the jury system and lay judge system in order to facilitate deliberations by jurors which have come to an impasse, the Act provides that, judges may attend the deliberation process and state their "opinions" when a majority of jurors requests the same, and that, they must also do so if the jury fails to reach a unanimous verdict. Under such circumstances, however, one cannot dispel the suspicion that judges might exercise undue influence on the decision-making process of the jury[26]. The Enforcement Rule of the Act sets only the minimum restrictions in this regard, namely, the Act[27] states that, even when judges take part in the deliberation, they are not allowed to state their opinions on whether the defendant should be judged "guilty" or "not guilty", and no other concrete provisions are provided. That is to say, once they take part in the deliberations, judges may state their opinions on the credibility of evidence and finding of facts. In reality, however, any opinions on the credibility of evidence and finding of facts can have a conclusive impact on the determination of guilt. Accordingly, it would be difficult to accept a verdict delivered after jurors have heard such opinions from judges as one that was given independently and free from the influence of the court[28]. Furthermore, so long as judges' attendance in any form during the deliberations is assumed as in the Act, changes such as merely replacing

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[25] This can, of course, occur among the jurors, but such cases lie beyond the scope of this report.

[26] Unfortunately, the author was unable to find detailed data that show how often judges participate in deliberations. However, judges certainly participated in 13.6% of the cases (sum of "guilty" and "not guilty" verdicts by a majority vote" (see Table 2).

[27] Article 41 (5).

[28] Sang-Hoon Han, *Gungminwei Hyeongsajaepane Gwanhan Beopyeulsang Baesimweonseonjeong Jeolchawei Naeyonggwa Geommto—2006 nyeon 4weol 12 il Sagaechuweuimoweijaepanwei Geongheomweol Jungsimweiro (Details and Study of the Jury Selection Process under the Law Concerning Citizen Participation in Criminal Trials: From Experiences at a Mock Court by the Judicial Reform Promotion Committee of April 12, 2006)*, 19(1) HEONGSAJEONGCHAIG (CRIMINAL POLICY) 67 (2007).

"opinions" with "explanations" or specifying the scope of those explanations do not represent radical measures sufficient to guarantee jurors' autonomy and independence, because once judges take part in the deliberations, there is no way for any impartial third-party to monitor or check the procedure. Moreover, this could foster a tendency on the part of jurors to rely on the judgments and opinions of professional judges, rather than try to reach a conclusion through earnest discussions drawing on their own experience and wisdom, even at the risk of having conflicting opinions[29]. If this becomes the case, jurors would be reduced to the role of mere assistants to the judges instead of core members in participatory trials as they are supposed to be, and the original purpose of the CPCT would eventually be lost[30].

Actually, earlier research and analysis involving shadow jurors discovered that, the variable with the greatest influence on deliberations was the juror's assessment of how helpful the attendance and opinions expressed by judges were in assisting deliberations to proceed smoothly. The study concluded that, this is indicative of the fact that shadow jurors think of judges' roles as higher than their own participation in the deliberations[31].

Rather than mixing the elements from the jury system and lay judge system only to extract their cores and create a mediocre and ambiguous system, the authorities should make a definite choice between these two participatory trial systems and formulate plans to enhance the system's effectiveness. In conclusion, the author believes that, the only way to do this is to completely remove judges from the deliberation process, because the involvement of professional judges in participatory trial deliberations can hinder the essential purpose of citizen participation in criminal trials.

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[29] Ho-Jong Lee, *Gungminchamyeojaepanwei Seonggawa Gwaje (Achievements and Issues of Citizens' Participatory Trials)*, 1(3) GIEOPYEONGU (STUDY OF LAWS AND ENTERPRISES) 218 (2011); Eun-Mo Lee, *Heonhaenggungminchamyeojaepanwei Naeyonggwa Munjecheom—Ilbonwei Jaepannweonjedowawei Bigyeoreul Jungsimwehro (Contents and Problems of the Current Citizens' Participatory Trial System: Focusing on Comparison with the Japanese Citizen Judge System*), 26(1) BEOPHAGRONNCHONG (LAW REVIEW) 67 (2009).

[30] Jung-Jin To, *Gungminchamyeojaepaneseo Pyeongwei mit Pyeonggeolwei Dongripseonghwakpoe Gwanhan Yeongu (Study on Ensuring Independence of Deliberations and Verdicts in Citizens' Participatory Trials)*, 25(1) HEONGSABEOPYEONGU (CRIMINAL LAW REVIEW) 423 (2013).

[31] Ji-Sook Woo, June-Woong Rhee, & Jae-Hyup Lee, *Jaepanwei Gonjeongseonge daehan Inseeke Yeongwhangweol michineon Yeoine daehan Yeongu—Gungminchamyeojaepan Shadow Baesimweon Deolwei Geomweol Batangweoro (Study of Factors Affecting Recognition of Impartiality of Trials—Based on Experiences of Shadow Jurors for Citizens' Participatory Trials)*, 54(4) SEOULDAEHAGKYO BEOPHAK (SEOUL NATIONAL UNIVERSITY LAW REVIEW) 282 (2013).

C. Arriving at Verdicts

It is often said that, jurors' verdicts have not been given binding power out of fear of violating the Constitution. There are many different views on this subject, but if a truly participatory trial commensurate with the Act[32] is to be held, binding power must be granted, even if it means considering a constitutional amendment. Majority opinion seems to be that such power should be given, but most of the comments on how constitutional infringement can be avoided are vague at best, and only a few go so far as to insist on a constitutional amendment. As it stands, it would be difficult to grant binding power either with or without constitutional amendments.

Being trapped in this dilemma, the amendment bill represents a third way, that is, to grant "practical binding power" through rather vague wording ("… shall respect verdicts"), rather to declare that binding power be given. Even this new solution does not seem to be very effective, however, since it provides for a broad range of exceptions. It even describes how the manner in which verdicts are delivered should be changed. Specifically, in exchange for granting "practical binding power", it suggests that, the simple majority vote should be abolished and instead adopts a weighted majority vote in which a verdict is passed only with approval from at least three-fourths of the jurors. Here again, however, other issues might arise on account of the involvement of judges in deliberations. These issues might occur in the first place due to the fact that, judges are allowed to take part in the deliberations. The following are some of these possible issues.

If jurors fail to reach a unanimous decision on the primary verdict, they cannot move on to a secondary verdict for a weighted majority vote without hearing the opinions of the judges who are taking part in the trial. If, in the secondary verdict, they fail to reach a weighted majority vote of at least three-fourths, judges must hand down sentences independently without a verdict from the jurors. It takes a great deal of effort for general citizens to serve as jurors and take part in participatory trials. In cases like this, however, all of their hard work would be completely for naught. No one can say with any certainty that, this situation would not result in significant impairment of the autonomy and independence of a jury's verdict, as the jurors, who are keenly aware of the possibility that their efforts may be futile, may feel that, they have no choice but to agree with the judges' opinions and explanations (or the judges may even threaten them by implying that, "If a verdict is not reached by a weighted majority vote, I will hand down my own sentence"). Thus, the jurors are forced to listen to the

[32] Article 1 (Purpose).

judges' opinions while being subjected to psychological pressure.

Another point that the author wishes to make is, as described in the explanations of Table 3, there have been as many as 97 cases in which jurors delivered a "not guilty" verdict that was overturned by the judges' sentences. Presumably, judges were not invited to take part in the deliberations in those cases. In other words, had the judges been invited by the jurors to state their opinions in the deliberations, it is suspected that, jurors would not have dared to deliver a "not guilty" verdict. It would seem that, these were cases in which the judges, who were not invited to take part in the deliberations, hindered the independence of jurors' deliberations after the fact.

CONCLUSION

The revision bill that, the Korean government submitted to the National Assembly aims for a revision that does not go beyond the bounds of constitutional conformity. Because of this, it leaves much to be desired. One may rightly be concerned that, the system will turn out to be an unsatisfactory and mediocre half measure, completely incapable of fulfilling its original purpose of raising "democratic legitimacy" and "confidence" in the judicial process as stated in Article 1 of the Act. Instead, it should be reformulated as a system that truly allows citizens' participation in trials. There is no reason why the people must be content with a vague, half-baked mixture of the jury system and lay judge system, or the present system that is one of participatory trials in name only. Below are the major conclusions of this report.

(1) A criminal trial system that welcomes citizens' participation is indispensable for judicial reform in Korea. However, to raise "democratic legitimacy" and "confidence" in criminal trials as stated in Article 1 of the Act, a pure "jury system"[33] is, in the opinion of the author, more effective and appropriate for Korea than the lay judge system.

(2) It would better serve the original purpose of the CPCT to never allow judges to be present at deliberations by jurors. This would be in line with its standing as a "pure" jury system.

(3) Verdicts should be given "legal binding power", rather than only ambiguous "practical binding power".

(4) Having jurors take part in discussions on sentencing after verdicts have been given is simply a rejection of jury independence, and thus should

[33] But the Jury System that is mentioned here doesn't necessarily mean only American Jury System. It is just a symbolic meaning that, the citizens can monitor and control the trials.

be abandoned, although this would naturally disappear by itself were a "pure" jury system to be established.

ENVIRONMENTAL STABILITY STILL IN DANGER, LOOPHOLES OF NEW ENVIRONMENTAL PROTECTION LAW (EPL) IN CHINA

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Explosive economic and industrial growth in China has led to a significant environmental degradation and it is currently in the process of developing more stringent legal controls. Although new Environmental Protection Law (EPL) 2015, has very important provision like handing out heavier punishment for environmental wrongdoing, specific articles and provisions on tackling pollution, environmental and health monitoring survey and risk assessment mechanism, public participation in environmental protection and encouraging social organizations to initiate public law suits on behalf of citizens. Yet the environmental legal system is still incomplete, and implementation and enforcement of environmental laws have shown major shortcomings. Release of the draft revised EPL has triggered a flood of questions, comments and complaints. Present paper spotlights these very impotent questions and contains a thoughtful discussion about EPL.

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INTRODUCTION

Economic reform brought revolutionary changes to China[1, 2] including raising living standard of hundreds of millions of Chinese people and makes china as the No. 2 economy of the world[3]. However, the excessive use of coal[4] for the expansion of heavy industry and urbanization creates numerous environmental problems. A report issued in April, 2014 showed that, nearly 60 percent of monitored areas in China had "very poor" or "relatively poor" underground water quality in 2013[5]. The Ministry of Environmental Protection and the Ministry of Land and Resources joint report on April 17, 2014 showed that, about 16.1 percent of the country's soil is polluted[6]. China has many environmental issues, severely affecting its biophysical environment as well as human health. The water resources of China are affected by both severe water quantity shortages and severe water quality pollution. The population burden and rapid economic growth as well as slack environmental oversight have increased water demand and pollution. China has responded by measures such as rapidly building out the water infrastructure such as South-North Water Diversion Project[7] and increased regulation as well as exploring a number of further technological solutions. South-North Water Diversion Project also has population displacement, health and environmental costs. Water usage by its coal-fired power stations is drying-up Northern China[8, 9, 10]. Desertification remains a serious problem,

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[1] ELIZABETH C. ECONOMY, THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE 368 (Ithaca: Cornell University Press 2004); KRISTEN A. DAY, CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 293 (Kristen A. Day ed., New York: M.E. Sharpe 2005).

[2] Kahn J. & Yardley J., *China is Struggling to Rein in Pollution; Nation Falling Victim to Its Own Progress*, THE NEW YORK TIMES, Aug. 26, 2007.

[3] T. N. Srinivasan, *China, India and the World Economy 2*, STAN. CTR, FOR INT'L DEV., WORKING PAPER NO. 286, 2006. *Available at* http://scid.stanford.edu/pdf/SCID286.pdf.

[4] Kahn & Yardley, (Part I, *supra* note 2) "there is little question that growth came at the expense of the country's air, land and water".

[5] MU XUEQUAN, TRANSITIONING CHINA NEEDS TOUGHER ENVIRONMENTAL LAW (Beijing: Xinhua, April 25, 2014). *Available at* http://news.xinhuanet.com/english/china/2014-04/25/c_126431782.htm.

[6] Ministry of Environmental Protection, *The People's Republic of China, China's Legislature Adopts Revised Environmental Law*, MEDIA NEWS, Beijing, Apr. 24, 2014. *Available at* http://english.mep.gov.cn. News and Media Service Media News.

[7] Daniel Carpenter-Gold, *Promises and Pitfalls in China's New Environmental Protection Law*, (September 14, 2014). *Available at* http://www3.law.harvard.edu/.../promises-and-pitfalls-in-c....

[8] Business Week, *On China's Electricity Grid, East Needs West—for Coal*, BUSINESS WEEK Mar. 21, 2013.

[9] Business Week, *Chinese Utilities Face $20 Billion Costs Due to Water*, BUSINESS WEEK, Mar. 24, 2013.

[10] Han Jun, *Effect of Integrated Ecosystem Management on Land Degradation Control and Poverty Reduction*, WORKSHOP ON ENVIRONMENT, RESOURCES AND AGRICULTURAL POLICIES IN CHINA (June 19, 2006). Retrieved March 26, 2008.

is expanding at a rate of more than 67 km² every year. 90% of China's desertification occurs in the west of the country[11]. Industrial pollution is causing widespread environmental and health problems. World's twenty most polluted cities are found in China[12, 13]. An official report released in 2014, found that, 20% of the country's farmland, and 16% of its soil overall, is polluted. An estimated 60% of the groundwater is polluted[14]. According to a report on April 11, 2014, more than 2.4 million people in Lanzhou, northwest China's Gansu Province, were affected by tap water that contained excessive levels of benzene[15]. Although China met the basic emission target in 2013, but the challenges of water, air and soil quality remain serious. To curb the air pollution problem, the Chinese government announced a five-year, US$277 billion plan in 2013. Northern China will receive particular attention, as the government aims to reduce 25 percent air emissions by 2017, compared with 2012 levels[16].

Environmental policy in China is set by the National People's Congress and managed by the Ministry of Environmental Protection. In Chinese environmental policy, the central government issues fairly strict regulations, but the actual monitoring and enforcement is largely undertaken by local governments that are more interested in economic growth. Effective implementation of laws, clarification, national and provincial government roles and strengthen the legal system is a tough job for Chinese officials[17].

The environmental protection awareness work of non-governmental forces, such as lawyers, journalists, and non-governmental organizations, is limited by government regulations[18]. In response to public pressure, the national government has undertaken a number of measures to curb pollution in China and improve the country's environmental situation[19]. However, the

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[11] Edward Wong, *Cost of Environmental Damage in China Growing Rapidly Amid Industrialization*, THE NEW YORK TIMES, Mar. 29, 2013. Retrieved March 30, 2013.
[12] *Air Pollution Grows in Tandem with China's Economy*, NPR, Mar. 17, 2007. Retrieved January 21, 2013. *Available at* http://www.npr.org/templates/story/story.php?storyId=10221268.
[13] *The Most Polluted Places on Earth*, CBS NEWS, Jan. 8, 2010. Retrieved January 21, 2013.
[14] China's *Eco-crisis:* 60*% of* Groundwater Polluted, THE JAPAN TIMES, Apr. 24, 2014. *Available at* http://www.japantimes.co.jp/.../chinas-eco-crisis-60-groundwater.
[15] EXCESSIVE BENZENE FOUND IN NW CHINA'S WATER (Lanchou: Xinhua, April 11, 2014). *Available at* http://news.xinhuanet.com/english/china/2014-04/11/c_133255669.htm.
[16] Jennifer Duggan, *China's Polluters to Face Large Fines under Law Change*, THE GUARDIAN, Apr. 25, 2014. Retrieved April 27, 2014.
[17] EPA, *China Environmental Law Initiative Home*, (updated August 22, 2013) *Available at* http://http://www.epa.gov/ogc/china initiative_home.htm.
[18] Melanie Hart & Jeffrey Cavanagh, *Environmental Standards Give the United States an Edge over China*, (Center for American Progress: April 20, 2012). Retrieved July 28, 2013.
[19] Louisa Lim, *Air Pollution Grows in Tandem with China's Economy*, NPR, May 17, 2007. Retrieved September 8, 2013.

government's response has been criticized as inadequate[20]. Encouraged by national policy that judges regions solely by their economic development; corrupt and unwilling local authorities have hampered enforcement of environmental laws and policies in their respective regions[21]. Nonetheless, in April of 2014, the government amended its environmental law to better fight pollution [22]. Environmental policies implementation as well as environmental laws enforcement is done by The Ministry of Environmental Protection (MEP)[23]. The Ministry is responsible for water, air and land protection from pollution and contamination in China. State Council directly empowered MEP to implement environmental policies and enforce environmental laws and regulations. Complementing its regulatory role, it funds and organizes research and development. In 1983, the Chinese government announced that, environmental protection would become a state policy.

I. SOCIAL UNREST

In recent years, China faced increasing number of mass protests over environmental issues, which are steadily grown day by day. Residents from few cities com out to the streets against different projects which they believe are a major threat to the environment and public health. In many cases, the projects were later suspended. From 2001 to 2005, Chinese environmental authorities received more than 2.53 million letters and 430,000 visits by 597,000 petitioners seeking environmental redress[24, 25]. From 2001 to 2007, mass protests over environmental issues gradually increased [26]. The increased public attention on environmental matters pressurized the Chinese government to display serious attitude towards environmental issues. Stricter environmental regulations were subsequently implemented. Subsidies for some polluting industries were cancelled, while other

[20] Richard Silk, *China Weighs Environmental Costs; Beijing Tries to Emphasize Cleaner Industry over Unbridled Growth after Signs Mount of Damage Done*, (Beijing: July 23, 2013).
[21] Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, THE NEW YORK TIMES, Aug. 26, 2007. Retrieved July 28, 2013.
[22] Rebecca Valli, *China Revises Environmental Law*, VOICE OF AMERICA, Apr. 25, 2014. Retrieved April 27, 2014. *Available at* http://www.voanews.com/.../china-revises-environmental-law.
[23] Jianmin Hua, Zujian Huanjingbaohubu Jiada Huanjing Baohulidu (in Mandarin Chinese), (March 11, 2008). *Available at* http://News.sina.com.cn. Retrieved February 12, 2013.
[24] Alex Wang, *Environmental Protection in China: The Role of Law*, CHINA DIALOGUE. Retrieved February 12, 2013.
[25] Ma Jun, *How Participation Can Help China's Ailing Environment*, CHINA DIALOGUE (January 31, 2007). Retrieved July 28, 2013.
[26] *Environmental Activists Detained in Hangzhou*, HUMAN RIGHTS IN CHINA (October 25, 2012). Retrieved July 28, 2013.

polluting industries were shut down. However, many internal environmental targets were missed[27]. After 2007, local authorities do not care about the effectiveness of central decisions, so influence of corruption was a hindrance to effective enforcement. In 2008, the State Environmental Protection Administration (SEPA) was officially replaced by the Ministry of Environmental Protection (MEP) during the March National People's Congress sessions in Beijing[28]. Citizen awareness increased in 2010 regarding government decisions that are perceived as damaging environment[29]. In April 2012, protests occurred in the southern town of Yinggehai following the announcement of a power plant project. Again in October 2012, police clashed with protester, leading to 50 arrests and almost 100 injuries[30]. A protest occurred by hundreds of thousands demonstrators in Qidong city in response to a waste pipeline for a paper factory in July 2012. In total, more than 50,000 environmental protests occurred in China during 2012[31]. By early 2013, public protests had succeeded in consistently gaining concessions from local governments, and in March 2013, Li Keqiang, China's premier, promised that his government will try to overcome on the pollution crises in China[32].

According to the U.S. Environmental Protection Agency, China has shown great determination to "develop, implement, and enforce a solid environmental law framework". However, the impact of such efforts is not yet clears[33]. Country's top national priority is the harmonization between the Chinese society and the natural environmental system[34, 35].

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[27] Richard Silk, *China Weighs Environmental Costs; Beijing Tries to Emphasize Cleaner Industry over Unbridled Growth after Signs Mount of Damage Done*, (Beijing: July 23, 2013).
[28] Jianmin Hua, Zujian Huanjingbaohubu Jiada Huanjing Baohulidu (in Mandarin Chinese), (March 11, 2008). *Available at* http://News.sina.com.cn. Retrieved February 12, 2013.
[29] Keith Bradsher, *Bolder Protests against Pollution Win Project's Defeat in China*, THE NEW YORK TIMES, Jul. 4, 2012. Retrieved July 5, 2012.
[30] *Chinese Protesters Clash with Police over Power Plant*, THE GUARDIAN (October 22, 2012). Retrieved July 28, 2013.
[31] John Upton, *China to Spend Big to Clean up Its Air*, GRIST MAGAZINE (Grist.org. Inc., July 25, 2013). Retrieved July 27, 2013.
[32] Benjamin Kang Lim & Sui-Lee Wee, *Something in the Air*, (Beijing, China: March 17, 2013). *Available at* http://www.reuters.com/article/2013/03/17/china-parliament-environment idUSL3NoC903K20130317 (last visited October 7, 2013).
[33] EPA, *China Environmental Law Initiative*, (August 21, 2013). *Available at* http://www.epa.gov/ogc/china/initiative_home.htm.
[34] Wang Alex, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARVARD ENVIRONMENTAL LAW REVIEW 365 (2013).
[35] NRDC, *Environmental Law in China*.

II. REVISED ENVIRONMENTAL LAW

During the opening session of the National People's Congress in March 2014, president Xi Jinping declared "war" on pollution. After long debate of two years, the parliament approved a new law in April 2014, which came into effect in 2015. It has 70 provisions, compared to the 47 of the existing law[36]. More than 300 different groups will be able to sue on the behalf of people harmed by pollution[37]. The new Environmental Protection Law (EPL) has greatly strengthened the country's environmental law regime. The new law empowers environmental enforcement agencies to enforce strict penalties and seize property of illegal polluters, defines areas which require extra protection, and gives independent environmental groups more ability to operate in the country[38]. This kind of right is added first time in environmental law history of China. The new articles of the law specifically address air pollution, and call for additional government oversight[39]. Environmental bureaus can confiscate polluting equipment, and detained the company bosses for up to 15 days if they fail to submit environmental impact assessments or refuse to comply with orders to suspend production under the current draft[40]. In the past, environmental authorities could only give small and toothless fines to deter businesses from illegally discharging pollution. Under the new law, however, they will be able to fine companies on a daily basis (rather than having to keep to an overall limit). Local governments will be answerable for failing to enforce environmental laws. The economic progress of the Regions will be judged entirely under environmental protection in newly amended law. New law makes local governments responsible to awaken the environmental protection awareness in the citizen. Article 6 of new law encouraged individuals to "adopt a low-carbon and frugal lifestyle and perform environmental protection duties" such as recycling their garbage under the law[41]. A number of different classes of protected areas are recognized under new Chinese Environmental

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[36] Jennifer Duggan, *China's Polluters to Face Large Fines under Law Change*, THE GUARDIAN (April 25, 2014). Retrieved April 27, 2014.
[37] Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, THE NEW YORK TIMES, Aug. 26, 2007. Retrieved July 28, 2013.
[38] Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, THE NEW YORK TIMES, Aug. 26, 2007. Retrieved July 28, 2013.
[39] Jennifer Duggan, China's polluters to Face Large Fines under Law Change, THE GUARDIAN (April 25, 2014). Retrieved April 27, 2014.
[40] Richard Pullin, *RPT-China's New Environment Law Submitted to Parliament*, (Xinhua, April 22, 2014) *Available at* http://www.reuters.com/.../china-environment-idUSL3N0NE0TC20140422.
[41] Jennifer Duggan, China's polluters to Face Large Fines under Law Change, THE GUARDIAN (April 25, 2014). Retrieved April 27, 2014.

law. National, provincial and local governments all have the power to designate areas as protected. Regardless of designation, most enforcement is made at the local level.

