International Law Raison d'etre and the Grounds for the Interpretive Approach

KUTAFIN UNIVERSITY LAW REVIEW

Volume 1 December 2014 Issue 2

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LAW REVIEW

Volume 1 December 2014 Issue 2

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Kutafin Moscow
State Law University (MSAL)
9 Sadovaya-Kudrinskaya str.,
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http://msal.ru/en/
msal@msal.ru

+7 (499) 244-86-35

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ARTICLE

INTERNATIONAL LAW RAISON D'ETRE AND THE GROUNDS FOR THE INTERPRETIVE APPROACH

By Gianluigi Palombella

Author

PHD (Law), cum laude, Scuola Superiore di Pisa,1980
Full Professor, Faculty of Law, University of Parma and
Scuola Superiore di Studi Universitari 'Sant'Anna' di Pisa
E-mail: g.palombella@sssup.it

Abstract

In constitutional States, principles are of different kinds. Some are of procedural nature or point to the functioning of law ('how'), some others encapsulate the raison d'etre, purpose and value ('what' and 'why') of the legal order, as a whole. With regard to the International legal system the second kind of principles remains much disputed upon, although a clarification of such an issue would be of relevance in the development of IL, especially in the adjudicative sphere.

One of the obstacles to overcome is certainly the account and narrative that legal positivism has offered of IL. This article shall explain, on the one hand, some weaknesses of traditional positivism, with particular concern for the transformation and interweaving of legalities in the supranational sphere. On the other hand, it shall appraise especially the contribution by the late Ronald Dworkin to IL, and how his interpretive theory of law can be projected onto the international environment. Eventually, recent cases before international Courts shall be considered, that expose the way judicial reasoning actually profits from asking questions of principles.

Keywords

International law, principles, legal regimes, legal adjudication, interpretivism, justice.

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1. Re-setting the Scene in the Supranational Domain

1.1. In the last decade the approach to law has been deeply affected by the constitutional way of thinking. It influences both the interpretive endeavours of courts and legal theory advancements. The appearance of the European constitutions, after World War II, shifted the legal universe from the Rechsstaat, Stato di diritto,[1] to the 'constitutional' legal State. This change channeled the posited law through substantive and procedural principles that have become the criteria of recognition, validity and constitutional legitimacy of ordinary legislation. *Mutatis mutandis* - new frames have been provided for the International Law (IL) under the Universal Declaration of Human Rights, the *United Nations Charter* and the European Convention of Human Rights. A large number of regional and quasi-universal agreements, conventions and treaties reoriented legal intercourses, duties and guarantees on the basis of a newly forged substantive programme of principles. And as a matter of fact, despite their disputed nature, principles play a crucial role in the International Law and the Administration of Justice. Principles do not only fill the legal gaps, but also serve as fundamental means for the interpretation of rules and the enhancement of legal reasoning.[2]

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1 JR Silkenat, JE Hickey, PD Barenboim, The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat), Springer, Dordrecht 2014.

2 F Raimondo, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (Brill, Leiden 2008).

However, while a role of principles in States' ambit increases, International Law seems to overlook that special kind of principles which characterizes the identity and builds up the foundation of a legal order. This is due both to the dominant authority of legal positivism in western legal theory, and to the poor elaboration that the latter has made of the international legal order specifically.

1.2. Legal philosophers of the last century, apart from Hans Kelsen, have barely deepened their understanding of International Law for both cultural and analytical reasons. Herbert Hart understated the legality of IL, as minor and incomplete, *vis à vis* the State, the perfect, central case, for the concept of law.[3] Such thesis can only in part be explained by the features and the structure of the International Law of late 50s.

Last decade registers two different reactions in legal theory scholarship. The first one concentrates on Hartian theory of law, and tries to amend it from the inside. It acknowledges that chapter X of the Concept of Law[4] (Hart) is 'embarrassing',[5] and that the thesis assuming the absence of secondary rules in IL is erroneous.

This means that Hartian theory can and should be applied in the international order, either for IL advancement in the subsequent years or because of the characteristics that were overlooked by Hart.[6] This holds true as well for the Hartian 'fundamental norm', *id est* the rule of recognition, that is now found inside the IL system, through criteria set by Art. 38 of the Statute of the ICJ[7] as well as those enshrined in the Vienna Convention for the Law of Treaties.[8] Hartian theory is also adopted in order to describe the newly transformed scenarios where global legal authorities and extra-

3 HLA Hart, The Concept of Law (with a Postscript edited by PA Bulloch and J Raz) (2nd ed, OUP 1997).

4 ibid.

5 J Waldron, 'International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?' (2013) NYU Law, Public law and Legal Theory WP 209.

6 S Besson, 'Theorizing the Sources of International Law' (2010) The Philosophy of International Law 163.

7 Waldron (n 1) 219.

8 Waldron (n 1) 219.

state legalities often flourish outside the traditional sight of IL (although Hartian theory is enriched by integrations and eclectic hypotheses). [9] However, such an approach can be considered itself insufficient for various reasons, let alone that it certainly does not build upon the ultimate function of principles and overlooks their judicial import.

The second way to relocate IL through a legal theoretical approach does not deny the development of the sources, institutional practices and the fact that they can actually form accurate premises for IL as a system with concrete and full-fledged order of legality. However, it believes that the sheer positivist explanation of International Law is fallacious because of its thesis that ultimately IL is *based* on the consent of states and that law, in general, is to be reduced to the 'historical fact' of a social *convention* identifying the premises of a legal order.

In fact, if Hart did not as accurately as necessary extend his theory to IL, after more than 50 years, Ronald Dworkin- himself having neglected the issue for long-, in his last days, has proposed a "new philosophy" of IL. IL has not overcome its weakness, while it is, as Dworkin writes, "only ignored." [10] Thus, he provides for theoretical reassessment, integrations and connections between his general philosophy of law and a theory of international law.-

1.3. In what follows, I shall firstly recall some features of international law recognised principles, then draw the essential tenets of Dworkin's "New Philosophy". I shall do so especially in so far as the latter contributes some relevant novelty in focussing on international law principles as necessary backbone for interpreting and perfecting the international legal order. In the concluding sections, I shall eventually widen the scene, accounting for transformations of the supranational scene that Dworkin himself did not

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9 B Kingsbury, 'The Concept of «Law» in Global Administrative Law' (2009) 20 European Journal of International Law 23; Th Schultz, 'Secondary rules of recognition and relative legality in transnational regimes' (2011) vol 56 American Journal of Jurisprudence 59; J Klabbers, 'Law-making and Constitutionalism' (2011) American Journal of Jurisprudence; A Peters and G Ulfstein, The Constitutionalisation of International Law (OUP 2009).

10 R Dworkin, "A New Philosophy of International Law" 1 Philosophy & Public Affairs 2.

address (not even in his only contribution dedicated exclusively to IL), and yet can prove to be a further case for treating IL through a mature, principle-based, interpretive approach. I shall propose recent case law and offer an understanding of their reasoning as a judicial progress: one that stretches beyond positivist legal theory, toward the interpretivist one and mainly in order to cope with new "disagreements" in the international scenario, involving relations among a plurality of separate legal orders. To this regard, the relevant judicial cases are those originating from being a single issue under the reach of concurring, and often conflicting, legalities. Among their many functions in IL, principles can help making sense or even reconciling divergences stemming from the multiplicity of discrete legal 'regimes' (presently featuring in IL: think of UN, and UNSC, UNCLOS, WTO, ECHR, WIPO, WHO, and so forth) that hardly would be solved by 'formal' legal tools (lex specialis, lex posterior, etc.).[11]

2. About Types and Function of Principles in IL

2.1. A canonical way to see principles in IL places them among the sources of law, as stated by art. 38 (1c) of ICJ Statute. It is to be noted, however, that they can surface within more than one source. In the context of the ICJ, from art. 38 paragraph 1(a), or (b), *ie* in the application of conventional or customary law by which they might be generated, beyond the separate provision singling out those principles 'recognized among civilized nations', in paragraph 1 (c).[12] Famously, to the latter Hersch Lauterpacht[13]- Judge in the ICJ- referred as subsidiary general principles

11 M Koskenniemi, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of IL' (2006) <http://untreaty.un.org/ilc/reports/2006/2006report.htm> on the proliferation of regimes and courts, for ex. Y Shany, The Competing Jurisdictions of International Courts and Tribunals (Oxford 2003).

12 ibid 42.

13 H Lauterpacht, 'Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order' (1958) Symbolae Verzijl and *International Law. Collected Papers* (CUP 1975).

with the special, systemic, function of banning *non liquet* from the realm of (international) law.

"General principles of law recognised by civilised nations" (art 38 1 c) are held to play the function of those clauses that in domestic systems refer to natural law (as in the Austrian civil code, art. 7) or the general principles of the legal order of the State (Italian civil code, art. 12 preleggi). As a consequence, reference to them is mainly meant to face the issue of legal *lacunae*. It embraces the doctrine of a legal system's *completeness,* one that in turn justifies, as mentioned above, (the feasibility of) the prohibition of *non liquet*[14] : "'the principle affirming the completeness of the legal order" is to be seen as "the positive formulation of the prohibition of non liquet'.[15] And both should be seen as positive rules in *customary law*.[16]

In truth, reference to principles belonging to civilised legal systems has been understood as evoking *jus gentium*, and it is contended upon, between at least two main theoretical strands. One assumes that these principles pertain to no particular system, being instead fundamental to all systems, and showing the essential unity of law, apparently as a matter of reason.[17] The other derives its rationale from comparative legal approaches: enquiry throughout various national systems shows that the widest consensus supports some legal principles that accordingly become general international law, "independently of custom or treaties."[18]

The resource of general principles, if seen through legal realist lenses, equates with an opening in favour of judicial discretion, if not judicial norm-creation. From some legal realist standpoint, general principles have been feared as the Trojan Horse of natural law and morality into the interstices

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14 J Stone,'Non liquet comes into argument rather when applicable rules of appropriate content and precision are simply not available for adjusting the particular clash of interests' (1959) Int'l L 124.

15 Lauterpacht (n 13) 216.

16 ibid 196.

17 B Cheng, General Principles of Law as applied by International Courts and Tribunals (Cambridge 1987) 24.

18 W R Hearn, 'The International Legal Regime Regulating Nuclear Deterrence Warfare' (1990) Int'l L 225.

of positive norms.[19] For Julius Stone (commenting on Lauterpacht) "even if, for the sake of argument, we were to accept the 'natural law' version most favorable to Judge Lauterpacht's position, namely, that these principles represent a kind of inexhaustible storehouse of potential law, they still would not dispense the judge from making law-creative choices."[20] Stone stressed the point, later become largely undisputed among legal scholars, that principles might be conflicting themselves, "and, indeed, often to the same principle by reason of its ambiguity, circuity or indeterminacy" can be traced diverse outcomes.[21] Stone's early criticism notwithstanding, legal systems are undoubtedly held to include principles, whose standards, far from being a sheer appeal to vague morality or natural law, are positive law essential in the construction of present legal orders.

As I see them, and as legal theory and jurisprudence have abundantly afforded consistent evidence in that regard, principles as normative standards, regardless of their treatment in different legal theories, hold a central place as positive law. Likewise, even those most structural 'general principles of law' play a fundamental function in every legal order: this is why art. 38 of the ICJ Statute upholds them as recognized among civilized nations, given their belonging to *law functioning*, as Lauterpacht would have them. Bin Cheng's analysis has recorded the general principles of law through their use by International Courts and Tribunals and listed several such as self preservation, good faith (and notably *pacta sunt servanda*, as well as malicious exercise of a right), varieties of sections on the principle of responsibility (fault, causality, individual responsibility, integral reparation, among them), most principles in judicial proceedings (from those inherent in jurisdiction to the various *jura novit curia, audiatur et altera pars, nemo judex in causa propria, res judicata*, etc.).[22]

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19 In different words, the door opening to (rule's) validity criteria placed outside the legal system. The duty to decide holds despite absent or conflicting rules; its feasibility is granted by recourse to principles, whose membership in the legal system -if any- would hardly prevent any reference to law of nature or of reason.

20 Stone (n 14) 133.

21 As a consequence, a "law-creating choice" shall be in place, although it shall be disguised by way of "logical deduction from the principle finally chosen" (ibid).

22 Cheng (n 17).

2.2. Also due to the special features of the international legal system, the capacity and latitude of fixed *rules stricto sensu,* in a positivist view, appears at times limited: be it a matter of completeness of the system or otherwise, there are cases where international norms have led to no answer or otherwise stated, unsatisfactory outcomes. As Jan Klabbers has recalled, "[M]any have held that the bombing of Belgrade in 1999 was illegal, yet legitimate; the non-activity of the United Nations in Rwanda or Srebrenica, in the mid-1990s, was legally difficult to condemn, yet morally wrong".[23]

It is because of these and similar issues, that Klabbers, for example, turned to focusing on some 'virtue ethics' that should be inherently essential for at least those that are entrusted to make the most of international law norms, and international judges among them.[24] And not by chance, among the general principles of international law, *good faith* is in pride of place in measuring how should the key norm -*pacta sunt servanda* -be observed.[25]

However, aside from the prospect of a possible virtue ethics in IL, as a matter of fact those problems that stem from missing or conflicting norms – or that as such are perceived- seem to be increasingly apparent in International law context, all the more so due to the more demanding objectives of the 'civilised nations' in the last 60 years. Thus, the full range of available IL principles is hardly overestimated and should better be felt as part of an on going constructive endeavor: it embraces certainly general principles of the law of civilized nations, principles of law-functioning, but also the principles belonging to specialized international rule-making (in,

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23 J Klabbers, 'Towards a culture of formalism? Martti Koskenniemi and the Virtues' (2013) Temple International & Comparative Law Journal 430; B Simma, 'NATO, the UN, and Use of Force: Legal Aspects' (1999) 10 Int'l L; G Robertson, Crimes Against Humanity: The Struggle for Global Justice (Penguin 2000) 68–72.

24 Some requisites of personal integrity, impartiality, honesty and the like are held for U.N officials, and codes of conduct for those with special mandates as Rapporteurs. *Cf.* Klabbers, supra fn 15, pp. 433 ff and *Human Rights Council Res. 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council*, 9th Sess., art. 3(e) (June 18, 2007).

25 *Vienna Convention on the Law of Treaties,* art. 26 (May 23, 1969, 1155 U.N.T.S. 331) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

say, trade law, human rights law, environmental law, humanitarian law and the like).[26] Nonetheless, it is worth supposing that adjudicative matters would better be viewed could one be drawing on *principles bearing some substantive raison d'etre* of IL as a *specific* legal order.

Taking account of that background, the issue can be raised whether some (other) set of principles, distinctively underpinning the international legal order, is capable of shaping its *identity*: as much as in any (State) legal systems, in their constitutional and primary law, principles frame the fundamental- ethical and political- choices to be pursued. They would indeed function as gap-filling as well as interpretive resources supporting IL as a whole.

Accordingly, they *should belong in the fundamental raison d'etre of IL properly*. Besides principles of law-functioning, referring to how IL can work, like *pacta sunt servanda* or, say, *good faith*, they would approximate the question as to *why* it is valued and *what* are being its substantive purposes.

In truth, such a question is not different from the one most recently tackled by the late Ronald Dworkin, in a posthumous article,[27] suggesting legal principles that, in his view, would frame IL, and help resolving 'disagreements' in identifying positive IL norms, to be applied in adjudicative issues.

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[26] Those principles range from higher-lower levels of generality: think of the principle of non discrimination in its specific WTO appearance as the "most favoured nation" principle, and its underlying rationale of enhancing unrestricted free trade. For example, it is maintained that "In the current WTO, the traditional trade law principles of most favoured nation and national treatment operate against state failure in the form of protectionism. These principles are constitutive of the system of multilayered governance and thus may be considered as amounting to constitutional principles of the trading system. They constrain the WTO members and are increasingly viewed as two facets of a constitutional principle of non-discrimination ultimately benefiting the ordinary citizens (such as importers, exporters, producers, consumers and taxpayers)" (K Armingeon, K Milewicz, S Peter, A Peters, "The constitutionalisation of international trade law", in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) 76.

[27] Dworkin (10) 1.

To a search for principles might lead, for example, Anne Peters 'compensatory constitutionalism' as encapsulating a general rationale of current IL. It conceives IL under a specific understanding which, through evidence of what she defines micro- and macro constitutionalisation trends, enhances fundamental norms that would help manage transnational level issues. Conflict-solution requires a balancing of interests in the concrete case, in the absence of abstract hierarchy. According to Peters, the international lawyer should determine "the supremacy of international law over domestic constitutional law in a non formalist way", that is, assessing the rank of the norms at stake "according to their substantial weight and significance."[28] However, fundamental norms would require some legitimacy, in the absence of a true international constitution, while state sovereignty and consent are no longer accepted as the sole source of legitimacy of international law.[29]

As I see it, the interplay between different regimes of law and separate orders in the global intercourses should be guided through mutually pondering their respective fundamental principles; as they function like hermeneutic sources of interpretation of rules, it is relevant how international law's rationale and legitimacy are justified and through what substantive principles.

2.3. Such a question is of a type familiar to State legal orders and to *constitutional* reasoning in the last decades. It is plain fact that substantive principles, often enshrined in our constitutions, define scope, values, and purpose of a legal order as a whole, by channelling rules' interpretation on one side and, on the other, connecting its general coherence both to the logical consistency of its norms and to the evolving political- ethical pillars of its own community of people.

Although such a role of principles has become uncontested, it was famously made part of a self-standing theory of law, neither positivist nor

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28 A Peters, "Conclusions" in J Klabbers. A Peters, G Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 348.

29 A Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" (2006) 19 Leiden Journal of International Law 579–610.

naturalist, but *interpretivist*, by Ronald Dworkin: a theory that is centred explicitly upon the *adjudicative* side.[30] Each legal order is to be referred to its own community, and principles belong to or constitute a bridge toward the *integrity* of its *political morality*. In truth, an interpretivist theory of law could accordingly be extended to IL, as much as to any legal orders properly meant, provided that a general *rationale* characterising the essential principles in the political morality of an *international* system of law is found.

However, in the tradition of legal positivism, from Austin to Hart, the very foundations and the maturity of IL as a legal order were never fully recognised;[31] on the other hand, substantive principles, of an ultimate nature, sustaining IL are not easily (nor unanimously) presupposed, despite the number of supranational preambles, charters, conventions and quasi-universal convergence upon peace, security, human rights (let alone *jus cogens* and banning of war, torture, genocide, slavery). It is contentious if historical progress of international law has overcome the traditional core of a law treating bilateral interests under the dogma of states' free will; if a *super partes* law,[32] to be oriented by the interests of humanity has changed its nature;[33] if individuals have superseded States as the ultimate subjects for whose sake sovereignty itself appears now a conditional notion,[34] and so forth.

If we imagined to adopt an interpretivist approach, by Dworkin's lessons drawn on western constitutional States, it would be arduous to argue through the key notion of *integrity,*[35] simply extended to IL. That concept connects coherence of a legal order with the political morality of a well defined social polity, while inter-states arena would still lack the unity of something like a universal community.

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30 Among his many works especially R Dworkin, *Law's Empire* (Cambridge Mass, HUP, Fontana Press 1986).

31 Waldron (n 5).

32 A Cassese, *International Law* (2nd edn, OUP 2005) 217.

33 R Teitel, *Humanity's Law* (OUP 2011); A Cassese, *The Human Dimension of International Law (*OUP 2008).

34 AM Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99 The American Journal of International Law 619-631.

35 Dworkin (n 30) 176-275.

Nonetheless, in the article of his last days,[36] eventually Dworkin tried to offer the missing template for IL, and extended his 'interpretivist' theory of law to the domain of extra-State law, by providing some newly forged support.

He did so, by spelling what he believed the fundamental principles that specifically attain to IL, those that should *justify* the existence of the international legal order. Of course, even if found controversial, still they can set the scene for a long awaited focus upon the distinctive underpinning of IL, thereby making interpretive endeavour to begin as a *principle-based exercise*.

3. Dworkin's Posthumous Work on a Theory of International Law

3.1. Dworkin rejects the positivist and Hartian idea[37] according to which rules are valid only depending on the criteria of recognition spelled by a fundamental secondary rule of the legal system. He refutes on one side the *conclusiveness* of such a theory as policing system's borders, on the other side, the social convention that is held to pinpoint specifically the birth and life of IL, that is, States' *consent*.

The latter remains unpersuasive: it does not establish any priority among sources, gives no clue on whose consent is ultimately relevant, or when customary rules become peremptory; and what have states consented to remains often disputed (in many cases text cannot be decisive: e.g. art 2 (4) UN charter on prohibition of the use of force). Even more fundamentally, for States to accept something as law, "they need some other standard to decide what they should regard as law."[38] *That* more basic principle, not the fact of consent, provides "the grounds of international law": similarly, the obligating strength of promises, cannot be due to the mere *fact* of promising.[39]

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36 Dworkin (n 10).

37 Hart (n 3) chapter X.

38 Dworkin (n 10) 9.

39 ibid 10.

Thus, being consent irredeemably flawed (and Dworkin is not alone in making that point),[40] the 'sociological' and descriptive answer according to which IL is law because it is believed law by "almost everyone"[41] cannot be final.[42]

Briefly to resume, Dworkin states that it is in order to improve the legitimacy of *their* coercive strength *vis à vis* their citizens, that States have a duty to accept a *mitigation* of their own power and to "accept feasible and shared constraints" based on IL.[43] It is today adequate for the State to achieve its legitimacy only if its coercive power is "consistent with the dignity of citizens", that is, a matter of substance not of pedigree; and similarly, even the *international* order makes up for the coercive system that States impose to their citizen: for the State, " [I]t follows that the general obligation to try to improve its political legitimacy includes an obligation to try to improve the overall international system"[44] (that means, so improving its own government legitimacy), and such an obligation includes *cooperative* duties, beyond a law of co-existence.[45]

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40 For example, see Martti Koskenniemi on the vicious circle between facts and norms *ie* between States' consent and its being norm-generative (normative) upon States themselves: M Koskenniemi, "The Politics of International Law" (1990) 1 *European Journal of International Law* 4-32; G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in FM van Asbeck *et al.* (eds), *Symbolae Verzijl* (Martinus Nijhoff 1958) 153-176.

