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BEYOND BORDERS: THE CASE FOR HYBRID TRIBUNALS IN TACKLING ONLINE CHILD SEXUAL EXPLOITATION IN INDIA AND PAKISTAN

Muhammad Imran Ali*

Abstract

This article addresses the growing threat of Online Child Sexual Exploitation (OCSE) and its complex transnational nature. It proceeds with the introduction to OCSE and a discussion of new developments in the area to stress the necessity for elaborate legislation. This article raises questions with respect to the strength of the principal global legal documents such as the Convention on the Rights of the Child (CRC), Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC), and the Lanzarote Convention in fight against OCSE. Jurisdictional challenges like complementarity, universality and territoriality are analysed especially with regard to transnational cases that are prevented by jurisdictional conflicts and sovereign issues from prosecution. focusing the analysis between India and Pakistan, the article outlines major deficits of modern legislation and the opportunities of conflicting jurisdictions. For that reason, the scholarly work in question suggests that hybrid tribunals should be employed as the solution that can complement national and international components for strengthening legal accountability. The article uses the analysis of best-case scenarios to suggest the kind of a model for the hybrid tribunals with jurisdictional as well as the protection of the victims together with fair trial. Finally, the article offers some policy implications for international legal developments, foreign and common law enforcement cooperation, judicial cooperation, and building institutional capacity. This is why there is a desperate need to have an international approach to OCSE and that is why hybrid tribunals serve as the solution for children’s protection in the era of online sexual exploitation.

Keywords: Child protection, hybrid tribunals, India, online child sexual exploitation, Pakistan.

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1. INTRODUCTION

Online Child Sexual Exploitation (OCSE) is considered to be one of the most dangerous types of cybercrime with India and Pakistan recognized as the countries at great risk among those nations where the usage of the Internet has recently dramatically increased. The case with technology specifically the internet has seen a significant rise in product and distribution child abuse materials, grooming and many other forms of abuse that cannot effectively be fought through traditional legal means such as arrest, detention and trial due to the power of technology and inter-connectivity (Wolak, Finkelhor, Walsh, & Treitman, 2018). The nature to engage OCSE that stems from this study is anchored on the emergent concern that responds to both the immediacy of impact, which deals with the lives of child victims and how, their families, and core beliefs of society are defined. Because these crimes are now in the digital platform and are committed across the boundaries, international solutions would seem to be appropriate because what they do is cross-border despite the complexity it brings they have a good way of creating hybrid tribunals that would aid prosecution and subsequently provide justice (Robalo & Abdul Rahim, 2023).

Online Child Sexual Exploitation (OCSE) refers to a variety of transactions and behaviours such as the creation, sharing and use of CSAM, internet stalking, real-time streaming of abuse and sexual blackmail. OCSE is incredibly massive in the world, because offenders seize upon opportunities in computers networks to attack targets in different jurisdictions (Álvarez-Guerrero, Fry, Lu & Gaitis, 2024). India and Pakistan are worse affected due to socio economic status, illiteracy, and ruling laws and laws relating to enforcement which further make the children vulnerable. The lack of a suitable legal instrument to address this matter effectively points to existing deficiencies in national and international laws, leading to introduction of the sophisticated hybrid courts.

Online Child Sexual Exploitation (OCSE) has been affected by technological advancements in this respect new forms of exploitation have been introduced and the criminals cannot be easily apprehended. New directions are connections through encrypted messaging services, the darknet, and cryptocurrencies for CSAM transactions (Ali, 2024). Besides, such advances as artificial intelligence and deep fake technology create new possibilities for misuse so that it becomes much more difficult for the police to find the perpetrator. Such developments have ensued beyond existing legal legislations, leading to demands for new methods that can alive to new trends of these crimes and encourage cooperation.

The legal arsenal in regard to the fight against child sexual exploitation and abuse globally include some pre-eminent treaties or conventions as follows; the Convention on the Rights of the Child (CRC) gives base for Children's Right Charter and recognizes the state's duty to safeguard children from any forms of sexual exploitation (Tobin & Seow, 2019). The CRC is accompanied by the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC), which requires state parties to outlaw activities regarding child abuse, such as making CSAM (Maxwell, 2022).

The Lanzarote Convention on Child Sexual Exploitation goes a notch higher in enhancing the international law by requiring states to put in place measures for the prevention of sexual exploitation of children, protection of these children and prosecution of offenders (Kaviani, 2024). These international instruments afford a framework for compliance of laws with these standards but their enforcement/implementation varies from country-to-country occasioning jurisdiction related and legal gaps.

Online Child Sexual Exploitation (OCSE) transnational character entails multiple jurisdictional problems even in offenses that implicates the perpetrating, victim, and digital environment of different nations (Álvarez-Guerrero, Fry, Lu, & Gaitis, 2024). Problems of traditional jurisdictional concepts which include territoriality, nationality and universality fails to address crimes which occur in the cyber-space today (Kaviani, 2024). According to the complementarity principle on which the ICC is founded, domestic legal systems are supposed to have priority, but in transnational cases these principles often are distorted by questions of sovereignty and conflict of laws (De Vos, 2020).

For instance, India and Pakistan have blurry political relations, and different legal frameworks, which subject OCSE matters to jurisdictional issues, that hampers prosecution of the cases. However, the absence of bilateral treaties and cross border cooperation due to sovereign jurisdictions compounding the problem does not facilitate cross border investigations and prosecutions. India and Pakistan have passed laws on OCSE, such as

India's POCSO, the Technology Act and Pakistani PECA 2016. However, these laws have been receiving criticism for instances online grooming and live streaming of sexual abuse material. In the same way, jurisdictional conflict ensues from differences between the national laws and international norms, hampering the legal approaches impact. The political and sovereign enmity between the two countries complicates the collaboration on developing synergies to combat OCSE, needs to enhance the integration.

Considering the jurisdiction al and legal restrictions there exists a scope of hybrid tribunals which contain parts of national as well as of international jurisdiction (Williams, 2024). These tribunals are meant to fill the gaps between the national and the international systems for trying of the cases like the OCSE. Combination of International and domestic laws increases the offenders' responsibility and brings a better system to deliver justice to the victims compared to the pure normal tribunals. The advantage of hybrid tribunals to conduct their operations in different jurisdictions makes them most suitable in the handling of OCSE complex cases in which the culprits often shift around in the misguided legal systems exploiting invulnerable citizenship and territories.

The article conducts a critical assessment of the Online Child Sexual Exploitation (OCSE) threat as it studies the impact of internet penetration growth and weak law enforcement systems on child safety in India and Pakistan. The article approaches its analysis through doctrinal and comparative legal methods to study national and international legal structures and detects jurisdictional challenges before advocating for hybrid judicial bodies. This article builds its structure from legal study and technological advancements and strategic policy guidance to stress the need for united transnational cooperation.

2. INTERNATIONAL LEGAL FRAMEWORK FOR COMBATING ONLINE CHILD SEXUAL EXPLOITATION

Online Child Sexual Exploitation (OCSE) is a recognized emerging cross border phenomenon that requires a multipronged international legal intervention. These include the Convention on the Rights of the Child (CRC), the Optional protocol on the sale of children, child prostitution and child pornography (OPSC) and Lanzarote convention to contain the OCSE and the protection of children.

The Convention on the Rights of the Child (CRC) signed in 1989 in reassertion of commitments of governments to protect children from every form of violence including sexual violence. Although it lacks provisions on digital exploitation per se, it lays down the general principles that formed the basis of the development of other more specific instruments. Article 19 requires the State parties to ensure Children will protect from exploitation (Tobin & Cashmore, 2019) and Article 34 of the convention that calls for measures to protect the children from sexual abuse (Arkadas-Thibert, 2022). Laws in line with the CRC have been enacted in Sweden and Finland and aimed at youth safety issues in their physical domain as well as the virtual one.

The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC) that was adopted in 2000 avails the CRC by speaking to cyber-crimes in particular referencing child pornography and child prostitution (Doek, 2023). It imposes criminalisation of actions owning to OCSE and requires states to act internationally, especially in relation to prosecution of producers, distributors or accessors of CSAM. The functions claims that investigations have to be made by international cooperation, sharing of information among countries. There are some laws like Sexual Offences Act 2003 in UK that punishes possession and distribution of CSAM, and actively supports ‘INTERPOL’ and ‘EUROPOL.’

The Lanzarote Convention which the Council of Europe passed in 2007 is specially aimed at child sexual exploitation and abuse both offline and online. It calls for the countries that have signed it to prosecute the sexual crimes on children whether through an internet connection or not (Kaviani, 2024). The convention focusses on the preventive measure, the support for the victims and the cooperation with the international level. It also requires programs aimed at preventing and raising awareness of risks of exploitation on the internet. Germany has passed the Network Enforcement Act (NetzDG) to deal with the case of post illicit content on the social networks while France’s Digital Services Act prescribes CSAM removal and monitoring from the platforms it regulates.

Although these laws, norms and standard have been developed and placed into international legal instruments there is usually a difference in the execution of laws between countries owing to differences in legal systems, resources and even uppermost technologies.

European countries have been comparatively more active in enacting tough legislation and making them compliant enough to the international norms. On the other account, enforcement measures present a formidable challenge to many developing nations due to poor resource endowment and dearth of specialized personnel. For example, Protection of Children from Sexual Offences Act (POCSO), the Technology Act, 2000 and Pakistan's Prevention of Electronic Crimes Act (PECA) 2016 that addresses cyber exploitation of children but lacks enforcement detectability such as, lack of resources and inadequate capacity and training for police. On the other hand, United States has better legislation such as Protect Our Children Act 2008 and the EARN IT Act 2020, which are measures against OCSE as they have imposed severe conditions on the IT industries for reporting such contents as violent, obscene, which conforms to international norms.

The CRC, OPSC and Lanzarote Convention form the primary regulatory instruments on international level towards combating OCSE. However, it is noted that these frameworks and the national laws addressing OCSE are best described as evolving due to the constantly emerging novel digital crimes. Therefore, for better combating against OCSE, there is the need to enhance the level of cooperation on the international level, set legal frameworks, and enhance the enforcement measures. They are helpful in the noble fight to safeguard the children in the digital world, and stopping others from being abused.

3. JURISDICTIONAL CHALLENGES IN ADDRESSING ONLINE CHILD SEXUAL EXPLOITATION

Online Child Sexual Exploitation (OCSE) is a transnational crime that raises serious jurisdictional issues because of the influence of the World Wide Web (Hiau et al., 2024). Therefore, combating OCSE has its basis in international legal instruments including the Convention on the Rights of the Child (CRC), the Optional protocol on the sale of children, child prostitution and child pornography (OPSC) and the Lanzarote Convention. However, the question of which state is competent to prosecute offenders and enforce laws hence the question of jurisdiction, remains one of the thorny issues, which involves balancing of other principles of international law, namely, complementarity, universality, territoriality and sovereignty, and others. This paper aims to analyse how these jurisdictional principles work in OCSE and the legal issues that emerge in cross-border matters.

Jurisdiction means power of a state to entertain a case and to compel compliance with its laws. In transnational crimes like OCSE, several countries can be affected, it means certain legal principles needs to be taken into consideration (Neil, 2012). However, scholars have agreed that Complementarity Principle is especially important within the framework of ICC (Jackson, 2016). Of the various theories of the relationship between the national courts and the international courts, the theory of complementarity hold that national jurisdictions are primarily responsible for the prosecution of the crimes and International Criminal Court like the ICC intervenes when state fails to do so. Nevertheless, national legal systems seem to be incapable or unwilling to address such crimes in OCSE cases due to several reasons, including technical or resource constraints, and, therefore, international institutions step in. For instance, the Rome Statute allows ICC to be involved in the matters of exploitation of children, but with conditions that mean that participation has to be where a state cannot prosecute, or where justice system cannot do so (Baidawi, Sheehan & Flynn, 2020). However, the application of this principle to OCSE is highly constrained because it is very difficult to obtain evidence in one jurisdiction against the offenders who cross the borders and operate from different engagement regions.

The universality principle, a state can extradite an offender implicated in an act against the international community even if the crime was committed in the offender country or the offender is of that country (Gallant, 2022). The following principle is rather important in OCSE cases when offenders and victims can be found in different countries. Under the United Nation Convention against Transnational Organized Crime (UNTOC), and the Convention of Cybercrime also known as Budapest Convention, this principle applies to instance as OCSE committed across borders may be prosecuted. For example: Universal jurisdiction has been enacted by the United States under the Protect Our Children Act 2008 That allows the country to prosecute try any person involved in production, distribution or possession of child porn regardless of where the crime occurred but there is an American citizen involved whether as a victim or as an offender (Gallant, 2022).

Territoriality principle holds that a state has exclusive criminal justice authority over a crime irrespective of the domestic or alien suspect and the domestic or foreign victim (Gallant, 2022). In OCSE, this principle is often invoked where the exploitation takes place in platforms hosted in a given jurisdiction. For example, in the United Kingdom, it is made possible through domestic laws that embrace the principles of international law and combating of child pornography include the Sexual Offences Act 2003 that prohibits possession, distribution and production of child pornography (Šepec, 2019), regardless of the source of that product including a server in the United Kingdom. Yet this principle proves problematic in the modern era when data and content dissemination is possible across country borders.

The enforcement of OCSE laws may result in conflicts of sovereignty because territorial jurisdiction principles may not be mutual between countries. Sometimes one state can claim they have exclusive territorial jurisdiction and punish a crime that has victimized its people while another state can advance its authority based on the geographical location of the crime or the criminal. For instance, dealing with content posted on websites such as Facebook or YouTube may create problems of Jurisdiction for states (Hörnle, 2021). The company might operate in one country, the criminal is in another, and the target is in yet another. These conflicting claims generate problems on the integration of national legal concepts and can undermine prosecution. These conflicts have been resolved by Interpol and Europol by organizing intergovernmental cooperation networks that can disseminate information and establish cooperation in the course of investigation; however, essential issues concern the efficient methods of enforcing these decisions.

Overlapping, competing and supplementing elements have provoked jurisdictional difficulties when addressing OCSE that is pregnant with the conflict between seemingly self-evident principles that lie at the heart of the international law; complementarity, universality and territoriality, on the one hand, and state sovereignty on the other. OCSE compounds these difficulties in deciding which jurisdiction should take or prosecute due to the fact that it is a digital business. While theoretically various international conventions and national laws have provisions to combat these issues, further cooperation and standardization of laws and strengthening of technological facilities are needed to combat OCSE and frequently provide justice for the affected parties anywhere in the world.

4. LEGISLATIVE LANDSCAPE ADDRESSING ONLINE CHILD SEXUAL EXPLOITATION IN INDIA AND PAKISTAN

India and Pakistan have enacted laws related to cybercrimes and primarily against online child sexual exploitation based on the international treaty under the CRC and OPSC. But these laws are not effective due to lack of gaps in laws and enforcement challenges. India has devised a good and realistic way of dealing with OCSE through Protection of Children from Sexual Offences (POCSO) Act 2012, which prohibits and considers various uses of the internet by a child as a criminal offense (Kaur, 2022). Further, Section 67B of the Information Technology Act, 2000 has been exclusively intend to prohibit child pornography. Such laws are backed up by India’s obligations under international human rights instruments such as the CRC. However, Indian Laws are bounded here and there; more specifically a legal system faces constraints in the development of cyber infrastructure and intricacies of international regulation. The POCSO Act has been criticized for mapping sexual abuse quite narrowly although there are not enough provisions for the digital world. In the same breath, the IT Act also faces challenges of enforcement because these technologies advance much faster than legal frameworks and more so, the prosecution of OCSE cases especially where it occurs under a digital context.

Pakistan also complied in the shape of Prevention of Electronic Crimes Act (PECA), 2016 involving the production, distribution and possession of CSAM is an offence (Iqbal, 2023). PECA puts it a treatise with international conventions like the Optional Protocol. Pakistan includes a severe lack of technical professionals to enforce laws, coupled with different levels of judicial compliance. The legislative gaps are apparent within OCSE prosecution in both in India and Pakistan. These gaps are seen to include lack of proper measures on cross border collaboration and absence of long-term measures for combating online grooming, trafficking and using encryption features to escape recognition. Another weakness is lack of legal certainty as to jurisdiction in transnational OCSE cases. Transnational crime, of which OCSE is a part of, results in jurisdictional problems from the onset. For example, in online child sexual exploitation cases which involve offenders and/or servers from two countries or more, both India and Pakistan are trialed. The laws India and

Pakistan do not effectively deal with challenges organized by global internet platforms where material can be hosted in one country.

Jurisdictional conflicts are worse off by the existing geopolitical relations between India and Pakistan. Many a time, due to diplomatic and sovereignty considerations, it is difficult for one country to cooperate with another especially in situations such as online child sexual exploitation (OCSE). The absence of trust between such nations also hampers the way evidence can be exchanged; cases can be investigated and sanctions placed on individuals who are involved in cross border crimes.

There exists one preventive measure in an attempt to counter these challenges in legislative and jurisdictional reforms and this is the development of hybrid tribunals. These hybrid courts which brings both national and international law have proven effective in handling international criminal offenses that include; genocide and war crimes (Williams, 2024). To some extent, hybrid tribunals could be viewed as more effective and efficient approach to prosecute OCSE in South Asia especially where case includes the aspects of international law.

India and Pakistan have both come a long way in developing legal instruments pertaining to OCSE but still this area is far from perfect. Prosecutors face some other obstacles: legislative; specifically, jurisdictional controversies and no cooperation, no coordination between the countries. Such trend means that the creation of hybrid tribunals presents a promising solution to address these issues, it provides for the mechanism that is based on combining the actions of national and international legal principles, as well as promoting cooperation and strengthening legal accountability. By coming up with such tribunals, the two countries could improve on their capacity to fight OCSE as well as enhancing children’s protection in the social media.

5. HYBRID TRIBUNAL

Sustainable hybrid courts have appeared as a suitable model for tackling increasingly sophisticated international crimes with the help of both domestic and international law (Ainley & Kersten, 2020). These tribunals combine international law in its jurisdiction and legal structure with national culture and reality of national law, which is the best way to solve such crimes as war crimes, crimes against humanity and genocide. Lessons for future hybrid tribunals from successful trials include the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) where problems of sovereignty and cooperation hamper the legal process in South Asia.

Thus, the Special Court for Sierra Leone (SCSL) launched in 2002 to try the individuals behind the atrocities during the Sierra Leone civil war of 1991-2002 is one the first models of hybrid tribunals. It amalgamated domestic legal framework of Sierra Leone with international laws inter alia the Rome Statute of International Criminal Court. Work of the SCSL has always been successful in maintaining the country's national sovereignty while enjoying international cooperation (Jalloh, 2011). That both the local and international judges were involved in the process ensured that the country owned the process because of the local collaboration while at the same time bringing in the international practices. This approach was particularly helpful in rebuilding people's trust in post-war Sierra Leone and serves a useful primmer for the South Asian that deals with similar sovereignty concern when dealing with cross-border offenses like OCSE (Knowles, 2006). The SCSL also noted especially the mixed personnel that ensures accountability a factor applicable by South Asia in the prosecution international crimes.

