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A LAWYER'S INTRODUCTION TO SMART CONTRACTS

Samuel Bourque
Sara Fung Ling Tsui

Abstract

Smart contracts represent some of the most exciting breakthroughs following Bitcoin and Blockchain-based technologies. However, much of the discussion has been around the technical aspects with the actual legal and practical implications left vague. This discussion bridges the gap between the legal world and the upcoming crypto-economy that will be shaped by Smart Contracts and proposed Decentralized Autonomous Organizations; and composes a cursory examination of the legal implications of Smart Contracts:

- (1) what are Smart Contracts?
- (2) are Smart Contracts considered contracts in law?
- (3) what are practical uses for Smart Contracts?
- (4) can Smart Contracts opt-out of the legal system?
- (5) are DAO/DACs outside of courts' jurisdiction?

Keywords

Smart Contracts, cryptocurrencies, technology, bitcoin, legal policy

1. Smart Contracts

1.1. The Short Answer

Simply put, a Smart Contract (“SC”) is a self-executing contract. To wit, SCs are just like traditional paper contracts drafted in natural human language only that SCs specifically are drafted electronically in a computer interpretable language. The important effect is that the computer system that interprets the SC can execute some of the terms of the contract.¹

The nearest analogy for a SC in the traditional view is that of an executor (in the older sense—not its probate definition); or in a more modern sense, an administrator or a servicer of a contract.

An appropriate analogy for the reader to envision would be that of two masters that share a servant; the latter has the ability to read and is bound to obey both his masters’ signed instructions. When the two masters draft and sign an agreement; the servant, upon receipt of the written contract, would oversee and perform the contractual obligations through to the contract’s termination. To draw the parallel back to SCs, the masters are the parties to the contract and the SC is the servant that executes the contract obligations.

1.2. Pure Smart Contracts vs. Smart Contracts Lite

Not all SCs are created equal—some are “smarter” than others. There are three perpendicular axes to consider:

- (1) the level of automation of the execution of the contract;
- (2) the extent of separation between the actual agreed upon terms and the executed code; and finally

¹ For more information, please visit: <http://szabo.best.vwh.net/contractlanguage.html>; N. Szabo, *A Formal Language for Analyzing Contracts*, 2002.

(3) the custodial rights and/or discretion of the SC and its execution from the parties.

Firstly, let's discuss the level of automation: there long have been many contracts for which its terms in part have been established in computer-executable code. Such examples are: any online merchant,² for which manual interaction is needed—e.g. shipping; conversely, data-only online merchants may be fully automatable as there may be no manual intervention required for the transaction to clear.

Secondly, let's go over the distinction between the actual contract and the SC. Generally in an online vendor scenario, the actual contract is an adhesion contract spelled out by the terms of use and/or terms and conditions on the website's sitemap, or on purchase confirmation display. The code executing the contract is then separate from the actual terms; and hence may be disjoint in a few separate ways—one could presume skewed in the vendor's favor, given the lack of transparency.

This leads to the third issue—regarding the custodian of the code. In keeping with the analogy of an online retailer, the code resides within the merchant's control; furthermore, the customer may never have a chance to review or audit it at any time. Understandably, most online customers may not have the level of sophistication to review—or even want to review—such code. However, with the *status quo*, a customer sophisticated in the ability to understand code and/or with a specialized need would scarcely be given authorization to audit the merchant's code. This is not for nefarious reasons, but due to information security concerns—merchants could/should not open their systems up to outside actors as it not only contains proprietary information but personal information of their other customers, which must be protected by law in most jurisdictions. The alternative scenario is one in which the code is held by a trusted 3rd party. Therefore, no party to the contract has special discretion over the contract. As mentioned previously, the 3rd party custodian ensures a minimum of disjunction between the terms and the code; additionally transparency over the complete set of express terms is ensured.

Pure SCs propose a change in normativity in which the actual code is to be the agreement; therefore, no possibility for disjunction between the execution and the contract.³

1.3. Novelty

As just described, SCs as a concept are not exactly new, and pure SCs do not involve any novel technological breakthroughs. Therefore, one could ask: why are SCs making a surge only now? The reason is that most interesting contracts involve monetary transactions. This was impossible for several reasons:

(1) actual cash is physical and SCs are obviously limited to the virtual world of the Internet; and

(2) digital cash, as bank's cash reserves, is heavily regulated and its use is not allowed in programmatic fashion by individuals.

This is for obvious information security reasons—as in this case, the information is money—and its breach can amount to a financial and economic tragedy. Therefore, drafting SCs to handle regular money, whether cash or digital, is not technically feasible or allowable.

As we will discuss, there already exists some notion of SCs, but they generally did not handle

²There are many online merchants available and some well known ones would be Amazon.com, eBay and the up and rising Alibaba. Please see <http://projects.wsj.com/alibaba/> for more information on Alibaba.

³Assumes no “bugs,” which will be covered infra.

actual assets; rather they rely on issuance and transfer of credit, i.e. debt, upon which does not guarantee performance, and is vulnerable to fraudulent activity.

1.4. What Are Cryptocurrencies?

This is where cryptocurrencies come in. Bitcoin is the first cryptocurrency to gain wide traction as a means of exchange and store of value; this is evidenced by its market capital, which stands at US\$5B⁴ and is potentially poised to gain many multiples if it becomes more widely adopted. Cryptocurrencies are important as they allow unfettered, programmatic access to means of exchange.⁵

1.5. What's New Then?

Now we can identify the true novelty: the advent of combining self-executing contracts and cryptocurrencies. Such a combination allows unforeseeable possibilities, in the same way that the Internet escalated the level of possibilities for commercial applications.

In sum, the novel features of SCs are:

- (1) transparency of the agreement and its execution;
- (2) independence of the agreement's execution and the parties;
- (3) automation of the agreement's obligations.

2. Properties of Smart Contracts

SCs are an aggregate of many components, each of which must be properly understood to grasp their complete legal ramifications. What follows is a distilled description of each with minimal emphasis on their technical details.

2.1. Parties

The first aspect of SCs that we'll examine is that of its parties. Each party must:

- (1) be identifiable; and
- (2) sign—or otherwise indicate acceptance to the agreement and its terms.

This all depends on the concept of identity of the party. In digital commerce, the use of the Private Key Infrastructure⁶ ("PKI") is already well established as means of identification.⁷ In simple terms, it is an equivalent to a certificate of identity that can be verified by the sole holder of a private key—similar to how a PIN verifies a bankcard holder—that must not be shared. So long as the private key is privately held, its owner can be demonstrably verified beyond a reasonable doubt.⁸

The most fundamental concept is that a PKI certificate (also termed public key) and its private key can be used independently to encrypt information so that only its corresponding key can decrypt (unlock) the information into a meaningful form; e.g. a simple message can be

⁴As of November 2014; source from Crypto-Currency Market Capitalization, available at: <http://coinmarketcap.com>.

⁵Available at: www.bitcoin.org/en/faq [accessed 18 November 2014].

⁶The PKI patent is publicly viewable at: www.google.com/patents/US8767965. The PKI was invented by Giovanni Di Crescenzo, Tao Zhang and Robert G. White.

⁷Ibid. As explained by the technology of the PKI, one of its functions is of identification when required.

⁸Ibid n 5.

encrypted by the private key and decrypted by its public key, and vice-versa.

Using a combination of such techniques, the SC can:

- (1) be signed,
- (2) make the parties verifiable,
- (3) be encrypted, and
- (4) guarantee the integrity of the code.

This will be detailed further in part 4.

2.2. Capacity

SCs may have their own web presence, either as a webpage or an accessible web service. Since they are identifiable PKI-wise, they may also be equipped with their own cryptocurrency wallet, or alternatively have custody of digital assets; e.g. electronic title or certificate recognized by an authorized system.

As an aside, there has been a movement towards digitization of assets, presumably to enhance efficiency and minimize paperwork in an attempt to modernize. One notable case is that of the United States that has the Mortgage Electronics Registration System (“MERS”)⁹, where mortgages and property transfers are executable electronically.

2.3. Interpretation

The terms of the SC are to be written in machine-readable code; to wit, this implies that it be written in a language that established CPUs, OSes and compilers/interpreters have the ability to interpret its instructions. Generally, it can be expected that SCs are to be written in standard programming languages, presumably high-level languages that allow for more abstraction, i.e. closer to human language; as opposed to assembly instructions which are very close to low-level machine instructions, or—even-worse—binary code.

Obviously, the language used ought to ultimately be unambiguous, and not dependent on the specific technology on which it is executed.

2.4. Offline Clauses and Contracts

Conversely, not all SCs or their clauses need to be neither interpretable nor executable. This can be useful in many ways, either as means of memorializing the purpose, such as the preamble, of the agreement; or it can be used to indicate the governing law in case there is a dispute. Such examples are: memoranda of understanding, governing law clauses, and so on. Alternatively, whole contracts may not be meant to be enforced. In such a case, the SC system can be used as simple storage and can document the signatures and evidence the time at which the contract was made.

⁹Information taken from: [www.mersinc.org]. Accessed 18 November 2014. MERSCORP Holdings, Inc. owns and operates the MERS System, a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans that are registered on the registry. The MERS System is a member-based organization made up of thousands of lenders, servicers, sub-servicers, investors and government institutions. MERS serves as the mortgagee in the land records for loans registered on the MERS System, and is a nominee (or agent) for the owner of the promissory note. The MERS System is a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans.

2.5. Conditionals

Computer programming is fundamentally a large aggregate of simple instructions and conditional statements; i.e. if something is true: then do something; else: do something different. If interpreting the conditional statements, the SC will mostly require outside information. Assuming the SC and its custodian have Internet access, it will be able to query anything accessible on the Internet.

As an example, one can imagine a friendly wager between friends where they bet on the result of a hockey match. The SC could be instructed to—upon conclusion of the match—query the match scores from an authoritative website or web service. Given those results, the SC then determines who wins the bet and awards the winnings accordingly.

This enables the parties to rely on trusted 3rd party sources of information, without relying on one of the parties to produce the crucial data—drastically reducing the risk of conflicts-of-interest.

2.6. Events and State

SCs must keep a record of events in order to interpret and track all obligations, just as a computer program does. Therefore, as various milestones are reached within a contract, such events are to be noted; or as certain values are determined and/or calculations to be made, those may need recording as well for future use.

The full set of such recorded values constitutes the SC's state. Assuming that each event's timestamp is recorded, then in tandem with the code, one ought to be able to reconstruct the history of the SC at any given point.

Furthermore, SCs' code may define instructions to be followed when an event occurred—same as event-driven computer programming. Such events can be triggered:

- (1) by an external prompt, or
- (2) based on a timer or schedule.

The typical purpose for the former type of events is for when instructions are to be followed, or data registered, when a party triggers it. Alternatively for the latter case, its purpose would generally be to indicate some expiration, or that a performance is due.

A simple example that illustrates both cases is one about an online purchase that requires shipment with a 10-days no-questions-asked return policy. Once the buyer and the seller both sign, then the buyer would deposit the cryptocurrency payment into the SC. The seller could manually indicate by triggering an event, which would notify the buyer that the package has been posted, along with its tracking number—the former type of event discussed the previous paragraph. From this point, the SC—if properly drafted—could conceivably track the shipment online to find out its date of arrival; at which point, it would start the 10 day timer at whose alarm would expire the return policy—the latter type of event discussed in the previous paragraph.

This type of functionality is required to track a contract through its various steps.

2.7. Performance

On the opposite end of things, once the SC has interpreted the conditionals and has

determined the instructions to execute, the SC can then perform any action that is possible on the Internet; e.g. posting something online, sending an email, making a Bitcoin payment.

This is the ultimate end, without which SCs would scarcely be useful. Alternatively though, even without any ability to perform the substantial purpose of the contract, it can act as the manager and/or timekeeper of the contract; e.g. notify the party of the due obligation at a schedule time.

2.8. Workflow

Contract Law is a well-entrenched set of rules encompassing all aspects of contracting: from their formation, to their termination. To wit, there is a prescribed series of steps through which parties have to follow.

One such procedure is that of amendment. The process for an SC is obviously different than the process for amending paper contracts, yet must still conform to the rules of contracting. As such, any amendment must not be unilateral, unless it was previously authorized by the other party. Therefore, the amendment should be recorded as a proposal pending its acceptance by the other party. Until such time as an amendment proposal is adopted, the contract must persist as was originally signed—in which time many proposals can be submitted in parallel. When an amendment proposal is finally found agreeable by all parties, it is then ratified into the contract, its execution to continue in the same state as the initial contract.

A similar such process would apply to early termination of a contract. So long as both parties can also agree on how to settle the remainder of the obligations—whether to waive them or to compensate appropriately.

2.9. Reporting

A full featured SC may also be equipped with a web service, meaning that it can behave as a website does—in fact it may appear as a website, or be displayed on a mobile application. As such, it has the capability to provide reports, including its:

- (1) particulars,
- (2) status,
- (3) event history,
- (4) other custom purpose specific information.

As an example, we can imagine an individual loan agreement. The SC could have its own webpage, which would give both parties a report on the loan:

- (1) its purpose, i.e. preamble;
- (2) its parties;
- (3) its particulars, e.g. interest rate;
- (4) its history, e.g. initial date, past payment dates;
- (5) interest vs. principal amounts paid; and
- (6) future payment schedule.

3. In Law

3.1. Note on Jurisdiction

This treatise is not intended as a comprehensive analysis for all or any particular jurisdictions.

Given the authors specialty, this paper will admittedly have a bias towards the application of English common law.

3.2. Are Smart Contracts Contracts?

The short answer is: yes... generally. The simple fact of using SCs does not redefine what constitutes a contract. Therefore, a SC could be found to not be contract in Law—just as a paper with terms and signatures do not necessarily constitute a contract.

As every lawyer knows, a contract is composed of:

- (1) offer,
- (2) acceptance,
- (3) consideration, and
- (4) intention.¹⁰

Short of any other vitiating factors, the SC would in fact be considered a contract in Law.

Interestingly, one can quite easily draft a SC lacking any of those elements. All previous examples could very well be proper contracts, but let's examine SC that would clearly not be contracts.

Let's imagine a SC that only composes one programmatic event, which is that whenever deposits are made to its wallet, it simply re-deposits them to another wallet. This, in TCP/IP terms, would be a simple redirect; or in programming terms: a wallet alias—presuming of course that the wallet it deposits to would be changeable via amendment.

Another imaginable scenario is that of a SC that does very much the same behavior as the previous SC only it splits the funds in half to two other wallets. This example is interesting as it could simply represent a partnership entity—in that the SC's wallet is that payable destination for the partnership's invoices. However, simply by looking at the SC alone, one could not necessarily determine whether it constitutes an enforceable contract.

Both examples above can be useful SC structures in business; anyone trying to do something of this sort with actual bank accounts would find it most difficult to convince either the bank, the accountant, the regulator that what one is intending on doing is proper. Nevertheless, the SC system left unfettered does not impose judgment—just as your computer does not—nor does it interpret beyond its concrete instructions.

3.3. Internal Dispute Resolution

One interesting use of SCs is the inclusion of arbitration procedures. Let's imagine that the parties agree on a specific person to be the arbitrator, and take it a step further and identify the person by his PKI certificate. When a notice of dispute is raised, the SC could conceivably be frozen pending a decision by the arbitrator. Such a decision could either resume the SC unaffected, or include an award encoded as an amendment to the SC.

Such baked-in resolution procedures may encounter legal issues, please refer to the discussion in part 9.

¹⁰W. E. Peel, *Treitel: The Law of Contract*, 12th Edition, Sweet & Maxwell 2007, Chapter 3.

3.4. External Dispute Resolution

Barring any such internal dispute mechanism that suits the parties in all cases, if a party ever escalates a dispute to an external authoritative body, such as an arbitration center or a court, the SC's records could conceivably be exported and put onto record. This would provide a convenient, objective view of the facts for the authoritative body's review and consideration.

3.5. Procedure

Of course, standard rules of procedure are not to be trumped; therefore, such evidence is still subject to examination—not to mention, it will require the need for a new breed of expert witnesses and cryptography forensics experts to provide explanations for the data and perhaps aid the authorities to verify and interpret the data appropriately; e.g. verifying identities, translating the code into human language.

4. Technological Variations

This section explores in technical—non-lawyer friendly level of—detail of the technology involved in building this type of system. The following concepts are important to understand the newfound technological implications to Law from part 5 that may lead to new policy considerations as discussed in part 6.

4.1. Infrastructure

SCs—as complex as they are—are only one component within the system. Just as a webpage is nothing without the underlying protocols and interconnected hardware infrastructure; SC's equivalent infrastructure is composed of:

- (1) a Smart Contract Platform (“SCP”), and
- (2) a Smart Contract Management System (“SCMS”).

SCPs are the interpreter and executor components at the top layer, depending on the design may include the SC storage module as well. More fundamentally, the SCPs involve also an underlying protocol layer for the cryptographic functionality that's needed for verifying identities and so on. In addition, it includes libraries for SC's use; e.g. email, cryptocurrency support libraries.

SCMSs, in contrast, are a superstructure around the SCPs that includes:

- (1) a full database of the parties' particular information;
- (2) event scheduling of SCs;
- (3) the SCs functional workflows, e.g. drafting, amendment and termination workflows;
- (4) finally, a front-end API or UI for user interaction.

At the time of this writing, there are no operational SCMSs; yet there are two competing SCPs in development: Ethereum¹¹ and Codius¹². Both offer varied approaches in their SCPs.

¹¹Ethereum is a platform and a programming language that makes it possible for any developer to build and publish next-generation distributed applications. Information available at: [www.ethereum.org]. Accessed 18 November 2014. For further information visit: <https://www.ethereum.org/pdfs/EthereumWhitePaper.pdf>, Ethereum White Paper, V. Buterin, *A Next Generation Smart Contract & Decentralized Application Platform*.

¹² Information available at: <http://webcache.googleusercontent.com/search?q=cache:http://codius.org>, accessed 18 November 2014.

4.2. Cryptography

Firstly, let's demonstrate how the SC can be signed by adding a "signature" at the end. Such could simply be an encrypted piece of data at the end of the SC's code whose meaning can only be revealed by the signatory; thus, the signatory is verified.

One can verify the signature so long as it is encrypted by one of the person's PKI keys. For example, let's consider that the signatory encrypts his signature with his private key; then anyone, using his publicly available public key certificate can decrypt and verify the signature as belonging to the signatory.

Conversely, let's imagine that the signatory chooses to encrypt the signature with his public key; then the data may only be decrypted by the corresponding private key. As such, the data composing the signature is meaningless and does not tattle the signatory's identity; nonetheless, when the signatory appears he may be verified by producing his private key.

Such are the two types of verification available to the parties: uni- or bi-directional identification; whereas one can make himself known openly on the SC, alternatively one can only make himself known by his own action.

Furthermore, the contract as a whole may be encrypted as to be meaningless to any outsider. This could guarantee privity of contract for jurisdictions that may not recognize the concept. However, it must be noted that the interpreter has to be able to decrypt the code to interpret it, obviously.

Lastly in passing, as an added level of security, by including and encrypting a hash¹³ of the code, one can ensure that the code was not tampered with.¹⁴

4.3. Decentralization

Codius mirrors more closely the current legal system, where an SCMS built on top of the Codius SCP would physically reside in a jurisdiction and would presumably be bound to it, unless otherwise stated.

Ethereum on the other hand, takes the idea of the Blockchain¹⁵—as established by Bitcoin—and applies it to the realm of SCs. The Ethereum SCP will take custody of the SC, placing it on its blockchain; hence, it resides everywhere and/or nowhere.¹⁶ Literally speaking, its custody is within a global consensus network, spread throughout countless computers across the Internet.

This decentralization of the SC makes for an interesting jurisprudential question: barring any express governing law clause, which jurisdiction would be said to be the seat of the contract? This issue is discussed further in part 9.

¹³The hash patent is publicly viewable at: www.google.com/patents/CA2441117C. The technology was invented by Silvio Micali.

¹⁴In oversimplified non-technical terms, imagine it as a hyper-compressed version of the code, from which the full code cannot be reconstructed, but the hash can be re-done and compared for authenticity.

¹⁵Available at: www.bitcoin.org/en/faq. Accessed 18 November 2014.

¹⁶Ibid.

5. Technological Implications on Law

Given the technology architecture as discussed above, absent new regulations, additional legal implications may arise.

5.1. Privacy

Pseudo-anonymity is an interesting concept; it ought not to be as intimidating a term as it sounds. A simple way to look at it, is to examine how email addresses do not in-and-of themselves reveal the identity of the person; only if one has the email registered in his own address book would he know who the person is. There is no centralized registration of databases and new, free emails can be created on a whim. The same is true of cryptocurrency wallets. The major difference is that wallets are not human-readable, to the point where one could perhaps not recognize his own wallet address. Otherwise, all is unchanged, the cryptocurrency wallet address is a one-way unique identifier that guarantees reaching a person's pocketbook, or inbox, but does not reveal the person's identity.

The issue surrounding this is rarely thought of, but is as follows: contracts are a heavily regulated exercise; much more so than the act of communicating—that is, in jurisdictions where speech is protected as a natural right. As much as speech may be protected, no jurisdiction allows full, unfettered right to contract—whether the contract be for: the sale of regulated goods, a criminal enterprise, or unconscionable pacts.

Jurisdictions will still inevitably attempt to crack down on such conduct. When SCs contain such illegality, courts will try to identify the party to the contract. This is where the difficulty will creep in; as wallet addresses will not inherently provide any clues to the party's identities. An additional consideration is the encryption of the body of the SC. The authorities may attach the SC via injunction, but neither its content, nor the parties' may be interpretable or identifiable without the parties' encryption keys. This presents a chicken-and-egg circular dependency in which there would be viable means to identify the parties, or interpret the content of the SC.

Some could leverage the opportunity to hide conduct—or involvement in such—from the public. This will inevitably come at odds with rights to privacy.

5.2. Jurisdictional

Along the same vein as the previous discussion on parties' privacy, the issues surrounding identifying the seat of the contract could be problematic to identify.

The major consideration will be, of course, the parties, the choice of governing law and the location in which the contract is being administered. There are no new issues here.

What is new however, is the possibility of having a SC administered by Blockchain Technology.¹⁷ What matters here is that the SC is not physically located, nor administered in any one specific physical location. In actuality, it is copied worldwide in a consensus network that guarantees its integrity. In a sense, it is both everywhere and nowhere.

Therefore, short of identifying the parties—which is not guaranteed—, or identifying the

¹⁷Ibid.

governing law—which may be encrypted and unreadable—, it may be quite challenging to identify a seat for the SC.

This could be seen as means for some to opt-out of public forms of legal systems. Given this, some could take the concept one step further and try to create new underground norms of contract law.

