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# SILESIAN JOURNAL OF LEGAL STUDIES

## CONTENTS VOL. 6

Foreword by
Barbara Mikołajczyk

Wydawnictwo Uniwersytetu Śląskiego Katowice 2014

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# EDITORIAL

Welcome to the sixth issue of the *Silesian Journal of Legal Studies* (SJLS). In this volume we continue legal discourse over geographical and legal borders. However, this time we have crossed the European borders! We present a text submitted by an author from Nigeria – Michael C. Ogwezzy from Lead City University in Ibadan, and one by the Indian author Akshaya Kamalnaath – presently working at the Newcastle University in Australia. Her interdisciplinary case study relates to ethnic minority rights and the legal and sociological aspects of multicultural cohabitation. The text by M.C. Ogwezzy concerns an international issue – the perspectives of African integration in framework of the ECOWAS.

International law issues are also discussed in the article by Ewa Kamarad from the Jagiellonian University, on relations between the European Union and the World Trade Organization. The group of articles dedicated to international law is completed by a text in German, written by Michał Filipek from the Polish Academy of Science, on the status of the Arctic region.

A mix of international and constitutional matters are taken up by Jerzy Menkes from the Warsaw School of Economics in his text on Polish citizenship from an international law perspective.

The other four authors are connected with the University of Silesia. The article by Marcin Janik tackles the difficult and vaguely problematic aspects of public goods. It is an interesting contribution to the worldwide debate on global administrative law. Marlena Jankowska provides an analysis of moral rights regulations in Asia, using the example of the right of attribution. Tadeusz Zieliński, writing in French, dedicates his article to the exemptions in the United Nations Convention on Contracts for the International Sale of Goods of 1980 affecting liability for a failure to perform party's obligations. Finally, Marek Zdebel and Malwina Bartela analyse issues of Polish financial law in his article on the legal character of internal audit.

As in previous issues, in this edition of SJLS we attaches the report from the interesting conference which took place in Oxford and we continue to present a list of selected monographs published in 2013 by researchers from our Faculty of Law and Administration, as well as a list of conferences organised or co-organised by the Faculty and our foundation – *Facultas Iuridica*. It should be stressed that our legal discourse across borders is possible thank to the *Facultas Iuridica*, which covers the publishing costs of the Journal.

* * *

It is notable that most of the texts contained in the SJLS No 6 tackle various international issues or analyse domestic issues from an international or European perspective. Maybe this trend will be continued in subsequent issues of our Journal? Maybe it is proof of the progressive globalisation of particular branches of law. We will see! Therefore we invite you to read our Journal and we warmly invite researchers from Polish and foreign universities to contribute to it (find us at: www.sjls.us.edu.pl).

*Barbara Mikołajczyk*

# ARTICLES

Michał Jan Filipek
Polish Academy of Science (Warsaw, Poland)

# DER HOHE NORDEN IM SEEVÖLKERRECHT. VÖLKERRECHTLICHE PROBLEME DER FESTLANDSOCKELABGRENZUNG IN DER ARKTIS

## VORBEMERKUNGEN

Der Entwicklung der völkerrechtlichen Situation in der Arktis wird seit einigen Jahren zunehmend größere Aufmerksamkeit geschenkt[1]. Das Interesse der Akteure (besonders der arktischen Anrainerstaaten) an den Polargebieten wecken nicht nur die neuen Zugangsmöglichkeiten zu den Ressourcen der Meeresböden, sondern auch die neuen Schifffahrtswege (Nordost- und Nordwestpassage). In der Arktis – im Nordpolarmeer wird ein Viertel der weltweiten Erdöl- und Erdgasvorkommen vermutet. Die globale Erwärmung kann zum Abschmelzen des arktischen Eises und zu konstantem Rückgang der Meereisbedeckung führen. Deswegen könnten dort in Zukunft die abgelegenen fossilen und montanen Ressourcen ausgebeutet werden. Die deutlich werdende Erschließung dieser Ressourcen sowie die zumindest saisonale Schiffbarkeit (bzw. Befahrbarkeit) der nördlichen, strategischen Seewege, wie die Nordost- und Nordwestpassage, werfen eine Reihe von Rechtsfragen auf. Es unterliegt dabei keinem Zweifel, dass in den nächsten Jahren die zunehmende Bedeutung von Rohstoffen eine der Hauptinteressen der internationalen Politik darstellen wird[2].

Ein Großteil der vermuteten Rohstoffe und Ressourcen liegt im Festlandsockel am Rande des Arktischen Ozeans. Die fünf arktischen Küstenanrainer Russland, USA, Kanada, Dänemark/Grönland und Norwegen erheben überlappende Ansprüche auf Teile des Festlandsockels. Von großer Bedeutung sind auch reiche Fischvorkommen, die in dieser Region vorhanden sind. Ein symbolischer Ausdruck dieser Goldgräberstimmung war die russische Nordpol-Forschungsexpedition die im Mai/Juni 2007 durchgeführt wurde. Internationale Aufmerksamkeit erregte wenig später die Tauchfahrt zweier russischer U-Boote unter dem Nordpol. Am 2. August 2007 verankerte der russische Duma-Abgeordnete A. Tschilingarov von Bord eines U-Boots aus eine russische Flagge auf dem Meeresboden des Nordpols. Diese Symbolhandlung hatte juristisch gesehen keine völkerrechtliche Bedeutung und war eher eine politische Demonstration der künftigen Gebietsansprüche Russlands.

[1] Nach allgemeinem Sprachgebrauch umfasst der geografische Begriff Arktis die Kalotte der Erde nördlich des Polarkreises von 66° 33' Nord.

[2] Albrecht, Braun, Politische Implikationen in der Arktis im Zuge des Abschmelzens des arktischen Meereises, http://www.ims-magazin.de/index.php?p=artikel&id=1313519880,1,gastautor, Mai 2014.

Mit der heutigen völkerrechtlichen Situation der Arktis sind drei Problemkreise eng verbunden: 1) die Frage der Abgrenzung der äußeren Festlandsockel, 2) offene Seegrenzen und umstrittene Grenzverläufe, 3) Verkehrsrechte, Meerenge und internationale Seewege (Nordost- und Nordwestpassage) (Jenisch, 2011: p. 63). Ein zusätzlicher Aspekt der völkerrechtlichen Debatte sind die Menschen- und Grundrechte der indigenen, in der arktischen Region lebenden, Bevölkerung. Jedoch scheint der Hauptgegenstand der völkerrechtlichen Diskussion zur Zeit vielmehr die Problematik der Abgrenzung der maritimen Zonen in der Arktis zu sein. Der Grenzverlauf zwischen den fünf arktischen Anrainern kann hingegen aus völkerrechtlicher Sicht als gelöst betrachtet werden[3]. Die meisten Grenzkonflikte in der Arktis sind entweder schon beigelegt oder auf dem Weg einer Lösung. Die noch nicht ungelösten Grenzdispute können auf absehbare Zeit noch ohne Folgeschäden ungelöst bleiben (USA/Russland in der Bering See und Seegrenze USA/Kanada in der Beaufort See).

## DAS RECHTSREGIME DER ARKTIS

Anders als für die Antarktis gibt es für die Arktis kein besonderes und umfassendes Rechtsregime[4]. Für die Arktis gibt es keinen besonderen, komplexen und übergreifenden, völkerrechtlich verbindlichen Vertrag. Dort gilt bereits eine Vielzahl von Konventionen mit jeweils spezifischem Inhalt und daher ist die Arktis kein rechtloser Raum. Hier finden einige Instrumente des Völkerrechts Anwendung. In erster Linie gilt für die Arktis das UN Seerechtsübereinkommen von 1982 (weiter SRÜ), das 1994 in Kraft trat[5]. Das SRÜ wird häufig nach allgemeiner Einschätzung als „Verfassung der Meere" bezeichnet. Das SRÜ ist heute das einzige Instrument des Völkerrechts, das zur Be-

[3] Wenn die meisten Souveränitätsfragen für das Festland in der Arktis als gelöst bezeichnet werden können, bleiben jedoch einige Fragen noch offen und ungelöst. Es gibt nämlich einen Disput zwischen Dänemark und Kanada über die kleine Hans-Insel im Kennedykanal zwischen Grönland und Kanada. Beide Staaten können sich auch über die Seegrenze in der nördlich davon gelegenen Lincolnsee nicht einigen. Dazu kommt auch die Grenzlinie zwischen den USA und Russland in der Bering See und die Grenze zwischen Kanada und den USA in der Beaufort See. Offen bleibt auch die Frage des Rechtsstatus der Nordwestpassage, die von Kanada im Disput mit den USA als nationales Territorium reklamiert wird. (Bettzuege, p. 20–22). Völkerrechtlich problematisch scheint aber auch der Rechtsstatus des Festlandsockels um Spitzbergen zu sein. Höchstumstritten ist in diesem Kontext der Geltungsbereich des Spitzbergenvertrages (Svalbard Treaty). Norwegen vertritt die Ansicht, dass Spitzbergen keinen eigenen Festlandsockel besitze, sondern auf dem norwegischen Sockel liege und daher werde er nicht vom Spitzbergenvertrag erfasst. Diese Ansicht wird von anderen Spitzbergenvertragsparteien nicht geteilt. Die meisten Vertragsparteien sind der Ansicht, dass Spitzbergenvertrag auch in der von Norwegen erklärten Fischereizone um Spitzbergen gelte. Die völkerrechtlichen Kontroversen um den inhaltlichen Geltungsbereich des Spitzbergenvertrages sind schon seit Jahrzehnten unentschieden. This matter has also been investigated by: Kempen (Kempen, 1995); Ulfstein (Ulfstein, 1995); Vylegzhanin, Zilanov (Vylegzhanin, Zilanov, 2007).

[4] Die geographischen und rechtlichen Verhältnisse unterscheiden sich grundlegend in den beiden Regionen voneinander. Die Antarktis besteht aus festem Land, das von Meereszonen umgegeben ist. Das Rechtsregime der Antarktis wird in erster Linie durch den Antarktisvertrag (Antarctic Treaty von 1959) gebildet. Außerdem der Fischfang, der Walfang und die Jagd auf Robben werden in anderen Verträgen geregelt.

[5] Dem SRÜ sind bisher 160 Staaten beigetreten. Es fehlen noch etwa 40 Staaten. Jedoch große Teile des SRÜ gelten als Völkergewohnheitsrecht auch für Staaten, die dieses Übereinkommen nicht ratifiziert haben. Das SRÜ beinhaltet keine Arktis-spezifischen Sonderbestimmungen. Es gibt nur eine einzige Vor-

antwortung aller (bzw. fast aller) Rechtsfragen zum Arktischen Ozean dienen kann[6]. Im Übrigen gibt es auch eine Reihe von anderen Abkommen. Zu nennen ist das gesamte Schifffahrtsrecht der IMO (International Maritime Organisation). Es gibt auch völkerrechtliche Abkommen, die sich nur auf bestimmte Teile der Arktis beziehen wie beispielweise der Spitzbergenvertrag von 1920 und das Canada/US Arctic Cooperation Agreement. Daneben werden auch einige internationale Abkommen angesprochen, die sich nur auf bestimmte Sachverhalte (z. B. Umweltschutz) beziehen, wie das Abkommen zum Schutz der Polarbären von 1973 (Agreement on the Conservation of Polar Bears).

Im SRÜ ist die Zoneneinteilung der Küsten und Meere festgelegt worden. In diesen Zonen genießen die Küstenstaaten exklusive Nutzungsrechte und Regelungsbefugnisse. Die Bestimmung der Zonengrenzen wird im großen Teil je nach geografischen Gegebenheiten vorgenommen. Das SRÜ kodifiziert weitgehend Gewohnheitsrecht und regelt viele Aspekte der Ozeannutzung. Wegen der Vielfalt der im SRÜ enthaltenen Regelungen und ihrer Komplexität soll diese Konvention als vorrangiger Regelvertrag – „lex generalis" in der Arktis gelten. Andere multilaterale völkerrechtliche Abkommen, Völkergewohnheitsrechte sowie zwischenstaatliche Verträge sollen als „lex specailis" betrachtet werden.

Die Arktisanrainerstaaten die unmittelbaren Anlieger des Arktischen Ozeans sind (die USA, Kanada, Dänemark, Norwegen und Russland)[7], haben sich in der Ilulissat-Erklärung vom 28. Mai 2008 für die Geltung des SRÜ ausgesprochen. Die Parteien der Ilulissat-Erklärung haben ihre eigene Vorrangstellung für die arktische Region betont und zugleich die Geltung des SRÜ bestätigt[8]. Die Erklärungsparteien haben festgehalten, dass sie die Außengrenzen ihrer jeweiligen Festlandsockel innerhalb des anwendbaren rechtlichen Rahmens, insbesondere der Regeln des SRÜ bestimmen werden[9]. Angesichts der von Arktisanrainerstaaten angemeldeten Gebietsansprüche und Festsockelansprüche, ist es eher unwahrscheinlich, dass ein neues Regelwerk – Arktisvertrag nach Vorbild des Antarktisvertrages, ausgearbeitet sein wird.

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schrift (Art. 234), die sich speziell auf die Polargebiete bezieht. Diese Vorschrift räumt den Anliegern das Recht ein, Gesetze zur Vermeidung von Verschmutzungen des Meeres zu erlassen.

[6] Das UN-Seerechtsübereinkommen regelt u.a. Festlandsockelgrenzen, Wirtschaftszonen, Hoheitsgewässer, Meerengen, Tiefseeboden, Meeresforschung, Ordnung der Inseln. Diese Vorschriften erfassen auch arktische Gewässer.

[7] In der Fachliteratur wird auch die Bezeichnung: „A 5" verwendet.

[8] Das würde bedeuten, dass die arktischen Anrainerstaaten auch die Geltung und Jurisdiktion der UN-Festlandsockelkommission anerkennen.

[9] „… we recall that an extensive international legal framework applies to the Arctic Ocean as discussed between our representatives at the meeting in Oslo on 15 and 16 October 2007 at the level of senior officials. Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims", Ilulissat-Erklärung vom 28. Mai 2008.

## FESTLANDSOCKEL ALS EINE DER MARITIMEN ZONEN IN DER ARKTIS

Nach dem SRÜ wird die zentrale Arktis als Hohe See eingestuft. Das SRÜ definiert fünf maritime Zonen: Küstenmeer, Anschlusszone, Ausschließliche Wirtschaftszone, Festlandsockel und der Internationale Meeresboden. Der Festlandsockel eines Staates umfasst den Meeresboden und den Meeresuntergrund der seewärts seines Küstenmeeres gelegenen Unterwassergebiete, die sich über die gesamte natürliche Verlängerung seines Landgebietes erstrecken (Hinz, 2011a: p. 88). Im Bereich des Festlandsockels werden vom jeweiligen Küstenstaat souveräne Hoheitsrechte ausgeübt. Das Recht zur Nutzung des Meeresbodens kann nur dann ausgedehnt werden, wenn der Küstenstaat belegen kann, dass sich sein unter Wasser gelegener Festlandsockel noch jenseits der 200 Seemeilen fortsetzt. Jenseits der Festlandsockelzone befindet sich die Tiefsee, die im SRÜ zum gemeinsamen Erbe der Menschheit erklärt wurde.

Gegenüber dem im SRÜ vorgesehenen Prinzip der Zoneneinteilung der Meeresgebiete wird das sogenannte Sektorenprinzip, das auf den historischen Territorialansprüchen beruht, hochgehalten. Besonders zwischen russischen und kanadischen Seerechtlern so wie Völkerrechtlern gibt es zahlreiche Anhänger der Sektorentheorie, nach der die gesamte Arktis bis hin zum Pol nördlich der Küste der Anrainerstaaten durch die entsprechende Längengrade zugesprochen werden könne. Nach dem Sektorenkonzept sollen die Land- und Meeresgebiete in Polnähe innerhalb eines sphärischen Dreiecks, dessen Ecken der Nord- oder Südpol und die östlichen und westlichen Punkte der Festlandküste der am weitesten nördlich oder südlich gelegenen Staaten bilden, *ipso facto* der Gebietshoheit (der territorialen Souveränität) dieser Staaten unterliegen. Die Sektorengrenzen verlaufen vom geografischen Nordpol entlang den Längengraden zu den westlichen bzw. östlichen Küstenpunkten des jeweiligen Anrainerstaates[10]. Laut dieser Theorie genießen die arktischen Staaten in diesen Sektoren zwar Hoheitsrechte, aber die Sektorenrechte sind keine Staatsgrenzen (Böhmert, p. 249–251)[11]. Zu den Anhängern der Sektorentheorie gehörten besonders Russland und Kanada. Das Konzept des Sektorenprinzips beruht auf historischen Gebietsansprüchen beider arktischen Anrainerstaaten[12]. Die Sektorentheorie hat sich auf der 3. UN-Seerechtskonferenz nicht durchgesetzt und daher sollte sie in Bezug auf die arktische Festlandsockelabgrenzung nur als rein theoretische Lösung von historischem Interesse gelten. Die von E. Pus-

[10] This matter has also been investigated by Kovalev (Kovalev, p. 177–181).

[11] Schon hieraus kann die Schlußfolgerung gezogen werden, dass das Sektorenprinzip als Theorie des Gebietserwerbs eng mit den geografischen Voraussetzungen verbunden ist. Die Arktis-Anrainerstaaten erwerben automatisch durch ihre geografische Lage die territoriale Gebietshoheit in dem betreffenden Sektor. Das Sektorenmodell sieht daher eine vollständig territoriale Aufteilung des sich in der Arktis befindenden Festlandsockels vor.

[12] Die ersten von einzelnen Staaten erhobenen Territorialansprüche auf die Arktis gingen von dem Sektorenprinzip aus. Als Erfinder der Sektorentheorie gilt der kanadische Senator Pascal Poirier, der im Jahre 1907 im Parlament von Ottawa den Vorschlag machte, dass der Senat die Einbeziehung aller Länder und Inseln im Norden von Kanada bis zum Nordpol zum Gegenstand einer Deklaration machen sollte. Senator Pascal Poirier war der Auffassung, dass die Eisregionen des Nordpolarmeers als ein Gebiet sui generis eine Fortsetzung des Territoriums darstellen, welches den Arktis-Anrainerstaaten gehöre. (Dahm, Delbrück, Wolfrum, p. 505). Das Sektorenprinzip hatte auch die ehemalige Sowjetunion in einer Note vom 15.4.1926 geltend gemacht, allerdings lediglich nur in Bezug auf Landgebiete.

hkareva vertretene Ansicht, dass bei der Begrenzung des Festlandsockels vor allem das Sektorenprinzip angewendet werden solle (Pushkareva, p. 83), scheint gar keine Rechtsgrundlage im zur Zeit geltenden Seevölkerrecht zu haben. Das Sektorenprinzip als Grenzmodel hat sich weder im Völkergewohnheitsrecht noch im SRÜ durchgesetzt. Es muss aber unterstrichen werden, dass im modernen internationalen Seerecht die Sektorenlinie nicht ganz ausgeschlossen ist. U. Jenisch konstatiert mit Recht, dass die Staaten in Einzelfällen bei bilateralen zwischenstaatlichen Seegrenzenverträgen, die aus dem Sektorenprinzip resultierende Sektorenlinie zugrundelegen können (Jenisch, 2011: p. 60). Das Seevölkerrecht gibt also grundsätzlich der Äquidistanzlinie den Vorrang, lässt jedoch Ausnahmen zu.

## ZUR PROBLEMATIK DER FESTLANDSOCKELABGRENZUNG

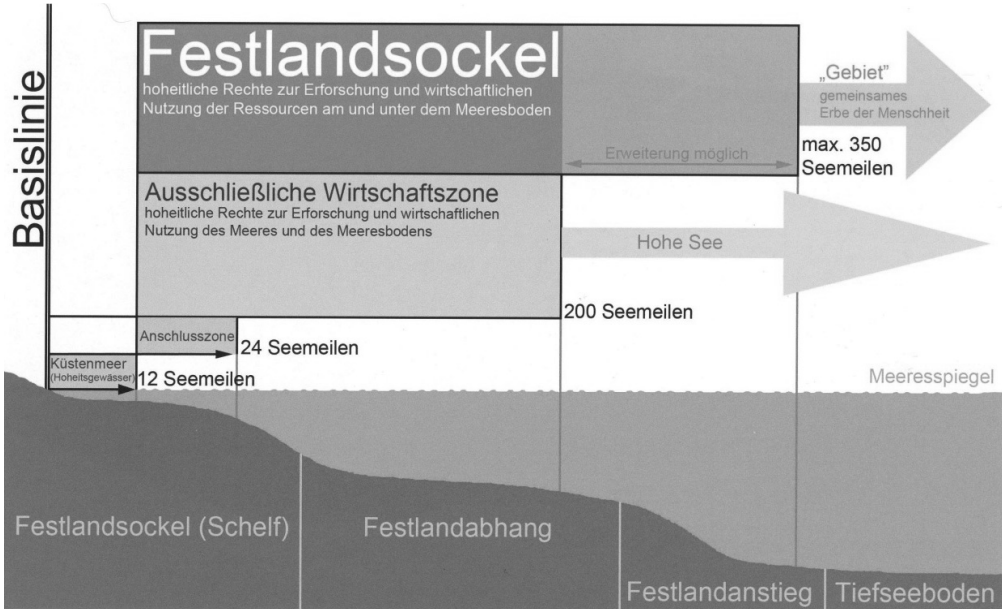


Schaubild 1. Seerechtliche Zonen
Quelle: Osteuropa Logbuch Arktis, vol. 61, ed. Humrich Ch., Berlin 2011, p. 449.

Im Seerecht gibt es einen rein juristischen Festlandsockelbegriff. Der Festlandsockel umfasst nach Art. 76 Abs. 1 SRÜ den Meeresboden und –untergrund jenseits des Küstenmeeres[13]. Die Bestimmung des äußeren Festlandsockels wird in Art. 76 SRÜ komplex geregelt. Die Regeln der Festlandsockelabgrenzung gehören zu der schwersten und kompliziertesten Problematik des modernen Seevölkerrechts (Łukaszuk, p. 62–63). Grundsätzlich steht jedem Küstenstaat ein Festlandsockel zu. Die Anrainerstaaten der Region um den Nordpol: Russland, Kanada, Dänemark und Norwegen kön-

[13] Art. 76 Abs. 1 besagt: „der Festlandsockel eines Küstenstaats umfasst den jenseits seines Küstenmeers gelegenen Meeresboden und Meeresuntergrund der Unterwassergebiete, die sich über die gesamte natürliche Verlängerung seines Landgebiets bis zur äußeren Kante des Festlandrands erstrecken oder bis zu einer Entfernung von 200 Seemeilen von den Basislinien, von denen aus die Breite des Küstenmeers gemessen wird, wo die äußere Kante des Festlandrands in einer geringeren Entfernung verläuft".

nen nach Art. 76 SRÜ Festlandsockelansprüche stellen[14]. Der Küstenstaat übt über den Festlandsockel souveräne Rechte zum Zweck seiner Erforschung und der Ausbeutung seiner natürlichen Ressourcen aus (Art. 77 SRÜ). Nach Art. 77 Abs. 1 SRÜ ist die äußere Grenze des Festlandsockels eine 200-Seemeilen-Linie gemessen von der Basislinie. Eine Ausweitung der äußeren Festlandsockel gem. Art 76 SRÜ über 200 Seemeilen hinaus verändert die Zugangsrechte zu den Bodenschätzen und Ressourcen der Meeresböden. Die Zugangsrechte werden aus der Zuständigkeit der Internationalen Meeresbodenbehörde in die Jurisdiktion der Küstenstaaten überführt. Der Artikel 76 SRÜ stellt eine äußerst komplexe und übergreifende Norm dar, die mehrere Optionen und Berechnungsverfahren vorsieht. Der Festlandsockel erstreckt sich für alle Küstenstaaten bis mindestens 200 Seemeilen von den Basislinien. Nach Artikel 76 Abs. 3 umfasst der Festlandrand die unter Wasser gelegene Verlängerung der Landmasse des Küstenstaats und besteht aus dem Meeresboden und dem Meeresuntergrund des Sockels, des Abhangs und des Anstiegs. Er umfasst weder den Tiefseeboden mit seinen unterseeischen Bergrücken noch dessen Untergrund. Falls jedoch ein Küstenstaat Ansprüche auf einen erweiterten Festlandsockel jenseits von 200 Seemeilen anmeldet, gelten die Regeln nach denen ein Küstenstaat die äußere Kante des Festlandrands jenseits von 200 Seemeilen zu bestimmen hat. Wenn also ein geologisch nachweisbarer Festlandsockel seewärts der 200 Seemeilen Grenze besteht, findet er seine Außengrenze gem. Art. 76. Die Lage des Festlandrands kann durch zwei Methoden bestimmt werden. Beide Optionen nehmen ihren Ausgang am Fuß des Festlandsockelabhangs. Nach Artikel 76 Abs. 4 SRÜ wird die äußere Kante des Festlandsrands jenseits von 200 Seemeilen entweder nach der Sedimentdicken-Formel oder nach der Distanz-Formel festgelegt[15]. Möglich ist auch die Kombination beider Methoden. Die maximale Ausdehnung des erweiterten Festlandsockels ist natürlich auch näher bestimmt. Die maximale Breite des Festlandsockels darf entweder nicht mehr als 350 Seemeilen von den Basislinien des Küstenmeers betragen oder nicht weiter als 100 Seemeilen seewärts von der 2 500m-Wassertieflinie entfernt sein[16]. Gem. Art. 76 Abs. 6 SRÜ findet die maximale Kappungsgrenze bei unterseeischen Bergrücken keine Anwendung. Auf unterseeischen Bergrücken darf die äußere Grenze des Festlandsockels 350 Seemeilen von den Basislinien nicht überschreiten. Unterseeische Erhebungen gelten hingegen als natürliche Bestandteile des

[14] Die USA sind bislang dem Seerechtsübereinkommen nicht beigetreten. Den Beitritt der USA blockieren konservative Senatoren, die angebliche Souveränitätsverluste befürchten. Die USA lehnen die Bestimmungen des SRÜ über den Gemeinschaftscharakter des Tiefbodens ab. Das Thema steht aber auf der Tagesordnung. Formaljuristisch (zumindest) sind die USA von weiterer völkerrechtlicher Entwicklung der Arktis ausgeschlossen, solange sie nicht dem SRÜ beigetreten sind.

[15] Wenn sich der Festlandrand über 200 Seemeilen von den Basislinien, von denen aus die Breite des Küstenmeers gemessen wird, hinauserstreckt, legt der Küstenstaat die äußere Kante des Festlandrands für die Zwecke dieses Übereinkommens fest, und zwar entweder i) durch eine Linie, die nach Absatz 7 über die äußersten Festpunkte gezogen wird, an denen die Dicke des Sedimentgesteins jeweils mindestens 1 Prozent der kürzesten Entfernung von diesem Punkt bis zum Fuß des Festlandabhangs beträgt, oder ii) durch eine Linie, die nach Absatz 7 über Festpunkte gezogen wird, die nicht weiter als 60 Seemeilen vom Fuß des Festlandabhangs entfernt sind (Art. 76 Abs. 4 a SRÜ).

[16] Die Festpunkte auf der nach Absatz 4 Buchstabe a) Ziffern i) und ii) gezogenen und auf dem Meeresboden verlaufenden Linie der äußeren Grenzen des Festlandsockels dürfen entweder nicht weiter als 350 Seemeilen von den Basislinien, von denen aus die Breite des Küstenmeers gemessen wird, oder nicht weiter als 100 Seemeilen von der 2 500-Meter-Wassertiefenlinie, einer die Tiefenpunkte von 2 500 Metern verbindenden Linie, entfernt sein (Art. 76 Abs. 5 SRÜ).

Festlandrands, wie seine Plateaus, Anstiege, Gipfel, Bänke und Ausläufer. Anhand der im Artikel 76 SRÜ enthaltenen Regulierung wollen einige der arktischen Anrainerstaaten nachweisen, dass unterseeische Bergrücken vor ihren Küsten als natürliche Bestandteile des Festlandsrandes bezeichnet werden, um ihre Festlandsockelaußengrenze über die sonst zulässige Grenze des Artikels 76 Abs. 6 SRÜ auszuweiten. Jeder Staat, der die Souveränitätsansprüche jenseits von 200 Seemeilen anmelden will, ist verpflichtet fachliche Daten beizubringen. Erforderlich sind schlüssige bathymetrische, seismische und relevante geophysikalische Datensätze. Die zu beibringenden Daten sollen die Berechtigung der Staaten für die von ihnen beantragten Ansprüche dokumentieren. Nach Art. 76 Abs. 4 (b) SRÜ wird, solange das Gegenteil nicht bewiesen ist, der Fuß des Festlandabhangs als der Punkt des stärksten Gefällwechsels an seiner Basis festgelegt. Der Küstenstaatm, der eine Erweiterung seines Festlandsockels beantragt, muss die Bestimmung des Fußes des Festlandabhangs durch eine mathematische Analyse der Morphologie des Festlandabhanges belegen (Hinz, 2011b: p. 90).

Das Seerechtsübereinkommen differenziert drei Formen von unterseeischen Erhebungen, an deren Vorliegen sich jeweils unterschiedliche Begrenzungen des Festlandsockels knüpfen. Einige der Anrainerstaaten vertreten die Meinung, dass sie wegen der die Arktis querenden unterseeischen Rückensysteme (Alpha-Mendeleev-Rücken und Lomonosov-Rücken) legalen und gerechtfertigten Anspruch auf maritime Gebiete jenseits von 200 Seemeilen haben (Hinz, 2011b: p. 91). Gem. Art 76 SRÜ sind drei Kategorien von unterseeischen Rücken zu unterscheiden. Dies sind zum einen die ozeanischen Rücken des Tiefbodens (oceanic ridges of the deep ocean floor), die keine Verbindung zu einem Festlandsockel besitzen. Die zweite Kategorie stellen die unterseeischen Bergrücken (submarine ridges) dar. Zur dritten Kategorie gehören die unterseeischen Erhebungen (submarine elevations). Dies sind aufgrund ihrer geologischen Beschaffenheit natürliche Teile des Festlandrands. Zu dieser Kategorie gehören Plateaus, Anstiege, Gipfel, Bänke und Ausläufer. Die verschiedenen Rücken werden im Seerechtsübereinkommen nicht eindeutig definiert. Die Auslegung, anhand deren der Lomonosow-Rücken und der Mendeleev-Rücken nicht als unterseeische Bergrücken, sondern als unterseeische Erhebungen interpretiert werden, würde dem jeweiligen Anrainerstaat den größtmöglichen Zugewinn erlauben. Dies würde zu den größeren Gebietsansprüchen berechtigen.

Nach Art. 76 SRÜ wird die Feststellung der äußeren Grenze des Festlandsockels durch die Kommission der Vereinten Nationen zur Begrenzung des Festlandsockels (UN Commission on the Limits of the Continental Shelf, weiter: CLCS) durchgeführt. Die seit 1997 in New York tätige Festlandsockelgrenzkommission setzt sich aus 21 unabhängigen Experten (Geologen, Hydrographen, Geophysikern) zusammen. Der jeweilige Staat übermittelt dieser Kommission die umfangreichen Daten und Angaben, aufgrund derer der betroffene Staat die Abgrenzung des äußeren Festlandsockels durchführen will. Nach Art. 4 des Annex II des SRÜ müssen fachliche und umfangreiche Angaben und Bodeninformationen mit erläuternden technischen und wissenschaftlichen Daten vorgelegt werden. Das Verfahren für die Bestimmung der äußeren Grenze des Festlandsockels ist im Artikel 76 Abs. 8 SRÜ normiert worden: „Die Kommission richtet an die Küstenstaaten Empfehlungen in Fragen, die sich auf die Festlegung der äußeren Grenzen ihrer Festlandsockel beziehen. Die von einem Küstenstaat auf der Grundlage dieser Empfehlungen festgelegten Grenzen des Festlandsockels sind endgültig und verbindlich“. Die Festlandsockelkommission hat keine Befugnisse, die Außengrenze

des erweiterten Festlandsockels festzulegen. Die Festlandsockelkommission kann weder verbindliche Aussagen zu der Grenzfestsetzung machen, noch hat sie Macht zur Durchsetzung ihrer Empfehlungen. Die CLCS verfügt also über keine Durchsetzungsbefugnis, für die von ihr selbst erteilten Empfehlungen. Wenn es aber überlappende Ansprüche gibt, werden die Staaten aufgefordert, sich zu einigen. Die CLCS ist nicht zuständig für Abgrenzung der Festlandsockel von gegenüberliegenden oder aneinander angrenzenden Küstenstaaten. Die Empfehlungen der CLCS sind dann erst rechtsverbindlich, wenn der Küstenstaat, der einen Antrag eingereicht hat, ihnen zustimmt und ihnen kein anderer Staat widerspricht (Hinz, 2011a: p. 95). Werden die Außengrenzen des Festlandsockels auf der Grundlage der von der CLCS an die Küstenstaaten gerichteten Empfehlungen festgelegt, erhalten sie einen verbindlichen und endgültigen Status. Die Empfehlungen können sich nur auf die Festlegung der äußeren Grenzen ihrer Festlandsockel beziehen. Falls die beiden Nachbarstaaten keine entsprechende Lösung erzielen und damit keine Übereinkunft zustande kommt, können die im Teil XV SRÜ vorgesehenen Verfahren in Anspruch genommen werden. Es ist aber unklar, was geschieht, wenn ein Staat der Empfehlung nicht folgt. Was scheint in einem solchen Fall möglich zu sein? Meines Erachtens wäre ein Verfahren vor einem internationalen Gerichtshof (IGH in Den Haag oder Seegerichtshof in Hamburg) höchstwahrscheinlich[17].

Das Verfahren vor der CLCS ist innerhalb von zehn Jahren nach Inkrafttreten des SRÜ für den jeweiligen Staat einzuleiten. Alle Staaten, die dem SRÜ bisher nicht beigetreten sind, können ihren Festlandsockelansprüchen im Verfahren vor der CLCS keine rechtliche Verbindlichkeit verschaffen.

Bislang haben nur zwei (Russland und Norwegen) der fünf Arktisanrainer bei der CLCS einen Antrag auf Erweiterung ihrer Festlandsockel über die 200 Seemeilen eingereicht. Russland hat bereits im Dezember 2001 einen Antrag auf Erweiterung des Festlandsockels in der Barentssee, im Beringmeer, im Ochotskischen Meer und in der zentralen Arktis gestellt. Der Antrag Russlands erstreckt sich auf ca. 1.2 Millionen km² bis hin zum Nordpol unter Einbeziehung des Lomonosov-Rückens als Teil des Festlandsockels (Jenisch, 2011: p. 74). 2002 empfahl die CLCS Russland, den Antrag inhaltlich nachzubessern. Russland wurde aufgefordert, den Antrag von 2001 mit präziseren wissenschaftlichen Daten zu konkretisieren. Außerdem empfahl die CLCS, in Bezug auf die Barentssee und das Beringmeer die seitlichen Abgrenzungen zu den Nachbarstaaten Norwegen und die USA zu klären. Der Antrag Russlands auf die Zuerkennung eines erweiterten Festlandsockels in der zentralen Arktis wurde zurückgewiesen. Die Russen können ihre Gebietsansprüche geltend machen, indem sie einen neuen überarbeiteten Antrag mit neuen Daten bei der CLCS einreichen. Entsprechende Forschungsvorhaben werden von Russland derzeit unternommen. Der neue Antrag seitens Russlands ist bis 2014 zu erwarten. Jedoch ist die Stellungnahme Russlands hochgradig fraglich und umstritten. Angelpunkt des russischen Anspruchs sind der Lomonosov-Rücken und Mendeleev-Rücken. Nach Russlands Ansicht ist der Lomonosov-Rücken eine Fortsetzung des eurasischen Kontinents[18]. Mit ähnlicher Interpretation könnten Dänemark

[17] Fraglich bleibt aber, ob das für alle fünf Arktisanrainer gelten würde. Kanada und Russland haben deklariert, ihre „*maritime delimitation disputes*" aus der Zuständigkeit des IGH in Den Haag und des Seegerichtshofs ausschließen zu wollen.

[18] Das heißt, dass es zwischen dem Festlandsockel und dem beanspruchten Gebiet keine Brüche geben darf. Um es zu dokumentieren, müssen entsprechende geomorphologische Nachweise erbracht werden.

und Kanada den Lomonosov-Rücken oder benachbarte andere Rücken für sich beanspruchen (Jenisch, 2010: p. 378). Nach Ansicht dieses, aber auch vieler anderer Autoren, ist es höchst umstritten, das 2000 km lange unterseeische Gebirge als natürlichen Bestandteil des Festlandrandes zu klassifizieren.

Norwegen hingegen stellte seinen Antrag auf Erweiterung des Festlandsockels im Jahr 2006. Der norwegische Antrag bezog sich auf folgende Gebiete: das westliche Nansen-Becken (nördlich Spitzbergen/Svalbard), das Banana Hole in der Norwegischen See, sowie in der Grönlandsee und das Loop Hole in der Barentssee. Die CLCS hat im Jahr 2009 die Empfehlungen an Norwegen gerichtet. Diesen Empfehlungen zufolge sollte Norwegen in Bezug auf die Barentssee für das umstrittene 175 000 km² große, beantragte Gebiet mit Russland bilateral eine Seegrenze vereinbaren. Dieser Vertrag wurde im September 2010 abgeschlossen[19]. Auch weitere Anträge von Dänemark und Kanada sind in naher Zukunft zu erwarten. Kanada und Dänemark sind dem SRÜ erst 2003 bzw. 2004 beigetreten, weshalb die Frist erst 2013 bzw. 2014 abläuft.

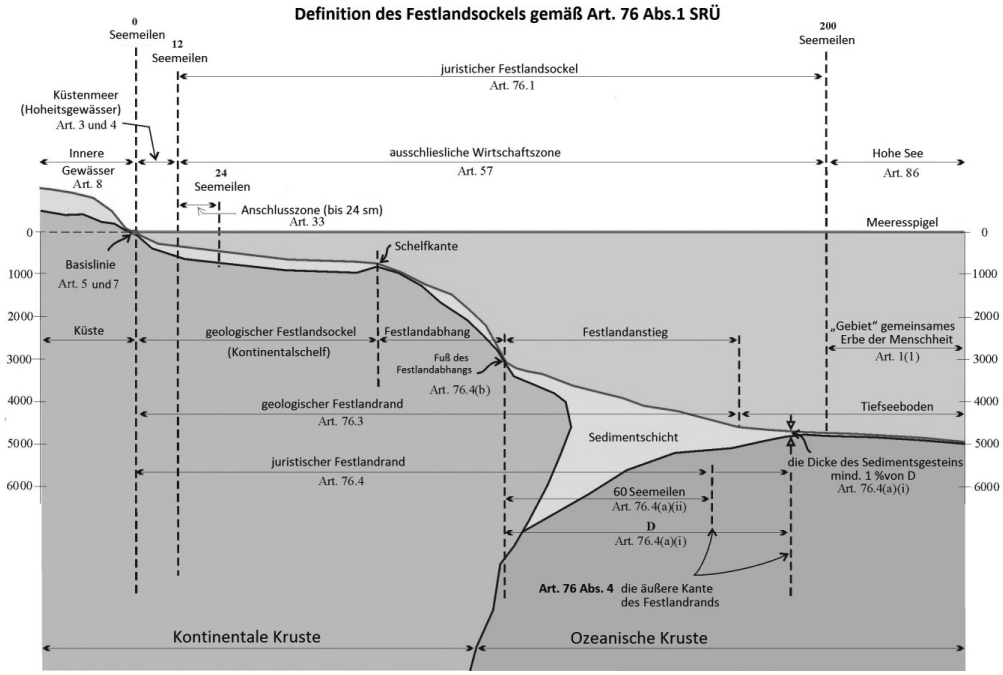


Schaubild 2. Definition des Festlandsockels gem. Art. 76 Abs. 1 SRÜ
Quelle: Eigene Bearbeitung der Schaubilder von http://www.acls-aatc.ca/node/304.

[19] Am 15. September 2010 unterzeichneten in Murmansk die beiden Außenminister Russlands und Norwegens, Sergej Lawrow und Jonas Gahr Støre ein bilaterales Abkommen über die Abgrenzung von Meereszonen und Zusammenarbeit in der Barentssee und im Nördlichen Eismeer. Die Grenzverhandlungen begannen bereits 1970 und dauerten damit vier Jahrzehnte. Russland beharrte auf seiner ursprünglichen Position – auf dem Sektorenprinzip. Die Russen bestanden darauf, dass die Seegrenze entlang der Sektorenlinie von der Küste zum Nordpol verlaufen soll. Die Norweger hingegen beharrten auf der Äquidistanzlinie–Lösung. Die von Norwegern geforderte Abgrenzungslinie sollte in gleicher Entfernung zu der Inselgruppe Spitzbergen und den Inseln Novaja Zemlja und Franz-Josef-Land verlaufen. This matter has also been investigated by: Filipek, Hruzdou (Filipek, Hruzdou, p. 207–233).

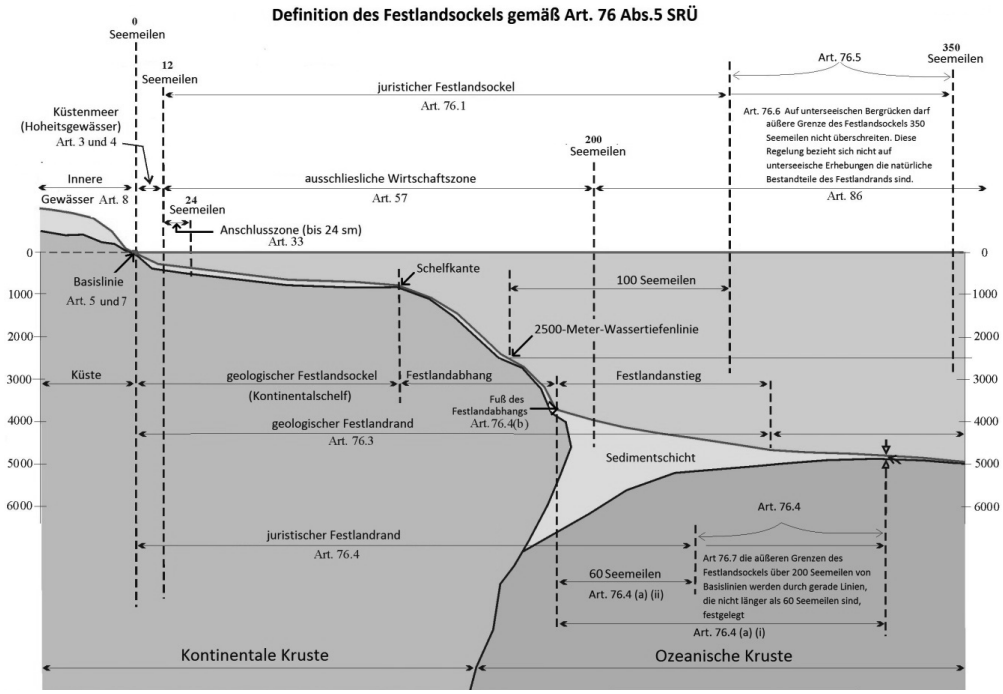


Schaubild 3. Definition des Festlandsockels gem. Art. 76 Abs. 5 SRÜ.
Quelle: Eigene Bearbeitung der Schaubilder von http://www.acls-aatc.ca/node/304

## ZUSAMMENFASSUNG

Da im Seerechtsübereinkommen (SRÜ) zwischen Wasser im flüssigen und im festen Zustand nicht unterscheidet wird und der Nordpol aus Eis besteht[20], wird nach allgemeiner Auffassung interpretiert, dass das SRÜ sowohl in der arktischen Region als auch in den Gebieten um den Nordpol gilt. In den meisten Fällen ist die äußere Grenze des Festlandsockels eine 200 Seemeilen-Linie gemessen von der Basislinie. Jedoch kann in einigen Fällen die 200 Seemeilen-Linie (gemessen von der Basislinie) überschritten werden. Die Grenze dieser ausgedehnten Festlandsockelzone wird durch schwer und kompliziert zu ermittelnde Punkte des Übergangs von Festlandsockel in Tiefseeplateau festgelegt und kann maximal bis zu 350 Seemeilen von der Basislinie oder 100 Seemeilen jenseits der 2500-Meter-Tiefen-linie liegen (Humrich, p. 9). Das geschieht nur in Fällen, in denen bestimmte geologische und geomorphologische Voraussetzungen gegeben sind. Sofern ein Küstenstaat seinen Festlandsockel beansprucht, der breiter als 200 Seemeilen ist, muss er die umfangreichen und fachlichen Daten der Kommission zur Begrenzung des Festlandsockels übermitteln (CLCS). Die CLCS hat keineswegs das Mandat, über die Abgrenzung überlappender Ansprüche zu entscheiden. Verbindlich sind nur die unter Berücksichtigung der Kommissionsempfehlung festgelegten Außengrenzen des Festlandsockels. Nach Auffassung der meisten Völkerrechtler ist die Anwendung, sowie Vorrangstellung des SRÜ unumstritten. Andere völkerrechtliche Ab-

[20] Nordpol besteht aus eisbedecktem Wasser, dessen Randzonen im Sommer teilweise abschmelzen.

kommen sollen jedoch als „lex specialis“ Anwendung finden und als Ergänzung zum SRÜ angewandt werden. Das SRÜ legt seinen Vertragsparteien sogar nahe, weitere Details in entsprechenden multilateralen Übereinkommen und Konventionen zu regeln. Nationalisierung der Meeresböden im Arktischen Ozean und damit verbundene Festlandsockelabgrenzung und Festlegung der maritimen Zonen sollen nur auf der Grundlage der Empfehlungen der Festlandsockelkommission (CLCS) durchgeführt werden (Humrich, p. 13).