Highlighting the importance of the legislation in the country's pursuit of sustainable development, The amendment process in 1989 law was started in 2001, and the draft updates went through three fruitless readings that was rare in China for a law or amendment to go through three readings and not be passed, before 23rd April, 2014 fourth and final round. At each stage, the proposed changes proved controversial.

Of the hotly contested points, the clause setting the rules for environmental public interest litigation[42] attracted most attention. In the second draft, the government-backed All-China Environmental Federation was given sole right to bring environmental public interest lawsuits, prompting public discontent. Later, in the third draft, this right was extended to national level organizations. However, the changes again failed to convince the public.

The updated law lays the foundations for future public interest litigation in China's environmental sphere, and adds legal weight to the public campaign against pollution. Effective implementation of newly-amended environmental protection law will make a significant difference[43]. Article 4 of the new law says that, economic and social development should be coordinated with environmental protection; Article 39 of updated law encourages studies on the environmental quality impact on public health, urging prevention and control of pollution-related diseases. It says that, the country should establish and improve an environmental and health monitoring survey and risk assessment mechanism[44]. Updated law has specific articles and provisions to control the smog pollution, citizen's environmental protection awareness and whistleblowers[45].

Lack of powerful law, weak implementation and irresponsible and non serious attitude of officials toward environmental pollution are the causes of China's deteriorating environment.

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[42] Liu Jiangqiang, *China's New Environmental Law Looks Good on Paper' China*, DIALOGUE (Beijing: April 24, 2014). *Available at* https://www.chinadialogue.net/...new-environmental-law...good.../en.

[43] Liu Jiangqiang, *China's New Environmental Law Looks Good on Paper' China*, DIALOGUE (Beijing: April 24, 2014). *Available at* https://www.chinadialogue.net/...new-environmental-law...good.../en.

[44] *Environmental Protection Law of the People's Republic of China*, (April 24, 2014).

[45] Wang, *NPC Adopts Revised Environmental Protection Law*, (Xinhua, April 24, 2014). *Available at* http://english.cri.cn/6909/2014/04/24/2361s823675.htm.

A. Litigation Powers of NGOs

It is the first time the environmental protection law has been revised since 1989.

The revised Environmental Protection Law allows qualified NGOs to take legal action in environmental matters of public interest. It is a relatively recent phenomenon that, NGOs can contribute to putting more pressure on local governments to help them implement the law[46]. If the provision is officially confirmed by the National People's Congress, the ability of Chinese NGOs to bring environmental suits on behalf of the public will be far broader than in any previous versions.

The role of NGOs as prosecution in public interest cases is also significant because they can obtain injunctive relief, unlike other plaintiffs in environmental cases. Almost 300 NGOs empowered by the revised law. Environmental organizations registered with a civil affairs bureau at municipal level or above, which have been operating for at least five years, can initiate public interest litigation (Article 58). Litigation powers of Chinese NGOs were recognized in 2012 by the amended Civil Procedure Law, which allowed "related organizations" to sue polluters, but courts often refuse to accept suits filed by NGOs because the provisions were vague. Specifying the requirements for NGOs to sue is one the more significant revisions in the new law.

B. Stiffer Punishments

New updated law detained the polluters for 15 days if their enterprises harm the environmental impact assessments, refuse to suspend banned production, fail to obtain a pollutant discharge permit but discharge pollutants and refuse to suspend the discharge after administrative bodies issue a ban; or if they neglect supervision through means including copying monitoring data or improperly operating pollution prevention equipment. The length of detention would depend on the impact of their violations. Responsible persons would face the same punishments if their enterprises produce or use forbidden pesticides and refuse to make corrections. The law also proposes that, organizations in charge of environmental impact assessments and supervision would bear joint liabilities if they are found to have acted fraudulently. If local officials are guilty of unacceptable crime, environmental related wrongdoing, falsifying data or compel others to copy

[46] Lican Liu, Environmental NGO Leader, *A Conversation with Chinese Fellow, Environmental NGO Leader*, IN THE NEWS, Sep. 17, 2014.

data dishonestly, failing to make public according to law by publicizing environmental information, or failing to give closure orders to enterprises which illegally discharge pollutants may be dismissed or give an opportunity to improve. If offenders' behaviors constitute crimes, they will be held criminally responsible. The law says a daily-based fine system will be introduced to punish offenders. An enterprise will face daily fine if it illegally discharge pollutants and refuse to the authorities to correct its wrongdoing. In the past, enterprises received a one-off fine, that are out in new law; daily penalties (Art. 59), confiscation of equipment (Art. 25), and even jail time for "the person directly in charge" of the polluting entity (Art. 63) are in. The groundwork has been laid for a comprehensive emissions permitting system (Art. 45). Regions which fail to meet environmental targets designated by the central government will face blanket suspensions of the right to undertake new construction projects (Art. 44)[47]. The new penalty system calls on local environmental protection bureaus to issue corrective orders and fines to violators and, beginning the day after the corrective order is issued, collect a fine for each day the violation continues, based on the original penalty amount. Local governments may strengthen these daily penalty provisions by enlarging the types of violations that are subject to continuous daily fines. Standing to bring public interest litigation will be extended to social groups that are registered with the Civil Affairs Agencies of Municipal People's Governments (with jurisdiction of districts) or above generally mean the governments at prefecture (municipal) and above levels, including municipal (prefecture), provincial and central governments). The amendments will give China's Ministry of Environmental Protection (MEP) greater legal authority to regulate and penalize polluters. The new amendments include provisions on transparency, such as requirements for real-time pollution data monitoring, and criminal penalties for those who evade such monitoring systems. They also encourage studies on the impact of environmental pollution on public health and urge the prevention and control of pollution-related diseases. The amendments encourage civic action in environmental pollution by setting protections for whistleblowers and declaring June 5 as Environment Day.

C. Channel for Public Litigation

The new law allows public interest litigation on environmental issues. Public interest litigation might also help cool the mass protests which are

[47] Daniel Carpenter, *Promises and Pitfalls in China's New Environmental Protection Law*, HARVARD ENVIRONMENTAL LAW REVIEW (September 14, 2014).

the result of environmental pollution have been increasing in recent years. According to the new law, social organizations which have been engaged in public litigation on environmental issues for more than five years, should not seek to profit through such litigation, Courts should receive public litigation on environmental issues according to the new draft. By promoting public interest litigation, it is hoped that, the public's appeal for a better environment can be addressed through rule of law, instead of resorting to protests. Finally, a number of new avenues for public participation have been opened up (Arts. 53-58).

D. Changes of Other Laws

China has more than 30 environment-related laws and about 90 administrative regulations concerning environmental protection. After the adoption of the revised Environmental Protection Law, the country's fundamental environment law, other environmental laws may also face changes. According to the NPC Standing Committee's annual legislation plan, the air pollution prevention and control law will be revised.

E. Powerful Tools

There were more than 20 new articles added to the original law of 1989[48]. The new law has set up powerful mechanisms for enforcement, combining strengthened hard mechanisms legally binding environmental protection responsibilities and consequences for environmental violations with soft mechanisms of public channels for participation in environmental protection. The updated law has provided a powerful tool for authorities to take stronger punitive actions against pollution and ensure that, information on environmental monitoring and impact assessments is made public. But the real challenge lies in ensuring that, the new law is implemented in full and in a consistent manner[49].

III. POLICY: LOOPHOLES IN CHINA'S NEW ENVIRONMENTAL LAW

China's Environmental Protection Law (EPL) is the main national environmental legislative framework. Yet the environmental legal system is incomplete, and implementation and enforcement of environmental laws

[48] *Environmental Protection Law of the People's Republic of China'*, (Adopted on December 26, 1989).
[49] Ren Zhongxi, *Transitioning China Needs Tougher Environmental Law*, (Xinhua, April 25, 2014). *Available at* http://www.chinadaily.com.cn/china/2014-04/.../content_17442588.htm.

have shown major shortcomings[50, 51]. A controversial attempt to revise the EPL could have far-reaching impacts on China's economic development and environmental protection, which may have global implications[52, 53]. Increasing pressures to strengthen the rule of law in China raise the stakes[54]. The National People's Congress (NPC) (the highest legislative body in China) Standing Committee included major revision of the EPL in its 2011 legislative agenda (see supplementary materials (SM)). Proponents for radical revisions (e.g., the Ministry of Environmental Protection (MEP)) opposed other agencies and ministries that favor incremental adjustments. The 2012 draft revision shows the power of the incrementalists: Only the most urgent, feasible, and commonly agreed- upon improvements that require little change of other existing environmental laws have been included[55, 56]. Release of the draft revised EPL has triggered a flood of questions, comments, and complaints[57, 58, 59] (SM). Debates resounded during the 2012 National Congress of the Communist Party of China (CPC), when top leadership changed and "Ecological Civilization" (restructuring the economy to achieve man-nature, production-consumption harmony) was included in the Constitution of the CPC, with emphasis on scientific and democratic governance under the rule of law[60, 61]. Inclusion in the Constitution strengthened the legal and authoritative position of ecological civilization in development planning. Because EPL revision was not approved by the NPC in March 2013, a new round of drafting is in process. The Legislative Affairs Commission of NPC has listed an EPL revision in

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[50] *Organization for Economic Cooperation and Development, Environmental Compliance and Enforcement in China: An Assessment of Current Practices and Ways Forward*, OECD (Paris 2006).
[51] C. MCELWEE, S. SQUIRE & DEMPSEY, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE (New York: Oxford Univ. Press 2011).
[52] T. Wang, *Environmental Protection Law Revision: A Collection of Opinions (in Chinese)*, SOUTHERN WEEKLY, Guangdong, Sep. 14, 2012. *Available at* http://www.infzm.com/content/80777.
[53] For more information about EPL revisions, *see Available at* http://www.npc.gov.cn/huiyi/lfzt/hjbhfxzaca/node_19114.htm.
[54] G. HE ET AL., ENVIRON. DEV. 3 25 (2012).
[55] J. Wang, ENVIRON. PROTECT. 11 34 (2011) (in Chinese).
[56] *Available at* http://www.cenews.com.cn/ztbd1/hbf/ (in Chinese).
[57] T. Wang, *Environmental Protection Law Revision: A Collection of Opinions (in Chinese)*, SOUTHERN WEEKLY, Guangdong, Sep. 14, 2012. *Available at* http://www.infzm.com/content/80777.
[58] For more information about EPL revisions, *see Available at* http://www.npc.gov.cn/huiyi/lfzt/hjbhfxzaca/node_19114.htm.
[59] *Available at* http://www.cenews.com.cn/ztbd1/hbf/ (in Chinese).
[60] Full Text of Constitution of Communist Party of China, revised and adopted at the 18th CPC National Congress on November 14, 2012, Xinhua News, Beijing, 2012. *Available at* http://news.xinhuanet.com/english/bilingual/2012- 11/18/c_131982634.htm.
[61] State Council, *Decision on Implementation of Scientific Development and Strengthening on Environmental Protection (in Chinese)*, (December 3, 2005). *Available at* http://www.gov.cn/zwgk/2005-12/13/content_125736.htm.

the 2013 legislation plan. Following major gapes still exist in new law.

In compliance with the Constitution, environmental protection and ecological civilization as national basic policy must be reaffirmed. The EPL should provide a legal basis for key environmental principles: the precautionary and prevention principles, public environmental rights and participation, and environmental justice [62, 63]. These are absent or insufficiently stressed in the current draft. A strong legal basis must be provided for independent strategic environmental assessment and performance-based auditing. The current Environmental Impact Assessment (EIA) law only requires EIA of plans or projects not of policies[64]. Although after the fact environmental audits should be conducted on all major public projects and programs by independent auditing institutions, few have been conducted because of limited capacity and knowledge within the National Audit Office and lack of legal backup[65]. Environmental audits should be indispensable parts of decision-making of major governmental investments. EPL revision provides an opportunity to remove obstacles for powerful policy and to plan EIAs and governmental environmental audits crucial for science-based environmental policies. Law enforcement must be improved. Principles for defining, coordinating, and supervising transregional and inter and intra departmental environmental rights, responsibilities, and obligations of governmental and nongovernmental actors need to be specified in the revised EPL. Internal and external evaluation of environmental performance of governmental organizations and officials should become compulsory and transparent [66, 67]. Adequate rules for punishment must be set up and enforced to penalize those who violate the law administrators, regulators, and regulated parties alike[68], e.g., through double punishment (punish the violating company and its owner), a daily penalty for continuous environmental violations, and avoiding low penalties. To align with litigation laws, the revised EPL should adopt public interest litigation and grant any public entity or citizen the right to bring violating

[62] J. W. CHANG, U.S.-CHINA LAW REV. 5 1 (2008).
[63] X. Ma & Leonard Ortolano, *Environmental Regulation in China: Institutions, Enforcement and Compliance*, (Lanham, Maryland: Rowman & Littlefield 2000).
[64] J. WU, I.-S. CHANG, O. BINA, K.-C. LAM & H. XU, ENVIRON. IMPACT ASSESS. REV. 31 77 (2011).
[65] G. HE ET AL., ENVIRON. MANAGE. 44 579 (2009).
[66] X. Ma & Leonard Ortolano, *Environmental Regulation in China: Institutions, Enforcement and Compliance*, (Lanham, Maryland: Rowman & Littlefield 2000).
[67] World Bank, *Strengthening China's Environmental Protection Administrative System: Analysis and Recommendations, No 12323*, WORLD BANK OTHER OPERATIONAL STUDIES (The World Bank 2009). *Available at* http://EconPapers.repec.org/RePEc:wbk:wboper:12323.
[68] *Organization for Economic Cooperation and Development, Environmental Compliance and Enforcement in China: An Assessment of Current Practices and Ways Forward*, OECD (Paris 2006).

administrative departments and other entities to court[69, 70]. The revised EPL should shift from regulation to governance, promoting participation of nongovernmental stakeholders and balancing "hard" instruments (e.g., command-and-control) and "soft" (e.g., environmental education and voluntary agreements)[71, 72, 73]. More transparency and public participation in policy and regulatory processes at all stages, from drafting legislation to enforcement activities, can improve policy effectiveness and address potential inconsistencies. Revision of the EPL can improve the government's legitimacy for promoting ecological civilization by following expert advice, including public suggestions, and empowering environmental authorities for sustainability[74]. It is a unique opportunity for China to be a role model, especially for other emerging economies. Effective environmental governance needed a new law. Now it requires robust implementation mechanisms, accountability regimes and institutional arrangements.

CONCLUSION

Decades of rapid economic growth have taken their toll on the China' ecology, while disturbingly lenient penalties have indulged excessive environmental pollution. China ravaged by pollution needs to wage a war against it. Economic development paying little heed to green concerns and a huge population has left China a serious headache. This long tug of war indicates that, parts of the government are still more concerned that, environment protection could become an obstacle to economic growth. Threats to public health and sustainable development make the new law more pertinent than ever. Compared to western countries which dealt with some environmental problems decades ago, China is under considerable pressure with synchronized efforts needed to address air, water and soil pollution all at the same time.

Although NGOs file suit against environmental destruction, yet enforcement and litigation costs remain grey areas. The new law imposes heavier punishment on polluters, but will it be enough to repair the damage

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[69] For more information about EPL revisions, *see Available at* http://www.npc.gov.cn/huiyi/lfzt/hjbhfxzaca/node_19114.htm.
[70] J. WANG, ENVIRON. PROTECT. 11 34 (2011) (in Chinese).
[71] G. HE ET AL., ENVIRON. DEV. 3 25 (2012).
[72] A. P. J. Mol & N. Carter, *China's Environmental Governance in Transition*, 15(2) ENVIRON. POLIT. 149-170 (2006).
[73] He, G. Z., A. P. J. Mol & Y. L. Lu, *Trust and Credibility in Governing China's Risk Society*, 46(14) ENVIRONMENTAL SCIENCE AND TECHNOLOGY 7442-7443 (2012).
[74] J. Liu, *China's Road to Sustainability*, 328(5974) SCIENCE 50 (2010).

done by decades of reckless development? For a country mired in pollution amid mounting public anger over a deteriorating environment, strict implementation of the new law is more relevant than ever. Meanwhile, though approval of the environmental law revisions is enough reason to rejoice, it would be simple-minded to believe that, the new law will automatically solve all troubles overnight, since China's ecological problems are the result of decades of reckless pollution. New provisions are helpless in getting local officials to enforce the rules effectively. The success of China's new environmental law will be in its implementation. In China, how a law is enforced is much more important than how it looks on paper. A lack of good legislation is not the cause of China's ecological crisis, but rather a failure by government to prioritize the environment and enforce laws effectively.

The actual implementation of the new law is a key to real change. However, implementation can be problematic. For example, there has been a regulation on environmental information disclosure for several years, yet many local environmental protection bureaus still do not follow the regulation.

SOUTH AFRICAN LABOUR LAW AMENDMENTS: POSITIVE ASPECTS AND UNINTENDED CONSEQUENCES FOR SKILLS DEVELOPMENT

Sylvia Hammond[*]

South Africa's developing country status is well known, as is the specific challenge to redress the legacy of a racially discriminatory education system. Although youth unemployment is an international concern, recent research for Department of Higher Education and Training found 3 million young South Africans not in employment, education, or training (NEETS). Persistent elevated levels of unemployment and underemployment hamper poverty reduction. Skills development is a key policy instrument of redress. However, access to workplace-based learning and experience is essential for achieving the occupational skills and qualifications that provide access to permanent employment. This paper utilises the Learnership structure to examine positive effects and possible unintended consequences of the recent amendments to the Labour Relations, Basic Conditions of Employment and Employment Equity Acts, and the Temporary Employment Services Act, upon the implementation of skills development. Statutory structures created by the Skills Development, and Skills Development Levies Acts, and the National Qualifications Framework Act are described, as is the centrality of workplace-based learning to the achievement of qualifications approved by the Quality Council for Trades and Occupations, and registered with the South African Qualifications Authority against levels of the National Qualifications Framework. The conclusion summarises conflicting definitions of employment and learning and makes proposals for enhancement of skills development outcomes.

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INTRODUCTION

Skills development arguably sits uneasily within labour law; the Skills Development Act (SDA)[1] and the Employment Equity Act (EEA)[2] may be described as contributing to transformation and redress for past discrimination and exclusion from education, qualifications and life chances. However, both the SDA and EEA are included in the definition of "employment law" in the Labour Relations Act (LRA).[3] In an historical context, South Africa is moving from segregated exclusion from access to education and training to a vision of universal access to education from Early Childhood Development (ECD) to funded access as far as tertiary education and training, whether academic, vocational, or technical.[4] Both the SDA and EEA are applicable to adults in South African workplaces, from youthful "born-free" entrants to older work-experienced adults without formal qualifications—or even basic literacy and numeracy. Together the SDA and EEA support the removal of barriers to individual performance and enable advancement to formally recognised occupational qualifications and career advancement. This paper therefore examines how the implementation of skills development may be positively or adversely affected by the recent comprehensive labour law amendments. To a limited

[1] RSA, *The Skills Development Act 97 of 1998*, GON 1400 (Pretoria: GG 19420 1998).
[2] RSA, *Employment Equity Act 55 of 1998*, GON 1323 (Pretoria: GG No. 19370 1998).
[3] RSA, *The Labour Relations Act 66 of 1995*, GON 1877 (Pretoria: GG No. 16861 1995). Section 213.
[4] The National Student Aid Fund (NSFAS) is the South African Government national student loan and bursary fund. *Available at* http://www.nsfas.org.za/ (last visited July 30, 2015).

extent, this paper provides an update to a chapter by Paul Benjamin, in which he identified: "… the proliferation of laws with different, and at times conflicting, objectives and overlapping sets of rights and obligations undermines rather than promotes the achievement of overall goals."[5]

For context, the skills development funding model, statutory structures, and implementation mechanisms are described. The unique South African formulation of a "Learnership" for acquisition of occupational qualifications is then utilised to examine how the amendments to the: LRA,[6] the Basic Conditions of Employment Act (BCEA),[7] and the EEA may benefit—or hamper—skills development. The centrality of the workplace and employment for Learnership implementation and qualification acquisition is explained, thereby raising: inconsistencies in interpretation and application between statutes; potential implications of the recent cases "deeming" Temporary Employment Service (TES) placements in excess of three months as "employees" of clients; and potential adverse industrial relations implications of the requirements for equal pay for work of equal value. The approach is multi-disciplinary and aims to examine how the implementation of these statutes manifests at the workplace from the perspective of a generalist human resource practitioner. Only brief reference is made to the taxation implications of skills development implementation and of Broad-based Black Economic Empowerment (B-BBEE). Finally, the concluding section advances an argument for greater alignment of statutory definitions, and a clearer definition of the Learnership employment relationship for previously unemployed learners.

I. THE SKILLS DEVELOPMENT FUNDING MODEL

Skills development falls under the Department of Higher Education and Training (DHET),[8] and the structures and processes are part of a differentiated, articulated post-school education and training landscape.[9] The three main labour law statutes, namely: the LRA, BCEA and EEA discussed in this paper fall under the Department of Labour

[5] Benjamin, *Different Routes to Equality and Empowerment*, EQUALITY IN THE WORKPLACE REFLECTION FROM SOUTH AFRICA AND BEYOND 119 (Ockert Dupper & Christoph Garbers eds., 2009).
[6] RSA, *The Labour Relations Act 66 of 1995*.
[7] RSA, *Basic Conditions of Employment Act 75 of 1997*, GON 1631 (Pretoria: GG No. 18491 1997).
[8] RSA, *Tranfer of Administration and Powers and Functions Entrusted by Legislation to Certain Cabinet Members in Terms of Section 97 of the Constitution*, PROCLAMATION 44 (Pretoria: GG 32367 2009).
[9] DHET, *White Paper for Post-School Education and Training: Building an Expanded, Effective and Integrated Post-School Education System*, GON NO 11 (Pretoria: GG. 37229 2014).

(DoL).[10] The skills funding model comprises a Skills Development Levy (SDL) of one percent of payroll paid monthly to the South African Revenue Service by all employers with an annual payroll in excess of R500,000 per annum.[11] There are a number of exclusions from the calculation of remuneration, notably for this paper, the amount payable to a "learner" contracted on a Learnership, who was previously unemployed.[12] Twenty percent of the SDL goes towards a National Skills Fund (NSF) for national priority interventions.[13] The remaining eighty percent of SDL is directed to twenty one Sector Education and Training Authorities (SETAs).[14]

The SETAs are entitled to retain 11.5 percent of SDL received for administration, 5 percent to be contributed to the Quality Council for Trades and Occupations (QCTO), and to disburse twenty percent back as mandatory grants to participating and compliant employers in their sector.[15] Thereafter remaining funds are available for disbursement as discretionary grant funding to employers, who participate in identified priority and PIVOTAL[16] programmes. As the following section will demonstrate the funds available to a participating, employer may potentially exceed what was paid in SDL. How these strategic priorities are identified and the types of skills development programmes funded by discretionary grants is now described.

II. NATIONAL STRATEGY AND DISCRETIONARY GRANT FUNDED PROGRAMMES

The National Human Resource Development Strategy (NHRDSSA)[17]

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[10] Other statutes mentioned briefly are: RSA, *Employment Tax Incentive Act 26 of 2013*, GON. 1032 (Pretoria: GG No. 37185 2013). Issued by National Treasury, and the *RSA, Broad-Based Black Economic Empowerment Act 53 of 2003*, GON 17 (Pretoria: GG 25899 2003). Issued by the Department of Trade and Industry (dti).

[11] As the remuneration of managers, owners or directors in included in the calculation of R500,000 in practice over a range of sectors this threshold is reached once companies have a regular employment complement of approximately 12 employees. National and Provincial government, public benefit organisations, and municipalities "granted an exemption are exempted from payment of the SDL".

[12] RSA, *Skills Development Levies Act 9 of 1999*, GON 516 (Pretoria: GG No. 19984 1999). Section 3(5)(d).

