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## EDITOR'S WELCOME NOTE

### Dear Reader

We welcome you to another issue of Kutafin Law Review, which with a change in Editorial leadership and team continues in our new directions in 2019 and beyond.

The theme of international moot court competitions is important. Within our own university our Rector has created the Department of Moot Competitions, and our students continue with great success. Our leading article looks at the scientific research matters for legal and education issues associated with this work. This will be of interest to our readers in other universities who also send teams to compete in these competitions — which cover both advanced theoretical and practical law.

We also look at topics of taxation — in particular the topic of double tax treaties, tax avoidance and the new trend of "beneficial ownership" which is developing as a very important anti-corruption topic.

We have made further improvements to our "Guidelines for Writers", and we are regularly adding new content to our website. In particular, we are delighted to welcome five extremely distinguished new members to our International Academic Council. Our new colleagues share our vision for developing legal scholarship in the English language, particularly for non-native speakers of English — especially to encourage the ability to apply for and study at the universities they represent. We are delighted to welcome to our team the following eminent scholars:

Professor Dr. Trevor Hartley (Emeritus Professor of Law at London University's London School of Economics and Political Science, UK),

Professor Dr. Martin Dixon (Professor of the Law of Real Property at University of Cambridge, UK),

Professor Dr. Ruth Chang (Professor of Jurisprudence, University of Oxford, UK),

Professor Dr. Floris De-Witte (Professor of European Law and Political Theory at London University's London School of Economics, UK),

Professor Adrian Briggs QC (Hon) (Professor of Private International Law at Oxford University UK, and Barrister at Blackstone Chambers, Temple, London UK).

Over the forthcoming months, the Editorial Staff will continue our contacts with our distinguished readers and contributors, with the purposes of building yet further our international cooperation and facilitating scholarly contributions. We most cordially invite you — if this Journal is in your hands — to write and make contact with the Editorial Office, who will be most delighted to hear from you.

Readers of our website will know that Kutafin Law Review is particularly interested in developing English language top-level legal scholarship amongst Russian young academics and their high-level students — and presenting it to the world. Working in co-authorship, we encourage students and their teachers to contribute articles. You will find a warm welcome at our Journal, which as in everything we do, we follow our university motto — "not for school but for life." We will give you every encouragement and support to help you to develop your legal scholarship skills into real abilities that you can use outside university.

Our proof reading service is free, and as a first step, we return your manuscript with helpful and constructive comments before the formal Peer Review process begins. Please get in touch with us to discuss any ideas you have and find out how we can help.

With our very best wishes from everybody at Kutafin Law Review and Kutafin Moscow State Law University.

*Charles Goddard*,
Chief Editor

# LEGAL EDUCATION — TRAINING FOR LAW MOOT COMPETITIONS

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## MOOT COURT COMPETITIONS AND THEIR ROLE IN PRACTICE ORIENTED TRAINING OF LAW STUDENTS

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**Abstract**

The paper explores the issues that are rarely dealt with by Russian Universities and their Faculties in the context of the methodology and general theory of legal education, whereas the issue of mooting (legal competitions) is rather well covered under the common law system. The primary goal of any moot competition is to facilitate both the study of the subject matter (e.g. international commercial law as in the annual Vis moot competition) and the existing dispute resolution processes (e.g. arbitration as the dispute resolution process of choice for international business disputes). Thereby, mooting trains future law leaders in dispute resolution. The most common approach is that a perfect team of mooters needs an equal combination of both outstanding legal arguments (both in

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oral and written forms) and effective presentation skills. Based on our coaching experience and the discussions we have conducted with our colleagues and students involved in mooting we show that there are numerous different views among moot competitions participants, judges, coaches, and the most experienced "real" professional advocates as to the most effective advocacy tools. Mooting and clinical work represent the key skills-oriented approaches to training lawyers. However, mooting prevails in the context of globalisation of legal education and the development of cross-cultural competences.

**Keywords**

Moot, legal skills, legal research, advocacy, analytical thinking, legal reasoning, legal writing

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## 1. INTRODUCTION

At many law schools, a moot court is one of the key extracurricular activities[3] (along with clinical activity, interactive law clubs, law societies, *etc.*). It consists of simulated court or arbitration proceedings that usually involve drafting memoranda and participating in oral rounds based on the annual problem issued to mooters that has been drafted by outstanding law scholars and practicing lawyers. A moot provides the setting of a court, where students act in the role of counsels, based on the problem (and the legal scenario it creates) that they are given in advance. The mooters need to be familiar with two aspects of law: the law governing the substance of the case, and the law governing procedure used to determine the dispute. In addition, such pragmatic things as court etiquette, dressing appropriately, and voice control are as important in a moot as it would be in a real life court.

Participation in moot courts provides a variety of unique opportunities for students, their faculty and educational institutions as a whole. In this paper, we would like to share our ideas and to take the opportunity to summarise, to some extent at least, our own experience as coaches in the belief that this will be helpful and valuable to other coaches and students participating in the moot competitions. While our own professional experience relates most directly to working with students within the context of law schools teaching the Russian mixed model, we have also spent significant time interacting with other coaches and teams representing the common-law system. We hope that our own ideas and experiences, as further developed and described in this article, may be useful to coaches and teams representing different countries with different law systems.

The impact of mooting is two-fold: on the one hand, mooting is used in law schools to equip students with knowledge and skills necessary to succeed in their future careers in courts. On the other hand, the impact

[3] In law schools representing the common-law legal system, mooting is a compulsory part of the course for those who wish to go on to take the Legal Practice Course (LPC) or Bar Professional Training Course (BVC). As rightly noted by Prof. Charles A. Goddard, "[s]ome universities (Mannheim, for example) allow their students credits on the Masters Programmes for studying for the Jessup or Vis. That is, they are allowed up to half of their university study timetable against their studies — which they can do 'instead of'."

of mooting can be indirectly reflected in the legal and judicial systems as law students chose to practice law implementing the mechanisms and techniques they acquire while participating in moot competitions.[4] Thus, implementation of mooting into academic curriculum requires a thorough examination of the content of the course.

Kutafin Moscow State Law University (MSAL) joined the mooting process almost twenty years ago, encouraging the students and faculties to take part in moot competitions extracurricularly. The first attempt to systematise and use mooting as a pedagogical tool was undertaken when the Department for International Legal Competitions — (our Moot Court Department) — was founded in 2016. In 2018 this was expanded to implement disciplines necessary for moot court competition preparation into the University curricula. Since then the faculty of the department have developed 9 syllabi used to train students.

In order to join any of the Moot Courts Department courses students have to undergo selection process to prove their level of awareness of legal concepts and language skills. Syllabi in language skills are aimed at training the skills necessary for students regardless of the moot competition they are going to take part in[5] and the courses on foundations of different branches of law are developed to increase awareness regarding legal concepts and skills necessary for the particular moot court competition.[6] Students joining the Moot courts Department

[4] Shreya Atrey, I object, Your Honour! The Moot Court Paradigm is Mootable, 6 National University of Judicial Studies Law Review 301 (2013).

[5] Such courses include "Foundations of Modelling Moot Competitions".

[6] E.g. Fundamentals of modelling the dispute resolution process in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; Fundamentals of Simulated Dispute Resolution process in the International Commercial Arbitration Courts (in English); English for specific purposes: Simulated Moot Competitions; Fundamentals of Simulated Dispute Resolution process in the UN International Court of Justice (in English); Fundamentals of Simulated Dispute Resolution Process in the Courts of the European Union (English); Fundamentals of Simulated Dispute Resolution at the Arbitration Center under the Russian Union of Industrialists and Entrepreneurs; Fundamentals of modelling the process of consideration of disputes arising from international corporate relations (in English); Fundamentals of modelling the process of consideration of criminal and criminal procedural matters in courts of general jurisdiction of the Russian Federation; Fundamentals of modelling the process of consideration of commercial disputes resolution in the state courts of the Russian Federation.

are exposed to different types of conflict resolution procedures and they learn how to use internationally harmonised law. At the stage of rehearsing for the oral hearings and during the orals themselves, the students are no longer taught the framework, but are trained in the practical use of dispute resolution procedures and the uniform law.

The Moot Courts Department was founded by the order of the Rector on August 29, 2018, as the successor to the International Moot Competitions Center. The department currently employs 4 associate professors, 2 senior lecturers, and 3 assistants. In addition, the Department employs Prof. Charles A. Goddard and A. V. Zamaziy to conduct lectures and give instructions in English. Courses are also run to prepare students who might be thinking about taking part in a moot competition — with a range of legal and practical legal English topics.

Every year, starting in September, the Department trains students who are going to participate in international and all-Russian moot court competitions. In total, 66 students were trained during the 2018/2019 academic year. This academic year the outcomes of the work of the Department have been as follows:

At the international level, the Jessup team of Kutafin University won the all Russian rounds and went to America for international rounds.

The team of Kutafin University participated in the 26th Annual Willem C. Vis International Commercial Arbitration Moot. Orals were held in various locations including the University of Vienna Faculty of Law (Vienna, Austria), and previously in a number of so-called "Pre-Moot Competitions". Some of these were formally arranged (for example the Moscow Pre-Moot competition). Others were informal, conducted by skype with foreign universities, and in the offices of Moscow law firms playing against teams from other Moscow universities.

At the Main Competition held just before Easter in Vienna, 372 teams were competing from all around the world. Our University team secured great success, winning a place in the list of the top 32 teams.[7] Two of

[7] The significance of this is that in this competition, teams who secure a place in the list of the top 64 are considered so successful that their competitors are not allowed to participate as competitors in subsequent year, thereby freeing places in the respective teams for fresh students.

our students — Anna Ryazanova and Alexandra Tereshchenko — were also awarded "Honourable Mention" certificates for their outstanding skills and performance. The Vis competitions are extremely tough, and in the 26 years of the existence of the competition, the team of Kutafin University became only the fifth Russian team ever to succeed to such a high level, as well as receiving high recognition for the team performance. Coaches of the team were Evgenia N. Puzyreva (Cand. Sci.), Olesya F. Zasemkova (Cand. Sci.) and Tatiana Yu. Chupakhina.

Outstanding results have also been achieved in national competitions. Thus, in November, 2018, Kutafin University students participated in All-Russian Student Judicial Debates on Criminal Cases held in the Tauride Academy of Vernadskiy Crimean Federal University. Two teams representing the Kutafin University took part in the Debates, namely our "Kutafintsy" team (consisting of Arina Kasatkina, Zoya Dzheiranova and Evgenia Tsybulenko) and our "MGYuA" team (consisting of Alina Cheladina, Dmitry Maryenko, Ksenia Aparina). All participants are the students of the Institute of the Prosecutor's Office. The teams are coached by Tatiana Sushina (Cand. Sci., Senior Lecturer of the Moot Courts Department). The overall supervision was exercised by Yana O. Alimova (Cand. Sci.), Head of the Moot Courts Department. During the competition, the "Kutafintsy" team succeded in taking the honourable second place, and the team "MGYuA" was nominated as "Best Accusation".

In November 2018, our Kutafin University team participated in "The Ural Student Competition on Settlement of Commercial Disputes" that was held at Ural State Law University in Yekaterinburg, Russia), where the team succeeded Honourable 1st place. The team also won the prize for "Best Memorandum for Respondent", and our student Nelly Zhuravleva was named the "Best Oralist" and was invited to take up an apprenticeship at *Enforce* law firm in Moscow. All participants were students of the International Law Institute of our University.

In March 2019, Kutafin University students participated in the sixth Mikhail G. Rosenberg student competition on international commercial arbitration devoted to International Purchase and Sale Law. The competition was organised by the All-Russian Academy of

Foreign Trade of the Ministry of Economic Development of Russia. The co-organiser of the competition was the Chamber of Commerce and Industry of the Russian Federation. The team of our University won the final rounds held between Kutafin University team and the Law Faculty of the Belarusian State University. Moreover, the team was invited to undergo apprenticeship in *Kulkov, Kolotilov* & *Partners*, and Nelly Zhuravleva received an invitation for internship at *Rybalkin, Gortsunyan & Partners*.

Every year the Moot Courts Department organizes an International Commercial Arbitration Competition. This year the team of our University won the Final against students of the Higher School of Economics. Team members were Nikita Ayrapetov (Institute of Private Law), Maria Btikeeva, Svetlana Apsalikova, Margarita Makhrina (International Law Institute). In addition, Nikita Hayrapetov won the silver medal position for oral presentation. Sergey E. Bibikov, assistant lecturer of the Moot Courts Department, trains the team.

However, participation in moot courts is not the only extra-curriculum activity carried out by the Department that students can join to improve their professional skills.

In February 2019, the team of the Moot Courts Department took part in the full-time national rounds of the international competition "International Negotiation Competition for Law Students" held at the Russian Peoples' Friendship University (RUDN University). The International Negotiating Competition for Law Students evaluates the skills necessary for students to participate in civil contracts negotiations. Following the results of the competition, the team took the 4th place.

In February and April, 2019, students of the Moot Courts Department took part in the International Law Faculty Cup held by MGIMO University (Moscow State University of International Relations). The team successfully passed the qualifying rounds of a particularly tough field, and were ultimately rewarded with the Bronze Medal position

In May 2019, Kutafin University team took part in the European rounds of the Manfred Lachs International Space Law Competition in Paris, France. The competition has been held since 1992 and is the most prestigious international competition on space law. The competition

simulates the process of dispute resolution in the UN International Court of Justice and addresses topical issues of space law, as well as related issues of environmental law, maritime law, air law, law of international responsibility, intellectual property rights. Kutafin University team was selected to participate in oral rounds where it competed with the teams from Great Britain, Belgium, Finland and the team of Samara University. Our team won three out of four rounds and lost only a few points in the semifinals.

In March 2019, Kutafin University team participated in the eighth All-Russian tournament on criminalistics and criminal procedure "KRIMTSESS" held in Tomsk, Russia. Our team took the 1st place in the nomination "Homework" (written documentation) and secured 6th place overall.

The Moot Courts Department is constantly taking different steps to develop English language skills and trial advocacy skills. Thus, we organised for our students a number of meetings with foreign professors.

This year the Moot Courts Department has organized a meeting with Jeffrey Burt, an expert in international arbitration and international commercial transactions law and a practicing lawyer. During the meeting, students discussed the problems associated with the process of choosing future professional career, advantages and disadvantages of an academic career and career of a practicing lawyer. A lively discussion was caused by the question concerning the qualities a lawyer needs for successful self-representation in the legal services market.

In May 20, 2019, our students met with Stephen P. Friot — a federal judge of the District Court of the Western District of Oklahoma (USA) who lectured on "Human Trafficking". The topic of crimes related to human trafficking aroused keen interest among students. The judge conducted a test for the listeners who attended the lecture. Yana Vasilyeva, the Moot Courts Department student who participates in several moot competitions, showed the best result. In recognition of her high level of training and personal accomplishments, Yana was awarded with an access to the legal writing course at the Pericles Centre for International Legal Education.

In the summer, the Department also organises work in summer schools and holds open seminars for the teams participating in moot courts.

However, the Department faces numerous challenges in its work. It has to facilitate the selection process looking for the best students to be engaged in moot courts competitions. For the English language moot competitions, one challenge is to develop a student's level of English to the point where they feel confident enough to start working in English- researching, debating, and writing with a professional level of ability. The level of English of the majority of students leaves much to be desired. In addition, the best way out is to provide students with the opportunity to be instructed in English within the framework of a course of lectures and practical seminars based on selected topics in the law of the UK, and relevant international law topics. Prof. Charles A. Goddard gives this course of lectures.

To conclude, we can reveal that in order to ensure permanent and consistent success for the students and University administration, we have found that a systematic approach is needed to secure multi-faceted consideration of best practices and their implementation into the work of the Department.

However, in this paper, we do not focus exclusively on participation in a particular moot,[8] and we do not focus primarily on certain unique features of particular moots.[9] Moreover, we submit that participation in any moot court gives rise to unique opportunities for team members, coaches, educators and law school administrators. Mooting maximises the overall pedagogical benefit that is to be derived as the result of educational institution participation in mooting as a pedagogical and teaching phenomenon.

[8] See as examples the following international moot courts: Willem C. Vis International Commercial Arbitration Moot, Willem C. Vis International Commercial Arbitration Moot (East), Philip C. Jessup International Law Moot Court Competition, International Maritime Moot, The Telders International Law Moot Court Competition, Jean Pictet Competition, ELSA Moot Court Competition EMC2, etc.

[9] For more details see Jack M. Graves, Stephanie A. Vaughan, The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity, 10 VJ 173–206 (2006).

Mooting is a many-faceted experience that requires thorough examination with regard to its pedagogical, educational, unifying, internationalising and socialising potentials. By investing months of research in the preparation of memoranda and oral pleadings, the participants of the moots are learning the law (as the subject matter) and acquiring the skills needed to distinguish them in their professional careers. By participating in the moot they are gaining knowledge, skills and experience that are not easy to come by through academic studies alone. They are gaining confidence in the art of advocacy as a key instrument to harmonising and internationalising legal norms. Thus, human rights, for example, would be "a hollow concept" without being "advocated" in courts and tribunals at national and international levels. Moot competitions participants are constantly gaining understanding that there are skills that lawyers possess as an art and because of which people require the services of lawyers.[10]

In this regard, we would like to mention that the progress of the moot courts movement has coincided with the rapid development of technologies and their penetration into the Realm of Law, which could not but result in fundamental changes in the legal profession and legal doctrines. However, it has already become obvious that Law will preserve its primarily human rather than technological domain. The participants of the Plenary Session "The Art of Law" of the 9th St. Petersburg International Legal Forum stated that technology would never replace lawyers because "[T]he legal profession is so much more than an array of skills and algorithms; it is not a job — it is an art!"[11] It is, therefore, not surprising that each year mooting attracts an ever-increasing number of students and stakeholders.

Moots are international events, and educational institutions participating in moots face a number of problems discouraging participation. Thus, law schools located far from the moot competition location may find the travel costs higher than those typically associated with domestic moots. As such, it may be important to the institutions that the moot they decide to take part in provides a substantially

[10] Ibid.

[11] Available at: https://spblegalforum.ru/en/programme/1540757756526.

greater educational benefit than other moots and greater costs of participation commensurate with advantages of participation and possible accomplishments.

## 2. MOOTING, RHETORIC AND ADVOCACY SKILLS

Oral pleadings that are the mandatory element of almost all moot courts represent a sophisticated exercise that primarily hones the skill of advocacy.[12] Black's Law Dictionary defines advocacy as *"the act of pleading for, supporting or recommending active espousal."*[13] Thus, advocacy is a "noble and necessary skill" that "gives life to legal norms in national and international relations."[14]

As we have mentioned above, the concept of human rights would not have developed and consolidated at both national and international levels but for being "advocated" in many contexts. With particular respect to international trade and the topics dealt with in the Willem C. Vis International Arbitration Moot, advocacy is *"indispensable in upholding the rule of law among merchants, in promoting contract discipline and making sure that honest work and investment are honoured as agreed in the business deal."*[15] Thus, moot competitions participants, striving to uphold the rule of law in different relations, are in a very real way promoting the well-being of different entities, stability of relations and predictability of outcomes. In that sense, nationally and internationally professional well-versed advocacy plays a vital role. However, academic curricula do not provide for much practice in this area. Thus, mooting gives a good opportunity to practice advocacy that involves more than just skill and professional knowledge, but courage, confidence, a sense of justice, compassion, understanding of and respect for other cultures, *etc.*

[12] Jernej Sekolec, Opening Address of the Fourteenth Willem C. Vis International Commercial Arbitration Moot Vienna, 30 March 2007, 11 Vindobona Journal of International Commercial Law & Arbitration 131 (2007).

[13] Black's Law Dictionary. Henry Cambell Black. 6th ed, at 55.

[14] Jernej Sekolec Ib. (2007).

[15] Jernej Sekolec Ib. (2007).

With regard to moots, almost every judge or arbitrator in their feedback comments concerning the teams' performance in some way or other underlines a key benefit — namely that mooting regardless of the competition outcome provides an excellent opportunity for the pursuit of personal happiness.[16] Thus, having a wider picture of perspectives substantiates the progress mooters can make after they move on with their careers.

## 3. FUNCTIONAL APPROACH TO MOOTING

In general, the most natural way for the moot court to be founded is following specific events (conferences or symposiums) organised by relevant centers or educational institutions to commemorate significant events or as an embodiment of the fact substantiating the fast growing and rapidly developing area of a national or international law.

Thus the adoption of the Convention of the Settlement of Investment Dispute (ICSID) served as the inspiration for the moot court that focused on investment treaty arbitration — The Frankfurt Investment Arbitration Moot). The key concept of any moot competition is to focus exclusively on a certain area of legal regulation (e.g. investment protection and investment arbitration, responsibility of States, State immunity, *etc.*) to encourage law students to develop an interest in the subject matter.

However, for the educational institution such an approach would mean disintegration rather than integration of the educational and pedagogical outcomes of the process of preparation into the syllabus, when only very few moot competition team members gain access to the most up-to-date legal knowledge and skills. The competence approach applied within the framework of Russian higher education requires a thorough analysis of functions served by mooting in order to understand short-term and long-term outcomes of the activity in question. Such a functional approach allows coaches, educators and administrators to organise moot competitions preparation in such a way that would

[16] Jernej Sekolec. Opening Address of the Fourteenth Willem C. Vis International Commercial Arbitration Moot Vienna, 11 Vindobona Journal of International Commercial Law & Arbitration 131 (2007).

provide the greatest advantages not only for the students involved in preparation but also for all law school students and faculty. Members of the teams participating in higher rounds meet the top of professional standard of advocacy.

Usually the issues that involve the key concepts of moot competitions belong to the most fascinating and intellectually challenging areas of international law and are of immense practical relevance. However, it may happen that the issues of primary concern for moot competitions are rarely, if at all, addressed in the curricula of law schools in Russia. Thus, thorough analysis of mooters' needs with regard to both subject matter knowledge and presentation skills can lead to improvements in curricula and syllabi that will have positive effect on training future lawyers.

### 3.1. Teaching and Training Function

This function is the most obvious one and it is clear that practice-oriented teaching and training gives the students the feeling of the profession and understanding of what is expected. Close collaboration between those who teach and those who are taught turns students into coaches and the most successful teams are coached, at least to some extent, by former mooters. In context of moot preparation conventional "lecturing" to large classes cannot be implemented. Thus, moot preparation provides for the platform where more interactive and dialogic approaches to training lawyers can be implemented, namely, case analysis, problem-solving, hypothetical cases analysis, Socratic teaching,[17] *etc*.

### 3.2. Internationalising and Harmonising Function

The Willem C. Vis Commercial Arbitration Moot has been annually held in Vienna since 1994. 376 teams from 87 countries worldwide attending in 2019 would mean that the moot over the period of 20 years

[17] Dianne Otto, Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of international Law, 1 Melbourne Journal of International Law 35 (2000).

since its beginning would have educated more than 15,000 students.[18] A fair number of these are now employed in international business, whether as advisors, litigators or in-house counsels. Their student-time experience that they had gained during the moot and beyond will encourage application of arbitration and the CISG in transnational cases, which will lead to the situation when the CISG might well turn into the rule instead of the exception when choosing the law of an international sales contract. Thus, the Vis Moot contribution in unification and internalisation of legal norms is obvious.

Mooting has an internationalising and harmonising effect on the thinking of all students involved in the process of international moot competition preparation. For the majority of Russian participants mooting is the first contact with non-domestic law and legal thinking. The most important contribution of the moot is to appreciate that foreign-trained lawyers look at exactly the same material before them in a different way and advocate their solutions in an unfamiliar fashion. Few lawyers rarely receive a chance to look beyond their own national legal framework, which is an experience important for those who want to be educated, open-minded and enthusiastic.

### 3.3. Socialising Function

Both within each university team and among the students from different teams, moots encourage the development of social and cross-cultural competences. Over a rather long period of time students must work in a team to elaborate the memoranda, share responsibility, deliberate, criticise, compromise, discover individual strengths and weaknesses and re-arrange shares of work accordingly. Once they come to Oral Arguments, they meet dozens of students from dozens of countries — and numbers keep rising year after year. There are few opportunities in any professional's life to encounter so many like-minded people in a largely relaxed and motivating environment.

[18] Available at Vis Moot Court official site: https://vismoot.pace.edu/site/previous-moots/26th-vis-moot (date of access: 23 July 2019).

### 3.4. Competing Function

One might consider that any moot represents a competition between teams of students from individual law schools,[19] as well as a competition between individual law students,[20] and that this competitive purpose predominates. However, Prof. Jeffrey Waincymer who claims that pedagogy predominates over competition has explored this issue thoroughly.[21] For the students participating in the moot, such an approach might seem quite reasonable, however, for educators (coaches and members of the faculty) this is the way to nowhere, and what educators are interested in is the development of such a training program that would provide for persistent and, to some extent, logical success that would substantiate and commensurate with the efforts and passion devoted to the moot as a systematic training rather than sporadic experience that depends on individual personalities and their specific contribution each year.

To this end, it is necessary to consider mooting as an important curricular or extra-curricular activity that can be systematised and institutionalised as an educating and pedagogical tool. Recently, skills training has become an increasingly important part of legal education, and mooting generally would seem to encompass many of the fundamental skills necessary for prospective lawyers.

Before addressing the problem of predominance of learning over competition or competition over learning, we would like to mention that the problem is twofold. On the one hand, according to the rules, such "gatherings" as the Philip C. Jessup or Willem C. Vis Moot Courts are competitions of schools representing the law schools around the world, and the rules themselves do not explicitly provide for any other purpose

[19] The Pieter Sanders and Werner Melis Awards are made to the teams writing the best memoranda in support of Claimant and Respondent, respectively, and the Frédéric Eisemann Award is made to the team prevailing in oral arguments in Vienna. The names of the recipients of these awards are posted on the Moot website.

[20] The Martin Domke Award is made to the individual students receiving the highest average scores for their oral presentations in the general rounds.

[21] See generally, Jeffrey Waincymer, International and Comparative Legal Education Through the Willem C. Vis Moot Program: A Personal Reflection, 5 The Vindobona Journal of International Commercial Law and Arbitration 251 (2001).

but competition.[22] Thus, winning at the competition becomes the issue of primary concern for almost everyone involved in the procedure. For the law school administration, winning in a prestigious competition promotes the educational institution and improves law school ratings. For coaches, its importance is that the result achieved by the team is the only criterion they can provide to have their contribution evaluated For students, who invest a lot of time and effort — they need a score as a manifestation of the result they have achieved, *etc.*

On the other hand, it is incontroversial that the primary reason for being a university student is to learn. Thus, students might consider all law school activities as opportunities to learn, and mooting is just a way different from the traditional teaching paradigms. Thus, moot courts programs represent one form of pedagogical experience that in part uses simulations of real legal practice as an aid to learning. Thus, learning should dominate over any competitive disposition that is just one of the features of the moot competition. The latter approach seems to us more promising with regard to long-term improvement in the quality and globalisation of legal education.

## 4. MOOTING FROM A STAKE-HOLDERS PERSPECTIVES

The multi-faceted nature of mooting does not allow us to determine which function predominates, however it is possible to consolidate expectations and accomplishments of different stakeholders involved in mooting in order to determine theoretical and practical prospects for this activity.

### 4.1. Students' Perspective

For students mooting is an excellent way to improve their knowledge in different subject matters, and to develop their advocacy and presentation skills while putting the theory of their lectures and law study into practice. In order to perform well and represent themselves,

[22] The Rules of the Annual Willem C. Vis International Arbitration Competition available at: https://vismoot.pace.edu/media/site/previous-moots/26th-vis-moot/rules.pdf.

their law school, and the law system team — members need to undergo intensive training and it is a joint decision of all parties involved into the preparation procedure how much training is needed. Moreover, students have to work in a team that they did not choose and which quite possibly do not even like. However, such an experience is one of the most important for the future working career.

For many students mooting is the first instance of communicating with decision makers (judges) who assess the arguments put forward by mooters and give feedback concerning their persuasiveness. In order to effectively answer a judge's question, students need to be able to think on their feet and to know and understand their arguments and authorities inside out. Students and coaches have to be in constant search for elegant ways of dealing with questions that are irrelevant and/or off limits instead of simply naming such questions as irrelevant, inadmissible, plain or stupid straightforwardly.

Through participating in moot competitions, students show potential employers a range of employability skills: the ability to organise themselves and others, mentoring, leadership and communication skills. In many aspects, mooting is voluntary, therefore counting as an extra-curricular activity. It shows the student's commitment to studies and the ability to use legal knowledge and refine research and advocacy skills in a particular situation. The prospect of international travel is also one of the advantages of participating in international moot competitions.

### 4.2. Coaches' Perspective

In this paper, we are focusing on the necessity to provide mooters with guidance concerning areas where a coach's support is likely to be most valuable. Coaches are in charge of both fulfilling certain obligations and providing opportunities. In fact, the key role the coaches play is to guide the moot competition team members through the process of developing, presenting and defending a convincing argument in an international mooting competition. First and foremost, coaches are experts in the moot court subject matter and they are in front line of the in-depth understanding of the hypothetical case. They are expected to possess and to be able "to distribute" among team members a thorough

understanding of the competition philosophy, competition rules, rules of building a persuasive argument and properly structured memoranda or memorials. The coaches are in the front line of determining the purpose and audience, choosing the style of oral arguments and written memoranda and creating a persuasive case. They teach students how to present information (story telling), how to structure written and oral submissions (road mapping), and, finally, they proofread and edit memoranda and memorials before submission. They explain the importance of preparing alternative arguments, understanding and addressing weaknesses in the case, communicating with adversaries and judges, handling questions and dealing with mistakes.

As well as training and educating, from the very beginning of the preparation period coaches have to resolve issues associated with timing and commitment, setting deadlines and determining the role of everyone in the team, communicating with moot competition organisers, and the law school administration and even the ways to pay entrance fees, costs of flights, and accommodation. They have to find out ways of not only how to teach effectively, but also how to create and maintain positive attitude, identify strengths and weaknesses of everyone in the team, deal with the crisis of confidence, maintain trust overcoming unavoidable periods of tension and frustration within the team.

It should be mentioned that coaches' involvement is twofold: being a unique form of legal training, mooting provides an opportunity for coaches to learn more about the teaching profession and the diverse needs of students, particularly in view of the fact that coaches work very closely and over a long period of time with a relatively small group of students. Therefore, coaches come to see more clearly how students learn the subject matter, how they might differ in regard of their legal research and writing skills and oral advocacy aptitudes and how their learning experience might be enhanced through individualisation of the learning process.[23]

Being an international event, the international moot court competition provides coaches with a unique opportunity for comparative

[23] Boyle R and Dunn R, Teaching law students through individual learning styles, 62 Albany Law Rev 213 (1998).

reflection and inspiration as to teaching ideas and methods. Training procedure preconditions considerations concerning pedagogical styles and methods, different pedagogical philosophies and their efficiency in the context of mooting and different legal families, comparative analysis of pros and cons of different aspects in legal education, comparative analysis of different moot programs and their utility. For coaches who are practicing counsels and who are merely contemplating an academic career, the process affords a chance to test their interest and aptitude as law school professors, although mooting is, of course, quite distinct from conventional university teaching.

Coaching moot court teams allows coaches to never stop learning the law and keep abreast of the law in ways that would not be possible if they were to focus exclusively on their practice or academic work. They develop a broad and deep knowledge that turns out to be invaluable at odd times in their own working practice or academic experience. Moreover, training students, coaches are reminded of the importance of certain skills and the impact of bad habits. That helps coaches keep their own skills sharpened and refine skills through lessons they learn from interactions with students, moot court organisers and judges.

Coaching provides networking and community and facilitates the feeling of greater job satisfaction regardless of whether coaches teach full time or practice law.

### 4.3. Judges' Perspective

One of the most notorious and provocative issues to be discussed within the framework of international moot competitions is the participation of decision makers (arbitrators or judges) and the impact their decisions have on the outcome of the moot competition. There is substantial research proving that there are no any certain criteria to determine what persuades decision-makers in the legal discourse.

In "Justice is Less Blind, and Less Legalistic"[24] H. Spamann and L. Klöhn provide us with a representative example describing statistically reliable results of an experiment in which actual judges

[24] Holder Spamann, Lars Kloehn, Justice is Less Blind, and Less Legalistic, 45 (2) The Journal of Legal Studies 255 (2016), DOI: 10.1086/688861.

upheld the conviction of the unsympathetic defendant at a rate more than twice as high as that of the sympathetic defendant (87–41 %). B. Spencer and A. Feldman have examined how and to what extent brief's overall readability influences the possibility of prevailing on summary judgment. The authors conclude that there is "a statistically significant relationship between brief readability and the outcome of summary judgments motions."[25]

John Campbell has examined "whether there is a measurable relationship between writing style and winning."[26] Having examined briefs from three appellate courts, he draws conclusions that stylistic choices affect the chances of winning on appeal. The study carried out by Ken Chestek was devoted to the examination of whether negativity bias[27] affected judges' perception of a hypothetical case. The results were not straightforward and inconclusive: "In some situations, negative themes seem to be important in priming a reader to disfavor the opposing party."[28] In "What Rhetorical Techniques Actually Persuade Judges", Edward R. Becker insists that there is "a gap between what we think and what we actually do know about whether and [...] how and why rhetoric influences judicial decisions." Thus, both for coaches and students there are no reliable grounds to claim that certain techniques of dealing with judges would be more advantageous than others.

Moreover, different judges adopt different approaches to oral arguments. Some ask few questions, while others are highly intervening not allowing the oralist to make any systematic argument at all. They can give the impression of not understanding the issues, spend too much time asking rather superficial and even aggressive questions that students are not able to handle or evaluate, since they are given very

[25] See Shaun B. Spencer, Adam Feldman, and Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success, 22 Leg. Writing J. 61, 63 (2018).

[26] See John Cambell, Writing That Winns: An Empirical Study of Appellate Briefs, 46 (3) Colo. Law 85 (2017).

[27] In Chestek's perspective negativity, bias refers to "the brain's natural inclination to attend to and process negative stimuli."

[28] See Kenneth D. Chestek, Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the negativity Bias, 14 Leg. Comm. & Rhetoric: JALWD 1, 2 (2017).

little time, insist on having citations for every proposition made during oral rounds instead of leaving this time-consuming approach to the written memoranda, seek authority for every proposition put forward, look for advocacy skills and demonstration of a student's ability to think on his or her feet.

One of the solutions to the problem is implemented by the moot competitions organisers who try to compose the panels from representatives of both common and civil law systems, practicing lawyers and academics and find it worthwhile reminding decision-makers that questions are intended to help the argument rather than test or challenge the student. However, the uncertainty concerning the strategy decision-makers can adopt provokes coaches and oralists to be prepared both to present a coherent reasoned argument and to be prepared to being occupied by questions and interruptions in such a way that would not detriment the argument put forward.

However, such an analysis of approaches that judges can adopt proves that the successful oralist is one who is able to "zealously advocate his or her position, while maintaining a professional and amicable tone and appearance, particularly under pressure." The team members need to be trained to respond to questions in such a way that motivates the judge to decide in favour of the oralist and the argument of the answering team.

There is one more very important function that the judges have. At the end of hearings, the decision makers give oral feedback to the students, this being another critically important teaching and learning tool if both students and coaches make an effort to treat it as such. Reasonable and justified comments can serve as a good guidance for the team's progress and success.

## 5. KEY MOOTING STAGES AND STRATEGIES

### 5.1. Selection Process

The process of selecting moot oralists and researchers (research assistants) is difficult from both psychological and tactical points of view.

In terms of tactics, it is important to pre-define the number of potential oralists and researchers needed, divide their efforts appropriately at the memorandum preparation stage between procedural and substantive issues and determine students capable and willing to perform the tasks depending on their individual capabilities, motivation, perspective. The paradox is that the team can find itself quite successful because of the availability of the bright oralist, while sometimes the endeavors to train the oralist are huge, however, students with average oralist capabilities do not let the team climb far enough. From a psychological perspective, consideration needs to be made on the incorporation of the oralists' and researchers' roles into the overall "division of labour" within the team, as well as avoiding internal conflicts that could arise on the basis of the selection of particular individuals as oralists.

Provision for the best oralist awards to the oralists who scored high pleading at least once on each side in the moot competition rules seems to advocate the no-more-than-four-pleaders mode, which contradicts the educating and pedagogical objectives of the mooting preparation process. The strategy is implemented by some universities who enter the Willem Vis competition (which has now divided itself into two competitions, one in Hong Kong and one in Vienna) by preparing two teams of four participants, one for each competition.