Such SCs without seat are technically possible with current technology on Ethereum.¹⁸

6. Policy Considerations

6.1. Banking, Regulatory and Fiscal Policies

The first effect of cryptocurrencies is the enabling of banking services¹⁹ outside of the scope of banking law.²⁰ This is because there is no need for banks in cryptocurrencies.²¹

Examining the evolution to the publishing industry that came about from the advent of the Internet. Here we have a global platform where anyone can be a publisher. It didn't outright kill the industry, but it certainly forced it to evolve—as has been observed since.

We should expect the same evolution to happen in commercial banking. The storage and transfer of funds services, given better user-friendly applications, in a cheaper, faster more convenient format, will challenge the *status quo* of commercial banks. The banking system will either evolve to rival cryptocurrency convenience, or will fall by the wayside.

There are important policy considerations here, for:

- (1) banking,
- (2) regulatory, and
- (3) fiscal policies; as of these would be impacted if a critical mass of the public would stop using public banking systems.

Firstly, banking law has evolved for centuries and is quite entrenched in our current legal system. It serves as means for:

- (1) consumer protection against unfair practices;
- (2) prevention of fraud;
- (3) general rules of order; and finally
- (4) public aggregate reporting.

Secondly, banking and financial regulation has for its goal of:

- (1) consumer protection against unfair practices;
- (2) risk controls; and
- (3) prevention of fraud.

Thirdly, fiscal policies with which governments see it fit to regulate the economy, typically by

¹⁸Information available at: www.ethereum.org, accessed 18 November 2014.

¹⁹Banking services are generally referred in law as that of accepting current accounts and paying in and paying cheques for the bank's customers. *Foley v Hill* (1848) 2 HL Cas 28; *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.

²⁰Both statutes and common law.

²¹Available at: www.bitcoin.org/en/faq, accessed 18 November 2014.

means of: (1) regulating interest rates; and in some cases, bail-ins²² and bail-outs²³.

Firstly, banking law and banking regulation require bankers to follow some procedures. In the cryptocurrency world, there is no need for banks, as previously established. Therefore, such rules would become obsolete. Furthermore, should there be a massive move towards the use of cryptocurrencies, to the detriment of traditional banking systems, public authorities would stand to lose public aggregate banking statistics, which would make fiscal policy not only difficult, but ultimately ineffective as fiscal policies would not have any provable direct impact on cryptocurrencies.

6.2. Financial Unleashing

The impact that SC can have in addition to the cryptocurrencies' impact on banking is even more profound.

Given the previously discussed concepts, we now see that a new, larger shadow banking system is easily possible.

This will either be very good for investment banks, or very bad for them. Firstly, this will provide the financial industry with more tools with which to scale existing, legal financial products, as well as also facilitate regulatory arbitrage²⁴ to avoid local regulations.

This will pose a serious challenge to local regulations, and exacerbate the economic competition between jurisdictions; as the moneyed elite will more easily be able to jurisdiction-shop for friendlier locales.

The other consideration is that SCs can allow for more sophisticated financial products, the likes of which would not otherwise be possible, either given technical or regulatory restrictions. Such innovation is likely to produce more cyclical economic fluctuations; the difference here will be that attempts for additional regulations may be ineffective.

As financial products become more popular, it becomes possible for the products to become standardized SCs, and hence be easily reproducible by the less moneyed classes.

Ultimately, either voluntarily or otherwise, it is likely that financial services will be unleashed, either by voluntarily deregulation or by reluctant desperation. At such a point, a nation's ability to regulate fiscal policies would become very difficult, short of banning cryptocurrencies altogether.

²²Name commonly given for heavy handed public correction of financial crises; e.g. Troubled Assets Relief Program ("TARP"). As an example, the US Treasury established several programs under TARP to help stabilize the U.S. financial system, restart economic growth, and prevent avoidable foreclosures. Information available at: <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/Pages/default.aspx>.

²³Name commonly given for mass seizures of bank accounts for purposes of public correction of financial crises; e.g. the Cyprus Bank Crises of 2013. For more information, visit: <http://business.time.com/2013/03/21/cyprus-banking-crisis-the-endgame-begins>, P. Gumbel, *Cyprus Banking Crisis: The Endgame Begins*, Business Time, 21 March, 2013.

²⁴Name commonly given to a strategy in which a venture is located or re-located in a jurisdiction with a friendlier regulatory environment. A. Shleifer, R. Vishny, Robert, *The limits of arbitrage* (1997) Journal of Finance 52.

7. Criminal Activity

7.1. Potential Uses

Most unlawful activity attributed to Bitcoin is generally not new to cryptocurrencies; e.g. money laundering, theft. The only new aspect is the speed and efficiency with which such activities could be done. However, one must consider that, using Bitcoin specifically—with its use of a public, permanent ledger—it is not a good tool for criminal activity as it can tattle the rogue's behavior long into the future. This is not so true for all cryptocurrencies however; such as is the case for Darkcoin²⁵, which is specifically purposed to anonymize the economic behavior of its users.

Smart Contracts, on the other hand, are similar in that they do not offer new means of criminal activity—no more than “dumb” paper contracts could. However, in the same vein, one must ensure that the contract represented in the SC is in accordance to law. This is of course a larger discussion as such issues that cross all categories of law, across all jurisdictions.

There is one more consideration, however, that is the possibility to make the SC illegible via encryption... but again, not very dissimilar to encrypting a paper contract.

7.2. Mitigation

Given an SCMS, its interpreter component must at all times be allowed to interpret the SC's code in order to interpret it, obviously. Due to this technical limitation, the SC must be decryptable by the SCMS. As such, a regulatory body could compel, or impose an injunction on, a SC to be revealed to public authorities.

It is likely that this issue will be discussed in legislative bodies in the future to regulate SCs. As such, it is likely that in some jurisdictions, SCMSs will be regulated to allow public authorities to seize SCs.

8. Regulation

8.1. Legislative Position

The current legislative position, at the time of this writing, is quite simple: it has never been discussed in legislatures. The reason is that, of course, this discussion is pre-emptive, as SCs are not currently publicly available as a product or service—although, there is beta version software available to demonstrate the technological concept.

It may be inherently illegal, same as cryptocurrencies are illegal due to inflexible laws on legal tender; some jurisdictions may have inherent laws similarly prohibiting SCs.

8.2. Lobby

There is a long held tradition of crypto-anarchists²⁶ that are increasingly active in their lobbying for privacy and online freedom. There is a spectrum at play here. We firstly observe, on the public legitimate front, strong lobbying efforts by groups, such as the Electronic

²⁵Darkcoin is an open sourced, privacy-centric digital currency. It allows users keep their finances private as users make transactions, similar to cash. Information available at: www.darkcoin.io, accessed 18 November 2014.

²⁶C.f.: the cryptoanarchist manifesto, please see: www.activism.net/cypherpunk/crypto-anarchy.html.

Freedom Foundation²⁷ that argue invariably in favor of freedom and privacy. On the darker side, there is Anonymous²⁸, whilst an illegitimate activist group also invariably takes on the side of freedom and privacy; albeit, in what could arguably be terrorist tactics.

The point here is to underscore the concept that there is likely to be an escalating-arms-race between the white-hat authorities and the cryptoanarchists. This will be played out in the realm of the darknet²⁹, where there are black-market activities; e.g. sales of illicit material, or illegal drugs. The darknet will presumably make use of SC related technologies and apply strong cryptographic obfuscatory measures; conversely, the authorities will escalate the sophistry of their measures to catch such actors.

9. Apparent Issues

There are many issues that can be raised, but upon further analysis reveal themselves to be non-issues.

9.1. Bugs

A major, valid concern is the possibility for there to be bugs—i.e. unintended behavior—in the SC's code. Upon reflection, one could easily argue that this is not a new issue, as unintended clauses in code is quite common and is generally known as a “loophole.”

This is a more severe concern in SC's case as there is:

- (1) fast performance via automation;
- (2) use of non-human-readable code; and
- (3) use of large code libraries, which could include vast amounts of implied code.

In such a situation, one hopes that the SCMS has a rollback mechanism or that the parties can rectify the situation; otherwise, the aggrieved party will have to seek remedy in the usual means.

9.2. Is it a Trust?

A SC is often compared to a trust³⁰, in the sense that the SC is the trustee³¹ performing for the parties holding the role of both settlors and beneficiaries; whereas the code is the indenture

²⁷The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, Electronic Frontier Foundation champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. The Electronic Frontier Foundation works to ensure that rights and freedoms are enhanced and protected as the use of technology grows. Information available at: www.eff.org, accessed 18 November 2014.

²⁸Information provided by The Guardian on Anonymous can be found at: <http://www.theguardian.com/technology/anonymous>.

²⁹Name commonly attributed to Internet activities and forums conducted in ways that are difficult, if not impossible, to trace. Darknet is a group of individuals founded around 1999 sharing knowledge in password cracking, cracking, cryptography and programming. Information can be found at: <http://www.darknet.org.uk/about>.

³⁰The basic idea of a trust is that the legal and equitable property in an object is separated and are placed with different persons. The person who holds the legal property is put in a fiduciary duty towards those who are placed with the equitable property. Scott, Austin, *Importance of the Trust*, 39 University of Colorado Law Review 177 and H. Hansmann, U. Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, New York University Law Review 1998, May.

³¹Trustee denotes the party that holds the legal title or property but is put within the fiduciary duty of the equitable property holder – the beneficiary.

and the holdings of the SC to be its res. For jurisdictions³² where trusts are indeed recognized, this is generally not applicable for SCs, as a trustee must be a natural or legal person with the capacity to contract.³³ Until such time as SCs are recognized as legal persons, this will not be the case. A discussion on personhood is detailed below.

Although this is not the case, would a SC ever be considered a trust could bring interesting implications, such as the applicability of Trust Law.

9.3. Is it an Agent?

What if one could encode a SC to engage in other contracts? Then the issue is whether the SC can perform as a legal agent³⁴—i.e. to have the capacity to be authorized to contract on behalf of another (natural person).

Again, as per the trust scenario, the general position in law is that only natural or legal persons have the capacity.³⁵ Barring such a declaration of status, this is not the case. However, this will be discussed further in the next section.

9.4. Is it a Person?

As previously alluded, at some point it may be argued that SCs are legal persons³⁶, in the sense that they are:

- (1) identifiable,
- (2) have a capacity for rights, and
- (3) capacity for obligations.

As previously established, a SC can be considered to meet the criteria:

- (1) identifiability from its cryptographic identity;
- (2) capability to exclusively receiving and controlling—i.e. to exercise all ownership rights over—digital assets;
- (3) capability to independently perform contractual obligations.

There is an additional interesting argument to be made however. Many financial institutions, as well as private traders, construct software that—via an heuristic method—makes lightning quick decisions on, and places trades to market exchanges. This could easily be argued that this is standard practice as it is so widespread; indeed, halting its practice suddenly would severely impact the financial health of developed economies. Therefore, one could argue on a policy basis that software ought to be recognized as an agent implying its personhood.³⁷

³²Common law jurisdictions recognized the concept of trust, while generally, civil law jurisdictions do not. H. Hansmann, U. Mattei, *op. cit.*

³³It is understood and generally discussed in many contract textbook that only ‘people’ have the *sui juris* to enter into a legally binding contract. Contract law provides protection to those who do not have or do not have full legal capacity to enter into a contract by invalidating them. Some of these categories are: a) minor; b) the mentally incapable; and c) drunkards. L.A. Kornhauser, W. Bentley MacLeod, *Contracts between Legal Persons*, NBER Working Paper No. 16049 Issued in June 2010. Available at: <http://www.nber.org/papers/w16049>.

³⁴F. Andrade, P. Novais, J. Neves, *Will and Declaration in Acts Performed by Intelligent Software Agents - Preliminary Issues on the Question* [in:] *Proceedings of The 4th Workshop on the Law and Electronic Agents* (LEA 2005), pp. 53-55; see also: G. Sartor, *Agents in Cyberlaw*; A. Yip (2002), *Some Issues on Agent Ownership* and A. Artosi, *On the Notion of an Empowered Agent* [in:] G. Sartor, G. (ed.), *Proceedings of the workshop on the Law of Electronic Agents (LEA02)*.

³⁵The idea of capacity is similar to that in contract law.

³⁶The concept of a legal person is that it is not a human being entity, but it is treated as a person for certain limited legal purposes, e.g. Smith, Bryant: *Legal Personality*. (1928)Yale Law Journal 37 (3): 283–299

³⁷For a fuller discussion and arguments on the application of rights and personhood on non-human subject, see C.

An even simpler scenario shows that automated systems are already in the business of contracting, such as the case of a vending machine. If the argument would to be made that only persons can engage in contracts, then this would imply that the vending machine's contract would not be binding. As a matter of convenience, this has become standard practice, but this still stands in a lacuna in the law.

As things stand, the granting of personhood status is generally only recognized by official declaration—which has yet to be conferred in any jurisdiction.

10. Legal Issues

This section discusses the issues raised by SCs for which there is no clear authority and are arguable either way.

10.1. UPL

The first issue to consider is whether drafting and/or advising on SC constitutes practicing law.

Most jurisdictions empower their law society with a monopoly over the practice of law in the state and generally has discretion over the granting of law licenses. As such, if one is deemed to be practicing law without the said license, then one can be found guilty of Unlicensed Practice of Law (“UPL”).

To examine this, we may look back at whether drafting or advising on traditional paper contracts requires a license. However, there is the additional complication in that SCs run on SCPs and SCMSs; therefore, an additional issue is whether advising on which SCP/SCMS to use, or advising on SCP/SCMS specific optimizations, be also considered practicing law.

The final issue relates to who is the custodian of the SC. The SCMS must be maintained by a person. Given the security risks associated with the custodial responsibility of SCs, an argument could be made that sufficient insurance ought to be imposed by regulation. Therefore, it is conceivable that the very act of running and maintaining an SCMS could be a licensed activity.

10.2. Licensed Business Activities

Some activities are licensed as a business, which are otherwise legal if done in one's private capacity. This obviously depends on the jurisdiction, but for example, many jurisdictions outlaw sports betting businesses, but allow private individual sports betting.

SCs allow mass-production of one-on-one contracts to the scale of a business, where a business could position themselves as simple being in the business of selling pre-defined SCs —e.g. a sports bet contract, to follow the previous analogy. This most probably simply skirt the purpose of the legislation, as presumably such rules were enacted to prevent mass-adoption of the activity with minimal oversight. SCs, coupled with the wide reach and convenience of the Internet, threaten to disturb the current balance of some licensed business activities by lowering the barriers to enter the business.

Wellman, *Real Rights*, Oxford University Press 1995.

The issue that arises is whether such a person that is in the business of selling specialized SCs that represent a legal activity as individuals—but is otherwise a license business activity—is in violation of said license. This will obviously be a matter of interpretation, but may force legislatures to either clarify or tighten their definitions of what constitutes acting in the said licensed business.

More examples of businesses that are usually licensed, but could be mass-produced with the use of SCs are: loans, betting, lotteries, stocks/bonds/derivatives exchanges, derivatives, insurance, etc.

10. 3. Regulatory Difficulties

Interestingly, if we imagine a scenario where Peer-to-Peer securities exchanges become easy to instantiate³⁸, then the amount of oversight required to police such activity, coupled with the ease with which one could side-step the long arm of the law either by going off-shore, hiding the identity of the parties, and hiding the seat of the contract. This would inevitably cause some to re-evaluate whether such licensing standard are worth maintaining.

11. Political Issues

11.1. Risks

In order to appreciate the rationale behind any legislation, we must first understand the potential risks to the state. Since SCs hold personal information, there is an obvious privacy risk from having its data being leaked. Beyond this, to have all of one's SCs to be leaked would also tattle one's whole business, which is an even more severe risk as it could be very valuable to one's enemies or competitors—more so than the personal data.

Further risks are not to the individuals but to the economy at large. As discussed in part 6, fiscal policy is means for the state to regulate and normalize the economic environment. This is done by imposing controls, not only by the Central Bank, but also on the banking and financial systems—collectively composing the spigot of the economy.

An additional reason for regulating the banking system is to allow oversight on the aggregate economic indicators and statistics, without which data-based fiscal policy making would be much more difficult, if not impossible. Furthermore, the ability to regulate banking is important for enforcing judgments and interlocutory measures, such as injunctions on accounts. A Bitcoin wallet cannot be attached, but a SC could if the SCMS is a licensed entity.

11.2. Licensing

The first political issue will certainly be whether to regulate SCMSs. There are several reasons why states may want to regulate them:

- (1) legal advice is necessary is the general case in drafting SCs;
- (2) requiring legally compliant workflows in managing the life-cycle of a SC;
- (3) managing the security risks related to the assets held by the SCs;
- (4) requiring access by public authorities.

³⁸Such as cryptocurrencies as easy to create your own. which is should in Bit Clone, available at: www.bitclone.net.

Therefore, it is quite likely that some jurisdictions will choose to regulate SCMSs. The options to consider are as follows:

- (1) imposing insurance requirements;
- (2) imposing reserve requirements;
- (3) requiring approved security audits;
- (4) requiring a law license; and/or
- (5) including a process for public authorities to enforce injunctions.

11.3. Oversight

Another issue is whether an SCMS is an implied trustee, similar to how a banker,³⁹ who ordinary⁴⁰ legal status may change and could be considered in the position of a constructive trustee.⁴¹ Such concept was put in place with the rationale that bankers should somewhat be responsible to prevent fraudulent activity by their customers through the banking systems.⁴² I.e. should the SCMS make it its business to prevent illegal activity? One could argue that the SCMS has a public duty—being the one in the best (if not the only possible) position to do so—to oversee SCs’ legality.

As such, one could foresee that the polity might see it fit to make an SCMS an exclusive public service supported by public funds—much like courts are today.

Alternatively, SCMSs could be compelled by the state to open the records for public authorities ostensibly to monitor for terrorist activity—much like Internet Service Providers, banks and telephone systems are often monitored.

12. Conclusion

12.1. Trends

At the time of writing, there is no publicly available production-ready SCMS, or even SCP. There are some beta versions available with which to tinker. The most long-lived project is Ethereum⁴³, which has notably raised at most US\$15M⁴⁴. Other notable projects in

³⁹The terms ‘bank’ and ‘banker’ may be used interchangeably by legislations (as an example, the Bills of Exchange Ordinance (Cap. 19) and the Banking Ordinance (Cap. 155) in Hong Kong) and courts, they are usually not inconsistent with each other. Even status’ definition of a ‘bank’ generally refers to the procedure nature, the protections and common law definition of ‘banker’ will still apply. Roebuck, Srivastava, Zafrullah & Tsui, *Banking Law in Hong Kong, Cases and Materials*, 2nd ed., LexisNexis 2009, p. 26.

⁴⁰A banker is considered a banker in common law if it shows that:

1. it holds current accounts for customers;
2. its customers can draw cheques from the bank; and
3. it collects cheques on behalf of its customers.

If a banker shows the requirements in common law, the ordinary relationship the bank has with its customer is one of contract, with an additional requirement to honour its customers’ cheques. As explained in the House of Lords decision in the case of *Foley v Hill* (1848) 2 HL Cas 28.

⁴¹The concept of constructive trustee was laid down in the case of *Barnes v Addy* (1874) 9 Ch App 244. The court held that a stranger who acts as an agent of a trustee can, in law be held to be liable as a constructive trustee, if that agent assisted in the dishonest and fraudulent conduct of the original trustee with knowledge.

⁴²In the case of *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 1 WLR 1555, the principles were adopted into a bank and customer situation even the application of the principles were slightly toned down in a later Court of Appeal case of *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340.

⁴³Available at: www.ethereum.org www.bitcoin.org/en/faq, accessed 18 November 2014.

⁴⁴R. Mcmillan, *Project to Turn Bitcoin Into an All-Powerful Programming Language Raises \$15M*, 9 Oct 2014. Available at: www.wired.com/2014/09/ethereum-backers-raise-15-million.

development are: Codius⁴⁵, CryptoLaw⁴⁶, BitHalo⁴⁷ and CounterParty⁴⁸.

12.2. Looking Ahead

Both Ethereum and Codius have indicated that they expect to be production ready by 2015. Whether they both deliver on schedule or not, one should expect that this technology ought to be publicly available before 2016.

12.3. Comment on Existing Regulation

As mentioned above, the authors very much expect legislatures to eventually face the issues introduced by SCs. The authors wish to encourage a balanced and durable long-term approach.

In order to do so, one must consider the sufficiency of existing law in addressing what appears to be new criminal behavior but are simply new manifestations of old crimes. Examples of this could be of hacking someone's cryptocurrency wallet. This is not anything more than an unauthorized access crime, or otherwise put: a trespass, as well as a theft.

For enforcement to be handled appropriately by authorities, there obviously needs to step up Blockchain technology based forensics and evidentiary procedure.

Furthermore, another consideration for legislatures to consider is the coming ineffectiveness of law enforcement that is bound to happen from increased technological efficiency that will lower barriers for the public to engage in licensed activities—similar to how ostensibly illegal downloads of copyrighted material became prevalent due it ease around the turn of the century.⁴⁹ The lesson to be learned here is that when an activity is so easy to do yet so difficult to enforce, the trend can lead to the activity becoming so prevalent that enforcement becomes near impossible, both physically and politically.⁵⁰

The legislature will be faced with a choice: either to scale up, at significant expense, the efforts to prevent the prevalence to reach critical mass; or to scale down regulations. As much as the latter may seem as a resignation—a win for the mob—it could also be seen as recognition of the people's will to decriminalize such conduct.

Obviously, the legislatures will have to balance their values and principles in reaching their decisions; but one may hope that they reach a balanced, long-term view lest they ratchet up public force only to fight a losing battle.

12.4. Comment on Future Regulation

Lastly, the legislatures will also have to discuss whether SCs, SCPs and SCMSs are to be controlled via licensing.

⁴⁵ Information available at: <http://webcache.googleusercontent.com/search?q=cache:http://codius.org>, accessed 18 November 2014.

⁴⁶Information available at: www.cryptolaw.com, accessed 18 November 2014.

⁴⁷Information available at: www.bithalo.org, accessed 18 November 2014.

⁴⁸Information available at: www.counterparty.co, access 18 November 2014.

⁴⁹G.M., *The legacy of Napster A tale of two file-sharers*, 13 Sep 2013, The Economist. Available at: <http://www.economist.com/blogs/prospero/2013/09/legacy-napster>.

⁵⁰Ibid.

The first issue to determine is whether advising on SCs constitutes practicing law. If so, then that activity would be included within the purview of the state law society. Either way, there will most probably need to be some clarifications and/or amendments made to the applicable law.

The second issue is to determine whether administrating SCs, i.e. running an SCMS, also ought to be a licensed activity. This is a new concept with which is difficult to bring a real world analogy. Therefore, this issue requires a fresh look.

12.5. Suggestions

In conclusion, the authors' suggestion to legislatures is to extend the current intent of the definition of what constitutes practice of law to its congruent construction in order to accommodate advising on SCs. When it comes to administrators of SCMSs, it is reasonable for there to be some minimum level of risk controls, such as insurance; or a reserve requirement in proportion to the digital assets under control of its SCs.