The Extraordinary Chambers in Cambodia formed in 2006 to try cases of Crimes committed by the Khmer Rouge regime in Cambodia also heard both domestic and international law (Jørgensen, 2008). This tribunal has consisted of both local and international judges and was established on the principles laid in the Geneva Conventions and Genocide Conventions. However, the ECCC is viewed as a model for post-conflict justice; it was not without its problems political pressures, resource constraints and delays (Lilja & Baaz, 2021). These challenges underscore the importance of original institutional settings of the judicial independence and the hybrid tribunals in particular. In the case of South Asia, the ECCC suggests that political influences must be excluded when selecting all judges, judiciary to preside over genocide and 'other' cases. Also, for the ECCC, the attention paid to the victim's role demonstrates how it is possible to engage local people and victims into judicial processes (Lobba, & Pons, 2020).

The Special Tribunal for Lebanon (STL) was set up in 2009 in response to the assassination of the Lebanese Premier Rafik Hariri and is a compound of mixed jurisdiction with special thematic focus on politically motivated crime (Jurdi, 2023). The STL applied both Lebanese laws along with the international law and despite of it, the court received much success and that was due to the principles of independence, neutrality and cooperation with other courts of the world for the collection of proofs. The STL's capacity to deal with political conflict and guarantee the proceedings against the political elites as closely connected to South Asia as political rivalry and interference could affect the outcomes of the investigation and the trials (Burgis-Kasthala & Saouli, 2021). It is noteworthy that STL achieved some victories in overcoming these challenges and provides important lessons for creating the hybrid tribunals in South Asia for the solution of more political sensitive cases and transnational crimes.

The cases of SCSL, ECCC and STL give rise to the following lessons relevant for South Asia. First, their processes have to contain elements of international and national law in order to be legitimate and efficient. This way, the working procedure is covered both by the national legal culture and international standards of justice. Second, the significance of gaining the judiciary independence is crucial and even in the South Asia political instability area it is very significant. It is also important for matters in hybrid tribunals to be free from political influence so as to allow efficiency. Moreover, enough financial and human provision, including training of local staff and use of up-to-date instruments, is indisputably helpful in prosecution, especially in connection with IT-related crimes such as OCSE. Last of all, it is our opinion that the potential of hybrid tribunals is to contribute to building international cooperation, with regards to combating international criminal law violations.

This paper has argued that hybrid tribunals like the SCSL, ECCC, and STL to be efficient and a feasible tool for prosecution of international crimes without undermining national laws of the country. Through these experiences, South Asia can establish sound and autonomous frameworks that can effectively solve other cross-boundary offenses in the age of technology. The experiences from these tribunals underline certain cardinal principles of cooperation, judicial independence and proportionate assimilation of the International and Domestic legal principles, which form the bedrock of justice delivery system in South Asia.

6. MODEL FOR A HYBRID TRIBUNAL IN INDIA AND PAKISTAN

Online Child Sexual Exploitation (OCSE) is a transnational crime and needs new strategies to combat and prevent the problem. Due to the familiar cultural and socio-political issues between India and Pakistan, a hybrid tribunal is beneficial as a specialised system to address OCSE. That tribunal would merge domestic laws and International legal norms and encourage accountability, cooperation, and protection of victims while honoring sovereignty.

The hybrid tribunal would aim to; increase OCSE offenders' prosecution efficiency by overcoming jurisdictional barriers, and avoiding legal pitfalls, enhance protection of victims, guarantee the child sensitive justice, promote international collaboration in combating international computer related offenses and to strengthen the ability of law enforcement and judiciary systems of both countries.

The tribunal would be established through a bilateral agreement between India and Pakistan, supported by international legal instruments, including; Convention on the Rights of the Child (CRC), Optional Protocol on Child Pornography and Trafficking, Budapest Convention on Cybercrime (as a guiding framework). International guidelines discussed above will be backed by national laws of countries such as India or Pakistan that comprises Information Technology Act, 2000 of India, Prevention of Electronic Crimes Act, 2016 of Pakistan, and child protection laws as well.

The tribunal would have jurisdiction over; offences relating to production, distribution or possessing a child sexual exploitation material, use of technology in the acts such as stalking and grooming, sex trafficking and cyber bulling, where the actors may be outside the two states and the crimes, victims, or digital artifacts themselves may cross the borders of the two states. The operation of the tribunal would be based on the complementarity system that guarantee cases are tried locally unless national systems fail to act effectively.

The formation and component of hybrid tribunal for addressing the OCSE in India and Pakistan would include the following prospect. Thus, the advocated bench of Indian, Pakistani, and international judges would bring impartiality and fairness on the table. The tribunal would comprise of legal attorneys and agents who practice in the field of cybercrime and digital investigation processes with assistance for cross-border collections from INTERPOL, ASEANAPOL as well as major IT companies. The cases shall be handled by specialized teams usually including psychologist's legal scholars' counselors and secure submission lines would ensure the victim's security and offer much more assistance.

The operating environment would use technologies like block chain, artificial intelligence and machine learning for tracking tracks and eradicating undesirable postings in conjunction with internet service providers and social medial companies. The tribunal would employ the principles of the acculturation of local cultural practices with the international human rights laws. Police officers and Judiciary from both the countries would be offered capacity on cybercrime laws and child welfare for improvement.

The tribunal would be established under an International supervisory authority, the UN or a neutral regional organization of the parties' choice and would review the tribunal practices periodically to incorporate the current legal practice and technologies available. This comprised of, integrating the domestic legal system with the international one, exploiting technologies and most importantly, adopting the victimology approach would help counter cyber-enabled child exploitation crimes. Through the cooperation, the tribunal could actually be a framework for combating international offenses across the world.

7. POLICY RECOMMENDATIONS

Therefore, there is an urgent need for international cooperation especially with the advancement of globalization leaving legal and jurisdictional issue, open for offenders to exploit. Crimes of the type including online child sexual exploitation (OCSE), human trafficking, and terrorism require international cooperation. This analysis focuses on three critical components: The actual examples of reforms and harmonization of national laws, improving cooperation of judicial and law enforcement authorities across the borders, and building up the skills and capacities of judicial and law enforcement individuals and organizations with examples in mind concerning these strategies.

International cooperation faces major challenges with such a sharp difference in legal regulation in different countries. Accommodation involves bringing the national laws into compliance with international legal norms in order to maintain legal uniformity and simplify MLA because, often, conflicts proportional to the difference in jurisdiction prevail.

It is seen that the South Asian countries particularly India and Pakistan have not incorporated their national laws with the international standards 'conventions' and thus lack the conformity in prosecution and extradition regimes. Both Pakistan through its PECA 2016 and India through its IT Act 2000 have had measures to prevent cybercrimes but lack sufficient structure on interconnection with other countries. One of the suggested strategies would be the necessity of introducing an element of mutual recognition agreements, as well as the tendency to follow treaties, such as the UNTOC. These steps would further enhance legal basis for prosecuting transnational crimes under international cooperation.

Fighting of transnational crimes implies the existence of sound International judicial and police cooperation systems. A range of successful examples from the international experience focuses on the peculiarities of organizing institutions and frameworks that contribute to cooperation. For example, the European arrest warrant (EAW) means fast tracking of extradition procedures within the European Union in order to transfer suspects between member states. Similarly, Interpol databases and notice help the member states to know about the suspect and arrest them around the world.

Due to political relations within the Southern Asian region, legal relations including collaboration between states are suffered such as the relation between India and Pakistan. This problem may be solved through the creation of regional structures, which are similar to the judicial networks of the EU. Manual on Mutual Legal Assistance and Extradition might concern cooperation on formation of the broad databases, on the unification of criteria pertaining to extradition, and on mutual trust in the participating countries. For instance, this framework could help move the extradition of people caught up in cross-border cybercrimes by eliminating political and legal barriers that may lead to many delays.

However, legal cooperation is also carried out at bilateral level through different forms of instruments and one of them is the Mutual Legal Assistance Treaties, (MLAT) signed by USA and several countries. Increasing such treaties among the SA countries would greatly improve the prospects for better cooperation in criminal inquiries as well as sharing of evidence.

Capacity building also makes sure that in enhancing the use of applying tactics and strategies such as law enforcement and judicial aspect throughout the world in combating complex transnational crimes possess adequate capabilities besides adequate knowledge and adequate resources. Most countries do no provide sufficient training and technical expertise especially in the third world to contain complex crimes like cybercrime or money laundering for instance. Routes that take this approach include; Global Program on Cybercrime by the United Nations Office on Drugs and Crime (UNODC) offering training and technical cooperation to national agencies involved. For instance, Kenya has used this program to build the capacity of the country on digital forensics; and, thereby, increase the prosecution of cybercrimes.

In South Asia, there is still a lack of substantive expertise, and there is frequently a lack of funding for investigations. For example, the computer criminal investigation agencies in most nations are poorly equipped with forensic instruments that could be used to monitor cybercriminals. Such a gap could be closed by regional approaches for instance through the training workshops offered by SAARC. Training with the UNODC or INTERPOL, or any organization, would foster the toughness of local capacities. In the specific topic like OCSE, training in such aspects of digital evidence management, cross-jurisdictional legal processes, and rescue for the victims are crucial tremendously.

In addition, using of technologies may help to strengthen the positions of law enforcement agencies more. Technological advancement in facades like crime detection Artificial Intelligent technology, use of Blockchain technology for tracking unlawful transactions and data analytics in investigations enhance investigation drastically. Multilateral relations with the advanced technological nations may afford developing nations access to such resources.

In order to address transnational crimes and threats effectively a number of recommendations are important surely this is through legal reformation, cross boarder cooperation and through capacity building. A common approach in justice is achieved by harmonizing laws; frameworks for cooperation between the judiciary power and law enforcement agencies help to act quickly. Capacity development at the local level preparing nations for emerging challenges empowers the authorities of the local government.

International cooperation as the Budapest Convention, European Arrest Warrant, and the Programs of UNODC serve as examples of its possibilities. These strategies can solve the problems of regional political competition and lack of resources for South Asia. Legal harmonisation, improved cooperation and capacity development that underpins this proposal provide a single comprehensive strategy that can help nations build strong legal frameworks to deal with the growing incidences in international crimes such as OCSE and others.

8. CONCLUSION

The increase in use of communication technology has been described as rewarding in the innovation in technology has also provided a ground for heinous crimes such as Online Child Sexual Exploitation (OCSE). This is a cross-cutting problem that is quite a headache as far as sovereignty, jurisdiction and enforcement is concerned especially in countries such as India and Pakistan. The effective fight against OCSE and the protection of vulnerable Children require a coordinated international effort which is best spearheaded by hybrid tribunals.

OCSE is by nature transnational, meaning that often the offenders, targets, as well as servers in question are based in different states. This global nature requires an international effort in order to effectively address systematically. Due to legal void or inadequacies, lack of cooperation at the bilateral level and due to political differences and disparities, both India and Pakistan suffer from jurisdictional and enforcement issues. Current tougher traditional law enforcement approaches cannot handle these complexities, and a model that interlinks international cooperation with local enforcement is ideal.

OCSE requires coordination of legal activities of different countries and it is essential that there is an appropriate structure that each country must follow, there should also be an alignment of the definitions used in the different countries. Bodies such as INTERPOL, ASEANAPOL or any other body associated to UN can be of immense support by helping in share of real time data and reports. Both the countries need to rely on agreements of international law that can be signed by both Indian and Pakistani legislature to eliminate political enmity and possess confidence in each other. And without such a collaboration, issues to do with jurisdiction and prosecution can only be consistently plagued which allows the offenders to exploit the legal inconsistencies in a bid to avoid being apprehended.

The idea of combining domestic and international laws the Hybrid tribunals provide a solution to counter OCSE in the socio-political dynamics of India and Pakistan. These tribunals may eliminate jurisdictional constraints by harmonizing national laws with international legal instruments, as well as by making them prompt, objective and impartial in their judgements of transnational crimes.

Another advantage of the hybrid tribunals is the participation of the domestic legal professional of culturally sensitive states while sticking to the international human rights law provisions. Firstly, this two-part structure also helps to enhance the popcorn legitimacy in the eyes for the local populations as well as to guarantee the application of the international best practices. It needs to be stated that in cases where an offence is prosecuted by OCSE, hybrid tribunals are capable of utilizing victim-centered approaches to provide for psychological assistance, legal aid, safe complaints submission, and protection of human dignity of survivors.

Furthermore, while hybrid tribunals are capable of drawing on the latest advances in investigation technologies such as artificial intelligence, machine learning, or blockchain. These tools facilitate tracking or offenders and handling of evidence electronically, and fast identification of the incriminating materials. This is where other facets of technological application come into play, backed up by tie ups with related tech firms and social media sites to cope with the ever-evolving problem of OCSE.

The appointment of a composite Tribunal for OCSE and India and Pakistan in particular would be a very positive step towards harmonization of legal structure of the two regions in cases of transnational crimes. Thus, although political relations interfere with a degree of cooperation, the danger of OCSE is a sufficient incentive for both countries to cooperate. The suggested form is a hybrid tribunal located, for example, in the United Nations since it allows resolving these crimes without violating the sovereignty of both states.

This tribunal apart from acting as a court of law that would try offenders in relation to this issue would also be responsible for training the ability of law enforcement and judicial organs. In that way, it would enhance the general legal and enforcement standards in both countries by promoting knowledge in cybercrime laws as well as digital forensics. Also, more awareness campaigns by the tribunal can create awareness within communities putting an end to OCSE making them part and parcel of the war against exploitation.

Hybrid tribunals are innovative, fair and realistic way to deal with the OCSE in context of India and Pakistan. These tribunals are forms of global cooperation and sophisticated techniques, which is more than political and juridical enmity, and victim-oriented approaches. Creation of this particular tribunal would help in providing justice to victims and enforcing justice on offenders, not only that but it will set a precedence in combating transnational Cybercrimes across the world. This is especially true as we advance into the ever-complicated digital space, then so too must the safeguard mechanisms for our most vulnerable targets; the children. In this way, India and Pakistan can lead a positive change through hybrid tribunals and demonstrate that only together it is possible can human dignity and rights be protected internationally.

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CIVIL LIABILITY OF MEMBERS OF THE BOARD OF DIRECTORS OF A JOINT STOCK COMPANY UNDER TURKISH LAW

Yunus Emre Ay*

Abstract

Joint stock companies have two compulsory organs. These are the general assembly and the board of directors. The difference between the members of the board of directors and the members of the general assembly is that they take part in the management and representation of the joint stock company. In addition, members of the board of directors have civil liability. The purpose of this study is to examine and address the civil liability of the members of the board of directors of joint stock companies in the light of the doctrinal research method. This research method is an effective way to analyze the current Turkish legislation.

Keywords: Board of Directors, Civil Liability, Violation of Statute and Articles of Association, Fault.

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1. INTRODUCTION

The authority to manage and represent the joint stock company does not belong to the general assembly. Rather, these powers belong to the board of directors. Since the general assembly is cumbersome compared to the board of directors, it cannot have the authority to manage and represent the joint stock company. For example, as the number of shareholders increases, the management and representation of the joint stock company becomes more difficulty. In addition, joint stock companies, which are generally established with large amonts of capital in commercial life, need a professional management structure. It should be emphasized that, as a rule, shareholders of joint stock companies are liable only for the capital they have subscribed. Therefore, it is not appropriate for the structure of joint stock companies to impose liability on shareholders for their companies. For this reason, there is a need for a corporate body that can be held liable for the responsibility arising from the management and representation authority. This corporate body is the board of directors(Çakır, 2014 ; pp. 110, 111). Therefore, the board of directors has certain obligations. If the board of directors fails to fulfill these obligations, the relevant members of the board of directors are liable.

2. LEGAL OBLIGATIONS OF MEMBERS OF BOARD OF DIRECTORS

A member of the board of directors is obliged to participate in all activities related to the management of the joint stock company and to be present at all relevant meetings. In this context, it is among the responsiblities of the members of the board of directors to attend the board of directors meetings, make suggestions and negotiations. At the same time, the members of the board of directors are obliged to oversee the administration of the joint stock company and the conduct of all transactions in accordance with the statute, the provisions of the articles of association and the interest of the company. The execution of these obligations is realized by overseeing the company. For example, the members of the board of directors may exercise their right to obtain and review information in this context(Bilgili & Demirkapı, 2021 ; pp. 282, 283).

2.1.Duty of Care and Loyalty

The members of the board of directors assigned to manage the joint stock company and third parties in charge of management must fulfill their duties diligently. Diligence refers to the attention and seriousness that the members of the board of directors should show in their business and transactions. As a result, a joint stock company should be managed in a manner that can be expected from an experienced and dutiful businessman. Duty of care is an objective criterion. It is not enough for a member of the board of directors to show the same diligence that he/she shows in his/her own affairs, according to his/her own abilities and means. Before a resolution is passed, market research, financial situation analysis and commercial ethics must be followed(Çebi, 2020 ; pp. 211, 212). In this context, these persons are obliged to observe the interests of the company within the framework of the rule of honesty. Duty of care is a criterion for determining the liability of members of the board of directors. A member of board of directors who shows the due diligence expected from him/her shall prove his/her faultless and fulfill his/her obligation(Çebi, p. 211). In addition, in determining the duty of care, case-specific factors such as the articles of association, the size of the company, business subjects, the industry in which the company operates, the number of members of the board of directors, and whether there is a division of power among the members of the board of directors also play an important role(Balaban, 2019; p. 21).

Members of the board of directors are under the duty of loyalty while fulfilling their duties. The duty of loyalty continues even after the termination of the board membership. For example, the duty of loyalty includes not sharing trade secrets with third parties. In this case, the member of the board of directors should not share trade secrets with third parties, even if his/her term of office expires (Arslan, 2012; p. 419).

2.2.Prohibition of Transactions with the Company

As a rule, a member of the board of directors may not enter into any transaction with the joint stock company on his/her own behalf or on behalf of another person without the authorization of the general assembly. Otherwise, the joint stock company may claim that the transaction is null and void. The other party cannot make such a claim. The legislator has regulated this rule in order to prevent the joint stock company from incurring losses. For example, a member of the board of directors may cause damage to the joint stock company by selling goods for more than their cost. Thus, conflict of interest is prevented. There are exceptions to this situation. For example, if a member of the board of directors purchases a service or product that meets his/her special consumption needs, consumer contracts with the joint stock company are not exceptions to this rule. However, if the board member's consumer contract with the joint stock company is more advantageous compared to third parties, i.e. other consumers, then the transaction is invalid (Şener, 2012 ; p. 401).

2.3. Prohibition of Borrowing to the Company

In a joint stock company, the members of the board of directors who are not shareholders, and the members of the board of directors' non-shareholder superior, subordinate and up to third degree blood relatives and in-laws may not borrow cash from the joint stock company. The company cannot provide surety, guarantee and collateral for these persons, and cannot assume responsibility for these persons. Transactions of the members of the board of directors contrary to the prohibition of indebtedness to the company cannot be lifte deven by a general assembly or board of directors resolution (Özbağ, 2023 ; p. 215). Thus, it is aimed to prevent corruption in the company. Another purpose of this rule is to protect the assets of the joint stock company (Bilgili & Demirkapı, p. 285).