From an educational perspective, mooting is an educational event, which basically means that every participant has to derive the maximum educational benefit possible. The main reason why not every member of the team cannot speak during the oral rounds is simple: all people have different strengths. Some are born to be convincing public speakers, others are gifted with easy flowing and comprehensible writing.

On the one hand, one could take the approach of intensive and persistent training of students to improve weaknesses. On the other hand, drawing on natural strengths, particularly taking into consideration the fact that competition matters, seems to be more reasonable. There is another side to the problem. People feel somewhat insecure with themselves in an environment they are not comfortable with, or doing things that are unfamiliar to them. This insecurity coupled with the natural astonishment of the competition itself might lower speakers self-esteem and result in the speaker's evaluations being lower than

initially expected. Some students — despite the fact that their speaking abilities are nearly perfect — may not be interested in training for the moot. Thus, as the moot competition implies, a healthy combination of oral advocacy and substantive knowledge is required — relying solely on oral advocacy talent would not be able to meet the image of the successful moot speaker.[29]

### 5.2. Determining the Number of Participants

When deliberating over the number of oralists, coaches have to keep in mind two things. The individual educational effect of the moot is arguably better achieved when every team member argues in oral rounds. The competitive effect, however, increases with the increase in the number of those who argue. Fostering of the educational effect depends on the number of members of the team. In a team of twenty, the "everybody-argues" scenario could hardly be implemented. Usually half of the team members are the pleaders, while the others are research assistants to them. What is typical is a team of four or five students, where each is given a chance to plead at least once. The four or five student team seems to be quite manageable in terms of the division (and completion) of labour, taking for granted that all the team members are about equally devoting time to their tasks. Moreover, it provides a good pre-moot oral advocacy training playground, as it is quite easy divisible into two pairs, one of which presents Claimant and the other one Respondent.

The pleaders gain more experience and, as some scholars refer to it, "maturity" with their own progress of participation in the oral rounds of arguments, which involves several interconnected things. First, the more you plead, the less you fear to plead again; the more you have spent in preparations, the less you are concerned with the environment surrounding you during oral rounds of arguments. Second, if you have pleaded different view points (representing both Claimant and Respondent), you are much more flexible with "tossing and turning"

[29] Leonila Guglya, Oral Advocacy Training: a Beginner's Look at the Willem C. Vis International Commercial Arbitration Moot from a Coaching Perspective, 12 Vindobona Journal of International Commercial Law & Arbitration 125 (2008).

facts and laws. Thus, provided the selection process is successful and the number of those willing to moot exceeds the number of team members, the number of participants is preconditioned by both the competition rules and individual aptitudes of the team members.

### 5.3. Task Division

(Substance v. Procedure) It is necessary to take into account particular mooting strategy. First, the issue of division between the pleaders is somewhat conventional for the moot, thus it is better to keep the same division for the preparations and presentations themselves. Second, in case the team is bigger than just two people, the teamwork strategy will necessitate some of the issue divisions. Namely, it hardly seems efficient to work on all the issues and it is rather practical that such issues are divided by the team members in between themselves. Thus, the prospective oralist in fact fully covers only one out of several issues. This becomes fairly obvious at the initial stage of oral advocacy trainings, when much more attention is devoted to the issue a person spent more time on during a practice moot. However, even with this "minus," the issue assignment has proven to be helpful enough due to some personal association thereto that arises in the course of preparation.

### 5.4. Selection of Oralists

It is hard to overestimate the driving force of motivation and its influence on the success of the mooting. Thus, only students that are highly motivated to participate in the moot should be admitted to the team and be selected to plead orally. Owing to the fact that the moots are carried out abroad, Russian students are almost always motivated enough to participate. Another motivation challenge is the immense workload (due to the substantial coursework) which law students are often experiencing at the time of their moot competition preparation. In this case, most of the students will concentrate on studies much more than on the moot preparation. The next motivation challenge is concerned with a so-called authority competition. Student motivation as experience shows is directly proportionate to the number of credits given

for the moot participation, if any. Namely, it really makes a difference if none, one or several credits are assigned for the participation, as it gives students some additional flexibility in curriculum self-modeling to allow more time to the moot preparation. Regular work assessment could in some cases remedy the motivational defects, if such do occur. The main problem one might still experience here, however, is an authority problem. This could totally undermine the assessment efforts. Thus, a strategic step a coach has to make in preparation for the Moot is the selection of oralists who, besides having the public speaking abilities discussed above, possesses a high enough degree of initial motivation. Furthermore, methods of enhancing their motivation need to be determined (such as through regular assessment and feedback performed either inside the team or by the coach).

One more challenge the coaches face with is of a psychological nature if at the moment of enrolment the oralists are selected separately from the other members of the team. It might be one of the worst moot-related shocks for a student to be told at the later stage that he or she would not be selected to be an oralist. There are several ways out of this situation practically addressed by the participating schools.

(1) The most frequently applied way provides for the initial division of team-members into researchers, research assistants and oralists at the team-formation stage. Thus, those participants who accept the researches' roles have to do it on a "take it or leave it" basis, which to some extent prevents further in-team tensions. Those admitted from the very beginning as researchers and research assistants are not going to undertake the oralists roles. Moreover, they will not go to international rounds (like in Vis Moot Competition), but as a main incentive, they can be given *carte blanche* for the full participation in the next year. On the one hand, this approach substantiates the non-oralists position by the actual lack of seniority. On the other hand, it limits the non-oralists in rights as compared to oralists. Moreover, this approach works better to the teams having several generations of students.

(2) The second way requires the selection of a particular number of oralists (from two to four) at the point when memoranda are ready and oral advocacy training starts. In this case the positive effect is achieved by the increased competitive advantage in the course of the writing

as students are trying to do their best in competing for the oralist's position. However, the in-team cooperation might get psychologically uneasy and the in-team hostilities in such a case, should they be present, may achieve substantial gravity to the detriment of the oral preparation process. In the best case, however, the team members would take the reasoned selection decision without objections. Additionally, from an objective point of view, it might be hard for the coach to properly evaluate a student's oralist potential at the very beginning of the oral advocacy training, when the team members are not yet comfortable with the positions they plead.

(3) Some teams and coaches currently resort to the selection of oralists on the later stage of preparation process. This approach allows for some "warm-up" period and encourages enthusiastic participation of all team members in early internal oral rehearsals. Furthermore, it helps in the justification of the particular oralist selection decisions, as the performance of individual team members in oral pleadings is visible not only for the coach, but also for the team. The complications with the implementation of this strategy involve the necessity for more intensive rehearsals to let all the team members try them out.

(4) The "all oralists team" approach means that only students having advanced enough in oral advocacy skills are offered to join the team. Selection in such cases includes the oral argument try-outs.[30]

(5) The method mentioned in the literature however rarely applied is based on the oralist pre-selection made by the coaches at the team formation stage, but not disclosed to the team members (including the prospective oralists) until the beginning of the oral advocacy phase. This method promotes the feeling of initial equality between participants, which might be quite helpful at the memoranda preparation stage. Moreover, coaches may change their mind in case their initial assessment of a prospective oralist abilities.

Whichever way may be chosen by the coach, attention has to be devoted to several team-spirit restoration factors. Coaches are expected to provide due and comprehensive reasoning in the selection decisions

[30] The oral pre-selection arguments are mentioned as a part of the mooters selection process applied at Pace Law School. For more details see http://appserv.pace.edu/execute/page.cfm?doc_id=23596.

made of the team members and give repeated explanation of how the contribution of each team member, oralist or not, to the research done is helpful for the team as well as for the mooters' professional wellbeing. To mitigate possible in-team tensions, coaches have to give clear explanation of the openness of all the other moot-related benefits disregarding mooters' personal participation in orals both at the time of the actual competition and thereafter: prospective involvement in the activities of the Moot Alumni Associations; participation in a moot as an arbitrator or team coach upon graduation; the availability of extra-curricula training opportunities in international tribunals and institutions, etc. The students have to realise that their participation in the moot competition is an equally unforgettable and useful experience, independent of their participation in oral rounds as oralists.

## 5.5. The Oral Advocacy Practicing Phase. Internal and External Rehearsals

### *5.5.1. Internal Rehearsals*

One of the pre-moot practices that can help coaches both to train the oral advocacy and presentation skills and make and justify oralist selection decision is referred to as internal rehearsals. The oral advocacy-practicing phase is often favoured by students more than the memoranda preparation phase. However, it is the coach who is in charge of providing internal rehearsals, which are highly influenced by the number of the team members.

The internal moot would ideally need four students, two pleading for Claimant and another two for Respondent,[31] thus four team members altogether. If the teams have more than four members in the first internal rehearsals, they can allocate the pleading time and issues in between all the members of the team: three or four students can plead for Claimant and another three or four for Respondent. This technique helps to keep all of the students involved and stimulates deeper research on the issues entrusted to each student. The other tip for getting everybody involved is to use the so-called rotation of pleaders. The rotation could

[31] Such an approach was successfully applied in MGIMO Moot Cup.

be random if no oralists are selected in advance, quasi-random when the oralists are selected, but the other team members are chosen to plead with them randomly from the pool of researchers, or pre-scheduled when a schedule of pleadings involving the team members is made.

Any method could be used in team preparation. It is crucial, on the other hand, to encourage the presence of all the team members on each internal rehearsal organised, independent of actual participation as an oralist. This way, the awareness of all the team members with all the newly discovered nuances of the problem would not suffer, and the interest in exploring further can be enhanced. The technique that could be used to attract presence in such cases is called alternative arbitrator position technique, which means that the members who do not participate might be called to sit on the panel, questioning pleading colleagues and delivering comments at the end. This way the students are getting a chance to check the effectiveness of their arguments from "outside the box", thus often being the most objective judges of their colleagues' performance.

Moreover, at the stage of internal rehearsals teams have an excellent opportunity to engage "knowledgeable outsiders" to decide on the persuasiveness of arguments and give the third-party review, but we need to keep in mind that the problem under consideration is explored quite well and academicians and practitioners invited to judge the internal rehearsals have to know the subject matter regarding the problem, have to have examined the memoranda and should know the rules of the moot competition. At this point the problem arises that it is the coach of the team with whom the oralists are rehearsing on a regular basis and who provides much of unexpected challenges to team members' performance. This might quite easily result in participants' adapting coach's presentation and rebuttal manner and skills.

However, during the whole period of preparation students and coaches have to keep in mind that more knowledge should not mean that more time is allowed for the presentation of arguments: if students fail to be discerning and merely cite all they know on a particular area, this will cause detriment to the team as a whole. For the moot court competition, the issue of primary concern involves an adherence to the time frame and ability to either reduce or extend the arguments

depending on the smoothness of the presentation process, and internal rehearsals serve those objectives best.

### *5.5.2 External Rehearsals (Pre-moots)*

One more experience-gaining process available to the teams (provided they are not precluded due to financial restrains or lack of the neutral arbitrators) is the aforementioned external rehearsals (pre-moots). Although such an opportunity is allowed by the rules of only a few moot competitions, pre-mooting could secure a due forum for the oralists' performance enhancement and presentation polishing. Pre-moots provide the team members with a chance to improve public speaking and persuasion abilities, compare their achievements with the achievements of the other teams, experience-presenting arguments before different panels of judges and arbitrators.

The idea of trying out the arguments during the phase of the preparation of the memoranda has been presented by Jack Graves[32] to enhance the training process of the Vis Moot Competition. Pre-moots were advocated by coaches and students as they allowed the teams to pre-argue the arguments for checking their effectiveness. The idea of external rehearsals might deserve the attention of the law schools offering more or less institutionalised moot preparation, as the try-outs might take additional group sessions.[33] It has to be admitted though that pre-moots take a less formal form of discussion between the team members, however, the group evaluation of the arguments can be put down in the memorandum.

However, some adverse circumstances exist that can preclude the team from pre-moots. Once the pre-moot is planned the following issues need to be considered: how much preparation the pre-moot requires; what the balance between the pre-moot and the moot preparation should be; who should participate in the pre-moot as oralists, *etc*. Moreover,

[32] Graves, J. M. and Vaughan, S. A. The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity, 10 Vindobona Journal of International Commercial Law and Arbitration (2006). URL: http://www.cisg.law.pace.edu/cisg/biblio/Graves-Vaughan.pdf.

[33] Ibid.

pre-moot participants might feel somewhat suspicious with the sharing of their legal evaluation of the facts presented both in the memoranda and in the oral presentations with the participants from other teams. Thus, the Vis Moot Rules exclude such competition as the pre-moots have to be notified in order to avoid the meeting of teams that have experience in pleading with each other at the actual competition. However, the risk of an indirect competition is enhanced due to the strengthening of the team's oral position as a result of interaction with the other teams.

The timing chosen for the pre-moots, to a substantial extent, frames the expectations going forward and the actual outcome achieved. The pre-moots taking place shortly after the submission of the memorandum would be valuable as a means of forming the team's perceptions of the sense of oral competition, emphasising the exchange of the substantive findings rather than skills.

On the other hand, Pre-moots held at the later stage would deal mostly with the "competition of the presentations" rather than the exchange of the ideas on the merits when the teams are expected to have developed substantial familiarity with the moot problem. Thus, external rehearsals (pre-moots) during the preparation should be scheduled in such a way that would provide teams with advantages of training during both earlier and later stages. If the coach considers pursuing pre-moot participation, the team inevitably meets the issue of the time allocation between the pre-moot preparation and the preparation for the *main* moot. Each pre-moot in a sense is a separate competition that requires specific preparation. The strategies adopted for the pre-moot, depending on the objectives set, might range. Teams may opt for the mere presentation of the position chosen by the team, leaving the response to the issues raised by the opposing team (or teams) to the *ad hoc* reactions. In this case, the pre-moot preparation might be limited to skimming through the opposing teams' memoranda. On the other hand, some teams may opt for a thorough analysis of the positions taken by the opposing teams researching the authorities put forward by the opposing teams and drafting specific speeches in response. A pre-moot rehearsal session may include internal rehearsals when one part of the team would be presenting opponents' arguments and the other team

members (usually oralists selected for the particular pre-moot round) would be in charge of rebutting them on the basis of a newly developed responsive position.

Obviously, regardless of the models chosen for participation in pre-moots, substantially more preparation time would be needed. Thus, the choice will be dependent on the availability of extra time for the internal teamwork prior to the pre-moot. In terms of participation, pre-mooting could be seen in several different manners. It could be approached as a means of getting more team members to plead, and thereby enhancing the interest of participation in the team. The same can be seen as a means of double-checking and conforming the oralist selection decisions made by the coach and, at the later stage of the preparation, as an additional chance to train the chosen oralists before the moot. Whatever approach is chosen, pre-moots definitely work for the benefit of the team as a whole. They give the team members a chance to experience the "close to real" mooting environment and evaluate their individual performance or the performance of the team against that of their adversaries.

## 6. A WORD OF CRITICISM

The advantages of mooting as a practice-oriented activity supplementing the lecture method and facilitating the process of training lawyers is obvious, however, there is always something to criticise.[34] In "A Brief SWOT-Analysis of the Willem C. Vis Moot" Friedrich Blasé suggests that moot competitions be analysed in the context of their strengths, weaknesses, opportunities and threats (SWOT) following a particular format approved in the business world.[35]

The majority of criticism and critical comments concern technical (the scoring procedures, the fact that the teams do not know the constitution of their tribunal in advance, *etc.*) or structural levels (the number of the participating teams and their growth in number) of the moot competitions. The main weakness of the Vis Moot is associated with evaluation of educating, internationalising and socialising effects

[34] Shreya Atrey, Ib. 303 (2013).

[35] Friedrich Blasé. A Brief SWOT-Analysis of the Willem C. Vis. Moot. 4 Vindobona Journal of International Commercial law & Arbitration 117–123 (2001).

that are felt more intensely by the average student when fewer teams take part.

For many teams participating in the Vis Moot Competition any of the awards seem so far out of reach that "making the cut", i.e. being amongst the best 64 teams which go through to the elimination rounds, becomes the alternative and most realistic prize. As the competition increases, but the rewards remain the same, the motivation to work harder on the case during the memoranda phase and while rehearsing for the orals diminishes. Those teams that are not deterred by the increase in competition will show a different negative consequence that is clearly attributable to the growth of the moot. Many of these teams will not interact with others on a casual, social basis. Instead, they spend their week in Vienna rehearsing, analysing and improving their presentations determined to make the cut and in the vague hope for the Award for the Best Team Orals.

The situation can be quite opposite with the moots providing for national rounds. Thus, the number of teams participating in Russian National Rounds of the Jessup Moot Court Competition decreases year after year due to the fact that national rounds demonstrate rotation among ten teams that compete between each other and for any new team it is very difficult to join this group of the best.

Thus, the solution suggested by Friedrich Blasé says that there should be General Rounds in groups leading to group winners and second places, the latter not moving on to Eliminating Rounds, but still enthused by their results. Alternatively, the General Rounds could be broken down into two or four leagues, each sending the same number of teams to the elimination rounds. Both measures would facilitate teams to individualise themselves from the rest adding to the motivation for the event.

Moreover, the increase in the number of practicing teams can give rise to the question of competition to the moot itself. Following the economic principles, if demand outstrips supply capacity of a non-protected monopolist, the market turns into an oligopoly, new

suppliers enter the scene.[36] Although we cannot say that the moots under consideration have reached their capacity, the question of alternative events is more hotly debated than ever. The moots could very well find themselves with a "franchised" moot. This need not be a full scale copy, but it could be held in different location or with a different geographical reach. Thus, mooting in itself due to its spreading and internal capabilities and conflicts needs further development in order not to exhaust itself

## 7. CONCLUSION

Mooting represents an extraordinary gathering of law students, law school faculty members, and practitioners from around the globe. Pedagogical and competitive elements within mooting preparation are entirely consistent and mutually supportive. As an extracurricular activity mooting offers many rewarding insights to the participating teams and greatly benefits students.

Participation in moot improves not only legal, linguistic and interpersonal skills, but also offers a platform from which to establish professional network and contacts with international practitioners, judges, arbitrators and institutions from the fields. Participants train in important techniques of dispute resolution and skills that they will need in their professional futures. These tools are put to the test in the pleading session before tribunals composed of internationally recognized experts. The more independent and representative is the composition of moot courts' panels the more they contribute to the professional atmosphere and match the high quality of the participants' performances.[37]

Since during the last two decades mooting has become an important part in training lawyers, participation in moot courts has become an important element in the extra curriculum work of a number of Russian law schools. Mooting as an interactive and practice-orientated activity

[36] Friedrich Blasé. A Brief SWOT-Analysis of the Willem C. Vis. Moot. 4 Vindobona Journal of International Commercial law & Arbitration 117–123 (2001).

[37] Eric E. Bergsten, Ten Years of the Willem C. Vis International Commercial Arbitration Moot, 6 International Arbitration Law Review 37 (2003).

provokes a complexity of adverse questions that need to be dealt with in an interdisciplinary manner: they cannot be resolved based on just thorough examination of the subject matter that underlines the problem of a particular moot competition.

In order to become an effective device in the development of a lawyer, mooting needs an institutional framework that can be developed by means of engaging accomplishments in jurisprudence, methodology, pedagogy, art of persuasion, psychology, linguistics, *etc*., in order not to become a very narrow-minded, however, very significant instrument exploited for the promotion of a particular law school. It is necessary to provide the institutional framework for the moots in the future by means of creating specific organisations (*e.g*. the Moot Alumni Association), moot courts departments or moot courts centers integrating moot court preparation into the curriculum for the purpose of fostering the development of the moot as both an educational, social and cross-cultural experience. Legal writing and oral advocacy training as processes underlying mooting encompass a much broader scope of considerations, strategies and challenges than the ones we have dwelled on in our article.

Moreover, mooting is extremely vulnerable to the multiplicity of factors and their combinations:

1) the specialties of team members' personalities and abilities;

2) the curriculum of the law school or faculty;

3) the funding for the training available;

4) the existence of psychological interaction between (and within) the members of the team, including coaches;

5) appropriateness of the coaching approach chosen, *etc*.

Mooting is a learning process for all participants involved: students, coaches, decision makers (arbitrators, *etc*.) and the related outsiders witnessing the devotion of those directly involved. Multidisciplinary nature of mooting rejects the "one-approach-fits-all" approach to coaching in general and to advocacy training in particular. Thus, further discussion is needed of the approaches that worked as well as those that did not perceive the substance and objectives of mooting in order to provide better training for mooters in particular and law students in general.

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# COPYRIGHT LAW

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# DETERMINING DAMAGES ARISING FROM COPYRIGHT INFRINGEMENT

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**Abstract**

This article seeks to clarify legal issues relating to determining damages in copyright infringement, including material damage and spiritual damage. This is a complex area of law, involving both objective and subjective considerations. The author examines the concepts of material damage and spiritual (or moral) damages in detail under Vietnamese law, drawing comparison to their meaning and intempretation in other jurisdictions. The challenges of valuation of material losses are identified and examined — with emphasis on the methods currently used in court practices. As to spiritual or moral damages, the challenges are more complex, being highly subjective to the infringed party, and thus difficult to assess. Other heads of cost — such as lawyer's fees are also examined, with a view to drawing a distinction between what is reasonable or not — and the reasonableness of the legal fees of a party who is claimed to be infringing the rights of another. Based on the study of Vietnamese laws, laws of certain jurisdictions and hearings in Court practice, this article also makes some proposals on the supplement, clarification of damages to be compensated and bases for evaluation of the infringed copyright. Specific conclusions are made upon the topics of supplementing the definitions of the type of damage to

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include other reasonable costs and damages, specifying in detail the valuation methods of copyright, and finally the establishment of criteria for determining reasonable lawyer's fees.

**Keywords**
Infringement, copyright, compensation, material damage, spiritual damage, moral damage, calculation, reasonable

**CONTENTS**



## I. INTRODUCTION

Copyright has the abstract nature of intellectual property rights in general. For that reason the consequences arising from copyright infringement are relatively complicated and difficult to identify. One of the effective remedies for handling copyright infringement is to claim for compensation for damage. Therefore, it is necessary to accurately determine the full damage arising from copyright infringement, especially to reasonably develop and apply legal regulations governing this field.

This paper overviews the regulatory framework on determining damages arising from copyright infringement in Vietnamese law including material damage and spiritual damage. This problem faces some shortcomings in practice and requires appropriate amendments of the law. Therefore, the article points out solutions to improve Vietnamese law based on similar researches of foreign laws.

## II. GENERAL REGULATIONS OF INTELLECTUAL PROPERTY LAWS ON DETERMINING DAMAGES ARISING FROM COPYRIGHT INFRINGEMENT

Legal issues on copyright are governed by a number of normative documents. There is the Law on Intellectual Property 2005 as amended and supplemented in 2009[2] and [its] guiding documents such as Decree No 22/2018/ND-CP dated 23 February 2018 detailing a number of articles and implementation measures of Law on Intellectual Property 2005. Further, the Law amending and supplementing a number of articles of the Law on Intellectual Property in 2009 regarding copyright, [and] related rights which took effect from 10 April 2018 (Decree No 22/2018/ND-CP). Decree No 105/2006/ND-CP dated 22 September 2006 detailing and guiding the implementation of certain articles of Law on Intellectual Property regarding protection of intellectual property rights and state management of intellectual property rights, as amended and supplemented by Decree No 119/2010/ND-CP dated 30 December 2010 (Decree No 105/2006/ND-CP). There is Joint Circular No 02/2008/TTLT-TANDTC-VKSNDTC-BVHTT&DL-BKH &CN-BTP dated 3 April 2008 instructing the application of certain legal regulations in resolving disputes of intellectual property rights at the People's Court (Joint Circular No 02/2008). Overall, these documents provide the legal bases to determine unlawful acts infringing copyright, the rationales for determining damages, the types of damages to be compensated as well as methods of determining compensation amount in specific cases.

In addition, the regulations on tort liability in the Vietnamese Civil Code 2015[3] are also applicable in cases where there are no available applicable or relevant regulations in the intellectual property laws. Article 5.2 of the Law on Intellectual Property specifies that in the event there are inconsistencies between the intellectual property regulations

[2] Law on Intellectual Property (No 50/2005/QH11) dated 29 November 2005, amended, supplemented by Amended, supplemented Intellectual Propery Law in number of articles (No 36/2009/QH12) dated 19 June 2009 and compiled in compiled document No 19/VBHN/VPOH dated 18 December 2013 (hereinafter referred as "Intellectual Property Law 2005").

[3] Law No 91/2015/QH13 dated 24 November 2015.

of the Law on Intellectual Property and the [same] regulations of other laws, the regulations in the Law on Intellectual Property shall prevail. This is also in line with the "specific controls over general"[4] canon (or principle) of enforcement, despite the fact that such canon is not expressly prescribed neither in the Law on Promulgation of Legal Normative Documents 2015[5] nor the same Law from 2008. However it is still recognised to be applied by the community of legal professionals. Article 4 of Civil Code 2015 also provides that "This Code is the general law governing civil relations, and in case other relevant law does not provide for the issue in question, the provisions of this Code shall be applied."

According to Joint Circular No 02/2008, a "Liability to compensate for damages against an infringer of intellectual property rights" shall be determined in accordance with Article 604.1 of the Civil Code. Further requirements are adherence to the provisions of section 1 Part 1 of Resolution No 03/2006/NQ-HDTP dated 8 July 2006 of the Council of Justice of the Supreme People's Court on guiding the implementation of certain regulations of Civil Code 2005 regarding compensation for tort damage" (Section B.VI.4.1). Thus, when applying for a remedy to compensate for damages arising from an infringement of intellectual property rights, the relevant regulations in Law on Intellectual Property must be applied first. In the event there are no relevant regulations in Law on Intellectual Property, the regulations on liability to compensate for damages as stipulated in Civil Code shall be applicable.

"Damage" shall be interpreted as "loss of human life, health, honour, dignity, prestige, property, other legitimate rights and interests protected by the laws."[6] From the perspective of legal science, damage is a deterioration in condition of the property, and/or personal values protected by the laws.[7] The existing scholars in the field seem to share

[4] Taken from When General Statutes and Specific Statutes Conflict. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669505 12 May 2019.

[5] Law No 80/2015/QH13 dated 22 June 2015.

[6] Ministry of Justice — Institute of Legal Science, Dictionary of Law (Encyclopedic Dictionary Publishing House and Justice Publishing House 2006) 713.

[7] Nguyen Xuan Quang, Le Net & Nguyen Ho Bich Hang, Civil laws of Vietnam (Ho Chi Minh City National University Publishing House 2007) 471.

a common perspective that damages shall be determined as the loss of values including both material and spiritual damage, such loss shall have not been incurred by the copyright holder but for the infringement. In order for the liability to compensate for damages to be arised, the "damage" must be a prerequisite.[8] Currently, the Law on Intellectual Property provides that damages caused by copyright infringement includes:

— Material damage (Article 204.1.a of Law on Intellectual Property) including loss of property, deterioration in income, profit, loss of business opportunities. These are losses that directly prejudice to matters such as manufacturing, business activities and profit-making of intellectual property rights' owners.[9]

— Spiritual damage including losses of honour, dignity, prestige, reputation and other mental sufferings incurred by the creators of literary, artistic and scientific works (Article 204.1.b of Law on Intellectual Property).

— Material damage arises mainly from infringement of property right under copyright, while spiritual damage arises from an infringement of moral right — an important disctinction.

## III. MATERIAL DAMAGE

### 1. Loss to Property

The first type of material damage stipulated in Article 204.1 of Law on Intellectual Property is loss to property. Property losses are construed as an impairment or loss of the calculable monetary value of a protected work (Article 17.1 of Decree No 105/2006/ND-CP). Copyright includes moral right and property rights.[10] Here, property right is a type of property as stipulated in Article 105 and Article 115 of Civil Code 2015, showing "the characteristic of property" as well as other

[8] Hoang The Lien (Editor), Scientific Commentary on Civil Code 2005 (National Political Publishing House, Volume 2 2013) 712.

[9] Article 16.1 Decree No 105/2006/ND-CP.

[10] Article 18 of Law on Intellectual Property 2005.

intellectual property rights,[11] with real value.[12] Further, the infringement had caused certain adverse effects impairing or otherwise affecting the property value. From the intangibility nature of intellectual property, the connotation of the concept of loss to property with respect to intellectual property rights is not entirely the same as ordinary property in civil transactions. For example, damage caused by trepass against property under Article 589 of Civil Code 2015 includes cases such as lost, demolished, damaged property, etc. In the case of intellectual property, it is quite difficult to identify these kinds of damage. In such cases damage can solely be determined through losses of calculable monetary value of such rights.

Such calculable monetary value might be determined by various methods[13] (intellectual property valuation methods). From an economic perspective, an intellectual property could be evaluated by one of (or combination of) three methods: cost approach,[14] market approach[15] and income approach.[16, 17] Intellectual property valuation

[11] Frank H. Easterbrook, Intellectual property is still property (13 Harv. J. L. & Pub. Pol'y 108, 1990) 20.

[12] Dinh Thi Mai Phuong, Towards compensation for damage arising from unlawful act in infringement of industrial property right under Vietnamese laws (National Political Publishing House 2009) 233.

[13] Bui Minh Phuong, Valuation of Intellectual property, http://baohothuonghieu.com/banquyen/tin-chi-tiet/dinh-gia-tai-san-so-huu-tri-tue/1303.html 10 May 2019.

[14] Intellectual property shall be evaluated based on costs arising during the creation and development of intellectual property, including costs of reproduction and replacement. For this method to be implemented successfully, it is required that information and data on research, investment and cost activities must be complete, [and] transparent.

[15] This valuation is based on whether a third party is willing to obtain a transfer of [such] intellectual property rights (in the form of [ordinary or complete] transfer or transfer of right to use). In addition, this method could also be conducted based on the price analysis of similar intellectual properties that have been traded successfully at the time close to the time of valuation.

[16] The intellectual property will be evaluated based on the estimated income sources that the owner of such intellectual property right might be likely to receive during the effective period of intellectual property rights. This method focuses on assessing the profitability of intellectual property rights objects.

[17] Nguyen Thanh Tu, Some legal issues on commercial exploitation of intellectual property in enterprises in Vietnam (2012) 2 Legal Science Journal 38.

is a complicated and highly specialised task.[18] Upon an occurrence of copyright infringement, the value of the work is lost or diminished, this is identified as losses of property. One of the grounds to determine the value of the works and losses arising from infringement is the transfer price of this object at both preceeding and following points of the infringement of copyright. The transfer price is to be calculated assuming that copyright is transferred under the contract to the extent relevant to the infringement committed. The difference between the prices at the two points is loss of the property — the value of copyright.

### 2. Deterioration in Income, [and/or] Profit

Property in general and intellectual property in particular do not only exist with their original values but in a positive way, they also have future values or benefits. These are benefits that should have been receivable by the owner. Hence, the loss or impairment of benefits in capability for exploiting the property is also a type of damage arising from infringement.[19]

Article 18.1 of Decree 105/2006/ND-CP stipulates that: "Income, an profit include: (a) Income, and profit derived from the direct use, and/or exploitation of the intellectual property right; (b) Income, and profits derived from leasing the intellectual property right; (c) Income, and profit derived from the transfer of the right to use of the intellectual property right." In addition to such direct exploitation of the intellectual property, the laws also allows the copyright holder to lease or transfer such right to another organisation or individual (Article 138 and Article 141 of Law on Intellectual Property) under the form of a transfer and transfer of right to use. The benefit deriving from the transfer of

[18] Ministry of Science and Technology and Ministry of Finance have jointly promulgated Circular No 39/2014/TTLT-BKHCN-BTC dated 17 February 2014 providing on valuation of results from scientific research and development of technology and intellectual property funded by the state budget. Although this document is only applicable to a limited number of subjects, it could also be used for reference in case any similar regulations appear to be ambiguous.

[19] Le Tuan Tu, How to settle claims for loss of benefits associated with the use, exploitation of property in criminal cases (2013) 19 Journal of the People's Court 20.

right to use is also a form of income which in case an infringement occurs, the copyright holder shall no longer be able to receive such benefit.

In order to calculate the impaired income, and/or profit, the following steps might be of use:

*The first step,* is to directly compare the actual income, and/or profit before and after the occurrence of infringement, corresponding to each type of income, and/or profit;

*The second step*, based on such comparison, the impaired income, and/or profit shall be determined. In case the income and/or profit of the aggrieved party after the occurrence of infringement is lower than the same before such occcurence, the differential amount shall be the actual income, and/or profit impaired. In this case, it is necessary to consider the objective factors affecting the increase or decrease of such income and/or profit of such aggrieved party, which are factors not related to copyright infringement.

In the event it is determined that the income and/or profit at the time the infringement occurs is not reduced compared with the same preceding to such occurrence, but in comparison to the actual income, and/or profit, it is still less than which should have been receivable to them but for the infringement, this case shall also be considered as an impairement of the income and/or profit.[20] In addition, income could be determined based on the average income of the period preceding to the occurrence of such damage.

Currently, the exploitation of works can be seen in many different forms. For example, the right to create derivative works (adaptation, translation, etc.), to perform or display the work in public, to reproduce the work, etc. These activities provide rich sources of income to their creators and owners, especially high-value works, which are widely exploited in commercial circles. An infringement might refrain the copyright holders from reaping these benefits, or cause their benefits to

[20] Nguyen Phuong Thao, Liability to compensate for damages arising from infringement of commercial indications under the laws of Vietnam (M. A. Thesis, Ho Chi Minh City University of Law 2017) 49.

diminished. To that end, they deserve to be compensated for the losses that they should have been received were it not for the infringement.

Legislations in some countries, such as Japan, the United States and the European Union countries, have promulgated certain regulations to address the problem of determining damage due to deterioration in income, and/or profit arising from infringement of intellectual property rights/ There are many cutting edge approaches which are useful. There is a method of determining actual damage upon an occurrence of intellectual property infringement called "incremental income".[21] The revenue part is divided into two categories, consisting of a fixed amount and a variable amount. This variable amount is calculated based on the difference between the incremental income when the product is sold by the right holder in comparison with the amount receivable when it is sold by the infringer. Given that, the plaintiff's impaired income is to be determined based on the business statistics of the infringer — the value they secured with the infringement. If the exact quantum of damage cannot be determined, the Court may base the valuation according to an estimated amount. In the case of multiple counterfeit products the valuation is the result of multiplying the price of one product by the number of counterfeits to calculate the amount of damage — possibly with a reduction due to differences in quality and sometimes even higher prices in comparison with the original products.

### 3. Loss of Business Opportunities

Exploitation and use of copyright can also bring an "opportunity to have a vested interest" — such as opportunities to expand business and to exploit assets in an effective way. Copyright infringement takes away the ability to take such opportunities and to reap some benefits from such opportunity. This is also counted as a type of damage to be compensated. The damage has not happened yet yet where it is certain that it will be, it could be considered for compensation.[22] Some are of the view that the business opportunity and the diminished value

[21] Denise W. DeFranco, Patent Infringement Damages: A Brief Summary (2000) Federal Circuit Bar Journal 40.

[22] Do Van Dai, Laws on non-contractual compensation in Vietnam (2nd Hong Duc Publishing House 2016) 382.

of intellectual property (loss to property) are different aspects of the same issue and are not truly independent values.[23] The main difference between deterioration in income, and/or profit and loss of business opportunity is a matter of time,[24] that is between past and present. If the deterioration in income and/or profit has already occurred, the business opportunity to be addressed is a "would-have-been-gained" value in the future.

Loss of business opportunities is listed as a type of material damage as stipulated in Article 204.1.a of Law on Intellectual Property, on the following grounds: *Firstly*, the fact that material interests are violated by an unlawful act is true and being under the infringee's ownership; *Secondly*, the right holder is likely to gain certain benefits. It could be contracts to be signed, and/or sales opportunities; *Thirdly*, there is a decrease or loss of benefits incurred by the infringee after an infringement occurs relative to to the ability to gain such benefits without any infringement.

In this regard, Decree No 105/2006/ND-CP and Joint Circular No 02/2008 provides specific guidelines. Accordingly, ***business opportunities*** are favorable circumstances, practical capabilities of the right holders to directly use and exploit, to let others lease, to transfer the right to use, to transfer the intellectual property right to other, etc. in order to reap the benefits. Thus, the business opportunity addresses to the owner's **ability** to gain material benefits. The right holder needs to prove that there is a purchase order received, and/or he or she has negotiated and agreed with a partner on essential contents in order for an agreement to be executed.

Further, such agreement would have been executed and implemented but for the infringement. Intellectual property laws of 2005 also require that when considering such a claim for loss of business opportunity, the Court shall require the infringee to specify and prove: (1) what is the lost business opportunity; (2) the calculable monetary value in such case for the Court's further consideration and decision.