12.6 Takeaway

The authors hope that this paper has educated the reader in this new (not even yet fully developed) technology. As much as we would like to take credit for the predictions made herein that may eventually come true in the future, we must hedge against some not coming true by reminding the reader of what the future looked like in the mid 90s.

When the Internet was in its infancy, one could scarcely predict the rise of Google, Facebook. It was a time where only a few were even aware its existence or its technological feasibility; even amongst those who were, many could not see its utility.

We are in the same period, just like the early 90s on the Internet: where technological issues are not yet ironed out, where its use is limited to academic exercises and where only pure enthusiasts endure the clumsiness and user-un-friendliness.

That said, we can only imagine where the future of SCs will take us.

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ANIMAL PROTECTION IN SLOVAK REPUBLIC

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Abstract

The author in this article devoted to the protection of animals in the Slovak Republic. The author in the introduction of article takes measure the legal status of animals in the Slovak Republic, and compares this with the neighboring countries of the European Union. Subsequently, the author discusses the current legislation protecting of animals in the Slovak Republic and critical of its stance on the lack of animal protection legislation in the Slovak Republic, and points out the need to adopt the Act on the protection of animals in Slovak republic. Furthermore, dedicated to the protection of exposed animals in circuses, and also highlights the lack of the legislation in this area. At the end the author comprehensively evaluates animal welfare legislation in the Slovak Republic, pointing to its fundamental problems.

Keywords

the legal status of animals in Slovak Republic, Protection of animals, Protection of animals in circuses

1. Introduction

Motive to write this scientific article was current issue, largely discussed by general public as well as professional community, regarding legal status and animal protection in the Slovak Republic.

This scientific article focuses exclusively on animal protection legislation at national level in the Slovak Republic; comparison of neighbouring EU countries is also taken into account in this evaluation.

In Slovak Republic, there are two basic legislations with the force of law governing animal protection: Act No. 39/2007 Body of Laws Veterinary care Act as amended (hereinafter “Veterinary Care Act”)⁵¹ and the Act No. 300/2005 Body of Laws Criminal Code Act as amended (hereinafter “Criminal Code Act”)⁵² as well as several other subordinate legislations⁵³.

⁵¹ Veterinary Care Act is not purely dedicated to legal protection of animals, but it also covers following areas:

- a) “Veterinary health requirements include animals, hatching eggs and sperm, animal’s ova and embryos (hereinafter “germ product”) in terms of animal health and welfare.
- b) Veterinary requirements for products of animal origin 1) including animal by-products and derived products 2) (hereinafter “animal by-product”) and selected products of plant origin 2a) in the interest of animal health protection,
- c) Veterinary animal health requirements, hatching eggs, as well as products of animal origin, including animal by-products 2) in the interest of public health protection,
- d) Rights and obligations of individuals and companies within the veterinary field, as well as specific veterinary activities and conditions for their implementation,
- e) Set-up, functions and powers of bodies exercising State management within the veterinary field,
- f) Penalties for breach of the duties appointed by this law. (section 1, clause 1 of the Veterinary Care Act)”.

⁵² Criminal Code Act amending criminal liability for animal cruelty – section 378 of the Criminal Code Act and for animal negligence – section 378a of the Criminal Code Act.

⁵³ For example Decree of the Ministry of Agriculture and Rural Development of the Slovak Republic no. 143/2012 Body of Laws about keeping dangerous animals; Government ruling (of Slovak republic) no. 432/2012

There is a lack of comprehensive animal protection legislation in Slovak Republic. I understand, under the comprehensive legislation, defining the term the animal and its exclusive legal status, also identifying requirements and conditions for the protection of animals against torture, rights and obligations of individuals and companies in section of animal protection, system, functions and powers of bodies exercising State administration in the field of animal welfare, as well as measures and sanctions used to ensure sufficient protection of animals in Slovak Republic.

I would argue that Slovak Republic has one of the weakest legislations providing legal protection of animals. Let me point out few examples. In Austria, there is a separate animal protection legislation- „Bundesgesetz über den Schutz der Tiere (Tierschutzgesetz - TschG)”⁵⁴. In Czech Republic there is a separate animal protection legislation “Act no. 246/1992 Coll. Protection of animals against cruelty”. In Poland the animal protection legislation is represented by: ustawa z dnia 21 sierpnia 1997 r. o ochronie zwierząt, ustawa z dnia 16 września 2011 r. o zmianie ustawy o ochronie zwierząt oraz ustawy o utrzymaniu czystości i porządku w gminach.

At the same time we cannot ignore the fact, to which this article is also dedicated, that there is an absence of any rules governing the prohibition and restriction of animals (wild or domesticated) performing in circuses or at least identifying the precise terms and conditions under which these animals can do so. The Slovak Republic is currently regarded as one of the most important countries of the EU for circuses involving animals, because there is a lack of any legal adaptation of the rule managing the animals performing in circuses.

On the other hand, circuses have been totally banned or restricted in countries like France, Germany, Hungary and others. For example in Austria following legislation represents the animal ban in circuses – BGBl. No. 489/2004 Regulation of the Minister of Health and Women on the protection, management and involvement of animals in circuses, variety shows and similar facilities (Animal Protection Regulation Circus – Tierschutz – Zirkusverordnung Tschu - ZirkV); BGBl. II No. 485/2004 Regulation of the Minister of Health and Women on the minimum requirements for the keeping of horses and equine, swine, cattle, sheep, goats, deer, llamas, rabbits, poultry, ostriches and fish culture (1st livestock Regulation - Tierhaltungsverordnung); BGBl. II No. 486/2004 Regulation of the Minister of Health and Women on the keeping of vertebrates that do not fall under the first Livestock Regulation, on wildlife with special requirements on the keeping and wildlife species for which keeping is forbidden for reasons of animal welfare (2nd Livestock Regulation – Tierhaltungsverordnung).

There are also ongoing protests, petitions and public rallies supporting ban on animals performing in circuses, but without any response from the authorities.

2. Legal Status of animals in Slovak Republic

Despite numerous legislative efforts and legislative proposals, the legal status of animals in Slovak Republic is very unfortunate. Legally, the animal in Slovak Republic is considered an item. This legal status of an animal as an item results from legal theory as well as the Civil Code. Irrespective of the moral aspect of the animal's perception as an item, this legal status

Body of Laws which stipulate requirements for the protection of animals during slaughter; Decree of the Ministry of Agriculture of the Slovak Republic no. 123/2008 on details of the protection of pets and requirements for quarantine stations and animal shelters.

⁵⁴ Protection of Animals Act.

also causes many legal issues in practical life.

There are many issues with the animal's legal status as an item, I will, however, attempt to outline two very significant ones.

The animal is perceived as an item. Under a Slovak law, if a non-owner finds out or sees that there is a damage to be done to a foreign thing/item (this belonging to a third party), they may intervene to avert the damage if their involvement would not cause even more damage.⁵⁵ Under the current legal status, same relates to animals. For example if I see an animal locked in a vehicle during a summer heat wave, suffocating and suffering in extreme heat, I should not intervene by smashing a car window, as by doing so and rescuing this animal I may cause even greater damage to the vehicle than the one of the item in the car (the animal), which might be of a low value.

The second, very significant example is, that under the Slovak law is valid that: "the one who finds the lost item is obliged to return it to the owner. If the owner is unknown, the finder is obliged to hand this item over to the competent authorities. If the owner does not claim the lost item within one year since it has been handed over, it falls to the State".⁵⁶ This means that in case somebody has found lost animal they are obliged to return it to its owner. If the owner is not known, they are obliged to hand it over to relevant government body. Following this, authorities should look after the animal for a period of one year, if the owner yet still has not been identified, than the ownership of this animal falls to the State, who may treat it as its own. This obviously causes huge problems in reality as well as activities of dog shelters dealing with lost animals on daily basis.

In the view of the above facts, as well as many other problems in Slovak Republic related to the animal being considered an item I deem it necessary to adopt a new legal definition of an animal and thus adjust its legal status within the legal system of the Slovak Republic.

It is not a simple act to define a legal concept of an animal, nor it is simple modifying its legal status, however the fact that neighbouring countries have defined a different legal concept of an animal as well as its legal status, it is possible to be inspired by foreign legislation. The legislation of the Czech Republic seems to be a good option to be inspired by.

Under the provisions of section 494 of Act no. 89/2012 coll. Civil Code as amended legislation, quote "Living animal has a special meaning and value as thinking living creature. Live animal is not an item and regulations governing items do not relate to living animal and shall only do so to the extent that it does not contradict its nature."

Further under the provision of section 1 of Act no. 246/1992 coll. Protection of animals against cruelty as amended legislation, quote "animals, as they are living creatures capable of feeling pain and suffering from abuse, deteriorating of their health and their meaningless killings, caused by man even by negligence."

Had the legal definition of an animal in Slovak Republic been inspired by the Czech legislation, this would have been a huge stepping stone for the legal status of an animal within

⁵⁵ Example: We see that somebody's house is on fire, so we are allowed to smash the window, damage caused is few Euros, but we can extinguish the fire and prevent massive damage – this action is allowed.

We see that somebody's chocolate is melting in the direct sun light in the car, we smash the window, damage caused is 300 Euros, but we will save the chocolate costing 2 Euros – this action is not allowed.

⁵⁶ Section 135 clause 1 of Civil Code legislation as amended.

Slovak law system and this would lead to many other legislative changes both the Civil Code of the Slovak Republic and also specific legislation. Of course the most appropriate option appears to be to adopt a new law to protect animals in the Slovak Republic which would reflect the new legal status of animal; to this I dedicate the rest of the article.

3. Protection of animals

First of all I would like to point out the absurd situation that occurred in the Slovak Republic regarding microchipping animals – dogs, cats and ferrets. National Council of the Slovak Republic (hereinafter referred to as “NRSR”) passed an amendment to the Veterinary Care Act based on which required all dogs, cats and ferrets kept in Slovakia to be microchipped. This duty has been accepted by the NRSR in 2011 and there has been 2 year transition-period which required all dogs, cats and ferrets to be microchipped by the 30.09.2013.

As this amendment came into force (two years since the amendment has been valid), there has been a lot of criticism in Slovak Republic by the public aimed at the duty that all dogs, cats and ferrets kept in Slovakia are subject to mandatory microchipping. Following this NRSR responded yet again, by the amendment of Veterinary Care Act which has seen the duty to microchip abolished as of 1st January 2014. Reform of the Veterinary Care Act was put in practice by the amendment of Veterinary Care Act approved by the National Council on 22.10.2013.

NRSR originally introduced mandatory microchipping of animals following the rules of the EU, but only as an error of transferring the EU rules into Slovak legal system, as only the animals moving with their owners within the EU or arriving from the third countries must be microchipped.

I consider such action by the NRSR absurd.

Furthermore there is an absence of comprehensive animal protection legislation in Slovak Republic. I understand, under the comprehensive legislation, defining the term the animal and its exclusive legal status, also identifying requirements and conditions for the protection of animals against torture, rights and obligations of individuals and companies in section of animal protection, system, functions and powers of bodies exercising State administration in the field of animal welfare, as well as measures and sanctions used to ensure sufficient protection of animals in Slovak Republic.

Adopting a completely new separate legal rule with the force of law that would protect animals seems to be the best solution which is being sought after for many years by various associations dedicated to the protection of animals. As it is evident from the above, that the rule protecting animals is part of a legal system in many EU countries it is about time that Slovak Republic proceed to adopt a law protecting animals as well.

In addition to already mentioned rights and duties, which should be the subject of the animal protection law, I deem it to be necessary, from the practical point of view that the law would differentiate wild animal, tamed animal, animal kept in captivity, domesticated animal and last but not least an animal kept in the zoo.

Furthermore I consider it very urgent to modify the rights and duties in case of the found animal, which of course must be adapted differently than those of the found item. Basic difference in terms of legal treatment of a found animal and found item is that the found

animal should be reported or handed over to the local authorities (city, town, and village). The second significant change should be the shortened period during which the rightful owner of the animal can claim the ownership, from one year down to two months, and after this two month period either the finder or the local authority will acquire ownership of this animal.

Furthermore I consider it absolutely essential to amend the issues related to fetus carried by the animal as well as the issue of animal inseminating another animal. As to the first issue I am clearly inclined to the fact that the owner of the animal is also the owner of the fetus carried by this animal. As to the second issue, this one is quite difficult and it is necessary to mainly modify the ownership of the newborn animals, in case that the insemination took place between animals of different owners, as well as it is necessary to adjust the matter of the fee related to animal insemination.

Last but not least is the issue related to the damage caused by the animal which also needs to be modified as well as liability for such damage. I would suggest the split in to two groups of liability; as to general damage and the damage caused by working animal.

Among other things I also see an issue with enforcing the law in Slovak Republic related to animal protection where I would propose to increase the power of individual government bodies, such as the regional veterinary and food authorities, state veterinary and food authorities as well as law enforcement agencies, in particular the right to enter the property or motor vehicle when the offense is being committed against the animal. I would also extend the powers of state agencies in the field of animal protection so they would have the right to enter the dwelling or the land in order to carry out an inspection, since the current powers, which I consider insufficient, do not allow this.

4. Protection of animals in circuses

I consider the absence of any comprehensive regulation relating to the prohibition or restriction of animals performing in circuses to be one of the biggest issues.

The Slovak Republic is a home country of many circuses that have been forced to leave the countries of their origin by their regulations and settled in Slovakia due to the absence of any regulations of this kind.

Legal ban or restriction on keeping animals in circuses is common in the countries of EU. For example in Belgium the legislation protecting animals in circuses is contained in "Royal Decree to ensure that the welfare of animals used in circuses and travelling exhibitions for the amusement of the public (2 September 2005) as amended by RD of 26 April 2007". In Norway the legislation governing circuses is contained in „Regulations on animal health requirements governing the movement of circus animals within the EU (2007)⁵⁷; Regulations for non - commercial transport of animals and transportation of circus animals (2012)⁵⁸. Legislation on the protection of animals in circuses is contained within many other countries of the EU, which is part of the legal regulations themselves or part of the animal protection law, or at least part of a legislative rule.

There are several options how to restrict or ban animals performing in circuses in Slovak Republic, either by adopting a separate legislative rule or amending Veterinary Care Act. Adopting a new legislative rule seems to be the most appropriate option that would

⁵⁷ [Http://www.lovdata.no/for/sf/ld/td-20070810-0955-0.html#1](http://www.lovdata.no/for/sf/ld/td-20070810-0955-0.html#1).

⁵⁸ [Http://www.lovdata.no/for/sf/ld/td-20120208-0129-0.html#1](http://www.lovdata.no/for/sf/ld/td-20120208-0129-0.html#1).

comprehensively regulate this issue or adopting Animal Protection Act, which would also include the protection of animals in circuses.

At present, however this solution is not possible due to the lack of interest of state authorities, therefore the success in this area would be an amendment and change of the Veterinary Care Act.

Following this fact I propose legislative intent by revision and amendments of Veterinary Care Act whereby I submit a proposal *de lege ferenda* relating to the protection of animals in Slovak Republic.⁵⁹

I propose the terms pet and domesticated animal to be defined within the legislative amendment as well as subsequent withdrawal of negative definition of wild animal.

Consequently it is necessary to define the concept of animal performance and of course the definition of circus is also needed. Only once these concepts have been embedded in the law we can legally ban wild animals performing in circus as well as keeping the wild animals in the circus.

The legislative proposal was inspired by the Austrian legislation which has one of the most elaborate laws in this field.

5. Conclusion

It was not the purpose of this article to propose solutions to all problems within animal protection in Slovak Republic, but comprehensively highlight these issues.

For that purpose several important issues have been selected which we may encounter in this area, in particular the issue of defining an animal, the issue of legal status of an animal as an item within the Slovak legal system and related relevant issues. The issue with mandatory labelling (registering) of animals, the liability issue caused by negligence, the issue with liability for damage inflicted on animal or caused by an animal, the issue with responsibility of the owner or the keeper of the animal and the last but not least the issue related to restricting or banning the animals from performing in circuses.

Individual selected issues within the animal protection in Slovak Republic were criticized and compared to foreign legislations.

⁵⁹ Section 2 letter d) 2. is renewed by e), as follows: “domesticated animal; animal genera of livestock, swine, sheep, goats, with the exception of exotic species, As both species of camel, water buffalo, domesticated rabbit, domesticated dog, domesticated cat, domesticated poultry and domesticated fish,”

Section 2 letter e) is renewed by f), as follows: “pets; animals kept and bred in household as companions or at hobby-group of pet species or domesticated carnivores, reptiles, hares, parrots, finches (Fringillidae) and columbidae (columbiformes) and of fish group,”

Section 2 letter f) is renewed by g), as follows: “wild animals are animals of all species except domesticated animals and pets,”

Section 2 letter g) is renewed by h), as follows: “animal performance is any form of showing, exhibiting and demonstrating of animals, performing with or on animals as well as breeding, training, drill and acquiring of animals for these purposes,”

Section 2 letter h) is renewed by i), as follows: “circus is permanent or travelling apparatus, where one person or group of persons perform routine, thereafter mobile or immovable amusement park, entertainment facilities and variety shows, menageries, aquariums, dolphinarium and other entertaining facilities.”

Section 22 clause 3 renewed by letter o) as follows: “using wild animal to perform in circus and keeping wild animal in the circus”

In conclusion I urge the solution of this situation to be addressed to each issue closely and individually, given the fact that the Slovak Republic is one of the last countries of the EU lacking legal status of an animal and there is no separate law protecting these nor there is any legislation governing animal performance in circuses.

Sources

1. Act No. 39/2007 Coll. Veterinary care Act as amended
2. Act No. 300/2005 Coll. Criminal Code Act as amended
3. Act No. 40/1964 Coll. Civil Code Act of Slovak republic as amended
4. Act No. 246/1992 Coll. Protection of animals against cruelty as amended
5. Act No. 89/2012 Coll. Civil Code Act of Czech republic as amended
6. Decree of the Ministry of Agriculture and Rural Development of the Slovak Republic No. 143/2012 Coll. about keeping dangerous animals
7. Decree of the Ministry of Agriculture of the Slovak Republic No. 123/2008 Coll. on details of the protection of pets and requirements for quarantine stations and animal shelters.
8. Government ruling (of Slovak republic) No. 432/2012 Coll. which stipulate requirements for the protection of animals during slaughter

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L'INCOMPATIBILITÀ DEL MANDATO DEL SINDACO CON ALCUNE CARICHE

INCOMPATIBILITY OF AN OFFICE OF COMMUNITY MAYOR WITH SOME OTHER FUNCTIONS

JUDr. Veronika Munková, PhD.

Abstract

In this paper the author analyzes the problems of incompatibility of an office of community mayor with some other functions. The function of community or municipal mayor is admissible to hold and execute concurrently with the obligations which arise from the employment relationship. In this connection the author refers to problems which originate in practical application. Initially she refers to cases where collision occurs between the performance of the function (office) of the community or municipal mayor and his personal business activities, or with cases when they figure as executives in the company with limited liability or as members of board of directors in or joint stock company. In the conclusion of the article she analyzes particular types of legal sanctions which can be taken against community or municipal mayors, who violate the provisions of the Act. No. 357/2004 Coll. on protection of public interest in exercise of office of the public officials.

L'estratto

In questo articolo l'autore analizza i problemi dell' incompatibilità della carica di sindaco del comune con alcune cariche. La carica di sindaco del comune oppure del sindaco della città è in grado di eseguire lungo riempito gli obblighi derivati dall' occupazione. In questo contesto, l'autore si riferisce in particolare ai problemi che sorgono nell'applicazione pratica. In primo luogo, si riferisce ai casi, quando si verifica una collisione tra la carica di sindaco del comune oppure il sindaco della città con attività commerciali o quando sono gli amministratori di una società a responsabilità limitata o membri del consiglio delle società per azioni. Alla fine descrive particolare tipo delle sanzioni legali che potrebbero essere attribuiti ai sindaci del comune che violano la legge n. 357/2004 sulla protezione dell'interesse pubblico nell' esercizio della carica di pubblici ufficiali.

Keywords

community mayor, municipal mayor, public official, incompatibility of office, salary of the community mayor, sanctions

Parole chiave

il sindaco del comune, il sindaco della città, il pubblico ufficiale, l'incompatibilità del mandato, il salario del sindaco del comune, le sanzioni

1. L'introduzione

Il tema del mio articolo considero attuale in vista delle elezioni comunali nel 15 novembre 2014. Le elezioni sono condotte in conformità con la legge n. 346/1990 sulle elezioni ad organi comunali. Il numero delle circoscrizioni elettorali (comuni e città) è 2926 in base alle informazioni disponibili sul sito web dell'Istituto statistico della Repubblica slovacca.⁶⁰

In generale si può dire che in Slovacchia viene rispettato il funzionamento autonomo dei

⁶⁰Disponibile su questo sito: <http://volbysr.sk/sk/districts.html>.

comuni e delle città e naturalmente, i loro organi. L'autogoverno del comune è attuato da organi comunali eletti che sono il consiglio comunale e il sindaco del comune.

Anche la Costituzione della Repubblica slovacca come una legge fondamentale del nostro stato, prevede che gli organi del comune sono il consiglio comunale e il sindaco del comune. Tranne la Costituzione della Repubblica slovacca regola il sindaco del comune e del consiglio comunale la legge n. 369/1990 su Comuni (di seguito il "Codice su comuni"). Nel caso della capitale Bratislava sono gli organi il consiglio municipale e il sindaco di Bratislava.⁶¹ Il sindaco può essere considerato come il sindaco del comune di carattere urbano. (Nel testo continuerò ad usare il nome sindaco del comune). Bratislava è divisa in distretti municipali e gli organi dei distretti municipali sono il consiglio locale e il sindaco del distretto municipale. Lo stesso vale per la città di Košice.

In conformità con Codice su comuni, il sindaco del comune è l'organo esecutivo supremo del comune. Il sindaco del comune è dunque l'organo indipendente di competenza originale. Il sindaco del comune è una funzione pubblica. "Il sindaco non è un dipendente del comune e la scelta per caratterizzare essa non crea un rapporto di lavoro con il comune."⁶² Un'eccezione è la valutazione del sindaco del comune ai fini dell'assicurazione sanitaria e sociale. Ai fini del pagamento dell'assicurazione sanitaria e sociale è il sindaco del comune di lavoro del dipendente.

Il sindaco del comune può anche effettuare oltre a soddisfare gli obblighi derivati dal rapporto di lavoro. Questo deriva direttamente dalla legge n. 311/2001 Il Codice del lavoro, in cui si afferma: "Il datore di lavoro deve fornire al lavoratore il tempo libero per il tempo necessario per esercitare le funzioni pubbliche, doveri civici ed altre attività di interesse generale in cui tale attività non possono essere eseguite al di fuori dell'orario di lavoro."⁶³ Un dipendente che si lascia a causa dell'esercizio delle cariche pubbliche non ha diritto al rimborso del salario del datore di lavoro. Il sindaco del comune può essere in occupazione che continua o trarrà off per quanto necessario, o sarà liberato dal lavoro. Dalla posizione del datore di lavoro è svantaggioso, mantenere lo stesso lavoro per un dipendente che viene liberato per il sindaco del comune. Il sindaco del comune può terminare l'occupazione in qualsiasi momento.