Im Interesse der internationalen Gemeinschaft, sowie aller EU-Länder (vielleicht außer Dänemark) liegt, dass möglichst große Teile der zentralen Arktis nicht aufgeteilt werden und den Status – „Erbe der Menschheit“ behalten (Kubiak, p. 177). Von besonderer Bedeutung ist auch die Neutralität und Objektivität der CLCS-Mitglieder. Die CLCS-Mitglieder sollen im Sinne des Völkerrechts (Seevölkerrechts), also des SRÜ, urteilen und neutral bleiben, ohne die nationalen Interessen ihrer Herkunftsländer zu vertreten. Bei Entscheidungen der CLCS sollen die nationalen Interessen zurückgestellt werden, sodass die CLCS-Entscheidungen für möglichst unparteiisch und unbefangen gehalten werden können. Die Festlegung der Außengrenzen des Festlandsockels und damit verbundene Nutzungsrechte soll nach für alle gleichen, klaren und transparenten Kriterien vorgenommen werden.

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## SUMMARY

### THE ARCTIC REGION IN THE INTERNATIONAL LAW OF THE SEA. ISSUES CONNECTED WITH THE ARCTIC CONTINENTAL SHELF

The Arctic Region, specifically the North Pole, contains rich oil and gas reserves. The High North is faced with many problems of various kinds: environmental, social and legal. The melting sea ice, due to global warming, has unleashed a debate over national sovereignty in the Arctic Ocean. The five Arctic States are striving to extend their continental shelves. The legal status of the Arctic Ocean was determined by the 1982 UN Convention on the Law of the Sea. Therefore, jurisdictional extended continental shelf claims by Arctic rim States are to be governed by UNCLOS. All Arctic coastal States claiming an extended continental shelf must notify the outer limits to the Commission on Limits of the Continental Shelf within ten years of becoming a party to UNCLOS.

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# PUBLIC GOODS IN ADMINISTRATIVE SPACE – AN OUTLINE OF PROBLEMATIC ASPECTS[1]

## 1. ADMINISTRATIVE SPACE – THE GIST OF THE MATTER

It seems that nowadays there is a sufficiently high amount of global or transnational administration to make it possible to identify a complex "administrative space", a concept embracing not only states, but also business entities and NGOs (Chiti, Mattarella 2011: p. 13). The term "administrative space", as a typical homonym, is also used to identify the model of public administration. However, it should be noted right away that this model is sometimes a normative (prescriptive) model and at other times a descriptive model,though it can also be an analytical model that can be used to verify the theoretical hypothesis. Still, in each case it applies to administrative convergence, meaning a convergence going towards universal (common or similar) administrative solutions in place of previous administrative differences. Administrative space or administrative convergence is, therefore, an opposition of idiosyncratic administrative systems of states, in which the structure of public administration, its forms and standards of action, are presented as having been derived from history, identity, and tradition.

The subject of looming administrative space has two competitive hypotheses in the related literature –onthe one handa global convergence hypothesis, while on the other an institutional robustness hypothesis (Supernat, 2005: p. 78). The first of these has its basis in the Anglo-Saxon concept of New Public Management (NPM), which constitutes a paradigmatic departure from the classic public management and assumes that administrative convergence does not have a merely European scope, but a global one (Pollitt, 2002: p. 471). Also those in favour of the New Public Management emphasise that this concept is not a temporary trend but a necessary change, signifying progress towards public administration development. What is more, this change is perceived as a transferring element from government to governance, or governance without government, which is supposed to occur in individual states as well as their organisations (Peters, 2003: p. 113). On the other hand, the institutional robustness hypothesis assumes that both convergent hypotheses overestimate the scope and pace of administrative convergence, and that for some time in the future, different types of public administration models will exist in Europe and in other parts of the world (Kassim, 2003: p. 162).

The competitiveness of the hypotheses outlined above calls for questions about the scope and conditions of administrative convergence. The possibility of the most progressed convergence is indicated by the old and often cited idea whereby there is a sin-

[1] The project was implemented within the framework of a project financed by the National Science Centre awarded on the basis of decision number DEC-2011/01/B/HS5/00661.

gle best way of organising public administration. Representatives of this idea can be found among theorists as well as practitioners of administration, all seeking and suggesting universal organisational solutions that, thanks to their effectiveness, are supposed to spread all over the world, regardless of national contexts. It has, of course, its determined opponents among the supporters of the situational approach whereby the administrative structure is determined by variables of different forms, defining: goals, values, strategies, and processes. If the latter are correct, then there is no common unification of public administration that is possible in the foreseeable future.

It should be noted that convergence (global or regional) can occur either from the attractiveness of a certain model solution, or from its imposition. Convergence by attractiveness means learning and voluntarily imitating those administrative solutions that are perceived as best, either worldwide or in a European context (Griffin, 1999: s. 352). A shared model can also loom in the process of shared research work or be the consequence of the fact, that each individual state, when facing the same challenges, adopts the same solutions independently. The perceived superiority of a certain solution can be based upon its technical-functional properties and high relative efficiency. It can also be developed from normative attractiveness, meaning that, because of the adopted solution, it is perceived as a more rational and modern solution. In other words, convergence around proper structures, forms, processes, and practices can take place, as long as a specific administrative solution reaches administrative hegemony (Izdebski, Kulesza, 1999: s. 153).

## 2. THE CONCEPT OF "PUBLIC GOODS"

The concept of public goods is extremely difficult to submit to description or assessment. Additionally, in literature, there are other synonymous terms apart from public goods, such as common goods, collective goods or common concerns of mankind. (Supernat, 2011: p. 151; Boć, 2011: p. 151).

Negative definitions, which treat public goods as an elimination of public evil, also emerge. Apart from this semantic problem, there is another one, related to the fact that public goods are not always tangible. Certain parts of public goods take the form of laws and institutions, which provide utility or fulfil needs. They are not a commodity in a sense of goods and services. With this meaning in mind, the elimination of "public bad" signifies the non-utility of such things as illness or pollution of the environment.

The modern theory of public goods derives from the views of Austro-German economical tradition from the late XIX century. The on-going discussion at that time revolved around the question of the state's role in the process of providing public goods. The leading representatives were A. Wagner, who began this debate, along with his successors: E. Lindhal and K. Wicksell (Mazzola, 1994: p. 98). In its current form, the concept of public goods is, however, primarily connected with the beliefs of P.A. Samuelson who, in his article from 1945 entitled "The Pure Theory of Public Expenditure", included the analytical bases of the public goods theory.

There is a classic economical definition that is predominant among the presented views, which says *"all enjoy [collective consumption goods] in common, in the sense that each individual's consumption of such a good leads to no subtraction from any other in-*

*dividual's consumption of that good"* (Samuelson, 1954: p. 387). In light of the definition mentioned above, a pure public good must possess two qualities.

First of all, it should not be excludable, i.e. when the good has already been provided, no one can be excluded from deriving benefit from it. This characteristic is related to the problem of determining the optimal amount of public goods.

Secondly, a public good should not be a rival in consumption, which means that consumption by an individual does not mitigate the amount available for others. R. Kanbur, T. Sandler and K. Morrison accurately observe that, *"when benefits are non-rival, it is inefficient to exclude anyone"* (Kanbur, Sandler, Morrison, 1999: p. 61).

It is hard to impeach the view that, in practice, public goods rarely fully authorise the features mentioned above. Many goods may be *quasi-public* or public as well as private, in a sense they are either non-excludable or non-rival, but they do not accumulate both of these features. In the case of a purely public good, access to its benefits cannot be constrained to anyone, and the benefits derived from some individuals do not reduce the amount of benefits available to others. As an example, we can use benefits provided by health safety programmes funded from public sources. They have qualities of a public good, because the marginal cost of including another person is low, and including all citizens in a vaccination programme is beneficial to the whole society. Therefore, remembering that, in principle, it is not possible to exclude someone from participating in these programmes; the alternative regulation by an appropriate system of prices would be unfeasible.[2]

An obvious circumstance worth noticing is that a significant amount of public needs and "common concerns" find their formal expression in a specific set of international legal instruments, identifying individual types of benefits giving rise to international public goods (Kanbur, Sandler, Morrison, 1999: p. 61). It is this way because the present international law applies to issues concerning international society as a whole, and therefore describes values that are increasingly public, and correspond with it (Supernat, 2005: p. 79).

One of the more important problems related to the globalisation of public goods applies to collective interest building mechanisms in the context of global management. Because of that, there are two main problems that should be tackled in the conducted analysis. Firstly, the issue of the existence of a global society must be considered, and in this context the existence of space where it is accepted on a global level that common goods occur. Secondly, it is important to answer the question of the hierarchy of public goods, and relations between global public goods and local goods (regional, national, private).

The starting point of any analysis set in this manner should be the answer to the question about the essence of global public goods. At the offset it should be noted that the concept of global public goods is not clearly defined. Ideas abound in literature saying that the consensus is limited only to what is the stake in each case. One of the authors claimed, quite authoritatively, that each single word – "global", "good", and "public" can be questioned (Morrissey, teVelde, Hewitt, 2002: s. 31).

A key problem faced by the supporters of global public goods is the answer to the question of how far does the globalisation of a good reach. Should the term "global" be

[2] In literature, the most commonly referred to example is the lighthouse: no ship can be excluded from the benefits of reading its indications.

understood broadly and be related to benefits that are completely global? Perhaps, on the contrary, a more specific approach would be more appropriate.

Talking about global public goods makes sense only when one takes into consideration the spatial range in which measurable benefits occur. Benefits may range from truly global, through community, down to local level. Some authors indicate that using the term "global" for benefits that reach beyond national borders does not mean that they can cover the whole world. For this reason, besides global public goods, regional public goods, which benefit the population of neighbouring countries, are also distinguished along with national public goods, which mainly benefit a specific population (Brousseau, Dedeurwaerdere, Siebenhüner, 2012: p. 19).

It is justified here to ask a question: what spatial criteria should be accepted, in order to distinguish global, regional and local public goods? In literature it has been postulated that this transnational characteristic should contain more than two states, with at least one placed beyond traditional regional groupings (e. g. Europe, Sub-Saharan Africa or South-East Asia) (Woodward, Smith, 2003: p. 5).

However, public goods shared between two or three closely neighbouring countries are seen as local or regional public goods. An example of this category of goods could be common actions aimed at not only diminishing disease reservoirs, but also gaining control over cross-border spreading.

It is indicated in many studies that there is a close relationship between basic public goods at a national and international level. For example, the provision of health as a basic public good refers to an international as well as a national level. If this basic public good is provided at every national level simultaneously, then an international public good is also provided. The only difference will be the appearance of an additional element at a global level in the form of co-ordination. On the other hand, if certain countries do not provide the good at a national level, it will result in the reduction or prevention of providing a given public good at an international level. Hence we distinguish a category of "collective goods", which includes a collective effort, indicating that the amount of available protection for each country depends on the sum of protective actions undertaken by individual countries. To simplify, it is usually given that provision at a national level is binary, meaning that a good is either provided or not (Barrett, 2002: p. 53).

It should be indicated that since there is no established global society, recognised as such by all of its members, then defining a good as a global public good can neither be the effect of agreements between those interested, nor the result of an aggregation process of their intent. For this reason, the concept of global public goods rather resembles a consensus between external factors existing among societies, and the strategy of promoting one's own interests (Olson, 1996: p. 63).

## 3. MANAGING PUBLIC GOODS IN ADMINISTRATIVE SPACE

There are many controversies related to the provision of public goods. In literature it is possible to see a whole array of different conceptions about the provision of public goods in an administrative space. Their common feature is making the assumption that traditional public-economic theories of public good provision are overly simplified, because they are essentially focused on a national level, and are therefore not able to take into account the various transitory politics of public goods.

Certain views, stating that many goods ought to be provided on levels that are neither national nor global, are formulated more and more often. Going beyond the national stage escalates many problems related to the effective provision of public goods. Above all, the number of entities involved in administrating public matters has become so large that what is already considered as a very complex scene, is proving to be a real "thicket" at higher levels, with all sorts of entities, starting with countries and traditional international organisations, ending with various private entities, performing public functions.

In addition, a fundamental change in the way of providing public goods has recently been observed. In many countries, a transformation took place in managing public goods by entrusting the provision of many of them to private entities, either in a pure, albeit regulated, market context, or by using third sector institutions not focused on profit, or even by external contracting within the framework of which public authorities delegate the provision of services for a certain period of time, retaining supervisory powers and final responsibility.

The accepted solutions presuppose a certain normative perspective that provides an answer to the question: what is the acceptable and desired scope of state intervention in cases that, at least in theory, should be an effect of market governance and social interactions.

From a cursory analysis, one can already see that a division of tasks between specialised institutions, as well as between them and institutions with more general expertise, causes the fragmentation of approaches related to managing public goods. It is not about the appearance of significant differences in the catalogue of public goods, because all international public actors, whether they are states or international organisations, agree with their basic list and none of them would confess publicly that counteracting climate change or fighting diseases is not a substantial cause. However, the meaning attributed to each public good changes on different levels. The lack of explicit knowledge about collective preferences has many causes, such as a lack of explicit knowledge about directions of effective development, a cognitive lack of collective preferences, or a complex combination of the decision process. Other important issues related to the availability of public goods are connected with the heterogeneity of benefits and contributions between interested parties (Brousseau, Dedeurwaerdere, 2012: p. 23).

Relevant to the conducted analysis are the ideas of S. Barrett, who mentions, among the main difficulties in the process of providing international public goods, the lack of a hierarchical structure and the lack of mechanisms that are able to enforce agreements in order to provide public goods while at the same time reducing free riding (Barrett, 2002: p. 56).

Studies conducted by E. Ostrom have shown that local societies are able to overcome their free riding tendencies. The conducted analysis indicates that free riding at a local level is less severe than assumed by the theory of collective actions, increasing hope that the same effect will be reached at an international level. It is a result of an assumption given by J.M. Baland and J.P. Platteau (1996) that a co-managing approach is predominant at a local level, where local societies co-operate with the state in order to create and maintain a proper catalogue of public goods. However, as noted by these authors, the assumption mentioned above is strongly limited at an international level.

To conclude this part of considerations, one could discover, that local public goods are provided in a vertical or hierarchical system. International public goods have to be

provided by a horizontal system of international relations. In the opinion of some authors, the indicated difference is essential and determines the need to use other types of institutions in order to have an influence on the provision of regional and global public goods. Nevertheless, local and international public goods can be equivalent to each other, or they could complement one another. Prevention and fighting against infectious diseases at a local level is an addendum to the global public good. The opposite situation is also possible, where a transnational public good is provided in an insufficient amount. In this case, certain countries may undertake actions heading toward the reduction of negative consequences. For example, if a vaccination against AIDS is not available, the state places emphasis on preventive treatment and education about the disease. The positive effect of such actions will not only be an increase in awareness amongst people, but also a reduction in risk, which in turn will reduce the negative results of failures in providing transnational public goods.

## 4. GLOBAL ADMINISTRATIVE LAW

The difficulties introduced above, concerning the identification and effective management of public goods at an international level, are the subjects of intensified analysis in legal literature. An important position in this debate is taken by the theory of global administrative law. The concept of global administrative law comes from two observations. Firstly, as mentioned before, in today's globalising world (global administrative space) there are many public entities, private or public-private, with all the features of administrative entities, and those taking part in decision processes that are significant to countries, individuals, business organisations and non-governmental organisations (Supernat, 2011: p. 160). Theorists of global administrative law have distinguished five types of those global institutional administrative solutions (Kingsbury, et. al. 2005: p. 15). Apart from administration by formal international organisations, they have indicated: administration conducted by informal transnational networks, administration conducted by domestic regulators in the framework of network treaties or other regimes of co-operation, administration as a part of hybrid public-legal arrangements, and finally administration by purely private entities equipped with regulatory functions (Kingsbury, et. al. 2005: p. 16).

Secondly, global administrative entities are insufficiently responsible, because on the whole they are not concerned with domestic legal requirements imposed on public entities. It is this way because global entities are either entities of international law (international law does not include regulations corresponding exactly with regulations in domestic law, imposing requirements of responsibility, rationality, lucidity and lack of discrimination on public entities), or they are admittedly entities of domestic law, but belonging to the international network in which legal functioning cannot be subjected to domestic law. In addition, some global administrative entities are private or semi-public, and thus are not affected by domestic or international obligations related to public entities (Supernat, 2011: p. 162).

This gives rise to the question of what is, under these circumstances, the contribution of global administrative law in defining and administrating global public goods. The answer to this question has to take into account the fact that the domain of global administrative law concerns procedural rather than material issues (della Cananea, 2011:

p. 162). The aim of global administrative law comes down to an assurance that global entities will subordinate to proper procedures and control mechanisms. The theory of global administrative law, however, is not related to what should be done by global entities, what goals should they achieve or what values should they serve. The potential contribution of global administrative law theory in the subject of identifying global public goods has been limited to the improvement of legislative procedures, used to determine ways of achieving goals of global administrative entities. It is about the fact that the choice of these goals is not usually performed by those entities, and therefore it seems that global administrative law is not able to significantly contribute to the determination of criteria used to identify global public goods.

However, on the other hand, the achievements of global administrative law may turn out to be quite useful at the stage of providing global public services. It is this way because the main effort of the theory of global administrative law is directed towards defining the best procedural solutions. In this way, it could significantly contribute to the improvement of providing public goods.

To conclude this part of deliberations, it should be noted that conducting public matters in an international sphere increasingly requires complex relations between two or more tiers of administration. This results in the allocation of roles between different tiers of public action, which means that, among other things, the fact that the identification and provision of public goods on the international arena is never an obligation of only one institution on one level, but always consists of several institutional levels along with complex relations. Under these circumstances, a simple introduction of procedures used on one institutional level does not guarantee the rationality of identification and provision of public goods on the international arena.

## CONCLUSIONS

The foregoing deliberations lead to several possible conclusions. First of all, it should be noted that public goods have long been an element of the economic analysis of politics at a national level (Connolly, Munro, 1999: p. 36). However, the globalisation process was the reason why many issues once confined to domestic politics have been moved to a level where these issues have a global impact and reference. As a result, one can accept that part of the assumptions concerning national conception of public goods provision currently has a purely historical quality. In view of the arisen doubt towards the adequacy of the appointed concept, a problem appears in relation to the provision of regional and global public goods. A particular role in this area is ascribed to networks, which can not only assist co-ordination and co-operation in the area of global public good production, but also help in understanding and expressing preferences and guarantee a fair form of division. It is worth noting that the network is characterised by flexibility, the ability to self-organise, and by an orientation focused on unveiling problems. It is fully given by W. Reinicke, who emphasises that *"networks relate to supranational issues, which cannot be solved by any other group*" (Reinicke, 2000: p. 24). As a final word, the role of global administrative law should be indicated, which for the time being does not concentrate on norms of substantive law, but on the usage of principles, process regulations, rules of inspection and other mechanisms related to responsibility, lucidity and the assurance of lawfulness in global administration.

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# *DROIT MORAL* IN SELECTED LEGAL SYSTEMS OF ASIA, BY EXAMPLE OF THE RIGHT TO AUTHORSHIP OF A WORK – WHERE ARE WE COMING FROM, AND WHERE ARE WE GOING?

## 1. INTRODUCTION

The specification of *droit moral* in Asian countries cannot be encapsulated uniformly in a clear-cut way, as the individual countries present certain dissimilarities in this respect. It is, however, possible to attempt to establish groups showing the general mechanisms governing the development of moral rights in this part of the world. A presentation of the copyright regulations of Asia gains importance if we concentrate on the currently progressing globalisation of intellectual property rights (Jena, 2005: p. 7; Swadźba, 2006: p. 33–39) and the convergence of the Asian countries' economies (Freeman, 2003: p. 158–159). This analysis will be carried out based on the laws of countries such as: Thailand, Malaysia, Indonesia, Singapore, the Philippines, Vietnam, India, Taiwan, Hong Kong and Japan.

## 2. THE ECONOMIC CONTEXT

Economic factors have had an inherent influence on the development of moral rights in Asian legal systems, in common with the general development of all copyright laws in that part of the world. Many South-East Asian countries that have based their economies on new technologies and intellectual capital, among other things, have achieved economic success, becoming known as the "Tigers of the Far East". The countries that are currently treated as members of this group include: South Korea, Taiwan, Singapore, Hong Kong, Malaysia, Thailand, China, the Philippines, Vietnam and Indonesia. However, it should be borne in mind that the economic structure of this region is not uniform. While some economies are converging, many countries are facing the opposite phenomenon – divergence. This is apparent from the economic diversity that resulted from the sudden technological boost of the highly industrial countries.

The country that most revealed a particular interest in matters connected with copyright issues in Asian countries, back in the 1980s, was the USA, entering into intense trade exchange with South-East Asia. This interest resulted from the development of the illegal copies market in Asia, whereas the enforcement of copyright protection was seriously undermined due to a lack of national copyright regulations (Uphoff, 1991: p. 2).

The jurisprudence of the Supreme Court of Malaysia paints a picture of the situation during those times. The court would often issue contradictory judgements that effec-

tively kept the USA at bay in its attempts to seek or enforce copyright protection there (Azmi, 2008: p. 403). When a new copyright law was introduced in Malaysia in 1987, it was hoped that it would be one of the first steps towards strengthening the protection of artistic works. Also significant in that country is the strong competition with Singapore, which had been undergoing a second technological revolution since 1979. This fact fostered Malaysia into introducing a co-operation plan in the computer industry in 1981, and finally, in 1987, led to the enactment of the Copyright Act (Smith, 1999: p. 232).

## 3. NATIONAL CONTEXT VS IMPERIAL INFLUENCES

### 3.1. OVERVIEW

It should be noted that factors such as the origin culture of the nation, its religion, as well as the influence of the colonial empires were of great significance when shaping legal regulations in Asian countries (Heath, 1997: p. 303). It has been highlighted that emerging copyright cultures in Asia were highly correlated towards the concepts of Christianity, Scientism, Hinduism, Islam, and especially Confucianism (Azmi, 1996: p. 649, 671; Azmi: 1997: p. 686; Yoon, 1997: p. 162–164; Sidel, 1997: p. 357, 359). This thesis will be discussed using the examples of Malaysia, Indonesia, Vietnam, India and Thailand.

### 3.2. MALAYSIA

When it comes to Malaysia, the literature of this country reveals very little about the origins of copyright law before 1902. As A.S. Gutterman and B.J. Anderson put it, "The Malaysian legal system is based on English common law and includes an independent federal judiciary. In addition, Malaysia has two other parallel legal systems: the *sharia* courts, which are administrated by the state and which apply Islamic law; and an indigenous legal system applying customary laws, which exists in the Borneo island states of Sabah and Sarawak" (Gutterman, Anderson, 1997: p. 314). Malaysia is a country whose system is based on the customary law (which includes: the Malacca Digest, the Legal Digest of Pahang, the Ninety-nine Laws of Perak, the Maritime Rules of Malacca and the Digest of Kedah laws). These acts regulate many issues, but issues concerning copyright are not among them. On that basis, it is pointed out in the literature that it cannot be unequivocally denied that the origins of copyright law were present in this country, even if it seems that they might not have had much in common with the present doctrine of copyright law. This view is shared by Ida Medieha BT. Abdul Ghani Azmi, who claims that Islam – the religion of this country since the VII century – provides a logical and consistent explanation for the existence of copyright law both in the past and the present. However, the doctrine of law was not sufficiently developed to prove the case one way or the other. As Khaw Lake Tee claims, in separate states of Malaysia, such as Penang and Malacca, English regulations concerning copyright law were available, and were used. The introduction of the first Malaysian copyright act coincided with the introduction of English law in Penang in 1826 (Tee, 2008: p. 3; Kaib, 1988, p. 41). According to Azmi, the assumption of a "*wholesale import*" of

UK law into Malaysia is not right, as law should reflect the religious, cultural and social values present in a given country. At the same time, Azmi points out that "Islam has a very detailed moral code of ethics and laws that can apply to modern issues such as copyright" (Azmi, 1995). Indeed, in the law of Islam, there is no straightforward explanation of the intellectual property law, but Muslim scientists derive it from a broad understanding of "res" (the subject of law, known as "mal") (Al-Darini, Fathi, 1984; Azmi, 1995: p. 53).[1] In the Islamic law doctrine, "res" can be found in the form of: 1) "ayn" (material goods), 2) "dayn" (debt) and 3) "manfa'ah" (benefit, fruit). In order to talk about the subject of intellectual property, people use the term "ibtikar", which means invention or creation. Al-Darini recognises the intellectual property laws as a benefit ("manfa'ah") brought by material goods. Azmi notes that most scientists use this notion to describe rights in relation to objects that have a material form, similar to the law of "intifa" (rights of enjoyment) or the right to "irtifaq" (easement) (Mahmasanni: p. 20–25, after Azmi, 1995: p. 61). This theory seeks to find an explanation for intellectual property rights, and is a view also shared by Izzu ib. As Salam (Azmi: 1995, p. 61). Therefore, the "usufructuary rights of intellectual inventions differ from usufructuary rights of tangible property in two ways; source and origin. While the source and origin of usufructuary rights of tangible property are the physical property itself, the origin and source of intellectual inventions is human intellect, or effort that can only be understood notionally" (Azmi: 1995, p. 62).

The relationship between the author and the work is described as a "special relationship" ("alaqah ikhtisasiyah"), whereas Al-Darini claims, on the grounds of the doctrine of Islamic law similarly to the European doctrine, that an author leaves a part of his personality in the work ("shakhsiyah"). In the doctrine, this view also has its opponents, those who deny the existence of rights to immaterial goods. This group of authors includes Ibn Hazm and, to a certain extent, Iman Al.-Qarafi.[2] Azmi points out that the concept justifying the existence of the right to own immaterial goods has a strong connection with the right to own material goods. According to Azmi, when considering the right of authorship to a work, it seems that it has a strong justification also in "Surah an Nisa", verse 29 of which provides a justification for the recognition of authorship, as well as a ban on both complete and partial plagiarism. It is stated in verse 29 that, "O Ye who believe, eat not your property among yourself in vanities; but let there be amongst you traffic and trade by mutual goodwill." Islam long denied the omission of attribution, false attribution and especially plagiarism, valuing the creativity and innovativeness of an individual incredibly highly. Signing works was very common and concerned not only art and literature, but also handicrafts, textiles, pottery and bookbinding services.

One of the best known examples of very precisely attributing a produced book was the Manafi manuscript, dated back to circa the year 500 from the time of the Persian rule. The Malaysian court accepted this reasoning in the case *Longman Malaysia Sdn*

[1] The notion "mal" comes from the word "ma-wa-la", which means "enrich". We can assume after Azmi that it means "[a]ll that has commercial value" or "[t]hose corporeal, usufructuary and other rights of any kind customarily exchanged, are to be regarded as property (mal) of commercial use".

[2] According to this author, "even if the author can claim a right over his intellectual products, it is a personal right and not proprietary and cannot be alienated."

*Bhd.* vs *Pustaka delta Sdn. Bhd.*[3] As Azmi claims, despite the fact that Islamic law developed its own concepts of how artistic work should be respected, the perception of authorship was far from the romantic concept that would depict the European view of XIX century. Authorship was not understood in such an individualised way. It had far more to do with the responsibility of authors "to guide others", as well as the need to protect the work, rather than protecting the author himself (Azmi, 1995: p. 137). It cannot be forgotten that, in Islam, a person is not only obliged to acquire knowledge, but also to pass it on to others (Azmi, 1995: p. 138).

Harir ibn. Salman ibn. Samir is believed to have said, "Do not narrate falsehood to al-hukama' (those possessed with wisdom), do not narrate wisdom to al-sufaha' (those who are ignorant) for they will be angry against you; do not conceal knowledge from those who deserve it, for you will be committing a sin; do not narrate to those who do not deserve it, for you will become ignorant. Indeed, you are obliged to observe the right in your knowledge as you are obliged to observe the right in your property." On the basis of this view, Azmi finds a strong justification for protecting the personal rights of an author (Azmi, 1995: p. 139).

## 3.3. INDONESIA

The Indonesian legal system was initially based on customary law, passed down orally and called "Hukum Adat" ("the law of Adat"). These "unwritten rules of law" did not constitute one system, but rather consisted of several groups of norms (Ali, 2001: p. 8). Written laws were more of an exception, and included the laws of the Hindu kingdom of the ancient kingdom of Java. These laws were based mainly on religious and ethical rules (Antons, 2000: p. 9). In most cases they referred to local legislation and did not have the status of an exclusive source of law (Maine, 1963). The Indonesian legal system was also heavily influenced by Islam, which easily settled in this country due to the local customs and value system (Antons, 1995: p. 9).

It can be noticed universally in the doctrine of this country that the present Indonesian legal culture derives to a large extent from its own tradition, religion and culture, not to mention the strong Dutch influences. According to Achmad Ali, "people commonly believe that history and tradition are very strong in the Indonesian legal system" (Ali, 2001: p. 1). However, the copyright law was developed especially under the influence of Dutch law. The change in the outlook on life was summarised by Sunaryati Hartono in these words, "while among the Balinese it is a source of pride that one's discovery or design is imitated by others, with the advance of the Copyrights and Patent Right Acts, one actually prevents one's work from being imitated by others. The changing values and awareness, as a result of globalised information and technology, both directly and indirectly affect the content and the pattern of our legal system. As a result, it is impossible for us to maintain our ambition to continually defend the purity of the application of the rules of our "adat law" to become national law" (Hartono, 1992: p. 3).

[3] *Longman Malaysia Sdn Bhd. vs Pustaka delta Sdn. Bhd. case* (1987) 2 MLJ 359.

## 3.4. VIETNAM

Whereas in Vietnam the legal culture was developing under the influence of Buddhism, Confucianism and Taoism, the combination of both Chinese and French influences can be noticed there. The first copyright law was issued there only in 1970. As L. Net and H.A. Morris point out "the tradition of codification in Vietnamese law is inherited from the French culture, but the reluctance to bring a dispute to court is most derived from Taoism, a philosophy from China" (Net, Morris: 2012, p. 17–18).

## 3.5. INDIA

The legal system of India has been built on a variety of sources of law, especially on English common law. Not much has been written about the religious background serving as an accelerator on the way to implementing moral rights in this country. However, the common law that is governing there is "supplemented by the Constitution, statutes passed by the legislature, and customary laws. Indeed it is not uncommon in India for a judge in a local matter to take into account local customs and conventions in interpreting and applying the law" (Gutterman, Anderson, 1997: p. 378).

## 3.6. THAILAND

Due to its successful foreign policy and diplomacy, Thailand was never given the status of a colony.[4] However, readers may be astonished to know that Thailand passed its Copyright Law in 1901, following along the lines of English copyright regulations, including the Statute of Queen Anne of 1709, as well as the Literacy Copyright Act of 1842. According to D. Subhapholsiri, the idea of developing IP national protection was raised at a national level, just as the act of drafting it was patterned on the English act (Subhapholsiri, 1993: p. 67; Sukonthapan, 2005: p. 102; Sumawong, 1999, p. 30).

## 3.7. DISCUSSION

When analysing the development of moral rights in this chosen part of the Asian continent, we cannot forget that its legislation and jurisprudence was developed not only under the maelstrom of influences from the continental legal systems (due to French or Dutch rule) and the common law systems (from British and American influences). It appears, nevertheless, that the development of copyright and its mechanisms in Asian countries had to be dependent on many more factors. Apart from the impact of colonial empires, more attention should be paid to the domestic background of introducing copyright and to the local striving to understand the gist of copyright. In many countries, namely in Malaysia and Indonesia, this effort found its form by referring to the local beliefs and religions that were helping people to understand why authors should receive credit and respect. As this concept became better understood, copyright laws were implemented into the Asian systems, but their shape has been strongly influenced

[4] When it comes to Thailand, it should be noted that the first copyright act in this country was issued in 1892, though it referred mostly to printing books. The next one, extending the range of regulation, comes from 1901.

by domestic comprehension. This has been subject to discussion from a philosophical point of view in many Asian countries as depicted above. Some of them have relied on foreign legislation, hardy amending any word of detailed regulations (e.g. Hong Kong), whereas others wanted to meet international standards while still formulating their copyright laws individually (e.g. Malaysia, Indonesia, Thailand, India). Only when we gain a deeper comprehension of this idea of encouraging Asian nations to implement copyright law into their national law systems – though in their own way and with their own wording – can we then go on with our analysis on moral rights in Asia (Heath, 2003: p. 5; Antons, 2004: p. 35).

## 4. TRIPS AGREEMENT – THE POLITICAL AND LEGAL CONTEXT

Pride of place in solving the problem of not obeying the copyright law can be assigned to the *Trade and Tariff Act* of 1984, in which it was stated that the inapplicability of the protection of intellectual property laws should be treated as a dishonest trade practice (Correa, 2000: p. 1).[5]

TRIPs, which was based to a certain extent on the achievements of the Berne Convention, established a rule setting out a minimum level of copyright protection. According to the above, in Article 9 section 1 TRIPs, it is stated that the member states will not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of the Berne Convention. By admitting that the character of moral rights was not directly connected with the trade aspect, the proposal of those countries following the common law system was accepted in order to provide the TRIPs signatory states with more flexibility in regulating droit moral in their national regimes (Rajan, 2001a: p. 5). However, it has been noted that such a general regulation of moral rights carries a risk of recoding these rights into the background in relation to pecuniary rights. These anxieties were plain to see in the example of J. Adams, who wrote in 2008 that, despite differing views in other legal systems, priority should be given to pecuniary laws. He was saying that recognising those rights as bearing priority in relation to moral rights is inevitable if we want to guarantee authors their economic interests, and this is why these rights aspire to be perceived as fundamental rights. According to his view, personal rights would be perceived as assuring "additional goods" (Adams, 2008: p. 26).

However, according to David Vaver, moral rights are actually connected with the international trade aspect in many ways. Respecting the right of authorship of a work – manifested by placing the mark of the author on the work – can be one guarantee about the authenticity of the work of authorship as a product. What is more, granting the author moral rights places him in a stronger negotiation position toward the holder of his pecuniary rights. The author may also gain some revenue by undertaking not

[5] Since 1988, USTR has published annual reports (known as the "Special 301 Report") on compliance with intellectual property laws in the world, in which it incorporates a list of countries that are on a special watch list ("Priority Watch List") as well as observed countries ("Watch List"). Between 1989 and 1993, countries such as China, India, Thailand and Taiwan appeared on the priority watch list, out of which only Taiwan has moved to the less priority list of observed countries – in 2008.

to bring a claim into court, e.g. on the grounds of his attribution being omitted (Vaver, 2006, p. 278).

As discussed above, the globalisation of copyright law spreading through the Asian countries cannot be treated only in a strictly economic sense. In addition to that, various Asian countries are obliged to provide authors with strong protection of their droit moral because of the accepted obligations resulting from the Berne Convention. It should be noted that Indonesia, Singapore, Hong Kong and Vietnam entered the Berne Convention only after signing the TRIPs Agreement. Some other countries accepted the Berne Convention a little earlier: Malaysia in 1990, whereas Cambodia and Taiwan have not yet accepted either of these legal acts. Only India, Thailand, the Philippines and Japan have been bound by the Berne Convention for much longer.[6]

## 5. MORAL RIGHTS IN ASIA

### 5.1. OVERVIEW

The *droit moral* doctrine was introduced in the legal systems of individual Asian countries without much resistance, which could be noted in the attitude of Great Britain or the United States towards introducing this institution in their copyright systems. What may raise more doubt is the method whereby moral rights were introduced. Although the institution of moral rights can be found without difficulty in all Asian countries' systems, it is often more difficult to interpret the provisions correctly. It is noticeable that the commentators themselves (and there are not many of them) seem to rely more on the copyright doctrine of the system functioning as the prototype of the national regulations, rather than creating a national copyright doctrine individually (Tee, 1994: p. V). However, it does not seem that a more detailed description of each country's regulations would be justified. At this point, I would like to draw attention to certain fundamental issues of special meaning.

### 5.2. HONG KONG

When it comes to the regulation of moral rights, an exact copy of the English legislation can be found in Article 89 of the Hong Kong Copyright Act. It can be noticed in an almost casuistic way of regulating the author's situation, in which the author is given the right to sign the work with his name according to the category of the work. As in the English legal system, claiming the right of authorship is possible only after performing an '*assertion*', which means handing in a statement of intent concerning the intention to execute moral rights, which should be issued before an act of infringement (Wong, Lee, 2002: p. 127).[7] There is no general right of authorship, but there are many subjec-

[6] India has belonged to the Berne Association since 1928, Thailand since 1931, and the Philippines since 1957.

[7] Such a declaration can be general or concern a specific situation. It should be accomplished when passing a copyright law or at any other moment. In the second case, it is carried out in a normal, written way (art. 90 sec. 2 Hong Kong Copyright Act).

tive exceptions due to the category of the work following the English act.[8] Although these exceptions were broadly discussed when voting on the act in England, both by the supporters of the doctrine and lobbyists, it appears that there were no such discussions and analysis accompanying the introduction of these legal rules in Hong Kong.

## 5.3. INDIA

Another country that was always heavily influenced by the British legislature was India. It is significant that the first copyright act in India, in 1914, was an exact copy of the English act issued in 1911 (Gupta, 2011: p. 17). Only the current legal act, issued in 1957, is a result of relatively independent work by the Indian legislator, although in some aspects (even by reaching for the English notion "author") it clearly borrows from English law (Doshi, 2003: p. 301–302; Narayanan 2007: 278; Vashishth, 2002: p. 992). However, India went much further than Great Britain in the search for droit moral. By issuing its own legal regulations, it turned away from the casuistic formulated categories of situations subject to the obligation of attribution, the catalogue of exceptions in the use of the law, as well as the circumstance of an *assertion* being the basis for executing the laws (Adeney, 2006: p. 32).[9] Different legal solutions should not come as any surprise if we realise that the institution of droit moral was introduced into the Indian legal system already in 1957, much earlier than in the English legal system. Therefore, at that time the Indian legislator took a step ahead of the English model. Moral rights have a special status in the Indian legal system, which is clear also from the statutory terminology. They are jointly called "special copyright laws" and they are treated that way, both in the doctrine and the judicature of Indian law.[10] Despite this, it can be noted that the droit moral regulation is not free from small inconsistencies, for example the duration of copyright protection, which is not defined (Rajan, 2001b: p. 175). Another matter forming an interesting point of reference concerns the existence of legal awareness and real compliance with these laws. It is perhaps puzzling that the first case dealing with moral rights went to court 40 years after the introduction of droit moral (Bansal, 2000: p. 16; Kumari, 2004: p. 109).[11]A statement can be found in literature that this case was a historically remarkable event as, despite the existence of Article 57 of the Indian Copyright Act, its contents remained unfamiliar to most Indian authors (Thairani, 1996: p. 98). The courts have tried to deal with certain theoretical inconsistencies and practical difficulties, which can be admitted as having an active role in developing the legal awareness, by providing a possibly complex interpretation of moral rights. However, this does not change the fact that a need to change this legal regulation has been highlighted in literature on the subject (Rajan, 2001b: p. 180).

[8] It does not have a sample use in relation to such works as: computer programs, writing style designs, computer generated works (art. 91 sec. 2 Hong Kong Copyright Act), press news, newspaper/magazine or periodical articles, as well as encyclopaedias, dictionaries or co-operative works (art. 91 sec. 5 and 6 Hong. copyright law).

[9] Art. 57 (1) of the Indian copyright act: "Independently of the author's copyright, and even after the full or partial assignment of the copyright, the author of a work has the right (a) to claim authorship of the work; […]".

[10] The terminology "of special moral rights" found its place not only in India, but also in Lebanon and Syria.

[11] It was the case *Manu Bhandari vs Kala Vikas Pictures*, (P) Ltd., A.L.R. 1987 Delhi 13.

Legal regulations concerning copyright can also be found, for example, in Malaysia (Article 25 (2a) of the Malaysian Copyright Act), Indonesia (Article 24 (1) of the Indonesian Copyright Act),[12]Thailand (Article 18 of the Thai Copyright Act)[13] and Vietnam (Article 19, point 2 of the Vietnamese Copyright Act).[14]

## 5.4. MALAYSIA

Droit moral in Malaysia was introduced as late as in the Copyright Act of 1969, though it seems that the explanation for respecting the attribution of an author in Malaysia is rather strong. It results not only from the legal regulations, but also finds some support in the doctrine of Islam. As Khaw Lake Tee claims, the first version of the Copyright Act of 1987 contained a very general regulation of the right of authorship that protects the author's right to sign his work with his own name, but only since the amended version issued in 1997 (Tee, 2008; Kandan, 1993: p. 86). Article 25 (2a) of the Malaysian Copyright Act only gives the author the legal right to enjoin any person from claiming authorship of his work or from attributing the authorship of a work to another.[15] So, until 1997, the Malaysian regulation in this respect was at variance with Article 6bis of the Berne Convention. The Malaysian judicature has also issued several rulings concerning the right of authorship. However, it seems interesting that these rulings are not new. It leads to the conclusion that, despite that the Malaysian regulations concerning authorship being introduced under the influence of Great Britain, the respect for authorship seems to be rather natural. In this respect, a rather old case can be mentioned, that of *Mokhtar Hj Jamaludin vs Pustaka Sistem Pelajaran* from 1986, in which the court accepted the claim of the author on providing a different name of the author. In this case, the editor acted against what had been arranged in an oral agreement and on the cover of the book, by providing the surname of the author 'Mokhtar AK', and the nickname on the first page of the book. However, it is not certain what the legal basis for the court's decision was. It seems that, instead of basing the verdict on the droit moral regulation of 1969, the court acknowledged the violation of the agreement.

[12] Art. 24 (1) Indonesian Copyright Act: "An author or his heirs will be entitled to require that the copyright holder place the name of the author on his work"; The act of 1982, source:http://www.geocities.com/Athens/Ithaca/1955/copyact.html, as for 03.06.2013).

[13] Art. 18 Thai Copyright Act: "The author of the copyright work under this Act will be entitled to identify himself as the author and to prohibit the assignee or any person from distorting, shortening, adapting or doing anything detrimental to the work to the extent that such act would cause damage to the reputation or dignity of the author". Cf. http://www.wipo.int/wipolex/en/text.jsp?file_id=129763, as of 03.06.2013

[14] Art. 19 of the Vietnamese Copyright Act: "The moral rights of authors include the following rights: […] 2. To attach their real names or pseudonyms to their works, to have their real names or pseudonyms acknowledged when their works are published or used."

[15] Art. 25(2) Subject to this section, where copyright subsists in a work, no person may, without the consent of the author, or, after the author's death, of his personal representative, do or authorise the doing of any of the following acts: (a) the presentation of the work, by any means *whatsoever, without identifying the author or* under a name other than that of the author (the amendment of 1997 has been provided in italics), cf. http://www.wipo.int/wipolex/en/text.jsp?file_id=128853, as of 3.06.2013

## 5.5. INDONESIA

In relation to Indonesian law, S. H. Simorangkir writes that "the relation between a creator and his creation is so real and so close that any transfer of all or part of the creation to another party will not deprive the creator or the heirs of the right to file a claim against any person who, without consent:
a. omits the creator's name from the creation,
b. inserts another creator's name on the creation" (Simorangkir, 1985: p. 12).

This position, defined on the grounds of the former Copyright Act dating back to 1982, seems to lead to the conclusion that the regulation of droit moral was introduced in an almost natural way. Indeed, the editing of the act of 1982 shows that the Indonesian legislator introduced this regulation to the system in a more mechanical than instinctive way. It should be pointed out that, while taking into consideration the right of the authorship of a work, this regulation of law in the act of 1982 can be found in two places, in Articles 24 and 41 of the former Copyright Act. According to Article 24 (1) of the previous Indonesian act, "an author or his heir will be entitled to require that the copyright holder place the name of the author on his work." This law was introduced in the chapter dedicated to the limitations of copyright law. It is only mentioned in Chapter V (Rights and Authority to Bring Lawsuit) in Article 41 that "The transfer of copyright on all works to another person or entity will not prejudice the right of the author or his beneficiaries to bring a lawsuit against any person who, without his consent:
a. deletes the name of the author on the work;
b. gives another name as an author of the work."