[23] Le Van Sua, Regulations of the laws on compensation for damages arising from infringement of intellectual property rights, Information webpage of Ministry of Justice. http://www.moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1942 20 Mar 2019.

[24] Dinh Thi Mai Phuong, Towards compensation for damage arising from unlawful act in infringement of industrial property right under Vietnamese laws (National Political Publishing House 2009) 242.

### 4. Reasonable Expenses for Prevention, and Remedy of Damage

Damage inflicted by infringement has adversely affected the protected copyright, whose owner is, thus, entitled to take reasonable measures to prevent, mitigate and remedy the damage. In accordance with Article 585.5 of Civil Code 2015, the party holding the infringing rights and interests shall not be compensated if the damage occurred due to such party's failure in taking necessary and reasonable steps to prevent and mitigate damage for himself or herself.

Preventing and mitigating damage are rights as well as duties of the owner, however it shall takes a certain amount of cost to undertake such steps. In this regard, reasonable costs shall also be considered as a compensatable amount, since this completely arises from unlawful act of the infringer, thereby causing damage.

Reasonable expenses to prevent and remedy the damage stipulated in Article 204.1.a of Law on Intellectual Property are divided into two groups: The first group is the cost to prevent and mitigate the damage, (including expenses for any temporary retention, maintenance, storage, archiving of the infringing goods, expenses for interim urgent measures and reasonable expenses for hiring assessment services); The second group is applied to remedy the damage. This would include the costs of notification and rectification and corrections in mass media as a form of cost recovery, in terms of regaining consumers' trust in the product.[25]

Similarly, under Article 589.4 of the Civil Code, reasonable expense to prevent, mitigate and remedy damages is a type of compensatable damage — but only provided that such damage satisfies the following two conditions: Firstly, this expense is applied to prevent, and remedy the damage; Secondly, this expense must be reasonable. In many cases, the question as to what is "reasonable" shall be subject to the view of the judicial authority since this is solely a qualitative standard. Hearings in practice have shown the diversity, and flexibility in resolving whether to accept these damages or not.

[25] Article 20 of Decree No 105/2006/ND-CP.

### 5. Reasonable Lawyer's Fee

The Law on Intellectual Property expressly provides that reasonable lawyer's fees are a compensatable amount. There are not many disputes in which the right holders are able to protect their rights themselves, given that, seeking counsultation from a consulting organisation, or a legal counsellor is absolutely reasonable in such cases. Article 205.3 of Law on Intellectual Property stipulates that in addition to compensation on material and spiritual damage, the intellectual property right holder has the right to request the Court to make *the organisations and individuals committing an infringement* on the intellectual property rights pay a reasonable amount for the engagement of lawyer. Under the Law on Lawyers,[26] a client must pay a remuneration for using legal services of lawyers.[27] The fee amount includes lawyers' remuneration and travel and accommodation costs for lawyers. The remuneration rate shall be agreed by the lawyer and the client in a legal service contract on the grounds and calculation methods of the renumeration specified in Article 55 of the Law on Lawyers.[28]

In fact, in copyright disputes, the aggrieved parties might seek dispensation from the Court to claim for an amount of lawyers' fee against the defendants. However, the existing problem is to determine whether it is considered as "reasonable" — i.e. how much compensation is considered as appropriate. In the cases of intellectual property disputes that have been resolved at the Court, the compensation amounts for attorneys' fees are very different and there are not many grounds upon which to specify this amount. In a dispute settled at the

[26] Law No 65/2006/QH11 as amended and supplemented by Law No 20/2012/QH13.

[27] The level of remuneration shall be calculated on the following bases: (a) The contents and nature of the legal services; (b) The time and amount of work required by the lawyer to provide such legal services; (c) The experience and prestige of the lawyer. Remuneration shall be calculated by the following methods: (a) Hours of work performed by the lawyer; (b) Cases and matters with a package remuneration; (c) Cases and matters with remuneration calculated as a percentage of the value of a case or of the value of a contract or of the value of a project; (d) A long term contract with a fixed level of remuneration (Article 54, 55).

[28] Section B.I.2.4 of Joint Circular No 02/2008.

Court of Appeal of the Supreme People's Court in Ho Chi Minh City,[29] the plaintiff claimed for lawyers' fee against the defendant an amount of VND 100,000,000 on the ground that the defendant has commited an infringement on the intellectual property rights owned by the plaintiff, according to Article 205.3 of the Law on Intellectual Property. On this basis. the defendant is liable to compensate an amount incurred by the plaintiff for an engagement of lawyer. In accordance with the legal service contract executed by the plaintiff and the law firm and pursuant to the value-added tax invoices, and the money transfer receipt of the bank, the plaintiff made a payment of aggregated amount of VND 100,000,000 to the law firm as agreed under the contract. Therefore, it is on a sound basis for the plaintiff's claim to be accepted.

First, the Court applied regulations of Law on Intellectual Property to require the defendant to pay the plaintiff a compensation for the lawyers' fee. Second, the evidence presented by the plaintiff and accepted by the Court included: the legal service contract, invoices, and proof of bank transfer. Third, the Court held that the amount of VND 100,000,000 is a reasonable amount in this case. At time of writing, this sum equates to $ 4,314 USD.

According to many jurisdictions, the amount of lawyers' fee in the field of intellectual property in general is also a payable amount and this has almost become a custom. In France, Germany or England,[30] the losing party can be liable for the legal costs and attorney fees. Article 12.2 of the Vietnam-US Trade Agreement[31] requires that infringers of intellectual property rights must be liable for expenses incurred by the right holders, which may include reasonable attorneys' fees. Article 45 of TRIPS Agreement states that "The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, *which may include appropriate attorney's fees,*" which recognises the attorney's fee is a compensatable amount.

[29] Case No 53/2013/KDTM-PT dated 08.01.2013 of the Appellate court of Supreme People's Court in Ho Chi Minh City.

[30] In England and Wales, the legal costs must be paid by an infringer of marks is of 80–100 % the actual costs incurred by the plaintiff.

[31] Trade Agreements between the Socialist Republic of Vietnam and other countries (National Political Publishing House 2002) 117.

## 6. Hearing in Practice in Vietnam

From a practical perspective, in the film industry related dispute between Anh Vuong Corp and Phuong Tung Co., Ltd,[32] in which Phuong Tung Co. Ltd had an infringement against the property right under the copyright of Anh Vuong Corp. Anh Vuong Corp had brought the following claims: Compensation for damage due to loss of proprerty which is the purchase value of movie copyright of USD 39,000; damage due to loss of business opportunity which is 10 % of USD 39,000 — USD 3,900. The plaintiff (Anh Vuong Corp) proved that the amount the company had to pay Sangyang (copyright holder) was USD 39,000 to purchase this movie.

However, this compensation claim amount was not accepted by the Court. The Court held that: "The loss calculation method based on the cost of acquiring the copyright proved by the plaintiff is unclear, there are many comparative objective factors which proves it to be unbelievable" and provided a method to determine damage by "taking the transfer price of the right to use of this movie in case the movie was transferred to Phuong Tung company by Vietnamfilm Import-Export And Distribution Corporation Limited, which is VND 135,000,000."

With respect to the compensation claim of loss of business opportunities, the Court held that Anh Vuong Corp had not conducted any business activities in exploiting profits from the movie, thus there was no ground for it to be accepted. On the basis of the above-mentioned rulings, it might be concluded that:

*Firstly,* the Court accepts the transfer price of copyright as a damage due to loss of property incurred by the plaintiff. In this case, the plaintiff had paid an amount (transfer price) to obtain the right to broadcast the movie in Vietnam. The copyright infringement committed by the defendant has affected such broadcasting rights of the plaintiff and thereby causing the damage.

*Secondly,* since the transfer price presented by the plaintiff was not sufficient evidence, the Court applied an "alternative method" — the transfer price at which the defendant obtained its copyright from

[32] Case No 11/2011/KDTM-ST dated 4 January 2011 of People's Court of Ho Chi Minh City.

another company. From the author's point of view, the application of similar alternative in this case is irrational since Vietnamfilm Import-Export And Distribution Corporation Limited does not hold the right to broadcast the movie, besides the scopes and subjects of the two transfers are different. However, in this case, the Court perhaps has no other basis to determine the damage, given that this is an acceptable resolution. This is one of the difficulties when determining loss and evaluating intellectual properties.

*Thirdly,* the Court found against the compensation claim for loss of business opportunities for the reason that Anh Vuong Corp had not conducted any business activities in exploiting profits from the movie. Although business opportunity is a factor demonstrating the probability of achieving future benefits, in order to claim for this damage, it is imperative to have pre-existing real or substantial factors proving the existence of this probability. The fact that the plaintiff had not conducted any business activities at the time shows that it is impossible for any predictable or measurable business opportunities to be generated. Accordingly, the Court did not find this claim to be reasonable.

## IV. SPIRITUAL DAMAGE

Currently, determining spiritual damage is a dubious task. Civil Code 2015 regulates a tortious liability from Article 584 to Article 608, including general regulations, and regulations on determining damage in compensation for damage in specific circumstances. Accordingly, anyone who infringes upon the life, health, honour, dignity, reputation, property, and/or other legal rights or interests of other persons causing any damage, must be liable for compensation.

Spiritual damage might be addressed in cases of damage due to infringement upon health, life, honour, dignity, and reputation. In cases of compensation for damage due to property infringment, the Civil Code 2015 does not expressly regulate whether spiritual damage could be claimed for compensation or not.

On the other hand, Article 204.1.b of Law on Intellectual Property stipulates spiritual damage including *loss of honour, dignity, prestige, reputation and other mental sufferings*. These losses must be actual

losses and belonging to the aggrieved party; i.e. there is a certain decrease in honour, dignity, prestige, reputation... upon an occurence of an infringement and such infringement is a direct cause resulting in such decrease.

This regulation also indicates that the party suferred from spiritual damages caused by a copyright infringement could only be the creator — other than the owner [of such copyright]. When an infringement occurs, moral rights as well as property rights could be both damaged, which may be both adversely affected. In case of property rights infringement, the plaintiff shall prove the material damages as aforementioned and accordingly determine the respective compensation amount. In case of moral rights infringement, the right holder might incur losses of honour, and/or prestige since these rights are associated with personal values (such as fame and reputation), as well as "the brainchild" (the integrity of the work) owned by the creator. Therefore, it is appropriate to allow the creator to claim for compensation for spiritual damage upon infringment. In many cases, the creators initiate a lawsuit primarily in order to protect moral — spiritual values — rather than property factors. This is also a differentiating factor to copyright of industrial property rights.

If compensation amount for material damage might be determined under one of the three bases stated in Article 205.1, as for the case of compensation amount for spiritual damage, there is no specific basis stated in the Law on Intellectual Property for the time being to determine the same amount. Article 205.2 of the Law on Intellectual Property stipulates that in cases where the plaintiffs are able to prove that the infringement of intellectual property rights had inflicted spiritual damage upon them, they may request the Court to decide the compensation amount from five million up to fifty million Vietnamese Dong, depending on the extent of damage. The existing guiding documents also do not show any further details in comparison with those regulations stipulated in Law on Intellectual Property, thus, to determine the actual compensation amount for spiritual damage is a burdensome issue.

According to the Japanese Copyright Act, liability to compensate for damages of copyright and moral rights caused by copyright infringement

are seperately regulated. In a copyright dispute,[33] the Court decided that the defendant had to compensate the defendant for spiritual damage in an amount of 1 million japanese yen and 7 % of selling price of the defendant's book which is being infringed. The Court had determined the compensation amount with consideration of the way in which the defendant committed an infringement, the social position of the plaintiff as an university professor, a scholar of ancient Japanese history, the work of the plaintiff and the mental sufferings of the plaintiff.[34]

It is noteworthy that one of the important bases for determining the compensation amount of spiritual damage is the reputation, and/or prestige of the infringed party before and after an occurence of the infringement. For example, in the aforementioned example the infringed party being "an university professor, scholar of ancient Japanese history" was one of the bases for the Court to consider the compensation amount.

In Vietnam, in comparison with the actual volume of copyright infringement acts, there are not many cases resolved by the Court in this area. In the copyright dispute between Mr. Trong and Mr. Dang,[35] Mr. Dang had used two songs composed by Mr. Trong without the consent of Mr. Trong (the creator), and at the same time editting the lyrics, the song titles without permission. Mr. Trong asked Mr. Dang to compensate for spiritual damages an amount of VND 10,000,000.

However, the competent Court held that: "Whereas, Mr. Dang's infringement did occur in reality — it is not serious and not intentionally committed, and also Mr. Trong himself cannot prove that the use of Mr. Dang of the two songs composed by Mr. Trong adversely affected and impaired his prestige. The plaintiff's claim of VND 10,000,000 for the two songs is accordingly not appropriate, and the trial panel only accepted the amount of VND 5,000,000." Given that, the court has recognized the infringement of moral rights (editing the lyrics, the

[33] Mutsuo et al versus Nihon Shelterkogyo KK.

[34] Truong Hong Quang and Le Thi Hoang Thanh, Compensation on damages arising from infringement of copyright and marks under Japanese laws and application in practice (2011) 6 Journal of State and laws 19.

[35] Case No 1549/2010/KDTM-ST dated 27 September 2010 of People's Court of Ho Chi Minh City.

song titles without permission) caused mental sufferings to the creator. However, the verdict does not refer to specific spiritual damages suffered by Mr. Trong; instead, it only concludes "adversely affected and impaired his prestige."

The factors to be considered by the Court when deciding the compensation amount of spiritual damage are (1) the seriousness of the infringement, (2) the fault, and (3) the impairment level of prestige and reputation. Additionally, in this case the Court did not specify any basis for accepting the VND 5,000,000 quantum instead of VND 10,000,000 quantum as claimed by the plaintiff.

The difficulties in determining mental sufferings is not solely a problem in the field of copyright, but is also seen in tortious liability to compensate for damages. It remains very challenging to stipulate specific bases to determine damages. In the two aforementioned cases, the infringing parties also used some bad words and phrases, which prejudiced the honour and prestige of the infringements, might merit being an essential matter liable for compensation.[36]

## V. PROPOSALS AND CONCLUSION

Based on the concept of "compensating", compensation for damage is heading towards converting damage into money to restore the aggrieved party to the situation as if there were no infringement occured. However, with the intangible nature of intellectual property, not every lost values could be compensated by the infringer for the losses incurred by the right owner. To that end, when determining and calculating damage, it must be carried out completely and comprehensively.

In the light of the above analysis, the author would like to suggest the following proposals:

*— To supplement damage type to include "other reasonable costs" and damages caused to the related copyright*

In addition to the material damages as stipulated in the existing Law on Intellectual Property, other costs might also be incurred during the

[36] Case No 05/2017/DS-ST dated 17 August 2017 of People's Court of Binh Gia District, Lang Son Province and Case No 504/2007/DSPT dated 17 September 2007 of People's Court Tien Giang Province.

litigation process by the involved parties such as accommodation, travel, printing, delivery costs in the process of petition, denunciations, etc. Whether these costs should be considered as compensatable damages or not is still unclear under the regulations of Law on Intellectual Property. Hearings in practice have not shown any likelihood that the Court shall find for these costs. However, under the Law on State Compensation Liability in 2017,[37] Article 28 expressly and specifically stipulates that these costs are considered as damage amounts, provided the incurred party is able to prove the same and such costs are reasonable. In the author's point of view, this recognition is necessary since these costs are incurred for the purposes of filing a relevant lawsuit and protecting infringed parties' interests. Intellectual property laws should also consider recognising those in the guiding documents.

In addition, copyright infringement might not only prejudice to the protected work itself but might also cause damage to the sales of products related to the infringed work due to the appearance of counterfeit products on the market. Copyright, in addition to the spiritual value for the creators of the works also has great economic value, which is to become an object of commercial business activities.

The infringement gives a misleading impression to consumers regarding the creator — the work, tarnishing their images, the trust of their readers and viewers or audiences, adversely affecting the works belonging to the same creators, and/or their rights to perform or display the work of the performers, etc. If the infringed party could prove the existence of these types of damage, the laws should recognise and protect their legitimate rights and interests. Currently, intellectual property laws only focus on the infringed work and the infringed creator, but has not expanded [its scope] to related works/copyrights.

*— To specify in detail the valuation methods of copyright*

Valuation of intellectual property in general and copyright in particular is a sophisticated issue. The core factor is to accurately determine damage and the compensation amount. One of the characteristics of copyright is to protect the medium or other form of

[37] Law No 10/2017/QH14 dated 20 June 2017.

expression, regardless of the contents of the works. For such reason, it could not be based on any "good" or "bad", "ugly" or "beautiful" nature, etc. to determine the monetary value of the work.

In the author's opinion, the "price" of the work must be construed in a broad sense, including two elements: "property value" and "spiritual value" of the work. "Property value" refers to the use value, material benefits that the work brings to the creator, [and/or] copyright owner. This kind of value could be converted into monetary value or estimated through property rights as recognised under Article 20 of Law on Intellectual Property. Based on the material damages stipulated in Article 204, the value of the work could be calculated at the time of copyright infringement. The "spiritual value" part is abstract and more difficult to define. Each work is a "brainchild" of the creator but when carrying out the valuation to determine the damage, it must be viewed objectively to the general extent — which is subject to a social evaluation of the work. In other words, whether the infringed work has any specific impression to the public is subject to the relevant expertise. Although determining this factor is not an easy task, it can become one of the basis for considering and assessing the alleged damage.

Currently, Courts are still not able to conduct the valuation of intellectual property in general and copyright in particular on it own. This activity is mainly carried out by specialised agencies. Whilst judges are trained to decide many different areas, property valuation for determination of losses is an activity requiring not only legal knowledge but also understandings relating to economic factors. There are some views doubting the independence of the Court in such a judging process and some propose an establishment of a specialised Court in the field of intellectual property.

From the author's point of view, the establishing a specialised Court is not necessary, especially at the moment. In other cases, Courts apply results from investigation, appraisal and evaluation from specialised agencies — why not in copyright infringement cases too? At the same time, adding a system of specialised court would make the judicial apparatus more bulky while in fact there have not been many disputes in this field so far.

*— To set up criteria for determination of reasonable attorney fees*

Recognising attorneys' fees as a claimable amount is one of the progressive points of the Law on Intellectual Property. In fact, international laws have considered such amount as a "customary" compensation instead of including it as a kind of material damage. Article 204 of the Law on Intellectual Property for the time being does not include this amount in the group of material damages either, but provides the same as a separate regulation in Article 205.3, showing its independence to other damages. For example, if there is an amount claimed for compensation less (or even considerably less) than the attorney's cost actually incurred by the plaintiff, should this cost be considered as reasonable?

In reality, it is not uncommon for copyright disputes cases in which the plaintiff does not claim for any material or spiritual damage but rather applies for other remedies such as requiring the infringer to make a public apology and/or correction, requiring a cease and desist order on the infringement or the destruction of all the pirated products. From the author's perspective, in these cases, the attorney fees must be considered separately from material and spiritual damages, as well as for the amount of attorney's fee exceeding those aforementioned damage, which is still acceptted to be compensated.

In order to determine the "reasonableness" of attorneys' fees, guiding documents in the field of intellectual property laws or the case law system under codification should have specific regulations carrying the nature of orientation so that the judgments of the Court shall be more persuasive. The author proposes the following grounds which might be considered when determining the reasonableness of attorneys' fees such as: reasonable working hours of lawyers in the disputes (in comparison with similar disputes with engagement of lawyers); the market price of consulting services; the complexity level of the dispute; reputation and prestige of the engaging lawyers, etc.

Specific grounds might allow the Court to flexibly apply these ground on a case by case basis but there must also be a guarantee of overriding principles. Engagement of a lawyer is an activity supporting the involved parties in settling the lawsuit and protecting their legitimate rights and interests. Given that, the infringing party should be prevented

for any claim for compensation of attorney fees exceeding the necessary amount or for the purpose of performing work which is not directly served for the litigation. To that end, the "necessary" nature should be taken into account when considering this compensation.

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# CRIMINAL LAW — JUVENILE OFFENDERS

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# LEGAL PROTECTION FOR JUVENILE OFFENDERS— LESSONS FROM THE INTERNATIONAL COMMUNITY

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**Abstract**

The problem of children and young people committing offences create real difficulties for a justice system in the light of the Rights of Children as variously enacted in national and international legal instruments. It is a problem that transcends international boundaries, and provides a rich field for legal scholarship to chart processes, rules and systems which to deal with this. This paper aims to present and analyse significant provisions of the legislative frameworks governing juvenile offenders of three nations very different approaches to this problem — namely the State of Victoria (Australia), New Zealand and Germany. These are Victoria's provisions protecting the confidentiality of criminal proceedings and governing bail application; New Zealand's regulations on family group conferences; and Germany's stipulations on victim-offender mediation. For each matter, the author makes a comparison with Vietnamese criminal procedure laws applicable to accused persons who are under 18 years of age. The finding is that there are certain shortcomings within the system of Vietnam, which need to be overcome. In this regards, the details, rules, and procedures as well

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as the experiences of the three nations' laws are valuable lessons for Vietnam in reforming and developing its legislative framework designed for juveniles in conflict with criminal law.

**Keywords**

Juvenile criminal justice, juvenile offenders, Victoria, New Zealand, Germany, Vietnam

**CONTENTS**

## I. INTRODUCTION

Juvenile criminal justice is an indispensible component of any country's criminal justice system. Although Vietnam has made great efforts to harmonise its legislative framework with the United Nations standards and norms on protecting juvenile offender's[2] rights, certain limitations still exist. In order to improve the Vietnamese legal framework for juvenile offenders, learning advanced provisions of other jurisdictions through legal comparative work is a useful method.[3]

Obviously it is more appropriate to make comparison with the laws of countries, which have similar features as Vietnam in terms of socio-economic, political regime and legal tradition. Nonetheless, at present there are only four socialist countries in the world[4] and these countries' laws are not much different from Vietnamese laws. In this situation, the optimum choice is to seek for effective provisions of developed countries' laws.

The State of Victoria (Australia), New Zealand and Germany possess significant regulations for dealing with juvenile offenders, which rely upon human rights based approaches and achieve impressive outcomes in practice. Victoria has adopted provisions ensuring the confidentiality of criminal proceedings to protect juvenile offenders' right to privacy and ones governing the application of bail to reduce the use of pre-trial detention. New Zealand has been famous for family group conferences whereas Germany's victim-offender mediation has been considered as an effective form of diversion or restorative justice program.

These provisions are not perfect but at least they appear in the laws of three jurisdictions. With the aim to identify lessons for Vietnam in improving its legislative framework applicable to juvenile offenders, this

[2] The term "juvenile offender" used in this paper includes any person charged with a criminal offence who at the time participating in proceedings is under 18 years of age.

[3] For benefits of comparative method used in criminal justice, see Harry R. Dammer, Erika Fairchild and Jay S. Albanese, Comparative Criminal Justice Systems (Wadsworth — Thomson Learning 2006) 8–12.

[4] Including the Laos People's Democratic Republic, the People's Republic of China, the Republic of Cuba, and the Socialist Republic of Vietnam. Information online available at World Population Review http://worldpopulationreview.com/countries/socialist-countries/ accessed 8 July 2019.

paper focus on analysing limitations of Vietnamese laws and practices rather than selected countries' ones.

In this regards, Vietnam should have a comprehension that "specific practices should be adopted only after serious thought and planning."[5] The article's main contents are divided into three parts with similar structure. In each part, the author uses the UN standards and norms on juvenile justice as criteria to firstly analyse particular provisions of Victoria, New Zealand and Germany; then present and evaluate Vietnamese laws as well as the practice; and finally compare with the three nations' laws to explore valuable lessons that should be learnt.

## II. CONFIDENTIALITY OF CRIMINAL PROCEEDINGS AND BAIL APPLICATION IN JUVENILE CASES UNDER VICTORIAN AND VIETNAMESE LAWS

### A. Confidentiality of Criminal Proceedings Against Juvenile Offenders under Victorian and Vietnamese Laws

#### *1. Victorian Laws Governing the Confidentiality of Criminal Proceedings Against Children in Conflict with Criminal Law*

Because of their "physical and mental immaturity,"[6] juveniles particularly those who violate criminal law need special safeguards during the criminal process. One of which is the protection of the right to privacy. In order to ensure this procedural right, international and national laws recognise a principle of confidentiality of juvenile delinquency proceedings. Basically, any information that may lead to the identification of a juvenile offender shall not be published.[7] The juvenile's right to privacy must be respected at "all stages of criminal

[5] Dammer, Fairchild and Albanese (n 2) 9.

[6] The term used in para 3 of the Preamble of Declaration of the Rights of the Child, G. A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No 16) at 19, U.N. Doc. A/4354 (1959).

[7] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985), rule 8.2. See also Committee on the Rights of the Child, General Comment No 10 (2007): Children's Rights in Juvenile Justice, 44th sess, UN Doc CRC/C/GC/10 (25/04/2007), paras 64–67.

proceedings"[8] with the aim "to avoid harm being caused to her or him by undue publicity or by the process of labeling."[9]

As a State of Australia,[10] Victoria has established its own legal system including distinctive legal framework for children[11] in conflict with criminal law. This legislative framework comprises various statutes such as: The Children, Youth and Families Act 2005, Criminal Procedure Act 2009, Evidence Act 2008, Charter of Human Rights and Responsibilities Act 2006, Magistrates Act 1989, Bail Act 1977, Crimes Act 1958.

Among these statutes, the first is particularly designed for dealing with children and family matters and is a crucial component of the Victorian juvenile criminal justice system.[12] In a criminal context, the Act provides for the criminal responsibility of children; procedures for solving criminal cases involving children; measures applicable to them; and organisation and operation of the Children's Court.

In Victoria, the minimum age of criminal responsibility is 10 years old.[13] Criminal procedures applicable to juvenile offenders are mainly governed by the Children, Youth and Families Act 2005, and the Criminal

[8] This "includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority, or release from supervision, custody or deprivation of liberty. (Committee on the Rights of the Child (n 6), para 64).

[9] Ibid, rule 8.1 and commentary. This rule is also provided by art. 40(2)(b)(vii) of the Convention on the Rights of the Child.

[10] Australia has six States: New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, and two major mainland territories: the Australian Capital Territory and the Northern Territory.

[11] Victorian legislation use the term "children" with similar meaning as "juveniles" in other jurisdictions. A child who is alleged to have committed an offence is defined by s 3(1) of the Children, Youth and Families Act 2005 as "a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court."

[12] The Act aims: "(a) to provide for community services to support children and families; and (b) to provide for the protection of children; and (c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and (d) to continue The Children's Court of Victoria as a specialist court dealing with matters relating to children" (Children, Youth and Families Act 2005, s 1).

[13] Children, Youth and Families Act 2005, s 344.

Procedure Act 2009. These special procedures are quite different from those used in adult cases. Under the Children, Youth and Families Act 2005, the Children's Court has jurisdiction for juveniles accused of summary offences and certain indictable offences. The Act enshrines procedural guidelines which must be followed by the Children's Court when dealing with juveniles.[14] When a juvenile is accused of an indictable offence, which cannot be heard and determined summarily, the jurisdiction to deal with these cases is vested in the County Court or the Supreme Court.

These courts operate under different principles and guidelines compared to those of the Children's Court. However, it should be noted that when the County Court or the Supreme Court deals with juveniles, the Court must comply with the additional requirements set out in the Charter of Human Rights and Responsibilities Act 2006 (the Charter) as to children's human rights in the criminal process.[15] In order to meet these requirements, the County Court and the Supreme Court can adopt procedural guidelines stipulated in the Children, Youth and Families Act 2005.

Significant provisions of the Victorian legislative framework for dealing with juvenile offenders are those ensuring the confidentiality of criminal proceedings (to protect children's right to privacy) and bail application. Generally, the Children's Court operates under procedural guidelines, which require it to respect the "cultural identity and needs of the child" as well as "minimise the stigma to the child and his or her family."[16] Following these principles, s 534(1)(a) of the Children, Youth and Families Act 2005 provides that, except with the permission of, the President of the Children's Court or a magistrate or the Secretary,[17] a person must not publish or cause to be published:

— A report of a proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to the identification of the particular venue

[14] Ibid Part 7.3.

[15] Charter of Human Rights and Responsibilities Act 2006, s 23.

[16] Children, Youth and Families Act 2005, ss 522(1)(e)-(f).

[17] Ibid ss 534(1A),(2),(3).

of the Children's Court, a child or other party to the proceeding or a witness in the proceeding;

— A picture, being or including a picture of a child or other party to, or a witness;

— Any matter that contains any particulars likely to lead to the identification of a child.

Furthermore, s 534(4) gives detailed explanation on the phrase "particulars which are likely to lead to the identification of a person."[18] Importantly, the Act also provides for penalties imposed on persons who violate duty to ensure the confidentiality of personal information of child offenders. In the case of a body corporate it shall be 500 penalty units;[19] in any other case it shall be 100 penalty units or imprisonment for 2 years.[20]

The child offender's privacy is also protected through provisions governing the publicity of trials in the Children's Court. Under s 523(2) of the Children, Youth and Families Act 2005, on the application of a party or of any other person who has a direct interest in the proceeding or without any such application, the Children's Court may order that "the whole or any part of a proceeding be heard in closed court; or only persons or classes of persons specified by it may be present during the whole or any part of a proceeding." This provision is compatible with s 24(2) of the Charter governing a fair hearing. Moreover, s 24(3) of the

[18] These include: (a) the name, title, pseudonym or alias of the person; (b) the address of any premises at which the person resides or works, or the locality in which those premises are situated; (c) the address of a school attended by the person or the locality in which the school is situated; (d) the physical description or the style of dress of the person; (e) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person; (f) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person; (g) the recreational interests or the political, philosophical or religious beliefs or interests of the person; (h) any real or personal property in which the person has an interest or with which the person is otherwise associated.

[19] From 1 July 2018 to 30 June 2019, one penalty unit is 161.19 AUD. See Victoria Legal Aid https://www.legalaid.vic.gov.au/find-legal-answers/fines-and-infringements/penalty-units accessed 8 May 2019.

[20] Children, Youth and Families Act 2005, s 534(1).

Charter emphasizes that "all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires." This provision is partially modelled on art. 14(1) of the International Covenant on Political and Civil Rights.

### *2. Vietnamese Laws Governing the Protection of Confidentiality of Criminal Proceedings Involving Juveniles*

Previously, Vietnam used the term "juvenile" in its legislation. Since 2015, when series of statutes in the field of criminal justice were adopted, this term was replaced by "person aged under 18" to clarify the meaning.[21]

Unlike Victoria, Vietnam does not have a separate legislation for juvenile offenders, but rather designs special chapters dealing with juveniles in conflict with criminal law. These are included within the Penal Code 2015 (amended in 2017),[22] Criminal Procedure Code 2015[23] and the Law on Enforcement of Criminal Judgments 2019.[24] Vietnam also enacts and creates legislation such as Resolutions, Decrees, Circulars, Joint Circulars, Decisions,. to provide detailed guidelines for implementation. Some special procedures applicable to persons under 18 are provided in Chapter XXVIII of the Criminal Procedure Code 2015 and are explained in details by the Joint Circular No 06/2018/TTLT.[25]

Significantly, Vietnam has established the system of Family and Juvenile Courts at different court levels with a hope to enhance the effectiveness of adjudication of criminal cases involving juveniles. Different from Victoria, Vietnam does not adopt a separate law governing

[21] Concerning Vietnamese laws in this paper, the terms "persons under 18 years of age" and "juveniles" are used interchangeably.

[22] Chapter XII.

[23] Chapter XXVIII.

[24] Chapter III, arts 73–76.

[25] This Joint Circular is dated on 21 December 2018 by the Supreme People's Procuracy, the Supreme People's Court, the Ministry of Public Security, the Ministry of Justice and the Ministry of Labour, War Invalids and Social Affairs. It replaces for Joint Circular No 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLĐTBXH of 12 July 2011 on Guiding for the implementation of some provisions of the Criminal Procedure Code 2003 governing juvenile procedural participants (Circular No 01/2011/TTLT).

the organisation and operation of Family and Juvenile Courts. These issues are commonly regulated by the Law on Organisation of the People's Courts 2014. The Supreme People's Court also enacted Circular No 02/2018/TT-TANDTC[26] providing guidelines for the jurisdiction and adjudication procedures of these specialised courts.

To protect the confidentiality of criminal proceedings and thereby to ensure the right to privacy of juvenile offenders, Vietnam has designed a number of particular provisions in its legislative framework. Article 414(2) of the Criminal Procedure Code 2015 recognises a principle that "personal secrets" of individuals below 18 years of age must be kept confidential. This is a new provision supplemented in the Criminal Procedure Code 2015. One of the effective ways to ensure the confidentiality of proceedings against juveniles is to conduct trials behind closed doors. Article 25 of the Code provides a fundamental principle of criminal procedures that:

A Court tries publicly and every person is entitled to attend the trial, unless otherwise stated in this Code. For special cases involved in state secrets, national traditions, protection of *persons aged below 18* or personal privacy as per litigants' rational requests, a Court *may* try in closed session but must pronounce its judgments publicly.[27]

Regarding juveniles, art. 423(2) provides more clearly that in cases where a defendant or crime victim below 18 years of age must be protected in special circumstances, the Court has power to order the trial to be held behind closed doors. This provision has recently been explained by art. 7(1)(d) of Circular No 02/2018/TT-TANDTC as following:

Criminal cases in which victims under 18 years old who are sexually trespassed, violently injured or trafficked must be tried "in camera"; other cases based on requests of persons under 18 years of age, their representatives, or due to protection of their privacy, protection of persons under 18, the Court may also try in closed session but must

[26] Circular No 02/2018/TT-TANDTC dated on 21 September 2018 of the Supreme People's Court on Providing details for the adjudication of criminal cases involving juvenile participants, which are within the jurisdiction of Family and Juvenile Courts.

[27] Emphasis added.

pronounce its judgments publicly pursuant to article 327 of the Criminal Procedure Code.

Article 327 of the Code prescribes that in a closed trial, only the decision part of the judgment shall be read by the presiding judge or a member of the Trial panel and additional explanations on the abidance by the judgment and the right to appeal may be provided after the reading of the sentence. This is also a new supplementation in the Criminal Procedure Code 2015. Moreover, Resolution No 03/2017/NQ-HĐTP of the Judges Coucil of the Supreme People's Court[28] prohibits the proclaimation of judgments involving procedural participants who are under 18 years old. Circular No 02/2018/TT-TANDTC also prohibits "roving trials"[29] of criminal cases involving procedural participants who are under 18 years old.

As well as the above, Vietnam also adopts Press Law 2016 and Children Law 2016. These two statutes contain a number of provisions aiming at protecting personal information of children in general and those in conflict with criminal law in particular.

Article 9(5),(8),(9) of the Press Law 2016 prohibits the disclosure of personal privacy; the providing of information that is untruthful, distorted, slanderous or harmful to the honor and dignity of an individual; the attributing a crime to a person in the absence of a court judgment; and the providing of information that affects the normal physical and spiritual development of children. On the other hand, art. 6(11) of the Children Law 2016 forbids the announcement or disclosure of information about the privacy or secret of the child without the consent of the child who is at least 7 years old or older, or the consent of the child's parent or guardian. Article 70(10) of this Law requires that children's privacy must be ensured and necessary

[28] Resolution No 03/2017/NQ-HĐTP of the Judges Coucil of the Supreme People's Court dated on 16 March 2017 on Proclaiming judgments, decisions in the court's website, art. 4(2)d.

[29] These are trials publicly conducted at the places where offences were committed or defendants domicile rather than at the courtroom. This form of trials is often applicable to important cases of which the purposes are to propagandise and popularize the laws and to admonish persons having intention to commit similar offences.

measures must be applied to limit their appearance in public during proceedings.

Provisions of the Press Law 2016 are applicable to the agencies, organisations and individuals that participate in and are related to press activities in Vietnam. These are main actors who may know information regarding juvenile offenders and their criminal cases and popularise them to the public through media. This Law also provides for handling of violations in the field of press including caution, fine, or withdrawal or confiscation of publications, video and audio recording tapes, suspension from publication, or revocation of its press activity permit in accordance with art. 59(2);[30] making a public apology and a correction in the press and payment of compensation for the damage in accordance with law.[31]

Additionally, if the head of a press managing agency, the general director, deputy general director, director, deputy director, editor-in-chief or deputy editor-in-chief of a press agency, a journalist, an author of a journalistic work or another individual violates the Press Law 2016, depending on the nature and seriousness of the violation, he/she shall be disciplined, can have his/her press card revoked, can be sanctioned for administrative violations, and can be examined for penal liability.[32]

However, punishments for administrative violations in the fields of press and publication have been governed by the Decree No 159/2013/ND-CP.[33] This Decree was adopted pursuant to the Press Law 1989.[34] Therefore, it does not cover violations enumerated in art. 9(5),(8),(9) of the Press Law 2016 regarding disclosure of personal privacy of individuals in general and children in conflict with criminal law in particular.[35]

[30] Press Law 2016, art. 59(1).