Anche se il sindaco del comune non ha diritto al salario dal datore di lavoro riceve il salario per la carica del sindaco del comune. Ha diritto al salario dalla data di composizione è giuramento prescritto. Il sindaco del comune comprende salario a decorrere dalla data della composizione del giuramento prescritto. Il salario del sindaco del comune non deve essere inferiore a quello previsto nel §3 comma 1 della legge n. 253/1994 sullo status giuridico e gli emolumenti dei comuni e dei sindaci del distretto municipale. Il salario del sindaco del comune "è il prodotto del salario mensile media nell'economia nazionale e la legge specificata volte da popolazione."⁶⁴ Per esempio nei comuni fino a 500 abitanti - 1,49 volte e in più di

⁶¹Nella legge n. 377/1990 della capitale della Repubblica slovacca è indicato:

“(1) Bratislava è una unità territoriale, autonoma ed amministrativa indipendente della Repubblica slovacca; riunisce le persone che hanno la loro residenza permanente. Bratislava esegue autonomia territoriale appartenente al comune e svolge il ruolo di governo trasferito al diritto comunitario.

(2) Il distretto municipale è l'unità autonoma ed amministrativa di Bratislava; riunisce i residenti che hanno la loro residenza permanente. Il distretto municipale fa autogoverno di Bratislava e la competenza trasferita per quanto definito dalla legge e dallo statuto di Bratislava; In questo caso ha la posizione comune.

(3) Un residente di Bratislava dal luogo di residenza, mentre è il residente del distretto municipale.”

⁶²M. Vrabko et al., *Správne právo hmotné. Všeobecná časť*, Bratislava 2012, p. 160.

⁶³Guarda § 136 art. 1 e 2 del Codice del lavoro.

⁶⁴Disponibile su questo sito: <http://www.employment.gov.sk/sk/praca-zamestnanost/vztah-zamestnanca-zamestnavateľa/voleni-funkcionári/platové-pomery-starostov-obcí-primátorov-miest.html>.

100.000 abitanti - 3,58 volte. Nel 2014 il salario mensile nell'economia nazionale è 857 euro, naturalmente, senza reddito d'impresa e salari non registrati.⁶⁵ "Nel caso in cui il salario del sindaco del comune è scesa al di sotto valore determinato dalla legge, il valore del salario del sindaco per il mese di gennaio fino a marzo dell'anno solare sarà nuovamente pagato. Pertanto, il salario del sindaco calcolato sulla base dei dati statistici deve essere discusso e deciso al livello del consiglio comunale."⁶⁶

La decisione del consiglio comunale può aumentare il salario del sindaco del comune fino al 70 %. Anche in questo caso è la questione piuttosto delicata. Perché il suo aumento non può essere considerato come risparmio dei soldi dal bilancio del comune. La domanda di valutazione del consiglio comunale è influenzata dai fattori soggettivi, non ci sono i criteri oggettivi fissati dalla legge in base ai quali è possibile l'aumento.

In pratica, il problema è che gli individui impiegati non vogliono lasciare lungo termine di questo lavoro senza pagare e fare la carica di sindaco del comune. Questo è un problema particolare in piccoli comuni dove non hanno soldi e il sindaco del comune avrebbero dovuto svolgere questa carica gratis o ore di lavoro al di fuori. E inoltre, "quando il sindaco del comune fa la sua carica in contemporanea con lo svolgimento dei suoi compiti nel lavoro non è specificamente protetto contro la terminazione."⁶⁷

Come ho già scritto, il sindaco del comune è un pubblico ufficiale dell'autogoverno. Quindi è anche un soggetto agli obblighi generali e le limitazioni previste dalla legge. In particolare, mi riferisco al campo di applicazione del Codice su comuni e la legge n. 357/2004 sulla protezione dell'interesse pubblico nell'esercizio della carica di pubblici ufficiali. ("legge n. 357/2004").

Nel Codice su comuni §13 comma 3 afferma che al fine di evitare conflitti di interessi del sindaco del comune con il funzionamento e l'organizzazione dell'autogoverno all'esercizio delle sue cariche incompatibili:

- a) il membro,⁶⁸
- b) il dipendente del comune in cui è stato eletto,
- c) l'organizzazione autorità di bilancio sindaco o organizzazione contributivo stabilito dal comune in cui è stato eletto,
- d) il presidente della regione autonoma,
- e) il capo del dipartimento governativo,
- f) sotto una legge speciale.

Legge speciale si intende, ad esempio, la legge n. 154/2001 su procuratori e candidati per procuratori. Tra l'altro, questa legge prevede, l'incompatibilità del mandato del procuratore di carica in enti locali.⁶⁹ Il sindaco del comune è anche esempio dell'incompatibilità con una carica di giudice.

⁶⁵ [http://statdat.statistics.sk/cognosext/cgi-bin/cognos.cgi?b_action=cognosViewer&ui.action=run&ui.object=storeID%28%22i94C7052B240A492FB3BE8C7A487D337B%22%29&ui.name=Priemern%C3%A1%20mesa%C4%8Dn%C3%A1%20mzda%20v%20hospod%C3%A1rstve%20SR%20\[pr0204qs\]&run.outputFormat=&run.prompt=true&cv.header=false&ui.backURL=%2fcognosext%2fcps4%2fportlets%2fcommon%2fclose.html&run.ouputLocale=sk](http://statdat.statistics.sk/cognosext/cgi-bin/cognos.cgi?b_action=cognosViewer&ui.action=run&ui.object=storeID%28%22i94C7052B240A492FB3BE8C7A487D337B%22%29&ui.name=Priemern%C3%A1%20mesa%C4%8Dn%C3%A1%20mzda%20v%20hospod%C3%A1rstve%20SR%20[pr0204qs]&run.outputFormat=&run.prompt=true&cv.header=false&ui.backURL=%2fcognosext%2fcps4%2fportlets%2fcommon%2fclose.html&run.ouputLocale=sk).

⁶⁶ <http://www.employment.gov.sk/sk/praca-zamestnanost/vztah-zamestnanca-zamestnavatela/voleni-funkcionar-i/platove-pomery-starostov-obci-primatorov-miest.html>.

⁶⁷ M. Thurzová, *Pracovné vzťahy v obecnej samospráve a ich právna regulácia*, Justičná revue 2011, vol. 63, no. 3, p. 351-369.

⁶⁸ Per chiarimenti afferma che essa ha in mente i membri del consiglio comunale.

⁶⁹ § 11 comma 1 della legge n. 154/2001 su procuratori e candidati per procuratori.

Nel caso del corpo di polizia, del Servizio degli informazioni slovacco, del Carcere e Tribunale guardia, della polizia Ferroviaria, le cariche vengono interrotte. In questo caso, non è possibile l'esercizio parallelo di due cariche.

Incompatibilità dell'esercizio delle cariche, tuttavia, è il caso in cui uno stesso sindaco del comune può essere membro della regione autonoma o del Consiglio nazionale anche del membro del Parlamento europeo. Diversi autori hanno messo in dubbio⁷⁰ l'esercizio parallelo di due cariche, per esempio il sindaco del comune e membro del Consiglio nazionale della Repubblica slovacca ("NRSR"). Il principale fattore da prendere in considerazione per l'analisi che le sessioni del NRSR sono sempre. Non è semplicemente fisicamente né fattibile, che il sindaco del comune sia presente nel comune ed anche nelle sessioni del NRSR. Allo stesso tempo, faccio notare che il sindaco della città di Bratislava e di Košice è incompatibile con il sindaco del distretto municipale.

Oltre al Codice su comuni l'incompatibilità dell'esercizio degli ufficiali pubblici è regolata nella legge costituzionale n. 357/2004. Il campo d'applicazione di questa legge è definito all'art. 2, che stabilisce che esso si applica ai sindaci dei comuni e ai sindaci dei comuni del distretto municipale di Bratislava e Košice, nonché i presidenti delle regioni autonome. Questa legge rende chiaro che il sindaco del comune è un pubblico ufficiale.

Come è ulteriormente specificato all'art. 4 comma1 della legge n. 357/2004⁷¹ "tenuto a svolgere i loro compiti per promuovere e proteggere l'interesse pubblico. Nell'esercizio delle loro funzioni di ufficio pubblico non deve privilegiare un interesse personale sopra l'interesse pubblico."

L'incompatibilità delle cariche sono esaminate dal punto all'esercizio del sindaco del comune e non nella sua stessa candidatura e non è l'ostacolo che dovrebbe impedire che il singolo per questa posizione sarà nominato di nuovo. Inoltre, l'articolo 5 della legge n. 357/2004 afferma:

- (1) L'ufficiale pubblico non può esercitare le funzioni, i lavori e le attività che sono incompatibili con i doveri d'ufficio pubblico della Costituzione slovacca e con le leggi,
- (2) L'ufficiale pubblico non può essere l'autorità statutaria o un membro dell'autorità statutaria, i membri della direzione, di controllo o di vigilanza di una persona giuridica, che è stato istituito per le attività commerciali, ad eccezione dell'autorità assemblea generale e dell'incontro dei membri. L'ufficiale pubblico ha vietato di attività commerciali⁷²; non si applica al lavoro, che può fare una persona fisica, come previsto dalla legge,
- (3) Il divieto di cui al paragrafo 2, prima frase, non si applica per l'appartenenza ad un pubblico ufficiale in persona giuridica, derivante dalla legge o dell'esercizio dell'ufficiale pubblico,
- (4) Il divieto di cui al paragrafo 2, prima frase, non si applica alla rappresentazione
 - a) uno stato nei corpi delle persone giuridiche di proprietà dello Stato,

⁷⁰Ad esempio J. Tekeli, *Nezlučiteľnosť funkcií starostu obce*, Právo pre ropu a obce 2014, no. 9, p. 13.

⁷¹L'interesse pubblico è definito come segue : "interesse che porta guadagno materiale o altra utilità per tutti i cittadini e molti cittadini."

⁷²La definizione delle attività commerciali è la stessa sia nel diritto pubblico e privato. Affari caratterizzato a termini in legge n.513/1991 Codice del Commercio, significa "attività sostenuta effettuata separatamente imprenditore in nome proprio e sotto la propria responsabilità a scopo di lucro." Legge n. 455/1991 su licenze commerciali stabilisce " continua attività a gestione indipendente a proprio nome, sotto la propria responsabilità a scopo di lucro e alle condizioni previste di questa legge."

b) il Fondo Nazionale di proprietà della Repubblica slovacca nei corpi delle persone giuridiche con la partecipazione del Fondo Nazionale di proprietà nazionale della Repubblica slovacca o

c) un comune o un regione autonoma nei corpi delle persone giuridiche con la partecipazione del comune o del regione autonoma.

(5) Il divieto di cui al paragrafo 2, prima frase, non si applica alle attività di paragrafo 4, ivi previsti entità giuridiche svolgono attività commerciali e quando l'appartenenza di questi non offre una ricompensa finanziaria,

(6) Le disposizioni della comma 2 non si applicano ai ufficiali pubblici di cui all'art. 2 comma 1 p) e r). Il divieto di cui al paragrafo 2, seconda frase, non si applica ai sindaci dei comuni.

(7) Se un ufficiale pubblico resta in carica, di occupazione o di attività di cui ai paragrafi 1 e 2, al momento della fornitura di funzioni pubbliche ne, entro 30 giorni dalla disposizioni alla carica pubblica tale ufficio, lavoro o attività o cessare di svolgere un'azione legale legge per la sua cessazione.⁷³

Alcuni sindaci dei comuni considerano legge costituzionale n. 357/2004 come una limitazione, ma l'intenzione è principalmente per prevenire la formazione di conflitto personale con il pubblico di interesse. Il più frequente nella pratica, vediamo i casi in cui si verifica una collisione tra i doveri del sindaco del comune con le attività commerciali o sono gli amministratori di una società a responsabilità limitata o membri del consiglio delle società per azioni. Rilevo, tuttavia, tale legge n. 357/2004 prevede una deroga nel caso in cui il sindaco del comune rappresenta il comune nei corpi delle persone giuridiche, con la partecipazione del comune. Il sindaco del comune potrebbe essere un membro del consiglio delle autorità di vigilanza, ma solo nelle società in cui ha la propria quota comune. Per lo svolgimento delle funzioni delle cariche non ricevono alcuna ricompensa finanziaria. Anche qui si può essere d'accordo con l'opinione espressa dall'autore Tekeli che "al sindaco del comune, non si applica un divieto generale di attività commerciali."⁷⁴ Dobbiamo prendere in considerazione come viene l'intraprendimento definito. In questo caso, secondo l'autore "in termini dell' intraprendimento il sindaco del comune può essere un membro (azionista, membro, socio accomandante) in ogni società o cooperativa che svolgono attività a meno che è anche un membro della direzione, di controllo o di vigilanza di tale società. Il sindaco del comune come una persona fisica - imprenditore può fare intraprendimento sulla base di una licenza commerciale, un contadino lavoratore autonomo o come una persona che esercita un'attività che non è considerata come un mestiere (ad esempio un avvocato). Nel caso in cui il sindaco del comune si decide di continuare, per esempio, rimane un membro del consiglio di amministrazione della società per azioni di vigilanza è un fattore molto importante possibile ricorso legale, cioè imporre sanzioni. Da un altro punto di vista si può anche parlare del rapporto tra incentivi finanziari e le eventuali sanzioni.

Secondo una recente indagine svolta da Transparency International Slovacchia⁷⁵ (di seguito TIS), attualmente i 5 % dei sindaci dei comuni, cioè 133 sindaci dei comuni e dei sindaci delle città viola la legge n. 357/2004. Mentre la causa principale per la violazione della legge, TIS vede che i sindaci hanno le cariche dell' autorità statutaria nelle compagnie private sono anche continuando a fare l'intraprendimento. Anche più triste opera il fatto che i consigli ritenuto responsabilità attratto 4 sindaci del comune o sindaci delle città.⁷⁶ In un caso particolare,

⁷³Per motivi di chiarezza, vi mostro la versione autentica della legge. L'ho fatto perché l'articolo è stato tradotto in lingua italiana.

⁷⁴J. Tekeli, *Nezlučiteľnosť funkcie starostu obce*, Právo pre ropo a obce 2014, no. 9, p. 15-17.

⁷⁵Transparency International Slovakia è una organizzazione non governativa, fondata nel 1998.

⁷⁶Per maggiori dettagli si veda <http://www.transparency.sk/sk/starostovia-vo-velkom-porusuju-zakon-o-konflikte-zaujmov>.

quando era il sindaco di Bratislava, gli hanno conferito una multa di 27010,32 euro. La multa può essere inflitta solo nella misura in cui è elencata nell'articolo 9 comma 10 della legge n. 357/ 2004. Nella Repubblica slovacca non è possibile sanzionare sotto forma di un divieto di ri-candidatura per la carica di sindaco del comune.

Se il sindaco del comune ritiene che la decisione pagare una multa o la perdita del mandato è illegale, ha l'opportunità di presentare una proposta alla Corte costituzionale. Il proponente può quindi iniziare una revisione di tale decisione. In questo caso, la procedura per la revisione della decisione in materia di interesse pubblico e di evitare conflitti di interesse e procede secondo §73a comma 1 della legge n. 38/1993 sull'organizzazione della Corte Costituzionale, il procedimento dinanzi ad essa e lo statuto dei suoi giudici. La procedura inizia con una proposta di un pubblico ufficiale.

È quindi sotto la giurisdizione della Corte Costituzionale esaminare se il comportamento del proponente come un pubblico ufficiale, era in contrasto con le disposizioni della legge sull'organizzazione della Corte Costituzionale. Che significa se la decisione di un organo della recitazione in materia di interesse pubblico sia accettabile dal punto di vista costituzionale. Il rapporto giuridico tra i pubblici ufficiali e gli organi comunali ha autorizzato procedimento causa di interesse pubblico è un pubbliche relazioni e non civile. La Corte Costituzionale può confermare la decisione del consiglio comunale o annullarlo.

Un altro dei meccanismi sanzionari, che dovrebbe essere una priorità, ma ha un ruolo preventivo è chiamato un obbligo di segnalazione dei sindaci dei comuni (notare l'interesse personale, cariche, lavoro e situazione finanziaria). Ai sensi della legge n. 357/2004 sindaco del comune ha l'obbligo annuale, entro e non oltre 31.3 dare una notifica scritta di incompatibilità dell'esercizio delle cariche pubbliche con altre cariche. Se si tratta di un sindaco del comune appena eletto che ha tale obbligo entro 30 giorni dalla data in cui ha iniziato. Nella notifica scritta delle cariche di lavoro e della situazione finanziaria, i sindaci del comune devono indicare se soddisfino le condizioni di incompatibilità dell'esercizio dell'ufficio pubblico. La notifica scritta fa alla Commissione per la protezione dell'interesse pubblico del paese.⁷⁷ Un membro della Commissione può essere solo un membro del consiglio del comune.

Nel caso in cui il sindaco del comune dà falsa dichiarazione in tale notifica scritta, appropriata procedimento di progettazione. Tale procedimento è possibile anche nel caso in cui il sindaco del comune non dà avviso della sua situazione finanziaria mai. "Questo procedimento può essere effettuato dal consiglio comunale di propria iniziativa, se i risultati suggeriscono che il sindaco del comune ha dichiarato nella notifica scritta delle cariche, di lavoro e della situazione finanziari le informazioni false o incomplete e quindi viola le disposizioni della legge n. 357/2004, o consiglio comunale può iniziare mediante denuncia che è stata presentata direttamente al consiglio comunale o è stata ricevuta in forma scritta."⁷⁸ La legge stabilisce termine di 60 giorni per una decisione in materia. Inoltre, la decisione che ha gli elementi classici della decisione e non è specifica.

Uno degli altri meccanismi di controllo può essere considerato, la disposizione di legge in art. 8 comma 5 della legge n. 375/2004 per cui il pubblico ufficiale deve fare una notifica scritta

⁷⁷A termini di legge n. 357/2004 i comuni e le città devono istituire una Commissione per la protezione dell'interesse pubblico del paese nell'esercizio dei funzionari del comune e delle sue missioni.

⁷⁸P. Strapáč, *Nezlučiteľnosť výkonu funkcie starostu obce s výkonom podnikateľskej činnosti*, Právo pre ropo a obce 2013, no.11, p.16.

entro 30 giorni dopo la scadenza di un anno dalla data di cessazione dalla carica pubblica. La notifica scritta deve indicare:

- a) le persone che sono state impegnate in lavoro o in un rapporto simile,
- b) nelle quale persona giuridica è stato un membro della direzione, di controllo o di vigilanza,
- c) le persone giuridiche dove è diventato un membro, azionista o socio,
- d) con i quali parti hanno concluso il contratto, ad esempio, un contratto di agenzia, atto di donazione, un accordo tacito ed etc.

Per illustrare un funzionamento di questo meccanismo di controllo, in pratica, descriverò un esempio specifico. Il sindaco del comune non ha rispettato il divieto di essere per un anno a partire dalla fine di una carica membro pubbliche dell'autorità di gestione e il divieto di essere un socio delle persone giuridiche ai quali i due anni precedenti la cessazione della carica pubblica ha deciso di concedere aiuti o concedere licenze statali o di altri aiuti e benefici, nonché e nei due anni prima della fine dell'esercizio delle cariche pubbliche eseguite istituisce l'autorità di tale persone giuridiche. Il consiglio comunale ha iniziato procedimento contro ex sindaco in materia della protezione di interesse pubblico e di evitare conflitti di interesse. Successivamente, il consiglio comunale ha preso la decisione, che riguardava il sindaco del comune ed gli hanno conferito una multa di 3739,98 euro per la violazione dell'art. 8 comma della legge n. 357/2004.

Il proponente o ex sindaco ha affermato che al momento di questa decisione non è stato più ufficiale pubblico. Nella risoluzione della Corte Costituzionale⁷⁹ chiaramente affermato che "gli argomenti del proponente di non essere considerato un pubblico ufficiale nel 2012 non valgono e quindi la Corte costituzionale non ha trovato rilevante motivi, che dovrebbe tradursi in forse l'annullamento di tale decisione."⁸⁰ Secondo me, il sindaco del comune aveva violato il suo obbligo legale, ma resta il fatto che in realtà non aveva lo status di ufficiale pubblico. Per questa disposizione di legge piuttosto vedere la risposta del legislatore alla situazione in cui i sindaci dei comuni violano la legge, al fine di evitare la punizione soprattutto verso la fine del loro mandato. Quando si considera de lege ferenda dobbiamo sottolineare che ritengo tale disposizione di legge inutile.

La conclusione

Per ora si può fare conclusione che 133 sindaci dei comuni, tra cui sono i sindaci delle città violano la legge. Resta inoltre aperta la domanda perché in violazione della legge n. 357/2004 non può essere ritenuto responsabile, compresa l'applicazione di sanzioni come il divieto di ricandidatura alla carica di sindaco del comune o della città. In generale, ritengo che ancora una volta un candidato sindaco non può essere la persona che viola gravemente la legge. Come evitare questa situazione? Per testi giuridici si consiglia di aggiungere: "Nel caso in cui il sindaco nel corso del mandato viola art. 5 della legge n. 375/2004 relativa alla protezione dell'interesse pubblico nell'esercizio dei pubblici ufficiali e il consiglio comunale conferma tale decisione, il sindaco non può essere un candidato per l'ufficio nel prossimo mandato."

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UNFAIR CONTRACT TERMS IN THE CZECH REPUBLIC AFTER RECODIFICATION OF PRIVATE LAW

Iva Šťavíková Řezníčková

Abstract

In this article, the author analyzed the crucial changes connected with the transposition of the Council Directive 93/13/ECC into the Act No 89/2012, i.e. the Civil Code which has entered into force on January 1, 2014 as a part of recodification of private law in the Czech Republic. The author also deals with transposition of the so-called general clause and the annex to the Directive 93/13. She also analyses the scope of application of the Directive 93/13 in the context of consumer loan agreements which often contain unfair contract terms. In the final part of the article, attention is paid to the legislative technique which was used by the Czech legislators while transposing the Article 6 of the Directive 93/13 into the new Civil Code.

Keywords

Consumer, protection of consumers, unfair contract terms, consumer loan, new Civil Code.