[13] RSA, *The Skills Development Act 97 of 1998*. Sections 27-29.

[14] RSA, *Skills Development Levies Act 9 of 1999*. Section 8.

[15] Employers who prepare annual Skills and PIVOTAL plans and annual Training reports and annual reports on PIVOTAL programmes implemented, which are submitted by the gazetted date, currently by end April. The SETA Grant Regulations regarding Monies Received by SETA & Related Matters No. R.990 GG No. 35940 and Amendment Notice to Gon R.990 Published in GG No. 35940 of December 3, 2012 of July 15, 2013.

[16] PIVOTAL is an acronym for professional vocational technical and academic programmes, which lead to a qualification or part-qualification registered by SAQA. *Available at* http://www.merseta.org.za/Portals/0/WHAT%20IS%20A%20PIVOTAL%20PROGRAMME.pdf (last visited July 30, 2015).

[17] DHET, *Human Resource Development Strategy for South Africa HRD-SA 2010-2030*, (Pretoria 2009).

sets overall national education and development priorities, and the National Integrated Human Resource Development Plan has been aligned to national economic strategic goals.[18] The skills development subset is itemised in the National Skills Development Strategy (NSDS)[19]. The NSDS objectives and indicators are cascaded down by the DHET Director General into an annual Service Level Agreement with each SETA.[20] The discretionary funding is utilised to encourage employers to participate in the programmes that assist the SETA in meeting the performance targets agreed with the DHET. Depending on the individual sectoral requirements, the usual priority programmes receiving discretionary funding are: Adult Education and Training (literacy and numeracy), Technical Vocational Education and Training (TVET) (certificate) programmes, artisan listed trade qualifications (apprenticeships)[21], practical work experience required for the achievement of a qualification (in-service training), post-graduate internships, bursaries and Learnerships.

Funding levels vary year on year depending upon identified priorities and each sector, and the various programmes attracts differing levels of discretionary grant funding. Examples of funding levels are: R2,000 per learner per AET programme (R2,000.00 for communication and R2,000.00 for numeracy). If the learner commences at AET level one on both programmes and advances through levels one to four, the employer would have received R16,000.00 per learner, which would usually cover the cost of the training service provider.[22] Artisan funding may be R30,000 per apprenticeship per year and the programme would usually be three years totalling R90,000.00. As indicated above, the Learnership is the main vehicle of implementation and recipient of discretionary grants, the following section expands upon this type of intervention, the funding and the contractual arrangements.

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[18] *National Integrated Human Resource Development Plan 2014-2018*, (Pretoria: Government Printer 2014).

[19] DHET, *National Skills Development Strategy III*, (Pretoria: Government Printer 2011). Previous strategies: NSDS I (2000-2005) and NSDS II (2006-2010).

[20] RSA, *The Skills Development Act 97 of 1998*. Section 10A.

[21] Examples of SETA. *Available at* websites http://www.merseta.org.za/LeviesandGrants.aspx;http://www.foodbev.co.za/grants/; http://www.mict.org.za/inner.aspx?section=5&page=46 (last visited July 31, 2015).

[22] Depending upon company and employee negotiations, the training may be in either the personal time of the employee, paid time of the employer, or a combination of both. The employer funds the cost of registering the company as an examination centre and pays the cost of the examination costs. Pre-placement assessments may also sometimes be funded by discretionary grant funding.

III. LEARNERSHIP FUNDING

The concept of a Learnership was specifically created by the SDA and consists of a structured learning component including theoretical knowledge, and a structured practical work experience component, for a specified duration. Each Learnership leads to a formal occupational qualification or part-qualification registered by the QCTO with the South African Qualifications Authority (SAQA) on the National Qualifications Framework (NQF).[23] From the 2008 SDA amendments, an apprenticeship is included in the definition of a Learnership. The advantage of this inclusion will become apparent in the following paragraph as the taxation benefits of Learnerships are explained. Each learner on a Learnership enters into a Learnership agreement, which is administered by the SETA but is concluded between: the learner, an employer, and the training service provider (TSP)—a tripartite agreement. Consisting of a structured learning component and a structured work experience component, the learner progress is monitored by formative and summative assessments conducted by the TSP. Concurrent with the duration of the Learnership, the learner requires an employment contract with the employer. Minimum rates of pay are specified by the Learnership Sectoral Determination 5: Learnerships.[24] A description of the financial implications for employers implementing Learnerships is required before exploring further the nature of the employment contract.

Unfunded Learnerships: Employers who are unable to obtain discretionary grant funding from the SETA with which they are registered, may go ahead and conclude agreements with learners and a TSP to provide "unfunded" Learnerships. The benefit to the employer is that, the financial costs incurred in implementation may be included in the assessment of the Skills Development element of the Broad-based Black Economic Empowerment (B-BBEE) scorecard.[25] In addition, the employer will be able to benefit from the Learner Allowance, which is a reduction of taxable

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[23] RSA, *The Skills Development Act 97 of 1998*. Sections 16-19 on Learnerships, and s26F-26J on the QCTO; RSA, *National Qualifications Framework Act 67 of 2008*, GoN 167 (Pretoria: GG No. 31909 2008). Sections 4-7 on the NQF, s10-23 on SAQA, and s26-27 on QCTO.

[24] *Sectoral Determination 5: Learnerships*, 432 GN 519 (Pretoria: GG No. 22370 2001). Minimum rates of pay are determined by the NQF level of the qualification, and are updated annually.

[25] RSA, *Broad-Based Black Economic Empowerment Act 53 of 2003*. "The fundamental objective of the Act is to advance economic transformation and enhance the economic participation of black people in the South African economy." *Available at* https://www.thedti.gov.za/economic_empowerment/bee.jsp (last visited July 30, 2015). The relevance of the B-BBEE Act is that, enterprises are categorised by size and scored according to elements identified as relevant to economic transformation. For enterprises wishing to obtain business from the state via tenders, the outcome of the scoring exercise is critical.

income by R30,000 per learner at commencement of the Learnership, and by a further R30,000 per learner at the conclusion of the programme—usually in the following or successive tax years (Increased to R50,000 per learner per commencement and R50,000 upon conclusion for registered disabled learners). Unusually for the South African Revenue Service (SARS), "double dipping" is also available to employers, if they contract with previously unemployed young persons[26] and meet the requirements, they may also benefit from the Employment Tax Incentive (ETI), which supports the employment of previously unemployed persons and provides a further reduction of taxation payable, in the present period and may be accumulated against a future taxation liability.[27]

Discretionary Grant Funded Learnerships: In the event that, the SETA approves discretionary grant funding, the employer receives a discretionary grant payment of approximately R20,000 per learner per year—in addition to: the reduction in taxation, the B-BBEE scorecard calculation, and the ETI tax reduction as explained above. From this description, it is suggested that, there is considerable financial benefit to the employer in implementing Learnerships. The following section will examine the implementation of Learnerships at the workplace, and the confusion arising from the two forms of employment contractual arrangements.

IV. LEARNERSHIPS AND TWO FORMS OF EMPLOYMENT CONTRACT

As indicated above, the acquisition of an occupational qualification via a Learnership requires two contracts, namely: the tripartite agreement with an employer and a TSP, and an employment contract with the employer. The person entering the Learnership may be an existing employee with a contract, or a previously unemployed person, who then concludes an employment contract for the duration of the Learnership. These learners are referred to colloquially—and for the remainder of this paper—as 18(1) or 18(2) learners.[28] The tripartite agreement may not be terminated prior to agreed termination date unless: the learner achieves the desired competence earlier than the set date, the administrating SETA approves, or the learner is: "fairly dismissed for a reason related to conduct or capacity".[29] This last clause (section 17(4) (c) would appear to refer to a dismissal in terms of the

[26] The distinction between learners in employment before contracting on a learnership and those unemployed will be covered in the following section on Learnerships and forms of the employment contract.
[27] RSA, *Employment Tax Incentive Act of 2013*.
[28] RSA, *The Skills Development Act 97 of 1998*. Sections 18(1) and 18(2).
[29] RSA, *The Skills Development Act 97 of 1998*. Section 17(4) (c).

employment contract. It follows therefore that, this would be covered by the standards of the LRA. This conclusion is supported: firstly, by section 18(5) of the SDA, which set outs that, the contract of employment may be terminated in terms of section 17(4) and secondly, by section 19(6) of the SDA, which makes reference to the "lawfulness" and "fairness" of a dismissal related to conduct or capacity including a contract contemplated in section 18(2). Section 18(6) then confirms that, the contract of employment of a learner terminates at the end of the specified learnership duration, unless the employment relationship already existed, in which case the employee rights are unaltered by the conclusion of the learnership.[30]

V. THE SOURCE OF TWO FORMS OF EMPLOYMENT CONTRACT

The first implication of the Learnership agreement arises from the termination conditions. Whether the learner was previously employed or newly employed, in both cases, the employment contract may not be terminated "before the expiry of the period of duration specified in the Learnership agreement unless the learnership agreement is terminated in terms of section 17(4)" (of the SDA), that is: conduct or capacity. Therefore it may be interpreted that, neither the tripartite Learnership agreement nor the employment contract may be terminated for operational requirements. Unfortunately for the purposes of this paper, there does not appear to have been any legal challenge to this interpretation.

However, a number of other circumstances have given rise to confusion within the ranks of human resource, payroll and training practitioners. Terms and conditions of the employment contract for the 18(2) learners are governed by the Sectoral Determination 5: Learnership Sector.[31] Although the Department of Labour, which issues the determination uses the wording "employment contract" and "employment" both in the determination and on the website, and SARS documents also use that wording, there appears to be a widespread view that the 18(2) learners are not "employees". The next section aims to contrast legal wording in relevant documents with what may be termed the "prevailing view" of practitioners.

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[30] RSA, *The Skills Development Act 97 of 1998*. Section 18(6).

[31] *Sectoral Determination 5: Learnerships*, 432 GN 519 (Pretoria: GG 22370 2001). The determination essentially mirrors the standard clauses of the BCEA, and publishes updates to the stipend rates, which are based upon the NQF level of the Learnership. The current document provides rates until March 31, 2016. *Available at* http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/learnershipalowances015.pdf (last visited July 31, 2015).

VI. DOCUMENTARY EVIDENCE SUPPORTING THE 18(2) EMPLOYMENT CONTRACT

A central definition of labour and employment law is that of the "employee". Notable for the following discussion, the LRA defines "employment law" as including: the Unemployment Insurance Act (UIF Act),[32] the EEA and the SDA.[33] Following the work of Simon Deakin on the evolution of the contract of employment in Britain, Le Roux has noted that, South Africa has reached a relative state of unification of the employment contract.[34] One of the aspects Le Roux examines is the "control test", in terms of which the 18(2) learners would certainly comply. The control test is also one of the elements used in the NEDLAC Code of Good Practice.[35] Under the ETI, the SARS would include 18(2) learners for the purpose of employers qualifying for that taxation incentive.[36] The SARS Interpretation Note on the Additional Deduction for Learnership Agreements[37] refers to a "registered learnership agreement," and specifies that: "… any period during which—a learnership agreement is not registered, or a learner is not in employment, will not qualify for the annual allowance."[38] This wording appears to contemplate "employment".

Focusing on definitions, the LRA definition of employee states:

> (a) "… any person … who works for another person", and also of relevance;
>
> (b) "… any other person who in any manner assists in carrying on or conducting the business of an employer".[39]

The Sectoral Determination then defines "work" as:

> "… 'work' includes any time that, the learner is required to spend in study periods or theoretical learning sessions with the training provider in terms of the learnership agreement."

The application of the determination applies to:

> "(a) the employment of a learner—
>
> (i) who has concluded a learnership agreement … and;

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[32] RSA, *Unemployment Insurance Act 63 of 2001*.
[33] An identical definition exists in the BCEA s1.
[34] Le Roux, *The Evolution of the Contract of Employment in South Africa*, 39 INDUSTRIAL LAW JOURNAL (2010).
[35] NEDLAC, *Code of Good Practice: Who is an Employee?* (Pretoria: NEDLAC 2006).
[36] RSA, *Employment Tax Incentive Act 26 of 2013*.
[37] RSA, *Income Tax Act 58 of 1962 Interpretation Note*, 20(4) (2011).
[38] RSA, *Income Tax Act 58 of 1962 Interpretation Note*, 20(4) 5-6.
[39] RSA, *The Labour Relations Act 66 of 1995*. Section 213.

(ii) who was not in the employment of the employer party to the learnership agreement when the agreement was concluded." Finally:

"This determination forms part of the contract of employment of any learner employed in terms of section 18(2) of the Act."[40]

Finally, the Department of Labour has tabled an amendment to the Unemployment Insurance Act to include: "… learners who are undergoing learnership training…"[41]

VII. EXAMPLES OF LEARNERSHIPS IN PRACTICE

From the section above, it would appear that, the Department of Labour intention was for an employment relationship to be established for the 18(2) learners. What would be the motivation for excluding the learner from an employment relationship? If it were considered that, the majority of time would be spent in a classroom or training venue, then it may be argued as appropriate given that, the employer is not gaining the benefit of their work. On the contrary, in practice especially for the lower level Learnerships the formal knowledge component of the Learnership comprises approximately 30%. The employee is working at an occupation for the employer for the majority of the contract period.

One common example is that of call centres, where a voice recording warns callers that, the consultant is operating "under supervision"; the "consultant" is on a Learnership but fulfilling all the requirements of the occupational role—albeit lacking in experience. A second example is the articled clerk in accounting firms: here the years of being "articled" have been registered as a Learnership—in this case at a very senior postgraduate level, and for a number of years. In the past, the articled clerk was always regarded as an "employee" for the duration of their articles. Whether they received tenure thereafter was generally decided based upon performance and suitability. This is comparable to the three year apprenticeship, where the apprentice was employed for the duration of the apprenticeship, and completes work under the supervision of master artisan at an apprenticeship remuneration rate. The employment contract terminates once the trade test is passed and the employer decides whether an additional permanent qualified artisan is required. The Learnership is specifically for an occupational qualification, which may only be acquired with work-based experience, the

[40] *Sectoral Determination 5: Learnerships*, 432 2001-GG22370 GN NO. 519. Sections 1, 2(1)(a)(i)-(ii), and 2(a).
[41] RSA, *Unemployment Insurance Amendment Bill*, B25 OF 2015 PUBLICATION OF EXPLANATORY SUMMARY. GG39273 GN No. 967 of October 8, 2015.

question may therefore be posed: what is the source of reluctance to accept the learners on 18(2) Learnership contracts as a fixed-term employment contract, and what are some of the implications?

In the event that, the Learnership qualification is acquired and the "learner" is employed permanently, the Learnership duration, which as indicated above may be a number of years may well not be credited. This may prejudice any long-service benefits that the employer may offer. In addition, it has become apparent that, employers may place learners on successive Learnership agreements. This raises the question of the employer motivation to avoid an employment relationship. In contrast to the section above, where documentary evidence appears to imply an employment relationship, a number of instances are advanced for a contrary interpretation.

VIII. COUNTER ARGUMENTS TO AN 18(2) EMPLOYEE STATUS

The payments to learners are not included in the calculation of SDL payments to SARS.[42] No deduction is made currently from the learners for UIF[43] and they do not qualify to draw unemployment insurance. The learners receive a stipend set by the Sectoral Determination on Learnerships.[44] The learners do not receive the same conditions as other employees within the company, for example: such as medical aid scheme contributions, or pension or provident fund scheme contributions.[45] The B-BBEE scorecard rewards companies for "absorption" of learners into the company for "formal permanent or long-term contract" employment, the implication being that, they are not employees.[46] It would appear from this list that, there are counter arguments in that differing conditions of employment do not necessarily remove the employment status of the 18(2) learner. However, the points do highlight the apparent incentive of South African employers to reduce complement numbers wherever possible. The possible rationale for that stance is set out below with discussion of the implications of some of the labour law amendments.

IX. EMPLOYER RESISTANCE TO A FORMAL EMPLOYMENT RELATIONSHIP

The criticality of workplace-based experience for the acquisition of

[42] RSA, *Skills Development Levies Act 9 of 1999*. Section 3(5)(d).
[43] RSA, *Unemployment Insurance Act 63 of 2001*.
[44] *Sectoral Determination 5: Learnerships*, 432 (2001).
[45] Personal correspondence. July 31, 2015.
[46] *Broad-Based Black Economic Empowerment Act (53/2013): Codes of Good Practice*, DTI 91 (2013).

occupational qualifications has been made clear. Access to workplace-based learning and experience is essential for achieving the occupational skills and qualifications that provide access to permanent employment for young people. Workplace-based learning is defined as: "The exposure and interactions required to practice the integration of knowledge, skills and attitudes required in the workplace."[47] This follows the purpose and intent of both the SDA and the EEA. What then is the source of employer reluctance to increase employment?

South African labour law is firmly grounded in numbers. The SDLA targets a payroll of above R500,000 per annum, which in practice across a number of sectors represents 10-12 employees. The dti has established definitions of small medium and micro enterprises and the latest B-BBEE Exempt Micro Enterprise level is R10 million annual turnover. The LRA excludes employees earning above the BCEA earnings threshold from cover, and exempts employers employing less than 10 employees or fewer than 50 where the business has been in operation less than 2 years from application of requirements for part-time employees.[48] The EEA has established "designated employers" at more than 50 employees[49] and until the recent amendments only companies with more than 150 employees required annual reporting—now all designated companies are required to report annually.[50]

The implementation both of skills development and employment equity requires a consultative committee. The EEA has always required consultation with a committee representative of all employees for all designated employers, including trade union representation.[51] Initially skills development included a similar requirement, but the requirement fell away with amendments to Regulations and re-surfaced with the latest Grant Regulations now requiring companies of over 50 employees to have evidence of consultation by signature on plans and reports submitted—also including union representation.[52] The initial removal may well have resulted from early signs by union representatives of refusal to sign Workplace Skills Plans. However, employers have resisted any attempts to move skills development into an industrial relations arena. One of the issues identified

[47] *Available at* http://hr.saqa.co.za/glossary/search_widget.php?id=139 (last visited July 30, 2015).
[48] RSA, *The Labour Relations Act 66 of 1995*. Section 198.
[49] Available at http://www.dti.gov.za/economic_empowerment/bee.jsp (last visited July 30, 2015).
[50] Employers who have less than 50 employees but have a turnover above the Schedule 4 level for their sector are also "designated" employers. RSA, *Skills Development Levies Act 9 of 1999*. Section 1 Definitions.
[51] RSA, *Employment Equity Act 55 of 1998*. Section 16.
[52] The SETA Grant Regulations regarding Monies Received by SETA & Related Matters in of 2012- and Amendment Notice to Gon R.990 Published in GG No.35940 of December 3, 2012 in of 2013- July 15, 2013.

by Godfrey, et al.[53] is that, with the implementation of the skills development SETA landscape and the removal of skills development from the bargaining council agenda, the potential for bargaining skills acquisition and productivity improvements against increased wages has been entirely compromised. It is ironic then that, equal pay for work of equal value has now landed firmly on the table as a result of the Employment Equity amendments, which will be discussed in the following section.

X. EMPLOYMENT EQUITY ACT AND UNFAIR DISCRIMINATION

By targeting adults in the workplace skills development has been seen as a key policy instrument of redress and a supporting instrument for the removal of barriers to appointment and advancement and enhancing effective implementation of the objectives of the Employment Equity Act. Section 6(1) on unfair discrimination via: "any employment policy or practice", includes training and development. An aspect of Learnership implementation that, appears not to have reached the Commission for Conciliation Mediation and Arbitration (CCMA) is the plight of female employees who fall pregnant shortly after commencing their Learnership. In practice in most companies, because of the extremely programmatic nature of Learnerships, with modules being assessed and completion dates set, it is practically impossible to accommodate maternity leave. Unless handled sensitively this may lead to unfair discrimination on a listed ground. Larger organisations with repeated Learnership programmes provide the chance to join a subsequent programme. It is interesting to consider what aspects of skills development such as this may lead to an allegation of unfair discrimination, the most likely would be of exclusion from a desired programme.

XI. EMPLOYMENT EQUITY REGULATIONS

Possibly the main driver of workplace equality will be the equal pay for work of equal value amendments. The Minister of Labour issued the Employment Equity Regulations 2014, which contain guidance on the establishment of the criterion, methodology, and means of assessing work of equal value in terms of s6(4).[54] Equal work is defined in the Regulations as including: "… work that is the same, substantially the same or of the same

[53] Godfrey, *The State of Collective Bargaining in South Africa*, AN EMPIRICAL AND CONCEPTUAL STUDY OF COLLECTIVE BARGAINING 143 (Cape Town: Development Policy Research Unit 2007).
[54] *Employment Equity Regulations 2014*, GG37873 GN NO R595 (2014).

value as other work". An argument that may be made by those on a Learnership compared to the permanent workforce—doing same or "substantially the same" work. The Regulations indicate that an exception to different pay would be: "… where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different remuneration or enjoys different terms and conditions of employment". This would be consistent with the different terms and conditions experienced by the 18(2) learners.[55] However, at some point, this may be challenged. In unskilled and semi-skilled positions, where the work consists of relatively simple repetitive tasks of limited variety and duration, such as fish filleting for example, it will be difficult to argue what amount of additional skill is gained from a few more months—or years—experience. Analysis to ascertain equal work requires an analysis of the individual jobs: the responsibility in terms of people, finances and material, qualifications and skills, and the effort involved whether physical, mental or emotional.[56]

XII. EMPLOYMENT EQUITY CODE OF GOOD PRACTICE

The requirements above centre on the nature of the job, the work to be done and the nature of the demands. In contrast Code of Good Practice on Equal Pay/Remuneration[57] moves the focus to the remuneration received by the incumbents. The Code aims to set out guidelines on how the assessment of equal pay is to be achieved, namely through: "…human resources policies, practices and job evaluation processes."[58] The document identifies past discriminatory practices, particularly those based upon race and gender. The codes also include again the analysis of the requirements for a job, that is: "The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal. This includes knowledge and skills that are required for a job. What is important is not how these were acquired but rather that their content corresponds to the requirements of the job being evaluated. Qualifications and skills can be acquired in various ways including academic or vocational training certified by a diploma, paid work experience in the labour market, formal and informal training in the workplace and volunteer work."[59] As mentioned previously, this description sits squarely in the domain of skills development

[55] *Employment Equity Regulations 2014*, R595 8 (2014).
[56] *Employment Equity Regulations 2014*, R595 7 (2014).
[57] *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*, GG38837 GoN448 (2015).
[58] *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*, GoN448 8 (2015).
[59] *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*, GoN448 11 (2015).

and occupational qualifications, and adds the Recognition of Prior Learning. This is an area that has been the despair of many skills development practitioners for the lack of progress. [60]

From an industrial relations perspective, unions traditionally seen long-service as beneficial and worthy of additional financial reward, with many companies giving long service awards and long-service payments. In contrast, from a human resource management perspective, this has negative implications as a static workforce is seen as an obstacle to the implementation of employment equity principles. Particularly older long-serving employees may be reluctant to participate in literacy and numeracy programmes, which given the increased technology requirements hampers productivity improvements as well as limiting promotion prospects. A potentially powerful aspect of this Code of Good Practice is to achieve an integration of human resource management practices, with employment equity and skills development implementation.