[31] Ibid art. 59(5).

[32] Ibid art. 59(3).

[33] This Decree was adopted on 12 November 2013.

[34] This Law was adopted on 28 December 1989 and amended on 12 June 1999.

[35] At the moment, the Ministry of Information and Communications have been gathering comments on the Draft Decree replacing for the Decree No 159/2013/ND-CP.

### *3. Comparison and Recommendation*

All of the above regulations show that Vietnamese legislators have been aware of the need to protect the right to privacy of juvenile offenders. However, these provisions are only applied in the adjudication stage. In other procedural stages including institution, investigation and prosecution, similar provisions cannot be found.

More precisely, in the investigation phase, art. 177 of the Criminal Procedure Code 2015 impose a duty on investigators, investigation officers, procurators and checkers not to disclose investigation secrets. If they do, they shall incur disciplinary or administrative penalties or face criminal prosecution according to the nature and degree of their violations prescribed by the laws. Nonetheless, whether the term "investigation secrets" include "personal secrets" of individuals under 18 years of age as mentioned in art. 414(2) is unclear.

On the other hand, trying criminal cases involving juveniles behind closed door or publicly depends on the discretion of courts except for cases in which victims under 18 years old who are sexually trespassed, violently injured or trafficked. This is incompatible with suggestions of the Committee on the Rights of the Child consistently expressed in its General Comment No 10[36] and General Comment No 12 that "[t]he court and other hearings of a child in conflict with the law should be conducted behind closed doors.

Exceptions to this rule should be *very limited*, *clearly outlined in national legislation* and guided by the *best interests of the child*.[37] Experts of common law countries also confirm that closed courts is "a bedrock principle of fair trial rights for children and a recognised exception to the open courts rules."[38]

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[36] Committee on the Rights of the Child, General Comment No 10 (2007): Children's Rights in Juvenile Justice, (n 6) para 66.

[37] Committee on the Rights of the Child, General Comment No 12 (2009): the Right of the Child to be Heard, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009), para 61 (emphases added).

[38] Ann Skelton, Iyabo Ogunniran and Violet Odala, A UN Model Law on Juvenile Justice: A Comparative Assessment, University of Pretoria, Outline of Presentation (20 April 2011) cited in Le Huynh Tan Duy, Protecting the Rights of Juvenile Offenders in Vietnamese and Victorian Criminal Procedure Laws in Compliance with United

As mentioned in above section of this paper, Victoria has a detailed explanation for the term "personal information" of children. Contrarily, the term "personal secrets" used in art. 414(2) of the Criminal Procedure Code 2015 of Vietnam has not been interpreted yet. Persons having a duty to protect personal information of juvenile offenders and sanctions imposed on whom violating this duty have not also been identified.

Previously, art. 3(3) of Joint Circular No 01/2011/TTLT provides that procedure-conducting bodies and persons have responsibility to ensure the confidentiality of personal information of juveniles; and all procedural activities relevant to juveniles must be conducted in environment appropriate for securing the privacy and honour, human dignity of juveniles. This Joint Circular is now replaced by Joint Circular No 06/2018/TTLT. Unfortunately, the latter removes all interpretation on this issue of the former.

Shortcomings in legislative framework cause a practice that information leading to the identification of juvenile offenders can be easily known by public in Vietnam.[39] The information is regularly published in media such as television, newspapers, and the internet. Most information relates to sentenced juveniles and includes their names, ages and where they live, the main facts of cases, offences and penalties.[40] Even where a juvenile is just arrested, this information is

Nations Benchmark Model of Juvenile Justice (Doctoral Dissertation, La Trobe University 2013) 84.

[39] For more information concerning the practice of implementing the right to privacy of juvenile offenders in Vietnam, see Le Huynh Tan Duy, The Right to be Protected of Personal Information of Juvenile Offenders in International Law and Vietnamese Criminal Procedure Law, Journal of Legal Science (2013) 2(75), 22–28. See also Le Huynh Tan Duy (n 37) 266–67, 285–89.

[40] For instance, Tran Tuan Huy, a sixteen-year-old was jailed for 17 years for murdering his pregnant girlfriend https://vnexpress.net/phap-luat/su-hoi-han-cua-thieu-nien-giet-nguoi-tinh-dang-mang-thai-2197758.html accessed 7 July 2019; Le Bao Trong, a sixteen-year-old was jailed for 18 years for committing two offences: "Murder" and "Plundering Property" https://anninhthudo.vn/phap-luat/cai-chet-tham-cua%C2%A0chu-quan-bia/385759.antd accessed 7 July 2019; Nguyen Thuy Hang (aged 17) and Nguyen Thi Thanh Thuy (aged 16) were given "suspended sentences" for committing the offence: "Procuring Prostitutes" http://tuoitre.vn/Chinh-tri-Xa-hoi/428289/Phat%C2%A0Sam-Duc-Xuong-9-nam-tu.html accessed 7 July 2019); Dao Thi Thu Huong, a fourteen-year-old was jailed for 12 years for committing three offences: "Rape", "Rape against Children" and "Plundering Property"

published.[41] Although these publications seek to alert society to the status of, and reasons for, juvenile delinquency, much information regarding offenders is thereby made known to the public. This practice is incompatible with arts 16 and 40(2)(b)(vii) of the CRC which require that the privacy of children and young offenders be fully respected at all stages of the criminal process.

The media in Vietnam sometimes hastily ascribe guilt to offenders (including juveniles) before a competent court renders a valid judgment. This contributes to the public having biased views regarding the guilt of juvenile offenders. Theoretically, this may subsequently affect judges in the decision-making process. Under the pressure of public opinion, a judge may not dare to pronounce a defendant innocent, even in circumstances where the evidence suggests this to be so. Even where the defendant is not guilty according to the court's judgment, public suspicion may still exist because of arbitrary accusations from the media. Additionally, a number of journalists use "pejorative" names to refer to some juvenile offenders.[42] Others include photographs of juvenile defendants in their papers. This may help readers to recognise defendants and thereby create more barriers for juveniles on their way to reintegrating into society in future.

Most trials of juveniles are conducted in public with the attendance of the public and journalists — even in cases where both the defendant

https://thanhnien.vn/thoi-su/phap-luat/my-soi-lanh-an-12-nam-tu-277958.html accessed 7 July 2019 and so on.

[41] In this case, the pupil Ngo Ngoc Linh, a seventeen-year-old was arrested because he is suspected of stealing 33 cell phones. The information of this case is available at https://www.webtretho.com/forum/f26/thanh-hoa-ban-khoan-ve-vu-bat-khan-cap-mot-hoc-sinh-lop-12-a-757854/ accessed 20 June 2019. Last year, Ngo Minh Thuan, a fifteen-year-old boy was arrested for murdering a grab driver (who was a student). The information of this case can be easily found at many websites including the website of Ho Chi Minh City Police http://congan.com.vn/vu-an/bat-sat-thu-15-tuoi-giet-sinh-vien-chay-grabbike-cuop-xe-may-o-sai-gon_64061.html accessed 20 June 2019.

[42] For instance, the juvenile defendant Dao Thi Thu Huong was named "Nu quai" ("Female Monster") by many Vietnamese websites including http://giadinh.net.vn/phap-luat/nu-quai-my-soi-trut-tam-su-vao-tho-2011032410400861.htm or https://www.tienphong.vn/phap-luat/vang-mot-so-dai-dien-bi-hai-trong-vu-xu-my-soi-541013.tpo, etc. accessed 7 July 2019.

and victim are juveniles.[43] Even in cases where trials are conducted behind closed doors, judgements are pronounced in public at court sessions in a way that clearly reveal the identity of juvenile defendants. At the end of the first decade of this century, Vietnam witnessed the increase of roving trials despite their negative impacts.[44] Roving trials contribute to frightened and stressed juvenile offenders[45] and often impose more serious punishment on convicted persons than those imposed by trials conducted in courtrooms.[46] Furthermore, under this form of trial, defendants bear not only the criminal responsibility prescribed by the criminal law but also accusations and pressures from members of the public.[47] Relatives of defendants also may experience considerable pressure from public opinion and social relationships may

[43] Nguyen Van Canh, Discussion on the First-Instance Trial Panel of Criminal Cases in the Protection of Rights and Legitimate Interests of Juvenile Offenders (Conference on the Protection of Juveniles under Vietnamese Criminal Law and Criminal Procedure Law, Ho Chi Minh City University of Law, December 2009) 3.

[44] The numbers of roving trials in three consecutive years (2007, 2008 and 2009) were 146, 163 and 199. See Adjudication Institute of the Supreme People's Court, Overview Report on the Reasoning and Practical Basis of the Necessity of Establishing Special Court for Juveniles in Vietnam (2010) 128.

[45] Roving trials of juvenile defendants have been conducted by many courts such as the Provincial Court of Bac Ninh jailing Tran Van Quy (aged 17) 18 years and Dam Van Ngoc (aged 16) 14 years for committing two offences: "Murder" and "Plundering Property"; the Provincial Court of Kon Tum jailing the three seventeen-year-old defendants: Tran Thanh Tung (17 years), Mai Anh Dung and Bui Huu Nghia (16 years for each defendant) for committing the offence: "Murder"; the District Court of Long Khanh (Dong Nai province) jailing Duong Van Hoa (aged 15) two years for committing the two offences: "Stealing Property" and "Plundering Property", Lang Quoc Viet (aged 17) one year and 6 months for committing the offence: "Deliberately Damaging Property", the District Court of Tam Ky (Quang Nam province) jailing Pham Phu Quy (aged 16) one year for committing the offence: "Property Robbery by Snatching": See Thanh Tung and Phan Thuong, Procedures for Juveniles — Paper 3: Should Roving Trial be Conducted? (24 March 2010) Online Legal Journal of Ho Chi Minh City https://plo.vn/thoi-su/co-nen-xu-luu-dong-342793.html accessed 22 July 2019.

[46] Pham Thai Quy, Roving Trial Should be Evaluated from Two Aspects (18 March 2011) Youth Online Journal http://tuoitre.vn/chinh-tri-xa-hoi/phap-luat/429494/xet-xu-luu-dong---can-nhin-nhan-tu-hai-phia.html accessed 7 July 2019.

[47] Dinh The Hung, Roving Trial Should be Eliminated (5 July 2010) Online Legal Journal of Ho Chi Minh City https://plo.vn/plo/khong-nen-xet-xu-luu-dong-188005.html accessed 7 July 2019.

be affected.[48] Defendants at roving trials may face many difficulties reintegrating into society after completing their sentence.

Making a decision to conduct trials behind closed doors or in public directly affects the honour, human dignity and future of juvenile offenders. However, in Vietnam this issue is not given proper weight. In practice, trials can be carried out behind closed doors based on the request of defendants or other participants.[49] This form of trial may be applicable to sexual offences where victims are children.[50] The rationale is that only child victims should be protected (the protection of juvenile offenders is deemed unnecessary). According to Bui, this approach has a negative influence on the psychology of juvenile offenders because it makes them feel ashamed of their guilt and hinders their reintegration into the community.[51]

In reality, professional judges often conduct trials in public in order to demonstrate their impartiality and objectiveness.[52] On the other hand, lay judges may not have the ability to determine which cases should be conducted behind closed doors.[53] Also some journalists in Vietnam are not sufficiently aware of the rights and obligations prescribed by the law. They do not know the requirements of international law, namely the CRC, on the protection of juvenile offenders' privacy. Journalists may focus on seeking information about a case and transmitting that to readers without thinking of the adverse impact on the interests of juvenile offenders.

In comparison with other rights of juvenile offenders, the right to privacy appears to be seriously violated in actual proceedings in Vietnam. This Member state is unable to achieve the main objective pursued by the UN regulatory framework governing the right to privacy: avoiding

[48] Ibid.

[49] Nguyen (n 42).

[50] Bui Huynh Trung, Protection of Juvenile Offenders through Exercising the Right to Prosecute and Supervising the Investigation and Adjudication of Criminal Cases (Conference on the Protection of Juveniles under Vietnamese Criminal Law and Criminal Procedure Law, Ho Chi Minh City University of Law, December 2009) 7.

[51] Ibid.

[52] Nguyen (n 42).

[53] Ibid.

harm caused by undue publicity or by the process of labelling, effect of stigmatisation, and possible impact on juvenile offenders' ability to reintegrate into the community, etc. The above weaknesses demonstrate that Vietnamese legislators and legal enforcement officers do not fully comprehend the necessity to protect juvenile offenders' privacy and therefore do not observe obligation of a State party to the CRC.

Regarding this matter, relevant provisions of the Children, Youth and Families Act 2005 of Victoria previously analysed, namely the explanation on the legal phrase "particulars which are likely to lead to the identification" of juvenile offenders, exceptional circumstances where juvenile offenders' personal information can be released and fines for persons who illegally disclose these information, are valuable references for Vietnam. Issues which need to be considered in the legal transplantation include the differences in terms of courts system, authorities of procedure-conducting persons, and the levels of fine.

## B. Bail Application for Children in Conflict with Criminal Law

### *1. Victorian Laws Governing Bail Application for Children in Conflict with Criminal Law*

There is a widely acceptance that detention before trials has negative impacts on juvenile offenders and therefore should be used only as the last option for the shortest appropriate period of time. This is also a requirement of the Convention on the Rights of the Child.[54] In order to avoid detention but still ensure the presence at trials of juvenile defendants, many countries utilise the institution of bail. In Victoria, the Children, Youth and Families Act 2005 contains a number of provisions encouraging bail application. Section 346(2) of the Act provides that:

"Subject to subsection (3), a child taken into custody must be (a) released unconditionally; or (b) released on bail in accordance with the Bail Act 1977; or (c) brought before the Court; or (d) if the Court is

[54] Article 37(b). See rule 13 of the Beijing Rules and explanation of the Committee on the Rights of the Child in its General Comment No 10(2007): Children's Rights in Juvenile Justice, (n 6) paras 78–81.

not sitting at any convenient venue, brought before a bail justice within a reasonable time of being taken into custody but not later than 24 hours after being taken into custody."

The *Bail Act 1977* emphasizes that any recommendation or information contained in a report provided by a bail support service should be taken into account in making a determination to grant bail to a child, and bail must not be refused only because the child does not have any, or any adequate, accommodation.[55] Moreover, the Act stipulates a set of factors, which need to be considered before granting bail to child offenders including:

(a) the need to consider all other options before remanding the child in custody; and (b) the need to strengthen and preserve the relationship between the child and the child's family, guardians or carers; and (c) the desirability of allowing the living arrangements of the child to continue without interruption or disturbance; and (d) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and (e) the need to minimise the stigma to the child resulting from being remanded in custody; and (f) the likely sentence should the child be found guilty of the offence charged; and (g) the need to ensure that the conditions of bail are no more onerous than are necessary and do not constitute unfair management of the child.[56]

As other States of Australia, Victoria has established bail support services and programs of which the main purpose is to help accused persons (including young persons and adults) to avoid being remanded in custody by accessing bail and meeting all bail conditions. In this regards, the "*Central After Hours Assessment and Bail Placement Service"*, and the "*Youth Justice Intensive Bail Supervision Program"* has been introduced and operated to assist accused young persons in Victoria.[57]

[55] Sections 3B(2),(3).

[56] Section 3B(1).

[57] For more information, see Australian Institute of Criminology, Bail Support Services and Programs https://aic.gov.au/publications/rpp/rpp125/bail-support-services-and-programs accessed 8 May 2019.

Where the Court refuses to grant bail and the child remains in custody, generally he or she must be placed in a remand centre.[58] The child may also be remanded in a police gaol. Section 347(2) of the *Children, Youth and Families Act 2005* sets out a number of rights for the child when he or she is placed in gaol such as the right to be kept separate from detained adults, the right to be kept separate based on sex, the right to receive visits from certain persons, etc. These provisions are consistent with the Charter, ss 23(1), 22(2).

According to Pound and Evans, the combination of s 23(1) and s 22(2) requires that "any accused child or any child detained without charge must be segregated in detention from both adults (whether charged or convicted) and, 'except where reasonably necessary', from other children who have been convicted of offences."[59] These provisions, on the other hand, do not prevent convicted children from being detained in the same place with convicted adults. However, the Human Rights Consultation Committee stated that "the current Victorian practice of detaining young adults (between 18 and 21 years of age) in the same correctional facilities as children represented best practice."[60]

### *2. Vietnamese Laws Governing Bail Application for Children in Conflict with Criminal Law*

It should be noted that unlike other countries' laws, bail under Vietnamese criminal procedure law can be undertaken by individuals or organisations. They use their reputation rather than an amount of money as a surety. At least two individuals who are 18 years of age or above, have good records, abide strictly by the laws, gain stable incomes and are capable for overseeing persons on bail can undertake bail for

[58] Children, Youth and Families Act 2005, s 347(1). Remand centres are established for "the detention of children awaiting trial or the hearing of a charge or awaiting sentence or in transit to or from a youth residential centre or youth justice centre" (Children, Youth and Families Act 2005, s 478(a)).

[59] Alistair Pound and Kylie Evans, An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities (Lawbook 2008) 162.

[60] Human Rights Consultation Committee, Rights, Responsibilities and Respect: The Report of Human Rights Consultation Committee (Victoria, Department of Justice, 2005) 43 cited in Pound and Evans (n 58) 162.

accused persons or defendants who are their kin. Organisations may bail accused persons or defendants who are their employees.[61]

Following one of policies in the judicial field of the Politburo set out in Resolution No 08-NQ/TW (which requires to research and make resolutions for limiting the use of temporary detention measure towards accused persons for certain offences),[62] the Criminal Procedure Code 2003 clarified that bail is a preventive measure replacing for temporary detention.[63] This is reaffirmed by the Criminal Procedure Code 2015.[64]

Regarding juveniles, art. 419(1) of the Criminal Procedure Code 2015 emphasised that preventive measures are only applied to persons aged below 18 in truly necessary circumstances. Particularly, custody and temporary detention of accused persons less than 18 years of age shall be used only on the grounds that supervisory and other preventive measures fail. When the grounds for custody or temporary detention evanesce, competent agencies and persons must promptly terminate it or replace it by other preventive measures. These are new provisions of the Criminal Procedure Code 2015 which are influenced by the UN standards and norms on juvenile justice.[65]

In practice, a supervisory measure has almost never been used. Therefore, bail becomes the first option of authorised persons in seeking a preventive measure to replace for temporary detention.[66] Provisions of the Criminal Procedure Code 2015[67] governing bail applied for juvenile offenders and their adult counterparts without any differences. In order

[61] Criminal Procedure Code 2015, art. 121(2).

[62] Resolution No 08-NQ/TW of the Politburo of 2 January 2002 on Some major tasks of justice in the next period, Part II(B)(1)(a).

[63] Article 92(1).

[64] Article 121(1).

[65] Namely, art. 37(b) of the CRC. See also Committee on the Rights of the Child, General Comment No 10 (2007): Children's Rights in Juvenile Justice (n 6) paras 78–81.

[66] In practice of Vietnam, temporary detention is a preventive measure which has been mostly used. The next three preventive measures have been applied respectively including Ban from travel outside one's residence place, Bail and Depositing money as surety. However, under the Criminal Procedure Code 2015, only Bail and Depositing money as surety are provided as replacement for temporary detention measure.

[67] Article 121.

to encourage the use of bail in reality, legislators have amended and supplemented a number of provisions.

First, they specify duties by which accused persons and defendants on bail must guarantee and make clear that if they violate these duties, they shall be put in temporary detention.[68] Second, specifying supplementary provisions on the length of bail time. This shall not exceed the prescribed time of investigation, prosecution or adjudication and the bail time for persons sentenced to imprisonment shall not exceed the time from conviction to enforcement of incarceration sentence.[69] Third, they clarify that organisations and individuals undertaking bail but failing to make accused persons or defendants conform to duties guaranteed shall incur fines subject to the nature and severity of violations as per the laws.[70]

### *3. Comparison and Recommendation*

In comparison to Victorian laws governing bail, the Vietnamese ones reveal certain shortcomings. Vietnam does neither enact a separate statute on bail nor particular provisions regarding bail application for juvenile offenders. Above mentioned regulations in the Criminal Procedure Code 2015 are unclear and is likely to lead to the arbitrary enforcement in reality. Article 121(6) of the Code provides for a fine to be imposed on organisations and individuals undertaking bail but failing to make accused persons or defendants conform to pledged obligations. However, other issues related to the fine such as authority, procedures, amounts of money, etc. are not provided. Resolutions in circumstance where organizations and individuals undertaking bail are unable to continue their duties are not stipulated. On the other hand, the Code does not provide for exceptional cases where accused persons, defendants cannot be granted bail.

[68] Article 121(3). Previously art. 92(5) of the Criminal Procedure Code 2003 only provides that in this situation accused persons, defendants shall be subject to the application of other preventive measure.

[69] Article 121(5). According to art. 92(5) of the Criminal Procedure Code 2003, in this circumstance individuals or organizations must bear responsibilities for pledged obligations.

[70] Article 121(6).

Moreover, there is a lack of legislation providing guidelines for detail implementation of bail. Vietnam has not established bail support services and programs like in Victoria. These are reasons causing a reality that in Vietnam where temporary detention has been the most popular preventive measure applicable to juvenile offenders.[71]

In this regards, the lessons learned from Victoria's Bail Act 1977 may help Vietnam to supplement particular and specific provisions for the bail application of juvenile offenders. The adoption of a Joint Circular among central judicial bodies, which adapts certain stipulations such as in the Bail Act 1977 of Victoria should be examined as part. of granting bail to juvenile offenders. This appears to be an appropriate direction for development of this topic in Vietnam. Bail supporting services and programs should also be introduced to promote the practical use of bail in juvenile cases.

## III. FAMILY GROUP CONFERENCES IN NEW ZEALAND AND LESSONS LEARNT FOR VIETNAM

### A. New Zealand's Laws Governing Family Group Conferences

It has been demonstrated that traditional judicial proceedings, of which the main purposes are to punish the offenders and prevent crimes, are not suitable for dealing with juveniles violating criminal law. Therefore many countries have tried to seek for new justice models.

From the last three decades of the 19th century, diversion and restorative justice have emerged as effective models in solving juvenile delinquency cases.[72] In the international context, the UN has consistently encouraged its member States to utilise measures and procedures for dealing with juvenile offenders "without resorting to judicial proceedings."[73] The UN Economic and Social Council (ECOSOC)

[71] Other reason is the psychology of procedure-conducting persons. They have frequently used temporary detention measure to prevent accused persons and defendants from escaping or creating obstacles in the process of dealing with criminal cases.

[72] UNODC, Handbook on Restorative Justice Programmes (2006) 8.

[73] The CRC, art. 40(3)(b). See also the Beijing Rules, rule 11; Committee on the Rights of the Child, General Comment No 10 (2007): Children's Rights in Juvenile

in 2002 adopted Resolution 2002/12 introducing Basic principles on the use of restorative justice programmes in criminal matters.[74]

This is a very important instrument providing guidelines for UN Member states in applying as well as reforming their restorative justice programs when dealing with crimes occurred in their territories. In national context, there have been a large number of countries in all continents, including New Zealand, recognizing and developing various restorative programs and use them to settle certain criminal cases provided by domestic laws.

In New Zealand's legislation, the term "juvenile" is replaced by "child" and "young person". According to the Children's and Young People's Well-Being Act 1989 (or Oranga Tamariki Act 1989), child means a person under the age of 14 years whereas young person generally means a person of or over the age of 14 years but under the age of 18 years.[75]

In the field of juvenile criminal justice, New Zealand has been famous with restorative justice programs. There are a wide range of programs to divert children and young persons from the traditional criminal process including warning, formal police caution and family group conference (FGC).

Generally, before instituting criminal proceedings against a child or young person, an enforcement officer is required to consider if it would be sufficient to warn that person, unless a warning is clearly inappropriate having regard to the seriousness of the offence and the nature and number of offences previously committed.[76] In this situation, warning is used as an alternative to prosecution.

A second type of restorative justice programs in New Zealand is the formal police caution. It is applied by a constable to a child or young person, who admitted or proved to have been committed any

Justice, (n 6) paras 22–29.

[74] ECOSOC, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ESC Res 2002/12, UN ESCOR, 2002 sess, 37th plen mtg, Supp No 1, UN Doc E/2002/99 (24 July 2002).

[75] Section 2.

[76] Children's and Young People's Well-Being Act 1989, s 209.

offence, based upon recommendations of a family group conference.[77] Procedures of giving a formal police caution are specifically provided by s 211(2) of the Children's and Young People's Well-Being Act 1989.

Family group conference is the most famous restorative justice program of New Zealand. It can be conducted at any stages of the criminal process. As previously mentioned, a formal police caution is given only if a FGC recommend it.

Furthermore, criminal proceedings cannot be instituted against young person unless youth justice coordinator consulted and FGC held.[78] An FGC plays different roles in the process of resolving juvenile delinquency mainly depended on the procedural steps which are held. This is demonstrated by various functions of FGC prescribed by s 258 of the Children's and Young People's Well-Being Act 1989 including:

— to consider whether the young person should be prosecuted for the offence or whether the matter can be dealt with in some other way, and to recommend to the relevant enforcement agency accordingly (where the conference is convened in relation to an alleged offence in respect of which proceedings have not been commenced);

— to consider whether the offence alleged to have been committed by that young person should be dealt with by the court or whether the matter can be dealt with in some other way, and to recommend to the court accordingly (where the conference is convened in relation to an offence in respect of which proceedings have been commenced);

— to consider how the young person should be dealt with for that offence, and to recommend to the court accordingly (where the charge against the young person is admitted or proved) etc.

It can be seen that the main purpose behind the above provisions is to avoid using traditional criminal proceedings against children and young persons because of its "inherent" limitations. Restorative justice programs recognised in New Zealand's legal framework aim to provide as much as support for children and young persons in conflict

[77] Ibid s 211(1).

[78] Ibid s 245. It should be noted that family group conference is not required in certain cases stipulated in s 248(1)(2)(3) of the Children's and Young People's Well-Being Act 1989.

with criminal law before, during and after the criminal process. These programs in general and FGC in particular have brought significant practical results contributing to the effectiveness of New Zealand's juvenile criminal justice system. According to a report of the Ministry of Justice:[79]

*"The reoffending rate for young offenders (aged 17 to 19) who participated in restorative justice was 17 % lower than comparable young offenders over the following 12 month period (8.9 % lower over three years). Young offenders who participated in restorative justice committed 30 % fewer offences per offender than comparable young offenders within 12 months (32 % fewer offences within three years)."*

On the side of crime victims, statistics also reveal impressive outcomes. A survey conducted by the Ministry of Justice in 2017 shows that:[80]

*"The majority of victims (86 %) were satisfied to some extent with the restorative justice conference they attended, including 56 % who said they were very satisfied. Only 8 % were fairly (3 %) or very (5 %) dissatisfied with the meeting they attended. The share of victims who were at least satisfied compares with 84 % in 2016 and 82 % in 2011, and continues what has been an increasing trend in positive ratings over time."*

Procedures of an FGC are not provided for in the legislation of New Zealand. Studies show that normally an FGC has five stages with equal importance and validity namely (1) Referral, (2) First contact, (3) Information sharing, (4) Private family time, and (5) Agreeing and recording family decision.[81] The flexibility and variety of FGC procedures

[79] Ministry of Justice, Reoffending Analysis for Restorative Justice Cases: 2008 to 2013: Summary Results, (2016) 1 https://www.justice.govt.nz/assets/Documents/Publications/rj-Reoffending-Analysis-for-Restorative-Justice-Cases-2008-2013-Summary-Results.pdf accessed 29 April 2019.

[80] Ministry of Justice, Restorative Justice Victim Satisfaction Survey, (2018) 10 https://www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Victim-Satisfaction-Survey-Report-Final-TK-206840.pdf accessed 29 April 2019.

[81] Netcare: Empowering Professionals to Empower Others, An Introduction to Family Group Conference http://www.netcare-ni.com/media/uploads/Practice%20and%20theory.pdf 7–10 accessed 21 June 2019.

may help to create a friendly and comfortable environment for parties and therefore increase the possibility of successful conferences.

### B. Lessons for Vietnam

Under Vietnamese criminal procedure law, juvenile offenders are given the right to have representatives,[82] schools and organisations present in criminal proceedings.[83] Nevertheless, there is no provisions recognising FGC in criminal justice in general and juvenile criminal justice in particular. This is likely because Vietnamese legislators, legal researchers and experts take the traditional view that criminal responsibility is an offenders' liability towards the State. Procedure-conducting bodies and persons are the principal actors in handling criminal cases. Crime victims and their families play no roles in the criminal process. In other words, the voice and position of victims as well as their families are not given appropriate attention, even in cases involving persons under 18 years of age. This leads to a consequence that in Vietnam whenever a criminal proceeding is commenced against a juvenile, it is extremely hard to divert he/she away from traditional judicial processes.

The Penal Code 2015 introduces a group of supervisory and educational measures applicable to juvenile offenders who are immune from criminal liability[84] including community reconciliation. In the process of reconciliation, parents or representatives of the main parties (juvenile offenders and victims) are required to participate. Unlike FGC in New Zealand, community reconciliation in Vietnam can only be carried out after the institution of a criminal case. Provisions governing this measure are extremely new and simple. Practical application is very limited because of various reasons.[85] In this regards, with its effectiveness in handling juvenile delinquency cases, FGC of New

[82] The Criminal Procedure Code 2003 (art. 306) uses the term "representative of family".

[83] Criminal Procedure Code 2015, art. 420.

[84] The other two measures comprise reprimand and education at the commune, ward and town.

[85] See the last section of this paper.

Zealand is likely to be a valuable model for Vietnam in reforming its legal framework regarding community reconciliation in future.

## IV. VICTIM-OFFENDER MEDIATION UNDER GERMAN AND VIETNAMESE LAWS

### A. German Laws Governing Victim-Offender Mediation

Together with conciliation, conferencing and sentencing circles, mediation has been considered as one of restorative justice programs used in criminal matters.[86] Despite different names, all these programs aim to create opportunities for "the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, to participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."[87]

They should be applied not only in juvenile delinquency cases but also in criminal cases against adult offenders. Regarding mediation in penal matters, "victim-offender mediation" (VOM) is the most popular model. The EU and UN have adopted resolution and recommendation proposing Member states to promote this restorative justice program.[88]

In Germany, a "juvenile" means "anyone who, at the time of the act, has reached the age of 14 but not yet 18 years", "young adult" means "anyone who, at the time of the act, has reached the age of 18 but not yet 21 years".[89] Despite different ages, they are basically governed by the same legislative framework including: Youth Courts Law 1974 (amended in 2017), Code of Criminal Procedure 1987 (amended in 2014), and Criminal Code 1998 (amended in 2013). The Youth Courts Law 1974 contains provisions governing many important issues relating to juvenile justice such as criminal liability, supervisory and disciplinary measures, penalty, constitution and procedure of the Youth Courts.

[86] ECOSOC (n 74) para 2.

[87] Ibid.

[88] Including Resolution 1999/26: Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice, adopted by ECOSOC on 28 July 1999; Recommendation No. R (99) 19: Mediation in Penal Matters, adopted by the Committee of Ministers of the Council of Europe on 15 September 1999.

[89] German Youth Court Law 1974, s. 1(2).

German provision on VOM has been evaluated as one of Europe's best practices of restorative justice in the criminal procedure.[90] German laws do not have definition of VOM. In civil cases, mediation, as defined by s 1(1) of the Mediation Act 2012, is "a confidential and structured process in which the parties strive, on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators". In a criminal context, according to Recommendation No. R (99) 19, VOM is a "process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)."[91]

Similar to FGC in New Zealand, Germany's VOM has been used as diversionary and educational measures at all stages of the criminal proceedings involving not only juvenile offenders but also their adult counterparts.[92] Under s 46 of the Criminal Code 1998, offender's efforts to make restitution for the harm caused and also his or her efforts at reconciliation with the victim is one of factors which need to be taken into account when sentencing. This shows the important role of mediation and indirectly encourages offenders to convince victims to participate in the reconciliation process with a hope to get lesser sanctions from the court.[93] Derived from above provisions, s 155a of the Code of Criminal Procedure 1987 imposes a duty on the public prosecution office and the

[90] Conference Publication, European Best Practices of Restorative Justice in the Criminal Procedure (2010) https://www.iars.org.uk/sites/default/files/Restorative%20justice%20report%20_%20Hungary.pdf accessed 30 April 2019.

[91] Mediation in Penal Matters, Adopted by the Committee of Ministers of the Council of Europe on 15 September 1999.

[92] Andrea Păroşanu, Mediation in Penal Matters for Juveniles in Germany, 4 http://journalofsociology.ro/wp-content/uploads/2014/11/Full-text-pdf.27.pdf accessed 30 April 2019.

[93] Furthermore, s 46(a) provides that when the offender, "in an effort to achieve reconciliation with the victim, has made full restitution or the major part thereof for his offence, or has earnestly tried to make restitution; or in a case in which making restitution for the harm caused required substantial personal services or personal sacrifice on his part, has made full compensation or the major part thereof to the victim, the court may mitigate the sentence pursuant to s 49(1) or, unless the sentence to be imposed on the offender is imprisonment not exceeding one year or a fine not exceeding 360 daily units, may order a discharge."

court, at every stage of the proceedings, to examine the possibility to reach a mediated agreement between the accused and the crime victim based on the latter's willingness.

For children and young adults, according to s 45 of the Youth Courts Law 1974, the public prosecutor is entitled to dispense with prosecution without the judge's consent where the conditions provided in s 153 of the Code of Criminal Procedure 1987 are met[94] or a supervisory measure has already been enforced or initiated. The juvenile offender's attempt to achieve a solution with the victim shall be considered equivalent to a supervisory measure. After the bill of indictment has been submitted, the judge may temporarily discontinue the proceedings with the prosecutor's consent in circumstances prescribed in s 47(1) of the Youth Courts Law 1974. The court then fixes a period of no more than six months in which the juvenile must comply with the conditions, instructions or supervisory measures.

Beside the nature as a diversionary measure, VOM can be used as part of court's instructions[95] — one type of supervisory measure.[96] In this situation, the judge may instruct the juvenile to make an effort to reach an agreement with the victim. VOM is also prescribed as part of "conditions"[97] — one kind of disciplinary measure.[98] Finally, under s 23(1) of this Law, VOM can be applied alongside the probation order.

Similar to FGCs in New Zealand, procedures of a VOM are not stipulated by the legislative framework of Germany. Research shows that in practice seven phases have been regularly conducted in a VOM comprising (1) Referral, (2) Contacting the parties, (3) Preliminary

[94] Under s 153(1) of the Code of Criminal Procedure, "[t]he approval of the court shall not be required in the case of a misdemeanour which is not subject to an increased minimum penalty and where the consequences ensuing from the offence are minimal."

[95] Youth Courts Law 1974, s 10(1) no 7.

[96] Other supervisory measure includes an order to avail oneself of supervisory assistance within the meaning of s 12. (Youth Courts Law 1974, s 9).

[97] Ibid s 15(1) no 1.

[98] Other disciplinary measures include reprimands and detention. (Youth Courts Law 1974, s 13(1)).

interviews, (4) Decision making, (5) Mediation dialogue, (6) Agreement, and (7) Closure.[99]

In the practice of Germany, VOM in general has brought significant results. Statistics reveal that[100] from 1993 to 2016, there were 96,360 VOM cases with 116,802 offenders and 115,103 victims. In the period from 2014 to 2016, the rate of offenders' acceptance to participate in VOM is higher than victim's one (about 10 % higher). Mediations in the presence of a mediator occupied more than 40 %. The outcome of VOM processes in 2016 was impressive with 85,6 % cases (approximately 3,232 cases) where parties reached agreements. Contents of the action agreed through VOM were plentiful with 65,4 % were apologies, 35,2 % was agreement on a certain behaviuor, 23,5 % was for damages, 14 % was for compensation for pain and suffering, and the balance included work for the victim, restitution, and common activity of the victim and other.[101]

It is obvious that the success of VOM contributes to the discontinuation of criminal proceedings against child and young adult offenders. In 2013, there were 39,628 cases dismissed pursuant to art. 45(3) and art. 47 of the Youth Courts Law 1974 (equal to 32,7 % of total 121,365 sanctions applicable to juveniles).[102]

[99] Servicebureau for Victim-Offender Mediation and Conflict Settlement, Standards for Victim-Offender Mediation (six revised edition) https://www.toa-servicebuero.de/sites/default/files/bibliothek/12-11-14_toa-standards_englisch_-_6._auflage.pdf 21–29 accessed 21 June 2019.

