

The legal framework and guidance on data protection under the European Data Protection Directive No. 95/46/EC

Ash ALKIŞ¹

Abstract

The European Parliament and Council adopted the “ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data” on 24 October 1995 to harmonize the national data protection laws of Member States.

This article focuses on four fundamental aspects of data protection:

- (1) Conditions for legitimate data processing (including sensitive data)
- (2) Rights of data subjects
- (3) Obligations of data controllers
- (4) Legal framework (Including remedies)

In the final part of the article, I shall try to reveal the shortcomings of these fundamental aspects.

1. Criteria for Making Data Processing Legitimate

The conditions for the processing of personal data in the Member States is listed in Article 7 of the Directive:

(a) the data subject has unambiguously given his consent; or

(b) processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance with a legal obligation to which the controller is subject; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

¹ International and European Trade and Investment Law(LL.M) student of University of Szeged

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed , except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 d).

However, the conditions in the above list are alternatives. For a particular processing operation, the controller has to comply with one only. In the vast majority of cases, controllers will be able to rely on (b)-(f) and will not require consent.²

According to Bainbridge, all alternatives are expressed as 'necessary' in order to obtain the consent of the data subjects. It would be more appropriate to interpret the 'necessary' in the sense of 'reasonably necessary' rather than to strictly interpret it. A stronger comment may lead to enormous administrative and financial burdens on most data controllers. The Ministry of Health estimates that this cost will exceed £ 1 billion, as there is an explicit consent to process personal data on all data issues themselves.³

Sensitive Data

In many judicial systems, “data revealing racial or ethnic origin”, “political opinions”, “religious or philosophical beliefs”, “trade union membership or where the processing concerns health or sex life” described as “sensitive data” because they require a higher level of protection. Article 8/1 of the Directive prohibits the processing of “sensitive data”.

The exemptions of the prohibition are given by the second paragraph of the same article, being:

(a) the data subject has given his explicit consent to the processing of those

² David I. Bainbridge, Processing Personal Data and the Data Protection Directive, 6 Info. & Comm. Tech. L. 17 (1997) p. 25

³ *Id.*

data , except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation , association or any other non-profit-seeking body with a political, philosophical , religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

Article 8 (3) allows for medical purposes, preventive medicine, medical diagnosis, provision of care or treatment, or treatment of the health care administration.

By Article 8 (4), the Member States may set additional exemptions based on substantial public interest, subject to appropriate measures.

Article 8 (5) only permits the processing of personal data concerning 'crimes, criminal provisions or security measures' by or under the control of the authorities.

Article 8 (6) permits the Member States to require that official data on administrative sanctions or legal judgments be processed under the control of the official authority.

Article 8 (7) requires that the Member States determine the conditions under which national identification numbers or other identifiers of the general application can be processed.

This provision is crucial in preventing individuals from being exposed to discrimination or being subject to suffering.

2. Rights of Data Subjects

Data subjects have the following rights under the Directive:

- Access to your personal data, free of charge, and without constraint, within three months;
- Rectification of inaccurate or incomplete personal data;
- Blocking data processing in certain circumstances;
- Erasure of unlawfully processed data;
- The right to object to a processing operation on compelling grounds;⁴
- He/she should also have the right to object, on request and free of charge, to the processing of personal data that the controller anticipates being processed for the purposes of direct marketing. He/she should finally be informed before personal data are disclosed to third parties for the purposes of direct marketing, and be expressly offered the right to object to such disclosures.
- Every person shall have the right to a judicial remedy for any breach of the rights guaranteed by the national law applicable to the processing in question. In addition, any person who has suffered damage as a result of the unlawful processing of their personal data is entitled to receive compensation for the damage suffered.⁵

Exemptions and restrictions on data subject's rights:

- The scope of the principles relating to the quality of the data,

⁴ <https://www.eea.europa.eu/legal/privacy/data-protection-at-a-glance/view> p.5

⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14012>

- Information to be given to the data subject,
- The right of access and the publicising of processing may be restricted in order to safeguard aspects such as national security,
- Defence,
- Public security,
- The prosecution of criminal offences,
- An important economic or financial interest of a Member State or of the European Union or the protection of the data subject.⁶

3. Obligations of Data Controllers

According to Brendan Van Alsenoy, Directive 95/46 has a "strict" liability regime for controllers in personal data processing.⁷

Data controllers have the following obligations under the Directive:

The data controller's primary duty is to identify personal data processing operations he or she carries out and to notify them to the Data Protection Officer. Notification should take place before the operation is undertaken. Operations already in place should be notified as soon as possible.

As mentioned previously, the data controller also has a responsibility to furnish certain information to data subjects. The data controller must also facilitate data subjects' access to their data and their exercising other rights such as rectification and erasure.

The data controller must also ensure that appropriate security measures are in place, and issue appropriate instructions to ensure confidentiality if data are processed by others (for example, by a sub-contractor).⁸

An entity can be a data controller, or a data processor, or both.

The duties of the processor towards the controller must be specified in a contract or another legal act. For example, the contract must indicate what happens to the personal data once the contract is terminated. A typical activity of processors is

⁶ *Id.*

⁷ Brendan Van Alsenoy, Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation, 7 J. Intell. Prop. Info. Tech. & Elec. Com. L. (2016) p. 272

⁸ <https://www.eea.europa.eu/legal/privacy/data-protection-at-a-glance/view> p.6

offering IT solutions, including cloud storage. The data processor may only subcontract a part of its task to another processor or appoint a joint processor when it has received prior written authorisation from the data controller.⁹

Transfers of personal data from a Member State to a **third country** with an adequate level of protection are authorised. However, although transfers may not take place when an adequate level of protection is not guaranteed, there are a number of exceptions to this rule listed in the Directive, e.g. the data subject himself agrees to the transfer, in the event of the conclusion of a contract, it is necessary for public interest grounds, but also if Binding Corporate Rules or Standard Contractual Clauses have been authorised by the Member State.¹⁰

4. Legal Framework

4.1 National Supervisory Authorities in the Member States

A data protection authority is an independent body responsible for:

- i) Supervising the processing of personal data within the jurisdiction,
- ii) Recommending the legal and administrative measures concerning the processing of personal data to the competent authorities,
- iii) Considering complaints about the protection of citizens' data protection rights.

In accordance with Article 28 of Directive 95/46 / EC¹¹, each Member State shall have at least one data protection authority in its territory with the power to initiate legal proceedings when the data protection laws have been violated, investigative powers, and efficient intervening powers.

The decisions of the supervisory authority which cause complaints can be appealed to the courts.

Each supervisory authority should regularly prepare a report on its activities. The report should be made public.

⁹ https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor_en

¹⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:114012>

¹¹For more information:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML> Article 28.

The supervisory authorities must cooperate with each other in order to fulfill their duties, in particular by interchanging all useful information.

Members of the supervisory authority and their staff, even after the end of their business, must be subject to a duty of professional secrecy concerning confidential information that they have access.

National data protection authorities have been established in almost all European countries and in many countries all around the world.

According to Article 18, *the controller or his representative, if any, must notify the supervisory authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.*¹²

However, there is an exemption from the notification providing that a personal **data protection official** must be appointed. In respect to this exemption, the conditions which are needed to be met by the data protection official are laid down under Article 18/2:

“where the controller, in compliance with the national law which governs him, appoints a personal data protection official, responsible in particular:

- for ensuring in an independent manner the internal application of the national provisions taken pursuant to this Directive*
- for keeping the register of processing operations carried out by the controller, containing the items of information referred to in Article 21 (2), thereby ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.”*

4.2 Data protection authority for the European Union institutions, bodies and agencies

The EU institutions and bodies sometimes **process citizens' personal information** - in electronic, written or visual format - in the course of their duties.

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML> Article 18.

Processing includes collecting, recording, storing, retrieving, sending, blocking or erasing data. It is the task of the **European Data Protection Supervisor (EDPS)** to uphold the **strict privacy rules** governing these activities.¹³

The tasks of the European Data Protection Supervisor:

- Controls the processing of personal data to ensure compliance with the privacy rules of the European Union administration,
- Advises European Union institutions and organizations on all aspects of personal data processing and related policies and legislation,
- Handles the complaints and investigates,
- Works with the national authorities of Member States to ensure consistency in data protection,
- Follows new technologies that can be effective on data protection.

The Supervisor and The Assistant Supervisor are appointed once in five years, and the former Supervisor could be re-elected. For day-to-day operations, the European Data Protection Supervisor has two main entities:

- Auditing and Implementation - evaluates data protection compliance of European Union institutions and organizations.
- Policy and consultation – European Union policy-makers have recommendations on data protection issues in various policy areas and new legislative proposals.

The European Union institutions and bodies cannot process your personal data for the following information:

- racial or ethnic origin
- political views
- religious or philosophical views
- union membership

¹³ https://europa.eu/european-union/about-eu/institutions-bodies/european-data-protection-supervisor_en

- health or sexual orientation (unless it is necessary for health care. Even then, this should be done by a health professional or a sworn person for professional secrecy.)

All EU institutions, including the EDPS, are obliged to comply with the data protection law¹⁴ specifically applicable to them.¹⁵

The law stipulates at least one **Data Protection Officer (DPO)** appointment for each European Union institution.

The tasks of the Data Protection Officer are:

- to ensure that the data protection law is implemented in the institute independently.
- to register for all the operations involving the processing (for example, collection, use and / or storage) of personal data carried out by the institution.

The register must be public and has to contain information explaining the purpose and conditions of the personal data processing.

The role of the Data Protection Officer in the European Data Protection Supervisor is accompanied by many difficulties, some of which are listed below:

- to be independent in an independent institution,
- meet the high expectations of colleagues who are particularly conscious and sensitive to data protection issues,
- offer solutions that can serve as benchmarks for other institutions.

The role of the Data Protection Officer which is mentioned above take place in the EDPS's rules¹⁶. In addition, they should take into account both the EDPS

¹⁴ https://edps.europa.eu/sites/edp/files/publication/reg_45-2001_en.pdf

¹⁵ https://edps.europa.eu/about/data-protection-within-edps/data-protection-officer-edps_en

¹⁶ https://edps.europa.eu/sites/edp/files/publication/10-10-12_edps_implementing_rules_en_1.pdf

Position paper¹⁷ and the Data Protection Officer Network Paper on Professional Standards for Data Protection Officers¹⁸.

The existing data protection rules applicable to European Union institutions are being revised to be in line with the General Data Protection Directive. The new rules aim to make European Union institutions more accountable in the way of personal data processing.

Remedies

If data subjects' privacy is violated by a European Union institution or organization, they must first tell the European Union staff who are responsible for their data. If they are not satisfied with the outcome, they need to contact the data protection officer of the European Union institution or body that has committed the violation.

If this also fails, a complaint can be made to the European Data Protection Supervisor using the application form¹⁹. The European Data Protection Supervisor will tell them if they have accepted their complaint and if so, how the situation has been corrected.

If the data subjects do not agree with the European Data Protection Supervisor's decision, it is possible to take the data subject to the European Union Court of Justice.

4.3 Article 29 Working Party

The "Article 29 Working Party"²⁰ is the short name of the Data Protection Working Party established by Article 29 of Directive 95/46/EC. It provides the European Commission with independent advice on data protection matters and helps in the development of harmonised policies for data protection in the EU Member States.

¹⁷ https://edps.europa.eu/sites/edp/files/publication/05-11-28_dpo_paper_en_0.pdf

¹⁸ https://edps.europa.eu/sites/edp/files/publication/10-10-14_dpo_standards_en.pdf

¹⁹ https://edps.europa.eu/data-protection/our-role-supervisor/complaints_en

²⁰ For more information:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML> Article 29.

The Working Party is composed of:

- representatives of the national supervisory authorities in the Member States;
- a representative of the European Data Protection Supervisor (EDPS);
- a representative of the European Commission (the latter also provides the secretariat for the Working Party).²¹

5. Result and Assessment

As a result of many years of work, the European Union Data Protection Directive has attempted to establish a comprehensive data protection regulation. It has been desirable to draft a framework law to legitimize the processing of data and to ensure that it is also adopted by each Member States to their domestic laws in a way that provides the safe and free movement of data among the Member States. But with the rapid development of technology, the framework law has been lacking in some aspects and the need for renewal has arisen.

First of all, the Directive is based on explicit consent to ensure that the processing of personal data is legitimate. However, the Directive does not include a separate provision concerning the conditions of the consent. In my opinion, it is necessary to strengthen the data subjects' consent which is known as the reason for compliance with the law. Moreover, more suitable mechanisms are needed to protect sensitive data.

As for the rights that data protection law is defined, some differences in the practices of member countries should be resolved. (For example, in terms of time limits)

In respect of obligations, only Data Control's strict liability is no longer sufficient. All actors (for example, data processor) of any processing activity related to personal data must be responsible for any breach of data or illegality resulting from such processing.

If there is no assurance that sufficient protection has been provided in the third country to which the personal data has been transferred, transfers of personal data from European Union to them is prohibited, even the consent is given to share the personal data to the data controller. However, the only person who is responsible for this judgment is the

²¹ <https://edps.europa.eu/node/3095#articlewp>

data controller. In the increasingly globalized world, it is necessary to consider this matter with more effective mechanisms.

In addition, there are different legal approaches and practices regarding the notifications and legal remedies of data breaches to users or data protection authorities with respect to existing domestic law regulations. The uncertainty in this regard and the divergence between member countries must be resolved.

Finally, it should be noted that the directives set out the main objectives that are expected to be adopted by the Member States to their national laws, but don't establish rules about how to implement the objectives in their domestic laws. In this context, it is difficult to achieve a high level of harmonisation among the European Union countries.

Above all, high-level harmonisation has to be achieved in order to achieve a global competitive advantage through a simplified, seamless and efficient EU digital economy targeted at the European Union Digital Single Market Strategy.

The Paradigm of Judicial independence in Common Law Countries and its limitation in developing Countries

Nazmul Haque Tonmoy (1)

Abstract

According to popular perception, judicial independence and the rule of law are indispensable features of modern democracy. The countries with common law jurisdiction and democratic set up are not always stable in making the judicial branch free from executive interference. On the other hand, the common law countries coexist with different approach in terms of judicial independence and indulging political strategies to either influence or make the judicial branch completely independent from other governmental bodies. The question is to what extent the judicial branch enjoys its freedom? How constitutional reforms impact in common law countries to make the judicial body more independent discarding political or executive interference? The judicial independence, in fact, always crucial for establishing the rule of law? The significance of International norms and its implementation widens the scope of judicial independence and gives a new directions and standards ensuring the legitimacy and efficiency of the judicial process. The constitutional reforms of British Judiciary have been more effective in making the judiciary more independent than ever. In spite of deriving from the common law jurisdiction the difference between Indian and Bangladeshi legal system surprisingly distinguished themselves particularly in terms of judicial governance and independence.

Introduction

In 2012 Egyptian president Mohamed Morsi produced a constitution which states that he was beyond the court, above the law and thus stigmatized the judiciary. The whole world cried out in anguish and criticism. Mohamed Morsi was found guilty afterwards and sentenced three years of imprisonment for stigmatizing and insulting the Judiciary. In what basis the judicial system having such rights or discretion to impeach the executive officials? What is the foundation? We all know that the dignity and stability of government in all of its branches, morals of the people and every place in a society depends so much upon an upright and skillful administration of justice. An independent judiciary has become a cornerstone of freedom in every democratic country. In this paper, I will discuss the judicial culture in common law countries as well as an overview of independence of judiciary and its international norms fortifying judicial independence and will analyze whether the judicial branch in developing countries (British Colonized) are still striving

to be free from the executive power, does economic stability matter or does economic development affect judicial system in developing countries in making the judiciary free from executive influence? This paper also examines the events and happenings particularly in common law countries emphasizing independence of judiciary, briefly explained the judicial functions and whether appointments of judges, security of tenure and other judicial administration is completely free from the executive interference or not.

Theory of Separation of Power

Theory of separation of power, this idea of the judicial independence was first introduced by a French Enlightenment Political Philosopher and jurist Baron de Montesquieu. In his book “The Spirit of Law” he postulated the distribution of political power in judicial branch, executive branch and legislative branch. He also emphasized the theory of separation by arguing that, each division should only exercise its own function and refrain from intervening others. He explicitly stated from his book the followings,

“When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner” (2)

“Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individual”.

As of January 1959 in New Delhi the Congress of the international commission of Jurists accepted this approach when it said: Judicial independence implies freedom from interference by the executive or legislative with the exercise of judicial function. It is now contended that the independence of judiciary is mainly an outcome of the application of the doctrine of separation of power. (3)

In legal studies, by judicial independence, we mean that the Judiciary as a branch of the government possesses the freedom and the ability to decide the dispute neutrally regardless of real, potential, or proffers of favor with the aim at promoting justice. By independence here we mean, a stable surrounding where judges are free to make a decision and pass judgment without any external pressure from the other entities of the government either executive or legislative branch.

This separation of power makes the judicial branch free from the undue influence and executive control as a guarantee of individual freedom. It is imperative for individual autonomy that the judges have given the verdict without any apprehension or favor and they are now free to pass impartial judgment even if confronting popular opposition.

- (1) International and European Trade and Investment Law (LLM) Student of the University of Szeged
- (2) Montesquieu, *The Spirit of the Laws*, Book VI The French Revolution and Industrial Revolution, Chapter III, page 218
- (3) <http://studentsrepo.um.edu.my/3239/3/CHAPTER1.pdf>

History of Judicial Independence:

The concept of independence of the judiciary was not easy to achieve in the early monarchical system of government in England. The judges would hold the position by Crown's pleasure and could be sacked as other servants by the King at will. Thus judges were trivial to the King and subordinated naturally which led the judges to favor the royal prerogative. In 1701 the judicial independence was protected by the Act of Settlement (1701). This ruling formally recognized as the principle of protection of judiciary by establishing that judges from the High Court and the Lords of Justice of Appeal hold office during good behavior. The Suitable and official mechanisms had to be in place before a judge could be dismissed from the office. Through the Act of Settlement, it is possible to remove a senior judge from the office with the consent of the queen and agreed by both house of parliament. (3)

Four Meanings of Judicial Independence

The most fundamental and conventional meaning of judicial independence implies freedom from control; pressure, inducement and interference or threat from any sector including executive, legislation or any private individual so that they can independently perform their function neutrally in accordance with their own understanding of the law and the fact. There are four meanings of judicial independence in general. These are the following (4)

- (1) Substantive Independence
- (2) Personal Independence
- (3) Collective independence
- (4) Internal Independence

The concept of substantive independence and personal independence can easily be understood and recognized by the legal scholars and legal system. The collective independence and internal independence was first introduced and recognized in 1982 by the International Bar Association's Minimum Standards of the Judicial Independence in New Delhi, and in 1983 by the Montreal Universal Declaration on the Independence of Justice afterwards. This incorporation of two concepts of collective independence and internal independence believed to be the vital for empowering judicial independence in recent legal history.

Substantive independence: This means the independence of judges to reach at their decisions in accordance with their oath of office without submitting to any kind of pressure whether internal or external but only to their own sense of justice and the dictates of law. This can also be described as functional and decisional independence. A European Jurist, Erkki Juhani Taipale stated that “the Judges can only be subordinate to the law while administrative justice, no other state authority, not even the highest, is allowed to influence the decisions made by the judicial branch.

(4) <http://studentsrepo.um.edu.my/3239/3/CHAPTER1.pdf> page 6 to 11

Substantive independent judge thus dispenses justice according to law without regard to the policies and inclinations of the government of the day. According to the International Bar Association's Minimum Standards of Judicial Independence defines substantive independence as judges are subject to the law and the commands of his conscience. This concept was explained in the Universal Declaration on the Independence of Justice thus, judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts their understanding of the law without any restrictions, influence, inducement pressure, threats or interference, direct or indirect from any quarter or for any reason. In 1985 UN Basic Principles of the Independence of the Judiciary emphasized thus: “The Judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influence, inducement, pressures, threats or interferences, direct or indirect, from any quarter or for any reason and which was again reflected in 1995 at the Beijing Statement of principles of the independence of the Judiciary in the LAWASIA region. (5)

The idea of substantive independence considered as the essential part of judicial independence and recognized in the Constitutions of some countries prior to the expansion of international standard in this regard. For an instance, the Constitution of Japan was adopted in 1946 which states “All Judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution of the Laws”.(6) In 1981 the Constitution of the Republic of Korea provides that “Judges shall rule independently according to their conscience and in conformity with the Constitution and law.(7) So therefore, the substantive independence ensures the independence of the judges to perform on the basis of their assessment of the facts-merit of the cases and must be free from any inducement, influence and threat from individual or state governing authority.

- (5) 2 Article 3(a), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995
- (6) Article 76(3), the Constitution of Japan, 1946
- (7) Article 103, the Constitution of the Republic of Korea, 1981.

Personal independence: As mentioned above, this correlates with the conventional and central meaning of the independence of the judiciary. This means Judges are free from any influence, force, inducement or threats coming from the government or anything that affect to reach to decision in individual case.(8) In 1982 it was defined by International Bar Association’s Minimum Standards of Judicial Independence that says, “The terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control”.(9) Personal independence therefore implies that the individual judges are free from the political branches of the government, particularly executive regarding the terms of judicial service including, transfer, remuneration, pension and the security of tenure until or obligatory retiring age and should be “placed in a position where he has no interest whatsoever that could be availed from the decision he made.(10)

Collective independence: By collective independence we mean the judicial branch absolutely independent from executive interference regarding the judicial institutions administration and financial matters. It seeks to eradicate of the dominant role of the executive branch in the administration and financial matters of the Court. This includes control over administrative personnel, maintenance of the Court and formulation of its budget and allocation of resources. The interference of the executive branch believed to be having inauspicious impact on the individual judges in performing their judicial function and it actually has negative impact in judicial system thus it becomes subservient to the executive or other governmental bodies. The Collective independence of the judiciary is compelling system that protects the judiciary from executive control where the judicial branch enjoys its autonomy in controlling its administration and financial independence. In 1996 a meeting held in Kuala Lumpur, Malaysia by the Commonwealth Law Ministers where they claimed that the collective independence is an important defense against improper interference and free the judiciary to discharge the particular responsibilities given to it within national constitutional framework and it was also emphasized by the Montreal Universal Declaration on the independence of justice thus: ‘It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency , judicial and administrative personnel and operating budgets. (11) The Beijing Statement of Principles of the independence of the Judiciary in the LAWASIA region,

1995, emphasizes that “The principal responsibility for court administration, including appointment, supervision and disciplinary control of administration personnel and support staff must vest in the judiciary, or in a body in which the Judiciary is represented and has an effective role.”⁽¹²⁾ In 1993 South Australia passed the Court Administration Act and established the State Court Administrative Council which was independent from the control of executive and made up of Chief Justices from the Supreme Court, Chief Judges from the district courts and Chief Magistrates from the Magistrate Courts and other associate members appointed by the judges. The roles and responsibilities of the State Court Administrative Council were to control and management of the Judiciary and carry out the judicial and administrative functions independently. ⁽¹³⁾ This can be the role model for other democratic countries to follow and to ensure collective independence of the judiciary.

(8) J.A.G Griffith, *The Politics of the Judiciary* (London: Fontana, 1977) at p. 29.

(9) Article 1(b), International Bar Association’s Minimum Standards of Judicial Independence, 1982.

(10) R.M. Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1954) at p. 486.

(11) Article 2.41, Montreal Universal Declaration on the Independence of Justice, 1983

(12) Article 36, the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

(13) Section 7, the Courts Administration Act, 1993

Internal Independence: Internal independence of the judiciary is the freedom from any order, pressure or indication from superior judges and colleagues in reaching to decision in individual cases which means that the threat to judicial independence may not only come from the other governmental organs or externally, it can be internal pressure from senior judges or colleagues. To be more candidly the judges not only independent from the interference of the executive and legislative but also from judicial colleagues and seniors having administrative power while deciding cases. The International Bar Association’s Minimum Standards and Montreal Declaration explicitly recognize the significance of the idea of internal judicial independence. The International Bar Association’s Standards of judicial independence says “In the decision-making process, a judge must be independent vis-à-vis his judicial-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors ⁽¹⁴⁾ whereas the Montreal Universal Declaration on the Independent of justice more emphatically emphasized the judiciary independence by saying that “In the decision making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of

the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely. (15) In the same way, Beijing Statement of the Principles of the Independence of the Judiciary, 1995, provides. “In the decision-making process any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment. The UN basic principles on the Independence of the Judiciary, 1985 states that “There shall not be any inappropriate or unwarranted interference with the judicial process”. (16)

(14) Article 46, International Bar Association’s Minimum Standards of Judicial Independence, 1982

(15) Article 2.03, Montreal Universal Declaration on the Independence of Justice, 1983.

(16) Article 6, the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

Judicial Independence in Practice

Independence of the judiciary is a sine qua non for the democratic countries. In every democratic country judicial independence is considered as the foundation of law and the principle of the due process of law is also based on judicial independence. The countries in a democratic setting always emphasize the importance of judicial independence and therefore place an immense store on the independence of the judiciary as a guarantee of individual freedom. The capricious power of the executive or legislative body sometimes can be unjustified, unethical and immoral; in that case, the independent judicial system can play a crucial role in protecting the rights of the citizens striving for justice for the sake of the citizens’ interests. Many democratic countries adopted a range of measures to ensure the judiciary independence, on the other hand, and there are many countries where the judicial system is not completely independent of the executive branch of the government. In the US judicial system, there is a separation of power ensured the judicial independence but in the constitutional system based on the concept of parliamentary supremacy.

The conversion of separation of power ruled out. This is the case in England and India. The doctrine of parliamentary and constitutional sovereignty both are integrated.

The operation of English legal System (Judicial branch and its independence)

Judicial independence is now considered a central part of any liberal democracy that a strong independent judiciary exists in order to hold the executive to account. In many dictatorships around the world the judiciaries are not independent and instead are a major part of the apparatus of control. The UK Judiciary now has a reputation for judiciary independence. However, this is only the refusal of very recent reforms. Prior to 2003 there were a number of issues which called into account judicial independence in the UK. The prime minister in theory had the powers of patronage. Their prerogative powers extended to choosing senior judges and this was obviously based on advice and suitability but it was hardly free from political judgment. The chief judges in the country were known as the law lords they sat in the House of Lords which were also therefore the highest court in the Land. This was part of the fusion of powers in the UK. The judiciary being also part of the legislature and this undermines the theory of 'separation of powers'. The Lord Chancellor was regarded as being the head of the judiciary. This however was a political appointment by the prime minister. The Lord Chancellor also was a member of all three branches as they were in the cabinet, judiciary and house of lord (Legislature). Obviously this was not a perfect system. A series of reforms helped to make the judiciary a lot more independent.

After reform now there are seven ways to protect judicial independent in the UK. First the appointment process as it now has a little political influence; otherwise judges would simply be selected on their sympathy for the government. Judges had previously been appointed by the prime minister and the lord of chancellor: this made it very difficult to rule out political consideration. The establishment of the judicial appointment commission (JAC) has introduced greater independence into the process. This was launched in 2006 as part of the constitutional reform act. They are a independent panel and they make their appointment decision on the basis of merit – free from political control.

Secondly, the security of tenure. This simply means that once they are appointed, they cannot be sacked they stay in office until the age of 70. This is important because judges don't want to have to under the threat of demotion or even dismissal due to their decisions otherwise it will affect their decision making. The senior judges can only be removed by an address to both houses of parliament which last happened in 1830. Thirdly "Pay". Just as in security of tenure the judges don't want their pay be threatened if they make a decision which conflicts with the government. To protect this therefore, they are paid out of what is known as the consolidated fund this is an independently assigned fund which is independently assessed and granted.

Another way is the reform of Lord Chancellor. Under the constitutional reform act 2005 much of the legislative powers of the office of Lord Chancellor were removed. The Lord Chancellor therefore is not the head of the judiciary in fact the position is bound up with minister for justice which gives it a much greater degree of legitimacy. They also no longer play the significant role in the appointment process. Independent legal profession is the fifth way to protect judicial independent, unlike many other countries lawyers in the UK are trained independently of the state.

Their profession has a fierce independence protected and self-regulated by law society. Another way is the freedom from criticism, by which judges are by convention supposed to be protected from criticism of their judicial decisions. This is particularly true of criticism from the executive. The sub judice rule forbids on commentary of trials as they are taking place and the last way to protect judicial independent is the British Supreme Court. The Supreme Court in the UK was also established as a result of the constitutional reform act. It removed the law Lords from the House of Lords and therefore the legislature. It established itself independently with 12 law Lords in the Supreme Court in Westminster – Across from the house or parliament – but now very separate physically and constitutionally. The Supreme Court was set up in order to achieve a complete separation between United Kingdom's senior judges and the legislature and executive. This helped to emphasize the independence of the judicial branch and increased the transparency between parliament and courts. (17)

Today UK Supreme Court plays a vital role as the final arbiter between the citizen of the UK and the British State. Judicial power ought to be distinct from both the legislative and executive body, judges are not to be dependent on political process, and they were to be immune from politicians and from politics. Article III of the US constitution established a judicial branch in the United States and empowers the judicial branch as part of the national government which is the court system that interprets the law.

(17) <https://www.supremecourt.uk/docs/separation-of-powers-post-visit-worksheets-for-teachers.pdf>

The Judicial branch and its independence in India

The Indian constitution adopts miscellaneous strategy to ensure the independence of the judiciary where the doctrines of constitutional and parliamentary power both are incorporated. Elaborated provisions are in place for ensuring the independent position of judges of the Supreme Court and High Court. Firstly, the judges of the Supreme court and the High court prior to entering the office take an oath saying that they will serve faithfully without fear, favor and affection, animosity and defend the constitution of the India and the laws. The acknowledgment of the doctrine of constitutional sovereignty is implied in this oath. Secondly, the process of their appointment also ensures the independence of judiciary in India. The President has the constitutional rights and obligation to appoint the judges of the Supreme Court and the High Courts in consultation with the highest judicial authorities and Cabinet. The Indian Constitution also prescribes required qualifications for such appointments and makes it impartial by political considerations. Indian constitution ensures the security of tenure of judges, once the judges are appointed they cannot be arbitrarily sacked by the president but only through impeachment. A judge can only be sacked on the ground of proved misbehavior or incapacity by the majority of the members of both Houses

and Parliament. In terms of salary and allowances of judges, India similar to that of UK has the Consolidated Fund of India from which judges are paid out and cannot be reduced during their tenure unless if there is any financial emergency under Article 360 of the constitution. The Judgment and other activities of judges are not subject to criticism by either executive or legislative branch, except in case of dismissal. The retirement system of the judges and the post retirement restrictions make the Indian judicial system more transparent. The high court judges usually retire at the age of 62 and the Supreme Court judges retire at the age of 65, such long tenor facilitates the judges to function independently and impartially. The retired Supreme Court judges cannot engage in legal practice in any court in India but retired high court judges can engage into legal practice other than the state he served as High court judge. This post retirement restriction imposed to retired judges to avoid any situation where they could influence the decision of the Courts. (18)

(18) <https://www.importantindia.com/2146/independence-of-judiciary-in-indian-constitution/>

Independence of Judiciary in Bangladesh

Unlike India, the judicial system of Bangladesh not absolutely independent from the intervention of the executive branch of the government. Since the British colonial rule, the separation of the judiciary from the executive had been a constant debate. Technically and physically the judicial branch is separated but it is not independent from executive interference and it seems intuitively obvious that without separation of power judicial independence is not achieved.