41 Dworkin (n 10) 3.

42 This argument is not only typical to Dworkin's criticism of legal positivism. It is an objection that can be raised against any conventionalist approach. As Cotterrell noted, accepting as law simply what "people identify and treat through their social practices as 'law' ", keeps a "definitional concern with what the concept of law should cover, yet removing from the concept as defined all analytical power". R Cotterrell, "Transnational Communities and the Concept of Law", in *Ratio Juris* (2008) 8. The reference is to B. Tamanaha, *A General Jurisprudence of Law and Society* (OUPress 2001) 166.

43 Dworkin (n 10) 17.

44 ibid/

45 ibid 17: "Any state ... improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny". It does the same also when it can protect its people, on whom it has monopoly of force, from invasions of other peoples; moreover, a state fails in a further way if it discourages *cooperation* to prevent economic, commercial, medical or environmental disaster. As to cooperation in IL see for ex. Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964).

The latter shall be all the more relevant in the future, if we think of those challenges to States self-referentiality stemming from climate change or other environmental interests common to all peoples.

However, of itself, such a principle of *mitigation* is insufficiently determinative as to different possible regimes of IL; accordingly Dworkin coins the *principle of salience*. It is a normative principle itself, and works in connection with the first. It establishes the duty *prima facie* to abide by codes and practices already agreed upon by a consistent number of States and populations. A duty that shall have an obvious "snowballing effect."[46] The moral obligation of all nations – for ex. to treat UN law as law- flows from the combined sense of those two principles, and explains as well why even States' constitutions tend to include and protect more widespread rules considered as *jus gentium* or even peremptory, *jus cogens*.

3.2. Dworkin does not embrace any *cosmopolitan* institutional view. International law principles are traced back to the rationale of the relationship between State power and its citizens, not to a global hypothetical government or to universal justice. It is a *second level order* of States, and international organisations, to matter, not a *universal community* of individuals. As far as I can see, even the 'political morality' of the international system can only enjoy a second level status, that is, the integrity of its values has a derivative status not a self standing substantive content. And in fact *mitigation* applies to the system of sovereigns (and by extension, I submit, to those self referential jurisgenerative bodies that have acquired *de facto* or *de jure* the status of global regimes). Mitigation and salience refer to *States' system (*or to powerful international organisations) premised on the general duty of States to protect the dignity of individuals. Because States shall have to respect citizens' rights, their sovereignty shall not prevent other States' intervention to stop genocide; mitigation shall ask States not to refuse cooperation in facing communal interest of humanity, be it concerning security, hunger, environmental protection. Mitigation is

[46] Dworkin (n 10) 19: "If some humane set of principles limiting the justified occasions of war and means of waging war gains wide acceptance, for instance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles."

explained, in a nutshell, as a source of both negative and positive duties. Although Dworkin suggests, as "phantasy upon phantasy", an international court having jurisdiction "over all the nations of the world", such a thought-experiment comes with a clear statement about the domain of International Law: a very distinct part of what "morality and decency require of States and other international bodies in their treatment of one another."[47] And again along these lines he asks which argument a hypothetical court should use to determine "the rights and obligations of States (and other international actors and organizations) that it would be appropriate for it to enforce coercively?"[48] So the question is defined through States and (regional or) global regimes as the theoretical bridge between social communities of individuals and international law.

All in all, the "new philosophy" can be seen as an upgrade in theory, intended to explain the state of the art and to validate an International legal order by identifying its own systemic principles. But once this reconstruction of IL has been done, IL becomes suited to Dworkinian theory of law as *interpretive* (as opposed to positivist theories of law, or to natural law).

4. An Interpretive (Adjudicative) Theory of Law

The feaures of interpretivism were spelled by Dworking in the last decades, and *not* with reference to IL. What Dworkin can contribute here, mirrors the logic of his criticism to Hartian theory in the '70s: roughly, the positivist view leaves too much to lawyers' discretion. Note that even with IL, Dworkin now warns that the recurrent appeal to morality as a direct reason for action, outside what law is held to prescribe (as Franck did in the case of NATO intervention in Kosovo)[49] would be a fatal undermining of the still fragile IL. What Dworkin is thinking about is the relocation of those choices- deemed to be morally, although not legally, mandatory- as *disagreements within* the *legal* domain. Uncertainties as to the 'simply'

47 Dworkin (n 10) 13.

48 ibid 15.

49 ibid 23, Dworkin mentions Thomas M. Franck, "Lessons of Kosovo" (1999) 93 *American Journal of International Law* 857–60.

moral or legal nature of an alleged obligation present themselves within controversies about what the law is in a specific case: they are often different from dissents about the existence of this or that particular rule, its validity and relevance. Their solution, if any, depends upon a higher scrutiny about the fundamental principles (and purposes) of the international legal system. If confrontation arises, it shall concern what those relevant principles are and what some consequent coherence would demand. The answers might actually be found by interpreting "the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system."[50]

However, as to the nature of law being interpretive, there is no novelty distinctive to IL. Law in general *is interpretive* because it postulates a practice where *participants* can *disagree* about what the practice (like International law) really requires, and assign a value and a purpose[51] to it, achieve insights about conditions of truth of particular propositions of law *under those purposes* and within the *constraints* of historical records, documents and relevant materials, sources shaping the object of that practice.[52]

It is of importance that nowhere Dworkin denies that such structures, rules, and institutions are central to the existence or identification of a legal system. [53] However, being law interpretive, a descriptive/sociological view would not be definitive or sufficiently determinative as regards the *doctrinal* questions concerning *what is the law in particular cases*.

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50 Dworkin (n 10) 22.

51 Dworkin (n 30) 52.

52 R Dworkin, *Justice in Robes* (Cambridge Mass, HUP 2006) 140.

53 "…Hart was right to think that the combination of first-order standards imposing duties and second-order standards regulating the creation and identification of those first-order rules is a central feature of paradigmatic legal systems. His emphasis on this structure was not itself remarkably original. […] Hart's distinctive contribution was his claim that in paradigmatic legal systems the most fundamental secondary rule or set of rules — the complex standard for identifying which other secondary and primary rules count as law — has that force only through convention". R Dworkin, "Hart and the Concepts of Law" (2006) 119 95 *Harvard Law Review Forum* 100.

Questions about the truth of propositions of law- or about whether and how a norm (or even a judicial outcome) is 'valid'- are firstly traced back to the *grounds of law,*[54] that is, to the existing institutional premises (judicial precedents, legislatures, procedures, enactments, and the like) that 'positivism' identifies by consensus. Such questions are allegedly solved, according to Hartian legal positivism, by verifying whether the required historical facts have been met (the proper procedural enactment, the 'right' source etc.). Although criteria of identification are provided in the rule of recognition of a legal order, disagreement would nonetheless possibly persist. True *disagreements* are hardly revolving around what the actual *grounds of law* are, their empirical (historical) existence and pedigree. Genuine disagreements, with Dworkin (who calls them 'theoretical') reach the identity (value and purpose) of the *grounds of law*, beyond their existence. Under contestation is not 'what really happened', but what legal scope and import it should bear (not whether the Parliament has actually legislated, but what deeper meaning and consequence should be ascribed to that). Being not *empirical,* they involve *evaluations* of principle. Indeed, they depend on the ascription of different meaning and purpose to those *grounds of law* once factually identified. Accordingly, invoking some *different principles of political morality* (involving the identity, scope, and value of the institutional system as a whole) determines different interpretations of the *same* grounds of law and corresponding answers to the problem of what the law is, *ie* what is the right answer in a single context.[55]

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54 Dworkin (n 30) 4.

55 It goes without saying here that Dworkin can hardly be isolated or sidelined to this regard, since as he knows, the post Hartian decades have shown the salience of this second view, in diverse ways upheld by positivist writings, from Coleman to Waldron, MacCormick, Postema and Schauer (as Dworkin himself writes in his 'Hart and the Concepts of Law' [2006] 119 *HLR Forum* 104). And it is rather revealing even the "nuanced difference" as to the precise role of morality *vis à vis* law, that Waldron has recently noticed between the late Dworkin in *Justice for Hedgehogs* and the exclusive positivism of Joseph Raz (J Raz, 'Incorporation by Law", in *Legal Theory* [2004] 16); Cf J Waldron, 'Jurisprudence for Hedgehogs', *Public Law and Legal theory Research Paper Series Working Paper,* n. 13-45 NYU 1-32.

Of course, from such a perspective, the positivist assumption of consensus on the (interpretation of) *grounds of law* is untenable. Scott Shapiro has nicely summarized the positivist puzzle to this regard: "... it is common ground between exclusive and inclusive legal positivists that the grounds of law are determined by convention. How can they account for disagreements about the legal bindingness of certain facts whose bindingness, by hypothesis, requires the existence of agreement on their bindingness?"[56]

Accordingly, if we do *not* wish to disregard the domain of IL, as a legal one, we cannot ignore that this kind of interpretive reading should better fit any legal systems. It claims that in the general fabric of the international order some coherence does exist only on the basis of the identity of certain basic founding principles (namely, revolving around the mitigation of power in defence of its legitimacy toward the dignity of individuals and peoples). Even IL acquires some *integrity* of its own (although as thin as it can be referred only to those mitigation-relative principles), and it can consequently pave the way to tackle disagreements in a legally substantive, corresponding manner.

5. An Interpretive Lens on Exemplary Case Law

5.1. After Dworkin's explicit contribution to IL, a further aspect, however, is to be mentioned, one that, as I shall submit, belongs to the potentialities of interpretivism within IL, although it is not either identified or elaborated upon by Dworkin himself. Because of IL being re-directed towards principles, they can also get to a function that legal positivism is hardly equipped to sustain or even admit. As I maintain, principles can be resorted to in order to explain and possibly solve disagreements on the valid rule to be applied, not only in those circumstances of routine, current in State legal orders (like gap-filling, rules interpretation, contrast among relevant principles, for example) but even, and all the more so, when divergences concern meaning, import, and scope of norms that, though

[56] S Shapiro, *The Hart – Dworkin debate: A short guide for the perplexed* (Michigan University, Public Law and Legal Theory WP Series 2007) 38.

controlling one single case at stake, might belong in *separate* legalities: the latter confront each other and each would lead to different legal outcomes, providing a different point of view as to validity.

One can see that theories of validity based on the rule of recognition alone, can admittedly explain the legal system, but they hardly can encompass the inter-systemic problems in the absence of a common practiced criterion of validity (one single rule of recognition); they are barely of help when multiple perspectives from different legalities- interfering against each other- shed their normative light onto the same legal question.[57] Proliferation of orders and 'regimes' of law generates some historical-institutional divergence, through their self-referentiality, and implies that the practice of *a* rule of recognition cannot easily develop in place of the *multiplicity of relative* rules of recognition.

In the apparent inconclusiveness of "social sources based" law, divergence originates from the institutional, 'legally objective' otherness of one (sub)'legality' *vis à vis* the other.

Making sense of such a complex and heterogeneous setting *is* a constructive endeavour, ultimately prompted by the adjudicative questions. For example, in the institutionalized imperatives of the World Health Organization (WHO) there are objectives that might well contrast the pursuit of the best results for free global commerce as regulated by the World Trade Organization (WTO). Which 'legal' view should prevail *in the abstract* might not be an issue, but the law to be ultimately found in deciding the *case at stake* in between Indian pharmaceutics regulation and WHO *vis à vis* the WTO patents' system, that certainly *is an issue*.[58] Such controversies become opportunities for theoretical inquiries into law through the adjudicative angle; principles can have a further role in addressing disagreements arising from the segmented texture of supranational law through different legal institutional regimes.

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57 This normally goes with notions of pluralism.

58 Despite that problem was somehow solved, through various provision fostering flexibility, still some states are at pains in fully profit from the opportunities that those solutions would provide: cf. in *WHO Bullettin at* <http://www.who.int/bulletin/volumes/84/5/news10506/en> accessed 14 July 2014.

In some recent instances, judicial decision-making has actually (cf. sections below) deployed a principled-based reasoning in order to address problems located at the crossroads between different legal sub-systems. This move involves the turn to an *interpretative* notion of law (mainly in the sense sketched in the foregoing sections), one which, among the rest, overtakes the received dogmas of strict legal positivism, and makes the assessment of principles to appear as the actual frontier of law-findings in international law matters.

5.2. After fragmented-law exemplary cases, like *Mox Plant* and others,[59] attention is to be brought to significant judicial decisions following some UN Security Council resolutions. Judicial cases have displayed different attitudes in a progress that goes from a self referential, or one-sided, to a whole-related, or comprehensive legal reasoning: that is, an argument that works through bridging or integrating, for the case at hand, the normative propositions belonging to different orders involved, that would claim for divergent outcomes.

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59 I recall Martti Koskenniemi, on this case- among the most debated upon some years ago- to which three different regimes were applicable: "Let me quote the Tribunal [Arbitral Tribunal at the UNCLOS]: 'even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS]'. The tribunal then held that the application of even the same rules by different institutions might be different owing to the 'differences in the respective context, object and purposed, subsequent practice of parties and *travaux preparatoires'*. It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias" (Koskenniemi, *International Law: Between Fragmentation and Constitutionalism* [2006] <http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf>. However in the same line there had been equally famous cases like *Swordfish*: at WTO: Chile- WTO Doc. WT/DS193; at the ITLOS, Chile v. Eur. Com.(Mar. 15, 2001 <www.un.org/Depts/los/ITLOS/Order1_2001Eng_pdf>. M. Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO" [2002] 71 NORDIC Journal of International Law 55. Also *Soft Drinks*: Panel Report, Mexico–Tax Measures on Soft Drinks and Other Beverages [2005] WT/DS308/R.

After the milestone case, *Kadi,*[60] at the ECJ, others followed at the ECtHR. In *Kadi* the Court made an argument for European primary law to prevail over the obligations stemming from IL (art. 103 UN) to implement a resolution of the UNSC. The decision was widely welcome for its defence of fundamental rights, and also criticised because of withholding the EU from IL obligations (contrary to the advice of the Tribunal of First Instance in its own Kadi decision)',[61] thus betraying true internationalism (like the US, in *Medellin*[62] and elsewhere): a kind of American style *exceptionalism*,[63] contradicting the original attitudes of compliance of the EC in the '50s.[64] Actually, and beyond its many virtues (that such a criticism seems indeed to sideline), the ECJ (to day CJEU) reasoning amounted to a pronouncement shielded by self-reference to the rule of law in its own jurisdiction: accordingly, not an assessment about the infringement of fundamental rights in a supranational sphere where the two jurisdictions involved are interrelated.[65] It settled not a question of *disagreement,* but a question of *primacy*. The two things are not compatible.

Rather different approach was displayed by the ECtHR in Al Jedda (2011) and in Al Dulimi (2013). The ECtHR decided to exceed the latitude of its own jurisdiction as defined by the rules of recognition of the Convention

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60 ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadì and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment of 3 September 2008.

61 CFI Kadi Case T-315/01, Kadi v. Council and Commission, 21 September 2005, [2005] ECR II-3649.

62 *Medellín v. Texas*, 552 U.S. 491 (2008)

63 G de Búrca, "The European Court of Justice and the International Legal Order After Kadi", [2010] 51 1 Harvard International Law Journal 1-49.

64 ibid., "The Road Not Taken: The EU as a Global Human Rights Actor" [2011] 105 *American Journal of International Law* 649 .

65 The *Kadi* decision however can also be stretched to represent a pattern of *conditional* agreement, based on mutual respect *under conditions*, which mirrors the equal protection requirement, or the Italian doctrine of 'counter-limits', and similarly the "So-lange" reasoning from the German constitutional court. I took this line in my "The Rule of Law beyond the State: Failures, Promises, and Theory" International Journal of Constitutional Law 7 [3] 442 – 467.

and resorted to wider principles reflecting the United Nation system and –as Dworkin would have it- the deeper political morality of international law as a whole.

In *Al-Jedda v United Kingdom,*[66] the Court stated that there must be "a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights"[67] (unless in case of contrary "clear and explicit language"); the interpretation must be chosen that "is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."[68]

The question would be, in fact, what should happen in case of 'clear and explicit language' against HR law? The Court has answered that question, in the *Al Dulimi* case, overcoming the kind acoustic separation between the involved legalities sharing a common terrain, upon which to settle a potential disagreement.

The ECtHR[69] deals- indirectly- with a UNSC 1483 (2003) resolution, which in "clear and explicit language" imposes to Switzerland, allowing to the State no discretion,[70] the freezing of the assets of Al Dulimi, one of those blacklisted as suspected terrorist, who had been denied any rights to defence. Since Switzerland[71] had rejected Al Dulimi's complaints and resolved to confiscate his assets, the Court decides that violation of art.

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66 European Court of Human Rights, *Case of Al-Jedda v. The United Kingdom*, Application no. 27021/08, 7 July 2011 (*Al Jedda*).

67 ibid.

68 ibid.

69 ECHR chamber judgment of 26 November 2013 in *Al-Dulimi*, No. 5809/08.

70 The Court had already decided the case *Nada* where discretion was deemed existent (ECtHR (Grand Chamber), *Nada v. Switzerland*, No. 10593/08, judgment of 12 Sept. 2012).

71 The Swiss Federal Tribunal ((BGE 2A.783/784/ 785 /2006; all of 23 January 2008) had maintained that it was not entitled to revise the legality of SC resolutions except in the event (that was not) of violation of a *jus cogens* rule (as in the reasoning of the Court of First Instance of the EU in *Kadi*). After allowing Al Dulimi more time for a (unsuccessful) further appeal to that Committee, the Tribunal concluded that Switzerland's behavior was legitimate, and did not violate either domestic constitutional norms or Artt. 6 and 13 of the ECHR.

6 ECHR (access to justice) has taken place on behalf of the State, and that consequent responsibility falls on it as a member to the Convention, regardless of the duty to implement sanctions from the SC, and even in absence of any State's discretionary power. In the reasoning of the Court, judicial review was not granted either at the UN or in the domestic procedure. Denial of access to justice, even in pursuing the legitimate ends of peace and security, is deemed *disproportionate* to achieve those objectives.

It is important that the Court, in the same vein as in *Al Jedda*, does not take a merely external attitude toward the normative corpus of the UN, assuming instead that it should be taken into consideration *qua normative* in its scope, meaning and aims. Accordingly its reasoning is not shielded in a self-referential closure, but pursues a comprehensive assessment. This is why it believes that apparently conflicting obligations from the UN Charter and the ECHR must be at their best harmonized and reconciled (Art. 31(3) lit. c) *Vienna Convention on the Law of Treaties* (para 112). The presumption according to which SC does not in principle mean to impose obligations contradicting international laws of human rights (formulated in its *Al Jedda* decision), is defeated. But it follows that, however commanded by the highest source in UN security purposes, not every behaviour can be deemed legitimate, just for that. The Court engages in a *proportionality* judgment, that is, a contextual evaluation between two divergent rules-principles, one that might exceed the strict limits of its own jurisdiction (such a judgment implies a revision of the legality of the Security Council resolution, that other Courts in the EU case had considered themselves not competent to pursue).

But such an assessment can only flow from taking the participant's point of view[72] in the interconnection of diverse international law regimes, prompted by the case under scrutiny. It requires bridging the gap that separates the two orders, that is, a deeper self understanding of one regime's role as an *agent of international law as a whole*, and a further insight into the purposes and meaning concerning the 'grounds' of those laws, the mutual relation between institutions, and the founding ideals of the diverse orders in their integrity. No place the Court merely resorts to 'formal' tools.

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72 Dworkin (n 30).

It has been from such an approach that the Court has chosen (right or wrong) to hold the State 'responsible', putting the State "caught between the obligation to carry out Security Council decisions under Art. 25 of the UN Charter and the obligation to respect international or regional human rights guarantees."[73] It is however preeminent point here that its reasoning implies a value choice, one that would be itself arbitrary, according to a positivist construction of the international system under a UN supremacy clause; this value choice opposes the assumption that absolute supremacy of Security Council would always fulfil its substantive *raison d'etre*. The interplay between security and rights, viewed under a proportionality judgment, can basically depend on a further principle underlying the purpose of the international system. One could even submit that the argument here could easily conform to a general principle of power *mitigation:* in the sense that it both justifies the role of the Security Council *vis à vis* States arbitrary power and at the same time limits the Council itself in pursuing its tasks.

6. Concluding Remarks

The cases recalled above from *Kadi* to *Al Jedda* and *Al Dulimi* should also be taken to show that in the relations between separate regimes of law, and in the relations between State legal orders and international law, the 'plain fact view' and the only reference to the historical, social facts of rules-production by pre defined sources, leave inevitably, outside the State, a very ample room for disagreement: one that does not in fact concern

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73 So writes Anne Peters, "Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is There a Way Out of the Catch-22 for UN Members?," in *EJIL Talk*, http://www.ejiltalk.org/author/anne-peters/ See the dissenting opinion of Judge Sajo: the complaint should have been dismissed, as "irrecevable" (inadmissible) *ratione personae*, because the State is not acting of its own but clearly under the order of the SC, which gave it no leeway. But he did join the majority in deciding that a violation of HR *occurred* due to the insufficient guarantees provided by the UN sanctions system. Read it *in coda* to *Al Dulimi* decision of the Court, supra (n 65).

the existence of documents, institutions and orders, but the import and meaning that should be ascribed to them either in isolation or *in the mutual relations* among legalities. Genuine disagreement originates here despite the very fact that no contestation arises as regards the sources of the relevant rules (say, art 103 of the Un Charter, or any of the SC Resolutions). This not 'empirical' disagreement (that is, one unrelated to the existence of rules belonging to one sphere of legality or the other) exceeds the range of control conceived through 'normal' legal positivism. Disagreements that Dworkin saw 'theoretical' are essentially involving different interpretations-understanding of the fundamental principles, in the political-moral sense, that institutions of law are meant to be *premised on*.