[100] Arthur Hartmann, Victim-Offender Mediation in Germany presented in VAST Victim Anlaysis and Safety Tool 1st Training Event, Sassari (2018) http://vast.ipos-research.eu/en/training-tool.html?file=files/downloads/VOM_VAST.pdf accessed 23 July 2019.

[101] Kerner/Hartman's presentation (Berlin, 2014) cited in Jörg-Martin Jehle, Criminal Justice in Germany (6th edn, Federal Ministry of Justice and Consumer Protection 2015) 45 https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile. accessed 23 July 2019.

[102] Federal Statistical Office, table 24a cited in Jehle (n 101) 41.

## B. Vietnamese Laws Governing Victim-Offender Mediation

As a member State of the CRC, Vietnam has gradually transferred international standards on juvenile criminal justice into its domestic laws. This is illustrated by the fact that general principles for dealing with juvenile offenders as well as supervisory and educational measures comprising reprimand, community reconciliation and education in the commune, ward and town applicable to persons under 18 years of age who are exempt from criminal liability are introduced in the Penal Code 2015.[103]

The application and implementation of these measures is governed by the Criminal Procedure Code 2015[104] and Decree No 37/2018/ND-CP.[105] Additionally, the Criminal Procedure Code 2015 contains fundamental rules[106] which must be observed in criminal proceedings involving accused persons, victims and witnesses who are under 18 years old and a large number or provisions specified these rules.

The Penal Code 2015 also recognises a new basis for the exemption from criminal responsibility. This is where the circumstance where "a person who commits a less serious crime or a serious crime because of involuntary damage to life, health, honour, or property of others can be exempted from criminal responsibility if the victim or his/her representative voluntarily seeks *reconciliation* and requests exemption from criminal responsibility."[107] These provisions are applicable to both juveniles and adult offenders during the criminal proceedings. Depending on which procedural stage, investigation authorities, procuracies and courts may render decisions to dispense the accused from criminal liability and suspend the investigation or cases.[108]

[103] Articles 91–95.

[104] Articles 426–429.

[105] Decree No 37/2018/ND-CP dated on 10 March 2018 Guiding for the implementation of supervisory and educational measures applicable to persons under 18 years of age who are exempt from criminal liabilities.

[106] See Criminal Procedure Code 2015, art. 414.

[107] Penal Code 2015, art. 29(3) (emphasis added).

[108] See Criminal Procedure Code 2015, arts. 230(1)(a), 248(1).

### C. Comparison and Recommendation

The "true diversion" does not exist in Vietnamese legislation for dealing with juvenile offenders. Researchers and legal experts in Vietnam only began to give attention to diversion and restorative justice about ten years ago. With the influence of international human rights law in general and children's rights in particular, similar forms of diversion programs are included in Penal Code 2015 and Criminal Procedure Code 2015. They are called supervisory and educational measures, and used as an alternative for penalties. Nonetheless, these measures only applicable to juvenile offenders who are exempt from criminal liability. Theoretically, if a person is exempted from criminal responsibility, no criminal sanctions are imposed. Here it is likely that juvenile offenders are treated more seriously than adult offenders. Explanation of the ECOSOC[109] and provisions of New Zealand's Children's and Young People's Well-Being Act 1989 on diversion do not mention the condition of criminal responsibility exemption. Therefore these are not real pre-sentence diversion programs as those having been consistently supported by the UN, although the existence of pre-sentence diversion is one of core indicators used to evaluate a State's juvenile justice system.[110]

Provisions of Vietnamese laws governing supervisory and educational measures in general and community mediation in particular have certain limitations. Competence to apply these measures is inappropriate. According to art. 426 of the Criminal Procedure Code 2015, authority to implement supervisory and education measures is vested in the Head or Vice Head of investigation bodies, procuracies or the Trial panel depended on stages of criminal proceedings.

The question arising here is why in the adjudication stage, only the Trial panel is empowered to make decision on the application of supervisory and educational measures? The term "Trial panel" indicates that the trial must be conducted which means that the criminal process

[109] United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, art. 7.

[110] UNODC, Manual for the Measurement of Juvenile Justice Indicators (2006) 19.

is prolonged unnecessarily. It can be argued that seperate from investigation bodies and procuracies, the courts operate based upon the principles of conducting trial collectively and making decisions by majority and so the authority to apply these measures must be vested in the Trial panel. Nonetheless, in the first-instance trial preparation stage, the presiding judge is generally entitled to make a number of decisions to settle a criminal case. Hence, there is no reason not to allow him/her to apply supervisory and educational measures for juvenile offenders. This will help to promptly remove juvenile offenders from traditional criminal proceedings and to ensure the principle set out in art. 414(8) of the Criminal Procedure Code 2015 that "criminal cases involving persons under 18 years of age must be settled in swift and timely manners."

Another shortcoming is the inconsistency between provisions of the Penal Code 2015 and the Criminal Procedure Code 2015 regarding the measure of community reconciliation. Under art. 94(2) of the Penal Code 2015, the authorised bodies "shall cooperate with the People's Committee of the commune to organise the reconciliation when the victim or his/her legal representative voluntarily seek reconciliation and *request exemption of criminal responsibility*."[111] This means that the request of criminal liability exemption must be made before conducting reconciliation.[112] However, art. 428(5)(g) of the Criminal Procedure Code 2015 stipulates that the written record of reconciliation shall contain victims and their representatives petitioning for exemption of criminal liabilities (if any). The term "if any" means at the end of reconciliation process, victims and their representatives may or may not petition for exemption of criminal liabilities.[113] This is contrary to provision in art. 94(2) of the Penal Code 2015.

Finally, the Criminal Procedure Code 2015 does not provide for solutions in case the community reconciliation is unsuccessful or there is failure in implementing agreement. Article 16(4) of Joint Circular No 06/2018/TTLT simply stipulates that in this circumstance

[111] Emphasis added.

[112] Article 15(2) of Joint Circular No 06/2018/TTLT has similar provisions.

[113] See also art. 16(4) of Joint Circular No 06/2018/TTLT.

procedural-conducting bodies continue to carry out the investigation, prosecution and adjudication as general procedures. It does not provide for solutions where the offender fails to fulfil his/her duties set out in the agreement, and whether or not information in the community reconciliation can be used as evidence when the normal criminal process resumes.

It is too early to evaluate practical application and enforcement of the three supervisory and educational measures applicable to juvenile offenders because the Penal Code 2015 has only taken full effect since 1 January 2018. Annual reports of the Supreme People's Procuracy and the Supreme People's Court do not contain statistics relevant to these measures. Education in the commune, ward and town were previously one of two "judicial measures"[114] designed for juvenile offenders.

Despite its advantages in dealing with juvenile offenders, this measure has been rarely used in practical reality of Vietnam's judicial system. Studies found that there are various reasons leading to the limited application of this measure in practice. Procedure-conducting persons, (particularly the judges) do not trust its punitive and deterrent effects and there is a lack of mechanism to supervise and educate juvenile offenders when enforcing this measure.[115]

They are also afraid of pressure from public and media blaming that they are "too complacent" to juvenile offenders or take bribes, particularly in cases involving very serious crimes. Participants in a survey[116] conducted by the author also point out a large number of difficulties when applying and implementing the three supervisory and educational measures. These include local authorities' lack of human and financial resources and facilities, incorrect awareness, attitude and insufficient knowledge of relevant State bodies, organizations and individuals, lack of measures imposed on juvenile offenders who violate

[114] The other measure is called "Education in correctional institutions" (Penal Code 2015, art. 96).

[115] Le (n 115) 18, 22.

[116] This survey was carried out online in 2018 with 115 participants including 9 investigators, 23 other officers in the people's police in the South of Vietnam, 27 procurators, 8 judges, 11 court clerks, 7 lawyers, 12 lecturers and 18 other professionals.

laws or do not conform their obligations and difficulties in supervising and monitoring homeless juvenile offenders.

In recent years, in some provinces of Vietnam, when dealing with criminal cases involving the "Breaching regulations on operating road vehicles" offence (art. 202 of the Penal Code 1999,[117] accused persons and representatives of victims have carried out mediation.[118] This is perhaps because they acknowledge the necessity of mediation by themselves or procedure-conducting persons encourage them to participate in mediation. Nonetheless, practice shows that even when victims or their representatives request exemption from criminal liability for the accused, there have been differences among procedure-conducting bodies in handling cases.

Some have used provisions in art. 29(3) of the Penal Code 2015 as legal bases to issue decisions to exempt criminal liability and suspend the investigation or the case. Oppositely, in similar cases, other Courts have not applied art. 29(3) and still sentenced defendants with probation or even termed imprisonment.[119] Another practice though less popular has been where the investigating authority (based upon various reasons) has issued a decision to exempt criminal responsibility for the accused although the victim's representative has refused to participate in mediation and make a request for criminal liability exemption.[120]

Reasons leading to above practices may derived from the fact that art. 25(3) of the Penal Code 2015 contains a new provision, a discretionary norm which has not yet been explained in details for implementation. Moreover, the traditional view of procedure-conducting persons focusing on crime control and punishment as well

[117] At the present, this is "Offences against regulations on road traffic" (art. 260 of the Penal Code 2015).

[118] For specific criminal cases which were settled through mediation, see Ngan Nga, Minor Offences: Successful Negotiation Avoids Imprisonment (Online Legal Journal of Ho Chi Minh City, 1 March 2017) http://plo.vn/phap-luat/thuong-luong-duoc-thi-khoi-di-tu-685809.html accessed 21 June 2019; and Nguyen Tran Minh Cong, Criminal Responsibility Exemption in Accordance to Article 29(3) of the Vietnamese Penal Code] (Master Thesis, Ho Chi Minh City University of Law 2018) 9–10.

[119] Information of these criminal cases can be found at Nguyen (n 119) 8–9, 12–13.

[120] Ngan Nga (n 119).

as unawareness of all values brought by restorative justice may create hesitancy in exempting criminal liability based on request of victims as a result of mediation.[121]

These practices reflect the differences among procedure-conducting bodies in applying the Penal Code 2015, namely art. 29(3). Regarding criminal procedures, there have had also been examples of the inconsistency among procedure-conducting bodies in dealing with cases involving mediation. In circumstances where victims or their representatives, after conducting reconciliation, make a request for criminal liability exemption, some investigation authorities still institute criminal proceedings, file charges against the accused, apply preventive measures and then suspend the investigation pursuant to art. 230(1)(a) of the Criminal Procedure Code 2015 — whereas others only institute criminal proceedings and suspend the investigation.[122] The absence of provisions in the Criminal Procedure Code 2015 for handling these cases is the main cause of practical discrepancy.

In terms of supervisory and educational measures, Vietnam can use provisions of the German Youth Courts Law 1974 governing VOM or regulations regarding FGC of New Zealand's Children's and Young People's Well-Being Act 1989 and as references to reform its legislation. Basic principles on the use of restorative justice programmes in criminal matters adopted by ECOSOC should also be followed. Vietnamese legislators and procedure-conducting persons should have a comprehensive understanding on values and effectiveness of restorative justice programs in dealing with juvenile delinquency cases, particularly the roles of victims and communities in criminal proceedings. Moreover, services and programs supporting juvenile offenders in accomplishing their duties set out by VOM agreements should be introduced.

## V. CONCLUSION

Using a human rights-based approach, the State of Victoria (Australia), New Zealand and Germany have all developed comprehensive legal frameworks for dealing with children and young offenders.

[121] Le Huynh Tan Duy, International and European Laws Governing Mediation in Penal Matters: Experiences for Vietnam (2019) 01(122) 47, 56.

[122] See Nguyen (n 119) 21–24.

Each country possesses distinctive provisions, which should be learned from by other jurisdictions including Vietnam.

The Children, Youth and Families Act 2005 of Victoria contains specific provisions to restrict publication of information leading to the identification of a child. Victoria also has detailed stipulations in the Bail Act 1977 to encourage the use of bail replacing for detention of children. To divert children and young persons from traditional criminal process, New Zealand has designed many restorative justice programs including warning, formal police caution and FGC in the Children's and Young People's Well-Being Act 1989. FGC has been considered as a New Zealand's "gift to the world"[123] because of its practical effectiveness. Germany in turn has been successful with the so called "victim-offender mediation" — a form of restorative justice programs popularly used in Europe.

These distinctive provisions are relatively new in Vietnam. Despite great efforts made in recent years, particularly from 2015, Vietnam still does not have a comprehensive and effective juvenile criminal justice system. There are still gaps between Vietnam's legal framework for juvenile offenders and successful international standards and norms. To eliminate these gaps, experiences from other developed countries' laws are valuable lessons for Vietnam.

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[123] Andrew Becroft, Children's Commissioner, Family Group Conferences: Still New Zealand's gift to the World? (2017) http://www.occ.org.nz/assets/Uploads/OCC-SOC-Dec-2017-Companion-Piece.pdf accessed 3 May 2019.

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# LAW-MAKING

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# INFORMATION REVOLUTIONS AS FACTORS FOR THE DEVELOPMENT OF LEGAL CONCEPTS

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**Abstract**

The paper considers a number of approaches with regard to the concept of the "information revolution" in the development of legal concepts. Various opinions regarding the number of approaches and their main points have been studied. The complexity as to how to determine the exact dates of the beginning and the end of certain events have an impact on new steps in the development of society and public relations — generating debate. The authors identified and systemised the most relevant issues to study in the sphere of the starts and results of information revolutions. They are: leaks and protection of confidential information on an international

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basis; reliability of the distributed information, firstly in political and military international conflict and secondly in the use of information resources by terrorist organizations and other similar structures. The characteristics of cause-effect relationships for the development of legal concepts are described as a follow-up of the development of the forms of information, information technologies and the info-sphere. Some conclusions are made concerning the further development of legal concepts in modern society on the basis of the classification available.

**Keywords**

Information revolution, development of legal concepts, information resources, mass media, social media, knowledge bases, information wars

**CONTENTS**



## 1. THE CONCEPTS AND FEATURES OF INFORMATION REVOLUTIONS IN TERMS OF THEIR HISTORICAL DEVELOPMENT

The history of mankind shows that any revolution takes place in society where methods and ways operating in the society do not meet the emerging realities and new trends of the societal relationships.

"Who owns the information — he owns the world." This phrase was said in 1815 by The Rothschild brothers, the well known and influential bankers and financiers. They were famous for being the first

to understand the need, and have methods to get vital and necessary information. In particular, they used pigeon post to obtain essential and operational information about the results of the Battle of Waterloo allowing them to deliberately mislead other members of the London and Paris stock exchanges. The Rothschilds increased their wealth by some 40 million pounds sterling overnight, becoming owners of a much larger share of the entire British economy.[3]

Summarising the views of different authors[4] on the concept of "information revolution", one can say that any information revolution is a qualitative change in all spheres of human life due to the introduction of fundamentally new means and ways of storing, processing and transmitting information. However, there is no universal definition.

Most scholars distinguish[5] five information revolutions:

1. The emergence of language and speech and transfer of information to the next generation in oral form;

2. The invention of writing and, thus, getting a reliable way to transfer information in its original form;

3. The invention of printing and mass replication of texts without distortion;

4. The development of means of communication operating on the basis of electricity at the end of the 19th century by means of, telegraph, telephone, and radio. This enabled the rapid transmission of information over long distances / to numerous audience;

5. The invention of the computer and the mass distribution of digital technology in the final quarter of the 20th century.

There is arguably a sixth:

[3] Who owns the information — he owns the world. URL: http://www.vsepoisk.ru/2011/01/blog-post_13.html (accessed 25.06.2019).

[4] See for example, V. Gafner. Information Security: study manual — Rostov-on-Don: Phoenix, 2010. 324 p.; Abdeev R. F. Philosophy of information civilization. M.: Business, 1994; Castells M. The Information Age: Economy, Society and Culture. Moscow: Publishing House of the Higher School of Economics, 2000; Rakitov A. I. The philosophy of the computer revolution. M., Publishing house of political literature. 1991; Toffler E. The Third Wave. M., ACT.

[5] Drucker P. The Next Information Revolution. Forbes, Web. URL: http://www.forbes.com/asap/1998/0824/046.html (accessed 25.06.2019).

6. A. quasi-revolution, namely the emergence of, artificial intelligence, neural networks, critical information value, the creation of digital currency not tied to an independent issuer (bitcoins and other types of non-state currency), bio-engineering (universal intervention in the genotype of plants, animals and humans), nanotechnology (in medicine, computing devices, etc.). The prefix "quasi" here implies a direct link with the 5th information revolution.

It is these inventions (or developments) — created and developed during the period of the 5th revolution — that unveiled the opportunities to develop a "virtual society" (for example, social networks) and a "virtual state" (in terms of virtual money). In this way, information has become a major and valuable product of the modern world and of contemporary civilization. The creation, diffusion and application of information has proved to be the most profitable and steadily growing, and dynamically developing industry of the world economy. This information revolution has become a follow up, and a consequence of, the scientific and technological revolution and its high tech widespread diffusion. The emergence of new means of communications (global computer networks, mobile and satellite communications, and othertelecommunications) has made the producers and consumers of information closer than never before to each other — eliminating ethnic and social differences and proving to be a crucial factor in the globalisation process.

Irving E. Fang identified six 'Information Revolutions': writing, printing, mass media, entertainment, the "tool shed" (which we now identify as "home"), and the information highway. In his work the term "information revolution" is used in a narrow sense to describe trends in communication media.[6]

From a different perspective, some authors consider[7] there are only four types of information revolutions excluding the first type. Yet,

[6] Fang, Irving E. (1997) A History of Mass Communication: Six Information Revolutions URL: https://www.academia.edu/5051168/A_History_of_Mass_Communication_Six_Information_Revolutions (accessed 25.06.2019).

[7] Kravchenko, AI, Sociology in Questions and Answers, M., "Prospectus", 2006, p. 50–52. URL: https://www.libfox.ru/649142-albert-kravchenko-sotsiologiya-v-voprosah-i-otvetah-uchebnoe-posobie.html (accessed 25.06.2019).

it seems illogical. In fact, it is due to the appearance of speech that the human race acquired and developed the ability and quality the human community had lacked before. Further, given at the end of this scientific paper, a table of causal relationships between historical and technological stages of society development (information revolutions) and its legal concepts and notions underlines the development of speech as a qualitatively new feature of society. In other words, the ability to undertake verbal communication is an independent stage and a forerunner of skills of writing. Writing skills could not have been developed without language families and dialects that have taken shape with the time.

The temporal and informative characteristics of the first four informational revolutions have been more or less defined previously. Disputes, if any, arise only with regard to some specific items that do not affect, as a rule, the essence of the issue in question. Speaking of the information revolution, which is currently taking place, its time period is a controversial issue. The most interesting view, in our opinion, is the one according to which the current information revolution has not begun yet. Moreover, judging by the description of its criteria given by the author of this idea,[8] it is just getting started.

Thus, P. V. Sorokoletov, pointing out the end of the current (5th) information revolution highlights the following facts:

— The translation into electronic format of texts and drawings, previously being transmitted in printed form, has almost been completed. The younger generation relies less and less on the use traditional paper books;

— The computer is still a tool, for whom 90 % of its use is to work with texts and graphics and is actually an addition to natural intelligence;

— The principle of parallel computing has not gone beyond the walls of the laboratories with their supercomputers, and the most common computer architecture is still a so called Neumann one today;

[8] Sorokoletov P. V. The world on the threshold of the fourth information revolution. URL: https://docplayer.ru/46912048-Mir-na-poroge-chetvertoy-informacionnoy-revolyucii.html (accessed 25.06.2019).

— All new programming technologies are modifications of well-known theoretical studies of the 60s — 70s of the 20th century.

What is really changing however is speed of processors, the amount of memory available, the speed of communications, and the capacity of optical recording devices. All this is certainly not a revolutionary achievement, but rather an evolutionary one of already available technology and devices.

At the same time P. V. Sorokoletov believes that the fifth information revolution is a transition from automated information processing to computer presentation and exchange of pure knowledge. Thus, there is going to be an explosion of universal and specialized knowledge bases, (KBs).

The content of the fifth information revolution is the creation of an automated knowledge processing technology which implies:

— the translation of accumulated textual information into knowledge structures;

— their integration into public and corporate KBs, publication in the Internet and corporate intranet networks;

— use of knowledge bases for fast, almost instantaneous (from the point of learning from texts) and guaranteed (from the point of view of an individual's perception) knowledge transfer. Revolution 6 will develop this knowledge and ensure dissemination and application at the interstate level.

According to many authors the common unifying signs of information revolutions are as follows:

— a significant increase of the role of information and knowledge in the system of values of a person, society and state;

— an increase of the share of IT communications, products and services in the GDP (gross domestic product);

— a functioning of the global information space ("network society")[9] ensuring interaction of information;

[9] Craven, Paul, and Barry Wellman. 1973. The Network City. Sociological Inquiry 43:57–88; Wellman, Barry. 1988. Structural Analysis: From Method and Metaphor to Theory and Substance. Pp. 19–61 in Social Structures: A Network Approach, edited by Barry Wellman and S. D. Berkowitz. Cambridge: Cambridge University Press;

— an integration of telecommunication technologies, including transboundary;

— a growth in the number of interactive mass media;

— an increase insatisfying needs of people in information products and services.

In addition to some positive aspects, simultaneously, there are some negative factors for society of information expansion:

— a huge impact on the media community;

— easier manipulation of mass consciousness being used on a large scale, including the technology of the so-called "democracy of noise";[10]

— excessive informational openness (the ability to trace people by the records from their social networks) — by means of social engineering technologies;

— an "information avalanche" — too much information to be processed;

— the formation of informational and technological markets along with the traditional real markets (for example, the labour market, the raw materials market), and the transformation of information resources into tangible resources of the state;

— a multiple increase of information resources and services available for public and personal use;

— a growing dependence in the functioning of socio-economic and government institutions on the sustainability of various infrastructures, primarily informational;

— the development of a single global information space and its growing interdependence;

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Wellman, Barry. 1979: The Community Question: The Intimate Networks of East Yorkers. American Journal of Sociology 84 (March): 1201–31.7 The technology consists in disguising a message that cannot be avoided in a random flow of information that does not identify its source, i.e. as a link to "a high-ranking anonymous person from circles close to...". Mantulo Natalia Borisovna Manipulative specificity of PR in the process of constructing social reality. SISP. 2012. №12. URL: https://cyberleninka.ru/article/n/manipulyativnaya-spetsifika-pr-v-protsesse-konstruirovaniya-sotsialnoy-realnosti (accessed 25.06.2019).

[10] Viktor Sorochenko Encyclopedia of propaganda methods http://www.economics.kiev.ua/index.php?id=886&view=article (accessed 25.06.2019).

— a need to tighten requirements for information security — creating the need for an effective legal framework to protect individuals, society and the state in the information sphere while ensuring appropriate balance.

Another negative sign of the fifth information revolution and the quasi-revolution 6 is their transboundary nature. which also impacts on the dark shadow side of human life**.** Network structures have become a base for world crime and terrorism.[11]

With information transforming into the category of one of the most important resources of humanity a problem of struggle for its legal possession has been brought to life. Fighting for spheres of economic and political influence in international relations, the focus is shifting from the use of military force to the use of hidden and flexible forms of influence, one of which being control and management of information resources of governments and states. Information and its impact towards this end is considered to be a new and highly efficient type of weapon.

The proliferation of webcams on a large scale, operating non-stop on-line, contributes not only to improved communication interaction, but also poses a challenge with regard to personal data confidentiality and the right to privacy.

In the coming decades the on-going rapid IT development and differences in the perception of the fruitions of information revolution in various regions of the world may exacerbate intergovernmental and international relations overlapped with the political, cultural and social dissimilarities of nations.

Progress in biotechnology and nanotechnology coupled with information technologies result in structural-sectoral shifts in the economy and can drastically change the world in the second half of the 21st century. The consequences of bio-revolution are highly likely to be especially deep and ambiguous. Advances in molecular biology have created the basis needed for management of plant, animal and human genomes — together with their legal implications. In terms of research

[11] Kulakov A. V. The impact of globalization processes on the border security of the Russian Federation. Electronic scientific publication Almanac Space and Time. 2013. No 1. URL: https://cyberleninka.ru/article/n/vliyanii-globalizatsionnyh-protsessov-na-pogranichnuyu-bezopasnost-rossiyskoy-federatsii (accessed 25.06.2019).

in the field of nanotechnology fundamentally new computing devices, gadgets and widgets will come to play.[12]

With regard to discussions on the concept of information revolution and its manifestations the authors of the paper in question have identified, based on the publications on the Internet, the following problematic issues:

Firstly, the problem of leakage and protection of confidential information on an international scale. Ten or fifteen years ago it was impossible even to consider that being in one part of the world a person could get access to well-secured state information resources far away in another part of the globe. Disclosure of classified and secret information by such well-known personalities as Julian Assange and Edward Snowden may serve a striking example of one of the manifestations of the current information revolution. Thus, WikiLeaks, Assange's organisation, literally stunned the whole world of disclosed secret information, which presented the US foreign policy in a unflattering but true light (information on Guantanamo prison, alleged crimes of the US military contingent in Afghanistan, etc.) and caused a storm of indignation among senior officials of the US administration. Mr Joe Biden, Vice-President of the USA, called Assange "high-tech terrorist".[13]

## 2. THE PROBLEM OF THE RELIABILITY OF INFORMATION DISSEMINATED PRIMARILY IN POLITICAL AND MILITARY INTERNATIONAL CONFLICTS

The problem is caused by the availability of technical capabilities to produce and distribute any information very fast — on a global scale while presenting it as authentic.

Such information ranges from harmless photoshops and video clips about pop stars' life and ending up with the incredibly powerful

[12] Baluevsky Yu. N., Grinyaev S. N. Threats and challenges of the information revolution. URL: http://flot.com/publications/books/shelf/safety/20.htm (accessed 25.06.2019).

[13] Fowler E. The most dangerous man in the world: Julian Assange and the secrets of WikiLeaks. SPb: ABC, ABC-Atticus, 2012. 288 p. Pp. 5–6.

information war on Russia-Ukraine events, which at one time risked the brink of a real war whilst simultaneously alarming and misinforming public opinion. This phenomenon is now widespread. Another even a more technological war is taking place, namely involving Russian and American commentators on the so called Syrian question. There have to be controls to limit contributions which are contrary to State Policies, Laws and related diplomatic initiatives.[14]

## 3. THE PROBLEM OF THE USE OF INFORMATION RESOURCES BY TERRORIST ORGANISATIONS AND OTHER SIMILAR STRUCTURES

Terrorists and their accomplices, abettors and the like use information for various purposes including planning and acts of terrorism, creating schemes for their financing around the world, and recruiting people into the ranks of terrorists, in particular, the so-called "Islamic state". The jihadist group Islamic State (IS) burst on to the international scene in 2014 when it seized large swathes of territory in Syria and Iraq. It has become notorious for its brutality, including mass killings, abductions and beheadings. This militant group is banned by Russian law.[15] As regards recruitment, terrorists' agents mostly concentrate their efforts on vulnerable people who for various reasons are susceptible to malign influencing. However information revolutions are in no way an exclusive driver only in the realm of IT.

The development of informational relations is directly proportional to the development of the legal dimension as one of the ways to ensure societal relations through information or mediate by information, and ensure the Rule of Law — both domestically an dinternationally. The following table identifies the key drivers, necessary to understand the optimal response of lawmakers.

[14] Shibaev D., Uibo N. State Policy Against Information War. Russian Law Journal. 2016;4(3):136–156. DOI:10.17589/2309-8678-2016-4-3-136-156.

[15] What is "Islamic State"? URL https://www.bbc.com/news/world-middle-east-29052144 (accessed 25.06.2019).

## 4. CHARACTERISTICS OF THE INFORMATION REVOLUTIONS (IR) AND THEIR INFLUENCE ON THE LAW

| IR characteristics | Branches of law shaped by IR |
|---|---|
| 1 | 2 |
| *The first* information revolution is connected with the articulate speech — human language that spontaneously emerged in the process of joint labor activity of the first humans. The more complex the forms of organisation of collective life became, the more urgent was the need for information exchange between individuals. Language become a powerful and vital tool for further development of a human being, his consciousness and society since language is one of the ways to express and transmit thoughts, the whole body of knowledge and ideas of people about the world. Due to its direct and immediate linkage with the process of thinking, language has the ability to fulfill a communicative function and to increase, store and improve the knowledge gained via it | *Quasi-criminal law* (responsibility for socially dangerous acts — ostracism, deprivation of life);<br>*Quasi-civil law* (decisions within tribal and intertribal disputes);<br>*Quasi-electoral right* (choice of a leader by voting or other means, for example ordeals) |
| *The second* information revolution is associated with the invention of writing resulting in a giant qualitative and quantitative leap and made it possible to transfer knowledge from generation to generation | *The appearance of the first written sources of law*.<br>With the advent of writing, the first state regulatory legal acts appeared such as The Russian Truth, which contained the norms of criminal, inheritance, commercial and procedural legislation, being a major source of legal, social and economic relations of ancient Russia.<br>*The formation of the basics of archiving* (as a rule, it was done on the basis of religious institutions) and, as a consequence, the archival law appeared |

| 1 | 2 |
|---|---|
| *The third* information revolution (mid-16th century) was signaled by the invention of printing, which radically changed the industrial society of those times, its culture and organization of activities, work and life, in general | *The emergence and consolidation of copyright*.<br>The fact that copyright and its related law were shaped exclusively at the level of the third information revolution is because the first books (for example in 12th century monasteries) were partly a work of rewriting either of the Holy Scripture or the lives of saints, as a rule. This way, they could not be considered as separate copyright objects. Printing made printed sources of law available to a large number of people and, as a result, the transition from the prevalent canon law to the advantage of secular law took place in society, including with the development of secular educational institutions.<br>*Formation of educational law*, though, whilst still inseparable from the church, meant it was no longe exclusively canonical |
| *The fourth* (end of 19th century) information revolution is remarkable for the invention of electricity due to which telegraph, telephone and radio appeared and made possible rapid transmission and accumulation of information in any amount | Widespread *development of patent law*.<br>For example, Alexander Bell applied to the Washington Patent Office to get a patent for his telephone invention on February 14, 1876.<br>*Legal regulation of means of mass communication* |
| *The fifth* information revolution (70s of 20th century) is associated with the invention of a microprocessor technology and the emergence of a personal computer. Microprocessors and integrated circuits are used to create computers, computer networks, data transfer systems (information communications) | *Information law*.<br>The core subject of legal regulation of information law is information relations, that is, social relations in the information realm arising from the implementation of information processes, namely, the processes of production, collection, processing, accumulation, storage, search, transfer, distribution and consumption of information.<br>Formation of the so-called "*Technological" copyright*, i.e. the rights of integrated circuits, software and hardware systems and databases. |

In the development of society, education, and infosphere,[16] technology is a key prerequisite for the development of legal concepts and institutions. The information revolution that will come next and provide the use of artificial intelligence technologies, is supposed to be a developmemnt of sophisticated knowledge-intensive algorithms of synthesis and synergy replacing human labor — intensive business with smart assembly lines coupled with CPS (cyber physical systems). Entirely new independent areas of business and societal activities will stand out like virtual money, electronic state, and other forms of interaction. The imminent information age implies further transformations of legal institutions and of some fundamental concepts.

## 5. FUTURE DEVELOPMENTS

In the near future, the following legal structures are expected to develop and, consequently, are supposed to be consolidated in legal terms. They are:

1. Some form of cyber-justice systems of trials of certain cases by a judge-robot. More specifically, it is expected that this will be with the help of a software algorithm or certain applications or programmes developed on the basis of the norms of law and established judicial practice, which would result in significant changes in the procedural regulatory legal acts

2. An expansion of banking law into the sphere of virtual quasi-currency and making it either legal or prohibiting its issue which tries to work in parallel to the state.

3. A Further development of energy law on a far larger magnitude, the international level — based on the growing importance of energy and energy resources in contemporary world. Unfortunately, many more major conflicts and even wars over access to energy resources seem to be looming in the years to come.

[16] Lovtzov D. A. (2016) Systemologiya pravovogo regulirovaniya informatsionnyh otnosheniy v infosfere [Systemology of legal regulation of information relations in infoshere]: monografiya [monogragh]. M.: Rossiyskiy gosudarstvenny universitet pravosudiya [Russian State University of Justice"]. 316 c.

4. Due to wide spread of telecommunications, on the one hand, and, on the other hand, people's desire to unite (not only by belonging to a particular state, language, religion and society), one can expect establishment of the so-called "virtual or electronic states" that will exist in virtual space bringing people for certain interests from different parts of the world together, but at the same time these people are looking forward to get some kind of a community and self-independence in the form of legislation, digital currency, citizenship, representation in international institutions, etc.

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10. Lovtzov D. A. (2016) Systemologiya pravovogo regulirovaniya informatsionnyh otnosheniy v infosfere [Systemology of legal regulation of information relations in infoshere]: monografiya [monogragh]. M.: Rossiyskiy gosudarstvenny universitet pravosudiya [Russian State University of Justice]. 316 s.

11. Mantulo N. B. (2012). Manipulyativnaya spetzifika v protsesse konstruirovaniaya sotsialnoy realnosti [Manipulative specificity of PR in the process of constructing social reality]. *SISP*. No 12. URL: https://cyberleninka.ru/article/n/manipulyativnaya-spetsifika-pr-v-protsesse-konstruirovaniya-sotsialnoy-realnosti (accessed : 24.09.2018) (In Russ).

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13. Shibaev D., Uibo N. (2016) State Policy Against Information War. *Russian Law Journal*. 4(3):136–156. DOI:10.17589/2309-8678-2016-4-3-136-156.

14. Sorokoletov P. V. Mir na poroge chetvertoy informacionnoy revolyucii [The world on the threshold of the fourth information revolution]. URL: https://docplayer.ru/46912048-Mir-na-poroge-chetvertoy-informacionnoy-revolyucii.html (In Russ).

15. Toffler E. (2002) Shok budushchego [Shock of the Future]. M., ACT. (In Russ).

16. Toffler E. (2004) Tretya volna [The Third Wave]. M., ACT. (In Russ).

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# LAW-MAKING AND THE SHADOW ECONOMY IN RUSSIA: RACE AHEAD OF THE CURVE

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**Abstract**

The shadow economy in most academic works is viewed as a negative phenomenon, something that the state should fight. Law-making is a one of methods to counteract pre-criminal and criminal shadow economy activities. Counteraction to the pre-criminal shadow economy is carried out by narrowing the so called "grey zones" where unregulated and untaxed activities occur. Grey zones are characterised by a difficult distinction between the normative and non-normative and a sense of the need for normative regulatory of an economic activity. To narrow the grey zone, it is possible to use two different strategies for creating norms. Firstly, it is possible to impose restrictions and prohibitions on various subjects (for example entrepreneurs, public and municipal officers). Secondly, it is possible to simplify the procedures for registering, licensing and control (supervision) economic activity.

Other strategies are preferable for fighting the criminal shadow economy: criminalisation of certain types of economic activity, tightening of sanctions, the imposition of restrictions and prohibitions which impede the use of incomes or property derived from corruption.

Lawlessness and the shadow economy seem to enter the race ahead of the curve of prescription and prohibition — that is, the law lags behind those who exploit the "grey zones". So, the legislator needs to have tools for anticipating and preventing the growth of the shadow

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economic sector. The need for such instruments is exacerbated in conditions of digital shadow economy development.

**Keywords**

Law-making, pre-criminal shadow economy, gray zone, criminal shadow economy, de-offshorization, state control (supervision), corruption counteraction, public officers, municipal officers, requirements, prohibitions

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**CONTENTS**



## 1. INTRODUCTION

In the 1930s, the shadow economy become the subject of multiple academic works. A number of approaches to the study of this phenomenon have recently been developed: economic, legal, sociological, and interdisciplinary. Each approach is characterised by its own methods and definition of the shadow economy. There are so many empirical research materials on the shadow economy that the comment has been made — *"it is quite difficult to judge the reliability of various methods."*[2]

In most cases, it is viewed as a destructive phenomenon. Although, for example, D. Cassel highlights the positive functions of the shadow economy, which are allocation, stabilisation, and distributional.[3]

[2] Schneider, Buehn, 2018, 1.

[3] Cassel, 1986, 73–103.