Bangladesh, as being a part of common law jurisdiction, its legal system originated from the laws of British India. Bangladesh seceded from its amalgamation with West Pakistan and became independent in 1971. Pakistan was a part of India until 1947 after the British departed from Indian subcontinent. Even though Bangladesh became independent in 1971 democratic movement, though fragile, prevailed in 1991. The supreme court of Bangladesh is the highest court of Bangladesh comprised of the Appellate division and High Court Division with separate jurisdiction. The Jurisdiction of the Supreme Court of Bangladesh has been described in Article 94(1) of the constitution of Bangladesh. Although The Supreme Court believed to be independent from the executive branch and has constitutional rights and ability to rule against the government but pragmatically this is not always the case.

The president of Bangladesh appoints the Chief Justice of Bangladesh and other judges of the Supreme Courts with prior compulsory consultation with prime minister under the provision of the Article 95 of the Constitution. The Judges of the Appellate division also appointed by the

president under the same provision. All appointments come into effect from the date of taking oath by the appointee under the provision of Article 148 of the constitution. The security of tenure, the Supreme Court judges stay in office until the age of 67 and cannot be sacked from the office prior their retirement age except with the provision of Article 96 of the constitution that empowers Supreme Judicial council to sack the Supreme Court judges from the office. Furthermore, the constitution of Bangladesh gives neutral and independent judiciary but in reality judiciary has been acquiescent to executive government since 1971 from the very beginning of the sovereign state. There are many rhetorical promises made by different governments to separate the judiciary from the executive interference just to conciliate popular demand of an independent judiciary. The dictatorial culture of executive absolutism over the constitutional exigent of the separation of power hindered against the creation of an independent judiciary. (18)

Article 22 of the constitution of Bangladesh clearly state that the separation of judiciary from the executive. In 1999 The High Court Division issued a directive to separate the judiciary (both higher and lower courts) from the executive because there were many instances where judiciary was interfered with executive in both lower and higher courts. This ruling was prevailed on appeal and reaffirmed in the review case in the Appellate division afterwards. The Supreme Court issued more directives

emphasizing the separation of judiciary without any constitutional amendment but it was spurned. In January 2007 the interim caretaker government enacted sets of rules which were implemented afterwards and rendered to the Supreme Court independent and allowed the magistrates exercising judicial function under the control of the Supreme Court free from executive influence. This modification yet to be implemented in the inferior judiciary which is still under control of the executive.

The judicial system in Bangladesh striving for the ages to obtain absolute separation from its other governmental bodies even in these days, there are many instances of executive efforts to control over the judiciary and the lower judiciary is in tight control of the executive. There is some tension between the judiciary and the executive branch with the power of controlling judiciary that had been treated unfairly and the administration never let the judiciary to run separately. The constitutional requirement of the separation of the judiciary has been fulfilled to allot justice independently but still it is not absolutely free from the executive control. After having achieved the independence in 1971, democratic practices just begun in 1990 and there are many efforts have been made to establish an expeditious judicial system in Bangladesh but it cannot be achieved if the judicial system is absolutely separated from other governmental organ or individual. There are many developing countries with thriving economy around the world where the judiciary independence is emphasized as prerequisite of democratic practice. Sudan can be a role model in terms of independence of judiciary where the judicial branch is completely separated financially and from executive control. The High Judicial Council consisted of the Chief of Judges and some other members are appointed by the Chief Justice. The constitution of Bangladesh does not have any provision aiming at to prevent growing concern and arbitrary questions about the conduct of

a judge of the Supreme Court in the Parliament which may cause distress and humiliate for the judges concerned. In addition, The Parliament persistently putting efforts to control the judiciary and it is still a controversial issue. (19)

(18) The Constitution of the People's Republic of Bangladesh.

(19) The Legal System of Bangladesh by MD Abdul Halim.

People's faith in Judicial Impartiality:

The Judiciary is the only hope for the people when they seek justice from their legal disputes and the Courts have the responsibility to preserve the faith of people in their judicial system. According to Justice Frankfurter "the confidence of the people is the ultimate reliance of the Court as an institution". The people's perceptions about the judicial system is as simple as the justice for everyone, regardless the race, gender, religion, disability or any other type of discriminations. The people seem to be more confident in judicial system rather than others governing bodies. Furthermore, the integral part of people's positive vibe towards the Courts largely reply upon judicial independency. The chief justice Holland of the Ontario supreme court in the case R.vs. Valente put it thus, "it is most important that the judiciary be independent and be so perceived by public. The Judge must not have cause to fear that they will be prejudiced by their decisions or that the public would reasonably apprehend this to be the case". The Judicial independence is crucial to secure the people against wrongful encroachment of the executive and legislative branch. If these trends continue Bangladesh will never be able to establish "Absolutism in Government" which is an integral part of the democratic country.

Conclusion

In conclusion, the discussion above focuses on the core principles of the judicial independence and its culture around the world. There are some countries with democratic set up failed to ensure the independence of the judiciary whereas in some other thriving economic county like Sudan absolutely free from the executive control. So now, it's obvious that economic instability does not affect the judicial system and its independence, only a good and efficient government with its transparency, integrity, honesty, and rule of law can fortify the judicial branch and can ensure its freedom. The Independence of the judiciary is a fundamental requisite for every society where the people respect the rule of law as a subservient judiciary. An independent neutral judicial system and administration is "like oxygen in the air, people know and care nothing about it until it is

withdrawn “said Lord Aktin. The people appreciate the courts that are impartial, able to serve expeditious justice and therefore independence of judiciary should be emphasized and protected with greatest care.

With this presentation, I tried to demonstrate that the basic concept of judicial independence and this research predominantly was to overview the judicial culture in common law countries, and its differences between thriving economic developing countries, in spite of being developing country, Sudan has ensured that the executive power has no control over the judicial branch thus judicial independence is ensured and in contrast to Sudan, Bangladesh with a thriving economy, has not yet achieved the judicial independence which is not only much needed but inevitable necessity for every society preserving the rule of law.

Amjad Ashraf:

The gold mine is hidden in the implement of effective competition law in Pakistan

Abstract

In the first part of article, i am going to discuss introduction, role of competition law and historical business classes in Pakistan, with current business environment in Pakistan.

Second part, the legislative history of the competition law and its beginning as well hurdle in the way, the judicial system of Pakistan

Third part included the conclusion of article; I have suggested some solutions to improve the performance of competition commission performance

Introduction

Competition law has the object to provide the consumer the quality product in lower price. It also ensures the innovation and creative work in the market. It means that when a company want to compete with other company, then it would bring such products which can catch the attention of the consumer more than its opponent. But it has been found in many cases the companies make the agreement to have certain prices to fix for the purpose of gaining economic advantages. Other hand, they may merge into the one company for the purpose of securing the dominant position in the market. They abuse the dominant position to raise the prices high as they like. The role of competition law to prevent such merger and acquisition or such unfair trade practises. Sometimes companies try to limit competition. To preserve well-functioning product markets, authorities like the Commission must prevent or correct anti-competitive behaviour to have an agreement between the companies that restrict the competition, an abuse of dominant position where a major player tries to squeeze competitor out of the market and avoid merger.¹

Pakistan is a country in Asia where the competition law has been implemented to avoid unfair trade practise but lack of awareness and judicial system ineffectiveness. The competition law is not contributing the economy of Pakistan as it could have brought the excellent results. We find daily that In front of A hundred of millions of public gathering, politician claims to achieve ultimately goal of an economical prosperity for Pakistan, have endorsed by TV anchors, unprofessional so-called economist specialists and industrial analyses to the spectators on the TV screens. I acknowledge the importance of other factors such institutionalisations, effective judicial system, political and educational reforms. Less explain and more ignore discussion topic of competition law importance for strong, health and vibrant economy which can allow reaping the fruit of their struggle and awarding through quality products in lowest prices. We currently see in Pakistan from health sectors to housing industry witnessing monopolisation, merger and acquisition that have brought unaccountable challenges to its citizens. It seems strange but obvious from fact and figures effective competition law implementation would highly helpful to reduce economic corruption and exploitation as well bring new investments and jobs for its citizens. We have to look historical, cultural and economical back ground of Pakistan as having an observatory eyes on social norms and values.

Historical

¹ http://ec.europa.eu/competition/consumers/what_en.html

Pakistan came into the map of world in 14 august in 1947 after British colonisation ended in the entire subcontinent. The Statistic indicates that time the 90% of wealth, commercial property, agricultural land, banks assets, gold and silvers possession, industrial sectors, manufacturing industry and political decision making power, was in the hand of only 22 families. In 1968, Dr Mahbub ul haq, the famous development economist and the chief economist of planning commission of Pakistan indentified 22 families in Pakistan where dominating the financial and economic life of country controlling 66% of industrial assets and 87% of the banking.² The figures declined slightly because Pakistan chief of army staff imposed the martial law government from 1958 to 1969.³ Due to army intervention in politics bread new form of industrial monopolisation included the retire army officers and feudal lords. Zalifaqir ali Bhutto was the first democratically elected prime minister who paved the ways of the other feudal lords to find their destiny in the politics. In 1973, first federal constitution was signed and enforced by the legislative assembly of Pakistan which was composed of feudal lords, retired army officers included lawyers, who had supported and assisted the army officer to impose martial law, in the house of senates. We still find the similar situation exchanges of administrative power from army to industrial and feudal lord's hand. According to a report, around ten million children are doing labour in brick kilns, farms, carpet manufacturing workshops and restaurants and another twenty million workers engaged in agriculture and industry work as bonded labour. Feudalism is the real problem and all other problems stem from it. The feudal lords and their allies constitute only five per cent of our agricultural households and own 64 per cent of our farm land. The rest of the 95 per cent are only their political vote-bank.⁴

Cultural, economical and political back ground

The family system of people Pakistan is based on religious and cultural belief. The majority of them live in joint families where it is easy to approach anybody or influence through the family ties with other families. It means that the majority of industries have been operated by the families such sharif group, The Nishat Group , The Hashoo Group, The Jang Group, The Packages Group, The House of Habib, The Saigols Saigols, that intermarriage with horizontal companies groups for the monopolisation on the market taking the examples of leading the nishat group He is one of the richest Pakistanis around. Nishat Group was country's 15th richest family in 1970, 6th in 1990 and Number 1 in 1997. Mansha is on the board of nearly 50 companies. Chiniotiby clan, Mansha is married to Yousaf Saigol's daughter. He is deemed to have made investments in many bourses, currency and metal exchanges both within and outside Pakistan. He has had his share of luck on many occasions in life and has recently been awarded Pakistan's highest civil award by President Musharraf.⁵ There are a plenty such examples in which corporate owners intermarriages their daughter and sons with politicians, bureaucrats, military officers and judges to secure their financial empire and gain monopoly upon the market. These groups and people have extremely powerful influence on all sectors of Pakistan including the business. They own huge assets in Pakistan and abroad. As the panama paper scandal had been breaking news by many broad casting companies around the globe. A treasure trove of leaked documents has blown the lid off the faces behind offshore companies operating in multi-layered secrecy, revealing names throughout the world, including those of Pakistani politicians, businessmen, bankers as well as a serving high court

² <https://paycheck.pk/main/salary/celebrity-income/richest-families-in-pakistan>

³ <https://www.dawn.com/news/1293604>

⁴ <https://www.dawn.com/news/881169>

⁵ <http://businessfamiliesofpakistan.blogspot.hu/2010/03/2010-most-influential-business-families.html>

judge and a retired judge.⁶ Another hand, Pakistan army has huge investment in oil, gas and manufacturing sectors. The book is well known in this issue “military Inc: inside the military economy” by Ayesha Siddiqi says the military's private wealth could be as high \$20bn, a "rough figure", she says, split between \$10bn in land and \$10 in private military assets.⁷ In these circumstances, it is not easy for emerging companies to make their position in the market where the sharks' tank is full of unfair trade practises and having concrete relationship among each other for monopolisation and mergers. The question how to make the competition law legislation effective in the country where such situation exists? But almost all the under developing countries have been facing the similar challenges in one another ways. It is true that above mention situation in fact exists there is a beacon light of hope that is the establishment of Pakistan competition commission of Pakistan.

Second part

The legislative history of competition law in Pakistan

Article 38 of constitution

- (a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;⁸

The constitution of Pakistan makes sure that the wealth should be allocated in the hands of few people through the monopoly and unfair trade practises which have been prohibited by the constitution.

Pakistani anti-monopoly law

Pakistan passed “Monopolies and Restrictive Trade Practices (control & Prevention) Ordinance, 1970 (V of 1970) with the Preamble that,

“An Ordinance to provide for measures against undue Concentration of economic power, growth of unreasonable Monopoly power and unreasonably restrictive trade practices.”
“Whereas the undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices are injurious to the economic well-being, growth and development of Pakistan:-And whereas it is expedient to provide for measures against such concentration, growth and practices and for matters connected therewith or incidental thereto;”⁹

Under this act, it was effective earlier period of time but it was not directly addressing the consumers.

This Ordinance, under its definition clause, i.e. section 2 with the heading “Definitions” has defined seventeen terms and but has not used or defined the term “consumer” in the definition clause. There appears to be no express direct intention of the legislature to benefit the end consumers. It is interesting to note that no provision of this Law connects with consumers directly.¹⁰

⁶ <https://www.thenews.com.pk/print/110196-Pak-politicians-businessmen-own-companies-abroad>

⁷ <https://www.aljazeera.com/focus/pakistanpowerandpolitics/2007/10/2008525184515984128.html>

⁸ <https://pakistanconstitutionlaw.com/article-38-promotion-of-social-and-economic-well-being-of-the-people/>

⁹ <http://nasirlawsite.com/laws/mrtpo.htm>

¹⁰ http://www.pja.gov.pk/system/files/Does_Competition_Ordinance_Result_In_Consumer_Protection_0.pdf

The passage of time, the development and progress industry has been legally challenging to enforce the act in its real spirit for the benefits of avoiding the monopoly and having the fair competition.

The Monopoly Control Authority (MCA) was the organization to administer this Law. In the fast changing global and national economic environment, the MRTPO, 1970 was inadequate to address competition issues effectively. This was because:

- i) The 1970's law was out of date for a modernizing and rapidly transforming market economy;
- ii) Due to several limitations in the law, the MCA was not able to meet the expectations of businesses and the consumers at large;
- iii) The first generation reforms that liberalized the economy and encouraged the private sector required a competition policy framework that could promote and protect competition and innovation.¹¹

The Competition Act, 2010

The competition act of Pakistan (CA '10) is a state of the art modern law which gives the Competition Commission of Pakistan legal and investigative instruments and powers to engender free competition in all spheres of commercial and economic activity, enhance economic efficiency, and to protect consumers from anticompetitive behaviour.

Briefly, the law prohibits situations that tend to lessen, distort, or eliminate competition such as actions constituting an abuse of market dominance, competition restricting agreements, and deceptive marketing practices.

- **Abuse of Dominant Position.** §3 of the Act prohibits the abuse of a dominant position through any practice that prevents, restricts, reduces, or distorts competition in the relevant market. These practices include, but are not limited to, reducing production or sales, unreasonable price increases, charging different prices to different customers without objective justifications, tie-ins that make the sale of goods or services conditional on the purchase of other goods or services, predatory pricing, refusing to deal, and boycotting or excluding any other undertaking from producing, distributing or selling goods, or providing any service.
- **Prohibited Agreements.** §4 of the Act prohibits undertakings or associations from entering into any agreement or making any decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services, which have the object or effect of preventing, restricting, reducing, or distorting competition within the relevant market. Such agreements include, but are not limited to, market sharing and price fixing of any sort, fixing quantities for production, distribution or sale; limiting technical developments; as well as collusive tendering or bidding and the application of dissimilar conditions. The Commission is authorised, however, to issue either individual or block exemptions under §5-9 of the Act.
- **Deceptive Marketing.** The Act prohibits deceptive marketing practices, in other words, any advertising or promotional material that misrepresents the nature, characteristics, qualities, or geographic origin of goods, services or commercial activities. An office of Fair trade (OFT) has been created within CCP specifically to oversee consumer protection issues under §10 of the Act.
- **Approval of Mergers.** The law prohibits mergers that would substantially lessen competition by creating or strengthening a dominant position in the relevant market. The Act requires prior notice of proposed mergers or acquisitions that meet the

¹¹ http://www.cc.gov.pk/index.php?option=com_content&view=article&id=59&Itemid=103&lang=en

notification thresholds stipulated in §4 of the Competition (Merger Control) Regulations 2007. If the Commission determines this to be the case, it can prevent mergers or acquisitions, set conditions or require divestitures. The Act does not distinguish between horizontal and vertical mergers. The term merger in §11 also covers joint ventures, therefore they are subject to the Commission's approval provided that they meet the notification thresholds.¹²

The current Pakistan competition law has all the required provision to bring the effective competition commission in the Pakistan. We have been witnessing the economic progress in the region where china and India are becoming the larger and bigger economies. In this period, the absence of an effective competition regime in a country is now universally regarded as constituting a grave lacuna in the investment climate of that country.¹³ There are a number of reasons due the competition commission of Pakistan ineffective in the country.

The Overloaded judiciary of Pakistan

Pakistan competition commission is an independent legally but it has to follow the procedure as mention in law. It has been seen that companies finds decision against them they approach to the courts where the companies stands in the line to wait for their turn to be heard by the court.

There are over 1.8 million cases pending in Pakistan courts. As per the latest statistics of the Law and Justice Commission of Pakistan (LJCP), there are 38,539 cases pending with the SC, 293,947 with the five high courts and 1,869,886 cases with the subordinate judiciary of the four provinces and the federal capital.¹⁴

It is the one of the main hurdle for the implementation of Pakistan competition commission therefore; it is unable to perform despite having the excellent draft competition acts While the commission did reel in about €1 million more in fines - €2.7 million in total - in 2016 than the previous year, over half of that was from consumer protection and deceptive marketing. Multiple people familiar with the commission's activities pointed to consumer protection and deceptive marketing enforcement as the main areas of success in 2016.¹⁵

"This shows that the judicial review process has started to become functional," a source said. "Delays in various courts have been the biggest challenge that the commission faces."¹⁶

Case laws

Wise Communication Systems (Private) Limited (WiseCom) Vs. Pakistan Telecommunication Company Limited (PTC)

In this case, the wise communication system is a complaint who put a petition to the competition commission of Pakistan that Pakistan telecommunication (PTCL) hold a dominant position in fixed local loop market(FLL) and has unilaterally discontinued the services to wisecom who is a customer and a competitor of PTCL in FLL market, the complaint demands the relief under the violation of section 3 (3)(g) which prohibits the abuse

¹² http://www.cc.gov.pk/index.php?option=com_content&view=article&id=60&Itemid=110&lang=en

¹³ http://siteresources.worldbank.org/INTMENA/Resources/Challenges_in_implementing_Modern_competition_law_-_updated.pdf

¹⁴ <https://www.dawn.com/news/1384319>

¹⁵ <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission>

¹⁶ <https://globalcompetitionreview.com/benchmarking/rating-enforcement-2017/1144843/pakistans-competition-commission>.

the dominant position. The commission conducted the inquiry on the issue and also provided the fully right of hearing by the full bench of commission and ordered:

The Bench in its order has held that exclusionary conduct is a commercial decision leading to anti-competitive foreclosure by the dominant firm without any objective justification that causes an actual or potential threat to the market and consumers. The Bench highlighted the important facts which form the background of the case and include; action taken by Pakistan Telecommunication Authority (PTA) against WiseCom on 04-11-13 for engaging in alleged illegal telecom business and subsequently raid conducted by Federal Investigating agency which resulted in seizure of equipment installed at WiseCom's office and suspension of services to WiseCom by PTCL on 26-11-13.

Payment notice dated 12-11-13 issued to WiseCom by PTCL which was alleged by WiseCom as an attempt to exclude it from FLL market was admitted by wiseCom during the course of hearing as disputed amount which matter is lingering on for the past many years and is sub judice before the High Court. Also, emails appended in the annexure to the complaint revealed the warnings of PTCL to pay its dues or else face action according to the books before the payment notice was issued.

Further, the Bench noted that WiseCom has 7000 to 8000 subscribers in five regions which is a very miniscule market share. A competitor having a negligible market share cannot be said to exert enough competitive pressure in the relevant market that its exclusion would impact the behaviour of the dominant undertaking and may cause prejudice to the consumers. Neither has WiseCom provided any evidence that shows any harm to consumers in terms of price, quality and choice due to the alleged action of PTCL.¹⁷

The important factor in this case law was that the fixing of price matter under proceeding in the high court Lahore in Pakistan was pending to hear by the honourably court.

Third part

Lack of awareness about importance law

Sherman act of united state was the beginning of competition law in the modern world. But When we peruse the history of the Sherman act, it is obvious that people of united state made the legislators to have such act which can protect the market to provide them quality products in lowest price. In Pakistan, people want to get solution of their problems of rising Prices of households item every second day. It creates the uncertainty in life of an individual but he is unaware about the importance of anti-trust law. He should be educated through seminars, TV talk show and other medium of communication. In the democracy, it is essential for the citizen to know the law which are being practised by the states. it is also the responsibility of the government to have an educational institutions a subjects about the importance of competition law for acquiring the quality products in lower prices as well as the excellent economy. Unfortunately, we find that even those people who have been studying law in their honour degree in law. They do not have the competition law subject in their course.

Conclusion

I think that the competition law effectively enforcement could bring outstanding positive result for the economy of Pakistan. It has been considerably connected other sectors of life of common persons. A common person is frustrated due to uncertainty about prices of basic

¹⁷ http://www.cc.gov.pk/index.php?option=com_content&view=article&id=404&Itemid=222&lang=en

needs to buy house. If the government implements and gives free hands to competition commission of the Pakistan, then I can hope that the prices of products will dramatically decrease and provide the healthy boost to the economy. It would be resulted less economic corruption in the society. When a person could not find basic needs in reasonable prices, here reasonable price means according to his salary, then it is more chances to indulge into economic corruption. Furthermore, the agricultural sector continues to play a central role in Pakistan economy. It is the second largest sector, accounting for over 21 percent of GDP, and remains by far the largest employer, absorbing 45 percent of the country total labour force.¹⁸ it has been neglected terribly by the government . The private sector has monopoly in field of seeds to agricultural machinery due to this sector has been suffering by the hand of these monopolies. If a free, independent and effective competition commission comes into the enforcement, i think this sector can produces more jobs and generate handsome amount of revenue for the country. In last, the competition commission the model of south of African can be a solution to Pakistan in the way that it has the power of veto on the merger and acquisition. The competition commission of South Africa has the power to veto the small and medium mergers and the next recommendation is the largest mergers.¹⁹ Otherwise, this institution could not enforce the decisions of it so quickly. Pakistan has gross domestic product 283.7 billion US dollar in 2016.²⁰ It means the fine we have discussed by the competition commission of Pakistan. It is very smaller amount of the money but still companies move toward the court to stop the enforcement of the decisions and resulted uncertainty in the market. When the companies have more trust in the matter of enforcement of decision, they will approach to commission for having fair trade practises and healthy competition among them.

¹⁸ http://www.finance.gov.pk/survey/chapter_10/02_agriculture.pdf

¹⁹ <https://www.youtube.com/watch?v=QxEbIKcnc50>

²⁰ https://www.google.com/search?q=pakistan+gross+domestic+product&stick=H4sIAAAAAAAAAAOPgE-LQz9U3MC1OMtTSzk620s_JT04syczP0y8uAdLFJZnJiTnxRanpQCGr9JSC-Lz83My8xBwA6o5twTkAAAA&sa=X&ved=0ahUKEwji-oyW4oTbAhUIOJoKHTL2BqIQ6BMI6gEoADAY&biw=1093&bih=502

A honvédelem és a jog egyes kérdései a populáris kultúra szemszögéből

Dr. Ormándi Kristóf

PhD hallgató

SZTE ÁJTK DI

Jogbölcseleti és Jogszociológiai Tanszék

1.) Bevezetés

Ezen esszé fő célja, hogy meghatározza a honvédelem és jog viszonyát, speciális kapcsolódási pontjait, ezeknek jellemzőit, és példákkal szolgáljon mindezekre, amelyeket a valós életből és a populáris kultúra világából meríthetünk. Mióta az első államnak nevezhető csoportosulások kialakultak, az emberiség egyik legfontosabb tevékenysége a közösség, a haza védelme volt. Ezt eleinte, a törzsi társadalmak idején a törzs tagjai látták el. Majd ahogy kezdtek a társadalmak egyre inkább rétegződni, szakosodni, kialakult a nemzettudat, és az első valódi államok, a katona szakma megjelent, és hivatásos hadseregek kezdtek el fellépni, mint az állam hivatalos rendvédő szerve. Az állam vált az erőszak monopóliumának letéteményesévé: kizárólagos állami hatáskör lett a háborúk indítása és békekötés, valamint a honvédelemhez szükséges katonai, polgári, és jogi feladatok ellátása. Napjaink globalizálódó világában azonban az erőszak – bár mennyisége csökkent a turbulens előző századokhoz képest – nem olyan számottevően lett kevesebb, és továbbra is fontos feladatként jelentkezik a fegyveres erők fenntartása, fejlesztése, illetőleg a honvédelem.

Az esszében szeretnék áttekintést nyújtani a magyar és a külföldi honvédelem kialakulásáról és hatályos jogi szabályozásáról, valamint a média és a populáris kultúra által közvetített atitütödkről, sztereotípiákról, amelyek a honvédelem mint témához való egyéni hozzáállást befolyásolják. Először a honvédelem, katonaság, mint intézményrendszer kialakulásáról fogok beszélni, majd a hatályos magyar Hvt.¹ által deklarált jogi állapotokat elemzem, illetve egyes példaértékű, a történelmi, honvédelmi és (köz)jogi hagyományok miatt modellként felhozható külföldi államok (USA, Franciaország) által alkalmazott honvédelmi rendszereket és jogi szabályozást veszem szemügyre összehasonlító céllal. Végül a honvédelem mint társadalmi toposz szubjektív lecsapódásait, megnyilvánulásait vehetjük

¹ 2011. évi CXIII. törvény a honvédelemről és a Magyar Honvédségről, valamint a különleges jogrendben bevezethető intézkedésekről.

szemügyre a *populáris kultúra* szemüvegén keresztül a különböző olvasmányokból, filmekből merített példákkal is.

A tanulmány *kutatás-módszertani* alapjait a *források elemzése, összevetése, a szakirodalom vizsgálata, és az összehasonlító elemzés* képezi. Ezen kívül támaszkodom még a társadalomtudományok által elért eredményekre. Fontosnak látom megjegyezni, hogy a médiából és a populáris kultúrából merített példák elemzése során művem erősen szubjektív színezetet öltött, de ahol alkalmazható, törekedtem megtartani az objektivitás mércéjét. Remélem, hogy a tanulmányból leszűrt konzekvenciák hasznos célt szolgálnak majd, és a jogtudomány eme területén folyó diskurzust új színekkel tarkítják.

2.) A honvédelem jogi szabályozása hazánkban és külföldön

2.1) Alapfogalmak

„A honvédelem a haza védelmével kapcsolatos komplex társadalmi jelenséget kifejező alapfogalom.”² Lényegében: békében a honvédelmi rendszer kiépítése útján az ország lakosságának, területének, szerveinek és gazdaságának felkészítése, készenlét szintjének a fenntartása; háborúban pedig a hadviselés eredményes folytatására irányuló, állam által irányított, és a nemzetközi kötelezettségekkel összhangban értelmezett *tevékenységek összessége*.³ A honvédelem *honvédelmi rendszeren* belül realizálódik, amely definíció szerint „...az ország politikai és állami rendszerén belül azoknak az elveknek, jogi eszközöknek, rendszabályoknak, és szervezeteknek a rendezett összessége, amely politikai, katonai, gazdasági, kulturális és jogi téren felöleli a honvédelmi feladatok eredményes teljesítésének személyi és tárgyi feltételeit”.⁴

2.2) A magyar honvédelmi rendszer és hatályos jogi szabályozás

Magyarországon a honvédelmi jogforrási hierarchia élén a *2011. évi CXIII. törvény (Hvt.)* áll, mely a honvédelem helyzetét, személyi állományát, és feladatköreit határozza meg. A törvény hatálya mind béke, mind háború idejére kiterjed. Külön határozza meg azokat a rendelkezéseket, melyek hatálya csak háború idejére szól.

A *törvény négy részre*, azon belül 10 fejezetre, 53 alfejezetre tagolódik. A *első rész* (A honvédelem alapjai) meghatározza a honvédelem célját, az ezzel összefüggő feladatokat, a

² HORTOBÁGYI István: A honvédelem jogi szabályozása. [s.n.], Bp., 1986. 1.o.

³ Uo.

⁴ Uo. 4.o.

háború vagy az állam biztonságát súlyosan fenyegető veszély idejére szóló rendelkezések alkalmazásának elveit, valamint a nemzetközi szerződések betartásával kapcsolatos szabályokat.⁵ A *második rész* (A honvédség) rendelkezik a Honvédség jogállásáról és feladatairól, szervezetéről, személyi állományáról, irányításáról és vezetéséről, a Honvédség készenléti és szolgálati rendszeréről, a fegyverek és a katonai jelképek, jelzések használatáról.⁶ A *harmadik rész* (Rendkívüli intézkedések) a terrorveszély, megelőző védelmi helyzet, rendkívüli állapot, szükségállapot, és váratlan támadás idején alkalmazható szabályokat tartalmazza, míg a *negyedik rész* a záró rendelkezéseket.⁷

A honvédelem *alapelvei és céljai* a következőképp összegezhetők: a honvédelem nemzeti ügy, a honvédelmi politika az ország védelmére irányuló közakaratot fejezi ki. Magyarország a nemzeti és szövetségi védelmi képességeinek fenntartásában a saját erejére: nemzetgazdaságának erőforrásaira, a Magyar Honvédség felkészültségére és elszántságára, hazafias elköteleződésére, a fegyveres erők közti együttműködésre épít. A honvédelemre való felkészülésben a törvény által létrehozott jogalanyok a szolgáltatások, az állampolgárok pedig a személyes szolgálat teljesítésével tesznek eleget. A honvédelmi kötelezettségek teljesítése békében nem okozhat aránytalan hátrányt. Az állampolgárok honvédelmi feladatokra felkészülése békében az önkéntes vállaláson alapszik.^{8 9}

A honvédelem irányítását az országgyűlés, a köztársasági elnök, a Kormány, a honvédelmi miniszter, valamint – feladat-és hatásköreinek megfelelően – az illetékes miniszter látja el. A *köztársasági elnök* a hadsereg főparancsnoka, széles körű jogosítványai vannak a MH vezetését illetően. A katonai-stratégiai irányítást a *Honvéd Vezérkar* látja el.

A törvény rendelkezik továbbá a hadkötelezettségről és annak járulékos kötelezettségeiről (adatszolgáltatási, megjelenési, bejelentési kötelezettség).¹⁰ Ezeknek a részletszabályait külön törvény szabályozza (*2013. évi XCVII. tv.*).¹¹

A katonai szolgálat teljesíthető *fegyveresen* vagy *fegyver nélkül*. A fegyveres katonai szolgálat célja a hadkötelesek kiképzése, felkészítése a katonai feladatokra, a MH védelmi képességének erősítése; a fegyver nélküli szolgálat célja pedig a fegyverhasználat nélküli feladatokban való közreműködés és az ehhez szükséges felkészítés.¹²

⁵ Hvt. Első rész.