XIII. EMPLOYMENT EQUITY COMPLIANCE

In an assessment of compliance with the requirements of the EEA,[61] the employer would be required to demonstrate: measures to identify and remove barriers to advancement, measures to ensure representation of diverse suitably qualified people, and to implement retention measures to retain those developed from designated groups. Whether the individual is "suitably qualified" may be determined by one or any appropriate combination of the following factors: formal qualifications, prior learning, relevant experience, or the capacity to acquire the necessary skills and ability within a reasonable time, this last element would suggest psychometric testing of learning potential. One word that is not used in this context is competence, and this may be an instance where the terminology and processes of skills development would benefit the implementation of the intentions of this section, applied competence is defined as: "A learner's ability to integrate concepts, ideas and actions in authentic, real-life contexts which is expressed as practical, foundational and reflexive competence". Assessment is defined as: "A structured process for gathering evidence and making judgments about an individual's performance in relation to registered national unit standards and qualifications."[62] Suitably qualified

[60] A substantial number of policy documents and conference presentations on RPL are available on the SAQA site. *Available at* http://www.saqa.org.za/list.php?e=RPL (last visited July 31, 2015).
[61] RSA, *Employment Equity Act 55 of 1998*. Section 15.
[62] SAQA, *Guidelines for Integrated Assessment*, i (Pretoria: SAQA 2005).

implies job analysis and appropriate occupational training and development. As described in the discretionary grant section, the range of PIVOTAL programmes are ideally suited to meet these requirements.

Finally, the EEA Code of Good Practice a number of additional documents, which should be read in conjunction including the ILO Remuneration Convention 100 of 1951,[63] and of central importance the Integration of EE into HR policies and practices.[64]

XIV. PAYMENT TO PROCURE TRAINING

Other than the Sectoral Determination on Learnerships there is minimal impact of the BCEA on skills development. However, section 33 A (1) (a) prohibits the acceptance by an employer of any payment in exchange for a job. It is unfortunate that, this section did not also include (as the following section does) the words: "any business nominated by the employer" as work-seekers have been lured into "training programmes ostensibly in the hope of gaining employment.[65] The relationship between training and employment is explored further in the following section.

XV. TEMPORARY EMPLOYMENT SERVICES AND LEARNERSHIPS

The intentions of the amendments to the LRA[66] are clearly spelt out and have been the subject of debate for a period of years by academics, development organisations, and particularly by the parties at NEDLAC,[67] namely: to reduce the growth of atypical forms of employment, and to limit the scope of tri-partite relationships, that is the TES or labour brokers. Apart from various changes to collective bargaining landscape, possibly the most important aspect of the LRA amendments for skills development is the clause "deeming" persons placed by a TES with a client for more than three months, to be "deemed" as the employee of the client.[68] Two recent cases confirm this interpretation.[69]

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[63] *Available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100 (last visited July 31, 2015).
[64] Integration of EE into Human Resource Policies and Practices, GG27866 GENN 1358 (2005).
[65] RSA, *Basic Conditions of Employment Act 75 of 1997*, s33A(1)(a).
[66] RSA, *The Labour Relations Act 66 of 1995*. The amendments came into effect January 1, 2015 and apply to workers earning below the BCEA prescribed earning threshold—currently R205,433.30 per annum.
[67] The author is indebted to John Botha and to Johnny Goldberg for the information provided on TES.
[68] RSA, *The Labour Relations Act 66 of 1995*. Section 198.
[69] Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd and NUMSA 2015 ECEL1652-15, and Refilwe Esau Mphirime and Value Logistics Ltd/BDM Staffing (Pty) Ltd 2015 FSRFBC34922.

Implications for the funding of Learnerships through discretionary grants however, is not clear.[70] The TES would be registered with the Services SETA and the discretionary grant funding to cover Learnerships would be from that source. If the employee is deemed the employee of the client, will the SETA with which the client is registered, then take over Learnerships—and discretionary funding? Given the process for application and the time-consuming bureaucracy to contract the learners, this would appear unlikely. If the TES continues to pay the employee as an outsourced payroll service, and to pay the SDL, then the discretionary grant could still be accessed from the TES registered SETA. However, SARS provides an exemption annually in respect of TES employee tax, it is unclear whether that would continue.[71]

The key question regarding skills development implications of the TES amendments, is the extent to which the TES have been placing Learnerships as part of their placements with clients. The statistics are not readily accessible from the Services SETA Annual Reports. However, Bhorat, et al.[72] have highlighted the substantial extent to which the total level of TES placements has fallen subsequent to the LRA amendments. The industry has in the past claimed to be a creator of jobs, contrary to the very early image of TES taking over the employment of previously employed persons on reduced employment conditions. If the "deemed" employees on a Learnership were to continue it would require an amendment to the Learnership agreement and potentially an updated employment contract, and the learner and the SETA would be required to approve the documentary changes.[73]

An extremely positive aspect in support of skills development implementation is the requirement that part-time employees should receive the same access to training and development as full-time employees.[74] In protection against the misuse of fixed term contracts, one of the accepted reasons for such a contract is for employing a student or recent graduate (which would be for internship also covered by SETA discretionary grant funding) and "for the purpose of being trained".[75]

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[70] Attempts by the author to obtain official SETA comment were unsuccessful.
[71] SARS, *Guide for Employers in Respect of Employees' Tax (2016) Tax Year*, (PAYE-GEN-01-G10: SARS 2015).
[72] Bhorat, Magadla & Steenkamp, *Employment Effects in the Temporary Employment Services TES Sector: Post-Regulatory Amendment Effects*, (2015); Bhorat, Cassim & Yu, *Temporary Employment Services in South Africa: Assessing the Industry's Economic Contribution*, (2014).
[73] RSA, *The Skills Development Act 97 of 1998*. Section 17(5).
[74] RSA, *Employment Equity Act 55 of 1998*. Section 6; RSA, *The Labour Relations Act 66 of 1995*. Section 198.
[75] RSA, *The Labour Relations Act 66 of 1995*. Section 198B(4).

CONCLUSION

The South African skills development landscape is characterised by a plethora of acronyms, complex pedagogic and andragogic learning theory, and bureaucratic SETA administration. At the coalface however are the adult learners grappling with literacy and numeracy, or the development of technical artisan skills, or seeking an occupational qualification via the Learnership route. This paper has endeavoured to highlight how the format of workplace-based learning interacts not only with mainstream labour law, but also unemployment protection and taxation. Within this context, it is easy to overlook the many industrial relations implications of the implementation of learnerships, and issues as central and familiar to labour law practitioners as the definition of "an employee". Ultimately all aspects of these activities rest within the human resource management purview and the management of people at work.

Therefore, the latest amendments to the EEA, with the 2014 Regulations and 2015 Code of Good Practice are seen as an enormously positive step for the implementation not only of employment equity, but also for skills development. It is unsurprising that, the majority of the observations of this paper centred on that area. The pulling together of the human resource management aspects of the implementation of employment equity and skills development is seen as positive. The challenges are to redress the legacy of discrimination in education and the workplace within a developing country context.

The plea is for "joined up" policy and strategy, interdisciplinary coherence of mutually supportive definitions, policy that further encourages the employment of youth, and clarity and certainty particularly for the 18(2) learners, their employers and the skills development practitioners.

ACRONYMS

ABET	Adult Basic Education and Training
AET	Adult Education and Training
BCEA	Basic Conditions of Employment Act
DHET	Department Higher Education and Training
DoL	Department of Labour
dti	Department of Trade and Industry
EEA	Employment Equity Act
ETI	Employment Tax Incentive
FET	Further Education and Training
LRA	Labour Relations Act
NASCA	National Adult Standard Certificate
NHRDSSA	National Human Resource Development Strategy of South Africa
NIHRDS	National Human Resource Development Strategy
NQF	National Qualifications Framework
NSDS	National Skills Development Strategy
NSF	National Skills Fund
PIVOTAL	Professional Vocational Technical and Academic
PSET	Post-school Education and Training
QCTO	Quality Council for Trades and Occupations
QLFS	Quarterly Labour Force Survey
RSA	Republic of South Africa
SAQA	South African Qualifications Authority
SARS	South African Revenue Services
SDA	Skills Development Act
SDF	Skills Development Facilitator
SDL	Skills Development Levy
SETA	Sector Education and Training Authority
TES	Temporary Employment Service
TVET	Technical Vocational Education and Training
WBL	Work-based learning
WIL	Work-integrated learning

DEVELOPMENT OF THE PAN EUROPEAN CORRIDORS IN MACEDONIA, AS A BACKBONE OF THE SOUTH EASTERN EUROPEAN REGION

Aneta Stojanovska-Stefanova[*] *& Drasko Atanasoski*[**]

The transport is a vital bloodstream of any society, of every country and to the world globally. The functionality of the states is largely simplified thanks to the transport. That is the reason why the power holders in local, regional and international level are aimed towards developing strategies and projects that will primarily maintain the transport infrastructure, but as well to projects that offer development of new projects, linking new places, increasing the communication, there to taking into concern the environmental protection. The completion of the transnational's axis—Pan European Corridors 8 & 10, which pass through Macedonia is a high priority for the Government, enabling safer, faster and more efficient transport of passengers and goods, thus providing a better regional economic development of the country, of the Balkan and of the South Eastern European Region.

INTRODUCTION

High Level Group (HLG) for transport identifies five main axes and determines the number of projects that are classified into two groups projects and will begin to be implemented before 2010 and projects with long-term interest until 2020. HLG highlighted the need for further studies and analyzes which relate to the technical specification of the environmental impact and financial mechanisms needed to implement the projects. Priority axes/projects identified by the High Level Group for Macedonia for the implementation by 2010 were provided:

- Construction of the border crossing highway with Albania-Skopje-border with Bulgaria (738.83 million euros);

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- Rehabilitation of the railway line Tabnovce-Gevgelija, phase 1;
- The railway line Kumanovo-Beljakovce-border with Bulgaria;
- The railway line Kicevo-Struga-border with Albania.

For the implementation after 2010:

- Rehabilitation of the railway line Tabanovce-Gevgelija phase 2.

Project with regional significance and national priority:

- Construction of multi-modal terminal located in Struga.

In the medium-term priorities, it is included the construction of the section Veles-Prilep. The section Veles-Prilep represents a strategic relation of the Republic of Macedonia by which the highway that passes through the central part of the Republic will be completed, and it is of primary importance for development. The section is a part from the European Corridor 10d and it is a connection of particular importance for the transport of the whole region towards the Central and Western Europe.

Within the programming of SEETO proposed routes that enter in the medium-term priorities are the routes:

- Upgrading the section at highway level Bitola-Resen-Ohrid-Podmolje and;
- Construction of the highway Otovica-Stip-Delčevo.

Key strategic documents for the development of the Trans-European axes passing through the territory of the Republic of Macedonia (Corridor VIII and X):

- Public Investment Programme 2006-2008;
- Memorandum of Understanding on the development of the SEE Core Regional Transport Network of the Southeast Europe (Status: signed in June 2004, the realization happens through the High Level Group of the EC for Transport and SEETO (South East Europe Transport Observatory);
- Final Report on the High Level Group on EC of transport for the Trans-European transport axes to the neighboring countries and regions;
- Five year plan of SEETO 2007-2011;
- Study for the development of the transport network in the Western Balkans from JBIC.

Relevant EU-funded projects relating to the transport sector development and Trans-European axes passing through the territory of the Republic of Macedonia (Corridor VIII and X):

- Upgrading of the road E-75, section border Bogorodica to Gevgelija (4.6 km);
- Construction and reconstruction of the border crossing point Bogorodica;
- Construction and reconstruction of border crossing point Medzitlija;

- Development of a major project to upgrade the road E-75 Demir Kapija-Udovo-Gevgelija (44.3 km);
- Upgrading of the road E-75, section Negotino-Demir Kapija Phase I (5.3 km);
- Construction of the highway E-75, section Negotino-Demir Kapija Phase II (2.3 km);
- Construction of the highway E-75, section Negotino-Demir Kapija Phase III.

The Ministry of Transport and Communications has received technical assistance from the European Union for:

- Preparation of a National Transport Strategy;
- Preparation of Investment Plan for the Roads;
- Preparation of Study on the restructuring of the road sector in the Republic of Macedonia.

Participation in the preparation for using the Instruments of the European Commission for Pre-accession Assistance (IPA).

The Instrument for Pre-accession Assistance of the European Union started with the application from 01.01.2007, following the timeline frame of the new financial perspective of the EU (2007-2013). It is governed by Council Regulation (EC) no.1085/2006 of the Council for establishing an Instrument for Pre-accession Assistance (IPA). IPA replaces the current programs CARDS (for the Western Balkans countries) and ISPA, PHARE and SARARD (the candidate countries), whose duration is limited by the existing Financial perspective i.e., by the end of 2006. The new IPA instrument is introduced in order to facilitate the management of the assistance from the European Union (instead of 4, introduces 1). However, it does not mean that, all beneficiary countries will have the same treatment; the differentiation is provided with the different approach for different category of countries to the components of IPA (potential candidates and candidates for membership).[1]

The structure of the new IPA is shown in the chart as follows:

Schematic representation of the structure of the IPA instrument
I. Transition Assistance and Institution Building (formerly CARDS / PHARE)
II. Cross-border and regional cooperation
III. Regional Development (formerly ISPA—infrastructure projects)
IV. Human Resources Development (formerly PHARE)
V. Rural Development (formerly SAPARD—Agriculture)

[1] STOJANOVSKA-STEFANOVA ANETA & ATANASOSKI DRASHKO, EUROPEAN AND REGIONAL EXPERIENCES IN THE FIELD OF TRANSPORTATION POLITICS (Pecatnica 2 Avgust-Stip 2014). ISBN 978 608 4662 32 7.

The Ministry of Transport and Communications[2] is involved in the preparation and additional implementation of the Components I, II, III. Considering that, the component III—Regional development an emphasis is placed on the development of infrastructure projects, with the conclusion of the Government, a senior program officer was appointed by the Ministry of Transport and Communications-Sector of the European Union by which the Ministry is responsible coordinator of this component.

According to the Multi Planning Document (MIPD) within the Component III—Regional Development an emphasis is placed on infrastructure projects aimed at full traffic connection of the Republic of Macedonia with the Trans-European networks. Common determination is the finalization of the Corridor 10, financing the construction of the sections of the highway Demir Kapija-Udovo and Udovo-Smokvica, modernization of the railway line Tabanovce-Gevgelija and completion of the project documentation for Corridor 8. The biggest part of the funds from this component will be designed for Development of the transport infrastructure due to a greater willingness to absorb the funds. For this component in that course are activities to prepare the Strategic Coherence Framework and Operational Programme.

[2] Ministry of Transport and Communication of Republic of Macedonia, *Available at* http://www.mtc.gov.mk (last visited August 3, 2015).

I. CORRIDOR 8

The Ministry of Transport and Communications of Republic of Macedonia actively participates in the work of the Technical Secretariat for Corridor 8, as well as in the working groups in its context. The main goal of this Secretariat is developing the road and railway infrastructure along the Corridor 8[3] for what purpose a series of studies and pre-feasibility studies have been developed and are in the course of making. The promotion of the Pan-European Corridor 8 in the EU funds and international financial institutions is one of the efforts of the Technical Secretariat.

In order to provide funds for the construction of the railway network of Corridor 8, the Republic of Macedonia is part of a regional initiative to lobby in front of the institutions of the European Union in order to provide funds for the construction and modernization of the Corridor 8. Also in this regional initiative were included Republic of Bulgaria, Republic of Albania and Italia, in order to lobby for receiving a Coordinator from the European Union who will be in charge of this Corridor[4].

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[3] ITALIAN MINISTRY OF TRANSPORT AND INFRASTRUCTURE, FINAL REPORT (Pan-European Corridor VIII Secretariat, November 2008) *Available at* http://www.mit.gov.it/mit/sites/varifiles/corridoioVIII/Corridoio_8_Strade_completo.pdf (last visited October 30, 2015).

[4] STOJANOVSKA-STEFANOVA ANETA & ATANASOSKI DRASHKO, EUROPEAN AND REGIONAL EXPERIENCES IN THE FIELD OF TRANSPORTATION POLITICS 73-74 (Pecatnica 2 Avgust-Stip 2014). ISBN 978 608 4662 32 7.

II. CORRIDOR 10

The most important activity when it comes to the Corridor 10 is the implementation of the Protocol on cooperation on border crossing along the countries of the Pan-European Corridor 10, which was signed in June 2006 in Corfu and which has as main goal to facilitate the flow of people and goods along the Corridor 10. Signatories for short or medium term need to realize harmonize of the legislation and procedures for border crossings with the EU acquis, the constant exchange of information between the relevant authorities and agencies, especially with the electronic media, in order to achieve closer cooperation and increased efficiency. The recommendation is to create contact points in each country which will be in charge of this task. The formation of a working group is in progress. First chair is the Republic of Greece.

Also, through the Greek Plan for Reconstruction of the Balkans, a donation was expected from the Greek government to finance the missing section of the Corridor 10, Demir Kapija Smokvica which represents an advantage for the European Union during the allocation of the IPA funds, as well increase of the same in the upcoming period. According to the adopted Action plan, it is expected signing of the Contract with constructor of the constructional works and commencement of the implementation during 2008[5].

[5] STOJANOVSKA-STEFANOVA ANETA & ATANASOSKI DRASHKO, EUROPEAN AND REGIONAL EXPERIENCES IN THE FIELD OF TRANSPORTATION POLITICS 74 (Pecatnica 2 Avgust-Stip 2014). ISBN 978 608 4662 32 7.

III. CONSTRUCTION OF NEW HIGHWAYS IN REPUBLIC OF MACEDONIA

In 2014, the Republic of Macedonia is committed and focused on the construction of new highways, new railways and reconstruction and modernization of the old, along the Pan-European transport corridors which are passing through our country.

The state implements these important projects in cooperation with the major international financial institutions like the World Bank, the European Bank for Reconstruction and Development, European Investment Bank, the European Union through the IPA and the Export-Import Bank of China.

The construction of two extremely important highways in Macedonia has started in cooperation with the Export-Import Bank of China. The issue is about highways which are linking the capital city of Skopje with the city Stip in the eastern part of the country and Kicevo with Ohrid, the most important tourist destination in Republic of Macedonia in the western part of the state. All these sections are part of the Pan-European Transport Corridor 8, which is crucial for the economic development of the region, including Macedonia, Bulgaria and Albania.

The construction of a new motorway section in eastern Macedonia has already begun. The motorway from Skopje to Stip is 47 kilometers long and represents an investment of 208 million Euros, the funds are provided by the EXIM Bank. The construction is expected to be completed in 2017[6].

Besides this project the construction of another very important new motorway section from Kicevo to Ohrid in the western part of Macedonia is in progress. This motorway is 57 kilometers long and has a value of 374 million Euros, the funds are provided by the EXIM Bank. It is planned to finish the construction of the motorway in 2016.

The construction of these sections of the highway means further expansion of the overall national motorway network, resulting in faster flow of vehicles, but at the same time, raising the level of the quality of transport services, and certainly one of the goals is to meet the needs of all tourists transiting in this area.

Regarding the part of the new highways construction in Macedonia, it is worked on the final completion of the Corridor 10 on highway level from the entry to the exit of the country. This is the part from Demir Kapija to Smokvica in the southern part of the country; the highway section has a length of 28 kilometers. This project is worth about 210 million Euros and the construction activities are already half completed. The funds for this part

[6] Ministry of Transport and Communication of Republic of Macedonia, *Available at* http://www.mtc.gov.mk (last visited August 9, 2015).

are provided by the EBRD, EIB and the EU Pre-Accession funds.

The aim of the Republic of Macedonia is the construction of highways of two more major sections, one along the Corridor 10 and one along the Corridor 8.

The first road is from the capital Skopje to Blace-Kosovo border, with a length of 12.4 kilometers and has an estimated value of 70 million Euros.

The second section is from Gostivar to Kicevo and is part from the Corridor 8. This section is designed to be added to the existing highway from Skopje to Kicevo, as well as to the section from Kicevo to Ohrid, which is expected to be completed in 2016. This road is 42 kilometers long and has an estimated value of 276 million Euros. The project envisaged construction, maintenance and toll collection on these parts.

In terms of the local infrastructure, it is worked on construction of local roads, and this project the state realizes in cooperation with the World Bank.

In terms of this policy in the following 2015, it is planned to build 118 local roads with a total length of 200 kilometers. Beside that, it is planned a construction of 5 new express routes, by which the internal road network will be enhanced and the traffic flow will be improved to and from the main directions of the Corridor 8.

Besides the improvement of the road infrastructure, the state is planning policies and measures for even more efficient transport, such as the construction of logistics centers at the border crossings and bigger cities through public-private partnership, the implementation of intelligent transport systems on the roads to monitor the road conditions, for which a design is in progress, and the construction should begin in 2016.

Regarding the railway connection, they are working on the last link to the Bulgarian border which is from Kriva Palanka to Deve Bair with length of 24 km, and the estimated value is 330 million Euros. Recently is announced a call for selection of consultant which should design the section for a period of 22 months.

Also, activities are undertaken as well for the completion of the railway line from Kicevo to Lin, i.e., the border with Albania, with a length of 70 kilometers. The estimated value for this line is 570 million euros. The activities for the design of this section had started and it is expected to be completed in around two years time[7].

[7] STOJANOVSKA-STEFANOVA ANETA & ATANASOSKI DRASHKO, EUROPEAN AND REGIONAL EXPERIENCES IN THE FIELD OF TRANSPORTATION POLITICS 75-78 (Pecatnica 2 Avgust-Stip 2014). ISBN 978 608 4662 32 7.

CONCLUSION

The transport is a vital bloodstream of any society, of every country and to the world globally. The functionality of the states is largely simplified thanks to the transport. That is the reason why the power holders in local, regional and international level are aimed towards developing strategies and projects that will primarily maintain the transport infrastructure, but as well to projects that offer development of new projects, linking new places, increasing the communication, thereto taking into concern the environmental protection.

At European level, the European Union through the Directorate of Transport allows the member states implementation of vital transportation projects, according to the assessed framework. The states in turn, that aspire for full membership, as is the case with the Republic of Macedonia, performing an approximation of the domestic legislation with the EU, confirm its fundamental commitment for the implementation of the European policies in the transport sector.

So we may conclude that, the completion of the transnational''s axis—Pan European Corridors 8 & 10, which pass through Republic of Macedonia is a high priority for the Macedonian Government, enabling safer, faster and more efficient transport of passengers and goods, thus providing a better regional economic development of the country, of the Balkan and of the South Eastern European Region.

IMPEACHMENT AND RECALL OF LEGISLATORS IN NIGERIA AND UNITED STATES OF AMERICA

Ilias B. Lawal[*]

The legislature, variously called the National Assembly, the Congress or the Parliament, plays a critical in any democratic dispensation. In addition to its law—making functions, the legislature also serves as a check on other arms of government through its oversight functions. These enormous responsibilities constitutionally imposed on the legislature are susceptible to being abused. Some of the ways by which the Nigerian Constitution seeks to curb such a negative tendency are the provisions on recall of legislators and forfeiture of legislative seats. This paper makes a comparative analysis of the constitutional provisions on recall of legislators and forfeiture of legislative seats in Nigeria and United States of America and offers suggestions for improvement.

INTRODUCTION

In any democracy, nascent or advanced, legislatures play a vital role in the socioeconomic well being of the people. Apart from their law-making function for which they are highly reputed,[1] they also play an important role in policy formulation and execution[2] thorough the legislative investigation committees[3] and confirmation of appointments made by the executive.[4] The legislature also performs some judicial functions. In most countries, the decision of the legislature on removal of its own members is highly respected.[5] Similarly, in Nigeria, no legislative proceedings relating to the

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[1] Section 4 of the 1999 Nigerian Constitution vests the National Assembly with the power to make laws for peace order and good governance of the country; *see also* Article 1, Section 1 of the United States Constitution.

[2] The legislative debates on the annual appropriation bills before their passage can substantially influence policy formulation and execution.

[3] *See* Section 88 of the 1999 Constitution.

[4] *See* Sections 147 and 231 of the 1999 Constitution on the appointment of Minister and the Chief Justice of the Federation, respectively.

[5] *See* Oloyo v. Alegbe (unreported), FCA/B/6/82 of 1/8/82.