1. Introduction

The roots of protection of consumers from unfair contract terms in the Union may be found in 1970s when the Commission proposed the Programme for a Consumer Protection (1975). The Commission then requested also an analysis of legislation concerning unfair contract terms in the particular Member states. A directive on protection of consumers against unfair contract terms was, however, not adapted for another thirteen years, i.e. on April 5, 1993.⁸¹ In the Czech Republic, the Directive 93/13 EEC (the “*Directive 93/13*”)⁸² was adopted on the grounds of the amendment No 367/2000 to the Civil Code No 40/1964. This amendment has also established the concept of consumer and consumer protection in so-called consumer contracts in the Czech Republic. There are also other laws on protection of consumers in Czech private law, e.g. the Act No 145/2010 on Consumer Loans, which has provided a foundation for extending credit to consumers. The area of consumer loans is typically vulnerable to such contractual terms, e.g. contractual penalties, arbitration clauses, choice of a court far away from the debtors dwelling, provisions on APR, which in light of the Directive 93/13 may be understood as unfair.

2. Protection of Consumers from Unfair Contract Terms before the Recodification of Private Law

Consumer protection was set forth in the general provisions, i.e. the Part I, chapter V, § 52 - §65 of the Civil Code No 40/1964 (the „CC“). This solution, however, was not conceptual and it interfered with the system of CC. Nonetheless, including the repective issue into the CC's part IXX on law of obligations seemed to be a clear solution from the legal point of view.⁸³

It was especially the art. 6 para 1 the Directive 93/13 which has stated that unfair terms of consumer contracts shall not be binding on the consumer. Having transposed this provision

⁸¹ B. Frie, *Die Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen und Ihre rechtlichen Grundlagen zwischen Verbraucherschutz- und Vertragsrecht*. 1997. 188 p. PhD thesis. Friedrich Alexander Universität, Faculty of Law, The thesis supervised by Profesor Dr. Schiemann.

⁸² The Council Directive 93/13/EEC of April 5, 1993.

⁸³ M. Selucká, *Ochrana spotřebitele v soukromém právu* [Consumer Protection in Private Law], C.H. Beck, Praha 2008, p. 18.

into the § 55CC, the lawgiver stated that the unfair terms of consumer consumer contracts shall be 'relatively invalid', i.e. it was considered to be a contingent valid deed. Aside from that, the consumer had to exercise his right against the supplier within the three year limitation period. As a result of improper implementation of the Directive 93/13 by some of the Member states, the Commission opened infringement procedure against the Czech Republic and several other Member states, e.g. Hungary, the Slovak Republic, Lithuania, Latvia, Malta and Poland. In the Czech Republic, this led to the passage of the Act No 155/2010 amending several laws in order to improve their application.⁸⁴ This Act established the concept that unfair contract terms are 'absolutely invalid'; such 'absolute invalidity' has to be considered by the courts *ex officio*.⁸⁵

3. Protection of Consumers from Unfair Contract Terms after the Recodification of Private Law

In this paper, the author will focus only on several selected core changes connected with the transposition of the Directive 93/13 into the new Civil Code No 89/2012 (the "NCC"), which entered into force on January 1, 2014. During the process of recodification of private law, it was being considered whether to include certain provisions on consumer protection into the new civil code⁸⁶ or to draft an independent consumer code. Based on a political decision, consumer protection was included into the NCC; the NCC's part IV (relative property rights), volume IV called *The provisions on Obligations arising from the Contracts Concluded by the Consumer* (§1812 et seqq). This decision will lead to many amendments of the NCC due to frequent legislative changes made in the EU law in this area; it was one of the main arguments against including the consumer issues into the NCC.

3.1. The General Clause (Article 3, para 1)

The general clause has been transposed into the §1813 NCC. The Directive 93/13 provides protection only against such terms that were not individually negotiated in terms of the art. 3 para 2 of the Directive 93/13. It means that the individually negotiated contractual terms do not fall within the scope of the Directive 93/13. Nevertheless, this does not prevent a Member state to employ so-called derogation clause (the art. 8) set forth in the Directive 93/13 and provided consumers with a higher degree of protection. Interpreting the linguistic meaning of §1813 NCC, we may come to a conclusion that consumers are granted protection from all unfair contract terms, regardless of how they were negotiated. Nevertheless, the explanatory report to NCC stated that consumers shall not be given protection based on these provisions if the particular term was negotiated individually.⁸⁷ If the lawgiver intended to provide consumers with protection only against such contract terms that were not individually negotiated, he should have expressed it clearly in the particular legal norm so that it would be clear and obvious to the addressees of the particular legal norms.⁸⁸

⁸⁴ The Act No 155/2010 changing several laws in order to improve their application and lessen the administrative burden placed on businesses.

⁸⁵ Unfortunately, there were not any temporary provisions concerning contracts and validity of unfair contract terms concluded prior to this regulation. See, e.g.: I. Šťavíková Řezníčková, *Právní a praktické dopady nesprávné transpozice směrnice o zneužívajících klauzulích*. [Legal and Practical Consequences of Improper Transposition of the Directive on Unfair Clauses], Jurisprudence, Wolters Kluwer a.s., 2013, XXII, No. 6, p. 27-32. ISSN 1802-3843.

⁸⁶ The main drafter of NCC, professor Karel Eliáš, was against including consumer law into NCC. Further, this issue was often deliberated on meetings concerning NCC.

⁸⁷ See p. 449 of the explanatory report to NCC [cited on 27.10. 2014]. Available at: http://www.novyobcanskyzakonik.cz/zakon/_obcansky-zakonik-novy-navrh-dz.pdf.

⁸⁸ Compare: Decision of the European Court of Justice of October 5, 2001 No C-144/99 the Commission vs the

Court of Justice of the European Union (“CJEU”) is entitled to interpret the general clause included in the Directive 93/13 if CJEU receives a request for a preliminary ruling from a national court of a Member State. Based on the article 267 of the Treaty on the Functioning of the European Union, CJEU has the power to interpret the general criteria, i.e. good faith, proportionality, excessive disproportionality in rights and obligations, used by the EU lawgiver for determining the concept of unfair contract terms. On the other hand, CJEU must not comment on application of the general criteria on a particular contract term which should be analyzed based on the particular circumstances of the case by a national court; only such a national court has the information about the question of law and the question of fact.⁸⁹

3.2. A List of Unfair Contract Terms – the Annex to the Directive 93/13

In the annex to the Directive 93/13, there is an indicative list of contract terms, a so-called blue list.⁹⁰ These provisions may be considered as unfair if all the requirements of the general clause are met. This list of contract terms was selectively transposed into §1814. The explanatory report to NCC does not mention anything about the issue of selecting of the particular contract terms.

§1814 NCC may not be interpreted that it sets a so-called black list, i.e. a list of contract terms that are always unfair. In the court litigations, courts will not have to analyze the contract terms laid down in §1814 NCC from the point of view of the general clause.⁹¹ Nevertheless, the lawgiver did not explain in the explanatory report whether he intended to provide even higher protection than what has been introduced in the Directive 93/13.

Beyond the contract terms set forth in the annex to the Directive 93/13, §1814 NCC para 1 bans a contract term that “deprives the consumer from his right to determine to which obligation his performance primarily applies.” This line reacts to the Constitutional Court decision No Pl. ÚS 1/10,⁹² in which the Constitutional Court openly declared that if it were in charge of deciding the subject matter of the case at hand concerning a consumer loan, it would conclude that a contract term depriving the consumer from determining which due obligation was to be primarily paid by the payment favors only the supplier, which means that such a term meets all the requirements of the general clause of the Directive 93/13.⁹³

Netherlands.

⁸⁹ For more on interpretation of the features of the general clause, see, e.g.: B. Vítová, *Nepřiměřená ujednání ve spotřebitelských smlouvách po rekodifikaci soukromého práva* [Unfair Terms in Consumer Contracts after Recodification of Private Law], Wolters Kluwer, Praha 2014, ISBN 978-807478-491-0; A. Graban, *Spotřebitelské zmluvy* [Consumer Contracts], Bulletin slovenskej advokacie 2005, No. 1, p. 23-27; J. Drgonec, *Spotřebitelské zmluvy v právnom poriadku Slovenskej republiky* [Consumer Contracts in Slovakian Legal Order], Justičná revue, 2007, No. 3, p. 316; K. Csach, *Štandardné zmluvy* [The Standard Contracts], Vydavateľství a nakladatelství Aleš Čeněk, Plzeň 2009, p. 188; M. Pavčnik, *Princip přiměřenosti (několik myšlenek k diskuzi)* [The Proportionality Principle – several ideas for discussion], Časopis pro právní vědu a praxi 2009, No. 1, p. 51.

⁹⁰ Same term was used by professor Dr. Marco B. M. Loos, Amsterdam Institute for Private Law on the Summer School of the European and International Consumer Law in Bayreuth, 2013.

⁹¹ This opinion is also supported by professor Tichý – presented on the conference Consumer Protection, December 29-30, 2013, Charles University, Faculty of Law, Prague.

⁹² Decision No Pl. ÚS 1/10 ze dne 09. 02. 2011. For more, see: I. Šťavíková Řezníčková, *Právní a praktické dopady nesprávné transpozice směrnice o zneužívajících klauzulích* [Legal and Practical Consequences of Improper Transposition of the Directive on Unfair Clauses], Jurisprudence, Wolters Kluwer a.s. 2013, XXII, No. 6, p. 27-32. ISSN 1802-3843.

⁹³ The author draws attention to legislative inaccuracy: the law mentions obligations, whereas the Constitutional court adds the adjective “due”, i.e. due obligation.

3.3 Price and the ‘Subject Matter of the Contract’

The art. 4 para 2 of the Directive 93/13 is a non-mandatory provision⁹⁴ which sets the subject-matter scope of the Directive’s application. This article has been transposed into § 1814 NOZ as well. The author believes that transposition of the respective provision was made properly when the lawgiver excluded a term on the subject matter of the contract and on the price from the (dis)proportionality test if the consumer was provided these data in a clear and unambiguous manner (the principle of transparency). Breaching of the principle of transparency during negotiation of the contract leads to an application of the (dis)proportionality test to both the price and the object of performance negotiated in the contract. Nevertheless, even this provision shall comply with EU law, as the Directive does not mention ‘*subject matter*’, but rather ‘*main subject matter of the contract*’; it also does not refer to only ‘*price*’, but rather to ‘*price and remuneration*’.

In connection with this legal construct, it seems to be problematic to use the vague notions of clarity and intelligibility. As for interpretation, the use of the concept of ‘subject matter of the contract’ or ‘main subject matter of the contract’ is disputable, which happened for example in Germany⁹⁵ and in the Czech Republic in connection with the case concerning bank fees for loan contracts.⁹⁶

In connection with extending credit to consumers, the author also refers to the important decision of CJEU⁹⁷ concerning APR in a loan contract. As it was mentioned above, the amount, price and reimbursement for the main subject matter of the contract, i.e. APR does not fall under the scope of the (dis)proportionality test if the provision on APR was provided to the consumer in a clear and intelligible way,⁹⁸ which shall be considered by the national court. Nevertheless, in the case at hand, CJEU had to deal with a situation when APR included in the loan contract was lower than what it really was. CJEU did not find that such a behavior of the supplier contradicts the principle of transparency as laid down in the Directive 93/13, but the court ruled that such a term is an unfair commercial practice according to the Directive 2005/29.⁹⁹ Such an unfair commercial practice is one of several elements which have to be taken into account, according to the Article 4 para 1 of the Directive 93/13, while considering disproportionality of any term.¹⁰⁰

⁹⁴ It is up to the Member state to decide whether it will limit the subject matter application of the Directive according to the Article 4, para 2. Nevertheless, if a Member states decides that the provision shall be transposed, it has to be done in a manner that corresponds with the goals of the Directive. For more, compare the decision of the European Court of Justice of October 5, 2001 No C-144/99 the Commission vs the Netherlands.

⁹⁵ Decision of the Federal Court of Law of June 7, 2011 No . XI ZR 388/10. In Slovakia “Commission on analyzing the terms in consumer contracts” established at the Ministry of Justice accepted this decision as important and relevant.

⁹⁶ For more see: O. Hruša, *Poplatky za vedení úvěrového účtu - mají mít i české banky důvod k obavám?* [Fees for a Loan Account – Should the Czech Banks Start Worrying?], *Právní rádce* 2012, No. 2, p. 57-62. Finding of the Constitutional Court of April 10, 2014, No III. ÚS 3725/13. Finding of the financial arbitrator of December 13, 2013 No. 10425/2013, litigation No 181/SU/2013. Available at: http://www.finarbitr.cz/galerie/tinymce/rozhodnuti/181_SU_2013_nalez.pdf.

⁹⁷ Decision of the European Court of Justice No C - 453/10 Pereničová Perenič of March 15, 2012.

⁹⁸ Compare: Decision of European Court of Justice of October 5, 2001 No. C - 144/99 Commission vs the Netherlands.

⁹⁹ Directive of the European Parliament and the Council 2005/29/EC of May 11, 2005.

¹⁰⁰ For more, see: I. Šťavíková Řezníčková, M. Selucká, *Incorrect APRC as an Unfair Commercial Practice and as an Unfair Term in Consumer Contracts*, *Journal of European Consumer and Market Law*, Rakousko: Verlag Österreich, 2014, Vol. 3/2014, No. 2, p. 110-115. ISSN 2191-3412; B. Keirsbilck, *The interaction between consumer protection rules on unfair contract terms and unfair commercial practices: Pereničová and Perenič*, *Common Market Law Review* 2013, Vol. 50, Issue 1, p. 260 et seqq.

3.4. Non-applicability of Unfair Contract Terms (the Article 6)

The article 6 of the Directive 93/13 is reflected in v §1813 and §1815 NCC. The provision v §1813 NCC set forth a rebuttable presumption that all terms which, contrary to the principle of proportionality, establish an excessive disharmony between the rights and obligations of the parties to the consumer's disadvantage. Does §1813 NCC allow a proof to the contrary? Is it possible that a contract term which shows all the features of disproportionality is not banned? In the author's opinion, such interpretation would contradict the purpose and goal of the concept of consumer protection as it is understood by EU law; such conclusions would also be in contradiction to the decisions of CJEU. § 1815 also states that the unfair contract terms shall not be taken into account unless they are challenged by the consumer. In the NCC's terminology, it is understood as an '*apparent legal act*' under the v §551 et seqq NCC, which shall not be taken into account and shall be considered as meaningless.¹⁰¹ In these cases, consumers do not have the right to claim damages as a result of an apparent legal act.¹⁰²

It is still a question how a consumer may claim something that has not been a legal act. May a legally irrelevant act turn into a legal act based on the consumer's request? It is likely that these questions will be answered by the courts' decisions. Nevertheless, the author believes that while drafting this provision, the lawgiver used improper legislative technique; the lawgiver should have adhere to the existing 'state of affairs' set forth by the CC, i.e. the rule that unfair contract terms were 'absolutely invalid'.¹⁰³

4. Conclusion

In this paper, the author tried to outline the crucial legislative changes concerning unfair contract terms. These changes were brought by recodification of private law in the Czech Republic. In general, the author dealt with the manner in which the so-called general clause and the annex to the Directive 93/13 were transposed; all this, within the context of negotiating consumer loan agreements. In the final part, the author paid dealt with the issue whether the unfair contract terms are binding or not (the Art. 6 of the Directive 93/13). Aside from that, the author researched the legislative technique used by the lawgiver while transposing this Article into the new Civil Code (§1815).

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¹⁰² Compare §579 para 2 NCC, which openly grants right to damages based on invalid deed, if the party was not aware of such invalidity. It is a question whether the courts will not interpret this provision analogically in connection with 'apparent legal act'.

¹⁰³ The author presented this opinion of hers in the paper 'Contractual Penalty in a Consumer Loan Agreement as Unfair Contract Term in Light of the new Civil Code' at the international conference Bykov 2013 – Hope of Jurisprudence.

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CROSS-BOARDER MERGERS IN THE SLOVAK REPUBLIC FROM THE CORPORATE LAW AND TAX LAW PERSPECTIVE

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Abstract

Cross-border mergers of companies are in the Slovak Republic regulated mainly in the Act no. 513/1991 Coll Commercial Code, as well as specific legislation governing some aspects of cross-border mergers. In this article we deal with the adjustment of cross-border mergers in the legal order of the Slovak Republic from two perspectives: corporate law and tax law perspective.

Keywords

mergers, cross-boarder mergers, taxes, shares

1. Introduction

The concept of merger is used as the common name for various cases of voluntary association of two or more independent undertakings into one undertaking. A prerequisite for the implementation of the adoption itself entrepreneurial decision by the management of all the undertakings about making that transaction. This is a complex transaction outside the ordinary course of ongoing management businesses over a longer period. A merger may take the form of a national merger, affecting businesses with a business within one state or cross-border merger, which represents the merger of enterprises operating in different countries.

2. Corporate Law perspective of mergers

2.1 General treatment of mergers in the Slovak Republic

General principles of merger of all kinds of companies and cooperatives, collectively referred to as mergers, find their legal basis in § 69 of the Commercial Code, as amended legislation (the Commercial Code), as without the possibility of cancellation of its liquidation. The current Slovak legislation is based on EU law, namely the so-called content. Third Directive. 78/855 / EEC, which deals with mergers of the public limited companies. The Slovak law under the concept of merging a bunch of two cases of dissolution of the company without liquidation, namely: mergers companies. The merging companies is a process by which terminates one or more companies, the capital of those companies passes to another existing company. The company becomes the legal successor of the merging companies. On the other hand, consolidation is a process by which the abolition of two or more companies going through their capital to another, the new company.¹⁰⁴ Under the Commercial Code, shall have the merging and emerging companies the same legal form, except in the case of merger of public limited company and limited liability company if the acquiring company will be a public limited company.¹⁰⁵ The decision about the merger is in the responsibility of all comanions or the relevant authority in the acquired company. The latter is the case of the

¹⁰⁴ Par. 69 part 3 of the Act no. 513/1991 Coll. Commercial Code.

¹⁰⁵ § 218l ods. 2 of the Act no. 513/1991 Coll. Commercial Code.

public limited company and limited liability company - the General Assembly. The company must approve the agreement of merger (the contract transformation) and also take a decision on dissolution of the company, preferably one belonging resolution authority. That contract must comply with statutory requirements: the identity of the merging companies, information and legal form of the successor company, shareholders shares in the acquiring company, the draft joint venture agreement, the timing of when participants have the right to share in the profits of the new company and the determination of the date for accounting purposes.¹⁰⁶ Specific legislation may require additional requirements for some specific types of companies.¹⁰⁷ Such a requirement may be, for example, the prior approval of the National Bank of Slovakia. Important factor in the process of mergers of companies in the Slovak Republic is incorporation. According to § 69a of the Commercial Code, the effects of mergers occur at the moment of entry in the Commercial Register – the public list of compulsory disclosure of data maintained by the Commercial court. This registration is made on the basis of a draft submitted all the merging and emerging companies. This registration has 4 basic effects on the process of merger: the transition asset value creation of participation of shareholders in the coming society, extinction merging companies and the emergence of successor companies. Other consequences of mergers may modify specific rules.¹⁰⁸ Despite that the decision on the merger of the company is fully in the competence of the companies, in some cases are the mergers controlled by state authority. The Antitrust office exercises control in cases where there is a concentration caused by merger. Only after the positive decision of the Antitrust office may be performed constitutive registration in the Commercial Register.¹⁰⁹

2.2 Cross-border mergers of companies

Cross-border element in the mergers of companies was taken into the Slovak legislation by implementing the tenth Directive of the European Parliament and of the Council no. 2005/56 / EC about cross-border mergers of limited liability companies, namely by the § 69aa of the Commercial Code. In the Slovak Republic are the cross-border mergers extended to the other forms of commercial companies and cooperatives. According to § 69aa - cross-border merger or cross-border merger of companies on the territory of the European Economic Area includes not only the legal conditions necessary for the process of joining and merging, but the definition of basic concepts such as the Member State or Slovak or foreign person involved. The actual cross-border mergers are defined as mergers of one or more of Slovak companies involved with one or more foreign participating companies.¹¹⁰ With reference to the general rules of corporate mergers § 69aa below summarizes all the elements of the process of cross-border merger. Treaty on the cross-border merger must be approved by the competent authority. In addition some cases¹¹¹, the application for registration of cross-border merger in the Commercial Register attaches approved contract of merger and an officially certified translation into the state language.¹¹² The identity of linguistic forms of contract assesses the commercial court. Specific terms of the contract must simultaneously satisfy the statutory requirements of the legislation of all countries participating companies. The specific nature of cross-border mergers is expressed in additional requirements for contracts where a bunch of:

¹⁰⁶ M. Patakyová, *Obchodný zákonník, komentár*, C.H.Beck, Bratislava 2013, p. 320.

¹⁰⁷ Examples of these companies are: management company, stock exchange, central depository, securities dealer, bank, insurance and reinsurance.

¹⁰⁸ For example : par. 14 part 2 of the Act no. 455/1991 Coll. Licensing Act - provides for the possibility to continue to operate deaths trade companies.

¹⁰⁹ Par. 10 of the Act no. 136/2001 Coll. Protection of Competition.

¹¹⁰ § 69aa part 1 ,e) of the Act no. 513/1991 Coll. Commercial Code.

¹¹¹ Par. 218k of the Act no. 513/1991 Coll. Commercial Code – ide o zjednodušené fúzie spoločností, ktoré sú majetkovo prepojené.

¹¹² Par. 25a part 5 of the Decree of the Ministry of the justice SR no. 25/2004 Coll.

determining the effects of a merger on employment¹¹³, the designing of social contract, the successor company statutes, to establish procedures for the participation of employees in the successor company, an indication of the amount of the previous capital, determine the date of the financial statements participating companies. The process of approval of the contract is specified by the type of company. The Commercial Code also defines the obligations Slovak participating companies to disclose certain information. These data are: business name, legal form, registered office of the companies involved; name of the register in which the participating companies are registered as well as their assigned identification number; indication of the measures taken to protect creditors and minority shareholders, and the place where those persons may obtain the necessary information. The law also imposes Slovak participating company information obligation, at its headquarters (the web) before approving a merger agreement disclosed: - information on the transfer of registered office outside the territory of the Slovak Republic, in the latter case, the language and the legal form of the company, the accounts of the companies involved for the last three years as well as interim financial statements drawn up to a date not earlier than the first day of the third month before the copy of the draft. The last mandatory data notary is the person issuing the certificate. Notary certified by notarial act in compliance with all the conditions required by law. Under the principle of the protection of third party creditors of the companies involved have the right to secure its receivables outstanding. If protection is not provided directly by the company, the creditor can go to the court. However, the law does not provide protection only to third parties, but also directly to the shareholders of the companies involved nationals who disagreed with the proposal of the contract, in accordance with § 218jb¹¹⁴. Moment of force cross-border mergers analogy determine the general provisions of the merger companies. This time will be differentiated depending on where it will be established by the successor company. Where is it located in the Slovak Republic, carried out the registration court deletion the merging and emerging of the registration in the Commercial Register of the Slovak Republic. To have a successor company established in the territory of the Slovak Republic, will register the foreign register. Slovak Commercial Court shall cancel the merging Slovak companies based on the decision of the like authority abroad. This deletion Slovak registry has only a declaratory effect. Details and conditions for entry in the Slovak Republic is regulated by Act no. 530/2003 Coll. the Commercial Register.¹¹⁵

2.3 Some particularities of mergers of the Public Limited Companies

Specific legislation for mergers in the Slovak Republic is found in the case of public limited companies. § 218a and next, specifics regulates mergers of public limited companies. Legal action - a contract which is a merger in this case has a stricter form, a deed on a legal act - Minutes of the legal act. Mergers of the public limited companies apply two basic principles: protection of third parties and minority shareholders and the effort to simplify the process of mergers in specific cases.¹¹⁶ Preventive protection directive lays down no. 2011/25 / EU concerning mergers of public limited company.