2.4. Prohibition of Participation in Negotiations

In joint stock companies, a member of the board of directors may not participate in negotiations on matters in which the company's interest conflicts with his/her "personal interest outside the company", or with the personal and outside interest of one of his/her descendants or one of his/her spouse or one of his/her relatives by blood or by marriage up to and including third degree. A member of the board of directors who is a representative of the workers attending the board of directors meeting where a salary increase is planned for the wages of factory workers may participate in the negotiations on the issue concerning his/her own salary (Ağırbaş, 2024 ; p. 82). However, a member of the board of directors selling goods to the joint stock company or renting out a shop is a "personal interest outside the company" (Adıgüzel & İlbasmış Hızlısoy, 2023 ; p. 47). This prohibition also applies in cases where it is a requirement of good faith that the member of the board of directors does not participate in the negotiations. In case of doubt, the board of directors passes a resolution. The relevant board member may not participate in this vote. In cases where the board of directors is not aware of the conflict of interest, the relevant member must disclose this and comply with the prohibition. The member of the board of directors who violates this prohibition, the other members of the board of directors who did not object to the participation of the relevant member in the meeting when the conflict of interest was objectively present and known, and the members of the board of directors who passes a resolution to alow the relevant member to participate in the meeting are obliged to compensate the damages incurred by the joint stock company due to this reason. The reason for not participating in the relevant discussion due to the prohibition and the relevant procedures shall be written in the resolution of the board of directors. As can be seen, it is accepted that a member of the board of directors cannot act objectively in cases where he or his relatives may have a conflict of interest with the joint stock company. For both economic and psychological reasons, a member of the board of directors may not be able to protect the interests of the company in such a situation (Sulu, 2019 ; p. 134).

2.5. Non-Competition

Non-comptetion is one of the most important obligations of board members. It is a special form of the duty of loyalty of the board member. A member of the board of directors may not compete with the joint stock company in which he or she serves. Within the scope of the prohibition of competition, a member of the board of directors in another joint stock company or manager in a limited liability company. However, he/she may be a shareholder in a capital company (Arslan, p. 420).

Since the prohibition of competition is linked to the status of board membership, it continues throughout the board membership. The prohibition of competition starts with the acquisiton of the status of board membership and ends with the termination of the board membership. One point should be emphasized that board membership and termination of board membership shall be registered in the trade registry, but these registrations are of an explanatory nature. They are not the starting and expiration dates of the non-competition. A contract between the joint stock company and the member of board of directors may stipulate a non-competition clause for the period after the board membership. In such a case, there is a contractual non-competition. The contractual non-competition clause may not regulate the economic future and freedom of work of the board member in an unfair manner in terms of place, time and sector. This restriction cannot exceed 2 years in terms of time(Çebi, p. 215). The limit of the prohibition of competition within the scope the place is the place where the commercial activities of the joint stock company are carried out and its goodwill. A member of the board of directors may carry out activities elsewhere and outside the goodwill in such a way that the joint stock company will not be economically damaged (Aşık, 2017 ; p. 170).

The joint stock company may optionally impose one of three different sanctions against the board member who violates the prohibition of competition. These sanctions are, respectively, compensation for the damage arising from the unfair competition transaction, deeming the transaction as made on behalf of the joint stock company, and transferring the benefits arising from the transactions made on behalf of third parties to the joint stock company. The authority to choose one of these sanctions belongs to the other members of the board of directors. Naturally, the member of the board of directors who violated the prohibition of competition will not be able to participate in the deliberations and votes regarding this resolution (Arslan, p. 421).

The prohibition of comptetition is not an absolute prohibition. The prohibition of competition of the members of the board of directors may be lifted with the permission of the general assembly (Özbağ, p. 217).

3. CONDITIONS OF LIABILITY OF BOARD MEMBERS

3.1. Violation of the Statute and Articles of Association

According to the Turkish Commercial Code, in order for the civil liability of the members of the board of directors to arise, they must have violated their obligations arising from the statute or the articles of association. If the members of the board of directors have not violated their obligations arising from the statute or the articles of association, their civil liability will not arise(Yavuz, 2022; p.30). The liability of the members of the board of directors arises not only from the violation of the Turkish Commercial Code, but also from the violation of other statutes(Çamurcu, 2014 ; p. 52). Civil liability may arise when the members of the board of directors fail to comply with the obligations imposed by an administrative regulation. In this case, the administrative regulation must have a legal basis. If an administrative regulation does not have a legal basis, there is no violation of the statute (Yavuz, 2022 ; p. 30).

3.2.Damage

Damage is a dimunition in the assets of a person without his/her consent. If no damage has occurred as a result of the board members' acts contrary to the statute or the articles of association, this liability does not arise. Therefore, the occurrence of damage is a necessary condition for the liability of the members of the board of directors. The damage that may ocur in a company may ocur in the form of a decrease in company assets or deprived profits. In this case, the sanction to be applied to the members of the board of directors is compensation (Yavuz, p. 32).

3.2.1. Direct Damage

Direct damage is the damage that arises in the form of a direct decrease in the value of the assets of the joint stock company, shareholder or a creditor, or the non-occurrence of the expected increase in the value of the assets as a result of the violation of the obligations of the members of the board of directors arising from the statute or the articles of association. In direct damage, the illegality arises directly in the assets of the joint stock company or shareholder or creditor. The direct damage of the creditor or shareholder is independent of the damage of the joint stock company (Altaş, 2023; p. 456). Failure to pay dividends directly to the shareholders by the members of the board of directors, or the shareholders being deceived by the incorrectly prepated balance sheet and selling their shares at a low price are direct damages to the shareholders (Balaban, p. 118). Receiving loans from the bank by giving false information about the financial statements of the joint stock company, not paying the salaries of the workers in the joint stock company are direct damages of the creditors (Balaban, pp. 118, 119).

3.2.2. Indirect Damage

Any acts and transactions of the board of directors that worsen the assets of the joint stock company in general, adversely affect the company's creditors and shareholders. Any acts and transactions that reduce the assets of the joint stock company adversely affect the shareholders in proportion to their shares. Even if the joint stock company is not bankrupt, if the creditors do not receive their receivables in full, the creditors are also affected by this situation. Therefore, a direct damage suffered by the joint stock company is considered an indirect damage for the shareholders and creditors (Pulaşlı, 2022; p. 647). However, in indirect damages, it is the joint stock company that suffers direct damage. For example, a capital increase resolution has been passed in the general assembly of a joint stock company. A shareholder who believes that the capital increase resolution will be implemented plans to but new shares based on the pre-emptive right. For this reason, the damage suffered by the shareholder who takes out a loan or sells a movable or immovable property is direct damage due to the unjustified non-implementation of the general assembly resolution. If the joint stock company misses a business project or profit due to the non-implementation of this resolution, this is a direct damage to the joint stock company (Pulaşlı, 2022; p. 648).

3.2.3. Damage by Reflection

A tort may not only cause damage to the victim in the tortious relationship. A 3rd person may also be harmed as a result of the tort. For example, a father may be beaten up as a result of a fight he was involved in, so he may not be able to work for days. Thus, he may suffer loss of income. As a result, his family, which he is obliged to take care of, may also be harmed for this reason. In this case, the family of the father who is the victim of this tort may also be harmed by this tort through reflection. Likewise, a singer was injured in an accident and the concert organizer had to cancel the concert. The organizer also refunded the ticket fees to the singer's fans. In this case, the singer is the person to whom the tort is directed. As the injured party, she can directly claim compensation for her damages. The concert organizer, on the other hand, is not the person to whom this act is directed, but the person who is damaged by reflection (Kılıçoğlu, 2011 ; p. 20). As can be understood from these examples, there is a three-party relationship in damage by reflection (Çiçekli, 2022 ; p. 1076). Damage by reflection may also ocur in a joint stock company. Shareholders may suffer damage by reflection as a result of damage to the joint stock company. As a matter of fact, according to Article 555/1. paragraph of the Turkish Commercial Code; "The company and each shareholder may request compensation for the damage suffered by the company." (Yüce&Köroğlu, 2022 ; p. 548).

3.3. Fault

Fault is behaviour that is not protected by the legal order. This behaviour is a will that is not in accordance with the law. The legal order does not accept defective behaviours. Fault is divided into two categories: intent and negligence. There is intent if the unlawful result is desired. In case of intent; the person who commits the tort knows and wants the unlawful result. In case of negligence; the unlawful result was not intended, but the measures required by the situation were not taken by not showing the obligation of attention and care. As a result; the person who wants the unlawful result or does not put forth the necessary will to prevent the unlawful result is at fault (Reisoğlu, 2011; pp. 169, 170). The fault of a member of board of directors should be assessed within this framework.

3.4. Causal Link

The causal link is the cause-and-effect relationship between the misconduct and the damage caused. In order for a member of the board of directors to held liable, there must be a connection between his/her misconduct and the damage caused. If there is no relationship between the faulty behaviour and the damage, there is no causal link.

4. THE PRINCIPLE OF DIFFERENTIATED SOLIDARITY

According to the Turkish Commercial Code, the differentiated solidarity principle is accepted in the liability of the members of the board of directors of joint stock companies. According to this principle, in the event that more than one member of the board of directors is liable to compensate for the same damage, each of them shall be jointly and severally liable for this damage together with the others, to the extent that the damage can be attributed to him personally, according to his fault and the requirements of the situation. Differentiated solidarity refers to the differentiation of the liability of each member of the board of directors within the scope of legal liability in the effect of their faults, and to be held liable in proportion to the occurrence of the damage. Therefore, the liability of the members of the board of directors is determined after determining the existence and nature of the damage. In doing so, the articles of association, internal directives, resolutions of the general assembly and the board of directors, and signature declarations are taken into consideration(Yavuz, p. 33). The differentiated solidarity principle, unlike joint and several liability, allows individual grounds for reduction of liability to be claimed against the plaintiff who is a creditor. In other words, the indemnification obligations of the responsible parties are differentiated in the external relationship according to the degree of their fault and the extent to which the damage can be attributed to each of them (Yavuz, p. 33). Differentiated solidarity can be explained with an example. The board of directors of a joint stock company consists of A, B, C, and D. These persons have incurred a loss of 40.000TL. Of these persons, A,B,C and D incurred a loss of 20.000TL. Of the remaining damage, A caused 10.000TL and B caused 10.000TL. In this case, A,B,C and D are jointly and severally liable for 20.000TL. A alone is liable for 10.000TL and B alone is liable for 10.000TL. As a result, it is possible to reach three results regarding differentiated solidarity together (Göktürk&Can, 2011 ; p. 253):

- Differentiated solidarity is effective in terms of the external relationship.
- Differentiated solidarity applies in respect of joint damages.
- The liability must not exceed the amount that would be attributable if the damage were personally attributable.

If only one member of the board of directors is responsible for the liability of the members of the board of directors, then the differentiated solidarity principle shall not be applied (Koç, 2020; p. 78). The differentiated solidarity principle shall be applied if the same damage is caused by at least two board of directors (Aksu, 2025; p. 1116).

5. TERMINATION OF THE RESPONSIBILITY OF THE MEMBERS PF THE BOARD OF DIRECTORS

5.1. Release

There are various definitions of the concept of release. In joint stock company law, release is the acceptance by the general assembly that the transactions of the members of the board of directors are in compliance with the law and in accordance with the interests of the company. With the release resolution, it is accepted that the transactions of the board members are in compliance with the statute and the articles of association. With the release resolution, the general assembly of the joint stock company waives any claims for compensation that may be asserted against the members of the board of directors (Şener, 2012; p. 414). With the release resolution, the general assembly declares a trust for the members of the board of directors. In this way, the members of the board of directors, who are discharged with the effect of the release resolution, work more motivated. They act more courageously in transactions with third parties (Önder&Karademir, 2014 ; pp. 174, 175). As can be understood from this statement, the release resolution is related to the internal relationship of the joint stock company. The release resolution is not binding for those who have claims. In the context of the external relations of the company, the release resolution has no effect.

It is one of the inalienable and non-transferable duties and powers of the general assembly to adopt a resolution of release. The general assembly may release all or some of the members of the board of directors. The general assembly may adopt a resolution of release either explicitly or implicitly. For example, the resolution to approve the balance sheet by the general assembly at the ordinary general assembly meeting is an implicit release resolution, unless the resolution is explicit to the contrary. However, if some issues are not shown in the balance sheet as required or if there are some issues in the balance sheet that prevent the real situation of the joint stock company from being seen, the approval of the balance sheet resolution does not result in the consequences of the release resolution (Şener, 2012; p. 414).

5.1.1. Release Case

If the conditions for release are met, the general assembly of a joint stock company may not arbitrarily and without just cause not release the members of the board of directors. In the event that the general assembly of a joint stock company fails to release the members of the board of directors without just cause, the members of the board of directors may fila a release lawsuit against the joint stock company. In this lawsuit, the members of board of directors may claim that they are not at fault for their actions during the accounting period. In this lawsuit, the members of the board of directors claim that they have performed a flawless management. They state that they have fulfilled their obligations arising from their contract with the company (Azarkan, 2022 ; p. 38).

5.2. Proof of the Board Member's Faultlessness

5.2.1. Casting a Negative Vote on a Resolution that is a Reason for Liability

A board resolution may give rise to the liability of the members of the board of directors. However, if the members of the board of directors vote against the board resolution that gives rise to the relevant liability, their liability will not arise. A negative vote is an indication that the breach of the obligation is clearly not intended. Abstaining from voting or remaining silent at the board meeting does not have any meaning under the Turkish Commercial Code. In fact, abstaining from voting implies refraining from performing duties. It is incompatible with the qualifications of being a member of the board of directors. A member of the board of directors either casts an affirmative vote or a negative vote. Therefore, in the event of a negative vote on a resolution that leads to liability, the liability is avoided (Altaş, p. 471).

5.2.2. Failure to Attend the Meeting with an Acceptable Excuse

There is no provision in the Turkish Commercial Code stating that a member of the board of directors who does not attend the board of directors meeting with an excuse shall not be liable for the resolutions to be taken at that meeting. In this case, a decision shall be made based on the general principles of private law. A member of the board of directors who has an acceptable excuse and proves it cannot be held liable for not attending the resolution that causes liability. While the relevant board member proves his/her excuse, permanent illness surgery, travel leave granted by the board of directors in advance are accepted as acceptable excuses (Altaş, p. 472).

5.2.3. Execution of General Assembly Resolutions

The general assembly passes resolutions to affect the internal relations of the company. General assembly resolutions are not capable of affecting the external relations of the company. However, a resolution of the board of directors may have an impact on the external relations of the company because the board of directors is the executive and representative body of the company. Therefore, the board of directors is a body obliged to execute the resolutions of the general assembly. Sometimes a general assembly resolution may cause damage to the joint stock company. For example, a capital increase resolution passed in the general assembly may harm the company. In this case, the shareholders of the joint stock company have consented to the damage arising from a matter that they were previously informed about. Therefore, the members of the board of directors will not have any liability for the execution of this resolution. If the members of the general assembly will file a lawsuit for liability against the members of the board of directors on this matter, there is an abuse of right (Yüce, 2023 ; p. 477).

5.2.4. Failure to Exercise the Right to Obtain and Examine Information

The members of the board of directors exercise their right to obtain and examine information on matters falling within their duties and authorities in order to manage the company appropriately. This right may be exercised both outside the board meeting and during the board meeting. A member of the board of directors may obtain information outside the board meeting with the approval of the chairman of the board of directors. Likewise, the chairman of the board of directors receiving information outside the board meeting is subject to approval of the board of director resolution. However, in the course of the board meeting, the rights of the board members to obtain and examine information are limitless (Pulaşlı, 2012; p. 588). Considering these situations, a board member may not be able to exercise his/her right to obtain and examine information. For example, the chairman of the board of directors may refuse to provide information to a board member outside the board meeting. In this case, that board member may not make the right decision. In such a case, holding that board member responsible for his/her decision is incompatible with equity. According to an opinion in the doctrine, the right of board members to obtain information is also an obligation, because decisions cannot be taken without obtaining information. For this reason, if a member of the board of directors fails to fulfill his/her obligation to obtain information and damages occur as a result, the liability of that member of the board of directors will arise. Therefore, the members of the board of directors should fulfill their duties diligently. The right to obtain and examine information is one of these cases (Karslıoğlu, 2021; p. 390). Therefore, failure to exercise the right to obtain and examine information is a reason for non-liability.

5.2.5. Delegation of Management and Representation Authority

Under the Turkish Commercial Code, the members of the board of directors have duties and authorities that are inalienable and non-transferable. They may delegate their duties and powers other than these duties and powers to third parties defined as executive directors. Executive directors are liable for the damages they cause to the joint stock company. As a rule, the members of the board of directors are not liable for the damages caused by the executive directors, but the members of the board of directors should take care in the selection of the executive directors. If the members of the board of directors have not exercised due diligence in the selection of the executive directors, they are not liable for the acts and transactions of the persons they have selected (Pulaşlı, 2022; p. 390).

5.2.6. Non-liability for Events and Transactions beyond Control

According to Article 553/3rd paragraph of the Turkish Commercial Code, there is the following statement about the liability of the members of the board of directors:

> "No one shall be held liable for breaches of the statute or the articles of association that are beyond his/her control due to his/her duty of supervision."

The reason for the inclusion of such a statement in the statute is that in practice, it is observed that the members of the board of directors are held liable for any breach of the statute or articles of association in the joint stock company with an understanding of supervision beyond human nature. The purpose of this provision is to prevent the members of the board of directors from being held liable based on an abstract understanding of the duty of supervision in the absence of a causal link or fault. However, this provision is very controversial in the doctrine because the duty of supervision of the members of board of directors in a joint stock company is one of the non-transferable duties and powers.

Moreover, such a provision renders the oversight power of the board of directors dysfunctional. In addition, the expression "breaches of the statute or the articles of association that are beyond his/her control due to his/her duty of supervision" is ambigous because according to Article 375 Turkish Commercial Code, which regulates the inalienable and non-transferable duties and powers of the board of directors, there is a supervisory authority to supervise whether the persons in charge of management act in compliance with the statute, articles of association, internal directives and written instructions of the board of directors. According to the preamble of this article, the concept of supervisory oversight is "the oversight of the flow of business, which is necessary both theoretically and in terms of business economics. Otherwise, the board of directors is nota control and supervision body. The normative nature of supervisory oversight is understood from the provision itself" (Pulaşlı, 2022 ; p. 663). In conclusion, Article 553/3rd paragraph of the Turkish Commercial Code contains an ambiguity.

5.2.7. Corporate Social Responsibility

The purpose of joint stock companies is naturally to make a profit. A joint stock company distributes the profit to the shareholders. For this reason, as a rule, the general assembly is authoried to decide on donations (Pulaşlı, 2022 ; p. 414). However, in recent years, the principle of corporate social responsibility has been accepted in business life. Within the scope of this principle, joint stock companies may make expenditures that are beneficial to the society in social issues such as education, health, culture, art and environment without seeking profit. According to the Turkish Capital Markets Act, a provision must be included in the articles of association of public joint stock companies in order to make donations or distribute dividends to non-shareholders. The limit of donations to be made is determined by the general assembly. Article 523 of the Turkish Commercial Code[*] is taken into consideration when determining the limit of these expenditures for non-public stock companies. There is no provision other than this article for non-public joint stock companies. Considering the content of this article, an assessment should be made according to the concrete case for such joint stock companies (Eskiocak, 2022 ; pp. 408, 409).