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removal of President or Governor "shall be entertained in any court".[6] To underscore the trust and confidence, the 1999 Nigerian Constitution has in the law-makers, the legislature is empowered to conduct investigation into the affairs of any person, authority, ministry or government department charged or intended to be charged with the duty and responsibility for disbursing or administering moneys appropriated by the legislature with a view of exposing corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds by it.[7]

In order to prevent the abuse and misuse of the enormous powers of legislature and others act volatile of the Constitution, the 1999 Nigerian Constitution makes elaborate provisions for recall of legislators and conditions under which legislators may forfeit their seats in the legislative house. The latter provision is loosely called "impeachment".

I. IMPEACHMENT OF LEGISLATORS

To impeach literally means "to challenge the credibility of" or "to accuse".[8] According to the *Black's Law Dictionary*, impeachment is the act (by legislature) calling for removal of a public official accomplished by presenting a written charge of the official's alleged misconduct.[9] Impeachment originated in Britain where the House of Commons would present articles of impeachment to the House of the Lords' which then tried the case.[10] To Eskine May, impeachments are reserved for extra-ordinary offences and extra-ordinary offenders.[11] The last impeachments were those of Warren Hasitngs (1786-95), First Governor-General of India and Lord Melville (1806) but an unsuccessful attempt was made by Thomas C. Anstey to impeach Lord Palmerston in 1848.[12]

In the United States of America, impeachment is the first step in the process specified in the Constitution for removing the President, Vice President or other government officials from office upon conviction of

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[6] *See* Sections 143 (10) and 188 (10) of the 1999 Constitution.
[7] For the nature and extent of the legislative power of investigation, *see* Atilola B., *Scope and Limits of Legislative Powers of Investigation: El-Rufai v. House of Representatives Revisted*, 1(2) LEGISLATIVE PRACTICE REVIEW 1-14 (2009).
[8] CURZON L. B., DICTIONARY OF LAW 20 (England: Pearson Education Ltd. 2002).
[9] BLACK'S LAW DICTIONARY 753 (6th ed.).
[10] 11 ACADEMIC AMERICAN ENCYCLOPEDIA 6 (USA: Grotier Inc.1990).
[11] MAY ERSKINE, TTEARISE ON LAW PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 734 (England: Butterworths 1964).
[12] 12 ENCYCLOPEDIA BRITANNICA 118 (London 2003).

"treason, bribery or other high crimes and misdemeanors".[13] Impeachment resolutions made by the members of House of Representatives are turned over to the House Judiciary Committee which decides whether the resolution and its allegations of wrong doing by the public official involved merit a referral to the full House for a vote on launching a formal impeachment inquiry. In Nigeria, the first complete effort to introduce impeachment as a sanction against erring public officers was in the 1979 Constitution.[14] The provision was virtually repeated in both the 1989 and 1999 Constitution.[15] The word "impeachment" is not used in any of these provisions. Rather, the Constitution provides for the removal of President, Vice President, Governor and Deputy Governor when the holder of any of these offices is guilty of gross misconduct[16] in the performance of the functions of this office.[17]

It is noted worthy that, the Nigerian Constitutions does not expressly provide for the impeachments of members of the legislature; it however makes provisions for circumstances under which the presiding officers of the legislative houses and other members can vacate their officers or forfeit their seats respectively.[18] By Section 50 of the 1999 Constitution, the President or Deputy President of the Senate and the Speaker of the House of Representative shall vacate his office if he ceases to be a member of the Senate or of the House of Representatives "otherwise than by reason of a distribution of the house or the House of Representatives";[19] or when the House of which he was a member first sits after any dissolution of that House,[20] or if he is removed from office by a resolution of the Senate or of the House of Representatives, by the votes of two-thirds of majority of the members of that House.[21]

Vacation of office by the presiding officers of the National Assembly on grounds of cessation of membership or dissolution of either House of the National Assembly does not seem to cast a pall on the integrity of the

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[13] *Available at* http://www. Historyplace.com/united states/impeachments/retrieved (last visited October 23, 2011).
[14] *Ibid.*
[15] *See* Sections 132 and 170 of the 1979 Constitution.
[16] Sections 143 and 188 of the 1999 Constitution.
[17] Section 143 (11) of the 1999 Constitution defines "gross misconduct" as a "grave violation of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct".
[18] *See* Section 50 of the 1999 Constitution.
[19] *See* Section 50(2) (a) of the 1999 Constitution.
[20] *See* Section 50(2) (b) of the 1999 Constitution.
[21] *See* Section 50(2) (c) of the 1999 Constitution; *see also* Sections 92 (a) (b) and (c) in respect of Speakers and Deputy Speakers of Houses of Assembly.

officer concerned. However, vacation of office on ground of removal by two-third majority of either House seems to impeach or malign the character of such an officer given the fact that, the presiding officers are usually elected by a simple majority of the members. Hence the provision of Section 50(2) (c) of the 1999 Constitution on removal of the presiding officers is usually regarded as impeachment of the officers concerned even though no such word is specifically used in the Constitution.[22]

Furthermore, Section 68 of the Constitution makes elaborate provisions for circumstances, the that may lead to forfeiture of seat by any member of the National Assembly. These include: when such a member becomes a member of another legislative house;[23] the occurrence of circumstances that would cause him to be disqualified for elections as a member of the National Assembly of the was not already a member;[24] if the ceases to be a Nigerian citizen;[25] if it becomes President, Vice President, Governor, Deputy Governor or a Minister of the Government of the Federation or Commissioner in a State, or a Special Adviser;[26] if he becomes a member of a commission or any other statutory body;[27] if he absent without just cause;[28] from meetings of the House of which he is a member for more than one-third of the total number of days during which the house meets in any one year;[29] if the becomes an member of another political party other than the one that sponsored his election before the expiration of the period for which the House was elected,[30] provided that, his membership of the latter political party is not as a result of a division in the political of he was previously a member or a merger of two or more political parties or factions by one of which he was previously sponsored;[31] and if he is recalled in compliance with Section 69 of the Constitution.[32] By Section 68(2), upon presentation of satisfactory evidence to the house concerned that, any of the above provisions has become applicable in respect of any member the

[22] For a critique of this provision, *see* AKANDE J. O., INTRODUCTION TO THE 1999 CONSTITUTION 131-132 (Lagos: MIJ Publisher 2000).
[23] Section 68(1) (a) of 1999 Constitution.
[24] Section 68(1) (b) of 1999 Constitution.
[25] Section 68(1) (c) of 1999 Constitution.
[26] Section 68(1) (d) of 1999 Constitution.
[27] Section 68(1) (e) of 1999 Constitution.
[28] Section 68(3) of 1999 Constitution provides that: "a member of the Senate or of the House of Representative shall be deemed to be absent without just cause from a meeting of the House of which he is a member, unless the person presiding certifies in writing that he is satisfied that, the absence of the member from the meeting was for a just cause".
[29] Section 68(1) (f) of 1999 Constitution.
[30] Section 68(1) (g) of 1999 Constitution.
[31] *See* the *proviso* to Section 68(1) (g) of the 1999 constitution.
[32] Section 68(h) of 1999 Constitution.

presiding officers of the respective houses "shall give effect" to the provision of Section 68(1) of the Constitution.[33]

Of all the conditions that would necessitate forfeiture of seats by members of the legislature, only two seem to impact negatively on the character of the law maker concerned. These are being absent without just because from the meeting of a legislative House for more than one-third of the total days of meeting and defecting to another party different from the one that sponsored their election before the expiration of their legislative term. In *Oloyo v Alegbe*,[34] one of the issues for determination was the competence of the presiding officers of a legislative House, to declare a member's seat vacant for being absent from meetings without just cause for more than one-third of the total number of days during which the House meets in any one year.

It was argued that, only the High Court could declare a member's seat vacant, and that the presiding officers could only refer the alleged contravention of the constitution to the High Court for determination. The argument was accepted by the High Court of Bendel State. On appeal, the Federal Court of Appeal held that, the enforcement of the constitutional provision was the responsibility of the House or the Speaker in the first instance.[35] The court further observed that, the fact the constitution had given the High Court special jurisdiction to deal with the matter did not mean that, the House or the Speaker thereof must fold their arms and allow a breakdown of discipline in complete disregard of the provisions of the Constitution.[36] The Court of Appeal's decision was subsequently affirmed by the Supreme Court by a majority of 5 to 2.[37]

On the issue of legislators who leave the party that sponsored their election for another party before the completion of their legislative tenure, it has been observed of that, the constitutional sanction forfeiture of legislative seat is to deter political flirtation or carpet crossing, and check legislators who may be tempted to leave their party to gain political office or some political advantage.[38] There however seems to be a *lacuna* in the

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[33] This means that, the presiding officer shall declare the seat of such a member, vacant, *see* Sections 109 (1) and (2) in respect of the state assemblies.

[34] 3 NCLR 647 (1982).

[35] Alegbe v. Oloyo, FCA/B/61/82; *see also* Fajinmi v. The Speaker, Western Region House of Assembly (1962) I all NLR 205, Obiv Waziri (1961) 1 ALL NLR 37. Contrast with the case of Usman v. Kaduna House of Assembly and Others (2007) 11 NWLR 265 (Part 1204).

[36] Alegbe v. Oloyo, *Ibid* at 17-18.

[37] For a critique of this case, *see* NWABUEZE B. O., NIGERIA'S PRESIDENTIAL CONSTITUTION LONDON 164-169 (Longman 1985).

[38] Ebeku K. S. A., *Nigeria's New Constitution for the Third Republic: An Overview*, 5(3) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 596 (1993).

constitutional provision. According to Ebeku, the provision does not cover a legislator who is expelled by his party for anti-party activities. This can be contrasted with the positions in Namibia where members of the legislature lose their seat if their political party informs the Speaker that, they are no longer members of the party, which could be as a result of expulsion.[39]

II. RECALL OF LEGISLATORS

One of the innovations in the 1999 Constitution aimed at curing the excess of parliamentarians is Section 69 of the constitution which provides that, a member of the National Assembly may be recalled if:

> "(a) There is presented to the Chairman of the Independent National Electoral Commission, a petition in that behalf signed by one-half of the persons registered in that member's constituency, alleging their loss of confidence in that member, and which signatures are duly verified by the Independent National Electoral Commission;
>
> (b) The petition is thereafter, in a referendum conducted by the independent national electoral commission within ninety days of receipt of the petition, approved by a simple majority of the votes of the persons registered to vote in that member's constituency."[40]

According to the Political Bureau, one of the reasons for the introduction of the power to recall was to establish in a permanent manner "a culture of consultation and reciprocal control law making and the use of power and privileges"[41]. Furthermore, it was based on the belief that, Nigerians have an idea of the goals of nationhood and the objectives of representation. It is this idea of conception which determines the depth of their faith in popular democracy and the nature of political judgment they form on the behaviour of their elected representatives.[42]

Before the amendment of the 1999 Nigerian Constitution in 2010, the verification of signatures of voters in the legislator's constituency was absent; the requirement was introduced by the Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010.[43] On the face of it, the amendment looks innocent, and well intended; however, the probability of its being abused by some corrupt officers of the Independent National Electoral Commission is very high, as it seems to further complicate the

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[39] Cottrel J., *The Constitution of Namibia: An Overview*, JOURNAL OF AFRICAN LAW 56-59 (1991).
[40] *See* Section 110 in respect of the state legislators.
[41] REPORT OF POLITICAL BUREAU 1987 141 (Lagos: Federal Government Printers 1987).
[42] *Ibid.*
[43] It was passed by the Senate on June 2, 2010, and by House of Representatives on June 3, 2010. President Goodluck Jonathan signed it into law on January 10, 2011.

process of recall. The modality for the verification of voters' signatures might also be deliberately made burdensome in order to frustrate the processes. It is therefore suggested that, the country should revert to the old provision without any need for verification of voters' signatures; or in the alternative, only people of impeccable character should be employed by the Independent National Electoral Commission, while any staff of the commission found to have been compromised should be severely dealt with. It is however surprising that, since the beginning of the Fourth Republic, more than a decade ago, the provision on recall has not been successfully invoked; there have been threats of its invocation.[44] Of equal importance is the issue of accurate voters' register by which the relevant members of the constituency can be identified. It has also been observed that, the different controversies that have attended our several attempts at compiling voters' register illustrate how problematic the recall process can be.[45] So also can be process be devilled by fraud, victimization and undue influence in the process of setting the machinery in motion.[46] The consequence of recall to the legislative house where a legislator has been recalled is that, it creates a vacancy in the house. Consequently, a fresh election will be conducted in order to fill the vacancy,[47]

III. RECALL OF LAWMAKERS IN AMERICA

The issue of recall of parliamentarians is also very controversial in the United States of America, with different legal considerations governing it at the state and federal levels. In some states, states legislators or other state or local elected officials may be removed from office before the expiration of their terms not only be action of the legislature itself through an expulsion (or for executive officers, through an "impeachment" and conviction by the legislature), but also by voters through a "recall" election procedure.[48] On the other hand, the United States Constitution does not provide for the recall of United States Officials such as United States Senators, Representatives to

[44] For example, on August 27, 2005, the Speaker of Plateau State House of Assembly, Simon Lalong, survived the first recall attempt in Nigeria. Ten out of the eleven wards in his local government voted against the referendum.
[45] Guobadia D. A., *The Legislature and Good Governance under the 1999 Constitution*, ISSUES IN THE 1999 CONSTITUTION 66-67 (Ayua I. A., Guobadia, D. A., & Odekunle, A. O. eds., Lagos: NIALS 2002).
[46] *Ibid* at 67.
[47] OKEKE G. N., INTODUCTION TO CONSULAR IMMUNITIES AND PRIVILEGES, JURISPRUDENCE AND CONSTITUTIONAL LAW 228-229 (Uwani-Enugu: Nolix Educational Publication 2010).
[48] THEODORE M., STATE AND LOCAL GOVERNMENT POLITICS AND PROCESSES 90-93 (U.S.A: Charles Scribber and Sons 1996).

Congress or the President or Vice President of the United States.[49] Therefore, no United States Senator or member of House of representative has ever been recalled in the history of the country. In 1807, a Senate Committee examining the question of the Senate's duty to expel a member noted, among other things, that the constitution had set out numerous provisions, qualifications and requirements for members of Congress to prevent conflict of interest, and to assure a certain degree of fealty to constituents but did not a give a member's constituency the authority to recall such a member.[50]

Although the Untied States Supreme court has not directly addressed the subject of recall of members of Congress, there are other judicial decisions to the effect that, the right to remove a member of Congress, before the expiration of his term of office rests with each House of Congress as expressly delegated in the expulsion clause of the United States Constitution, and not in the entire Congress as a whole, nor in the State legislatures through the enactment of recall provisions.[51] Similarly, the United States Supreme Court held in *U.S. Term Limits, Inc. v. Thorton*,[52] that the authority of the individual sates under Article 1, paragraph 4, clause 1, is not a broad authority for an individual state to substantially change the qualifications, length or number of terms of federal officials established within the constitution. With respect to the Tenth Amendment and the "reserved" authority of the states the United States Supreme Court held that, the determination of the qualification and terms for federal offices, created within the United States Constitution was not part of the original powers of sovereignty that, the Tenth Amendment reserved to the States.[53]

The import of the foregoing analysis is that, unlike what obtains under the Nigerians Constitution where both the members of the National Assembly and the states' Houses of Assembly are recallable by members of their constituency, only members of the state legislatures can be recalled by the members of their constituencies under the United States Constitution. The members of the Congress are not subject to the recall enactments in the states since their terms and qualifications of office for federal officers are prescribed by the United States Constitution, and not by those of the individual component states. Such officers can only be removed by the

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[49] *See* MASKNELL J., RECALL OF LEGISLATORS AND THE REMOVAL OF MEMBERS OF CONGRESS FROM OFFICE *Available at* http://www.fas.org/sgp/crs/misc/RL30016.pdf (last visited October 1, 2011).
[50] *Ibid*.
[51] Burton v. United States, 202 US, 369.
[52] U.S. Term Limits, Inc. v. Thorton, 514 US, 810-862.
[53] *Ibid* at 802; *see also* Garcia v. San Antonio, Metropoitan Transit Authority 469 US 528, 549 (1985); New York v. United States, 505 US 144, 155-156 (1992).

expulsion clause of the United States Constitution.

CONCLUSION

Constitutional provisions on impeachment and recall of public officers are enshrined to strike a just balance between immunity, enjoyed by some public officers and abuse of powers or offices held by them. Expectedly the process is very cumbersome, anachronistic and time—consuming.[54] While the Nigerian Constitution has copious provisions on the impeachment and removal of the some members of the executive,[55] it seems not to have any provision on impeachment of members legislature. It only has some provisions on how some presiding officers of the legislature could be relieved of their offices;[56] and how members of the legislature could forfeit their seats.[57] These provisions are not as detailed as the impeachment provisions of the chief executives. On the other hand, the provisions on recall of legislators are more specific and more detailed. While removal or expulsion of legislators is an internal authority of legislative bodies pursuant to their power to regulate their internal proceedings, and exercise authority over tier members, recall is a special process outside the legislature itself, exercised at the instance of the members for their constituency expressing their loss of confidence in their legislative representatives. The impeachment and recall clauses are meant to make the legislators to be alive to their responsibilities and to confirm that, sovereignty really belongs to the people.[58]

It is however suggested that, these two provisions should be sparingly used in only deserving cases and should never be used as instruments of witch-hunting or character assassination. On their own part, the members of the Independent National Electoral Commission should not use the recent amendment in the recall provision, requiring the verification of the signatures of registered voters in the members' constituency to corruptly enrich themselves and frustrate an otherwise genuine recall process.

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[54] This is because of the diverse interests and considerations involved.
[55] *See* Sections 143 and 188 of the 1999 Constitution.
[56] Section 50 of 1999 Constitution.
[57] Section 68 of 1999 Constitution.
[58] Section 14(2) of the 1999 Constitution.

JUDICIAL INDEPENDENCE AND INDIVIDUAL LEGAL CASE SUPERVISION IN CHINA[1]

—Be inspired by Urawa Mitsuko incident

Ying Yan[*]

The necessity of the individual legal case supervision in China is a well-debated yet unconcluded topic. Urawa Mitsuko incident is a classic case of defending judicial independence and rejecting the individual legal case supervision in Japanese history. It caused people to concentrate on use of census right in judicial field and formed a consensus that, it should be restricted by many factors. The case has three inspirations to judicial independence of China: National People's Congress is the organ of supreme power, but it is not absolutely right for it to perform the individual legal case supervision, the surveillance of National People's Congress to Law Courts should not and must not be the real supervision to individual legal cases, allowing the judgement of right or wrong by National People's Congress will lead to the violation of the finality principle of judicature.

INTRODUCTION

The relationship between judicial independence and the individual legal case supervision is one of the issues in China legal circle over a long time. The individual legal case supervision is provided as the supervision by local people's congresses or its Standing Committee at and above the county level supervision over execution towards the judicial department[2]. The Article 71 of the constitution of the People's Republic of China says: "The National People's Congress and its Standing Committee may, when they

[1] The paper has been announced in the 4th East Asian Law and Society Conference in Tokyo, August 4-6, 2015.

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[2] Cai Dingjian, *Case Supervision by the People's Congress and Its Reform*, SUPERVISION AND JUDICIAL JUSTICE 38 (Cai Dingjian ed., Law Press China 2005).

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deem it to be necessary, appoint committees of inquiry into specific questions and adopt relevant resolutions in the light of their reports. All organs of state, public organizations and citizens concerned are obliged to supply the necessary information to those committees of inquiry when they conduct investigations." The Article 31 of the law of the People's Republic of China on the organization of local people's congresses and people's governments at different levels says: "Local people's congresses at and above the county level can establish committee of inquiry in investigation of specific cases."[3] The individual legal case supervision stands on above and some other laws. According to the investigation of Cai Dingjian, the first individual legal case supervision is the supervision to case called "Three lawyers"[4], a case occurred in Tai'an county of Liaoning province in 1984.

The Article 62 of the constitution of Japan says: "Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records." The Article 62 of the constitution of Japan is identical to the Article 71 of the constitution of China, each provides right for the organ of supreme power to investigate and supervise the judicial department. Nevertheless, there is already a final conclusion about whether the individual legal case supervision is necessary. Discussion of relationship between judicial independence and the individual legal case supervision occurred in former Japan provides some important inspirations to China. Urawa Mitsuko incident is an important incident in rejecting the individual legal case supervision and protecting judicial independence. Through the introduction and analyze of the Urawa Mitsuko incident, the article summarized its inspirations to judicial independence in current China.

I. SUMMARY OF URAWA MITSUKO INCIDENT

Urawa Mitsuko incident is considered an important event to protect judicial independence of Japan. The incident is not too complicated. Urawa

[3] In addition to above articles, following articles also serve for the establishment of the inquiry panel of specific issues: the Article 38 of Organic Law of the National People's Congress of the People's Republic of China and the Article 38 of Law of the People's Republic of China on Supervision by the Standing Committees of the People's Congresses at All Levels.

[4] Wang Baiyi, Wang Licheng and Wang Zhishuang, three lawyer of Tai'an county, are arrested by the People's Procuratorate due to their effort to defend justice. And they petitioned the National People's Congress. Then the Standing Committee of National People's Congress gave a command, together with the assist of the Bureau for Complaints of the General Office of the Standing Committee and other related department, the case was finally solved. *See* Cai Dingjian, *Case Supervision by the People's Congress and Its Reform*, SUPERVISION AND JUDICIAL JUSTICE 38 (Cai Dingjian ed., Law Press China 2005).

Mitsuko (30) who lived in Saitama Prefecture, Kita-Katsushika District, Yoshida village, had three daughters, but Katarisuke (34), the husband of Mitsuko, did not live with his wife and was addicted in gambling. He sold everything including house. Mitsuko thought she lost the love of her husband and was also under the great pressure of raising three children. At last, she lost every hope and decided to die with her children. April 6, 1948, evening, Mitsuko boiled fish with rodenticide and fade it to her children, but the poison did not take effect instantly and children fall asleep. After a while, Mitsuko thought children will suffer less if she kill them right away, so she used a lope and pinched her three daughter to death. Mitsuko couldn't kill herself. She gave herself up. On July 2 of the same year, Urawa District Court sentenced her to take three years of imprisonment and three years with a reprieve, the reason was "there are some points that will extenuate her rime such as her motive"[5]. Responsible prosecutor also agreed. Without any appeal, the case was confirmed and Urawa Mitsuko was released. Resulting a murderer of three children doesn't receiving any punishment.

For this case, the Legal Committee of the House of Councillors called Urawa Mitsuko, her former husband and responsible prosecutors as witnesses, did an investigation and organize the result of the investigation into a report on March 30, 1949, stated the dissatisfaction to the finding of fact of the judge and prosecutor, argued the severity of the sentence was far from enough and it is improper. The contents of the report are as below: First, in finding of fact, the severity of the living, which was stated as a motive of crime, is not clear, and even if there was a great pressure in living, half of the reason came from Mitsuko herself. In this point, the effort of the judge to clarify the fact is insufficient. Was her husband really unreliable? Did she talk with her family? Why she didn't use public facilities to get help? All these are questionable. The judge that stands on the fact that, this it was an incident that mother and children die together, but there can be possibility that Mitsuko was planned to kill only her children. Second, though the motive of the crime was love of parent, there is no reason to lighten the punishment. Third, barbarous and programmatic of the killing should be paid more attention.

II. CENSUS RIGHTS AND INCIDENT INVESTIGATION

The Legal Committee of the House of Councillors submitted the report based on the "Census rights", the Article 62 of the Constitution of Japan. May 16, all judges of the Supreme Court voted for submitting the opinion

[5] *The Issue of Urawa Mitsuko Incident*, MAINICHI SHIMBUN (MAINICHI DAILY), May 20, 1949.

paper to the House of Councillors President on May 20. The summary of the contents is below[6]: First, Census rights, defined by the Article 62 of the Constitution of Japan, are owned by the Diet and should only be wielded with the purpose to collect necessary materials in the execution of the legislative authority and the examination of budget. Second, the jurisdiction is under absolute control of the court, and any action to disturbor interfere the execution of the jurisdiction will not be allowed in Constitution. Third, criticize or evaluate the judge of a specific case by the Legal Committee of the House of Councillors is offence to judicial independence and is exceeding the right of investigation protected by Constitution.