This regulation lacked something that was typical for civil law regulations – a typical incorporation of the droit moral. It seems that the negligence of the legislator in this respect reveals a lack of understanding of this institution. What is more, an opinion concerning the erroneous formulation of Article 41 b) can be found in the doctrine of Indonesian law. According to Rosidi, Simorangki and Panggabean, in the content of the regulation, there was an omission of the term "*other person's* name" as constituting a moral right infringement in a situation of placing somebody else's name as the author on the work of authorship. Antons claims that the version mentioned above has a lot in common with the Dutch act, which also regulated the rights of an author by giving him specific claims in case of an infringement in law in the version before 1989, but did not give him a positive right (Antons, 2000: p. 95). At present, in the Indonesian Copyright Act of 2002, the notion of droit moral (Indonesian "hak moril") appears before Article 24, but the formulation is still general enough to raise the concerns stated above.

## 5.6. SINGAPORE

Wee Loon Ng-Loy claims, on the grounds of Singaporean law, that the attitude towards moral rights in those countries with a civil law tradition, as well as in India, which she names the "'soulful' approach", is not visible in Singapore. As she writes "even though Singapore is a member of the Berne Convention, there is no protection for the right of paternity and the right of integrity as such in our copyright system." Through a British colony since XIX century, Singapore imported the entire body of English common law, equity and statute law as it stood in England at that time. The Second Charter of Justice took effect from 27 December 1826, whereas the copyright of 1814 came into force

also in Singapore on the grounds of the charter mentioned above. The English Act on Copyright Law of 1911 functioned in Singapore until 1987, when a new act was introduced (largely based on the Australian Copyright Act of 1968). The reference to Australian law was on one hand a result of the desire to amend a rather outdated act, but it also reflected the intention to be freed from the influences of Great Britain and to perform an individual legislative initiative (Ng, Lim, Loke, 2001; Ng-Loy, 2007: p. 61). However, when it comes to droit moral, the tradition of common law adopted from Great Britain remained unchanged, which leads in a way to the lack of copyright law in the copyright act of Singapore. A hot topic for discussion when it comes to Singapore is whether it should amend the act to adapt it to Article 6bis of the Berne Convention, which was ratified by this country. The claims to stop violating the proper usage of a work can be carried out using one of the common law institutions, namely *passing off* (Ng, Lim, Loke, 2010). In addition, the regulation forming part of Article 188 of the Singaporean Copyright Act should be mentioned, as it is a substitute for the right of authorship.[16] According to Ng-Loy, "the absence of moral rights protection in Singapore per se does not mean that morality-based justifications are entirely irrelevant in the Singapore copyright scene. Within the morality-based justifications is the […] 'reap not where thou hath not sown' principle" (Ng-Loy, 2007: p. 59–60).

## 5.7. THAILAND

A good example of a rather chaotic introduction of the droit moral institution into the legal system can be found in Thai law. In its present form, Article 18 of the Thai Copyright Act of 1994 gives the author the right to identify himself as the author, and to prohibit the assignee, or any other person, from distorting, shortening, adapting or doing anything detrimental to the work to the extent that the act would cause damage to the reputation or dignity of the author. In the 1978 act, the provision granting the right of authorship was formulated as "in the case where the copyright has been assigned under a second paragraph, the author still has a personal right to prohibit the assignee from distorting, abridging, adapting or doing any act in relation to the work to such an extent as to cause injury to the reputation or goodwill of the author." This wording was criticised on the grounds that it does not say whether the author was given a positive right to claim the attribution, or he was only entitled to object any action concerning injury to his reputation caused by signing the work with his name. Under the regime of the 1978 act, many issues concerning moral rights were left undecided, including the time of application and the expiry of the moral rights, as well as the possibility of transferring them along with the pecuniary rights. The act of 1994 did not settle these doubts, and the judicature in this respect is also not very rich (Subhapholsiri, 1993: p. 73). As is pointed out by the literature, the moral rights last as long as the property rights, 50 years from the moment of death (Weerawowarit, 1998: p. 53).

[16] The duty not to falsely attribute authorship of the work or the identity of the performer of a performance 188.–(1) A person (referred to in this subsection as the offender) will, by virtue of this section, be under a duty to the author of a work or a performer of a performance not to – (a) insert or affix another person's name in or on the work, or recording of the performance, or reproduction of the work or recording, in such a way as to imply that the other person is the author of the work or the performer of the performance.

## 5.8. THE PHILIPPINES

E.B. Bautista writes about the relatively strong protection of an author's moral rights under Philippine law (Amador, 1998: p. 14),[17] noting that it is inevitable not only when it comes to protecting the interests of the author in relation to the work, but also in relation to protecting the interests of society, as well as protecting the integrity of the national cultural heritage (Bautista, 1985: p. 25; Rodriguez, 2002: p. 124).[18]

## 5.9. JAPAN

The only country that resisted the West for a long time when it comes to legislature and judicature was Japan (Parker: 1989: p. 181).[19] Nevertheless Japanese copyright law was introduced under pressure from the USA and Europe. The first Japanese Act on Copyright Law of 1899 already covered the droit moral regulation and secured the right of authorship.[20] At that time, Renato Mizuno having done his research on some of national copyright law regulations wrote that the doctrine of the French distinguishes droit pecuniare (*kinsenjo no kenri*) and droit moral (*mukeiji no kenri*). He fully supported this view and proposed introducing moral rights in Japanese system naming them as *mukeiteki kenri* (Doi, 2001). An indicator of a relatively well-developed legal culture of copyright law in Japan can be seen in the debate that took place in the 1970s concerning the provenance of droit moral. It was considered whether this right constituted a subcategory of the general personality right, or a separate legal category (Ueno, 2005: p. 42). This means that Japan became highly developed in the droit moral doctrine long ago.

## 5.10. DISCUSSION

If these regulations were interpreted in comparison with regulations concerning the authorship of a work under the French, German or Polish legal systems, for example, it could be noted that in some Asian regulations the author seems not to be granted the right of authorship in the strict sense, but is instead given the right to sign the work with his name, which in a civil law approach is just one aspect of the broadly understood right of authorship. Therefore, it is justified to ask the question whether, by providing the author with "the right to sign the work with his name," the codifications really incorporated the "right to the authorship of the work" to these legal systems. A negative answer to this point would reveal a certain non-compliance between the national regulations and the Berne Convention. On the other hand, a positive answer to this question would lead to the conclusion that the introduction of the *droit moral* institution,

[17] The act of 1998, (later referred to as: the Philippine Copyright Act), source: http://www.chanrobles.com/legal7copyright.htm, as for 03.06.2013).

[18] "Society itself has a direct interest in the protection of the creator in this respect, since such protection is closely linked with the preservation and integrity of the nation's cultural heritage."

[19] R.B. Parker claims "the Japanese are […] comfortable with the belief that they are an absolutely unique people who cannot be understood by the rest of the world. […] Japan is, in fundamental ways, different from the rest of the world, and radically different from the United States. Japan is an isolated homogeneous island society. […] From the early 1600s until the middle of the nineteenth century, Japan cut itself off from the rest of the world."

[20] Cf. Art. 18 of this act.

despite the widespread use of this notion (Simorangkir, 1985: p. 12; Bautista, 1985: p. 8) in these legal systems, migh have not been preceded by a detailed analysis of the copyright law theory, but rather was focused on its practical application. The correctness of formulating the right of authorship is one thing, while the proper understanding of the *droit moral* doctrine in Asia is the other. In any case, it is plain to see that pragmatism and a practical approach were at the basis of introducing moral rights in Asian countries since the very beginning.

## 6. CONCLUSIONS

To sum up, we cannot underestimate the influence of the colonial empires' governments on the shape of copyright regulations in Asian countries. On the one hand, colonialism imposed upon the colonies legal regulations reflecting the legal culture of the colonising countries, but on the other hand it resulted in a kind of withdrawal from the inner ways of law development, and into a specific "patchwork" of legal cultures, stitched together not according to cultural affiliation, but to membership in a given empire. At the same time, it should be noted that the legal regulations were not always introduced without changes, but they sometimes included national concepts or indigenous customary mechanisms (Simorangkir 1985: p. 7).[21]

It seems clear then that colonial influences are very strong not only in the legal regulations, but also in the national doctrine, in which the analysis of a given institution is very rarely carried out on the grounds of an independent theoretical approach and practical experience, but more often by a wide reference to the literature and national judicature of the colonising country, which had a significant influence on the introduction of law in its former colony.

However, there is no doubt that the main attention in the field of executing copyright law in Asian countries was focussed on abiding by the pecuniary rights, and above all eliminating major piracy. The theory of copyright itself, and consequently the notion of an "author", as well as a consideration of the institution of *droit moral,* was somehow neglected. The fact of simply adopting copyright institutions from former colonial countries has also contributed to giving less significance to these concepts. The institutions and terms were often only adopted for pragmatic reasons, meaning that they were intended to be used mostly in practice. It seems that it is precisely these factors that have contributed to the appearance of many difficulties in interpretation.

An analysis of the selected legal systems enables certain conclusions to be drawn on the manner of implementing the right of authorship into Asian systems. Undoubtedly, the main focus in the field of enforcing copyright law in Asia was to provide authors with pecuniary rights and to eliminate piracy. Nevertheless, it is plain to see that insti-

[21] According S.H. Simorangkir, "The 1982 Copyright Law, which repeals the colonial Copyright Law, the 1912 Auteurswet, besides accommodating new elements to keep up with the technological advancements, also introduces an element of Indonesian character, which nurtures both individual and social interests, so that there is a harmonious balance between the two interests. […] This social function can be seen, among other things, from: a. the possibility to limit a copyright for public interest, for which the creator is entitled to compensation; b. the shortening of the period of validity of a copyright from 50 (fifty) years, according to the former law, to 25 years; c. the appropriation by the State of copyright on National Cultural Objects".

tutions and terms were often adopted for purely pragmatic reasons, which means that it was intended for copyright to be easily used in practice. In the case of moral rights, as far as the rights of authorship are concerned, the Asian legislators went in one of the following directions:

- simply transferred the legal solutions from the foreign countries to the Asian ground, without taking into account their evolution or paying attention to the need to place them in specific functional groups together with other elements of a foreign system,
- formulated possibly independently legal constructions dealing with the institutions of the right of authorship to a work. Though inspired by western institutions, these are often not without flaws, largely due to the fact that such factors as the aim and origin of the *droit moral* institution, and maybe even its very essence, were not taken into much consideration.

It appears that modelling Asian regulations on moral rights after European copyright acts seemed to be the best idea in order to implement copyright proficiently, while remaining coherent with the Berne Convention. As a matter of fact, a strict transferal of the ideas and mechanisms into Asian systems is inadequate, as we bear in mind that each implementation should be preceded by a precise analysis of the institutions involved. Given that ideas on creativity in Asia do not mirror European ideas, a strict transfer would not be effective enough. In addition, if the implementation bears only a small resemblance to the precursor models (European and US), then domestic changes to the standard wording of the precursoring copyright laws sometimes make it difficult to understand the essence of the chosen regulations. In this situation, from a European point of view, we must wait and look for new case law and references to copyright law in the national doctrine in order to be able to say more about the direction that Asian regulations on moral rights are taking. A good example of this kind of situation will be observed soon in China, as on 31 March 2012 the National Copyright Administration published a preliminary draft amendment to revise China's copyright laws. The proposed draft very quickly became the subject of many opinions and public discussions, revealing the consciousness of the Chinese on many copyright issues, including moral rights.

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# THE EUROPEAN UNION AS A MEMBER OF THE WORLD TRADE ORGANIZATION

The form of co-operation between the EU and the WTO, as it is at this point in time, is an outcome of two parallel processes – one occurring among the European countries, gradually leading them towards the final stage of economic integration, and the other that has been taking place within the GATT/WTO system. Because of that, the EU's participation in the WTO is a complicated issue, both on the grounds of EU law as well as on the grounds of international trade law.

In order to examine the relationship between the EU and the GATT/WTO, it is necessary to briefly describe the integration process that has been taking place in Europe for more than 60 years now. It will help show the difference between the shape of the European integration structure when this relation started, and how it functions as a part of the GATT/WTO system nowadays.

According to the Hungarian economist Béla Balassa, there are six stages of development of every economic integration structure (Balassa, 1961: p. 1–18). The first is a Preferential Trading Area (PTA), achieved by giving preferential market access to certain products from certain countries, usually by reducing tariffs without eliminating them completely. The European Union (EU) has such agreements with approximately 70 countries of the ACP (Africa, the Caribbean and the Pacific). The majority of those countries are former colonies of EU member states. Usually in those PTA agreements there are also special provisions regarding access to funds created to maintain price stability in the agricultural and mining markets of those countries. These provisions guarantee regular supplies of raw materials to the EU (Nacewska-Twardowska, 2010: p. 160).

The second stage is a Free Trade Area (FTA). It is based on an international treaty between at least two countries in which they agree on trading goods (usually industrial and highly processed products, rather than agricultural produce) freely between themselves. At the same time, the way they trade with third countries (countries from outside the FTA) is not regulated by the agreement, so in those trade relations they are allowed to keep the national tariffs. There are many examples of FTAs around the world, including the North American Free Trade Agreement (NAFTA) between Canada, the US and Mexico; the European Free Trade Association (EFTA) existing between Iceland, Norway, Switzerland and Liechtenstein; the Latin American Free Trade Association (LAFTA), concluded by Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and Uruguay, which later transformed into the Latin American Integration Association which now has 12 member states; or the Baltic Free Trade Area (BAFTA) which existed between Estonia, Latvia and Lithuania until 2004 when those countries became member states of the EU. The EU itself has never been a classic FTA, 'leaping' this particular stage in a way, as its predecessor, the European Economic Community (EEC) was founded as a customs union. Nevertheless, the EU has concluded FTA agreements with many

third countries, such as Chile, Colombia, Peru and South Africa. Very often FTAs between the EU and the third countries are also created by Associated Agreements, e.g. with Algeria, Egypt, Morocco, Montenegro, Albania and Serbia.

The third step for economic integration organisation is a customs union (CU). It can be defined as an FTA in which countries agree to adopt common external barriers. This means that, unlike in an FTA, countries bound by a CU cannot keep national tariffs for products from third countries, but that those products, while entering a CU, regardless of which country, are subjected to the unified tariff. While an FTA is usually only an international agreement, a CU has to have some sort of organisational structure (in order to divide income from collected duties between the countries of the CU), and very often takes the shape of an international organisation. Current examples of a CU are the Andean Community (CAN) among Bolivia, Colombia, Ecuador and Peru; the Southern African Customs Union (SACU) comprising Botswana, Lesotho, Namibia, South Africa and Swaziland, and the Southern Common Market (Spanish: *Mercado Común del Sur* – Mercosur) existing between Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela. Since every common market and customs and monetary union is also a CU, the EU itself is a customs union as well. Since its creation, the European Economic Community (EEC) was supposed to become a CU. The legal grounds for it were made by Article 9 of the Treaty of Rome concluded in 1957 which provided that "*the Community shall be based upon a customs union covering the exchange of all goods and comprising both the prohibition, as between Member States, of customs duties on importation and exportation and all charges with equivalent effect and the adoption of a common customs tariff in their relations with third countries.*"[1] The EEC became a customs union in 1968 (Edward, Lane, 2013: p. 446). However, according to some scholars, the EEC became a customs union much later, when all the legal instruments that form the Common Trade Policy came into force (Lasok, 1998: p. 2–4).

The next step of economic integration is a common market. As already stated, every common market is a customs union where there is also the free movement of goods, services, capital and labour, as well as common policies on product regulation (common standards). Apart from the EU, another example of a common market is the Caribbean Community (CARICOM) established by Barbados, Jamaica, Guyana and Trinidad & Tobago, and now associates 15 Caribbean nations and dependencies. The European Coal and Steel Community (ECSC), which was established by the Treaty of Paris signed in 1951, was another example of a common market, but limited only to two products – coal and steel. The EEC set the goal of becoming an internal market (which is more advanced than a common market, as trade barriers between member states are reduced almost completely) in the Single European Act,[2] adopted in 1986. In Article 13 it was stated that "*The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992.*" The goal was

[1] The Treaty establishing the European Economic Community signed on 25 March 1957 in Rome. The original version of the Treaty can be found on the EU website (http://eur-lex.europa.eu/) in authentic languages: French, Italian, German, Dutch or, in English, on the Centre for European Studies website (French: *Centre virtuel de la connaissance sur l'Europe*) (http://www.cvce.eu/).

[2] Single European Act, signed at Luxembourg on 17 February 1986 and at The Hague on 28 February 1986 , OJ L 169 of 29.6.1987.

indeed achieved within the stated period of time, and from 1993 the EU functioned as an internal market.

The fifth step of integration is an economic and monetary union, which is a common market with a common currency. There are a few examples of economic and monetary unions made on bilateral relations, like the one existing between Switzerland and Lichtenstein. A good example of an economic and monetary union consisting of several countries is the Eastern Caribbean Currency Union (ECCU), composed of Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines, and using a common currency – the East Caribbean dollar. As for the EU, the Eurozone is also an example of an economic and monetary union, though the EU has not properly reached this stage of integration yet, since only 18 of the 28 member states use the Euro as their currency so far. Moreover, it is uncertain whether the EU will reach this stage any time in the future, as three countries – the UK, Denmark and Sweden – have decided not to use the Euro.[3] The other countries are obliged to join the Eurozone once they meet the criteria to do so.

The final stage would be complete economic integration, at which point there would be full monetary union and complete harmonisation of economic policy, which means that it would not be under the control of the member states anymore. This stage is purely theoretical, as no integration organisation in history has ever achieved it.

Bearing in mind the steps that the EEC (and then the EU) had to take in order to reach its current level of the integration, it is clear that when the GATT was signed in 1947, the EEC (and not even the ECSC) had not been established yet. On the other hand, in 1951 when the Treaty of Paris was signed, all six countries – Belgium, Italy, Luxemburg, Netherlands, Germany and France – had already signed the GATT. What is even more, there was a customs union existing between three Benelux countries at that time. This customs union was explicitly listed in Annex C to Article 1.2(b) as territories that were an exemption to the duty of eliminating any preferences that were against the most-favoured-nation clause. The most-favoured-nation clause obliged the states to accord any advantage, favour, privilege or immunity that they have granted to any product from one country to a like product originating in or destined for the territories of all other contracting parties (Puślecki, Skrzypczyńska, 2011, p. 11–12). Naturally, free trade areas and customs unions are, by definition, inconsistent with the most-favoured-nation clause, as a reduction of trade barriers takes place only within the area or the union.

Despite the historical exceptions to the most-favoured-nation clause, such as the customs union between the Benelux countries, the GATT anticipates another type of exception. Article XXIV (5) states that "*the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area*." One of the conditions for a customs union to fall within the scope of Article XXIV is that duties and other restrictive regulations of commerce will be eliminated with respect to substantially all the trade (SAT) between the constituent territories of the union, or at least with respect to substantially all trade in products originating in such territories. According to this provision, the ECSC could not be considered as a customs union forming an exception to the most-favoured-nation clause under

[3] The UK and Denmark negotiated the permanent derogation in this field, while Sweden did not join the ERM II (because of the negative result of the referendum) and thus failed to fulfill the criteria for introducing euro.

Article XXIV, because it was limited only to coal and steel, thus it did not meet the SAT condition. The ECSC had to use another possibility, provided for in Article XXV. Under this article, it is possible, in exceptional circumstances not elsewhere provided for in the GATT, to waive an obligation imposed by the GATT upon a contracting party, particularly the most-favoured-nation clause. In order to obtain such a waiver, the decision has to be approved by a two-thirds majority of the votes cast of the contracting parties. The ECSC was granted a waiver in 1952.[4]

In the case of the EEC, since it had a general character, not limited only to some categories of products, it became an exemption to the most-favoured-nation clause based on Article XXIV. According to this particular issue it is worth to be mentioned that, apart from the SAT condition fulfilled by the EEC, Article XXIV states that, with respect to a customs union, the duties and other regulations of commerce imposed at the institution of any such union will not, on the whole, be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the union. Taking this provision into account, the EEC established the common external tariff (CET) based on the arithmetic mean of the tariffs of six countries. Among those countries, Belgium, Luxemburg and the Netherlands had much higher tariffs than the rest of the member states of the EEC (France, Italy and Germany), whereas their share in trade was rather insignificant in comparison to the share of the latter three. As a result, from the perspective of the third countries, the tariffs for most goods became higher than they had been before (Czubik, 2002: p. 276–278). However, such a solution could not be considered as a violation of the GATT, as Article XXIV states that the CET shall not, on the whole, be higher than tariffs prior to the creation of the union. Nonetheless, there was a conclusion drawn from that case. In the Interpretation to the GATT, it was been stated that "*the general incidence of the duties applied before and after the formation of a customs union shall be based upon an overall assessment of weighted average tariff rates and of customs duties collected*." Such a weighted average should be calculated taking into consideration the share in trade of all the countries that are parties of the given customs union.

Usually when one international organisation wants to co-operate with another one, the co-operation is done by taking administrative or diplomatic measures, and when an international organisation wants to participate in the work of another international organisation, it does so by gaining the formal status of an observer (MacLeod, Hendry, Hyett, 1998: p. 165–170). The situation where one international organisation is a regular member of another international organisation is rather unique, although there are many examples[5] of international organisations of which the EU is a member, equal to states. Such a situation exists due to EU law, and is strictly connected with the issue of the EU's external competence. External competence means taking such actions as negotiating and concluding international agreements with non-member states and other international organisations. This competence can be exclusive of the EU, when exer-

[4] Document L/66 – European Coal and Steel Community – Presentation of Waiver of 18/11/1952, available on the WTO website http://www.wto.org/.

[5] E.g. the Food and Agriculture Organisation of the United Nations (FAO), the European Bank for Reconstruction and Development (EBRD), the Hague Conference on Private International Law (HCCH), the International Tropical Timber Organisation (ITTO), the International Coffee Organisation (ICO), the International Cocoa Organisation (ICCO), and the International Olive Oil Council (IOOC).

cised entirely by the EU, or shared between the EU and the member states, when exercised either by the EU or by the member states. After the reform made by the Treaty of Lisbon, it is precisely stated in the treaties in which areas the EU has which kind of competence.[6] If the range of activities of the international organisation falls into a field of EU exclusive competence, the member states should not maintain relations with it individually, but it should be the EU doing it instead. Such a rule, called the principle of parallelism between internal and external powers (Leal-Arcas, 2004: p. 10–11), was formulated by the Court of Justice of the European Union (CJUE) in its famous ERTA ruling[7] from 1971.

When the EEC became a customs union, it was clear that, for some crucial areas of international trade, it was the EEC that became responsible, not the member states. In other words, in those areas that belonged to the competence that the EEC took over from the member states, it became entitled to represent them within the GATT system (Nowak-Far, 2008: p. 11), as was clearly stated by the CJEU in many rulings.[8] Nothing changed in that matter in 1992 when the EU was created, because it was not granted legal personality, thus, under international law, it could not signed treaties or be a member of international organisations.[9]

With EU membership in the WTO, the problem is that the EU does not have exclusive external competence in all the areas covered by the GATT/WTO legislation. To some of those areas, like public auction, common agriculture policy or environmental protection, the shared competence between the EU and member states applies. Because of that, the EU membership in the WTO is somehow mixed – both the EU and 28 member states are members of the WTO, making 29 WTO members altogether (Steinberger, 2006: p. 839–840).

There is also another, historical, reason for this solution. As has been already noted, the EU is a customs union. Even though it was states that were signatories to the GATT, the rights and the duties are given to the separate "customs territories".[10] Of course, those "customs territories" usually coincide with the territories of states, but not always. For example, the Faroe Islands,[11] which are a part of Denmark, are a separate customs territory and are able to negotiate their own trade agreements within the GATT/WTO system, as well as Hong Kong, which is formally a part of China, but was a signatory of the GATT and has been a member of the WTO long before China joined it in 2001 (Czubik, Kuźniak, 2004: p. 68). The same rule applies for a group of states that are integrated on the basis of a customs union, like the EEC and now the EU. Later, when the WTO was created, a provision was added to the Marrakesh Agreement (Article XII) which explicitly said that "*any State or separate customs territory possessing full autono-*

[6] The areas of exclusive competence of the EU are listed in Article 3 of the Treaty on the Functioning of the European Union (TFEU) and the areas of shared competence are listed in Article 4 of the TFEU.

[7] C-22/70 Commission v. Council, 1971.

[8] E.g. joined cases C-21/72 & C-24/74 International Fruit Company NV v. Produktschap voor Groenten en Fruit, 1972; case C-38/75 Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen, 1975; case 70/87 Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities, 1989.

[9] Although some scholars point to that in fact the EU signed some treaties before it gained legal personality. Because of that they say about the "implied legal personality" of the EU. *Vide* Raluca, 2010: p. 7–18.

[10] *Understanding the WTO*, handbook at WTO official website, www.wto.org/, p. 3.

[11] In addition, EU law does not apply on this territory.

*my in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.*"

In 1995 when the WTO was created, according to the provisions of the Marrakesh Agreement, all signatories to the GATT automatically became member states of the WTO,[12] according to the general rules of public international law considering succession. The issue of the European Communities (EC)[13] membership in the WTO has been regulated by Article XI and Article XIV, which made it clear that both the member states and the EC itself could become members of the WTO. In addition, according to Article IX, the EC was granted a number of votes equal to the number of member states that are members of the WTO, which was a very beneficial solution from the European Communities' point of view. The EC became a member of the WTO under a decision of the Council of 22 December 1994.[14]

In 2009, after the Treaty of Lisbon came into force, the EC was abolished and the EU "replaced and succeed it"[15] which, among other things, means that the EU became a party of all the international treaties that were signed by the EC, and replaced the EC in all the international organisations in which the EC was a member, including the WTO. At the moment, after 1 July 2013, when Croatia became the 28th member state, the EU has 28 votes in the WTO. Moreover, the number of votes is the same regardless of the matter that is put to a vote. This means that when the EU exercises its exclusive competence in the WTO forum, a common position is agreed upon at the EU level, the EC presents it and all the EU member states vote unanimously (Leal-Arcas, 2007: p. 84). However, in theory it is possible for the EU member states to vote differently when the matter that is put to a vote belongs to the area of competence shared between the EU and the member states (Hernando Sanz, 2013: p. 4). Because of that, it is extremely important for the member states to work out a common position, not only in this first case, but also in the second one.

In the Ministerial Conference, which is the highest decision-making body within the WTO, meeting at least every two years, the EU is represented by the EU Trade Commissioner. In the General Council of the WTO, which has a permanent character and meets on a regular basis, the EU is represented by the European Commission. The European Commission also acts on behalf of the EU in the Trade Policy Review Body and the Dispute Settlement Body (where it initiates and handles all complaints raised by the EU or against the EU), and also in all subsidiary WTO bodies (such as the Committee

[12] Article XI: "The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO."

[13] The Treaty of Maastricht changed the name of the European Economic Community (EEC) to the European Community (EC). With the European Atomic Energy Community (EAEC or Euratom) and the European Coal and Steel Community (ECSC), which existed until 2002 when the Treaty of Paris expired, they were called "the European Communities".

[14] Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), OJ L 336, 23.12.1994.

[15] According to Article 1 of the Treaty on European Union (consolidate version after the Treaty of Lisbon).

for Trade and the Environment or the Council for Trade in Goods). When the negotiations of trade agreements during the rounds are taking place, the EU is also represented by the European Commission, which is authorised to conduct such negotiations by the Council and the European Parliament. All the time the Commission has to coordinate all its actions with the EU member states. There is a special committee[16] responsible for that. It is appointed by the Council and is made up of trade experts from all the member states. It is chaired by the member state that holds the EU presidency at the moment (Woolcock, 2010: p. 24–25). The European Parliament is also involved in this process, as the European Commission is obliged to regularly provide information regarding outgoing issues in the WTO forum to the Committee on International Trade (INTA), which works within the Parliament (Bendini, 2013: p. 3–4).

As has already been stated, the situation whereby one international organisation is a member of another international organisation is rather unique. An attempt to describe the manner in which the EU and the WTO co-operate in the field of international trade has to lead to the creation of a complicated network of relations falling within the scope of the GATT/WTO law and the EU law at the same time. Nevertheless, the past decades shows that, although such a solution is uncommon and complicated, it should be assessed positively, as it seems to work quite well, although not always completely smoothly, as could be observed in the case of famous "Banana War" or the GMO Dispute (van Well, Reardon, 2011: p. 14–16).

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# ACT ON POLISH CITIZENSHIP OF 2 APRIL 2009 – FROM THE PERSPECTIVE OF INTERNATIONAL LAW

## INTRODUCTION

Lawyers specialising in international law consider the issue of citizenship on the one hand as an obligatory part of an international law lecture or textbook, and on the other as an issue still at the intersection of international, national and EU laws, but falling into the other, i.e. the constitutionalists' part, thus determining a far-reaching prudence in considering the subject and the readiness to give it up for constitutional law consideration, especially for comparative analysis. At the same time, the issue of citizenship was one of the first human rights issues[17] codified by the Hague Codification Conference as an issue of international law (Acts of the Conference), back in the 1930s. However, if the issue is considered in terms of human rights international law, it is considered in terms of the rights and freedoms of citizens, rather than an individual right: a claim to acquire and possess citizenship. It is determined by the conviction that international law – following the prevailing opinion of the doctrine – protects individuals against the status of a stateless person (Michalska, 1982: p. 148), however, is not the source of substantial law – the right to citizenship (Galicki, 1996: p. 11–12). Still, in this case the boundary between statelessness and the substantial law is not as evident as in other cases where the right to change citizenship belongs to anyone. It predominantly involves protection from arbitrary deprivation of citizenship by the state, as well as obligations of member states of the international community confronted with illegal situations, and finally (relatively new) obligations related to the state in the capacity of a sovereign meeting its responsibility – R2P (Report of the International Commission and World Summit Outcome) its citizens and people staying in its territory. These problems, when considered as research challenges, particularly given certain controversies regarding Polish law regulations, justify the issue of the right to citizenship creating new research perspectives.

According to the basic definitions of a citizen and citizenship, a citizen is considered to be "*A person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges. A* ***natural-born citizen*** *is a person born within the jurisdiction of a national government. A* ***naturalized citizen*** *is a foreign-born person who attains citizen by law*"; while the notion of citizenship de-

[17] The significance of the issue for the states is proven by their challenge to international legislation on citizenship, already after implementing bans on slavery and slaves trafficking and on humanitarian norms of the law at a time of war.

picts "*1. The status of being a citizen. 2. The quality of a person's conduct as a member of a community*" (Garner, 1999: p. 237).

Still, the comparison at that level of utterance shows a fundamental difference between defining citizenship in the world and in Poland. Polish textbooks define the citizenship as "*a particular type of legal relation of an individual with the state. It depicts an obligation of faithfulness and loyalty towards the state and institutional jurisdiction of a state of its citizens…*" (Góralczyk, Sawicki, 2009: p. 252), "*it is a permanent legal relation connecting an individual with a state*" (Bierzanek, Symonides, 2002: p. 256). The difference comes from not noticing in Polish textbooks the transition from a feudal social structure with its specific relations to a civil society, as evidenced by the reluctance of textbooks authors to define citizenship (Czapliński, Wyrozumska, 2004).

The definitions embrace all the components considered to be elements of a citizen legal status and ties. Those constituting elements of a legal status include the following:

- status attributed to an individual – a person as a member of a state/civic community. The legal title for the status may come by virtue of birth – the legal title of an individual may be the place of birth (under state jurisdiction) or naturalisation (a person born outside the state jurisdiction may gain the status on the base of a legal act, in the majority of cases it is an individual administration decision). Ehrlich (Ehrlich, 1958: p. 598) points to the appropriateness/regularity of linear alteration of setting a "man's legal status" from gaining citizenship by virtue of birth to the virtue of decision (from a status to a contract);
- membership in a political community based on a correlation of the duty of political loyalty[18] to the community and rights making use of the plenitude of citizens' rights and protection by the institutions of the community – the state. The ties of citizenship are equivalent to the legal regime of citizenship.

At the same time, the substantial aspects of law also require attention – definitions and regulations do not refer to the nature of citizenship ties (common for many domestic law systems, and even international law). Neither the law itself nor legal consideration perceive differences derived from the presence of *de facto* citizenship and classical citizenship *de iure*[19] (Swirski, Hasson, 2006)

Common acceptance and formulations reflecting this pattern of both the law and legal definition is confirmed by national and international legal texts such as encyclopaedias (Symonides, 1976: p. 220–222) and fundamental textbooks (Sørensen, 1968: p. 472; Buergenthal, Murphy, 2002: p. 207).

In the modern understanding of both citizenship and state (Dahl, 1971: p. 1–3) relations between citizenship/the citizen and the state are of constant feedback, as citizenship is the source of existence of a state considered as an institutionalised form of a community of citizens.[20] Citizenship is relative to the existence of the state and to the state–citizen relationship: "*citizenship' means legal binds between an individual and a state and does not depict ethnic origin*" (European Convention: Article 2, point A). The Polish Constitutional Tribunal has expressed the partially similar opinion that "*citizenship means permanent legal ties between the individual and the state, expressed by all their mutual rights and obligations enforced by law, and the value of citizenship is not mani-*

[18] The institution roots derive from feudal society – relations between lord and vassals.

[19] In this aspect, the legal status of the Bedouins of Negev should be perceived.

[20] In Polish there are different words meaning nationality and citizenship.

*fested solely by legal consequences, as it is also membership in political, historic, cultural and axiological community*,"[21] embracing the historical community may stress citizenship by virtue of *quasi ethnic* community, though by analogy to the perception of cultural and axiological values in the Constitution of the Republic of Poland, a reference to historic "community" may not always be the same as to the ethnic one.

Having recognized the issue of nationality – in the past almost entirely within the scope of the domestic law- as a state internal domain is the subject of competence transfer to the sphere governed by the international law. Numerous arguments, embracing both the norms of binding and non-binding, but still of normative power, international texts, as well as the international and domestic practice) support the opinion on the competence transfer. By the second half of the twentieth century, the traditionally exclusive competence of a state in the area of citizenship was evolving towards allowing other subjects, when, due, to the development of human rights in international law a division between "*the issues belonging by their nature to the competences of a state*" (the UN Charter Article 2) and those shared capacity of a state/states and international community shifted towards narrowing the state exclusive domain.[22]

Undoubtedly, the internationalisation of human rights law has resulted in international law obligations of a state regarding the scope of citizenship, though this is still relatively new. However, an analysis of texts and international practice shows a certain inconsistency in considering the issue as the exclusive competence of a state. On one hand, in its advisory opinion from 7 February 1923 on "decrees on Tunisia and Morocco citizenship", the Permanent Court of International Justice confirmed that the issues of citizenship are the exclusive competences of the state.[23] On the other hand, however, Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws regarding certain cases of statelessness stipulates that: "*It is for each State to*

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[21] This is analysed below.

[22] Schlesinger Jr. pointed that "*great liberating ideas of individual dignity, political democracy, equality before the law, religious toleration, cultural pluralism, [and] artistic freedom*" evolved from the Western tradition, but "*empower people of every continent, colour, and creed*" and are ideas "*to which most of the world today aspires*." (Schlesinger, 1992: p. 27); on the internationalisation of human rights law see Forsythe (Forsythe, 1991, p. 119–142) and Coatsworth (Coatsworth, 2003).

[23] As the French Government concluded in "*…en ce qui concerne les décrets de nationalité en Tunisie et au Maroc est ou n'est pas, d'après le droit international une affaire exclusivement d'ordre intérieur*" and the advisory opinion referring to the issue remains is still valid, the Court stated: "*Les mots «compétence exclusive» semblent plutôt envisager certaines matières qui, bien que pouvant toucher de très près aux intérêts de plus d'un Etat, ne sont pas,en principe, réglées par le droit international. En ce qui concerne ces matières, chaqile Etat est seul maître de ses décisions. La question de savoir si une certaine matière rentre ou ne rentre pas dan le domaine exclusif d'un Etat est une question essentiellement relative: elle dépend du développement des rapports internationaux. C'est ainsi que, dans l'état actuel du droit international, les questions de nationalité sont, en principe, de l'avis de la Cour; comprises dans ce domaine réservé. Aux fins du présent avis, il suffit de remarquer qu'il se peut très bien que, dans une matière qui, comme celle de la nationalité, n'est pas, en principe, réglée par le droit international, la liberté de 1'Etat de disposer à son gré soit néanmoins restreinte par des engagements qu'il aurait envers d'autres Etats. En ce cas, la compétence de l'Etat, exclusive en principe, se trouve limitée par des règles de droit international. L'article 15, paragraphe 8, cesse alors d'être applicable au regard des Etats qui sont en droit de se prévaloir desdites règles ; et le différend sur la question de savoir si l'Etat a ou n'a pas le droit de prendre certaines mesures, devient dans ces circonstances un différend d'ordre international qui reste en dehors de la réserve formulée dans ce paragraphe. Ecarter la compétence exclusive d'un Etat ne préjuge d'ailleurs aucunement la décision finale sur le droit que cet Etat aurait de prendre les mesures en question*." (French Government).

*determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.*" (Convention 1930) The discrepancy in those legal statements is *prima facie* visible. Both the PCIJ and states-parties to the Convention consider citizenship issues to be the exclusive competence of a state, though obviously having the right to subdue to treaty stipulations obliging it to restrict its regulatory capacity (following the PCIJ legal standing and the Convention stipulation, their adoption may influence law regulations within treaties). However, the Convention also provides norms "*of the international custom, and principles of law generally recognised,*" limiting a state's capacities in discretionary citizenship issues. It requires the legislator to list applicable norms, traditionally forming the catalogue of norms. It is possible to resort solely to the requirement of "effective nationality", quoted in the case of "*Nottebohm (Liechtenstein v. Guatemala)*" and Article 3 of the PCIJ Statute, as well as the right to diplomatic and consular protection (*LaGrand*). The restriction is advocated in some way by the dissenting opinion of Judge Read in the "*Nottebohm*" case,[24] though international practice determined by multinational treaties regulating issues of citizenship proves to the contrary. This is the case because the international agreements concluded since the inter-war period, including the Minority Treaties of the League of Nations (such as the stipulations of Articles 1–6, Chapter 1 of the Allies and the Republic of Poland Treaty – i.e. the Little treaty of Versailles) or the Hague Convention on some issues regarding a conflict of laws on citizenship and the Protocol on Cases of Statelessness (of 12 April 1930) were the tools of states-parties to protect an individual from the status of a stateless. The desire of states to protect an individual is expressed *expressis verbis* in the Preamble to the New York Convention on the Nationality of Married Women (from 20 February 1957) *"… recognizing that conflicts in law and in practice with reference to nationality arise as a result of provisions concerning the loss or acquisition of nationality by women as a result of marriage of it dissolution or of the change of nationality by the husband Turing marriage, recognizing that in the Article 15 of the Universal Declaration of Human Rights the General Assembly of the United Nations has proclaimed that "everyone has the right to nationality" and that "no one shall be arbitrary deprived of his nationality or deprived the right to change his na-*

[24] „*… Applying this rule to the case, it would result that Liechtenstein had the right to determine under its own law that Mr. Nottebohm was its own national, and that Guatemala must recognize the Liechtenstein law in this regard in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality. I shall refer to this quality, the binding character of naturalization, as opposability.*

*No 'international conventions' are involved and no 'international custom' has been proved. There remain 'the principles of law generally recognized with regard to nationality.' Yet Guatemala concedes that there are no firm principles of law generally recognized with regard to nationality, but that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this regard–opposability–are limited not by rigid rules of international law, but only by the rules regarding abuse of right and fraud. (…)*

*In the first place, I do not think that international law, apart from abuse of right and fraud, permits the consideration of the motives which led to naturalization as determining its effects. (…)I have difficulty in accepting the position taken with regard to the nature of the State and the incorporation of an individual in the State by naturalization. To my mind the State is a concept broad enough to include not merely the territory and its inhabitants but also those of its citizens who are resident abroad but linked to it by allegiance. Most States regard non-resident citizens as a part of the body politic.*" p. 4.

*tionality", desiring to co-operate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to sex.*" The regulations met numerous individual cases as well as situations on the scale of humanitarian catastrophe regarding statelessness. It is hard to remain indifferent to the price that the human rights protagonists of the UN Bill of Rights paid for *quasi consensus* on not obstructing at the UN forum the Human Rights Pact by its antagonists defending the *ancien régime* of state omnipotence . The price paid included abandoning the right to citizenship, comforted by the stipulation of Article 24 (3) of the Covenant on Civil and Political Rights, whereby "Every child has the right to acquire a nationality." This concession on the universal forum was accompanied by sustaining the right to citizenship on the regional co-operation forum – the American Convention of Human Rights (from 1969) confirmed that "Every person has the right to a nationality." (Article 20 (1)) The resignation from Pact repeating the stipulation of declaration of Article 15(1), was never intended by the states and international institutions (deriving from the foundation of meeting the obligation to respect fundamental rights and freedoms) to be giving up the system of values stipulated by Article 15 of the Universal Declaration. The UN works were taking place in two directions: towards resigning from promotion of the right to citizenship (thus the claim to citizenship) resignation from its confirmation in the Pact on the one hand, while confirming the obligation to respect individual rights to citizenship and creating a regime for its implementation on the other, through the Convention on the Reduction of Statelessness of 1961 (Jennings, Watts, 2011: p. 868, 889).

States desired to protect individuals against an unwanted status, and communities against an unwanted phenomenon, with both desired balanced between the interests of the individuals and the communities (Goodwin-Gill, McAdam, 2007). Reality proves that a stateless person tends to be of relatively lower economic and social status in comparison to the one privileged with citizenship (Cooter, Ulen, 2012: Chapter 4. Appendix),[25] as the desired protection of fundamental rights and freedoms of an individual is fully performable in respect to such a person (Freeman, 2007: p. 22–31, 70–89). Lack of citizenship may result from a number of factors, including those in connection with the negative coincidence of the right to citizenship of a newborn, hereditary succession of an underprivileged status, regulations on married women citizenship, as well as factors resulting in refugee status. Among them, the underprivileged status of a refugee raised objection, as the case of a refugee most often poses a threat or infringement of one of the "*Four Freedoms*" (Roosevelt, 1941), i.e. freedom of speech, freedom of worship, freedom from want or freedom from fear.[26] In most cases, not respecting fundamental rights enforces the migration of an individual, i.e. exile. This raises the question of the legal consequences of not securing individual rights in the situation of existing international law of human rights, for other states and other members of the international community. Despite agreement over the home state's obligation to protect individual rights and freedoms, this is hard to acknowledge, as for many years (Symonides,

[25] Opinion to the contrary see: Judge Zbigniew Cieślak (Dissenting Opinion).

[26] See Geneva Convention Relating to the Status of Refugees (from 28 July 1951); Preamble "The high Contracting parties, considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,".

1991) it appears that the only obliged is the state blemed for infringing human rights It is acknowledged that in the situation of a state infringement of fundamental rights and freedoms, other members of the international community are empowered, if not obliged, to counteract in spite of a lack of clarity as to the scope of rights, and in particular of obligations. Thus, states rather avoid taking responsibilities, being aware of the consequences of coming between an infringing state's execution of its sovereignty[27] and its own citizens' interests.[28] States, nations are also reluctant, or at least reserved, in specifying their obligations towards the victims of infringers, in particular regarding the implementation of "R2P".

## I. IMPULSES FOR ACTION – CITIZENSHIP STAKEHOLDERS

Due to its duality, the right to citizenship should be considered from two perspectives: the obvious perspective of a state – civil society, as well as from the perspective of an individual lacking citizenship, whether in the situation of wanting to obtain it or wanting to change it. Both perspectives obviously reflect not only different points of view, but also competitive interests. The international perspective should not reject the state one, as such an exaggerated demand (relative the adopted perspective), even if justified, by moral standards would result in gaining nothing. However, the fact that the individuals interested in gaining citizenship with all the rights and privileges are the people in need, i.e. the already mentioned refugees, should not be neglected.

An analysis of the issue based on the legal criterion allows the following categories of refugees to be differentiated:

- exiles resulting from the complexity of events preceding and following the First World War. Among them holders of a "Nansen passport" (Jaeger, 2001: pp. 727–736): Russians (not protected by the USRR) and Armenians (former subjects of the Ottoman Empire, not protected by Turkey)[29] as well as Assyrians, Assyrian and Chaldean, Syrians or Kurds, (not protected by any state), and Turks (not protected by Turkey);[30]

[27] As refers to the responsibility for protection ("R2P") "*Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*" the UN General Assembly in the referred to Resolution (A/60/L.1).

[28] I am aware of positioning the issue on the intersection of two institutions, i.e. refugees and exiles; the institutions are distinct For sake of clarity: "asylum" is giving shelter on the state's own territory to those prosecuted or threatened with prosecution, and it is manifestation of internal competence of the state. Pursuant to Article 14 of the Universal Declaration of Human Rights (1) *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*") is the right of an individual, not having, however, equivalent of obligation of another State. The power of the Convention regulates the status of a person who "*because of a reasonable fear of persecution because of race, religion, nationality, membership of a particular social group or political conviction due to living outside of the State of which he is a citizen, and can or may not want to because of these concerns, benefit from the protection of that country, or has any citizenship and, as a result of similar events, being outside the country of his former permanent residence cannot or does not want, return to his State*." This status provides international protection.