The key vault in the relations among mutually *external (or self-contained) legalities,* is the recognition of their being both relevant and thus equally *internal* to the case at stake. In such a context, different interpretations of respective *grounds of law* need to be further elaborated in the interplay among legalities (that actually escape a clear hierarchical systematization) endowed, in the global space, with distinctive rules of recognition. Given the angle of the case, the Court's reasoning might on one side be viewed as interpreting the rules and *principles* of *each involved legal regimes*, and on the other side arbitrating their interplay on a *proportionality* assessment. One possible argument to justify this latter move, that is, a kind of 'jurisdiction overstepping', requires appeal to further principle premised to supranational law, beyond States. A plausible candidate might be the Dworkinian principle of *mitigation* of States' power and of international organisations, one that justifies both positive and negative duties.

Mitigation is traced back to the political morality of the general system of power as it is built in the supranational sphere. It recalls the *raison d'etre* of IL, and of States and international organisations, by reminding us that their final objective refers to the essential concern and respect for the *dignity* of citizens, asking that the exercise of power, from whichever actors, can only be legitimate under the limitations that such respect imposes to each concurring regimes of law on a case by case basis. From the foregoing, the role and potential of 'principles' in the different guises and levels analysed in this article, can all the more be seen at the forefront of IL adjudication.

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ESSAY

BEHAVIOURS IN SUPPORT OF THE RULE OF LAW

By Anthony Inglese

Author

LLM, Cambridge University, 1975
The Bar of England and Wales, 1976 and
Formerly member of the UK Government Legal Service
(but all views expressed here are personal of the author)
E-mail: anthony.inglese@btinternet.com

Abstract

The purpose of the essay is to illustrate importance of behaviours in support of the rule of law in the world of UK government departments. Not only knowledge of the necessary law makes one a good lawyer. Effective behaviours in supporting the rule of law are also very important. Civil servants are bound by the civil service code, which requires them to act with honesty, objectivity, integrity and impartiality. The author provides three examples to illustrate his belief about the importance of behaviours in support of the rule of law.

Keywords

The rule of law, constitutionalism, government lawyer, UK government, behaviours in support of the rule of law

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I. Introduction

"The rule of law" is a fine-sounding expression, but, without effective behaviours to support it, it means little. I am adopting Lord Bingham's formulation of the rule of law who said "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts." This appears in seminal lecture entitled "The Rule of Law" given by the Rt Hon Lord Bingham of Cornhill KG on November 16, 2006 at the Centre for Public Law, University of Cambridge UK. This article majors on Lord Bingham's 6th principle. He wrote: "Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred, and without exceeding the limits of such powers." Lord Bingham called this the "core of the rule of law principle."[1]

This article shows the real importance of behaviours in support of the rule of law in the world of UK government departments, a world from which I have recently retired after 38 years of legal service.

During my time as a government lawyer I worked for seven government departments and was legal head in five of them. I was responsible over the years for the work of over one thousand lawyers at all levels, preparing and drafting legislation, advising Ministers on their powers, defending them when challenged in court and prosecuting offenders. If in my earliest years I ever thought that the only necessary quality to make one a good lawyer was to know the law and communicate it to internal clients accurately, I soon learned the importance of effective behaviours in supporting the rule of law.

II. The Structure of Legal Advisory Services within the UK Government

First a brief explanation about legal structures within the UK government service, simplified for the purposes of this article. Every government

[1] Lord Bingham of Cornhill KG, Lecture "The Rule of Law" <www.cpl.law.cam.ac.uk> accessed 10 December 2014.

department contains a Legal Section,[2] made up of qualified lawyers, who give legal advice to the rest of the department on their various policies and proposed actions; defend them when challenged in the courts; and carry out any necessary legal functions such as drafting. The head lawyer of the Legal Section I call the Legal Adviser. The size of Legal Sections varies between government departments, depending on their own size and complexity. The Legal Adviser is accountable for all the legal work needed by the department.

All members of staff of government departments, including the members of the Legal Section, are civil servants. A few departments are headed by civil servants, for example HM Revenue & Customs, the tax department, but most departments are headed by Ministers who in the UK are members of the governing party or parties in Parliament and are accountable there for the actions of their department.

Civil servants are bound by the Civil Service Code, which requires them to act with honesty, objectivity, integrity and impartiality (including political impartiality).[3] In this context "integrity" includes complying with the law.

Government Ministers are not of course politically neutral but are bound by a code requiring them to adhere to the rule of law and uphold the political impartiality of the civil service.[4]

III. The Commitment to the Rule of Law as a Practice

The commitment to the rule of law is both principled and practical. It is principled because it is the hallmark of a democratic government, enabling it to pursue its desired political objectives but only in accordance with the constitutional and legal framework which gives it power. It is practical

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2 The UK Government has broadly a decentralized model for the provision of legal advisory services to it unlike some other countries with a centralized one. See S Kabyshev, 'Canadian Model of Centralized Delivery of Legal Services and its Application in Russia' (2014) vol 1 Kutafin University Law Review 80. Although the UK is now grouping most of its advisory lawyers into one legal department (the Treasury Solicitor's Department), it still "beds them out" into the buildings of their client departments so that the Legal Sections still work side by side with their clients.

3 Civil Service Code 1996, updated in 2010.

4 Ministerial Code 2010, s 1 (2).

because the courts of law have wide powers to stop unlawful action in its tracks, if interested individuals or groups bring a legal challenge, and to award damages and penalties not only against the department as an entity but also against individual civil servants and Ministers if they are adjudged to have committed abuse of their official position ("misfeasance in public office").

In practice what does adherence to the rule of law entail? Usually it means pursuing options that are well-precedented in legal terms; ones that are sound and carry a low level of legal risk or even none; and, where legal advice is needed within the department, seeking it early from the Legal Section and acting upon it. Most government business is fairly uncontroversial and would be pursued by any political party who happened to be in government.

On the other hand the rule of law does not require government to take the most timid legal option. Having asked and answered in the negative the fundamental question, "Is this unlawful?", Government is entitled to pursue any option in furtherance of its objectives provided that the option is properly arguable, ie counsel for the government could in accordance with counsel's professional duty to the court put the argument in good faith to a court in the event of a legal challenge. If government then loses the challenge, it will abide by the court's decision, however grumpily (and subject of course to rights of appeal). This kind of risk-based decision-making enables government to achieve more than if it pursued a risk-averse approach. But, in deciding its approach to risk, government will take into account the consequences of a defeat in court and indeed the impact of a legal challenge on its ability to actually progress its objective. Will it nevertheless enable government to achieve its objective but after a delay? Will it rule the objective out entirely? Will it require government to pay compensation or a penalty, and if so how much?

It has been my experience, having trained a great many government lawyers on the role of the civil service lawyer – and many of what I call their "internal clients", too, their fellow civil servants who come to them for legal advice – that the rule of law does not come alive unless considered in the context of examples drawn from practical experience. I take just three examples (of many) to illustrate my belief about the importance of behaviours in support of the rule of law. The less effective behaviours in them are very

much the exceptions to how business is conducted, but without the exceptions we would not be able to prove the rule, as the saying goes.

EXAMPLE ONE: Legal Adviser has given final advice that an action proposed by one of the internal clients would be unlawful. Human nature being what it is some internal clients do not always like to hear what they regard as negative, unhelpful advice even though they may be intellectually committed to the rule of law. Now read on ...

The Legal Adviser may come under pressure to change the advice, especially where the issue is of significance to government: "You can't be right – your advice would adversely affect the public interest. It won't do you any good if people think you lack subtlety" Or, "Is the law really that clear cut: surely there must be some room for argument." Or even, "My boss will go ballistic when she hears your advice – couldn't you just shade it a bit and say that we 'might well' lose in court rather than that it is 'unlawful'."

A vital requirement for the rule of law is for the Legal Adviser to resist this sort of pressure and stand firm. The code for UK government lawyers supports this requirement and says that they have a professional obligation to give "impartial, objective and frank advice. In providing such advice they must have particular regard to the fact that it is a fundamental obligation of government that it should itself act in accordance with, and subject to, law."[5] These provisions were issued for Government Lawyers in about 1996 by the Treasury Solicitor who is their professional head. But the act does not appear to have been formally published. The text can be found, however, in an interesting report, prepared for the Constitution Society UK by Dr Ben Yong and published in 2013. It is entitled "Risk Management – Government Lawyers and the Provision of Legal Advice within Whitehall."

The word "impartial" implies that, although government lawyers will give advice that constructively assists their governmental client to achieve

5 Ben Yong *Risk Management – Government Lawyers and the Provision of Legal Advice within Whitehall* (2013) <www.consoc.org.uk> accessed 10 December 2014.

its objectives, they will not show bias or political partiality: the civil service is there to assist the government of the day but civil servants need to conduct themselves at all times in a way that does not destroy the trust that members of the opposition need to have in the civil service when in their turn they one day become the party of government.

"Objective" implies that the legal advice needs to be given accurately, following a rigorous analysis of the evidence: what would a court say if this matter were brought before it?

The need for "frank" advice means that the Legal Adviser has to speak up assertively, with "backbone", and "tell it like it is". It was my experience that lawyers were valued for doing so, even by the very internal clients who did not always like what they were being told. This is not the same as saying that all tough-speaking lawyers are good lawyers, because an over-dogmatic tough lawyer can be as dangerous as a spineless one. And "frank" is not code for "rude" or "aggressive", as in "We had a frank exchange of views."

It may seem obvious, but in a rule of law culture it is especially important for the legal advice to be clear and accurate. Lawyers who work in teams together will have systems for sharing advice and views and for supporting and challenging each other, so that the final advice in high profile matters is the product of co-operation and represents a collective view insofar as this is possible. Because government will not do anything which it has been advised is clearly unlawful – it cannot just say "Thanks for your advice but we'll take a chance on that!"

I have already indicated above the importance of "backbone" in support of the rule of law. What one might call the reverse is also true. The lawyer who, when under challenge, realises that the legal advice has indeed been too categorical –ie he or she now realises that the proposed action is not after all "clearly unlawful" but is, say, "arguably lawful" – such a lawyer may now have a grateful client when the legal advice is changed but there is a risk to his or her credibility in the future when giving so-called negative advice ("Last time you told us 'no', you changed your mind shortly afterwards. Are you sure this time?")

I am aware, however, that the last few paragraphs above risk oversimplifying a more complex issue. Legal advice sometimes evolves during the development of a policy or the handling of an issue because, for all sorts

of reasons, the background facts themselves evolve. The Legal Adviser will want to advise properly but on a provisional basis on whatever information is put before him or her as things develop; and will probe, ask questions and welcome robust discussion of the emerging advice with a view to the advice which he or she eventually gives being accurate and based on a true and full assessment of the facts.

When an issue is really fraught it is possible, and sometimes advisable, for the Legal Adviser to go for a second opinion – for example to a QC in chambers – but it is not confidence-inspiring for him or her to be the kind who goes for a second opinion every time the legal advice comes under pressure. And it is not such a big jump for internal clients who get used to their Legal Adviser regularly going for a second opinion to start to argue, when the second opinion is not to their liking, that a third opinion would be helpful.

Finally, in a rule of law culture respect for the rule of law and the ability to stand up for it are incorporated into the processes by which lawyers are recruited, trained, appraised and promoted and how they support each other in the teams in which they work.

EXAMPLE TWO: The Legal Adviser becomes aware that no one in the Department is seeking legal advice on a proposal which in the Legal Adviser's experience and knowledge of the Department appears to be of such significance that legal advice is required. Now read on ...

The situation may not be sinister: it could simply be the case that the civil servants in the relevant part of the department are insufficiently legally aware and do not realise that legal advice is needed. But it could be more serious: they may fear that the advice would be negative and so have not asked for any.

A human reaction on the part of the Legal Adviser might be, "I won't get involved in this. I know when I'm not wanted. On their heads be it when it goes wrong."

Adherence to the rule of law, however, requires the Legal Adviser to intervene to assess whether legal advice does need to be given and if so give it. To make the right interventions the Legal Adviser needs to develop wide knowledge of the organisation, its culture and its people so as to know when

and how best to step in: too few interventions and the department fails to receive legal advice on important matters and downgrades the importance of legal advice in its work; too many unnecessary and aggressive interventions and the Legal Adviser risks being branded as a fusspot or a prima donna and so will carry less weight.

It is important that the Legal Adviser's interventions in such cases are constructive. He or she will need to show an understanding of what the department is trying to achieve, by asking questions and engaging with the answers. Where the Legal Adviser has to advise "What you want to do is unlawful", he or she should be ready to add, "But have you thought of doing it in a different way or of trying to achieve a slightly smaller, but legally sound, outcome?"

Then, when the Legal Adviser has intervened constructively, it is often consistent with the rule of law to seize the opportunity to offer training to members of the department on how to raise their legal awareness and how to make to best use of lawyers in the future so that the need for legal advice can be identified and lawyers consulted at the best time. This is usually early in the development of a proposed policy or action, because at that stage a good lawyer can help the department by offering sound and effective legal options for putting its policies into effect and, equally, can rule out bad options in law, thereby avoiding much wasted time and effort further down the line.

If, however, the Legal Adviser wants to be the kind of lawyer who becomes involved early in the development of policy or during crises, he or she needs to exhibit welcoming behaviours when brought in, however personally uncomfortable of irritating the situation may be: "We are all in this together – how can I help you?". A sneering tone along the lines of "I can't see how any sensible folk could have got themselves into the mess that you have created for yourselves!" would cause many clients individually and collectively to be reluctant to involve the lawyer in future cases.

And when brought in early the Legal Adviser must then engage, even if the issues as presented are very unfocussed. The lawyer who says, "I can't advise; come back when you have sorted yourselves out" is unlikely to be involved at an early stage again and risks losing his or her ability to influence affairs for the good. The internal clients will say, "We tried to involve him last time but he didn't want to engage."

A practical and effective way of engaging when the issues are still unfocussed is to give a steer rather than attempt to give detailed legal advice. A steer might be: "I'm glad you have involved me at this stage. Most of your options seem legally reasonable to me. In developing Option 1 you will need to remember that it can only be done by Parliamentary Bill, which will affect your timetable. Option 2 seems to be the easiest Option in legal terms as it stands but you'll want to come back to me as you continue to develop it. Option 3 is a complete non-starter in legal terms, as I can explain. Option 4 contains a consultation period that a court would say is too short in the context in which you want to deploy it; can you make it longer?"

EXAMPLE THREE: The Legal Adviser gives advice on a proposed action to one of the internal clients in the Department. The advice is that the action if taken would more likely than not be defeated in any legal challenge. The Legal Adviser then finds out that the internal client has just asked the Minister in charge of the Department to agree to the proposal and has said that "Legal Adviser thinks it is ok". Now read on …

Adherence to the rule of law requires the Legal Adviser to find an appropriate way of stepping in to ensure that the Minister is properly made aware of the legal advice before the decision is taken. The code governing UK government lawyers says that "lawyers should ensure that their legal advice, when relevant for the purposes of any written or oral submission, is correctly relayed to the [Minister]." In the UK system submissions to Ministers recommending action are made in writing and copied to the people who have been working on the proposal and also to the group of the most senior people in the Department (which normally includes the Legal Adviser). This gives the Legal Adviser an opportunity to intervene if he or she spots anything unusual in a submission, for example an inaccurate summary of the legal advice. In such a case an appropriate intervention will normally be to go back to the internal client and say, "Something appears to have gone wrong with your submission. You did not understand my legal advice or I did not explain it properly. You need to withdraw your submission and consider it further in the light of my legal advice. I can help you do that." It would be rare, but not

unknown, for the Legal Adviser to contact the Minister's office directly and advise that no action be taken on the submission until the internal client has properly reflected on the legal advice, but if timing is tight there may be no option.

Of course, in any Legal Section of several lawyers or more it is not the Legal Adviser who gives all the legal advice. In my last post I headed a Legal Section of over 200 lawyers. The great bulk of legal advice is given by the other members of the Section without reference to the Legal Adviser, who becomes involved only in special cases. One of these is likely to be where a submission being considered at the top of the Department does not properly reflect the legal advice or where a lawyer is giving advice which he or she can sense is going to prove unpopular and meet with resistance. Another of the behavioural aspects of the rule of law is that the lawyers in a Section need to be good at communicating with each other and sharing problems openly about their work so that the seniors can advise and support the juniors and the juniors can alert the seniors when they need to make interventions of the kind described in this article.

IV. Conclusion

In this article I have tried to bring to life through practical examples the behaviours required of lawyers who work in an organisation which is formally committed to operating in accordance with the rule of law, such as the UK civil service. An effective government lawyer needs not only to be fully sound on the legal issues on which he or she is called to advise but will also need to understand the mission, policies and day-to-day operations of the Department so that legal advice can be properly given at the right time and in the right context, addressing and wherever possible solving the real problems of the Department. He or she will need to be prepared to engage in a robust and honest discussion with clients and to exhibit the right behaviours: impartiality, objectivity, frankness, fearlessness, assertiveness, a welcoming and patient approach to receiving and solving problems constructively, a corporate approach to joining up issues and solving them in the context of the needs of the whole Department rather than just one part of it. Because all advice is given by lawyers working in teams with each other,

what is also needed is an open approach to sharing problems and supporting colleagues with theirs. Although all of these attributes and behaviours are to some degree relevant also to all lawyers, wherever they work, they are in my submission seen at their sharpest in the context of an organisation which is committed supporting, practising and operating in accordance with the rule of law.

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ARTICLE

CONTRACTS FOR SPORTS SERVICES

By Dimitrios P. Panagiotopoulos

Author

Doctor of Sports Law, University of Athens, 1990
Professor of Law, University of Athens
President of the International Association of Sports Law
E-mail: panagiod@otenet.gr

Abstract

This paper investigates the relationship between professional—or simply remunerated—athletes and their respective clubs or sports organizations, as well as every aspect of their employment and relevant agreements. Lex Sportiva divides athletes into three categories: amateurs, professionals and remunerated athletes. The legal distinction between amateur and professional athletes, especially as far as it concerns the protection of their rights and personality, is strongly questionable in regard to its constitutional lawfulness. This distinction should mean the differences between professionals and amateurs in the provision of sports services; amateur athletes have to constitute services offered to a club with no remuneration and are excluded from the scope of employment agreements. What's more, there is no any special legal definition for the term "amateur athlete": it simply refers to those athletes who are not remunerated and who also do not play professionally. Financial rewards or other means of support given by sports clubs, associations or federations to amateur athletes, in the context of their sports activity, do not constitute any form of remuneration and therefore, those athletes are not considered to be remunerated or professional ones according to Sports Law.

Keywords

Sports services, Amateur athletes, professional athletes, agreement, contract, player, contractual obligations, employment disputes.

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I. INTRODUCTION

Sports activity is considered to be a practice of an Olympic or non-Olympic sport with the objective of performing physically in sports games.[1] In this context, sports activity should refer to an activity that is practiced by people with a special sports status, namely athletes. Clubs, which organize sports activity and possess the will to obtain special sports recognition,[2] adjust their statute provisions in order to comply with ones of the domestic sports federation statutes.

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1 D Panagiotopoulos, *Amateur and Professional status of athletes and their participation to the Olympic Games (*N Klamaris ed, Sakkoulas 2005)

2 Article 8 of Law 2725/1999, Sports Code, s 8 (2005).

The Sports Federation is the main organisation that unites sports clubs.[3] It exists in every country,[4] as long as it has been granted the Special Recognition Award by a competent minister.[5] The Sports Federation is proficient in the sports that it manages and it has to exercise its authority according to the regulations of the relevant International Sports Federation and the International Olympic Committee (IOC).

II. SPORTS CATEGORIES

A sport should be defined as a specific technical and physical action, aimed at the achievement of the maximum physical performance and ultimate excellence, namely victory.[6] There are certain technical and legal rules that define a competition on a domestic and international level. These rules determine some technical aspects of sports, including the way games are taking place and the relationships between athletes, clubs and coaches.[7] *Lex Sportiva*, which is a set of special legal rules, divides Sports into two categories: (1) individual sports and (2) team sports.[8] A team sport is one in which the participation and the successful effort of several athletes, working as a team, is required so as to achieve a goal, namely victory. Even in individual sports, there can be a team competition, as long as it is included in part of that particular sport[9].

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3 ibid.

4 ibid. It also cooperates with the public authorities, the sports organizations and the commercial companies, European Commission, Directorate – General X, Sport, Brussels, 22 April 1999, Version 2, First European Conference on Sport. Olympia, 21 May 1999, "The European Model of sport", (Discussion paper for the Working group) 2.