⁶ Hvt. Második rész

⁷ Hvt. Harmadik rész, Negyedik rész.

⁸ Hvt. 1. §

⁹ PRANDLER Árpád [et al.]: Rendészeti igazgatás. Államigazgatási Főiskola, Bp., 1994. 25.o.

¹⁰ Hvt. 2. § (1).

¹¹ 2013. évi XCVII. törvény a honvédségi adatkezelésről, az egyes honvédelmi kötelezettségek teljesítésével kapcsolatos katonai igazgatási feladatokról

¹² Hvt. 4. §

A Hvt. fontos részletszabályokat állapít meg a *behívás, bevonulás, és leszerelés* rendjére vonatkozóan is.¹³ A honvédségi irányítás lényegi információit már közöltem, a részletes ismertetésre nemigen van lehetőség; viszont kiemelendő, hogy a Hvt. meghatározza az Alaptörvényben is lefektetett *Honvédelmi Tanács* szervezetét és működésének rendjét.¹⁴ Ez lényegében egy speciális politikai-honvédelmi *döntéshozó testület*, amely a *különleges jogrend* (rendkívüli állapot, szükségállapot, váratlan támadás, stb.) idején jön létre.¹⁵ A Honvédelmi Tanács elnöke a köztársasági elnök, tagjai az Országgyűlés elnöke, az országgyűlési képviselőcsoportok vezetői, a miniszterelnök, a miniszterek és -tanácskozási joggal - a Honvéd Vezérkar főnöke.¹⁶ A testület gyakorolja az Országgyűlés által rá átruházott jogokat.¹⁷ A Hvt. annyit finomít az itt leírt alapokon, hogy ezeken a feladatokon túl a Honvédelmi Tanács meghatározza a kormányzás szervezetét, irányát, és feltételeit; a békeszerződés kivételével megkötöti a nemzetközi szerződéseket, meghatározza a közigazgatás területszervezésének rendkívüli rendszerét, és közkegyelmet gyakorol.¹⁸ A HT tagjait mentelmi jog illeti meg. Meg van határozva, hogy bizonyos tagok akadályoztatása esetén ki veheti át a helyüket.¹⁹

A törvény *záró részében* rendelkezik az Észak-Atlanti Szerződés Szervezetével folytatott kooperációról és az általuk kiírt pályázatokkal kapcsolatos szabályokról. Megjelennek ezen részben az értelmező rendelkezések is, illetve a felhatalmazó rendelkezések révén a Kormány felhatalmazást kap speciális honvédelmi szabályok megalkotására (ezek egy része szükségállapotban kerül meghozásra.)²⁰

Összességében véve a 2011-es Hvt. precíz és érthetően megfogalmazott jogszabály, azonban nem sok bravúros jogtechnikai megoldást fedezhetünk fel benne; tovább nehezíti a helyzetet, hogy a honvédelem és a jog fogalomrendszere, szabályai nehezen közelíthetők egymáshoz, illetve, hogy a szabályok egy része alkotmányos szinten van rögzítve, ami miatt különösen szűk mozgástere nyílik a jogalkotónak egy rugalmas, időtálló, átfogó honvédelmi szabályozás megalkotására.

2.2.1) A hatályos Hvt. és a régebbi törvények közti fő eltérések

¹³ Hvt. 5-8. §

¹⁴ Hvt. 30-33. §

¹⁵ TRÓCSÁNYI László, SCHANDA Balázs: Bevezetés az alkotmányjogba; Az Alaptörvény és Magyarország alkotmányos intézményei. HVG-ORAC, Bp., 2014. 4./VII. Különleges jogrend – különleges jogforrások

¹⁶ Alaptv. 49. cikk (1)

¹⁷ Uo. 49. cikk (2) a)

¹⁸ Hvt. 30. §

¹⁹ Hvt. 32. §

²⁰ Hvt. 47/A-54. §

Az utolsó Magyarország területét érintő komoly fegyveres konfliktus, a második világháború óta (a hatályosat is beleértve) hazánkban négy honvédelmi törvénye született. Az első, az 1976. évi I. tv. nem sokban hasonlít a demokratikus jogállami rendszerben hozott szabályozásokhoz, mivel ezt még a szocialista rendszer és annak szellemisége hozta létre. A honvédelmet még nem az alkotmányból kifolyó, központi jelentőségű nemzeti ügyként szemlélte, mint a hatályos joganyag, hanem egyfajta ágazati, funkcionális szabályozásként.²¹

A törvény öt részre, azon belül húsz fejezetre oszlott, nagyjából a jelenlegi beosztást követve: az I. rész meghatározta a honvédelem célját, a II. a honvédelem irányítását és a résztvevő szervek feladatait, a III. a honvédelmi kötelezettségre részletszabályait, a IV. a háborúban esedékes korlátozó intézkedéseket, az V. pedig a záró rész.²² A törvény hatálya a *fegyveres erők*re (Magyar Néphadsereg, BM Határőrség), a *fegyveres testületekre* (rendőrség, munkásőrség, büntetésvégrehajtási testület), a *rendészeti szervekre* (vám-és pénzügyőrség, tűzoltóság) terjedt ki.²³

A *honvédelem irányítása* nem sokban változott azóta, bár akkoriban az *Elnöki Tanács* látta el azokat a honvédelemmel kapcsolatos feladatokat, amelyeket ma a Kormány. A *Minisztertanács*, mint legfőbb szerv, leginkább a felkészítő honvédelmi feladatok koordinálásában kapott vezető szerepet.²⁴

A rendszerváltás eljöttével (az 1989-es alkotmánymódosításkor) az *Alkotmányban* rögzítették a honvédelmi rendszer alapvető feladatait és hatásköreit.²⁵ Ez már *demokratikus alapokat* teremtett a haderő szervezésére; az ennek alapján létrejött új (1993.:CX.) törvény értelmében a neve *Magyar Honvédség*. A törvény a jelenleginél logikusabb szerkesztésű és beosztású volt, *11 fejezetet* ölel fel.²⁶ A törvény személyi hatálya a fegyveres erőkre terjed ki, ami ekkor a honvédség és a határőrség.²⁷ (Ellentétben a hatályos szabályozással, ugyanis a határőrséget időközben megszüntették, illetve a Rendőrségbe integrálták.) A törvény *konceptiója* – a korábbi törvény(ek)el összhangban - még mindig az volt, hogy a haderő sorozás útján kell, hogy felállítva legyen, ahogy fogalmaz: „*A honvédség általános hadkötelezettségen alapuló - keretrendszerű - reguláris haderő.*”²⁸

²¹ FARKAS Ádám – KÁDÁR Pál [szerk.]: Magyarország katonai védelmének közjogi alapjai. Zrínyi Kiadó, Bp., 2016.

²² HORTOBÁGYI i.m. 14-15.o.

²³ HORTOBÁGYI i.m. 11.o.

²⁴ Uo.

²⁵ FARKAS – KÁDÁR i. m. 30.o.; 1949. évi XX. törvény a Magyar Köztársaság alkotmányáról.

²⁶ 1993. évi CX. tv. a honvédelemről

²⁷ PRANDLER i.m. 30.o.

²⁸ 1993. évi CX. tv. 23. § (2)

Ezt a 2004. évi CIV tv. változtatta meg, amely az akkor hatályos (2004-es) Hvt.-t úgy módosította, hogy a MH legyen önkéntességen alapuló katonai szervezet.²⁹ Ezt tükrözi a hatályos Hvt. is, amely így fogalmaz: „*A Honvédség polgári irányítás alatt álló, függelmi rendszerben működő, békében az önkéntességen, rendkívüli állapotban és megelőző védelmi helyzetben az önkéntességen és az általános hadkötelezettségen alapuló állami szervezet...*”³⁰

Szemmel látható tehát, hogy az új Hvt. a régi alapokra épít, csak néhány jogintézményt változtattak meg. Egy érdekesség – és egyben aggály – hogy az 1993-as szabályozás rendelkezett arról is, hogy az ország fegyveres erői nem rendelkeznek és a jövőben sem rendelkezhetnek *tömegpusztító fegyverekkel* – ez az új Hvt.-ből kimaradt, vagy legalábbis, amennyiben a háttérjoganyagból ki is derül, nincs karakánul kimondva.³¹ Kevés kivétellel nem a rendszer alapjai változtak, hanem a jogalkotók hozzáállása.

2.3) Az Egyesült Államok honvédelmi rendszere

A globális szinten egyik legerősebb, mintaként szolgáló katonai rendszert az Egyesült Államok építette ki. Az USA katonai erejét a létrejöttéhez vezető *függetlenségi háború* alapozta meg. Az *US Army*-t, eredeti nevén a Kontinentális Hadsereget (*Continental Army*) a Második Kontinentális Kongresszus állította fel 1775-ben, élén George Washingtonnal, hogy megvívja a brit hadsereggel szemben a felszabadító harcot.³² A *haditengerészet* (*US Navy*), *tengerészgyalogsággal* (*US Marine Corps*), *légierővel*, és *parti őrséggel* együtt alkotják az Egyesült Államok fegyveres erőit.³³ Az Egyesült Államok geopolitikai helyzetének és később a nagyhatalmi státuszra emelkedésének köszönhetően sok harcot látott, és ma is a világ egyik legnagyobb, legerősebb hadereje.³⁴

Eredetileg a sorkatonaságon alapuló *reguláris hadsereg*modellét követte (amely segítségével nagy sikereket ért el a 20. század döntő konfliktusaiban, mint a második világháború vagy a koreai háború), ám a poltikai légkör változásával, demokratizálódásával

²⁹ FARKAS – KÁDÁR i.m. 32. o.

³⁰ Hvt. 35. (1)

³¹ PRANDLER i.m. 26.o.

³² Journals of the Continental Congress, 1774-1789. WEDNESDAY, JUNE 14, 1775. [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc00235\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00235))); (2018.03.27.)

³³ United States Armed Forces. <https://www.thefreedictionary.com/United+States+Armed+Forces> (2018.03.27.); 10 USC 101 (a) (4)

³⁴ Encyclopedia Britannica: The United States Army. <https://www.britannica.com/topic/The-United-States-Army> (2018.03.27.)

(és a vietnámi háború során elszenvedett vereség következményeképp) át kellett térjenek az önkéntes alapokon nyugvó hivatásos hadseregmodell követésére.³⁵

Az Egyesült Államok honvédelmi rendszerét és katonai jogát az *Alkotmány 2. cikk 2. fejezete* alapozza meg³⁶, és a *United States Code*³⁷ 10. címe határozza meg szervezetének és működésének részletes szabályait.³⁸ Ez öt alcímre bomlik: A – általános katonai törvények, B - hadsereg, C – haditengerészet és tengerészgyalogosok D- légiere, E – tartalékos egységek.³⁹ Ezen esszé szempontjából legrelevánsabb az A alcím, amely a katonai erők szervezetének és működésének általános szabályait adja meg. Ez további négy részre oszlik, melyek címe: 1. Szervezet és általános katonai hatáskörök.⁴⁰ 2. Személyzet.⁴¹ 3. Kiképzés és oktatás⁴², 4. Szolgálat, ellátás, és beszerzés.⁴³

Itt csak a lényegi vonásokat kiemelendő mutatnék fel pár szabályt az U.S. Code-ból. A bevezető szakasz a definíciókat, értelmező rendelkezéseket tartalmazza. A Code által szabályozott fegyveres erők túlmutatnak a hazai értelemben vett „honvédelem” definícióján, hiszen itt nemcsak egy államterületen belül vett védekező akciókra korlátozódik a szabályozás, hanem definiálva van, hogy az *Egyesült Államok földrajzi értelemben* mit foglal magába, a „possessions” azaz az USA tengeren túli területei mik, miből állnak a fegyveres erők (a már említett öt elemből), mit jelent az „illetékes államtitkár” (*Secretary concerned*), ki számít tisztnek, mit jelent a *fizetés, ellátmány, a védelmi bizottság*, stb.⁴⁴ (Megjegyzendő, hogy ellentétben a magyar törvény szövegének jogtechnikai megoldásaival, az USA törvénye – az amerikai *common law* szellemében - elképesztően szigorú és részletgazdag, minden fogalom és minden funkció aprólékosan van definiálva, ráadásul a bevezető részben kap helyet.)

A fegyveres erők főparancsnoka az *elnök*,⁴⁵ ő nevezi ki a Szenátus hozzájárulásával a nemzetvédelmi államtitkárt (*Secretary of Defense*), aki a *Department of Defense* (*Nemzetvédelmi Minisztérium*) feje. Az államtitkár civil jogállású, és a kinevezése előtti 7

³⁵ LOCK-PULLAN, Richard: *US Intervention Policy and Army Innovation : From Vietnam to Iraq*. Routledge, London, 2006. 13-25. o.

³⁶ United States Constitution, Article 2, Section 2.

³⁷ Az az egységes törvényköny (kódex) amely az USA törvényeit és a kodifikált szövetségi jogszabályokat tartalmazza.

³⁸ 10 USC 101-2696. §

³⁹ 10 USC Subtitles A, B, C, D, E

⁴⁰ 10 USC Subtitle A, Part I. – Organization and General Military Powers (101 - 499a. §)

⁴¹ 10 USC Subtitle A, Part II. - Personnel (501 – 1801. §)

⁴² 10 USC Subtitle A, Part III. – Training and education (2001 - 2200f. §)

⁴³ 10 USC Subtitle A, Part IV. – Service, Supply and Procurement (2201 – 2926. §)

⁴⁴ 10 USC 101. § (a) (1), (3), (4), (9), (b) (1-5)

⁴⁵ United States Constitution, Article 2, Section 2. Az elnök a hadsereg és a flotta főparancsnoka, jogában áll az USA ellen való bűncselekmények elkövetőnek megkegyelmezni. A Szenátus tanácsára és beleegyezésével egyezményeket köthet. A Kongresszus kizárólagos joga a háborúk indítása.

évben nem viselhet katonai tisztséget,⁴⁶ Az államtitkár az elnök fő asszisztense minden olyan ügyben, amely a minisztériumot érinti. Feladata továbbá meghatározni a nemzetvédelmi stratégiát, tanácskozni a *Vezérkari Főnökök Egyesített Bizottságával* (*Joint Chiefs of Staff*, az USA fő katonai vezetést ellátó szerve), és előkészíteni a honvédelmi költségvetést, amelyet a Kongresszus szavaz meg és hagy jóvá.⁴⁷ Az államtitkár helyettesítését a helyettes államtitkár látja el, illetve van egy *általános tanácsadó* (*General Counsel*), aki a fő jogi tisztséget látja el, és minden olyan feladatkört ellát, amelyet az államtitkár rá bíz. Őket is az elnök nevezi ki.⁴⁸

A *hadsereg* mai közigazgatási *szervezete* az 1947-es National Security Act és az 1949-es kiegészítései révén jött létre. A hadseregért felelős osztály (*Department of the Army*) a Nemzetvédelmi Minisztérium katonai szerve.⁴⁹ A Hadsereg Titkárának Hivatala vezeti. A hadsereg vezérkara tanácsot és segítséget nyújt a titkárnak, és civil feladatokat is ellát, mint például a Mérnöki Hadtest építésügyi feladatai.⁵⁰

Az Egyesült Államok fegyveres erőit tartják a világon a *legerősebbnek*. Bár nem a legnagyobb a létszámuk: Kína fegyveres erői számszerű fölényben van velük szemben, a modernebb taktikák és a gépesítés miatt hatékonyabb erő kifejtésre képesek.⁵¹ Egy igen gyakran felmerült kritika az USA katonai politikájával szemben, hogy a háborút (melyet gyakran vívnak) csak öncélként, a hatalmi státuszuk erősítésére és a figyelem elterelésére használják, mindenesetre ezt nem célja ezen írásnak megítélni.

2.4) A francia honvédelmi rendszer

Hogy a hazai honvédelmi szabályozás és a más népek ilyen jellegű szabályai, rendszerei között megfelelő kontrasztot tudjunk találni, érdemes az *európai kontinens* egy kiemelkedő kultúráját szemügyre venni. A már említett napóeloni alapokra építő, egykoron sikeres, ma már csak a honvédelmi feladatok és NATO-s funkciók ellátására tartott *francia fegyveres erők* (*Forces armées françaises*) többszöri átalakuláson estek át, és lényegi vonásaik igen sokat változtak az évek alatt. Jelen állapotban itt is az önkéntes modellre tértek át 2001 óta, bár Franciaország fenntartja a jogot, hogy háború esetén sorozást vezessen be.⁵²

⁴⁶ 10 USC 113. § (a), (b), (c)

⁴⁷ 10 USC 113. § (2), 151. §

⁴⁸ 10 USC 132. §, 140. §

⁴⁹ Encyclopedia Britannica: The United States Army. <https://www.britannica.com/topic/The-United-States-Army> (2018.03.27.)

⁵⁰ Uo.

⁵¹ Compare armed forces. http://armedforces.eu/compare/country_USA_vs_China (2018.03.28.)

⁵² War Resisters' International: Country report and updates: France. https://www.wri-irg.org/en/programmes/world_survey/country_report/en/France (2018.03.28.)

A francia honvédelmi eszme nagy képviselője volt *Charles De Gaulle* tábornok, aki a II. világháborúban segített a szövetséges hatalmaknak felszabadítani az országot, majd 1958-ban elnökké választották. Időnként a féldiktatorikus módszerektől sem riadt vissza, viszont erőskezü irányításának köszönhető az Ötödik Köztársaság és a jelenleg is hatályos alkotmány létrejötte, a félprezidenciális rendszer, illetve az algériai háború vereséges, de komolyabb veszteségek nélküli lezárása.⁵³ Az általa meghatározott katonai és politikai irányvonalak még mindig erők az országban.⁵⁴

A hadsereg feje itt is a (köztársasági) *elnök*,⁵⁵ Az elnök hatáskörei e téren a következők: ő elnököl a felsőbb szintű védelmi bizottságokban, kinvezei és elbocsátja a legfontosabb katonai vezetőket (például a vezérkar főnökét), meghatározza a fegyveres erők által szükségbe vett erőforrások mennyiségét, nukleáris csapást rendelhet el (ő az egyetlen, akinek erre jogköre van), katonai beavatkozást vezethet más országokban, és hadat üzenhet.⁵⁶

A miniszterelnök irányítja a honvédelmi intézkedések végrehajtását, ebben a *nemzetvédelmi államtitkárság (SGDN)* van segítségére.⁵⁷ A francia Parlament (Nemzetgyűlés és Szenátus) nem játszik komoly szerepet a honvédelmi irányításban, csupán a háborúindításhoz kell a parlamenti jóváhagyás. Továbbá a parlament hirdethet ki hadiállapotot (*état d'siege*) és szükségállapotot (*état d'urgence*)⁵⁸ A konkrét *katonai vezetés* a honvédelmi vezérkar főnökének kezében van (*chef d'état majors des armées, CEMA*). Ő segíti a honvédelmi minisztert a fegyveres erők szervezetével és ellátásával kapcsolatos kérdésekben, vezényli a hadműveleteket, és katonai ügyekben tanácsot adhat a kormánynak.⁵⁹ A francia rendszeren belül jelen levő legnyilvánvalóbb minta a *honvédelmi politika elnöki kézbe koncentrálása*.

Az egész katonai közigazgatás a honvédelmi minisztérium alá van rendelve. A minisztérium különböző szervekre oszlik, mint például az *Általános Vezérkar*, a *Beszerezési Ügynökség*, a *hadsereg*, *haditengerészet*, *légierő* és a *gendarmerie* („csendőrség”) *vezérkara*, valamint az Igazgatási, Egészségügyi és Üzemanyagellátó Általános Titkárság.⁶⁰

⁵³ Encyclopedia Britannica: Charles de Gaulle, President of France. <https://www.britannica.com/biography/Charles-de-Gaulle-president-of-France> (2018.03.28.)

⁵⁴ GEKRATH, Jörg: Military Law in France. European Military Systems, Georg NOLTE [ed.]. De Gruyter Recht, Berlin, 2003. 284.o.

⁵⁵ Constitution of 4 October (továbbiakban. FC) 1958, Title 2, Article 15.

⁵⁶ FC Title 2 Article 5,13, 15; Decree No. 96-520. du 12 June 1996 portant détermination des responsabilités concernant les forces nucléaires.

⁵⁷ FC Title 3, Article 21; GEKRATH i.m. 293.o.

⁵⁸ GEKRATH i.m. 294-295.o.

⁵⁹ Uo. 297.

⁶⁰ Uo. 301.

Sajátos jellemzője a francia hadseregeknek, hogy itt a parancsuralmi rendszert szigorúbban veszik, mint más rendszerekben: a parancs lelkiismereti okokból való megtagadásának joga hiányzik. Korábban a hivatásos katonáknak nem voltak politikai jogai, azaz nem viselhettek hivatalt, nem szavazhattak.⁶¹

Megfigyelhető tehát, hogy a szigorú autoriter gaulle-i alapok még mindig meghatározzák a francia honvédelmi politikát. Egyes államok azt a kritikát hozzák fel ez ellen a rendszer ellen, hogy a franciák anakronisztikus módon értelmezik a szuverenitást, és még mindig a nagyhatalmi státuszukba kapaszkodnak. A globalizációval vesztek vezető státuszukból, mint Európa többi része is, de honvédelmi erejük még mindig tiszteletre méltó.

3.) A honvédelem (és a háború) mint téma a populáris kultúrában

A hadviselés és a honvédelem témája már ősidők óta foglalkoztatja az emberiséget. Ez a tendencia tehát megtestesül a mindenkori kultúrában, médiában is. A valós történések, kronológiák megörökítésén kívül számos olyan mű született, amely a háborúnak és a haza védelmének toposzát dolgozza fel. Javarást az *objektív szempontok helyett* itt a *szubjektivitás* és a *személyes megélés* számít, a főszereplő szemszögén keresztül a szerző olyan tanulságokat akar elénk vetíteni, amelyet átélt, vagy amelyet a hasonló helyzetben lévők éreznének. A belső pszichológiai történések révén vagyunk képesek azonosulni a főhős(ök) álláspontjával, és annak a történelmi kornak vagy helyszínnek a sajátosságaival, viszontagságaival.

3.1) A honvédelem témája az irodalomban

Az említett témában számos írás született, az ókori és középkori krónikáktól, regösénekektől kezdve a „klasszikus” műveken át, mint Shakespeare királydrámái, vagy Csehov Háború és béké-je, az egészen modern interpretációkig.

Itt most csak egyetlen regényt hoznék fel, mint kiemelt példát. *Joseph Heller A 22-es csapdája* című műve egy háborús szatíra, amely a hadviselés borzalmai mellett kidomborítja a társadalom és a harci helyzet abszurd, pikareszk arcát. A regény címe a végtelen, logikátlan bürokrácia által okozott csapdára utal, amelybe bárki könnyedén beleeshet.⁶²

A történet dióhéjban: a második világháború a végéhez közeledik, a szövetségesek bevették Rómát, a győzelem már csak dátum kérdése. John Yossarian a légierő első osztályú bombázótisztje. Megérti a háború szükségességét, és vállalja kötelességét: az a szabály, hogy

⁶¹ Uo.

⁶² HELLER, Joseph: *A 22-es csapdája*. Árkádia, Bp., 1986.

25 bevetést kell a tiszteknek teljesíteni, azután ha még élnek, felváltja őket az utánpótlás. Ámde felettese, a kapzsi és rangra éhes *Cathcart* ezredes csak a saját előrejutásával van elfoglalva, és a tábornokoknak csak úgy tud kedvére tenni, ha egyre több bevetésre küldi katonáit. A huszönötből harminc, negyven, sőt hatvan bevetés lesz. Yossarian és barátja, Dunbar rájön, hogy minden oldalról az életükre törnek, azonban a csapda állítói eltávolítják a túl intelligens, lusta, élethalálharcra képtelen Dunbart. Megimsejük a többi barátját is, akiknek a nevéből is kiderül, hogy színes figurák: többek közt Orr, a „szeretni való, torz törpe”⁶³, Félkupica Fehér Főnök, az indián, és Éhenkórász Joe mind rossz véget érnek. Yossarian a sok bevetés és bajtársainak halála elől mindig a kórházba menekül. Megpróbálja minden eszközzel a leszerelését kérelmezni. Itt az orvos elmondja neki a 22-es csapdájának lényegét: aki örült, annak nem kell bevetésekre menni, de aki kérelmezi, hogy örültnek tekintsék, az nem örült. Yossarian rájön, kimenekülhet a csapdából, ha egyezséget köt a csapdaállítókkal. Ezt utólag megbánja, minthogy „gyenge pillanatában” kötötte, és felrúgja a megállapodást. Mikor megkapja a hírt, hogy Orr sikerrel menekült Svédországba, utána szökik.

A regény stílusa, bár tökéletesen leírja a háború borzalmait, igen mulattató, és szatirikus. Hogy egy kicsit idézzek a szövegből: *„Az ezredes körül specialisták örvénylettek, akik még tovább specializálódtak abban az igyekezetükben, hogy rájöjjenek, mi baja az ezredesnek. Fényt villogtattak a szemébe, vajon lát-e, tűkkel szurkálták az idegeit, hogy meghallgassák, vajon érez-e. Urinájának urológusa, limfájának limfológusa, endokrináinak endokrinológusa, pszichéjének pszichológusa, dermájának dermatológusa volt, pátoszáinak patológusa, cisztájának cisztológusa volt, és ott volt még egy kopasz, pedáns cetológus a Harvard Egyetem Állattani Tanszékéről, akit egy IBM számítógépanódjának meghibásodása következtében kíméletlenül beszippkáltak a Hadsereg Orvosi Karába, s vizitjeit a haldokló ezredesnél azzal töltötte, hogy megpróbálta vele megvitatni a *Moby Dick*-et.”*⁶⁴

Joseph Heller definíciója szerint a 22-es csapdája: *„Csak egy csapda volt, és ez a 22-es csapdája volt, amely leszögezte, hogy bárki, aki közvetlen és valóságos veszélyben saját biztonságára gondol, az a döntésre képes elme természetes működéséről tesz bizonyosságot. Orr örült, tehát le lehet szerelni. Csak annyit kell tennie, hogy kéri a leszerelését, de ha kéri a leszerelését, akkor már nem lehet örült, és további bevetésekre küldhető. Orr lehet örült, ha további bevetésekre megy, és lehet egészséges, ha nem megy. Ha egészséges, akkor viszontmennie kell. Ha megy, akkor örült, és nem kell mennie; de ha nem akarmenni, akkor*

⁶³ Uo. 318.o.

⁶⁴ Uo. 11. o.

*egészséges, és mennie kell.*⁶⁵ A 22-es csapdája ellen nem lehetett fellebbezni sem, hiszen ez egy informális, íratlan szabály. Ez tehát a *bürokrácia* legyőzhetetlen *útvesztője*: a szerző így akarja érzékeltetni, hogy mennyiben befolyásolhatják az életet (vagy halált) a mások – társadalom, család barátok – által kreált szabályok, amelyekre az egyénnek nincs befolyása.

A regény kiválóságát továbbá az adja, hogy érzékletesen bemutatja a háború esztelenségét borzalmait, és az azokból adódó lelki nehézségeket. Egy összefoglaló szerint: „*Heller keserű, groteszk alkotása sokkal érdekesebb képet fest a háborúról, illetve a háború emberekre gyakorolt hatásáról, mint ahogy azt megszokhattuk. Lehet, hogy humorral tényleg könnyebb túlélni a szörnyűségeket, de attól a szörnyűségek még nem válnak meg nem történetké.*”⁶⁶

3.2) Filmek a honvédelemről és a háborúról

A mozgóképes kultúra már a kialakulása óta viszonylagos gyakorisággal foglalkozik a fegyveres harc, konfliktus, sőt a háború és a honvédelem témáival is. A felhozható példák száma több ezerre rúg, azonban én – személyes szempontok és a mondanivalóm illusztrálása végett – csak hármat emelnék ki.

A *hazafi* című film egyike a mára már klasszikusnak mondható alkotásoknak. A Mel Gibson főszereplésével készült történelmi kalandfilm az amerikai szabadságharc eseményeit mutatja be egy fiktív szereplő szempontjából, aki elkeseredett harcot vív az angol elnyomás ellen. *A történet vázlatosan* a következő: *Benjamin Martin* százados özvegyként egyedül neveli hét gyermekét. Pár évvel a történet előtt kemény harcos volt, sok csatában részt vett a franciák és az indiánok ellen, azonban most igyekszik elkerülni a háborút. Ellenzi a háborút, de a nemzetgyűlésen, melyen részt vesz, mégis megszavazzák. Ezt követően legidősebb fia, *Gabriel* katonának áll, a fiatalabbak is követni próbálják, de lebeszéli őket. Mikor a brit sereg elfoglalja a városukat a szadista *Tavington ezredes*, aki az antagonistája a filmben, Gabrielt foglyul ejti és ki akarja végeztetni. Benjaminban elpattan egy húr, két fiatalabb fiával ad-hoc gerillacsapatot alkotnak, és lesből lemészárolják az angol őrcsapatot, megmentve a fiút.

Később az amerikaiak felfigyelnek sikereire, és a hadsereg vezérkarának kérésére ezredes lesz a milíciánál. Az a feladata, hogy parasztokból, önkéntesekből verbuváljon és vezessen sereget. A gerilla harcmodornak köszönhetően nagyon sikeresek lesznek, mivel mindig lesből támadnak a britekre, azok nem tudnak megfelelően védekezni. Vérdíjat tűznek

⁶⁵ Uo. 43. o.

⁶⁶ Ekultúra: Joseph Heller: A 22-es csapdája. <http://www.ekultura.hu/olvasnivalo/o/cikk/2005-03-03+00%3A00%3A00/joseph-heller-a-22-es-csapdaja> (2018. 03.30)

ki Martin fejére, és menekülnie kell, de közben számos harci küldetést sikerrel hajt végre a csapatával, például felrobbantanak egy angol hajót, illetve csellel ráveszik az ellenséget a „fogolycserére”. Közben az ezredes hajtóvadászatot rendel el a családjával szemben, a bűvöltheyüket megtámadják, és alig tudnak menekedni, illetve a városuk népét különösen kegyetlen módon kivégzi: rájuk zárja és felgyújtja a templomot. A főhős megesküszik, hogy még a háború vége előtt meg fogja ölni az antihőst. Egy bosszúküldetés, amelyet ellene szerveznek, balul üt ki: meghal Gabriel. Benjamin lelkileg kicsit megrokkban, de nem adja fel a küzdelmet. A végső, döntő csatában a brit hadsereg, akiknek idáig kedvezett a hadi szerencse, majdnem lemészárolja hősünk csapatát, azonban az amerikaiak hősiességük ellenállásának köszönhetően megfutamodnak. A főhős és az antihős elkeseredett párbaj vívnak a csata kellős közepén, és végül, már majdnem belehal, a hős nyer. Végül talál magának egy új feleséget, és családjával egy farmra költöznek.⁶⁷

A filmről elmondható, hogy bár *témája komoly, és hősiesség illetve hazafias* jellegű tónusokat mutat, nem veszi komolyan magát. A helyenként feszült hangulatot és a háborús légkört megtörik azok a humoros aranyköpések, beszélgetések, amelyet a szereplők gyakran elsütnek, pl. mikor bemennek a kocsmába toborozni: „-*Ön szerint ez a megfelelő hely milicistákat toborozni?* (Martin beljebb lép, elkiáltja magát): *-Isten óvja György királyt!* (Megfagy a levegő, a tömeg elkezd késeket, pisztolyt ragadni, a főhősök kiszaladnak) *-Azt hiszem, megfelelő hely.*”⁶⁸, illetve egy angol hölgy reakciója, amikor felrobban a hajó: „*Tűzijáték? Milyen csodás.*”⁶⁹

A film a háború borzalmainak akkurátus bemutatásán kívül *pozitív üzeneteket* is tartalmaz (viccek, happy end), nagyban épít a *sztereotípiák* erejére. Az angol lordok még hisznek a becsület és a lovagiasság erejében, a filmben látható egyetlen fontosabb francia szereplő pedig piperkőc. Összességében véve a film elgondolkodtató alkotás, amelyben benne van a hősiesség, humor, és a vérontás fölösleges mivoltának kemény pszichológiai tanulsága.