[29] The Agreement of 12 May 1926 regulated the status of refugees The international instruments texts see Collection…

[30] Agreement of 30 June 1928.

– exiles enforced by the authoritarian and totalitarian regimes activities before the Second World War: Spanish,[31] German[32] and Austrian[33] victims of Nazism;
– exiles of the years 1946–1951 resulting directly and indirectly from the Second World War, during which the mass scale expulsion of civilians took place in occupied territories of the "Axis powers", and those attacked by the USSR caused German civilians to escape the attacking army, as well as the forced displacement of German minorities, and finally political changes in states under Soviet dominance caused the population to escape (their climaxes leading to in repressions of liberation movements such as the Berlin and Hungarian uprisings or the Prague Spring);
– exiles of the recent period resulting from instability in the 1990s caused by conflicts across Europe (including the former USSR and the former Yugoslavia).

Regardless of this periodisation, exiles may be identified on the basis of geopolitical criteria covering the following:
– The Middle East initiated by the Arab rejection of the legal and actual consequences of the United Nations General Assembly Resolution No 181 of 29 November 1947 (British mandate of Palestinian territory decolonisation formulas[34]) and the war against the newly emerged state of Israel. Exile has been powered by successive waves after wars against Israel, the Kingdom of Jordan and an unsuccessful attempt by Arab immigrants to appropriate power in Lebanon;
– Africa and Asia, caused by conflicts in states set up after decolonisation (escaping from the new State power, e.g. the Moluccas or "boat people" as well as the consequences of civil wars, separatism, ethnic and national feuds, etc.)

And the scale of this exile has not been reduced.

*The exile may also be analysed by its reason. Due to that differentiate the* exile resulting from the infringement or the threat of infringement of individual rights and freedoms immediately under the Geneva Convention from migration for purely economic reasons. Italians seeking employment migrating to neighboring countries after WWII – make a good example of a broader phenomenon of "migrant workers". On the other hand, it is important to be aware of the correlation between poverty and the violation of human rights and the lack of the rule of law (as a result, exile is *de facto* caused by a joint violation of "four freedoms", namely religious and ethnic discrimination results in economic discrimination and impairment (Staszewski, 2003)). The principle of the indivisibility of individual rights and freedoms forbidding to treat violations of economic, social and cultural rights separately from violations of first-generation rights and freedoms should not be forgotten.

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[31] Convention of 28 October 1933.

[32] Convention of 10 February 1938.

[33] Protocol of 14 September 1939.

[34] Its essence is presented in the following decision: "*The Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948. (…) The mandatory Power shall advise the Commission, as far in advance as possible, of its intention to terminate the mandate and to evacuate each area. The mandatory Power shall use its best endeavours to ensure that an area situated in the territory of the Jewish State, including a seaport and hinterland adequate to provide facilities for as substantial immigration, shall be evacuated at the earliest possible date and in any event not later than 1 February 1948. (…)*

*The period between the adoption by the General Assembly of its recommendation on the question of Palestine and the establishment of the independence of the Arab and Jewish States shall be a transitional period.*"

## II. THE LAW

The international community has taken the challenge to defend human rights of (the underprivileged status of) stateless people by implementing laws confirming the right to citizenship, allowing for the alteration of citizenship and forbidding the arbitrary deprivation of citizenship. These fundamental civil rights and freedoms have already been confirmed by Article 15 of the Universal Declaration of Human Rights[35] and their warranties extended by Article 12.4 of the International Covenant on Civil and Political Rights, stipulating that "No one shall be arbitrarily deprived of the right to enter his own country." However, this response has proved ineffective in preventing those fundamental human rights and freedoms from being infringed. There have been efforts to implement universal and regional standards, of which the European Convention on Nationality is one regional example. Its authors, being aware of the challenge to reconcile the traditionally (defensively) considered powers of the state, while also meeting the European model of human rights, sought an acceptable compromise. Article 3 of the Convention confirms the historic right of a state to statutorily define who is its citizen, and sets out the requirement of making citizenship under national regulations compatible with international treaties, as well as "customary international law and principles of law generally recognized with regard to nationality" (Czapliński, 1998: p. 49). The Convention authors went even further, having formulated rules that cannot be contradicted by national law that "*a. everyone has the right to a nationality; b. statelessness shall be avoided; c. no one shall be arbitrarily deprived of his or her nationality; d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.* Normative regulations of the Convention granted the right of citizenship to individuals belonging to groups particularly disadvantaged as regards citizenship, obliging States to enable the acquisition of citizenship *ex lege*. This special protection concerns: children ("one of whose parents possesses, at the time of the birth, the nationality of that State Party"); infants (one of whose parents possesses, at the time of the birth the nationality of that State Party"); infants (found in the State Party territory who would otherwise be stateless), who do not acquire another nationality at birth.

The Convention also restrains the freedom of naturalisation requirements and conditions by making it obligatory for "persons lawfully and permanently residing[36] in its territory" and the obligation to facilitate naturalisation for: spouses and children of citizens; children of naturalised citizens; adopted children; people born in a State and legally and permanently residing there; individuals who have legally and permanently resided in a State for a period since before they were 18 years of age, determined by the internal law of that State Party; stateless individuals and individuals recognised as refugees lawfully and permanently residing in the State. Article 7 of the Convention also reinforced the illegality of the *ex lege* loss of citizenship at the State's initiative, allowing

[35] (1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[36] However, "the conditions for naturalisation, shall not provide for a period of residence exceeding ten years before the lodging of an application."

as sole exceptions a voluntary change of nationality or committing actions justifying the loss (acquiring the citizenship by means of fraudulent conduct, false information or concealment of any relevant fact; service in a foreign military service; conduct seriously prejudicial to the vital interests of the State; lack of actual ties; and establishing during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled. Still, concerning the conformity of Polish regulations with the Convention, it is particularly important that every state decision concerning an individual acquisition, loss or regaining of nationality is justified, and every decision is open to administrative or judicial review (Article 12 of the Convention).

## III. IMPLEMENTATION OF INTERNATIONAL LAW AND THE EUROPEAN CONVENTION – THE POLISH CASE

On 14 February 2012, two years after its enactment, the Act on Polish Citizenship from 2 April 2009 was published. Its signing by the President of the Republic of Poland was preceded by a Presidential complaint[37] and a ruling of the Constitutional Court from 18 January 2012 (M.P. 2012). In the preventive control judgment, the Court declared that Article 30 governing the recognition as Polish citizen[38] complied with the Constitution.

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[37] From 27 April 2009, filed under Article 122.3 of the Constitution

[38] Recognition as a Polish citizen can take place in relation to:

1) a foreigner residing continuously in Poland for at least three years under a settlement permit, a residence permit for a long-term EC resident or under a permanent residence permit, who has a stable and regular source of income in Poland as well as the legal title to dwelling premises;
2) a foreigner residing continuously in Poland for at least two years under a settlement permit, a residence permit for a long-term EC resident or under the permanent residence permit, who:
   a) remains married to a Polish citizen for at least three years, or
   b) has no citizenship;
3) a foreigner residing continuously in Poland for at least two years under a settlement permit, obtained in connection with having a refugee status granted in the Republic of Poland;
4) a minor foreigner with a parent who is a Polish citizen, residing in Poland on the basis of a settlement permit, a residence permit for a long-term EC resident or under the permanent residence permit, where the second parent. who does not have Polish citizenship, has agreed to this recognition;
5) a minor foreigner, with at least one parent whose Polish citizenship has been restored, if the minor resides in Poland on the basis of a settlement permit, a residence permit for a long-term EC resident or under the permanent residence permit, where the second parent, who does not have Polish citizenship, has agreed to this recognition;
6) a foreigner residing continuously and legally in Poland for at least 10 years, who meets all the following conditions:
   a) he has a settlement permit, a residence permit for a long-term EC resident or a permanent residence permit,
   b) he has a stable and regular source of income in Poland as well as the legal title to dwelling premises;
7) a foreigner residing continuously in Poland for at least two years under a settlement permit, obtained in connection with Polish ancestry.

2. A foreigner applying to be recognised as a Polish citizen, except for a foreigner as referred to in section 1 points 4 and 5, is obliged to have a command of the Polish language, confirmed under

The Court concluded that the extension of the scope of recognition as Polish citizen is consistent with Article 137 of the Constitution. The case was considered in the full court[39] and there were dissenting opinions to the judgment from the following judges: Zbigniew Cieślak, Maria Gintowt-Jankowicz[40] Wojciech Hermeliński, Marek Kotlinowski, Teresa Liszcz and Marek Zubik.

Justifying the constitutional complaint, the President raised the argument that regulation of Article 137 of the Constitution with regard to granting Polish citizenship by the President of the Republic of Poland codifies the traditional norm – common law sanctioned[41] citizenship awarded by the Head of State,[42] and in his opinion the other cases (as indicated in Article 34 (1) of the Constitution) are incidental regulations derogating from the general rule of granting citizenship in the awarding act. The President also maintained that the provision regulating the prerogatives of citizenship is a constitutional norm of particular importance – its policy. The President indicated that the law on Polish citizenship of 1962 actually described the conditions for recognition as a citizen, and their extension results in depriving it of an exceptional character, which "leads to the erosion of Presidential prerogatives" (Constitutional Court: Press release). The President also pointed out that, by the Citizenship Act, the Head of State, as a representative of the State community, accepts a new member to the political organisation of citizens, to the State.[43] In the opinion of the President, the legislator limited the scope of the President's competence, as set by the constitutional legislator, in a way that is unacceptable. The law on obtaining citizenship through an administrative decision de facto, identical with the awarding[44] ,in the opinion of the President, violated regulation of Article 137 of the Constitution.

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an official certificate referred to in Article 11a of the Act on the Polish language as of 7 October 1999, a school graduation certificate in the Republic of Poland, or a certificate of graduating from a school abroad, with the Polish language of tuition.

3. Article 64 section 4 of the Foreigners Act of 13 June 2003 will be applied accordingly to determine whether a foreigner resides continuously in Poland.

[39] Andrzej Rzepliński – Presiding Judge, Stanisław Biernat, Zbigniew Cieślak, Maria Gintowt-Jankowicz, Mirosław Granat, Wojciech Hermeliński, Adam Jamróz, Marek Kotlinowski, Teresa Liszcz, Małgorzata Pyziak-Szafnicka, Stanisław Rymar, Piotr Tuleja, Sławomira Wronkowska-Jaśkiewicz, Andrzej Wróbel, Marek Zubik.

[40] I Judge Repporteur; Sławomira Wronkowska-Jaśkiewicz was II Judge Repporteur.

[41] The applicant adduced law doctrine as an evidence.

[42] The argument, however, was not supported by facto as the citizenship of II Republic of Poland was awarded by the Minister of the Interior (after consultation with the authorities of an applicant province and the respective authorities). A prerequisite was an impeccable life style, at least ten year stay in Poland and command of Polish. Regulations of other Member States do not confirm that, so for example, pursuant to Australian Act On Citizenship „*14. (1) The Minister may grant a certificate of Australian citizenship to a person who has made an application in accordance with section 13 and satisfies the Minister.*" (Australian Act).

[43] Sentence, justification. This is consistent with the case-law, as indicated the Constitutional Court. Recalling the Supreme Administrative Court resolution from 9 November 2998 ref Act OPS 4\/98: "the President of the Republic of Poland (. . . ) when issuing the law on Polish citizenship, acted as Head of State, symbolizing the Majesty of the State, its sovereignty, fully discretionary authority of the Member State as regards the inclusion of the alien to the community of citizens of the Republic of Poland ").

[44] "Besides clearly referred to in the Constitution Presidential prerogatives implemented in momentous act of adoption new citizens to the community, equal indeed is the decision of the State administration."

## SCOPE OF ANALYSIS

The statutory regulation of the Polish Citizenship Act of 2009 is another amendment to the provisions. The very fact of relatively frequent changes in the issue seemingly stable, as regulated by traditional norms, thus predestined to stability because regulating constitutional issues deserves legal analysis. The Polish legislator regulated the law on citizenship in subsequent Acts on Citizenship: 20 January 1920 (Dz.U. 1920), of 8 January 1951 (Dz.U. 1951) and of 15 February 1962 (Dz.U. 2000), each of which, except for the amendment of 1951, subjected it to numerous profound changes. It may be concluded that laws reflect the state-making or political-changing events of a similar nature, though this perception is contradicted by the law-making process after the transformation of 1989, firstly amending and finally adopting the new Act and serious dispute over constitutional principles.[45]

Previous changes in Polish citizenship law have already adjusted it to international standards of human rights. These adjustments were connected with the removal from Polish law of penalties (*sui generis*) of citizenship deprivation, and the effects of the decision. The importance of subsequent changes in law cannot be overestimated:

- firstly, to repeal the binding law within the scope of Article 12 providing for such a possibility toward a citizen residing abroad, including children;
- secondly, to more leniently amend the exclusion of children from the punishment.

Legal formulas for the deprivation of citizenship in Poland can be traced in both foreign and domestic solutions, namely in the provisions of the Act of 20 January 1920, on Polish State nationality, whose Article 11 allowed, as one of the instances of citizenship the "loss of Polish citizenship in the following cases: (…) 2) through the adoption of a public office or joining the military service of a foreign country without the consent of the competent provincial Governor (Government Commissioner for the City of Warsaw), given in cases where the intention to join the military service in a foreign country, in consultation with the relevant District Corps Commander."

It is worth remembering, despite the legal inappropriateness of this personal remark, that the constitutional complaint was lodged by President Lech Kaczyński and reiterated by Bronisław Komorowski. In this situation, it seems reasonable and necessary to subject the Polish citizenship law to analysis in the context of international law, answering not only the question of its conformity/conflict with international law, but also of unregulated issues that the legislator should have regulated. This is important as the constitutional complaint, despite referring to issues derivative to international law, was left on the margin of political and legal reflection, despite being obviously significant for at least two equivalent perspectives, namely the head of state prerogatives and an individual right to citizenship. Concerning these issues, the fundamental controversy should not be neglected, as the President perceives the citizenship solely as a tool "facilitating the settlement of the legal status of persons of Polish origin and persons residing in Poland due to political and social changes and massive relocations after the First and Sec-

[45] The Constitutional Tribunal pointed out that "The binding law of 1962, despite its numerous amendments, ceased to meet many modern challenges, such as: numerous migrations, multiple citizenship, frequent marriages of Polish citizens with foreigners and resulting issues of citizenship change by the spouse, the citizenship of children of married couples in which one spouse is not a Polish citizen, not settling a number of" historical precedents", such as the citizenship of Poles who lost it against their will."

ond World Wars."[46] According to the Petitioner, the continuation of recognition as Polish citizen in the Act binding in 1962, as well as in the Act in question of 2009, is of no practical purpose, and thus not sufficiently justified. The President not only dismissed the new regulation, but also denied the earlier legal status, as in his opinion the premises for derogation from granting citizenship ceased to exist due to substantial changes, but also rejected the recognition of the right to citizenship as a human right. In a parliamentary answer to the constitutional complaint, the Speaker stated that the regulation of Article 30 of the Act of 2009, extending the scope of reasons for recognizing Polish citizenship, is consistent with Article 137 of the Constitution. The extended disquisition contained arguments above all from the constitutional scope of the law. Such narrowing argumentation isn't surprising although can raise doubts The Speaker indicated constitutionally approved ways of acquiring citizenship, among which Article 34.1 enumerates birth to parents being Polish citizens (*ius sanguinis),* and provides for its voluntary acquisition at the request of a person, by power of the law or an act of the respective authorities. According to the Speaker, by the power of the Constitution, the President is entitled to grant citizenship to an individual, and the Constitution itself does not prohibit delegating the power "in respect of granting citizenship" to other authorities. Thus, the Speaker continued, since 1920 two norms of granting citizenship were created in Polish law: granting citizenship and recognition as a citizen by a discretionary act. The amendment introduced in the respective area by the Act of 2009 on the one hand maintained the empowered competence of governmental administration, i.e. a voivode, while on the other hand extended the group of persons authorized to citizenship by virtue of recognition specifying premises for recognition or refusal to recognize as the citizen. A specifically individual decision of recognition as a citizen is, in that case, by the power of the Act, an administrative decision; a voivode is obliged to objectively verify whether an applicant meets the requirements and the decision is subject to judicial review. On the other hand, the presidential decision, in the Speaker's opinion, is discretionary and thus not subject to judicial review.

Paradoxically, the Presidential representative present at hearing consistently considered as unconstitutional the Act of 2009, submitting the decision-making authority to judicial review, thus the human right to be recognized as a citizen.

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[46] The Constitutional Tribunal shared the standpoint: "Recognition as Polish citizen provided by the Act of 1920 was to serve the settlement of the legal status of Poles (people of Polish descent) returning to the reviving homeland, and persons residing in the territory of the new Republic of Poland. Due to the emerging State and a new category of its citizenship, the institution in question was, first and foremost, to confirm the readiness of great number of people who until now could not be Polish citizens. Recognition as a citizen then, had a specific character, not so much an act of incorporating a foreigner to the community of citizens, but rather making this community constitutional. That is evidenced by the wording of the Act: "Polish citizenship serves any person (…) who" or "Citizens of other countries who are of Polish descent and their progeny will be recognized as citizens of The Polish State". The Act differentiated granting citizenship "at the request of a person who wants to obtain it."

Granting the citizenship provided by the Act of 1951 served to settle the citizenship of persons who had permanently resided in Poland since at least 9 May 1945 without having a specific citizenship. This Act also provided for recognition as a citizen, as well as allowed citizenship to be granted. Both Acts, while providing recognition of citizenship as a means to its acquisition, aimed at clarifying / ordering the issue after two world wars that resulted in profound territorial and political changes, accompanied by a massive relocation of population. Recognition as a citizen met the requirement of settling citizenship issues after the disasters."

In the closing remarks, the Speaker referred to international law arguments, specifically saying that "the disputed Act of 2009 implements the European Convention on Nationality adopted by the Council of Europe on 6 November 1997, signed by Poland on 29 April 1999 though still not ratified."

Pursuant to the Convention's requirements, the Act facilitates the acquisition of citizenship for foreigners who legally reside in Poland, and provides for the use of an administration decision.

The issues were not addressed by the President, thus neither the Petitioner nor the Speaker explained the reasons for Poland signing the European Convention on Nationality and not ratifying it for over twelve years, i.e. what has changed in the citizenship policy of Poland as regards the Convention of the Council of Europe, or what important issues are protected by its non-ratification and not implementing the Convention.

The Attorney General also stated that Article 30 of the Act of 2009 is not inconsistent with Article 137 of the Constitution. The Attorney General supplemented constitutional and legal arguments with a politically-interesting dispute with the Presidential standing, stating that arguments valid after the First and the Second World Wars have been exhausted.[47] He recalled the Act on Repatriation of 9 November 2000, which indicates that a person arriving in Poland on the basis of a repatriation visa acquires Polish citizenship by virtue of law as of the day of crossing the border, so without the participation of the President, by an administration decision of issuing a repatriation visa.

The Tribunal recognised the acquisition of Polish citizenship: *ex lege* or *ius sanguinis*; and by being granted by the President ("a solemn, peremptory, discretionary and unilateral act by means of which a foreigner is included into the community of the Polish state") and bound by an administrative decision, (a voivode is obliged to issue the decision when the foreigner meets the eligible requirements, and recognition may only be refused when "the acquisition of citizenship would pose a threat to the defence or security of the state, or to the protection of security and public order," as administrative decision, is subject to judicial review).

[47] The Constitutional Tribunal rejected this opinion. ("Indicated reasons for considering as a citizen are of solely historical value and are no longer valid") accepting the Presidential standing. Still, neither the President nor the Constitutional Tribunal referred to facts regulated by citizenship restoration under Article 38 of the Act of 2009. To "1. A foreigner who lost his Polish citizenship before 1 January 1999, on the basis of: 1). 11 or 13 of the Act of 20 January 1920 on citizenship of the Polish State (Journal of laws No. 7, item 44, as amended. 7)), 2); 11 or 12 of the Act of 8 January 1951 on Polish citizenship (OJ No 4, item 25), 3); 13, 14 or 15 of the Act of 15 February 1962 on Polish citizenship (OJ 2001 No. 28, item 353, as amended. 8)) Polish citizenship restored, at the latter's request.

2. The Polish citizenship shall not be restored to a foreigner who: 1) voluntarily joined the armed forces of the Axis or their allies in the period from 1 September 1939 to 8 May 1945; 2) held the public office in the period from 1 September 1939 to 8 May 1945 in the Axis or their allies; 3) acted to the detriment of Poland, especially its independence and sovereignty, or participated in human rights violations.
3. Polish citizenship shall not be restored to a foreigner if it constitutes a threat to national defence or State security, or the protection of the safety and public order."

## FINAL REMARKS

The Act, by the power of Article 30, has significantly broadened the number of approved cases and, by abolishing discretion, created simplified and transparent implementation instruments – having met the statutory requirements – for the right of citizenship and institutional control by the state of law. The Act does not pose any threats to state security, as the respective decisions are closely related to Article 64.1 of the Act on Foreigners, setting conditions on granting a permit for entry into and residence of a long-term resident of the European Communities, Permanent residence is regulated in the Act on Entering, residing and Exiting from the Republic of Poland of Nationals of the European Union Member States and their Family Members of 14 July 2006 (Dz.U. 2006), while refugee residence is covered by the Act on Granting Protection.

The Act on Citizenship entering into force may bring Poland closer to the ratification of the signed Convention on Nationality of the Council of Europe. These undertakings comprise a long, difficult and controversial process of redefining citizenship, and of understanding such fundamental notions as nation and state. Proof of how important and controversial this is comes in the form of the dissenting opinions to the judgment of the Constitutional Tribunal – derived from different philosophy backgrounds, namely:

- on one hand by Judge Hermeliński: "… I wish to clearly emphasise that – similarly to the majority of the bench adjudicating in this case – I recognise that the Act under analysis manifests the intention to simplify (…) and to modernise the legal institution of Polish citizenship, and to adjust it to the up-to-date legal and social requirements (including also Poland's membership in the European Union as well as the requirements of the European Convention on Nationality, adopted by the Council of Europe of 6 November 1997). However, this does not change the fact that Article 30(1) of the challenged Act fails a confrontation with the relatively conservative provisions on citizenship included in the Constitution. Thus, the implementation of examined intentions of the legislator should be regarded only on condition that the Constitution will be amended."
- on the other hand, Judge Liszcz stated, "it is primarily the interest of the state. The new regulation has undoubtedly arisen under the influence of the not-yet-ratified European Convention on Nationality, takes into account only the interest of foreigners who apply for Polish citizenship – often not due to ties that bind them with our country, but for the purpose of improving their social status, or even in order to avoid the threat of extradition. It does not, however, take into account the interests of the Republic of Poland to a sufficient extent, making it possible for its authorities to implement a reasonable immigration policy. The Constitution links citizenship with having certain particular political rights. The liberalisation of acquiring Polish citizenship on the basis of "claims" undermines the value of citizenship, which negatively affects the authority of the Republic of Poland; in my view, this also implies the non-conformity of the challenged regulation to Article 1 of the Constitution, which stipulates that the Republic of Poland is the common good of all its citizens."

It seems, however, that, despite the new Act, members of the civil society are not linked with a narrow creek of doubts, but rather divided by the ocean of the world visions and notions. Still, re-capitulating the conclusion of the analysis, one should remind,

regardless of the reasons underlying the State not regulating the right to citizenship in the form of a treaty (in the Covenant on Civil and Political Rights), neither protecting against the arbitrary deprivation and change of citizenship and that negligence evaluation, in the case of Poland, or any other state, does not change the legal nature of the Universal Declaration of Human Rights, support for this Declaration constitutes the unilateral act for any single state. In this respect the primary importance has article 15 of the Universal Declaration of Human Rights It seems that neither the Republic of Poland nor any of its governments would like to give impression that is not bound by the commitment expressed in the Declaration to respect its standards.

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# ECOWAS: A PROMISE OF HOPE OR SUCCESS FOR SUB-REGIONAL ECONOMIC INTEGRATION IN WEST AFRICA

## 1. INTRODUCTION

The launch of theEconomic Community of West African States (ECOWAS) represented one of the most significant of numerous examples of regional integration among developing countries, it was the culmination of a long and complex history of West African economic co-operation dating back to the colonial era and continuing today in a broad range of institutional manifestations. The size, diversity, and economic and political importance of the countries comprising this grouping mean that the ultimate success or failure of ECOWAS will have major repercussions on the African Continent and beyond.[1]

## 2. HISTORICAL BACKGROUND OF ECOWAS

ECOWAS is one of the six main sub-regional economic communities in Africa in addition to Common Market for East and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union (AMU) and the Southern African Development Community (SADC). The idea to create a regional economic organisation for the West African sub-region dates back to 1964. It was the brainchild of President William Tubman of Liberia. He conveyed a meeting of four West African countries; Cote d'Ivoire, Guinea, Liberia and Sierra Leone, to explore the feasibility of setting up a Free Trade Area. Almost a year later, in February 1965, diplomats from the four states met again in Freetown, Sierra Leone, to draw up a document that would have led to the formation of what they called an Organisation for West African Co-operation. However, these early initiatives did not materialise due to a lack of sincerity on the part of the West African leaders, and their strong adherence to their newly won political sovereignty (Amadu, Omotosho, 2011: p. 11).

Seven years later, in April 1972, a more frantic effort was made to actualise the idea mooted by President Williams, this time by General Gowon of Nigeria and General Eyadema of Togo, who travelled to twelve countries within West Africa and held viable consultations with their fellow leaders to bring to existence a regional economic com-

[1] Andrew A.W., "The Economic Community of West African States (ECOWAS) in Comparative Perspective: The Lessons of Asian, Caribbean, and Latin American Integration", available online at http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA089017, accessed 10 august, 2013.

munity. As a follow up, a meeting was then convened in Lomé, Togo from 10–15 December 1973, which studied a draft treaty. This treaty was re-examined at a meeting of experts and jurists in Accra in January 1974 and by a ministerial meeting in Monrovia in January 1975. Finally, fifteen West African countries signed the treaty for an Economic Community of West African States in Lagos, Nigeria on 28 May 1975.[2] The protocols launching ECOWAS were signed in Lomé, on 5 November 1976.[3] In July 1993, a revised ECOWAS Treaty was signed designed to accelerate economic integration and to increase political co-operation. ECOWAS was originally a union of sixteen West African states forming a single community. However, only fifteen nations now form this community as the Islamic Republic of Mauritania withdrew on 26 December, 1999 (Niger, 1999: p. 4).[4] It is a tri-lingualunion of eight French, five English and two Portuguese speaking nations. The French speaking countries are: Benin, Burkina Faso, Cote D'ivoire, Guinea, Mali, Niger, Senegal and Togo. The English speaking nations include: The Gambia, Ghana, Liberia, Nigeria and Sierra Leone while the Portuguesespeaking nations include: Cape Verde and Guinea Bissau – Francophone, Anglophone, and Lusophone nations respectively (Ibegbulam, 2011: p. 31).[5]

## 3. AIMS AND OBJECTIVE OF ESTABLISHING ECOWAS

According Article 3 of the provision of the ECOWAS treaty, the aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African Continent. The Community will, by stages, ensure[6](i) the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism and legal matters; (ii) the harmonisation and co-ordination of policies for the protection of the environment; (iii) the promotion of the establishment of joint production enterprises; (iv) the establishment of a common market through: the liberalisation of trade by the abolition, of customs duties on imports and exports among member states, and the abolition of non-tariff barriers among member states in order to establish a free

[2] The Economic Community of West African States (ECOWAS) was established via a treaty on 28th May, 1975, in Lagos, Nigeria.

[3] 15 West African Countries signed the treaty for an Economic Community of West African States (Treaty of Lagos) on 28th May, 1975, 1010 U.N.T.S. 17, 14 I.L.M. 1200. The Protocols launching ECOWAS were signed in Lome, Togo on 5th November, 1976.

[4] Available online at http://www.africa-union.org/root/au/recs/ECOWASProfile.pdf, accessed 9 August, 2013

[5] See also Population Source – The Economic Newspaper Ltd. 2000 or http:www.is.co.za/af/regorg/unity or www.ecowas.int accessed on 9 August, 2013.

[6] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou, 24th July, 1993, Article 3. Available online at http://www.comm.ecowas.int/sec/index.php?id=treaty, accessed 10 August, 2013.

trade area at the Community level; (v) the adoption of a common external tariff and, a common trade policy towards third countries; (vi) the removal, between member states, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment; (vii) the establishment of an economic union through the adoption of common policies in the economic, financial social and cultural sectors, and the creation of a monetary union, (viii) the promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments; (ix) the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium-sized enterprises; (x) the establishment of an enabling legal environment; (xi) the harmonisation of national investment codes leading to the adoption of a single Community investment code; (xii) the harmonisation of standards and measures; (xiii) the promotion of the balanced development of the region, paying attention to the special problems of each member state particularly those of landlocked and small island member states; (xiv) the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations as well as socio-professional organisations such as associations of the media, business men and women, workers, and trade unions; (xv) the adoption of a Community population policy that takes into account the need for a balance between demographic factors and socioeconomic development; (xvi) the establishment of a fund for co-operation, compensation and development; and (xvii) any other activity that member states may decide to undertake jointly with a view to attaining Community objectives.[7]

The revised treaty of 1993, was intended to extend economic and political co-operation among member states. Economically, it aimed to achieve a common market and a single currency as economic objectives, while in the political sphere it provides for a West African parliament, an economic and social council and an ECOWAS Court of Justice to replace the existing Tribunal and to enforce Community decisions. The treaty also formally assigned the Community with responsibility of preventing and settling regional conflicts.[8]

## 4. ECOWAS POLICIES ON PROMOTION OF REGIONAL INTEGRATION PROGRAMMES

### (A) MEANING OF REGIONAL INTEGRATION

The process of regional integration involves joining together different economies into large economic areas for the purpose of free trade while at the same time removing all discriminatory barriers between them. This in turn creates a need for some degree of cooperation and coordination of policies between them (Anadi, 2005: p. 25).[9]

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[7] *Ibid.*

[8] Profile: Economic Community of West African States (ECOWAS).

[9] Available online at www.kfpe.ch/download/PhD_thesis_Anadi.pdf, accessed 10 August, 2013.

Regional integration does not have a single, universally acceptable definition. This is not unexpected because as an academic discipline, it is located within the social sciences genre. Available definitions are varied, ranging from the shortest and selective to the longest and all inclusive. For Onwuka and Sesay, regional integration refers to the various forms and contexts of economic integration arrangements including common markets, free trade areas and harmonisation policies prevailing or proposed at both the continental e.g. African Economic Community, AEC, and regional, e.g. ECOWAS, SADC, levels. According to S.K.B. Asante "…regional integration and regional cooperation have in common the involvement of neighbouring countries in collaborative ventures…" (Asante, 2002: p. 4). For Phillippe De Lombaerde and Luk Van Langenhove, regional integration is a process of "…large scale territorial differentiation characterised by the progressive lowering of internal boundaries and possible rising of new external boundaries…" in which states move from a condition of total or partial isolation towards complete or partial unification, among things (Amadu, Omotosho, 2011: p. 11–12). To Jacqueline Mambara "…regional integration connotes the formation of closer economic linkages among countries that are geographically close to each-other, mainly through Preferential Trade Agreements, PTAs…" (Mambara, 2007: p. 5).

The EU defines regional integration as "… the process of overcoming, by common accord, political, physical, economic and social barriers that divide countries from their neighbours, and of collaborating in the management of shared resources and common national goals". While the United Nations University identifies several types of regional integration arrangements that include: free trade area, customs union, common market, political and security integration. Irrespective of the way the processes are defined, regional integration projects are essentially aimed at addressing, directly and indirectly, the perceived or real national interests of members individually and collectively. A successful regional integration project must be premised on three broad pillars: firstly, domestic peace and security in the integrating states because apart from the destruction of infrastructure such as road networks, telecommunications and other important facilities, conflict diverts attention from regional integration projects as was the case with Liberia, Sierra Leone and Cote d'Ivoire while their civil wars lasted; secondly, enhancing political and civic commitment and deepening mutual trust among members; and thirdly, there must be a minimum threshold of macroeconomic stability and good financial management in member countries.[10]

## (B) EXTENT OF HARMONISATION AND INTEGRATION PROGRAMMES OF ECOWAS

The need for greater integration among the states of West Africa arose mainly from the perceived economic potentials of a sub-region bedevilled by the problems of insecurity and underdevelopment. Many notable regions, the world over, have applied such an integration approach to achieve development and security, thus, contributing to global peace. A typical example of a successful regional bloc is the European Union

[10] Lolette Kritzinger-van Niekerk, "Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience" Accessed online at http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_ay2005.pdf, on 20 July, 2013: p. 6–7.

(EU). In West Africa, the integration process has tentatively been broadening to cover political, economic, social, cultural, security and other issues.[11]

The ECOWAS Vision 2020, which sets out the strategic objectives of: a borderless region, sustainable development, peace and good governance, and integration into the global market, coupled with a commitment to an ECOWAS of people rather than that of states, was adopted in June 2008. The scope of the strategic framework cascades from the level of strategic pillars, to the goals and down to the strategies and objectives levels. The strategic pillars take inspiration from the fundamental principles of ECOWAS as a region. According to the ECOWAS Treaty, member states, in pursuance of its objectives in Article 3, solemnly affirm and declare to adhere to eleven principles, grouped to incorporate; sovereignty, co-operation and independence, peace and security, dialogue, human rights and social justice, equity, and good governance.[12] The founding fathers of ECOWAS were quite aware of the huge challenges that confronted them at independence, following years of unbridled exploitation and utter neglect of the basic needs of the citizens by the colonial masters; Britain, France and Portugal. Consequently, successful nation building remained the greatest challenge for them, because their economies are small, weak and highly competitive. Accordingly, they are unable to exploit the complementarities of big and strong economies, and are equally incapable of competing effectively within the global economy. These realities made regional integration an attractive option for West Africa. Undeniably, globalisation processes also forcefully brought home to the region the reality that it is impossible for any country, even the most economically and politically powerful, to go it alone‘. Now, more than ever before, all countries need each another to survive in a world where states are intricately weaved together economically, politically and technologically, with significant externalities for those that are unable to catch the globalisation train.

## (C) HARMONISATION AND CO-ORDINATION OF POLICIES FOR THE PROTECTION OF THE ENVIRONMENT

Under the revised treaty member States of ECOWAS decided to protect, preserve and enhance the natural environment of the region and co-operate in the event of natural disasters; they will adopt policies, strategies and programmes at national and regional levels and establish appropriate institutions to protect, preserve and enhance the environment, control erosion, deforestation, desertification, locusts and other pests.[13]

The Vision 2025 of the ECOWAS Heads of State of the sub-region wants “to turn West Africa into a borderless zone where the citizens will benefit from the opportunities and develop, in a sustainable manner, the huge resources of the region.” This West African zone is seen as “a regional space that enables the people to make transactions

[11] Hakeem Olayiwola Sarki, “The Economic Community of West African States (ECOWAS): Challenge Sustainable Peace in the Sub Region – The Journey So Far”, Thesis Submitted to the United Nations Peace Operations Training Institute, for the Award of Certificate of Training in Peace Support Operations (COTIPSO), at: p. 21–22. Available online at http://www.comm.ecowas.int/sec/index.php?id=treaty, accessed 10 August, 2013.

[12] “Regional Questionnaire on Aid for Trade”, Available online at www.oecd.org/dac/aft/questionnaire, accessed 10 August, 2013.

[13] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou, 24th July, 1993, Article 29 (1) and (2).

and to live in peace and dignity within the context of the rule of the law and good governance". Within the general context of this vision, the environmental policy proposes the vision of a peaceful, dignified and prosperous ECOWAS region, where various productive natural resources are preserved and managed on a sustainable basis for the development and equilibrium of the sub-region. Therefore, production, processing, consumption, trading and disposal activities are controlled and managed in a healthy environment, from the point of view of raw material flows, wastes and final processes.[14]

As part of its objectives, ECOWAS offers "to promote co-operation and integration with a view to creating a West African Economic Union in order to raise the standard of living of its people, maintain and increase economic stability, strengthen relationships among member States and contribute to the progress and development of the continent."[15] Among the intermediary objectives essential for achieving those objectives, the ECOWAS treaty recognises the need for "the harmonisation and coordination of national policies, and promotion of programmes, projects and activities in the area of agriculture and natural resources. "It gives more recognition to the harmonisation and coordination of policies on environmental protection." This is the basis and justification of the duty for which the ECOWAS Highest Authorities promulgated the Environmental policy for the Community.[16] The environment and natural resources are characterised by a general trend of degradation and resource depletion. These challenges highlight the major sectors and problems relating, among other things, to: land degradation; deforestation,[17] the degradation of landscapes and the loss of bio-diversity through the combined effects of natural factors such as drought and floods as well as human factors such as the abusive exploitation of trees and forests;[18] rapid change in the status and quality of water resources;[19] degradation of the entire landscape through a lack of appropriate development, and weakness in environmental restoration. Though efforts are being made and capacities are being built, they are insufficient and it is essential and urgent that policies and initiatives for restoration be carried out without delay. This is what the ECOWAS environmental policy aims to achieve.[20]

The environmental systems of Member States, largely support the livelihood of rural people that account for approximately 80% of the population. The living conditions of the rural populace and indeed the general population are seriously hampered by changes in climatic conditions. The environmental policy must therefore address the serious challenges that militate against the achievement of sustainable development. The pol-

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[14] ECOWAS:" ECOWAS Environmental Policy", ECOWAS Commission, Abuja, Nigeria, 2008: p. 13. Available online at http://www.comm.ecowas.int/dept/d/d2/en/ecowas_environment_policy.pdf, accessed 10 August, 2013 see the vision for the ECOWAS Environmental Policy.

[15] *Ibid*: pp. 1–3.

[16] Supplementary Act A/SA.4/12/08 Relating to the ECOWAS Environmental Policy, Thirty Fifth Ordinary Session of the Authority of Heads of State And Government Abuja, 19 December 2008, sixty First Ordinary Session of the Council of Ministers held in Ouagadougou from 27 to 29 November 2008. Chapter 2: Scope of Application, Vision, Objectives and Social Initiatives Articles 3, 4, 5 and 6

[17] See ECOWAS Commission Decision C/DEC./3/5/83 related to the reforestation Decade 1983 – 1993.

[18] See ECOWAS Commission Decision A/DEC.1/12/1999, related to the adoption of a sub-regional desertification control in West Africa.

[19] See ECOWAS Commission Decision A/DEC.12/12/2000, related to the adoption of a sub-regional integrated water management action plan.

[20] ECOWAS:" ECOWAS Environmental Policy", p. 4.

icy must seek to address these challenges through: (i) good governance and sustainable use of natural resources, national policies and regulations that will address industrial, pollution, urbanisation and waste disposal; (ii) efficient resource management aimed at poverty reduction and general improvements in the livelihood of the people; (iii) advocacy to combat ignorance, the provision of information and communication technology, the adaptation and orientation of institutional bodies in order to effectively organise and optimise synergies and partnerships; (iv) promotion of social equity in national policies of Member States.

Hence the ECOWAS Supplementary Act relating to the Environmental Policy proclaims that: the ECOWAS Environmental Policy concerns all activities relating to the management of natural resources (mines, forests, wild fauna, water resources…), preservation of the eco-system and biological diversity, prevention and management of technological risks, the climate, pollutions and other environmental risks. The ECOWAS Environmental Policy is part of the ECOWAS vision for a "peaceful, dignified and thriving West Africa whose various productive natural resources are sustainably preserved, strengthened and managed for the development and stability of the sub-region". The ECOWAS Environmental Policy has the objectives of reversing the state of degradation of natural resources and improving the quality of their living conditions and environment, to conserve biological diversity, so as to secure a healthy and productive environment by improving the ecosystem balance and the well being of the populations. The ECOWAS Environmental Policy will in its implementation, take into account the actions and initiatives of various stakeholders (parliamentarians, civil society, and private sector etc.) as well as the sub-regional institutions in charge of environment and sustainable development.[21]

## (D) PROMOTION OF THE ESTABLISHMENT OF JOINT PRODUCTION ENTERPRISES

In 2010, ECOWAS adopted its "West African Common Industrial Policy".[22] One of the key objectives is to increase the share of intra-regional trade from currently 12% to 40% in 2030, with a vision to "maintain a solid industrial structure, which is globally competitive, environment- friendly and capable of significantly improving the living

[21] Articles 3–6 of the Supplementary Act A/SA.4/12/08 Relating to the ECOWAS Environmental Policy, Thirty Fifth Ordinary Session of the Authority of Heads of State and Government Abuja, 19 December, 2008.

[22] WACIP's vision is to "maintain a solid industrial structure, which is globally competitive, environment-friendly and capable of significantly improving the living standards of the people by 2030." In its bid to achieving this, it has the following specific objectives: Diversifying and broadening the region's industrial production base by progressively raising the local raw material processing rate from 15–20% to an average of 30% by 2030, through support to the creation of new industrial production capacities and the development and upgrading of the existing ones; Progressively increasing the manufacturing industry's contribution to the regional. GDP, currently at an average of 6–7%, to an average of over 20% in 2030; Progressively increasing intra-Community trade in West Africa from less than 12% to 40% by 2030, with a 50% share of the region's trade in manufactured goods, particularly in the area of energy (equipment, electricity, petroleum products, etc.); Progressively increasing the volume of exports of goods manufactured in West Africa to the global market, from the current 0.1% to 1% by 2030, through the enhancement and development of skills, industrial competitiveness and quality infrastructure (standardization, accreditation and certification), particularly in the areas of information, communication and transport.

standards of the people by 2030"[23]. This is another step in a long history of ambitious attempts towards regional integration in West Africa, which follows a global trend towards a regionalization of trade integration. While this is often attributed to the disappointing progress of multilateral trade negotiations in the World Trade Organisation (WTO), there also appears to be a widespread notion that regional trade is in some way "better" for developing countries than trade with the rest of the world.[24]

The joint production enterprise[25] will create an intra-community and international industrial partnerships that will enable the region to improve investment and technological flow, while strengthening public–private partnership; its industrial fabric, local job creation, intra-Community trade and its presence on the global market through the constitution and strengthening of partnerships between national and foreign enterprises, especially SMEs/SMIs. The joint production enterprise will increase infrastructural development involving collaborations with New Partnership for African Development (NEPAD) with a view to significantly reducing the cost of production factors, promoting the development of intra-community trade and affording the national economies enhanced access to West African, and global markets. The joint enterprise will facilitate industry restructuring and upgrading programmes aimed at restructuring and upgrading enterprises to enable them become competitive, upgrading technical support structures and invigorating industrial activities by strengthening economic information, developing export consortiums/export promotion networks, promoting partnership and mentoring, as well as establishing a system of traceability and support to the informal sector. It will help improve the business environment and facilitate the reinforcement of the co-ordination of technical and financial partners' interventions in industry.[26]Considering the imperatives of globalisation and the important role that industry plays in development, the ECOWAS Member States have reiterated their will to make industrialisation the medium of development and have jointly undertaken to work in partnership with the private sector for the effective and efficient implementation of the West African Common Industrial Policy. This is in view of the desire to have a common regional vision to "collectively becoming an important stakeholder in the globalisation process in the framework of sustainable industrial development" (Gbeho, 2010: p. 4).

## (E) THE ESTABLISHMENT OF A COMMON MARKET

Given the fast pace of globalization, the less developed countries of the world (particularly in the sub-Saharan African region) are increasingly becoming marginalized in the world economy. These countries are confronted by serious supply and demand side constraints as well as weak institutional capacities. They are therefore less able to

[23] The policy was set up in the 2010 meeting of the ECOWAS Authority of Heads of State and Government with an implementation vision of 2030.

[24] Erik von Uexkull, "Regional Trade and Employment in ECOWAS", Trade and Employment Programme ILO, 26 August, 2011 at 2 available online at http://www.oecd.org/site/tadicite/50288711.pdf, 11 August, 2013.

[25] Protocol A/P1/11/84 Relating to Community Enterprises.

[26] ECOWAS Aid for Trade: "The West African Common Industrial Policy (WACIP)", available online at http://www.aidfortrade.ecowas.int/programmes/the-west-african-common-industrial-policy-wacip access on 11 August, 2013.

reap potential benefits of trade, investment and technological transformation from globalisation. It is therefore argued that for developing poor countries, regional market integration is crucial for meeting the challenges of globalisation. Regional market integration has been seen as a way out of the problem of the small size of most ECOWAS countries and economies. It is hoped that by integration, economies of scale can be achieved and that industrialisation will follow.[27]

ECOWAS, has undoubtedly, followed the European Union's model methodically moving from an economic to a political union as it tagged on supplemental treaties to the Union's original protocol. The 1960 Rome Treaty provided for establishing a common market, a customs union and common policies for the EU countries. The ECOWAS original treaty set up eight technical committees of which trade, customs, taxation, statistics, money and payments was one. This committee seemed well-suited for its primary task of promoting trade among ECOWAS member countries (Bamfo, 2013: p. 16).