May 24, the Legal Committee of the House of Councillors replied the opinions[7]: First, the Supreme Court is overstepping its authority in issue opinion about the behavior of the cabinet and Diet related to Constitution, not to judgment of specific case. Second, the Diet is supreme department of the national rights and the only legislature; the Census rights are independent functions to investigate and criticize any national affair, which is a branch of national rights. Third, judicial independence means that, the judge will not be disturbed or interfered in making judgment of specific cases, does not mean the judgment will be free from any criticism. The investigation and criticizing by Census rights has positive effect to checks and maintain the balances of the rights of nation, thus the investigation of the case which has already be judged is not any offence to judicial independence.

Argument between the Legal Committee of the House of Councillors and the Supreme Court, the theme "auxiliary power theory versus independent power theory" led to huge discussion in academic and press circles.

III. STATEMENTS OF ACADEMIC CIRCLES AND PRESS CIRCLES

Tokyo Asahi Shimbun (*Tokyo Asahi Daily*) published a thesis titled "the limits of census rights" on May 22, stated that, Census right are related to all part of the legislation and the administration, but the existence of judicial independence restricted the effect to judgment, a pure judicial function. So the Legal Committee of the House of Councillors is overstepping its rights to investigate and interfere specific case and threaten judicial independence. Yomiuri Shimbun (*Yomiuri Daily*) also published editorial on May 27. The editorial states that, Urawa incident is difficult to

[6] Ryokichi Arikura, *Census Rights of the Diet and Judicial Independence*, WASEDA LAW REVIEW 135 (November 25, 1949).
[7] *Ibid.*

judge in Constitution interpretation, but the House of Councillors went too far in investigation. May 28, Mainichi Shimbun (*Mainichi Daily*) proposed its idea in article: it is not good to create an image that the final court is the Legal Committee of the House of Councillors instead of the Supreme Court, but it also will smother new system imported to operate the Diet if defining the census right as "an auxiliary function just for collect of the material". The problem appears when investigation becomes interference, it is proper to criticize the over-action of the House of Councillors. From above, it is clear that, the press circles supports but not all the assertions of the Supreme Court.

Next, let's switch attention to the academic circles. Toshiyoshi Miyazawa, professor of Tokyo University, published thesis "Census rights of the Diet and Judicial Independence"[8]. It says: in a narrow sense, the judicature, judging of any jural dispute, is the function of court in principle, and the authority to the Diet or each House can not affect it. It means that, the Diet and each House cannot directly judge any jural dispute, and they also can not offend judicial independence by Census rights or any other actions that are possibly disturb the judge to make judgment purely and independently. So the Constitution do not allow to investigate the case in court for the same purpose with court, but the investigation of case that is not related to court or case that has already been judged is not regarded as an action to offend judicial independence. Professor Miyazawa also stated in later forum that, the Committee of the House of Councillors threatened the jurisdiction by criticizing the behavior of each judge in court and blaming the affirming of facts and the severity of the punishment[9].

Yasukura Suzuki, a constitution scholar, published his article on Yomiuri Shimbun (*Yomiuri Daily*) on May 27: Census rights are independent rights stands on constitution and their function are not limited to assist the operation of the legislative authority and the examination of budget. As the supreme department of the national power in popular sovereignty constitution, the Diet can and should publish its opinion to national affairs, which is essential to modem democracy. As long as the Legal Committee of the House of Councillors does not assert the judicial effect of its comment, it is not an offence. Jiro Tanaka, professor of Tokyo University, showed opposite attitude towards Mr. Suzuki: the only function of the Census rights is to assist the Diet's fully operation, and the rights are limited not to affect the judgment of specific case. Besides, reinvestigate case that has been judged is improper.

Shigemitsu Dando, professor of Tokyo University, stated his view in

[8] HORITSU JIHO, 21(3) LAW JOURNAL 35 (1949).
[9] TOKYO ASAHI SHIMBUN (TOKYO ASAHI DAILY), (May 29, 1949).

his thesis "Census rights of the Diet"[10]: take the Census rights in America as example, the function of Census rights is to support other authority in a range of supported authority, and the restrain function to judiciary should be limited to criticism related to legislation and budget, therefore the statement which claims that, the legislature has right to criticize the judgment is unacceptable. That is to say, the Diet cannot investigate cases in court with purpose to interfere the judgment, and it also can not criticize any case that has been judged, whether by procedural supervision or real supervision. Even if the Census right is permitted to interfere judiciary, it still cannot investigate specific cases in order to protect judicial independence.

The overview of above statements is showing the attitude of the academic circles: through the degree differs, the great majority of them are supportive to the Supreme Court.

Now, it's widely accepted that, the exertion of the Census rights is limited by numbers of constraints. Typical prohibited terms are as below:

First, to avoid improper interference to jurisdiction, the Diet is not allowed to confirm facts and drawn conclusion from them[11].

Second, the purpose of investigation should limited to support of the operation of the Diet's power defined by constitution, such as administrative supervision and examination of budget[12].

Third, investigation of any under way case and the related litigation command of judge is prohibited[13].

Urawa Mitsuko incident is a typical case occurred when Japan start to adopt the separation of the powers. And it is a case that caused fierce objection to political involvement to jurisdiction of the Diet. It solved the problem between judicial independence and the Census right of the Diet, and achieved brilliance to protect judicial independence.

IV. PRESENT CONDITION OF LEGISLATIVE SUPERVISION OF COURT CASES IN CHINA

The individual legal case supervision of judiciary by the people's Congress started from late 1980s, the beginning was the corresponding of the local People's Congress towards petitioned incident (*shangfang*). Earliest stipulation of the individual legal case supervision in local method

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[10] HOSO JIHO, 1(5) LAWYERS ASSOCIATION JOURNAL 72 (1949).
[11] HASEBE YASUO, CONSTITUTIONAL LAW 354 (2th ed., Shinsei-Sha 2001); URABE NORIHO, KENPOGAKU KYOSHITSU (STUDIES ON THE CONSTITUTION) 329 (Nippon Hyoron Sha 2001).
[12] ASHIBE NOBUYOSHI, KENPOU 283 (5th ed., Iwanami Shoten 1998).
[13] ASHIBE NOBUYOSHI, KENPOU 283 (5th ed., Iwanami Shoten 1998); NONAKA T., NAKAMURA M., TAKAHASHI K. & TAKAMI K., CONSTITUTIONAL LAW Ⅱ 225 (3rd ed., Yuhikaku 2005).

was defined in Liaoning Province, and currently each region of China has its own regulations.

From the beginning of the individual legal case supervision, the legitimacy of the individual legal case supervision by People's Congress was discussed many times. Cai Dingjian divided people's view into supportive one and rejective one[14]: if the People's Congress has rights to supervise courts[15], it will also be able to supervise specific cases. Besides, the corruption of judiciary is spreading in whole China[16], and the frustration of people are also accumulating. Under such condition, the individual legal case supervision should even strengthened. Increasing petition incidents that complain the corruption can't be ignored. Above is the most claimed reason of supporters. On the other hand, protesters claim that, the individual legal case supervision to judiciary by People's Congress are not standing on any proper jural basis and is threatening judicial independence. Many privies of the petition incidents are representatives of the People's Congress themselves, so the supervision of their own case will induce another corruption. The individual legal case supervision by People's Congress is severely threatening the effectiveness of courts, and is the menace of the public stability.

According to Jiang Minan, professor of Beijing University, the individual legal case supervision by People's Congress can be divided into three types[17]: First, the individual legal case supervision to protect public advantages from corruption of judiciary. Second, the individual legal case supervision with purpose to get profit, which is often the case of representative of People's Congress. Third, the individual legal case supervision with purpose to protect the local benefit, which occurs when the local representative use unlawfully alter the judge unfavorable to his or her administrative area.

The first type is also the direct cause of the individual legal case supervision. According to the statistic published by petition office[18] of Shanxi on July 16, 2007, 24.4 percent of 3,112 petition cases are regal disputes, which are also majority of petition case, the corruption of the

[14] Cai Dingjian, *Case Supervision by the People's Congress and Its Reform*, SUPERVISION AND JUDICIAL JUSTICE 39 (Cai Dingjian ed., Law Press China 2005).
[15] *See*, the Article 3, the constitution of the People's Republic of China.
[16] Below is popular words about phenomenon that, courts are defy divine and have contempt for the law: taking bribes from both the plaintiff and the defendant (chi wan yuangao chi beigao).
[17] Li Kefu & Wang Yilin, *How to Regulate the Individual Case Supervision of Representatives of People's Congress*, XIAOXIANG CHENBAO (XIAOXIANG DAILY), July 22, 2014, at A02.
[18] Petition office and the bureau of petition office are departments to correspond to advices, suggestions and complaints raised by public in form of e-mails, faxes or telephone calls and visit.

jurisdiction are most common cause of petition cases[19]. Another petition office in middle China published a statistic, that shows from January to July in 2012, 28.2 percent (626 cases•persons) of the petition case that were brought to Beijing are related to regal disputes, and the number of petition cases•persons brought to provincial capital is 1,109[20]. There are many elements to restrict the corruption of the judiciary: there is supervision from higher level courts, examples are second trial, direct retrial (*zhiling zaishen*)[21] and bring up (*tishen*)[22]. There is supervision of lower level from privies, such as: appeal. Before the case was judged, there is supervision from prosecutors, for example, accusation. After the case was judged, the supervision of People's Congress of the same level, such as: the People's Congress discussing the annual work report from courts every year, question (*zhixun*), council. From inside, the director can supervise by submitting proposals about the court's work. From outside, there is supervision by public opinion. If the corruption still occurs frequently under those rigorous supervision systems, it doesn't help any to set up another supervision of individual cases. Because the ineffectiveness of courts to prevent the false accusation incidents, the petition from victims and their family to People's Congress and Standing Committee are increasing, to correspond to those petitions, the individual legal case supervision appeared.

The second type is the individual legal case supervision by privies. The individual legal case supervision is described as "abnormal supervision" by Southern Weekly[23]. According to the relevant person of the "Lianggao"[24], privies of many cases that supervised by representative of the People's Congress are representatives themselves. And most of those privies are business owners, and are involved in civil litigation. If the representatives are not satisfied about the judgment, they will create difficulties to obstruct courts, "no matter how hard courts try, the representatives won't be satisfied". The relevant person said. According to the real experience of an anonymous judge of the Supreme Court, a representative was unsatisfied

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[19] Li Qiang, *Petition Office of Shanxi Province: The Corruption of Jurisdiction is the Major Reason of Public Petitions*, SHANXI RIBAO (SHANXI DAILY), July 17, 2007. *Available at* http://politics.people.com.cn/GB/14562/5993749.html (last visited February 28, 2015).

[20] Hu Jinwu & Lai Xin, *Enhance Credibility of the Jurisdiction: Decipher "the Petition than the Law"*, CHINA COMMENT (BANYUETAN), April 26, 2014. *Available at* http://www.banyuetan.org/chcontent/sz/szgc/2014425/100117.html (last visited February 26, 2015).

[21] To judge a former case by the command from higher level court.

[22] To judge a case that is being judged or has been judged in lower level court by higher level court.

[23] Zhao Lei, *During "Lianggao": Between the Individual Case Supervision and Judicial Authority*, NANFANG ZHOUMO (SOUTHERN WEEKLY), March 18, 2010. *Available at* http://www.infzm.com/content/42713 (last visited April 20, 2015).

[24] The abbreviation of the Supreme People's Court and the Supreme People's Procuratorate.

with the judgment and threatened the judge that, if the Supreme Court cannot come up with a better explanation, the representative will associate other representatives to make dissenting vote for the work report. The judge recalled: "the persuasion of the representative lasted till the night before the discussion of the annual work report".

From above, it's clear that, if the courts are under the great pressure created by privies, the representatives of People's Congress, the corruption will occur.

The third type is mainly for protection of local profit. Courts of China are all set according to the administrative levels. The administrations of certain level are always connected to the People's Congress and the court of the same level. As a result, every court is controlled by its corresponding People's Congress, and the members, which are also elected by the People's Congress and under supervision of the People's Congress, have duty to report their work to the People's Congress. The budgets of the court are calculated from the public finance of the same-level region. In a word, courts are controlled by administrative department of same level. Therefore the individual legal case supervision became a tool to benefit the local finance.

Southern Weekly published a typical case that representatives of People's Congress intruded judicial independence using the individual legal case supervision. In eight years, the case was judged by three levels of courts and had four judgments, and became in executable in the end[25]. The seemingly usual case was judged by two levels courts of Henan province and the original judgment was changed by the Supreme Court for two times, and the final judgment from the Supreme Court was inexecutable in the Henan province. Where is the problem of this case? According to the article of the Southern Weekly, after the first judgment of the Supreme Court, representatives of People's Congress of Henan Province defended the privy who lost in court and are rejected to the judgment, and they raised a proposal to subvert the judgment. The privy is also a representative of the local People's Congress, and had many supporter around in the local People's Congress. The opponent recalled sadly: "If I were aware of the come-off, I would never sue the representative no matter how many humiliation I have suffered." The action of the representatives to reject the judgment of the Supreme Court is doing a great harm to the order of the law.

[25] Shou Beibei, *Three Levels of Courts, Four Judgments, Eight Years of Lawsuit, a Piece of Blank Paper*, NANFANG ZHOUMO (SOUTHERN WEEKLY), June 5, 1998.

V. BE INSPIRED BY URAWA MITSUKO INCIDENT

In China, most people believe that, the individual legal case supervision is right because the representatives of People's Congress are elected from public, and the People's Congress is the organ of supreme power, so the individual legal case supervision is achieving the national sovereignty and the democratization of the jurisdiction. This theory is assemble to the "independent power theory" appeared in discussion of the Urawa Mitsuko incident. In Urawa Mitsuko incident, some people state that, the Census rights belongs to the Diet, the organ of supreme power, and are rights that stand alone identical to the legislative authority and the examination of budget. And as supreme power and the only legislation department, the Diet owns the Census rights to integrate and investigate the national affairs. But it can be inferred that, the "independent power theory" is not supported in academic circles and press circles.

Indeed, the member of courts are elected by the People's Congress and are reflecting the mind of public, so the judicial system has democratic legitimacy of achieving the popular sovereignty. Popular sovereignty does not mean that, public should take part in every tiny cases. Some scholars claim the election of Lay judge system as the basis of the legitimacy of the individual legal case supervision, but it is wrong even if it seems right.

Urawa Mitsuko incident showed three inspirations about the execution of the individual legal case supervision. First, the individual legal case supervision should be procedural supervision, not real supervision. People's Congress can supervise the problem of procedures, but it can't interfere the application of the law and the specific punishment. The objects of the People's Congress' supervision are the corruption of the judges, not the content of judgment or the confirmation of facts. People's Congress should advance the procedures of from the inside of the courts, and protect the independence and conformability of the application of the law and confirmation of facts, thus achieving the justice of the jurisdiction. It's unacceptable that, the People's Congress investigate the case, evaluate the activity of courts and command the judgment. Even facing the corruption of the judges, People's Congress is not supposed to investigate by itself; it should rather ask for other inspection authorities for help.

Second inspiration is that, the individual legal case supervision cannot prevent the corruption of the jurisdiction. As mentioned above, the main purpose of the individual legal case supervision is to prevent the corruption of the jurisdiction. But the clues in the individual legal case supervision are mostly the petition from victims and the command from upper level

department, and it's difficult to operate proper supervision leaning on those clues. As a result, the supervision for correction will become the cause of new mistake and injustice.

The individual legal case supervision prevented some corruption of the jurisdiction, consequently people who want to prevent the corruption of the jurisdiction will send petition to the People's Congress, thus the power of the People's Congress is strengthened, and the power of judicial department are weakened. The judgment of cases is repeated due to the individual legal case supervision, and it takes too long time to get to final judgment. Privies will ask representatives of People's Congress for help after the judge is over in order to benefit from it. The supervision will wreck the stability of the social order, and boost people's disbelieve towards the order of law. In the above mentioned case of Henan, the Supreme Court changed the original verdict for twice, but the non-interference of the local court caused the case's judgment of Supreme Court to be inexecutable. It's fair for public to question the effect of the individual legal case supervision.

Third inspiration is to prohibit the investigation of the cases that are being judged. The core of judicial independence is the independence of the judges, disturbance of the independent judgment by judges should not be allowed. If outsiders of courts have rights to criticize and command the judges, majority of judges will compromise the judgment, and the independence of the judges will be damaged. The accountability system of false accusation case is also accounts for the obedience of the judges to supervisors. From the fear of producing false accusation cases, judges will report every indeterminate cases to its supervisors and follow the commands of them. If the command and criticism of the People's Congress are conceded, courts will lose independence in making judgments by law. As a result, courts will only be able to judge cases following the private files, commands, suggestion and implication from supervisors. It not only intrudes judicial independence, and will turn the relationship between People's Congress and courts from supervisor and supervised into commander and follower.

In addition, attention should be paid to two more points: First, the individual legal case supervision is intruding the procedure of jurisdiction. Theoretically, enough investigation, public hearings and deliberative assemblies are indispensable in supervision of cases. However, the People's Congress is not able to construct a new system to collect clues and arguments from privies. Letting People's Congress to decide whether judgments are appropriate intrudes the finality of courts. Finality means that, courts have the last say in judging cases by law, in other word, the judgment

of courts is the only and absolute judgment that does not affected by any other department. “We are not final because we are infallible, but we are infallible only because we are final”.[26] Robert Jackson, the former justice of the United States Supreme Court, stated. The core of court’s power is the finality of their judgments, not the accurateness. Courts are the ultimate safeguard in solving the legal disputes, protecting the human rights and achieving the social justice. Utilization of courts means other methods are already tried and abandoned, and cases in law process are insulated from any outside factors including the Regime Party, the legislature and administrations. Cases that have received final judgment are fixed and unchangeable, and any other power cannot re-judge the case or change the contents of the judgment. Possibility of improper judgment still remains, but it’s the necessary cost of persistence of court’s finality. Because the finality of courts is undeniable, the problem of improper judgment should depend on the revision of system and the reform of the jurisdiction. Take Urawa Mitsuko incident as an example, through majority of public admit the punishment should be more severe, the finality of judgment is absolute and the judgment is unchangeable.

In Urawa Mitsuko incident, under the Census rights, the Legal Committee of the House of Councillors questioned the judgment of Urawa Mitsuko incident by release a report to criticize the contents of the judgment. Such a behavior of the Legal Committee corresponds to the individual legal case supervision of China. Instead of obedience, the Supreme Court of Japan firmly rejected the supervision. The Supreme Court is an organ to guard the power of nation’s jurisdiction, and is the protector who inquisite other local courts and shield the disturbance from outside. Above are the inspirations from Urawa Mitsuko incident to current China. When other public power start to intrude judicial independence, the first one to raise up against the power should be the Supreme Court. In this view, there is still a long way to go until the Supreme Court of China to fight against the People’s Congress’ offence to judicial independence by the individual legal case supervision.

CONCLUSION

Through reviewing the history of important Japanese Judicial case “Urawa Mitsuko incident”, the analysis is made on the impact on the present and the effect caused by the final judgement, which involved the relationship between Census Right and Individual Legal Case Supervision,

[26] Brown v. Allen, 344 U.S. 443, 540 (1953).

in order to claim that, China's National People's Congress should accept certain restrictions to perform the supervision of the specific case of the judiciary: the individual legal case supervision should be procedural supervision rather than real supervision, the purpose of the supervision shall not be related to judicature, and prohibition of any investigation into the cases that are being judged.

The individual legal case supervision will not prevent the corruption of the jurisdiction, and it also does not follow the proper procedure of jurisdiction, and judging whether judgments are appropriate by People's Congress intrudes the finality of courts. To protect the independence and conformability of the application of the law and confirmation of facts, People's Congress should advance the judicial procedures from the inside of the courts, thus achieving the justice of the jurisdiction. It's unacceptable for the People's Congress to investigate the case, evaluate the activity of courts and command the judgment. By inspecting the major event of counteracting political power to protect the judicial independence in Japan, China can learn a valuable lesson to correct the relationship between judicial independence and individual legal case supervision in China.

INTERNATIONAL RELATIONS AS CONSTITUTIONAL MATTER IN REPUBLIC OF MACEDONIA

Aneta Stojanovska-Stefanova[*] *& Drasko Atanasoski*[**]

Foreign policy and international relations of each country are conditioned with its internal policy and with the basic features of the political system. Besides, the principles and objectives of the foreign policy and international relations are expression and effect of its internal politics, i.e., the basic social relations that determine the physiognomy and character of the basic political institutions, and the content and purposes of the political decisions. Chapter VI of the Constitution of the Republic of Macedonia is dedicated to the issue whereby clearly and unequivocally is indicated that, for proper functioning of the democratic state, it is important how the internal as well as the issues of the international relations are regulated.

INTRODUCTION

In any democratic country, it is equally important to regulate and develop the internal and international relations.

"Macedonia is a parliamentary democracy which has a clear model of the triple division of power. The Foreign policy is a domain, constitutionally

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reserved for the head of the state, the Assembly and the Government. In practice, the head of the state performs a little more powers than it is usual in the parliamentary systems, while the government performs the essential functions in the foreign policy, while the Government performs the basic functions of the foreign policy, leaving the Assembly in a rather weaker position."[1]

"The political, legal, economic and cultural traffic between the subjects of the international law is going through their authorized representatives and through their bodies."[2]

The Republic of Macedonia has dedicated the Chapter VI of the Constitution to the regulation of this matter.

"The international relations are subject to the regulation of the constitutional regulation because the internal law depends on the international law.

The best proof of this are those constitutes that contain provisions for the transfer of part of the national sovereignty over the international institutions, or stipulating consent for accordance of the internal legal order with the generally accepted rules of the international law. The dependence of the internal law of the international law is in function of the actions of the independent states in the field of protection and promotion of the world peace."[3]

The main sources of the international relations are the mandatory norms of the international law ("jus cogens") and the legal principles recognized by civilized nations.

"With the mandatory norms of the international public law and legal principles recognized by the civilized nations, the international relations of the states become legal relations or values that are developed with the help of the law. In such a context, the right appears as a factor of civilized development of the international relations."[4]

The rules of the international public law are often violated, especially this phenomenon is noticeable in time of war when "the strong do what they have power to do, and the weak do what they must accept."[5]

"The constitution of the Republic of Macedonia from 1991 regulates the international relations with the two types of provisions.

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[1] MIRCHEV DIMITAR, THE MACEDONIAN FOREIGN POLICY 1991-2006 20 (Skopje, Az-buki 2006).
[2] FRCHKOSKI LJUBOMIR, INTERNATIONAL PUBLIC LAW 185 (Tabernakul, Skopje 1995).
[3] SHKARIKJ S. & SILJANOVSKA-DAVKOVA G., CONSTITUTIONAL LAW 607 (Skopje: Faculty of Law "Iustinianus Primus" 2007).
[4] SHKARIKJ S. & SILJANOVSKA-DAVKOVA G., CONSTITUTIONAL LAW 608 (Skopje: Faculty of Law "Iustinianus Primus" 2007).
[5] TUKIDIT, HISTORY 344-350 (Adomir, Moscow 1981).

First, the international relations are evaluated from the perspective of the generally accepted norms of the international law, as a fundamental value of the constitutional order of the Republic of Macedonia and second, with several provisions, contained in a separate section of the normative text of the Constitution.