[*] Turkish Commercial Code Article 523

(1) Unless the legal reserves and the optional reserves stipulated in the articles of association are set aside, the dividend to be distributed to the shareholders cannot be determined.

(2) The general assembly shall;

a) If necessary for the restoration of assets,

b) If it is deemed justified in terms of continuous development of the company and the distribution of dividends as stable as possible, taking into account the interests of all shareholders, it may also resolve to set aside reserves other than those stipulated in the statute and the articles of association.

(3) Even if there is no provision in the articles of association, the general assembly may allocate reserves from the balance sheet profit for the purpose of establishing or maintaining charity funds an other charitable organizations for the employees of the company or to serve other charitable purposes.

5.3. Prescription

The Turkish Commercial Code regulates special prescription lawsuits for liability to be filed against the members of the board of directors. According to the Turkish Commercial Code; the right to claim compensation against the members of the board of directors who are responsible is 2 years from the date the plaintiff learns about the damage and the responsible person. However, under all circumstances, lawsuit for liability cannot be filed against the members of the board of directors after the expiration of the 5 year prescriptions from the day the act giving rise to the damage occurred. If the act giving rise to the laibility of the members of the board of directors is also crime and the Turkish Criminal Code provides a longer prescription for that crime, this prescription shall apply to the claim for damages. As an exception, the Turkish Commercial Code provides a shorter prescription for breach of non-competition. The prescription is 3 months from the date of learning of the non-competition and 1 year from the date of the act of non-competition. Whether the members of board of directors have caused damage to the joint stock company is determined through financial statements. However, if the damage cannot be determined from the financial statements, the shareholders' right to obtain and examine information and the right to special audit will play an important role in determining the prescription in determining the liability of the members of the board of directors (Özkan, 2023; p. 64).

6. Requirement of a General Assembly Resolution to File a Lawsuit for Liability Against the Members of the Board of Directors

The necessity of a general assembly resolution to file a lawsuit for liability against the members of the board of directors is an important problem because there is no explicit provision in the Turkish Commercial Code on this issue. However, when it is inferred indirectly from some provisions of the Turkish Commercial Code, it is understood that a general assembly resolution is required to file a lawsuit against the members of the board of directors for their liability.[*] It is a criticizable situation that the legislator, instead of explicitly regulating such a very important case, leads the jurists to conclusions through indirect

[*] Turkish Commercial Code Article 479 regulates the privileged votes of shareholders in the general assembly.
(3) Voting privileges cannot be used in the following resolutions:
a) Amendment of the articles of association
c) Filing a lawsuit for release and liability

inferences (Şener, 2023; p. 234). In this case, the general assembly resolution is a cause of action under the civil procedural law in lawsuits for liability to be filed against the members of the board of directors. The existence of this cause of action is explicitly investigated by the judge. If a lawsuit for liability is filed against the members of the board of directors without a general assembly resolution, this lawsuit will not be dismissed immediately. A definite period of time is given to the joint stock company in this regard. If the lack of a cause of action is not remedied within this definite period, the lawsuit for liability shall be dismissed under the civil procedural rules (Şener, 2023; p. 235).

7. CONCLUSION

According to the Turkish Commercial Code, the members of the board of directors are liable while managing the joint stock company. The liability of the members of the board of directors are liable while managing the joint stock company. According to the Turkish Commercial Code, the obligations of the members of the board of directors are generally management and supervision obligation, duty of care and loyalty, prohibition of transactions with the company, prohibition of indebtness to the company, prohibition of participation in negotiations and prohibition of competition. The obligations of the board of directors are not limited to these, but also include the obligations under other statutes. However, it is quite difficult to determine the boundaries of the management and supervision obligation and duty of care and loyalty among these obligations under the Turkish Commercial Code.

The members of of the board of directors are liable to the principle of differentiated solidarity. The principle of differentiated solidarity is applied when more than one board member is responsible. Responsibility groups are determined among the members of the board of directors who are held responsible. A member of the board of directors who has no responsibility cannot be held liable.

The liability of the members of the board of directors does not arise with the release resolution, the lawsuit for release, the proof that the member of board of directors is not at fault in various matters in various ways and the lapse of the prescription.

In order to file a lawsuit for liability against the members of the board of directors, a general assembly resolution is required. A general assembly resolution is a cause of action for the lawsuit for liability.

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ADVANCING THE REPUBLIC OF ALBANIA TOWARD EU ACCESSION THROUGH FUNDAMENTALS: PROGRESS ON OPENING BENCHMARKS IN RULE OF LAW AND HUMAN RIGHTS

Evis Qaja *

Abstract

This article examines Albania's progress in meeting the opening benchmarks of Cluster I "Fundamentals" following the submission of its Negotiating Position to the European Commission on 2 October 2024. Anchored in the revised enlargement methodology, the article focuses on the effectiveness of reform implementation in the core areas of the Rule of Law, Human Rights, Public Administration Reform, and the Functioning of Democratic Institutions. By evaluating 'roadmap-based monitoring' approach, the article explores how Albania's strategic choices and commitments translate into measurable progress. In doing so, it offers insights into the transformative potential of EU conditionality and the credibility of Albania's integration trajectory.

Keywords: EU accession, Opening Benchmarks, Rule of Law, Human Rights, Public Administration Reform, Democratic Institutions.

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1. INTRODUCTION

The initiation of EU accession negotiations represents a critical juncture in Albania’s European integration process, particularly under the revised enlargement methodology introduced by the European Commission in 2020 (European Commission, 2020). This methodology strengthens the focus on fundamental reforms—specifically those related to the human rights, rule of law, democratic institutions, public administration, and fundamental rights—as essential preconditions for further progress in the accession process. These areas are grouped within Cluster I “Fundamentals,” which serves as the foundation of the accession negotiations (Blockmans & Vidović, 2021).

Opening benchmarks within this cluster are not merely technical indicators but strategic mechanisms designed to ensure the irreversibility of reforms, enhance transparency, and increase political accountability in candidate countries (Kochenov & Dimitrovs, 2020). In the case of the Republic of Albania, the submission of the Negotiating Position for Cluster I ‘Fundamentals’ on 2 October 2024 was preceded by the adoption of key strategic documents such as the Rule of Law Roadmap, the Public Administration Reform Roadmap, and the Functioning of Democratic Institutions Roadmap. These instruments aim to operationalize the EU's political criteria in national policy and institutional frameworks (Ministry for Europe and Foreign Affairs, 2024).

The effectiveness of these Opening Benchmarks lies in their ability to guide structural reforms and promote institutional convergence with EU standards (Sedelmeier, 2014). Moreover, they serve as a litmus test for the political commitment of the candidate country to uphold EU values and ensure compliance with the Copenhagen criteria (Grabbe, 2006). This article aims to assess the impact of these benchmarks in Albania’s case, with a specific focus on the progress achieved in the areas of rule of law, human rights, and democratic institutions. Through a critical analysis of institutional coordination, legal reform instruments, and initial implementation outcomes, the article seeks to offer insights into the transformative potential of the EU’s conditionality framework.

2. STRATEGIC READINESS AND AIM OF THE OPENING BENCHMARKS MECHANISM (OBM)

One of the core purposes of the Opening Benchmarks mechanism, as established under the revised EU enlargement methodology, is to assess the strategic readiness and responsiveness of candidate countries to undertake transformative reforms aligned with the Union's foundational values. The Opening Benchmarks, as outlined in the context of Albania's accession negotiations, are designed not merely as procedural milestones but as strategic tools to guide and measure the country's progress in meeting the EU's fundamental criteria—particularly in the areas of rule of law, human rights, and democratic governance (European Commission, 2020).

These benchmarks are inherently dynamic, evolving in tandem with Albania's alignment trajectory and its institutional capacity to internalize and operationalize EU norms. Evaluating their effectiveness requires an assessment of their dual role: first, in driving structural reform, and second, in testing the political will and institutional coherence necessary for their enforcement. The formal adoption of strategic instruments such as the Rule of Law Roadmap and the Public Administration Reform Roadmap (Ministry for Europe and Foreign Affairs, 2024) demonstrates Albania's intent to fulfill these obligations. Yet, the critical phase lies in implementation—where the consistency of inter-institutional coordination and the credibility of monitoring mechanisms become central to ensuring reform sustainability.

Recent scholarly assessments emphasize the transformation in the EU's approach towards enlargement, highlighting an increased politicization of conditionality that goes beyond technical compliance to scrutinize substantive reforms, particularly in the rule of law (Kochenov, 2019; Schimmelfennig & Sedelmeier, 2005). This shift has heightened the importance of the Opening Benchmarks as instruments of political accountability and as early indicators of candidate countries' capacity to uphold democratic principles (European Commission, 2018). Moreover, comparisons with experiences from existing Member States reveal that the depth and credibility of reforms, especially judicial independence and anti-corruption measures, significantly influence accession trajectories (Grabbe, 2006; Sedelmeier, 2014). Therefore, it is essential to situate Albania's benchmark progress within this broader EU framework, acknowledging that these benchmarks do not merely represent formal requirements but embody a strategic recalibration of enlargement policy aimed at safeguarding the Union's institutional integrity. In this context, monitoring mechanisms must be robust and adaptive, reflecting lessons learned from past enlargements where superficial compliance failed to guarantee sustainable reform (European Commission, 2020). Ultimately, the Opening Benchmarks serve as both a catalyst and a compass for Albania's EU integration journey, reinforcing accountability while shaping a governance culture that aligns with the EU acquis and democratic standards.

3. OPENING OF NEGOCIATION FOR CLUSTER I 'FUNDAMENTAL'

3.1. Shifting Conditionality and the Role of the Rule of Law: The 2018 EU Enlargement Strategy

The 2018 EU Enlargement Strategy, officially titled A credible enlargement perspective for and enhanced EU engagement with the Western Balkans, marked a strategic shift in the European Union's enlargement policy (European Commission, 2018). While reaffirming the EU's commitment to future enlargement, it placed unprecedented emphasis on strengthening the rule of law, fighting corruption, and ensuring the independence of the judiciary. This approach reflects a broader evolution in EU conditionality, where accession is no longer measured solely by technical compliance with the acquis, but increasingly by the depth and credibility of structural reforms. As noted by Schimmelfennig and Sedelmeier (2005), conditionality functions as a mechanism of "external governance" that promotes Europeanization through the incentive of membership. However, in more recent years, the EU has acknowledged the limits of formal compliance and has begun to emphasize the substance of reforms, particularly in areas such as justice, media freedom, and institutional integrity (Grabbe, 2006; Sedelmeier, 2014). The 2018 Strategy introduced "flagship initiatives" — reform priorities that serve as reference points for monitoring progress in the Western Balkans. These include judicial reform, public administration modernization, economic development, and reconciliation (European Commission, 2018). Importantly, the EU also highlighted that enlargement would follow a "merit-based and reversible" approach, making it clear that progress can be paused or reversed in the event of backsliding, especially in the rule of law (European Commission, 2020). In Albania's case, this translates into increased scrutiny over initiatives such as the judicial vetting process, the establishment and functioning of justice independent institutions, and the operationalization of anti-corruption frameworks. These efforts are assessed not just in procedural terms, but in light of their credibility, sustainability, and impact—criteria at the heart of modern conditionality (Kochenov, 2019). This shift signals that benchmarks—once mainly technical—have become instruments of political conditionality, reflecting broader concerns over democratic backsliding and the resilience of institutions in candidate countries.

3.2. Strategic preparation and milestones for Cluster I 'Fundamentals'

The process of opening negotiations for Albania's accession to the European Union (EU) under Chapter I, entitled "Fundamentals," was initiated after the completion of the analytical screening process of the EU Acquis with the European Commission. Based on a letter from the Spanish Presidency dated November 30, 2023, Albania took significant steps towards preparing for the formal start of negotiations. Albania developed two pivotal opening benchmarks under this chapter, which were essential for the negotiation process: the "Rule of Law" and the "Public Administration Reform" roadmaps. These two roadmaps were formally approved by the Albanian Council of Ministers in December 2023, through Decision No. 736, which authorized the "Rule of Law Roadmap," and Decision No. 737, which approved the "Public Administration Reform Roadmap for 2023-2030." Both of these strategic documents were officially submitted to the EU on December 13, 2023 (Council of Ministers, 2023).

These documents set out the fundamental measures Albania had committed to implementing in line with EU standards and outlined the planned reforms across various key sectors. The "Rule of Law" Roadmap is part of Albania's broader commitment to upholding the rule of law, while the "Public Administration Reform" roadmap aligns with the EU's demands for modern, transparent, and accountable administrative systems (Council of Ministers, 2023). In addition to these benchmarks, Albania also developed a third roadmap, titled the "Functioning of Democratic Institutions" Roadmap, as part of its alignment with the EU enlargement methodology. Although this roadmap was not a precondition for the negotiations, it was required as part of the broader alignment with EU standards. This document was approved by the Albanian government with Decision No. 611 on October 2, 2024 (Council of Ministers, 2024). The roadmap set out clear goals for improving democratic processes and institutions in Albania, in accordance with EU expectations for democratic governance. The submission of Albania's Negotiating Position for Chapter I "Fundamentals" was preceded by significant deliberations. Following a letter from the Hungarian Presidency on September 25, 2024, requesting the submission of the Negotiating Position, Albania's Negotiating Group thoroughly reviewed and approved the final draft of the Negotiating Position on September 26, 2024 (European Commission, 2024). This document formed the basis of Albania's commitments and the roadmap for future negotiations under Chapter I. In accordance with Albanian law, specifically Law No. 15/2015 "On the Role of the Assembly in the Integration Process of the Republic of Albania into the European Union," as amended by Law No. 19/2023, the Minister of State and Chief Negotiator presented the proposed Negotiating Position for Chapter I to the Committee on European Affairs of the Albanian Parliament. The Committee convened on September 30, 2024, to review the draft, and it made several key recommendations for refining the final document. These suggestions were incorporated into the draft by the Negotiating Group, demonstrating a collaborative approach to the negotiation process (Assembly of the Republic of Albania, 2023). Subsequently, on October 2, 2024, the State Committee for European Integration reviewed the Negotiating Position again. The meeting involved the presentation of the proposed document, which had been updated to reflect the feedback from the Committee on European Affairs. After incorporating these recommendations, the position was sent for approval to the Council of Ministers, which subsequently authorized it under Decision No. 614 on October 2, 2024 (Council of Ministers, 2024). The approved Negotiating Position was officially forwarded to the European Commission services through the Mission of the Republic of Albania to the EU.

The Negotiating Position for Chapter I "Fundamentals" comprehensively addresses the commitments Albania has made under the roadmaps and outlines the necessary reforms for aligning with EU standards. Key areas of focus include the functioning of democratic institutions, public administration reform, the judiciary, and fundamental rights. Notably, Albania has committed to modernizing its electoral system by introducing biometric voter identification and electronic voting systems to enhance transparency and accuracy in elections. Efforts also focus on improving gender representation and depoliticizing election commissions, alongside facilitating greater participation of the Albanian diaspora in the electoral process. In the domain of public administration, Albania has outlined plans to fully implement the National Strategy for Development and European Integration (NSDIE 2022-2030), ensuring good governance and transparency in human resource management. These reforms aim to improve recruitment processes within the civil service, making them more transparent and merit-based, while also emphasizing continuous training for civil servants to enhance their capacities. Furthermore, the Republic of Albania is committed to reforms in its judiciary and fundamental rights. This includes bolstering the independence and impartiality of the judiciary, ensuring the quality and efficiency of court procedures, and enhancing anti-corruption strategies through improved international cooperation and strengthened legal frameworks for preventing and prosecuting corruption. Albania has also committed to strengthening its justice, freedom, and security frameworks, including increased cooperation with EU agencies such as Europol and Frontex, and addressing organized crime and human trafficking. The country has also focused on economic criteria, striving to enhance economic stability, improve competitiveness, and foster a better business climate through streamlined legal and regulatory processes. Additionally, Albania’s public procurement processes will be enhanced through digitalization and the application of modern technologies such as artificial intelligence to reduce corruption risks. Improvements in statistical methodologies and financial control mechanisms are also part of Albania’s broader reform efforts, ensuring greater accountability and transparency in public spending. The comprehensive approach outlined in Albania’s Negotiating Position underscores the country’s commitment to meeting EU standards in key areas, with a clear timeline aiming for full alignment by 2030 (European Commission, 2024). No transitional periods or derogations are requested in the negotiation process for these chapters, reflecting Albania’s determination to fully integrate into the EU’s regulatory and legal frameworks. On October 15, 2024, the Second Intergovernmental Conference was held, marking the formal opening of negotiations for Chapter I "Fundamentals." This event represented a significant milestone in Albania’s EU integration journey (European Union, 2024). The European Commission subsequently issued the EU Common Position document, which outlines the intermediate benchmarks for Chapter I and sets specific benchmarks for Chapters 23 "Judiciary and Fundamental Rights" and 24

"Justice, Freedom, and Security." The document also defines the closing benchmarks for Chapters 5 "Public Procurement," 18 "Statistics," and 32 "Financial Control." These benchmarks will guide further negotiations and ensure that all criteria are met before the closing of these chapters (European Commission, 2024). This step marks a crucial point in Albania's European integration process, highlighting the progress made and the continued commitment to fulfilling the necessary reforms. The opening of negotiations for Chapter I "Fundamentals" sets the stage for deeper engagement with the EU and strengthens Albania's position on the path to full EU membership.

4. PROGRESS ON THE REFORMS AND HUMAN RIGHTS

4.1. The Transformation of EU Conditionality and Benchmarking: Implications for Albania's Reform Process

The evolution of the European Union's enlargement policy over the past two decades reflects a shift from technical compliance to a more politicized and values-based approach. In its early phases, enlargement focused heavily on alignment with the acquis communautaire, measured through progress in meeting Copenhagen Criteria and the successful adoption of EU legislation. However, experiences from previous enlargement rounds — particularly with Central and Eastern European countries — revealed that formal alignment did not always ensure deep, lasting reforms (Grabbe, 2006).