Egy másik alkotás, amelyet nagyon vázlatosan bemutatnék, az *Ellenség a kapuknál*. Ennek műfaja háborús dráma. Kivonatolt története az, hogy a már említett Szovjetunióban a második világháború (avagy a honvédő háború) idején egy átlag katona, Vaszilij Zajcev jó löni tudásának köszönhetően kiemelkedik, és Danyilov komisszár segítségével magas rangra jut, mint mesterlövész. Zajcev nemzeti hőssé válik, közben a Szovjetunió a német támadásnak

⁶⁷ EMMERICH, Roland: A hazafi (film), InterCom, 2000.

⁶⁸ Uo. 01:00:10 - 01:00:31

⁶⁹ Uo. 01:11:27

köszönhetően már szinte romokban hever, Sztálin megparancsolja, hogy a hadsereg minden erejével védje meg a várost, és magát Hruscovot küldi, hogy felügyelje a védelmet. Zajcev és a komisszár vállvetve harcolnak, de aztán viszályt szít köztük, hogy egyazon nőbe lesznek szerelmesek. A németek legjobb mesterlövészüket, König őrnagyot küldik Zajcev megsemmisítésére. A két férfi módszeresen és türelmesen vadászik egymásra, és vívja személyes háborúját, miközben mindkét oldalon sokan esnek el a harcok alatt. Mint sejthető, a végén a főhős nyer, és a lánnyal egymásra talál, a német meghal.⁷⁰

Az előző filmmel szemben itt a *komoly szempontokon* van a hangsúly: a háború és a szovjet rendszer embertelensége, kietlensége, az élet hiábavalósága kiérződik a képkockák mögül. A főhős, bár kezdetben egy alig gondolkodó, alig érző, csak a túlélésre koncentráló kiüresedett ember, egyre inkább megelevenedik, személyiségének vonásai és motivációi kiütköznek a monológok, párbeszédok során. A karakterek és a forgatókönyv egyszerű, de a lényegét jól ábrázolja a rendező. Úgy is fogalmazhatunk, hogy ez egy (történelmileg) nem teljesen hiteles, de hihető film; pontatlanságai ellenére az atmoszférája és összehatása zseniális, és kiválóan érzékelteti a harc keltette pszichológiai feszültséget.^{71 72}

Még egy filmművészeti alkotás, amely kiválóan érzékelteti a háború borzalmai közt megtartott emberséget és a béke iránti elkötelezettséget, A fegyvertelen katona.⁷³ A történet szintén a második világháborúban játszódik, a távolkeleti fronton. Az orvos, Desmond Doss (Andrew Garfield) egy alkoholista, megfáradt veterán apa és egy gondterhelt anya mellett nő fel; gyermekkorában majdnem megölte öccsét, ezért, és vallási meggyőződése miatt nem hajlandó fegyvert fogni. Mikor a japánok megtámadják Pearl Harbor-t, úgy dönt, beáll a hadseregbe, de továbbra is ragaszkodik elveihez. Emiatt katonatársai megverik, megalázzák, de nem használ továbbra sem fegyvert, csak gyógyítja a sebesülteket. Még az esküvőjére sem hajlandóak elengedni, sőt a parancsok megtagadása miatt hadbíróság elé citálják. Apja és barátai (az őrmester, illetve Doss menyasszonya) segítségével azonban felmentik a parancsmegtagadás vádjá alól. Az ő ideje akkor jön el, amikor Okinava szigetén megment mintegy 75 embert a biztos pusztulástól, így a háború végén Bíborszív Érdemrenddel kitüntetik, és elismerik azt, amiért folyamatosan küzdött.

A film fő témája, üzenete a rendszerrel szembeni *ellenállás* és az *egyéni értékek* mellett kiállás a társadalom rosszállása ellenére is. (Az egyik felettese úgy fogalmaz, hogy:

⁷⁰ ANNAUD, Jean-Jacques: *Ellenség a kapuknál* (film). Paramount Pictures, 2001.

⁷¹ Uo.

⁷² RÉVÉSZ Béla: *Retro-mozi: Ellenség a kapuknál* (filmkritika). <https://honvedelem.hu/cikk/47243> (2018.03.30.)

⁷³ GIBSON, Mel: *A fegyvertelen katona* (film). Summit Entertainment, 2016.

„Az Egyesült Államok hadserege nem hibázik. Tehát ha itt gond van, akkor maga a gond.”⁷⁴⁾

A főszereplő legfőbb erénye, hogy olyan következetesen kiáll elvei mellett, hogy még a szigoráról híres U.S. Army is kénytelen meghátrálni előtte, és elismerni tevékenységét, hősiességét. A mű képi világa nagyon érzéletes, a véres valóság bemutatásán kívül szinte művészi érzékkel készítették el a robbanásokat, lángokat, sebesült vagy halott testeket.

4.) A leszűrhető jogelméleti-jogszociológiai tanulságok.

A *hazafi* kapcsán felmerülő legjellegzetesebb jogelméleti tanulság talán a *radbruch-i formula* néven nevezett gondolat.⁷⁵ Legrövidebben úgy lehet ezt definiálni, hogy ha az írott jog igazságtalanná válik (vagyis szembe kerül a természetjogi, alapvető emberi jogi elvekkel és jogos érdekekkel), akkor a nép – akár fegyverrel is – köteles szembeszállni az elnyomó hatalommal szemben, míg az igazságosságot helyre nem állítják. Bár ezt a formulát a náci rezsím résztvevőinek megbüntetése érdekében hozták, ideológiai alapja nem újkeletű: az amerikai Alapító Atyák is hasonló elven mondták ki az elszakadást Nagy-Britanniától, lévén, hogy a rájuk kiszabott adók túl terhesek, a körülmények élehetetlenek voltak. Maga Martin sem akar eleinte harcolni, de kénytelen szembenézni a társadalmi helyzettel, a történelmi szükségszerűséggel, és szerettei révén ő maga is érintetté válik a küzdelemben. (Ugyanez az elv jelenik meg, bár korlátozottabb formában, *A fegyvertelen katonában* is, hiszen a történetben egyedül Doss rendelkezett azokkal a morális elvekkel, amik lehetővé tették számára, hogy a háború embertelen és zsarnoki viszonyai között is megtartsa pacifista meggyőződését, mely által szembeszegült az általa igazságtalannak tartott törvényekkel.)

A másik jelentős elv, amit fel lehet itt hozni, a *talio* (szemet szemért, fogat fogért) *elve*, amely az antik kultúrák óta szerves része a jogi gondolkodásnak.⁷⁶ Jóllehet a jóléti államok megjelenése ezt már okafogyottá tette, ilyen kiélezett honvédelmi (önvédelmi) helyzetben érthető módon előkerül. A főhős küzdelme a szadista Tavington ezredessel nemcsak érzelmi vonatkozású, hanem az ilyenkor felkorbácsolt bosszú iránti vágyat, az ellenállás elvi, szocio-pszichológiai alapjait is bemutatja.

Az Ellenség a kapuknál egy olyan helyzetet mutat be, ahol a háborús viszonyokon kívül még egy egyéniséget tagadó, kollektivista, diktatórikus jogi és társadalmi rendszer kritériumainak is meg kell a szereplőknek felelni. Itt az adja a hősök, illetve antihősök emberi

⁷⁴ Uo. 37:09

⁷⁵ Lásd pl. FOGARASSY Edit: A Radbruch-i formula jelentősége. Publicationes Universitatis Miskolciensis. Sectio Juridica et Politica 20. évf. 1. sz. 59-72. o, 2002. http://www.matarka.hu/cikk_list.php?fusz=17549 (2018.06.02)

⁷⁶ Kislexikon: Talio. <http://www.kislexikon.hu/talio.html> (2018.06.02.)

nagyságát, dicsőségét, hogy az arctalan tömegeből, ahol „*minden katonára három puskagolyó jut*”, az embertelen körülményekből képesek felemelkedni, és a saját egyéniségüket megmutatni, saját harcaikat megvívni.⁷⁷ Ha a jogelvek szintjén akarnánk tehát értelmezni (amennyiben ez lehetséges), akkor itt a szigorú doktrinális, ideológiai alapokon nyugvó rendszer és az egyéni önérték, jogok, jogos érdekek közötti *feszültség* manifesztációját láthatjuk. Egy ilyen helyzet *Hobbes*, *Rousseau* és az általuk fémjelzett irányba tartó filozófusok szerint csak egy forradalomban, társadalmi konfliktusban csúcsosodhat ki.⁷⁸

A már többször is idézett, *A fegyvertelen katona* című filmben van egy rövid, ámde el nem hanyagolható jelenet, amely az *értelmezés problémakörére* hívja fel a figyelmet. Dosst a felettesei elmeorvoshoz küldik, mivel nem hajlandó fegyvert fogni. Mikor elmondja a pszichiáternek a problémáját, az utóbbi rájön, hogy nem beteg, csupán nagyon szigorúan ragaszkodik a vallása által diktált elvekhez. Próbálja meggyőzni katonatársát, hogy a „*ne ölj*” azt jelenti, hogy „*ne kövess el gyilkosságot*”, és egyébként is háborús helyzetben Isten megbocsátja az ölést (vagyis a mainstream vallásosság megszorító jellegű értelmezésével él).⁷⁹ Doss számára azonban a *ne ölj* parancsolat *expressis verbis* azt jelenti, hogy ne ölj, nincsenek kivételek. Érdekes módon az, hogy egy bibliai szabályt is többféleképpen lehet értelmezni, előrevetíti a hétköznapi életben is tapasztalható jogértelmezés által keltett nehézségeket.

Az említett filmművészeti alkotásokból leszűrhető legáltalánosabb konzekvencia, hogy szükséghelyzetben, harci helyzetben, bár korlátozódnak a jogok és radikalizálódnak az emberek, nem szabad feladni belső meggyőződésünket, elveinket, amelyek különbé tesznek az „arctalan” tömegtől.

5.) Záró gondolatok

Mint azt már az eddigiekből leszűrhetette az olvasó, a honvédelem és a jog témája, a populáris kultúrával való kapcsolódások keresése igen árnyalt témakör. Ha mindent elmondanánk róla, amit tudni érdemes, azzal egész könyveket tölthetnénk meg. Esszém során csak a *lényegi vonásokat* törekedtem számításba venni, és azon *kérdésekre* kerestem választ, hogy *hogyan alakult ki a honvédelem* mai arculata, intézményrendszere, *milyenek a domináns honvédelmi rendszerek*, ezek milyen megoldásokat vesznek igénybe? Továbbá, *a jogrendbe mindezek*

⁷⁷ ANNAUD i. m.

⁷⁸ Lásd pl. MCADRLE, Ann: Rousseau on Rousseau: The Individual and Society. The Review of Politics Vol. 39, No. 2. (Apr., 1977) 250-279. o.

⁷⁹ GIBSON i.m., 43:15.

hogyan illeszkednek? Hogyan tükröződik vissza ez a témakör a populáris kultúrában? Nem törekedtem semmilyen *konkrét hipotézis* felállítására, csupán a kérdésfeltevés és a *status quo* vizsgálata volt célom. A mű első egysége a jogi szabályozás vizsgálatára tért ki, ebben az egyes rendszerek *fő karakterisztikáit* igyekeztem kidomborítani. A második rész céljának azt tűztem ki, hogy példálózó jelleggel mutassa be, hogy csapódott le a honvédelem témaköre a *populáris kultúra* „lakmuszpapírján”. Végül az utolsó rész a médiából vett példák jogelméleti-jogszociológia háttérét kutatva igyekszik a tanulságokat szintetizálni. A multidiszclipináris jellegből adódóan nehezen állt össze a téma, de a benne foglalt gondolatok a köztük lévő természetes tudományterületi diffúzió ellenére is egységet képeznek. Bízom benne, hogy eme tanulmány gondolatébresztőnek bizonyul majd, és alapot nyújt e háttérbe szorult, keveset kutatott téma jogelméleti tárgyalásához.

A vegyes jogrendszerek jellegadó vonásai Skócia, Dél-Afrika, Québec-tartomány és Louisiana állam példáján keresztül

Hettinger Sándor

1. Alapvetés

A vegyes vagy hibrid jogrendszerek (az angolszász bontott terminológiával élve *mixed legal system*, illetve *mixed jurisdiction*) létezését azzal a feltétellel fogadhatjuk el, ha valamely klasszifikációs megoldás mellett elkötelezve magunkat az osztályozás alapján meghatározott jogcsaládok, jogkörök „keveredését” mutatjuk ki egy adott jogrendszer vonatkozásában. Szélsőséges értelemben bármely jogrendszer ilyennek tekinthető, hiszen nem létezik olyan állam, melynek jogát történelmi fejlődése során ne érték volna idegen hatások.¹ A jogrendszerek klasszifikációs irodalmának legnagyobb hatású munkáit alapul véve azonban egy ennél szűkebb, a beazonosított jogcsoportok jegyeit *erőteljesen* felmutató jogrendszerek esetén lehet egyáltalán szó vegyes jogrendszerről. Vizsgálatuk rávilágíthat arra, hogy a különböző felfogások mellett elköteleződött jogászok számára e jogrendszerek *sui generis* megoldásai elfogadható és követendő mintaként szolgálhatnak,² valamint új távlatokat nyithatnak a különböző jogcsaládok találkozásakor megnyíló jogközelítési lehetőségeknek.³

A vegyes jogrendszerekre vonatkozó elmélet gyökerei szinte az összehasonlító jog kialakulásának kezdetéig vezethetők vissza. A legelső, meghatározást tartalmazó tudományos írás 1899-ben született,⁴ melyben a szerző, Frederick Parker Walton Kanada jogrendszerét elemezve ír a kontinentális jogrendszerek és a *common law* keveredéséről. Az általa adott meghatározás szerint „vegyes jogrendszerben a római-germán jogi hagyományt bizonyos fokig az angolszász-amerikai jog elemei hatják át”.⁵ Bár ezt követően születnek hasonló jellegű tudományos írások,⁶ az 1950-es évekig az összehasonlító jogászok nem sok figyelmet szenteltek e kérdéskör vizsgálatára. Az ötvenes évektől kezdve azonban egy olyan, vegyes jogrendszerek vizsgálatát folytató műhely kialakítására kerül sor, amely lökést adott az ilyen jellegű összehasonlító jogi kutatásoknak.⁷ T. B. Smith, a skót Aberdeen egyetem kutatójaként arra hívta fel a figyelmet, hogy e téma vizsgálata mindenekelőtt azok számára lehet hasznos, akik maguk is valamely vegyes jogrendszer megismerése, megértése céljából kívánnak más, hasonló helyzetben lévő vegyes jogrendszerek tapasztalataira támaszkodni. Smith számos

¹ Esin ÖRÜCÜ: „What is a Mixed Legal System: Exclusion or Expansion?” in Esin ÖRÜCÜ (szerk.): *Mixed Legal Systems at New Frontiers*, London, Wildy, Simmonds & Hill, 2010, 37–55.

² Jean BENOIST et al.: *La formation du droit national dans les pays de droit mixte : les systèmes juridiques de Common law et de droit civil*, Aix-Marseille, Presses Universitaires, 1989, 11.

³ Basil MARKESINIS (szerk.): *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, Oxford, Clarendon Press, 1993, 33.

⁴ Frederick Parker WALTON: „The Civil Law and the Common Law in Canada”, ¹¹*Juridical Review*, 1899/12, 291.

⁵ Frederick Parker WALTON: *The Scope and Interpretation of the Civil Code*, Montreal, Wilson & Lafleur Ltée, 1907, 1.

⁶ R.W. LEE: „The Civil Law and the Common Law. A world survey 1915”, ¹⁴*Michigan Law Review*, 1915/2, 89.

⁷ J. DU PLESSIS: *Comparative Law and the Study of Mixed Legal Systems*, Oxford, Oxford University Press, 2006, 75.

publikációja, konferenciaszervező tevékenysége e gondolat talaján hozta össze a téma skót, dél-afrikai, vagy éppen louisianai szakértőit. Smith tevékenysége nyomán kezdett az az elgondolás kibontakozni, hogy az összehasonlító jog klasszifikációs megoldásait újra gondolva egy vegyes jogkör, vagy jogcsalád léte is indokolható lenne. Maga a vegyes jogrendszer elnevezés is Smith nevéhez fűződik, aki egy 1965-ös cikkében használta ezt először.⁸ A szerző a skót vegyes jogrendszerrel kapcsolatosan ekként ír: „alapvetően kontinentális jogi rendszer, amelyre az anglo-amerikai *common law* környezet nyomása alatt részben e rivális rendszer joggyakorlata telepedett rá.”⁹

Valamivel később Robin Evans-Jones ugyancsak Skócia viszonylatában a következőt írta: „a terminus napjaink Skóciáját tekintve azt a jogrendszert fedi le, ahol mind a kontinentális jogi, mind pedig az angolszász *common law* szemlélet jegyei nagymértékben gyökeret vertek”.¹⁰ E szűk felfogás tehát azokat a jogrendszereket tekinti ilyennek, melyeknél a római-germán, vagy más elnevezéssel kontinentális (kontinentális jogi) és a *common law* jogrendszerek jellegzetességei *együtt élnek*.¹¹ Az ennél tágabb (de nem a korábban jelzett szélsőségesen tág, minden jogrendszert vegyesnek tekintő) felfogás alapján pedig minden olyan jogrendszer vegyesnek tekinthető, melyben bármilyen, legalább két jogcsalád *markáns hatása* érzékelhető.¹²

A ma már mozgalomként is aposztrofált¹³ irányzat igazából a XXI. század elején vált igazán markánsná, amit leginkább a Vernon V. Palmer által szerkesztett, a „harmadik jogcsalád” fogalmát már címében is tartalmazó kötet fémjelez.¹⁴ E kötetben az irányzat alapvetésein túl a „jogcsalád” egyes tagjait képviselő szakértők saját, vegyesnek tekintett jogrendszeréről szóló írásai is helyet kapnak. Palmer határozottan amellet érvel, (akárcsak e megközelítés egy másik képviselője, R. Evans-Jones¹⁵) hogy „klasszikus értelemben vett” vegyes jogcsaládba csakis azon jogrendszerek tartoznak, melyeknél a *common law* és a római-germán jogcsalád jegyei meghatározó mértékben szerepet játszanak.¹⁶

Ugyanakkor későbbi írásában ő maga is elismeri, hogy az általa vallott felfogással rivalizáló pluralizmus elmélet egészen új távlatokat nyithat az összehasonlító jog számára.¹⁷ A magyar szaknyelv szerinti jogelméleti irányzatokat magába foglaló jogi pluralizmustól eltérő, Tetley, Öröcű, Attwool és Coyle szerinti felfogás alapján a római germán és *common law* elemek

⁸ T. B. SMITH: „The Preservation of the Civilian Tradition in ‘Mixed Jurisdictions’” in A. N. YIANNOPOULOS (szerk.): *Civil Law in the Modern World*, Baton Rouge, Louisiana State University Press, 1965, 2.

⁹ Lásd SMITH (8. j.) 2–3.

¹⁰ R. EVANS-JONES: „Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law”, ¹¹⁴*Law Quarterly Review*, 1998, 228.

¹¹ E körbe az alábbi jogrendszerek sorolhatók: Skócia, Dél-Afrika, Louisiana, Québec-tartomány, Puerto Rico, Fülöp-szigetek, Srí Lanka, Ciprus, Botswana, Guyana, Málta, Mauritius, Namíbia, Santa Lucia, valamint a Seychelles-szigetek.

¹² ÖRÜCŰ (1. j.) 54–55.

¹³ Kenneth G.C. REID: „The Idea of Mixed Legal Systems”, *Tulane Law Review*, 2003/12, 1.

¹⁴ Vernon V. PALMER: *Mixed Jurisdictions Worldwide: The Third Legal Family*, Cambridge, Cambridge University Press, ²2012.

¹⁵ Lásd R. EVANS-JONES (szerk.): *The Civil Law Tradition in Scotland*, Edinburgh, Stair Society, ²1995.

¹⁶ PALMER (14. j.) 3.

¹⁷ Vernon V. PALMER: „Two Rival Theories of Mixed Legal Systems”, *Electronic Journal of Comparative Law*. 2008/5, 2.

szerves együttélésére alapozott vegyes jogrendszereken túl azon jogrendszerek is vegyesnek minősíthetők, ahol a szokásjogi elemek, a gyarmatosítás következményeként megjelenő nyugati jogintézményekkel, valamint vallási jogokkal keverednek. Az e felfogást vallók ennek megfelelően jelentősen kibővítik a vegyes jogrendszerek csoportját, és Ausztráliától kezdve Hong Kongon át egészen az Európai Unióig merészkednek.¹⁸

Erre a jogi pluralizmusra építő vegyes jogrendszer fogalmát tág értelemben használó irányzat plasztikus megjelenítését az ottawai jogi karon dolgozták ki, és csoportosításuk a világ nagy jogrendszereit bemutató, 2000-ben megjelenő enciklopédiában is helyet kapott.¹⁹

Palmer utal arra, hogy a jogi pluralizmus alapú megközelítés a jogcsalád felfogást alapjaiban boríthatja fel, és hagyományosan „tisztá” római-germán, vagy *common law* jogrendszerek „vegyes” jellegére is rávilágíthat, hiszen akár az angol jogrendszer sem tekinthető ma már tiszta *common law* rendszernek, miután ott is erőteljes kontinentális elemek jelentek meg az erősödő törvényhozás, vagy éppen az uniós tagság következményeként.

2. A klasszikus értelemben vett vegyes jogrendszerek általános jellemzői

A fentiek alapján jogosan merül fel a kérdés, hogy melyek azok a jellegadó vonások, amelyek e jogrendszereket összefűzik? A kérdés megválaszolása, azaz a keveredés mértékének kimutatása helyesen kiválasztott néhány stíluselemre²⁰ és Palmer rendszerezési elvére²¹ támaszkodva elvégezhető. A „nyugati” jogcsaládok találkozásából létrejött jogrendszerek ugyanis stíluselemnek tekinthető vonásokon osztoznak. Alapvetően három jellegadó, kritériumként is megjeleníthető stíluselemet érdemes ehhez felhasználni. Ezek a későbbiekben vizsgált vegyes jogrendszerek kialakulásához vezető (i.) történeti szálak, amelyek a vizsgált jogrendszer szerkezetét, struktúráját érintik, az (ii.) egyes jogcsaládok (*common law* közjogi oldal, illetve kontinentális jog magánjogi oldala) súlyát mérő stíluselem, illetve a (iii.) jellemző jogászai gondolkodásmód. E stíluselemek megnyugtatóan elhatárolják az adott jogrendszert a szűk értelemben vett vegyes jogrendszerek közé nem sorolható rendszerektől.

A fentiek alapján a bemutatásra kerülő vegyes jogrendszerek közös jellemzőjeként a hasonló történeti fejlődést kell kiemelni. Jellemző, hogy az adott vegyes jogrendszer gyarmatosítás vagy nemzetközi szintű közjogi egyezmény révén jöttek létre. Az adott jogrendszerben először a kontinentális jog fejtette ki a hatását, amelyet később a *common law* hatása követett. Ami a későbbi jogfejlődést illeti, a két jogcsalád egykori állapota fejtette ki a hatását, amelynek következtében a vegyes jogrendszerben található kontinentális jogi elemek már nem ugyanazok, amelyek kiinduló jogrendszerben ma hatályosak. Sőt, vannak olyan

¹⁸ N. MARIANI – G. FUENTES: *World Legal Systems/Les Systéme Juridique dans le Monde*, Montréal, Wilson and Lafleur, 2000, 45.

¹⁹ N. MARIANI – G. FUENTES (18. j.) 48.

²⁰ Konrad ZWEIGERT – Hein KÖTZ: *Einführung in die Rechtsvergleichung*, Tübingen, J.C.B.Mohr, 1971, 72.

²¹ PALMER: *Mixed Jurisdictions Worldwide* (14. j.) 12. Lásd még PALMER (szerk.): „First Worlwide Congress on Mixed Jurisdictions: Saliience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities”, *Tulane Law Review*, 2003, 78.

jogintézmények is, amelyek a begyes jogrendszerben még léteznek, de a származás helyén már nem léteznek, vagy legalábbis nem abban a formában.

A történeti stíloselemből következik az, hogy a *common law* közjogi, illetve a kontinentális jogi hagyományon kimunkált magánjogi gondolkodásmód *számottevő* mértékben van jelen az adott jogrendszerben. Ebbe a körbe a két jogrendszer egymásra hatásának terjedelmét illeszthetjük, különös tekintettel a kontinentális jogi jogterületekre gyakorolt anyagi jogi *common law* hatásra, illetve eljárásjogi változások mértékére. A vegyes jogrendszerek további ismertető jegye, hogy vegyességet kimutatni csakis a magánjog területén lehet. Itt a *common law* elemekkel vegyülnek ez egyes magánjogi jogintézmények megőrizve a kontinentális jogi személyek, család, tulajdon, öröklés és kötelmek tagolást. A közjogban döntő módon a *common law* érvényesül a rá jellemző bírósági szervezeti rendszerrel és *common law* eljárási és precedensrendszerrel. E stíloselem megfelelő elhatárolásként szolgál például Texas és Kalifornia államok jogára tekintettel, mivel ugyan magánjoguk büszkélkedik némi kontinentális jogi vonással, mégis *common law* jellegű tagállamoknak tekintik őket, ellentétben a vegyes jogrendszerű Louisianával, ahol a kontinentális jogi hatás meghatározó módon érvényesül. Végül a jellemző jogászai gondolkodásmód a jogászai hivatás jellemvonásain, a bírák és ítélezésük intézményesült formáin, a bírói határozatok indokolásán érezhető *common law* stíluson, az esetjogi szemlélet terjedelmén, illetve a törvényi rendelkezések értelmezésén szűrődhet át.

3. A jogrendszercsoport egyes tagjai

3.1. Skócia

A skót jog (*Scots law* avagy *Scottish common law*) egyedülállóságát Kecskés László szerint egyrészt a többszöri újrakezdés, a külföldi jogi megoldások közötti válogatás adta, másrészt pedig a római-germán szellem és a *common law* mellett el nem kötelezett volta fogja keretbe.²² Ezt a félutasságot mi sem mutatja jobban, minthogy a 12. századtól kezdve kialakuló sajátos skóciai jog hol az egyik, hol pedig a másik hagyomány mellett tört lándzsát.²³

Skócia vegyes jogrendszerként való „minősítése” az 1707-es Skóciát Angliával egyesítő *Act of Union* (Egyesülési törvények) életbelépésével vette igazi kezdetét, amellyel a közjog és a közjogi intézmények közössé váltak, míg az addig két nemzet magánjoga (az egyik oldalon a *common law*, a másikon pedig a *Scots law*) továbbra is elkülönült. A kelta szokásjogi gyökerek,²⁴ az angol jog korai hatása, a kétszáz évig tartó francia szövetségnek és a

²² KECSKÉS László: *Polgári jogi fejlődés az angol és a skót jogban*, Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2012, 335.

²³ HAMZA Gábor: *Az európai magánjog fejlődése*. Budapest, Nemzeti Tankönyvkiadó, 2002, 190.

²⁴ Lásd az élelmiszerekben behajtott hűbér (*payment of cain*), az 1773-ig fennmaradó szokásjogot kimondó bíró, a *breitheamh* (később a *High Court of Justiciary* mellett működő halálbüntetést kiszabó *doomster*) intézményét. KECSKÉS (23. j.) 340.

kálvinizmus térhódításának köszönhetően beszivárgott kánonjogi hatások²⁵ is mind arra engednek következtetni, hogy Skócia joga már az 1707-es Egyesülési törvények előtt is vegyes jogrendszeri vonásokat hordozott. Az angol jog kiemelten és nem elhanyagolható módon gyakorolt befolyást Skóciára. Ezt főként az angol jogot túlélő *sheriff* és a *justiciary* intézménye, a skót jogban hamar elhaló *writ* (skót elnevezéssel *brieve*) perrendje, a feudalizmusban gyökerező öröklési és földjogi intézmények,²⁶ és az angol jogtudós, Glanvill ihlette kora XIV. századi skót jogtudomány fő eredménye, a *Regiam Majestatem* kompilációja mutatja.²⁷ A bannockburni csatában (1314) tetőző skót függetlenségi háború után a régi rendszer szétforgácsolódott, Skócia hátat fordított az angol jognak,²⁸ a korabeli skót jog forrásának számító *Regiam Majestatem* és a bárói bíróságok perrendjéről szóló *Quoniam Attachamenta* is erről tanúskodik, mivel másolásuk során mind római jogi, mind pedig az azon alapuló *ius commune* anyagából találhatunk benne rendelkezéseket. Cooper szerint „a skót jog egyenesen a római jogból gyökerezett ki újra.”²⁹

Az 1707-es esztendő az angol jog recepcióját hozta a skótok életébe, amelyet az angol bírói és parlamentáris intézmények bevezetése indított meg. Alkotmányjogi elmélet szerint az Egyesülési törvények az újonnan létrejövő Nagy-Britannia alapító okiratainak tekinthetők ahol a szuverenitás letéteményesei a régi skót és angol parlamentet feloszlató új brit Parlament, élén VI. Jakab skót királlyal. Az egyesülést kiváltó törvényeket külön fogadta el a skót és az angol parlament, majd a két királyság közötti egyeztetéseket követően léptek hatályba. A két ország elveszítette addigi szuverenitását és új államalakulatként, a perszonaluniót felváltva, Nagy-Britanniaként folytatták közös útjukat. Az Egyesülési törvények hatására a két ország vámunióba lépett, továbbá többek között rendezték a közös költségvetésbe történő befizetések arányát (1:40 arányban), elismerték az anglikán és a skót presbiteriánus egyház (*Kirk*) egyenrangúságát.

Az Egyesülési Szerződés (*Treaty of Union*) nem alakította át a skót jogintézményeket, sőt úgy rendelkezett, hogy a skót jogot és a független bírósági rendszert meg kell őrizni. Ebbe a rendszerbe tartozik az 1532-ben alapított *Court of Session*, a skót legfelsőbb polgári bíróság, a *Court of Justiciary*, mint legfelsőbb büntetőbíróság és a tengerjogi vitákat eldöntő *Court of Admiralty*. Az angol bíróságok, így a Kancelláriabíróságnak, illetve az egyéb westminsteri bíróságoknak (*King's Bench*, *Court of Common Pleas*) nem lehetett skót jogvitát eldönteni. Az újonnan felállított és egészen 1856-os eltörléséig fennálló *Court of Exchequer* volt hivatott eldönteni a vámokkal és jövedéki adókkal kapcsolatos jogkérdéseket Skóciában. A brit parlament hatásköre kiterjedt ugyan a bírósági rendszer átalakítására, amennyiben az az

²⁵ A 14-15. századi skót jogászok francia egyetemeken tanultak (*Orléans, Avignon, Louvain*), majd pedig miután Skócia a kálvinizmus tanai felé fordult, holland egyetemeken képezték őket (*Leyden, Utrecht, Groningen*). Lásd: KECSKÉS (23. j.) 343.