Regional Integration is the gradual elimination or abolition of economic barriers that impede the free movement of goods, services, capital and persons among a group of nation states like ECOWAS. These fundamental objectives are 'perfectly beautiful', in, the way they are conceived, because, the end result of these conceptions, when fully achieved, will bring not only socio-economic development, but also translate the entire west African community into a 'near perfect' community; where lives and properties will not only be safe and secured, but have a guarantee of achieving the full potential of life in a safe environment, where poverty will no longer have a place to hibernate and a community where it tend to develop its own technological needs from within.[28]Building on the commitment to have a common market, better policies and regulations for investment, ECOWAS Member States decided to use the impetus of preparations towards the Economic Partnership Agreements (EPAs) to harmonise their regulations on investment and work towards the establishment of a common regional investment rule and code, to establish the common investment market. The Road Map to EPAs negotiations between West Africa and the European Union (EU) was adopted on 4 August, 2004 in Accra, Ghana.[29] From February to May 2008, the EU, through BizClim, finalised a study on ECOWAS's Common Investment Code (CIC) and Investment Policy Framework to assist the region in fast-tracking the implementation of its Common Investment Market. At the same time during their 60th Session on 17–18 June 2008,the Council of Ministers adopted the two documents signalling the commencement of the process towards the harmonization of community investment rule into a code.[30]

The overall objective of establishing the ECOWAS common investment market is to enable the region to attract greater and sustainable levels of investment through creating

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[27] Okoh R.N "Market Integration And Expansion of Intra-Regional Export Trade: The Case of Nigerian Cocoa in ECOWAS", available online at http://www.unionbankng.com/uddrose.pdf, accessed 10 August, 2013.

[28] Sambo, "ECOWAS: The Challenges of Regional Integration" Available online at http://www.gamji.com/article8000/NEWS8443.htm, accessed 9 August, 2013.

[29] Lambert N'galadjo Bamba,"ECOWAS Common Investment Market Initiative", Available online at http://www.privatesector.ecowas.int/en/III/Key_Note_Address_of_Commissioner.pdf, accessed 9 August, 2013.

[30] Director: Private Sector Department ECOWAS Commission, "Basis for ECOWAS Common Investment Market" available online at http://www.privatesector.ecowas.int/en/III/Basis_English_for_ECOWAS_Common_Market.pdf, accessed 9 August, 2013.

an international competitive investment area that allows for the free movement of capital, labour, goods and services across borders of Member States. The creation of a common investment market is particularly useful as national markets in most ECOWAS countries are too small to attract investment on their own. Furthermore, multinationals, fund managers and other investors now give preference to regional, rather than national markets in making decisions where to invest. The focus of the ECOWAS common investment market will be to make ECOWAS one of the major destinations for regional and international investors while simultaneously enhancing national investment. Investment is critical not only for sustainable regional integration, but also for the overall socio-economic development of the entire region. Investment, particularly in the productive sectors and export-oriented enterprises, is critical if the region is to benefit from globalisation and strengthen the bonds of integration. The common investment market would therefore act as a catalyst for accelerated investment in the region.

## 5. ECOWAS COMMON POLICIES IN THE ECONOMIC, FINANCIAL, SOCIAL AND CULTURAL SECTORS

Under the ECOWAS revised treaty in 1993, the following were proclaimed under the Economic, Financial, Social and Cultural Sectors by the member states; 'in order to promote monetary and financial integration, and facilitate intra-Community trade in goods and services and achieve the Community's objective of establishing a monetary union, the Member States undertake to: study monetary and financial developments in the region; harmonise their monetary, financial and payments policies; facilitate the liberalisation of intra-regional payments transactions and, as an interim measure, ensure limited convertibility of currencies; promote the role of commercial banks in intra-community trade financing; improve the multilateral system for clearing payment transactions between Member States, and introduce a credit and guarantee fund mechanism; take necessary measures to promote the activities of the West Africa Monetary Agency in order to ensure the convertibility of currencies and the creation of a single currency zone; establish a Community Central Bank and a common currency zone.'[31] 'ECOWAS member States undertake to achieve the status of an economic union within a maximum period of fifteen (15) years following the commencement of the regional trade liberalisation scheme, adopted by the Authority through its Decision A/DEC. 119/83 of 20 May, 1983 and launched on 1 January, 1990. Member States shall give priority to the role of the private sector and joint regional multinational enterprises in the regional economic integration process.'[32] 'Under Article 61 of the revised treaty member States undertake to cooperate with a view to mobilising, the various sections of the population and ensuring their effective integration and involvement in the social development of the region.[33] Member States undertake to pursue the objectives of the Community Cultural Framework Agreement. Member States shall undertake to: encourage the promotion, by every means possible, of all forms of cultural exchange; promote,

[31] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou, 24 July, 1993, Article 51 (a)-(g).

[32] *Ibid*, Article 54 (1) and (2).

[33] *Ibid*, Article 61 (1).

develop and, where necessary approve structures and mechanisms for the production, propagation and utilisation of cultural industries; and promote the learning and dissemination of a West African language as a factor in community integration.'[34] These issues, among others, will be analysed in the following sub topics.

## (A) ECOWAS POLICY ON THE ECONOMIC SECTOR

Though the adoption of three major Supplementary Acts by the ECOWAS Heads of States on 19 December, 2008, the Commission is proceeding with the implementation of the Regional Common investment market.[35] The various steps in economic integration are defined in terms of the definitions of integration arrangements that follow in logical progression, from the simplest to the more complex. First, a free-trade area is characterised by intra-regional free trade, but with each member country having separate tariffs on imports from the rest of the world, and trade controlled by a set of rules of origin to prevent trade deflection (duty-free imports from the rest of the world through the member state with the lowest general tariff).[36] The second type of economic integration adds a common external tariff to create a customs union. This effectively removes the problem of trade deflection to which a free trade area is usually exposed; the third type of economic integration allows the intra-regional free flow of factors of production and is known as a common market; and finally comes, an economic union, which includes the integration of monetary and fiscal affairs. Against these backgrounds, ECOWAS was established on the 28 May, 1975 to drive the integration, process leading to the establishment of an Economic Union. Its Treaty comprises all the various phases of economic integration as it was mandated to: eliminate tariffs and non-tariff barriers among member states; establish a common external tariff structure and commercial policy towards non-members; eliminate obstacles restricting factor movements; harmonise agricultural policies and promote common projects in member states notably in the field of marketing, research and agro-industrial enterprises; implement schemes for the joint development of transport, communication, energy and other infrastructural facilities, as well as the evolution of a common policy in these fields; harmonise economic and industrial policies; harmonise monetary policies of member states; establish a cooperationfund; and embark on other activities of interest to member nations. From the Treaty provisions, the ambition of the founding fathers of ECOWAS is clear these are: free trade area; customs union; common market; and economic union. Having achieved some success with respect to a customs union; with the putting in place of a common external tariff (CET) in 2008, the Community is on its way to a Common Market by allowing the intra-regional flow of factors of production.

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[34] *Ibid*, Article 62 (1) (2) and (3).

[35] These Acts are; Supplementary Act A/SA.1/12/08 Adopting community competition rules and the modalities for their application within ECOWAS; Supplementary Act A/SA.2/12/08 on the establishment, functions and operation of the regional competition authority for ECOWAS; and Supplementary Act A/SA.3/12/08 adopting community rules on investment and the modalities for their implementation with ECOWAS.

[36] ECOWAS: "ECOWAS Common Investment Market Vision", ECOWAS Commission, Abuja, 2009, pp. 6–7, available online at http://www.ecobiz.ecowas.int/en/pdf/cim-vision-english-version.pdf, Accessed 12 August, 2013.

In line with Articles 3.2 (f) and 3.2 (i) of the revised ECOWAS Treaty therefore, a key and immediate concern is to develop a regional investment (one of the factors of production) code, compliant with West African macroeconomic convergence criteria that will make the countries in the community improve their macroeconomic stability and will enhance credibility in the regional economic policy. This will not only strengthen the development of the private sector, but also lead to long-term economic growth of the community.[37]

## (B) ECOWAS POLICY ON CULTURE AND EDUCATIONAL DEVELOPMENT

In pursuance of a community cultural framework, ECOWAS Member States agreed to: encourage the promotion, by every means possible, of all forms of cultural exchange; promote, develop and, where necessary approve structures and mechanisms for the production, propagation and utilisation of cultural industries; and promote the learning and dissemination of a West African language as a factor in community integration.[38]

The ECOWAS Cultural development programme, approved by the Council of Ministers, is designed to strengthen and develop exchange in order to promote creativity, develop cultural tourism, free movement of cultural products, and enable African artists to have greater access to the international art market. It is also designed to ensure that culture is taken into account in the regional integration process for development and to foster a sense of belonging. The objectives are to support and encourage creativity within the ECOWAS space; to promote cultural exchange, to strengthen cooperation with film makers.[39]In order to reform education in ECOWAS, within the framework of the Decade of Education adopted by the African Union, NEPAD Initiatives, Education for All as well as Millennium Development Goals (MDG), in 2003 ECOWAS adopted a Regional Protocol on Education, and a Convention on the Recognition and the equivalence of Degrees, Diplomas and other qualifications. The protocol sets out priority objectives in education, and the means to achieve them within the framework of Member States co-operation. ECOWAS also adopted an Action plan that was annexed to the protocol on education relating to the priority programmes adopted by the conference of Ministers namely: HIV/AIDS preventive education for girls, teacher training through distance learning, promotion of science and technology, technical and vocational education and training, objectives: to provide all Community citizens with greater access to quality education and training opportunities available in the region; to harmonise criteria for admission into institutions of higher learning, research institutions, and vocational training centres; harmonise certificates; and progressively harmonise the educational and training systems in the Member States.[40]

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[37] *Ibid*.

[38] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou , 24 July, 1993, Article 62.

[39] *Directione a Educação, de cultura e ciência da Tecnologiaen*, See Protocol A/P1/7/87 and A/DEC.4/11/96 ECOWAS Cultural Development Programme.

[40] Decision A/DEC.3/01/03, Protocol relating to Education and Training; and Decision.4/01/03, General Convention on Equivalence of Certificate.

## (C) ECOWAS POLICY ON FINANCIAL SECTOR

The ECOWAS states decided that, in order to promote monetary and financial integration, they have to facilitate intra-community trade in goods and services which lead to the realization of the Community achieving its' objective of establishing a monetary union. The Member States also agreed to: study monetary and financial developments in the region; harmonies their monetary, financial and payments policies; facilitate the liberalisation of intra-regional payment transactions and, as an interim measure, ensure the limited convertibility of currencies; promote the role of commercial banks in intra-community trade financing; improve the multilateral system for clearing payment transactions between Member States, and introduce a credit and guarantee fund mechanism; and take necessary measures to promote the activities of the West Africa Monetary Agency in order to ensure the convertibility of currencies and the creation of a single currency zone; and to establish a Community Central Bank and a common currency zone.[41]

The ECOWAS Bank for Investment and Development (EBID),[42] which took over from the ECOWAS Fund is now set to play a crucial role in the economic integration of West Africa. EBID (ECOWAS Bank for Investment and Development) is a regional financial institution created to facilitate investment and the financing of projects in West Africa. It forms a powerful body that aims to enable and encourage greater financing to the private sector, resulting in wealth creation as well as promoting employment in the sub-region, along with infrastructural development projects integrating the whole region primarily promoting multilateral projects that benefit several countries at once.[43]Since 10 October, 2011, the Bank has increase its capital from 600 million to 1 billion UA, about USD 1.5 billion, 70% owned by the fifteen regional Member States of ECOWAS, with the remaining 30%, about USD 450 million are opened to subscription for non-regional partners. EBID's main objective is to contribute towards the economic development of West Africa through financing ECOWAS and NEPAD projects and programmes, notable among which are programmes relating to transport, energy, telecommunications, industry, poverty alleviation, wealth creation and job promotion for the well-being of the people of the region. EBID is based in Lome, the Togolese Republic.[44]

The ECOWAS Bank for Investment and Development (EBID) is the principal financial institution of the Economic Community of West African States (ECOWAS). EBID

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[41] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 51.

[42] ECOWAS Bank for Investment and Development (EBID) is an international finance institution established by the new Article 21 of the ECOWAS Revised Treaty as amended by the Additional Act A/SA.9/01/07 of 19 January 2007. It comprises fifteen Member States, namely Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. It has two windows, one for the promotion of the private sector and the other for the development of the public sector. see http://cokoye.com/genenal-jobs/ecowas-bank-for-investment-and-development-ebid-lome-togo-recruitment-2012/ accessed 12 August, 2013.

[43] "West Africa's Financial Muscle" African Business interviews with Christian Narcisse Adovelande, President of the ECOWAS Bank for Investment and Development (EBID).

[44] "ECOWAS Bank for Investment and Development EBID Lome Togo" Available online at http://cokoye.com/genenal-jobs/ecowas-bank-for-investment-and-development-ebid-lome-togo-recruitment-2012/, accessed 14 August, 2014.

as a holding company, operates through its two subsidiaries, the ECOWAS Regional Development Fund (ERDF), and the ECOWAS Regional Investment Bank (ERIB). ERDF focuses primarily on the public sector while ERIB deals with the private and commercial sectors. EBID is also the financing bank of the New Economic Partnership for African Development (NEPAD) projects in the region. EBID plays a similar role to that played by the European Investment Bank within the European Union. ECOWAS was created in 1975 to provide member states with collective bargaining clout, to stimulate trade and investment within the community and to harmonise some infrastructure projects, such as roads and railways.[45] It had become clear to West African leaders that there was strength in numbers, especially as the West African economic zone contained several small economies that were unlikely to make headway individually. One of the aims of the ECOWS treaty is to gradually integrate the economies of the sub-region to forge a large and vibrant trading bloc. It was also an attempt to collectively attack poverty while simultaneously developing regulatory and infrastructural links. One of the significant features of ECOWAS is that the grouping contains a very wide diversity of economies in terms of size, development and resources. It is also a region that has experienced, and continues to experience, violent conflicts in some member states, although these have reduced considerably over the last decade. To its great credit, ECOWAS has not deviated from its set objective in the face of these challenges. It has been very active in conflict resolution and prevention through a combination of intense discussions at the highest political levels and direct intervention. EBID, as part of its brief to foster greater integration among member states, created, in conjunction with the African Development Bank, a Conflict Prevention Fund in 2004. The Fund is managed by EBID. At its inception in 1975, ECOWAS set up a Fund for Co-operation, Compensation and Development, commonly known as the ECOWAS Fund. The ECOWAS Fund was directed mainly at the public sector and was used to finance projects that contributed to the greater integration of the region, for example, by providing access to ports for landlocked countries. In the 1990s, as globalisation spread, changing the traditional patterns of international trade, economic blocs acquired a new significance. For example, investment risks, especially those posed by smaller economies, can be minimised through a regional approach and economies that would have floundered on their own in an increasingly competitive world can be given a new lease of life by being allied to stronger regional economies. Furthermore, environmental issues can only be realistically dealt with on a regional basis rather than by individual states. The nature of internal economies also changed considerably with the shift away from state-owned and operated organisations to privatisation. Privatisation often presents considerable technical problems and requires carefully modulated financing by highly skilled and specialised experts.[46]

With this in mind, the ECOWAS Conference of Heads of State and Government which met in Lomé in 1999, decided to transform the ECOWAS Fund into the holding company EBID with its two subsidiaries, ERIB and ERDF, to deal with the new realities. With this change, EBID added a private sector focus responding to the multiple privatisations in the region and supporting the private sector as the engine of sustain-

[45] ECOWAS Bank for Investment and Development (EBID) "The Bank for West Africa's Development" Available online at http://www.africasia.com/uploads/ab_pg3843_01005_1.pdf, access 12 August, 2013.
[46] *Ibid.*

able growth. At the same meeting, West African leaders resolved to work towards creating a single entity out of ECOWAS and the *Union Economique et Monétaire Ouest Africaine* (UEMOA). UEMOA is a grouping of eight francophone countries using a single currency, the CFA. All eight members of UEMOA are also members of ECOWAS. The goal is to marry the CFA with the proposed single currency for The Gambia, Ghana, Guinea, Nigeria and Sierra Leone (the Eco) to set up a single monetary zone in the future. By bonding together to promote the free movement of people and goods, the coastal and landlocked countries will bolster each other's economies as well as that of the region. Through financing cross-border investments and projects, EBID is assisting West Africa to achieve this goal of greater co-operation, development and prosperity.

## (D) PROMOTION OF JOINT VENTURES BY PRIVATE SECTORS ENTERPRISES

One of the aims and objectives of ECOWAS under Article 3 of the revised treaty is the promotion of joint venture enterprise by the private sector. The promotion of joint ventures by private sectors enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments,[47]as well as the harmonisation of national investment codes leading to the adoption of a Single Community Investment Code.[48]

The Secretariat of the Economic Community of West African States (ECOWAS) was transformed into a Commission by the Authority with effect from 1January 2007, in order to promote efficiency in service delivery. Under the new structure, the position of Commissioner for Macro Economic Policies was created, along with several new departments that the Commissioner is to oversee including the Private Sector Department. The new Private Sector Department inherited the assets and liabilities of the investment and private sector division under the defunct Economic Policy Department. It is responsible for achieving ECOWAS's aims and objectives relating to the promotion of cross-border investments, joint venture businesses and small and medium enterprises in order to contribute to the achievement of a competitive, dynamic and diversified regional economy that is preferred by investors. To this end, the mandate of the Department includes the following:[49] improve the investment climate in the region to expedite the growth of domestic investment and attract foreign investment in order to achieve the structural transformation of the regional economy and foster the overall socio-economic development of the Member States; enhance the competitiveness of the regional private sector through promoting good corporate governance, supporting the provision of business development services, establishing guarantee institutions and promoting the development indigenous entrepreneurship and micro/small/me-

[47] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 54(2) provides that member States shall give priority to the role of the private sector and joint regional multinational enterprises in the regional economic integration process.

[48] "Consultant Warns against Trade Barrier in ECOWAS States", *The Tide*, 12 June, 2013. Available online, http://www.thetidenewsonline.com/2013/06/12/consultant-warns-against-trade-barrier-in-ecowas-states/accessed 13 August, 2013.

[49] ECOWAS Private Sector, available online at http://www.privatesector.ecowas.int/stand.php?id=presentation&lang=en&chem=/ accessed 12 August, 2013.

dium enterprises (MSMEs) to foster pro-poor economic growth and sustainable development in the region; facilitate the involvement of the private sector in the regional integration process through support to regional private sector institutions and the creation of relevant new ones; promote harmony and synergy among these activities of the institutions and facilitate consultations amongst the organized private sector in the region, and with the organised private sector in other regions of the world to enhance the exchange of information; promote the development of a viable regional capital market with strong linkages in all member states to facilitate the mobilization of investment capital and wealth creation; Facilitate the establishment of multi-national joint ventures and Community enterprises in the region to promote employment and sustainable inclusive growth. Facilitate public private partnerships to promote regional investment; and encourage West African entrepreneurs to develop and maintain links with diaspora groups, relevant continental and international bodies, south-south bodies, etc to attract investment and its associated benefits to the regional private sector.

## 6. SUPPOSED ECOWAS ACHIEVEMENTS ON ECONOMIC AND PHYSICAL INTEGRATION

### (A) MARKET INTEGRATION: FREE MOVEMENT OF PEOPLE/ LABOUR

Free movement of person will involve the abolition of visa right of residence and establishment removal of roadblocks and security checkpoints, introduction of ECOWAS passport, harmonization of customs documents, regulation and formalities.[50]

The ECOWAS treaty on the free movement of people is considered to be a key component towards the economic growth of the Community enhancing the flexibility and availability of labour in the sub-region while enlarging opportunities for workers. In their first protocol from 1979, ECOWAS Member States called upon one another to allow fellow citizens to work freely anywhere within the region.[51] As a result, citizens of the Community no longer require entry visas to travel into the territory of other member States and in 2000 the ECOWAS passport was introduced,[52] which is ultimately designed to replace national passports, to further facilitate the mobility of people throughout West Africa. In addition, under the Community's Revised Treaty, citizens

[50] "ECOWAS Affairs History and Background", available online at http://www.ghana.gov.gh/ecowas/ecowas.php, accessed 12 August, 2013.

[51] 1979 ECOWAS Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment.

[52] ECOWAS 2000a. "Executive Secretary's Report, 2000", Abuja: ECOWAS Secretariat. Available online at http://www.sec.ecowas.int/sitecedeao/english/es-rep2000-3-2.htm, accessed 13 August, 2013. In 2000 at its meeting in Abuja, the Authority of Heads of State and Government adopted a uniform ECOWAS passport, modelled on the EU passport and with the ECOWAS emblem on the front cover. A five year transitional period was foreseen during which national passports would be used in conjunction with ECOWAS passports while ECOWAS passports were phased in and became more widely available. See Aderanti Adepoju, Alistair Boulton and Mariah Levin, "Promoting Integration through Mobility: Free Movement under ECOWAS" Available online at http://nants.org/wp-content/uploads/2013/05/A-Practical-Review-of-the-ECOWAS-Protocol-on-Free-Movement-ENGLISH.pdf, accessed 13 August, 2013.

are guaranteed the right of residence and establishment throughout the sub-region,[53] which includes the right to apply for and take up employment in any Member State.[54]

It is worth noting that the 1979 Free Movement Protocol[55] has undergone some legal transformations which have given rise to the following: 1985 Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons,[56] the Right of Residence and Establishment; 1986 Supplementary Protocol[57] on the second phase (Right of Residence); 1989 Supplementary Protocol[58] amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment; and the 1990 Supplementary Protocol[59] on the implementation of the third phase (Right to Establishment).[60]The underlying reason for the protocol was that the integration of the member states into a viable Regional Economic Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will. It was believed that the existing bilateral and multilateral forms of economic co-operation within the region open up perspectives for more extensive cooperation. It was also based on the view that the sub-region needed to face together the political, economic and socio-cultural challenges of sustainable improvement in the welfare of their populations; and pooling together of their resources, particularly people will ensure the swiftest and optimum expansion of the sub-region's productive capacity. These constitute the main rationale for re-creating the free movement of people in the sub-region.

The Free Movement Protocol is essentially a contraption aimed at achieving the economic integration agenda of the region, as set out in Article 3 of the ECOWAS treaty. The recognition of the need for economic integration including the free flow of persons, goods and services resulted in the enactment of the ECOWAS Protocol on the free movement of people, and the right of residence and establishment in 1979. Article 27 of the ECOWAS treaty affirmed the need for economic integration, which includes free flow of people, goods and services by calling on the member states to ensure the gradual removal of all obstacles to free movement of people, services and capital. ECOWAS member states were required to stop demanding visa and residence permits, and therefore allow citizens of other member states to work and undertake commercial and industrial activities within their territories.

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[53] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 59 (1).

[54] René Robert "The Social Dimension of Regional Integration in ECOWAS", Policy Integration Department International Labour Office Geneva, Working Paper No. 49 of December 2004, p. 28, available online at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079141.pdf, accessed 10 August, 2013.

[55] ECOWAS Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment, Done at Dakar, on 29th May, 1979.

[56] ECOWAS Supplementary Protocol A/SP.1/7/85.

[57] ECOWAS Supplementary Protocol A/SP.1/7/86.

[58] ECOWAS Supplementary Protocol A/SP.1/6/89.

[59] ECOWAS Supplementary Protocol A/SP.2/5/90.

[60] ECOWAS Vanguard, "A Practical review of the ECOWAS Protocol on Free Movement", Volume2 Issue, 6 of April, 2013. Available online at http://nants.org/wp-content/uploads/2013/05/A-Practical-Review-of-the-ECOWAS-Protocol-on-Free-Movement-ENGLISH.pdf, accessed 14 August, 2013.

## (B) THE RIGHT OF ENTRY AND THE ABOLITION OF A VISA WITHIN ECOWAS SUB-REGION

The first phase of the Protocol essentially sought to guarantee free entry of Community citizens into all member states without undue restrictions. With the Free Movement of Protocol coming into force upon its ratification by the member states in 1980, visa and other entry requirements for citizens travelling to a sister country were effectively abolished.[61] Article 3 of the Protocol provides that any Community citizen has the right to enter into the territory of another member on the possession of a valid travel document and an international health certificate. A valid travel document is either a national passport or an ECOWAS travel certificate. A citizen visiting any member state for a period not exceeding 90can enter the territory of that member state through the official entry point free of visa requirements. This means that a citizen of an ECOWAS member state who possesses valid travelling documents and international health certificate can spend up to 90 days in another state. However, where a stay exceeding 90 days is desired, the citizen would have to obtain permission for an extension of stay from the appropriate authority. However the Protocol however did preserve the right of a member state to deny entry to any immigrant considered to be inadmissible by its laws.[62]

## (C) THE RIGHT OF RESIDENCE WITHIN THE ECOWAS SUB-REGION

The second phase of the protocol,-right of residence-became effective in July 1986 upon the ratification of a Supplementary Protocol by the member states. The Supplementary Protocol defines the "Right of Residence" as the "right of a citizen who is a national of one Member State to reside in a Member State other than his State of origin, and which issues him with a residence card or permit that may or may not allow him to hold employment". Article 3 of the Supplementary Protocol delimits the right of residence to include the right to: apply for jobs effectively offered; travel for this purpose, freely in the territory of member states; reside in any member state in order to take up employment in accordance with national employment laws; live in the territory of a member state in accordance with conditions defined by national laws of the host member states, after having held employment there; to contemplate employment in the civil service of member states. Notwithstanding this, the Protocol subjects this right to the right of a member state to impose restrictions justifiable by reasons of public order, public security and public health.

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[61] ECOWAS Protocol A/P.1/5/79 Relating to the Free Movement of Persons, Residence and Establishment, Done at Dakar, on 29th May, 1979. This protocol entered into force provisionally upon signature by the Heads of State and Government of Member States, and definitively upon ratification by at least seven signatory States in accordance with the constitutional procedures applicable for each signatory State.

[62] *Ibid*. Article 4.

## (D) THE RIGHT OF ESTABLISHMENT WITHIN THE ECOWAS SUB-REGION

A Supplementary Protocol on the implementation of the third phase right (right of establishment) was ratified by member states in 1990.[63] "Right of Establishment" means the right granted to a citizen who is a national of a member State to settle or establish in a member state other than his state of origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, and in particular companies, under the same conditions as defined by the legislation of the host member state for its own nationals. Here again, it is important to note that this right is subject to relevant legislations (like the labour laws, company laws, tax laws etc.) of member states and any such citizen must exercise this right within that limit. However, there is an overwhelming burden on the member state to ensure that such legislation is not discriminatory. It should be emphasised that Article 2 of the Protocol expressly includes within the definition of "right of establishment" access to non-salaried activities and the exercise of such activities as well as the creation and management of enterprises and companies.[64]

There is a conviction that the promotion of harmonious economic development of the Member States required effective economic co-operation and integration largely through a determined and concerted policy of self-reliance. The recognition of the need for economic integration including free flow of people, goods and services stimulated the enactment of the Protocol on free movement of persons, and the right of residence and establishment in 1979. The first phase of the Protocol guaranteed free entry to citizens from member states without a visa for ninety days and it was ratified by all member states in 1980. The second phase of the protocol, right of residence became effective in July 1986 and all member states and ratified it.[65] However, the right of establishment is yet to come into force. With the coming into force of this protocol, the member states will abolish visa and other entry requirements for citizens travelling to a sister country. This means that a citizen of an ECOWAS member state who possesses a valid traveling documents and an international health certificate can spend up to 90 days in another state. Notwithstanding the protocol, a member state has the right to deny entry to any immigrant considered to be inadmissible by its laws. In 1986, the second phase of the protocol (right of residence) was ratified by all member states.[66] The reason is that the ECOWAS treaty affirmed the need for economic integration, which includes free flow of persons, goods and services by calling on the Member States to ensure graduation removal of all obstacles to free movement of peoples, services and capital. ECOWAS member states were required to stop demanding visa and residence permits, and therefore allow West Africans to work and undertake commercial and in-

[63] 1986 Supplementary Protocol A/SP/.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment.

[64] *Ibid*, Article 2

[65] *Ibid*, Article 23

[66] Clottey, "Operationalizing ECOWAS Protocol on Free Movement of People among the Member States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration": p. 10–11, available online at http://www.imi.ox.ac.uk/pdfs/research-projects-pdfs/african-migrations-workshops-pdfs/ghana-workshop-2007/CLOTTEY%20and%20AGYEI.pdf, accessed 13 August, 2013

dustrial activities within their borders.[67] The re-creation of a borderless West Africa was in consonance with the African Charter on Human and People's Rights and UN human rights (Clottey, p. 10–11).

## (E) MARKET INTEGRATION INVOLVING ECONOMIC AND MONETARY CO-OPERATION

Under the integration involving economic and monetary cooperation, the ECOWAS Member States agreed to undertake to complete the establishment of an economic monetary union within five years following the creation of a Custom Union. This was to be done through: the adoption of a common policy in all fields of socioeconomic activity particularly agriculture, industry, transport, communications, energy and scientific research; the total elimination of all obstacles to the free movement of people, goods, capital and services and the right of entry, residence and establishment; the harmonisation of monetary, financial and fiscal policies, the setting up of a West African monetary union, the establishment of a single regional Central Bank and the creation of a single West African currency.[68]

Under the ECOWAS monetary integration, the monetary policy involves the creation of an economic and monetary union, a second Regional Currency is planned to take effect in January 2015, while the ECOWAS-wide Common Currency will come into operation by 2020 (Magbagbeola, 2009: p. 14) ECOWAS was established with the objective of liberalising trade among member states: the elimination of tariff and non-tariff barriers, and ultimately achieving an economic and monetary union after successfully going through the process of a free trade area, custom union and common market. The idea of having all 15 countries in West Africa spend, save, invest and trade in a single common currency is as old as ECOWAS itself. After several failed attempts and postponements in starting dates, ECOWAS has now given member states up to 2015 to put into effect a plan for a second monetary union and a single common currency in 2015 which will run alongside the existing common currency, the CFA franc, used by the French-speaking member states of the regional body. The ultimate goal is to eventually combine the two monetary unions and create a single common currency for the entire sub-region.[69] One of the major advantages in having a single currency is that, "It creates a situation where the countries become disciplined. This is because if a country is not managing her economy properly, there is moral suasion from the others to ensure that she performs…" "and that can assist countries in the sub-region to develop quickly and be able to compete with the rest of the world." The Speaker of the ECOWAS Parliament, Senator Ike Ekweremadu, the Deputy Senate President of Nigeria, who is one

[67] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 27 (1) and (2).

[68] *Ibid*, Article 55., Member States undertake to achieve the status of an economic union within a maximum period of fifteen (15) years following the commencement of the regional trade liberalization scheme, adopted by the Authority through its Decision A/DEC. 119/ 83 of 20 May, 1983 and launched on 1 January, 1990. See Article 54 of the Revised Treaty. 2. Member States shall give priority to the role of the private sector and joint regional multinational enterprises in the regional economic integration process.

[69] Ghana Business and Finance, "The ECO: A Common Currency Phantasm or Certainty?", Ghana Business Media, 2011, available online at http://www.ghanabizmedia.com/ghanabizmedia/january-2011-ecowas/191-the-eco-a-common-currency-phantasm-or-certainty.html, accessed 12 August, 2013.

of the arrowheads of the common currency agenda, stated that the single currency objective would become effective by 2020, but by 2015 in English-speaking countries.[70]

## (F) ECOWAS TRADE LIBERALISATION SCHEME

Article 35 of the revised ECOWAS treaty deals with trade liberalisation within the sub-region and it is the policy to progressively establish in the course of a period of 10 years effective from 1 January 1990, as stipulated in Article 54, a Customs Union among the Member States whereby customs duties or other charges with equivalent effect on Community -originating imports will be eliminated.[71] Quotas, quantitative or similar restrictions or prohibitions and administrative obstacles to trade among the Member States will also be removed. Furthermore, a common external tariff in respect of all goods imported into the Member States from third countries will be established and maintained.[72]

The ECOWAS Trade Liberalisation Scheme (ETLS) is ECOWAS's main operational tool for promoting the West Africa region as a Free Trade Area. This lies in tandem with one of the objectives of the community which is the establishment of a common market through "the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition among Member States, of non-tariff barriers…."[73] The purpose of the liberalisation scheme are to encourage entrepreneurial development in the region, increasing intra-regional trade and boosting economic activity, increasing West African competitiveness on the global market and increasing the GDP of Member States, thus ensuring better welfare for citizens The scheme has undergone a series of transformations in respect of the categories of goods that are covered.[74] The first category was defined when the scheme first came into existence in 1979. At that time, agreement was reached on only agricultural, artisanal handicrafts and unprocessed products to benefit from the scheme. Following this, in 1990, further agreement was reached and industrial products could be approved to take part in the scheme. With industrial products being accepted, it became imperative to define what products were "originating" from the ETLS region.

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[70] Ezeemo, "ECOWAS Currency: A Worthwhile And Timely Venture?", *Nigerian Orient News*, 6 March, 2013 Available online at http://www.nigerianorientnews.com/?p=2985accessed 13 August, 2013. Senator Ekweremadu made it known at a dinner organized for members of the Administration, Finance and Budget Committee of the organisation after their one week meeting and workshop recently in Enugu. He said ECOWAS had transformed from being a committee of states to becoming a committee of the people. It could be recalled that the West African Monetary Zone (WAMZ) was formed in 2000 as a group of six countries within ECOWAS that plan to introduce a common currency, the Eco, by 2015. All the members of the group are English-speaking countries, apart from Guinea, which is Francophone. Since 1987 the body has continued deliberations on how to implement the policy. Members strongly believe that a common currency for the West African Monetary Zone (WAMZ) would facilitate trade in the region, as well as fast-track development in the African sub-region.

[71] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 35 (1).

[72] *Ibid.*

[73] *Ibid*, Article 3.

[74] See ECOWAS Trade Liberalisation Scheme (ETLS) Available online at http://www.etls.ecowas.int/etls/about-etls/ accessed 13 August, 2013.

ECOWAS Member States articulated a comprehensive trade liberalisation programme, the ECOWAS Trade Liberalisation Scheme (ETLS) quite early in its existence. Implementation was supposed to have started in 1979, but it had to be postponed three times before it was finally launched in 1990. The implementation of the programme is designed to occur in the following stages: an immediate and full liberalisation of trade in unprocessed goods and traditional handicrafts; phased liberalisation of trade in industrial products, with the phasing reflecting the differences in the levels of development of three[75] categories of ECOWAS member states; the gradual establishment of a Common External Tariff (CET). Thus, the trade liberalisation scheme of ECOWAS was conceived as a progressive reduction culminating in the elimination of all tariff and non-tariff barriers against intra-ECOWAS trade.[76] The annual tariff reduction rates varied among the three categories of countries: for the most advanced of the countries the schedule was expected to be in six years; the completion period was set at eight years for the middle group of countries; and the third group was given up to 10 years.[77]

In line with its objective of promoting co-operation and integration and as one step towards the creation of a common market that, according to the ECOWAS Revised Treaty, should be established, through "the liberalisation of trade by the abolition, among member states, of customs duties levied on imports and exports, and the abolition among member states, of non-tariff barriers in order to establish a free trade area at the Community Level". "ECOWAS adopted the ECOWAS Trade Liberalisation Scheme". This was first implemented in 1979 with only agricultural products, handicrafts and crude products being allowed to benefit from the scheme. In 1990, however, it opened up to include industrial products.[78] Given the evolution of international trade and the adoption by the World Trade Organization (which most ECOWAS Member States are members of) of a new agreement on rules of origin, it was deemed necessary to comply with these rules. As a result, ECOWAS and UEMOA adopted the same origin criteria.[79]

## (G) ECOWAS CUSTOMS UNION (5-BAND COMMON EXTERNAL TARIFF)

Under the 1993 revised ECOWAS treaty, Member States agreed in Article 37 that there would be a gradual establishment of a common external tariff in respect of all goods

[75] Decision of the ECOWAS Authority of Heads of States and Governments, Decision A/DEC.1/5/83 classes member states into three groups for the implementation of the ETLS: Group 1-Cape Verde Guinea Bissau, The Gambia, Upper Volta, Mali and Niger, Group 2; Benin, Guinea, Liberia, Sierra Leone and Togo, Group 3-Ivory Coast, Ghana, Nigeria and Senegal. Available online at www.comm.ecowas.int/sec/index.php, accessed 13 August 2013.

[76] These are barriers to trade that restrict imports but are not in the usual form of a tariff. Examples include anti-dumping measures and countervailing duties.

[77] ECOWAS Vanguard, "The ECOWAS Trade Liberalisation Scheme: Genesis, Conditions and Appraisal", Volume 2 Issue 3. Jan. 2013. Available online at http://nants.org/wp-content/uploads/2013/03/The-ECOWAS-Trade-Liberalization-Scheme-Genesis-Conditions-and-Appraisal-ECO-VANGUARD-Jan-2013-English- accessed 13 August 2013.

[78] ECOWAS Aid for Trade: "ECOWAS Trade Liberalisation Scheme (ETLS)", available online at http://www.aidfortrade.ecowas.int/programmes/ecowas-trade-liberalization-scheme-etls, accessed 13 August 2013.

[79] *Ibid*., The ECOWAS protocol A/P1/1/03 of 31st January 2003 defines the concept of originating products and origin criteria applicable for the free circulation of industrial goods.

imported into the Member States from third countries in accordance with a schedule to be recommended by the trade, customs, taxation, statistics, money and payments commission. Member States would schedule to be recommended by the trade, customs, taxation, statistics, money and payments commission, the abolition of existing differences in their external Customs tariffs. Member States undertook to apply the common Customs nomenclature and Customs statistical nomenclature adopted by Council.[80] The treaty further provided that goods would be accepted as eligible for Community tariff treatment if they had been consigned to the territory of the importing Member States from the territory of another Member State and originated from the Community.[81]

The ECOWAS Common External Tariff (CET) is a basic feature of the integration of the Union. By that, all the countries in the ECOWAS region will adopt a common customs union and abandon the individual tariff structure with which they trade with other countries, adopting instead a common external tariff in trade with third countries. The same customs duties, import quotas, preferences or other non-tariff barriers to trade apply to all goods entering the ECOWAS region, regardless of which country in the region they are entering. It is designed to end re-exportation, but it may also inhibit imports from countries outside the customs union and thereby reducing consumer choice and supporting the protectionism of industries based within the customs union. In addition to having the same customs duties, the ECOWAS countries may have other common trade policies, such as having the same quotas, preferences or other non-tariff trade regulations apply to all goods entering the region, regardless of which country within the area they are entering.[82]Article 3 of the Revised ECOWAS Treaty, indicates that one of the main objectives for the creation of the Community is the establishment of a common market through trade liberalisation and the adoption of a Common External Tariff.[83]

At the 29th Summit of the ECOWAS Heads of State and Government held on 12 January, 2006 in Niamey, two important decisions were taken regarding the implementation of the ECOWAS CET.[84] The first decision was in respect of the implementation of the ECOWAS CET with effect from 1January 2006. The decision provided for the

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[80] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 37.

[81] *Ibid*, Article 38 (1).

[82] ECOWAS Vanguard, "Enhancing Intra-Regional Trade in West Africa", Volume 2 Issue 6.NANTS/152 Available online at http://nants.org/wp-content/uploads/2013/02/ECOWAS-Common-External-Tariff-and-Regional-Integration-English.pdf, accessed 14 August, 2013. See also ECOWAS Vanguard, "The ECOWAS Common External Tariff (CET) and Regional Integration", Volume 2 Issue 2 Dec. 2012, available online-at http://www.inter-reseaux.org/IMG/pdf/The_ECOWAS_CET_and_Regional_Integration_ECO_VANGUARD_Dec_2012_English_Edition_.pdf, accessed 13 August, 2013.

[83] The Authority of Heads of State and Government, at its 29th session, adopted the ECOWAS CET for ECOWAS Member States vide Decision A/DEC.17/01/06. The legal mandate for the CET derives from the following: Article 3 of the ECOWAS Revised Treaty which states clearly that one of the main objectives for the creation of the Community is the establishment of a Common Market through trade liberalization and the adoption of a Common External Tariff (CET). The decision A/DEC.17/01/06 of the 29th Session of the Authority of Heads of State and Government which adopted the ECOWAS CET for ECOWAS Member States and the ECOWAS Regulation C/REG.1/5/09 which provides that ECOWAS CET is supposed to be based on a Harmonised System (2007).

[84] Twenty Ninth Summit of the Authority of Heads of State and Government Niamey, 12 January 2006. Decision A/DEC.24/01/06 Adopting An ECOWAS/UEMOA Regional Policy On Access to Energy Ser-

adoption of a four-band tariff structure made up of basic social goods attracting an import duty of 0%; basic essential goods, raw materials, capital goods and specific inputs attracting an import duty of 5%; intermediate goods with an import duty of 10%; and finished goods with an import duty of 20%. The decision also provides for a number of taxes as part of the CET, including the community levy, the statistical tax and certain accompanying measures. It was decided that the period 1 January, 2006 to 31 December, 2007 would serve as a transitional period for the implementation of the ECOWAS CET, leading to its coming into full effect from 1January, 2008.[85] At the Joint West African Economic and Monetary Union (WAEMU)/ECOWAS Committee negotiating the CET which was held in November, 2008 at Abuja, the committee recommended a rate of 35% for the fifth band and that safeguard measures be explored. It also requested member States to put forward their proposed lists of products to be classified under this fifth band; these lists would be on the negotiation agenda for the February 2009 session.[86]In the end the five-band tariff regime, which was a subject of ten years of internal negotiations driven by the technical committee of the Commissions of the ECOWAS and the eight member West African Economic and Monetary Union (UEMOA), was endorsed by the ministers at their meeting in Praia, Caper Verde, on 20 March, 2013. The new Common External Tariff was modelled on the UEMOA tariff regime following the 2006 decision of Heads of State and Government of the region. Some 5,899 tariff lines are covered under the new tariff regime, with tariff ranging between zero and 35 per cent for the 130 tariff lines that fall into the category of specific goods contrib-

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vices for Populations in Rural and Peri-Urban Areas for Poverty Reduction in Line with Achieving the MDGS in Member States.

[85] *Ibid*. Essentially, the UEMOA CET features four tariff categories with rates at 0% for essential social goods, 5% for essential/basic raw materials, capital goods and specific inputs, 10% for intermediary products, and a peak tariff rate of 20% for final consumer goods. The unweighted average Tariff Rate (ATR) is 12.1%. Apart from the above highlighted rates, the January 2006 decision of ECOWAS Heads of State provided for specific protection instruments additional to the customs duties, such as the regressive protection tax, the special import tax and safeguard measures to make up for the inadequate taxation of some products. The decision further made provision for a two-year transition period (1st January 2006 to 31st December 2007) to enable non –UEMOA countries to adapt to the new tariff policy (Type A exceptions) and to pursue the negotiations with a view to reaching agreement on the re-classification of some products as requested by the non-UEMOA countries (Type B exceptions). Entry into force was targeted at 1st January 2008. By giving effect to the ECOWAS Authority, the Federal Government of Nigeria (FGN) had as far back as February 2004 announced her intention to comply with an ECOWAS CET but made provision for a 30% special tax to offer temporary protection to selected products of domestic industry. The special tax as announced was to be phased out in 3 or 4 years. In addition, the Government of Nigeria prohibited imports of some products. But more importantly, it would further be recalled that Nigeria demanded for the creation of a fifth tariff band of 50% as an addition to the existing UEMOA rate. This request was made when Nigeria which made a political commitment to align with the UEMOA CET realized that such commitment was made without due recourse to technical analysis in terms of research, or prior consultations with stakeholders including relevant sectors of the economy such as the manufacturers, farmers, traders and other private sector organizations. See Ken Ukaoha, " ECOWAS CET: The Imperatives of Nigeria's Fifth Band", available online http://www.acp-eu-trade.org/library/files/Ukaoha_EN_060308_NANTS_ECOWAS-CET-The-imperatives-of-Nigeria-s-fifth-band.pdf, accessed 13 August, 2013.