In the case of mergers of limited liability companies is significant justification for the merger. The Board of Directors of the participating companies is under legal obligation to develop legal and economic analysis of the reasons for merger with emphasis on its impact on shareholders, creditors and employees of participating companies. Here it is possible to simplify the procedure with the agreement of all the shareholders of all the companies

¹¹³ Par. 63 part 1 of the Act no. 311/2001 Coll. Labour Code.

¹¹⁴ Par. 69aa of the Act no. 513/1991 Coll. Commercial Code.

¹¹⁵ Par. 8 part 2 of the Act no. 530/2003 Coll. Commercial Register.

¹¹⁶ M. Patakyová, *Obchodný...*, *op. cit.*, p. 859.

involved. The actual merger decision belongs to the General Assembly each of the participating companies. At this point, however, specified the necessary quorum for decision. If the participating company has issued several classes of shares, shall constitute a quorum of shareholders present 2/3 of each class of shares.

Protection of shareholders and employees is demonstrated by information obligations of the participating companies.¹¹⁷ The protection involves the position of creditors too. Any outstanding claim must be sufficiently ensured, if the creditor has requested its claim in the 6 month period from registration of the merger in the register.

Legislation mergers of public limited companies contains many specifics. These mainly involve the specificities of these companies on shares and shareholders' rights. The Commercial Code governs the rights and privileges of shareholders resulting from inadequate exchange ratio in cross-border merger, the right to repurchase shares and more. Special rights conferred by the employees participating in the management of the companies in cross-border mergers, in particular through the special negotiating body.¹¹⁸ Implementation of European legislation caused, that we in the Slovak Republic also can talk about the simplified merger procedure. This is a case where the parent company holds the majority of shares of subsidiaries merger extinguished and property goes to the parent company. At the same time, however, there shall be to suppress the rights of minority shareholders.¹¹⁹ Legal requirements for the simplified merger cases governed by the Commercial Code and subsequent par 218k.

3. Tax Law Perspective of mergers

This part of the article will briefly address the tax treatment of corporate combinations. The Slovak tax and business environment for corporate combinations has changed over the last ten years. One of the most significant changes that influenced the legislation concerned was the adoption of the Euro (EUR) as of 1 January 2009 as the Slovak national currency. This has brought several positive outcomes, particularly the elimination of foreign exchange rate differences in transactions between Slovak and other European Union entities. Another factor that has significantly influenced the tax environment for business combination was the reduction in worldwide activity in 2009 due to the global financial crisis resulting in the decline of foreign investment in Slovakia. Last but not least the amendment to the Act no. 595/2003 Coll. Income Tax Act („ITA“) introduced two tax regimes for business combinations as of 1 January 2010. Moreover, with effect as of 1 January 2015 there are several important changes taking place due to the adoption of the latest ITA amendment such as re-introduction of thin capitalization rules or changes in tax depreciation.

3.1 Different tax treatment of asset purchase and share purchase

At the beginning, it is necessary to bear in mind that there is a significant difference between the tax treatment of asset deals and share deals.

As to the former, assets can be purchased as either individual assets or as a business/ part of a business. In principle, in a pure asset deal, the buyer does not assume the liabilities of the company from which the assets are acquired. On the sale of a business or part of a business, the seller is generally obliged to transfer to the buyer all assets, rights and other property that relate to the proper functioning of the business, and the buyer is required to assume all

¹¹⁷ Look at par. 218 part 2 and next of the Act no. 513/1991 Coll. Commercial Code.

¹¹⁸ Look at par. 218lb and next of the Act no. 513/1991 Coll. Commercial Code.

¹¹⁹ M. Patakyová, Obchodný..., p. 922.

obligations related to the proper functioning of the business and to pay the purchase price as mutually agreed. Thus, the business or a part of a business is transferred as a going concern except of several public law obligations (such as tax payable) that are not subject to transfer. On the other hand, the transfer of the business from the seller to the buyer also includes obligations from employment relations and industrial property rights. The Slovak Commercial Code applies the same principles to a sale of part of a business as to the sale of a whole business, but such a part of a business must be categorized as an independent operational unit before the sale. Consequently, the part of the business should maintain its own books from the accounting perspective and have records of assets and liabilities relating to that part of the business. The purchase price of assets generally is considered as the acquisition value for tax depreciation purposes. Generally, the acquired assets may be further depreciated for tax purposes (up to the acquisition price), except for certain items stipulated by the Slovak tax law (e.g. land property). Moreover, the seller should be aware of the fact that a tax loss on certain assets sold is not considered as a tax-deductible item (e.g. loss on the sale of land). When acquiring a business or part of a business, it is essential for the sale-purchase agreement to stipulate the acquisition price for each individual asset as this helps to avoid problems in determining the acquisition price for the respective assets acquired with the business later.

In respect of asset deal we further need to address the consequences that it brings to goodwill according to Slovak tax legislation. Goodwill, positive or negative, does not arise in the purchase of individual assets but may arise in the purchase of a business or part of a business. As of 1 January 2010, the assets acquired on the sale or purchase of a business or part of a business should be valued for tax purposes at their fair market values according to accounting regulations. According to par. 17a (5) ITA, depreciation of goodwill or release of negative goodwill should be included in the tax base, as a cost or income respectively, over a maximum of seven tax periods starting with the period in which the goodwill arose (i.e. in the year of the purchase of business) at 1/7 of the value each year. This treatment is usually subject to specific conditions, such as an economic continuity test.

With regards to the later - sale of shares, under the Slovak income tax legislation, capital gains on a sale of shares in a Slovak company are considered to be subject to Slovak corporate or personal income tax. For individuals, an income tax rate of 19% applies to their tax base not exceeding EUR 35,022.31 for 2014 (monthly in the amount of EUR 2,918.52); a rate of 25% applies to the portion of the tax base in excess of EUR 35,022.31. For companies, a corporate income tax rate of 22% applies as of 1 January 2014¹²⁰. To briefly outline to tax treatment of sale of shares we should highlight the fact that in case a Slovak company sells shares, it is always liable to pay tax in Slovakia on the transaction. As of 1 January 2014 an amendment to ITA introduced that income from the sale of shares in a Slovak company generated by a Slovak tax non-resident is treated as Slovakia source income¹²¹ under Slovak rules unless the seller is an EU tax resident¹²². However, where the buyer of the shares is a Slovak tax resident or Slovak permanent establishment of a non-resident¹²³, income from the sale of shares is taxable in Slovakia even in the case of EU residents. The exemption from tax on capital gains may be only based on provisions of respective double tax treaty concluded between Slovakia and the respective country.

In a share acquisition, the purchaser takes over the target company together with all related liabilities, including contingent liabilities. In this case, the purchaser may require more

¹²⁰ Par. 15 of the Act no. 595/2003 Coll. Income Tax Act.

¹²¹ Par. 16 (g) of the Act no. 595/2003 Coll. Income Tax Act.

¹²² Par. 2 (t) of the Act no. 595/2003 Coll. Income Tax Act.

¹²³ Par. 16 (a) of the Act no. 595/2003 Coll. Income Tax Act.

extensive indemnities and warranties than in the case of an asset acquisition. From a tax perspective, it is advisable due to statutory limitation included in par. 69 of the Act no. 563/2009 Coll. Tax Administration Act (“TAA”), to seek tax warranties and indemnities covering a period of at least 6 years after the end of the year in which the share-purchase agreement was concluded and at least 8 years if the target company carried forward a tax loss.

3.2 Tax losses carry-forward

As of 1 January 2014, tax losses in Slovakia can be carried forward in equal parts (1/4) over 4 years. Transitional provisions to ITA provide that any tax losses reported from 2010 to 2013 and not utilized before 1 January 2014 can only be carried forward in four equal portions based on the new rules. There are no restrictions in the tax loss carry forward rules relating to a change of shareholders of a company or a change of its business. Generally, a legal successor may carry forward tax losses declared by a company that was dissolved without liquidation, provided that the purpose of the restructuring was not solely to avoid tax.

4. Conclusion

Cross-border mergers as a form of dissolution of the company without liquidation with cross-border elements are carried out for a number of motives. The most common is efficiency, which can then be increased through effective management, operational and financial synergies and market power of the company. Precisely because of the legal and organizational connection between the parties increases the market power of the new entity, which is one of the reasons why such statements are subject to a concentration within the meaning of anti-trust legislation. Among other themes, we can mention undervaluation of the target company: this theme is based on the existence of inefficient capital markets, which failed to correctly assess the target company. If the shares are undervalued the company, then in the case of expansion seems to be preferable asset acquisition or merger with the target company instead of alternative investments in the same device. Another motive is the liquidation value, where the reason for the merger of a company may also be that the liquidation value of the assets may be greater than the value of the company. This motif is similar to the content of the motif related to underestimation of the target company, but this is an understatement of assets that we sell. Of course the border mergers occur also in other specific motifs of the managers.

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CONFLICT OF LAWS CROSS TO PUBLIC INTERNATIONAL LAWS: THE CONFLICTING MODELS IN THE CONCEPTUALISATION OF DISABILITY RIGHTS UNDER INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

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Several scholars of legal jurisprudence contend human rights law (HRL) and international humanitarian law (IHL) share same school origin. In fact postmodern scholars of the law school such as Hugo Grotius are classical example of proponents subscribing to the above view. Therefore the two branches of public international law are both founded on the protection of humane, humanity and humanitarian principles thus accounting for the similarities in their major attributes. Contrarily the discussion unveils some research findings exposing the wide differences in conceptualisation the rights of persons with disabilities under IHL and HRL in times of armed conflicts and times of peace respectively. In this case IHL/LOAC and HRL possess two varied models that are completely irreconcilable on to each other. In this IHL is one branch of public international law according to which the rights of persons with disabilities are framed upon a medical model instead of the social rights based model provided for and promoted under the CRPD for HRL. The paper shall advance this argument by demonstrating the potential of a legal battle between these two sister branches of public international law. This raises the question of sufficiency, coherence in objectivity and adequacy of the two branches of law in reaching the same aims and goals as far as the best interests of disabled people are concerned. Such as autonomy, equal recognition and independent living and adequate protection in the post armed conflict period. This generated a reported made the contradictory models embedded in the theoretical frameworks from the two evident and visible. It is upon this that observations and conclusions on the different characteristics from the two categories of public laws reached.

Keywords

Conflict of laws, public international law, disability

1. Introduction

The issues concerning the rights of persons with disabilities have undergone a number of drastic reforms in the last few decades. In most cases this implies that the developments are a reflection of social changes which have had a draconian impact and indeed a profound legacy on the international progression on the rights of persons with disabilities. The research paper is intended to accord redress to a wide range of irreconcilable developments around to two related branches of public international law. These include; human rights law on one hand and international humanitarian law on the other. The two fields of public international law are part of the remarkably outstanding branches that deal with a wide range of areas. These areas range from aspects of human rights, environmental law to those of the different types of armed conflicts. In this case the attention is centred on how core aspects of disability have been perceived in the last few years under the lenses of the contemporary human rights regime in relation to how these are conceptualised under international humanitarian law.

The historical context that underlies the circumstances in which the two branches of law have been conserved to be of vital importance in understanding the major variations of interfaces by the above two areas of public international law with aspects of disability rights. This study is advanced further to conceptualise the eventual responses to issues of disabled people by

each of the two branches of public international law respectively. For instance it is in as much as human rights started their development with the UDHR in 1944-1948 the first soft law the laws of armed conflict predated the Lieber code of 1800. It is apparent that laws have gradually changed with change in society. It must be appreciated that the earliest laws were regarded to be on remarkable impact on societies at large but at the same time these had profoundly weaknesses.

In this case rights of the minority grounds were indeed invisible and in many respects the same rights could be completely non-existent at the different points in time. In the above vain the paper uses the historical context to mirror that legal perception of person with disabilities. In the same ethos that papers advances this argument further to relate these historical influences with respect to their impact on the current state of developments in public international law. This approach is aimed to demonstrating the sociological and historical influences of other disciplines to the present day structure of and conceptualisation of public international law.

Conversely the discussion appreciates how persons with disability continue to suffer due to practices that states, societies and states have adopted from outmoded practices of the past legal regimes. International humanitarian laws have currently impacted the manner in which disabled veterans are likely to treat. Certainly the Geneva Convention as well as the additional Protocols are such remarkably respectable international instruments in situations of armed conflicts. In spite of the above challenge these are still tainted with a few weaknesses more so as far as the inclusions and comprehension of disabled persons is concerned.

By and large the terminologies such as disability, disabled and disabilities are all used in the texts of the major sources of human rights and humanitarian laws. Unfortunately the nature of language used in these domains of public international clearly differs. This could be attributed to the fact that legal developments are also known to have undergone consistent changes over a period of time. In this respect it must be appreciated from the findings that these distinctive zones are known to clash and in some aspects so as the result into conflict of law situations. It must be understood that the conflict of law arises from the rather contradictory than a complementary perception of persons with disabilities. This could be a direct consequence of the historical context and the varied motives for which these specialities of public international law were intended.

Therefore it is highly debatable as to whether the above two branches of post modernism natural scholars could portray any evidence of complementarity as far as how their conceptual and contextual frameworks are structured with respect to persons with disabilities. Their interactions with aspects of disability is indeed an interesting and yet a very unclear, undirected and largely an ambiguous trend of unmonitored development. On the contrary it might seem more apparent from the current state of findings for this research that the nature of relationship with disability by the two branches of public international law seems more contradictory and less complementary. Conversely this is one area of law that deserves careful academic scrutiny to comprehend the similarities and rationalise the differences in the objectives of human rights and international humanitarian law. Interestingly the correspondence interactions with issues of persons with disabilities seem clearly weak and in some respects totally disjointed. The interfaces of these interactions could be traced for the theoretical landscape underpinning the objective and core values of these two different areas on public international law. As such the rights person with disabilities the impact of the varied conceptual interactions indeed the two areas of law conceive and theorise persons with disabilities stands out as remarkable feature worthwhile according further exploration. Equal important yet another question can be raised to whether these irreconcilable differences enable

to the two areas of public international law have the same capability and efficiency in far as meeting the interests of persons with disabilities is concerned.

As far as schools of legal jurisprudence are concerned the two branches namely human rights and international humanitarian law are still perceived as linked and indeed interconnected following their origin being more traceable to the same patronage of post modern natural scholars of legal jurisprudence. In practice this study shall challenge to unchanged presumption of complementarity and consistence in human rights and international humanitarian law as far as the protectiveness and inclusiveness of persons with disabilities is concerned. This hypothetical scenario remains highly underresearched and indeed constitutes a subject matter for even more research. Wherever this hypothetical model shall be used, it can be developed further to strengthen the theoretical dimensions upon which the problems faced by disabled people can be contextualised and subsequently addressed. Therefore the theoretical concepts underlying the two branches are inspirational and insightful. Subsequently the study needs to explore the jurisprudential concepts that underpin the laws as attributes of vital importance.

In essence it becomes apparent that the nature of factors constraining disability rights remains a growing concern and yet there are number of multifaceted impediments that play a directly or indirectly role in hindering the smooth enjoyment of disability rights. In essence more attention detail and research is equally relevant if the communities are to remain predominantly undertake reforms mention for vulnerable groups of person to be in position to benefit for the nature of protection accorded under the right based approach. This could in terms of its severity have several impacts of the less protected and vulnerable groups. The study finds it relevant to explain the means and method that were used by the study to reach some of the constructive observations upon which this study has drawn observations but also developed strands of theoretical connections. In this case the method use would in most cases come up with the same results if another person used it in with the same materials carrying out the research related developments. Certainly like any other methods research even through the use of the following method there could be allowance for error but in this case the likelihood of such an occurrence is more than unlikely.

2. Methodological framework

Mixed methods were used in carrying out this analysis. These methods included the collection the primary data. The primary data that was used most included the official reports that were obtained from the websites. The major websites included that of the United Nations that consists of the United Nations Treaty Series (UNTS) at the same time for the international humanitarian law the laws that were used were all secured from the website of the International Red Cross. This was intended to ensure some degree of consistence in the quality and structural formats of the primary data that was to generate the results of secondary findings. On this occasion the reports were easily obtained with the general motive of ensure. In reality the resources that were from authentic websites. This was aimed at ensure that sites are report relied upon were taken from highly reliable sources. A total of 27 shown documents were extracted below. The documents were all up loaded through the Nvivo software tool. Anticic was also used in some of the analysis of textual reports. The results are attached as appendixes. The word query frequency was carried out on both the document on human right and those of international humanitarian law. The methodology was based on the view that unless the legal frameworks are consistent in directing and instructing states on how they are expected to deals with disabled, it is very unlikely that intended results of restoring humanity, dignity and bodily integrity shall be attained result are likely to be attained in the shorty or in the long run. The analysis was carried out three separate phases. Phase one consisted of only human rights Conventions and treaties, while Phase two comprised of only instruments of

international humanitarian law while the third phase comprised of a combination both international humanitarian law and human rights law. The trio test approach was very useful in comprehending how and why these laws use the term protect. It was apparent that the use and conception of the duty to protect at some stage referred to disabilities in both branches of law (that is human rights CRPD on disability and the treaties of international humanitarian law from completely different contexts for the sake of meeting clearly varied agendas on several occasions respectively. Equally interesting is how the legal language on disability rights keeps consistently changing over years. The legitimacy of disability rights has increasingly become the centre of attention for the regime the recently developing models of human rights in the latest human rights regimes. This is more varied from how disability was protected and perceived in the 1863 under the Lieber code in relation to the present day perspective under the 2006 CRPD. In fact some of the positions are totally irreconcilable in relation to the ways in which IHL and human rights understand to concept of disability and subsequently the rights of person with disabilities. After the different documents were uploaded through software, it aided the theorising and processing and later the connectivity of word patterns. According to the IHL documents the wording was more centred on civilians. As such a process was all able to notice as expected when the word query analysis was carried, it was able to generate the report of words in their ascending order. This generated report attached the appendix of the study. As expected from the findings for three completely separate reports that were rather activities and completely.

The documents that were considered during the study process:

- (1) Lieber code Government of Armies of the United States in the Field of 1863,
- (2) Declaration (IV-2) concerning Asphyxiating Gases (The Hague, 29 July 1899),
- (3) Declaration (IV, 3) concerning Expanding Bullets of 1899,
- (4) Hague Convention IV – Laws and Customs of War on Land of 1907,
- (5) Hague Convention on Laying of Automatic Submarine Contact Mines of 1907,
- (6) Hague Convention Bombardment by Naval Forces in Time of War of 1907,
- (7) Hague Convention the Rights and Duties of Neutral Powers in Naval of 1907,
- (8) Right of Capture in Naval War (The Hague, 18 October 1907),
- (9) Hague Rules on Air Warfare of 1923,
- (10) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 1925,
- (11) Universal Declaration of Human Rights (UDHR) of 1948,
- (12) Geneva Conventions of 1949 (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field – First Geneva Convention, hereinafter: GCI; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea – Second Geneva Convention, hereinafter: GCII; Convention relative to the Treatment of Prisoners of War – Third Geneva Convention, hereinafter: GCIII; Convention relative to the Protection of Civilian Persons in Time of War – Fourth Geneva Convention, hereinafter: GCIV),
- (13) Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as European Convention of Human Rights, ECHR) of 1950,
- (14) Convention relating to the status of Refugees of 1951,
- (15) Convention on the Elimination of Racial Discrimination (CERD) of 1965,
- (16) International Covenant on Civil and Political Rights (ICCPR) of 1966,
- (17) International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966,
- (18) American Convention on Human Rights of 1969,
- (19) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (commonly known as Environmental Modification Convention, ENMOD) of 1976 with additional protocols,
- (20) Convention on the Elimination of Women Discrimination against CEDAW of 1979,

- (21) Convention on prohibitions or restrictions on the use of certain convention weapons which may be deemed injurious (2) of 1980,
- (22) African Charter on Human and Peoples' Rights (African Convention) of 1981,
- (23) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) of 1984,
- (24) Convention on rights of a child (CRC) of 1989,
- (25) Statute of international Criminal tribunal for Yugoslavia (1993),
- (26) San Remo Manual of the international law applicable at Sea (1994),
- (27) Statute of the International Tribunal for Rwanda (1994),
- (28) advisory Opinion on legality of the threat or use of nuclear weapons (1996),
- (29) Asian Human Rights Charter of 1998,
- (30) Rome Statute of the International Criminal Court (Rome statute, 1998),
- (31) Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999),
- (32) Convention of Rights of persons with disabilities (CRPD) and Optional Protocol to that Convention.

The research generated useful connections in theoretical some of which are worthwhile sharing as discussed hereafter below.

2.1. Human rights and the model for disability rights

It was very apparent from the analysis of the international instruments that none of these instruments was able to generate the term disability before 1966. After 2006 the human rights have adopted the CRPD as an instrument that was strictly meant to cater for person with disabilities as the most disproportionately affected group. The 1980s marked the zenith of disability movements.¹²⁴ This period paved the way for the year of the disabled. This was very parent that this was to latter stir a wide range of human right reforms specifically to accord better considerations to persons with disabilities. In fact it become clearer that disability rights were only limited to certain groups while majority of person with disabilities remained without any economic support, employment support.¹²⁵ To make matters worse the situations of persons with mental or physical disabilities were all marred with this attitude of self-pity the equality.¹²⁶ The model of approach clearly reduced person with disabilities to being merely objects.¹²⁷ Indeed with such as perspective about person with disabilities instilled a sense of social stigma and stereotypes that were hardly condemned and if anything most of these were condoned. The best illustration of the attitude that societies had and perhaps still have is well demonstrated by some the medieval provisions of laws of armed conflicts. In spite the unchallenged and moreover unchanged shade of laws of armed conflicts, at the presence of the CRPD has gone a long way to mention about the action of some protection to person with disabilities even in those situations of insurgencies or armed conflict up risings.¹²⁸ It must be indeed understood that just like other types of rights and struggle for freedom even the rights of persons with disabilities have come a long way.¹²⁹ It has made

¹²⁴ M. Price, *Defining Mental Disabilities* [in:] D. Lennard, (ed.), *The Disability Studies Reader*, 4th edition, Routledge, New York – London 2013, p. 298.