²⁶ W. David H SELLAR: "A Historical Perspective", in Crichton Scott STYLES (szerk.): *The Scottish Legal Tradition*, Edinburgh, The Stair Society, 1991, 35–37.

²⁷ Colin KIDD: *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-British Identity 1689 – c. 1830*, Cambridge, Cambridge University Press, 2003, 20–23.

²⁸ Whitty and Blackie szerint a skót jog lelke a kontinentális jogban gyökerezik. Lásd J. BLACKIE – N. WHITTY: *Scots law and the New ius commune* in H. MCQUEEN (szerk.): *Scots Law in the 21st century*, Edinburgh, 1996, 63–81.

²⁹ Lord COOPER OF CULROSS: *Selected Papers 1922-1954*, Oliver & Boyd, 1957, 201.

igazságszolgáltatás hatékonyabb működését segítette elő³⁰, azonban ezt csak később, a *Court of Session* szervezeti struktúrájának és hatáskörének meghatározása, illetve a skót polgári eljárásjognak az angol eljárásjoggal való harmonizációja során tette meg, amint erről a polgári ügyekben bevezetett esküdtszéki tárgyalás intézménye is tanúskodik. A helyi igazságszolgáltatási szint, a seriff hatáskörét az 1707-es törvény továbbra is érintetlenül hagyta,³¹ 1746-ban azonban a jakobita lázadást követően a skót klánok vezetőjét, illetve a seriffeket megillető örökletes bírói pozíciót a brit parlament eltörölte, és a bírói kinevezés joga ettől fogva a Koronára szállt át.³²

A kontinentális jogon nyugvó magánjog Skóciában azonban eltér a jogrendszercsoport többi tagjától, ugyanis Skócia magánjogát sohasem kodifikálták. Marshall szerint a skót magánjogi jogfejlődés négy időszakra bontható fel.³³ a rendi korszakra, amely a Skócia jelenlegi határait megvonó carhami csata (1018) idejétől egészen a Bruce-házba tartozó I. Róbert haláláig számítanak. Skócia ekkor különálló királyság volt, a feudalizmus Angliából terjedt át, és a föld tulajdonjog máig meghatározó eleme, különösen a Skót-magasföldön. A római katolikus egyház egyházi bíróságok ítélkezésén keresztül kifejtett kánonjoga is ebben az időszakban gyakorolt döntő befolyást a családi jogra, és a modern skót családi jog alapját vetette meg.³⁴

Ezt az időszakot követte az ún. „sötét korszak” 1532-ig, a *Court of Session* megalapításáig. I. Róbert halálát követően Skóciát politikai viaskodások, gazdasági nehézségek és a gyenge kormányzás jellemezték. A nevével ellentétben ezt a korszakot Skócia és Franciaország között virágzó kapcsolata aranykorként jellemzi. Számos francia jogintézmény honosodott meg ebben az időben, mivel a jogászképzés során a skót jogászok nagy része francia egyetemeken sajátította el a jog tudományát. Az angol *common law*tól elkülönülve itt vált meghatározó módon kontinentális jogi rendszerré a skót jogrendszer, amelyet a skót parlament megalapítása és az egyházi bíróságoknak a házasság intézményét és a családi jogot kisajátító tevékenysége csak tovább fokozott.

Az egészen a napóleoni háborúig terjedő harmadik korszakot a római jog recepciója fémjelezi, amelynek a kontinensen a reneszánsz kor adott életet. Az Európai egyetemeken kiművelt skót jogászok a római jog terminológiájával, fogalmaival és gondolkodásával tértek vissza, így a kontinentális jogi szabályok és alapelvek beivódottak a skót jogtestbe, és szubszidiárius módon a szokásjog által nem érintett hézagok kitöltésére szolgáltak.³⁵ Ebben a korszakban születtek Stair,³⁶ Erskine,³⁷ Bell³⁸ és számos egyéb jogtudós művei³⁹, amelyeknek máig jogforrási jelleget tulajdonítanak.

³⁰ Lásd az Egyesülési Szerződés XIX. cikkét.

³¹ Lásd az Egyesülési Szerződés XX. cikkét.

³² Lásd az 1746-os *Heritable Jurisdictions Act* rendelkezéseit.

³³ E. A. MARSHALL: *General Principles of Scots Law*, Edinburgh, W. Green & Son Ltd, 4¹⁹⁸², 1–11.

³⁴ H. DAVID: *Introduction à l'étude du droit écossais*, Paris, L.G.D.J, 1972, 11.

³⁵ EVANS-JONES (10. j.) 231.

³⁶ Lásd Sir John DALRYMPLE, VISCOUNT STAIR: *Institutions of the Law of Scotland*, 1681.

³⁷ Lásd Professor J. ERSKINE: *Institute of the Law of Scotland*, 1773.

³⁸ Lásd Professor G. J. BELL: *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence*, 1804, illetve *Principles of the Law of Scotland*, 1829.

A római jog recepciójának időszaka egyben politikai irányváltást is jelentett. A római katolikus bíróságok eltávolításával járó 1560-ban tetőző skót reformáció megszüntette a bíróságok házassági (vagyon)jogra is kiterjedő hatáskörét. Az 1617-es sasinesi telekkönyvi nyilvántartás, illetve az 1672-ben alapított, büntetőügyekben végső jogorvoslati fórumként működő *High Court of Justiciary* maradandó hatást gyakorolt az alkalmazott jogra. A skót parlament megszüntetését is eredményező 1707-es Egyesülési Szerződés valójában a római jogot felváltó angol jog térnyerésének alapjait fektette le. Az 1745-ös jakobita lázadás pedig a klánrendszer eltörlését és a föld tulajdonjoga megszerzésének alapfeltételét jelentő katonai szolgálatot vezette ki a jogrendszerből.⁴⁰

Az időszak vége felé a római jog befolyása hanyatlásnak indult részben azért is, mert a *Court of Session* ekkorra már kifejlesztette saját egyedi joggyakorlatát, valamint a jogtudomány kommentárjai is olyan mértéket öltöttek, hogy a kontinens jogtudósaira és jogelveire való támaszkodás is egyre gyéribb igényként lépett fel. A jogászképzés és jogi értelmiség tekintetében leendő jogászokat már nem vonzotta különösebben az, hogy Franciaországban vagy Belgiumban folytassák jogi tanulmányaikat, ahol is az otthon addig ismeretlen kodifikációk képezték a jogi oktatás alapját. Erre a folyamatra aztán 1707 nyomta rá a bélyegét, amikor is az új Nagy-Britannia parlamentje törvényalkotása és a skót polgári ügyekben végső fellebbviteli fórumként egészen 2005-ig funkcionáló Lordok Házában⁴¹ zajló törvénykezés fokozatosan egyre több *common law* elemet honosított meg a skót jogrendszerben.

Végül a jelenkor időszaka fektette le azt a mérőkövet, amely nyomán az angol jog befolyása kiteljesedett az 1707-es parlamentek egyesülése folytán. Ez a befolyás jelentékenyen érezte hatását bíró alkotta, illetve törvényi jog terén különösen a kereskedelmi jog, a munkajog és a közigazgatási jog területén.⁴² Teret engedtek a bíró alkotta jog precedenst teremtő gyakorlatának, és a skót jogászok az angol esetjogban és a kapcsolódó jogirodalomban kerestek megoldást a felmerülő jogkérdésekre.

Ennek ellenére a kontinentális jogi hagyományok alapvető mértékben jellemzik a skót magánjogot, jogi terminológiáját és tartalmát, így a *common law*tól eltérően megkülönböztet kötelmeket, *quasi contractus*okat, deliktumot, ingó és ingatlan dolgot, vagyoni értékű jogokat, az elévülést és a szolgalmat is. Ebben az értelemben a skót jog valódi vegyes jogrendszernek minősül, noha Evans-Jones szerint is a kontinentális jogi gondolkodást az utóbbi időben az

³⁹ Ide sorolhatóak többek között Sir Thomas CRAIG 1655-ös *Jus Feudaléja*, Sir George MACKENZIE 1684-es *Institutions of the Law of Scotland*je, Andrew MCDOUALL és Lord BANKTON által 1751 és 1753 papírra vetett *Institute of the Laws of Scotland*, Henry HOME és Lord KAMES 1760-ben született *Principles of Equity*-je, valamint David HUME 1797-ben írt büntetőjogi témájú *Commentaries on the Law of Scotland respecting Crimes* című műve is.

⁴⁰ MARSHALL (34. j.) 57–78.

⁴¹ A 2005-ös alkotmányos reformot bevezető törvény harmadik fejezete (*Constitutional Reform Act of 2005*) létrehozta a Nagy-Britannia Legfelsőbb Bíróságát, amely átvette a Lordok Házának skót ügyekben történő fellebbviteli fórumának a helyét.

⁴² Lásd A. RODGER: „Thinking about Scots Law”, *Edinburgh Law Review*, 1996/1, 3.

angol *common law* erőteljes befolyása, az kontinentális jog oktatásának korlátozott volta állandó támadásként éri.⁴³

A két jogi hagyomány keveredése figyelhető meg a skót jogi gondolkodás természetén is. Az alapvető kontinentális jogi alapelvekhez történő igazodást ugyanis gyakorta esetjogi érvelésen keresztül valósítják meg a skót jogászok. Erre a legszembetűnőbb példa a skót tulajdonjogi szabályok mivolta, amelyekben Gretton szerint a joganyag a kontinentális jogi befolyást nyomokban hordozó helyi jog dominanciája érvényesül.⁴⁴ Így maga Gretton is Reid szavait idézi, miszerint a *ius commune* öröksége gyökeresen meghatározta a skót jogtest fejlődési irányait.⁴⁵ A latin jogi nyelvezet dominanciája (pl. *negotium gestio*, illetve a *forum non conveniens*) is vitathatatlan, illetve a jogi érvelés deduktív iránya, így az általános alapelvekből kiindulva eljutni az egyedi alkalmazhatóságig is mind a fenti állítást támasztják alá.

Általánosságban azonban a római jogra történő közvetlen hivatkozás elenyésző mértékben van jelen a mai skót jogban, viszont ha jelen van, akkor azt kellő pontossággal és odafigyeléssel teszik meg.⁴⁶ Roger szerint azonban a római jogi, illetve kontinentális jogi források használata veszélyt is jelenthet, mivel a jogvita alapját képező kontinentális jogi szabály értelmezése nehézséget okozhat a jogalkalmazás számára, mivel nem biztos, hogy a szereplők rendelkeznek megfelelő római jogi ismeretekkel a régebbi döntésekben fellelhető, valamint egyes írók tollából előpattant latin nyelvű hivatkozások értelmezése kapcsán.⁴⁷

Megállapítható, hogy kontinentális jogi műveket általában nem használnak elsődleges referenciaként a skót jogászok, mint ahogyan az jelen a kontinentális jogi rendszerek kódexeiben. A kontinentális jogi alapelvek léteznek, de csupán annyiban, hogy azt az esetjog mögött rejlő elvek formájában „fedezzék fel”, így a skót jogász gondolkodásmódja e mögöttes kontinentális jogi elvet rejtő esetjogi szemléletből alakult ki. Míg az alapelvek vitathatatlanul kontinentális jogi eredetűen sok esetben, a joganyag felhasználásának technikája a *common law* jogász szemléletet tükrözi. Ebben a tekintetben Skócia elüt az alább bemutatásra kerülő dél-afrikai jogász gondolkodásmódjától, amely esetében kontinentális jogi forrásokat sokkal szélesebb körben alkalmazzák, és a bírák is rutinosan alapítják döntéseiket rájuk. Ez a különbség a nyelvi kompetenciára vezethető vissza: a skót jogász nincs felvértezve akkora latintudással, hogy e forrásokhoz biztos kézzel nyúljon hozzá. Adalékként említhető meg, hogy Alan Watson által szerkesztett Jusztiniánusz *Digestája* angol nyelven⁴⁸ megkésve, csupán 1985-ben került a jogászközösség elé, így számottevő hatást nem gyakorolhatott még a jogászai gondolkodásmódra.

⁴³ Lásd EVANS-JONES (10. j.) 230–231.

⁴⁴ G. GRETTON: „Scots Law in a Golden Age” in A. J. KINAHAN (szerk.): *Now and Then: A Celebration of Sweet and Maxwell's Bicentenary*, London, 1999, 161–174.

⁴⁵ K. G. C. REID: *The Law of Property*, Edinburgh, 1996, 74. Lásd még: REID: “The Idea of Mixed Legal Systems”, *Tulane Law Review* 2003/78, 5–40.

⁴⁶ Lásd például a *Sloans Dairies Ltd v. Glasgow Corporation* ügyet (1977 SC 223), amelyben Lord Stott a jusztiniánuszi Intitutiókra tett utalást, illetve a *Scrimgeour v. Scrimgeour* ügyet (1988 SLT 590), amelyben a jogvita alapját képező jogszabály római jogi gyökereit szintén Jusztiniánuszhoz vezették vissza.

⁴⁷ RODGER (43. j.) 16.

⁴⁸ A. WATSON: *Justinian, Digest*, Philadelphia, 1985.

Összegzésként Enid Marshall szavaival élhetünk, aki szerint „a skót jog elkülönült jogrendszerével korántsem eredeti jogrendszer abban az értelemben, hogy külső befolyások ellenére önálló fejlődésen ment át. A tiszta skót jogot megtalálni olyan, mint a tűt a szénakazalban, mivel jogot más jogrendszerek szolgáltatták, és a jog egyedisége pontosan e vegyes forrásokból az évszázadok során összeválogatott koherens joganyagban rejlik.”⁴⁹

3.2. Dél-Afrika

Az európaiak megjelenését a fekete kontinens déli részén Bartolomeu Diasnak a Jóreménység-fokot 1488-ban megkerülő hajóját fémjelzi, melyet követően Jan van Riebeeck a Holland Kelet-indiai Társaság megbízása révén jó másfél évszázaddal később hozott létre állandó ellátási bázist a mai Fokváros területén. A 17. század végén előbb holland, majd szabad vallásgyakorlatuktól hazájukban megfosztott francia hugenották érkeztek a térségbe, akik később magukat búroknak (boeren) (afrikaaners) nevezték. E telepesek magukkal hozták anyaországuk kontinentális jogi hagyományokon nyugvó jogát is, majd a 18. századtól a búrokkal folyamatosan szembenálló britek is elhintették jogrendszerük magvait azon a területen, ahol a holland-francia telepesek és a törzsi jogra támaszkodó őslakosok egyre inkább Dél-Afrika északi területei felé kényszerültek húzódnival.⁵⁰

Az 1910-re négy gyarmatból összeálló Dél-afrikai Unió a következő képet mutatta: a Jóreménység-foki holland gyarmat eredetileg a XVII. századi római-holland jogot honosította meg a területen, vegyes jogrendszerre csak 1806-ban alakult át, amikor az irányítást átadták az angoloknak, akik saját jogrendszerük elemeit kezdték átültetni a térségre.⁵¹ A másik három gyarmat, Transvaal, Oranje Szabad Állam, valamint Natal a római-holland jogot módosításokkal, Dél-Afrika szokásainak és a búr hagyományoknak megfelelően, és észak felé történő vándorlásuk (a nagy trek) során egyre inkább angol, skót és fokföldi joggyakorlatra támaszkodva alkalmazták. Tehát megállapítható, hogy a bíróságok által alkalmazott római-holland jog már az angol megszállás előtt is átírták a fenti jogok egyes elemeit.⁵²

E köztársaságok vegyes jogrendszeri jellege akkor vált teljesebbé, amikor azokat az angolok meghódították. Így Natalt 1843-ban annektálták Fokföldhöz, és elkülönített angol gyarmattá 1856-ban alakult át. Transvaal és Oranje Szabad Állam 1902-ben került angol irányítás alá a második angol-búr háborút követően. Az angolok rögvest angol jogon nyugvó törvényi jogot telepítettek az irányítottakra, bár rendeleti úton a római-holland jog státuszát is megőrizték.⁵³

A *common law* közjogi alapjait az 1843 és 1856 között lezajló brit annexió vetette meg, miután a négy területet az angol korona gyarmatainak nyilvánították, felváltva ezzel a korábbi alkotmányokat és kormányzási formát. 1806-ban a Jóreménység-foki gyarmaton a holland hét tartomány legfőbb törvényhozó szervét, a külpolitikával, védelmi kérdésekkel és a kapcsolódó

⁴⁹ MARSHALL (34. j.) 12.

⁵⁰ W. F. MENSKI: *Comparative Law in a Global Context : The Legal Systems of Asia and Africa*, Cambridge, Cambridge University Press, 2006, 49–61.

⁵¹ PALMER (14. j.) 88.

⁵² H. R. HAHLO – Ellison KAHN: *The Union of South Africa: The Development of its Laws and Constitution*, London and Cape Town, 1969, 20–25.

⁵³ H. R. HAHLO – Ellison KAHN: *The South African Legal System and its Background*, 1968, Fokváros, Juta & Co. Limited, 44.

adókkal foglalkozóhágai Össztartományi Gyűlést⁵⁴ felváltotta brit törvényhozás, amely ún. tanácsban hozott rendelettel (*Orders in Council*), illetve a brit parlament aktusaival látta el ezt a funkciót. A holland kormányzó és a Jóreménység-foki gyarmat irányításával foglalkozó *Raad van Politie* szerepét a brit kormányzó vette át, akinek a végrehajtó és törvényalkotó hatásköre az első években csupán külső kontroll korlátozhatta. A kormányzó hatáskörei 1853-ig maradtak fenn, amikor pátenslevéllel új, képviseleti kormányzást megvalósító alkotmányt deklaráltak. Ettől fogva a terület törvényalkotását a kormányzóból és a kétkamarás választott Jóreménység-foki parlament vette át, bár a brit parlament maradt továbbra is a szuverenitás letéteményese. Ez abban mutatkozott meg, hogy a Jóreménység-foki parlament nem módosíthatta a gyarmatra vonatkozó brit törvényeket, valamint a brit kormányzat a kormányzó által jóváhagyott jogszabályokat két évre visszamenőleg hatályon kívül helyezhette.

Natal 1843-as koronagyarmattá válásakor (a Jóreménység-foki gyarmathoz csatolás révén) az 1838-as alkotmányát (*Grondwet*) eltörölték, illetve legfőbb törvényalkotó, végrehajtó és bírói hatalmat képviselő Néptanácsot (*Volksraad*) feloszlatták. A terület élére kormányzóhadnagyot neveztek ki. A törvényalkotó hatalmat eleinte a Jóreménység-foki szervek gyakorolták, amikor azonban Natal 1853-ban független önálló gyarmattá lépett elő, ezt a hatáskört pátenssel ételre hívott, részben kinevezett, részben választott tagokból álló törvényhozó tanács látta el. Amikor Transvaal és Oranje Szabad Állam 1902-ben szintén koronagyarmattá váltak, alkotmányaik helyébe királyi nyílt parancsal új alkotmányok, kormányzók és kinevezés útján működő végrehajtó és törvényalkotó tanácsok léptek. További alkotmányos változások következtek be, amikor a két gyarmaton képviseleti alapon nyugvó felelős kormány alakult.

Az igazságszolgáltatást a brit uralom első két évtizedében csupán kisebb változtatások jellemezték: a polgári ügyekben eljáró fellebbviteli bíróságot élén a kormányzóval és a kormányzóhadnaggal 1807-ben, a büntető ügyekben eljáró fellebbviteli bíróságot élén a kormányzóval és két ülnökkel egy évvel később állították fel. 1811-ben kerületi bíróságokat is létrehoztak. Később az 1820-as években az egész bírósági rendszert megreformálták. A polgári és büntető ügyekben végső fokon eljáró holland *Raad van Justitie*-t a Jóreménység-foki Legfelsőbb Bíróság váltotta fel 1828-ban. Tanácsaiba jogi végzettséggel rendelkező bírák Angliából és Skóciából kerülhettek. Ez utóbbi esetben a kontinentális jogi hatás erőteljesebben éreztethette magát.⁵⁵ Natal tekintetében 1845-től a kerületi bíróságokon a brit korona által kinevezett egyesbíró járt el, illetve 1857-ben itt is létrehozták a Legfelsőbb Bíróságot, ahol a bírói kinevezés feltételei a Jóreménység-foki gyarmaton bevett gyakorlatot tükrözték. Skóciában képzett bíró is állt e testület élén, noha ez csak 1904-ben történt meg. Transvaal és Oranje Szabad Állam területén az elcsatolást követően új felsőbbbíróságok jöttek létre 1902-ben: egy a két gyarmatot felölelő Legfelsőbb Bíróság, illetve az egyes gyarmatok területén működő Felsőbíróságok. A jogelőd köztársaságok bírái közül egy sem jutott a

⁵⁴ Lásd *Letters and negotiations of the count d'Estrades, ambassador from Lewis XIV to the States General of the United Provinces of the Low Countries, 1663 – 1669*. BROWN, D. J. TONSON A. O. Printed for D. Browne, London 1711.

⁵⁵ A bíróság élén 1827-1850-ig eljáró William Menzies főbíró skót szellemben alkalmazta a hatályos jogot. Lásd PALMER (14. j.) 86.

testületekbe, bár szinte mindegyik újonnan kinevezett bíró jól ismerte római-holland jogot, ezzel is biztosítva a kontinentális jogi hagyományok átmentését az új közjogi rendszerbe.

Nem egyértelmű az álláspont a jogtudósok között, hogy a római-holland jog, amelyet a Jóreménység-foki gyarmaton recipiáltak valóban a XVII-XVIII. századi tiszta holland kontinentális jogon alapult,⁵⁶ vagy tartalmazta a középkori kodifikálatlan *ius commune* elemeit is.⁵⁷ A létező kontinentális jogi alapokon nyugvó magánjogot a brit gyarmatosítók megtartották eredeti formájukban, így az tovább fejlődhetett mind a négy gyarmaton. Ez a döntés a brit alkotmányos gyakorlatot lefektető *Campbell v. Hall* eseten nyugszik, amelyben kimondták, hogy „a meghódított ország joga érintetlenül hagyatik mindaddig, míg azt a hódító ország meg nem változtatja.”⁵⁸ Ez lassan beigazolódnia is látszott, amikor is a XIX. század folyamán az angol jog törvényhozáson keresztül beszivárgott a Jóreménység-foki gyarmatra, magával hozva a végintézkedési szabadságot, a kereskedelmi és társasági jogot, a biztosítási és csődjogot, illetve egyéb, alkotmányos, közigazgatási és büntetőjogi szabályozást.

A búr háborút (1899-1902) és a Dél-afrikai Unió létrejöttét (1910) követően, az angol *common law* és a római-holland kontinentális jog nagyjából egységes rendszerré kovácsolódtott össze, köszönhetően javarészt Lord De Villiers, a Jóreménység-foki gyarmat főbírája tevékenységének, akinek a munkáját J. R. Innes, valamint L. C. Steyn főbírák folytatták a jogi purizmus jegyében, hogy megtisztítsák a római-holland jogot az angol *common law* vadhajításoktól. Ez az irányzat nagyjából párhuzamosan fejlődött az apartheid kialakulásával.

Mára a Dél-afrikai Köztársaságban azonban a római-holland és angol jogforrások (precedensek) megközelítőleg egyenlő súllyal esnek latba a pragmatizmus égíse alatt. Mind az institutionális írók, mind a kortárs római-holland jog szerzői nagy tiszteletnek örvendenek, utat engedve a kontinentális jogi hagyományok megőrzésének, illetve nagy jelentőséget tulajdonítanak a bírói precedens megközelítésnek is, amely a vegyes jogrendszer *common law* fő pillérét alkotja.⁵⁹ E vegyes jogrendszerben elismerik továbbá az afrikai szokásjog jogforrási jellegét is, amelyet a jelen alkotmány szubszidiárius jelleggel alkalmaz, illetve annak törvényrontó erejét kizárja.⁶⁰

Dél-Afrikára is jellemző a skót rendszernél bemutatott esetjogi szemlélet, amely legkiválóbban a bírósági döntések érvelési gyakorlatában érhető tetten, amelyek önmagukban is jogforrási jelleggel bírnak. A római-holland jog, illetve *ius commune* alapján írt műveket is gyakran idéznek a bírósági határozatokban. Míg a múlt század hetvenes éveiben folytatott kutatás szerint e források közé tartoztak az institutionális írók művei, a XVII. századi

⁵⁶ E. FAGAN: „Roman-Dutch Law in its South African Historical Context” in R. ZIMMERMANN – D. VISSER (szerk.): *Southern Cross. Civil Law and Common Law in South Africa*, Oxford, Clarendon Press, 1996, 38–40.

⁵⁷ FAGAN (57. j.) 44–45.

⁵⁸ *Campbell v Hall* ügy (1774) 1 Cowp 204, 98 ER 1045, illetve lásd H. J. ERASMUS: „The Interaction of Substantive and Procedural Law: The Southern African Experience in Historical and Comparative Perspective” *Stell Law Review*, 1990/349, valamint HAHLO – KAHN (54. j.) 17.

⁵⁹ R. ZIMMERMANN – D. VISSER (57. j.) 10–13.

⁶⁰ Lásd a hatályos Dél-afrikai Köztársaság Alkotmányának 211. § (3) bekezdését.

Hollandia joggyakorlata, a *ius commune* hatása alatt tevékenykedő szerzők művei, a *Corpus iuris civilis* illetve egyéb római jogi források, a század végére idézési gyakoriságuk jelentősen csökkent.⁶¹ Használatuk pedig a szubszidiaritás elve mentén húzódik meg. Ezt azt jelenti, hogy az alapvető kontinentális jogi alapelvekhez csak akkor és annyiban ragaszkodnak, amikor és amennyiben az adott bírósági szinten nincs bírói precedens, vagy pedig a létező precedensek egymásnak ellentmondanak.

3.3. Québec

Kanada terület alapján legnagyobb, a mai Franciaország mintegy háromszorosát kitevő tartományként ismert Québec-tartomány vegyes jogrendszerének születését a terület szuverenitásának Franciaországról Nagy-Britanniára történő átszállásától eredeztetik.⁶² A kezdeti időszakban, amely 1760-tól 1774-ig tartott, az 1759-es brit megszállást követően a megszálló hatalom elsődleges törekvése a teljes jogrendszer – a magánjog és a közjog – angol mintára történő átalakítása volt. A magánjog tekintetében azonban ez a politika nem vezetett eredményre, és 1774-ben a Québec Act nyomán a francia magánjogi rendszert ismerték el mérvadónak. Ezt követően az angol *common law* intézmények bevezetése csak fokozatosan és kis lépésekben ment végbe, bár az állami gépezet a kormányzáson át a bírósági rendszerig brit alapokon nyugodott.⁶³

A hétéves háború végét fémjelző párizsi béke nyomán (1763) Kanada – akkori nevén Új-Franciaország – brit fennhatóság alá került. A britek a saját közjogi rendszerüket vezették be, és 1777-ig a gyarmatot Westminsterből irányították, amikor is Québec-tartományba kihelyezett törvényhozó tanácsot állítottak fel, amely 1791-től választott alsóházzal, ún. törvényhozó gyűléssel rendelkezett. Az angol *common law* által ihletett törvényi jogot *ex officio* nem terjesztették ki erre a tartományra, hanem azt fokozatosan eleinte végrehajtási utasítással (*executive order*), majd helyi szinten történő jogszabályalkotással tették meg.

A *common law* hatást az is híven tükrözi, hogy a legkorábbi bíró fórumokat az angol modell alapján hozták létre, erre a legszembetűnőbb példa a Québec-i Kancelláriabíróság, amely Kanadában elsőként itt látott napvilágot. A tartomány végrehajtó hatalmát a Londonból utasított kormányzó testesítette meg, amelyet később kijelölt tanács vett át. A bírák és hivatalnokok javarészt az angol, illetve az amerikai jogi hivatás területéről kerültek ki.

A párizsi békét megelőzően a tartomány magánjogát alapvetően a *coutumes de Paris* képezte. Ez a szokásjogon alapuló rendszer írásos formában 1580-tól létezett, és Párizs városára és az azt körülvevő Ile-de-France tartományra korlátozódott. A *coutumes de Paris*-t Új-Franciaországra XIV. Lajos 1663-64-es ediktumai terjesztették ki.⁶⁴ Mivel ez a szokásjogi gyűjtemény elsősorban az ingatlantulajdonból eredő dologi jogokat helyezte előtérbe, a személyek jogát pedig háttérbe, ezért a *coutumes*-t ez utóbbi vonatkozásban a Pothier és

⁶¹ Lásd R. ZIMMERMANN - D. VISSER (57. j.) 15–20.

⁶² PALMER (14. j.) 329.

⁶³ J. A. CLARENCE SMITH – J. KERBY: *Le droit privé au Canada, Études comparatives, I : Introduction général*, Ottawa, Presse de l'Université d'Ottawa, 1975, 36–39.

⁶⁴ Edit d'avril 1663, valamint Edit de mai 1664. In: Edits, Ordonnances royaux, Déclarations et Arrêts du Conseil d'état du roy concernant le Canada, De la presse à vapeur de E.R. Fréchette, Québec. 1854. vol. I. 37.; valamint vol. I. 40.

Domat jogtudományi művei által rendszerbe fogott római jog, illetve a római katolikus egyház kánonjoga váltotta fel. A magánjog további kútfői között szerepeltek még a királyi rendeletek, melyek közül az polgári eljárásjogot magában foglaló 1667-es *Ordonnance sur la procédure civile*, a kereskedelmi jogot rögzítő 1673-as *Ordonnance sur le commerce* és a tengerjogi vitákra alkalmazandó 1681-es *Ordonnance de la marine* érdemel említést. Jogforrási erővel bírtak továbbá a főként mezőgazdasági, közegészségügyi és tűzvédelmi szabályokat lefektető helyben működő szuverén Tanács precedens értékű határozatai (*arrêts de règlements*) is.⁶⁵

Ez a jogtranszplant azonban nem ment zökkenőmentesen. A békét követően kezdetben nem volt világos, hogy mi legyen az alkalmazandó jog. A francia lakosság ezt ki is használta, és az újonnan létrehozott angol bíróságokat mintegy bojkottálva a magánjogi jogvitákat az *ancien droit* szerint rendezték el.⁶⁶ A fentebb említett *Québec Act*-tel némileg tisztázódott a helyzet, mivel a sarkalatos jogszabály megőrizte „Kanada jogát”, azaz az *ancien droit*-t a tulajdonjog és polgári jogok tekintetében, miközben a végrendelkezési szabadságot, illetve a büntetőjogot az angol jog szerint fektette le.