5 Law 2725/99, s 28 (1).

6 JAR Nafziger, 'Transnational Law of Sports' (Edward Elgar 2013).

7 Sports Code 2005, ss 27, 31, 33.

8 Q Wang, 'Legal relations of parties involved in professional sports' (2013), vol I Lex Sportiva Journal.

9 Law 2725/1999, s 34 (14 y).

According to the case-law, an athlete is a person who develops a "physical" sport effort and achieves specific performances.[10] This definition does not include athletes who are not practicing "physical" sports.[11] In order to exercise their rights, athletes are entitled to obtain an *Athlete's card* and must be responsible for their acts or omissions.[12] In this way, according to the law, they obtain and maintain the sports status, which results from the authorization to participate in club sports and the sports life. The athletes, according to what is mentioned above, are divided into three categories:

a. Amateur athletes.

b. Remunerated athletes who have settled on an employment agreement with a sports club that has a Department of Remunerated Athletes

c. Professional athletes who have settled on an employment agreement with a Sports Public Company (SPC).

III. SPORTS CAPACITY

A. Introduction

The sports status for all categories of athletes mentioned above is acquired and maintained only if the sports fan capacity has been obtained in compliance with existing legal provisions and if the athlete does not commit misconducts that are contrary to the sporting spirit.[13] Sports law makes a clear distinction between the amateur and professional sports statuses.[14] Moreover, it states that the sports activity of athletes (except the professional ones,[15] who participate in sports activities for a fee) does not constitute a professional activity practice.[16]

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10 Laws 1351/83, 1877/88 and 2009/92.

11 Air sport, motor sport and mind sport athletes, Law 2725/1999, s 3 (5).

12 Greek State Council 3190/1986.

13 Law 2725/1999, ss 130, 132.

14 Law 2725/1999, ss 33, 85 (1) 2.

15 ibid.

16 Law 2725/1999, s 33 (2).

Thus, the participation of the athlete throughout the cycle of the physical sports activity is obviously linked, in one way or another, to the provision of sports services in amateur sports and to the employment of an individual by means of an employment agreement, in accordance with those labor law provisions[17] applying that are applicable to professional sports.

As the Bosman case[18] shows, it is important to take into consideration the following elements of the sports activity, as a whole:

a. The definition of both the financial and the professional sports activity, according to the law.[19]
b. The legal delimitation of free participation in sports activities.[20]

Moreover, in this context, it is necessary to consider the following opinions:

a. Participation in sports activities carries with it the idea of achieving successful results that is expressed through sports competitions and games development.

That kind of participation automatically establishes the presumption of amateur sportsman status having been acquired by the participating athlete.

b. Participation in sports activities mainly aims at the individual profit; it therefore constitutes a professional practice of sports[21] or the professional provision of sports services.

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17 ibid s 85.

18 Court of Justice of the European Communities, Case C-415/93.

19 Ponkin I.V., Shevchenko O.A., Ponkina A.I. Vliyanie transfernoy sistemy na professional'nyy sport // Teoriya I Praktika Fizicheskoy Kul'tury 2014. № 6. S.32 (IV Ponkin, OA Shevchenko, AI Ponkina "On correlation of Lex sportiva and Sports law" 10 (2014) 3 International Sports Law Review Pandektis 408).

20 R Davis, 'Olympic Competition: an Opportunity to Participate or a Privilege with Obligations' (1998) Sports and European Law, 154.

21 ibid 350.

Therefore, it is worth mentioning that sports services do not just promote the idea of sports, but they should also be considered as:

a. A form of services proposal, according to the terms of the athlete's card issuance, statute provisions, or specific regulations of the domestic sports federation (for the amateur athletes).[22]
b. A form of services provision, according to the terms of an employment agreement[23] (for the professional athletes).

B. Sports Capacity as a Legal Fiction

Sports capacity and sports fan status, which are awarded to athletes and other people involved in the sports sector, are incompatible with any other kind of involvement in sports activities, for purely financial reasons.[24] An exception applies to doctors, coaches, and referees, who can provide fee-paying services, as they contribute to the sports activity, as long as they comply with the sports fan capacity principles.[25] Another exception applies to professional and remunerated athletes, who, despite taking part in sports activity for a financial profit, maintain their athlete's status, considering that status as the main prerequisite for their participation in sports competitions.

According to the law, those athletes possess sports capacity, which constitutes a legal fiction. Consequently, there is a special regulation, which determines the fields and conditions of sports activity for professional and remunerated athletes. According to the agreement between the domestic sports federation, domestic professional clubs, and the athletes' union, there is a special regulation,[26] which determines the relationship between remunerated or professional athletes and sports clubs or sports public companies. More precisely, that agreement determines "*the terms and*

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22 S Karalis, 'The obligation of the athlete to stay to his/her club and the compatibility with the community law' (1998) Sports and European Law 162.

23 MJ Meirim, 'Clubes e sociedades desportivas, Livroshorizonte' (1995) Lisboa 55.

24 Royal Decree 26-9-1955, s 122.

25 Law 2725/1999, s 130.

26 Sports Code, s 87 (4).

conditions of acquisition of the remunerated or professional athlete's status".[27]

There is also a special regulation that defines the different categories to which those athletes belong, the number of those athletes that each sports public company or remunerated athlete's department (AAE / TAA in Greek) can have, the terms of registration, transfer or release of an athlete, competent bodies, and other related issues.[28]

A professional athlete, providing fee-paying services, acquires a sports capacity, which constitutes a legal fiction. In this case, a sports activity takes place not in order to promote sports and the idea of sports, but mainly to gain a financial profit.

C. Sports Capacity Attributed by Right

In amateur sports, the athletes, according to both the law and the case-law, are free to choose their sports club that, in turn, will lead to the issuance of the athlete's card and to his or her registration as a member of the club.[29] Then, the athlete, whose intention is to pursue his or her physical development, shall be able to participate in sports games and competitions.

In this case, the amateur athletes are entitled to acquire the sport capacity, which is attributed to them by right, as he or she does not provide fee-paying sports services. Rather, the athlete *offers*[30] such services without receiving any remuneration for participating in sports activities, to simply promote the idea of sports without attaining financial goals or other material benefits.

The issuance of an athlete's card should be regarded as a conclusive agreement on the provision of non-remunerated sports services to the

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27 A Tampakis, 'Claims arising from employment agreements of professional athletes' (2005) vol 112 Enterprise and Company law 219, I Anagnostopoulos, 'Athlete agreements in Greece' (1999) Sports Law in 21st century' 353; P Dedes, 'Unilateral sport agreements' (1999) Sports Law 367

28 Dedes (n 27).

29 A year after his/her participation in the sports game, he/she can be registered also as a member of the club, according to the terms and provisions of its statutes; D Panagiotopoulos (n 1) 257.

30 IM Apostolakis, *Justice in Mycenaean period*. Doctoral thesis (Sakkoulas 1990).

sport club with which the athlete is registered. That agreement is a bilateral onerous agreement resulting from the acceptance of contractual obligations by an athlete. By virtue of the agreement, an athlete has an obligation to execute his or her training program, to develop his or her body through physical efforts, and to takes part in the competitions[31] that the club participates in. Apart from that, an athlete, participating in competitions, assumes all potential risks involved, as long as participation occurs in a manner that complies with the legal, technical, and sports rules that apply for each specific sports activity.[32] For any injury or physical harm that may occur outside of the context previously mentioned, the athlete is entitled to compensation and a full recovery. The athlete has a right, according to the civil litigation procedure, to request damages for any harm caused.

The club is obliged to provide the necessary technical infrastructure for any training needs. It should also cover the expenses for training and participation of its athletes in games, as well as their transportation and other relative expenses. A club is also responsible for the athlete's full recovery from any harm that has been caused during training or competitions.[33]

Apart from satisfying its own interests, a sports club has to protect the interests of its members. Every kind of sport should be monitored by the State in order to protect public interest,[34] which is served by the participation of national teams and constituted by domestic sports federations through the participation of domestic athletes in international games and events, on the basis of the criteria established by the domestic federations.[35] The participation of an athlete in those games or events is mandatory and any unjustified refusal should be punished in accordance with the relevant federation's regulatory standards.[36]

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31 Greek State Council 1738/1986.

32 Greek State Council 1738/1986.

33 K Vieweg, A Krause, *Sports Law In Germany* (2013).

34 IV Ponkin, AI Ponkina, 'Limits of State Intervention and Non-Intervention in the Sports Field' (2014) vol 1 Kutafin university law review 93.

35 D. P. Sports Code, I 280.

36 Law 2725/1999, ss 33 (5), 27.

IV. THE PROVISION OF SPORTS SERVICES

A. Introduction

Sports activities are not professional activities they involve remunerated athletes of RAD (Remunerated Athletes Departments) and professional athletes of SPC (Sports Public Companies). The relevant domestic federation's statutes and regulations determine the relations between athletes and sports clubs.[37]

The participation of an athlete in sports competitions that are not approved by the domestic sports federation is prohibited,[38] while the provision of services to the national team is a mandatory obligation for the athlete;[39] the refusal of participation in the national team is considered to be a disciplinary offence, namely misconduct.[40] According to the special provisions of the domestic federation, athlete who, with no valid justification, refuses to provide his or her services to the national team is sanctioned by means of his or her exclusion from the national team games, as well as the domestic championship and cup games. The athlete in question is also deprived of any kind of support received by the relevant federation.[41] What's more, an athlete who has refused to provide services to the national team cannot receive any kind of support given by the State.[42] The same applies for athletes who have violated the domestic legislation and the regulations of the IOC on Doping.[43]

Amateur athletes participate in championships under a private agreement between the organizing authority and the participating clubs, in accordance with the current regulations. This agreement regulates all relations between parties, including a championship's conduct, potential dispute resolutions, etc.

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37 Law 2725/1999, s 33 (2).

38 Sports Code.

39 Sports Code, s 33(5).

40 Supreme Council for the Resolution of Sports Disputes 44/2002.

41 Supreme Council for the Resolution of Sports Disputes 67/17.4.2000, s 27.

42 ibid.

43 ibid.

B. Latent Agreement for Amateur Athlete Remuneration

Financial rewards or other support for athletes, given to them by their sports clubs, associations, or federations in order to develop their sports activities, should not be considered as a form of financial remuneration for athletes. Clubs must provide athletes with the support necessary for their physical development, training, and participation in competitions.[44] It's worth mentioning that according to a case-law, the provision of regular support for the training needs of athletes—such as covering their transportation costs, for example—can serve as grounds for a claim of foregone earnings, while financial support presented in the form of success bonuses is not considered to constitute a form of remuneration.[45]

At the same time, the reality is that even amateur athletes can sign an agreement with their clubs for a compensation that ultimately does not cover transportation and other expenses. They often receive it in the form of a regular monthly payment, like a salary. In cases of non-payment, a penalty amount should apply. Furthermore, in order to guarantee a regularity of payments, a club can provide an athlete with some financial guaranty,[46] which should be refundable in case of a discharge of payment obligations by a club. This type of situation can apply to athletes who constantly practice with the club in accordance with the rigorous schedule established by relevant sports associations, in addition to having no other concurrent occupations.

It is worth mentioning that in case if a dispute occurs as a result of the agreement mentioned above, the courts are bound to rule any legal hearings

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44 see more Shevchenko O.A. Priroda i osobennosti sportivno-trudovogo dogovora v professional'nom sporte // Zakony Rossii: opyt, analiz, praktika. 2014. №3 (OA Shevchenko, 'Nature and features sports employment contract in professional sports' (2013) vol I:2 e–Lex Sportiva Journal).

45 Greek High Court 921/1998.

46 Athens Peace Court 475/2004, where the action of a volleyball player of the league A1 versus her club was taken, according to which the club was obliged to pay to the athlete the amounts due for her remuneration as a "volleyball player" (2006) vol 5 Lex Sportiva 75.

on the matter in accordance with a special procedure that is applicable to employment disputes.[47] The case-law assents that due to the nature of the agreement, it falls under the definition of an employment agreement, regardless of the athlete's gender or the sport that he or she practices.[48] Of course, those athletes should be held liable for any moral and disciplinary misconduct.

What's more, European law provisions on professional athletes, following the Bosman court decision, also admit to financial relations between amateur athletes and their clubs.[49] According to these provisions, the terms concerning the relations between athletes are studied in the framework of the agreement that they have drafted with their clubs. In addition, these terms have to be in compliance with the law (even if they are not professionals), as long as an underlying financial relation is established.[50] European Law shall apply to athletes who have European Union (E.U.) member-state origins and to those living in a Eurozone state that is intending to become a member-state.

Both individual and team-sport athletes can enter into sponsoring agreements and agreements for products or services promotion with individuals or legal entities. Those agreements shall be valid only if they are not contrary to the technical rules of each sport, the regulations of the domestic sports federation, or the regulations of the International Olympic Committee (IOC); they also require the approval of the domestic sports federation.[51]

As a result, amateur athletes provide sports services under very difficult conditions and can be transferred only after a prior sports club approval, in cases when there are serious grounds for a transfer.[52]

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47 Code of Civil Procedure, s 663-672; Athens Peace Court 475/2004.

48 Athens One-Member Court of First Instance 1298/2005 // Labor Law Bulletin 61 1343.

49 D Panagiotopoulos, N Minis, D Makri, 'Sports and Competition in Europe' (1997) Lex Sportiva 243.

50 European Court of Justice decision of 13.4.2000 in the case C-176/1996, on an interpretation of Article 39 (former article 48 European Community Treaty).

51 ibid, The federation is obliged to submit them to the competent tax authority.

52 ibid s 33 (3), s 27 which provides for a specific regulation.

C. Amateur Athletes' Rights

The expression of an athlete's free will is a fundamental right; it is the cornerstone of his or her freedoms, which keep the athlete from becoming hostage to club managers, while preventing them from being a victim of their own interests. Increasing competitiveness between sports clubs limits athletes' freedom and makes it more difficult to progress in accordance with their personal abilities. For underage athletes, "self-determination" should mean their right to approve decisions made for their development.

An athlete's personality is, first of all, protected by the Constitution, as long as other people's rights and competition morals are not violated.[53] Relations between athletes and sports clubs are to be regulated by the statutes of relevant domestic sports federation.[54] Any restrictions must necessarily be in absolute favor of Sports.

Every athlete deserves to progress and develop his or her personal skills without being obstructed; this progress needs to take place in accordance with the law and the athlete's physical safety, while operating within specific moral limitations.[55] What's more, the Constitution allows for the restriction of any athlete's personal development only in cases when it is necessary for the public interest protection, as long as any such restrictions are not excessive.

It is worth mentioning that it's very important for the athlete—especially for the underage one—to make the distinction between his or her own rights and those of the sport club. None of the athletes should be in a situation in which he or she has to unwillingly increase time for trainings, following a decision of the club management.

High-performance amateur athletes who are focused on arduous training and constant participation in sports competitions for the purpose of serving the interests of their sports clubs or the public should receive the

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53 D Panagiotopoulos, *Legal Aspects and Protection of Fair Play* (Olympia 1997).

54 Law 2725/1999, s 33 (2).

55 These opportunities are included also in the articles of the European Sport Charter, which was signed during the 7th Conference of the Ministers responsible for sport matters within the European Union, in Rhodes (14 and 15-5-1992).

same legal protection as all other service providers if they participate in national teams.

V. ATHLETES'AGREEMENTS/CONTRACTS

A. Nature of the Agreement

Athletes' agreements are, on the one hand, the subject of labor law provisions and, on the other hand, that of applicable sports law provisions.[56] There are also special governmental norms that apply to each specific sport; these norms particularly deal with the relations between professional or remunerated athletes and their clubs or sports public companies, in addition to dealing with every aspect of the employment and relevant agreements.[57]

B. Professional Athletes

The development of professional sports has created certain social and financial effects that are linked to the legal regulation of sports.[58] Athletes carry out their professional activities by signing contracts or agreements with clubs or sports companies, usually aiming to get remuneration. It is always important to examine the regulation of work provided by the athlete, as well as that of financial relations between the athlete and the respective club or relevant company.

It is important to understand the difference between "Remunerated athlete" and "Professional athlete". A remunerated athlete can draft an agreement with a sport club[59] that has a "Remunerated Athletes Department"

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56 Law 2725/1999, s 85 (4).

57 see more RH McLaren, *Governance in Sports Governing Bodies* (D Panagiotopoulos, W Xioping eds, Hellenic Center of Research on Sports Law 2013)

58 D Panagiotopoulos, *Sports Law Theory* (Sakkoulas 1990).

59 In case of amateur athlete transfer for the reason of studies, to a club registered in a TAA (Department of Remunerated Athletes), the athlete doesn't acquire the professional athlete status automatically and after the end of his/her studies, he/she has to return to his/her team. // Supreme Council for the Resolution of Sports Disputes) 131/2000.

(RAD),[60] while a professional athlete signs an agreement for the provision of sports services with a sports public company (SPC). The contract for the provision of sports services, according to sports law, is an employment agreement.[61] Underage athletes enjoy a special status as trainee athletes,[62] who, in case of their release by means of a club decision, "*are free to register as professionals or remunerated athletes under the same conditions which, according to the applicable provisions, are necessary for the acquisition of the professional, remunerated or amateur athlete of a sports club capacity.*"[63] Previously, underage athletes were banned to sign an employment agreement. The remunerated athlete agreement is governed by both Labour Law and Sports Law.

It is worth mentioning that on the grounds of the Bosman case decision, European Law provisions (concerning professional athletes) have been directly incorporated in the national sports and labour law provisions. Those European Law provisions, as mentioned above, also apply to the relationship between amateur athletes and sports clubs, particularly in case of dealing with issues related to the existence of a financial agreement.

C. Provision of Sports Services

The first systematic legal regulation effort in the professional sports field dealt exclusively with professional football (soccer), by means of Law 879/1979. Provisions of Law 958/1991 have also become very important, stating that sport professionalism, particularly in football (soccer), is a must.

Every athlete is obliged to provide sports services to his or her club, unless health reasons or force majeure prevent them from doing that. An

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60 The remunerated athlete, for his/her remuneration due, can only act against his/her sports club, but not against the TAA (Department of Remunerated Athletes). Greek High Court 626/2003 (2007) 6 Lex Sportiva.

61 Sports Code, s 85 (1).

62 New legal framework established by the provisions of Article 26 of Law 3479/2006 in which Article 90B was added in Law 2725/99, inset Sports Code I 15.

63 Law 2725/1999, s 90B, Law 3479/2006, s 26, Sports Law 2005 15.

athlete who, in an unjustified way, refuses to provide services to the national team, is sanctioned by being eliminated from official games.[64]

The law does not explicitly indicate that professional athletes must participate exclusively in team sports (such as football, basketball, volleyball, etc.). However, that tendency has often been the observed resulting in the emergence of many opportunities for amateur athletes to participate in individual sports.

VI. CONCLUSION

In order for a court to qualify a contract as being an employment contract, it is crucial to identify the existence of all relational characteristics between an employee and an employer, regardless of any legal description or qualification about the relations that may have been given by both parties in their agreement. According to the case-law, even in a relation between a club and amateur athletes, if the club "*makes use—as an employer and in a professional manner— of the remunerated services of volleyball players, belonging to its team, the related agreement is an employment one; therefore, all provisions of a labor law should be applied in this case*"[65].

It is very important to understand the difference between the "remunerated athlete" and the "professional athlete," according to *Lex Sportiva* terminology. The development of professional sports has led to social and financial effects that are linked to the legal regulation of sports.

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64 see more Ponkin I.V. Obzor opredeleniy ponyatiya "sport" v zarubezhnom zakonodatel'stve // Pervyy ezhegodnyy mezhdunarodnyy forum po sportivnomu pravu: sb.mater. (RUDN). 2013. S. 146-158 (IV Ponkin, 'On Definition of the Concept "Sport' (2013) vol I:2 e–Lex Sportiva Journal (ISSN 2241-7079)).

65 Athens Court of Appeals 5151/2006, Labor law Bulletin 62/2006.

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ARTICLE

SOURCES OF CONFIDENTIALITY OBLIGATIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

By Elza Reymond-Eniaeva

Author

LLM, Universities of Geneva and Lausanne, 2005
Associate at Sidley Austin LLP
E-mail: ereymond@sidley.com

Abstract

Confidentiality is one of the most controversial topics in international commercial arbitration. Most inexperienced users simply presume that the arbitration proceedings are confidential. Those with more experience realize that this is not simply a black-and-white issue, and in the absence of an express agreement and specific regulation, confidentiality will not be guaranteed. Given the multitude of sources, it is not easy to determine whether the relevant person is bound by the confidentiality obligations regarding the documents or information related to the arbitration proceedings. It is therefore essential to identify the relevant sources. The subject matter of this article is limited to examination of such sources as an express agreement, international arbitration rules, generally accepted arbitral practice, national case law, and legislation. Based on this analysis, it becomes clear that the involved parties' autonomy regarding the existence and scope of confidentiality of the arbitral proceedings is very important. For the parties seeking some predictability, it is therefore advisable to conclude an express agreement, as well as to carefully choose the seat of the arbitration, the law applicable to the contract, the applicable procedural rules, and the institutional arbitration rules.

Keywords

Confidentiality, confidentiality obligations, international commercial arbitration, presumption of confidentiality, sources of confidentiality obligations

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I. INTRODUCTION

The confidentiality of international commercial arbitration is a very controversial issue. On the one hand, it is widely recognized that confidentiality provides an important advantage contributing to the attractiveness of international commercial arbitration. On the other hand, there is no uniform regulation in national legislations, arbitration rules and other relevant sources, as to the scope or even the existence of an obligation for involved persons to keep certain information related to the arbitration proceedings confidential.[1] Moreover, the doctrinal debate over the existence of an implied duty of confidentiality, in the absence of a legal or contractual basis, is not over yet.