¹²⁵ Guidance on matters taken into account in determining Questions relating to the definition of disability, London: HMSO. (ISSUED 25TH July 1996, also Disability Discrimination Regulation 1996, SI 1996/1455.

¹²⁶ T. Hammarberg, *Disability Rights from Charity to Equality*, European Human Rights Law Review 2011, no. 6, p. 638; 641.

¹²⁷ C. Cojocariu, *Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled Persons*, European Human Rights Law Review 2011, no. 6, p. 688.

¹²⁸ C. Murray, *Moving towards rights-based mental health law: the limits of legislative reform*, Irish Jurist 2013, vol. 49, p. 161, 163.

¹²⁹ M. Oliver, *Understanding disability from theory to practice*, Macmillan Press 1996 p. 63.

human rights to develop mechanism by which persons with disabilities to be handled with a relatively deserving degree of respect for humanity, dignity and bodily integrity.¹³⁰ This has been never been attained on silver plate but consistent reforms have made. Certainly the economical abilities for many of the developing states have remained a challenge to comply with a wide range of obligations under the CRPD Convention.

Independent living remains among the fundamentally notable rights that have strongly developed through the promulgation of the CRPD. The above notion is more projected by the language of the 2006 CRPD.¹³¹ Such provisions are meant to restore a reasonable degree of personal autonomy and well personal authority for persons with disabilities. By and large it becomes even apparent that the legal traditions strongly discredited the social presence and visibility of persons with disability in virtually all sphere of life. As thus case it must notably recalled that common law rules on insanity denied all manner of legal capacity the persons regarded to experience disabilities would have enjoyed. For examples under the contract for sales of goods it is crystal clear that the person with mental disabilities claimed to lack the legal capacity to be in position make the contract.¹³² This had implications such as the denial of rights such as undertaking contracts of employment with any employer, the right to rent houses in day to day life was also constrained in this case none of the landlords could ever take the risk of undertaking a contract with a person of mental disability,¹³³ similar the rights to make sound decisions of consenting to medical treatment was also strongly denied from this same group of persons.¹³⁴ The most important is the right to sue as the pinnacle of other rights was also definitely deprived. It must be understood in light of the above discussing the people with disabilities were essentially deprived of a great deal of personal and human rights.¹³⁵ In others wards the CRPD partly stems from the presence of such unchallenged injustices surely need immediate legal redress. It is therefore clearly in the above examples that the presence of disabilities could just jeopardise the rights of person with disabilities even in times of peace.

Having said so, it equally vital clarifying at this juncture that disability is and has always been broader than what most municipal laws seemed to understand, respect or even seemed to accept. In other wards the human rights instruments such as the CRPD can clearly make it apparent that the current perspective is wide enough to cover mental and physical disabilities.¹³⁶ In fact before the enactment of the laws of disability from an international spectrum it more than clear that most of the disabled persons with invisible, intangible disability the suffered from challenges of limited legislative framework that would effectively encompass then into the legislative protection.

The phases of disability rights have been transformed thought the following phases. In this regard the very first stage was defining the interests of persons with disabilities as needs. The challenges with this approach it relied on the medical model. This model is founded on a view that persons with disabilities with are sick and there they need the need to undergo treatment as one of the best ways to make them become normal. This varied for examples those in mobility limitation were understood as person that are expected to undertake clinical medical

¹³⁰ M. Waterstone, *Foreword: Significance of the United Nations Convention on the Rights of Persons with Disabilities*, Loyola of Los Angeles International and Comparative Law Review 2010, vol. 33, p. 1-6.

¹³¹ O. Lewis, *Advancing legal capacity jurisprudence*, European Human Rights Law Review 2011, no. 6, p. 704.

¹³² M.A. Stein, *Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities*, Mental and Physical Disability Law Reporter 2007, vol. 31, no. 5, p. 679, 681.

¹³³ M. Price, *Defining...*, *op. cit.*, p. 298.

¹³⁴ Article 12 and 13 of the UNCPD 2000. See also S. Fredman, *Discrimination law*, 2nd edition, Oxford University Press 2011, p. 98.

¹³⁵ J. Rehman, *International Human Right Law*, 2nd edition, Person Education Limited, London 2010, p. 618.

¹³⁶ C. Cojocariu, *Handicapping Rules...*, *op. cit.*, p. 691.

There are however on the very few occasions whenever and wherever the LOAC and state manuals of armed forces considered persons with disabilities. It is very clearly from most of the State documents and LOAC that these persons were considered not necessary because disability was neither because of disability being part of their bodily identity or their bodily personality, but purely considered since their disabilities were a consequence of working as armed military men in armed conflicts.

Therefore in as much as on the whole awareness of persons with disability seemed totally insignificant and to a greater extent completely ignored, the only exceptional to the above observation include: the Lieber code of 1893, the third Geneva Convention and Additional protocol 1 (hereinafter: API), as discussed latter in their chronological order. As already mentioned that even international humanitarian laws were framed upon a fallacy that special protection to persons with disabilities ought to be given since these were a helpless and needy batch of fallen war victims of war and thus surrendering was a legal perquisite for the bodily human treatment. It becomes quite clear from the context most State armed forces a strongly associated and perhaps continue associating being disabled with being weak, helpless and sheer need of help due to loss of battle or falling prey to the rigours of the armed conflicts. As whether the CRPD has helped or might ever help to resolve this attitude which the army tends to have towards persons with disabilities.¹³⁹ That remains completely another debatable aspect for another time. The stereotypical attitudes of how the armed forces look down on persons with disabilities has never waned but instead continues to resonate with habits and behaviours of many commanders in charge of armed troops that perceive persons with disabilities as less able bodied men and women without capability to make a sound contributions to activities of armed hostilities.¹⁴⁰ The divide between the combatants and their poor interactions with the world of the deaf, blind or dumb makes it crystal clear that legal redress through more integrative frameworks are necessary. Perhaps this attitude armed forces had upheld continues to explain the limitations of extending adequate protection to persons with disabilities. To make the discussion more precise and express and account shall be given of the manner in which the identified provisions of international humanitarian law have in past dealt with this rather obscure and invisible group of minorities.

¹³⁹ Captain L.E. Fitzgibbons, *Disability benefits for discharged soldiers law, regulation and procedure*, Current Legal Thought 1946, p. 184.

¹⁴⁰ B. Gauthier, *War Crimes in International Versus Non-International Armed Conflicts: New Wine in Old Wineskins?*, International Criminal Law Review 2008, vol. 8, no. 1-2, p. 319, 321.

Word Frequency Query

1	law	armed	9	10	see	medical	7	power	prisoners	must			
					vol	states	parties	forces	de	protocol	also		
					16	11							
					5	3							
					state	gc	united	23	party	aircraft	conventions		
international	article	12	convention	conflict		conflicts	rules	enemy	personnel	court	civilian	protected	
					part								
					b	territory	c	one	1949	14	para		
					persons								
					use	sick	iv	30	cross	icrc	ii		
2	war	case	4	15	geneva			nations	hospital	time	general	hostilities	25
					pp	military	wounded	la					
					protection			criminal	ships	non	civil	page	mod
						neutral	rights	iii	p	weapons			
					humanitarian	red	paragraph	provisions	civilians	original	pm	person	
8	art	may	13	6									

2.2.1. Lieber code of 1893 and disability

Under the Lieber code instructions were issued out to American soldier on their preparation to the battlefield.

“[...] except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.”¹⁴¹

It is apparent that the duty to protect under the above law was framed on premises that the role of armed conflicts is to certainly to cause disabilities but accord humane treatment strictly to those civilian or combatants that it has in the due process disabled. It remains unclear from the context and conceptual framework as to whether room is given to acknowledge the possibility of the several disabilities resulting from completely different factors.

“Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.”¹⁴²

In fact it seems like one of the CRPD's objectives is to project more emphasis on equality and equitable distribution of amenities persons with disabilities. A distributive model that should be adopted without discrimination and preferential treatment of persons with disabilities on the basis of the underlying causal factors or circumstances a consequence under which such persons became have disabled.¹⁴³ Related to the above the habit of looking at with disabilities as powerless is strongly embedded in laws of war. Therefore it becomes ever more apparent that situations of armed conflicts are remarkably important as far as understanding areas that need reforms for the better protection of person with disabilities.

Accordingly the code outlawed the soldiers from further action whenever there was evidence of disabilities as a result of the armed conflict. This was through the chain of command that instigates the concept of command authoritarian leadership. The models of command leadership accounts for why the Lieber code imposed orders that were thereafter followed the different parties to the armed conflict. In this case it must be appreciated that the above protection was also stressed. It is also relevant to note the aspects of care framed purely of control than dignified concern of disabled people as persons deserving a humanitarian attention.

2.2.2. The Third Geneva Convention of 1949

The nature of relationship between the parties involved under Geneva Convention is based on a rather misguided view that disability are anomalies that would under normal circumstances attract medical attention. In as much as this view holds sense with respect to war related cases of disabilities somewhat it can pose a potential danger of treating all disabled people as needy, sick, and miserable and therefore a comparably undervalued image of persons with disabilities. This is indeed very likely especially in comparison other persons that are deemed to constitute the normal able bodied men and women with this fallacy of posing required sanity as the rightful thinking member of the community. In other aspects there is clear element of dependence, control and a condoned sense of dominance in laws of armed conflicts with regards to the conception of persons with disabilities.

¹⁴¹ Lieber code article 49.

¹⁴² Lieber code article 61 and 71.

¹⁴³ I. Mugabi, *Protection of vulnerable groups during armed conflicts*, US-China Law Review 2014, Vol. 11, p. 1273-1274.

“Any claim by a prisoner of war for compensation in respect of [...] disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it.”¹⁴⁴

In this context the above law must not be overly criticized in light of the likely amputation or even mutilation that might often prevail in times of armed conflict hostilities than in times of peace. In this regard there it is more than clear the single based approach has been for long embedded under the war-disability relationship. The approach attracts critic for over usage of bodily humanity and bodily dignity with regards to perceiving the law a watchman of an armed conflict as causing agent of disabilities than a regulating the armed conflict-disability relationship as an impacting agent of persons with disabilities during and after occurrence of such conflicts. The latter view must attract social legal research in the suffering encountered by persons that may already bear any disability even before occurrence of an armed conflict. The need for recapturing the conceptualization the broader spectrum of the armed conflict and disability relationship is still long overdue. In fact the above relationship remains apparently far from restoring the descent institutions necessary if the social and physical requites of persons with disabilities are to survive situations of armed conflicts as the worst of times that continues to be dreaded by mankind even today than ever before especially in the Middle eastern Gulf and most of the sub-Saharan African.¹⁴⁵ Of course without overlooking the rationale upon which such protections are founded, such as restoring a reasonable sense of humanitarian considerations amidst the harmful and indeed appalling bodily effects of armed conflicts. Yes indeed during armed conflicts and situations of threshold of the fundamental standards for humanitarian protection has often been unsurprisingly compromised. It would be indeed probable and yet absolutely wrong to rely on the civilian and combatant divide to justify grounds of preferential treatment of disabled prisoners of wars, veterans of former combatants under international humanitarian law. The above view could be clearly exemplified by the proceeding text from GCIII.

“All prisoners of war suffering from the following disabilities as the result of trauma: loss of limb, paralysis, particular or other disabilities, when this disability is at least the loss of a hand or a foot, or the equivalent of the loss of a hand or a foot.”¹⁴⁶

The challenging conditions of armed conflicts have often posed insurmountable damage not only to combatants and prisoners of war but to the more vulnerable members of the civilian population. In this respect the disabled women would be even more prone to increasing cases of rape have often been worsen.¹⁴⁷

2.2.3. The Additional Protocol 1 of 1977

“Article 8. For the purposes of this Protocol: "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and

¹⁴⁴ GCIII article 68.

¹⁴⁵ S. Meyers, *Wounded Warriors or One of the Crowds?: Civil War, Citizenship, and Disability in Nicaragua* [in:] G. Wolbring (ed.), *Disability Studies and Ability Studies: Two Lenses to Investigate Peace*, Peace Studies Journal 2013, vol. 6, issue 4, p. 22-23.

¹⁴⁶ Ibid.

¹⁴⁷ M.B. Smyth, *Injured and disabled casualties of the Northern Ireland conflict: Issues in immediate and long term treatment, care and support*, Medicine, Conflict and Survival 2013, vol. 29, no. 3, p. 244-266.

who refrain from any act of hostility.”¹⁴⁸

In the above case there is a good case to assert that API adopts a completely different model compared to the equal rights and treatment that is more reflected. The understanding of disability has under a wide range of changes over a period of time. The medical model was the model that according to which disability becomes perceivable as a medical problem than a type of identity.¹⁴⁹ The software system thinking tool deserves credit following the contribution in elucidating the manner in which disability has been perceived by the laws of armed conflict.¹⁵⁰ In the same capacity the capability, humanity and dignity of persons with disabilities can be easily undermined.¹⁵¹ This happens in cases where the medical model has been practised. Perhaps the above argument greatly explains why there has been shift in the understanding of disability from merely special needs persons with disability to the view that the law must disabled persons a rights based models.¹⁵² It was from the weaknesses of the medical model that the need to adopt a rights based model became a better alternative for persons with disabilities and this giving deserving their best interest better redress. In the same ethos the medical model was condemned for its self imposed sense of external control, in addition to the denial of authority and subsequently autonomy which was followed by the denial of even reasonable consideration for any room for authority. The medical model is a contradictory to of the recent concept of independent living. Actually manner in which the international humanitarian law perceives persons with disabilities it all creates the situation in which these persons are subject the unjust controlled.

2.3. Aspects of State personality, State sovereignty and State responsibility in law

Today the attributes of State personality, State sovereignty and State responsibility have remained as applicable as they used to be a few centuries ago, but this time modified with exceptions.¹⁵³ It is therefore unsurprising to come across commentators whose views highlight the criticisms associated with the rights of Statehood sovereignty in some conflicts. Such criticisms are a result of State authorities indulging in acts of armed conflict violence. This is well illustrated from the case of *Van Anraat v Netherlands*,¹⁵⁴ by the behavior of Iraq government towards the Kurdish communities Northern Iraq. Such State behaviors are contrary to State obligations and signify a failure by some of the State authorities to comply with the nature of humanitarian obligations, even after ratifying the relevant Conventions under international law.¹⁵⁵

As a result some of the commentators have detested State authorities that can afford to torture their own civilians including the most vulnerable minorities instead rendering protection especially in non-international armed conflicts. The above trends constitute tendencies that Djoyou has described as ruthless and dehumanizing and yet the perpetuating parties have

¹⁴⁸ API article 8.

¹⁴⁹ G.T. Couser, *Disability Like Narrative, and Representation* [in:] D.J. Lennard, *The Disability...*, op. cit., p.256.

¹⁵⁰ Lieber code 61; see also GCIII article 68.

¹⁵¹ UNHCR, The UN Refugee Agency Policy Development and Evaluation Service; M. Mirza (ed.) *Unmet needs and diminished opportunities: disability, displacement and humanitarian healthcare* (June 2011) viewed from: <http://www.unhcr.org/4e0dbdb29.pdf> [access 29 September 2014].

¹⁵² L. Clements, *Opinion piece*, European Human Rights Law Review 2011, no. 6, p. 633.

¹⁵³ D. Harris, *Cases and Materials on International Law*, 7th ed., Thomson Reuters 2010, p. 115; see also T. Hillier, *Source Book on Public International Law*, Cavendish Publishing Company 1998, p. 204 and S. Zifcak, *The responsibility to protect* [in:] M.D. Evans (ed.), *International Law*, 3rd ed., Oxford University Press 2010.

¹⁵⁴ *Van Anraat v Netherlands*, <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3204004-3565665>.

¹⁵⁵ D. Turns, *The law of armed conflict (international and humanitarian law)* [in:] M.D. Evans (ed.), *International Law*, op. cit.

often inflicted minority without impunity.¹⁵⁶ Such tragedies have happened and may continue happening unless assertive action is taken by regional and international human courts against all parties that take in the different types of armed conflicts. Indeed some scholars contend that the above situations are only redeemable through the regional and international institutions increasing exceptions to State sovereignty while responding with humanitarian intervention.¹⁵⁷

Affa'a and Christakis are typical examples of scholars that subscribe to the above view. The views of Affa'a and Christakis regarding humanitarian intervention are of relevance to this study in understanding the justifications for such intervention whenever vulnerable groups are affected during non-international armed conflicts. Following the comparably higher levels of physical and psychologically harm inflicted upon persons with disabilities in some of the recent cases of non-international armed conflicts more suffering would seem to be experienced in absence of humanitarian intervention. In that case only one State might claim to be exerting proactive and pragmatically measures against its own domestic belligerents thus preference of unjustified external intervention.¹⁵⁸ The need for global security by countering acts of terrorism has also curved more exceptions to the traditions of State sovereignty.¹⁵⁹ Affa'a also defines State sovereignty as the practice of non-intervention and non-interference with the internal affairs of another State.¹⁶⁰

Furthermore as far as reciprocity and armed conflicts are concerned, it is equally important to appreciate that compliance with the protective duties of States under the LOAC is mutually and easily attained through reciprocity by both parties regardless of their legal capacity or State personality under public international law.¹⁶¹ Perhaps the desire to attain a reasonable degree and an enforceable degree to the standards of reciprocity may partly account for the latter changes made on the LOAC. These latter changes relate to enacting new rules that later became API and APII for international and non-international armed conflicts respectively. This idea of drafting proposed rules for API and APII was first proposed in 1969 to during an international conference in Istanbul.¹⁶² The proposed rules enshrined contributions from by the International Committee for Red Cross (hereafter ICRC).¹⁶³ Most important for disabilities scholars is that API and APII were based on a rather outmoded and irreconcilable model in comparison to the present day developments on disability rights.

Additionally the proposed rules were also intended to protect ICRC staff during the execution of humanitarian support with regions inflicted by armed conflicts although it remains debatable to argue this protection is closer to be achieved.¹⁶⁴ Probably if the LOAC enshrined under the Additional Protocols is strictly followed by all participants in all types of armed conflicts, then instances of indiscriminate attacks on the Red Cross office would be greatly

¹⁵⁶ S.A. Djoyou Kanga, *A call for a Protocol to the African Charter on Human and Peoples. Rights on the rights of persons with disabilities in Africa*, African Journal of International and Comparative Law 2013, vol. 21, no. 2, p. 219-220.

¹⁵⁷ T. Christakis, *Emperor has no clothes; The secondary role of African regional organizations in recent armed conflicts in Africa*, American Society of International Law Proceedings 2013, vol. 10, no. 7, p. 327, 329.

¹⁵⁸ H.R. Fabri, *Human Rights and State Sovereignty: Have the Boundaries been Significant Redrawn?* [in:] P. Alston, E. Macdonald (eds.), *Human Rights, Intervention, and the Use of Force*, Oxford University Press 2008.

¹⁵⁹ E. Macdonald, P. Alston, *Sovereignty Human Rights, Security: Armed Intervention and Fundamental Problems of International Law* [in:] P. Alston, E. Macdonald (eds.), *Human Rights...*, *op. cit.*

¹⁶⁰ M. Affa'a Mindzie, *Intervention and Protection in African Crisis Situations: Evolution and Ethical Challenges*, Criminal Justice Ethics 2010, vol. 29., no. 2, p. 174, 176.

¹⁶¹ C. Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, Virginia Journal of International Law 2007, vol. 47, no. 4, p. 840, 883; see also H.J. Steiner, *International protection of human rights*, M.D. Evans (ed.), *International Law*, *op. cit.*

¹⁶² A. Robert, R. Guelff, *Documents on the Law of War*, 3rd ed., Oxford University Press 2008, p. 419.

¹⁶³ International Committee for Red Cross (hereafter: ICRC) offers support like food, shelter, medical all war affected victims including disabled civilian in armed conflict territories.

¹⁶⁴ L.C. Green, *The contemporary law of armed conflict*, 3rd ed., Manchester University Press 2008, p. 70.

minimized. Take for instance the shelling during the armed conflict between Ukrainian and the Russian separatist that claimed the life of Pasquier.¹⁶⁵ The above tragedy happened while the Red Cross worker executed humanitarian services at the Red Cross administration offices in the rebel controlled town of Donetsk.¹⁶⁶

Before proceeding to explore the background of API and APII a critic that deserves to be highlighted concerns the inadequate inclusiveness of disabled people in policies and practices of many of the humanitarian organizations. This should cite observations by ethnographic studies carried out under the auspices of the UNHCR in of June 2011. The findings reported a lack of inclusiveness of persons with disabilities in their humanitarian intervention arrangements. The same humanitarian organizations operate during both non-international and international types and yet they usually have rarely less inclusive and responsive health program to cover the unmet needs of persons with disabilities living in war displacement camps. Even though the findings of the report suggest that the above problem is common in all types of armed conflict as long as there are eventual cases of civilian displacement into intermittent camps during the ongoing armed conflict. This criticism is somehow an appeal for more inclusion of persons with disabilities in programs and planning of organizations like Red Cross. Especially if these humanitarian organizations are to ever improve their standards of distributive equity in their services.¹⁶⁷

In the interim by 1971 and 1972 the proposed drafts of the Protocols were availed to for review based on the contributions of IHL experts that had convened in Geneva. On this occasion even the representative groups from liberation movements were also invited as attend and participate in the reviewing and deliberation process. Parties behind the formation of API and APII included; the liberation movements, the ICRC and States who were all involved in the one way or another.¹⁶⁸ In that case the last are two examples comprise of subjects having legal personality in public international law.¹⁶⁹ Whereas the liberation movements are neither legitimate entities under public international law nor had statehood rights. The distinctiveness of the participants of the formation is indeed a precursor to the scope of parties to whom the extensiveness in scope of these protective obligations applies. However as far as the voting process is concerned, the liberation movements are not allowed to vote basically because they are non-state actors.¹⁷⁰

Consequently the above developments marked the timely reforms of LOAC that were eventually paved way for the ratification of the two Additional protocols API and APII. The reforms were never specifically meant for person with disabilities even though this stage APII begins referring to person with disabilities for the very first time.¹⁷¹ Apart from the absence of much on protection of disabled people, perhaps the formation process has lesson to be emulated if future human rights instruments are to apply to all types of armed conflicts such as the merits of adopting more comprehensive consultative formation mechanisms so as to develop even more holistically binding regime of LOAC.

Perhaps the same reforms went a long way in improving the applicability of LOAC to cope with changing trends of the contemporary armed conflicts. In addition to the above the

¹⁶⁵ M. Tsvetkova, *Swiss Red Cross worker killed by shell in Ukraine's Donetsk*, Reuters, 2 October 2014, <http://uk.reuters.com/article/2014/10/02/uk-ukraine-crisis-redcrossidUKKCN0HR24Z20141002?feedType=RSS&feedName=worldNews> [access 3 October 2014].

¹⁶⁶ A. Kolyandr, G.L. White, *Swiss Red Cross Worker Killed by Ukraine Shelling*, Wall Street Journal, 2 October 2014, <http://online.wsj.com/articles/swiss-red-cross-worker-killed-by-ukraine-shelling-1412272753> [access 4 October 2013].