Alkotmányjogi szempontból a következő nagy lépés 1791-ben következett be, amikor is az ún. *Constitutional Act*⁶⁷ az akkori Québec tartományt kettévágta Alsó-Kanadára (a mai Québec-tartományra) és Felső-Kanadára (a mai Ontario-tartományra) úgy, hogy Alsó-Kanada magánjogának primátusát nem érintette. Tulajdonképpen ennek a jogszabálynak köszönhetően jöttek létre Québec vegyes jogrendszerének alapjai. Ahogyan azt Brierley is írja: „A folyamat eredménye a Québec-i magánjog fokozatos átalakulása lett, ahol a kettős jogrendszer alapjaiban formálja a tartomány jogát, ugyanis az angol *common law* jogának egyes részei továbbra is együtt léteztek a Québec Act-tel érintetlenül hagyott *ancien droit* jogával.”⁶⁸

Az 1840-es esztendő az unió hívó szavával kecsegtetett, ugyanis Felső- és Alsó-Kanada egyesült,⁶⁹ azonban a *common law* hátrányára a kontinentális jog létjogosultsága mit sem veszített érvényéből, és fennmaradt azokon a területeken ahol 1774 óta is alkalmazták. A magánjogi jogforrások sokrétűsége, a nyelvi sokszínűség, amelyen kifejezésre juthatott, a kortárs jogi kommentárok hiánya, valamint a francia és a louisianai kodifikációk mind a tettek mezejére vezérelték a Québec-i jogalkotást. Így az erre a célra hivatott kodifikációs bizottság munkája nyomán 1866-ban elkészült Alsó-Kanada polgári törvénykönyve,⁷⁰ valamint egy évvel később az eljárásjogi törvénykönyv is, amelyek már hatályban voltak, amikor Québec-tartomány 1867-ben kezdetben négy tartományból álló föderatív Kanada domíniumának

⁶⁵ J. E. C. BRIERLEY – R. A. MACDONALD: *Quebec Civil Law. An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications Limited, 1993, 5–44.

⁶⁶ BRIERLEY – MACDONALD (66. j.) 67–78.

⁶⁷ Teljes nevén: An Act to Repeal certain Parts of an Act passed in the fourteenth Year of His Majesty's Reign, intituled, An Act for making More effectual Provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province, U.K., 31 Geo. III, c. 31.

⁶⁸ BRIERLEY – MACDONALD: i.m. 17.

⁶⁹ Az egyesülési törvény teljes nevén: An Act to Re-unite the provinces of Upper and Lower Canada, and for the Government of Canada, U.K. 3 & 4 Vict., c. 35.

⁷⁰ J.W. CAIRNS: *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change*, (Dissertation), Edinburgh, 1980. 75–78.

részévé vált.⁷¹ Ellentétben a francia forradalmi eszmékkel felfegyverzett *Code civil* és az olasz, illetve német kodifikációkkal, amelyek az újonnan elért nemzeti egység konszolidációját jelentette, Alsó-Kanada polgári törvénykönyve a XIX. századi Québec javarészt falusi és frankofón konzervatív, családközpontú értékeit képviselte, valamint a bimbózó kereskedelmi és ipari – elsősorban anglofón – Montrealban koncentrálódó elit gazdasági liberalizmusát.⁷² Felépítésében és stílusában a francia *Code civil*re ütött, azonban a Québec-iek számára társadalmilag elfogadhatatlan, a francia forradalom hatására a jogtest részévé váló „új jogot” (pl. a házasság felbontásának intézményét) elvetette, csupán a forradalom előtti francia jogot egyes elemeit tartotta meg a helyi sajátosságokhoz igazítva. Újdonság volt viszont a kódex 2615. §-a, mely szerint a francia és angol nyelven is hivatalos törvénykönyv értelmezése során az értelmezőnek szabadságot nyújtott abban a tekintetben, hogy azt a nyelvi változatot részesítse előnyben, amely a leginkább összhangban van az értelmezni kívánt valós joggal, amelyen az értelmezés tárgyát képező cikk alapult.⁷³

A több szakaszban lezajló, a II. világháborút követő, a konzervativizmust és tradicionális attitűdöket elvető Québec-i „csendes forradalomnak” titulált mozgalom hatására hivatalosan is végbement kódex revízióknak köszönhetően⁷⁴ mára egységes formát elnyert új elnevezésű Québec-tartomány polgári törvénykönyve 1994. január elsején lépett hatályba, hatályon kívül helyezve Alsó-Kanada polgári törvénykönyvét. A kódex híven tükrözi Québec vegyes jogrendszerét, és helyet ad többek között olyan angol jogelveknek és jogintézményeknek, mint például a végrendelkezés szabadságának, a bizalmi vagyonkezelés, valamint az ingó dolgon fennálló jelzálogjog intézményének. Ellenben továbbra is megtartja a kontinentális jogi kodifikáció alapszerkezetét és terminológiáját. A francia és az angol változatok ma is hivatalosnak tekintendők, és a nem egyértelmű rendelkezések értelmezése során egyaránt hivatkozhatnak rájuk.

A bírói határozatokban leszűrődő jogászai gondolkodásmód erősen közelített a kontinentális jogi hagyományokhoz, az angolszász érvelési stílus azonban egyre inkább felfedezhető bennük.⁷⁵ Ez leszűrhető mind a határozatok indokolásán, az érvelési stíluson, habár az érvek és ellenérvek magyarázata sok esetben felületes marad. Az angolszász gyakorlatra jellemzően a bírói határozatok indokolása az egész bírói tanács nevében is íródhat, ilyenkor beszélünk *per curiam* indokolásról, és ilyenkor a szerző kiléte sem derül ki, illetve kollektíve kerül feltüntetésre. Nem ritka az indokoláshoz fűzött párhuzamos, illetve különvélemény sem. A francia stílusú, tömör, lakonikus bírói határozatok ma már nem igazán jellemző, és mindinkább az angolszász esetjogi szemlélet veszi át a stafétabotot.

⁷¹ A négy tartomány, Québec, Új-Skócia, New Brunswick és Ontario, 1867 óta már 10-re bővült és három különleges igazgatású terület is hozzátartozik.

⁷² Lásd William TETLEY: *Mixed Jurisdictions: „Common Law vs Civil Law (Codified and Uncodified)”*, *Louisiana Law Review*, 2000/66, 677.

⁷³ E tekintetben mindkét nyelvi változat azonos jogforrási erővel bír az 1867-es Constitution Act alapján, amelyet Kanada Legfelsőbb Bírósága is megerősített 1979-ben az *A. G. Québec v Blaikie* [(1979), 2 S. C. R. 1016.] ügyben.

⁷⁴ E folyamatban nagy szerepet játszott Paul-André Crépeau professzor munkássága, a Polgári Törvénykönyv Felülvizsgáló Irodája, valamint végső soron az kanadai Igazságügyi Minisztérium is. Lásd BRIERLEY – MACDONALD (66. j.) 90-93.

⁷⁵ Lásd PALMER (14. j.) 334.

3.4. Louisiana

Louisiana Állam kezdetben a francia ediktumok, királyi rendeletek és a *Coutumes de Paris* szokásjogának volt alávetve, amelyek a kereskedelmi vállalkozások alapítóleveleiben kerültek először megfogalmazásra a XVIII. század elején, és érvényben voltak már akkor is, amikor a terület királyi gyarmattá vált 1731-ben. Louisiana spanyol kézre kerülését követően (1763) a francia jogszabályok maradtak érvényben 1769-ig, amikor is a spanyol jog vette át a helyüket. A jelenkori jogtudomány azonban azon az állásponton van, hogy a francia magánjogot továbbra is alkalmazták, csak nem a bírói út igénybevételével.⁷⁶ Mindazonáltal a hivatalos jog a spanyol volt, amelynek jogforrási erővel bíró gyűjteményei, többek között a *Nueva Recopilación de Castilla* (1567) és a *Recopilación de Leyes de los Reinos de las Indias*, voltak hatályban, illetve joghézag esetén, a *Siete Partidas*, amely a jusztiniánuszi dogmatikán és a glosszátorok jogfejlesztő szerepét tükröző jogszabályok gyűjteménye volt a 14. századból. A terület 1800-as francia visszavételét követően a spanyol jog maradt hatályban, mivel Franciaország csupán húsz napig gyakorolhatta szuverenitását 1803-ban, mielőtt az Egyesült Államok december 20-án átvette az irányítást Louisiana felett.⁷⁷

Amikor az amerikai alkotmány és a többi tagállamban érvényben lévő közjogi modellt alkalmazni kezdték az új tagállam tekintetében, Louisiana közjoga tulajdonképpen lényegében amerikai lett. Magánjoga azonban a kontinentális jogi hagyomány berkeiben maradt.⁷⁸ A párizsi békeszerződés 3. cikke és az 1804-es sarkalatos törvény is lényegében ezt rögzítette Louisiana lakossága tekintetében. Így a Kongresszus kifejezetten érvényben hagyta valamennyi, a tagállam területén létező jogszabályt a skót példához hasonlítható kikötéssel, hogy e szabályok a későbbiekben a törvényhozás által módosíthatók, illetve hatályon kívül helyezhetők lesznek.⁷⁹

Az amerikai hatalomátvételt követően megnövekedett az igény a *common law* használatára az új tagállam területén, különösen azért is, mert hat eltérő spanyol jogi gyűjtemény létezett a területen, és nem volt egyértelmű, hogy a több ezer spanyol jogszabály közül melyik volt a hatályos. Hála azonban Edward Livingstone, New York-i angolszász jogász munkájának, aki maga is a kontinentális jogi hagyományok utólagos tisztelőjévé vált, New Orleansba történő költözése után egy kéttagú bizottságban elkészítette az Orleans területén alkalmazott kontinentális jogi jogszabálygyűjteményt. A munka eredményeként így jött létre a louisianai polgári törvénykönyv 1808-ban, amelyet a *common law* szerint gondolkodó jogászok is elismertek, illetve a szintén ehhez hű kormányzó is jóváhagyott.⁸⁰

A kódex maga a francia forradalmi eszmékben találta meg fő forrását, illetve az 1804-es francia Code civil előkészítő munkálataival együtt a több mint kétezer szakaszból álló munka több mint kétharmadát lényegében átvette. A fennmaradó részt a spanyol jog adta, amelyek

⁷⁶ Lásd H. BAADE: „Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial' Jurisprudence”, *53 Tulane Law Review* 3, 1978, 87–88.

⁷⁷ Lásd H. BAADE: „The Formalities of Private Real Estate Transactions in Spanish North America” *38 Louisiana Law Review*, 1978, 656.

⁷⁸ Lásd A. N. YIANNPOULOS: *Civil Law System: Louisiana and Comparative Law*, Claitors, 1999, 70–75.

⁷⁹ Lásd Gordon IRELAND: „Louisiana's Legal System Reappraised” *11 Tulane Law Review*, 1937, 585.

⁸⁰ Lásd J.W. CAIRNS (71. j.) 25–30.

érvényben maradtak arra az esetre, ha a francia ihletésű rendelkezések ellentétesek volnának az alkalmazott joggal. Ennek ellenére továbbra sem volt egyértelmű, hogy pontosan melyik jogszabály alkalmazandó Louisianában. Ezért egy másik bizottságot hoztak létre, hogy még hatályos szabályokkal kiegészítsék a kódexet. A munka eredménye az 1825-ös louisianai polgári törvénykönyv lett, amely tartalmában a francia *Code civil* utáztatának is tekinthető. A kodifikáció célja felülről valamennyi addig érvényben lévő magánjogi jogszabályt, bár a bíróságok mégsem tulajdonítottak neki ezzel egyenértékű kötelező érvényt.⁸¹

Az 1808-as és az 1825-ös kodifikációk francia nyelven íródtak, és ezt követően fordították le angolra, azonban mindkét nyelvi változat hatályos volt. Az értelmező rendelkezéseket tartalmazó 1808-as jogszabály (*loi d'habilitation*) elrendelte, hogy kétség esetén mindkét nyelvi változatot értelmezni kell. Viszont az 1825-ös kódex tekintetében csupán a két nyelven történő kiadás érvényesült, míg a két változat közötti ellentét feloldására egyéb szabályt nem iktatta a kísérő jogszabályba. Mivel azonban a francia szöveg volt az eredeti, és a fordításról köztudott volt, hogy hibákat tartalmazott, a francia változat maradt az irányadó.⁸²

Később egy harmadik polgári törvénykönyvet is elfogadtak 1870-ben, amely azonban az eltérő számozástól eltekintve az 1825-ös kódex másolata volt a politikai és társadalmi változások tükrében végbement változások adta új élethelyzetek (rabszolgaság eltörlése) kiegészítésével. Ezt a kódexet már angolul adták ki, azonban kétség esetén a változatlan formában fennmaradt szövegrészek tekintetében az 1825-ös francia változatot tekintették irányadónak.⁸³ 1976-tól kezdődően a kódex gondozásáért felelős Louisianai Állami Jogi Intézet számos részleges revíziót eszközölt a törvénykönyvben, amelyet a tagállami törvényhozás is elfogadott.⁸⁴

Louisiana Állam jogászai gondolkodásmódja megfelel az Egyesült Államok *common law* szerinti gondolkodásnak.⁸⁵ A tagállam bírói határozatainak érvelési technikája és stílusa nagyon hasonlít a tipikus egyesült államokbeli bírósági ítéletek leíró jellegű és a tényközlésen alapuló *common law* jogi érveléséhez. Ellentétben Québec-tartomány gyakorlatával a határozatok indokolása és a különvélemények megfogalmazása nem a bírósági bürokrácia személytelen közlése, hanem a bírák mint egyéni szerzők műveiként léteznek.⁸⁶ Mindazonáltal a kódex megfogalmazása a francia jogi gondolkodás befolyását is mutatja.⁸⁷ Így a magánjog területén, különös tekintettel a tulajdonjog, a kötelmi jog, a gazdasági társaságok szerkezete, a családi jog és a polgári eljárásjog jogterületére, a hagyományos római jogi gondolkodás erősen érezteti a hatását. Ennek enyhülése azért sem valószínű, mert a

⁸¹ V. PALMER: *Critiques of Codification in a Mixed Jurisdiction: Essays on the Louisiana Civilian Experience*, Carolina Academic Press, 2004, 66–70.

⁸² V. PALMER (szerk.): *Louisiana: Microcosm of a Mixed Jurisdiction*, Carolina Academic Press, 1999, 56–60.

⁸³ Lásd A. N. YIANNOPOULOS: *Louisiana Civil Law System Coursebook, Part I*, Baton Rouge, Claitor's Publishing Division, 1977, 30–35.

⁸⁴ Ezek a módosítások többek között a tulajdonjog, szolgalmak, szomszédjog, törvényes gyermekek jogállása, öröklés, birtoklás és az elvölés intézményét érintették.

⁸⁵ J. DAINOW (szerk.): *The Role of Judicial Decision and Doctrine in Civil Law and in Mixed Jurisdictions*, Baton Rouge, Louisiana State University Press, 1974, 34.

⁸⁶ PALMER (14. j.) 276.

⁸⁷ V. PALMER – E. REID: *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland*. Edinburgh, Edinburgh University Press, 2009, 456.

louisianai jog olyan fogalmakat is megtartott, amelyek egyedülállók az amerikai *common law* területén, mint például a haszonélvezet (*usufruct*),⁸⁸ valamint a felén túli sérelem intézménye (*lesion beyond moiety*).⁸⁹

Összegzés

Nincs olyan jogrendszer, amely hermetikusan, külső hatások nélkül működik és fejlődik. A jogrendszerek egy típusában, a vegyes jogrendszerben, meghatározott jogcsaládok keveredését mutathatjuk ki. Tág értelemben minden jogrendszer vegyesnek tekinthető, hiszen valamennyi állam jogát történelme során érték idegen hatások. Szűkebb értelemben vegyes jogrendszerről akkor beszélhetünk, ahol legalább két beazonosított jogcsoport jegyeit felmutató jogrendszerrel állunk szemben. A jogösszehasonlító irodalom a legszűkebb értelemben azokat a rendszereket sorolja ide, ahol a két nyugati jogcsalád, az angolszász *common law* közjogi, valamint a kontinentális római-germán jogcsalád magánjogi elemei erőteljesen, de egymásra hatva érvényesülnek. Így beszélhetünk Skócia, Dél-Afrika, Québec-tartomány és Louisiana állam jogáról, mint a vegyes jogrendszer elemeit meghatározó módon felmutató jogrendszerekről. A vegyes jogrendszerek vizsgálata rámutat arra, hogy e rendszerek egyedi megoldásai követhető és követendő például szolgálnak, új távlatokat nyitva számos jogközelítési lehetőségnek.

⁸⁸ Lásd a louisianai polgári törvénykönyv 535-629. §§-ait.

⁸⁹ Lásd a louisianai polgári törvénykönyv 2589-2600. §§-ait.

The new legal framework and a guide to the General Data Protection Regulation (GDPR) (2016/679)

Ash ALKIŞ¹

Abstract

Because the data protection law should be comprehensive, the General Data Protection Regulation replaces the Directive 95/46/EC. GDPR was adopted in May 2016 and will be implemented directly in all EU member states on May 25, 2018, with no transposition needed. In addition, it is likely that GDPR applies to three members of the European Economic Area (EEA), which are not members of the EU and are included in Article 7 and Annex XI of the EEA Agreement.

Thus, this paper will examine the implementation of the new regulation as:

- 1) Lawfulness of processing
- 2) Rights of data subject
- 3) Obligations of the data controller and data processor
- 4) Legal framework

Finally, in the result part, I shall evaluate the new regulation based on my research from my point of view.

1. Lawfulness of Processing

The GDPR continues the approach under the previous regime requiring a data controller to justify the processing of personal data in accordance with Article 6.

The consent of the data subject has given for data processing only one or more specific purposes (*Article 6(1)(a)*).

Processing is necessary to perform or enter the data contract with the data subject (*Article 6(1)(b)*).

Processing is necessary to comply with a legal obligation that the data controller is subject to (*Article 6(1)(c)*).

The vital interests of data are to be protected (*Article 6 (1) (d)*). Recital 46 explains that this legal ground is, in principle, to be used only if it cannot be done clearly based on one of the other justifications of the process. It also emphasizes that some types of operations can serve both the vital interest (for instance, processing for the monitoring and controlling of epidemics, or the processing of personal data in humanitarian emergencies, such as natural or man-made disasters) of the data subject and for the public interest.

Processing which is an obligation in the public interest or in the exercise of the official authority of a third party or the data controller to whom the data is disclosed (*Article 6 (1) (e)*).

Data processing is necessary for the purposes of legitimate interests pursued by the data controller or a third party; except that these interests are invalidated by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data (*Article 6 (1) (f)*). The public authorities that process personal data while performing their duties cannot withstand this situation. When determining whether the interests of the database or its fundamental rights and freedoms invalidate the legitimate

¹ International and European Trade and Investment Law(LL.M.) Student of the University of Szeged

interest of the data controller, reasonable expectations based on the relationship of the database to the controller should be considered (*Recital 47, GDPR*). The interests and fundamental rights of the data subject may invalidate the interest of the data controller in which personal data is processed, especially where the data subject is not expected to be further processed.

Conditions for which the process may be applied:

The legal grounds referred to in *Article 6 (1) (c) and (e)* shall be established in accordance with the EU or national law (*Article 6 (3), GDPR*).

In particular, these laws should determine the purpose of the transactions they authorize or authorize. To this end, the legislation may contain the following "special provisions" in order to comply with the implementation of the GDPR:

- General conditions governing the data processor's legality by the controller.
- The type of data being processed.
- Relevant data subjects.
- For what purpose and for what purpose the data can be explained.
- Purpose limitation.
- Storage times.
- Transaction processing and processing procedures. This will include measures to ensure legal and fair treatment, including other specific processing situations contained in *Chapter IX* (see National Derogations).

GDPR *Article 6 (2)*. The Article gives the Member States the right to protect or adapt more specific provisions concerning the processing in terms of compliance with *Article 6 (1) (c) and (e)*. Any such measure shall be taken to ensure that *Chapter IX*. (*See Article 6 (2)*) (see National Derogations).

2. Rights of the Data Subject

3.

Data subjects have certain rights under the GDPR as:

- Information Right (Articles 12-14, and Recitals 58-62)
- Personal Data Access Right (Articles 12 and 15, and Recital 63)
- Personal Data Correction Right (*Article 16*)
- Personal Data Erasure Right (Right to be forgotten) (*Article 17, and Recitals 65 and 66*)
- Data Processing Restriction Right (*Article 18*)
- Data Processing Restriction Right (Article 21, and Recitals 69 and 70)
- Data Portability Right (Article 20, and Recital 68)
- Automated Decision-Making Objection Right (*Article 22, and Recital 71*)
- Breach Notification Right (Article 34, and Recital 86)

Additional data subject rights in the scope of particular circumstances and of consent

We aren't counting rights regarding consent (*if it's the chosen legal basis for a specific type of personal data processing*), additional 'rights' with regards to those special categories of personal data which are called 'sensitive data' in GDPR Recital 10, rights in the scope of proceedings, lodging complaints, representation, compensation, rights in the scope of the occurrence of personal data breaches (*e.g. notification if serious risks*) and far more.²

4. Obligations of The Data Controller relating to The Data Subject's Rights

GDPR applies a variety of obligations on data controllers, including obligations, in particular, to the rights of the data subjects and their ability to exercise those rights. The data controller should assist in the use of data subject to the rights (*Article 12 (2), GDPR*). In addition, they must comply with certain conditions regarding the rights of data subjects in the following situations:

- Communicating with Data Subjects
- Responding to Data Subject Requests
- Data Portability Requests
- Joint Controller Relationships Automated Decision-Making Obligations
- Handling Personal Data Breaches

Another duty of the controller is to make sure that the GDPR's Data Protection by Design and by Default principles are enabled. This again means taking the mentioned proper technical and/or organizational measures but here the GDPR goes a bit further (*Article 25*) by:

- Recommending the use of pseudonymisation,
- Pointing to measures designed to implement the previously mentioned data protection principles,
- Emphasizing measures with regards to the fact that only personal data which are needed for each single processing purpose are indeed processed with additional details.³

Appointment of a data processor

Unlike the Data Protection Directive, GDPR imposes an important burden not only to the data controller, but also to the data processor that contributes to the accountability principle, to demonstrate compliance with the data protection regime.

The data controller must enter into a contract or another legally binding action on the processor that must fulfil the following obligations:

- Process personal data only on the documented instructions of the controller, including international data transfers to a third country or an international organization. This may mean that data processors will not be able to use cloud computing technology or services without the data controller's approval.
- Comply with security requirements equivalent to those of auditors under Article 32 of the GDPR.

² https://www.i-scoop.eu/gdpr/data-subject-rights-gdpr/#Data_subject_rights_list

³ https://www.i-scoop.eu/gdpr/data-controller-data-controller-duties/#Responsibilities_of_the_controller_under_the_GDPR

- Only recruit staff who are committed to confidentiality or under confidentiality obligations.
- Obtain a subprocessor only on the pre-authorization of the controller.
- Help data controllers to fulfil the obligations of the data subjects to apply the rights mentioned in the Chapter III.
- Help data controller to carry out its security obligations under the Article 32 to 36 of the GDPR.
(Article 28(3))

Appointment of a data protection officer

Data controllers and data processors must designate a data protection officer (DPO) in any of the following situations:

- Where the proceedings are carried out by a public authority or body, except courts serving in judicial capacities.
- Where the controller or the operator's core activities consist of processes that require a large and regular and systematic monitoring of data issues due to their nature, scope, and purpose.
- Where the controller or operator's core activities consist of the processing of large-scale private data categories and the processing of data relating to criminal convictions and crimes (Articles 9 and 10, GDPR).

(Article 37(1))

Article 30 of the GDPR sets out document requirements for both data controllers and data processors.

Documentation Requirements

Article 30 of the GDPR sets out document requirements for both data controllers and data processors.

Exceptions

The documentation requirement does not apply to data controllers and data processors who have fewer than 250 employees unless at least one of the following conditions is fulfilled:

What they do is likely to pose risks in terms of data rights and freedoms.

Processing is not occasional.

Processing includes personal data or data categories relating to criminal convictions and offenses (Articles 9 (1) and 10, GDPR).

(Article 30 (5))

5. Legal Framework

i) National Data Protection Authorities

Member States should establish one or more NDPAs with responsibility for monitoring compliance with the GDPR (*Article 51 (1) and Article 54*). NDPA must act with complete independence when it fulfils its duties and powers under the GDPR (*Article 52 (1)*).

In particular, each of the NDPA members should:

- Have the qualifications, experience and skills necessary to perform their duties and use their powers (Article 53 (2)).
- Avoid external influences and do not take anyone's instructions while performing their duties (Article 52 (2)).
- Avoid any action incompatible with its powers (Article 52 (3)).
- During the term of office do not engage in any incompatible profession, whether profitable or not (Article 52 (3)).

Each NDPA has the power to carry out its duties and exercises its authorities in relation to the data processing activities of the data controllers established in its Member State (Article 56 (1)).

If the processing of personal data by an EU data controller or processor occurs in more than one member country, one single NDPA should assume leadership role and have the authority to monitor its activities across the EU (one stop-shop). In this case, the competent authority shall be the NDPA of the member state in which the controller or the processor has its main or the single establishment (Article 56 (1)).

The Regulation also provides for derogation from the application of the one-stop shop, by setting up an urgency procedure for exceptional circumstances when a DPA considers that it is urgent to act so as to protect the interests of data subjects.⁴

It is designed for the following:

- Carry out a consistent implementation of GDPR
- Provide legal certainty
- Reduce the administrative burden for controllers and processors that process personal data in an international context

Powers

As opposed to Directive 95/46/EC, the Regulation now foresees a set of clearly defined tasks and powers equally applicable to all European DPAs. The tasks circumscribe their fundamental duties, such as monitoring and enforcing the application of the Regulation, promoting awareness, dealing with complaints, cooperating with other DPAs etc. The powers represent the means to perform these tasks. The powers of DPAs are now grouped into three main categories, namely investigative powers, corrective powers as well as authorisation and advisory powers.⁵ (Article 58)

Co-operation

The chapter VIII of the GDPR sets out the scope of cooperation between the NDPAs of the different member states where data processing activities affect more than one member state.

⁴ Andra Giurgiu; Tine A. Larsen, Roles and Powers of National Data Protection Authorities, 2 Eur. Data Prot. L. Rev. 342 (2016) p. 350

⁵ Andra Giurgiu; Tine A. Larsen, Roles and Powers of National Data Protection Authorities, 2 Eur. Data Prot. L. Rev. 342 (2016) p. 348

Joint operations of NDPAs

Article 62 of the GDP provides a framework for cooperation between data protection authorities in different regions in relation to research, implementation and other joint operations. Each NDPA has the right to participate in all processes related to the process which, if appropriate, is likely to affect the data subjects in their area.

ii) European Data Protection Board

It ensures the creation of a new European Data Protection Board (EDPB) consisting of NDPAs 68 to 76 of the GDPR, each of the member states, and the European Data Protection Supervisor. EDPB replaces the Working Group of Article 29.

EDPB must act independently while performing its duties (Article 69 (1)). *Without prejudice to requests by the Commission referred to in Article 70(1) and (2), the Board shall, in the performance of its tasks⁶ or the exercise of its powers, neither seek nor take instructions from anybody (Article 69(2)).*

EDPB should take its decision with a simple majority (Article 72(1)). The discussion should be confidential (Article 76). Where feasible, it should consult with interested parties and give them the opportunity to comment within a reasonable time. The results of the consultation process should be made publicly available. (Article 70(4)).

iii) Remedies, Liability and Penalties

VIII of the GDPR has set out solutions for the violations of the GDPR and the penalties that the NDPA may be subject to.

Article 77- Data subject's right to lodge a complaint with a NDPA

If each of the data subjects considers that the processing of their personal data violates the GDP, they have the right to file a complaint with an NDPA, in particular in the member states, such as the place of residence, place of work or alleged violation place (Article 77(1)). This right exists without prejudice to any other administrative or judicial resolution.

The NDPA to which the complaint is lodged shall ensure that the data subject is informed of the progress of the complaint and the outcome, including whether or not the judiciary is present (Article 77 (2)).

Article 78- Right to an effective judicial remedy against a NDPA

Article 78 of the GDP opens the way to jurisdiction over data issues:

- Against a legally binding decision by an NDPA concerning them (Article 78 (1)).
- If the NDPA under the authority to designate the leading authority (Articles 55 and 56) does not file a complaint or does not inform the complainant about the progress or the result within three months from the date of the complaint (Article 78 (2)).

⁶ For further information about the tasks of the EDPB: <https://gdpr-info.eu/art-70-gdpr/>

Article 79- Right to an effective judicial remedy against controllers and processors

Article 79 of the GDPR recognizes data entities and auditors' rights to violate their rights under GDPR as a consequence of transactions that do not comply with the requirements of GDPR.

Article 80-Representation of data subjects

Although GDPR ultimately rejects the concept of collective or class action, Article 80 stipulates that data subjects should appoint a non-profit organization, association or association to have a complaint in their favor and use the right of data collection under the title of the Articles. 77, 78, 79 and 82 in their name.

The relevant organization should:

- It was created in accordance with the law of a member state.
- Having legal objectives in the public interest.
- Be active in the area of protecting the rights and freedoms of data concerning the protection of personal data.

Member States may also obtain a more general right under national law for an organization, institution or organization to lodge an appeal against an NDPA by a data subject independently of an authority (Article 80 (2)).

Article 81-Suspension of proceedings

Article 81 of the GDPR provides for the right of a second judge in the courts of another member state to suspend the proceedings if he/she obtains knowledge that the proceedings are continuing, in order to prevent the same issue involving the same controller or operator in different Member States.

In cases where these proceedings are anticipated in the first instance, a court from another court may first refuse the jurisdiction of the court upon the application of one of the parties, if the court first has jurisdiction over the actions and if the law permits such actions to be consolidated. (Article 81 (3)).

Article 82- Right to compensation and liability

A person who has suffered financial or non-material damages as a result of a violation of GDPR has the right to receive compensation from the controller or the processor of the damage.

In this context, auditors are liable for damages caused by the transaction if they are involved in the infringing transaction. Processors are only responsible for:

- Has not complied with any of its obligations under GDPR.
- Have acted in violation of or outside the controller's legal instructions.
- (Article 82 (2)).

Article 83-General conditions for imposing administrative fines

Article 83 (1) of the GDPR empowers the supervisory authorities to impose administrative fines for the breach of the GDPR. Infringements of the obligations of the

controller and the processor; the obligations of the certification body; the obligations of the monitoring body carry an administrative fine which can be as much as 10 Million Euros or 2% of the worldwide annual turnover of the preceding financial year. Infringements of the basic principles for processing including consent; the data subject's rights which include the right to data portability, the right to be forgotten etc.; the transfer of personal data to a recipient third country or international organization; obligations pursuant to member state law; non-compliance with any order by the supervisory authority for restriction of processing or suspension of data flows attracts an administrative fine of up to 20 Million Euros or 4% of the worldwide annual turnover of the preceding financial year. Also non-compliance with the orders of the supervisory authority under Article 58 (2) of the GDPR attracts an administrative fine which can be as much as 20 Million Euros or 4% of the worldwide annual turnover of the preceding financial year.⁷

Member states are also allowed to introduce sanctions for infringements not covered under the GDPR and such penalties are to be notified to the Commission by the 25th May, 2018.⁸ (*Article 84*)

Result and Assessment

The amount of data circulation on the Internet continues to increase day by day. In this direction, cyber attacks and threats will continue to increase. Hence, the GDPR, in comparison with the Directive 95/46/EC, has introduced more stringent and comprehensive regulations in terms of responsibilities, sanctions, human rights and data protection measures.

Innovative approaches such as data portability and impact assessment and data protection by design and by default, strengthening deterrence by increasing the sanctions for administrative fines, the remarkable rights of the data subjects such as right to rectification, right to be forgotten, right to restriction of processing, notification obligation are considered to be beneficial not only to the EU member countries but also as a role model to the whole world.

Furthermore, if the Digital Single Market Strategy is effectively alive with all the legal regulations, the EU economy is expected to add an annual value of 415 billion Euros and provide hundreds of thousands of new jobs.⁹ Therefore, the GDPR is looked forward to being successfully implemented as it is one of the pillars in the Digital Single Market Strategy.