The EU's growing concern with democratic backsliding in some new Member States prompted a re-evaluation of conditionality mechanisms. As Schimmelfennig and Sedelmeier (2005) note, pre-accession conditionality functions best when the EU maintains credibility and consistency in both incentives and enforcement. The revised enlargement methodology of 2020 introduced clearer political steering, more transparent benchmarks, and an explicit emphasis on the reversibility of the process (European Commission, 2020). One of the most significant conceptual shifts was introduced with the 2018 Enlargement Strategy, which reframed enlargement as a geopolitical necessity tied to regional stability, but also highlighted that rule of law, justice reform, and good governance are no longer negotiable political conditions — they are foundational principles (European Commission, 2018). This repositioning has had direct consequences on how candidate countries, such as Albania, are evaluated. Albania's EU integration process now operates within this renewed framework of substantive conditionality, where not only legal alignment, but also institutional performance and integrity are central to progress. Mechanisms such as benchmark-based reporting, flagship reforms, and progress reversibility illustrate how the EU has learned from past challenges and is now attempting to enforce more credible accession pathways (Kochenov, 2019). This evolution reflects a dual intention: to protect the EU's internal cohesion by ensuring that new members share core democratic values, and to strengthen transformative power in candidate states through credible and strategic engagement. Comparing Albania's accession process with the path taken by current Member States illustrates the increasing stringency of these conditions. For example, countries like Romania and Bulgaria faced rigorous benchmarks related to judicial reform and anti-corruption mechanisms, which were subject to post-accession monitoring under the Cooperation and Verification Mechanism (CVM). However, in recent years, the EU has recognized that these measures sometimes lacked sufficient enforcement power and have since refined conditionality mechanisms, embedding political benchmarks earlier in accession talks and linking progress to tangible institutional changes (European Commission, 2020). In Albania's case, the Opening Benchmarks under Chapter I "Fundamentals" reflect this evolved approach by serving both as strategic tools to guide reforms and as tests of the country's political will and institutional capacity. The benchmarks now encompass not only procedural reforms—such as adopting legal frameworks—but also the practical implementation, sustainability, and credibility of these reforms. This represents a notable shift from earlier enlargement rounds, where the focus was more on the existence of laws rather than their effective enforcement. Activities such as the Rule of Law Roadmap and the Public Administration Reform Roadmap demonstrate Albania's alignment with these enhanced conditionality standards. Yet, consistent with lessons learned from previous accessions, the emphasis is on credible monitoring and inter-institutional coordination to avoid superficial compliance. This shift recognizes that rule of law reforms are inherently political and require durable institutional changes supported by broad societal consensus. Therefore, reevaluating Albania's reform activities within this updated conditionality framework is essential. It highlights that benchmarks are no longer static checklists but dynamic instruments reflecting political realities and institutional integrity. This nuanced understanding aligns Albania's accession path with the EU's broader goal of safeguarding the Union's democratic values and preventing challenges faced by earlier Member States after their accession.

4.2. Progress in Key Reforms and Human Rights towards Meeting EU Opening Benchmarks

On October 30, 2024, the European Commission published its 2024 Albania Progress Report. This came after the completion of the first screening process for the six negotiation chapters by November 24, 2023, and following the First Intergovernmental Conference on Accession Negotiations held on July 19, 2022. In the context of the ongoing accession negotiations, Albania presented three key roadmaps which are instrumental in guiding its reform efforts in the integration process (European Commission, 2024). These roadmaps were designed to align with the broader European Union framework, while also reinforcing Albania's commitment to fulfilling the criteria necessary for membership. Furthermore, Albania has remained actively engaged in implementing the Stabilization and Association Agreement (SAA), with consistent interactions in the joint bodies set up under this agreement, which convened regularly throughout the past year (European Commission, 2024).

4.2.1 Advancing based on the EU Progress Report Recommendations

The Second Intergovernmental Conference, held in October 2024, marked the formal opening of negotiations for Chapter I "Fundamentals," a significant milestone in the country's EU accession journey (Council of the European Union, 2024). Albania has repeatedly underscored that EU integration remains its highest political priority, and the country has demonstrated sustained ambition in driving forward the reform agenda in line with EU expectations. This ambition is manifest in the country's commitment to accelerating reforms, which is expected to be further facilitated by the ongoing negotiation process (European Commission, 2024). The Republic of Albania's alignment with the EU's common foreign and security policy has been another area of significant progress. In particular, Albania's active role as a non-permanent member of the United Nations Security Council from 2022 to 2023 served as a demonstration of its full support for the EU's stance on critical global issues (United Nations, 2023). The country co-sponsored resolutions condemning Russia's aggression against Ukraine, reflecting its commitment to the EU's foreign policy objectives. Albania's participation in EU sanctions and its positioning as a reliable EU partner is indicative of its strategic alignment with the Union (United Nations, 2023).

The country has also made significant strides in regional cooperation through the Growth Plan for the Western Balkans, which emphasizes four key pillars: the integration of the region into the EU single market, fostering regional economic integration, implementing fundamental reforms, and securing increased financial support from the EU (European Commission, 2024). The reform agenda is comprehensive, addressing key areas such as the business environment, human capital, digitalization, energy and green transition, and fundamental rights, along with strengthening the rule of law. The European Commission's Rule of Law Report for 2024 includes Albania for the first time, further highlighting the country's alignment with EU norms (European Commission, 2024). In terms of specific progress, Albania has shown notable improvements across six negotiation chapters, with particularly positive developments in the areas of "Judiciary and Fundamental Rights," "Justice, Freedom, and Security," and "Economic Criteria." These chapters saw progress from previous assessments, moving to a higher level of preparation, which has been recognized in the EU's evaluation (European Commission, 2024). Albania has also made substantial progress in the areas of energy, foreign policy, and digital transformation, all of which are key components of the EU accession process (European Commission, 2024).

One of the standout achievements highlighted in the 2024 Progress Report was the completion of 798 vetting cases by the vetting institutions, marking a high completion rate of nearly 99%. Moreover, the Albanian State Police demonstrated enhanced international cooperation, increasing the use of the Secure Information Exchange Network Application (SIENA) by 32.2% compared to previous years (European Commission, 2024). This step was seen as vital in Albania's efforts to strengthen its security sector, in line with EU expectations (European Commission, 2024). The country has also made significant strides in its economic performance. Despite a challenging global economic environment, Albania achieved a growth rate of 3.4% in 2023, following strong performances in previous years. The country's tourism sector played a crucial role in this growth, with service exports, particularly in tourism, driving much of the expansion (World Bank, 2023). This was accompanied by a continued reduction in Albania's trade deficit, a decrease in foreign debt, and a significant drop in the current account deficit, reaching the lowest historical level of 0.9% of GDP (World Bank, 2023).

These economic improvements reflect Albania's commitment to aligning its economic policies with EU standards (European Commission, 2024). In terms of fiscal management, Albania has demonstrated substantial progress. The fiscal deficit narrowed significantly, and public debt decreased to below 60% of GDP, representing a positive trend toward fiscal sustainability (International Monetary Fund, 2023). Government revenues also increased, with tax collections rising by 10.6% year-on-year (European Commission, 2024). Employment rates also saw an upward trajectory, reaching 67.2% in 2023, primarily driven by increased labor force participation (Eurostat, 2023). Further, Albania made significant progress in its efforts to enhance digital infrastructure. By Q3 of 2023, the number of broadband subscribers had risen by 7.6%, reflecting the country's efforts to improve digital connectivity (International Telecommunication Union, 2023). Online public services also expanded, with 95% of public services being made available online in the 2023–2024 period (European Commission, 2024). In the transportation sector, Albania continued its investments in infrastructure projects. Notably, the country focused on enhancing road and railway networks, improving regional connectivity, and facilitating trade (Albanian Ministry of Infrastructure, 2023). Investments in digital services also gained momentum, with broadband connectivity reaching 611,130 subscribers by the third quarter of 2023 (International Telecommunication Union, 2023). Overall, the 2024 Progress Report clearly reflects Albania's substantial and continued progress in its EU integration journey. The country has demonstrated commitment across various sectors, including the judiciary, security, economy, and infrastructure, and has made significant strides in aligning with EU policies and standards. These advancements represent both Albania's ambition and its capacity to meet the EU's rigorous accession criteria, signaling that Albania is on the right path toward eventual membership (European Commission, 2024).

4.2.1.1 Advancing based on the Opening Benchmarks Cluster I 'Fundamental'

The implementation of the key measures outlined in the three Roadmaps as triggers for the Opening benchmarks for 2024 is progressing as follows: "Rule of Law" Roadmap - Opening Benchmark. Pursuant to the Council of Ministers' Decision no. 736, dated 13 December 2023, regarding the adoption of the "Rule of Law" roadmap, the Ministry of Justice, acting as the lead institution (Negotiator) for Chapter 23 "Judiciary and Fundamental Rights," initiated the coordination and monitoring process for the implementation of the measures outlined in this roadmap (European Commission, 2024). Related to the judiciary the process for selecting members of the High Judicial Council (HJC) and the High Prosecutorial Council (HPC) from civil society has been successfully completed. Both Councils are now fully operational, with newly elected chairs and vice-chairs. Additionally, the transitional re-evaluation of judges and prosecutors was successfully concluded by the Independent Qualification Commission (KPK), which completed 805 cases out of 805, or 100% of the ex-officio list (European Commission, 2023).

On 18 December 2024, the Council of Ministers approved the Intersectoral Justice Strategy 2024-2030, along with its strategic documents. This strategy outlines key objectives and expected results over the next seven years for the justice system, in line with Albania's EU integration obligations (European Commission, 2023). The High Prosecutorial Council (HPC) appointed a magistrate as an internal instructor at the School of Magistrates in September 2024. Furthermore, the twinning project with the Dutch School of Magistrates (SSR) commenced work to assess and improve the mentoring program (EU Twinning, 2024). The School of Magistrates established a working group to develop a new curriculum on "Judicial Process Digitalization." This curriculum is being assisted by the Council of Europe, which has provided expertise on the issues it will address (Council of Europe, 2024). On 26 November 2024, the HPC approved the "Methodology for Ethical and Professional Evaluation of Prosecutors at the General Prosecutor's Office," which will be integrated into the Regulation on Ethical and Professional Evaluation. The HPC also approved seven ethical and professional evaluation reports, justified according to the format of judicial decisions (Council of Europe, 2024). In October 2024, the HJC appointed 32 judges who had been selected in July 2024. The Special Court of Appeals for Corruption and Organized Crime became fully operational with ten judges assigned to their positions, out of eleven required. On 3 December 2024, the HJC issued Decision no. 700, appointing an inspector at the High Inspectorate of Justice.

Related to the Anti-Corruption the measures outlined in the 2024-2030 'Anti-Corruption Strategy' (SNKK) have been consolidated, particularly in relation to integrity, transparency, and accountability. On 26 December 2024, the Council of Ministers approved the new SNKK, the 2024-2026 Action Plan, and a performance indicators passport (Council of Europe, 2024). A preventive wiretapping unit has been established within the Bureau of Anti-Corruption (BKH), and the establishment of two additional units is in progress. During 2024, BKH secured access to 19 databases from Albanian state institutions and signed four agreements with foreign law enforcement agencies (EUROPOL, INTERPOL, and SELEC) for information exchange and database access (European Commission, 2023). On 6 December 2024, the Director of BKH appointed a Deputy Director for the Bureau. The development of a methodology for assessing corruption risk in the public procurement sector is underway. In December 2024, a roundtable discussion on anti-corruption measures in public procurement was held, involving the DPAK and the Public Procurement Agency, in cooperation with ANAC (European Commission, 2024).

Related to the Fundamental Rights on 19 December 2024, the law "On the Protection of Personal Data" was approved, aligning it with the EU General Data Protection Regulation (GDPR) and the Police Directive (European Commission, 2023). A methodology for calculating the cost of care for orphaned children has been developed, and over 100 new professionals in Tirana and Shkodra have been trained. The Agency for the Protection of National Minorities (ASHK) worked with the Minister of State for Public Administration and Anti-Corruption to finalize and approve an Integrity Plan. On 14 October 2024, ASHK's Director issued Order no. 1769 to establish a working group for drafting an integrity plan for the State Cadastre Agency for the 2025-2026 period. On 27 September 2024, Ministerial Order no. 513 established an inter-institutional working group to collect and process gender-disaggregated data for 2024. Regarding the legislation under Law no. 96/2017 "On the Protection of National Minorities in the Republic of Albania," the Ministry of the Interior has worked on and sent for evaluation the three related draft decisions to the Commissioner for

Information and Privacy (KIE). These decisions were approved by the Council of Ministers on 26 December 2024, which included criteria, documentation, and procedures for identifying individuals belonging to national minorities (European Union, 2023).

Related to the "Functioning of Democratic Institutions" roadmap was adopted through the Council of Ministers' Decision No. 611, dated October 2, 2024, titled "On the Approval of the Roadmap for the Functioning of Democratic Institutions." The Ministry of Justice and the Minister of State for Relations with the Parliament are the primary institutions responsible for coordinating and monitoring the implementation of the roadmap (Council of Ministers, 2024). In July 2024, an amendment to the Electoral Code was approved, which enables Albanian citizens residing abroad to vote, fulfilling a requirement outlined by the Constitutional Court (GJK) (Constitutional Court, 2024). The Central Election Commission (CEC) adopted a regulatory package concerning the identification, registration, and voting of overseas voters, which included Decision No. 10, dated October 23, 2024, regarding the registration process and Decision No. 11, dated November 1, 2024, specifying the required documentation for verifying residency status (Central Election Commission, 2024). Moreover, Decision No. 194, dated November 7, 2024, by the State Election Commissioner, set the technical rules for managing requests for overseas voter registration through the Electoral Register System (PER) (State Election Commissioner, 2024). The Audiovisual Media Authority (AMA) also adopted Regulation No. 40, dated April 26, 2024, which sets the requirements for reviewing changes in media ownership structures (Audiovisual Media Authority, 2024). AMA published a report on media ownership transparency on its website, complying with the EU integration obligations (Audiovisual Media Authority, 2024). In addition, the establishment of the Joint Industry Committee for audience measurement, followed by the release of the annual media market data bulletin, contributed to enhanced transparency in the media sector (Audiovisual Media Authority, 2024). The Post-Legislative Review Methodology was approved by the Conference of Presidents on October 9, 2024 (Albanian Parliament, 2024). This methodology aims to guide the post-legislative scrutiny process of laws and their implementation by permanent parliamentary committees. The Parliament has also developed an action plan for enhancing transparency, which includes 26 main measures and 6 sub-measures, of which 21 measures have been fully implemented as of

July 2024 (Albanian Parliament, 2024). Furthermore, transparency initiatives within the Parliament include live broadcasts of committee and plenary sessions, as well as the publication of parliamentary documents online, ensuring that the public and media are fully informed (Albanian Parliament, 2024). Involvement of civil society organizations (CSOs) in the parliamentary process has also been strengthened, with the publication of annual reports on their participation and the establishment of a civil society engagement coordinator (Albanian Parliament, 2024). The Ministry of Health and Social Protection (MSHMS) is responsible for overseeing the implementation of the "Roadmap for a Supportive Environment for Civil Society," with ongoing efforts to overcome institutional challenges (Ministry of Health and Social Protection, 2024). The final roadmap document is expected to be launched in early 2025, and discussions regarding proposed amendments to VAT guidelines for CSOs are ongoing (Ministry of Health and Social Protection, 2024).

The implementation of the "Public Administration Reform Roadmap" is guided by the decision of the Council of Ministers No. 737, dated December 13, 2023, titled "On the Approval of the Roadmap for the Public Administration Reform 2023-2030" (Council of Ministers, 2023). The institution responsible for coordinating and monitoring the implementation of the RAP is the Department of Public Administration (DAP), under the oversight of the Minister of State for Public Administration and Anti-Corruption, who serves as the political leader of the reform and the chief negotiator of the Public Administration Reform. During 2024, significant measures have been taken to finalize the strategic document for the 2030 Public Administration Reform. This includes the drafting of the Strategic Document for the Public Administration Reform (SNRAP 2030), the Action Plan covering all strategic pillars, and the finalization of the performance indicator passport (Council of Ministers, 2024). In the framework of the Public Finance Management Strategy (PFMS) 2023-2030, the strategy was approved through Decision of the Council of Ministers No. 390 on June 12, 2024, aligning with the National Strategy for Development and European Integration (NSDIE) 2022–2030 (Council of Ministers, 2024). The main goal is to establish a public finance management system ensuring transparency, accountability, fiscal discipline, efficiency, and equality in the use of public resources, while facilitating Albania’s swift integration into the European Union. The Digital Agenda Strategy for Albania was approved by the Council of Ministers with Decision No. 370 on June 1, 2022 (Council of Ministers, 2022). By September 2024, 43% of the activities in the Digital Agenda Strategy's Action Plan had been completed (Council of Ministers, 2024). Efforts to improve policy coordination and alignment with national and international development objectives have been enhanced through the reorganization and simplification of the Integrated Policy Management Groups (IPMG) and thematic teams. This aims to foster effective cross-sectoral collaboration, strategic planning, and proper resource allocation. SASPAC (the Agency for the Support of Public Administration and Policy Coordination) began revising the Prime Minister's Order No. 90, dated August 1, 2023, to reflect changes in ministry responsibilities and the definition of policy areas within the Integrated Policy Management Groups (IPMGs) (SASPAC, 2023). Furthermore, policy monitoring and reporting have been improved through the introduction of the Integrated Strategic Planning Information System (IPSIS), with SASPAC working alongside the National Agency for Information Society (AKSHI) to maintain and enhance this system (AKSHI, 2023). The new sectoral and cross-sectoral strategies are also aligned with the Sustainable Development Goals (SDGs) for 2030, with SASPAC continuing to provide support to relevant decision-making institutions to ensure each strategic document is developed in line with the SDGs. In preparation for the 2030 SDGs, the first draft of the SDG Implementation Roadmap has been completed, with approval expected from the Inter-Institutional Committee for Sustainable Development in the first quarter of 2025 (Inter-Institutional Committee, 2025). Moreover, the drafting of the three-year Priority Policy Document (DPP) has included national strategies, economic reforms, and EU integration plans, ensuring an effective allocation of resources and strategic decision-making, aligned with societal developments and the results of the most recent census (Council of Ministers, 2024).

The introduction of the National Projects List (NSPP) has also been incorporated into the decision-making process, with the 2025-2027 DPP and NSPP approved in March 2024 (Council of Ministers, 2024). This medium-term planning document highlights the new EU growth plan for 2024-2027 as a government reform priority, as well as the restructuring of key development sectors, such as EU Integration, Anti-Corruption, Agriculture, Tourism, Digitalization, and Energy (Council of Ministers, 2024). The National Plan for European

Integration (NPEI) 2025-2027 has been developed outlining the legal and policy measures, institutional and administrative steps, and investment actions that will be implemented by ministries and other institutions up to 2027(Secretariat for European Integration, 2024). Regarding civil service and human resource management, salary increases for civil servants are planned for 2025, with executive-level positions expected to see an increase of 11-16% compared to 2023 levels. This is part of the broader government policy for civil service reform, which began in 2023. In 2024, the second phase of salary increases was completed, benefiting around 36,000 employees in educational and other non-teaching roles (Council of Ministers, 2024). Additionally, significant adjustments have been made to salary structures for managerial positions, aimed at counteracting attrition and motivating qualified staff to compete for higher-level roles (Council of Ministers, 2024). Recruitment procedures for senior managerial positions are being streamlined, with an emphasis on merit-based hiring and improved application assessment processes (Council of Ministers, 2024). Organizational improvements, accountability, and transparency are being strengthened through the amendment of Law No. 90/2012 on the Organization and Functioning of the State Administration. These amendments, which are expected to be completed by December 2024, aim to create an effective accountability framework for subordinate institutions (Council of Ministers, 2024). Furthermore, secondary legislation related to open data and the reuse of public sector information was enacted in 2023, with the drafting of a secondary act for public sector information reuse expected by January 2025 (Council of Ministers, 2023). The public service delivery are being prioritized, with a focus on enhancing electronic services and simplifying administrative processes.

A new inter-institutional task force has been formed to streamline procedures for public services, and monitoring of online and offline public services is being increased to improve real-time efficiency (Council of Ministers, 2024).