Confidentiality has long been considered an inherent feature of international arbitration. As pointed out by Serge Lazareff, "the inseparable link between arbitration and confidentiality derives from the very origins of arbitration as a method of dispute resolution, from its raison d'être and the manner in which it has been practiced over the centuries."[2] In addition,

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1 *See,* for example, para 31 of UNCITRAL Notes on Organizing Arbitral Proceedings : « It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. »

2 S Lazareff, 'Confidentiality and Arbitration : Theoretical and Philosophical Reflections' in *Confidentiality in Arbitration/ Commentaries on Rules, Statutes, Case Law and Practice* (2009) 81.

since arbitral hearings are traditionally held *in camera* and arbitral awards are published only sporadically, in contrast with the court proceedings, there were no reasons to believe that arbitral proceedings were not confidential.

The following citation from the treatise of Bucher, published in 1988, reflects the contemporaneous predominant view on the inseparability of international arbitration and confidentiality:

> "Confidentiality is an essential element of the arbitration. The parties are often concerned about confidentiality because publicity related to an arbitration proceeding might cause moral and financial damages. Observance of the confidentiality principle is an obligation inherent in an arbitration agreement. It should be admitted, therefore, that an arbitral tribunal has competence to order a party to refrain from any publication with regard to the arbitration, and in particular, if a party presents a one-sided account outside of the arbitration proceeding."[3]

Given the assumed presumption of confidentiality, the decision of 1995 made by the High Court of Australia in Esso/BHP etc. v. Plowman came as a shock for most of the arbitration scholars and practitioners. The High Court of Australia made a clear distinction between privacy of the hearing and confidentiality of the arbitration proceedings. Privacy of the hearing was confirmed, which was not the case with confidentiality of the arbitration proceeding considered as a separate issue. The Australian Court ruled, in particular, that unless the parties had specifically agreed on a confidentiality provision, there was no obligation of confidentiality with regard to the information obtained in the course of the arbitration and therefore, such information could be disclosed to third parties.

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[3] Andreas Bucher, *Le nouvel arbitrage international en Suisse* (Basle 1988) para 205, with other references. Loose translation from French, here is citation of the original: "La confidentialité est un aspect essentiel de l'arbitrage. Les parties y sont en general très sensibles, car une publicité relative au contentieux arbitral est susceptible de leur causer un prejudice moral et économique. Le respect du principe de la confidentialité constitue une obligation inhérante à la convention d'arbitrage. L'on doit donc admettre la competence du tribunal arbitral d'ordonner qu'une partie s'abstienne de toute publication relative au differend, notamment losqu'elle tend à presenter unilatéralement son point de vue en dehors de l'instance arbitrale."

Today, no one challenges the fact that a distinction needs to be made between privacy of the hearing and confidentiality of the arbitration proceedings. The debate on confidentiality of the arbitration proceedings is, however, far from being over. The main controversy surrounding the issue of confidentiality is whether or not an implied duty of confidentiality exists in the absence of an express agreement and applicable rules. There are also other related issues, which are considered to be controversial, including publication of the arbitral award and confidentiality over the mere existence of the arbitration proceedings.

Identifying the sources of the confidentiality obligation is essential for understanding how confidentiality is regulated in international commercial arbitration. Given the multitude of different sources, it is indeed not easy to determine which of them apply to every specific situation.

Once the relevant sources are identified, it is also important to determine the hierarchy of the sources and their interaction. Subject to public policy and mandatory legal requirements, an express agreement of the parties will always prevail. If the parties adopt the rules of an arbitration institution or another set of rules containing provisions on confidentiality, these rules will apply in the absence of an express agreement or as a supplement to an express agreement.[4] Generally accepted arbitral practice might also be a guide in the absence of more specific applicable rules.

The rules of national applicable law can become relevant in the absence of an agreement about the confidentiality of the arbitration proceedings. They can also supplement an agreement between the parties involved, or even prevail if the parties' agreement violates public policy and/or mandatory legal requirements.

First of all, the author examines the express agreement of the parties as a source of confidentiality obligations (Section II). Secondly, she presents a selective overview of some institutional arbitration rules (Section III). Thirdly, she presents generally accepted arbitral practice as a potential source of a confidentiality obligation (Section IV). Finally, domestic legislation and case law will be considered (Section V). Among them are

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4 LCIA Rules, s 30 (1) : « Unless the parties expressly agree in writing to the contrary... ».

the national arbitration laws (Section V.B), case law of domestic courts (Section V.C), and domestic laws originally not intended to be applied to international arbitration proceedings (Section V.D). The article ends up with a conclusion (Section VI).

II. EXPRESS AGREEMENT

The parties' autonomy with regard to confidentiality in international arbitral proceedings will generally be recognized in most developed legal systems.[5] This is an application of the broader contractual and procedural autonomy of the involved parties.[6]

The parties can exercise their autonomy by choosing the applicable substantive law and the seat of the arbitration, through adopting the institutional or non-institutional arbitration rules and possibly procedural rules or guidelines. These choices may have a direct influence on how the confidentiality of the arbitral proceedings will be regulated, since by making one of the above-mentioned choices, the parties will generally adhere to the provisions on confidentiality that the applicable law and selected rules/guidelines might contain.

A more tailored approach would be for the parties to expressly agree on a specific confidentiality clause. This can be done in anticipation of arbitration proceedings, at the commencement of arbitration, or at any time thereafter. The parties can add a provision on confidentiality into the arbitration agreement. The underlying contract may also contain a broader confidentiality provision, applicable to all parties' contractual obligations and covering, by extension, arbitration proceedings related to the contract.[7] The confidentiality agreement can also be entered into by a separate agreement at any time before or after the dispute arose.

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5 Gary B Born, *International Commercial Arbitration,* vol 2 (2nd edn, Wolters Kluwer, 2014) 2787.

6 ibid 2787.

7 Ileana M Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 9-10.

Unless it violates public policy or is in contradiction with mandatory legal requirements, a confidentiality agreement will be valid and enforceable.[8] Confidentiality agreements will be enforceable against the parties, but will generally not bind third parties, such as arbitrators, witnesses, experts, interpreters, etc.[9] In order to extend the confidentiality obligations to arbitrators, a specific provision can be inserted, for example, in the Terms of Reference. A separate agreement can be entered into with witnesses, experts, interpreters, and other persons having access to confidential information.

The UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes"), the purpose of which is to "assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful," propose a list of issues that might be covered by an agreement on confidentiality (para 32):

> "An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (*e.g.* pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining the confidentiality of such information and hearings; whether any special procedures should be employed for maintaining confidentiality of information transmitted by electronic means (*e.g.* because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (*e.g.* in the context of disclosures of information in the public domain, or if required by law or a regulatory body)."

The International Commercial Arbitration Committee of the International Law Association, in its Report and Recommendations on "Confidentiality in International Commercial Arbitration," came to the conclusion that the best way to ensure confidentiality or non-confidentiality across multiple jurisdictions

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8 Born (n 5) 2791.

9 Julian DM Lew, 'The Arbitrator and Confidentiality' in *Dossier of the ICC Institute of World Business Law : Is Arbitration Only As Good as the Arbitrator ? Status, Powers and Role of the Arbitrator* (2011) 3.

was to make an express agreement before or during the arbitration.[10] The Committee has also proposed model arbitration clauses for confidentiality and for non-confidentiality. Both clauses are cited in full below.

Model arbitration confidentiality clause

"[A] The parties, any arbitrator, and their agents or representatives, shall keep confidential and not disclose to any non-party the existence of the arbitration, all non-public materials and information provided in the arbitration by another party, and orders or awards made in the arbitration (together, the "Confidential information").
[B] If a party or an arbitrator wishes to involve in the arbitration a non-party – including a fact or expert witness, stenographer, translator or any other person – the party or arbitrator shall make reasonable efforts to secure the non-party's advance agreement to preserve the confidentiality of the Confidential information.
[C] Notwithstanding the foregoing, a party may disclose Confidential information to the extent necessary to: (1) prosecute or defend the arbitration or proceedings related to it (including enforcement or annulment proceedings), or to pursue a legal right; (2) respond to a compulsory order or request for information of a governmental or regulatory body; (3) make disclosure required by law or by the rules of a securities exchange; (4) seek legal, accounting, or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in case of any disclosure allowed under the foregoing circumstances (1) through (4) where possible, the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided. The arbitral tribunal may permit further disclosure of Confidential information where there is a demonstrated need to disclose that outweighs any party's legitimate interest in preserving confidentiality.

[10] Filip de Ly, Mark Friedman, Luca G. Radicati di Brozolo, 'International Law Association International Commercial Arbitration Committee's Report and Recommendations on "Confidentiality in International Commercial Arbitration" ' (2012) Vol. 28 Issue 3 Arbitration International 381-383.

[D] This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract. This confidentiality provision may be enforced by an arbitral tribunal or any court of competent jurisdiction and an application to a court to enforce this provision shall not waive or in any way derogate from the agreement to arbitrate."[11]

Model arbitration non-confidentiality clause

"Save to the extent required by any applicable law and by any other obligations to which a party may otherwise be bound, the parties shall have no obligation to keep confidential the existence of the arbitration or any information or document relating thereto."[12]

The advantage of agreeing on a confidentiality (or non-confidentiality) clause is clear: the parties can tailor the confidentiality regime according to their needs. There may, however, be some downsides as well. For example, one disadvantage of agreeing on confidentiality terms in anticipation of a dispute is that the parties might change their mind between the time when the confidentiality agreement is drafted and the point at which an issue with confidentiality arises in an arbitration proceeding.[13] Another problem is the enforceability of the confidentiality agreement. According to Yves Derains and Eric Schwartz, in order to ensure continued protection of confidentiality, an appropriate judicial recourse should be provided for.[14]

III. INTERNATIONAL ARBITRATION RULES

A. Introduction

The purpose of this subsection is to provide an overview of only a few selected rules to demonstrate how the confidentiality of arbitration is regulated within the scope of international arbitration rules.

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11 ibid 381.

12 ibid 383.

13 Lew 4.

14 Yves Derains, Eric A Schwartz, A Guide to the ICC Rules of Arbitration (2nd edn, Kluwer Law International 2005) 286.

In fact, I will mainly discuss institutional arbitral rules in the present section. As I have decided to also discuss the UNCITRAL Arbitration Rules ("UNCITRAL Rules"), which cannot be defined as institutional rules, this section received a broader title of "International Arbitration Rules." The overview will start with the presentation of confidentiality provisions in the UNCITRAL Rules. It will move further to a few selected institutional rules, such as the London Court of International Arbitration Rules ("LCIA Rules"), Swiss Rules of International Arbitration ("Swiss Rules"), ICC Rules (International Chamber of Commerce Arbitration and ADR Rules), and World Intellectual Property Organization Arbitration Rules ("WIPO Rules").

B. UNCITRAL Rules

The UNCITRAL Rules do not contain a general provision on the confidentiality of the arbitration proceedings. This absence of regulation is deliberate and was due to a lack of consensus on the issue during the 46th session of the Working Group.[15] This is why the revised 2010 UNCITRAL Rules regulate only some aspects of confidentiality, such as privacy of the hearings and publication of the award.

According to Article 28(3) of the UNCITRAL Rules, the hearings are to be held in private. This provision is not mandatory, and the parties can agree on a different approach.

Article 34(5) of the UNCITRAL Rules provides that the award may be published with the consent of all the parties involved or "if disclosure is required of a party by legal duty, to protect or pursue a legal right, or in relation to legal proceedings before a court or other competent authority."

C. LCIA Rules

The 1998 version of the LCIA Rules has been recently revised, although the confidentiality provisions have not had significant changes. The new version became effective in October, 2014.

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15 Pierre Pic, Irène Léger, 'Le nouveau règlement d'arbitrage de la CNUDCI' (2011) 1 Revue de l'Arbitrage 104.

In addition to Article 19.4 on the privacy of hearings, the LCIA Rules have specific provisions protecting the confidentiality of an arbitration proceeding. These provisions are contained in Article 30, which was introduced in the 1998 edition of the LCIA Rules.[16] LCIA was the first institution to introduce such a detailed and sophisticated provision on confidentiality.[17] Article 30 protects the confidentiality of the arbitration proceedings in three ways.[18]

First, Article 30.1 of the LCIA Rules provides that the parties are bound to preserve the confidentiality of all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings, which are not in the public domain. The text of Article 30.1 has been changed in the 2014 version of the LCIA Rules, as it does not mention any longer the phrase, "unless the parties expressly agree in writing to the contrary," which was contained in the previous version of 1998. It is, however, not clear whether or not this means that the parties are entitled to a deviation from the general rule.

Article 30.1 of the LCIA Rules also contains several exceptions to the general rule of confidentiality. The parties are allowed to disclose the above-mentioned documents if disclosure is "required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."

Secondly, according to Article 30.2 of the LCIA Rules, members of the arbitral tribunal must keep their deliberations confidential from any person outside of the arbitral tribunal, including the LCIA and the parties themselves.[19] The only exception is when an arbitrator's refusal or inability to participate in deliberations blocks the tribunal's work in one of the cases mentioned in Articles 10, 12, 26, and 27 of the LCIA Rules, and therefore needs to be disclosed.

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16 Simon Nesbitt, 'LCIA Arbitration Rules, Article 30' in *Concise International Arbitration*, (2010) 1 Kluwer Law International 462.

17 Antonias Dimolitsa, 'Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration' in *Confidentiality in Arbitration/ Commentaries on Rules, Statutes, Case Law and Practice* (ICC Publication 2009) 9.

18 Nesbitt (n 16) 462.

19 Nesbitt (n 16) 462.

Thirdly, in accordance with Article 30.3, the LCIA will only publish the award with a prior written consent of all involved parties and the arbitral tribunal.

D. Swiss Rules

Although they are based on the UNCITRAL Rules, the 2004 Swiss Rules contained explicit and detailed provisions on confidentiality.[20] These provisions were introduced to "promote the confidential nature of arbitration by making sure that the parties and the arbitrators would be efficiently protected."[21] The Swiss Rules were revised in 2012, but no major substantive changes were made to the relevant provisions. The revision only changed their numbers to Article 44 (1, 2, 3), as opposed to Article 43(1, 2, 3). The only substantive change was made to the provision on the publication of the award,[22] which now allows, provided the required conditions are met, publication of tribunals' orders and not only of the awards, as was previously the case. Article 44 of the Swiss Rules — which with the exception of some minor nuances is very similar to the LCIA Rules — protects the confidentiality of the arbitration proceedings in three ways.

First, Article 44(1) of the Swiss Rules imposes a duty of confidentiality on the parties, arbitrators, tribunal-appointed experts, a secretary of the arbitral tribunal, members of the board of directors of the Swiss Chambers' Arbitration Institution, members of the Court and the Secretariat, and the staff of the individual Chambers. This duty of confidentiality covers the awards and orders of the arbitral tribunal, as well as materials submitted by the parties that are not already in the public domain. The parties can, however, disclose the materials they have submitted themselves.[23] Disclosure

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20 *See* under letter (b) of Introduction to the former Swiss Rules on International Arbitration of 2004.

21 Tobias Zuberbühler, Christoph Müller, Philipp Habegger (eds), *Swiss Rules of International Arbitration, Commentary* (2nd edn Zurich-Basel-Geneva 2013) s 44 (1).

22 ibid s 44 (3) .

23 Zuberbühler, Müller, Habegger (n 18) s 44 (10).

of the confidential materials is allowed, according to Article 44(1) of the Swiss Rules, when such disclosure is required in order to exercise a legal duty, protect or pursue a legal right, ensure the enforcement of a ruling, or challenge an award in court proceedings. Article 44(1) is not a mandatory provision in relation to the parties, but they need to agree on its non-application in writing.[24]

Secondly, according to Article 44(2) of the Swiss Rules, deliberations of the arbitral tribunal are confidential. This means that the arbitrators cannot disclose any information concerning the deliberations of the arbitral tribunal, including their position during the deliberations, outside of the arbitral tribunal.[25]

Thirdly, Article 44(3) of the Swiss Rules provides that an award or order may be published if the following three requirements are met: a) the Secretariat has received a request for publication; b) references to the parties' names are deleted; c) no objection arises from the involved parties within the time limit provided by the Secretariat.

Finally, the Swiss Rules, like most other institutional rules, provide that the hearings are to be held *in camera* (Article 25(6)).

E. ICC Rules

The ICC Rules guarantee the confidential character of the work of the Court and its Secretariat (Art. 1 of Appendix II to ICC Rules). There is also a practice within the ICC Secretariat to consistently inform arbitrators, prior to the appointment, about their duty to respect the confidentiality of the arbitration proceedings.[26] As pointed out by Yves Fortier, "this fact — the lack of consensus regarding whether "simply because it is private, arbitration must be confidential" — combined with what are generally understood to be the legitimate exceptions to the principle of confidentiality that arise in the

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24 ibid s 44 (17).

25 ibid s 44 (20).

26 Karin Calvo Goller, 'The 2012 ICC Rules of Arbitration – An Accelerated Procedure and Substantial Changes' (2012) 29 (3) Journal of International Arbitration 337.

normal course of event, is reflected in the 1998 ICC Rules by the absence of any mention of a general rule of confidentiality."[27]

The ICC Rules, however, do not impose a general duty of confidentiality on the parties, arbitrators, attorneys, and other persons involved in arbitration proceedings.[28] Drafters of the 1998 ICC Rules could not reach a consensus on this issue, which explains the absence of rules on confidentiality obligations.[29] When the 2012 ICC Rules were discussed, the issue of confidentiality was raised again. It was, however, decided that a provision on a general duty of confidentiality should not be introduced, but rather, the issue should be addressed by the involved parties and the arbitral tribunal, depending on specific circumstances of the case.[30]

The ICC Rules contain a provision (Article 22(3)) entitling the arbitral tribunal to make orders concerning the confidentiality of the arbitration proceedings upon the request of any party. These confidentiality orders may be issued in relation to specific documents, such as pleadings, witness statements, documentary evidence, or the award.[31] They can also relate to the very existence of the arbitration or to any other information related to the arbitration.[32]

F. WIPO Rules

Compared to other arbitration rules, the WIPO Rules contain possibly the most comprehensive regulation on confidentiality in international commercial arbitration.[33] For this reason, the WIPO Rules will be cited in full:

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27 L Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15 Arbitration International 133.

28 Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (Paris 2012) 807.

29 Derains, Schwartz 285 ; Christoph Müller, 'La confidentialité en arbitrage commercial international : un trompe-l'oeil ?' (2005), 2 (June) ASA Bulletin 222.

30 Fry, Greenberg, Mazza (n 28) 807.

31 ibid 808 ; Derains, Schwartz (n 29) 286.

32 ibid 808 ; Derains, Schwartz (n 29) 286.

33 Smeureanu (n 7) 17.

Confidentiality of the Existence of the Arbitration

Article 73

(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required so by law or by a competent regulatory body, and then only:

(i) by disclosing no more than what is legally required; and

(ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.

(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

Confidentiality of Disclosures Made During the Arbitration

Article 74

(a) In addition to any specific measures that may be available under Article 52,[34] any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.

(b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in

34 S 52 WIPO deals with specific measures with regard to disclosure of trade secrets and other confidential information.

order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Confidentiality of the Award

Article 75

The award shall be treated as confidential by the parties and may be disclosed to a third party if and to the extent that;

(i) the parties consent; or

(ii) it falls into the public domain as a result of an action before a national court or other competent authority; or

(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

G. Conclusion

Regulation regarding confidentiality varies considerably depending on the applicable arbitration rules. While the ICC Rules provide almost no protection of confidentiality, UNCITRAL Rules provide minimal regulation by dealing with the issues related to publication of the award and privacy of the hearings. LCIA Rules and Swiss Rules go further, as they also contain provisions dealing with such important aspects as the confidentiality of the award and arbitral tribunals' orders, confidentiality of the materials submitted by the parties as part of the arbitration, and confidentiality of the deliberations of the arbitral tribunals.

However, the tendency of arbitration rules introduces at least some level of minimum regulation on the confidentiality of the arbitration proceedings. The absence of regulation regarding some important aspects of confidentiality in the UNCITRAL and ICC Rules, as it was previously mentioned, was indeed due to a lack of consensus within the working groups. It is very likely, therefore, that in the near future, when a consensus on confidentiality obligations in international arbitration is reached, most of the arbitration rules will introduce a specific confidentiality provision.

IV. GENERALLY ACCEPTED ARBITRAL PRACTICE

Confidentiality obligations can also find their sources in generally accepted arbitral practice.[35] When invoking the generally accepted arbitral practice, reference is made to a set of principles or procedures that are commonly recognized by professionals working in the field of international arbitration, whether they are legal scholars or practitioners. These principles can be found, in particular, in prior arbitral awards or legal treaties, and can sometimes even be codified.

The role of the "arbitral precedent" is not clearly defined in international commercial arbitration. A survey of several hundred awards from commercial arbitration cases reported by Gabrielle Kaufmann-Kohler showed that there is no uniform practice regarding the effect of prior awards.[36] Another survey focused on the ICC awards, as a part of the same study, demonstrated that out of the 190 reviewed awards only about 15 percent cited other arbitral decisions.[37] Most of the citations were made with regard to the issues of jurisdiction and procedure.[38]

Gabrielle Kaufmann-Kohler argues that although past arbitral decisions do not have a binding effect *per se*, arbitrators have a moral obligation to follow precedents where it is necessary to secure the predictability of the legal environment.[39] The necessity for the existence of binding rules through arbitral decisions would logically be desirable in the areas where the law is not yet well developed.[40] With regard to commercial arbitration, she states that:

> "[T]here is no need for developing consistent rules through arbitral awards because the disputes are most often fact and contract-driven. The outcome revolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs. Unsurprisingly, awards are published

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35 Lew 3.

36 abrielle Kaufmann-Kohler, 'Arbitral Precedent : Dream, Necessity or Excuse ?' (2007) 23 3 Arbitration International 362.

37 ibid 363.

38 ibid.