[86] Reseau Des Organisations Paysannes Et Des Producteurs Agricoles De L'afrique De L'ouest (ROPPA), "Memorandum From Farmers' Organisations On The ECOWAS Common External Tariff Negotiations" Ouagadougou, 9th February 2009. Available online http://www.roppa.info/IMG/pdf/English_memerandum_TEC_fev_09_1_1_.pdf, accessed 13 August, 2013.

uting to the promotion of the regions economic development. Under the new regime, the five per cent duty is applicable for 2,146 tariff lines under the basic raw materials and capital goods category, 10 per cent for the 1,373 tariff lines that qualify as intermediate products category while 20 per cent duty is reserved for the 2,165 tariff lines that fall into the category of final consumer products.[87]

## (H) ECOWAS ENERGY POLICY: WEST AFRICAN GAS PIPELINE AND POWER POOL

Under Article 28 ECOWAS Member States agreed to co-ordinate and harmonise their policies and programmes in the field of energy to ensure the effective development of the energy resources of the region; and establish appropriate co-operation mechanisms with a view to ensuring a regular supply of hydrocarbons; promote the development of new and renewable energy particularly solar energy in the framework of the policy of diversification of sources of energy; harmonies their national energy development plans by ensuring particularly the inter- connection of electricity distribution networks; articulate a common energy policy, particularly, in the field of research, exploitation, production and distribution; establish an adequate mechanism for the collective solution of energy development problems within the Community, particularly those relating to energy transmission, the shortage of skilled technicians and financial resources for the implementation of energy projects of Member States.[88]

The ECOWAS regional energy programme is part of the integration and economic development policy of the community. The main objective of the programme is to strengthen regional integration and to boost growth through market development in order to fight poverty. The community energy programme has developed regional coordinated actions at all stages of the energy chain. These actions focus on developing the use of regional resources for the expansion of electricity production and exchange and on developing cross-border interconnections within the context of a regional integrated energy market. Their overall aim is to boost and optimise the availability and the end use of energy, by ensuring increased access to energy services to rural and periurban communities.[89]

The ECOWAS Energy Policy has two major ongoing energy projects namely the West African Power Pool (WAPP),[90]which aspires to inter-connect the power grids of all the Member States, and the West African Gas Pipeline Project (WAGPP) which aims to link three nations (Benin, Ghana and Togo) to Nigeria's natural gas supply.

WAGPP benefits from the 18 billion m3 of natural gas that Nigeria currently burns off with flare towers. It stands as a complement to the WAPP regional strategy for the

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[87] "ECOWAS Ministers Endorse New Regional Tariff Regime, Panapress", 22 March, 2013. Available online http://www.panapress.com/ECOWAS-ministers-endorse-new-regional-tariff-regime--12-866372-100-lang2-index.html, accessed 13 August, 2013.

[88] Revised Treaty of the Economic Community of West African States (ECOWAS), Annex VII-2 Cotonou 1993, Article 28.

[89] ECOWAS: Regional Initiatives to Scale up Energy Access for Economic and Human Development Sharing Lessons Learned: the Case of the ECOWAS at 4. Available online at http://www.gfse.at/fileadmin/files/Archive/GFSE_6/CEDEAO_Briefing_paper_for_GFSE_final.pdf accessed 14 August, 2013.

[90] The WAPP was created in 1999 by ECOWAS Member States (A/DEC.5/12/99) and granted the status of ECOWAS Specialised Institution in 2006 (A/DEC.20/01/06).

development of WAPP hydro-electricity. The 687 km pipeline, with an estimated cost of US$ 617 million and will supply thermal power stations in Benin, Ghana and Togo, and yield a capacity of 3 000 MW in 20 years' time. It will be built, run and owned by the West African Gas Pipeline Company (WAPCo), a public-private partnership comprising the following shareholders: Chevron Texaco West African Gas Pipeline Limited (38.2%), Nigerian National Petroleum Corporation (26%), Shell Overseas Holding Limited (18.8%) and Takoradi Power Company (17%). There are also plans for SOBEGAZ (Benin) and SOTOGAZ (Togo) to take up shares in the consortium.[91]

In accordance with the May 1992 decision on the Community energy policy, which seeks to harmonise the Member States' energy policies and increase collective energy autonomy, in December 1999 ECOWAS adopted, the principle of setting up a West African Power Pool system (WAPP). This led to the formulation of a master plan for the development of energy production means and inter-connecting electricity grids with a view to boosting Member States' inter-connection capacity and quadrupling it between 2005 and 2020. WAPP's objective is to interconnect national grids across 5,600 km in most West African countries (Nigeria, Benin, Togo, Ghana, Cote d'Ivoire, Niger, Burkina Faso and Mali). Total investment in all infrastructures will amount to 11.8 billion US dollars over 19 years. The resulting facility will equip the ECOWAS region with an installed capacity of some 17 000 MW, which can adequately satisfy estimated demand until 2023.[92]

WAPP's aims are to integrate the national power systems in order to create a unified regional electricity market; provide adequate, reliable and affordable electricity; share hydro and gas resources; and quadruple inter-connection capacities between member states within 20 years. It was a projected investment that will cost US $9 billion by 2011. The West African Gas Pipeline Project is aimed at transporting Nigerian Natural Gas to Benin, Togo and Ghana. The investors include: Chevron-Texaco, NNPC, Shell, VRA, Sobegaz & Sotogaz and it's a project requiring a 600 km pipeline estimated at the cost of US$ 610 million(Magbagbeola, 2009: p. 17–18).

Additionally, the West African Solar Energy Project is renowned for undertaking numerous renewable energy projects in approximately all the States in the Sahel region (Magbagbeola, 2009: p. 17–18). At an operational level, the WAPP and WAGP both concentrate on trades in power or natural gas, but other regional projects are also underway including the Regional Solar Programme (RSP), the Regional Programme for the Promotion of Household and Alternative Energies in the Sahel, the Multi-Functional Platforms Project and the Regional Biomass Energy Programme.[93] The construction of gas-fuelled thermal plants in Ghana and Côte d'Ivoire; and the renovation of plants in Nigeria (together providing about 9,000MW) will assist in the energy needs in the sub region (Mohamed, 2007: p. 9). With the Adoption of the ECOWAS Energy Protocol in 2003, there is a call to eliminate cross-border barriers to trade in energy. It encourages

[91] ECOWAS: "White Paper for a Regional Policy, Abuja", 19 October 2005, p. 36. Available online at www.energy4mdg.org, accessed 14 August, 2013.

[92] *Ibid.*

[93] ECOWAS and WAEMU, Geared Toward Increasing Access to Energy Services for Rural and Periurban Populations in Order to Achieve the Millennium Development Goals, White Paper for Energy Policy, January 2005: p. 19.

investment by providing for investor-friendly terms such as: international arbitration for dispute resolution; and repatriation of profits….[94]

## (I) ECOWAS ROAD TRANSPORT INTEGRATION POLICY

Articles 32 and 33 of the ECOWAS revised treaty provides that ECOWAS will develop common transport and telecommunications policies, laws and regulations; develop an extensive network of all weather highways within the community; formulate programmes for the improvement and integration of railway networks; formulate programmes for the improvement of coastal shipping services and interstate inland waterways, and for the harmonisation of maritime transport policies and services; promote the development of regional air transport services and implement air transport safety and security programmes; encourage the establishment and promotion of joint ventures and the participation of the private sector in the areas of transport and telecommunications. [95]

The ECOWAS road transport priority programme was adopted in 1980.[96] This programme was aimed at ensuring the construction and maintenance of the Trans-Sahelian, Dakar-N'djamena road network and the trans-coastal, Lagos-Nouakchott road network with a length of about 11000 km (Magbagbeola, 2009). The programme was also aimed at the harmonization of transport legislation in Member States. The second phase of the ECOWAS road programme was approved in 1988 mainly to inter-connect roads to open up land-locked countries. For the implementation of the two phases of these road programmes, the Community (Executive Secretariat, ECOWAS Fund, Member States) organised a number of donor conference. The first conference was held in April 1988 in Lomé, Togo; the second in July 1992 in Dakar, Senegal. The Dakar meeting was followed by another meeting held in Cotonou, Benin in March 1993. The outcome of the efforts made by the Community in the implementation of the programme is as follows: out of 4560 km of the trans-coastal roads 3800 km have been tarred (83%) out of 4460 km of the trans-sahalian road, 3824 km have been tarred (88%) and out of 11466 km of interconnecting roads, 7803 km have been tarred (70 %)[97].

Regional transport policy first emerges in the ECOWAS Treaty of 1975, where the following declaration is made: "Member States undertake to evolve gradually common transport and communications policies through the improvement and expansion of their existing transport and communications links and the establishment of new ones as a means of furthering the physical cohesion of the member states and the promotion

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[94] ECOWAS: Regional Initiatives to Scale up Energy Access for Economic and Human Development Sharing Lessons Learned: the Case of the ECOWAS p. 4. Available online at http://www.gfse.at/fileadmin/files/Archive/GFSE_6/CEDEAO_Briefing_paper_for_GFSE_final.pdf, accessed 14 August, 2013.

[95] Article 32 and 33 of the Revise ECOWAS Treaty of 1993.

[96] Convention A/P.4/5/82Relating to Inter-States Road Transit of Goods relating to the principles of the Convention of the United Nations Conference on Trade and Development on transit of goods within landlocked countries adopted on 8th July, 1965. Supplementary Convention A/SP.1/5/90 Establishing A Community Guarantee Mechanism For Inter-State Road Transit Of Goods by the Government of Member States of the Economic Community of West African States.

[97] ECOWAS: "1st Meeting of Transport, Communications and Tourism Commission", ECW/TCTC/XXXX/3, Cotonou, 26–28 July 2001, available online athttp://www.ecowas.int/ips/ii/transport/doc/1st_TCT_COMM_COT.pdf, accessed 14 August, 2013.

of greater movements of person, goods and services within the Community".[98] Road transport is the dominant mode of transport in the ECOWAS sub-region accounting for between 80 to 90 per cent of the sub-region's passenger and freight transport and provides the only form of access to over 70 per cent of the population residing in rural communities. The road network is among the sub-region's largest assets, with a replacement cost estimated at approximately US$45 billion. Central government's budgetary expenditures to the road sub-sector are typically between 5 and 10 per cent of the recurrent budget and 10 to 20 per cent of the development budget. A large portion of the central government's disbursed and outstanding debts is attributable to road loans. It is estimated that overall expenditures account for over one per cent of the regional GNP. The road construction industry is therefore one of the largest businesses in the sub-region.[99] ECOWAS have also developed an action plan on the construction of the 1,028 km Lagos-Abidjan Highway. Nigeria and the other four countries concerned – Benin, Togo, Ghana and Cote d'Ivoire adopted a plan at a meeting in Abuja with the aim of speeding up the building work. The Lagos-Abidjan Highway connects some of the largest and most economically dynamic cities in West Africa, including Lagos, Accra, Cotonou, Lome and Abidjan. The construction will commence sometime in 2014 and will be completed within 24 months.[100]

Furthermore the programme also cover a 443 km long Bamenda–Enugu road network which comprises the Cameroonian Bamenda-Mamfe-Ekok road sections on the road network (203 km), the Nigerian road sections (240 km), the bridge over the Munaya River in Cameroon (100 m) and the border bridge over the Cross River (230m). The programme is expected to help increase trade and strengthen co-operation between the countries of the Economic Community of Central African States (ECCAS) and those of the Economic Community of West African States (ECOWAS) in general, and between Cameroon and Nigeria, in particular.[101] More specifically, the programme seeks to improve the efficiency of the logistic chain of transport along the Bamenda-Enugu corridor, as well as the living environment of populations of the programme area. The programme will be implemented from July 2008 to December 2013. The total cost of the programme is estimated at UA 276.72 million, including UA 218.96 million in foreign exchange and UA 57.76 million in local currency. The direct beneficiaries of the programme are transport service users, as well as the 11 000 000 inhabitants (3 000 000 in Cameroon and 8 000 000 in Nigeria) in the programme area, represent-

[98] "ECOWAS: Document on ECOWAS Regional Road Transport Programme" *Development and Maintenance of West Africa Regional Road Network,* Abuja April, 2002, p. 17, available online at http://www.ecowas.int/ips/ii/transport/doc/DONORS_2002.pdf, accessed 14 August, 2013.

[99] *Ibid*, p. 13.

[100] African Research online, "Major New Road to be built in West Africa :Construction of the Abidjan to Lagos highway-part of the long, long awaited Trans-West African Highway – will begin in 2014", Africa Research Bulletin, 15 May, 2013. Available online at http://africaresearchonline.wordpress.com/2013/05/15/major-new-road-to-be-built-in-west-africa/, accessed 14 August, 2013

[101] African Development Fund., "Transport Facilitation Programme for the Bamenda-Mamfe-Ekok/Mfum-Abakaliki-Enugu Corridor", Available online at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Multinational%20-%20Cameroon%20-%20Nigeria%20-%20Transport%20facilitation%20programme%20for%20the%20Bamenda-Mamfe-Abakaliki%20-%20Eng.pdf,accessed 20 August, 2013.

ing 7% of the total population of the two countries. The programme will reduce overall transport costs, and improve the living conditions of populations living along the road.

## (J) ECOWAS RAILWAY NETWORKS INTERCONNECTION MASTER PLAN

The ECOWAS road network is said to be in a relatively good condition but suffers enormously from overloads caused by heavy vehicles. With the purpose of relieving the road network and harnessing the region's natural resources, the ECOWAS Commission has undertaken to revitalise and modernise the rail network. In that regard, the construction and renovation of the rail networks have become regional priorities. The Commission therefore initiated in 2008 a study aimed at developing a master plan on the interconnection and modernisation of the region's rail networks.[102] The proposed ECOWAS railway system is expected to commence soon after years of neglect to connect Nigeria to Benin, Togo, Ghana and Côte d' Ivoire with a single railway line, expected to be 1,178 kilometres long, to connect the sub-region and end in Abidjan, Cote d'Ivore. The project is expected to transform the region's transportation system by launching new high-speed passenger and freight rail services. This will allow large container ships to concentrate on a smaller number of ports, thereby increasing efficiency and reducing the costs of international trade. It is also to facilitate a major industrialisation of West African countries, improve the transportation of agricultural produce, and create immediate economic emancipation for the 300 million or so people within the region.[103] The expanded highway hopes to provide a vital road link to the sea ports used by landlocked countries in the sub-region such as Mali, Burkina Faso and Niger.[104] The road network is also expected to speed up the movement of citizens along the corridor and enhance the ease of doing business.[105]

## (K) ECOWAS REGIONAL AIR AND MARITIME POLICY

The ECOWAS Commission has, as one of its goals, the improvement in air and marine transportation in the region through the development of the ECOAIR air transport project and the further development of the ECOMARINE initiative with the cooperation of the private sector and financial institutions. It is projected that the ECOAIR transport initiative will be achieved through an amalgam of the existing West Afri-

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[102] ECOWAS Commission, "Recruitment Of A Consultant For The Update of The *ECOWAS Railway Networks Interconnection Master Plan*" available online at *services.**ecowas**.int/wp-content/uploads/…/EOI-ECOWAS-Railway.docx*, accessed 15 August, 2013.

[103] Ghana Web; "ECOWAS Railway Nears Reality", *Business News*, 9 Friday, August 2013, available online at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=282009, accessed 14 August, 2013.

[104] Article 68, of ECOWAS Revised treaty of 1993 provides that member States, should take into consideration the economic social difficulties that may arise in certain Member States, particularly island and land-locked States, agree to grant them where appropriate, special treatment in respect of the application of certain provisions of this Treaty and to accord them any other assistance they may need.

[105] Ventures, "West African States To Build 6-Lane Highway", Posted on 27 May, 2013, available online at http://www.ventures-africa.com/2013/05/west-african-states-to-build-6-lane-highway/, accessed 14 August, 2013.

can airlines to compete internationally.[106] The Commission stated that its operational budget was now sourced wholly from member states which it said was an indication of great political will of the community. It projected that 25 per cent of the funding of its programmes come from external bodies, and three percent from its partners debunking claims that the organisation is being run by donor funds. There is an absence of strong regional air transport hubs in the ECOWAS region. Relative to other regions in Africa, ECOWAS has a large domestic air transport market (almost entirely accounted for by Nigeria), but a relatively small market for intra-African air transport. While the countries in ECOWAS have fair international connectivity, domestic connectivity is very poor. More than half of the countries in ECOWAS have no domestic connectivity at all (Ranganathan, Foster, 2011: p. 34, 36). Before concluding this paper, it will be necessary to set out a small comparison of ECOWAS and the South African Development Community (SADC) as these two appears to be the most effective regional economic organisations in Africa.

## 7. COMPARISON BETWEEN ECOWAS AND SADC

In terms of corporate identity, it appears that SADC[107] and ECOWAS are similar in their objectives: they both aim to encourage economic growth and development, reduce poverty, and promote peace and security through regional integration. However, their social identities are quite different, in part due to their very different origins. For ECOWAS, the enhanced role of the Commission in regional affairs has resulted in greater preference convergence between ECOWAS member states compared to SADC, where the majority of states have defected from a common position, ECOWAS has remained more united (Hulse, 2014: p. 16).[108]

In contrast to SADC's political roots, ECOWAS was founded in 1975 as a purely economic organisation, bringing together the Francophone organisation UEMOA,[109] the five Anglophone and two Lusophone states of the region. ECOWAS expanded its mandate into political and security affairs, and by 1990 had become the first African regional organisation to abandon the norm of non-interference in the domestic affairs of member states. It has since carried out a number of military interventions in order to uphold democratic constitutional norms (Börzel *et al* . (eds), 2012: pp. 179–98). Despite having many unconsolidated democracies by its member states, ECOWAS is committed to the promotion of democratic constitutionalism (Börzel, Hullen, Lohaus, 2013), seeing it as a 'necessary precondition for thirteen successful integration and economic development'.[110] ECOWAS expresses 'zero tolerance' for *coup de etat*,

[106] Federal Ministry of Information, "ECOWAS Plans Regional Air, Maritime Projects", available online at http://fmi.gov.ng/ecowas-plans-regional-air-maritime-projects/ , accessed 14 August, 2013.

[107] Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

[108] Available online at http://www.academia.edu/4913369/Actorness_Beyond_the_European_Union_comparing_the_international_trade_actorness_of_SADC_and_ECOWAS, accessed 14 April, 2014.

[109] The existence of the Union Économique et Monétaire Ouest-Africaine, a monetary union since 1945, is related to France's continued influence in its former colonies long after independence, while most Anglophone states opted for a clean break from their former colonizer.

[110] ECOWAS Commissioner Victor Gbeho, keynote address, Chatham House, 7 June, 2011.

insurgency and power obtained or maintained through unconstitutional means, and has institutionalised highly legalised pro-intervention norms since 2008 (Striebinger, K. 137: p. 184). This interventionism is consistent with ECOWAS's gradual move towards supranationalism.[111]As for decision-making in trade matters SADC is an entirely intergovernmental organization; trade affairs are no exception. ECOWAS on the other hand is more inclined towards supranationalism and majority voting in formal decision-making procedures: the Treaty notes that integration 'may demand the partial and gradual pooling of national sovereignties'(Merran Hulse). Above all, SADC has a marginally larger international trade presence than ECOWAS, meaning that both of them are low in terms of international trade net output. Available record has it that the region's exports in 2011 amounted to US$218 billion, 1.2 percent of the world total. ECOWAS's material presence is also low, with approximately US$131 billion worth of exports in 2011, or 0.7 percent of the world total.[112]

Compared to the Economic Community of West African States (ECOWAS) grouping, SADC as a body has made considerable progress in integrating its economies. The ECOWAS and SADC schemes have been hampered by immense diversities in economic size, historical experiences and cultural backgrounds. In the case of ECOWAS, this is reflected in wide differences between Nigeria (which showed considerable commitment to the scheme) and the smaller partners, especially the francophone countries. Despite its ambitious treaty, ECOWAS remains a largely ineffective and dormant integration scheme. To buttress the above assertion, Ghana's Vice president John Dramani Mahama has urged leaders of the ECOWAS sub-region to demonstrate more commitment towards the integration effort in order to make the region globally competitive, and has said that other sub-regions were making much better progress than West Africa, mentioning the Southern African Development Community (SADC), as one example, along with the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) which are achieving much faster liberalisation than the ECOWAS region.[113] In terms of peacekeeping and peace enforcement, the two sub-regional organisations in particular, ECOWAS and SADC, have gathered significant experience in military interventions in Liberia, Sierra Leone, Guinea Bissau, Cote d'Ivoire, Lesotho, and the Democratic Republic of Congo as peace is a necessary pre-condition for regional economic integration and development.[114]

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[111] Zounmenou, Loua, Confronting Complex Political Crises in West Africa: An Analysis of ECOWAS Responses to Niger and Côte d'Ivoire', ISS Paper 230 of 2011.

[112] See also CIA (2013) World Factbook: Country Comparison, Exports, Available online at https://www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html, accessed 15 April, 2014.

[113] Lawrence Quartey, " ECOWAS Lagging Behind SADC, EAC, COMESA in Integration". *The Africareport*, 29 February, 2012. Available online at http://www.theafricareport.com/West-Africa/ecowas-lagging-behind-sadc-eac-comesa-in-integration.html, accessed 15 April, 2014.

[114] Rodrigo Tavares, "The Participation of SADC and ECOWAS in Military Operations: The Weight of National Interests in Decision-Making", African Studies ReviewVolume 54, Number 2, September 2011: p. 145–176.

## 8. CONCLUSION

Since the establishment of the ECOWAS in May 1975, almost four decades ago, it has fallen far behind in the area of reconciling its aims and objectives as enshrined under Article 3 of the revised treaty with potent achievements. The effort of the organisation in achieving its economic goals of turning the West Africa sub-region into a unified economic community, like the European Union has been far from true reality considering the futuristic nature of the set programmes. There is a trade liberalisation scheme under the auspices of the ECOWAS Trade Liberalization Scheme (ETLS) which was slated to take-off in phases. Efforts to render West Africa totally borderless by graduating the Community from ECOWAS of states to ECOWAS of peoples are projected for 2025. It has been determined that the West African Common Industrial Policy will take effect in 2030. In June 2008, the the ECOWAS Heads of State agreed on the adoption of a Second Regional Currency in January 2015, the ECOWAS-wide Common Currency in 2020, and The overall ECOWAS Vision 2020, which sets the strategic objectives of: a borderless region, sustainable development, peace and good governance, and integration into the global market, coupled with a commitment to an ECOWAS of people rather than that of states. By this, ECOWAS recorded a noticeable milestone in its effort to attain the set goals, the free movement of goods, services and people within the Community, and more by member states. In addition, the West African Gas Plant (WAGP) has been completed, and the states of the region are linked by the West African Highway. The states of the region have also initiated a uniform passport scheme that allows a bearer to stay within the Community for 90 days without a visa. There is an ultimate target to phase out the nine different and inconvertible currencies of the member states with the introduction of a single currency for the Community (Ogbonna, Aluko, Awuah, 2013: p. 105–106). ECOWAS has also performed well in the area of promotion of peace and good governance within the sub-region through the 1999 Protocol on Conflict Prevention and Management, and the 2001 Supplementary Protocol on Democracy and Good Governance. However, compared with other regional economic organisations in Africa, such as SADC, it is obvious that ECOWAS is lagging behind in some aspects of its economic integration project. ECOWAS, as a group, has been faced with a lot of challenges and this has resulted in it not meeting most of its set aims and objectives. These challenges include: poor democratic governance, corruption, poverty, military incursion in politics within the sub-region, the proliferation of small arms, cross border crime, HIV/AIDS epidemic, environmental degradation and terrorism. All these have been hindrances to the effective regional integration in West Africa contrary to the aims and objectives of the founding fathers of the Economic Community of West African States (Sarki: p. 59–69).

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# THE LEGAL NATURE OF INTERNAL AUDIT IN LIGHT OF THE REGULATIONS OF THE ACT ON PUBLIC FINANCES

Internal audit in the Polish legal system has only been functioning since 1 January 2002, and has been one way in which Poland has met its obligations towards the European Union.[1] The first legal regulations regarding internal audit were based on the implementations of other legal systems, despite the fact that these frequently failed to meet the requirements of Polish realities. It will come as little surprise, therefore, that in the short history of internal audit in Poland, there have already been several attempts to harmonise it and adjust it to better suit the Polish legal system, as a result of which the role and range of internal audit gradually underwent an extension. This coincided in time with changes in public financial statutes, though the latter were connected with organisational changes in the public financial sector and the implementation of new systemic solutions meant to strengthen and improve the transparency of public finances.[2]

An analysis of the issues determined by the subject of this article requires a certain categorisation of them, as well as a discussion about the institutions of significance for internal audit under Polish law.

## 1. THE NOTION OF INTERNAL AUDIT

As indicated above, internal audit was implemented into the Polish legal system with the Act of 27 July 2001 on the amendment of the Act on Public Finances, the Act on the Organisation of the Council of Ministers, the procedure to be followed in performing its functions and on the scope of functions to be carried out by the various ministers, the Act on the Departments of Governmental Administration, and the Act on the

[1] To achieve its aim of full membership in the European Union, Poland made a pledge to rationalise public expenses, to be concerned about the proper use of means coming from EU funds, as well as to counteract financial abuses. The basic activities that Poland was to undertake in order to achieve its obligation were determined on 16 July 1997, when the European Commission published a document on 15 March 1999 in Berlin. In the plan of action specified in the Agenda 2000 document, the European Commission stated that the organs of internal and external control have not reached a satisfactory level of efficiency, and they cannot be acknowledged as being compatible with commonly understood European norms – both on the level of member states and the European Community. The European Commission recommended that Poland implement an internal audit into public administration as an evaluation and counselling tool for managerial bodies, and a compilation of the methodology of drawing audit paths, as well as the application of the international financial control and internal audit standards, among other things.

[2] The Act of 27 August 2009 on Public Finances (Journal of Laws of 2009, No 157, item 1240).

Civil Service, which came into force on 1 January 2002).[3] The need to implement internal audit in Poland resulted from the need to expand the instruments of control in order to strengthen transparency, rationality and responsibility for all the actions undertaken in this sphere of management and expenditure of public means (Jagielski, 2003, p. 13). However, the legislator's solutions did not meet with approval, and the main argument against raised the issue of the lack of explanation about the relation between internal audit and financial control (Ruśkowski, Salahny, 2010, p. 865 et seq.) The basis of those doubts may have arisen from the opinion that the legislator did not have full knowledge about the essence of the internal audit, and identified it rather with a form of internal (or external) control, as expressed by M. Sekuła, the then chairman of the Supreme Chamber of Control, who indicated that audit means nothing other than control (Sekuła, 2004). The existence of such relations between audit and control resulted in a blurring of audit targets and forms, because in light of regulations about public finances the auditor's interest should be directed either towards internal control, which is simply copying control tasks, or directed towards an analysis of financial reports, which is simply duplicating the activities performed by expert financial controllers. The legislator's superficial treatment of the audit resulted in it being misunderstood by the subjects obliged to perform it. What is more, the authorisation for the Minister of Finance to determine a specific form and manner of performing audit activities was included in the amended law. The regulation of the Minister of Finance in this matter was issued only on 5 July 2002,[4] a full six months after the implementation of the internal audit institution into the Polish legal system. The chaos that prevailed in the units of the public finance sector during this time comes as no surprise. Summing up, during the first years of the internal audit becoming binding in Poland, it existed only as a financial audit, which led the legislator to begin working upon a draft new statute in 2003. The result was the Act on Public Finance, passed on 20 June 2005.[5] According to Article 48 of this act, the internal audit was understood as the totality of activities including an independent analysis of management and control systems in a unit involving the procedures of financial control as a result of which the head of the unit is given an objective and independent evaluation of the adequacy, effectiveness and efficiency of those systems, as well as advisory activities including submitting motions aimed at improving the functioning of a unit. The justification of the draft act drew attention to the need to provide high quality operations of units in the public finances sector (Lipiec, 2008), the need to implement a rational economy of public means, and the need to adjust Polish legal regulations on public finances to the European Union standards (Pomorska, 2002, p. 13–14). In this last case, Poland made a pledge to the rational (primarily economical) use of public means, in particular to the proper expenditure of means coming from the European Union, as well as counteracting abuses in that matter (Winiarska, 2007, p. 51).

[3] With the Act of 27 July 2001 on the amendment of the Act on Public Finances, the Act on the Organisation of the Council of Ministers, the procedure to be followed in performing its functions and on the scope of functions to be carried out by the various ministers, the Act on the Departments of Governmental Administration, and the Act on the Civil Service(Journal of Laws of 2001, No 102, item 1116).

[4] The regulation of the Minister of Finance of 5 July 2002 on the specific mode of performing internal audit (Journal of Laws of 2002, No 111, item 973).

[5] Journal of Laws of 2005, No 249, item 2104.

In the explanatory statement to the act, it was underlined that the internal audit in units in the public finances sector is directed towards protecting the financial interests of the European Union, and the basis for this protection should have been the resolutions of the Treaty establishing the European Community (TEC). Once again, therefore, the statutory definition of internal audit was flawed by its inadequacy in properly understanding the notion of audit, and the source of misunderstandings and doubts involved could have been the fact that the foundations for forming such a definition were the negotiations carried out in connection with Poland's accession to the European Union, which were directed mainly towards the financial control of Union means.

The separation of the notion of control from management should also be acknowledged as a significant default of the legislator, while it seems to be one of the elementary parts of the managing process. In this respect, one should agree with the opinion of B.R. Kuc who states that, "management cannot be separated from control, since control as a function completes the managing cycle and as a process infiltrates all of its areas: planning, organizing, motivating" (Kuc, Warszawa 2007, p. 352). More positively, the legislator implemented a division into assuring activities (understood as an analysis of management and control systems) and advisory activities, while the Act on Public Finances of 2001 defined audit exclusively as an analysis of financial economy.

The binding legal definition included in Article 272 of part 1 of the act of 2009 certainly concentrates upon the essence of audit to a greater extent. It defines the internal audit as an independent and objective activity aimed at supporting the minister managing the section, or the manager of a unit in achieving targets and tasks through the systematic evaluation of managerial control as well as advisory activities. In this way the legislator clearly indicated the role of the internal audit, and also the connection between the internal audit and the new institution of managerial control. Moreover, this definition is coherent with commonly acknowledged international definitions of internal audit,[6] and the implemented modifications result only from the binding rules of legislative technique. In addition, the definition respects the division into the assuring and advisory activities, but also, in contrast to previous acts, underlines the significance of added value and the improvement of unit operations. Finally, from the contents of the new definition it follows that the internal audit is to support a unit in achieving determined targets through a systematic evaluation based on knowledge, as well as *"(…) perfecting efficiency of the process of managing risk and perfecting control and organization governance*" (Przybylska, 2010, p. 45). It is also significant that the subjective definition includes also criteria according to which there follows an evaluation of the system, and mainly it regards the adequacy, efficiency and effectiveness of managerial control in the section of government administration or a unit – Article 272 of part 2.

[6] E.g. the definition of audit according to IIA of 2001 – Internal audit is an independent activity, objectively assuring and advisory, the aim of which is adding value and improving the operation of a unit. Audit helps to achieve targets through a systematic and disciplined attitude towards evaluation and perfecting the efficiency of processes of managing risk, perfecting the system of internal control and governance.

**CHART 1 – DEFINITION AND RANGE OF THE INTERNAL AUDIT IN THE UNITS OF THE PUBLIC FINANCES SECTOR**

| The Act of 27 July 2001 about amendments to the Act on Public Finances (…) | The Act of 20 June 2005 on Public Finances | The Act of 27 August 2009 on Public Finances |
|---|---|---|
| Internal audit is a totality of activities whereby the manager of the unit receives an objective and independent evaluation of the unit operating within the scope of financial economy with respect to legality, administration, expediency and reliability, as well as transparency and openness. The scope of the audit involves in particular:<br>1) an analysis of accountancy reports and records in bookkeeping;<br>2) an evaluation of the system of accumulating and disposing of public means, as well as the administration of property;<br>3) an evaluation of efficiency and financial governance | Internal audit is a totality of activities involving:<br>1) an independent analysis of the management and control systems in a unit including procedures of financial control mentioned in Article 47 of part 3, as a result of which the manager of the unit receives an objective and independent evaluation of the adequacy, effectiveness and efficiency of the systems;<br>2) advisory activities including submitting motions aimed at improving the unit's operations. | Internal audit is an independent and objective activity aimed at supporting the minister managing the section or the manager of a unit in achieving targets and tasks through a systematic evaluation of managerial control as well as advisory activities. |

## 2. THE SUBJECTIVE SCOPE OF INTERNAL AUDIT – UNITS OF THE PUBLIC FINANCES SECTOR ARE SUBMITTED TO AUDIT

The novelty in the act of 2009 was the specification of the catalogue of public finances sector units that were obliged to carry out an internal audit. On this basis, two essential groups of units obliged to carry out an audit can be distinguished. In the first of them, the legislator exemplifies the subjects obliged to carry out an audit, disregarding the amount of the budget – Article 274 of part 1. In the other group, the limits of public means conditioning the obligation for carrying out an audit in those units were indicated. This affects units in which the amount included in the financial plan of income (revenues) or the amount of expenses (costs) exceeded the sum of PLN 40,000 – Article 274 of part 2, as well as local government units if the incomes and revenues, or the amount of expenses and disbursements of the local government budgetary unit exceeded the sum of PLN 40,000 – Article 274 of part3. In comparison with the previous regulation, the legislator deprived the Minister of Finance of the right to determine the limit of accumulated or disbursed public means.

**CHART 2 – UNITS OBLIGED TO CARRY OUT AN INTERNAL AUDIT**

| Subjects obliged to carry out an internal audit under Article 274 of part 1 | Units limited under Article 274 of parts 2–3 |
|---|---|
| Internal audit is carried out in:<br>1) the Prime Minister's Office;<br>2) the ministries;<br>3) regional offices;<br>4) customs offices;<br>5) treasury offices;<br>6) the Social Insurance Institution (ZUS), including the funds administered by it;<br>7) the Agricultural Social Insurance Fund, including the funds administered by the chairman of the Agricultural Social Insurance Fund;<br>8) the National Heath Fund | 1.Budgetary state units<br>2. State academies<br>3. Independent health care institutions established by local government units<br>4. Executive agencies<br>5. State target funds<br>9. Others |

Source: the grounds of Article 274 of the Act of 27 August 2009 on Public Finances.

Independently from the indicated groups of units that are obliged to submit to an audit, the regulations of Article 274 of parts 4 and 5 determine one more group of such units. In this case, carrying out an internal audit requires a decision from the head of the unit of the public finance sector – Article 274 of part 4, or the minister responsible for the government administration division – Article 274 of part 5. Such an audit is therefore relative, meaning that until the decision is issued the audit has a facultative character, and only becomes obligatory once the decision has been made. These groups of units can include, for example, some central offices, customs offices, treasury offices, state entities, common prosecutor's organisational units and the organisational units of the penitentiary system. Implementing such a solution, the legislator was aiming at "*(…) establishing internal audit as an effective and efficient tool for evaluating managerial control functioning in the government administration section, as well as the attainment of targets and tasks specified by the minister.*"[7] This decision was made by the Minister of Finance, among others, implementing the obligation of carrying out an internal audit in the treasury control offices. Moreover, these regulations are applied relatively to the units subjected to the Prime Minister or those administered by him, as well as to the units operating the organs subjected to the Prime Minister, or those supervised by him.[8]

As mentioned, in the majority of units of the public finances sector, the audit becomes obligatory, which in turn affects the scope of responsibility of the head of the unit for a violation of public finances discipline. Changes regarding the circle of subjects obliged to carry out an audit have their source in organisational changes of the whole public finances sector, in three ways (Bury, 2010, p. 100):

1. liquidating some of the existing forms of public finance sector units;
2. changing the scope of activity of some of them, by expanding or limiting their competencies and range of their activity;

[7] *Uzasadnienie do projektu ustawy o finansach publicznych,* parliamentary paper No 1181 available on the website www.sejm.gov.pl .

[8] Disposition No 52 of the Minister of Finance of the 22nd of December 2010 regarding the indication of the units obliged to carry out an internal audit (Journal of Laws MF of 2010 no 14, pos. 59).

3. creating new organisational forms – the institution of financial economy as well as executive agencies.

It is worth noting that, in spite of the attempts to standardise the public finances sector in the countries of the European Union, there are still significant differences between member countries. In the subjective scope, these discrepancies mainly come down to the criteria of classifying a particular unit – in the Polish system, the decisive factor is the organisational form (legal form), while in other countries it is the nature of the tasks performed (Malinowska-Misiąg, Misiąg, 2006, p. 34).

Beyond the major current of considerations of this article, there is also the question of the legislator's inconsistency on the application of terminology when indicating the subjects obliged to carry out the internal audit. First of all, the act does not include a definition of a public finances sector unit, and only indicates in what legal organisational forms these units can occur. Admittedly, in light of the remaining regulations of the Act on Public Finances, it may be assumed that Article 9 includes a catalogue of public finances sector units, but this regulation does not have a directive character, merely an instructive one. It can therefore be concluded while interpreting Article 9 (Nowacki, Tobor, 2007, p. 222–245). The first argument in favour of this thesis is based on a grammar interpretation – in Article 9 of the Act on Public Finances of 2009, the legislator did not use the expression "public finances sector unit", but only introduces the expression "public finances sector includes (…)" This operation appears to have been done on purpose, as confirmed by the fact that in Article 4 of the Act on Public Finances of 2005 the legislator also used the expression "public finances sector includes (…)" and in spite of its abatement, the same expression is still used.

## 3. INTERNAL AUDIT IN THE SYSTEM OF CONTROL

The next crucial element when analysing the legal character of the internal audit is to specify its position in the system of control, in particular its correlation with internal control. To place an audit in this structure in the proper way, it is necessary to explain the meaning of the notion "control". This is a complex task because the term, in spite of its frequent occurrence in legal acts, has never been defined by the legislator. In the doctrine of administrative law, it is necessary to pay attention to the standpoint of H. Fayol, who formulated what is known as the classic function of management. According to him, control is a crucial element of the entire management process, because it is responsible for all the undertaken activities being in accordance with the specified regulations and the issued orders (H. Fayol, 1926, p. 15). Though subsequent conceptions of management have been based on the Fayol an attitude, the development of the surrounding has led to crucial changes in this respect. Control became an essential link in the process of managing an institution. At present, control is identified with screening, specifying or detecting the factual state, comparing reality with intent, and then signalling the relevant subjects about the results of such observations without deciding, however, about the change in direction of the activity of the controlled unit (Starościak, 1975, p. 356).

Referring to the notion of "internal control", it is necessary to indicate that, of all the various definitions of the notion, the most appropriate should be considered the one specified by M. Klimas, according to whom an internal control should constitute a ver-

satile linked system comprising all employees of firms who, considering the posts they occupy, perform supervisory functions, employees whose duty is to control particular issues, as well as those persons whose duties within the scope of control follow from appropriate regulations or temporary orders of their superiors (Klimas, 1985, p. 9).

The unquestionable advantage of this definition is underlining the position of internal control in management. Moreover, although internal control is an activity that is to some extent secondary in relation to other undertaken activities in the unit, it is necessary to agree with the postulate of B.R. Kuc that internal control should be something more than a process. It should constitute a system (Kuc, 2007, p. 83).

Here, attention should also be paid to the opinion of J. Jagielski, who uses the notion of internal control in a strict sense. According to him, we speak about control in a strict sense with reference to control that is organised, and acts within (inside) a particular organisational unit that take the form of an institutional or functional control (sometimes it takes both forms) (Jagielski, 2003, p. 3). In this state of things, there might appear to be a significant similarity between J. Jagielski's definition of an internal control and an internal audit. This is based primarily on the placement of those two institutions inside the unit. However, the essential difference between those two notions comes down to the scope of their performance. H. Szymańska rightly remarks that the internal control is used to detect errors and irregularities in particular situations, as well as to specify responsibility in order to protect the property of the unit and to strengthen the managing processes (H. Szymańska, 2009, p. 36).

The internal audit reaches a bit further. In the opinion of the authors, an audit is not limited only to the function of detection, but also enriches the internal control system through the screening mechanism and has an advisory function. It is focused upon the drawbacks "of the system as well as correcting them," and it also allows an evaluation of the processes that take place in the unit, including an evaluation of the internal control functioning and all the connected activities. Control can become one of the targets of the audit and contribute to its improvement.

## 4. CONCLUSIONS

Taking into consideration the findings regarding the institution of internal audit, it can be seen that for the 10 years in which audit has been functioning in Poland, a dynamic development has been observed, though based on the patterns of Western European countries (Przybylska, 2010, p. 44). The changes have involved nearly all aspects of the audit, but the most crucial one is the separation of audit from the notion of internal control. Other positive aspects include the attempts to widen the scope of audit – from financial into newer and newer areas of unit operations. While the challenge was to adjust Polish legal regulations to the demands of the European Union, the changes occurring after 2004 have certainly been heading in the right direction. The manifestation of this can be seen in the new standards and ways of approach of the legislator himself, who has changed the theoretical character as well as the methodological dimension of the audit. The extension of the internal audit contents comes down to the fact that it is used in the management process to an ever greater extent, through evaluations and in the manner of managing and controlling units while also formulating recommendations aimed at making the work of the unit more efficient (Banaszkiewicz,

2003 , p. 16). In the Authors' opinion, the regulations regarding the internal audit should be excluded from the Act on Public Finances, and the question of audit should be regulated in a separate legal act, especially if the position of internal audit is strengthened. Finally, in spite of several changes in the law, while the question of audit is regulated in the Act on Public Finances, there will always be an equals sign between the internal audit and internal control. The Authors believe that the next changes affecting the internal audit should tackle this problem, and believe that such changes are indispensable.

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# L'IMPRÉVISION ET LA POSSIBILITÉ DE LA RÉVISION DU CONTRAT INTERNATIONAL EN VERTU DE L'ARTICLE 79 DE LA CONVENTION DE VIENNE

Entrée en vigueur en 1988 la Convention des Nations Unis sur les contrats de vente internationale de marchandises (ci-après: la Convention, la Convention de Vienne, CVIM) est devenue l'un des plus importants actes juridiques pour le commerce international. Cependant, malgré plus de vingt ans de sa force obligatoire il reste toujours des questions qui n'ont été tranchées définitivement ni par la doctrine ni par la jurisprudence. L'une de ces questions est celle de l'application de la Convention aux situations de *hardship* (imprévision) et, le cas échéant, ses conséquences. Pendant très longtemps cette question et les opinions présentées à ce sujet restaient plutôt théoriques. Néanmoins, en 2009 la Cour de Cassation belge a rendu un jugement qui, en faisant beaucoup de bruit dans le monde de commentateurs de la Convention, a consacré la possibilité d'invoquer l'article 79 de CVIM par la partie lésée par le changement des circonstances économiques pour demander la renégociation du contrat ou résiliation de celui-ci.

Dans le présent article on abordera au premier chef l'argumentation justifiant l'application de la Convention dans les cas où les bouleversements économiques rendent l'exécution du contrat trop onéreuse mais non impossible (§1). Après on fera connaissance de la décision de la Cour de Cassation belge et de quelques remarques de la doctrine confirmant cette interprétation (§2).

## §1

La disposition qui exonère la partie de la responsabilité pour inexécution du contrat à cause des circonstances indépendantes de sa volonté, insurmontables et imprévisibles est l'article 79 de la Convention.

Cet article énonce:

*Article 79*

1. *Une partie n'est pas responsable de l'inexécution de l'une quelconque de ses obligations si elle prouve que cette inexécution est due à un empêchement indépendant de sa volonté et que l'on ne pouvait raisonnablement attendre d'elle qu'elle le prenne en considération au moment de la conclusion du contrat, qu'elle le prévienne ou le surmonte ou qu'elle en prévienne ou surmonte les conséquences.*
2. *Si l'inexécution par une partie est due à l'inexécution par un tiers qu'elle a chargé d'exécuter tout ou partie du contrat, cette partie n'est exonérée de sa responsabilité que dans le cas:*
   *a) Où elle l'est en vertu des dispositions du paragraphe précédent; et*
   *b) Où le tiers serait lui aussi exonéré si les dispositions de ce paragraphe lui étaient appliquées.*

3. *L'exonération prévue par le présent article produit effet pendant la durée de l'empêchement.*
4. *La partie qui n'a pas exécuté doit avertir l'autre partie de l'empêchement et de ses effets sur sa capacité d'exécuter. Si l'avertissement n'arrive pas à destination dans un délai raisonnable à partir du moment où la partie qui n'a pas exécuté a connu ou aurait dû connaître l'empêchement, celle-ci est tenue à des dommages-intérêts du fait de ce défaut de réception.*
5. *Les dispositions du présent article n'interdisent pas à une partie d'exercer tous ses droits autres que celui d'obtenir des dommages-intérêts en vertu de la présente Convention.*

Avant la présentation des arguments optant pour l'application de la disposition susmentionnée aux situations de *hardship* il faut d'abord alléguer brièvement les exigences générales d'exonération y prévues.

## EXIGENCES GÉNÉRALES

Pour que le débiteur soit exonéré de la responsabilité pour inexécution de ses obligations, cette inexécution doit être due à un empêchement: indépendant de sa volonté, imprévisible, impossible à éviter et surmonter (Schwenzer, Schlechtriem, 2010: p. 1067).

## EMPÊCHEMENT INDÉPENDANT DE LA VOLONTÉ DU DÉBITEUR

L'effet exonératoire dépend de la situation si l'empêchement est étrange à la volonté de la partie défaillante, c'est-à-dire s'il est hors de son contrôle (Tallon, 1987: p. 578). Selon I. Schwenzer et P. Schlechtriem « *seules les circonstances objectives qui empêchent l'exécution, soit celles externes au promettant, peuvent être considérées comme les empêchements au sens de l'article 79* » (Schwenzer, Schlechtriem, 2010: p. 1067).