¹⁶⁷ M. Mirza, *Unmet needs and diminished opportunities: disability, displacement and humanitarian healthcare*, UNHCR, The UN Refugee Agency Policy Development and Evaluation Service, New Issues in Refugee Research, Research Paper no. 212, <http://www.unhcr.org/4e0dbdb29.pdf> [access 29 September 2014].

¹⁶⁸ A. Robert, R. Guelff, *Documents...*, *op. cit.*, p. 419.

¹⁶⁹ T. Hillier, *Source Book...*, *op. cit.*, p. 204

¹⁷⁰ *Ibid.* p. 419.

¹⁷¹ APII Article 8.

reforms in LOAC can be deemed as a timely response to the limitations that had caused the unevenness in the binding effect of the Geneva Conventions and as such mitigating single sided application of humanitarian obligations. Hence the obligations are extended to both parties of non-international armed conflicts, unlike for human rights agreements.¹⁷² As far as armed conflicts are concerned the State responsibilities are therefore derived from the ratified the human rights and humanitarian duties of member States.

Two observations should be made on the development of API and APII. First and foremost is the holistically consultative mode of involving numerous parties that in one way or another get involved in activities during armed conflicts. That characteristic is remarkable and it notably makes API and APII distinctive. It in fact makes the formation processes of APII and API different from human rights instruments like the CRPD.

Further to the formation process of API and APII is the capability of its consultative model to cater for the responsibilities of the various parties that are usually involved across the broader spectrum of the different forms armed conflicts. This is perhaps yet another unique aspect with the protocols that is worthwhile acknowledging and according tribute. This makes protocol well modified considering the variety of the armed conflicts and involvement of various parties in today's changing landscape of armed conflicts.¹⁷³ In which case human rights must emulate similar modifications to enabled instruments like the CRPD assign to each of the respective parties a substantial degree of obligations. That seems helpful if human rights instruments are to ever claim respect from all actors taking part in the in the various types armed conflicts. In this way the impacts of armed conflicts on disable people are to become gradually alleviated and appreciated.

In relation to the above the aforementioned obligations wherever accepted ought to be respected by the ratifying State of the respective instruments. Accordingly supposing the obligation to protect is equally and inclusively construed or applied then such protection must be in position to benefit all civilians regardless of their disabilities are physical and mental by nature. The persons with disabilities must also be made aware of the need to refrain from acts that broaden fractions that would disunities due to succumbing to divisions peculiar with ideas that tend emanate from certain types armed conflicts.¹⁷⁴ These ideas could influence persons with disabilities behave in manner which persons supports with one of the sides taking part in the armed conflicts.¹⁷⁵ Admittedly the above view can attract criticism, as it sounds like denying persons with disabilities liberty express to their affiliations and affection to theoretical factors upon which armed conflicts are based.

Wacks is of the view that affections and affiliations could justify the reasons as to why some of the aggrieved parties may resort to relying on any of the different types of armed conflicts. To him peace supersedes any other alternatives used to resolve the disputes of injustice.¹⁷⁶ It can be contended that occurrence of armed conflicts is a day to day reality and States will continue experiencing any of the different types of armed conflicts, in spite of having peaceful alternatives that are probably the most ideal ways of dealing with the internal and external disputes.¹⁷⁷ Arguably under international law the protective obligations that a State owes to civilians an instrumentally crucial irrespective of the parties and types of armed conflicts such

¹⁷² C. Byron, *A Blurring of the Boundaries...*, *op. cit.*, p. 841, 883.

¹⁷³ L. Cameron, R. Everly, *Conceptualizing the Administration of Territory by International Actors*, *European Journal of International Law* 2010, vol. 21, no. 1, p. 221, 230.

¹⁷⁴ M. B. Smyth, *Injured...*, *op. cit.*, p. 37.

¹⁷⁵ S. Meyers, *Wounded...*, *op. cit.*, p. 22-23.

¹⁷⁶ R. Wacks, *Understanding Jurisprudence. An Introduction to Legal Theory*, Oxford University Press 2005, p. 29.

¹⁷⁷ L. Cameron, R. Everly, *Conceptualizing...*, *op. cit.*, p. 221, 230.

a State might find its self involved. Unfortunately it is sad to note that amidst the influence of international relations the obligatory nature of protective roles has often been ignored by most governments of the war tone States often in the name of pursuing their political or economic ambitions.¹⁷⁸

Researchers in armed conflicts have noted as to how the influence of such political or economic factors is a prevalent prototype that has been noted to comprise State compliance with humanity and humanitarian obligations in several types of armed conflicts.¹⁷⁹ Therefore the role of political or economic factors is neither dependant on the type the armed conflict nor the legal capacity of the parties involved in the armed conflict.¹⁸⁰

The above point is in fact a justification for reconsidering the long overdue need for establishing stronger institutional frameworks that are international in scope, autonomous in nature and authoritatively empowered to evaluate the legitimacy of armed conflict behaviors in relation to the feasibility of potential threats to disability rights.¹⁸¹ This can go a long way in creating more awareness on disability rights irrespective of the type of armed conflict. As of now the LOAC are extensive enough to regulate not just the behaviors of States but also to curb the violence of non-state actors in non-international conflict.¹⁸² Unfortunately, as far as the human rights laws applicable are concerned there has been this tendency of continuing with the State based model of apportioning and enforcing international obligations.¹⁸³ Such an approach can be huge limitation whenever attempts are made to extend the scope of human rights instruments to non-State parties of non-international armed conflicts.

The examples of the aforementioned international instruments include those that were already discussed and explained in first chapter with regard to the States' protect responsibilities in international law during and after situations of armed conflicts. That is to say the wether in the midst of armed the different armed conflicts the law effectively regulates how States ought to undertake the responsibilities to protect civilians in general but with more attention to how such protection could be subsequently applied to the benefit of the disabled as more vulnerable civilians wherever they find themselves caught up in the different types of armed conflicts.

In the same spirit Affa'a makes a convincingly persuasive criticism against the notion of State sovereignty.¹⁸⁴ She contends overemphasizing State sovereignty can be a barrier to room for humanitarian intervention. The above argument is even more convincing in situations where a non-international armed conflict happens in a State with already a bad reputation for protecting the rights of persons with disabilities. As a matter of fact the issue of humanitarian intervention is even more important now than ever before. A view can be supported by the increasing cases of armed conflicts. Moreover incidents of armed conflicts are increasing with little attention to given to the dignity of the most vulnerable and minority groups.¹⁸⁵ Humanitarian intervention is defined as the actual use of force or threatening to use it by a State, group of States or an international organization for the sole purpose of protecting the nationals from a targeted State from the continued deprivation of internationally recognized

¹⁷⁸ Human Rights Watch Report, *At a Crossroads, Human Rights in Iraq Eight Years after the US-Led Invasion*, <http://www.hrw.org/sites/default/files/reports/iraq0211W.pdf> [access 18 September 2014].

¹⁷⁹ B. Sultan, C. Margaret, J. Tim, L. William, *The composite approach: Research design in the context of war and armed conflict*, Third World Quarterly 2002, vol. 22, no. 5, p. 991, 994-997.

¹⁸⁰ Ibid. p. 997.

¹⁸¹ G.T. Couser, *Disability...*, *op. cit.*, p. 256.

¹⁸² APII, see also L.C Green, p. 75.

¹⁸³ C. Byron, *A blurring...*, *op. cit.*, p. 841, 883.

¹⁸⁴ M. Affa'a Mindzie, *Intervention...*, *op. cit.*, p. 174, 176.

¹⁸⁵ S.R. Barriga, *Dispatches: Invisible victims of the Syrian conflict; people with disabilities* (19 September 2013), <http://www.hrw.org/news/2013/09/19/dispatches-invisible-victims-syrian-conflict-people-disabilities> [access 20 September 2014].

human rights.¹⁸⁶ By referring to the role of the African Union in armed conflicts, Christakis seems to suggest more reliance on humanitarian interventions while overcoming the barrier of State sovereignty.¹⁸⁷ In as much as at a glance Affa's work looked insightful in many aspects of other vulnerable groups to armed conflict violence such as women and children,¹⁸⁸ just like most humanitarian scholars her study excludes the already indivisible group of persons with disabilities. It is of no wonder therefore that even State actors have often ignored any obligation to do with these vulnerable in most types of armed conflicts.¹⁸⁹ At least identifying the existence of the disabled group of persons would have sufficed in minimizing the consequential damages.

2.3.1 Disability protection in texts and legal context under public international law

Protection is a commonly used verb not just with the instruments of public international law but also in manuals of the several states authorities. In this respect it becomes indeed clearer human rights are intended to impose an obligation upon states to protect their nationals from the harmful, dehumanising and cruel practices utterly degrading to humanity. In this above context it must be clearly understood that most of the spheres of public international law are centred towards states as already highlighted in the earlier explanation. Subsequently in this discussion the issues to be resolved in deciding as to whether available evidence is sufficient for arriving at conclusions from the legal context can reflect some degree of consistency. The challenge has ever been the absence of adequate limitation that might arise due to the comparably varied global nature of legal text and context in which public international law tends to interact with the respective branches of municipal law. On this occasion it must be appreciated that the complexities of the issues from the cultural dimensions across the broader spectrum tend to have impacts based on concepts of cultural relativity. In this case cultural relativity is a rather strange concept but it has been used in cases where states are seeking to circumvent certain obligations as under internal law. Conversely the public domains continue to grapple with attaining common interpretations within the respective municipal laws. There is yet another challenge of poor legalities for protective framework the rewards from charities. On this occasion disability rights are continue to struggle with the subtle attention some of States are willing to express in international law and municipal law to aspects of protecting rights of persons with disabilities. The major supporting theories that underlie the controversy include the instances where states have preferred reliance on either the concept of dualism or the concept of cultural relativity.¹⁹⁰ The persistence of even variations in the municipal systems across the world might equally impact the ease and certainty in enforcing rights of persons with disabilities. In this context the reference is made to the presence of both the common law and the civil system of legal traditions. It must be equally appreciated that such legal traditions have interacted with the aspects of disability in comparably different ways.¹⁹¹ This is yet a vital aspect that deserves to be mentioned at this juncture. Common laws are those jurisdictions whose legal institutions derive their decisions upon previously decided case law. In this context it must be appreciated that disability is such a newly developing concept that judicial institutions hardly have evidence of previously decided upon which to draw

¹⁸⁶ M. Affa's Mindzie, *Intervention...*, *op. cit.*, p. 174, 176.

¹⁸⁷ T. Christakis, *Emperor has no clothes...*, *op. cit.*, p. 327, 329.

¹⁸⁸ M. Ron, M. Hannah, *Comment: The CRPD and children with disabilities*, Australian International Law Journal 2013, vol. 20, p. 17, 21.

¹⁸⁹ S. R. Barriga, *Dispatches...*, *op. cit.*

¹⁹⁰ J.A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, International and Comparative Law Quarterly 2005, vol. 54, issue 2, p. 459, 462; A.D. Renteln, *Unanswered Challenge of Relativism and the Consequences for Human Rights*, Human Rights Quarterly 1985, vol. 4, no. 7, p. 514, 517.

¹⁹¹ C. Buisman, *The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?*, Leiden Journal of International Law 2014, vol. 27, no. 1, p. 205.

further reference.¹⁹² On the other hand international shows evidence of poor complementarity and if anything in terms of the protection derived human rights and international humanitarian law are undisputedly inadequate to have substantial attributes of irreconcilable concepts on disability. That makes public international law of duality deserve more clarity and further academic scrutiny for justify the need for consistence if this areas of law is to be effectively streamlined.

Civil jurisdictions are those jurisdictions hat are intended to follow statutory codes in deciding matter on a case by case basis. In this case it must be appreciated that the challenges a that are involved in this nature of legal traditions courts would decides matters that relates to issues of human rights violations solemnly depending on the provisions in the municipal law.¹⁹³ In it is perhaps becoming apparent that the presence of functioning regional body these in regional bodies are already.¹⁹⁴ On this case the EU is a classical example of bodies that are effectively engaging with their respective member states are resolving the problems of disability rights.¹⁹⁵ By and large to impact of the numerous forms of legal systems across the word deserves to be given some attention.¹⁹⁶ In the same accord it must be appreciated that courts are the cornerstones of these rights even though the denial of legal capacity to persons with disabilities has often been yet another limitation to the enforcement of their rights. Actually this is one area that several proponents have suggested needs enabling reviews to person with disabilities.

In a nutshell even in the same regional integration some of the states might opt to reply on the cultural relativism, other might prefer dualism. All these are forum through which the right of persons with disabilities under the CRPPD. In this case the situations after armed conflict would find the notion of legal warrants in the legal text and contexts. Therefore the issue of the global context operates on the basis of numerous underlying theories. The locus standi rules under some of the procedure rules have tied down the affected persons with disabilities following the presumption they the lack capacity to take legal action.

2.4. Civilian and combatants as perceived under lenses of disability models

The occurrence of armed conflicts is also associated with the use of the terms civilian and combatants especially when referring the persons. Certainly in much as much on the face it would sound like as if the persons with disabilities are covered according the reference to the civilians under the Geneva Conventions to IV. Unfortunately the overly generally approach to the disabled persons has often created a degree of invisibility to this vulnerable group. Accordingly API Armed conflicts therefore rely on the principle of distinction to suggest civilian as well as their must at all times of the armed conflict be distinguished from the combatants.¹⁹⁷ In the above case it is undeniably apparent that the law of armed conflict essentially accords the protection to the civilian categorically depending on how they are classed.¹⁹⁸ In the above case the presence of persons with mental or physical disabilities seem to undergo rather more damaging experiences as compared to those civilians without

¹⁹² B. Chaloka, *International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States*, International Journal of Refugee Law 2000, vol. 12, p. 251, 260.

¹⁹³ C. Tomuschat, *Human Rights and International Humanitarian Law*, European Journal of International Law 2010, vol. 21, no. 1, p. 15.

¹⁹⁴ S.R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, European Journal of International Law 2005, vol. 16, no. 4, p. 695-696.

¹⁹⁵ T. Hillier, *Source Book...*, *op. cit.*, p. 204.

¹⁹⁶ E. Macdonald, P. Alston, *Sovereignty Human Rights...*, *op. cit.*

¹⁹⁷ L. Moir, *The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949*, International and Comparative Law Quarterly 1998, vol. 47, no. 2, p. 337.

¹⁹⁸ API article 52 and 54.

disabilities. Conversely the occurrence of armed conflicts would therefore imply presence of disabled civilians and disabled combatants the draftsmen of the CRPD hardly accord the above issue attention and yet the above categorisation is remarkably important as far the cases of armed conflicts are concerned.

2.4.1. Civilian with disabilities

In this case it is apparent that civilians with disabilities could range from a disabled woman to a disabled child.¹⁹⁹ On several children and women with disabilities have encountered hindrances for one reason or another but more so this class would encompass the civilians that might have had disabilities even long before the commencement of the armed conflict.²⁰⁰ The above calibre would therefore comprise of persons whose disabilities might have been part of their bodily experiences right from birth. That is opposed to those civilian whose experiences and identifying with disability might have started with the occurrence of the armed conflict. In the above case international humanitarian law in conflict with CRPD. Bearing in mind that the CRPD is a Convention that was purely aimed at addressing issues of disability rights and it assumes a unified, generic and homogenous class of persons with disabilities.²⁰¹ On the contrarily armed conflict is a model example of a relationship that creates the problem of fragmenting persons with disabilities.²⁰² In fact the situations of armed conflicts become inherently apparent and yet this a regrettably growing concerning in terms of the fractionising persons with disabilities into groups.²⁰³ It is apparent that there is relatively higher number of civilians that prone to cases of disabilities. As far as the post conflict entitlement to the rights is concerned the CPRPD has never apportioned its right on the basis of any class or causes of the disabilities.

2.4.2. Combatant with disabilities

In this case the international humanitarian laws seems to put substantial degree of protections on the combatants as long they are maimed, amputated or affected by wounds or injury as result of taking part in the armed conflicts. The two branches of public international (human rights and international humanitarian law) are on this occasion citing disabilities under the third Geneva Convention on simply grounds of protecting *hose de combat*.²⁰⁴ In the post armed conflict season the armed forces that have surrendered as *hose de combat*.²⁰⁵ Such persons would perhaps benefits from policies of amnesty and such leading to room for transitional justice, of course depending on the types of conflict that they were involved.²⁰⁶ It would seems unclear wether such persons would be exempted from enjoyed of their rights under the CRPD. In this respect those involved have surrendered are fire harms. There other symbols that are used in the process of expressing communication. This sounds closer to developing internationally inclusive communications patterns in times of conflicts.

¹⁹⁹ I. Mugabi, *Protection...*, *op. cit.*, p. 1273-1274.

²⁰⁰ S. Sivakumaran, *Binding Armed Opposition Groups*, *International and Comparative Law Quarterly* 2006, vol. 55, no. 2, p. 369.

²⁰¹ A.D. Renteln, *Cross-Cultural Perceptions of Disability: Policy Implication of Divergent Views* [in:] S.S. Herr, L.O. Gostin, H.H. Koh (eds.), *The Human Rights of Persons with Intellectual Disability*, Oxford University Press 2010, p. 59.

²⁰² I. Mugabi, *Protection...*, *op. cit.*, p. 1273, 1276.

²⁰³ S. Simonson, *Back from War – A Battle for Benefits: Reforming VA's Disability Ratings System for Veterans with Post-Traumatic Stress Disorder*, *Arizona Law Review* 2008, vol. 50, p. 1177.

²⁰⁴ R. Goodman, *The Power to Kill or Capture Enemy Combatants*, *European Journal of International Law* 2013, vol. 24, no. 3, p. 819-853 and M.N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, *European Journal of International Law* 2013, vol. 24, no. 3, p. 855-861.

²⁰⁵ M.N. Schmitt, *Wound, Capture, or Kill...*, *op. cit.*, p. 855, 857.

²⁰⁶ M.B. Smyth, *Injured...*, *op. cit.*, p. 37.

2.5. Second World War and the interactions with deaf communities

There is evidence that seems to suggest that deaf communities were involved in the armed conflicts of the world war. It is apparent that in as much as under the communities of the deaf and mute have been lately undermined as a helpless group of persons in the context of armed conflicts situations, this is rather irreconcilable with BBC report that unveiled evidence showing the contributions of deaf communities to the first world war.²⁰⁷ It is rather unlikely that persons with disabilities are always assumed to be unproductive.²⁰⁸ Therefore they are able bodied persons like anyone else with capacity and ability to be supportive by performing a few of the manageable activities of an armed conflict.²⁰⁹ This makes such a difference in terms of how the communities perceives and conceives persons with disabilities. Thus there is ever a possibility of persons with disabilities could be equally useful labour force in armed conflict.²¹⁰ The blind the mute among other related groups could play certainly useful roles in times of armed conflicts. However at present day the current types of armed conflicts are developed more dangerous typologies to the bodily dignity and integrity of persons with either visual, hearing or other forms of bodily impairments. Such acts range from the reported instance.

2.6. Present relationships between the persons with disability and military works

Following the presence of clear evidence that deaf communicated had a constructive role to play in the First World War.²¹¹ This means it analysing necessary exploring the current nature of armed forces and explore that general attitude to the possibility of having persons with bodily disabilities working within the armed forces. It seems apparent that in as much as working in the military professional can lead to disabilities, it also remains particularly striking that most of the armed forces are unlikely to work with or allow the disabled persons work with them. Actually in spite of the development in technology to invent new strategies with means and methods of warfare the present structures of power and work relations within the armed forces seems very reluctant to recruit persons with any forms of impairments.

3. Conclusions

In light of the above discussions the following observations and conclusions have been reached; firstly CRPD adopts a State based nature of human rights obligations remains a challenge to apply and bind its obligations to non-state actors more so in times of armed conflicts. This comprises the applicability of the rights based model that is advanced for disability rights under the CRPD when faced with certain types of armed conflicts. The limitations to a comprehensive application of the disability to all types of armed conflicts leads to a vacuum of to contemporary applicability of the most ideals models of disability rights while also leaves the disabled victims of especially non- international armed conflicts to end in the most controversial and rather complicated situation that subsequently the medical model that is fully founded. In essence at the present would imply revising and rethinking ways of extending human rights obligations and beefing up the existing human rights treaties relating to the rights of persons with disabilities. The above view is based on the absence of advocacy for the interest of persons with disabilities through reliance on a rights based implementation model under the laws of international.

²⁰⁷ W. Mager, *The untold stories of deaf people in WWI* (BBC News, 4 November 2014), <http://www.bbc.co.uk/news/blogs-ouch-29846154> [access 4 November 2014].

²⁰⁸ G.T. Couser, *Disability...*, *op. cit.*, p. 256.

²⁰⁹ W. Mager, *The untold stories...*, *op. cit.*

²¹⁰ A. Thomas, *Equity for All: Accessing Equitable Education for Children with Sensory and Physical Disabilities in Nicaragua*, Harvard Graduate School of Education, p. 6.

²¹¹ W. Mager, *The untold stories...*, *op. cit.*

Secondly the historical aspects affected the context within which international humanitarian law have been understood to develop overtime. This is evidenced in type of law and the content of these laws over a period of time. Most of the developments in history were more centred on post World War period. This accounts to laws in the public domain to be saturated in such a way that its content are able to meet the demands and state of needs that are required at that point in time required point in time. The lieber code given to the American soldiers in 1893 stressed the obligations to respecting and never attacking rebel member.

Thirdly there is a conflict in the interpretative tests thus inconsistency and varied meaning are likely to arise in most cases. Modes of disability: based models under the CRPD were clearly intended to enhance equality; equity and humanity are promulgated to persons with disabilities. This carries with it the foreseeable concept of independent all of which are enshrined under the CRPD is shown as an instrument that reformed the public domains the of persons with disability for restoring fairness in all aspects of family life. More so reconsidering given persons with disabilities some room to make decisions of matters that have a direct and indirect impact on their day to day livelihood. Comparably the all the instruments of armed conflicts are founded on a contrary platform. In this case the concern with the international humanitarian law attention is accorded to the combatants and the general civilian population. In fact there is more of a rescue. Secondly the impact that armed conflicts and international humanitarian law are clearly taking varied stands. In view of the developments in armed conflicts it is clear that there must be some preliminary questions have to be to decide so as to degree and nature of protection that can be accorded.

Finally and yet a related aspects is the nature of relationship; In some respects these branches of public international law may be contended to be two a complementary while as far as the conceptual framework on persons with disabilities is concerned, both human rights and international humanitarian law seems contextually contradictory. In essence in as much as the both human rights and international humanitarian law are derived from the mainstream argument of maintaining the fundamental humanitarian stands. In spite of some similarities in the two areas of law on this occasion a conclusion can be deduced from the study that remains clearly confrontational as to how, when and why they attempt to accord protection those with disabilities.

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