⁷ Salami Emmanuel Akintunde, *An Analysis Of The General Data Protection Regulation (EU) 2016/679*. (2017) p. 32

⁸ *Id.* p 32

⁹ https://ec.europa.eu/commission/priorities/digital-single-market_en

**Introductory Guide to the General Data Protection Regulation (GDPR)
(2016/679)**

Ash ALKIŞ¹

Abstract

GDPR (EU) 2016/679 is the regulation on data protection and privacy for all individuals within the European Union. The main aim of the GDPR is to simplify the regulatory environment for international trade and the single market by giving the control back to data subjects who are citizens or residents and by unifying the Regulations among the Member States. As of May 25, 2018, the GDPR will replace the 1995 Data Protection Directive (Directive 95/46).

This paper examines the legal benefit, general information, the scope including the exemptions and finally the principles of the GDPR. In the result, I shall explain the innovations of the GDPR compared with the Directive 95/46 and evaluate the progression from my point of view.

1. The legal benefit of the GDPR

With the developing technology and rapidly increasing use of computers, processing and protecting personal data has become more important and critical. It is perfectly illegal that personal data storing in data banks and sharing them with other entities have seen much more frequently without the consent of the data subject. This activation cause data profiling which makes the entities find and reach their potential clients easily but in an illegal way.

However, the need for personal data protection arises not only from the right of privacy but also the redressing the balance between protection and free movement in European common market.

2. General Information

The rapid change in the use and role of the data in economic activities has led to a change in the regulatory framework, in other words, the need to update the Directive.

¹ International and European Trade and Investment Law(LL.M.) Student of the University of Szeged

The renewal to be made in this field is deemed necessary in order to maintain a much higher level of confidentiality.

Considering that the Data Protection Directive has been implemented since 1995, it is evaluated that this regulation remained obsolete in the face of radical transformations that took place due to the commercialization of the internet, especially from the middle of the 90s. New technologies that have entered our lives sharply during this transformation have provided lots of benefits. On the other hand, they have brought privacy and/or security risks in terms of data collection, processing, storage and reuse of data.

One of the most basic drawbacks within the European Union has been the facilitation of transferring the personal data to third countries. Therefore, this situation brought the necessity of applying the rules of privacy against foreign countries.

In this context, the need for a replacement of the applicable law and adapting to the new digital world has become increasingly necessary due to the concrete disputes that have arisen.

“There is an important distinction between EU directives and regulations, and that distinction is among the reasons why the European Commission strived to replace the Data Protection Directive by a regulation. Directives are broad, goal-driven pieces of legislation which provide guidelines for Member State implementation but depend on the independent passage of a law in every Member State within a designated period of time. Regulations are narrow, specific pieces of legislation which become immediately enforceable-and binding-in every Member State without implementing a law in each State. When the European Commission first considered reforming data protection, it was not yet clear that a directive would be replaced by a regulation. The Commission committed to addressing the following issues:

- (1) Addressing the impact of new technologies;
- (2) Enhancing the internal market dimension of data protection;
- (3) Addressing globalisation and improving international data transfers;
- (4) Providing a stronger institutional arrangement for the effective enforcement of data protection rules;

(5) Improving the coherence of the data protection legal framework.”²

The exposure draft of the Regulation adopted by the Council on 8 April 2016 was adopted and ratified by the European Parliament on 14 April 2016. These regulations were published in the Official Journal of the European Union in all official languages on 4 May 2016. GDPR entered into force on 24 May 2016. However, the exercise date of the Regulation is 25 May 2018.

According to Beata A. Safari, the regulation, as opposed to the current Directive, would be a huge step towards increasing coordination of national and European policy.³

3. The Scope of The GDPR

(1) Material Scope

The GDPR, which consists of approximately 90 pages with the text of the 173-paragraph recital section and the 99-articles, provides a comprehensive data protection framework.⁴

Like the Data Protection Directive, GDPR applies to the processing of personal data:

- Wholly or partly by automated means.
- Other than by automated means, if the data are form part of a filing system or are intended to form part of a filing system. (Article 2 (1).)

A filing system is mentioned as “any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis” in Article 4(6)).

Household Exception

Processing " *by a natural person in the course of a purely personal or household activity*; " does not have to conform to many of the Data Protection Directive (Article 2(2)).

² Beata A. Safari, *Intangible Privacy Rights: How Europe's GDPR Will Set a New Global Standard for Personal Data Protection*, 47 *Seton Hall L. Rev.* 809 (2017) p. 820-821

³ *Id.* p. 824

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

This exception is clarified in Recital 18 as:

“This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.”

This means that the use of personal data uploaded to the services by those service providers during personal or household activities remains an example of data processing subject to the rules of the GDPR.

Territorial Scope

GDPR will be directly applicable to all member states. However, it is important that data controllers outside the EU know the conditions under which their processing activities can be managed by strict EU regime. This concerns especially three types of processing.

First, the GDPR applies to *“processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.”*(Article 3 (1)). It is likely to be expanded to the EEA. This provision indicates that data processors are now specifically included in the GDPR.

Second, the GDPR applies to *“the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.” (Article 3 (2)).

Third, the GDPR applies to *“the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”*(Article 3 (3)).

Where the GDPR applies to a controller or processor not included in the European Union, an EU representative must be appointed (Article 27 (1)) subject to certain exceptions (Article 27 (2)). The EU representative must be established in one of the Member States where the controller or the operator provides goods or services or monitor behaviours (Article 27 (3)).⁵

National Exemptions

Such restrictions have to respect the substance of fundamental rights and freedoms and they should be necessary and proportionate measures in a democratic society to protect:

- a) national security;
 - (b) defence;
 - (c) public security;
 - (d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
 - (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security;
 - (f) the protection of judicial independence and judicial proceedings;
 - (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
 - (h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);
 - (i) the protection of the data subject or the rights and freedoms of others;
 - (j) the enforcement of civil law claims.
- (Article 23)

Chapter IX allows Member States to provide exemptions, exceptions, conditions or rules relating to the following specific processing activities:

⁵ For further information see the Article 27 :
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

- Processing and freedom of expression and information
- Processing and public access to official documents
- Processing of the national identification number
- Processing in the context of employment
- Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes
- Obligations of secrecy
- Existing data protection rules of churches and religious associations

4. Basic Concepts

- i) Personal data: GDPR defines personal data as "any information about a data subject" (Article 4 (1)).
- ii) Data subject: A person who is defined or identifiable as being related to personal data.
- iii) Data controller: Most obligations under GDPR fall to the data controller which determines the purposes and means of processing personal data (Article 4 (7)). The Controller may act alone or in conjunction with others as is covered by the Data Protection Directive.
- iv) Data processor: In contrast to the Data Protection Directive, GDPR also imposes specific and separate tasks and obligations on data processors. A processor is " a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller" (Article 4 (8)).
- v) Identifiability: A natural person is identifiable if he/she "can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person". (Article 4(1))
- vi) Processing of data: This has been extensively described as "any operation or set of operations" on the data, including the following:
 - collection,
 - recording,

- organisation,
- structuring,
- storage,
- adaptation or alteration,
- retrieval,
- consultation,
- use,
- disclosure by transmission,
- dissemination or otherwise making available,
- alignment or combination,
- restriction (‘restriction of processing’ means the marking of stored personal data with the aim of limiting their processing in the future(Article 4 (3))).
- erasure or destruction.

(Article 4(2))

vii) Third Party: It means “a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data.” (Article 4 (10)).

viii)Consent: Consent of the data subject means “any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.” (Article 4 (11)).

ix) Filing System: It means “any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis.” (Article 4(6)).

x) Recipient: It means “a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those

public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing.” (Article 4(9)).

5. Principles relating to processing of personal data

GDPR sets out a set of principles that the data controller and the data processors must comply with for processing personal data (Article 5).

These principles are the core of the data controller's obligations and are often the basis for a claim that a data controller does not comply with the legal duties.

Article 5 contains the following data protection principles:

- Lawfulness, fairness and transparency:

Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject (Article 5(1)(a)). Detailed information in regard to the lawfulness of processing is mentioned in Article 6.

- Purpose limitation:

Personal data should only be collected for specified, explicit and legitimate purposes. It should not be processed in any way incompatible with these purposes. (Article 5 (1) (b).)

Exceptions:

i) Further processing with the consent of the data subject

Further processing of personal data intended for an incompatible purpose, where the data are collected for the first time, is allowed if the data subject is compatible with this new transaction activity (*Article 6 (4), GDPR*). This may mean that the controller must notify the intention to use the data for the new purpose (*Recital 50*) and not process the data for this new purpose until the data has been approved.

ii) Further processing on the basis of EU or member state law

Personal data may be processed for more mismatched purposes on the basis of an EU or Member State legislation that constitutes a necessary and proportionate measure in a democratic society for the protection of the objectives set out in the GDPR. (*Article 23 (1)*) (*Article 6 (4)*) (see national derogations).

The EU or member state law may harmonize and legally determine the tasks and objectives to be taken into consideration in the future proceedings, if it is necessary for the performance of the undertaking to be carried out in the public interest or in the performance of the official authority granted to the supervisor (*Recital 50*).

In theory, this would allow, for example, member states to adopt legislation authorizing the subsequent use of personal data collected by private organizations for their own commercial purposes (including clarification to public authorities and further processing of authorities). This is an important departure from current legal restrictions and may potentially allow public authorities more access to existing data pools on the basis of legislation that can be adopted after these data repositories have entered into force.

iii) Further processing for the public interest purposes

Further operations for public interest, scientific or historical research purposes or for archiving purposes for statistical purposes will not be considered incompatible with the original purposes. For this reason, further processing of existing data is usually allowed, depending on the particular circumstances.

- Data minimisation:

Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (Article 5 (1)(c)).

- Accuracy:

Personal data should be accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (Article 5 (1)(d)).

- Storage limitation:

Personal data should not be kept in a form that allows the data to be identified for a longer period than is necessary for the purposes for which it is being processed (Article 5 (1) (e)). Personal data may be stored for a longer period as long as it is processed for the public interest, for scientific or historical research purposes, or for archival purposes for statistical purposes. This is subject to the implementation of

appropriate data security measures designed to protect the rights and freedoms of data subjects.

- Integrity and confidentiality:

The personal data should be processed in a way that ensures proper security (Article 5 (1)(f)). This includes protection against unauthorised or illegal operations and accidental loss, destruction or damage. In this context, data controllers and processors must use appropriate technical or organisational security measures.

- Accountability:

It is a new principle introduced by GDPR. The controller must be responsible for and be able to observe the principles mentioned above. (Article 5(2)).

This is significant as it shifts the burden of proof to the data controller in the event of a compliance investigation by a data protection authority. Organisations should view this principle in light of the record keeping obligation, the requirement to prove that consent is obtained and the concept of privacy by design and default.⁶

The GDPR includes a range of other obligations and requirements that will impact on different organisations to varying degrees, but the overall objective is to recognise that data about individuals belongs to them, and they should be entitled to determine how it is used.⁷

Result and Assessment

As the rapid development of data processing technologies and the internet become an integral part of social life, the importance of the protection of personal data has been increasing. For this reason, unlike the Directive, it was necessary to make a regulation that would have a direct effect on all European Union countries from the moment it entered into force.

⁶ https://www.mhc.ie/uploads/MHC_GDPR_web.pdf

⁷ https://s3-eu-west-1.amazonaws.com/5874multi/wp-content/uploads/sites/63/2017/11/28150840/ML4200-AIHO-Data-Protection-and-the-GDPR-Key-Principles-FIN_WEB.pdf

Compared to Directive 95/46/EC, the GDPR has brought more stringent and comprehensive rules that are made in terms of responsibilities, sanctions, individual rights and data protection measures.

The responsibilities of data processing parties have been increased. In contrast to the Directive, the data processor is also responsible for processing under the GDPR. The responsibilities of the data controller have been made even stricter with the principle of "accountability".

Moreover, the GDPR has stronger norms in terms of implementation area. It's been criticised that the "territorial scope" was not included in the Directive. However, it is involved in the GDPR to prevent complications and harmonize practices among the Member States.

Furthermore, basic concepts have been examined and diversified in more detail. For instance, the concept of clear consent has been strengthened. As stated in Recital 32, data subjects' silence to the privacy settings on their online social networks or web browsers or if they have not raised any objections until then, the default setting does not mean that a valid consent has been received.

It is clear that there are areas where Member States are competent, for example in national security and defence matters. It is natural that GDPR does not present all the possibilities for certain data processing activities. However, it should be said that the Regulation is a real revolution and it will affect not only European Union countries but also the third countries with its detailed and strict rules. According to Jan Philipp Albrech, From 24 May 2018 the fragmented digital market of today and the lack of enforcement in the field of data protection provisions will end. There will be a unified and directly applicable data protection law for the European Union which replaces almost all of the existing Member States' provisions and which will have to be applied by businesses, individuals, courts and authorities without transposition into national law.⁸

The GDPR now directs almost all the matters and leaves only exceptional and limited powers to the Member States, but it is difficult to foresee what will happen as a result of new and speedily developing technological developments.

⁸ Jan Philipp Albrecht, How the GDPR Will Change the World, 2 Eur. Data Prot. L. Rev. 287 (2016) p. 287

Nazmul Haque Tonmoy: How effective WTO in practice? What is its core activities and contribution to the development of international trade?

Abstract

International trade and the integrated capital market both are essentially unique features of 20th century. The process of internationalizing businesses through the foreign investment was still in practice in the earlier period of gradual globalization but in the form of foreign direct investment. There were still some barriers in existence in international trade and it was necessary to eliminate such barriers like tariffs and import quotas, relationship between countries and an effective dispute resolution system therefore, a unified trading system based on the international trade law was an inevitable necessity for countries. This research paper examines the general overview of World Trade Organization; it also analyzes its potency in the development of international trades and how effective it is in practice. An attempt is made in this paper to examine the core activities of WTO and answering the questions whether developing countries are benefited through the adaptation of the WTO. The paper further discusses the impact of WTO policies on developing countries, whether or not the WTO policies have positive effect on the trade of developing countries.

Introduction

A French economist “Thomas Piketty”, quoted that “Protectionism does not produce wealth, and free trade and economic openness are ultimately in everyone’s interest”. By protectionism, we mean an economic protectionism, it is the economic policy that restricts outsiders from doing businesses or importing goods through the methods of imposing tariffs in imported goods, import quotas and with other governmental regulations. The protectionist policies prevent the producers, businesses and workers of the import competition sector in the country from foreign competitors. The protectionist policies not only reduce trade but also adversely affect consumers through tariffs in imported goods, and harm the producers and workers in export sectors. The economists are agreed that protectionism has negative effect on economic welfare and economic growth, whereas free trade and the reduction of trade barriers has significantly positive impact on economic growth¹. The governments and leaders found out that the free trade and economic openness is crucial for economic welfare and economic liberalization is the only way to achieve economic goals. Contrary to what we see today, USA and Western European Countries once adopted protectionism policies which led the Great Depression in 1930. The Great Depression was a severe worldwide economic depress originated in the United States, after a major fall in stock prices that began around 4th September 1929 and became worldwide news with the stock market crash of October 29, 1929. In consequences, US had experienced a decade-long period of poverty and unemployment followed the stock market crash. Between 1929 to 1932, worldwide GDP fell by an estimated 15%. (By comparison, worldwide GDP fell by less than 1% from 2008 to 2009 during the Great Recession).

HOW BAD WAS THE GREAT DEPRESSION?

¹ N. Gregory Mankiw, Economists Actually Agree on This: The Wisdom of Free Trade, *New York Times* (April 24, 2015): "Economists are famous for disagreeing with one another.... But economists reach near unanimity on some topics, including international trade.

As I mentioned above, the Great Depression was a decade-long period of unemployment and poverty beginning in 1929, resulted from a number of economic issues including an overall decline in demand, imbalances and weaknesses in the economy, faltering demand for housing, and reduced production in the automobile industry.² Loans to foreign nations was one of the worrying aspects for the United States after first World War, which became problematic in the 1920s as European countries lacked the means to repay the loans, destabilizing American debt markets, farm prices began to fall in the post-war period and farmers already deeply in debt, therefore failed to pay back their creditors.³ In consequence, more than 10,000 banks failed, taking the life savings of 9 million people. In addition, outstanding debts became heavier, because prices and incomes fell by 20-50% but the debts remained at the same dollar amount. The failure of the banks and stock markets led to factory closures and foreclosures worldwide, leading to millions of unemployed and evicted Americans during the 1930s.

In order to deal with the Great Depression, United States and other western nations decided to adopt protectionist policies with high import tariff. As of June 1930, the United States passed an Act called “Smoot-Hawley Tariff Act of 1930”. Through the “Tariff Act of 1930”, the United States implemented protectionist trade policies supported by Senator Reed Smoot and Representative Willis C. Hawley and raised US tariff on over 20,000 imported goods.⁴ The tariffs under the Act were the second-highest in the U.S in 100 years, exceeded by a small margin by the Tariff of 1828. Prior to this Act, in 1922 Congress passed similar act increasing tariffs on imports known as Fordney-McCumber Tariff. As soon as the United State began to impose tariffs on imported goods, all western European developed countries began to pass similar acts/laws, as a result, not only United States, other industrialized world declined their export and import up to 40% to 50%. The aim of these Acts on tariffs, were to recover from Great Depression by imposing tariffs on imported goods but in reality it turned into a phenomenon which was contrary to the expectations. The Great Depression became more and more intense, worsening the world economy and a major worldwide downturn ensued. Today, many economists and historians together put the consensus view that such economic downturn would never have happened if the Tariff Act of 1930 hadn't been enacted and implemented. Thus the tariff war begins around the world and export and import relation between countries significantly decreased and nations became less interdependent on each other. Most importantly, due to this tariff war some economic issues raised which subsequently led to the World War 2. Speaking candidly, tariff war was not only reason for World War 2 but one of the significant reasons.

As we know from the aforementioned events, Tariff Acts of 1930 exacerbated the Great Depression.⁵ After World War 2, when it was obvious that Allied forces going to defeat Axis Powers, the world leaders arranged Bretton Woods Conference, which was formally known as the United Nations Monetary and Financial Conference held in Bretton Woods,⁶ New Hampshire at the Mount Washington Hotel, to regulate the international monetary and financial order. After having experienced Great Depression and its circumstances, world leaders were reluctant to experience such depression again in the future, particularly John Maynard Keynes of the British Treasury and Harry Dexter White of the United States Treasury Department started developing ideas about the financial order of the postwar world and therefore in order to avoid such

² <https://courses.lumenlearning.com/boundless-ushistory/chapter/the-great-depression/>

³ Ibid

⁴ Taussig (1931)

⁵ Whaples, Robert (March 1995). "Where Is There Consensus Among American Economic Historians? The Results of a Survey on Forty Propositions" (PDF). *The Journal of Economic History*. Cambridge University Press. **55** (1): 144.

⁶ Markwell 2006.

economic downturn, it was necessary to conclude some form of agreement so that there is a less possibility for protectionism and a global norm of an open market. The predominant idea behind the Bretton Woods Conference was the notion of open market. The conference was held from July 1-22, 1944 where 730 delegates from the all 44 Allied nations were present. Agreements were signed that, after legislative ratification by the member governments, established the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) and International Trade Organization (ITO). Unlike the IBRD and IMF, International Trade Organization never came into existence because the ITO charter, even if it was agreed on at the U.N Conference in March 1948 but it was not ratified by the U.S. Senate as a result the International Bank for Reconstruction and Development came into existence and began operating in a regular basis since 1944.

The functions of the International Bank for Reconstruction and Development (IBRD) were to offer loans to developing countries, economic development assistance and reducing poverty. It was owned, governed and funded by its member states, as the member states contribute capital to the IBRD, it primarily acquires funds by borrowing on international capital market. The IBRD was established with the mission of financing and reconstruction of European countries that are devastated by World War 2. On the other hand, International Monetary Fund (IMF) was created for the purpose of fostering global monetary cooperation, secure financial stability, facilitate international trade and to promote high employment and sustainable economic growth.⁷ Both have equal numbers of member states (189 countries up to now).

In addition, in 1927, the League of Nations' World Economic Conference held at Geneva, concluding in its final report: "the time has come to put an end to tariffs, and to move in the opposite direction.

Emergence of WTO

The "WTO" is an acronym for the World Trade Organization, which is the largest economic international organization deals with international trade by facilitating and liberalizing international trade, and supervise its member states. The WTO provides a framework for negotiating and standardizing trade agreements. It also mediates dispute resolution process aimed at enforcing member states adherence to WTO agreements which are signed by the state representatives of member governments and ratified by their parliaments. The WTO is a forum for trade regulation, regulating trade in goods and services and intellectual property within signatories. There are now 164 WTO member states operating under this agreement to ensure a level playing field, thus global trade is flexible and flows as smoothly reducing obstacles to international trade, thus contributing significantly to the economic growth and development. The WTO, as mentioned above, officially started to operate on 1 January 1995, under the Marrakesh Agreement replacing the General Agreement on Tariffs and Trade (GATT) and its headquarters is located in Center William Rappard, Geneva Switzerland.

History of WTO

As of 1st January 1995, the World Trade Organization officially started its journey under the Marrakesh Agreement, which was held in Morocco, signed by 124 countries on 15 April 1994. The World Trade Organization is 'member-driven', with decision made by General Agreement

⁷ "About the IMF". IMF. Retrieved 14 August 2018.

among all member of governments, dealing the rules of trade between nations at a global. The Creation of WTO was one of the important achievements of Uruguay Round of GATT which was held in Marrakech in 1994. The WTO is considered as a successor of General Agreement on Tariffs and Trade (GATT) agreement, which was a multilateral treaty held in Geneva and signed by 23 countries in 30th October 1947. The purpose of the GATT agreement was to eradicate trade barriers such as tariffs or quotas and to facilitate international trade. GATT was the outcome of the failure of creating ITO (International Trade Organization) and was created after World War 2 in the wake of other two new multilateral institutions such as World Bank and IMF (International Monetary Fund) that were aimed at developing international economic cooperation. It was also purposes of holding Bretton Woods Conference to reduce trade barriers and smooth international trade through multilateral agreement. However, GATT as predecessor of WTO, have successfully reduced tariffs and its original text is still in effect under the WTO framework, subject to the amendments of GATT 1994.⁸ Since 1946, The GATT was the only multilateral instrument leading, regulating and governing international trade around the world until the establishment of WTO in 1st January 1995.⁹ The GATT held 9 rounds of negotiations. The first round that took place in Geneva as of April 1947, and lasted for 7 months which was predominantly about tariff concession. As a result, 45000 tariff concessions were made affecting \$10 billion of trade. In next rounds, more nations were involved and signed the treaty and variety of subjects were covered such and Anti-dumping, non-tariff measures, framework agreement. In 1986, Uruguay round (8th round) took place and it was lasted for seven and half year long. This round had led to the creation of WTO and variety of new subjects were covered such as intellectual property, dispute settlement, textiles, agriculture and most importantly it led major reductions in tariffs which was about 40%. In this GATT round(Uruguay Round) its signatories concluded that, they have been straining with the GATT system in order to adapt to a new globalizing world economy¹⁰. Subsequently, in 1993 in order to cope with the issues arising from new globalizing world economy, the GATT was amended (GATT 1994) and improved to include new duties and responsibilities upon its participants. One of the significant modifications was the creation of the WTO and as a result, all existing GATT member states and the European Communities became the founding members of the WTO in 1995 thus replaced GATT as an international organization. The World Trade Organization (WTO) along with General Agreement in Tariffs and Trade (GATT) created a strong and prosperous international trading system over the past 60 years and it has contributed significantly to the global economic growth.¹¹ Among the WTO (164 countries) members, 117 are developing countries who were benefited or believed to be benefited from the this international trade organization through its agreements. The GATT lasted until the signature by 123 nations in Marrakesh on April 14, 1994 of the Uruguay Round Agreements, which established the World Trade Organization on January 1, 1995.

There are some important points to mention about GATT, which differentiates GATT from WTO in following ways,

1. Under this agreement, countries agreed to substantially reduce tariff of goods (agriculture and textile were excluded)
2. GATT was applicable only on trading of merchandised goods
3. Unlike WTO, GATT was not organization, but an agreement.

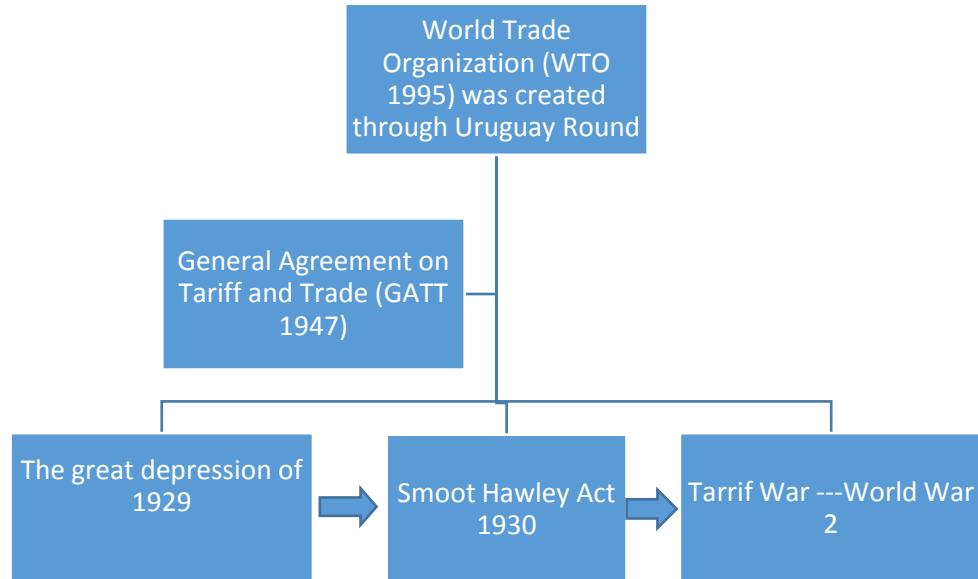
⁸ World Trade Organization: WTO legal texts; General Agreement on Tariffs and Trade 1994

⁹ The GATT Years: from Havana to Marrakesh, WTO official site, accessed 16th of August 2018

¹⁰ P. Gallagher, *The First Ten Years of the WTO*, 4

¹¹ <https://www.wto.org> WTO official website, accessed 16th August 2018

4. Participating countries were not called members, but contracting parties.



1.1 Sequences of the establishment of WTO

One of the important features of GATT agreements was the protocol for “provisional application”, (also known as Grandfather’s right) which was praised by the world and gave GATT a lot of flexibility in adopting national law complying with the GATT agreements when necessary. Under this protocol, when the national laws of a participating country contradict with GATT’s law, the participating country then can only follow GATT’s laws complying with their national laws, thus reduced the rigidity of the conflict of laws.

Trade Round

It is important to understand Trade Round in both GATT and WTO. The trade round is a meeting held often by the GATT’s contracting parties when there is issues to be addressed. For example, if contracting parties found out some problems need to solved or new issues need to be addressed or if contracting parties intend to include more areas in it or to amend the laws, they usually call for a meeting when necessary. All the contracting parties then decide the place where the trade round takes place becomes the title of the trade round. Under the GATT, there were eight trade rounds took place so far in different locations in the world. For starters, first round took place in Geneva in 1947 where 23 contracting states were involved for discussing Tariffs lasted for 7 months and signed GATT agreements. In every trade round, one thing was common, which is tariff reductions. The final round under GATT, the eighth round known as Uruguay round, which led to the creation of WTO. Under WTO, only one round takes place in Doha in 2001, where 159 members were participated but the round has not yet concluded.

Why Replacing GATT?

As we know one of the fundamental reasons for the establishment of WTO is to regulate international trade as an organization not as treaty. Now, it is crucial to discuss why it was

important to replace GATT. The GATT was replaced with WTO because of the following reasons:

1. Even though GATT was working efficiently but powerful contracting states of GATT decided to replace it with some global level regulating and governing authority.
2. GATT was applicable only on trading merchandised goods, but WTO significantly cover more trading services like intellectual properties along with the merchandised goods and so on.
3. GATT was highly bureaucratic structure, in the other hand WTO is faster in implementation of international agreements and it enjoys more authority while resolving the disputes between member countries.
4. GATT was actually just a set of instructions and rules, with no organizational or institutional foundation. There was no central body to regulate the functioning of GATT and its member countries. On the other hand, WTO is a permanent full-fledged international institution with its own independent secretariat.
5. Furthermore, unlike WTO, GATT agreements were subject to the willingness of member countries to implement it. It was quite possible that one or more member countries refused to implement the signed agreements simply due to various miscellaneous local reasons and no one was there to account their responsibility of implementation. But commitments of WTO are permanent and reliable.
6. Demand by Developing countries to include trade in agriculture and textile within international trade regime.
7. Mainly GATT was a provisional agreement not an organization.
8. The developing countries could get only little benefits from GATT. Trade liberalization was confined mostly to the developing countries.
9. The textile and clothing industries were exempted from GATT.
10. GATT followed the principle of commodity-based negotiations. Developing countries, mainly exporting primary products could not effectively bargain with developed countries.
11. There was no efficient means of resolving disputes arising from international trade in GATT agreement.

The developed countries were almost agreed with every issue which addressed in WTO except the trade in agriculture and textile within international trade regime so there was a bargain session commenced between developed countries and developing countries called “The Grand Bargain”. In response to the demand, for the inclusion of trade in agriculture and textile in WTO, developed countries from their standpoint demands to include service and intellectual property right in WTO, and subsequently both agreed and concluded agreements.

Principles of the trading system in WTO

The WTO created a framework for trade policies which is concerned with setting the rules of the trade policy game.¹² After the conclusion of the Uruguay Trade Round and the creation of the WTO, the basic principles formulated in the GATT remained unaffected.

¹² B. Hoekman, *The WTO: Functions and Basic Principles*, 42

Non-Discrimination Principle is one of the fundamental trading principles of WTO and is recognized in the Preamble of the trade policies in the WTO Agreement. Non-discrimination principle believed to be a crucial instrument to achieve objectives of the WTO. The WTO members expressed their desire in the Preamble WTO, to eradicate any type of discriminatory treatment in international trade relations. Non discrimination principle has two major components, the most favored nation (MFN) treatment obligation, and the national treatment obligation. The MFN principle applies to trade in services, trade in goods and trade in relation to intellectual property. On the report of the Appellate Body in the EU Tariff Preferences case (WT/DS246), the MFN treatment is a cornerstone of the GATT and one of the pillars of the WTO trading system.

A **Most favored nation** rule requires that a member of WTO must apply the same conditions on all trade with other WTO members while providing any concessions, privileges, or immunities granted in a trade agreement. For example, China and Russian both are WTO members and trading with each other, Russia granted a tax reduction to China up to 7% for imported goods and gave China a status of MFN (Most favored Nation). Now, any other WTO members, if exporting the same goods to Russia, in this case Russian cannot impose more than 7% tax as it for China, thus WTO avoiding discrimination within its members and making level playing field in order to facilitate international trade.

The **National treatment** principle constitutes the second component of the non-discrimination pillar and this principle prohibits WTO members from favoring domestic products over the imported products of other WTO member states, thus ensuring the absence of discrimination in trading. So therefore, imported goods cannot be treated less favorably for the same product or services as being WTO member countries. For example, Hungary as WTO member import cars from Germany, Hungary cannot create policies in which they treat less favorably to imported cars over its domestically produced cars with the WTO membership status.