To combat the shadow economy, the state uses not only the various elements of the usual state coercion mechanisms at its disposal for normative behavior in the sphere of entrepreneurial and other economic activities, but also the possibilities of law-making (state level, activities of special state bodies) and rule-making (local level, internal processes in organization) activities

## 2. LAW-MAKING ACTIVITY AS A WAY TO COUNTERACT THE PRE-CRIMINAL SHADOW ECONOMY

The application of this method depends on the specific type of shadow economy which is being fought: is it pre-criminal or criminal? Pre-criminal shadow economy implies economic activities and misconducts that are not registered and not controlled by the state. Examples would include doing business without registration, tax avoidance or reducing the taxable base (no corpus delicti), corruption offenses, etc. The criminal shadow economy involves illegal activities, for example gambling (except in special zones), illegal arms, drug and human trafficking, smuggling, etc.

The pre-criminal economy is a kind of "grey zone" between normativity and non-normativity. This area does not include, for example, household activities aimed at ensuring their own needs, because such activities are not asocial and destructive. It can be attributed to the informal or undocumented[4] economy, which is not illegal. A relevant example of production activity that is part of the "grey zone" is the so-called "side business" (colloquial in Russian "shabashka"). This would be labour activity carried out either with no registration, or with some extra employment records. Shadow labor activity is especially high in condition of defective tax morale. But tax morale

*"...increases if political decisions for public activities are perceived to follow fair procedures or if the treatment of taxpayers by the tax authorities is perceived to be friendly and fair."*[5]

Economic "grey zones" arise not only due to the inadequate regulation of certain processes (for example production, distribution,

[4] Swanson, Bruni-Bossio, 2018, 1–13.

[5] Schneider, 2011, 7.

exchange, consumption), but also as a result of excessive normative regulation and bureaucratization of economic activity.

The pre-criminal shadow economy "grey zone" is very wide: it includes not only acts turning into crimes with a certain amount of damage, but also such phenomena as, for example, the so-called "homer-making". M. Anteby defines homer-making as the use of organisational materials and tools for personal use. Such practices are prohibited, but organisations usually treat them tolerantly.[6] "Homer-making" includes printing or photocopying documents for personal use, social networking from a work desktop during business hours, and others. Such "grey zones" can be eliminated through local rule-making, for example, by tightening of sanctions for violations, including dismissal. However, excessive restriction on employees may lead to the moral and psychological climate deterioration in an organisation.

A similar reaction may be caused by too active verification activities carried out by state control (supervision) bodies. R. Gulakov wittily notes:

*"This is not a personal will or whim of an entrepreneur, these are the requirements of the law and of some terrible 'Ros-anything-supervision'."*[7]

Earlier, in 2008 The Former President of the Russian Federation D. A. Medvedev called on the law enforcement agencies to stop "nightmare business". In order to clarify the powers of the supervisory bodies, the state adopted the Federal Law of the Russian Federation "On the Protection of the Rights of Legal Entities and Individual Entrepreneurs During State Control (Supervision) and Municipal Control",[8] the latest amendments were made on April 15, 2019. Recently, changes have been made to the Federal Law "On the Prosecution Service of the

[6] Anteby, 2008, 2.

[7] Gulakov, 2017, 195.

[8] Federal Law of the Russian Federation No 294-FZ dated December 26, 2008 "On the Protection of the Rights of Legal Entities and Individual Entrepreneurs During State Control (Supervision) and Municipal Control". Legislation Bulletin of the Russian Federation. 2008. No 52 (part 1). Art. 6249. (Федеральный закон "О защите прав юридических лиц и индивидуальных предпринимателей при осуществлении государственного контроля (надзора) и муниципального контроля" от 26.12.2008 № 294-ФЗ).

Russian Federation".[9] These include norms limiting the timeframe for conducting a prosecutor's verification, defining the procedure and any grounds for its suspension and prolongation. Such normative trends serve to reduce the "grey zones" because evasion from state control (supervision) procedures becomes unprofitable.

Other trends are observed in the fields of concealment of proceeds and tax avoidance. Law-makers create norms that are aimed at reducing the "grey zones" and curbing pre-criminal economic practices. Thus, the Russian Federation is pursuing a policy of gradual de-offshorisation, under which a number of regulatory legal acts were adopted. These include Presidential decree of the Russian Federation "On Long-Term State Economic Policy";[10] the Federal Law "On Enforcement of the Tax Code of the Russian Federation Part One in Connection with the Implementation of the International Automatic Exchange of Information and Documentation for Multinational Groups of Companies",[11] the Federal Law "On enforcement of the Federal Law "On currency regulation and currency control",[12] the Federal Law of August 3, 2018

[9] Federal Law of the Russian Federation No 2202-1 dated January 17, 1992 "On the Prosecution Service of the Russian Federation". Rossiiskaya Gazeta. 1992. No 39. (Федеральный закон "О прокуратуре Российской Федерации" от 17.01.1992 № 2202-1).

[10] Decree of the President of the Russian Federation No 596 dated May 7, 2012 "On Long-Term State Economic Policy". Legislation Bulletin of the Russian Federation. 2012. No 19. Art. 2333. (Указ Президента РФ "О долгосрочной государственной экономической политике" от 07.05.2012 № 596).

[11] Federal Law of the Russian Federation No 340-FZ dated November 27, 2017 "On Enforcement of the Tax Code of the Russian Federation Part One in Connection with the Implementation of the International Automatic Exchange of Information and Documentation for Multinational Groups of Companies". Legislation Bulletin of the Russian Federation. 2017. No 49. Art. 7312. (Федеральный закон "О внесении изменений в часть первую Налогового кодекса Российской Федерации в связи с реализацией международного автоматического обмена информацией и документацией по международным группам компаний" от 27.11.2017 № 340-ФЗ).

[12] Federal Law of the Russian Federation No 427-FZ dated December 28, 2017 "On enforcement of the Federal Law "On currency regulation and currency control". Legislation Bulletin of the Russian Federation. 2018. No 1 (part 1). Art. 11. (Федеральный закон "О внесении изменений в Федеральный закон 'О валютном регулировании и валютном контроле'" от 28.12.2017 № 427-ФЗ).

No 291-FZ "On Special Administrative Areas in the Territories of the Kaliningrad Region and Primorsky Krai",[13] etc.

Thus, in the Russian Federation, the activities of offshore companies are being gradually limited in order to reduce capital outflows from the Russian Federation and curb offshore tax avoidance schemes. Modern deoffshorization processes take place globally, since many financial and material flows are global, and tax systems are local. This largely determines the law-making processes that are aimed at reducing the "grey zones" in the shadow economy, making "shadow evasion" unprofitable.

There is another example of strengthening normative regulations in order to reduce economic "grey zones". This is the formation of a system of requirements and prohibitions for public and municipal officers. For example, in 2011, the Federal Law "On Countering Corruption"[14] was supplemented with Article 12.3, which obliges officers to transfer securities into trust management in order to avoid conflicts of interest. In 2013, there was a norm that prohibited the use of foreign financial instruments and opening accounts in foreign banks located outside the Russian Federation (Article 7.1). These measures were taken in order to prevent the possibility of withdrawing budgetary funds abroad, as well as to avoid real or potential conflicts of interest in public and municipal service.

However, ambiguous situations arise in applying such norms. The above norms are aimed, first of all, at individuals holding corresponding positions, and at the same time having substantial funds, securities and other material assets. However, public and municipal officers who own securities with low cost and low income should also pass on their

[13] Federal Law of the Russian Federation No 291-FZ dated August 3, 2018 "On Special Administrative Areas in the Territories of the Kaliningrad Region and Primorsky Krai". Legislation Bulletin of the Russian Federation. 2018. No 32 (part 1). Art. 5084. (Федеральный закон "О специальных административных районах на территориях Калининградской области и Приморского края" от 03.08.2018. № 291-ФЗ).

[14] Federal Law of the Russian Federation No 273-FZ dated December 25, 2008 "On Countering Corruption". Legislation Bulletin of the Russian Federation. 2008. No 52 (part 1). Art. 6228. (Федеральный закон "О противодействии коррупции" от 25.12.2008 № 273-ФЗ).

property to trust management. For example, the Commission of Federal Public Officers with Conduct Requirements and Settling Interest Conflicts considered a case when a public officer declared income 6000 rubles from securities cost of 1000 rubles. Securities were included in the total mass of inherited property. It is very difficult to transfer such papers to trust management.[15] Obviously, in this case, the public officer did not intend to go into the "grey zone" — given the declaration that was made. It is possible that law-making efforts aimed at specifying the norms containing restrictions and prohibitions referring to officials will serve to narrow the "grey zone".

So, the law-making activity as a way to counteract the development of pre-criminal shadow economy is aimed at reducing the "grey zone". This is not always associated with over-regulation. Sometimes the result of law-making is norms that reduce the pressure on the economy. For example, this can be by reduction of the tax burden, abolishing licensing of certain types of activities, and simplifying reporting and state control in the form of supervision.

In the fight against the shadow economy law-makers need to act carefully to formulate such norms that regulate the activities of business entities but do not make them impossible. However, law-making and the shadow economy seem to enter the race ahead of the curve. — that is the law is constantly playing catch up with the shadow economy — reactive not proactive. The state represented by the competent authorities detect the "grey zone" and regulate it, but gaps in the legislation can be found and the shadow sector in the economy is able to exploit these. In this race ahead of the curve, one paradox must be taken into account: if the normativity regulation in the "grey zone" becomes stronger, the "grey zone" grows wider as people find ways to exploit it. H. de Soto suggests that the nature of the shadow economy involves people being forced to go into the grey and black zones, because the costs of legal economic activity significantly exceed the benefits.[16] Thus, there is an increasing doubt both in the justice of the law and integrity of the law-makers, when it becomes too expensive to uphold the law. This further

[15] Archive of the Prosecutor's Office of the Republic of Mordovia, 2016.

[16] De Soto, 1995, 320.

contributes to the expansion of the "gray zone" and the crowding out of more and more legal economic practices.

At the same time, there are areas in which normativity regulation is necessary. For example, in the field of education and science. For example, the shadow practices of writing articles, qualification papers, and dissertations have recently flourished thanks to the internet. "Buyers" of academic papers (through for example websites that offer paper-writing services) are on discovery, punished by being deprived of their degrees and subsequent non-recognition by the academic community. But as a rule people who provide such "grey" services are not brought to justice. The academic community in Russia is in great need of normative regulation of this "grey zone". In 2018, the Federal Law "On enforcement of Article 7 of the Federal Law 'On Advertising'"[17] prohibited only advertising services for the preparation and writing of academic papers, but this did not solve the problem of shadow practices themselves occurring.

## 3. LAW-MAKING ACTIVITY AS A WAY TO COUNTERACT THE CRIMINAL SHADOW ECONOMY

Law-making efforts are needed in the fight against both pre-criminal and criminal shadow economy. The criminal shadow economy is already a "black zone", which is completely outside the normative area. This kind of law-making is carried out mainly within the criminal law. The main trends are related to the tightening of sanctions for committing "shadow" economic crimes and the criminalisation of certain types of acts. Such offences relate to white-collar crime, that has is characterised by "elitism".[18]

Sometimes state officials integrate themselves into the criminal shadow circles and economy. Budget funds are transferred to the

[17] Federal Law of the Russian Federation No 383-FZ dated October 30, 2018 "On enforcement of Article 7 of the Federal Law "On Advertising". Legislation Bulletin of the Russian Federation. 2018. No 45. Art. 6838. (Федеральный закон "О внесении изменения в статью 7 Федерального закона 'О рекламе'" от 30.10.2018 № 383-ФЗ).

[18] Gottschalk, Gunnesdal, 2018, 155.

shadow sector, but then they do not necessarily return to the legal area. In order to prevent the motion of budget funds to the "shadow", lawmakers create not only criminal law norms, but also norms that change the structure of spending money obtained through corruption. So, for example, control over the compliance of officials expenses with their incomes was introduced.

Paragraph 1 of Part 1 of Article 2 of the Federal Law "On the Control of Compliance Personal of expenses by those holding the state positions, and other persons, to their income"[19] contains a list of positions which need to meet the following requirement. If the purchase of property is carried out, the value of which exceeds the income of the official and his or her spouse for the last three years, then they have to explain the origin of the funds used to acquire the property. Thus, the state not only combats bribery, but also limits the means of investing criminal incomes. However, the other shadow areas allowing illegally obtained funds to be spent are currently entering the race ahead of the curve — ahead of the ability of the law and its practices to restrict, control, and enforce compliance to norms.

Thus, in addition to tightening the sanctions for economic crimes, it is necessary to improve the prevention of criminal activity. Also, it an increase of the effectiveness of various law enforcement agencies activities coordination in combating criminal shadow economy is merited — with new and wider powers.

## 4. CONCLUSION

Globalization does not only provide chances for economic well-being, but it also creates problems associated with the development of the shadow economy. Therefore, it seems necessary to conduct law-making activities at the international level aimed at improving the normativity regulation of international organizations such as the FATF

[19] Federal Law of the Russian Federation No 230-FZ dated December 3, 2012 "On the Control of Compliance Personal of expenses by those holding the state positions, and other persons, to their income". Legislation Bulletin of the Russian Federation. 2012. No 50 (part 4). Art. 6953. (Федеральный закон "О контроле за соответствием расходов лиц, замещающих государственные должности, и иных лиц их доходам" от 03.12.2012 № 230-ФЗ).

(Financial Action Task Force on Money Laundering), the International Labor Organisation, and the International Monetary Fund, the World Bank, etc.

International law-making is especially needed in the circumstances of a digital shadow economy development.[20] One example might be the Dark Web with its criminal transactions. Law-making activity of special state bodies must be supported by special prognostic methods for winning the race ahead of the curve with digital shadow economy. For example, effective criminal and administrative responsibilities not only for illegal e-traders, but for "a consumer as a party of digital shadow transaction"[21] — such as the purchaser of fake academic papers. Further needs are new e-government and e-police development strategies.

In conclusion, it needs to be noted that the law-making activity is one of the most important ways to combat the shadow economy. At the same time, such activities should be carried out for common good and take into account dynamically changing legal relations. The "gray zones" in the pre-criminal economy are reduced both by introducing normativity requirements, restrictions and prohibitions, and, on the contrary, by easing and simplifying the procedures of registration, licensing, and control of economic activity. Other principles are implemented in the case of combating the criminal shadow economy, when severe sanctions are imposed for the committing of illegal acts. However, the criminal shadow economy is closely merged with pre-criminal. Therefore, law-makers must carefully weigh the risks and calculate the possible consequences of norm-applying in order not to have a reverse effect of their actions.

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# TAXATION LAW

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# BENEFICIAL OWNERSHIP FOR PURPOSES OF APPLYING OF DOUBLE TAX TREATIES: THE VIEW FROM RUSSIAN COURTS

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**Abstract**

The topic of taxation is one which finds few enthusiasts outside the field of tax specialists. Yet, public indignation when large companies are discovered to be avoiding large amounts of tax is common — especially when set alongside matters such as rising prices, salaries which do not match inflation, and cuts to public services due to reduced sums of money in the public purse to pay for essential infrastructure and services. Accordingly, the basis on which such large companies — and affluent persons can avoid (not evade) paying taxes becomes interesting. The question as to how to secure better tax income stream from such companies and persons becomes a matter to which States increasingly pay attention. To this end, the existing international system of double tax treaties provides a mechanism whereby dividend payments can avoid tax liability when they are cunningly manipulated with a number of financial entities linked together. The concept of "beneficial ownership" has been developed internationally as a tool to leverage income tax revenue out of such tax avoidance schemes. The tax code of the Russian Federation now incorporates provision regarding such beneficial ownership — yet its implementation (both in Russia and abroad)

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is in its infancy, There are ambiguities and anomalies. This paper explores this concept of beneficial ownership — historically, in theory and in practice — and signposts directions for the taxation law and practice to develop.

**Keywords**

Beneficial ownership, tax, taxation, Russian Federation

**CONTENTS**



## 1. INTRODUCTION

The concept of "beneficial ownership" is a new and unexplored concept in both theory and practice yet it is provided for in the national tax legislation of the Russian Federation — which has a big importance for international taxation involving subjects of the Russian Federation. The story of this concept starts in the middle of 20th century. In Russian Federation, studying of concept of the "beneficial ownership" starts after dissolution of USSR only. In present time there a few researches of the concept of the "beneficial ownership" in Russian tax science. Attention to this team is increased after year 2015 when the concept of the "beneficial ownership" was implemented in national legislation.

The Russian Federation is developing this in practice now and the courts and their positions will play a big role in the process of interpreting and implementing this concept in practice. In this paper author aims:

— to study the developing of concept of the "beneficial ownership" in Russian legislation;

— to show the role of Russian companies in withholding taxes in deals with foreign companies and in applying of concept of the "beneficial ownership" in practice;

— to review court positions on this topic related with "beneficial ownership" based on those few cases that so far exist.

## 2. DOUBLE TAX TREATIES AS LEGAL INSTRUMENT FOR COORDINATION OF TAX POLICIES OF STATES

The concept of "beneficial ownership" in respect to international taxation was first mentioned in the protocol to the 1966 double tax treaty between the United Kingdom and the USA. So, the birth of the concept of "beneficial ownership" was in the states of the common law system. This is one of the reasons why there were no definition of this concept in 1966.

This concept has developed over the years. OECD's Model Tax Convention on Income and on Capital issued by OECD (OECD's Model Convention) uses this concept for now. Firstly, "beneficial ownership" concept was related with agents or nominees. Concept was expanded on conduit companies following the Conduit Companies Report of year 1986. Conduit companies are the companies which are interposed in a state — party of double tax treaty to forward passive income to company (people) which are not interposed in state — party of double tax treaty.[2]

Double tax treaties are necessary instruments for the coordination of tax policies of different countries. The right of a state to impose taxes on its territory is an inseparable part of sovereignty, so called "fiscal sovereignty".[3]

The right of a state to impose taxation on an exact person or legal entity is related with the concept of identifying a "tax resident".

Traditionally, tax residents were considered only physical persons, who have a link with the territory of a state as regards the matter of taxation. The legal status of a tax resident is not connected with their status of citizenship. A foreigner may be a tax resident of another state,

[2] See Jain S., Prebble J., Bunting K. Conduit companies, beneficial ownership, and the test of substantive business activity in claims for relief under double tax treaties. eJournal of Tax Research. 2013. Vol. 11. No 3. Pp. 386–433.

[3] Terra B., Wattel P. European Tax Law. 5th ed. Hague, 2008. Pp. 8–9.

if he satisfies the requirements of the tax legislation of that state, just as a citizen of that state may under certain circumstances not be tax resident.

Usually, to become tax resident in most countries it is sufficient for a physical person to just to be on territory of state for some period of time during a tax period. For example, under Russian tax legislation, a physical person present in the territory of Russia forat least 183 days in a prior 12 month period becomes a tax resident. The tax resident shall bear a total tax burden to the state of tax residence as regards all of his income — irrespective of whichever state where that income was earned — so called "worldwide income".

This does not mean that a person who is not a tax resident of a state shall not pay taxes from their income to this state at all if their residency on the territory of the state is less than the tax eligibility period. Tax is still levied, but on a different basis. The tax rate for non-tax residents is usually higher than for tax residents.

The taxation of the income of legal entities was traditionally linked with their place of juridical registration. Due to this the institute of tax residence of legal entities for some time was not implemented in the Tax Code in Russian Federation.

Since 2015 the rules of tax residence for legal entities was added to the Russian Tax Code. Along with legal entities, which are registered in Russian Federation, other foreign legal entities shall also be considered as tax residents of Russian Federation: These include:

— foreign legal entities which shall be considered as tax residents of Russian Federation under double tax treaties in which one of the parties is the Russian Federation;

— foreign legal entities, which have place of effective management in the Russian Federation.

The territory of the Russian Federation shall be considered as a place of effective management if the executive bodies of the legal entities or the main managing person are acting from within the territory of Russian Federation irrespective of their place of registration de-jure.[4]

[4] Shashkova A. V. (2018) Corporations and the State: Emerging of the Problem of Corporate Liability. Opción, 34 (Special No 14) Pp. 432–458.

The tax legislation of the Russian Federation provides foreign legal entities the opportunity for self-recognition as a tax resident of Russian Federation in special cases — notably with regard to participation in oil and gas development projects and international transportations projects.

The institute of tax residence is regulated firstly by national legislation. Each state determines the conditions for the application of tax resident status to legal or physical persons by its own will. Such an approach leads to competition between fiscal jurisdictions and provides opportunities for multi-taxation when a legal entity or physical person may be recognised as a tax resident of several states — or when income received by a non-resident in one state is obliged to pay tax in this state as well as on the basis of it being a source of income in the place where they are a tax resident.

To balance the fiscal interests of different states and private interests of taxpayers in cross-border economic activity double tax treaties between different states are concluded.[5]

Generally, double taxation under the definition of the OECD's arises if all of the following conditions are met:

— imposition of taxes shall be made in two (or more) states;

— imposition of taxes shall be made in respect of the same subject matter;

— impositions of taxes shall be made for an identical period;

— impositions of taxes shall be made on the same taxpayer;

— taxes which are imposed shall be comparable.[6]

Only, if these conditions mentioned above are all present is there is a legal basis for the determination of double-taxation. So, these conditions are also conditions for the application of a double tax treaty (if one exists between two states) to exact business transactions.

For the purposes of the regulation of double taxation, all types of income are divided into two groups: "passive" and "active". We can

[5] Kudryashova E. V. Cross-border interest rate swaps and their treatment for regulatory and tax purposes. Kutafin University Law Review. 2018. T. 5 No 1. Pp. 198–208.

[6] http://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-2017-full-version-g2g972ee-en.htm.

see the definition of "passive income" in the OECD's glossary of tax terms: As to "passive income — this is income in respect of which, broadly speaking, the recipient does not participate in the business activity giving rise to the income, e.g. dividends, interest, rental income, royalties, etc."[7] There is no similar definition though for "active income" in OECD's glossary of tax terms, so, it can be given based on "negative definition" of "passive income", as income in respect of participation of the recipient in the business activity.

Usually income from business activity by double tax treaties shall be due in the state of tax residence of the recipient of the income. Passive income may be obliged in both states, but usually in double tax treaties for state-source of such income there is a lower rate than in national legislation.

As an example, the Tax Code of the Russian Federation provides that the dividend income paid to foreign companies by Russian companies shall be due in the Russian Federation with a tax rate of 15 %. In double tax treaties concluded by the Russian Federation there is instead a tax rate for dividend income between 5 % to 10 %.

At the moment, most states use a Model Tax Convention on Income and on Capital issued by the OECD (further Convention). The structure of Convention consists seven chapters: Scope of convention, definitions, taxation of income, taxation of capital, methods for elimination of double taxation, special provisions and final provisions.

All kinds of income are divided in Convention into twenty categories: income from immovable property, business profits, international shipping and air transport, associated enterprises, dividend, royalties, capital gains, income from employment, director's fees, entertainers and sportspersons, pensions, government service, students, and other income. As can be seen, we first see identification of the kinds of income of enterprises, and then physical persons.[8]

Within the Model Tax Convention comments by OECD are provided to each article. These comments have significant influence on states' tax policies, fights with the erosion of tax bases and on the development

[7] http://www.oecd.org/ctp/glossaryoftaxterms.htm.

[8] https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1.

of national legislation in this matter. For example, comments of the OECD to Article 10 "Dividends" clarify the key position that the profit of a company is not the profit of shareholders, so the distribution of a company's profit as dividends among shareholders shall be considered as income from capital. Due to this position it is obvious that the taxation of dividends are not double-taxation of company's profit, because there are different subjects of taxation — the company pays tax on the income from business activity, shareholders — tax on income from capital, which they provide to company for using.

The concept of "beneficial ownership" is also is mentioned in the comments of the OECD to Article 10 "Dividends" of Convention.

The main purpose of a double tax treaty is to protect business actors from double taxation and protect free transfers of goods, services, capital and labour force. Opportunities of reducing the total tax burden for multinational companies lead to the possibility of aggressive tax planning with a goal of tax avoidance. Multinational companies use the net of double tax treaties to spread production and profits between fiscal jurisdictions in ways to secure a minimal total tax burden.

Tax avoidance should not be confused with tax evasion. Tax avoidance means that taxpayer uses tax legislation with maximal effectiveness to reduce tax payments. Tax avoidance is distinguished legally in two ways:

Firstly, using provisions of law which allow the reduction of tax obligations or using the lack of provisions in the law to partly avoid taxation. Tax evasion, on the other hand, is always made in an illegal form, as kind of criminal action.[9]

So, using of lack of legal provisions in double tax treaties is a way of tax avoidance in an aggressive manner when the taxpayer artificially makes conditions for receiving tax benefits which in a normal way stimulates good taxpayers. Despite the legal character of tax avoidance it is very harmful for the financial stability of states. To combat aggressive tax avoidance the OECD works out recommendations and new concepts which are implemented in bilateral and multilateral tax treaties and in

[9] Nwocha M. E. Tax Evasion and the law in Nigeria. Problemy zakonnosty. 2017. No 139. Pp. 286–295.

national legislation acts. In fact more close coordinations of states in fiscal affairs and exchange of relevant financial information between states are developed as a result.[10]

One such concept that helps states to arrest such activities is to encourage multinational companies shareholders "is the concept of beneficial ownership" Due to gradual developing of Russian national tax legislation related with transnational business activity this concept was implemented in Russian legislation in year 2015. This has been described succinctly as follows*:*

*Legal ownership of an asset means that the legal person or individual ("Person") claiming legal ownership is regarded to be the legal owner under the (civil) laws of the country in which the Person and/or the asset is located. Under the civil laws of most countries, legal ownership will be assumed for a Person who has "possession" of the asset. "Possession" of the asset means either physical possession or official registration of the asset in the name of a Person. Initially, a legal owner also has full economic ownership of the asset. To be "Beneficial Owner" of an asset, it is understood that one should at least be the legal owner of the asset. A legal owner can transfer (part of) the risk associated to the asset to another Person. This risk transfer is a transfer of (part of the) economic ownership. It is clear that being merely the legal owner ("agent" or "nominee") of an asset, after having transferred the full economic ownership of the asset, is not sufficient to be regarded as the Beneficial Owner. It can be questioned whether the full economic risk can be transferred.*[11]

The first mention of the "beneficial ownership" concept in Russian practice is to be found in the 1977 in double tax treaty between Spain and USSR. Command economy in Soviet Union meant specific tax system and government monopoly on foreign trading. Disputes of

[10] Kudryshova E. V., Mirzaev R. M. On the issue of tax harmonisation processes within regional economic integration. Kutafin University Law Review. 2019. V. 6. No 1. Pp. 91–107.

[11] Commentary on: OECD Model tax convention: Revised proposals concerning the meaning of "Beneficial Owner" in articles 10, 11 and 12. 19 October 2012 to 15 December 2012 — MLL van Bladel, see https://www.oecd.org/ctp/treaties/BENOWNMLL_vanBladel.pdf.

taxpayers with government based on double tax treaties could not come up because of absence of relevant relations. That's why concept of the "beneficial ownership" was not studied in theory and practice and was not reflected in national legislation in soviet time.

Issues of international taxation become more actual for Russian Federation after dissolution of USSR and transformation of economic and tax systems. As of today, there are already eighty four double tax treaties concluded by the Russian Federation with such countries as: USA, the United Kingdom, China, Germany, Cyprus, France and others and in many of them concept of the "beneficial ownership" is mentioned.

It was taken years for Russian Federation to develop national tax legislation for implementation of actual concept of the "beneficial ownership" based on actual Recommendations of OECD and theory concepts.

## 3. LEGAL REGULATION OF DOUBLE TAXATION BY NATIONAL LEGISLATION OF RUSSIAN FEDERATION

Since the dissolution of USSR concept of beneficial ownership in Russia developed and amplified with constant growth of its importance. The three stages could be identified once we analyse the development of legal regulation in Russian Federation:

— first stage: 1991–2001 — an absence of any special regulation on avoiding of double taxation in national legislation, direct acting of double tax treaties;

— second stage: 2002–2014 — implementation of double taxation regulations in the Tax Code of Russia. Formal rules for applying of double tax treaties;

— third stage: 2015 — present time — implementation of "beneficial ownership" concept in national tax legislation of Russian Federation.

At the first stage questions of double taxation were regulated by the Law of Russian Federation "About corporate profit tax". According to these old rules withholding taxes from foreign contractors shall be calculated and paid by Russian companies. Such companies are called in Tax Code as "tax agents". Withholding taxes shall be calculated in matter of income paid by tax agents to foreign companies only for "passive

income", such as dividend, royalty, interest, without any conditions or exemptions. Foreign companies by themselves had to request the Russian government for the application of double tax treaties in a year after the withholding of relevant tax and return to them amount of tax withhold. The right to request for this return of tax withheld was expired after a one year period. So, at this stage the Russian government and foreign taxpayers were going into direct legal relationships in the process of applying double tax treaty. Regulations in law did not consist of any of rules for a foreign company about any order of providing arequest for the application of double tax treaty nor about any list of documents for proving of right on applying of double tax treaty.

With the acceptance of the Tax Code, strict rules for implementing double tax treaties were applied. Foreign companies no longer had to directly communicate with the Government. The application of double tax treaties from the year 2002 was the burden of tax agents. "Passive income" which shall be obliged in Russian Federation was writren down in the Tax Code in more detail: dividends, interest, royalty, financial operations, sales of real estate, rent income, income from international transportation, claim income, etc. The List of "passive income" which shall becomes the subject of duty under corporate profit tax in Russia was not limited. Tax inspectors and courts were able to treat any income as "passive" regardless of character of income. On the other hand, it is directly written in the Tax Code that income from sales of works, services and goods shall be not subject at all to profit tax in the Russian Federation.

In the years 2002–2014 the rules for applying of double tax treaties were very formal.

Only two conditions were enough to qualify for exemption from taxation in the Russian Federation for a lower tax rate:

— acting (as ratified by Federal Council) on the basis of double tax treaty between the Russian Federation and a state in which the foreign company has the status of tax resident;

— documental confirmation of tax residence of foreign company issued by authorised body of state.

In the Tax Code of Russian Federation there are no explanations about what is to be understand by "documental confirmation of tax

residence." By common practice such documents are issued by a fiscal body of state as a "certificate of tax residence." The specific fiscal body which is authorised for confirmation of such tax resident status is usually mentioned in the text of a relevant double tax treaty or empowered to issue such conformation by national legislation. In the Russian Federation at the current time, it is the Federal Tax Service.

All documents issued by foreign state body as to confirmation of tax residence has to be legalised in the proper way. Proper legalisation means consul legalistion. At the same time, most states at the present time are partners of the Hague Convention on the cancellation of legalisation requirements for foreign official documents (made in Hague on October, 5 of year 1961). Under this Convention the placing of an apostille on document shall be considered as legalisation in the proper way. In the Russian Federation the authorised body for placing an apostille is the Ministry of Justice. In double tax treaties parties may agree about the acceptance of documents on confirmation of tax residency without apostille.

The Federal Tax Service and the courts in Russia have a very formal approach about apostille on documents confirming tax residence. They do not accept such documents without apostille if conditions about the cancellation of apostille exists in treaties not directly related to issues of double taxation, for example, in treaties about mutual help in civil, criminal and other legal relations.

The Russian Federation has currently agreed about cancellation of apostille on documents confirming tax residence with the following states: Armenia, Kazakhstan, Belorussia, Turkmenistan, Uzbekistan, Kyrgyzstan, Germany, Belgium and others.

The legal relation about the application of double tax treaty benefits from year 2002 becomes more complex. The main responsibility for fulfilling all formalities related with the application of double tax treaty rests with the Russian company — the participant of the deal with a foreign company — which shall act as tax agent. The process of applying the double tax treaty can be simplified using the following steps:

— The legal fact of income appearing to a foreign company from Russian company.

— Determination by the Russian company of the kind of income — passive or not?

— If the income is passive — checking if there is an acting double tax treaty between Russian Federation and the state of tax residency of foreign company.

— If there is an acting double tax treaty — requesting confirmation of the tax resident's status.

— Identification of income shall be paid to the foreign company with the exact kind of income in the double tax treaty.

— Applying the reduced tax rate or exemption to the income of foreign company.;

— Payment to foreign company with consideration of tax withheld.

— The payment of tax withheld to the budget of the Russian Federation no later than the day after payment to the foreign company.

— By end of the quarter providing to Federal Tax Service the reporting form about income paid to foreign companies for the quarter ended.

The reporting form consists of data about all payments to the foreign contractors for the previous quarter without any exemptions. Common court practice in Russian Federation confirms that the absence of tax withheld in deals with foreign companies (even if income is "active") is not a basis for not providing the reporting form about income paid to foreign companies. Still, money sanctions in Russian Federation for non provision of this reporting form are very small. Far more serious fines may be charged to tax agents for not withholding tax in the absence of documents confirming the tax resident's status of a foreign provider in another state.

By direct legislative rules these documents shall be received by the tax agent before payment to a foreign contractor. Still courts are flexible enough in this matter and free tax agents from responsibility if the tax agent receives documents on tax residency after payment and from the content of these documents it is possible to establish that confirmation correlates to the tax period in which payment was done.

The tax agent is not obliged to provide documents on the confirmation of tax residence status of his foreign contractors to the Federal Tax Service after each payment or by end of some period.

Providing documents related to payments to a foreign company shall be made only upon the official request of tax inspectors during a desk or field tax audit. There is a separate responsibility and liability for the non-fulfillment of official requests from tax inspectors.

One more thing about the responsibility for non-withholding of tax is related to the position of the Plenum of the Supreme Arbitration Court of Russian Federation which stipulated in its Resolution in y 2013 a new position about duties of tax agent.

Previously, a tax agent was not considered as a subject of tax obligation related with payment to foreign company. Only a foreign company shall be considered as a taxpayer, and a Russian company shall only act as an agent between the foreign taxpayer and the budget of the Russian Federation. So, in the case of non-withholding of tax, the Russian company shall not bear a tax burden in lieu of the foreign company — only responsibility for non-fulfilling the tax agent's obligations (20 % from tax amount not withhold). By the position of the Plenum of the Supreme Arbitration Court of Russian Federation a foreign provider is not a tax resident of Russian Federation and not under the control of Russian tax bodies. Thus the Federal Tax Service has no powers to force a foreign company to pay tax in Russia if the tax agent avoids his duties of tax withholding. This may lead to easy breaking of rules of the tax legislation in the Russian Federation and foreign companies avoiding taxation in Russian Federation by collusion with Russian companies. So, the Resolution of the Plenum of the Supreme Arbitration Court stipulates that in the case of a Russian company avoiding its duties as a tax agent and not withholding tax from income paid to foreign company, such a Russian company shall pay the tax not withheld by itself.

It is an effective measure to fight tax avoidance using of lacunae or gaps in Russian tax legislation, but it does not directly correlate with the provisions of the Tax Code of the Russian Federation. For six years passed there is no any clarifications in Tax Code on this matter were done.. The Plenum of Supreme Arbitration Court had not just interpreted legislation, but in fact created new legislation rule, which is not directly set in Tax Code.

The tightening of tax legislation and court tax practice is a normal practice for the Russian Federation after the world financial crisis with the background of foreign sanctions and the reduction of oil and gas prices. To secure budget funds and increase efficiency of collecting of taxes new concepts to help in the fight with tax avoidance recommended by OECD were implemented in the tax legislation of Russian Federation. One of them is, as mentioned before, "beneficial ownership".

## 4. CONCEPT OF "BENEFICIAL OWNERSHIP" IN RUSSIAN COURT PRACTICE

To understand the necessity of "beneficial ownership" the concept for international taxation, it is necessary to review the most common and well-known (including to courts) scheme of tax avoidance. This is the one usually used by Russian companies to enjoy benefits from using double tax treaties without real economic purposes in transactions with a foreign company — a tax resident of a state, by double tax treaty with which the Russian company tries to receive tax benefits.

The most popular scheme is used by Russian companies to secure their assets and minimise tax burden is related to linking of companies in offshore states, and the first foreign company in this link shall be a tax resident of a state with which Russian Federation has double tax treaty.

To implement this scheme in reality in respect of dividend income (the most popular kind of income for tax avoidance) the foreign company-shareholder of a Russian company is registered in Cyprus. The Russian Federation has a double tax treaty with Cyprus by which tax rate on dividend income shall be 5 % (on the condition that the shareholder has a major share in the Russian company) instead of the 15 % rate required under the Tax Code. After receiving the dividend income the Cyprus company pays a minimal registration fee in the budget of Cyprus and transfers the dividend income to its shareholder which is usually a tax resident of the British Virgin Islands. The Russian Federation has no double tax treaty with the British Virgin Islands and in case of direct payment of dividend income to such company, taxation in Russian Federation shall be made by tax rate 15 %. The company in the

British Virgin Islands distributes dividend income to real shareholders in the next link

By this scheme as real receiver of dividend income shall be considered not a Cyprus company, but an unidentified person (legal entity or physical person) who really manages the dividend income and enjoys all benefits related with this income. An artificial company-shareholder in Cyprus is needed only for applying reduced tax rate on the dividend income by double tax treaty between the Russian Federation and Cyprus.