By accepting the generally accepted norms of the international law as a fundamental value, the Republic of Macedonia is committed to respect the sources of the international law: the international customary law; practice of international courts; doctrine or opinion of respectable experts in the field of the international law and ratified international agreements. In the section, dedicated to the international relations are regulated several groups of issues: the relation of the ratified agreements against the internal legal order of the Republic of Macedonia; entities responsible for the concluding of the international agreements; association and dissociation of the Republic of Macedonia from alliances or communities with other countries and deciding on association and dissociation of the Republic of Macedonia from membership in international organizations[6].

The international agreements ratified in accordance with the Constitution are part of the internal legal order in the Republic of Macedonia and they cannot be changed by law. With this solution, the ratified international agreements; association and dissociation of the Republic of Macedonia from alliances or communities with other states and decides on association and dissociation of the Republic of Macedonia from membership in the international organizations."[7]

I. COMPETENCES IN THE AREA OF THE FOREIGN POLICY UNDER THE CONSTITUTION OF THE REPUBLIC OF MACEDONIA FROM 1991

The latter principle of the fundamental values of the constitutional order of the Republic of Macedonia is respect of the generally accepted norms of international law. Namely, with the belonging of the international community, each state as a unitary and federal falls under the authority of the rules or standards of behavior that are built in that community.

Foreign policy and international relations of each country are conditioned with its internal policy and with the basic features of the political system. Besides, the principles and objectives of the foreign policy

[6] Aneta Stojanovska, *Constitutional-Legal and Political Aspects of the Foreign Policy, with Special Retrospection to Republic of Macedonia*, MASTER THESIS, 41.

[7] SHKARIKJ S. & SILJANOVSKA-DAVKOVA G., CONSTITUTIONAL LAW 609 (Skopje: Faculty of Law "Iustinianus Primus", University "Ss. Cyril and Methodius" 2007).

and international relations are expression and effect of its internal politics, i.e., the basic social relations that determine the physiognomy and character of the basic political institutions, and the content and purposes of the political decisions.

Chapter VI of the Constitution of the Republic of Macedonia is dedicated to the issue whereby clearly and unequivocally is indicated that, for proper functioning of the democratic state, it is important how the internal as well as the issues of the international relations are regulated.

As a peaceful, independent and sovereign state, the Republic of Macedonia is fighting for international relations based on:

1. respect of the national sovereignty and equality of all people and countries;

2. non-interference in the sovereign rights of other countries and in their internal affairs;

3. settlement of the international disputes with dispatch with clear statement that it has no territorial claims against neighboring countries;

4. acceptance and fulfillment of its international obligations;

5. active participation in the activities of the international organizations to which wants to join and;

6. compliance with the principles of the Charter of the United Nations.[8]

Apart from the Constitution as the highest act, the issues of the international relations are regulated by the Law on Foreign Affairs, Law on Signing and Ratification and Enforcement of the International Agreements.

The Constitution undertakes the traditional provision, present in many constitutions in the world that build a system of parliamentary democracy, according to which the international agreements in the name of the Republic of Macedonia are concluded by the President of the Republic of Macedonia. Thereto, the Constitution gives possibility to the Government of the Republic of Macedonia to conclude international agreements when it is determined by law (Article 119).

But much more important are the provisions of the Constitution that govern issues for entering into a union or community with other states, or dissociation from a union or community with other states. As holders of the proposal for association or dissociation from a union or community with other states, the Constitution strictly lists: 1. The President of the Republic, 2. The Government, or 3. At least 40 MP's.

This proposal they submit to the Assembly of the Republic of Macedonia which the decision for association or dissociation from a union

[8] KLIMOVSKI S., CONSTITUTIONAL AND POLITICAL SYSTEM 469-470 (Prosvetno delo AD Skopje 2001).

or community with other states adopts by qualified, i.e., two-thirds majority from the total number of the MP's. But this procedure is not completed with that. The decision adopted by the Assembly is considered for adopted if on a referendum voted for it the majority of the total number of voters (Article 120).

The constitution envisages a shorter procedure when it comes to entering into membership or cancellation of membership in international organizations. In this case also, the decision on entering or cancellation of a membership in the international organizations adopts the Assembly of the Republic of Macedonia by a majority vote from the total number of MPs, and holder of the proposal is the President of the Republic, the Government, or at least 40 Members of the Parliament (Article 121).[9]

II. COMPETENCES IN THE FIELD OF THE FOREIGN POLICY IN ACCORDANCE WITH THE CONSTITUTION OF THE REPUBLIC OF MACEDONIA FROM 1991

According to the Constitution of the Republic of Macedonia, and according to the character whether the conduct of the foreign policy is one of the major responsibilities, authorities for performing foreign affairs can be divided into two groups: primary and secondary.

Primary are those authorities that are focused on the major responsibilities in the execution of the foreign policy and here belong the following:

1. The President of the Republic of Macedonia;
2. The Assembly of the Republic of Macedonia;
3. The Government of the Republic of Macedonia;
4. The Ministry of Foreign Affairs and;
5. The Minister for Foreign Affairs.

Secondary however are, those authorities and institutions which in certain cases and circumstances may participate in the conduct of the foreign policy and here belong the following:

1. Authorities of the state government; and
2. The units of the local self-government.

In the area of the foreign policy, the President of the Republic of Macedonia has the following responsibilities:

- Appoints and dismisses by decree the ambassadors and MP's of the Republic of Macedonia abroad;
- Accepts the credentials and revocable letters of the foreign diplomatic representatives.

[9] KLIMOVSKI S., CONSTITUTIONAL AND POLITICAL SYSTEM 472 (Prosvetno delo AD Skopje 2001).

The Assembly of the Republic of Macedonia has the following responsibilities:

- Ratifies international agreements;
- Makes decisions on association and dissociation from a union or community with other states.

While the Government of the Republic of Macedonia has the following responsibilities:

- Decides on recognition of states and governments;
- Establishes diplomatic and consular relations with other countries;
- Adopts decisions on opening of diplomatic and consular offices abroad;
- Proposes appointment of ambassadors and MP's of the Republic of Macedonia abroad and appoints heads of consular offices.

"Conventionally, the authorities responsible for international relations can be divided into two groups:

(1). State authorities whose headquarters is in the state (or internal authorities); and

(2) Authorities whose headquarters is in the territory of other countries (foreign authorities).

The first group includes the: Head of State (monarch or president of Republic), the President of the Government (Prime Minister), and the Minister for Foreign Affairs.

The second group includes the diplomatic and consular representatives and the permanent representatives of the countries in the international organizations."[10]

III. LAW ON FOREIGN AFFAIRS FROM 2006

With the Law on Foreign Affairs [11] precisely are defined, the responsibilities of authorities for performing of the foreign work. With the same prescriptive in details normatively is determined the whole process of creation, establishment and implementation of the foreign policy, as well as the relations between the authorities conducting foreign affairs and the state government authorities, in the exercising of the foreign affairs, which reduces the possibility of overlapping or dysfunction. Characteristic of the Law on Foreign Affairs of the Republic of Macedonia is that, besides the traditional approach towards creating such a norm, it emphasizes the role of the Assembly of the Republic of Macedonia.

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[10] FRCHKOSKI LJUBOMIR, INTERNATIONAL PUBLIC LAW 185 (Tabernakul, Skopje 1995).
[11] Law on Foreign Affairs, Official Gazette of the Republic of Macedonia 46/06.

Also, by the law, it is determined the jurisdiction, structure and operation of the Ministry of Foreign Affairs, which before the adoption of the law was governed by one member of its competence and the Law on the organization and operation of the state administration authorities, i.e., some members in the same law for competences of the management authorities. The great part of the matter for the essential elements of the organization and work of the Ministry before the adoption of the law were moved by-laws.

Furthermore, the law defines the diplomatic and consular representations that Republic of Macedonia can open abroad, and the procedure and conditions of appointment of the head of the diplomatic-consular office. More precisely is determined the procedure for revocation of the heads of the missions, and their duties, responsibilities and relations with the authorities for performing of the foreign works. Determined are specific duties and diplomatic-consular officers working in diplomatic-consular offices.

The Law on Foreign Affairs in Article 2, precisely determines and delimits the terms *foreign affairs* and *foreign policy*.

The term "*foreign affairs*" refers to actions performed by the competent authorities of the state government, and the state government management in the exercise and protection of the rights and interests of the Republic of Macedonia in the international relations with the countries, international authorities, organizations and communities.

While the term "*foreign policy*" refers to political objectives and activities of the Republic of Macedonian relations with countries and with international authorities, organizations and communities that protects the interests of the Republic of Macedonia in the international relations and protect the interests of its citizens and the legal entities registered in it[12].

IV. THE ASSEMBLY OF THE REPUBLIC OF MACEDONIA AND FOREIGN POLICY

According to the Article 6 of the Law on Foreign Affairs, the Assembly of the Republic of Macedonia determines the foreign policy of the Republic of Macedonia, including the issues of the international relations with implications for security and defense; at their request or at the request of the Government, reviews reports on realization of the foreign policy and international position of the Republic of Macedonia, including security and defense issues at the international plan; takes positions on an

[12] Aneta Stojanovska, *Constitutional-Legal and Political Aspects of the Foreign Policy, with Special Retrospection to Republic of Macedonia*, MASTER THESIS, 27.

issue on the proposal of the Government, including those on foreign-policy issues related to security and defense; with different views on matters of foreign affairs, at the proposal of the Ministry, on behalf of the Government or on the proposal of the President, the Assembly debates on these issues, after what adopts appropriate conclusions; the working body of the Assembly responsible for foreign policy at least twice a year reviews report of the Minister, on the implementation of the foreign policy and realization of the international cooperation in the framework of its powers.

V. THE GOVERNMENT OF THE REPUBLIC OF MACEDONIA AND FOREIGN POLICY

According to the provisions of the Law on Foreign Affairs, the Government has extensive competencies in the area of the foreign policy. Namely, in accordance with Article 7 of the Law on Foreign Affairs, the Government of the Republic of Macedonia, participates in the creation of the foreign policy by establishing the general guidelines for the foreign policy in cooperation with the President, including issues of the international relations with implications upon security and defense of the country; informs the Assembly on issues of foreign policy and international relations; at the request of the Assembly, submits a report on the realization of the foreign policy and for international position of the Republic of Macedonia, including security and defense issues at the international level; monitors the implementation of the foreign policy, and the results and eventual disagreements with other bodies for foreign affairs could notify the Assembly; shall submit to the President opinions and suggestions on international issues; to establish, develop and promote political, economic or financial relations with one or more countries or international governmental or non-governmental organizations and informs the Assembly for that; proposes the appointment and dismissal of ambassadors, envoys and appoints and dismisses heads of consular offices of the Republic of Macedonia abroad, in accordance with this Law; issues agreement or exequatur for the heads of foreign diplomatic and consular offices; decides on opening of diplomatic-consular offices and other offices of the Republic of Macedonia and for opening of foreign diplomatic-consular representative offices or offices on international organizations in the Republic of Macedonia, in the procedure determined by this Law; decides on the participation of the Republic of Macedonia in the Common Foreign and Security Policy and the European Security and Defense Policy of the European Union; provides funds within the Budget of the Republic of

Macedonia for emergency and unforeseen situations that arise within the frames of the implementation of foreign policy; provides funds in the budget to compensate the cost of fees and other expenses arising from the membership and participation of the Republic of Macedonia in the international governmental organizations; regularly monitors and evaluates the international relations that have implications on the security and defense and shall inform the President and Assembly for that; provides relief operations in which participates the Republic of Macedonia to be coordinated with those of the international organizations and appoints honorary consuls in proceedings determined by this Law.

VI. Ministry of Foreign Affairs and Foreign Policy

According to the Law of Foreign Affairs, the Ministry of Foreign Affairs, represents and promotes the Republic of Macedonia and develops and coordinates the bilateral and multilateral relations and cooperation with other countries and international organizations; conducts the foreign policy; ensures coordination between the competent authorities for foreign affairs in the performance of foreign affairs; conducts a procedure for the establishment and termination of diplomatic and consular relations with other countries, as well as the procedure to join and establish relations with international organizations; protects the interests, rights and property of the state and its citizens and legal persons abroad; undertakes activities related to the implementation of the decisions of the Security Council of the United Nations concerning the restrictive measures, adopted in accordance with the provisions of Chapter 7 of the UN Charter; coordinates the participation of the Republic of Macedonia in the Common Foreign and Security Policy and the European Security and Defense Policy of the European Union; provides coordination of the foreign-policy aspects of the participation of the Republic of Macedonia to the missions and operations to maintain international peace and security; monitor the development of the international economic relations and proposes; appropriate decisions to the competent authorities; cares for the status and rights of the Macedonian people in the neighborhood; cares for the status and human rights of the communities minorities, citizens of the Republic of Macedonia abroad; cares for the status and human rights of the citizens of the citizens in the Republic of Macedonia that temporarily or permanently reside abroad as well for the expatriates; organizes and manages the diplomatic-consular and other offices of the Republic of Macedonia and organizes the system of relations with them; participates in the signing, preparation and ratification

and keeping of the international conventions to which has joined the Republic of Macedonia; monitors and contributes to the development of the international relations and international law; determines and marks the border, maintains and renews the border markers and participates in the solution of the border incidents; proposes and implements the visa policy and the visa regime of the Republic of Macedonia; manages with the Visa Center and with the Visa Information System by which provides connectivity to all segments in the implementation of the visa regime of the Republic of Macedonia; communicates and coordinates the cooperation with the foreign diplomatic and consular offices and with the missions of the international organizations in the Republic of Macedonia; manages the accreditation procedure and the procedure on the credentials of the foreign ambassadors, the procedure for recognition of the privileges and immunities of the foreign diplomatic offices and on offices of the international organizations, in accordance with the international law; proposes, prepares and conducts the procedure for appointment and dismissal of the heads of the diplomatic and consular offices of the Republic of Macedonia; conducts the procedure for rental, purchase, construction and maintenance of the real estate in other countries for the diplomatic and consular offices of the Republic of Macedonia; collects and keeps domestic and foreign documentation in the field of foreign policy and the international relations of the Republic of Macedonia in the diplomatic archives of the Ministry; informs the President of the most important issues in the realization of the foreign policy of the country and gives opinions and suggestions in relation to the foreign policy issues within its jurisdiction, including security and defense aspects arising from the international relations; participates in the development and application of the acts and initiatives of the President, pursuant to the authority of the Ministry; cooperates with associations of citizens and with scientific institutions; coordinates the implementation of the political views on participation in operations to maintain the international peace and security, in cooperation with the relevant ministries and performs other duties determined by Law.

VII. THE MINISTER OF FOREIGN AFFAIRS AND FOREIGN POLICY

According to the Law on Foreign Affairs, the powers of the Minister of Foreign Affairs prescribed in the Article 9, by which the Minister participates in the creation of the foreign policy by proposing of the general guidelines of the foreign policy, including the issues of the international relations with implications on the security and defense of the country;

proposes views of the area of the foreign policy and gives opinions in the field of the foreign affairs and international relations; implements the established foreign policy; within their jurisdictions, leads and conducts the political dialogue with international actors in the name of the Republic of Macedonia; represents the views of the state to international organizations and international conferences; before the working body of the Assembly competent for foreign policy, at least twice a year, submits report on the implementation of the foreign policy and international position, including the security and defense issues at the international level; at the request of the Assembly, submits report on the implementation of the foreign policy and international position, including the security and defense issues at the international level and at the request of the Assembly or at the proposal of the Government, explains the attitudes and actions of the Government on issues of foreign policy, including issues of the international relations with implications for security and defense of the country and for the progress in the implementation of the foreign policy[13].

CONCLUSION

Republic of Macedonia is a parliamentary democracy which has a clear model of the triple division of power. The Foreign policy is a domain, constitutionally reserved for the head of the state, the Assembly and the Government. The Republic of Macedonia has dedicated the Chapter VI of the Constitution to the regulation of this matter. According to the Law of Foreign Affairs, the Ministry of Foreign Affairs, represents and promotes the Republic of Macedonia and develops and coordinates the bilateral and multilateral relations and cooperation with other countries and international organizations.

According to the Law on Foreign Affairs, the powers of the Minister of Foreign Affairs prescribed in the Article 9, by which the Minister participates in the creation of the foreign policy by proposing of the general guidelines of the foreign policy including the issues of the international relations. The working body of the Assembly competent for foreign policy, at least twice a year, submits report on the implementation of the foreign policy and international position, including the security and defense issues at the international level. The international agreements ratified in accordance with the Constitution are part of the internal legal order in the Republic of Macedonia and they cannot be changed by law.

[13] *Ibid.* at 35-37.

INTERACTIVE RELATIONSHIP BETWEEN PROPERTY AND CONTRACT LAW—SECURITY RIGHTS PERSPECTIVE

Rongxin Zeng[*]

Property law and Contract law are two of the most important fields of the private law. There exist some obvious distinctions between property and contract law. Meanwhile, properties are usually caused and influenced by contracts; the validity and forms of contracts are also influenced by property law. Therefore, there's an interactive relationship between them. The present research aims to analyze this interactive relationship from the perspective of the security rights which are normally considered as some typical forms of property rights.

INTRODUCTION

Property law defines into a field of law governing different types of ownership in property, either real or personal property. These concepts manifest in various statutes from the modern law defining the accompanying rights of ownership in such property. On the other hand, contract law entails the formation and fulfillment of promises. The aspects of this law become distinct in various countries, mostly based on the common law. A contract, therefore, defines an agreement enforceable in

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court involving two or more parties in agreement of performance or non-performance of some action presently or in the future.

I. DISTINCTION BETWEEN PROPERTY AND CONTRACT LAW

A. Principle of Numerus Clausus

The law limits the ability of owners of assets in the granting of partial rights in assets binding subsequent holders of the remaining rights in the asset. This is commonly referred to as *numerus clausus* principle, and describes the recognition of only a limited list of mandatory forms in property law. The distinguishing feature rests on the fact that, a property right becomes enforceable against both the original grantor of the right and third parties to whom such rights have been transferred. From a property law context, the liability of a property right rests on the person in its possession.[1] For instance, consider the case of a tenant renting a piece of land: he has a property right in the land if he enforces his rights in the land against the landlord and also other individuals to whom the land is transferred by the landlord as per his interest in the land.

Property law seeks to address this matter by defining and offering standardized forms with desirable attributes and labels. The expression "copyright", for instance, presents a simple label that denotes a complicated package consisting of well-defined property rights intended for serving the requirements of authors and publishers.[2] Through such limitation of property rights to a set of standard forms, the law minimizes on related information processing costs of individuals seeking to acquire rights to certain property.

The law on property, thus, proves challenging in the provision of mechanisms aimed at solving problems of verification, commonly referred to as assurance of effective notice. As a matter of resolve, it employs a range of rules for verification.[3] These rules determine the conditions under which transfer of rights will occur, especially as relates to a third party. One such rule entails, the concept of possession presenting the most primitive and common means. Theoretically, verification is only based on possession

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[1] ALPA G., BAR C., DROBNIG U. & EUROPEAN COMMISSION, THE INTERACTION OF CONTRACT LAW AND TORT AND PROPERTY LAW IN EUROPE: A COMPARATIVE STUDY (Munchen: Sellier- European Law Publishers 2004).

[2] SIMON J., EUROPEAN CONTRACT LAW: DRAFT CODE PUBLISHED (2011). *Available at* http://www.cliffordchance.com/publicationviews/publications/2011/05/european_contractlawdraftcodepublished.html (last visited May 27, 2013).

[3] Alpa G., Bar C., Drobnig U. & European Commission, *supra* note 1.

depicting as a simple process. It provides that, the party with physical possession of the property retains the full rights and transfer of such property is accompanied by those rights.

B. Principle of Freedom of Contract

The principle of freedom of contract becomes the dominant concept in the law on contract. It requires that, parties possess the freedom to make agreements on own terms and with a desired party, without any intrusion of the courts or Acts. It becomes evident that, a *numerus clausus* of property rights existing in many states develops in absolute contrast to freedom of contract principle which stands out as a forming part of contract law. However, according to some studies, it has been a claim that, the contrast is not complete as in the framework of contractual rights in property, the involved parties possess the freedom to agree or disagree on institution of an admitted real right.

Additionally, the parties have the power to agree on those aspects relating to the desired property right under which the law fails to regulate through mandatory rules or total lack of regulation, occurring within the stated limit. The intention to formulate new property rights, even in permitted circumstances, practically takes place in unusual and rare cases. The models offered by law provide form the majority of contractual property rights. Thus, in this viewpoint, property law's limitation on the autonomy of either party portrays a distinguishing feature from contract law.

C. Universal Effects of Property Rights and Effects of Contract

A key and particular feature of proprietary rights comes out in their universal impacts. For contractual rights, the parties form an agreement existing only between them, while proprietary rights extend such rights against the entire world, described as erga omnes. Most cases show the universal effect of proprietary rights as relating and subject to conformity with stipulated methods of publicity, mainly for real rights in the case of immovables as well as security rights in movables. The major fundamental aspect of a proprietary right and the consequent universal effects manifests clearly in the essential consequences drawn from it: an individual entitled to such a right has the capability to enforce it against a holder of the asset without entitlement to such custody (possession) as relates to the right or legitimate holder.

II. SECURITY RIGHTS IN MOVABLES AND CONTRACT LAW

Movables, also known as personal property, entail anything other than land with the capability of ownership, encompassing money, notes, intellectual rights, stocks and intangibles. It classifies broadly into two: tangibles (corporeals) and intangibles (incorporeal).[4] The former includes things like merchandise, jewelry, animals and so on; whereas intangibles refer to items such as bonds, patents and copyrights. A security right in a movable asset describes any finite proprietary right in the property which grants the secured creditor better satisfaction of related rights from the full asset. The term "finite proprietary right" indicates that, a security right entails the involved liability to the complete ownership of such an asset.[5] Conventionally, the security provider holds the right to ownership, though a third party may also have authority to create that liability in his or her own name. The limited right entitles the secured creditor to special value creation from the asset. The preferential satisfaction becomes the essence of security rights in property.

A. Europe

The Draft Common Frame of Reference intervenes deeply into the law on property as it affects movables. Goods fall under corporeal movables, with the class encompassing incorporeals while excluding immovables. Contracts influencing on movables receive cover for general and specific contracts including sale and hire.[6] In recent times, non-possessory security in movables becomes paramount, with the present contribution being limited to contractual security rights.

The pledge stands out as the classical form of possessory security without considering the issue of qualification. By "possessory" we mean that, the pledged corporeal goods are held by the secured creditor and not by the debtor or a third party.[7] The legal criteria for determining a possessory pledge is seen from the requirement that, the debtor must be dispossessed of such goods. Thus, the economic function of pledges is determined by the strict criterion used. Use of pledges mainly applies for goods which the debtor does not urgently need for trade or manufacturing purposes, but

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[4] CISG.LAW., INTRODUCTION TO PRINCIPLES OF EUROPEAN CONTRACT LAW (2010). *Available at* http://www.cisg.law.pace.edu/cisg/text/peclcomments.html (last visited May 27, 2013).
[5] COMMISSION ON EUROPEAN CONTRACT LAW PRINCIPLES OF EUROPEAN CONTRACT LAW, PART 2 (Boston, UK: Wolters Kluwer Law & Business 1999).
[6] Alpa G., Bar C., Drobnig U. & European Commission, (2004), *supra* note 1.
[7] CISG.LAW., INTRODUCTION TO PRINCIPLES OF EUROPEAN CONTRACT LAW (2010), *supra* note 4.

necessary for those dispensable for the time being, such as luxury products and jewelry.

The means used in creation of a possessory security depicts the characteristic nature of the resulting pledge. The debtor remains to be dispossessed of the goods through transfer of possession to the secured creditor or to a third party after a mutual agreement. This becomes an essential and permanent requirement that deserves fulfillment until the pledge is terminated. It seeks to serve two major functions: the process makes it hard for the debtor to dispose of such goods to a third party; and he/she cannot develop a misleading impression in the minds of other creditors as relates to ownership of the corporeals that may be available for preferential satisfaction of any leveled claims.[8] Additionally, particular pledges must accompany certain formalities, for instance, in Italy, certain documentation becomes applicable unless the creditor entails a credit institution.