39 Kaufmann-Kohler (n 36) 374.

40 ibid 378.

only sporadically in this context, unlike sports and investment arbitration, where publication has become the rule."[41]

While Gabrielle Kaufmann-Kohler seems to treat commercial, investment and sports arbitrations differently when discussing the issue of precedent, Gary Born tends to take a more universal approach when discussing the role of precedent in international arbitration:

> "In practice, and like the application of concepts of *stare decisis* by most national courts, arbitral tribunals have adopted nuanced approaches towards the question of precedent. Tribunals afford varying degrees of precedential authority to past arbitral awards, based on the number of decisions adopting a particular analysis, the nature of the tribunal(s), the quality of the tribunal's reasoning, and similar factors. As with most national courts, there is no absolute rule of binding precedent, but instead a pragmatic analysis that gives effect to the underlying values served by the doctrine of precedent, while permitting change, evolution and correction in the law. That is consistent with, and mandated by, the basic objectives and aspirations of the international arbitral process."[42]

One example of generally accepted practice in commercial arbitration is the privacy of the arbitral tribunals' hearings or the secrecy of their deliberations. Even if applicable procedural rules ignore these issues, the arbitral tribunal will most likely respect the secrecy of deliberations and take measures to hold a hearing *in camera*. These are generally admitted practices which are also sometimes referred to by legal scholars when discussing the arbitral procedure.

Generally accepted arbitral practice can also be codified in a set of rules, as was the case with the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"). The IBA Rules, adopted in 1999 and revised in 2010, contain a set of rules for the taking of evidence in international arbitration. These rules can be used as procedural guidelines, leaving a wide-ranging flexibility and discretion to the arbitrators.[43] The

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41 ibid 375-6.

42 Born (n 5) 3827.

43 Julian DM Lew, Loukas A Mistelis, et al., *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 553.

parties can also choose to give a binding force to the IBA Rules if they adopt them at any time before or after the dispute arose.[44] The IBA Rules contain, in particular, an obligation of confidentiality concerning all documents submitted or produced in the arbitration. Article 3.13 of the IBA Rules provides the following:

> "Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in *bona fide* legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations in the arbitration."

This provision appears to be an acceptable compromise, when it comes to such a controversial issue as confidentiality. Although the IBA Rules take no position with respect to some important aspects of confidentiality, such as publication of the award or deliberations of the arbitral tribunals, they do provide the necessary framework with regard to the documents submitted or produced in an arbitration proceeding.

Some legal authors argue that there is an implied obligation of confidentiality, even if there is no legal or contractual source for this obligation. When this opinion is not confirmed by the case law of national courts, it can be argued that this principle finds its source in the generally admitted arbitration practice.

Although there is a consensus on certain issues in international commercial arbitration—recognized either in past arbitral decisions, legal treaties and non-binding normative texts or through application of the principles and procedures in practice—there is no certainty as to a uniform application. This is why it is advisable for the parties involved, looking for specific procedural rules to be applied to reach an express agreement or adopt a set of rules containing the necessary provisions.

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44 Forword to IBA Rules.

V. NATIONAL LEGISLATION AND CASE LAW

A. Introduction

National legislation and case law are important sources of confidentiality obligations. However, before analyzing the sources, it appears necessary to examine the problem of applicable law. It is indeed not easy to determine the law that is applicable to confidentiality obligations. The author will now provide an overview of confidentiality regulation in national arbitration laws and briefly discuss the national case law. Finally, the author will provide a brief explanation of how national internal rules not originally intended for application in international arbitration can come to be of relevance.

i. Applicable Law

Since confidentiality is composed of various elements, it is virtually impossible to provide an exhaustive list of potentially applicable laws. The applicable law will depend on many factors, but some possible options include: the law governing the arbitration agreement,[45] *lex arbitri*,[46] and the law applicable to the underlying contract.[47]

The applicable law might depend, in particular, on the source of confidentiality obligation. If the source is the arbitration agreement, whether it is because the parties included a specific provision on confidentiality in the arbitration agreement or because confidentiality is considered to be an implied term of the agreement to arbitrate, the law governing the arbitration agreement will most likely be applied.[48]

In the situations where the state court is requested to enforce the arbitral award or grant interim measures, *lex fori* is applicable. Other legal

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45 Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, London 2007) para 369.

46 Lew 6.

47 Born (n 45) 2812-13.

48 ibid.

exceptions to confidentiality obligations might lead to the application of different laws. Some examples of these include the law governing the corporate obligations of a party and the law of a country where a party is engaged in certain types of activities or transactions.[49]

If an alleged breach of confidentiality leads to a tort claim, the law governing tort liability will apply.[50] In this and other cases, the applicable law depends on the conflict of laws of the forum, which also contributes to uncertainty about the applicable law.

These are just a few examples of the laws that might apply to different facets of confidentiality. Even from this short analysis, it becomes clear that there is a certain amount of risk related to confidentiality obligations for the parties looking for legal certainty. In addition to making an express agreement on confidentiality (or non-confidentiality), which has been discussed in Section II, the parties could reduce the risk of legal uncertainty by agreeing on a carefully drafted *choice of forum* (or *arbitration*) and *choice of law* clauses. It would, however, be difficult for these clauses alone to cover all possible situations related to the confidentiality obligations.

B. National Arbitration Laws

Today many national legislations are silent on the confidentiality of international arbitration.[51] The UNCITRAL Model Law, which influenced a significant number of national arbitration laws,[52] does not contain rules on confidentiality.[53] The question was intentionally left open, at least with regard to publication of the arbitration awards, in order to avoid the regulation of

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49 Ly, Friedman, Radicati di Brozolo (n 28) 368.

50 ibid.

51 Swiss PILA, Swedish Arbitration Act 1999, English Arbitration Act 1996, Russian Law On International Commercial Arbitration 1993, USA Federal Arbitration Act.

52 By 2005, some 50 states adopted the UNCITRAL Model Law (Sanders, 443).

53 Pieter Sanders, 'UNCITRAL's Model Law on International and Commercial Arbitration : Present Situation and Future' (2005) 21 Arbitration International 456.

an overly controversial issue.[54] According to certain authors, confidentiality should be dealt with in arbitration rules rather than in the Model Law.[55] Here are some very insightful observations contained in the Report of the Secretary-General on Possible Features of a Model Law on International Commercial Arbitration:

> "On peut douter que la loi type doive traiter de la question de la publication des sentences. Bien que cette question soit épineuse, sachant le nombre d'arguments que l'on peut invoquer soit pour, soit contre cette publication, la décision pourrait être laissée à la discrétion des parties ou aux règles d'arbitrage que celles-ci adopteront. Si, cependant, une disposition à cet effet devrait être incorporée à la loi type, le compromis le plus acceptable serait vraisemblablement de stipuler que la sentence ne peut être rendue publique qu'avec le consentement exprès des parties."[56]

Not surprisingly, countries that have closely followed the Model Law do not have provisions on confidentiality in their own arbitration laws.[57] Absence of express provisions in the national laws may also be explained by the contractual nature of the arbitration and the willingness of legislators to keep statutory interference to a minimum.[58] The parties can indeed exercise their autonomy by agreeing on a confidentiality clause tailored to their needs or choose ready-made institutional rules that already contain a confidentiality clause.

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54 Rapport du Secrétaire général sur les éléments éventuels de la Loi type sur l'arbitrage commercial international, Annuaire de la Commission des Nations Unies pour les droit commercial international, Volume XII, 1981, deuxième partie, 95-6.

55 Sanders (n 53) 456, 476 ; Dimolitsa 13.

56 Rapport du Secrétaire général sur les éléments éventuels de la Loi type sur l'arbitrage commercial international, Annuaire de la Commission des Nations Unies pour les droit commercial international, Volume XII, 1981, deuxième partie, 95-6.

57 Dimolitsa (n 17) 13.

58 Alexander Jolles, Maria Canals de Cediel, 'Confidentiality' in Gabrielle Kaufmann-Kohler, Blaise Stucki (eds), *International Arbitration in Switzerland : A Handbook for Practitioners* (The Hague, 2004) 93; Andreas Bucher, Pierre-Yves Tschanz, *International Arbitration in Switzerland* (Basle, 1988) para 115.

Some countries, like Sweden, as well as England and Wales, do not have express provisions on confidentiality in their arbitration laws, but the principles related to confidentiality are established by case law.[59] In other countries, like Bulgaria, Japan, or the Netherlands, the confidentiality of the arbitration proceedings is established as a principle, although there are no express provisions to that effect.[60]

There is however, also a tendency towards introducing more or less detailed rules on confidentiality into the national arbitration laws. Several countries decided to address the issue of privacy and/or confidentiality of the arbitral proceedings in their legislations. For example, the arbitration laws of Australia, Ghana, Hong Kong, Hungary, New Zealand[61], Philippines, Portugal, Slovakia, and Spain have specific provisions dealing with confidentiality in international arbitration.[62]

Some of these countries, such as Australia and New Zealand, have chosen to have a relatively detailed regulation. The legislations of both countries contain elaborate provisions imposing the duty of confidentiality on arbitral tribunals and the involved parties, in addition to setting out exceptions for when the confidential information can be disclosed. The distinctive feature of confidentiality regulations contained in the Australian International Arbitration Act of 1974 is that its confidentiality provisions (Arts. 23C, 23D, 23E, 23F, 23G) apply only if the parties to the arbitration agreement specifically agree that they will apply.[63] If the parties do not "opt-in" to those provisions, the common law rules will apply.[64] In

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59 'Privacy and Confidentiality in Arbitration Smart Charts' <www.kluwersmartcharts.com> accessed 1 September 2014.

60 ibid.

61 New Zealand Arbitration Act 1996, s 14A.

62 For most of the countries, this list (which is not exhaustive) is based on the 'Privacy and Confidentiality in Arbitration Smart Charts' <www.kluwersmartcharts.com> accessed 1 September 2014.

63 S 22 (3) AIAA.

64 Chester Brown in his report on Australian regulation in 'Privacy and Confidentiality in Arbitration Smart Charts' <www.kluwersmartcharts.com> accessed 1 September 2014..

contrast, the confidentiality provisions of the New Zealand Arbitration Act of 1996 (Arts. 14A to 14I) apply unless the parties decide to "opt-out."[65]

The Norwegian Arbitration Act is also interesting in this regard. Contrary to the general assumption that the arbitration proceedings are confidential, Article 5 of the Norwegian Arbitration Act provides that the arbitration proceedings and arbitral award are not subject to a duty of confidentiality unless the parties have agreed otherwise.

Other countries opted for rather general clauses declaring confidentiality as one of the principles governing the arbitral proceedings.[66] For example, the Law of the Republic of Kazakhstan on International Arbitration of 2004 has established a duty of confidentiality for arbitrators as one of the principles of arbitral proceedings:

> "[C]onfidentiality meaning that arbitrators shall not divulge information, which became known to them in the course of arbitral proceedings, without prior consent of the parties or their legal successors, and may not be interrogated as witnesses with respect to circumstances that became known to them in the course of arbitral proceedings, save in the cases where the law explicitly provides for the duty of a citizen to report information to a relevant body."[67]

C. Case Law of National Courts

A lack of express provisions in national legislation does not automatically imply the absence of regulation. Although this problem is relatively recent, domestic courts in many countries have already had a chance to rule on different aspects of confidentiality.

In fact, state courts established some very important principles of confidentiality, with regard to international commercial arbitral proceedings. For example, the confidentiality obligations upon parties involved in international arbitration proceedings have been recognized by the English

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65 S 14 NZAA.

66 S 24 (2) of Spanish Arbitration Act 60/2003.

67 S 4 (5) of the Law of the Republic of Kazakhstan on International Arbitration of 2004.

Courts in such cases as Dolling-Baker v. Merrett, Ali Shipping, and the Emmott case.[68] This is, however, not the case in all jurisdictions. This is why the parties need to be aware that depending on the relevant jurisdiction, the applicable principles regarding the confidentiality obligations may vary considerably.

D. National Rules

Internal rules not originally intended for application in international arbitration serve as another important source. Depending on the specific problem of confidentiality at issue, multiple areas of law—containing various rules—can come to be of relevance.

One example of such rules comes into play when statutory or non-statutory provisions impose confidentiality obligations on certain professions. The most obvious case in point would be the set of rules on attorney-client privilege. Another example is the regulation of relations between the parties and the arbitrators by way of national laws. Since such relations are most likely to have a contractual basis, it would be necessary to check the applicable national rules.[69] If a state court gets involved, for example, because it is requested to take interim measures against one of the parties involved in arbitration, or because there is an appeal against the arbitration award, rules of the *lex fori* become relevant.

VI. CONCLUSION

The parties' autonomy with regard to determining the scope of confidentiality of the arbitral proceedings is very important. The most obvious tool is an express agreement, which carries with it the benefit of being tailor-made. The only limit to the parties' autonomy would be the applicable legal mandatory requirements and the public policy rules. The

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68 Dolling-Baker v. Merrett [1990] 1 WLR 1205; Ali Shipping v. Shipyard Trogir [1997] EWCA Civ 3054; Emmot v. Wilson & Partners Limited [2008] EWCA Civ 184.

69 In Switzerland, Arts. 394 ff of the Swiss Code of Obligations on the Agency Contract apply to a contract between the parties and the arbitrators.

main disadvantage of agreeing on a confidentiality regime in anticipation of a dispute is that the parties' needs might change between the moment they draft the confidentiality agreement and the point at which an issue with confidentiality arises.

Depending on their needs, the parties can also adhere to the confidentiality obligations contained in international arbitration rules or in a set of other rules (such as the IBA Rules of Evidence), or combine such rules with an express agreement. The parties can also exercise their autonomy by choosing the seat of arbitration and the law applicable to the disputes involving the contract. As mentioned before, these choices may have an influence on the law applicable to the existence and the scope of confidentiality obligations.

Legislators in some countries chose to have relatively detailed provisions, while in other countries the legislations remain silent in relation to confidentiality in international arbitration. Some landmark court decisions greatly influenced the current system of confidentiality in international commercial arbitration.

Given a large diversity of confidentiality systems, all governed by different rules, it is advisable for the parties looking for some predictability and consistency of regulation to carefully choose the seat of the arbitration, the law applicable to the contract, the applicable procedural rules, and the rules of an arbitration institution. They should do so knowing that these choices might influence the applicable confidentiality system of the arbitral proceedings. In addition, a tailor-made agreement on the confidentiality of the arbitration proceedings, possibly with a *choice of forum* (or *arbitration*) and *choice of law* selections, may also be entered into between the involved parties. However, the parties should be aware of a potential change of their mind between the moment they draft the confidentiality agreement and the point at which an issue with confidentiality arises. As for the *choice of law* and *choice of forum* (or *arbitration*) clauses, they will certainly contribute to reducing the risk of legal uncertainty, but can hardly guarantee avoidance of undesirable jurisdictions or laws.

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ESSAY

GAME OF THRONES: THE ONGOING DISCOURSE ON RELIGION AND STATE IN ISRAEL (Part 1)

By Liana Voloch

Author

Student, Interdisciplinary Center Herzliya, Tel Aviv

Abstract

My main purpose in this essay is to explore a nature of the status quo agreement and examine main disputes regarding the status quo: unchained women ("Agunot"), an exemption of the "Yeshiva" students from mandatory military service; a separation of woman and man in buses; biblical prohibitions that have a direct effect on non-religious citizens, etc. The author researches a political and legal framework as a base of relations between state and religion. He analyses sources of law in Israel and their evolution. Then the notion of "Jewish and Democratic state" is discussed. The author thinks that a democratic liberal state model does not go together with Israel. Israel is considered as a special model of democracy, which is Jewish-Democracy.

Keywords

Israel, laws of Israel, Status quo agreement, religion and state, sources of law, sources of law in Israel, religious education system

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> "Religious institutions that use government power in support of themselves and force their views on persons of other faiths, or of no faith, undermine all our civil rights. Moreover, state support of an established religion tends to make the clergy unresponsive to their own people, and leads to corruption within religion itself. Erecting the 'wall of separation between church and state,' therefore, is absolutely essential in a free society."
>
> *Thomas Jefferson*

I. Introduction

In November 1947 General Assembly of the United Nation deliberating on the issue of Palestine, finally recommended dividing the territory into two parts: a separate Jewish state and an Arabic state. It was also mentioned that two states would function as democratic ones without any infringing social and political rights of different nations in the borders of the other states. The global Arabic leadership opposed the decision, and after the declaration of independence of Israel (1948) an ongoing war began.

Prior to those events and foundation of Israeli state, a number of disputes were going on between the Jewish community members. One of the main disputes took place between orthodox and non- orthodox Zionsits Jews.[1] After the UN decision, the first Israeli Assembly was gathered in order to decide about a nature of the religion and state relations. Although a majority of people were for a non-orthodox state orthodox parties could not be ignored since they were united under Rabbis and had a significant voting power. A settlement was achieved. The settlement was later named "status quo agreement" and pointed out four main issues in which the orthodox party demanded full jurisdiction or complete autonomy.

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[1] For further information regarding Zionism and orthodox parties pre-foundation of Israel see: The State of the Jews, introduction, Theodore Herzl. Ahad Ha-Am : The Jewish State and the Jewish Problem + The Negation of the Diaspora "From an unsolvable dispute to a unifying compromise", The Jerusalem center of research <http://bcrfj.revues.org/index6178.html> accessed 1 September 2014 .

This agreement was a compromise between parties. As a result, Israel is not a theocratic state it does not establish any religion.[2] However, "*de facto*" it has no separation between state and religion. The status quo agreement results in many laws and social norms, which are influenced by the Jewish biblical law. For example, a Jewish law determines a right of one to acquire citizenship in Israel[3]creating religious discrimination between Jews and other religions.[4]

My main purpose in this article is to explore a nature of the status quo agreement. I would like to examine main disputes regarding the status quo: unchained women ("Agunot"), an exemption of the "Yeshiva" students from mandatory military service; a separation of woman and man in buses; biblical prohibitions that have a direct effect on non-religious citizens, etc. We must understand a political and legal framework that relations between state and religion rely upon. Therefore, in the first two chapters I am trying investigate on brief sources of law in Israel, starting from the Turkish and British regime, and going through former president of the Supreme Court, Judge Aharon Barak's 'Constitutional Revolution' of 1992. Then I am going on the notion of "Jewish and Democratic state" as it is suggested in the declaration of independence. I would say that a democratic liberal state model as we know it is does not go together with Israel therefore we should "put on different glasses" and consider Israel as a Jewish-Democracy.

The main chapter of this article is dedicated to review of the status-quo agreement. I am going review the original document, than focusing on the development of the agreement and different forms that it is created.

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2 N Lerner, 'Religious Liberty in the State of Israel' (2007) 21 Emory Int'l L. Rev. 239.

3 S Samoha, 'Jewish State and Jewish Democracy: A Review Article of Alexander Yakobson and Amnon Rubinstein's Israel and the Family of Nations: Jewish Nation-State and Human Rights' (2006) Mishpat Umimshal (Law and Government in Israel) (Hebrew) 10.

4 The Jewish population numbers approximately 6.042 million residents (75.3% of the total population); the Arab population numbers approximately 1.658 million residents (20.7%); and the population of "others," referring to non-Arab Christians, members of other religions, and persons not classified by religion in the Ministry of the Interior, numbers 318,000 (4.0%)4. According to a survey from the year 2006, among the Jewish population 8% define the selves as ultra-orthodox; 9% as orthodox;; 39% as "traditional" Jews; 44% are secular Jews. <www.ynet.co.il/articles> accessed 1 September 2014.

The original status quo agreement declared four matters that would be considered exclusively orthodox: Shabbat, Kashrut (kosher food), Marital Law and autonomous Educational system. I am going to examine each of them as it was originally stated and there transformation during the years, analyzing central matters that were widely discussed in the Israeli society. Furthermore, I would like to suggest two additional influences of the status quo. Even being not mentioned in the original agreement, I will try to show that Euthanasia and Feminism in Israel are directly affected by consequences of the political need to preserve the status quo. Before I will conclude, I would like to suggest a comparative look of separation of religion and state from Israeli and Italian point of view. Although two countries do not share the same religion and tradition, I believe both of them give to a religion a central and most influential place in their political and legal traditions. I would specifically examine the case of Euthanasia, as it is the most relevant and was a subject of social disputes in both countries.

I would like to mention that a subject of "religion and state" in Israel is much more complicated issue. I chose to focus on the orthodox and non-orthodox relations in Israel. It is also worth mentioning that in Arab minority living among other minorities in Israel produce a number of disagreements that are broadly discussed in Israel politics, legal system and society. Unfortunately, this essay is too short to cover this subject in full.

II. Sources of Law in Israel

In order to understand the origins of the Israeli legal system and the place religion on it, it is necessary to explain the foundations of this system. The state of Israel was established on the May 14, 1948, as a result of the United Nations decision of November 1947 that ended the British mandate and declared Israel an an independent state within the borders accepted.[5] Israel declared itself as a "Jewish and democratic state."[6]

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5 United Nations Palestine Commission.First Monthly Progress Report to the Security Council. A/AC.21/7, January 29, 1948 <unispal.un.org/unispal.nsf> accessed 1 September 2014.