L'étendue de la responsabilité du débiteur est liée à la sphère typique de risque de celle-ci. Elle comprend notamment les questions de la capacité financière, les circonstances personnelles, l'approvisionnement et la responsabilité pour les employés (ibidem: p. 1067). Le débiteur « *ne pourra pas s'exonérer lorsqu'il est hors d'état de se procurer les marchandises ou les matériaux nécessaires à la fabrication pour des raisons financières, à la suite par exemple de la clôture d'une ligne de crédit. L'organisation et l'approvisionnement en source d'énergie de l'entreprise, la disponibilité du personnel par exemple relèvent des risques que le débiteur doit assumer* » (Schlechtriem, Witz, 2008: p. 251).

En tant qu'événements qui constituent l'empêchement au sens de l'article 79 CVIM les commentateurs indiquent les catastrophes naturelles (par ex. séismes, orages) (Tallon, 1987: p. 582), actes d'État (par ex. interdictions d'exportation ou d'importation, rationnement des biens, contrôle d'échange) (Schwenzer, Schlechtriem, 2010: p. 1071) ou circonstances de nature économique (par ex. augmentation de coût des matières premières) (Almeida Prado, 2003: p. 101).

En ce qui concerne le moment de la survenance de l'empêchement le principe général est qu'un événement perturbateur doit se produire au cours de l'exécution du contrat. Pourtant il y a des auteurs qui admettent l'application de l'article 79 CVIM aux empêchements initiaux (Schwenzer, Schlechtriem, 2010: p. 1071). D'après P. Schlechtriem

et C. Witz décisive est la question de savoir si le débiteur « *a eu ou non la possibilité de prendre* « *en considération* » » (art. 79, al. 1er) l'empêchement déjà existant (Schlechtriem, Witz, 2008: p. 252). En même temps ils remarquent que ce qui joue un rôle primordial en l'espèce c'est le caractère insurmontable ou non de l'empêchement lors de l'exécution. La connaissance ou la possibilité de reconnaître un empêchement lors de la conclusion du contrat fait que son exécution exige des efforts plus importants pour y faire face (ibidem: p. 252).

## IMPRÉVISIBILITÉ DE L'EMPÊCHEMENT

L'exonération en vertu de l'article 79 CVIM est possible seulement dans les cas des empêchements qui n'ont pas pu être anticipés au moment de la conclusion du contrat. D. Tallon y fait la référence au critère de la personne raisonnable, d'un *bon père de famille,* soit « *mi-chemin entre pessimiste invétéré qui prévoit toutes sortes des désastres et optimiste résolu qui jamais anticipe le moindre malheur* » (Tallon, 1987: pp 579 et s.). La question de prévisibilité de l'empêchement est d'autant plus importante que, comme P. Schlechtriem et C. Witz remarquent,« *le débiteur répond également d'un empêchement se situant hors de sa sphère d'influence dès lors qu'il aurait pu raisonnablement le prévoir lors de la conclusion du contrat ou que cet empêchement existait déjà à ce moment, alors qu'il le connaissait ou était en mesure de le connaître ; dans ces cas, l'empêchement aurait dû être pris en considération lors de la conclusion du contrat* » (Schlechtriem, Witz, 2008: p. 251). D. Tallon ajoute ici que la prévisibilité devrait être liée non seulement à l'empêchement lui- même mais aussi au temps (moment) de sa survenance (Tallon, 1987: p. 580). Selon lui le débiteur étant, en général, conscient de l'empêchement concret peut être exonéré au cas où il serait raisonnablement imprévisible que cet empêchement se produise au cours de l'exécution du contrat.

## EMPÊCHEMENT IMPOSSIBLE À PRÉVENIR ET SURMONTER

Pour que la partie défaillante soit exonérée de sa responsabilité elle devrait être raisonnablement incapable de prévenir ou surmonter l'empêchement ou ses conséquences.

En ce lieu il convient de mentionner que la version anglaise de la Convention utilise les expressions « avoid » qui signifie plutôt « éviter » et « overcome » qui signifie « surmonter ». D. Tallon les explique de la façon suivante:

- « to avoid » (éviter) signifie de prendre toutes les mesures nécessaires pour prévenir la survenance de l'empêchement, ce qui est liée à la question des faits/ événements étant hors le contrôle du débiteur;
- « to overcome » (surmonter) signifie de prendre toutes les mesures nécessaires pour exclure (empêcher) les conséquences de l'empêchement; ce qui joue un rôle ici c'est le comportement de la partie (Tallon, 1987: pp 579 et s.).

D'après P. Schlechtriem et C. Witz même si « *les empêchements imprévisibles surgissent après la conclusion du contrat et qu'ils sont hors de la sphère du débiteur – s'ils l'étaient, ils seraient surmontables – il incombe au débiteur d'accomplir les efforts qu'on est raisonnablement en droit d'attendre de lui pour éviter ou surmonter un tel événement imprévisible, intervenu postérieurement, ou ses conséquences.* » (Schlechtriem, Witz, 2008:

p. 252). Le débiteur ne pourra pas donc être exonéré s'il a la possibilité de surmonter l'empêchement ou ses conséquences. Le créancier peut attendre de son cocontractant qu'il exécute le contrat de la manière convenue, même si cela implique pour ce dernier les coûts augmentés ou la perte résultant de la transaction (Schwenzer, Schlechtriem, 2010: p. 1069).

Pourtant I. Schwenzer et P. Schlechtrim remarquent que l'exonération en vertu de l'article 79 CVIM peut être prise en considération si le débiteur a déjà franchi sa « limite de sacrifice » (ibidem: p. 1069).

Bien que le contenu de l'article 79 de la Convention et son interprétation générale semble exclure l'application de cette disposition aux situations de *hardship*, la question n'est pas si évidente. Bien au contraire, il y a des arguments susceptibles de constituer la justification légale de la demande de révision du contrat en vertu dudit article.

## L'INTERPRÉTATION DE L'ARTICLE 79 DE LA CONVENTION JUSTIFIANT SON APPLICATION AUX SITUATIONS D' *HARDSHIP*

### HISTOIRE

Si l'on accepte que l'histoire de la rédaction de la disposition en question joue un certain rôle dans son interprétation, il faut constater qu'elle n'amène pas à la réponse complétement décisive si la révision de contrat en cas de changement des circonstances a été refusée.

D'abord il est nécessaire de mentionner que pendant les travaux préparatoires on discutait la possibilité de l'application des dispositions de l'article 79 de CVIM l'alinéa 1er pour permettre à la partie faisant face aux « excessive damages » (dommages ; pertes excessives) de demander la résiliation ou adaptation du contrat (CISG Advisory Council Opinion No. 7). Le rejet de cette idée n'a été ni précédé de discussions ni bien justifié. Ensuite, pendant la Conférence de Vienne la délégation norvégienne a proposé d'inclure dans l'article 79 la disposition selon laquelle l'exonération temporelle pourrait être modifiée en exonération permanente si lors de l'empêchement les circonstances ont radicalement changé et ceci au point qu'il ne serait pas raisonnable de forcer le contractant à l'exécution de ses obligations (Rimke, 1999–2000: p. 212). Malgré l'acceptation et l'appui de plusieurs autres délégations, cette proposition a été rejetée en raison de craintes (soulevées notamment par la délégation française) qu'elle puisse introduire la théorie d'imprévision.

Il est donc évident que la question de révision du contrat en cas de bouleversement des circonstances de sa réalisation, était non seulement prise en considération mais aussi reconnue par de nombreuses délégations travaillant sur la Convention. On peut en déduire que même si la rédaction finale de l'article 79 CVIM ne prévoit expressément de telle possibilité, il y a des pays contractants qui l'ont voulu et l'acceptent aujourd'hui.

C'est pourquoi CISG Advisory Council dans son opinion constate à juste titre que « *l'histoire de la législation et de la rédaction de l'article 79 n'est pas suffisamment décisive pour garantir la conclusion que le problème d' hardship a été censé être exclus ou inclus dans sa portée* » (CISG Advisory Council Opinion No. 7).

## JURISPRUDENCE PRÉCÉDANT L'ARRÊT DE LA COUR DE CASSATION BELGE

Plusieurs commentateurs s'opposant à l'idée de l'acceptation de la révision du contrat international en raison de changement des circonstances allèguent souvent les arrêts de *Tribunale Civile de Monza* (Italie) (Tribunale Civile di Monza, 14 janvier 1993; Nuova Funcinati S.p.a. v. Fondamentall International A.B.; décision n° 54), de *Landgericht Aachen* (Allemagne) (Landgericht Aachen, 14 mai 1993; décision n° 47) ou de la Cour de Cassation dans l'affaire Behr France S.a.r.l contre Romay AG (du 30 juin 2004) (Cour de Cassation, 30 juin 2004, n° de pourvoi: 01-15964).

En ce qui concerne les deux premiers , M. Almeido Prado remarque que ces décisions ont été rendues en 1993 et il pose à juste titre la question si l'avènement des Principes d'UNIDROIT sur les contrats du commerce international n'a pas influencé l'interprétation de la Convention (Almeida Prado, 2003: p. 107). En même temps il est plutôt douteux que l'interprétation rejetant l'application de l'article 79 CVIM à la situation d' hardship puisse se fonder sur la décision qui s'est limitée à une simple constatation que « *l'article 79 ne prévoit pas d'exonération pour difficultés d'exécution, comme les définit la doctrine juridique italienne qui parle d'eccesiva onerosità sopravenuta ; selon la Convention donc, un vendeur ne peut demander d'être exonéré de sa responsabilité pour non-livraison de marchandises lorsque le prix du marché de celles-ci a augmenté « de façon remarquable et imprévisible » après la conclusion du contrat* »(extrait de la décision de Tribunale Civile di Monza, 14 janvier 1993 [dans:] Précis de jurisprudence de la CNUDCI concernant la Convention des Nations Unies sur les contrats de vente internationale de marchandises).

Quant à l'arrêt de la Cour de Cassation française, son interprétation n'est pas si évidente qu'elle pourrait sembler de première approche. La Cour de Cassation a constaté que la partie réclamant l'exonération « *n'établit pas le caractère imprévisible de cette modification des conditions de vente de ses produits alors que, professionnelle rompu à la pratique des marchés internationaux, il lui appartenait de prévoir des mécanismes contractuels de garantie ou de révision ; que la cour d'appel a pu en déduire, sans se contredire et en procédant à la recherche prétendument omise, qu'à défaut de telles prévisions, il lui appartenait d'assumer le risque d'inexécution sans pouvoir se prévaloir des dispositions de l'article 79 CVIM* »(Cour de Cassation, 30 juin 2004, n° de pourvoi: 01-15964). Il s'en suit donc, que l'exonération en vertu de l'article 79 CVIM est possible sous la condition que la partie lésée par le changement des circonstances prouve son caractère imprévisible (selon J. Dewez « *L'arrêt de la Cour de cassation française du 30 juin 2004 n'exclut pas, par contre, qu'un débiteur qui établit le caractère imprévisible des circonstances qui bouleversent l'économie du contrat puisse invoquer l'article 79 de la CVIM pour interrompre l'exécution de ses obligations* » [dans :] Dewez, 2011: p. 101).

## POSITION DE LA DOCTRINE

Malgré certains doutes soulevés en la matière par l'ensemble de la doctrine, il y a des commentateurs qui acceptent l'application directe de l'article 79 CVIM aux situations d'*hardship*.

P. Schlechtriem et C. Witz constatent que « *un empêchement, au sens de l'article 79 alinéa 1*er *n'est pas uniquement un événement faisant totalement obstacle à l'exécution,*

*mais aussi celui entraînant un coût exorbitant* » (Schlechtriem, Witz, 2008: p. 254). Cet avis est partagé par J. O. Honnold (2009 allégué par Momberg Uribe, 2011: p. 128) selon lequel la conception de l'empêchement aux termes de l'article 79 de la Convention doit être interprétée dans le sens qu'un tel empêchement doit obturer l'exécution du contrat, même si cela ne signifie pas que l'exécution devient littéralement impossible ; elle doit être plutôt interprétée en tant que difficulté dans l'exécution tellement extrême qu'il en résulte l'impossibilité pratique (pourtant pas technique) de l'exécution du contrat.

Selon I. Schwenzer et P. Schlechtriem l'impossibilité économique (*economic impossibility* – ang.) perçue comme « *le changement des circonstances de telle gravité que l'approvisionnement ou la fabrication des biens causerait au vendeur l'engagement des coûts déraisonnables par rapport au prix de contrat* » peut constituer la justification d'exonération en vertu de l'article 79 CVIM (Schwenzer, Schlechtriem, 2010: p. 1076).

Ces opinions sont confirmées par Opinion No 7 de CISG Advisory Council selon laquelle « *Un changement de circonstances qu'on ne pouvait pas raisonnablement escompter qu'il fût pris en compte et rendant l'exécution excessivement onéreuse (« hardship »), peut être qualifié d'« empêchement » au sens de l'article 79(1). Le libellé de l'article 79 n'assimile pas expressément le terme « empêchement » à un événement qui rend l'exécution absolument impossible. Dès lors, une partie qui se trouve dans une situation de « hardship » peut l'invoquer comme cause d'exonération de responsabilité en vertu de l'article 79.* » (CISG Advisory Council Opinion No 7).

## LE PRINCIPE DE BONNE FOI COMME LE FONDEMENT D'EXONÉRATION

Il y a des auteurs qui justifient (parallèlement aux arguments susvisés) l'application de l'article 79 CVIM aux situations d'*hardship* par la référence au principe de bonne foi, exprimé dans l'article 7 alinéa 1 de la Convention.

En général, un certain nombre des commentateurs admet que dans le cas d'empêchement ultérieur et imprévisible, résultant du changement important des conditions économiques, il doit exister une limite de sacrifice. Au-delà, vu les graves inconvénients économiques impliqués, on ne peut pas s'attendre que le promettant exécute le contrat (Rimke, 1999–2000: p. 212).

Selon O. Lando (1987 allégué par Momberg Uribe, 2011: p. 127) l'article 79 CVIM, interprété dans la lumière du respect de la bonne foi dans le commerce international, ne peut pas être lu comme imposant à la partie lésée une obligation d'assumer les obligations extraordinaires aux fins d'exécution du contrat.

D'après P. Schlechtriem et C. Witz l'exonération en vertu de l'article 79 CVIM est possible dans les cas où « *la sauvegarde de la bonne foi dans le commerce international (art. 7, al. 1er) s'oppose à ce qu'un risque imprévisible et exorbitant pèse sur le débiteur* » (Schlechtriem, Witz, 2008: p. 254).

## « GAP- FILLING » DE LA CONVENTION

Puisque l'interprétation présentée ci-dessus suscite toujours des doutes et, en effet, peut être insuffisante pour justifier la demande de révision du contrat en vertu de l'article 79, le débiteur peut invoquer aussi l'argumentation fondée sur le « *gap-filling* » de

la Convention. Cela est nécessaire aussi comme le motif de la prétention de renégociation (réajustement) du contrat (ibidem: p. 255).

Plusieurs auteurs prennent la position (ou au moins envisagent l'hypothèse) que la question de *hardship* est « une matière régie mais pas expressément tranchée » par la Convention (en ce sens: Veneziano, 2010: p. 144; Tallon, 1987: p. 593; Dewez, 2011: p. 111). En acceptant cette hypothèse « *il est ainsi possible de voir une lacune de la Convention en matière d'imprévision et d'invoquer « les principes généraux dont elle s'inspire ou, à défaut de ces principes, la loi applicable en vertu des règles du droit international privé* » (Deumier, 2005: pp 456 et s.). Comme les principes généraux visés dans l'article 7 alinéa 2 ils peuvent être appliqués « Les Principes d'UNIDROIT relatifs aux contrats du commerce international » (en ce sens : Deumier, 2005: p. 456; Momberg Uribe, 2011: p. 121; Veneziano, 2010: p. 144. Cela s'ensuit (aussi) de leur préambule qui stipule qu' « *ils peuvent être utilisés afin d'interpréter ou de compléter d'autres instruments du droit international uniforme* » (selon R. Momberg Uribe « *Such a purpose is expressly laid down in the Preamble to the Principles: [These Principles] may be used to interpret or supplement international law instruments.* » [dans:] Momberg Uribe, 2011: p. 122).

En se fondant sur l'article 7 alinéa 2 de la Convention et l'interprétation présentée ci-dessus, la partie lésée par le changement de circonstances économiques peut invoquer l'article 6.2.2 des Principes, qui définit la situation de *hardship* et l'article 6.2.3. qui régit ses conséquences.

§2

Le 19 juin 2009 la Cour de Cassation belge a rendu un arrêt dans lequel elle a confirmé l'exonération de la responsabilité pour inexécution du contrat par la partie touchée par le changement des circonstances économiques. En étant fondée sur les articles 79 et 7 de la Convention de Vienne, cette décision a confirmé la position d'une grande partie de la doctrine qui reconnaît depuis longtemps la possibilité d'invoquer ces dispositions pour justifier la révision (renégociation) du contrat soumis à la Convention.

Ce paragraphe présentera d'abord l'affaire et ledit arrêt pour alléguer ensuite les opinions des commentateurs.

## ARRÊT DE LA COUR DE CASSATION BELGE DU 19 JUIN 2009

Par les contrats conclus entre la société néerlandaise Scafom International BV (acheteur) et la société française Lorraine Tubes S.A.S. (vendeur), cette dernière s'était engagée à la livraison de tuyaux d'acier à un prix fixé par les parties.

Pendant la période de validité desdits contrats le prix d'acier sur le marché avait augmenté de 70%. En effet, le vendeur s'était trouvé dans la nécessite d'y adapter le prix de vente des tuyaux. Puisque le contrat ne contenait aucune clause de révision de prix, société Lorraine Tubes avait demandé à son cocontractant d'accepter l'augmentation du prix convenu. Suite au refus de la société Scafom International, le vendeur avait cessé de livrer les marchandises. L'acheteur avait donc assigné la société française.

Dans la réponse à la demande en justice, la société Lorraine Tubes avait invoqué l'article 79 CVIM comme la justification de l'inexécution de ses obligations résultant des changements des conditions économiques.

En première instance, le tribunal de commerce de Tongeren avait jugé que le vendeur n'avait pas eu le droit d'arrêter les livraisons en vertu de l'article 79 CVIM. Pour-

tant le tribunal avait changé le prix initial en l'augmentant de la moitié du prix supplémentaire offert par le vendeur. La société Scafom International avait porté l'appel.

Dans un arrêt avant dire droit du 29 juin 2009, la Cour d'Appel avait estimé entre autres que:

« 6. *C'est à juste titre que le premier juge a décrit la situation de fait dans laquelle la défenderesse se trouvait à la suite des augmentations de prix et les conséquences qu'elle veut y rattacher (demande d'adaptation des prix convenus) comme une application de la théorie de l'imprévision. La cour d'appel se rallie aux motifs du premier juge aussi en ce qui concerne cette appréciation.*

*7. C'est à juste titre que le premier juge a constaté que la Convention de Vienne du 10 avril 1980 ne règle pas la situation qui est décrite par la théorie de l'imprévision.*

*8. En vertu de l'article 7.2 de la Convention de Vienne du 10 avril 1980, les questions concernant les matières régies par cette Convention et qui ne sont pas expressément tranchées par elle seront réglées selon les principes généraux dont elle s'inspire ou, à défaut de ces principes, conformément à la loi applicable en vertu des règles du droit international privé.* »

Afin de permettre aux parties de prendre une position en matière du droit applicable, la Cour d'Appel avait ordonné la réouverture des débats.

Dans un arrêt définitif du 15 février 2007 la Cour d'Appel avait décidé d'abord que le droit français était applicable. Ensuite elle avait constaté que « *suivant le droit français en vigueur, la bonne foi avec laquelle les contrats sont exécutés requiert l'obligation dans le chef du cocontractant de renégocier les conditions du contrat dans certains cas. C'est notamment le cas si après la conclusion du contrat des circonstances imprévisibles surviennent faisant naître un grave déséquilibre entre les obligations réciproques de sorte que l'exécution ultérieure du contrat devient anormalement préjudiciable pour une des parties.* ». Selon la Cour l' augmentation imprévue du prix d'acier de 70% au cours de la période ultérieure à la conclusion du contrat « *répond, pour les motifs précités, aux conditions pour constater l'obligation de renégocier les conditions contractuelles dans le chef de la demanderesse* ». Sur ce fondement la Cour avait estimé qu'en excluant toute révision de prix, n'ayant avancé aucune contre-proposition, ainsi qu'en voulant obliger la défenderesse à respecter les dispositions contractuelles existantes, la défenderesse avait violé l'exécution de bonne foi des conventions. Par ces motifs la Cour d'Appel avait jugé l'appel non fondé et avait condamné la société Scafom Internation à payer 450.000 euros des dommages-intérêts. Le pourvoi en cassation avait été formé.

Dans l'arrêt du 19 juin 2009 la Cour de Cassation (L'arrêt de la Cour de Cassation de Belgique du 19 juin 2009, No C.07.0289.N) a affirmé que de l'article 79 de la Convention de Vienne il s'est ensuit que «*des circonstances modifiées qui n'étaient pas raisonnablement prévisibles lors de la conclusion du contrat et qui sont incontestablement de nature à aggraver la charge de l'exécution du contrat peuvent, dans certains cas, constituer un empêchement au sens de cette disposition conventionnelle* ».

Puis, en invoquant l'article 7 alinéa 2 de la Convention elle a considéré que « *afin de compléter les lacunes de manière uniforme il y a lieu de puiser dans les principes généraux régissant le droit du commerce international. En vertu de ces principes, tels que consacrés notamment par « Unidroit Principles of International Commercial Contracts », la partie contractante qui fait appel aux circonstances modifiées perturbant fondamentalement l'équilibre contractuel comme visé au numéro 1, a le droit de réclamer la renégociation du contrat* ».

Selon la Cour, en vertu de ces constatations l'arrêt rendu en deuxième instance « *a pu décider sans violer les dispositions légales citées par le moyen, que la demanderesse était obligée de renégocier les conditions du contrat* ».

La Cour de Cassation a rejeté le pourvoi de la société Scafom International.

## LA POSITION DE LA DOCTRINE

La décision de la Cour de Cassation belge a fait beaucoup des controverses et a suscité diverses opinions dans la doctrine. Certains commentateurs, s'opposant à l'application de la Convention aux situations d' *hardship,* ont critiqué la solution adoptée par la Cour (D. Philippe indique ici l'avis du professeur Ramberg qui « *estime que la lacune est trop large pour être comblée et critique aussi son application en fait* » et celui du professeur Uribe selon lequel « *les Principes Unidroit s'écartent de la Convention de Vienne en matière de hardship et ne reflètent donc pas l'usage* » [dans :] Philippe, 2011: pp 963 et s.). D'autres, avec professeur Claude Witz à la tête, en présentant de différents points de vue, ont confirmé l'interprétation justifiant la décision en question.

C. Witz encore une fois a invoqué la question portant sur ce que l'on peut raisonnablement attendre de la part du débiteur en vue d'exécution du contrat, ainsi que sur le critère de limite de sacrifice. Selon lui « *on ne saurait attendre raisonnablement du débiteur qu'il se ruine pour surmonter les conséquences d'un cas fortuit ou d'un changement de circonstances imprévisible. Il existe ainsi un seuil de sacrifice infranchissable que l'on ne saurait imposer au débiteur (V. not. H. Stoll et G. Gruber in Schlechtriem et Schwenzer, Commentary, art. 79, n° 30 et la doctrine citée ; P. Schlechtriem et C. Witz, n° 377). Dans ce cas, le débiteur défaillant devrait pouvoir se libérer de sa responsabilité (en ce sens, Comité consultatif de la CVIM, avis n° 7 ; L'exonération de responsabilité en vertu de l'article 79 CVIM, rapp. A. Garro, n° 3.1, in cisg.law.pace.edu et cisg-france.org pour une traduction en français, sans les commentaires).* » (Witz, 2010: pp 921 et s.). Il a soutenu aussi l'avis de la Cour quant à l'obligation de renégociation du contrat, en estimant qu'elle « *doit pouvoir se déduire, selon ce courant, du principe de bonne foi qui préside à l'interprétation de la Convention ou qui s'impose aux contractants, en tant que principe général (en ce sens, V. not. C. Brunner, art. 79, n° 27 ; Neumayer et Ming, art. 79, n° 14 ; I. Schwenzer, in Schlechtriem et Schwenzer, Kommentar, art. 79, n° 31).* » (ibidem). En même temps, en raison de différentes approches des tribunaux en la matière, il a conseillé d'éviter la référence au pourcentage pour illustrer la gravité de bouleversements économiques et en effet franchissement du seuil de sacrifice (ibidem).

J. Dewez prend la position un peu plus objective. Selon elle « *Si l'interprétation évolutive du champ d'application de l'article 79 de la CVIM adoptée par la Cour de cassation belge est louable, il est certain que l'exonération du débiteur défaillant doit garder un caractère exceptionnel.* » (Dewez, 2011: p. 116). Quant à l'application de Principes d'UNIDROIT, elle estime que la décision de la Cour de Cassation belge peut être considérée comme un nouvel argument confirmant la thèse que les Principes d'UNIDROIT sont les principes généraux du droit commercial international (ibidem: p. 115). Par contre, elle remarque qu'ils n'ont pas de valeur législative. C'est pourquoi d'après J. Dewez la décision en question doit être envisagée avec la prudence (ibidem).

Un commentaire particulier a été écrit par A. Veneziano, qui a approuvé en général la position de la Cour de Cassation belge, en présentant à la fois l'interprétation plus dé-

taillée quant à l'application des Principes d'UNIDROIT (Veneziano, 2010: pp 137 et s.). Selon elle cet arrêt « *peut être considéré comme une reconnaissance des Principes d'UNIDROIT particulièrement pertinente, notamment en raison de provenance de la plus haute juridiction interne et non d'un tribunal arbitral* » (ibidem: p. 137).

Elle remarque à juste titre que le rejet d'application des Principes d'UNIDROIT du fait qu'ils sont ultérieurs à la Convention de Vienne, ne peut pas être reconnu dans la lumière de la nécessité d'encourager l'application pratique et développement permanent des instruments internationaux de *hard law* (ibidem: p. 141).

Elle n'accepte non plus l'argument que les Principes d'UNIDROIT constituent l'instrument externe sans aucune importance pour la détermination des « principes généraux dont s'inspire la Convention » (ibidem: p. 141). La position d'une partie de la doctrine, considérant les Principes d'UNIDROIT comme les règles générales du commerce international est plus juste car elle prend en considération les décisions qui ont favorisé l'approche pratique au lieu des considérations purement théoriques (ibidem: pp 141 et 142).

D'après A. Veneziano « *Les Principes d'UNIDROIT peuvent jouer un certain rôle dans la définition précise quels principes généraux pourraient être considérés comme la partie de CISG dans la lumière du développement du droit commercial international* » (ibidem: p. 143).

Selon elle l'argumentation « *gap-filling* » ne doit être fondée que sur l'article 7 alinéa 2 de la Convention. Il y a deux hypothèses requises: « *premièrement, hardship devrait être considéré comme une matière régie, mais pas expressément tranchée, dans CISG; deuxièmement, un principe général dans la Convention devrait être construit* » (ibidem: p. 144). Comme le principe étant la base pour l'application des effets visés dans l'article 6.2.3 des Principes d'UNIDROIT elle indique l'exemple de *favor contractus* (ibidem).

Pour conclure, A. Veneziano constate que les Principes d'UNIDROIT peuvent être utilisés pour expliquer la signification exacte de l'expression « le droit de renégocier » et définir quelles sont les conséquences de l'échec des renégociations d'un contrat menées de bonne foi. Elle y indique notamment l'article 5.1.3 de Principes d'UNIDROIT, en vertu duquel « *les parties ont entre elles un devoir de coopération lorsque l'on peut raisonnablement s'y attendre dans l'exécution de leurs obligations* » (ibidem: p. 148).

Sans doute la position de A. Veneziano soutient l'arrêt de la Cour de Cassation belge dans son ensemble. En même temps, grâce aux plusieurs remarques elle donne l'interprétation plus complexe de la Convention qui peut mieux justifier la demande de renégociation du contrat.

* * *

Nonobstant la rédaction de l'article 79 de la Convention de Vienne qui semble rendre applicable ce dernier seulement aux situations de force majeure, son interprétation un peu plus large permet l'invoquer aussi comme justification d'exonération en raison de changement des circonstances économiques.

Aucun juge ou arbitre tranchant un litige en la matière ne peut ignorer la position des telles autorités que C. Witz, D. Tallon, P. Schlechtriem ou O. Lando dans l'appréciation des faits donnés et dans l'interprétation de la disposition en question. C'est pourquoi la compréhension de la notion d'empêchement ne peut pas se limiter seulement aux situations d'impossibilité provoquée par les événements de la force majeure.

Par ailleurs si l'on accepte l'existence de la règle *pacta sunt servanda*, il convient aussi d'accepter l'existence d'autres principes comme ceux de l'équilibre contractuel, l'exécu-

tion du contrat de bonne foi ou *favor contractus.* Dans leur lumière les questions portant sur ce que l'on peut raisonnablement attendre du débiteur afin d'exécuter le contrat, ainsi que son seuil de sacrifice sont d'autant plus justifiées.

Cela donne à la partie lésée le fondement légal pour exiger de son cocontractant la renégociation du contrat en cas de changement essentiel des circonstances économiques et, en cas de refus, pour la prétention sollicitant la prononciation d'un tel remède. Pourtant, l'invocation de l'article 6.2.2. et s. des Principes d'UNIDROIT en rapport avec l'article 7 alinéa 2 de la Convention de Vienne est nécessaire pour donner la justification claire, précise, complète et en effet difficile à contester.

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L'arrêt de la Cour de Cassation de Belgique du 19 juin 2009, No C.07.0289.N.

## SUMMARY

The UN Convention on Contracts for the International Sale of Goods, which came into force in 1988, has become one of the most important legal acts in international trade. However, despite more than 20 years of it being in force, there are still many questions that have not yet been resolved definitely, either by the doctrine or the jurisprudence. One of these issues is the application of the Convention to situations of hardship (*imprévision*) and, if applicable, its consequences. For a long time, this question and any opinions presented on the subject remained rather theoretical. Nevertheless, in 2009 the Belgian Court of Cassation rendered a judgment (Scafom International BV v. Lorraine Tubes S.A.S; No. C.07.0289.N; 19 June 2009) that caused great controversy among the commentators of the Convention by sanctioning the possibility of invoking Article 79 of the Convention by a party affected by a change of economic circumstances in order to demand the renegotiation or termination of the contract.

This article starts by presenting the argumentation justifying the application of the Convention in cases where economic upheavals make the performance of a contract too expensive, but not impossible. It goes on to cite the decision of the Belgian Court of Cassation, and certain remarks made by the representatives of the doctrine confirming this interpretation.

# OTHER MATERIALS

# INTERDISCIPLINARY STUDY

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# A NUTS AND BOLTS STUDY OF THE CULTURAL DEFENSE: AN ASIAN AMERICAN PERSPECTIVE

## INTRODUCTION

Consider the following hypothetical:

A person from a minority culture commits an act that is a crime under the laws of the country they resides in, but the act is either mandated or permitted by their culture as they understands it. Should that person be punished for it? In other words, should the cultural motivation or circumstances of the person committing the act be considered when the judge is determining guilt? This question is at the heart of the 'cultural defense' debate.

The next level of questioning is about what I call the nuts and bolts of the cultural defense, and this relates to the application of the cultural defense by courts and the use of expert witnesses. If cultural factors are to be considered, then at what stage should they be considered, and what cultural factors should be relevant and to what extent? Further, if a consensus is reached regarding how these cultural factors are to be considered, by what means can the legitimacy of these cultural claims be examined? It is important to find balanced and efficient answers to these questions for courts to be able to meaningfully apply the cultural defense.

Cultural defense debates are charged with political, racial and feminist undertones. While there is a fear that the legal system would be threatened by making these accommodations for minority cultures, there is also a feeling of the cultural defense being something bestowed upon inferior races and immigrants. On the other hand, proponents of the cultural defense feel that the value systems of minority cultures are marginalized. Further, there is an argument that the cultural defense will lead to people from minority cultures being stereotyped. Overall there is skepticism about the court making a determination about the culture of a minority it knows nothing about. There is also feminist resistance to the recognition of cultural factors in crimes where victims are women, as it would perpetuate practices of patriarchal cultures seen as antithetical to the feminist movement.

This paper examines the cultural defense discourse in the U.S., situating it in the context of Asian Americans, and proposes a cultural defense test consisting of four questions as a guide for courts applying the cultural defense in criminal law cases. It also proposes that the appropriate expert for cultural defense cases would be an anthropologist, and puts forth guidelines for an expert in these cases so as to enable the court to use their testimony to apply the four question cultural defense test.

While cultural factors might become relevant in a wide array of both civil and criminal cases, like cases involving treatment of children, use of certain drugs, attire, public health, etc., I have chosen to focus, in this paper, exclusively on cultural defense cases in the criminal justice context. This is because, in criminal cases, the consequences of either denying the cultural defense or allowing it (without limitation) could be severe. Since criminal justice is not an exact science and involves the consideration of context and state of mind, the consideration of cultural evidence in these cases helps understand the context and state of mind of the specific person informed (Renteln, 2004: p. 23).

This paper further focuses its study of the cultural defense in criminal cases in the specific context of Asian Americans,[1] because while Asian Americans are definitely not a homogeneous group, they tend to be treated collectively as one minority group.

Part I of this paper introduces the concept of the cultural defense and the arguments surrounding it. It calls for the cultural defense to be recognized by courts after an evaluation of all the normative arguments both for and against the cultural defense. Part II briefly situates the cultural defense discourse in the context of Asian Americans. Part III studies three cases where the cultural defense was used with varying outcomes and where the defendants were Asian Americans. Part IV proposes a cultural defense test consisting of four questions that the court needs to apply while applying the cultural defense. Part V examines the role of an expert witness in cultural defense cases and also examines who would be an appropriate expert witness in cultural defense cases. Part VI briefly looks at whether the cultural defense must be given statutory authorization, and whether it should play a role in the prosecution stage or the sentencing stage of the criminal process.

## I. THE CULTURAL DEFENSE DISCOURSE

The cultural defense is really a misnomer and is not a defense by itself.[2] Instead, it is the term used to describe the ability of a person belonging to a minority culture[3] to introduce cultural factors to defend his actions with respect to the offence he is being tried or sued for. While there is no single universal definition of culture, scholars writing on the cultural defense have defined it as "a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and develop their creative potential" (Gordon, 2009, p. 8).

So if culture is such a dynamic value system, how can the existence of particular cultural factors be definitively proven at any given point of time in court, even if they are allowed to be introduced? The key to this is that an individual of a minority culture in

[1] In this paper I use the term Asian Americans to encompass both Asian immigrants in America, and Americans of Asian origin.

[2] Elaine M. Chiu is the only scholar who supports a complete cultural defense. See discussion *infra* Part VI.

[3] I use the term minority culture not to mean a minority in numbers, but to mean any culture that is not the dominant culture in the country. This is relevant because the law of any country would already have internalized the dominant or mainstream culture, while people belonging to minority cultures do not have this benefit. In the U.S., the cultural defense is used in the context of many immigrant groups, Asian Americans being one of them.

the U.S. is either an immigrant or a member of a diasporic community that once immigrated from another country, and such an individual tends to have a point of reference fixed to the time of either her immigration or the first immigration of the diasporic group that she belongs to and interacts with (Kumaralingam, 2009: 44). Further, if culture informs the interaction of the members of a group, with each other and with the world, and the communication and development of the creative potential of each person, then different individuals must necessarily be influenced differently by culture based on personal attributes such as age, gender, class, race or sexual orientation (Leti Volpp, 1996: 92). In this way, different individuals may be influenced by the same cultural practices to varying degrees.

This Part I argues that courts should consider cultural factors motivating a defendant's acts. Not doing so goes against the principle of accommodation, and instead ensures that the dominant culture in the country is imposed on people from other cultures.

## ARGUMENTS IN SUPPORT OF THE CULTURAL DEFENSE

Well-established legal principles of individual justice and equality require that cultural factors are at least considered by courts (Leti Volpp, 1996: 96). This is also supported by the international human rights law discourse, which states that cultural minorities have a right to follow their traditions (Renteln, 2004: p. 212). Alison Renteln, one of the major proponents of the cultural defense, argues that cultural information is relevant because individual justice demands that the actor, the act and motive of the actor in doing the act must be looked at by the court (Renteln, 2004: p. 187). Additionally, the presentation of cultural factors helps the court obtain a more accurate picture of the circumstances surrounding the case, rather than have defendant's counsel try to artificially fit the fact pattern into one of the permitted defenses, which more often than not is the insanity defense, even though the defendant is sane (Sikora, 2001: p. 1707).

Situating these arguments in the U.S., proponents reason that American society, being multicultural and pluralistic, must allow minority cultures to show how their cultures have influenced their actions (Lee, 2007: p. 911, 917).

## AN EVALUATION OF THE ARGUMENTS AGAINST THE CULTURAL DEFENSE

One popular argument amongst critics of the cultural defense, and also a reason cited by most commentators for the cultural defense being used unsuccessfully even where it was permitted, is the 'when in Rome do as the Romans do' perception that people have about the law. This argument also draws from the maxim, *ignorance of law is no excuse,* inasmuch as it seeks to convey that people from minority cultures might have differing practices, but by virtue of living in a country they are expected to be aware of the laws of that country Lee, 2007: p. 920). To put it differently, there is an implied assumption that everyone should assimilate into the mainstream culture (Renteln, 2004: p. 193).

The part of this argument that draws from the '*ignorance of law is no excuse*' is not applicable here, because the cultural defense does not actually go against this. Instead, the cultural defense addresses the issue of the law being at odds with a practice that may be permitted, accepted or even mandated by a certain culture. The assimilationist

part of this argument is problematic, firstly because it is biased against minority cultures retaining their practices, and secondly because such an attitude results in the coercive assimilation of minority cultures (Renteln, 2004: p. 197).

Turning the equal protection argument around, opponents argue that the cultural defense goes against the anti-discrimination principle of the equal protection clause and favors people belonging to minority cultures over other Americans (Lambelet, 1996: p. 1093, 1097). However, this argument overlooks the fact that American law already internalizes mainstream American culture, and the cultural defense is needed to give cultural minorities 'equal protection' under those laws (Lee, 2007: p. 911, 918).

Another concern articulated by opponents is that deterrence, which is an essential feature of criminal law, will be undermined by the cultural defense, which would reduce the sentence or be a mitigating factor in the trial. Thus members of that minority culture would continue to commit such acts and law enforcement will not be strong enough to deter them (Renteln, 2004: p. 192). Since cultural defense cases apply only to the cultural minority, the deterrence argument cannot be raised for people not belonging to that cultural minority (Renteln, 2004: p. 195). Further, in cultural defense cases, actions by members of a minority culture are motivated by the dictates of their culture, and in most cases punishment will not matter to them. For example, in cases where an action is motivated by a need to 'save face' (respect in one's community), punishment will be less important to such a person as compared to 'losing face' in the community (Chen, 2009: 250–251). Even if not, accepting the cultural defense would ensure deterrence to a limited extent, the important question to be asked against this deterrence argument is whether achieving this limited deterrence is more important than according equal access to justice to everyone? Also important to note is the fact that the cultural defense rarely leads to a full acquittal, and usually only serves to reduce the sentence, in which case the deterrence argument carries less weight as there is still some punishment (Renteln, 2004: p. 196).

Another argument against the cultural defense is that it would result in negative stereotyping, because courts would present minority cultures in a bad light. Further, it would lead courts to stereotype minority cultures in terms of how much they do or do not fit into the majority culture (Sikora, 2001: p. 1709). However, this argument hardly has any merit since American mainstream society already perpetuates and carries a number of stereotypes about minority cultures and especially about Asian Americans, as will be clear in part II of this Paper. Should the cultural defense then be denied to people from these groups just to avoid more stereotyping? In my opinion, if a systematic model for applying the cultural defense by courts is put in place, culture will be presented in an informed and sensitive manner by an expert, usually an anthropologist, and with reference to a particular individual, thereby possibly reducing the negative stereotyping already prevalent in society. I will demonstrate how this could be done in Part IV, where I lay out a model for courts to apply the cultural defense.

Concerns have also been raised about women and children from minority cultures. One of American society's most fundamental progressive goals is to empower women and children, and the cultural defense would go against this (Coleman, 1996: p. 1093, 1095). As a reply to this, Letti Volpp quotes Mari Matsuda who takes the position that focusing on women's rights in cultural minorities takes away attention from the criminal justice system, rendering radicalized justice, which in effect is what would result if the cultural defense is denied to minority cultures (Volpp, 1996: p. 73, 87). It is my

opinion that recognizing a full cultural defense (which is not what I am proposing), where the defendant is given absolutely no punishment for a culturally motivated act, and where the victim is a woman or child, would definitely be opposed to the rights of women and children. However, most scholars do not advocate such a complete cultural defense and merely propose cultural factors being considered by the court during the trial phase.

Arguments about the rights of victims find favor with critics of the cultural defense. They argue that victims of the same crime receive different levels of protection based on whether the cultural defense applies or not (Renteln, 2004: p. 193).

This argument does not hold much sway because it defeats the purpose of criminal law, which is to ensure just punishment for the defendant by focusing on the defendant's state of mind. If all victims of the same crime are entitled to the same sentence being awarded to the defendant, even traditional defenses under criminal law like insanity would not be valid (Renteln, 2004: p. 196).

### NEED FOR THE A CULTURAL DEFENSE

The above discussion makes it clear that the cultural defense is necessary in order to protect the rights of minority cultures. Most of the normative arguments articulated against it stem either from a faulty understanding of the cultural defense, or a failure to consider rights of cultural minorities, or misplaced concern for negative stereotyping of these minority cultures.

However, other concerns on a more practical level have been raised with regard to how the cultural defense is applied by courts. These issues have been discussed in Part IV of this paper.

## II. CULTURAL DEFENSE IN THE ASIAN AMERICAN CONTEXT

Immigrants are not new to America. In fact, America prides itself on being the land where "people from all over the world will come and their differences will be accepted and embraced" (Sikora, 2001: p. 1708). How much has the Asian American difference been accepted and embraced in America?

Answering this question is extremely pertinent to a study of the cultural defense for Asian Americans in criminal cases. This is because the cultural defense seeks to accommodate beliefs and practices of minority cultures at the stage of either trial or sentencing since the law has not internalized them.

### THE ASIAN AMERICAN EXPERIENCE

The Asian American experience has historically been one of exclusion on the one hand, and forced assimilation on the other.

Asians, as a group, are stereotyped as having such a heightened loyalty to family and tradition that it is impossible for them to blend into mainstream society (Volpp, 2010: p. 63). However, there have also been success stories of Asian Americans studying and working hard and improving their economic standing. For this, ironically, the stereotype perpetuated in that Asians and Asian Americans as a group are minority with

a culture that encourages them to work hard and achieve the American dream of economic success, and this makes them a 'model minority' in America.[4]

Thus, on the one hand Asian Americans have been considered incapable of assimilating into mainstream society because of their culture, while on the other hand they are seen as the model minority that has succeeded in America, which is also attributed to their culture (in this case consisting of positive attributes like hard work and perseverance), and hence an example of a minority having access to the great American dream.

## EXCLUSION

Asians were perceived by American society as 'different' and 'the others' right from the 1800s when the first Chinese immigrants arrived in Hawaii and California during the gold rush (Chiu, 1994: p. 1053, 1055). This perception was manifested in various pieces of legislation and norms that resulted in excluding Asians from mainstream society. Some early examples of these early exclusionary regulations are those denying naturalized citizenship to Asians[5] by classifying Asians as not belonging to the Caucasian race[6] and being non-white,[7] thereby linking race to geographical location in (Chiu, 1994: p. 1061). As a consequence of being ineligible for citizenship, Asians were denied access to a wide range of employment positions and from owning real property in (Chiu, 1994: p. 1064). Asians were prevented from marrying white people, and were not allowed to attend schools attended by white children in (Chiu, 1994: p. 1065). Further, both laws and social exclusion resulted in the ghettoization of Asians, i.e. the creation of China towns, Korea towns etc. in most American cities, where Asians lived outside of mainstream society (Chiu, 1994: p. 1065).

## FORCED ASSIMILATION

Parallel to the laws that aimed to exclude Asians from mainstream society, there were also laws that tried to force Asians to confirm to the norms of mainstream American society. Instead of accepting that Asians were influenced by a different set of cultural values, Asians in America were forced to confirm to mainstream society's norms through various laws and regulations. Ordinances passed to compel the Chinese to change their living arrangements in San Francisco (the Cubic Air Ordinance, which required every living house to provide 500 cubic feet of air space per adult lodger) and legislation frustrating Chinese burial practices in California (requiring a permit from the county officer for the disinterment of a body) are some examples of this (Chiu, 1994: pp. 1076–1077).