5. CONCLUSION

Advancing Albania’s EU accession process through the "Fundamentals" cluster is crucial to ensuring the country’s alignment with the EU’s core values and standards. The Opening Benchmarks in areas such as the rule of law, human rights, public administration, and democratic institutions are instrumental in guiding Albania’s transformation towards a more transparent, accountable, and effective governance system. As highlighted throughout this article, the implementation of these benchmarks is not merely a procedural requirement but a strategic mechanism aimed at fostering long-term structural reforms and institutional convergence with EU norms. The successful completion of these reforms relies heavily on Albania’s commitment to both political will and the effective capacity of its institutions. The roadmaps, such as the Rule of Law Roadmap and the Public Administration Reform Roadmap, represent key milestones in the country’s progress. However, the true challenge lies in translating these strategic documents into tangible outcomes. Monitoring, inter-institutional coordination, and ensuring the sustainability of these reforms will be crucial for their success. The EU’s enlargement methodology plays a significant role in incentivizing this progress, with Albania’s efforts being continuously evaluated through structured monitoring and reporting mechanisms. While significant strides have been made, challenges remain in ensuring that reforms are both comprehensive and irreversible. The Opening Benchmarks not only test Albania’s political commitment but also the capacity of its institutions to internalize and enforce the required changes. Moving forward, Albania must continue its efforts to strengthen governance structures, enhance the rule of law, and promote democratic values to ensure that these benchmarks lead to lasting change. In conclusion, Albania's path toward EU integration, particularly in the "Fundamentals" cluster, presents both challenges and opportunities. By maintaining a focus on the rule of law, human rights, public administration, and democratic institutions, Albania can secure the necessary reforms for a successful EU accession process. The continuous engagement of both political leaders and citizens, along with the effective implementation of EU-driven reforms, will be key to ensuring Albania’s readiness for EU membership, while fostering stability, transparency, and accountability in the long term.

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DEVELOPMENT OF PRIVATE LAW IN UNITED STATES – SHORT OVERVIEW OF INHERITANCE LAW

Haris Silajdžić *

Abstract

With the arrival of English traders and the formation of colonies on the territory of North America, it developed the need to establish a legal system. Inheritance law, along with all other branches of private law, was present in a similar form as in England. Over time, the law changed and moved away from its English predecessor. At the beginning of the nineteenth century, each state began the process of codifying inheritance law, which differed from state to state. The twentieth century marked a turning point in the adoption of a large number of laws that regulated every area of inheritance and property management. A Unified Probate Code was created in 1969, which was fully or partially adopted by more than a third of the states. In this paper, short overview of development of the inheritance law is provided. Beginning with the colonial period, the explanation of development of forms and practices of inheritance law and probate procedures is presented. In addition, this paper deals with the period of the American Revolution, the nineteenth, twentieth and twenty-first century in the same way. Many scientific methods were used in this paper and their detailed explanation will be shown in introduction.

Keywords: Inheritance law, inheritance law in United States, development of private law, probate law

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1. INTRODUCTION

The development of private law in the United States differed significantly from the development of public law. Ever since the establishment of the first English trading settlement of Jamestown on the territory of North America, there has been a need to establish an adequate legal system that will regulate all areas of the newly formed society. Like other branches of private law, the inheritance law developed in accordance with the social changes of a certain period. In the first part of this paper, English inheritance law will be presented with its customs that were present in colonies in North America. Given that most of the colonies, and later all of them, belonged to Great Britain, this meant that the population that moved to the new territory did not reject the already existing norms and rules of inheritance law of their home state. Over time, inheritance law developed within the colonies themselves so that reforms and developments even differed between colonies. Such reforms increasingly distanced colonial society from British legal culture. After the American Revolution and the formation of the early republic, various earlier forms of inheritance were abolished. In addition to this, the second part of this paper will explain the process of codification in the 19th century. In the last part of the work, which refers to the 20th and 21st centuries, the reforms of inheritance law and probate procedure, the introduction of tax on inherited property and modern forms of inheritance up to the electronic will shall be presented. This manuscript is made using appropriate scientific methods such as historical and dogmatic normative method, method of content analysis, as well as comparative method. All different periods in the development of inheritance law in the United States of America will be presented using historical method. The approach to law through its normative character will be presented using the dogmatic normative method. Using the method of content analysis, I will analyze all the laws that were adopted in different periods of United States history. Lastly, a comparative method will be used to compare certain institutes of inheritance law with the same ones in Great Britain.

2. INHERITANCE LAW IN COLONIAL PERIOD

With the establishment of the first trading settlements and colonies in North America, the need for a legal system arose. Since most traders came from England, they brought with them their culture, customs, and legal system. In addition to other branches of law, the concept of inheritance under English common law was introduced to the colonies in North America.

The forms of inheritance established by English common law that were adopted in the colonies were primogeniture, entail, dower, curtesy, and will. Primogeniture is a form of inheritance law where the firstborn child has priority over other children in inheritance. (Probyn, 1876, pp. 367-368) Primogeniture was present in all the newly formed colonies, but its application and its abolition depended on each colony. By the 1660s, almost all the New England[*] colonies had abolished primogeniture, while it was retained in the other English colonies. In addition to primogeniture, there was a form of inheritance known as entail. This originally meant that property could not be sold or inherited outside the male line of descent. Although in early colonial law the firstborn son had a privileged status compared to his brothers, the Statute of Descent 1692 determined the equal division of property among all children. However, many colonies continued to give the firstborn male a privileged position, arguing that the new law had to be in accordance with previous regulations and customs on which society was based. (Morris, 1927, pp. 31-32)

The forms of inheritance under English common law were different for men and women. The dower represented property that a woman had before entering into a marriage union and which automatically passed under her husband's control upon entering into a marriage union. Although the husband had control over the wife's dower, he was not allowed to sell it or leave it to a third party by will. If the husband died before the wife, according to the customs of the time, the property would rarely become the property of the wife. In the opposite case, i.e. when a woman dies before her husband, then he, if they have children, could keep all her property, and this was called curtesy. Such forms of inheritance were also present in the colonies on the territories of North America. (Shammas, 1987, p. 147) An example of this is the Massachusetts colony, where a statute was adopted in 1647 requiring a wife to retain one-third of the dower that was in the husband's possession during the marriage. (Stoebuck, 1968, p. 400)

Testamentary inheritance was also present in the colonies. However, already at the end of the 17th century, several colonies, such as Pennsylvania, introduced new solutions to

[*] The New England colonies at the time were Massachusetts, Rhode Island, New Hampshire, and Connecticut.

protect women and children. Thus, since 1682, in Pennsylvania, it was determined that one third of the property belonged to the wife, the other third was divided equally among the children, and the last third represented the property that could be left by will. If there was no living wife behind the testator, then two thirds would go to the children. In this way, the wife and children would be protected from the husband's possibility of leaving them without an inheritance. (Shammas, 1987, p. 154) Another difference introduced in most colonies in the late 17th century from English common law was intestate succession. The common law that prevailed in England gave first place to the first-born son in terms of inheritance. The New England colonies and Pennsylvania colony abolished this rule and determined equal shares for children to inherit. However, Virginia and the other southern colonies took a more conservative stance and stuck with the English original. (Hirsch, 2009, p. 235)

In England, probate proceedings were conducted by ecclesiastical courts, but it was never case in the colonies because these types of courts didn't exist. These matters were handled by courts of general jurisdiction, and by the end of the 17th century, many colonies, such as Pennsylvania, had established special types of courts to handle such cases. The procedure itself was much simpler and shorter than the original one that existed in England. (Hirsch, 2009, p. 235) The executor or next of kin had to go to the county court to show what property was owned by the deceased person. The validity of the will was checked there, handled situation if there was no will, property was divided and many other things that were part of the court's authority. (Haskins, 1942, p. 1285)

3. DEVELOPMENT OF INHERITANCE LAW AFTER THE REVOLUTION AND IN 19TH CENTURY

After the end of the American Revolution, most of the newly formed states immediately began to change their laws, which included laws that regulated inheritance law. Thomas Jefferson was a symbol of the most significant changes in Virginia. One of the first laws he worked on and that was adopted was the Virginia Act to Abolish Entails (1776) or the full name of the law "An Act declaring tenants of lands or slaves in taille to hold the same in fee simple" (1776). This law regulated the abolition of entails that were a reflection of English common law and thus changed inheritance law. (Schouler, 1893, p. 93) Given that this was a turning point for other states that had not previously abolished this practice, it is necessary to present several articles of this act:

“Section I

Whereas the perpetuation of property in certain families, by means of gifts made to them in fee taille, is contrary to good policy, tends to deceive fair traders, who give a credit on the visible possession of such estates, discourages the holder thereof from taking care and improving the same, and sometimes does injury to the morals of youth, by rendering the independent of and disobedient to their parents; and whereas the former method of docking such estates taille by special act of assembly, formed for every particular case, employed very much of the time of the legislature, and the same, as well as the method of defeating such estates, when of small value, was burthensome to the public, and also to individuals;” (General Assembly, Encyclopedia Virginia, 2020)

“Section II

Be it therefore enacted by the General Assembly of the commonwealth of Virginia, and it is hereby enacted by the authority of the same, That any person who now hath, or hereafter may have, any estate in fee taille, general or special, in any lands or slaves in possession, or in the use or trust of any lands or slaves in possession, or who now is or hereafter may be entitled to any such estate taille in reversion or remainder, after the determination of any estate for life or lives, or of any lesser estate, whether such estate taille hath been or shall be created by deed, will, act of assembly, or by any other ways or means, shall from henceforth, or from the commencement of such estate taille, stand ipso facto seized, possessed, or entitled of, in, or to such lands or slaves, or use in lands or slaves, so held or to be held as aforesaid, in possession, reversion, or remainder, in full and absolute fee simple, in like manner as if such deed, will, act of assembly, or other instrument, had conveyed the same to him in fee simple; any words, limitations, or conditions, in the said deed, will, act of assembly, or other instrument, to the contrary notwithstanding.” (General Assembly, Encyclopedia Virginia, 2020)

Apart from this, Thomas Jefferson is credited with writing and passing a series of laws that changed English common law practices in newly formed states. Another adopted law related to inheritance law was “An act for regulating conveyances” (1785). (General Assembly, Encyclopedia Virginia, 2020) This law abolished primogeniture in Virginia. Although primogeniture was abolished very soon after the Revolution in all states, the law did not prevent an individual from leaving all of his property to his firstborn son by will. (Orth, 1992, p. 35) Also, after the revolution in Virginia, the holographic will was introduced, which was simple and cheap to make. Many other countries have introduced this type of will into the forms of inheritance present in their territory. (Hirsch, 2009, p. 236)

After Virginia, New York State passed “An Act to Abolish Entails, to Confirm Conveyances by Tenants in Tail, to Regulate Descents, and to Make the Law of Real Property More Conformable to the Spirit of the Constitution” in 1782. This law abolished primogeniture and entails. This law was a novelty because it determined equal shares for the testator's children. Therefore, it is necessary to present several articles of this law:

“Section I

Be it enacted by the People of the State of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, That from and after the first day of January next, all estates tail shall be and hereby are abolished; and that in all cases wherein any person or persons would, if this law had not been made, have been seized in fee tail of any lands, tenements or hereditaments, such person or persons shall, in future, be deemed to be seized of the same in fee simple.“ (An Act to Abolish Entails, to Confirm Conveyances by Tenants in Tail, to Regulate Descents, and to Make the Law of Real Property More Conformable to the Spirit of the Constitution, 1782)

“Section III

And be it further enacted by the authority aforesaid, That from and after the said first day of January next, when any person shall die intestate, seized of any lands, tenements or hereditaments, in fee simple, such lands, tenements and hereditaments shall descend in equal parts to the children of such intestate, and to the lawful issue of a child who may have died in the lifetime of the intestate, such issue to take per stirpes, in the same manner as the children of such intestate would have done if living; and if there be no children or lawful issue of such intestate, then to the next of kin in equal degree, and their legal *representatives*.“ (An Act to Abolish Entails, to Confirm Conveyances by Tenants in Tail, to Regulate Descents, and to Make the Law of Real Property More Conformable to the Spirit of the Constitution, 1782)

In the late eighteenth and early nineteenth century, more and more laws were adopted in the United States to regulate inheritance law. New York was one of the states with the most modern legal solutions in this area of law. First, a series of statutes were passed in the New York Revised Statutes in 1829, which regulated inheritance issues regarding the wife and children of the deceased and made a detailed analysis of the lines of inheritance.

“Section 75

Where the deceased shall have died intestate, the surplus of his personal estate remaining after payment of debts; and where the deceased left a will, the surplus remaining after the payment of debt and legacies, if not bequeathed, shall be distributed to the widow, children, or next of kin of the deceased, in manner following:

1. One-third part thereof to the widow, and all the residue by equal portions among the children, and such persons as legally represent such children, if any of them shall have died before the deceased;

2. If there be no children, nor any legal representatives of them, then one moiety of the whole surplus shall be allotted to the widow, and the other moiety shall be distributed to the next of kin of the deceased, entitled under the provisions of this section;

3. If the deceased leave a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to a moiety of the surplus as above provided, and to the whole of the residue where it does not exceed two thousand dollars; if the residue exceed that sum, she shall receive, in addition to her moiety, two thousand dollars; and the remainder shall be distributed to the brothers and sisters, and their representatives;

4. If there be no widow, then the whole surplus shall be distributed equally to and among the children, and such as legally represent them;

5. In case there be no widow, and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives…" (Revised Statutes of the State of New-York (1829), 1829)

Increase in women's property rights was present in the late 1830s. Although the first Married Women's Property Act was enacted in Mississippi in 1839, it is important to note that a similar law was enacted in New York in 1848. This law allowed women to own, inherit, and devise estate and it was revised in 1860. Therefore, it is necessary to present several articles of this act:

"Article I

The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female." (New York's Married Women's Property Act, 1848, 1848)

"Article II

The real and personal property, and the rents issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and separate property as if she were a single female except so far as the same may be liable for the debts of her husband heretofore contracted." (New York's Married Women's Property Act, 1848, 1848)

"Article III

It shall be lawful for any married female to receive, by gift, grant devise or bequest, from any person other than her husband and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." (New York's Married Women's Property Act, 1848, 1848)

In the mid-19th century, California passed the first comprehensive inheritance law in 1851 known as California Probate Act. This law is divided into 139 chapters and it is important to show Chapter 124 - An Act to Regulate the Settlement of the Estates of Deceased Persons. The law is divided into 14 subchapters and contains 313 sections. This law codified inheritance with and without a will and determined the division of inheritance shares according to the degree of kinship with the testator. The following are several sections of this act:

Chapter II – Of the Proof of Wills

"*Section 4 – Any person having the custody of any Will, shall, within thirty days after he shall have knowledge of the death of the testator, deliver it into the Probate Court which has jurisdiction of the case, or to the person named in the Will as Executor*." (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

"*Section 5 – Any person named as Executor in any Will, shall, within thirty days after the death of the testator, or within thirty days after he has knowledge that he is named Executor, present the Will, if in his possession, to the Probate Court which has jurisdiction*". (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

Chapter V – Of the Provision for the Support of the Family

"*Section 120 – When a person shall die, leaving a widow or minor child or children, the widow, child, or children, shall, until letters have been granted, and the inventory has been returned, ne entitled to remain in possession of the homestead and of all the wearing apparel of the family, and of all the household furniture of the deceased, and shall also be entitled to a reasonable provision for their support, to be allowed by the Probate Judge*." (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

"*Section 121 – Upon the return of the inventory, the Court shall set apart, for the use of the widow or minor child or children, all property which is by law exempt from execution, or so much of such property as may have belonged to deceased.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

Chapter VI – Of the Claims against the Estate

"*Section 128 – Every Executor or Administrator shall, immediately after his appointment, cause to be published in some newspaper printed in the county, if there be one,* *if not, then in such newspaper as may be designated by the Court, a notice to the creditors of the deceased requiring all persons having claims against the deceased to exhibit them with the necessary vouchers, withing ten months after the date of the notice, to such Executor or Administrator at the place of his residence or transaction pf business, to be specified in the notice. Such notice shall be published as often as the Judge may deem necessary, but not less than once a week for four weeks.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

Chapter VII – Sales of Property by Executors or Administrators

"Section 148 – *No sale of any property of an estate shall be valid unless made under order of the Probate Court.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

"*Section 149 – All applications for orders of sale shall be by petition in writing, in which shall be set forth of facts showing the sale to be necessary, and upon the hearing any person interested in the estate, may file his written objections, which shall be heard and determined.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

Chapter VIII – Of the Powers and Duties of the Executor and Administrator, and the Management of the Estate

"*Section 194 – The Executor or Administrator shall take into his possession all the estate of the deceased, real and personal, and shall collect all debts due to the deceased.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

Chapter XI – Of the Partition and Distribution of Estates

"*Section 250 – At any time subsequent to the third term of the Probate Court, after the issuing the Letters Testamentary or of Administration, any heir, devisee or legatee, may present his petition to the Court that the legacy or share of the estate to which he is entitled may be given to him, upon his giving Bonds with security of the payment of his proportion of the debts of the estate*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

"*Section 258 – Upon the final settlement of the accounts of the Executor or Administrator, or at any subsequent time, upon the application of the Executor or Administrator, or of any heir, legatee, or advisee, the Court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

"*Section 259 – In the decree the Court shall name the persons and the proportion of parts to which each shall be entitled, and such person shall have the right to demand and recover their respective shares from the Executor or Administrator, or any person having the same in possession.*" (An Act to Regulate the Settlement of the Estates of Deceased Persons, 1851)

By the end of the nineteenth century, many states of the United States had adopted similar laws. Apart from that, most states regulated in more detail the formalities of writing and witnessing all forms of testamentary succession, regardless of the type of property left by the testator. (Hirsch, 2009, p. 236) However, at the end of the nineteenth century, there was an innovation in the law of trusts. Any form of trust could be inherited and it was a novelty that would spread significantly in the United States of America in the 20th century. (Hirsch, 2009, p. 237)

4. CHANGES IN 20TH AND 21ST CENTURY

The twentieth and twenty-first century did not change the forms of inheritance, but the scope of inheritance law expanded rapidly. The expansion of trusts increased the property that was the subject of inheritance, and this led to attempts to reduce the tax liability to a minimum. At the beginning of the 20th century, a federal estate and gift tax were introduced. The first law was the Revenue Act of 1916, or its full name "An act to increase the revenue, and for other purposes", which determined the federal estate tax. Since this was the first law that determined the tax rate as a percentage, it is important to present one of its articles:

"*Section 201 - That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided m section two hundred and three, is hereby imposed upon the transfer of the net estate of every* *decedent dying after the passage of this Act, whether a resident or nonresident of the United States:*

- *One per centum of the amount of such net estate not in exceeds of $50,000;*
- *Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;*
- *Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;*
- *Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;*
- *Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;*
- *Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;*
- *Seven per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;*
- *Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;*
- *Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and*
- *Ten per centum of the amount by which such net estate exceeds $5,000,000.*" (An act to increase the revenue, and for other purposes, 1916)

In 1924, a second Revenue Act was passed and it established a gift tax. This Act set the percentages of the gift tax and it was repealed until it was re-enacted in 1932. The percentages are part of Section I of this Act. (Revenue Act, 1924)

However, the most significant change was the adoption of the Uniform Probate Code in 1969. Through the adoption of this law, the probate procedure for small-value assets was simplified, the wife and children were favored in the case where is no will, and non-probate transfers were favored. In addition to that, this law abolished dower and curtesy. This law was adopted fully or some parts of it by 18 states and it was revised in 1982, 1990, 2008, and 2019. Therefore, it is necessary to present several sections:

"Section 2-101 – Intestate Estate

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this [code], except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed the intestate share." (Uniform Probate Code 1969, 2019)

"Section 2-101 – Share of Spouse

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(a) no descendant or parent of the decedent survives the decedent; or (b) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [$300,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$225,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [$150,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse." (Uniform Probate Code 1969, 2019)

"Section 2-112 – Dower and curtesy abolished

The estates of dower and curtesy are abolished." (Uniform Probate Code 1969, 2019)

"Section 2-205 - Decedent's non-probate transfers to others

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

(A) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(B) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(C) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(D) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(2) Property transferred in any of the following forms by the decedent during marriage:

(A) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(B) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount." (Uniform Probate Code 1969, 2019)

The development of technology has led to the creation of electronic versions of wills. Although a will can be written by hand, today most wills are written using word processing programs on computers. An electronic will is a type of will that is in electronic form when it is executed. (Gary, 2020, p. 308) Today, more than half of the states have their own law on electronic wills. Each such law prescribes rules that apply to wills drawn up electronically. Any state that does not want to allow electronically drafted wills can still require that the will be tangible by hand. (Gary, 2020, pp. 317-319)

"15-12-1503 - Law applicable to electronic wills - principles of equity.