There are three different situations when such scheme may occur:

— real shareholders are Russian physical persons or legal entities who want to stay anonymous and save tax payments by applying of reduced tax rate (usually 5 %) by double tax treaty instead of the tax rate set by Russian tax legislation — 13 %;

— real shareholder is a tax resident of the state which does not have a double tax treaty with Russian Federation. In this case the tax rate of 15 % shall be applied to dividend income by Russian tax legislation;

— real shareholder is a tax resident of the state which has double tax treaty with Russian Federation, but tax rate by this double tax treaty is higher than by double tax treaty between Russian Federation and Cyprus. The third situation is very rare in practice.

Each situation causes great economic harm to the Russian Federation as public funds of Russia are deprived of income.[12] Also, the implementation of such schemes in business practice are harmful for good taxpayers who have a higher tax burden than not so socially responsible businessmen. As a result such fundamental principles as equality and justice of taxation are broken.

For such cases the concept of "beneficial ownership" is needed. There were attempts to implement it in the national tax legislation of the Russian Federation since year 2009, but finally relevant provisions were implemented in the Tax Code only from 2015.

[12] Kudryashova E. V. (2014) State Planning and Budgeting in the Russian Federation. In: Joyce P., Bryson J. M., Holzer M. (eds) Developments in Strategic and Public Management: Studies in the US and Europe. Palgrave Macmillan, London. https://doi.org/10.1057/9781137336972_10.

The principle of this scheme is this: If a tax resident, a receiver of income is an artificial structure which is not managed income and it is obvious that it is another person who enjoys benefits from theincome received, taxation shall be made considering the tax residence this very person.

This concept for tax purposes should not be confused with the concept of a beneficial owner in civil law. In all cases of business activity the final beneficiary will be a physical person always, because legal entity is a "fiction" which was made by physical persons (directly or through other legal entities) to manage their capital.[13]

Due to this all dividend income is an income of physical persons, payment for the provision of their capital. By the concept of "beneficial ownership" the beneficial owner is not an obligatory physical person. It can be legal entity also which manages income and "decide about economical fate of income received." Applying the approach that beneficial owner must be a physical person (the final link in chain of shareholders) is harmful for good taxpayers legal entities which in this case may lose all benefits by double tax treaty without any obvious reasons.

Such approach will be harmful for the prior goal of the concept of "beneficial ownership" — to provide equality and justice of international taxation within of freedom of movement of goods, capital, works and services.

In Russian legislation the concept of "beneficial ownership" set as an "actual right on income" shall be treated in meaning the "right on managing income and deciding of economic fate of income." It is a very vague definition for such a sensitive sphere of legislation as tax. There is an opinion in Russian legal science that such a vague approach to the establishment of beneficial owner of an income may lead to the position that no such person exists.[14] In other opinions in Russian legal science there is the opinion that the beneficial owner is the person who receives benefits from income and benefits from a reduced taxation

[13] See The Puppet masters (how the corrupt use legal structures to hide stolen assets and what to do about it). The World Bank, 2011. P. 18.

[14] Brook B. Y. Perspectivy codificacii conspecii beneficiarnogo sobstvennika v rossijskom nalogovom zakonodatelstve. Zakon. 2014. No 8. Pp. 43–57.

(tax exemption).[15] The OECD's comment to the Model Tax Convention is based on a "right to use and enjoy" which shall not be limited by contractual or legal obligations.[16] As it was mentioned before, concept of the "beneficial ownership" was birthed in common law system, where court practice is important in creating of law. It is worry of society that concept of "beneficial ownership" is not have official definition in legislation and shall be treated by court practice.[17]

Through these definitions we may see some uncertainty in understanding the "beneficial ownership" concept which may lead to an ambiguous interpretation in Russian practice. Moreover, Russian tax legislation setss obligation on tax agents to establish who is the beneficial owner of income paid, and tax agent shall prove it by evidence to be provided to tax agents by a foreign company. With the setting of this obligation Russian tax legislation does not provide any details about how "actual right on income" shall be proved.

Presence of some evidences before payment with the certificate of tax residency before payment as of now is another condition for applying a double tax treaty. By literal reading of the new provisions we may see that the absence of some evidences of "actual right on income" on the date of payment is enough for rejecting a possibility of applying of double tax treaty without any investigation, but the presence of such evidences is not enough to be free from the charges of tax inspectors who will collect their own evidences.

In practice due to such vague regulations there are many different approaches in collecting of evidences on "actual right on income" by Russian companies. Some companies request from foreign partners just formal letters with confirmation that the foreign partner really manages the income received. Other companies collect dozens of documents from contracts up to bank documents of a foreign partner. The Ministry of Finance of Russian Federation tries to give official explanations that

[15] See: Khavanova I. A. Mezdunarodnye nalogovye dogovory Rossijskoy Federacii ob izbejanii dvoinogo nalogooblojenia.

[16] https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page629.

[17] See Baker P. Beneficial ownership: after Indofood. URL: http://taxbar.com/wp-content/uploads/2016/01/Beneficial_Ownership_PB.pdf.

vague provisions about possible evidences of "actual right on income" actually help tax agents allowing them to find the best suitable evidences in a specific case, still the main idea from their advice is "the more — the better."

In practice tax inspectors try to challenge in courts only obvious tax avoidance schemes usually conducted with the participation of Cyprus companies. In this case the formal letter that a foreign partner really manages income received will be not accepted as evidence even in court, which will instead pay more attention to evidences collected by tax inspectors through the exchange of financial information with Cyprus fiscal bodies.

Practice shifts the burden of proof from the tax bodies to the tax agent, who shall know the beneficial owner of income paid. Even in the reporting form on income paid to foreign companies by tax agents there shall be added information about the beneficial owner of income in the following ways — and the tax agent can choose which

— tax agent knows that foreign partner has "actual right on income";

— foreign partner provides information about absence of "actual right on income" and the tax agent knows which third party has it;

— foreign partner provides information about the absence of an "actual right on income" and the tax agent does not know which third party has it;

— tax agent knows that foreign partner has no "actual right on income" and knows that some third party has "actual right on income";

— tax agent has common information about deals with financial instruments (a special case);

— tax agent does not know who has "actual right on income".

From the literal reading of the provisions of the Tax Code it is clear that only the first option may be the basis for applying a double tax treaty with the state in which the foreign partner is a tax resident. At the same time in case of a third option it is possible for a tax agent to apply a double tax treaty (if one exists) with the state of the actual beneficial owner's tax residence if tax agent has enough evidences.

Due to the net of agreements with other states (including Cyprus) the Federal Tax Service of Russian Federation may receive enough evidences from tax bodies of other states in respect of the international

exchange of financial information. It allowed the Federal Tax Service easy enough wins in courts cases versus Russian companies which build structures of dividends payments using the link of Cyprus to the British Virgin Islands.

Court cases in the matter of "beneficial ownership" in Russian Federation are reviewed by Arbitration Courts under the rules of the Arbitral Procedural Court. Arbitration Courts in the Russian Federation review cases related with business activities of entrepreneurs and legal entities. By the procedural rules, the burden of proof in tax disputes is upon the Federal Tax Service. In cases related with the concept of "beneficial ownership" only "negative proof" by Federal Tax Service is sufficient.

By court position, the Federal Tax Service shall only prove that the foreign company — receiver of income — has no "actual right on that income" and cannot establish an exact beneficial owner. In such a case, it is enough to reject applying a double tax treaty and instead apply tax rates according to Russian Tax Code.

At the same time. the tax agent, according to literal provisions of theTax Code and court practice, has to prove exactly who is the beneficial owner of the income paid, especially if he wants to apply a double tax treaty with the state in which the beneficial owner is a tax resident.

Such position is in contradiction with the Arbitration Procedural Code of Russian Federation and the principle of justice of taxation. Tax bodies in any event have more powers to establish exactly who the beneficial owner of income are and which exact taxation shall be applied. Such court practice shifts the balance in respect of the fiscal goals of state. At the same time, it is a common tendancy in world practice, because the same position may be found in the case reviewed by the Court of European Union "*T. Danmark, Y. Denmark vs. Ministry of Taxation of Denmark*".[18]

In rare court practice related with "beneficial ownership" there there do not appear to be any cases where courts have used this position. The Federal Tax Service has in such deals sufficient evidences, so all

[18] http://curia.europa.eu/juris/document/document.jsf?text=&docid=211047&pageindex=0&doclang=en.

court cases are obviously not in favour of taxpayer. Still, some negative tendencies for Russian companies in respect of payments to foreign companies may be found in court positions.

## 5. CONCLUSION

Russian national legislation about international taxation has developed seriously for the 29 years of modern economic history of the Russian Federation since the dissolution of the USSR. With the significant influence of world practice and, notably the OECD recommendations, modern new concepts for the fight against tax avoidance were implemented. One of them is the concept of "beneficial ownership" which serves as a barrier for artificial structures of a group of companies with the purpose of using a net of double tax treaties to minimise tax burden.

Set against the background of the world financial crisis, sanctions on Russian economic and low prices and oil and gas, the Russian government makes efforts to secure public funds of the Russian Federation and increase the effectiveness of tax collections. It leads to some strict practices in tax bodies and courts and an increase in the proof burdens on Russian companies — tax agents — in deals with a foreign company. Still, court positions about implementing the concept of "beneficial ownership" are in trend with world court practice which also tough enough.

— We can point to certain specific features developed in the Russian context for the concept of the "beneficial ownership": concept of the "beneficial ownership" in Russian legislation has meaning of "actual right on income". It is very vague definition. Role of court practice is increasing in treating of this concept.

— Russian court practice on the concept of the "beneficial ownership" is mostly in favor of tax bodies. Tax bodies effectively use all their powers to collect evidences including international exchange of financial information.

— Main burden of correct withholding of taxes from foreign companies is on the Russian companies — tax agents. Tax agent shall provide evidences to tax bodies and to court on "actual right of income".

Still, Tax Code does not stipulate form or content of evidences needed. It means that accepting of evidences collected by taxpayer depends on discretion of court.

— Tax bodies shall not prove who is exactly beneficial owner of the income, it is needed to be proved only that direct contractor of Russian company is not beneficial owner. It means that tax bodies shall not establish exact fiscal jurisdiction of beneficial owner and recalculate withholding taxes according to it.

Specifics mentioned above shows that concept of the "beneficial ownership" is developing now in Russian theory and practice. As for now, it take heavy burden for Russian companies to comply with this concept. Still, next developing and updating of this concept within the Russian internal context can be made in court practice.

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# INTERNATIONAL LAW

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# THE SANCTION OF EXPULSION FROM THE STATE OF VIETNAM

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**Abstract**

The sanction of expulsion is a significant coercive measure that a State has to remove unwanted persons from its territory. Such powers should not be used arbitrarily, but rather in the situations which the legislature decrees, by properly defined and regulated practices. Not least of the reasons for this is the need for legal certainty and avoiding being subject to the sanction of expulsion.

Nonetheless a "big data" review of the 92 Vietnamese decrees which provide for this sanction reveals a number of inconsistencies. These are reviewed and analysed in detail.In doing so, the anomalous and parallel sanction of "compelled exit" is also reviewed, together with situations where the person who is the competent authority to order expulsion or compelled exit — either does not have the power to do so, or does not have sufficiently clear guidance on how to decide if these sanctions are appropriate.

The author draws a number of specific conclusions on the changes which shoulld be implemented to correct this situation — and proposes a new Code for the handling of Administrative Offences, similar to that in the Russian Federation. In doing so, he identifies the need for an incremental approach to solving this problem, such that the Government and Legislative Assembly come to a mutual understanding of the problems to be resolved and the nature of the work to achieve this.

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From the angle of sanction of administrative violations, expulsion means compelling foreigners who have committed acts of administrative violations in Vietnam to leave the territory of the Socialist Republic of Vietnam. On the basis of reference to the laws of some countries in the world on the issue of expulsion, the author made some comments and suggested directions to perfect the form of expulsion under Vietnamese law.

**Keywords**

The administrative sanctions, sanction forms, expulsion, remedial measures, Vietnam, big data, decree

**CONTENTS**



## I. INTRODUCTION

Expulsion is a coercive measure of the State in order to compel a foreigner who breaks the law to leave the territory of a certain country. Depending on the law of each country, the expulsion is considered as a sentence provided in the Criminal Law or an administrative coercive measure regulated by the Administrative Law. The aim of this sanction is to eliminate and prevent foreigners from breaking the law. It is also used to protect the rights and interests of citizens and organisations. In Vietnam, expulsion is considered as a sentence provided in the Criminal Law or an administrative coercive measure regulated by the Administrative Law.

## II. EXPULSION IN VIETNAMESE LAW

Article 37 of *Vietnamese Criminal Code in 2015* (amended and supplemented in 2017) stipulates the expulsion sentence applicable to foreigners who commit criminal offences in the Vietnamese territory. Article 27 of the *Law on Handling of Administrative Violations in 2012* also provides the sanction of expulsion for foreigners committing administrative violations in the Vietnamese territory. However, there should be a distinction between the sanction of expulsion defined in Article 27 of *Law on Handling of Administrative Violations in 2012* with the sentence of expulsion defined in Article 37 of the *Criminal Code in 2015* (amended and supplemented in 2017).

As for the method of expulsion, expulsion in criminal cases and expulsion in administrative cases are similar in that the foreign offender (criminal or administrative) must leave the territory of Vietnam. Under the regulation of the criminal law and administrative law, international treaties shall be applied to foreigners who commit breaches of regulations of law, except otherwise provided for by international treaties of which the Socialist Republic of Vietnam is member.

In addition, both criminal and administrative law allow the adjournment of the expulsion sentence and the sanction of expulsion for severely ill foreigners, for emergencies or for health reasons, and in cases where force majeure prevents the carrying out of the decision on expulsion. However, the legal nature of the expulsion in the criminal law is decided by the court completely different from the sanction of expulsion decided by the Director of the Immigration Management Department or the Directors of provincial-level Police Departments.

Specifically, the expulsion sentence is recorded in the penalty system as provided for in the *Criminal Code in 2015* (amended and supplemented in 2017) while the expulsion in administrative cases is regulated in the *Law on Handling Administrative Violations in 2012* and decrees on sanction of administrative violation in a number of areas.

The expulsion sentence is one of the strictest coercive measures of the State applicable to foreign individuals committing one of the crimes defined in the *Criminal Code in 2015* (amended and supplemented in 2017). The expulsion sentence is defined in Article 37 of the *Criminal Code in 2015* (amended and supplemented in 2017), which is not

regulated by any other article in the *Criminal Code in 2015* (amended and supplemented in 2017).[2] That means the expulsion sentence shall be applied to any offence set forth in the Crimes Offence of the Criminal Code in 2015 (as amended and supplemented in 2017).[3] Meanwhile, the sanction of expulsion is the coercive measure for foreigners committing administrative violations in Vietnam. The sanction of expulsion shall be applied to the specific administrative violations prescribed in the decrees on sanction of administrative violations. The expulsion sentence shall be applied according to the judicial procedures while the sanction of expulsion shall be applied according to the administrative procedures.

In addition, a person to whom the expulsion sentence is applied as a result of a criminal conviction is an offender. On the other hand, a person whom is subject to expulsion as an administrative sanction does not have a conviction. Foreigners who are subject to the expulsion, will be allowed to re-enter Vietnam after 3 years.[4] However, there are now no specific regulations on whether foreigners who are subjected to the expulsion sentence for criminal reasons could be allowed to return to Vietnam or not.

The following table highlights the distinction criteria, the sanctions of expulsion, and the sentence itself.

| Distinction criteria | Sanction of expulsion | Expulsion sentence |
|---|---|---|
| 1 | 2 | 3 |
| Application conditions | To be applied to the specific administrative violations prescribed in the decrees on sanction of administrative violation | To be applied to any offence set forth in the Crimes Offence of the Criminal Code 2015 (amended and supplemented 2017) |
| Legal bases | Law on Handling of administrative violations in 2012 | Criminal Code in 2015 (amended and supplemented 2017) |

[2] Criminal Code in 2015 (amended and supplemented in 2017) regulates 538 offenses.

[3] Cao Vu Minh (2018). Recommendations on Expulsion penalty in Vietnamese Criminal Law. Internal Affairs Magazine. No 57.

[4] Law on Entry, exit, transit, and residence of foreigners in Vietnam in 2014, Art. 21 (5).

| 1 | 2 | 3 |
|---|---|---|
| Authority to apply | Directors of provincial-level Police Departments; Director of the Immigration Management Department | People's Courts at all levels |
| Expression form | Decision on expulsion | Judgment on expulsion |
| Consequence | No conviction | Conviction |
| Executory subject | The Immigration Management Department (Ministry of Public Security) The immigration management sections (The provincial-level Police Department) | The criminal sentence execution authority |
| Capable of returning Vietnam | After 3 years from the effective date of expulsion | No specific regulation |

An expulsion sentence which is specified in the *Criminal Code in 2015* (amended and supplemented in 2017) could create a unified law application. Meanwhile, the sanction of expulsion is not specified in the *Law on Handling Administrative Violations in 2012*, which is adduced to the decrees on sanction of administrative violations. However, these decrees themselves are even not clear, creating inadequacies in the application process. Therefore, within this paper, the author focuses on analysing the sanction of expulsion in the *Law on Handling Administrative Violations in 2012* and the decrees on sanction of administrative violations.

## III. THE SANCTION OF EXPULSION IN THE LAW ON HANDLING ADMINISTRATIVE VIOLATIONS IN 2012 AND THE DECREES ON SANCTION OF ADMINISTRATIVE VIOLATIONS

### 3.1. The Statistics of the Gorvernment's Decrees on Regulating the Expulsion

Article 27 of the *Law on Handling of Administrative Violations in 2012* provides that *"Expulsion is a sanction which compels a foreigner who commits an administrative violation in Vietnam to leave the territory of the Socialist Republic of Vietnam."* Therefore, the *Law*

*on Handling Administrative Violations in 2012* briefly stipulates the sanction of expulsion and delegates the right to regulate in details the application of the form of expulsion to the Government. Based on that, the Government shall regulate which administrative violations shall be subject to the form of expulsion; the conditions for application of this sanctioning form.

By surveying the Government's decrees on regulating the sanction of administrative violations in a number of areas, we have some statistics as follows:

— The total number of surveyed decrees: According to statistics of the Ministry of Justice of Vietnam, by the year 2018, the Government of Vietnam has issued 92 different decrees on sanctioning administrative violations in the fields.[5] Therefore, a survey was conducted on 92 decrees.

— The number of decrees on regulation on sanction of administrative violation is 11 decrees (accounting for 11,9 %). These are Decree No 55/2009/ND-CP on sanctioning of administrative violations of gender equality[6]; Decree No 107/2013/ND-CP on regulating sanction of administrative violations in atomic energy[7]; Decree No 138/2013/ND-CP on penalties for administrative violations pertaining to education (amended and supplemented 2015);[8] Decree No 159/2013/ND-CP on providing for administrative penalties for violations arising in the realm of journalism and publishing[9]; Decree No 167/2013/ND-CP on regulations on sanction of administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence[10]; Decree No 174/2013/ND-CP on regulations sanctioning administrative violations in the field of postal, telecommunications, information technology and radio frequency

[5] Ministry of Justice's, Report No 09/BC-BTP on summarizing 5 years of implementing the Law on Handling Administrative Violations in 2012 (from 2013 to 2018).

[6] Decree No 55/2009/ND-CP dated June 10, 2009.

[7] Decree No 107/2013/ND-CP dated September 20, 2013.

[8] Decree No 138/2013/ND-CP dated October 22, 2013 (amended and supplemented by Decree No 79/2015/ND-CP dated September 14, 2015).

[9] Decree No 159/2013/ND-CP dated November 12, 2013.

[10] Decree No 167/2013/ND-CP dated November 12, 2013.

(amended and supplemented 2017)[11]; Decree No 176/2013/ND-CP on penalties for administrative violations against medical lawsstipulates[12]; Decree No 64/2013/NĐ-CP on penalties for administrative violations against the laws on scientific activities and technology transfers **(amended and supplemented 2014)**[13]; **Decree No 95/2013/ ND-CP on penalties of administrative violations in labor, social insurance and overseas manpower supply by contract (amended and supplemented 2015)**[14]**;** Decree No 103/2013/ND-CP on stipulating the handling of administrative violations in fisheries fields (amended and supplemented 2017)[15]; and Decree No 67/2017/ ND-CP on regulations on sanction of administrative violation in the field of petroleum[16].

| Criteria | The total number of surveyed decrees | The number of decrees on regulation on sanction of administrative violation |
|---|---|---|
| Amount | 92 | 11 |
| Percentage | 100 % | 11,9 % |

— Among 11 decrees on regulating the sanction of expulsion, one of these decrees prescribes expulsion as a principal sanction (accounting for 9 %). This is Decree No 95/2013/ND-CP (amended and supplemented by Decree No 88/2015/ND-CP).

— Among 11 decrees on regulating the form of expulsion, seven of these decrees presscribe expulsion as an additional sanctioning form (accounting for 64 %). These are Decree No 107/2013/ND-CP; Decree No 138/2013/ND-CP (amended and supplemented 2015); Decree No 159/2013/ND-CP; Decree No 174/2013/ND-CP (amended

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[15] Decree No 103/2013/ND-CP dated September 12, 2013 (amended and supplemented by Decree No 41/2017/ND-CP dated April 5, 2017).

[16] Decree No 67/2017/ND-CP dated May 25, 2017.

and supplemented 2017); Decree No 64/2013/NĐ-CP **(amended and supplemented 2014)**; Decree No 103/2013/ND-CP (amended and supplemented 2017); and Decree No 67/2017/ND-CP.

— Among 11 decrees on regulating the form of expulsion, three of the decrees prescribe expulsion as a principal or an additional sanction (accounting for 27 %). These are Decree No 55/2009/ND-CP; Decree No 167/2013/ND-CP; and Decree No 176/2013/ND-CP.

| **Criteria** | **The number of decrees on regulation on sanction of administrative violation** | **The number of decrees prescribes expulsion as a principal sanction** | **The number of decrees presscribe expulsion as an additional sanction** | **The number of decrees prescribe expulsion as a principal or an additional sanction** |
|---|---|---|---|---|
| Amount | 11 | 1 | 7 | 3 |
| Percentage | 100 % | 9 % | 64 % | 27 % |

— Among 11 decrees on regulating the form of expulsion, five of them clearly prescribe the competence to apply the form of expulsion right in these decrees (accounting for 46 %). These are Decree No 167/2013/ND-CP; Decree No 174/2013/ND-CP (amended and supplemented 2017); Decree No 176/2013/ND-CP; Decree No 95/2013/ND-CP (amended and supplemented 2015); and Decree No 103/2013/ND-CP (amended and supplemented 2017).

— Among 11 decrees on regulating the form of expulsion, two of them do not clearly stipulate the competence to apply the form of expulsion right in these decrees (accounting for 18 %). These are Decree No 138/2013/ND-CP (amended and supplemented 2015); and Decree No 67/2017/ND-CP.

— Among 11 decrees on regulating the expulsion as a santioning form, four of the decrees are adduced to the Law on Handling of Administrative Violations in 2012 on the competence to apply the expulsion as a sanctioning form (accounting for 36 %). These are Decree No 55/2009/ND-CP; Decree No 107/2013/ND-CP; Decree No 159/2013/ND-CP; and Decree No 64/2013/NĐ-CP **(amended and supplemented 2014).**

| Criteria | The number of decrees on regulation on sanction of administrative violation | The number of decrees clearly prescribe the competence to apply the sanction of expulsion right in these decree | The number of decrees do not clearly stipulate the competence to apply the sanction of expulsion right in these decrees | The number of decrees are adduced to the Law on Handling of Administrative Violations in 2012 on the competence to apply the expulsion as a sanction |
|---|---|---|---|---|
| Amount | 11 | 5 | 2 | 4 |
| Percentage | 100 % | 46 % | 18 % | 36 % |

### 3.2. Specific Violations are Subject to Expulsion

Decree No 55/2009/ND-CP on sanctioning of administrative violations of gender equality prescribing the application of the principal sanction or additional sanction is the expulsion of foreigners from administrative violations of gender equality in the Vietnamese territory.

Decree No 107/2013/ND-CP on regulating sanction of administrative violations in atomic energy prescribing the application of the additional sanctions of expulsion to the following acts: *"appropriation, sabotage, transfer, illegal use of source nuclear materials, nuclear materials and nuclear equipment"*.

Decree No 138/2013/ND-CP (amended and supplemented 2015) on penalties for administrative violations pertaining to education, prescribing the application of the additional sanctions of expulsion to the following acts: *"organize enrollment of educational programs with foreign elements without being licensed to carry out in the territory of Vietnam."*

Decree No 159/2013/ND-CP on providing for administrative penalties for violations arising in the realm of journalism and publishing, prescribing the application of the additional sanctions of expulsion to

the following acts: *"storing and distributing publications with contents banned in publishing activities."*

Decree No 167/2013/ND-CP on regulations on sanction of administrative violation in social security, order and safety, prevention and fighting of social evils, fire and domestic violence, prescribing the application of the additional sanctions of expulsion to the following acts:

— Stealing assets;

— Openly appropriating the others' assets;

— Using deceitful tricks or running away to appropriate the others' assets;

— Illegally using the others' assets;

— Crossing national border without entry or exit procedures as prescribed;

— Evading, organizing or helping the others hide in the entry or exit vehicles for entering Vietnam or going abroad;

— Permitting the others to use their Passports or valuable papers in lieu of Passports to perform acts in contradiction with regulations of law;

— Using Passport or other valuable papers in lieu of Passport of others for entry, exit or transit;

— A foreigner fails to register his/her temporary residence as prescribed or uses a temporary residence certificate, temporary residence card, or permanent residence card which has expired for 16 days or more without the permission of a competent authority;

— Foreigners have been issued with permanent residence card but changed their address without notification for re-issue;

— Illegally gambling which are lost or won in cash or in kind;

— Gambling with machine or illegal electronic games;

— Betting in cash or in other forms in sports competition, entertainment or other activities;

— Selling illegal lottery sheet or printed matters used for playing illegal lottery;

— Failing to fully and promptly fulfill the written requirements on fire prevention and fighting from the competent authority;

— Failing to appoint responsible persons to take part in the inspection team of fire prevention and fighting;

— Failing to organize self inspection of fire prevention and fighting as prescribed;

Decree No 174/2013/ND-CP (amended and supplemented 2017) on regulations sanctioning administrative violations in the field of postal, telecommunications, information technology and radio frequency, prescribing the application of the additional sanctions of expulsion to the following acts:

*— Trading, exchanging, displaying and propagating postage stamps with contents, images, symbols, signs of agitation and enmity between peoples, ethnic groups and religions; there is wrong content on Vietnam's national territorial sovereignty.*

*— Using, leasing and lending subscriber terminal equipment, specialized telecommunication goods to transfer international telephone traffic in contravention of law provisions.*

*— Use telecommunications services to perform prohibited acts in telecommunications activities.*

Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulates, prescribing the application of the principal sanction or the additional sanctions of expulsion to the following acts:

*— Practicing without a practicing certificate.*

*— Practicing at the time of revocation of practice certificate, practice suspension.*

Decree No 64/2013/ND-CP **(amended and supplemented 2014)** on penalties for administrative violations against the laws on scientific activities and technology transfers, prescribing the application of the additional sanctions of expulsion to the following acts:

"*Technology transfer of the list of technologies banned from the transfer.*"

**Decree No 95/2013/ND-CP (amended and supplemented 2015**) on penalties of administrative violations in labour, social insurance and overseas manpower supply by contract, prescribing the application of the principal sanction of expulsion to the following acts:

*— Work but do not have a work permit in accordance with the law, unless it is not a work permit;*

*— Use the expired work permit.*

* Decree No 103/2013/ND-CP (amended and supplemented 2017) on stipulating the handling of administrative violations in fisheries fields, prescribing the application of the additional sanctions of expulsion to the following acts:

"*Fishing activities in Vietnamese waters without a fishery operation license*".

* Decree No 67/2017/ND-CP on regulations on sanction of administrative violation in the field of petroleum, prescribing the application of the additional sanctions of expulsion to the following acts:

*— Conducting oil and gas exploration and exploration activities in the State sector, declaring the prohibition or temporary prohibition without giving out any illegal benefits or profits of under 100,000,000 VND.*

*— Trespassing territorial waters, contiguous regions, exclusive economic zones and continental shelf of the Socialist Republic of Vietnam in order to study and search for oil and gas exploration without generating resources or illicit profits of less than 100,000,000 VND.*

*— Trespassing in the land, islands, internal waters, territorial waters, contiguous regions, exclusive economic zones and continental shelf of the Socialist Republic of Vietnam in order to exploit oil and gas.*

### 3.3. Some Practical Issues of Expulsion in Vietnam

Firstly, with the clear provison that "The Government shall detail the application of the sanction of expulsion," Law on Handling Administrative Violations in 2012 is still actually an intransitive law. This means this law is only a general provision of a larger Code on sanction of administrative violation.

This also means that National Assembly does not fully perform legislative duties. Delegating to prescribe in detail the sanction of expulsion to the Government is somewhat contrary to the spirit of the Constitution of 2013 because the issues relating to human rights, fundamental rights and obligations of citizens need regulating in law.[17] With this delegation, the Government may lack the actual basis or arbitrarily prescribe which behavior and conditions applied to the sanction of expulsion without fearing of the control from the National Assembly.[18]

The issue is why the act of *"foreigners travelling in the territory of Vietnam without Passport or valuable papers in lieu of Passport"* shall be imposed the sanction of expulsion.[19] By comparison, the act of "*foreigners entering border areas or border belts having no prescribed papers"* cannot be imposed the sanction of expulsion — which is surely anomalous.[20]

Considering the correlation, the act of *"foreigners enter border areas and border belts having no prescribed papers"* still has the nature and extent which is surely more dangerous than that of *"foreigners in the territory of Vietnam travelling without Passport or valuable papers in lieu of a passport."*

Further, why do Decree No 138/2013/ND-CP (amended and supplemented 2015) on penalties for administrative violations pertaining to education, Decree No 64/2013/ND-CP **(amended and supplemented 2014)** on penalties for administrative violations against the laws on scientific activities and technology transfers, and Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulate and regulate the application of the sanction of expulsion?

[17] Nguyen Canh Hop (2015), Comment on Law on Handling Administrative Violations in 2012, Publisher HCMC National University, para. 213.

[18] Do Hoang Yen (2007). Law on handling administrative violations in some countries in the world. Legislative Studies. No 107.

[19] Decree No 167/2013/ND-CP, Art. 17 (1).

[20] Decree No 169/2013/ND-CP, Art. 6 (2).

Meanwhile, matters directly relating to national security and territorial sovereignty have arguably more important objects to protect such as the management and protection of national borders,[21] waters, islands and continental shelf[22] — where there is not a stipulation of the application of the sanction of expulsion? Why are there only 11 Government's decrees (accounting for 18 %) on sanction of administrative violation in a number of areas which "boldly" regulate the application of the sanction of expulsion? Why is there only one Governmental decree regulating expulsion imposed as a principal sanction?

Then, what is the nature and extent of violations which may be sanctioned in the form of expulsion suitably? All in all, this is the most important issue of the law on sanctioning administrative violations, not the general issues stipulated in *the Law on Handling of Administrative Violations in 2012*. It can be affirmed in reality, the sanctioning of violations is based only on specific decrees and not on general provisions passed by the National Assembly in the *Law on Handling of Administrative Violations in 2012*. Therefore, the issues relating to the sanction of expulsion is still only adjusted in the subordinate laws.

*Secondly*, many violations have the same composition but have different forms of sanctions. Some violations shall be subject to sanction of expulsion, some of them shall not be subject to this sanction.

Due to the specific violations regulated in the specialised decrees, there are a lot of decrees issued, resulting in the same behaviour, with the same offending composition, but adjusted in many different decrees. The problem is that with the same violation, there is a decree to apply the sanction of expulsion while others decrees do not regulate the application of this sanction.

For example, Decree No 167/2013/ND-CP regulates the act of *"stealing assets; Openly appropriating the others' assets; Using deceitful tricks or running away to appropriate the others' assets"* shall on conviction be a matter for which an offender is liable to a fine of

[21] Decree No 169/2013/ND-CP sanctioning administrative violations in the field of national border management and protection.

[22] Decree No 162/2013/ND-CP (amended and supplemented by Decree No 23/2017/ND-CP) sanctioning administrative violations in the sea, islands and continental shelf of the Socialist Republic of Vietnam.

between 1,000,000 VND and 2,000,000 VND and may be sanctioned in the form of expulsion.[23] Meanwwhile, the act of *"stealing, appropriate items, equipments or asserts in the restricted area of airport, airfield"* is only imposed a fine of from 5,000,000 VND to 10,000,000 VND without being expelled.[24]

After all, these two acts are stealing, appropriating asserts of individuals and organszations. These two acts are carried out on the territory of Vietnam, whether they are in *"airport, airfield"*, they are still in the territory of Vietnam.[25] And they are naturally administrative violations according to the law of Vietnam. In terms of nature and extent, the act of *"stealing, appropriate items, equipments or asserts in the restricted area of airport, airfield, airplane"* can not be less dangerous than those of *"Stealing assets; Openly appropriating the others' assets; Using deceitful tricks or running away to appropriate the others' assets."* This is reflected in the logical thinking of the lawmakers when regulating the fine high or low based on these behaviours. But the unreasonable thing is that the violations with more serious nature and extent and with the higher fine can not be deported. Why is that the violations with less serious nature, extent and lower fine can be deported? Does the lawmaker consider that higher fine which are enough to deter or punish should not be expelled?

Similarly, Decree No 167/2013/NĐ-CP stipulates the acts *"illegally gambling which are lost or won in cash or in kind"* are liable to a fine of from 1,000,000 VND to 2,000,000 VND and may be sanctioned in the form of expulsion.[26] Meanwhile, the act of *"gambling or letting other people take advantage of the office or on the means of transportation in the area of airport, airfield or airplane"* shall be imposed a fine of from 5,000,000 VND to 10,000,000 VND, but without the the application of the sanction of expulsion.[27]

According to point b, clause 1, Article 6 of Decree No 169/2013/ND-CP, the act *"failure to declare or concealment or provision of Assistance*

[23] Decree No 167/2013/ND-CP, Art. 15 (1).
[24] Decree No 162/2018/ND-CP, Art. 26 (5).
[25] Law on the Handling of Administrative Violations in 2012, Art. 5 (1).
[26] Decree No 167/2013/ND-CP, Art. 26 (2).
[27] Decree No 162/2018/ND-CP, Art. 26 (5).

*for others to illegally travel or reside in the border area"* shall only be sanctioned as a caution or a fine of from 300,000 VND to 500,000 VND. Meanwhile, point a, clause 5, Article 17 of Decree No 167/2013/ND-CP stipulates the sanction of acts of *"helping, receiving, sheltering or enabling others to go abroad, stay abroad, enter Vietnam, stay in Vietnam or crossing national borders illegally"* brings with it a fine of between 15,000,000 VND and 25,000,000 VND and may be sanctioned in the form of expulsion.

However, these two acts are intersecting and difficult to distinguish clearly in all cases. The act of a foreigner concealing or providing assistance for others to illegally travel or reside in the border area can completely occur in the border area. Therefore, the competent authorities may discretionarily choose to impose fines under Decree No 169/2013/ND-CP or Decree No 167/2013/ND-CP.

The paradox is that when sanctioning according to Decree No 167/2013/ND-CP, the competent authorities can apply the sanction of expulsion. Conversely, when sanctioned according to the Decree No 169/2013/ND-CP, this form of sanction can not be applied. This inadequacy leads to the fact that the competent persons can "flexibly" apply the sanction of expulsion under Decree No 167/2013/ND-CP or Decree No 169/2013/ND-CP for the same violation.

The act of *"Failing to organise self inspection of fire prevention and firefighting as prescribed"*[28] shall bring a liability of a fine of from 300,000 VND to 500,000 VND and may be sanctioned in the form of expulsion. Conversely, the act *"failure to equip firefighting equipment at the office building or failure to conduct periodical inspection of firefighting equipment"*[29] brings a liability for a fine of from 40,000,000 VND to 50,000,000 VND but no sanction for expulsion. Meanwhile, *"failing to organise self inspection of fire prevention and fighting as prescribed"* is only a matter of larger legal scope of *"failure to equip firefighting equipment at the office building or failure to conduct periodical inspection of firefighting equipment."* It is important to note that violations with lower fines can be expelled, while those with higher

[28] Decree No 167/2013/ND-CP), Art. 28 (2).