6 Lerner (n 2) 240.

Together with the declaration of independence by prime-minister David Ben Gurion, a war for independence began. It was necessary to establish a judicial system, but the war could not allow create a judicial system ad-hoc. Therefore, it was decided that the British Judicial system was going to keep being the main legal system in Israel. This decision seemed to be temporary: Many judicial jewish figures came from Europe and were educated by the civil law. MohseZemora, the first president of the Israeli Supreme Court was educated in Germany. Furthermore, there is a traditional judicial system which is called "the Hebrew religious law". Some of judicial figures in the young Israel believed that this system should be the basic ground to establish the Israeli law.[7] But the reality in Israel was different- since the declaration of independence was created Israel rested in an ongoing state of war. This fact could not allow establish a new system. Therefore in the first years of Israeli the judicial system was very similar to the British one. Over the years the Israeli system evolved into a "hybrid" judicial system with a support of the civil-law judges. Until 1980 – when the "the foundation of the law" act was established – the Israeli law was "Anglifikised" as former president of the Supreme Court Aharon Barak said, meaning it was a sibling of the English law.[8]

In General, Israel has no formal constitution, though it has created a variety of laws which are called "Basic Laws". These Laws gained a constitutional status from the "Knesset" (the Israeli parliament) and mainly from judicial activism. In order to understand this peculiar structure, we ought to go back to sources of the Israeli legal system. Israel has four main sources of law:

Ottoman law, which ruled Palestine until the British mandate.

The British mandate, which implemented the common law system, based on equity.

Legislation that was enacted by the Knesset since the state of Israel was established.

The Religious law implemented in several laws, including Basic Laws. The religious law has also a separate judicial system, which dominates matters of marriage, divorce, alimony, burial and further more.[9] There courts are divided

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7 ibid.

8 B Aharon, 'ShitotMishpat Be-Israel (Israeli Judicial Methods)' (1992) Hapraklit B (Hebrew).

9 Warsoff, 'The Legal System of the State of Israel' (1956) 2 N.Y,L.F. 379.

and there are Muslim, Christian, Jewish and other courts. Every court uses its own religious laws for the decisions making process. In General, all courts function under Ministry of religion affairs.[10]

A. The Constitutional Revolution and its Influence in Terms of Religion:

The original decision of the Israeli founders in Israel's first years regarding constitution was a "Decision not to decide". In fact, this decision is well-known among the Jewish people, since in the "Talmud" – the book of interpretation of the biblical law – there are always ongoing disputes which are not solved.[11] In the absence of any civil authority, there were many disputes on the nature of the Jewish state: from Zionsits organizations, to religious and even socialist movements, that were all the results of 2000 years in the "*Gola*" (Diaspora). Therefore, this decision "Not to decide" was inevitable.

With the years passing legal scholars and judges started to realize the importance of having a constitution, mainly because of human rights conflicts that arose from incapability of the legal system to handle them without a proper tool such as constitution. There were many cases, concerning religious issues. A good example is a case of *Rogozinsky vs. The state of Israel in 1972*. Two Israel couples claimed that they had a private marriage ceremony which was not "Rabbinical". They claimed that they had a right to be recognized as married under Article 83 of the order in council, which imposed a principle of freedom of conscience.[12] This article was preserved from the Mandate regime and had no special status. The Supreme Court referred this matter to rabbinical court. Basically, Supreme Court declared it had no jurisdiction in matters of marriage of a Jewish couple, which wished to avoid rabbinical marriage.[13]

The second period of the constitutional debate in Israel stated in the late 1980's, when voices demanding formal constitution rose again.[14] The enactment

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10 ibid 383.

11 J Segev, 'Who Needs a Constitution? In Defense of the Non- Decision Constitution-Making Tactic in Israel' (2007) 70 Alb. L. Rev. 409.

12 CA 450/70 *Rogozinsky v. State of Israel* (1971) IsrSC 26(1) 129 (Isr.).

13 Lerner (n 2) 260.

14 Segev (n 11) 411.

of the 1984 was Judgment bill[15]according to which basic laws gained supremacy over ordinary legislation.[16] However, up until the revolutionary case of *Bank Ha-Mizrahi*, Israel stated itself as having a "substantial" but not formal constitution. That means that the legislators and Courts were obeying general principles, which derived from the Israeli reality and the existing laws. It was created during the natural process of development in Israel.[17] The case of Bank Mizrahi changed the view upon several laws, which were called "Basic Laws."[18] Judge Aharon Barak claimed that those laws had supra statuary status. Barak declared basic law "as donning the cap of the constitutional authority, an authority carrying a different status than that of the ordinary legislative bodies, and thus being able to grant the Basic Laws a higher status than ordinary legislation. Any new, ordinary legislation, attempting to change the Basic Laws, or not conforming to the limitation clauses in the Basic Laws, is to be annulled."[19]

This higher normative status comes to life in Aharon Barak later Judgments. Barak used proportionality tests in order to find out whether a certain law violates one of the basic laws. The proportionality tests were stated in Article 8 of "Basic Law- Human Dignity "there shall be no violation of rights under this Basic Law apart from the laws befitting values of the state of Israel, enacted for a proper purpose and to an extent greater than required"[20] First of all a preliminary examines if violation has done by law. Then it continues to the three proportionality tests as following:

a. Befitting values of the state of Israel.
b. Enacting for a proper purpose.
c. To an extant greater than required.

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15 Basic Law: The Judiciary, S.H No. 1348 of 5748, 237.

16 Segev (n 11) 449.

17 A Rubinstein, *The constitutional Law of the State Of Israel* (5th edn, by Amnon Rubinstein and Barak Medina, Shoken, Hebrew 1996) 294.

18 B Aharon, 'The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law' (1997) 1. Israel Law Review 31;CA 6821/93 Bank Mizrahi v. Migdal Cooperative Village <elyon1.court.gov.il/files_eng> accessed 1 September 2014.

19 Shalev G, 'Interpretation in Law: Chief Justice Barak's theory' (2002) 36 Isr. L. Rev. 123.

20 Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150 (Isr.); Basic Law: Freedom of Occupation, 1994, S.H. 90 (Isr.).

Two basic laws ought to be discussed in this essay since they have a strong link to religion. Basic law of Dignity in the Article 1 determines a purpose of this Basic Law as following: to protect human dignity and liberty of the state of Israel in order to establish a Jewish and democratic state. Article 1 of Basic law of Occupation says: Fundamental human rights in Israel are based on recognition of the value of a human being, sanctity of human life and a principle that of freedom for all people. These rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel. This revolution and specifically those laws had a direct effect on the rabbinical courts.

B. Jewish and Democratic State

The Declaration of independence states "Land of Israel was the birthplace of Jewish people. Here, their spiritual, religious and political identity was shaped.... The United nations General Assembly passed a resolution calling for the establishment of a Jewish state..."

"The state of Israel... will foster the development of the country for benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; It will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, conscience, language, education and culture; it will safeguard the holy places of all religions."[21] In the declaration we can see elements of Judaism together with elements of democracy, such as human right, in particular. In order to understand whether this combination is even logical, I would like to disclosure those terms separately, starting with "a Jewish state".

Jewish state: Despite of the fact that declaration of Israel as a Jewish state, Judaism has never been proclaimed as an official religion.[22] Still, the Basic Law of "The Knesset" (The parliament), provides that a candidates list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if goals or actions of the candidate(s), expressly or by implication, include one of the following:

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21 The Declerarion of the Establishment of the State of Israel, 1 LSI 3-5.

22 R Lapidoth, 'Freedom of Religion and of Conscience in Israel' (1998) 47 CatUL 441.

1. Negation of the existence of the State of Israel as a Jewish and democratic state.
2. Incitement to racism.
3. Support for armed struggle by a hostile state or a terrorist organization against the State of Israel.[23]

So, even although Judaism is not declared formally as a Jewish state, one who becomes a member of the Israeli parliament should at least acknowledge the existence of Israel as a Jewish state. Most scholars differ "Jewish state" from "Christian/Muslim state."[24] The reason for that is based on the Jewish history. Throughout decades, Jewish people were gathered in their communities all around the world, preserving their unique identity. Therefore, the term "Jewish" could be considered in two ways: Jewish state as a matter of religious identity; and Jewish state from a social and historical view, also referred to "Jewish nation."[25] For example, most of the Jewish in Israel are not religious. Some of them even are even atheists. Nevertheless, if they are asked about their identity they would answer that they consider themselves Jews, as a matter of "tradition" and social status. In other states, this situation would not occur, since there is a clear distinction between religion and nationality. This lack of observation obviously used to create and is still creating different difficulties. It is clearly not a "pure" religious term, but a term that contains historical and social factors in it.

Furthermore, the word "Jewish" is used in various political and legal documents relating to establishment of the state.[26] For example the Balfour Declaration of 1917 declaring the mandate over Palestine,[27] and UN declaration that declared that Jewish nation had an historical link to the land of Palestine.

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23 Basic Law: The Knesset (Amendment No. 9), 39 L.S.I. 216, (1984-85) (adding section 7A).

24 Lerner (n 2) 243.

25 R Gavizon, 'Israel as a Jewish and Democratic State: Tensions and prospects' (2000) Tel Aviv: Van Leer Jerusalem Institue, HakibutzHameuhad Publishing (Hebrew) 57.

26 Lerner, *supra* note 2, at 243.

27 Letter from Lord Arthur James Lord Balfour, British Foreign Secretary, to Lord Rothschild (Nov. 2, 1917), in The Arab-Israeli Conflicy: Volume 3 (John Norton Moore ed, 1974).

We can conclude that in the eyes of the world, Israel was meant to be a Jewish state with a Jewish majority.[28] Different political parties in Israel referred to the meaning of "Jewish" state in different ways according to their beliefs. In the eyes of the ultra-orthodox, the Jewish state is a religious state in which laws of religion should apply as laws of state. The non-orthodox Jews are divided into two groups: the ones who believe that a Jewish state can be also democratic by assuring minorities rights; and the others who think that a definition of Jewish state contradicts the model of a democratic state.[29]

Democratic state: Some might consider this to be a problematic issue, but formally Israel is a democratic state. This was decided unanimously by political parties that were involved in creating of Declaration of independence,[30] though this term is being continuously intrigued by the clash of religion and democracy in Israel. Even so, the basic principle of the "Majority Rule" in Israel is fully achieved. Israel has a functioning democratic election system. On the other hand, political parties could not agree upon a written and formal constitution,[31] which is one of the central pillars in strong democracies of the western world. The democratic principle of neutralism is definitely violated in Israel. This principle is violated in other democratic states as well though. Every nation has its own symbols, hymen, and ethnical orientation, which derive from their origins. Canada for example, being a bilingual state, infringes the principle of neutrality towards immigrants who are not Anglo-Saxons or French. This principle is constantly violated by a number of democratic states.

The combination of Jewish and Democratic state: One of the suggestions, of Professor Rubinstein and Professor Medina is the following: "Israel is a Jewish state... In the sense a right of the Jewish people to self-determination is exercised."[32] It should mean that "Jewish state" in the context of democracy, is not about religion, it is about politics and rights. This observation refers mainly to the claims that there are some laws who

28 Samoha (n 14) 14.

29 ibid 15.

30 Segev (n 11) 418.

31 ibid 419.

32 Rubinstein (n 17).

cannot be considered democratic. One of these laws is Law of Return (1950)[33]. Article 1 states "Every Jew has a right to come to this country as an Oleh." It means that every Jew- and only Jew- who comes to Israel has a right to aquire citizenship. This, of course, has a direct effect among Palestinians who were forced out of their homes during the Independence war and could not return to Israel under the limits of this law. Therefore, it is claimed that this law violates value of equality, creating a religion- based wrongful observation between humans.

A suggestion made by Professor Sami Samoha[34], which I find a plausible solution in order to understand this combination is the following: Israel is a Jewish and a non-western Democracy. In other words, Israel is a Jewish-Democracy. The law of return is a great example to understand this definition: this law is not unique. Other democracies, such as Greece and Germany have the same one. Nevertheless, the proportionality is different. In Israel, this law is absolute, whereas Law of Resturn in Germany is about the following: "Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of December 31, 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person. Former German citizens, who between January 30, 1933 and May 8, 1945 were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall on application have their citizenship restored. They shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after May 8, 1945 and have not expressed a contrary intention."[35] Though this law provides advantage to German nationals, it does not prevent to acquire a citizenship by others. This is the main difference with the Israeli Law of Return. Moreover, the German law guarantees a right of return only for Germans who were "deprived of the citizenship on political, racial or religious grounds" so it does not apply to German's who chose to live in Canada or the US as they are considered to be "Free Immigrants". Furthermore, it does not deny the right of non-German

33 Law of Return, 5710-1950, 4 LSI 114 (1949-50).

34 Samoha (n 3) 19.

35 <http://www.iuscomp.org/gla/statutes> accessed 1 September 2014

nationals to return to Germany on the basis of religion, as the Israeli law does.[36]

An additional scope of having a non-western democracy is a debate about the law of return between orthodox and non-orthodox. According to the "*Halacha*", a Jew is considered to be a Jew only if he has a Jewish mother. In the late 1960's an officer in the Israeli army who was married to a Christian woman filed a petition to the High Court of Justice claiming to recognize his children as "Jewish nationals". In an outstanding decision, the Court ordered to accept his claims and to enlist his children as Jews, disregarding the rules of "*Halacha*".[37] The Israeli Knesset reacted by amending Law of Return and declared "For the purpose of this law Jew is a person who was born from a Jewish mother or has become converted to Judaism and who is not a member of another religion."[38]

Still, this definition was not strictly following "Halacha" rules since it did not demand a conversion should be made by an orthodox rabbi. Additionally, a great change has been made by an amendment declaring that relevant rights would be also vested to a child and a grandchild of a Jew, a spouse of a Jew, a spouse of a child of a Jew and a spouse of a grandchild of a Jew, apart from those who have been a Jew and have voluntarily changed their religion."[39]

We can conclude from adjustments that made by the Court that although Israel has a Jewish nature, it also applies general principles democracy such as separation of power and preserving human rights. However, it has those democratic failures, which prevent us from declaring it as a western democracy, especially since it fails to create constitution and separate religion from state. Provided that Israel maintains this strong connection between Judaism and state, it remains a non-western democracy. This conclusion leads us directly to the next chapter in which I am going present the status-quo agreement and its effects, preventing separation of religion and state in Israel.

This intrigue is going to be disclossed in the next issue...

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36 Samoha (n 3) 20.

37 HCJ 58/68 Shalit v. Minister of Interior [1969] IsrSC 23(2) 477.

38 Law of Return (Amendment No. 2), 5730-1970,24 LSI 28 (1969-1970).

39 Law of Return (Amendment No. 2), 24 LSI 28.

CONFERENCE PAPER

LEGAL REGULATION OF ADVOCATES ETHICS IN THE RUSSIAN FEDERATION

By Nikolay Kipnis

Author

PhD (Law), Kutafin Moscow State Law University, 1996
Advocate, member of Moscow City Chamber of Advocates

Abstract

In November 2013 in Kaunas (Lithuania) the International Conference „Theoretical and Practical Issues of Advocates Ethics" took place. The barristers and scholars from a number of Europian countries took part in the conference. The participants revealed and discussed different dimensions of advocates ethics, including confidentiality issues, solutions for conflict situations between the advocates and their clients and so on. The mission of this paper is to give an idea of what advocates ethics – and its legal regulation in particular – is like in the Russian Federation. The author briefs a history of a legal profession in Russia and specifies the current legislation situation in this sphere. The document of a great significant in author's opinion is the Code of Professional Ethics for Advocates. It was the first written ethical code in Russian history. It establishes professional ethical rules of behavior and legal consequences in case of their violation by advocate. The author analyzes regulation and practical application of disciplinary proceedings in Russia on both federal and regional levels. Corporate ethics rules and disciplinary proceedings have a great significance for guaranteeing ***legality, independence and self-administration for Russian Bar Association and equality for all lawyers.***

Keywords

Advocates ethics, Russian Bar Association, disciplinary proceedings, Code of Professional Ethics for Advocates, Chamber of Advocates of the Russian Federation

The introduction of the institution of lawyers – a necessary component of adversarial proceedings – was one of the main achievements of Legal Reform of 1864. It finally formalized principles of publicity and adversarial nature of court proceedings, judges' independence and oral pleadings.

Being a mouthpiece for the interests of all strata of society the 'lawyer class' fixed and guaranteed basic principles. That provided corporate consolidation, self-regulation and independence for the institution of lawyers. By 1917 there had been about 13,000 lawyers working in Russia.

On October 22, 1917 Council of Peoples Commissar's by its Decree No. 1 On Courts removed the previous legal system together with the institution of lawyers. Five years later a new soviet government finally realized how fragile justice system was without professional defense lawyers. The RSFSR Criminal and Procedural Code appeared in 1922. This, to some extent, restored to advocates their role in legal proceedings and the right to associate professionally.

But during all Soviet period regulations governing USSR lawyers preserved the dependence of the legal profession on government authorities and their subordination to state and party bodies. This trend was taking place throughout all the pre-reform period.

In 1986 a bar association gradually started to set itself free from the all-embracing "guardianship". Thus, a formation of an independent corporate body began and lasted until a new law On the Activities of Lawyers and Bar Association in the Russian Federation came into force on July 1, 2002.

This law reflected new trends in the development of the Russian Bar Association. It specifies the status of the bar as a professional community of lawyers as well as an important institution of civil society, covering the relationships between bar's self-governing bodies and state bodies, officials and individuals. The law defines basic principles, aims and tasks, guaranteeing an independence of the bar.

Under the new law, general meetings (conferences) of lawyers have been held to establish one regional chamber of advocates in each entity. At the moment there are 85 regional chambers of advocates in Russia. Before taking a new member each regional chamber resolves if his/her professional behavior corresponds with ethical norms of a legal community. By 2014 there were 68. 292 advocates registered in the Russian Federation.

The first in history of the Russian Federation Conference of Advocates hold on January 31, 2003 in Moscow was the final stage in forming foundations of the Russian legal profession. Within the Conference, Federal Chamber of Advocates was founded; Federal Chamber Council was elected; Articles of Association, Code of Professional Ethics for Advocates and other documents were adopted.

The foundation of the Federal Chamber of Advocates was an event of historic importance for the Russian Federation. For the first time in the country's history, a professional community of lawyers has been formed. The Federal Chamber - established under public law – is based on the compulsory membership of chambers of advocates of constituent entities of the Russian Federation.

Thus, uncoordinated regional bar associations have turned into a single corporation establishing rules and behaviors, as well as professional skills requirements for all its members, and having officially recognized self-governing bodies. It is worth noting that a very important function of the bar is also strengthening the status of advocates and guaranteeing their professional activity. Under the new law, an advocate got an opportunity to choose, at his own discretion, the organizational and legal form of advocacy (collegium, partnership law firm or sole-practitioner).

The basic principles of Russian Bar Association are legality, independence, self-administration, and equality of advocates.

Moscow Advocates Chamber unites 9000 members. As the other 85 regional chambers, it has five self-administrative bodies which are Annual Meeting (Conference) of Advocates, Council of the Chamber, President of the Chamber, Qualification Commissions (Disciplinary Board), and Internal Audit Commission of the Chamber.

Three of the mentioned self-administrative bodies, namely, President of the Chamber, The Qualification Commissions (Disciplinary Board) and the Council of the Chamber participate in disciplinary proceedings.

The Qualification Commission consists of thirteen members. Seven of them are lawyers, including President of the Chamber and six representatives of the state (two federal judges, two representatives of the territorial board of the Ministry of Justice and two representatives of the Legislative Board of a constituent territory of the Russian Federation (e.g. Moscow City Duma).

The Council of the Chamber consists of lawyers only. The number of them is not to be more than 15. The President chairs the meetings of the Chamber Council.

The meetings of the Qualification Commission and Council of the Chamber are considered competent if at least two thirds of its members are present.

The Code of Professional Ethics for Advocates consolidates unified norms and rules of professional conduct obligatory for all members of the corporation.

It is the first written code in the Russian Federation. Before only oral disciplinary precedents were applied.

The preamble of the Code says that advocates have to adopt this Code of Professional Ethics for Advocates pursuant to requirements set forth in the Federal Law On Advocacy and the Bar in the Russian Federation, with a view of upholding professional honor and promoting Russian advocacy traditions. The Bar cannot exist or function unless its members observe corporate discipline and professional ethical rules, uphold their honor and dignity and maintain the authority of the Bar.

The Code consists of two sections.

– Section I. Principles and standards of professional conduct of advocates.

– Section II. Fundamental rules for disciplinary proceedings.

The Code of Professional Ethics for Advocates establishes obligatory rules of conduct – in line with the moral criteria and traditions of the Bar – which all advocates must comply in the course of carrying out their professional activities. While executing their professional duties, lawyers may be guided by the rules and standards set forth in the Common Code of Conduct for European Lawyers insofar as such rules do not contravene Russian Law on Advocacy and the Bar or the provisions of the Russian Code.

The Code of Professional Ethics for Advocates amplifies the rules established by the Law on Advocacy and the Bar. None of provisions of this Code can be interpreted as prescribing or permitting such conduct as may contradict the provisions of the Law on Advocacy of the Bar.

Violation of the provisions of the Law on Advocacy and the Bar, as well as the Ethic Code, committed by advocates intentionally or by gross negligence

entails the imposition of disciplinary sanctions as provided by the Law on Advocacy, the Bar and the Code.

Disciplinary sanctions can only be imposed in the course of disciplinary proceedings in accordance with the rules described in Section 2 of the Code.

In selecting a disciplinary sanction, the Bar Council must take into account the gravity of violation, the circumstances under which the violation has been committed, the form of guilt, and other factors, which the Bar Council may deem material and take into account before making the judgment. Disciplinary sanctions may include:

1) a reprimand, 2) a warning, 3) disbarment.

Disciplinary sanctions can be imposed within six months of the discovery of a violation, excluding the time of sick leaves or holidays. Disciplinary sanctions can only be imposed before the expiry of one year since the date of violation.

The procedure of considering and resolving complaints is established by Section II of the Code.

Disciplinary proceedings include the following stages:

1) Initiation of disciplinary proceeding by President of the Chamber of Advocates of a constituent territory of the Russian Federation.
2) Review of the case by the Qualifications Commission of the Chamber of Advocates of a constituent territory of the Russian Federation.
3) Review of the case by the Bar Council of the Chamber of Advocates of a constituent territory of the Russian Federation.