An electronic will is a will for all purposes of the law of this state. the law of this state applicable to wills and principles of equity apply to an electronic will." (Colorado Uniform Electronic Wills Act, 2020)

“*15-12-1505. Execution of electronic will.*

(1) subject to section 15-12-1508 (4), and except as provided in section 15-12-1506, an electronic will must be:

(a) a record that is readable as text at the time of signing under subsection (1)(b) of this section;

(b) signed by: (i) the testator; or (ii) another individual in the testator's name, in the testator's physical presence, and by the testator's direction; and

(c) either:

(I) signed in the physical or electronic presence of the testator by at least two individuals, each of whom is a resident of a state and physically located in a state at the time of signing and within a reasonable time after witnessing:

(A) the signing of the will under subsection (1)(b) of this section; or

(B) the testator's acknowledgment of the signing of the will under subsection (1)(b) of this section or acknowledgment of the will; or

(II) acknowledged by the testator before and in the physical or electronic presence of a notary public or other individual who is authorized by Colorado law to notarize records, and who is located in Colorado at the time the notarial act is performed.

(2) intent of a testator that the record under subsection (1)(a) of this section be the testator's electronic will may be established by extrinsic evidence.” (Colorado Uniform Electronic Wills Act, 2020)

5. CONCLUSION

Inheritance law has been present since the early colonial period in North America. With the arrival of English merchants and the establishment of colonies, the need for an adequate legal system arose. In the same capacity, English inheritance law came to life in the territory of the colonies. Primogeniture and entails were abolished shortly after the revolution, and dower and curtesy remained until the end of the 1960s. Since the end of the 18th and the beginning of the 19th century, many states have adopted unique laws regulating specific areas of inheritance law. The rights of the wife and children behind the testator have increased significantly and the law of trusts was created. Trusts expanded in the late 19th and early 20th centuries, which led to an increase in the scope of inheritance law. Apart from that, federal estate and gift taxes were introduced that clearly determined percentages depending on the value of the estate and gift. At the end of the 1960s, the Uniform Probate Code was adopted, which was adopted fully or some of its parts by more than a third of the states. The last changes were made by the creation of an electronic will. It was very challenging to present the chronological development of inheritance law in United States. Starting with English norms and customs, the law of inheritance in the newly formed state separated from the English original after the revolution. From the 19th century, the American legal tradition developed, which at the beginning of the 20th century grew into American law. Not only did inheritance law completely separate from its predecessor, it developed into a branch of law that kept pace with the circumstances in which American society found itself.

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DISMISSAL FOR GROSS MISCONDUCT IN EMPLOYMENT UNDER THE 1992 LABOUR CODE OF CAMEROON: ANY NEED FOR REFORM?

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Abstract

Section 36(2) of Cameroon's Labour Code 1992 explicitly recognises that a contract of employment may be terminated in cases of gross misconduct subject to the findings of the competent court as regards the gravity of the misconduct. However, this section is ambiguous, and renders effective implementation in the context of Cameroon difficult, because it does not unambiguously encapsulate the grounds of a worker's gross misconduct that may necessitate summary dismissal. Through the doctrinal research method, the paper critically examines the gravity of a worker's misconduct that may necessitate dismissal as envisioned under section 36(2) of the Code. It reveals that the ambiguous nature of section 36(2) renders effective implementation in Cameroon difficult with grave consequences on workers' rights. The paper recommends a revision of section 36(2) in order to clearly encapsulate the nature of a worker's gross misconduct that may justify summary dismissal.

Keywords: Dismissal, Gross misconduct, Worker, Employment, 1992 Labour Code of Cameroon.

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1. INTRODUCTION

Dismissal is the act of terminating an employment contract by releasing or discharging an employee (Garner & Black, 1991). With specific reference to dismissal for gross misconduct, the latter refers to a precipitate decision of the employer to put an end to a contract of employment for reasons of a worker's misconduct (Yanou, 2009). Although the law has explicitly recognised the right of either party to an employment to summarily determine it for misconduct not minding the wishes of the other party, it must be noted, for purpose of clarity that, dismissal for gross misconduct is tied to the fault of a worker and therefore emanates from the employer. This implies that dismissal for gross misconduct, which is effected without notice is a strong measure, to be justified in the most exceptional circumstances (section 36(2) of the 1992 Labour Code). This in strict labour phraseology may normally relate to deliberate refusal to perform an obligation owed under the contract of employment. In fact, Judge Hawkins captured the essence of this concept in *Robb v Green (1895 2 QB 1).* He posits that in the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation on the servant that, he shall perform his duty honestly, and faithfully serve his master.

It is for this reason that during the performance of the contract of employment, the employer may deem it necessary himself, or through his appropriate manager or supervisor to exercise some form of disciplinary authority over the worker. This may take one of a number of forms; suspension from work, demotion, punitive transfer and eventual dismissal for misconduct. An employer who acts in this manner will be considered to have acted within the purview of his powers on grounds of a worker's refusal to perform his obligation under the contract of employment.

This theoretical foundation has been summarised under sections 36(2) *et seq*. of the 1992 Labour Code which are significant for establishing the concept of dismissal for gross misconduct in employment. The latter with regards to a contract of employment, expressly stipulates that it may be terminated without notice in case of serious misconduct, subject to the findings of the competent court of law as regards the gravity of the misconduct. However, section 36(2), and subsequent sections of the Code, simply empower the employer to dismiss a worker for gross misconduct but do not define the extent of misconduct that may justify summary dismissal. Moreover, one would have expected section 37 to fill this lacuna, but it seems to have eluded the dexterity of Cameroon's labour legislator. A proper interpretation of section 36(2) reveals that an employer is free to choose the appropriate ground of misconduct that may warrant a worker's summary dismissal. Although section 36(2) subjects such dismissal to the findings of the competent court of law as regards the gravity of the misconduct, a major question which has stirred controversy is whether or not, a worker who has engaged in gross misconduct of a criminal nature, for example, must first be prosecuted and convicted by the competent court of law before he can be dismissed from the service of the employer (Bodede, 2019).

Moreover, from a practical standpoint, what can amount to gross misconduct greatly varies from one enterprise to another. The absence of a conceptual clarification of gross misconduct in the Code places the worker in a precarious situation, and at the mercy of the employer who can dismiss the worker at any time. As a result of the ambiguous nature of section 36(2) *et seq*. of the Labour Code, effective implementation in the context of Cameroon is problematic given the adverse socio-economic consequences of dismissal on a worker (Yanou, 2009). In fact, some unscrupulous employers have capitalised on the ambiguous nature of this provision to wrongfully dismiss workers for gross misconduct thereby trouncing the very purpose of the Code which is to secure private service employment as well as protect the rights of the weaker party; the worker in a contract of employment. It is against this backdrop that, the paper critically examines the gravity of a worker's misconduct that may necessitate dismissal as confectioned under section 36(2) of the 1992 Labour Code of Cameroon. Through the doctrinal research method, the paper critically examines the concept of a worker's, misconduct that may arise in, and out of employment, in a bid to determine the severity of a worker's misconduct that may necessitate summary dismissal as confectioned under sections 36(2) *et seq*. of the 1992 Labour Code.

2. THE CONCEPT OF MISCONDUCT IN EMPLOYMENT

Misconduct may be defined as behaviour or an action by a worker which is contrary to rules and standards prescribed by the employer. From this definition, it implies that misconduct which is tied to the fault of a worker undermines the trust and confidence of his employer in him, and is seen as sufficient to justify a dismissal. However, whether the conduct in question is serious enough to warrant summary dismissal is always a question of fact in each case, and the standards to be applied are those of the current *mores* (Selwyn, 1982). This interpretation can be gleaned from the decision in *SODEPA Dumbu v. Biebu Martin Fang* (BCA/7L/2006 (Unreported), where it was held that, the appreciation of the gravity of conduct for the purpose of determining a misconduct is at the discretion of each individual judge noting that gravity is a function of each individual case whose dichotomy is established on a case-by-case basis. Even though sections 36(2) *et seq.* of the 1992 Labour Code have not clearly circumscribed the concept of gross misconduct, the paper examines the various categories of misconduct that can justify a worker's dismissal. For effortlessness in assimilation, misconduct as a ground for dismissal could arise in employment or out of employment.

2.1. Misconduct in employment

Misconduct in employment can be considered as all acts of a worker that occur during the performance of the contract, and are alleged to have an adverse effect on the employment. These acts may be stratified in accordance with their gravity into acts of a trivial nature (minor misconduct), serious matters (major misconduct) and extremely serious matters (gross misconduct). The significance of such a classification lies in the methods which are to be adopted to solve the problem in question (Selwyn, 1982).

2.1.1. Minor misconduct

Minor misconduct are actions or faults committed by a worker but are not severe enough to warrant immediate dismissal. These faults are insignificant, and as such cannot render it impossible to maintain contractual relations (Pougoue, 1988, Djouikouo, 2016). It is characterised by involuntary negligence and the absence of bad faith on the part of the worker, for example, arriving an hour late at work. For acts of minor misconduct, these can usually be dealt with by a warning (informal, then perhaps formal), but it would be wrong to utilise the full weight of a disciplinary sanction in order to deal with a trivial matter (Selwyn, 1982). Thus, to give an employee a final warning that, if you come in late again, you will be dismissed, is bound to lead to trouble at some later stage, for the sanction is out of all proportion to the wrongdoing. Such a worker could be dealt with, for example, by a short period of suspension. Further, for some acts, a single repetition would suffice to warrant dismissal (for example, theft) and hence the warning would spell this out. But other acts may have to be monitored over a period of time, for example, lateness, absenteeism. Hence, the warning will indicate the period, spell out the improvement required, and state the ultimate sanction, the non-respect of which could result to a major misconduct.

2.1.2. Major misconduct

A major misconduct is one which could be deliberate or willful, is inconsistent with the continuation of the employment relationship, but does not necessitate immediate departure of a worker from the enterprise (Pougoue,1988). These acts could be handled by an immediate final warning, without the need to go through stages in a disciplinary procedure, that is, informal warning or written warning, since the seriousness of the matter is sufficient to leap over other stages. A careful assessment of case law in Cameroon reveals that most often, acts of major misconduct could either be characterised as gross or minor misconduct depending on the facts of each case and the situation of a worker. It is against this backdrop that in *Tjon Hegbe Pierre c/ Papazin* (T.G.I. Douala, jugement N^{o} 61 du 14 Avril 1975), the fact that an ironer burnt a customer's trousers was held to constitute an act of gross misconduct. It is apparent from the above dictum that not every misconduct would justify a dismissal under Cameroon's labour legislation. For such dismissal to be justified, it must be sufficiently substantial to the extent of jeopardising the employer's business (*SODEPA Dumbu v. Biebu Martin Fang*, BCA/7L/2006 Unreported). This interpretation simply implies that professional errors which are pardonable and dismissals effected because of the opinions of a worker or his membership or non-membership in a particular trade union are considered to be wrongful (Section 4(2) and (3) of the 1992 Labour Code of Cameroon). It is certain from the above case that the gravity of the worker's misconduct arose from the nature of his employment, and negligence on his part in executing the job that made it rise to the rank of gross misconduct.

2.1.3. Gross misconduct

Gross misconduct is an act of a worker which is so serious that it justifies dismissal without notice, or pay in lieu of notice, for a first offence (section 37(1) of the Labour Code of Cameroon). Once proven, acts of gross misconduct can lead to instant dismissal, for this amounts to a breach by the worker which in effect, repudiates the contract. Alternatively, dismissal on grounds of gross misconduct could unarguably be considered as any conduct of the worker which prevents further satisfactory continuance of the employment relationship, and justifies immediate termination of the contract. In fact, any such misconduct must be so grave in order to offset the importance which the courts attach to the security of private service employment.

This is so because dismissal, which is tied to the fault of the worker, remains a radical option, and carries both infamy and dishonour (Yanou, 2009). A dismissed worker loses the entitlement to both contractual and statutory minimum notice as well as certain benefits and gratuities. Equally damaging is the fact that a dismissed worker loses the opportunity to vindicate his/her name including all the statutory protection given to workers once the 'just cause' has been established (Uvieghara, 2000). Once dismissed, a worker definitely finds it a lot more difficult to get another employment. This conceptual clarification is grounded in *Irem v. Obubra District Council*, (1960, 5 FSC 24), where Ademola C.J.N held that, "a dismissal from service carries such infamy that a termination does not carry". The decision in *Irem's case* is consistent with the views of scholars (Uvieghara, 2000) who contend that because dismissals are laden with social consequences, they could not be compared with terminations and resignations which barely inconvenience the employee.

It is against this backdrop that acts of minor misconduct, for example, late coming to work, can usually be dealt with by a warning, for it would be wrong to utilise the full weight of a dismissal in order to deal with such a trivial matter. In contradistinction, acts of gross misconduct, once proven, can lead to instant dismissal without notice, for this amounts to a substantial breach of the contract of employment by the worker. A careful perusal of Cameroon's labour legislation, and case law reveals that it is this latter interpretation that has been adopted by the courts in determining the regularity of dismissals in the country (*Sibeusseu Raphael c/ Ste Arno*, C.S., Arrêt N° 26/S du 15 Mars 1979). This constitutes the substratum of subsequent analyses. Although it will be impossible to exhaustively examine conducts in employment which can justify summary dismissal, acts such as, insubordination and breach of work rules, and theft of the employer's property have a general theme of gross misconduct underlying them.

2.1.3.1. Insubordination and breach of collective agreements

The performance of a contract of employment is predicated on the principle of subordination of the worker to the employer. Since the worker is under the control and authority of the employer, he gives orders and directives to the worker which s/he must execute. This principle is measured by yardsticks: the employer's power to select his workers, payment of wages or other remunerations, the employer's right to determine the method of doing the work, and the right of suspension or dismissal in case of breach. In line with the principle of subordination, a worker, during the performance of the contract of employment, is under an obligation to respect the employer's instructions to the latter. These instructions are often drawn up by the head of the enterprise and communicated to workers. It deals exclusively with rules relating to technical organisation of work, disciplinary standards and procedure, safety and hygiene at work which are necessary for the proper functioning of the enterprise (Section 29(1) of the 1992 Labour Code).

Generally, internal rules and regulations of enterprises often proscribe smoking in prohibited areas, fighting, unauthorised absenteeism, lateness, and failure to observe safety precautions. These regulatory conducts are considered to be reasonable and compatible with the performance of any employment contract. A worker who deliberately breaches these internal rules and regulations, even after attempts by the employer to call the latter to order is termed 'insubordinate', and dismissal effected by the latter comes within the purview of dismissal for gross misconduct contemplated under sections 36(2) *et seq.* of the 1992 Labour Code.

A more fundamental way in which a worker's insubordination may be thought to be a breach of work rules, and as a result justify dismissal is where the worker fails or refuses to obey reasonable orders of the employer. This was the decision in the English case of *Turner v Pleasurama Casinos Ltd* (1976, IRLR 151). In this case, the applicant who was an inspector was employed to observe a gaming table, to ensure that there was no dishonesty by croupiers. He was dismissed for 'neglect of duty' after a complaint that a croupier and a member of the public had been cheating under his nose. Though the allegation was denied by him, a full and proper investigation of the employer found against him. It was held that the dismissal was fair; the gaming world being a hard world, even the minutest of mistakes could not be tolerated. The underlying consideration for the outcome of the court's decision in this case is purported insubordination and breach of specific work rules by the worker.

While affirming the court's decision in this case, it must be noted, with regard to cases of dismissal for misconduct as contemplated in section 36(2) *et seq* of the Labour Code, that it is not the function of the court to substitute its views and opinions for those of management, but merely to decide if management has acted reasonably (Selwyn, 1982). It results from the court's decision in this case that, in order to determine whether or not the employer has acted reasonably in dismissing the worker, the current test is what a reasonable employer would have done in such circumstances. There is a band of reasonableness within which one employer might decide to dismiss, whilst another might decide not to do so. If the circumstances of the case are such that a reasonable employer may dismiss, the dismissal will be fair even though not all employers would take that view (Selwyn, 1982).

Another question that has tasked the ingenuity of legal scholars with regard to dismissal for gross misconduct is whether an employer can lawfully dismiss a worker for conduct which is not expressly sanctioned in the collective agreement of the enterprise. Cameroon's Supreme Court in affaire *Bakehe Joseph c/ Regie des Chemins de Fer* (C.S., Arrêt N^{o} 30/S du 19 Décembre 1967) answered this question in the affirmative. In doing so, the apex court recognised that the employer's power to qualify a worker's misconduct goes beyond what could be provided in the collective agreement. This means that it must not necessarily be aforementioned in the applicable collective agreement in order to be enforceable. The facts of the case above reveal that the head of the enterprise (Regie des Chemins de Fer) immediately proceeded to dismiss the appellant, a security officer, on grounds of gross misconduct because he was found asleep in a state of drunkenness at his work post during working hours.

The decision of the Supreme court in this case simply reveals that the employer is free, in the face of reprehensible conduct to determine the gravity of a worker's misconduct that may warrant summary dismissal. This was the principle demonstrated in *Sinclair v Neighbour* (1967, 2 QB 279). In this case, the manager of a betting shop had without his employer's permission borrowed money from the till for the purpose of gambling, and was dismissed on this basis. On the argument that the worker was not dishonest because he had the intention of repaying same, and did in fact repay the next day, it was held that his dismissal was justified. The court's decision in this case was grounded on the fact that the conduct was of such a type that was inconsistent in a grave way with the employment in which he had been engaged as a manager (Yanou, 2009). This foundational principle which in practice stresses honesty and confidence in the discharge of a worker's obligations attests to a worker's subordination which goes to the core of the existence of an employment relationship. This is the reason why in the cases analysed above, the rules cover the sort of misconduct that an employer will not tolerate under any circumstances.