The Reciprocity principle applies when a WTO member reducing trade barriers with when other trading WTO member, then trading partner must reciprocate with whom they are trading with. More candidly, it's a mutual lowering of trade barriers between two trading countries that are members of WTO.

Binding and enforceable commitments: One significant difference between GATT and WTO is, in GATT agreements, however, the implementation of signed agreements were subject to the discretion of contracting parties. To be more candidly, it was within their discretion whether or not to implement it but commitments of the WTO are binding and enforceable. If there is any situation arises in which the tariff commitments made by WTO members and one or more the trading partners found violating WTO trade rules/ agreements are subject to negotiation with affecting members, which could lead them compensation for the damage in trading. If still no satisfaction is gained, the complaining WTO member state may invoke the WTO dispute settlement procedures.¹³

Transparency: It is important for the WTO members to publish their trade regulation in order to maintain institutions permitting for the appraisal of administrative decisions affecting

¹³ Principles of the Trading System, WTO official site accessed 20th August 2018

trade. The WTO system also strives to improve predictability and stability disheartening the use of quotas and setting limits on quantities of imported goods.¹⁴ It is essentially important that regulations and policies of WTO are transparent and coherent to the member governments.

Safety Values principle allows the member government to restrict trade under certain circumstances when it relates to protection of environment as well as public health, animal health and plant health.¹⁵

Freer trade: through negotiation: As discussed above, the WTO is the result of negotiation, whatever WTO does is the result of negotiation. It is intuitively obvious that one of the effective means of encouraging trade is lowering trade barriers, such barriers includes custom duties or tariffs and banning quotas that restrict quantities of imported goods. The WTO occasionally discusses issues like exchange rate policies and red tape.

Ever since GATT came into existence, there have been eight rounds of trade negotiation had taken place where lot a subjects and issues were addressed in the first places, such as lowering tariffs in imported goods. A ninth negotiation round known as Doha Development Agenda, is still underway. The negotiations had expanded to cover variety of new issues in afterwards, such as services and intellectual property. The WTO agreements provide progressive liberalization with which countries can introduce changes they require for their economic growth and trade development.

Structure of World Trade Organization

1. The Structure of WTO as follows:
 - a. Ministerial Conference
 - b. General Council
 - c. Council for Trade
 - d. Subsidiary Bodies
2. Memberships, alliances and bureaucracy
3. The Secretariat

Ministerial Conferences

The main decision making body in WTO, is the Ministerial Conference, which takes place once in every two years.¹⁶ However, the WTO is directed by the Ministerial Conference who has absolute power over the institution and carries out functions of WTO, playing vital role in administrating the new global trade rules. The Ministerial Conference consisted of Trade and Commerce Ministers of Member countries. It brings all members of the WTO and can take decisions on all matters under any of the multilateral trade agreements. **The WTO General Council** is the top-most decision making body, acting on behalf of the Ministerial Conference on all WTO affairs and oversee ministerial decision in a regular basis in Geneva, Switzerland.¹⁷ The

¹⁴ ibid

¹⁵ Understanding the WTO: What we stand for accessed 20th August 2018

¹⁶ https://www.wto.org/english/thewto_e/minist_e/min11_e/min11_e.htm accessed on 20th August 2018

¹⁷ The WTO General Council <https://www.wto.org> official website accessed on 20th August 2018

General Council works in two different forms depending on demand and circumstances and sits regularly to carry out the functions of the WTO mainly to oversee procedures for settling disputes between members and to analyze member's trade policies.¹⁸ The chairman of the General Council is Ambassador Muhamad Noor (Malaysia). **The Dispute Settlement Body** of WTO is the procedure for resolving trade dispute which is vital for enforcing the rules thus ensured the trade flows smoothly. It consisted of all member governments, usually represented by ambassadors or equivalent. The Chairperson is H.E Mr. Bruce Gosper (Australia). All WTO members are subject to review under **The Trade Policy Review Body** which carries out trade policy reviews. The role of the body is to improve transparency and creating a greater understanding of the policies that countries are adopting and to assess their impact. The WTO General Council meets as the Trade Policy Review Body (TPRB) to undertake trade policy review of members under to Trade Policy Review Mechanism(TPRM). The roles and responsibilities of the **Council for Trade and Goods** (also known as **Goods Council**) are to deal with agreement for trade in goods, particularly in the sector of agriculture and textile and with specific issues such as state trading, product standards, subsidies and action taken against dumping. It operates under the General Agreement on Tariffs and Trade, (since 1995 updated GATT has become the WTO's umbrella) which covers international trade in goods. The **Council for Trade in Service (Services Council)** operates under the guidance of the General Council, which is held responsible for overseeing the functioning of the GATS (General Agreement on Trade in Service), and can create subsidiary bodies as required. The sectors covered by Service Council are, Banks, insurance firm, telecommunications companies, tour operators, hotel chains and transport companies. For example, the telecommunications sector has a double role: it is a distinct sector of economic activities on the other hand it is an underlying means of supplying other economic activities for example, electronic money transfers. The WTO Council for Trade-Related Aspects of **Intellectual Property Rights/ Intellectual Property Council** (TRIPS Council) supervises implementations of the Agreements and sets meeting in which WTO Members can consult on intellectual property matters. It carries out the specific responsibilities allotted to the Council in the TRIPS agreement and provides sets of minimum standards of protection for copyrights and related rights such as, trademarks, geographical indications, industrial designs, patents, integrated circuit layout designs, and undisclosed information. In addition, the TRIPS Agreement also provides minimum standards for the enforcement of intellectual property rights (IPRs) through civil actions for infringement.¹⁹ The three main features of the Agreements covered by TRIPS are, **Standards, Enforcement and Dispute settlement.**²⁰

The Committee on Trade and Development (CTD) and Trade and Environment (CTE): The WTO's committee on Trade and Development (CTD) works as a central point for the coordination of work on development in the WTO. It covers a broad range of issues relating to the trade of developing countries.²¹ In 1994, the Ministerial Decision on Trade and Environment created the WTO's **Committee on Trade and Environment (CTE)**, which is subject to the all WTO membership along with international organizations as observer. The **Committee on trade and the environment** aimed at promoting sustainable development and it had contributed to identifying the understanding the relationship between trade and environment.

¹⁸ https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#ministerial accessed on 20th August 2018

¹⁹ https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm accessed on 20th August 2018

²⁰ Ibid

²¹ Committee on Trade and Development <https://www.wto.org> official website accessed on 20th August 2018

WTO Administration

The Directorate-General supervises the WTO's employees as well as serves as the WTO's public face and spokesperson and also known as the Secretariat.

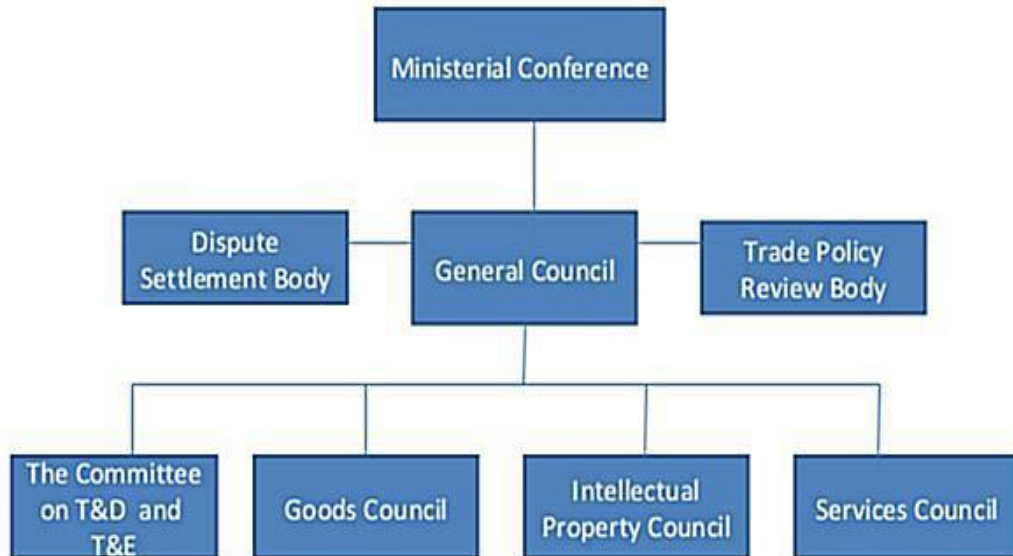
Finally, **the Secretariat of the WTO** led by a Director-General is appointed by the Ministerial Conference without having the decision making powers. The roles and responsibilities include, supplying technical support for the various councils and committees, it provides advices to developing countries and to provide legal assistance in the dispute settlement process. In contrast to the WTO bodies mentioned above, the WTO Secretariat is integrated by international officers who cannot seek or accept instructions from any government or any other authority external to WTO in the discharge of their duties.²² **Secretariat** based in Geneva and it includes more than 600 professional staffs members. It also provides supports to developing countries and advices governments seeing WTO membership.

Decision-Making Bodies in WTO: The WTO labels itself as “a rules-based, member-driven organization and all decisions are made by the member governments through negotiations.”²³ In general, decisions are made by consensus, a consensus decision takes into account when no member formally objects to a decision. In certain circumstances, in order to reach a decision, the WTO agreements permit a voting system, usually by a supermajority. However, the WTO's Ministerial Conferences and the General Council are two most important decision making bodies as well as they have some of its subordinate decision-making bodies discussed above. These are, **Goods Councils, Services Councils, TRIPS Councils**. Six committees with limited responsibilities along with various **working groups** report to the General councils. Some of these subordinate bodies, sequentially, have their own sub-committees and working groups.

²² https://ecampus.wto.org/admin/files/Course_382/Module_2317/ModuleDocuments/eWTO-M1-R2-E.pdf accessed on 20th August 2018

²³ Decision-making at WTO official site accessed on 22nd August 2018

STRUCTURES OF WTO



Accession of WTO

The WTO, now has become an integral part of global economic governance and it has 164 members actively trading under this agreement. Any state having full independence in the conduct of its trade policies may become WTO member. In order to be a WTO member all WTO members must agree on the terms. As we know, international organization actually made up of sovereign States, it is same for the WTO. According to Article XII of the WTO agreement, it is not necessary for the trading partner to be fully-fledged sovereign states to accede, only if they are a separate customs territory and they possess full autonomy in the conduct of their external commercial relations.

Process for accession: The acceding country **first** send a written request expressing its interest to become a member of WTO under the procedures of Article XII of the Agreement Establishing the WTO. Thus begins the process of gathering information of the accession process and the applicants provides a **memorandum** on its foreign trade system describing all aspects of its trade policy that has a bearing on WTO Agreement.²⁴

The memorandum provided by the acceding government covers board economic indicators, policies affecting the trade in goods and services, for example, import and export

²⁴ For complete details on what is included in the Memorandum, see WTO Documents WT/ACC/1, WT/ACC/4 and WT/ACC/5 available at <http://www.wto.org>

regulations, policies related to agriculture and industrial as well as intellectual property, policies affecting customs valuation and licensing requirements. However, the request is disseminated to all WTO Members and conveyed to the Chairman of the General Council for consideration at a future meeting. **Secondly**, the General Council then establishes a **Working Party (WP)**. The Working Party consisted of WTO members and it is open to all WTO members, any member states can join at any state of the process. The role of the Working Party is to examine trade system and coherence between domestic laws and the WTO. The Working Party also studies terms and condition on accession After having examined the application, the Working Party then submit to the General Council or Ministerial Conference recommendations, which may include a Draft Protocol of Accession.²⁵ **In third step**, accession negotiation comes to take place in which acceding government must be prepared for two types of negotiation, these are as follows:

1. **Multilateral Negotiations:** These are the negotiations take place within the framework of WP (Working Party) and cover all WTO Agreements. In its first phase (Fact –Finding Phase), it collects information on the applicant’s foreign trade regime and provide a basis for the negotiation of its terms of entry into the WTO. The acceding government (applicant) has to submit a “Memorandum” on its foreign trade regime which is disseminated to all WTO Members. On the basis of memorandum, the WP Members examined the applicant’s foreign trade regime and they can ask questions and replies on the basis of their submitted documents by the acceding government. In the first meeting, WP continues the fact-finding process and look for whether there is inconsistency with the WTO Agreements. The Secretariat, in order to ensure the transparency of the process, requests to circulate a **Factual Summary of Points Raised** (an informal document to sum up discussion in the WP) thus developed a draft WP report. The WP Report includes the commitments on the general rules to be accepted by the acceding country.
2. **Bilateral Negotiations:** Such negotiations take place when bilateral meetings are held with interested WP members regarding the concessions and commitments on tariff and market access for goods and services. It begins after the acceding government has submitted primary offers on goods and services to the Secretariat for consultation by Members. These negotiations take place usually on the fringes of WP meetings. However, once an agreement has been reached a bilateral agreement is concluded.
3. **Plurilateral Negotiations:** There are certain multilateral issues and interests that are discussed plurilaterally, such as, informal consultations with a number of interested WTO members. Such discussions relate to the technical aspects of domestic support and export subsidies in agriculture.

The approval of the accession relies on the result of both multilateral and bilateral negotiations. The accession process includes the **draft Report**. The **Draft Decision** is taken by the General Council/Ministerial Conference. If two-third majority of WTO members vote in favor, the acceding government is invited to sign the protocol and to accede to the organization. In most cases, the acceding country’s own parliament has to ratify the agreement before the accession process is complete.

As you know from the aforementioned information, WTO accession process involves complex negotiations and requires many documents. In order to face the challenges efficiently

²⁵ <https://peycanlas.files.wordpress.com/2008/01/wto-structure.pdf> accessed on 22nd August 2018

and effectively, WTO Secretariat along with the WTO Members as well as other international organization provides technical assistance to the acceding government. There are many forms of technical assistance provided by the WTO Secretariat to acceding government in the preparation of documents and answers to questions regarding WTO rules and requirements. Acceding governments can participate in WTO trade-related technical assistances (TRTA) and training activities coordinated by the Institute for Training and Technical Cooperation (ITTC).²⁶

Thus countries become members of WTO by negotiating for accession.

WTO's Objective and Functions

The World Trade Organization was created to facilitate international trade and it is driven by its member states and it cannot function without its Secretariat to organize the activities. In addition, it provides a framework for negotiating trade agreement and dispute resolution process by enforceable to participants adhering WTO agreements, signed by the member government and ratified by their parliament.²⁷ The core activities and its objectives of the WTO are such as, highlighting benefits of trading systems while stimulating economic growth and employment opportunities for its member government and helping weaker member countries to develop.

Objectives of the WTO: One of the important objectives of WTO is to improve the standard of living of people in the member countries and to enlarge production and trade of goods, thus increased the trade of services and the trade of goods. Secondly, it ensures full employment and board increase of effective demand and optimum utilization of world resources. Another objective of the WTO, is to emphasize the protection and preservation of the environment through the **Committee on Trade and Environment** (established in 1994 by Ministerial Decision on Trade and Environment, subject to all WTO members and operate alongside some international organizations as observers) which was created by the WTO General Council, acting under article IV para.7 of the Agreement Establishing the World Trade Organization.²⁸ In addition, the central principle of the WTO is Sustainable development, which strives to alleviate economic growth and poverty through the trade and thus making trade a powerful ally of sustainable development.²⁹

The core functions of WTO are as follows:

1. Implementing rules and provisions regarding trade policy and review mechanism.
2. Providing a platform to member states to decide what would be the future strategies in relation to the trade and tariff.
3. Facilitating implementation process, administration and operation of multilateral and bilateral agreement of the world trade.
4. Administrating the rules and procedures in dispute settlement process.

²⁶ https://ecampus.wto.org/admin/files/Course_382/Module_2317/ModuleDocuments/eWTO-M1-R2-E.pdf Technical Assistance And Training of WTO for Acceding Government, accessed on 25th August 2018

²⁷ Malanczuk, P. (1999). "International Organizations and Space Law: World Trade Organization". *Encyclopedia Britannica*. **442**. p. 305. Bibcode:1999ESASP.442..305M.

²⁸ WTO official website https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm accessed on 29th August

²⁹ WTO official website https://www.wto.org/english/tratop_e/envir_e/sust_dev_e.htm accessed on 3th September

5. Ensures the optimum use of world resources.
6. Finally, assisting international organization such as, IMF and IBRD for establishing coherence in Universal Economic Policy determination.

The World Trade Agreement/ WTO Code

The World Trade Organization provides a framework through WTO code for an integrated approach to confront the trade-related economic issues which cannot be isolated from the world economic order. These codes lie in the international instrument, such as, the GATT 1994, the Multilateral Trade Agreement and the Plurilateral Trade Agreement (PTA). The WTO Agreements therefore, covers the following:

- 1. Multilateral Agreements on Trade in Goods**
- 2. General Agreement on Trade in Service**
- 3. Agreement on TRIPS**
- 4. Rules and Procedures regarding dispute settlement**
- 5. Plurilateral Trade Agreements (PTA)**
- 6. Trade Policy Review Mechanism (TPRM)**

The abovementioned agreements seek to deal with non-tariff measures affecting global competition, aimed at reducing domestic and export subsidies on agricultural goods. The agreements also demonstrate that the current total collective measures of supports should not exceed more than 10 percent of the annual value of total agricultural product measured at international price. It also demonstrates that member states should reduce the value of direct export subsidies to a level of 36 percent below the 1986-90 base period level during the implementation span of 6 years. In addition, the volume of subsidized exports should be reduced by 21 percent.

WTO Membership Benefits

The WTO aids trade throughout the world flow easily through its trade agreement. The members of the WTO are aware of the rules and penalties for breaking the rules. They know how to play the global trade game, thus creating a safer trading arena for everyone. The WTO also provides a fair method to resolve disputes arising from the trade for its member states. It prevents a practice that retards economic growth called “trade protectionism”. In addition, the WTO negotiation improves trade agreements within its members.

After the establishment of WTO, only one negotiation round took place, known as DDA (Doha development agenda), that was predominantly aimed at reducing agricultural subsidies, agricultural market access, services and trade facilitation but it is still underway thus remained ineffective because the United States and Europe were not willing to cooperate in reducing agricultural subsidies. The WTO membership lowers the cost of doing business and the strives to eliminate barriers and thus facilitate increased global trade.

The WTO membership also lowers the costs of doing business by eliminating instability and these benefits extend to all member states, such benefits include “Most favored nation status” (status providing equal treatment for all member states in trade, no preferential trade benefit to any one member without giving it to all) and secondly, removing barriers like tariffs, import, quotas and regulations, thus lowering the trade barriers and allow members to enter into larger

market with their goods and larger market as a consequence, it breeds a lot of opportunities like greater sales, more jobs and faster economic growth.

Thirdly, two-thirds of WTO members are developing countries. As being WTO members these developing countries have direct access to developed markets at the lower tariff rate, and this creates opportunities for developing countries for sophisticated corporations and their mature industries. They don't have to remove mutual tariffs in their markets until later. That means developing countries don't immediately have to open their markets to overwhelming competitive pressure. In addition, thirty-six WTO members are considered as least developing countries or LDSc. The United Nations along with other agencies provide them additional assistance in development and trade. Moreover, Thirty-six WTO members are categorized as least-developed countries or LDCs. The United Nations grants that status to low-income countries with severe blocks to sustainable economic growth. The U.N. and other agencies provide them extra assistance in development and trade.

WTO in Practice and its criticism

The “World Trade Organization” in practice does not manage the global economy impartially said “Martin Khor”, (the executive director of the South Center) and it has been seen in its operation which has a systematic bias towards rich countries and multinational corporations, harming smaller countries which has less negotiation power. One of the core objectives of the WTO is trade predictably and freely.³⁰ The WTO, however, often described as a “free trade” institution, but that is not absolutely true in practice because in certain circumstances, the WTO system impose tariffs or other forms of protection. More candidly, critics are often arguing that the WTO only empowers the rich and facilitate their big corporations of arbitrage to exploit the people for developing countries.

In 2004, the WTO members met in Geneva to fine tune the draft modalities concerning trade in Agriculture and Non-Agriculture products. In this development round, it is believed that developed countries were trying to convince developing countries by offering concessions, but in reality the WTO always stands in favor of developed countries who controlled half if the world trade, domestic supports like subsidies are taken away from the developing countries. In addition, rich countries like the United States and EU continue to provide subsidies for their own farmers, thus equal and fair treatment is absent for developing countries.

The most common criticisms made about the WTO are the followings:

1. Undermines national environmental protection laws
2. Reduces national sovereignty
3. Trade agreements do not include provisions for environmental and labor standards
4. WTO governance and decision making process is not democratic.

Most popular criticism is that the WTO strikes down policies that countries have implemented to protect the environment.

Undermines national environmental protection laws: - This can be best described from the case Shrimp and Turtle case (a case brought by Pakistan, India, Malaysia and Thailand against the USA) where the WTO compliance panel ruled in favor of the US in 2001. The Shrimp and turtle case refers to the complaint against the US prohibition on import of shrimp from these countries. The reason given by the US for ban was that the shrimp coming from these countries were not using turtle escape devices, these devices allow sea turtles to escape if they are

³⁰ "WTO Homepage". Retrieved 2018-09-09.

unintentionally caught into nets intended for catching shrimp. The US considered requiring the use of such devices as an important environmental protection. The WTO does nothing to prohibit countries for implementing policies that protect environment but it does insist that such policies implemented in a manner that does not discriminate between the members of the WTO. The WTO ruled that US ban violated WTO rules not because countries are not allowed to implement environmental protection policies but because the US was applying the protection in a discriminatory manner. The USA had allowed certain central American countries greater flexibility in adopting the turtle escape devices but did not allowed the Asian countries the same flexibilities. The ruling was not about environmental protection but it was simply a discrimination. The ruling was discarding larger issue labeling this as environmental protection. It is similar to that of the case ruled by the US Supreme Court in 1954 known as *Brown Vs Board of Education* which was about whether the parents should have choice about their children's school.

WTO Undermines National Sovereignty: In the Shrimp and turtle case the WTO was suggesting the US what they could and could not do. Shouldn't sovereign state have the right to determine how they are going to conduct policies with other countries, yes of course they should. But the WTO is not imposing its rules to any sovereign state wants to be left alone. The WTO is only asking to the sovereign states just to comply with the agreement it had signed onto in order to get the benefits of other countries following the same rules. The countries often sign such agreements that bind them to a certain course of action. Such example includes, an agreement that prevents proliferation of nuclear weapons, agreement to not use landmines, agreement to not trade in ivory blood diamond etc. But such agreement does not undermine national sovereignty.

According to many critics, the WTO does not adopt a neutral stand on trade policies. Due to the fact that it benefits only to the powerful states in trade commerce. One of the main criticisms of the recipients of the World Bank loans as WTO members often found repressed. The IMF (International Monetary Fund) and World Bank both implemented some economic policies known as SAPs (Structural Adjustment Program) which must be followed by the countries with economic crisis as WTO member in order to get loan and help them make debt repayments on the older debts owed to commercial banks, governments and World Bank but of course in many conditions.³¹ The recipient countries are forced to adopt reform their regulations of capital market, privatization of state companies and many other stabilization policies include:

1. The balance of payments deficits reduction through currency devaluation
2. Budget deficit reduction through higher taxes and lower government spending, known as austerity
3. Restructuring foreign debts
4. Monetary policy to finance government deficits
5. Eliminating food subsidies
6. Raising the price of public services
7. Cutting wages
8. Decreasing domestic credit

The long-term SAPs conditions include liberalization of markets to guarantee a price mechanism, privatization, or divestiture, of all or part of state-owned enterprises, creating new financial institutions, improving governance and fighting corruption, enhancing the rights of

³¹ Lensink, Robert (1996). *Structural adjustment in Sub-Saharan Africa* (1st ed.). Longman. ISBN 9780582248861.

foreign investor and focusing economic output on direct export and resource extraction and finally increasing the stability of investment.³²

More candidly, critics asserted that such conditions (SAPs) is threat to the sovereignty of national economies because with these program an outsider dictating and influencing a nation's economic policy. Critics also argue that the creation of policy is in a sovereign nation's own best interest thus SAPs undermine national sovereignty. In addition, according to some post colonialists view, SAPs are the modern form of colonization, by which government's power and ability to regulate its internal economy is minimized. The SAPs established a pathway for the multinational companies to enter into the states and extract resources. The SAP free-trade and low-regulation requirements take over the control or restricted controls of natural valuable resources (oil, minerals) of nations who are unable to repay the debt. Subsequently, in order to repay both the loan and interest countries are forced to take further foreign debt thus they experience endless cycle of financial subjugation.³³

The Structural Adjustment Programs (SAPs) connected to IMF loans have proven surprisingly catastrophic for the poor countries and proved huge beneficial for rich countries.

Privatization and Austerity: The **privatization** of state-owned industries and resources is one of the requirements of structural adjustment. The nations are bound to implement new policies complying with SAPs. Primarily, such policies aimed at increasing efficiency and investment and decreasing state spending. State-owned resources are to be sold whether they generate a fiscal profit or not.³⁴ There are many criticisms in these privatization requirement, arguing that when resources are transferred to foreign corporations and national elites, the goal of public prosperity is replaced with the goal of private prosperity. Moreover, state-owned companies fulfill a wider social role such as providing low cost utilities and jobs therefore they may show fiscal losses. The SAPs and neoliberal policies have negative impact on many developing countries.³⁵ On the other hand, the borrowing countries facing economic stagnation due to SAPs which emphasize a balanced budget thus forcing **austerity** programs. **Austerity** measures are taken by the government having difficulties to pay their debts by reducing government budget deficit through spending cuts, tax increases or a combination of both. But such program can be detrimental to the society and country as a whole, for example, if the government cuts education funding, universities are impaired and so the long term economic growth. Correspondingly, cuts to health program have allowed diseases such as AIDS to devastate some areas economies by destroying the workforce.

Trade Agreement do not include environmental and labor standards: The trade agreement negotiated under the WTO do not include provisions for environmental and labor standards. The critics mean here is that, the trade agreement should allow WTO members to prohibit imports from fellow WTO members whose labor and environmental standards are below a certain level. Such provisions would protect producers and workers in high standard countries from a race to the bottom and unfair competition from countries that do not spend as much money on labor and environmental protection. It would also force the countries with low standard

³² White, Howard (1996). "Adjustment in Africa". *Development and Change*. 27: 785–815. doi:10.1111/j.1467-7660.1996.tb00611.x. Retrieved 12 September 2018.

³³ McGregor, S (2005-05-03). "Structural adjustment programmes and human well-being". *journals2.scholarsportal.info*. Retrieved 2018-09-10

³⁴ Cardoso and Helwege, "Latin America's Economy" Cambridge, MA: MIT Press (1992)

³⁵ McPake, Barbara. 2009. Hospital Policy in Sub-Saharan Africa and Post-Colonial Development Impasse. *Soc Hist Med* 22 (2):341-360.

to improve. However, agreeing to a level of standards that all countries are expected to reach is very difficult. First question is, whose standard should be adopted, higher standard result in higher expenditures for firms, it can only be followed by rich countries. The Poor countries work at the suggestions that they should spend an amount comparable to the rich countries on labor and environmental standards. It would be like mandating that all people must buy cars that have safety features that are closed to the most expensive cars. The rich people would not be affected much but poor people would. It is not surprising that the biggest opposition to labor and environmental provisions come from the government of the poor countries requiring their firms to incur higher cost would erode their only competitive advantage. The firms in poor countries cannot compete with their counterparts in rich countries based on quality, speed or innovation. They can however, compete on cost. The poor countries have expressed their fear that such provisions will be used by rich countries to practice “backdoor protectionism” under the guise of concern for the poor. In this respect, Egyptian trade minister Youssef Boutros Ghali, said, “The question is why industrialized countries are suddenly bothering about Third World workers now that we have shown we can compete with them”.

In 1999, the rich country protesters outside the WTO ministerial were fighting for the inclusion of labor and environment standards into trade agreements. The representative of the poor countries garments inside the ministerial were fighting against the inclusion of such provisions.

WTO governance and decision-making is not democratic and is dominated by big powerful countries:

Another criticism of the WTO is that, its decision making process is undemocratic and its dominated by some rich countries. On its face, the WTO is democratic, each country has one vote unlike other international organizations where some countries have more votes than others. In fact, the WTO is extremely democratic that instead of a simple majority, 100% of votes are required in favor of a proposal before it can be adopted. Additionally, developing countries are given what I called “special and differential” treatment, which means they are allowed to liberalize their trade to a smaller extent and at a slower pace than rich countries. But the purpose of saying WTO undemocratic is that the US and EU have disproportionate influence on the decisions because of certain norms followed in the WTO, that allow the US and EU to set the agenda for the talks and decide, what is to be voted upon and when. Such criticism has some validity. These norms are handover from an era when the GATT was a small club of mostly rich countries. But now, developing countries make up majority of the membership and they have begun to demand a great say in proportion to their numbers. The latest round of trade talks, the Doha Development Round has been so named because it puts the needs of the developing countries. The round has not yet concluded even it has been 13 years since it begun because the developing countries are asking for more concessions than the rich countries had bargain for. The round came very close to its agreement in 2008 but the agreement could not be signed because of the reluctance of one developing county and that is India.

Regardless of whose fault is was the WTO seems like an undemocratic organization where the rich countries bully to weak into submission.

In conclusion, the ultimate goal of the WTO is to facilitate the international trade and support developing countries for their prosperities. The WTO was actually set up by the governments to deal with businesses related negotiations, discussion and conclude agreements for further economic improvement, thus creating more predictability and stability in the area of international world trade. Moreover, the WTO is working in a daily basis on variety of issues

(two or three meetings a day involving all WTO members). The most importantly, one of the democratic principles the WTO adopting when it comes to decision making that, everything is decided by consensus where all members must be present and all member must agree. Unlike other organizations, the WTO system requires member government to agree on the proposed issue then the decision is reached, it does not discard any of its members because the WTO considers trade policies so crucial and so important for economics of many countries and they wanted consensus to be the basis. The WTO provides security and protection to international traders. In contrast to the criticisms, the WTO adopts non-discriminatory trade rules applicable to the all member states as it strives to create a balance that equalizes countries regardless of its size and economic position. So in a fact, the biggest country is bound for the same rules as smallest country and smallest country can actually use these rules against biggest country. The WTO rules, by the way, cannot solve every power and balance in the world. It's the given fact the bigger economic power, bigger political power and the smallest ones, the WTO is one aspect deals with trade while try to create a balance. The WTO is nothing but a facilitator, its core object is to facilitates trade and support member governments in producing documents and settle dispute arising from the trade. Environment protection is the concern for the member government whereas the WTO set up for trade, this does not mean it does not care of environment. It seems intuitively obvious that the trade does get into other area and other area does get into the trade.

The WTO cares for the environment but its rely on the member government involved in trading. The governments implement their own policies for the protections of plants, animal, health of the citizens, thus it only can save itself. The WTO has dealt with a lot of dispute settlement cases in relation to the environment protections. The WTO member countries try to apply different standards in the context of trade. Another way the WTO facilitates international trade is to resolving trade dispute effectively and efficiently. Surprisingly, around 40% cases have been brought by developing countries and 60% of cases have been brought by developed countries. The WTO offers rights and obligations to everyone on an equal basis regardless of the size and power of the country. The dispute settlement system is there to enforce these rules, accessible to everyone on same basis regardless of the size, strength and economy. The WTO provides comparative advantage equally to all member states and there are many empirical evidences to show that the member countries do indeed gain from the WTO trade policies.