Disciplinary proceedings can only be conducted by the President, Qualifications Commission and the Bar Council of that Chamber of Advocates which an advocate belongs to at the moment of initiation of disciplinary proceedings.

Thus, a question of a disciplinary action in relation to any advocate – before he may become a subject of litigation between the advocate and the Chamber of Advocates of a constituent territory of the Russian Federation – shall be considered by 19-28 lawyers. This amount depends on quorum of the Qualification Commission and Council of the Chamber of Advocates of a constituent territory of the Russian Federation and shall include two judges of federal level as obligatory members of the Qualification Commission.

Disciplinary proceedings can be initiated as a result of:

1) Complaint filed to the Chamber of Advocates by another advocate, advocate's client or client's legitimate representative, or by the person seeking free legal assistance under Article 26 of the Federal Law on Advocacy in case of advocate's refusal to provide that assistance.
2) Presentment submitted to the Chamber of Lawyers by the Chamber's Vice-President or by the person acting in that capacity.
3) Presentment submitted to the Chamber of Lawyers by a government authority relating to the Bar, namely, the territorial board of the Ministry of Justice.
4) Court (judges) initiative.

Complaints, presentments and initiatives filed by the aforementioned persons are deemed as admissible grounds for initiating disciplinary proceedings, if submitted in writing, complete with:

1) The name of the Chamber of Advocates wherein the complaint or presentment is submitted.
2) The full name of a lawyer, filing the complaint against another lawyer and his/her affiliation to a Chamber of Advocates.
3) The full name and place of residence of the lawyer's client or the name and location of the agency or organization, or the name and place of residence (location) of the client's representative.
4) The name and location of the government authority, as well as the full name of the executive officer filed the relevant presentment.
5) The full name of the advocate against whom disciplinary proceedings are being sought, as well as his/her affiliation, the reference data on the agreement of legal assistance (if applicable).
6) The advocate's specific actions (or omissions), which constituted violation of his/her professional duties;
7) Facts, underlying the claim as stated in the relevant complaint, presentment or communication, and evidence in support of such facts.

Each and every participant of disciplinary proceeding may propose, verbally or in writing, a way of resolving the disciplinary case.

Complaints and presentments that are not filed by the aforementioned persons cannot be recognized as acceptable grounds for initiating disciplinary proceedings.

Complaints or statements filed by other lawyers cannot be deemed acceptable grounds for initiating disciplinary proceedings, if such complaints or statements ensue from relations pertaining to the establishment or operation of respective collegiums or law firms.

Anonymous complaints and statements about advocate improper conduct (failure to act) are not subject for consideration.

If the President of the Chamber of Advocates considers a concrete complaint or presentment to be an acceptable ground, he/she initiates disciplinary proceedings. Upon receiving complaints or statements, which:

– Cannot be deemed as acceptable grounds for initiating disciplinary proceedings

– Were filed by persons unauthorized to raise the issue of disciplinary proceedings

– Contain the facts, excluding a possibility of disciplinary proceedings, President of the Chamber of Advocates shall return them to a claimant, explaining in writing the reasons for such dismissal.

Upon initiation of disciplinary proceedings, participants therein have the right to:

1) Familiarize themselves with all of the case records, take notes and make copies of the documents with the help of technical devices.
2) Attend the hearings hold by the Qualifications Commission and the Bar Council in person and/or send their representatives.
3) Give oral or written explanations on the merits of the case, and submit evidence.
4) Familiarize themselves with the hearings' records and written opinion of the Qualifications Commission.
5) Submit their explanations to the Bar Council in case of disagreeing with the decision of the Qualifications Commission.

The Qualifications Commission of the Chamber of Advocates reviews the case orally in line with the principles of adversarial nature and equality of participants in disciplinary proceedings.

The Qualifications Commission must give its opinion regarding the disciplinary case by way of direct examination of evidence presented by the parties before the hearings and of their testimony during the hearings. It may adjourn the hearings to examine the newly admitted evidence.

The Qualifications Commission can request additional information and documents, if it considers it necessary for objective and impartial conclusion (opinion, decision) on the merits of the case. The advocate and his/her representative are the last to give explanations to the Qualifications Commission.

Nonappearance of any participant of disciplinary proceedings shall not constitute the grounds for postponing the hearings. In this case the Qualifications Commission is to review the merits of the case as presented by available evidence and hear out the attending participants.

The Qualifications Commission reviews the case within the limits of the claims and on the grounds indicated in the relevant complaint or presentment. A subject matter and the grounds for the complaint cannot be changed.

It is worth mentioning that an advocate can take measures to reach conciliation with the claimant before the Bar Council will pass a judgment.

On the basis of the results of disciplinary hearings the Qualifications Commission may conclude in its final resolution the following:

1) Advocate's conduct (or failure to act) represents a violation of the provisions of the Law on Advocacy and the Bar and/or the Code of Ethics

   Or the advocate failed to carry out or carried out inappropriately his/her professional duties,

   Or the advocate failed to execute the decisions of the Chamber of Advocates. Disciplinary sanctions must be imposed on the advocate.
2) Disciplinary proceedings must be terminated insofar as the advocate's conduct (failure to act) involves no violation of the provisions of the Law on Advocacy and the Bar and/or the Code of Ethics and his/her professional duties are properly executed.
3) Disciplinary proceedings must be terminated due to the existence of an earlier decision rendered by the Qualifications Commission which involves the same participants, subject matter and grounds.
4) Disciplinary proceedings must be terminated due to the withdrawal of the complaint or presentment, or due to the reconciliation of the claimant and the advocate.

5) Disciplinary proceedings must be terminated due to the expiry of the statute of limitations for disciplinary liability.
6) Disciplinary proceedings must be terminated insofar as the Qualifications Commission, while reviewing the case, failed to find legitimate reason for the initiation of disciplinary proceedings.

The written opinion of the Qualifications Commission must be motivated and adequately substantiated. It must contain a title, narrative of alleged facts, a statement of reasons, and a final resolution. The narrative part must include a subject matter of complaint or presentment, together with the advocate's explanations. The statement of reasons must contain actual facts as established by the Commission, the evidence underlying the Commission's findings, the arguments used to refute allegations, and rules of professional conduct of lawyers as provided by the Law on Advocacy and the Bar and by the Code by which the Qualifications Commission was guided while taking the decision.

The final resolution must contain one of the provisions mentioned above.

Then a disciplinary case is referred to the Bar Council of the Chamber of Advocates together with the opinion of the Qualifications Commission.

Within ten days after the decision has been adopted by the Qualifications Commission, participants of disciplinary proceedings can file a written objection to the Commission's decision. This objection can be submitted via the Commission's Secretary to the Bar Council.

The Bar Council reviews disciplinary cases *in camera*. Non-appearance of any participant in disciplinary proceedings shall not hinder the proceedings or the adoption of a judgment. Participants of disciplinary proceedings have equal rights to argue for or against the opinion of the Qualifications Commission, and speak on the disciplinary sanctions proposed for the advocate in question.

The Bar Council's judgment must be motivated and contain references to the rules of professional conduct advocates as provided by the Law on Advocacy and the Bar and by the Code of Ethics.

Decisions of the Bar Council are adopted if a majority of members vote in favour. The resolutive part of a decision must be communicated to participants of disciplinary proceedings during the meeting immediately upon completion of proceedings.

In a course of disciplinary proceedings The Bar Council may decide the following:

1) Advocate's conduct (failure to act) represents a violation of the provisions of the Law on Advocacy and the Bar and/or the Code.
   Or the advocate failed to carry out or carried out inappropriately his/her professional duties,
   Or the advocate failed to execute the decisions of the Chamber of Advocates. Disciplinary sanctions must be imposed on the advocate.
2) Disciplinary proceedings must be terminated insofar as the advocate's conduct (failure to act) involves no violation of the provisions of the Law on Advocacy and the Bar and/or the Code of Ethics, and his/her professional duties are properly executed.
   A decision of Council may be contrary to the opinion of the Qualifications Commission in case if the Commission, having correctly established the facts of the case, has given an incorrect legal qualification of the advocate's conduct or has incorrectly interpreted the provisions of law and the Code;
3) Disciplinary proceedings must be terminated due to the existence of an earlier opinion rendered by the Qualifications Commission with a subsequent judgment adopted by the Bar Council that involves the same participants, subject matter and grounds.
4) Disciplinary proceedings must be terminated due to the withdrawal of the complaint or presentment, or due to the reconciliation of the claimant and the advocate.
5) Disciplinary case must be returned in order to be reviewed by the Qualifications Commission.
6) Disciplinary proceedings must be terminated due to the expiry of the statute of limitations for disciplinary liability.
7) Disciplinary proceedings must be terminated due to the insignificant nature of the advocate's misconduct.
8) Disciplinary proceedings must be terminated insofar as the Bar Council or Qualifications Commission, while reviewing the case, failed to find legitimate reason for the initiation of disciplinary proceedings.

The advocate may oppose a decision of the Bar Council by lodging an appeal with the federal district court within one month from the day he/she learned or should have learned about the decision.

Unless an advocate is subjected to a new disciplinary sanction within one year after a prior disciplinary sanction, the advocate is considered to have no disciplinary sanctions. The Bar Council can cancel a disciplinary sanction before the expiry date on its own initiative, or at the advocate's request, or at the request of the Chamber of Advocates whereto the advocate is affiliated.

During the period from 2003 to 2014 Moscow Chamber of Advocates considered disciplinary proceedings in relation to 2021 advocates. In about 40% of cases Bar Council decided that:

Advocate's conduct (failure to act) represented a violation of the provisions of the Law on Advocacy and the Bar and/or the Code of Ethics

Or the advocate failed to carry out or carried out inappropriately his/her professional duties,

Or the advocate failed to execute the decisions of the Chamber of Advocates Disciplinary sanctions must be imposed on the advocate.

In general, only during the year of 2013, for example, there were disciplinary proceedings in relation to 4. 638 of advocates considered in the Russia Federation. As a result 410 advocates terminated their status for the following reasons:

– An advocate failed to perform or inappropriately performed his/her professional duties – 73 lawyers;

– Violation of the provisions of the Law on Advocacy and the Bar and/or the Code of Professional Ethics for Advocates – 95 lawyers;

– An advocate failed to execute the decisions of the Chamber of Advocates – 242 lawyers (failure to pay obligatory fees for the needs of the Chamber of Advocates of a constituent territory of the Russian Federation; failure to inform the Chamber of Advocates about the changes of legal forms of advocacy, etc.).

Since its creation in 2003 the aforementioned disciplinary procedure has shown its effectiveness in guaranteeing basic principles of activity of the Russian Bar Association which are legality, independence, self-administration, together with the principle of equality of all lawyers and independence of every lawyer.

CASE REVIEW

FREEDOM OF SPEECH AS IT IS: TALKING ABOUT A FRENCH COMEDIAN, US OFFICIAL AND THE RUSSIAN TRUTH

By Maria Zakharova

Author

PhD (Law), Kutafin Moscow State Law University, 2005
Head of a research center at Kutafin Moscow State Law University and Associate Member at University of Bordeaux
E-mail: avis_777@mail.ru

Abstract

The declaration of freedom of speech used to be a milestone event for the legal world. It has paramount importance for the development of both national legal systems and political order.

For a long time Russia trailed behind world liberal trends and initiatives in this regard. In the 19th century tough Imperial state regime did not allow it to generate freedom of the press in its legal arenas. And even in the 20th century, pro-Marxist authoritarian attitudes suppressed the development of a liberal legal system. In many ways, only the events of the end of the last millennium, involving changes in social structure, made it possible for Russia to merge with world humanitarian standards.

This article investigates modern aspects of constitutional legal regulation of press freedom in Russia. The author draws parallels with the legislature of other countries, emphasizing legal and social practices that have taken shape on the issue in question.

The current review considers applying provisions, regarding freedom of speech and press, by courts both in Russia and foreign countries.

Keywords

Freedom of speech, freedom of the press, Constitution, Constitutional Law, civil rights, French Council of State, US Supreme Court, Supreme Court of the Russian Federation, the press

The freedom of speech is a prerequisite for ensuring human individuality and personal freedom. In his famous speech On Freedom of the Press given to the Society of the Friends of the Constitution in May 1791, Maximilien de Robespierre said, "After the ability to think, the ability to communicate one's thoughts effectively is the most amazing feature that distinguishes a human being from an animal..."

Nowadays the society and the State are assisted in understanding complex issues of both legalization and – most importantly – determining the limits of exercising the freedom of speech not only by man's best friend – a legislator, but also by a judge.

More than a century ago O.W. Holmes wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Even earlier, in his "Speech for the Liberty of Unlicensed Printing to the Parliament of England" (1644) John Milton declared, "The State shall be my governors, but not my critics."

And what about the current court practice? Let's start with France, country of the first theories of the social contract origin. What's more, in the opinion of the representatives of its legal corps, France "shall assume the leadership functions as a representative of the common European values and social development models."[1]

The beginning of the current year 2014 was marked by a resounding litigation, regarding banning the performance of the French comedian of Cameroonian origin Dieudonné M'Bala M'Bala. This stand-up comedian had repeatedly shocked the audience with his controversial theatrical "exercises" also before that process. He is famous for his anti-Semitic and anti-Israel statements and has even been criminally convicted several times. In addition, the case became known outside France, Cameroon and other Francophone countries. The information appeared even on the newspaper pages of the far-away snowy Russia.[2]

The performance of Mr. Dieudonné M'Bala M'Bala "The Wall" was to take place on 9 January 2014 in Saint-Herblain. However, on 7 January a prefect

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1 FX Priollaud, D Siritzky, Que reste-t-il de l' influence francaise en Europe? (2011) Paris (165).

2 <http://www.rg.ru/2014/01/10/umorist-site-anons.html> accessed 10 January 2014.

of the Loire-Atlantique department decided to ban it due to the fact that the anti-Semitic content of the performance may pose a threat to public order. The prefect's decision was appealed. As a result, on January 9 the injunctive relief judge of the Administrative Tribunal of Nantes suspended the prefect's decision until the time when merits of the case were considered. However, on the same day a representative of the Interior Minister appealed against the decision on injunctive relief to the Judicial Section of the French Council of State. So the decision was rapidly made exactly at that instance, it was quite controversial though.[3]

What was the decision of Council of State based on?

1. It is worth mentioning that two key points were taken into account:

1.1. While banning the performance of "The Wall", previously showed in the Golden Hand theatre (*théâtre de la Main d'Or*) in Paris, the prefect of Loire-Atlantique pointed out that the performance contained lines of anti-Semitic character that incited racial hatred as well as apologetics of discrimination, persecution and extermination during World War II.

1.2. A high-level risk of threat to public has been caused in this case by both materials of the case and argumentation within court proceedings.

2. It was a mistake of judge of the Administrative Tribunal of Nantes who indicated that the threat to the public order which could be triggered by the performance was not sufficient to justify the disputed measure.

Not only legislation but also judicial precedents (court practice) were used as the legal basis for the case, particularly: *Benjamin* of 19 May 1933, *commune de Morsang-sur-Orge* of 27 October 1995, *Mme Hoffman-Glemane* of 16 February 2009 (recognizing a role of France in the Holoca).

The decision on this case on the basis of the facts mentioned above was the following.

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[3] For example, the authors of an article dedicated to the case in question in the French newspaper Liberation called it an example of unfair restriction of the freedom of expression <www.liberation.fr/societe/2014/01/09/dieudonne-la-mise-a-pied-du-mur_971805> accessed 09 January 2014.

1. To cancel the ruling of the injunctive relief judge of the Administrative Tribunal of Nantes of January, 9 2014.

2. To dismiss the appeal filed by the Les Productions de la Plume Company and Mr. Dieudonné M'Bala M'Bala to the injunctive relief judge of the Administrative Tribunal of Nantes, including the requirements to apply Article L.761-1 of the Code of Administrative Justice.[4]

In the American court practice the real triumph of the First Amendment to the US Constitution took place in regard with the case of New York Times v. Sullivan (376 US 254, 1964). This litigation was initiated by an elected official in charge of the police in Montgomery, Alabama, in the midst of the civil rights movement in the 60s. The official claimed that he was defamed in a full-page advertisement published in The Times in which the police was accused in abusive actions against peaceful protestors and persecution of one of the leading figures of the civil rights movement - the Reverend Martin Luther King. The Supreme Court found that although some of the statements of the advertising material did not correspond to the facts, the First Amendment gave The Times protection from prosecution on the part of the official. The court reviewed the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." According to that principle, the court ruled that a person holding office could not get a compensation for moral damage as a result of defamatory false statements about his/her behavior in the office, "if they do not prove that the statement was made with actual malice." Later on, the mentioned rule was applied to all "public figures" but not only to officials. (Curtis Publishing Co. v. Butts and Associated Press v. Walker (388 US 130, 1967[5]).

Russia has always looked for its own way, sometimes being ahead of its European neighbors and sometimes ... dragging hopelessly behind. As

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4 <http://ru.scribd.com/doc/197836018/Ordonnance-refere-09012014> accessed 09 January 2014.

5 For detailed information, please refer to: Artem'ev M., N'yu York Tayms protiv Sallivana // EZH-yurist. 2012. № 8. (M Artem'ev, 'New York Times vs Sullivan' (2012) 8 EZH - lawyer).

Professor Mikhail Fedotov remarked, "Censorship was abolished in the UK at the same time when it was introduced for the first time in Russia."[6]

Nowadays, more than 20 years after the adoption of Law on Freedom of Mass Media (the first one in history of the Russian Federation), the court practice in regard to cases on freedom of speech constitutes a significant pool of court judgments.

For example, Plenary Meeting of the Supreme Court of the Russian Federation adopted Resolution "On Judicial Practice at Disposal of Cases on Protection of Honor and Dignity of Persons and Business Reputation of Persons and Legal Entities" dated 24 February 2005. The Resolution, in particular, encourages the lower-level courts to take into account the opinion of the ECHR on the application and interpretation of Article 10 of the Convention. In the opinion of the Supreme Court of the Russian Federation, the concept of defamation used by the ECHR is identical to the concept of dissemination of false defamatory information in Article 152 of the Civil Code of the Russian Federation. According to this regulation a citizen [person] is entitled to demand rebuttal of information discrediting his/her honor, dignity and business reputation in a judicial proceeding unless the person, disseminating such information, proves that it corresponds to the facts. A legal entity is entitled to protect its business reputation only.

The Constitutional Court of the Russian Federation also could not refrain from assessing the freedom of mass information. As O.V. Mannikov points out, the Constitutional Court of the Russian Federation expressed several significant points of view on the issue of the freedom of speech and press.[7]

First, "... restrictions of constitutional rights including, therefore, the freedom of mass information, must be necessary and proportionate to the constitutionally recognized goals of such restrictions."

Second, "...based on the fact that using the freedom of mass information – within the meaning of Article 29 of the Constitution of

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6 <www.svoboda.org/content/transcript/1607525.html> accessed 22 December 2014.

7 Manannikov O.V. Predely svobody pechati : pravovye aspekty // Zhurnal rossiiskogo prava. 2010. № 4. (OV Manannikov, 'The limits of the freedom of the press' (2010) 4 Journal of Russian Law).

the Russian Federation, Paragraph 2 Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Paragraph 3Article 19 of the International Covenant on Civil and Political Rights – imposes special obligations and special responsibilities on mass media publishing organizations, the representatives of these organizations acting on the basis of editorial independence and rules of self-regulation generated by the journalistic community. So the rules of the profession and the ethical principles must take ethical and balanced positions and cover election campaigns in a fair, balanced and impartial manner."[8]

Third, "...while considering cases on honor and dignity protection in courts of general jurisdiction the accuracy as well as the nature of the disseminated information must be established and appraised. Based on that a court must decide whether the dissemination of the information has caused a harm to the values protected by the Constitution of the Russian Federation, whether it fits into a framework of political debates and how to draw a line between dissemination of false facts/information and political assessments and whether their denying in a judicial proceeding is possible..."[9]

Thus, the judicial authorities in Russia, France and the United States, undertake to respond the requirements of the civil society. Themis' Scale in concern of press freedom is always between "execute him, we should not pardon" and "pardon him, we should not execute."

As for the question recently heard on the Serebryany Dozhd (Silver Rain) if it was necessary to yield Leningrad in order to save hundreds of thousands of lives, every Russian should answer it by him/herself. And it does not matter whether such person is a judge or not a judge...

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8 Resolution of the Constitutional Court of the Russian Federation 15-P [15-П] of 30 October 2003 on the case on checking constitutionality of certain provisions of the Federal Law on the Basic Guarantees of Electoral Rights and the Right to Participate in Referendums of the Citizens of the Russian Federation in connection with the request by a group of deputies of the State Duma and complaints by citizens SA Buntman, KA Katanyan and KS Rozhkov.

9 Ruling of the Constitutional Court of the Russian Federation 69 of 27 September 1995 on refusal to accept complaint of citizen Kozyrev Andrey Vladimirovich.

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KUTAFIN UNIVERSITY
LAW REVIEW

Volume 1 December 2014 Issue 2

Concept and Design

Lubov Mikhalevich
(Kutafin University, Moscow)

Published and printed by
Kutafin Moscow State Law University (MSAL)
9 Sadovaya-Kudrinskaya str.,
Moscow, Russia, 123995
http://msal.ru/en/
msal@msal.ru
+ 7 (499) 244-86-35

Printed in Russia

Updated on 1 November 2014
2014 - 120 pp. - 24 x 17 cm

ISSN 2313-5395

Moscow State Law University named after O.E. Kutafin (MSAL)

www.msal.ru/en/

msal@msal.ru

+ 7 (499) 244-86-35