The debtor, after dispossession, remains the owner of such goods, while the secured creditor takes the position of a holder, commonly referred to as bailment in English law. The secured creditor becomes responsible for the maintenance and safekeeping of the pledged goods. In most places, breach of this role results to a liability in form of damages or restitution of the goods such as in France. The time-oriented principle of "*prior tempore, potior jure*" requires that, the rank between various secured creditors becomes a determinant of the time of creation.[9] It applies between different creditors with contractual, statutory security rights as well as execution creditors. In modern times, the debtor's insolvency affects the rights of the pledge including the right of enforcement. As a general agreement, if proceeds from enforcement fail to cover the secured claim, the outstanding payment may be claimed from the estate as a dividend, with a surplus being paid to an administrator.

Default of payment by the debtor prompts the creditor to enforce his proprietary right of satisfaction from the pledged goods.[10] The arising conflict evokes a number of differing solutions, for example, an agreement by the parties to pass ownership to the creditor while involving an expert to determine the market value at the appropriation period, as in France. Following maturity, the involved parties can freely agree on the means of enforcement. England provides for the most tolerant method that, entails

[8] YOUNG M., UNDERSTANDING CONTRACT LAW (London: Routledge 2009).
[9] COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (1999), *supra* note 5.
[10] Alpa G., Bar C., Drobnig U. & European Commission, (2004), *supra* note 1.

sale of the goods by the secured creditor in case of default.[11] This only requires that, the sale becomes "reasonable". Any surplus from the sale proceeds after the creditor's satisfaction of claims pass on to the debtor, and vice versa in case of deficits.

Non-possessory security describes forms of security where the movable assets remain in the debtor's hands undeliverable to the creditor or to a third party.[12] Thus, the economic value portrays from the advantages of retaining the goods as held by the debtor. For instance, an individual consumer will use household goods as security for the secured goods. The contemporary legal regime shows a less existent form of law on non-possessory security as historical roots are short. This uncoordinated development brings about less harmony between various countries. The variety of legislative, doctrinal and judicial resolves aimed at coping with certain needs classify into a few basic models.[13] Consequently, two basic models clearly stand out: the pledge and ownership of an asset.

The pledge or charge intends to serve as security in corporeals, whereas the latter comes out as a complex property right not designed for security purposes. The requirements for creation of a non-possessory pledge differ from those of a possessory pledge, since in the former, the debtor need not dispossess himself of the security.[14] Legislators employ more or less effective substitute for publicity meant to inform interested individuals about existing charges on particular assets of their potential debtor. This becomes an essential requirement for the validity of the security also affecting third parties. Registration of the security agreement becomes one of the most common and effective method of substitute publicity.

For non-possessory security, it becomes paramount to enhance the creation of a security in a fund, which entails a mass of assets consisting of changing elements. In England, the use of floating charge is a clear manifest of this technique as well as the pledge on an agricultural tenant's stock in Germany. Possessory pledges demand that, possession be transferred to the creditor thus implying the necessity to keep the secured assets separate from the creditor's corresponding assets. This situation corresponds to the contemporary non-possessory pledge in the debtor's assets. Nonetheless, both cases require mutual consent between the involved parties, hence the need for corresponding rules in every jurisdiction.

Protection against third parties for non-possessory goods is similar to

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[11] CISG.LAW., INTRODUCTION TO PRINCIPLES OF EUROPEAN CONTRACT LAW (2010), *supra* note 4.
[12] KLASS G., CONTRACT LAW IN THE USA (Boston, Kluwer Law 2010).
[13] CISG.LAW., INTRODUCTION TO PRINCIPLES OF EUROPEAN CONTRACT LAW (2010), *supra* note 4.
[14] SIMON J., EUROPEAN CONTRACT LAW: DRAFT CODE PUBLISHED (2011), *supra* note 2.

that of possessory goods. However, the non-possessory creditor is affected by certain demerits as relates to procedures and rules in insolvency proceedings against debtor's property.[15] This is in line with the enforcement of the security as the insolvency administrator holds the security. The debtor's decision to dispose of the security without the creditor's consent also springs up concerns of protection.[16] The concept of good faith lacks merit in some cases since the legal provisions differ across regions and are uncertain. For instance, the parties may accept the legislator's invitation to apply an optional publicity by means of a sign as an attachment to the security.

Non-possessory pledges receive enforcement in a similar way to possessory security as the same rules remain applicable. As a matter of note, two special features stand out: the secured creditor cannot begin to enforce his security until he obtains the said collateral from the debtor in possession, and thus has to request its transfer to him; the enforcement of an enterprise pledge slightly differs from that of a pledge against certain assets.[17] The holder of an English floating charge, for example, becomes permitted to appoint a receiver responsible for the administration of the security so as to secure an optimal return for it.

Intangible personal property, such as intellectual rights and debts become most eminent in these times with a corresponding growing economic importance. Subsequently, they acquire considerable use as collateral for securing credits.[18] Similar models accrue for incorporeals (intangibles) vis-à-vis utilization of monetary claims as security: it involves a pledge or a full transfer to the creditor, commonly known as an assignment. The basic legal issue is also identical as by an assignment of a claim, the creditor acquires excess rights than those required for security purposes.[19] The question thus arises as to how and whether the powers are to be limited in particular situations.

For monetary claims, the pledge is governed by the common rules relating to pledges. Nonetheless, under the narrow possessory ideology of the pledge developed, the essential dispossession of the pledgor of an incorporeal or intangible cannot be recognized. Alternatively, the Civil Codes of England demand for notification of the debtor of the pledged claim or the account debtor.[20] On the contrary, the French laws require a document

[15] Alpa G., Bar C., Drobnig U. & European Commission, (2004), *supra* note 1.
[16] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.
[17] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.
[18] Alpa G., Bar C., Drobnig U. & European Commission, (2004), *supra* note 1.
[19] CISG.LAW., INTRODUCTION TO PRINCIPLES OF EUROPEAN CONTRACT LAW (2010), *supra* note 4.
[20] WISHART M., CONTRACT LAW (Oxford, NY: Oxford University Press 2012).

in writing as proof of validity of the pledge restricting the meaning of notification of the account debtor of the liable claim to such information that payment must be made for proper discharge. The required notification of the account debtor seems fundamental as an assurance that, he will pay his arrears to the pledge and not to the pledgor. Conversely, in most cases, the importance of notification to the account debtor proves to be commercially inconvenient. This stands out if there exists a significant number of such debtors owing modest amounts; since the reputation of pledgor is affected; and due to the dominant motion in many cases to leave the collection of the pledged claims to the pledgor in place of the pledge (to whom that pledgor ought to account and make payment). In English law, there exists no extension to the prevailing narrow thinking of the possessory pledge in case of intangibles, thus using the institution of the charge.[21]

The Civil Code in the Netherlands portrays an introduction of pledge without notification to the account debtor. It presents a similar situation as that for non-possessory pledges relating to tangibles. Similarly, the approach should be established through a public or registered private document. Where the pledgor fails in performance of his duty in relation to the pledge, or has reasons of being skeptic of such breach, the Dutch law demands that, the pledge notifies the account debtor. Additionally, in England and Wales, such monetary claims are made subject to an equitable charge without the debtor's notification. It is a requirement that, such charges be registered. It may be fixed or floating (consists of a changing fund of debts).[22]

Alternatively, instead of using a pledge for monetary claims with or without notification to the account debtor, the debts are transferred fully to the creditor by application of assignment. The approach corresponds to the security transfer of ownership. It however, becomes essential for the involved parties if it requires no notification. The assignment for security in Germany is guided by the common rules on the issue of assignment. There is a correlation between the Dutch and German rules for pledges of debts without notification as far as the right to collect the assigned debts is concerned.

Resulting impacts of an ordinary assignment remain restricted to the assignor's insolvency. This implies that, the creditor as the assignee loses the entitlement to distinguish the assigned claims from the assignor's insolvency estate. He is reduced to the status of a pledge limiting him to the right of preferential satisfaction from the proceeds of such claims. An

[21] SIMON J., EUROPEAN CONTRACT LAW: DRAFT CODE PUBLISHED (2011), *supra* note 2.
[22] EUROPEAN COMMISSION, CONTACT LAW (2013). *Available at* http://ec.europa.eu/justice/contract (last visited May 27, 2013).

outright sale of these claims to the creditor becomes disregarded as a charge thus not a subject to registration and other limitations as in the case of Wales and England.

B. United States

Security interest in most personal property which mainly includes tangibles is guided by the Uniform Commercial Code (UCC), a model law formulated in every state and the District of Columbia. Under Article 9 of the UCC clear guidelines concerning security interests in personal property are stipulated.[23] US federal law and international treaties binding the country pre-empt the UCC in some cases. The provided article excludes particular types of property and transactions from its wide scope, for instance, most insurance policies, real property interests, chattel paper and payment intangibles forming part of business sale out of which they seem to erupt.

UCC describes goods as everything that is movable in the attachment of a security interest. It, therefore, includes: inventory, equipment, fixtures, standing timber awaiting cutting, unborn offspring of animals, grown crops or those still growing, and manufactured homes. On the other hand, the expression security interest defines into broad meanings. It develops from an interest in movables securing payment or performance of duty. This encompasses entitlement of property right by a seller of goods, as well as most consignments of goods.[24] The UCC takes into account the interests of a purchaser of accounts, chattel papers and so on. The implication then becomes that, UCC treats most transactions as the development of a security interest appearing different on the face of it.

A security interest in personal property is required for attachment as proof of validity enhances its enforcement against the borrower or other third party acting as a grantor of the security interest or debtor. This demands that, the debtor possess rights in the security and enters into a sufficient security agreement which explains the form of security.[25] It is not a requirement of UCC that, a debtor ought to receive a value almost or equal to the collateral's value. However, if this does not come up and the debtor falls into a position of insolvency, it remains that, a bankruptcy court sets aside the security interest as transfer in fraud.

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[23] MOOTZ F. J., PRINCIPLES OF AMERICAN CONTRACT LAW (Boston, MA: Wolters Kluwer Law & Business 2011).
[24] *Id*.
[25] WISHART M., CONTRACT LAW (2012), *supra* note 20.

Any party granting such interest may only create a security interest in whichever rights contained in the collateral, irrespective of whether they comprise of absolute ownership or lesser rights including leasehold interest.[26] The UCC often demands for a written or electronic security understanding describing the security authenticated by the electronic related form of signature. It also outlines how the agreement is to portray the collateral. Such description entails a set of governing rules, thus, terms like "all assets" remain void in a security agreement. Alternatively, the UCC develops a set of guidelines for how such security is to be described.[27] Oral security agreements become rare but possible for commercial transactions.

The ascription of a security interest remains to be valid between the borrower and the secured party which entitles the latter to implement resolves if due. Nonetheless, the secured party ought to enhance the interest against future parties (third), especially future creditors of the same borrower and any trustee in bankruptcy in case the borrower files bankruptcy. Two main methods stand out under UCC in the perfection of a security interest in goods: filing of sufficient financing statement, and possessing of the goods by the secured party.[28]

The financial statement describes a filing aimed at placing other creditors on notice of the secured party's collateral interest as recognized by the financing statement. It must comprise of information on the grantor and the secured party such as the address and a brief highlight of the collateral. Essentially, the grantor's name becomes of utmost importance: it must correspond appropriately to the grantor's legal name.[29] The method is valid for description of the collateral as "all assets" as long as the security agreement allows it. This does not occur sufficiently in a security agreement.

Most collateral involve an adequate single financing statement in the location of the debtor. The type of debtor determines the proper location. For instance, if the debtor includes a local corporation or a limited liability company, the location usually falls in the state under whose guidelines they were governed. A common individual acquires his location at the place of principal residence.[30] For foreign chartered organizations, trusts, firms under the federal law and so on obtain special rules of governance. Such statements generally apply in use for five years after filing unless there exists a continuation statement filed six months before the lapse period. A

[26] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.
[27] EUROPEAN COMMISSION, CONTACT LAW (2013), *supra* note 22.
[28] YOUNG M., UNDERSTANDING CONTRACT LAW (2009), *supra* note 8.
[29] WISHART M., CONTRACT LAW (2012), *supra* note 20.
[30] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.

new statement or amendment will be needed in case there are changes in the name, firm's structure or location of the grantor before expiry of the instrument.

The perfection of a security interest by a secured party through possession prompts him to involve a third party in such possession on behalf of the secured party. However, it remains clear that, the third party lacks the right to a debtor. In cases where the collateral entails a set of goods evidenced through a bill of lading, receipt from a warehouse or any corresponding document, a secured party may perfect such interest by taking particular actions regarding the document, instead of filing a UCC financing statement. For negotiable documents, the secured party can as well take possession of it.[31] As an alternative he can also notify the document issurer of the security interest or issue such document in the name of the secured party.

Where a secured party is in possession of a perfected security interest in collateral with the collateral resulting to proceeds, the secured party automatically obtains a perfected security in such proceeds for twenty days after receipt to the borrower. On expiry of the twenty-day period, a security interest in identifiable proceeds from cash remains in perfection. Other types of goods receive special treatment in terms of the governing laws ascribed to them outside the scope of the UCC.[32] Common examples include ships and aircraft: perfection of security interest in aircrafts and related assets demands for registration at the international registry located in Oklahoma; for ships, filing a mortgage with the Secretary of Transportation becomes an essential requirement.

Guidelines provided by the UCC distinguish between the various financial instruments. The most common forms include investment property, deposit accounts, instruments and chattel papers. Investment property includes debt and equity securities, security accounts, commodities contracts and commodities accounts. Deposit accounts entail demand accounts, time accounts, savings accounts and passbook accounts. Instruments encompass such written evidence showing proof of payment, but not including leases or certified security, for example, a promissory note.[33] Lastly, chattel papers describe proof of monetary duty with a security interest in, or lease of, particular inventory. They can either be written or electronic, such as sale of a certain motor vehicle.

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[31] COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (1999), *supra* note 5.
[32] WISHART M., CONTRACT LAW (2012), *supra* note 20.
[33] CISG.LAW., INTRODUCTION TO PRINCIPLES OF EUROPEAN CONTRACT LAW (2010), *supra* note 4.

Perfection is carried out by the secured party through a filing of a UCC financing statement for either instrument. Investment property, chattel papers and instruments hold the secured party as a priority over another party having perfected its interest singly through filing, irrespective of the period of filing. Security interest in instruments, incorporeal chattel paper and securities obtain perfection by possession.[34] Such perfection requires no endorsement, but capable of resulting benefits. Thus, an endorsement in blank becomes common for both instruments and certified securities.

For uncertified securities, electronic chattel paper, deposit accounts, and commodity accounts perfection by possession will not suffice, but rather through "control". Deposit accounts, for instance, may involve a control agreement between the debtor, the secured party and the bank representing the intermediary in securities maintaining the account.[35] In such an agreement, the acting intermediary comes into agreement with the secured party to comply with the leveled instructions without further consent of the debtor. Other methods for achieving control are provided for by UCC. For instance, the secured party becomes the registered owner of an uncertified security, or the account holder of a deposit or securities account. Some situations allow the secured party too be in automatic control as in cases where the secured party depicts as the intermediary maintaining the account.

Other assets under personal property are classified into claims and receivables and generally comprise of accounts, commercial tort claims, letter of credit rights, and general intangibles. The policies governing such property correspond in a similar way to those for goods. However, commercial tort claims demand for particular identification of resulting claims as relates to the security interest. Security interest in these forms of property usually evokes concerns of whether the debtor ought to assign its interest to the secured party.[36] The UCC is mandated to prevail over certain limitations on assignment either in full or part. It also becomes a necessity to comply with special requirements as provided in the statutes in cases where the obligor on any claim involves a government entity.

Perfection of a security interest for these properties entails the common UCC financing statement. In a letter of credit, such approach does not suffice. It requires the issurer to agree to an assignment of the proceeds of the claim (letter of credit) to the secured party. In situations where the claim agrees to payment or performance of any account, document, instrument,

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[34] WISHART M., CONTRACT LAW (2012), *supra* note 20.
[35] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.
[36] YOUNG M., UNDERSTANDING CONTRACT LAW (2009), *supra* note 8.

intangible, and so on, the UCC terms such letter of credit as a "supporting obligation". Here, the secured party automatically acquires a perfected security interest on perfection, resulting as a supporting obligation. This, however, limits the secured party from drawing on the letter of credit, unless the debtor transfers it to the secured party.

III. SECURITY RIGHTS IN IMMOVABLES AND CONTRACT LAW

Immovables or real property entail items of property that cannot be transferred from one place to another due to permanent fixation such as land or buildings. It thus includes land and typically anything erected on, fixed to or growing on it. Such property can only experience movement when altered or destroyed. It is commonly referred to as real estate in the USA, and simply as property in Britain.[37] The term includes buildings and property rights such as inheritance rights, land located on or below the Earth, or having a fixed address. No changes are made to immovable property without clear consent from the owner.

A. United States

In the USA, real property security tools differ according to various states. Mortgages remain to be the most common security instruments encumbering any interest in real property having legal transfer. This includes transfer of full ownership, interest under lease due to the tenant or interest due to a beneficiary of an easement.[38] If the party granting the mortgage (mortgagor) defaults in payment or performance of duty, the holder of the mortgage or the lender (mortgagee) may facilitate an auction sale of such property, with subsequent proceeds used towards the secured responsibility.

An alternative form of instrument also includes deeds of trust: the borrower under this approach transfers title to any immovable to a third party trustee. The trustee can either transfer back the instrument after payment of loan or hold a trustee's sale in case of loan defaultment. Thus, the lender remains in the same position as if held by a mortgage. Application of mortgages result in lack of ownership of the security until a foreclosure or trustee's sale is made. The lender cannot, therefore, receive revenue from the rental property before occurrence of a sale.[39] As a matter

[37] Alpa G., Bar C., Drobnig U. & European Commission, (2004), *supra* note 1.
[38] MOOTZ F. J., PRINCIPLES OF AMERICAN CONTRACT LAW (2011), *supra* note 23.
[39] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.

of response, lenders demand that, borrowers separately assign such income to the lender, from the time of closure, in order for the lender to collect the incomes on any arrears. This arises without the need of waiting for a foreclosure or a corresponding sale. The process is done in a separate document different from the mortgage or deed of trust.

All states demand that, the borrower takes ownership of any real property being mortgaged to the lender. This implies that, in case the borrower possesses a lease of such property, they have a leasehold interest, which may be mortgaged basing on the set terms of such lease, but cannot mortgage interest due to the landlord. It is required that, the borrower grants either of the security instruments through signing and recognizing a written document.[40] The necessary technical needs vary across different states including description of the real property, language in use, and formalities arising from signatures.

For perfection of liens burdening on real property, the lender is required to make note of the security instrument used in the land covering its location. Recording demands compliance with the leveled technicalities, payment of taxes and legal fees, and conveyance of reinforcing documents. This does not present automatic or simple situations.[41] It results in issuance of a title insurance policy, with a title insurance company assuring the lender of validity in the held lien that, encumbers the real property as described in the policy. The average costs for such coverage stands at 0.2% of the full amount of the lien under insurance.[42]

B. Europe

Real property shows development in Europe based on feudal and Roman law. The general contemporary sources become spread over continental codifications and the British common law with particular areas as apartment ownership being managed in special statutes. The law on immovables is highly influenced by liberalism relying heavily on individual ownership of land. Land ownership legally termed as *dominium*, represents the all-inclusive property right.[43] Continental systems require that, ownership cannot be divided in different rights unless there exists "pioneer rights" including possession. Nonetheless, the common law provides for ownership on a limited time basis for estates.

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[40] MOOTZ F. J., PRINCIPLES OF AMERICAN CONTRACT LAW (2011), *supra* note 23.
[41] KLASS G., CONTRACT LAW IN THE USA (2010), *supra* note 12.
[42] WISHART M., CONTRACT LAW (2012), *supra* note 20.
[43] SIMON J., EUROPEAN CONTRACT LAW: DRAFT CODE PUBLISHED (2011), *supra* note 2.

Security rights encompass the use of land as guarantee in rem for settlement of a debt. They require creation buy deed or notarial act, and registration in a land register. In the creation of a mortgage, the property becomes a possession of the owner.[44] Conversely, with a default in payment, the land is sold at an auction or through another means of forced sale, which demands for authorization by a court action. The traditional English viewpoint of a mortgage saw the lender becoming the owner of such land, or being granted a long lease.

The most essential forms of security rights in rem consist of: mortgages developed from a credit contract by parties securing debt; liens enforced by statutes resulting from certain factual situations especially when the seller of land stays put due to default by the debtor, as in France and England; and rent charges which secure a periodic payment method on the land, usually for maintenance of the family, as in Germany. Some countries present other forms of securities in rem: Belgium laws create forms of securities known as mortgage promises which distinguish from full mortgages, aiding in avoiding high registration duties.

The major difference between mortgages under varied systems in Europe stands out in the nature of accessoriness. This describes the linkage of a mortgage to an existing debt secured as a result of the mortgage being minimized as the debt is gradually settled expiring completely once the debt lacks existence.[45] The accessory concept mostly prevails in the English and French legal systems, with the non-accessory form dominant in Germany. It also exists in Finland, Sweden and some Eastern European states, with a corresponding approach being acknowledged under the polish legal rules. For the accessory form, a maximum of security is created for the debtor, while the non-accessory option facilitates the recurring use of a mortgage and its transferability among the involved parties, further enhancing the refinancing by banks.

IV. INTERACTION OF PROPERTY AND CONTRACT LAW ON SECURITY RIGHTS

The key issue demanding resolve entails the conceptual and terminological variations between the fields of property law and contract.[46] Thus, concerns of a unification of contract law with property law seek to harmonize the scope developed from both fields. The individual disturbing concept under contract law rests with the common view of contractual

[44] YOUNG M., UNDERSTANDING CONTRACT LAW (2009), *supra* note 8.
[45] Alpa G., Bar C., Drobnig U. & European Commission, (2004), *supra* note 1.
[46] SIMON, J., EUROPEAN CONTRACT LAW: DRAFT CODE PUBLISHED (2011), *supra* note 2.

proprietary effects which influences the transfer of a proprietary right, either ownership of or security right in movables or immovables.

One key issue relates to the due influence of the contractual agreement. This entails the validity of the involved agreement which has to meet certain provisions, such as acceptance and consideration showing consent by the parties. Property rights are enhanced through legal and valid contracts pertaining to transfer of ownership to the subsequent holder. The passing of property rights from one party to another, either a second or third party, depends highly on the performance of the contractual agreement. Thus, contract formation involving property such as movables will require that, the contract formed conforms to all essential demands meant for a valid contract.

Another concern entails the element of free will binding the contractual parties, and corresponding to freedom of contract. Harmonization of property rights and the constitutive contracts thus requires a middle ground that allows for more flexibility, especially for civil law which considers the doctrine of *numerus clausus* as an essential part of property law. For instance, the system of civil law may employ lesser restrictions on property rights and common law systems formulate certain rights against the world through a standardization of those rights. The existences of mandatory rules of standardization are leveled to a certain point optimum for both circumstances.

CONCLUSION

Possible remedies remain relevant in order to mitigate on the interference of contract law with property law, with encouraged exclusion from the latter field of study. Legal systems employing the divided approach minimize on any undesirable effects of contract law through establishing separate, independent means for the institution or transfer of proprietary rights. Conflict laws become essential as sources of remedy as they overcome the differences between various legal systems without altering them in substance. A common remedy is use of grace periods for transactions involving different countries, since during this time, the security rights maintain their validity. In a nutshell, harmonization serves to provide a common global understanding as relates to contractual property law, suggesting similarities in security laws as the best solution.

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