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[4] *See generally*, Wu, *Asian Americans and the 'model minority' myth*, LA Times, Jan 24, 2014, available online at http://www.latimes.com/opinion/op-ed/la-oe-0123-wu-chua-model-minority-chinese-20140123-story.html.

[5] Naturalization Act of Mar. 26, 1790, ch. 3, ? 1, 1 Stat. 103, repealed by Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (granting naturalized citizenship to alien whites). Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (codified as amended at 8 U.S.C. 1422 (1988) finally eliminated the provision against the naturalization of nonwhite aliens. Cited in (Chiu, 1994: p. 1061).

[6] *Ozawa v. United States*: 260 U.S. 178 (1922).Cited in (Chiu, 1994: p. 1061).

[7] *United States v. Thind*: 261 U.S. 204 (1923).Cited in (Chiu, 1994: p. 1061).

## MODEL MINORITY MYTH

Asian Americans are regarded as a model minority in the U.S. due to their economic and professional achievements, which is attributed to their hard work and discipline. This, like most generalizations, is a myth; the reality being that many Asian Americans suffer from extreme poverty.[8] However, even where the reference to economic success is true, this myth ignores the total lack of political success of Asian Americans in the U.S. Even where political lack of participation of Asian Americans is spoken of, it is in terms of their being disinterested in American society and their clannish predisposition. Therefore, today's stereotypes of Asian Americans reinforce the same perception of them as 'others' or 'different', despite some Asian Americans having lived in the U.S. for two or three generations.

The model minority stereotype promotes a mistaken notion that Asian Americans have assimilated in mainstream society and adopted white values, while in reality Asian Americans have retained their values to varying degrees (Chiu, 1994: p. 1082). Thus there is a constant push to force Asian Americans to assimilate, and the model minority myth is used as a tool to convey the bitter-sweet message – 'conform and succeed or be left behind'. Examples of this in contemporary times can be found in the workplace, where employees are expected to dress in such a way as to appear American.[9]

This is definitely not a story of differences being accepted and embraced, but rather one of the coerced elimination of those differences, and otherwise blaming the culture for being too excessive.

## THE CULTURAL DEFENSE FOR ASIAN AMERICANS

It is apparent from the above discussion that Asian Americans have been forced to assimilate, while at the same time being historically excluded from mainstream society. Notwithstanding whether this is due to historical reasons or due to 'excessive' culture, the fact remains that Asian Americans are informed by different cultural values than mainstream society, and no efforts have been made to accommodate these practices.

By recognizing the cultural defense in criminal cases, some accommodation is being made to Asian Americans, at least in this context. Conversely, denying them the benefit of the cultural defense then translates into forced assimilation, as they would be punished for committing acts that are either permitted or mandated by their culture. Most culturally motivated criminal acts fail to achieve the 'state of mind' required in criminal law, and in order for the defendant to be able to defend himself in such a case, it becomes essential to present cultural evidence and motivations. Therefore, not recognizing the cultural defense would prevent the defendant from being able to present cultural evidence in order to defend himself.

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[8] *See* supra note 5.

[9] http://www.forbes.com/sites/evangelinegomez/2012/01/31/should-businesses-worry-about-appearance-based-discrimination-in-the-workplace/ (visited, May 2nd, 2012).

## III. CASE STUDIES

This part will present three cultural defense cases in a criminal justice context that are relevant to the study of an Asian American perspective of the cultural defense. The first two of these cases are unpublished, and the third was later de-published. This in itself underlines the nebulous attitude of courts towards the cultural defense, and at the same time casts uncertainty about its use in subsequent cases. A study of these cases also helps throw light on how different approaches of courts and experts in the application of the cultural defense can lead to different outcomes.

*People v. Dong Lu Chen*[10]

***Facts***

One day, Dong Lu Chen confronted his wife about their sexual relationship and she confessed to having an extra-marital affair. Hearing this, he left the room and returned with a claw hammer and, after knocking her onto the bed, hit her on the head eight times until he finally killed her (Goldstein, 1994: pp. 141, 151).

***Defendant's specific situation***

Dong Lu Chen was an immigrant from Canton, China, and had immigrated one year earlier before the crime in question was committed (Choi, 1990: p. 84).

***Cultural factors and how it played out in the court room***

The defense argued that cultural pressures had resulted in Dong Lu Chen's diminished capacity, thereby rendering him unable to form the necessary intent for premeditated murder (Goldstein,1994: p. 152). Expert testimony on traditional Chinese culture was introduced, in support of this argument. The expert was Dr. Burton Pastemak, a professor of anthropology. He testified that in Chinese culture, a woman's adultery is considered as proof of her husband's weak character and that it brings shame upon the husband's ancestors. He explained that a husband is usually enraged upon learning of his wife's infidelity and threatens to kill her, but that the close-knit Chinese community intervenes and offers help to the family before the husband can carry out the threat. However in this case, there was no community to intervene and protect Dong Lu Chen's wife (Goldstein,1994: p. 151).

Based on this, Judge Pincus found that Dong Lu Chen was guilty of the lesser crime of second degree manslaughter (Goldstein,1994: p. 151). Further, the judge imposed probation rather than grant a sentence, justifying it with the argument that the defendant here was a victim too, as there was no 'community' to calm him down and stop him from killing his wife (Volpp, 1996: p. 73). In fact, the judge was so persuaded by the expert testimony that he stated that had Dong Lu Chen been born and/ or raised in an American, or even a Chinese community in America, the decision would not have been the same.[11]

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[10] *People v. Chen,* No. 87-7774 (New York Superior Court, 1989).

[11] "Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court [sic] would have been constrained to find the defendant guilty of manslaughter in the first degree. But, this Court [sic] cannot ignore… the very cogent forceful testimony of Doctor Pasternak, who is, perhaps, the greatest expert in America on China and interfamilial relationships." cited in (Volpp, 1996: p. 73).

***Current position in China***

The expert witness testifying for Dong Lu Chen in this case himself admitted that he could not actually recall a single instance of a man killing his adulterous wife in China (Volpp, 1996: p. 70).

*People v. Kimura*[12]

***Facts***

This was a case of *oyako-shinju* or parent-child suicide. Fumiko Kimura, a Japanese American woman living in California waded through the Pacific Ocean with her two children when she heard of her husband's infidelity. The two children died but she survived and was charged with first degree murder (Renteln, 2010, p. 427).

***Defendant's specific situation***

Fumiko Kimura had been living in the U.S. for many years, but had not assimilated due to her cultural isolation (Renteln, 2010, pp. 428–429).

***Cultural Factors***

The cultural background to this was that Fumiko Kimura, being despondent after having learnt of her husband's infidelity, committed *oyako-shinju* to save herself from shame and humiliation, and to save her children from future shame and humiliation. Commentators have opined that in Japan a mother considers her children an extension of herself, and *oyako-shinju*is thus caused by the inseparable parent-child bond (Choi, 1990: p. 82). A mother committing suicide and leaving her children behind is seen as dooming them to the disgrace of living in an orphanage, or with a single parent, and is seen as a demon-like person (Goldstein, 1994: p. 147).

***How it played out in the court room***

A petition signed by 4000 Japanese Americans was sent to the district attorney, appealing that modern Japanese law be applied to the case; however, the prosecutor, defense attorney and judge declined(Goldstein,1994: p. 148).

Instead, the strategy adopted by Fumiko Kimura's defense lawyer was to plead the insanity defense. Six psychiatrists testified that Fumiko Kimura was suffering from temporary insanity, some of them basing their opinion on her inability to distinguish between her life and her children's lives (Renteln, 2010, p. 428). Finally, a plea bargain was entered into according to which her charge was reduced from homicide to voluntary manslaughter; she was sentenced to one year in county jail, which had already been served during the trial, five years' probation and psychiatric counseling (Renteln, 2010, p. 428).

***How Japanese law deals with oyakoshinju***

While *oyakashinju* is illegal in Japan, it is fairly common. While a parent who survives it is charged with homicide, the sentence is usually suspended (Choi, 1990: p. 82).

*People v. Helen Wu*[13]

***Facts***

Helen Wu was a native Chinese woman living in the U.S. She was upset because Gary, the father of her son, had promised to marry her but then broken that promise. Then he

[12] *People v. Kimura*, No. A-091133 (Los Angeles Superior Court, 1985).

[13] Court of Appeal of California, Fourth Appellate District235 Cal. App. 3d 614, 286 Cal. Rptr. 868 (1991) Pursuant to *California Rule of Court 976(c)(2)*, the California Supreme Court has ordered this opinion depublished.

had agreed to marry her only when she promised him a sum of money. On the eve of the homicide, her son told her that his father was living in the house of another woman, and that he was beaten regularly China (Volpp, 1996: p. 85).

This made her agitated and depressed, and ultimately led her to strangle her son with a rope from the window. She then wrote a note to Gary saying that he had bullied her too much and that "now this air is vented. I can die with no regret." She then tried to strangle herself and, when she failed, slashed her wrists and lay down next to her son to die China (Volpp, 1996: p. 86).

***Defendant's specific situation***

Helen Wu was a native of China and had first come to the U.S. when Gary contacted her and promised to divorce his wife and marry her. She arrived in the U.S. in 1979, and conceived a child with Gary in 1980, though he had not yet married her. Helen Wu did not speak English, did not drive and had no other support system in the U.S. but Gary. So she returned to China and returned eight years later when he proposed marriage China (Volpp, 1996: p. 85).

***Cultural factors and how it played out in the courtroom***

The defense for Helen Wu argued an automatism defense (meaning that the acts were done in an unconscious state of mind) and a cultural defense; however, the trial court did not accept this, as that would approve actions that, even if acceptable in China, are not acceptable in the United States (Renteln, 2010, p. 430). The Court of Appeal held that the trial court should have instructed the jurors that they could choose to consider Helen Wu's cultural background in determining the 'state of mind' necessary to be determined for murder. It also held that there was evidence of Helen Wu's background and the impact her background may have had on her mental state.

Significantly, the court also distinguished between admitting cultural evidence for the purpose of proving 'state of mind' from admitting it to for the purpose of showing that defendant was ignorant of the law, and therefore excused from it. It clarified that the former was permitted and the latter was not (Taylor, 1998: pp. 445, 450). While the California Supreme Court declined to review the case on the merits, it ordered the depublication of the opinion by the Court of Appeal. Despite this, Helen Wu was entitled to a new trial wherein the jury convicted her of voluntary manslaughter, as it saw the cultural factors as being a partial excuse for her actions (Renteln, 2010, p. 431).

In this case, cultural evidence was presented by experts on 'transcultural psychiatry', who testified that Helen Wu's emotional state was intertwined with and explained by her cultural background. One expert, Dr. Chien, said he drew not only from transcultural psychiatry, but also from his expertise in Chinese culture and from his interview with Helen Wu.[14] The expert testimony essentially established that Helen Wu's act of killing her son did not stem from an evil motive, but instead from love for her son, a feeling of failure as a mother and a desire to be with him in another life (Volpp, 1996: p. 88).

***Current position in China***

Nothing was presented here about the law in China for an act similar to Helen Wu's committed by a person in her circumstances.

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[14] "[I]n my expertise as a transcultural psychiatr[ist] . . . with my familiarity with the Chinese culture . . . and from the information interview I obtain from Helen, she thought she was doing that out from the mother's love, mother's responsibility…" as cited in (Volpp, 1996: p. 88).

## IV. APPLICATION OF THE CULTURAL DEFENSE BY COURTS

*[I]f respect for an individual also requires respect for the culture in which his identity has been formed, and if that respect is demanded in the uncompromising and non-negotiable way in which respect for rights is demanded, then the task may become very difficult indeed, particularly in circumstances where different individuals in the same society have formed their identities in different cultures. – Jeremy Waldron*[15]

As Jeremy Waldron says, it becomes very difficult to have an uncompromising and non-negotiable cultural defense, as there are other concerns (discussed in Part I of this paper) that must be taken into account. In this Part IV, I will first discuss the suggestions and views of scholars about the extent of the cultural defense, most of whom favor a limited cultural defense, and then present a model for courts to apply the limited cultural defense.

As the cases examined in Part III show, cultural factors are, in fact, considered by courts, but there is no general rule with respect to its application. The way it has played out in courts is not out any fixed pattern. Lawyers may, at their discretion, choose to introduce cultural evidence, and judges may or may not admit that evidence. Even if the evidence is admitted, there is no certainty as to how it will be applied. Again, there is no certain rule establishing how or at what stage courts will admit such evidence. It may be admitted as part of expert testimony at trial, or as part of jury instructions, or as mitigating factors during sentencing, or maybe even in the plea bargaining phase (Volpp, 1996: pp. 95–96).

Therefore it is necessary for a model to be formulated whereby courts can uniformly apply the cultural defense. Such a model must obviously take into account all the concerns surrounding the cultural defense debate to be accepted.

Most scholars in favor of the cultural defense have called for the establishment of a limited cultural defense, and have suggested different ways to limit it so that it does not end up being a slippery slope of sorts. However, there has been one proposal to make the cultural defense a complete defense or justification.

### THE CULTURAL DEFENSE AS A COMPLETE JUSTIFICATION – IS THIS JUSTIFIED?

Uninspired by the way in which courts have been using their discretion to apply the cultural defense, Elaine M. Chiu proposes that culture should be a complete justification rather than just a defense. In support of her proposal, she argues that if the use of the cultural defense is discretionary, then it results in fitting it under one of the existing criminal defenses, as was done in the *Kimura* cases (Chiu, 2006: p. 1321). There is merit in this argument as, for instance, in *Kimura*, while pleading insanity and linking cultural factors helped reduce Kimura's sentence drastically, she was also given psychiatric counseling which was not appropriate for her.

She makes another argument that one of the main purposes of criminal law is determination of blameworthiness, which is not achieved by recognizing a limited cul-

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[15] Jeremy Waldron, *Cultural Identity and Civic Responsibility,* in*Citizenship In Diverse Societies* Will Kymlicka& Wayne Norman eds., Oxford University Press 2000, p. 160, cited in (Chiu, 2006 : pp. 1317, 1318).

tural defense where the act is still determined to be wrong but cultural factors would reduce the sentence (Chiu, 2006: p. 1322). In my opinion, however, the purpose of the cultural defense is to accommodate people of minority cultures in America, and a limited cultural defense achieves this inasmuch as a person is not made to suffer an excessive sentence for an act which, in their mind, was permitted or mandated by their culture. In doing what Chiu proposes, if a complete cultural defense were to result in the act of a defendant being considered not morally blameworthy merely because the defendant belongs to a certain minority culture, it would result in that culture being stereotyped as morally lacking. Further, for an act like Chen's, i.e. a man killing his wife because she committed adultery, not being held to be blameworthy because of cultural factors would undermine women's rights in particular, and victims' rights in general. Thus, while Chiu's approach of culture being a complete justification may be appropriate in other walks of life, it cannot be accepted in the context of criminal law.

## IN DEFENSE OF A LIMITED CULTURAL DEFENSE – DEVELOPING A MODEL FOR IMPLEMENTATION

The limited cultural defense balances the dangers of an unlimited cultural defense or justification with the need for the cultural accommodation of minorities. Most scholars therefore favor a limited cultural defense, but have proposed different models in terms of how and when cultural factors must be considered by the court. What is required is a balanced model that all courts would apply in order to have certainty, and prevent any misuse of the cultural defense.

Renteln suggests a cultural defense test that courts can use to avoid a potential abuse of the cultural defense. Under this test, the courts have to answer three queries, in applying the cultural defense namely: (1) Is the litigant a member of an ethnic group? (2) Does the group have such a tradition? (3) Was the litigant influenced by the tradition when he or she acted? (Renteln, 2004: p. 207). These three queries, constituting the test, act as an excellent starting point for a judge to determine, in a structured way, whether the cultural defense applies. For instance, had this test been followed by the *Dong Lu Chen* court, Judge Pincus would have had to first determine whether Dong Lu Chen was a member of 'Chinese culture'. The answer to this would have been yes, as Dong Lu Chen had immigrated to China only a year previous. Next, the judge would have had to determine whether there was a tradition in Chinese culture where the husband kills his wife if he learnt that she was committing adultery. The answer to this, according to the expert witness in that case, would probably have been yes, based on his testimony that a husband in china is usually enraged on learning of his wife's adultery and threatens to kill her, but is then stopped by his community. Therefore, as Judge Pincus reasoned, since Dong Lu Chen lacked this community support that would have been available to him in China, he ended up killing his wife. The final question that the court would have had to answer is whether Dong Lu Chen was influenced by the tradition when he acted, which the court would have most likely have answered in the affirmative, going by the expert testimony and Judge Pincus's reasoning. Thus, even applying this test, the *Dong Lu Chen* case would have determined that the cultural defense is applicable and the outcome would in all probability have been the same.

Cher Weixia Chen has tried to address the issue of the relevance of the current law on the particular issue in the home country of the minority culture. She suggests that, in addition to presenting the cultural background of the defendant, there should be a comparative study of the law in the home country of the culture, in order to determine whether the cultural defense must be adopted. She supports this suggestion with the argument that the law in any legal system reflects the value system and morality of that territory (Chen, 2009: p. 256). Applying this suggestion to the *Dong Lu Chen* case, she explains that Prof. Pasternak, the expert witness for the case, could not answer the question about the status of law and the legal consequence of divorce in China, which a lawyer or a legal scholar from China could have answered. According to Chen, had a lawyer or legal scholar from China testified, the outcome of this case would have been very different that the law in any legal system reflects the value system and morality of that territory (Chen, 2009: p. 256).

Her argument is very attractive, because one of the basic justifications for adopting the cultural defense is the fact that American law would necessarily have internalized American values, and that cultural accommodation must be given to people belonging to minority cultures who do not share this privilege. However, her argument overlooks the fact that culture is a dynamic concept and that immigrants or diasporic communities, when asserting their cultural identity, tend to have a point of reference that is fixed to the time of the first wave of emigration or dispersion (Kumaralingam, 2009: 44). This means that, while current laws in the home country of the particular minority culture might reflect the current values and beliefs of the people, the defendant's point of reference might be to a culture fixed in a different time. This means that merely a legal scholar or lawyer from the home country of the minority culture will not suffice to make an accurate determination of whether the cultural defense is applicable in the case. Yet, her analysis that the *Dong Lu Chen* case could have come out differently had a legal scholar or lawyer from China testified, instead of an anthropologist, holds some promise. As she points out, the Judge did ask the anthropologist about the current status of marriage law and the legal consequences of divorce in China. This aspect is extremely important and could have turned the decision around, particularly in this case because the defendant had immigrated from China only a year previous. This aspect is vital to a cultural defense case, which the court did not consider.

Therefore, in my opinion, in addition to Renteln's three questions, a fourth question must be considered by the court namely, what period of time the defendant uses as his fixed point of reference when asserting his cultural identity. This is a particularly hard question to answer, because the time of emigration from the home country might not always be the only thing to be considered. The cultural background of the defendant might be more nuanced, like in the case of *Fumiko Kimura*, who had been living in the U.S. for many years, but still remained isolated from mainstream society and had not assimilated. In this case, she was probably influenced by the Japanese American community in the U.S. that she might have interacted with, and her actions might be influenced not only by her understanding of her culture at the time she immigrated, but also from the beliefs she might have gleaned and shared with her immediate community. While something of this nature is admittedly hard to determine, the expert in the Helen Wu case stated that he drew his conclusions from transcultural psychology, his expertise in Chinese culture and personal interviews with the defendant. I propose that the expert must necessarily interview the defendant personally to understand her spe-

cific time of reference when making the cultural claim. The expert can make this determination by drawing from his expertise and the personal interview with the defendant, as was done in the Helen Wu case.

## V. EXPERT WITNESS IN CULTURAL DEFENSE CASES – QUALIFICATION AND TESTIMONY

Experts played a critical role in all three cultural defense cases discussed in this paper. Both Renteln's model and the model I have proposed here, presuppose that the court receives expert testimony. Cher Waxia Chen too focuses on what sort of expert is appropriate for a cultural defense case. This raises two important questions, namely, who is best suited to be an expert in cultural defense cases, and what role should such an expert play in these cases? In this Part V, I consider each of these questions and propose that an anthropologist is best suited to be an expert in cultural defense cases, and recommend that the court must instruct the expert to examine certain specific issues. I end this part with a recommendation to develop rules of guidance for experts in such cases.

### *WHO SHOULD BE AN EXPERT IN CULTURAL DEFENSE CASES?*

Historically, anthropologist testimony has been accepted in a number of cases, including racial discrimination cases, cases related to miscegenation laws, child custody cases, etc. and date back to the landmark case of *Brown v. Board of Education*, where expert testimony was relied on to make the argument that racial segregation was unconstitutional if it lacked any rational basis (Rosen, 1977: pp. 555, 571)[16]

While mostly anthropologists have been appointed as experts in cultural defense cases, arguments have also been made for the use of members of the minority culture as experts, as they would be in a position to explain the significance of traditions to courts (Renteln, 2004: p. 206). As is apparent from the type of experts used in the cases discussed in Part III above, anthropologists tend to be more accepted by the courts as compared to members or leaders of the community. This is because anthropologists are seen as qualified social scientists who can testify objectively, whereas a member of the same minority culture as the defendant might succumb to political pressures, or might themselves, being insiders to the community, be biased in favor of people belonging to their community. Further, the testimony of a member of the minority culture might not be easily accepted as expert testimony without a standard to show the person as an expert in the culture.

However, there are also concerns with respect to anthropologists' testimony in cultural defense cases. Since anthropology, as a disciple (and therefore anthropologists), has its roots in colonial conquest, it could be seen as remaking 'other' cultures as per colonial pragmatics as a means to better subjugate them.[17] This would mean that anthropology, as a discipline, is biased against 'other' cultures, and thus anthropologists testifying in cultural defense cases must necessarily be biased against the other culture. If this is true, there is a danger of perpetuating the biases inherent in the discipline into

[16] *Brown v. Board of Education* 347 U.S. Supreme Court 483 (1954).

[17] http://slavic.lss.wisc.edu/~tlongino/ctp/whitehead.shtml (visited on May 22nd, 2012).

courts in cultural defense cases, by relying on the testimony of anthropologists. While this may have been true earlier, anthropology has evolved, to some extent, since its colonial origins, so that the relationship between 'who is doing the study' and 'who is being studied' is changing.[18] However, there could be some instances of anthropologists, like Dr. Pasternak in the *Dong Lu Chen* case, emphasizing how different Chinese culture was from American culture and painting a picture of Chinese culture that was far from present day reality. Therefore, it is prudent to weigh the merits of using anthropologists' objective and scientific testimony against this danger of further perpetuating 'othering'. To balance out the two, it may be useful to adopt certain procedural safeguards in terms of laying out precise parameters to be followed by an anthropologist giving expert testimony in cultural defense cases. For instance, every assertion about a minority culture by the expert must necessarily be substantiated by concrete evidence. This would ensure that the judge weighs the testimony of the expert as per these parameters, rather than accept the testimony based mostly on the reputation of the anthropologist, as was probably true in the *Dong Lu Chen* Case. In that case, the Judge explicitly stated: "… this Court [sic] cannot ignore… the very cogent forceful testimony of Doctor Pasternak, who is, perhaps, the greatest expert in America on China and interfamilial relationships" (Volpp, 1996: p. 73).

If the court has to apply the cultural defense as per the model I proposed in Part IV above, an anthropologist specializing in that particular minority culture would be the most appropriate expert. I will substantiate this by examining who is suited to answer each of the four questions in my model.

The first question to be answered is, '*is the litigant a member of the ethnic group?*' Ethnography being one of the subjects anthropologists study, an anthropologist would be able to answer this question.

The second question to be answered is, '*does the group have such a tradition?*' While this question could also be answered by a member of the minority culture, there is always the possibility that these community experts might succumb to pressure from inside the community to save the defendant from prison (Renteln, 2004: p. 206). On the other hand, an anthropologist who has an expertise in that particular culture would be able to answer this question more objectively.

The third question is, '*was the litigant influenced by tradition when he or she acted*?' Anthropologists who study culture also focus on the importance of its influence on human thoughts, feelings and behavior (Caughey, 2009: p. 326). This would make them the most appropriate experts to answer this question. However, since this question involves some element of second-guessing the defendant's thoughts, perhaps the use of a psychologist or a transcultural psychologist (as seen in the Kimura case) can be used in conjunction with the anthropologist's testimony if the case calls for it. John L. Caughey, an anthropologist with interests in South Asian cultures, recounting his experience as an expert witness for a cultural defense case in Maine opines that it might have been better if he could have interacted with the psychiatrist testifying about the defendant's psychological state, as cultural matters are intertwined with an individual's personal psychology and state of mind (Caughey, 2009: p. 329).

[18] "World anthropologists and current trends", available online: http://sc2218.wetpaint.com/page/World+Anthropologies+and+Current+Trends (visited on May 22nd, 2012).

The last question is '*what is the period of time that the defendant uses as his fixed point of reference, while asserting his cultural identity*?' The answer to this question is to be determined by a study of the defendant's background and a personal interview with the defendant. Here too, an anthropologist would be appropriate for the same reasons as in answering the previous question.

In the *Dong Lu Chen* case, despite an anthropologist testifying as the expert, both his testimony and the outcome of the case have been criticized. The expert in that case, Dr. Pastemak, placed too much emphasis on the difference between American and Chinese, and that the Chinese must necessarily be constructed as an 'in-assimable alien' thereby further perpetuating the feeling of immigrants being the 'other' in mainstream America (Volpp, 1996: p. 67).

In contrast, the experts in the Helen Wu case, who were transcultural psychiatrists, based their opinion on extensive interviews with the defendant to see how the culture had influenced her. This had the benefit of focusing on the individual, rather than drawing out perceptions about the culture itself, and ensuring that the trial remains a trial of the individual and not the culture in question. Although Dr. Pastemak in the Chen case did not do this, an anthropologist is equipped to assess the influence of culture on human thoughts and behavior, and hence can provide a more individualized testimony (Caughey, 2009: p. 326). The important question one should ask is how we can ensure that the anthropologist, in his role as an expert, does not end up alienating and 'othering' the culture, and instead applies his expertise to the individual's specific circumstances.

The other problem with Dr. Pastemak's testimony was that he did not focus on the time period that should be the fixed point of reference for Chen when claiming the cultural defense, which in this case should have been current Chinese culture, as Dong Lu Chen had immigrated only a year ago. Instead Dr. Pastemak made general comments about American stereotypes about the hyper-sexualized Chinese woman, and Chinese men finding it hard to find a Chinese wife after his first wife had committed adultery, as he could not maintain a minimum level of control. His source for this information, by his own admission, was field work he had done 'between the 1960s and 1988,' and could not cite a specific similar incident, let alone a recent incident. (Volpp, 1996: p. 70).

This takes us back to the question of how we can ensure that the anthropologist, in his role as an expert witness, does not draw generally from his knowledge of the culture, but focuses on the specific time period applicable to the defendant in question.

## *WHAT ROLE SHOULD THE EXPERT PLAY IN CULTURAL DEFENSE CASES?*

The above discussion underlines the importance of the role of the expert witness in enabling the court to apply the 'four question' test model I have proposed. How can the court ensure that it receives the necessary and appropriate guidance from the expert testimony? This is not the only problem that needs to be addressed when considering the role of an expert witness in cultural defense cases. There is a concern about anthropologists testifying as expert witnesses being considered as merely 'hired guns' for lawyers on either side (Renteln, 2004: p. 206). There is also the problem of anthropologists not being willing to testify in cultural defense cases, since it generally involves a 'difficult, adversarial, disturbing and depressing' trial process at the end, during which their testimony may

be challenged and excluded (Caughey, 2009: p. 322). This problem is accentuated by the fact that selection of anthropologists as expert witnesses is generally haphazard, and there is easily accessible list of experts available on various cultures (Renteln, 2004: p. 206).

Addressing the latter two issues is necessary to try and find an answer to the first issue of ensuring the anthropologist enables the court to follow the four step test I have proposed. To address the issue of anthropologists merely being 'hired guns', the formulation of a code of ethics for expert witnesses has been suggested (Renteln, 2004: p. 206). In my opinion, this is a suspicion one can have about any expert witness, for instance a medical expert or a forensic science expert. However, an anthropologist, like any other expert, would worry about his reputation more than the monetary incentive for testifying a certain way, and that would be the greatest check against an anthropologist merely acting as a 'hired gun'.

The next concern to be addressed is that of anthropologists not being willing to testify in a cultural defense case. Apart from anthropologists finding the adversarial court room environment unattractive, the fact there is no clarity about how courts will apply the cultural defense as yet, might be a reason for this. Many feel that the cultural defense is merely a 'culture-made-me-do it excuse' and that it has been wrongly used to excuse crimes against women and children (Caughey, 2009: p. 324). From an anthropologist's point of view, if they feel that the cultural defense is being misused, and rightly so in a number of cases, it is all the more reason for them to involve themselves and help bring about a change (Caughey, 2009: p. 324). Renteln also proposes that professional associations like the American Anthropological Association, including region specific cultural studies organizations, could compile lists of experts on different cultural groups (Renteln, 2004: p. 206). These groups could also increase awareness by organizing talks by legal scholars and practitioners about the use of the cultural defense, so that anthropologists are aware and open to the idea. Caughey says that his involvement in a cultural defense case, the study it entailed and the trial process, helped him learn about cultural matters and how they play out in court (Caughey, 2009: p. 323). Even if we are assured of the availability of anthropologists to testify in cultural defense cases, how can the court ensure that it receives the necessary and appropriate guidance from their testimony in order to be able to apply the four question test proposed?

Typically, anthropologists are asked to serve by the defense and they have to combine their independent cultural assessments with what the defense wants of him or her (Caughey, 2009: p. 324). This is hardly an ideal scenario to ensure a uniformly structured opinion answering the four questions that the judge has to make a determination on. Suggestions have been made to hold a pre-trial conference in which all the experts, representatives of the parties and the presiding judge would be involved in order to narrow factual issues and for experts to discuss the possibility of filing a joint report (Rosen, 1977: 571). I support this suggestion and also suggest that at this pre-trial conference, the judge outline the four questions he intends to make a determination on so as to prompt the experts – both the anthropologist and psychiatrist (where present) – to structure their opinion on those lines.

This process would prevent unstructured and non-individualized expert testimony of the sort rendered by Dr. Pastemak, and would enable judges to follow the four question cultural defense test. This process might also have the added benefit of preventing the testimony of the anthropologist from merely being biased against the 'other' culture, as a more specific and structured analysis would be required.

## VI. MISCELLANEOUS DETAILS RELEVANT TO IMPLEMENTING THE CULTURAL DEFENSE

Apart from developing the cultural defense test that courts must apply, and expert testimony to enable that test, there are several other miscellaneous issues that would have to be addressed in implementing the cultural defense. This part tries to account for these issues namely, whether there needs to be statutory authorization, how much discretion courts should have and, once a determination is made as to the applicability of the cultural defense, whether it should be accounted for during the trial and prosecution, or merely during sentencing.

Statutory authorization or common law defense?

Elaine M. Chiu, who proposes a complete cultural defense, which she calls a justification, suggests that a completely new cultural justification be drafted as an additional defense in criminal law (Chiu, 1994: p. 1343).

With a caveat that it is merely a first effort, she proposes the following definition:

"*A defendant is not guilty of an offense if a reasonable person of a similar cultural background to the defendant believes that the harm caused by the conduct of the defendant was outweighed by some other imminent harm prevented by the same conduct. A defendant cannot claim this defense if there was a way, other than their conduct, to prevent the harm sought to be avoided*" (Chiu, 1994: p. 1343).

While the first part of this provision rightly takes into account that fact that the 'reasonable person' standard does not include people of a different cultural background, the 'imminent harm' might not be an adequate standard to encompass situations as diverse as 'loss of face', as seen in Chen, or feelings of disgrace and concern for the future of one's children, as seen in Kimura. The second part of the provision makes a requirement of there being no other way to prevent the harm sought to be avoided, in other words there has to be 'necessity' to commit the act. This is extremely problematic, because in these cases the defendant usually feels compelled to commit an act due to the forces or dictates of his cultural beliefs. The 'necessity' is felt in the mind of the defendant, and there is no way to test this other than through expert testimony. The testimony would try to answer whether the particular culture has practices in the time period that the defendant feels anchored to, and whether in the specific case the defendant feels compelled by that practice. However, Chiu was trying to use this provision to bring in a complete cultural defense.

A provision dealing with a limited cultural defense must deal with the circumstances under which the cultural defense may be made available, as the cultural defense test suggested in this paper does.

It is my belief that a statutory provision will expressly grant courts the authority to apply the cultural defense, but the details of the mode of application will have to develop though case law. However, statutory authorization will put an end to the hesitation of courts to apply the cultural defense, which would definitely be a big step forward.

Is the cultural defense to be accounted for at trial or sentencing?

The next issue that comes up is the stage at which a determination of the applicability of the cultural defense must be accounted for. In other words, once the judge determines that the cultural defense is applicable, and cultural accommodation has to be made for the defendant, at what stage should this be made?

While some have suggested taking it into account as a mitigating factor, others suggest that cultural accommodation should be given effect in the sentencing stage. In this Part VI, I propose that the cultural defense be given effect at the determination of guilt stage, by considering it as a mitigating factor rather than in the sentencing stage.

In the past two decades, criminal defenses have been generally given a subjective evaluation of their conduct in the sentencing phase of their prosecution (Taylor, 1998: 449). Therefore a case can be made for cultural factors playing a role in the sentencing phase. However, this would not be consistent with the court making a determination of the applicability of the cultural defense using the four-question model if it is only taken into account in the sentencing phase.

One of the main elements of a crime is *mens rea* which means a culpable or guilty mind (Sheybani, 1987: pp. 751, 753). The cultural defense takes account of the cultural background of the defendant, for culturally motivated crimes, in order to evaluate the state of mind of the defendant. This strikes at the heart of the elements required for an act to be considered a crime. As per the four-question cultural defense test, the expert opines on the cultural background motivating the defendant's particular acts, and the judge makes a determination on this. This means that the cultural defense is reducing the amount of culpability or intention on the part of the defendant. Therefore, it is my submission that any determination based on the cultural defense must be considered as a mitigating factor in the prosecution stage, rather than merely being considered at the sentencing stage.

Those in favor of taking the cultural defense into account only at the sentencing stage argue that that is the best way to keep the determination of 'guilt' or 'innocence' untouched by cultural factors, while still accommodating for the cultural circumstances of the defendant (Sikora, 2001: pp. 1715–1716). However, this would just be a half-hearted accommodation by the state, almost as state benevolence, rather than as recognition of the rights of minority cultures in a multicultural society.

## CONCLUSION

In this paper I have tried to go beyond the cultural defense discourse centering round the need for a cultural defense in a multicultural society like American society, and have dealt with the issues arising with regard to the implementation of the cultural defense. This is crucial as a faulty application of the cultural defense could result in many harms, such as the perpetuation of stereotypes about minority cultures, undermining the rights of women belonging to minority cultures, the exoneration of terrible crimes by blaming it on culture, the wrongful use of expert testimony etc. Thus the right balance needs to be struck, and for this the consideration of specific tests to be applied by courts and guidelines to be followed by experts becomes relevant.

The current uncertainty with regard to its application by courts and the role of experts in these cases needs to be addressed, and this paper, apart from formulating a model cultural defense test to be applied by courts, presents suggested steps towards the formulation of guidelines for experts in these cases. Through this study of the nuts and bolts of implementing the cultural defense, this paper has attempted to ponder the issues and offer solutions to both policy level and practical concerns.

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# REPORTS

# IS INTELLECTUAL PROPERTY A LEX SPECIALIS? THE CONFERENCE REPORT FROM THE ATRIP 2013 CONGRESS, OXFORD

The 32nd Annual Congress of the International Association for the Advancement of Teaching and Research in Intellectual Property took place on 23–26 June 2013 in Oxford, UK. The conference was attended by delegates from over 40 countries (and over 100 universities): mainly by doctors and professors teaching IP at their universities who wanted to discuss the degree to which IP is a lex specialis. Given the number of delegates willing to take the floor, the debates ran from dawn to dusk. The sessions took place within the distinctive walls of Pembroke College at Oxford University, which defines itself as "a college of poets and scientists, thinkers and players who want to make a difference to the world." While it is not possible to talk at length on every speaker, I would like to highlight a few core points made at the conference.

The participants were greeted by Prof. Graeme Dinwoodie (Oxford University, the former President of ATRIP), Prof. Stefan Vogenauer (Oxford University) and Carlotta Graffigna (WIPO). Ms Graffigna opened the congress by making the point that, in order to develop we first need to develop "IP culture".

The first session was chaired by Prof. Bill Cornish (Cambridge University) and was dedicated to general rules in IP Law. Prof. Robert Burrell (University of Western Australia) and dr. Emily Hudson (Oxford University) discussed the doctrine of abandonment, using the example of *Fisher vs. Brooker & Others* [2009, UKHL 41]. The case concerned Brooker and Onward, who had relied on the equitable doctrines of laches, estoppel and acquiescence to argue that the passage of time since the song was written precluded Fisher from now claiming a portion of the copyright. As stated in the judgment, "there is no statutory equivalent in intellectual property matters similar to the doctrine of adverse possession in relation to real property."[19]The speakers referred to the common law principle of *nemo dat quod non habet* as well as by the example of *Robot Arenas Ltd & Anor v Waterfield & Anor* [2010, EWHC 115] asked to what extent doctrines from chattel property must be changed to apply to intellectual property. Their finding was that abandonment in IP law might pave the way for compliance.

Dr. Dev Gangjee (LSE) referred to public domain and open access movement, asserting that people think that public domain is *res commune,* but in fact it is more like *res nullius*.

Prof. Ansgar Ohly (University of Munich) shed some light on the first sale doctrine and its territorial range, taking the example of *Kirtsaeng v. John Wiley & Sons, Inc.* of 29 Oct. 2012 [654 F. 3d 210]. He discussed the doctrine of exhaustion where the data

[19] Cf. http://www.leeandthompson.com/2009/09/24/fisher-%E2%80%93v-brooker-others-2009-ukhl-41/, as of 27 Dec. 2013.

carrier is dematerialised, and touching on new ways of transferring data and using the cloud. He asked when law is exhausted and referred to the case *UsedSoft GmbH v. Oracle International Corp*. (CJEU, case C-128-11).

Prof. Alain Strowel (St. Louis University, Brussels) also discussed the doctrine of exhaustion and doctrine of first sale by example of software. With reference to Articles 4(1), 4(2) of Directive 2009/24, he depicted his concerns with a recent case, *Capitol Records, LLC v ReDigi Inc.* of 30 March 2013 [No. 12 Civ. 95 (RJS)].

Concerning the relation between intellectual property and contract law, Dr. Caroline Ncube (University of Cape Town) discussed the contractual regulation of copyright licensing contracts in South Africa, using the example of *Prism Holding Ltd. And Another v. Liversage and Others* [2004 (2) SA 478 (W)] and the Consumer Protection Act of 2008.

The next speaker, Prof. Pina D'Agostino (Osgoode Hall Law School), asserted that contract law trumps copyright law and made reference to some case law too (*Robertson v Thomson corp*, 2006, SCC; *Leuthold v Canadian Broadcasting Corp*. 2012).

Prof. Charles McManis (Washington University, St. Louis) raised the topic of mass market licensing in e-Commerce and social networking 2.0 era. He cited the cases *ProCD v Zeidenberg* [86 F.3d 1447, 39 U.S.P.Q.2d 1161, 1 ILRD 634 (7th Cir. 1996)] and *Assessment Technologies of WI LLC v. Wiredata, Inc.*, [350 F.3d 640 (7th Cir. 2003)] and referred to the ALI Principles of the Law of Software Contracts and Uniform computer Information Transactions Act (UCITA).

During the session chaired by Prof. Christian Le Stanc (University of Monpellier), the idea was proposed that countries need IP divisions in courts (e.g. at county level). As an example, reference was made to IP courts in Tokyo and Osaka in Japan, as well as 32 IP divisions in the high peoples' courts in China.

Dr. Orit Fischman Afori (The Haim Striks School of Law, Israel) noticed that a careful use of remedies can reshape the contours of copyright law, and that there is a tight linkage between rights and remedies. In her opinion, the courts should have more judicial discretion along with a new independent framework of remedies in copyright law. Dr. Anna Tischner (Jagiellonian University) asked whether there is an accumulation of IPR and remedies, and whether we need a lex specialis in this area.

Prof. Lionel Bently (Cambridge University) referred to "Report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights" (COM(2010)779 final) of 22 Dec 2010 and Proposal for a Regulation of the European Parliament and of the Council concerning the customs enforcement of intellectual property rights (COM(2011)0285 final). More than that he discussed cases *Phillips v Mulcaire* [2012, UKSC 28] and Judgment of the Court (Third Chamber) of 15 November 2012 (Case C-180/11).

Dr. Lior Zemer (Radzyner School of Law) wondered whether we have come to the end of users' rights in Israel. He gave interesting examples of cases disputed in Israel: *Muzafi v Kabali*, *Ziso v Petach, Shapiro v Regen, Premier league v Israeli Sports Betting Board* [2010] and *Weinberg v Wieshof* 2012.

The last session, most awaited by your scholars, was devoted to Quality Control and Ranking of Specialised IP Journals The topic was discussed by Prof. Margo Bagley (University of Virginia School of Law), Prof. Martin Senftleben (Amsterdam Free University), Prof. Geetrui Van Overwalle (KU Leuven) and dr. Giorgio Spedicato (University of Bologna) under the chair of Prof. Reto Hilthy (Max Planck Institute for Intellectual Property). They considered that there are an incredibly low number of IP journals

that are granted many points. More than that, they assumed that one of the conditions of publication in international journals is the style of the language, making it impossible for many non-native authors to get published.

The next congress will be held in July 2014 in Montpellier.

*Marlena Jankowska* (University of Silesia)

# LIST OF SELECTED BOOKS PUBLISHED BY THE RESEARCHERS OF THE FACULTY OF LAW AND ADMINISTRATION OF THE UNIVERSITY OF SILESIA IN 2013

**Jacek Barcik**
*Międzynarodowe prawo zdrowia publicznego*
*[International Public Health Law]*
C.H. Beck, Warszawa 2013, pp. 370

**Artur Biłgorajski**
*Granice wolności wypowiedzi. Studium konstytucyjne*
*[A Constitutional Study of the Limitations of the Freedom of Speech]*
Wydawnictwo Sejmowe, Warszawa 2013, pp. 336

**Artur Biłgorajski**
*Prawo konstytucyjne i ustrój organów ochrony prawnej dla praktyków. Objaśnienia, wzory pism, kazusy i pytania*
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**JANUARY**

**Programme on European Private Law for Postgraduates** (round III)

**MARCH**

Partycypacja społeczna w samorządzie terytorialnym
**Social Participation in Local Governments**

**APRIL**

Dobra osobiste a portale społecznościowe
**Personal Rights and Community Portals/ Social Media**

Nowelizacje prawa karnego i ich konsekwencje – teoria i praktyka
**Amendment of Penal Law and its Consequences**

**MAY**

Przepisy wymuszające swoje stosowanie w prawie prywatnym międzynarodowym
**Overriding Mandatory Rules in Private International Law**

**JUNE**

Kryminalistyka w walce z przestępczością. Nowoczesne rozwiązania taktyczno-techniczne w kryminalistyce jako determinanty skuteczności organów ścigania w walce z przestępczością
**Forensic Science Against Crime – Modern Technical and Tactical Solutions as Determinants of the Effectivness of Law Enforcements Agencies**

**SEPTEMBER**

Prawne zasady ochrony środowiska w związku z gospodarowaniem jego geologicznymi zasobami
**Legal principles ofenvironmental protection inrelationto the management ofitsgeological resources**

II Sympozjum Historyków Państwa i Prawa Polskiego pt. Ewolucja prawa
**II Symposium of Historians of the Polish State and Law – "The Evolution of Law"**

Postępowanie rozpoznawcze w nowym kodeksie postępowania cywilnego – Katowice – Kocierz
**Civil Procedure Convention. Main Court Proceedings in the New Civil Procedure Code**

25 lat fundamentów wolności działalności gospodarczej. Tendencje rozwojowe
**25 Years of Economic Liberty. Development tendencies**

**OCTOBER**

Europejskie i międzynarodowe prawo karne – osiągnięcia, kierunki rozwoju, wyzwania
**European and International Criminal Law – Achievements, Directions and Challenges**

**NOVEMBER**

Kontrola przedsiębiorcy
**Control over the Enterpreteur**.

**DECEMBER**

Akty poświadczenia dziedziczenia na tle harmonizacji prawa prywatnego
**Certificates of Inheritance in the Context of Harmonization of Private Law**

Ochrona własności intelektualnej w przedsiębiorstwie
**Protection of Intelectual Property in Enterprises**

Dni Edukacji na Rzecz Zwierząt
**Education Days on Animals' Rights**

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