However, it may be difficult to establish misconduct by an employee which is strictly within his contractual rights, but is obstructive in nature to the performance of the contract of employment. In *Pengilly v North Devon Farmers Ltd* (1973, IRLR 41), it was held that a refusal to work overtime, even though not compulsory within the terms of the worker's conduct, warranted a dismissal, as the refusal was contrary to the normal practice, and the worker was trying to put improper pressure on the employer. But in *Burns v Ideal Timber Products* (1975, IRLR 19), it was held that a refusal to work overtime in order to get the employer to improve working conditions did not amount to improper pressure.

The refusal of the court to uphold the employer's decision in *Burns case* must be commended for being in consonance with section 36(2) of the 1992 Labour Code of Cameroon. In our context, it must be applauded for granting a worker an opportunity to contest dismissal for conduct considered to be wrongful. More so, for reasons of the security of private service employment, and adverse socio-economic consequences of dismissal for gross misconduct on a worker, Cameroonian courts have followed common law precedents in insisting on a high burden of proof in dismissal cases (Yanou, 2009). Therefore, it is not simply enough for the employer to dismiss the worker on grounds of insubordination. This principle has been consistently followed by our courts as demonstrated in *Société Shell Cameroun S.A v Kemayou Henri* (Appeal N° 79/S/04-05 of 12/05/2005) where the High Court, Court of Appeal and Supreme Court all held in favour of the worker who was sacked for what the employer simply characterised as loss of confidence. Apart from insubordination and breach of collective agreements, theft of the employer's property equally comes within the purview of gross misconduct contemplated under section 36(2) *et seq*. of the Labour Code.

2.1.3.2. Theft of the employer's property and other criminal charges

Theft arises when a worker steals, uses, or misuses an employer's property or assets without permission. It covers both tangible and intangible assets of the employer such as money, stock, time, personal data and business knowledge from the workplace. It is worth noting that it is not the function of the court to substitute its views and opinions for those of an employer, but merely to decide if the latter has acted reasonably. For example, if an employee has committed an act of theft, it is for the employer to decide what should be done in the circumstances of the case, and provided a fair procedure is adopted, the eventual decision is that of the employer. In *Trust House Forte Hotels Ltd v Murphy* (1977, IRLR 186), the applicant was a night porter. He kept a small supply of liquor for hotel guests, but when his stock was checked, there was a deficiency of £10. He admitted taking some of this for his own use, and was dismissed.

The industrial tribunal found this to be unfair, but the decision was reversed on appeal by the Employment Appeal Tribunal. This decision of the court must be applauded. If at first instance, the decision was upheld, it would have placed an unreasonable burden on employers if they could not fairly dismiss employees who have stolen property which had been entrusted to their care. Although management might have been influenced by compassionate grounds, and decided not to dismiss an employee who had stolen a small amount of property, a reasonable management may have taken either view. Moreover, this decision of the appeal court must be considered as sound in principle given the risk of maintaining employment for a worker who has demonstrated signs of untrustworthiness towards the employer.

The consequences of theft in an enterprise cannot be overemphasised. A worker, for example, who steals information related to workers could use it to destroy an enterprise's reputation. In the same vein, a worker or cashier who out of bad faith, writes a cheque to a non-existing employee and then cashes it out could cause grave financial losses to the enterprise. Such repeated acts of theft involving lumpsums have disastrous consequences on the enterprise if they become untraceable, and the business can end up in bankruptcy. Hence, it is not possible, in this context to argue that the employer had acted unreasonably, nor does the employer need to prove that an offence has been committed beyond reasonable doubt. A different construction of the court's view in this situation would rather render the employer's case fatal, and this would impose on the employer a higher commitment than would ever be possible to fulfil, and impose a duty which rightfully belongs to a court of trial.

More so, for theft to be justified as a ground for dismissal on grounds of misconduct as contemplated under sections 36(2) *et seq.* of the Labour Code, an employer must genuinely believe that the employee has been guilty of the theft in question. The employer must have reasonable grounds for that belief, and must have carried out such investigation into the matter as is reasonable in the circumstances. Cameroon's position in this province of the law is not different from what obtains in English courts. The Supreme Court in *Othou Messendi Jean v Socacao* (Appeal N^{o} 83 of 07/06/1972*)* held that the involvement of a worker in theft of the employer's property amounts to a breach of confidence justifying the worker's dismissal for misconduct on the basis of the penultimate sentence of section 36 of the 1992 Cameroon labour Code.

From this analysis, it can be ascertained that dismissal on grounds of theft must be reasonable and it is imperative on the employer to proof beyond reasonable doubt that theft by the worker is the basis for his/her dismissal. Proof beyond reasonable doubt in this instance is not treated lightly given that theft is a criminal offence sanctioned by section 318 of the Cameroon Penal Code. Failure on the part of the employer to establish or proof this allegation will be fatal to his case. Section 135 of the Evidence Ordinance 1945 is instructive in this regard. It stipulates that, "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Moreover, section 39 (3) of the 1992 Labour Code leaves no room for equivocation as it expressly places the responsibility of proof in all cases of dismissal on the employer who alleges same.

This is why in *Victor Oyebog v CDC* (Suit N^{o} CASWP/L10/2004), the Court of Appeal in Buea had no difficulty in holding that the burden was on the employer to prove its assertion of the criminal falsification of the consignment note by the worker beyond reasonable doubt. In this case, the court held that a worker who conducts himself in the course of employment in a dishonest and untrustworthy manner by stealing materials entrusted to him by his employers in Tiko to deliver in Kumba was legitimately dismissed. In confirming the decision of the trial court dismissing the worker's claim in wrongful termination, the court of appeal noted that the worker deserved his faith for "tampering with the consignment note by inserting therein quantities of materials as he thought fit". This decision must be saluted for its consistency with worldwide trends on the fairness of a reliable justice system to an employer because no business organisation will function effectively if workers are dishonest, untrustworthy and underserving of their employer's confidence.

However, it should be borne in mind that the fact that an employee faces criminal charges subsequently, and is acquitted on those charges, is also irrelevant to the issue of the fairness of the dismissal for gross misconduct. In *Da Costa v Optolis* (1976, IRLR 178), the applicant was dismissed from his job as a book-keeper for not keeping proper accounts, and he subsequently faced criminal charges. Though this ended in his favour, it was held that, the fact that the Crown Court had acquitted him did not preclude a finding by the court that the dismissal was fair. In the Crown Court, it had to be decided whether he was guilty of the charge beyond reasonable doubt, whereas in the industrial tribunal, it had to be shown whether the employer had reasonable grounds for dismissing him.

It must surely be sound policy for the employer to be consistent in his procedure and flexible in his decisions. Thus, an employer may take into account the fact that the employee has had a long record of exemplary conduct but the importance of such mitigating factors is a matter for the employer's discretion. In *Taylor v. Parsons Peebles Ltd* (1981, IRLR 119), the applicant, who had been employed for 20 years without complaint, was dismissed for fighting. It was the company's policy to dismiss anyone caught fighting. The court held the dismissal to be unfair. The company's policy had to be considered in the light of a reasonable employer's reaction to the incident. Given that the applicant had 20 years of good conduct, a reasonable employer would not have applied a rigid sanction of automatic dismissal for misconduct. In failing to take account of mitigating circumstances, the employer had acted unreasonably.

The decision of the court in the *Taylor case* must be applauded and considered as sound in principle for it stressed the need for flexibility in dealing with industrial misconduct by the courts as re-echoed in the penultimate sentence of section 36(2) of the 1992 Labour of Cameroon. This subjective view point can be gleaned from the Latin maxim; *summum ius, summa iniuria,* which means, rigorous law is often rigorous injustice. This Latinism serves as a warning to judges on how a strict application of the law can become a huge injustice on a poor worker. One can imagine the gross injustice which would have been suffered by the worker in *Taylor's case* who had diligently served his employer for up to 20 years. Had it not been for the dexterity of the judges hearing the matter, a single act of misconduct would have caused his dismissal.

2.2. Misconduct outside employment

Another problem with regard to the nebulousness of the 1992 Labour Code is that neither section 36(2) *et seq.* nor any other relevant section of the code ascertains whether or not, misconduct out of the enterprise can be relied upon by the employer as ground for a worker's dismissal. This problem arises here because what a worker does outside his working hours is not the employer's business. Simply put, can misconduct alleged to have been committed outside the place of work be justification for the dismissal of a worker? No straight forward answer can be furnished to this question as the issue will vary depending on the circumstances of each case. It is urgent, in the wake of recurrent dismissals on grounds of a worker's misconduct to provide an appropriate answer to this delicate question. The basis of this assertion arises from the fact that a worker's subordination to the employer is in the place of work. Out of the latter, and during non-working hours, the worker, like any other person is a free being, and the power of the employer is limited to the threshold of the private life of the worker.

Nevertheless, the answer to this worry may well depend on a number of factors, including the nature of the employment, the position held by the employee, the nature of the misconduct, the effect of the misconduct on the employer, on the enterprise, and on fellow employees. If it is established that the conduct in question has an adverse upshot on the employer's business, then a dismissal may be reasonable. The conduct may, for example, be a conviction by a court of law for a criminal offence unconnected with the employment or moonlighting.

2.2.1. Criminal misconduct unconnected with employment

Sometimes, it may happen that the misconduct of a worker which is incompatible with his employment also constitutes a criminal offence committed out of employment. If findings of the competent court establish that the conduct in question has an adverse effect on the employer's business, then the dismissal may be fair. This interpretation is buttressed by the concluding sentence of section 36(2) of the Labour Code. As far as this is concerned, the practice in Cameroon is a facsimile of some decisions of English courts.

In *Richardson v. City of Bradford Metropolitan Council* (1975, IRLR 296), the applicant was a senior meat inspector, who was convicted for theft of money from his local rugby club on several occasions. When his employers were informed, he was suspended, but as there were no other suitable vacancies which could be offered to him, he was dismissed and this was held to be fair. However, in *Bradshaw v Rugby Portland Cement Co Ltd* (1972, IRLR 46), the applicant was dismissed following a conviction for incest with his own daughter, for which he was placed on probation by the Crown Court. The dismissal was held to be unfair. The offence had no bearing on his work as a quarryman, the firm's customers would not have objected to his continued employment, and his relationship with his fellow-employees had not deteriorated to the extent that they objected to working with him. There must have been strong mitigating circumstances for the Court to deal with the matter so leniently, and the court did not see any reason to impose further punishment. Clearly, different considerations would have been applied had the applicant been a schoolmaster. In *Gardiner v Newport County Borough Council* (1974, IRLR 262), the applicant was a lecturer at an Art College, in charge of a foundation course on which were pupils who were between the ages of 16-18. He was convicted for gross indecency with another man in a public lavatory, and his dismissal by the college was held to be fair. The court held that Bradshaw's case was no authority for saying that a person who receives a moderate punishment from the court is immune from dismissal, for the courts are frequently being reminded in mitigation that whatever punishment they impose is only part of the misfortune which will befall the accused (Selwyn, 1982).

The decisions of the court in the cases examined hitherto are salutary and must be considered as sound on the following grounds; in the *Richardson and Bradshaw* cases, the court stressed on the prime importance of integrity of public servants who are in a position of confidence in the performance of their functions. It is a critical condition of the employment relationship that the parties to it conduct themselves in a manner that the trust and confidence essential for employment is maintained. Dishonesty of any sort by the worker in such strategic managerial position strikes at the core of the employment relationship and a breach of this could stand as justification for dismissal. This is because the continuation employment relations with such misconduct could act as a disincentive to the enterprise of the employer irrespective of the fact that the act was committed outside the scope of the employment relationship.

2.2.2. Moonlighting

Moonlighting which in strict labour phraseology means taking additional employment outside normal working hours may be a ground for dismissal as contemplated under section 36(2) of the Labour Code. However, moonlighting as a ground for dismissal in Cameroon must be exercised in consonance with section 31(1) of the 1992 Labour Code which empowers a worker, to undertake outside his working hours, any gainful activity which is not liable to compete with the due performance of his agreed services in the enterprise, save as otherwise stipulated. If this section is comprehensively construed, then it requires that that a worker should devote his service to the employer in accordance with the employment contract, and the employer can only dismiss a worker on grounds of misconduct if this has an adverse effect on his business. It is for this reason that the courts are reluctant to impose a restriction on workers which would hamper their ability to increase earnings in their spare time, except for the fact that it may inflict great harm on the employer's business. It is this interpretation that was adopted in the case of *Gray v. C&P Pembroke Ltd* (1350/72, IDS Brief 10). Here, the applicant agreed not to engage in any other business without the written consent of the employer. Contrary to this agreement, he took a part-time job with a rival company, and this was held to be a breach of faith for which he could be fairly dismissed. This English law position is a facsimile of the practice in Cameroon as the Labour Code clearly prohibits a worker from taking up employment with a competitor except otherwise agreed upon by the parties.

Legal scholars may incur difficulties in trying to contextualise moonlighting to dismissal for misconduct as examined hitherto. It should be commented that a worker whose conduct is incompatible with the faithful discharge of his employment duties can be dismissed under section 36(2) *et seq.* of the labour Code. Conduct incompatible with employment will classically fall within the definition of what the Supreme court regards as intentional acts amounting to serious misconduct (Yanou, 2009). Therefore, a proper construction of section 31(1) of the Labour Code indicates that moonlighting likely to compete with the due performance of the agreed services of a worker, and having an adverse effect on the employer's business is a ground for dismissal in consonance with section 36(2) of the Code.

However, section 36(2) must be applied with caution as any attempt by the employer to play boss and require the worker to guard the employment relationship as a marriage institution to the extent of not taking up another employment may be fatal to his case. Hence, a worker may, unless otherwise agreed, use his private time to improve his earning capacity elsewhere. If he does so in accordance with section 31(1) of the Code, then any dismissal on the basis of misconduct will be considered as unfair.

However, it must be emphasised that to constitute a breach of employment to the extent of justifying dismissal for moonlighting, the conduct in question must be such as to cause a loss of confidence in the worker. This can be demonstrated in *Whitlow v. Alkanet Construction Ltd* (1975, IRLR 321). Here, the applicant was asked by the company's executive to do some work on the latter's house. There, he met the executive's wife, love play took place between them in the house, and they had sexual intercourse elsewhere. Although the tribunal recognised that the applicant had been subjected to a temptation which few men would have resisted, his dismissal was held to be fair for misconduct. Quite apart from the fact that loss of confidence is not expressly stated as a ground for dismissal in the Labour Code, the court's decision in this case is salutary for its consistency with section 36(2) *et seq* of the Code.

A related issue with dismissal on grounds of gross misconduct under section 36(2) of the Labour Code is the procedure to be applied prior to or at the time of the dismissal. A proper construction of this section unequivocally asserts that dismissal, in practice, is and remains a power of the employer which can be exercised when need be. This interpretation is further reinforced by section 39(3) of the Labour Code which asserts that "in all cases of dismissal, it is up to the employer to show that the grounds for dismissal alleged by him are well-founded". If this section of the Code is construed mean exactly what it stipulates, then it is lawful for the employer to unilaterally dismiss a worker and use all the necessary avenues at his disposal to justify the act before the competent court.

Moreover, section 36(2) has not provided the appropriate procedure to be followed when dealing with criminal misconduct. This poses a worry as to whether gross misconduct which also amounts to a criminal offence must be heard and determined by a criminal trial resulting in a conviction before the employer can dismiss the worker. This is a legal vacuum which was not contemplated by Cameroon's labour legislator. However, the Nigerian Supreme court in the case of *Yusuf v. Union Bank of Nigeria* (1996, LLJR-SC) opines that the prosecution of an employee before the law court is not a *sine qua non* to exercise the power of summary dismissal by an employer for gross misconduct. In cases of gross misconduct of a criminal nature, the court opined that the obligation on an employer is to give the employee fair hearing before dismissal, and it is not the law that the employee must be prosecuted and convicted by a competent court before he can be dismissed. This is provided in article 7 of Convention N° 158.

The basis of this principle is the audi alteram partem rule; a Latin phrase which simply means "listen to the other side", or "let the other side be heard as well". It is a principle of law that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them. Although the court's decision in *Yusuf's* case could be castigated for violating the the *audi alteram partem* rule, the latter could nevertheless be commended for shielding employers from the injustices that arise from frivolous adjournments in hearings of criminal misconduct. This is so because a stricter application of this rule will mean that an employer cannot dismiss but must place the worker on suspension until the conclusion of the trial when the worker may be acquitted for technical reasons; the trial may even be inconclusive. In fact, such an outcome may attract a claim by the employee for malicious prosecution with grave consequences on the employer's business *(UAC of Nigeria PLC v. Prince O.O. Sobodu*, (2006, JELR 49422 (CA). Sama-lang, nevertheless, opines that even if the conduct of a worker warrants dismissal as contemplated in section 37 of the Code, it is necessary in this respect that the right to be heard is provided prior to the dismissal, irrespective of whether the worker is entitled to procedures after the dismissal, and even if the latter is not considered as final until appeal procedures are exhausted (Sama-Lang, 2018). It is on these grounds that in *Fomben Thomas v. Societe Nationale De Eaux Du Cameroun* (HCF/L.49/99-2000), a case concerning dismissal based on disobedience of reasonable orders, the Buea High Court held that a worker's misconduct, no matter how grave, does not ordinarily change the parties' terms of employment on the disciplinary procedure to be followed. The facts of the case were that the defendant employer, the sole water company in Cameroon had a memorandum setting out the disciplinary procedure of the company. The plaintiff challenged his termination on grounds that the employer did not observe the formalities prescribed in the disciplinary memorandum. The court held that the dismissal of the plaintiff was not only wrongful but also malicious, and he was therefore entitled to damages.

3. CONCLUSION

It has been observed that section 36(2) *et seq*. of the 1992 Labour Code of Cameroon are significant for epitomising the concept of dismissal for gross misconduct in employment. The former, with reference to a contract of employment asserts that it may be terminated without notice on grounds of gross misconduct, subject to the findings of the competent court of law as regards the gravity of the misconduct. Findings reveal that the ambiguous nature of the code has rendered effective implementation in Cameroon difficult. As demonstrated in the *Bakehe Joseph c/ Regie des Chemins de Fer* case, workers continue to suffer from unfair dismissal on grounds of misconduct which ordinarily would not have resulted to such consequences if section 36 et seq of the Labour Code was unambiguously drafted. Although the same Code encourages a worker who has been wrongfully dismissed on grounds of gross misconduct to contest such dismissal in the competent court, justice remains far-fetched for a poor worker with limited financial resources to pursue same. Given the adverse socio-economic difficulties and grave consequences that such a dismissal may have on a worker, it is recommended that section 36(2) of the 1992 Labour Code of Cameroon be revised in order to clearly conceptualise the nature of a worker's misconduct that may necessitate dismissal. Moreover, even if such dismissals are inevitable, it is paramount that the procedure as contemplated in article 7 of the ILO Termination of Employment Convention N^{o} 158 should be respected. This policy recommendation is buttressed by the fact that, section 36(2) equally violated article 7 of ILO Convention N^{o} 158 where no one is supposed to be sanctioned without being heard. It is imperative to review this section of the code in order to accord workers in Cameroon the much-needed impetus to relish their rights.

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