[29] Decree No 139/2017/ND-CP, Art. 67 (3).

fines can not be expelled. Why is that? All these issues are not answered thoroughly in the legal documents.

Thirdly, many decrees do not explicitly stipulate the conditions for imposing the sanction of expulsion.

Among the 11 decrees mentioned above, most of the decrees stipulate in details the violations that are subject to the sanction of expulsion. Specifically, foreigners who fall under these acts *"working without a work permit or using an expired work permit"*,[30] *"trading, exchanging, exhibiting or distributing postage stamps with contents, images, signs or symbols in contravention of social ethics, and traditional habits and customs of Vietnam"* shall be expelled.[31] These specific and clear regulations facilitate the application of legislation unitedly.

In addition to these improvements, some Governmental decrees do not provide specific conditions for the application of the sanction of expulsion. Specifically, Decree No 167/2013/ND-CP stipulates that *"foreigners who have acts of administrative violation specified, depending on the seriousness of the violation, may be sanctioned in the form of expulsion from the Socialist Republic of Vietnam."*[32] Therefore, based on *"seriousness of violation"*, it is understood that the competent persons shall apply the sanction of expulsion or not on a case-by-case basis.

Similarly, Article 30 of Decree No 138/2013/ND-CP (amended and supplemented 2015) stipulates that "*any foreigner who commits any administrative violation in Clause 7 of this Decree which is liable to expulsion from Vietnam shall be handled according to the Decree of the Government on impoundment and escort under administrative procedures and suffer the penalty according to administrative procedures."* As a result, not all foreigners who organise the enrolment

[30] Decree No 95/2013/ND-CP (amended and supplemented 2015), Art. 22 (1).

[31] Decree No 174/2013/ND-CP (amended and supplemented 2017), Art. 12.

[32] In Decree No 167/2013/ND-CP, Clause 6 Article 5, Clause 6 Article 12, Clause 6 Article 13, Clause 4 Article 15, Clause 5 Article 16, Clause 9 Article 17, Clause 5 Article 19, Clause 7 Article 21, Clause 3 Article 23, Clause 7 Article 26, Clause 5 Article 28, Clause 3 Article 29, Clause 8 Article 30, Clause 7 Article 31, Clause 8 Article 32, Clause 4 Article 33, Clause 5 Article 40, Clause 6 Article 42, Clause 5 Article 43 stipulates the application of expulsion penalties for foreigners violating.

for an international program without permission in Vietnam shall also be subject to the sanction of expulsion. On a case-by-case basis, based on the *"seriousness of violation"*, the competent persons will decide whether to impose the sanction of expulsion or not.

The issue is which criteria are to be used when deciding the *"seriousness of violation"*? Regrettably, the Law on Handling of Administrative Violations in 2012, the Decree No 167/2013/ND-CP and Decree No 138/2013/ND-CP (amended and supplemented 2015) do not contain any provisions defining or regulating the *"seriousness of violation"* as the basis for the application of the sanction of expulsion. So, when the foreigners violate the provisions on the application of form of expulsion, which criteria will be used by the competent authorities to define *"seriousness of violation"* as the basis for the execution of expulsion? With this discretionary regulation, it can be seen that, in many cases, the competent authority will also be anxious to make an expulsion decision because it is easy to violate the principle of *"objective and proper competence, ensure fairness, in accordance to law provisions"* specified in clause 1, Article 3 of the Law on Handling of Administrative Violations in 2012.

Decree No 176/2013/ND-CP on penalties for administrative violations against medical laws stipulates a fine of between 30,000,000 VND and 40,000,000 VND for the acts *"practicing without a practicing certificate; (or) Practicing while (a) practicing certificate is revoked or suspended."*[33] Any foreigner that recommits one of the violations in point a and point b clause 5 of this Article is to be expelled from Vietnam. However, Decree No 176/2013/ND-CP does not stipulate that this sanction shall be applied as the principal sanction or additional sanction.

Accordingly, two possibilities for foreigners who recommit are: (i) being deported only because deportation is applied as the principal form (ii) being fined (principal sanction) and expulsion (additional sanction). This leads to a confusion of comprehension and application of law between competent authorities.

[33] Decree No 176/2013/ND-CP, Art. 28 (5).

*Fourthly*, there are two Government's decrees which do not clearly define even the competence to apply the sanction of expulsion.

As stated, under clause 7, Article 8 of Decree No 138/2013/ND-CP (amended and supplemented 2015), foreigners shall be imposed fines of from VND 40,000,000 to VND 60,000,000 for the organisation of enrolment for an international program without permission in Vietnam (principal sanction) and shall be expelled from Vietnam (as an additional sanction). In cases where foreigners commit acts of organising the enrolment of international programs without permision in Vietnam, if being fined from 40,000,000 VND to 60,000,000 VND, the sanctioning competence may belong to the chairmen of the province-level People's Committees,[34] the Heads of the ministerial-level specialised inspection[35] or the Chief Inspector of Ministries[36,37].

However, in cases where the foreigners are subjected to additional sanction such as expulsion, the competence may only belong to the Director of the Immigration Management Department. The paradox is that Decree No 138/2013/ND-CP does not regulate the sanctioning competence of the Director of the Immigration Management Department. Therefore, there will be a situation that the subject is liable to the application of the sanction of expulsion — but the competent person, the Director of the Immigration Management Department does not have the power to impose sanctions. This paradox, if not resolved, will result in the imposition of sanctions in practice reaching the deadlock.

According to Decree No 67/2017/ND-CP, foreigners committing acts of *"searching and exploring oil and gas in a banned area or temporarily banned area but without resulting in resources or illegal profits under 100,000,000 VND"* shall be imposed a fine of between 800,000,000 VND and 1,000,000,000 VND and an expulsion as additional sanction.[38] Similarly, under clause 9, Article 6 of Decree No 67/2017/ND-CP, foreigners who commit acts of *"infringing upon the territorial waters,contiguos zone, exclusive economic zones and*

[34] Decree No 138/2013/ND-CP (amended and supplemented 2015), Art. 28 (3).
[35] Decree No 138/2013/ND-CP (amended and supplemented 2015), Art. 28 (4).
[36] Decree No 138/2013/ND-CP (amended and supplemented 2015), Art. 28 (5).
[37] Law on the Handling of Administrative Violations in 2012, Art. 39 (7).
[38] Decree No 67/2017/ND-CP, Art. 6 (8).

*continental shelves of the Socialist Republic of Vietnam to survey, search and explore oil and gas but without generating resources or illegal profits under 100.000.000 VND"* shall be imposed a fine of from 1.800.000.000 VND to 2,000,000,000 VND and an expulsion as additional sanction.

Based on the form and level of fine as above, the sanctioning competence may only belong to the Director of the Immigration Management Department. However, Article 74 of Decree No 67/2017/NĐ-CP only regulates the sanctioning competence of the Director of Department of Public Security, and does not provide for the sanctioning competence of the Director of the Immigration Management Department.

Article 74 of Decree No 67/2017/ND-CP does not stipulate the sanctioning competence (including the competence to apply the sanction of expulsion) to the Director of the Immigration Management Department. So, does the Director of the Immigration Management Department have the sanctioning competence to these acts in the reality?

It should be noted that while there are four decrees adducing to the *Law on Handling of Administrative Violations in 2012* on the competence to apply the sanction of expulsion, Decree No 138/2013/ND-CP and Decree No 67/2017/ND-CP do not have any adducible provisions. This results in the fact that the Director of the Immigration Management Department will have difficulties in finding the legal basis for the application of the sanction of expulsion for specific violations subject to the form of this sanction in the Decree No 138/2013/ND-CP and Decree No 67/2017/ND-CP.

Fifthly, administrative violations being subject to the sanction of expulsion and the acts being applied to compelled exit and remedial measures are unclear and in many cases, overlap.

Currently, in the Vietnamese legal system, in addition to the sanction of expulsion, the lawmakers also regulate something called compelled exit. According to clause 8, Article 3 of the *Law on foreigners' entry into, exit from, transit through and residence in Vietnam in 2014*, compelled exit is a case in which a competent Vietnamese person decides to compel a foreigner to leave the Vietnamese territory through a Vietnamese border gate. Compelled exit is imposed to foreigners in two cases: First, his or her temporary residence duration has expired

but he or she does not leave Vietnam; Second, for reasons of national defence, security, social order and safety.

It seems to be that the sanction of expulsion and compelled exit are not clearly distinguishable in application, in other words there is an overlap between form and content of application. As stated, compelled exit is to compel a foreigner residing in Vietnam to leave Vietnam through one of Vietnam's border gates and expulsion is also compelling foreigners to leave the territory of Vietnam — which of course must take place through the border gate of Vietnam. Therefore, compelled exit and expulsion overlap with each other on the form of implementation. Expulsion is applied to foreigners committing administrative violations in Vietnam, while compelled exits are applied to foreigners who have their temporary residence period expired but do not leave the country, which is also an administrative violation in Vietnam. Therefore, compelled exit and expulsion overlap with each other on the content of implementation. It is worth mentioning that compared with the sanction of expulsion, the compelled exit is not regulated in the *Law on the Handling of Administrative Violations in 2012* as an administrative coercive measure.

Besides, Decree No 103/2013/ND-CP (amended and supplemented 2017) provides for remedial measures *"compelling foreign fishing vessels and foreign crewmen to leave the territory of Vietnam"*. Under clause 4, Article 13 of Decree No 103/2013/ND-CP (amended and supplemented 2017), acts of *"harvesting in Vietnam's sea areas without permission"* will be subject to a fine of between 80,000,000 VND and 100,000,000 VND (principal sanction) and confiscation of fishing vessels, illegally exploited aquatic products, expulsion of foreign crewmen from the territory of Vietnam (additional sanction). However, this act was also applied to the remedial measure of *"compelling foreign fishing vessels and foreign crewmen to leave the territory of Vietnam"*.

It is very unreasonable because if the additional sanction such as the confiscation of fishing vessels, and the confiscation of illegally exploited fisheries are imposed, the offenders will no longer have fishing vessels to which can be applied the remedial measure of "compelling violating fishing vessels to leave the Vietnamese territory" by the competent persons. In addition, it is more absurd that when the sanction

of expulsion for foreign crews is applied, there is no need to apply remedial measure *"compelling foreign crewmen to leave the territory of Vietnam"* because the legal nature of the expulsion is to compel the foreigner commiting administrative violations to leave the territory of Vietnam. Obviously, the same violation was imposed on both expulsion and remedial measure *"compelling to leave the territory of Vietnam"* in Decree No 103/2013/ND-CP (amended and supplemented 2017) is inaccurate because of overlapping scope and form of implementation.

## IV. CONCLUSION

*Firstly*, with the current situation in Vietnam, a law on handling administrative violations has dozens of decrees regulating the sanctioning of specific violations, and it has proved unavoidable that the status of these decree is inconsistent to each other. From the perspective of the sanction of expulsion, the situation of violations of the same composition is similar, even the nature of the offense is the same, but some violations are subject to expulsion, and some are not.

The restrictions in the regulations on the competence, and procedures for expulsion have inconsistencies. The decrees on administrative violations in general and the decrees on the sanction of expulsion in particular are promulgated by the Government but the drafting agencies are different. The drafting agencies are the Ministries and their branches. Each Ministry and branch draft documents in the "local" direction with little regard for the documents of other Ministries and branches. As a result, administrative violations have become unstable, crowded, overlapped, and even contradictory.

Therefore, it is necessary in the author's opinion to promptly bring in a Code on the Handling of Administrative Violations. This Code should have a defined General Part and a Special Part similar to the *Code of Administrative Offences of the Russian Federation*.[39] The Generally Part need to base on the provisions of the *Law on Handling of Administrative Violations in 2012* in order to raise the model in line with the General Part of the *Criminal Code*. The Special Part

[39] Nguyen Canh Hop — Cao Vu Minh (2011). Improving the law on administrative violations from the experience of the Russian Federation. Legislative Studies. No 18.

will stipulate violations in specific areas. This Special Part should be formulated according to the principle that the types of administrative violations in a number of fields need to be handled unitedly and specific handling forms shall be prescribed in the law.

Accordingly, specific groups of administrative violations, depending on their nature, should be delegated to the Government to specify, as well as how to handle them, but only in new cases, changes or emergencies. After that, these regulations of the Government must be reported to the National Assembly at the nearest meeting, and if appropriate, should be added to the Code.

The process of innovation can be implemented step by step. It cannot be done immediately.[40] Currently, the National Assembly of Vietnam does not have a plan to draft any such Code on the Handling of Administrative Violations. By the end of the 14th National Assembly term (2016–2021), it would be impossible to issue any such Code on the Handling of Administrative Violations.[41]

In the near future, it is necessary to change the way of making laws on sanctioning administrative violations in general and the sanctions in particular. In the near future, the Government should conduct a careful review of the violations under which it is deemed impossible to allow foreigners to remain in Vietnam and to regulate the application of expulsion as a sanction. This work — which is very important — is to limit the inaccurate application of this sanction, and the waste of human and material resources in the implementation.

At the same time, the National Assembly Standing Committee should review the Government's decrees on the sanctioning of administrative violations in the fields where the sanction of expulsion is prescribed. If this review is implemented well, the regulations relating to the application of the sanction of expulsion, there will be different opinions between the Standing Committee of the National Assembly and the Government. Through this review, the Government will have

[40] Nguyen Cuu Viet (2009). Renewing the law on administrative violations in Vietnam. Legislative Studies. No 138.

[41] Resolution No 57/2018/QH14 dated September 6, 2018 of the National Assembly on the Program of developing laws and ordinances in 2019–2020.

effective "reverse" information channels to complete the legal provisions relating to the sanction of expulsion.

Secondly, the status of multiple violations with the same composition, but some violations shall be imposed an expulsion, some are not, is not sustainable longterm. This not only violates the rule of law, but also does not guarantee the general principle of formulating and promulgating legal documents mentioned in the Law on Promulgation of legal documents in 2015 as *"ensuring the constitutionality, legality and consistency of legal documents in the legal system"*.[42] Therefore, the Government should review and amend the sanctions in the decrees on sanctioning administrative violations regulating the sanction of expulsion in order to suitable for each other. This amendment is very important to ensure consistency in identifying the violations as well as imposing a sanctioning form of expulsion for specific violations.

Thirdly, according to the Law on Promulgation of legal documents in 2015, when issuing a decree, the Government must ensure transparency in such legal documents.[43] Therefore, the formula *"depending on the seriousness of the violations may be subjected to the form of expulsion"* or *"committing administrative violations to be being expelled"* is very discretionary and easy to create an abuse of authority, through arbitrary decision making. Consequently, the application of law will become inconsistent, very easy to violate human rights. Therefore, the Law on Handling of Administrative Violations in 2012 and the decrees on sanctioning administrative violations should clearly stipulate the specific criteria, conditions and acts upon which to apply the sanction of expulsion.

*Fourthly*, as stated, Decree No 138/2013/ND-CP (amended and supplemented 2015) and Decree No 67/2017/ND-CP do not provide for the sanctioning competence of the Director of the Immigration Management Department. This leads to the fact that these two decrees have the sanction of expulsion but are not applied in practice. Therefore, it is necessary to supplement Decree No 138/2013/ND-CP (amended and supplemented 2015) and Decree No 67/2017/ND-CP

[42] Law on Promulgation of legal documents in 2015, Art. 5 (1).

[43] Law on Promulgation of legal documents in 2015, Art. 5 (3).

the competence to santion administrative violations to the Director of the Immigration Management Department. In terms of legislative technology, Decree No 138/2013/ND-CP (amended and supplemented 2015) and Decree No 67/2017/ND-CP can be abducted to clause 7 of Article 39 of the Law on Handling of Administrative Violations in 2012 on the sanctioning competence of the Director of the Immigration Management Department, which is competence to apply the sanction of expulsion.

*Fifthly*, lawmakers need to review the legal basis of the measure *"compelled exit"*. Currently, the Law on Handling of Administrative Violations in 2012 does not consider *"compelled exit"* as an administrative coercive measure. That means this measure can not be imposed as a sanction to apply for foreigners committing administrative violations in Vietnam. In cases where *"compelled exit"* is a good measure to prevent and limit administrative violations, strict conditions must be prescribed to apply and avoid widespread application for the acts which shall not be applied. In the author's view, if we recognize this measure, we should only apply *"compelled exit"* to foreigners for reasons of national defense, security, social order and safety, but without including *"fails to leave Vietnam after the expiration of the temporary residence period"* because in this case there is the sanction of expulsion. In other words, the sanction of expulsion is applicable to foreigners committing administrative violations.

Meanwhile, in order to stabilise national defense, security, social order and security, compelled exit may still apply to foreigners who do not commit administrative violations. If so, the sanction of expulsion and compelled exit may be the same as compelling foreigners to leave the territory of Vietnam but differ in terms of contents, subjects and authorities.

The parallel application of remedial measures *"compelling foreign fishing vessels and crew members to leave the territory of Vietnam"* with the sanction of expulsion, results in waste of legal provisions for the same purpose, form of implementation. Therefore, serious and careful research is required to determine what acts need to be applied remedial measures and what actions are subject to the sanction of expulsion. Thus, the legal issues surrounding the contents, purposes, competence,

procedures, limited periode of time and time limits for the application of the sanction of expulsion are clear, facilitating for law application in practice.

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# SPORTS LAW

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# SPORTS LAW CATEGORIES FIELDS OF RESEARCH AND IMPLEMENTATION OF SPORTS LAW

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**Abstract**

This paper examines the relationship of international law to sports law and the particular nature of so called Lex Sportiva[2]. The paper also researches whether Lex Sportiva (sometimes also called Lex Olympica) may be a subcategory of international law, or on the other hand whether it creates a different and independent type of rules of law in the sphere of the international practice of sports, with its sources being private international sports institutions. It has been said that the theory of international law maintains that "*The law is a mandatory class. It establishes socially organised penalties and it is clearly distinguished both from the religious*

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[2] Claim had been supported by Dimitrios P. Panagiotopoulos (1999) Sports Law, a special branch of Sports Science [in Gr. Αθλητικό Δίκαιο ειδικός κλάδος της επιστήμης in : Professional Sports Activities, 1st Sports Law Congress EKEAD Ellin: Athens, pp. 38–52, see also Dimitrios P. Panagiotopoulos (2002), Sports Legal Order in National and International Sport Life, 8th IASL Congress Uruguay, Modevideo Nov. 28–30, 2001, in: Revista Brasileira De Direito Sportivo (Instituto Brasileiro De Direito Desportivo), no: 2, Pp. 7–17 and in: International Sports Law Review Pandektis, Vol. 4:3, pp. 227–242.See also Dimitrios P. Panagiotopoulos (2003) Sports Law A European Dimension, Ant. N. Sakkoulas: Athens, pp. 16–27, and Ibid (2004), Sports Law (Lex Sportiva) in the world, Regulations and implementation, Sakkoulas: Athens, pp. 22–32.

*classes and the moral ones...*"[3] On the basis of this theory the paper examines whether the international sports institutions, notably the International Sports Federations and the International Olympic Committee are according to international law, international entities, i.e. bodies whose rules can be considered as international sports law.

**Keywords**

Sports, Sports Law, Lex Sportiva, Lex Olympica, International Law, Enforcement, Court of Arbitration for Sport, Lausanne

**CONTENTS**



## 1. SUBJECTS OF INTERNATIONAL LAW

What is the meaning of, and understanding of, international law? It is a body of rules and principles contained in the legal instruments of the agreements between states, in international customs deemed binding for the subjects of international law, namely. the states, international organisations, and, notably, individuals. States are the primary subjects of such international law.[4]

[3] Kelsen in the same book affirms that international law is true law. Kelsen, the Principles of International Law, Rinehart 1952, σελ. 45–50.

[4] Part of this section formed considerations in the 11th IASL Congress in Johannesburg 28–30 Nov. 2005, South Africa. See D. Panagiotopoulos, Tina Xristofilli (2006) International Law and Lex Sportiva, In: International Sports Law Review/ Pandektis (ISLR/Pand), Vol. 6:1/2, pp. 11–13.

Despite the fact that another category of subjects of international law has been emerging, namely international organisations, individuals, groups of people and liberation movements, the states themselves remain the traditional category of international legal subjects holding the authority in the sphere of the international legal community.[5]

When states are interested in realising and carrying out tasks of mutual interest, they establish specific international machinery. The International Court of Justice in its advisory opinion on the Legality on the Use by a State of Nuclear Weapons in Armed Conflict,[6] stated that the object of the Charter of the international organisations "is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals."

In the famous Reparation case,[7] the ICJ observed that the performance by the organisation of the tasks entrusted to it would be impossible, if the organisation did not possess international personality. The judges took great care to link the attribution of such a personality to the will of the member states, which is necessarily implied in the case. The court acknowledged in its 1949 advisory opinion that the concept of legal personality has no uniform content in international law.[8]

International organisations[9] are governed by the principle of specialty. A twofold test verifies the possession of legal personality by the international organisations.[10] First, it must be shown that the member states intended to confer upon the international organisations the competence required to enable them to discharge effectively these

[5] A. Cassese (2001), International Law, Oxford University Press, pp. 7–27, J. Dugard, International Law, A South African perspective, 2000, pp. 5–10, 26, 133–145. 376, Ian Brownlie, Principles of Public International Law, 1998, Oxford University Press, pp. 31–45.

[6] Βλ. advisory opinion on Legality on the Use by a State of Nuclear Weapons in Armed Conflict,Legality of the Threat or Use of Nuclear Weapons Case I. C. J. Rep. 1966.

[7] Reparation for Injuries Suffered in the Service of the United Nations Case, I. C. J. Rep. 1949.

[8] advisory opinion of The Court from 1949, Ph. Sands, P. Klein, Bowett´s Law of International Institutions, 2001, London, Sweet and Maxwell, pp. 285, 292, 472, 474.

[9] Sands, Klein, 508,509.

[10] Cassese, pp. 71–72.

functions.[11] Second, it is necessary for the organisation to enjoy real autonomy from member states and the effective capacity necessary for it to act as an international subject.

In the words of the ICJ it is necessary to show that the organisation "*is in fact exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plan*."[12]

What are the international rights and duties conferred upon international organisations? We mention the most important ones:

1. The right to enter into international agreements with non-member states.[13]

2. The right to immunity from jurisdiction of state courts for acts[14] and activities performed by the organisation.[15]

3. The right to protection for all of the organisation's agents.[16]

4. The right to bring an international claim with a view to obtaining reparation for any damage caused by a member States or by third states to the assets of the organisation or to its officials acting on behalf of the organisation.[17]

[11] Ibid, 78.

[12] Expression of the International Court

[13] Ibid, 78.

[14] Due to the judicial activity within the limits of the mandate received from the Member States and which are specified in their charter,. Cassese, Op. cit., pp. 80–81.

[15] In 1931 the Italian Court of Cassation delivered a seminal decision in Istituto Internazionale di Agricoltura v. Profili. Mr. Profili, an employee of the International Institute for Agriculture, the organisation that was the predecessor of the FAO and headquartered in Rome, was dismissed by the organisation. He sued the IIA before a court of Rome. The IIA challenged the jurisdiction of the Italian courts, and the case was brought before the Court of Cassation. The Court held that the Organisation had international legal personality, as the states establishing the organisation had intended to be ¨absolutely autonomous vis-à-vis each and every member state." Consequently it was empowered to organize its own structure and legal order autonomously and without any interference from sovereign states. Therefore the Italian courts lacked jurisdiction over employment relations with the organisation.

[16] Ibid 81.

[17] The ICJ upheld this right in the Advisory Opinion on Reparation for Injuries, On September 1948, the UN mediator, Count Folke Bernadotte, and the UN observer, Colonel André Serot, were assassinated while on official mission in Israel. Israel declared itself to be ready to make reparation for its failure to protect the two UN agents and to punish their killers.

Another emerging topic in international law emerges timidly yet decisively, namely the individuals. An increasing number of treaties confer rights directly on individuals and impose obligations on them, especially in the area of International Criminal Law.[18] The right of an individual to petition to the ICC and other judicial organs are indications of the slow but marked trend of making individuals subjects of international law. The right of individuals to petition international or quasi international judicial bodies is considered exceptional since it lacks any substantive right, or the power to enforce a possible decision of the international body that might be favorable to the individual. Rather, it is the states that are in a position to advance such a claim and pursue enforcement bringing a claim before a national or international court those allegedly responsible for breaches of their international obligations.[19]

## 2. INTERNATIONAL LAW VS. DOMESTIC-NATIONAL LAW

The status of international law as opposed to the national law creates three separate distinctions

1) The monistic doctrine,[20] according to which international law is not a separate legal order but a set of provisional guidelines to be advanced to the status of law, but only if this is in the interest of the sovereign state and according to its unchecked will.

2) The dualistic doctrine, according to which the international legal order and the domestic national orders are two different sets of legal orders quite distinct from each other. Their differences may be characterised thus:

a) Their subjects (namely individuals and groups of individuals for the domestic legal orders, states and international organisations in the case of international law),

[18] Sh. Bassiouni, International Criminal Law, 1999, New York, Transnational Publishers pp. 456, 678.

[19] Cassese, pp. 90–93.

[20] Fitzmaurice, The general principles of International Law Considered from the standpoint of the Rule of Law in Hague Recueil 5, 1957, pp. 70–80, J. G. Starke, Monism and Dualism in the Theory of International Law In: British Year Book (1936), p. 74.

b) Their sources (for example parliamentary statutes or judge made law in the national law systems, treaties and customs in the international law), and

c) the contents of the rules (including national law regulating the internal functioning of the state and the relation between the State and the individual, while international law regulates the relations between states).[21]

This second position allows for an equal, but entirely different status of international law. However, it is obvious that it discretionary on the states as to whether to enforce it by implementation in their legal systems or to disregard it.[22]

3) A third view, formulated by Kelsen,[23] argues for the supremacy of international law vis-à-vis the domestic legal systems. It appears to have gained ground more in theoretical debates than in reality.

To establish which of the above positions is taken by any given state, it is necessary to examine the stipulations which the state sets for the implementation of international law in its domestic law.[24]

## 3. ENFORCEMENT OF INTERNATIONAL LAW

In international law, neither any central executive authority, nor effective mechanisms of enforcement exist. One is quite justified in the opinion that the United Nations has fallen short of its role to be

[21] As a counterbalance to these two contrasting opinions, there has been also the opinion put forward, that international law can additionally derive from various other sources; according to these theories even private bodies can set binding rules which extend to the international field of their activities. Typical example of that theory is the lex mercatoria as a foundation of international commercial practice. For the special nature of this autonomous legal order see also Ch. Pampoukis (1996), Lex mercatoria (in Greek), Ant. N. Sakkoulas, p. 17 ff.

[22] Cassese, pp. 162–165.

[23] Kelsen, The Principles of International Law, Rinehart 1952, pp. 45–50.

[24] States like Greece, the Netherlands, and Spain adopt an automatic incorporation system. In addition, in Greece, according to the Hellenic Constitution, customary international rules and treaties override national law. In Spain provision is made not only for the supremacy of the international treaties but also for the obligation of the national authorities to construe national legislation on human rights in the light of international instruments.

the executive power of international order. The lack of any effective enforcement mechanism is linked to a lack of a system of compulsory international adjudication. The International Court of Justice and other international courts such as the European Court of Human Rights only have jurisdiction when the parties to the dispute have consented to the Court's jurisdiction. On the whole, the history of the ICJ has been, with a few notable exceptions, one of an embarrassing succession of failures to establish its authority over the subjects of international law. It appears then that international law is still in a primitive state evident. Current political developments sadly confirm this. International law has not been much different from the contractual mercantile spirit that gave birth to it. It remains highly fragmented, contractual, and, as a result, basically ineffective in its enforcement.[25]

## 4. INTERNATIONAL SPORTS LAW, OR "UNETHNIC" SPORTS LAW? LEX SPORTIVA-OLYMPICA?

### 4.1. Features

The term international sports law appears to be a subcategory of international law. Basically most of the international Sports organisations were the product of private initiative belonging to the category of private international organisations**.** However, it is commonplace that the most important ones, like the International Olympic Committee and the international sport federations, have acquired an international legal personality through customary practice.[26]

The compliance by the states and individuals with the rules created by these organisations leaves no other logical alternative — compliance is mandatory.[27] The fact that these organisations are subject to the law of the country in which they are based, does not contradict with their international nature or personality. It appears that the originally private

[25] Brierly, p. 167, Dugard, 175, 178, Cassese, pp. 223–224.

[26] D. J Harris, Cases and Materials on International Law, 2000, London, Sweet & Maxwell, pp. 24–43, 143–144; Asylum Case, Columbia v. Peru, I. C. J. Rep. 1950, p. 226. See also Dimitrios Panagiotopoulos (1991), Olympic Games Law, [in Gr. Δίκαιο Ολυμπιακών Αγώνων, (Αρχαία και Σύγχρονη Εποχή), Ant. Sakoulas: Athens, pp. 249 next.

[27] See Dimitrios Panagiotopoulos (1991), Olympic Games Law, supra note, and see also L. Silance (1977), Sports Law, IOA. 16th Congress, Athens, p. 76.

international sports organisations by the implied will of states and individuals and also as a result of custom have acquired an international legal personality and effective capacity in order to attain the specific goal of creating and organising the performance of international sports and international sporting events.

Thus, international sports organisations meet the requirements of the twofold test, discussed above, e.g., the International Olympic Committee, which is vested with the authority to organise and supervise the Olympic Games.

We note here a clear departure from the international law reality described above. In Sports Law as Lex Sportiva, obligations of law and rights are imposed directly on the individual athletes**.** The direct effect of international sports law on individuals can be compared only with the vertical effect existing in domestic national law systems and, in the case of regulations, in EU law. In addition, the integration rules of Lex Sportiva in the national jurisdictions are automatically through the National Sports Federations and National Olympic Committees, an issue that does not exist in international law, but only after the accession to it.

In terms of the creation of the rules, the main legislating function is performed by the international organisations of sports law themselves, i.e. the International Olympic Committee and the international sports federations. However, there are many differences between Lex Sportiva and International Law.

In case of non-compliance by the member states with the rules of Sports Law as Lex Sportiva, the exclusion of the disagreeing member, be it a national sports organisation or sports federation or athlete, is immediate and is enforced through the sanction of permanent or temporary banishment from the games.

Failure of the athlete to abide by the rules of Lex Sportiva is different and activates a system of penalties which vary from fines and suspension to partial and life game exclusion. The system of penalties for the athletic existence of the individual athlete is the equivalent of detention, temporary incarceration, and life imprisonment in the "land" of non-athletic competition.

This is a crucial difference between international law and Lex Sportiva: an effective enforcement mechanism[28] is definitely not one

[28] Dimitrios P. Panagiotopoulos (2008), Lex Sportiva and sporting jurisdictional order, in: International Sports law Review Pandektis, Vol. 8:3–4, pp. 335–373.

of the characteristics of international law while the sophistication of sports law international as Lex Sportiva has in terms of enforcement is impressive.[29]

Another very important difference is the exclusive jurisdiction of the judicial organ of international system of sports law, as Lex Sportiva, that is the Court of Arbitration for Sport in Lausanne (CAS).[30]

In the "Bliamou case"[31] the clash between national judicial organs and the CAS proved without doubt the superiority of the CAS jurisdiction in international sports law. In international law there is no system of compulsory international adjudication.

[29] Considering all the above, the notion expressed by J. Nafziger in International Sports Law, 2nd edition, New York 2004, p. 49, that "lex sportiva is the product of only a few hundred arbitral decisions within a limited range of disputes (...) It is still more of a lex ferenda than a mature lex specialis" seems unjustified. As much as we disagree regarding this opinion; Lex Sportiva exists with the already established rules and is not created by court decisions. These decisions only state in the present moment their devotion to the international sports system and less their interest to formulate case law, i.e. to subvert the rules of lex Sportiva, meaning to force the actors to change the rules in accordance with the operative part of the judgment. For the obvious existence of lex sportiva in the international sports domain compare Dimitrios Panagiotopoulos (2002), Sports Legal Order..., op. cit. pp. 7–17 and in: International Sports Law Review Pandektis, Vol. IV:3, Pp. 227–242, Ibid (2003), Sports Law: A European Dimension..., op. cit., pp. 16–27, (2003), Reglements Sportifs — Limites Juridiques et Lex Specialis Derogat Legi Generali, in: Revue Juridique Et Economique Du Sport, Dalloz: Paris, pp. 87–98, (2004), Sports law [Lex Sportiva] op.cit., pp. 39–50, also Ibid (2004), Lex Sportiva: Sport Institutions and Rules of Law, in: International Sports law Review Pandektis (ISLR/Pandektis), Vol. 5:3, p. 40 f., and in: (2005), Sports Law — Implementation and the Olympic Games [ed], Sakkoulas: Athens pp. 40–44. For the Lex Sportiva Theory, generally see Dimitrios P. Panagiotopoulos (2011) Lex Sportiva and Lex Olympica, Theory and Praxis, Ant Sakkoulas: Athrens, pp. 102–209 and for the "Lex Olympica", pp. 375–439.

[30] For the international sports judicial system and the principle of exclusion of sports federations, βλ. Dimitrios P. Panagiotopoulos (2006), Sports Law II Sports Jurisdiction [in Gr. Αθλητικό Δίκαιο ΙΙ, Αθλητική Δικαιοδοσία] Nom Bibliothiki, Athens, pp. 144–148. For the practice of CAS for the applicable law and the enforceability of its decisions, see Ibid pp. 192–203. For the process of resolving disputes arbitral see also Pantelis Dedes Andreas Zagklis (2006) Court Arbitration for Sport, [in Gr. Το Αθλητικό Διαιτητικό Δικαστήριο της Λωζάνης], Nom. Bibliothiki: Athens, pp. 25–46.

[31] See, Dimitrios P. Panagiotopoulos (2004), International Sports Rules' Implementation — Decisions' Executability, in: Marquette Sports Law Review, Vol. 5:1, pp. 1–12 and Comment in ISLR/Pand., Vol. 5:4, pp. 304–307. For a detailed analysis of this case, see also Dimitrios P. Panagiotopoulos (2011) Lex Sportiva and Lex Olympica... Op. p, Part V, pp. 502–523.

### 4.2. A New Species of Internationalised Sports Law

We can see differences between Lex Sportiva and the international law on issues fundamental to the nature and the quality of the law itself.

The position that Lex Sportiva[32] is merely a category or subspecies of international law does not bear up upon closer examination. We are faced with a system of law which, although it undoubtedly possesses characteristics from the General Principals of Law, it nonetheless regulates relations in the international domain. The international sports system has succeeded in establishing an impressive system of coercion, through sanctions and binding jurisdiction of the judicial institution, comparable only with national domestic law and Community law, in terms of efficiency and application.

We have before us another species of an international legal system which can not be a simple category or a diversification of international law. Between the system of Lex Sportiva and public international law there is no conflict because there is a law of private nature, internationally, which is the sports "anethnic", that regulates a field of relations that could regulate the public order[33] to apply the provisions of this regulation.

This is another kind of law on the international level, which is parallel with international law, and shares common elements, such as the general principles of law generally, in a new format,[34] typified in the international arena Lex Sportiva/Olympica.

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[32] Analogous to the Lex Mercatoria, see Dimitrios P. Panagiotopoulos (1999) and (2002), Sports Legal Order in National and International Sport Life, 8th IASL Congress Uruguay, Modevideo Nov. 28–30, 2001, in: Revista Brasileira De Direito Sportivo (Instituto Brasileiro De Direito Desportivo), no: 2, Pp. 7–17 and in: International Sports Law Review Pandektis, Vol. 4:3, pp. 227–242.

[33] This outside of nations sporting character of law is not identical with either a national, has a substantial similarity in the Community legal order, which is located midway between the legal systems of the Member States and the international legal order, borrowing elements from all, while remaining independent of them, "Supranationalität" and "supranationalité" German and French literature, respectively. But in this case the term more appropriate is anethnic law, or Lex Sportiva-Olympica.

[34] See Adnan A Wali (2010), The theory of the Sports Law: Towards specific Legislation for sports Transaction, in: International Sports Events and Law [Jacek Foks Ed.], Warsaw, pp. 183–192.

This is not an amalgam of law, but rather an independent system of anethnic sports law. The rules of this new legal order are a new system of rules derived from the composition of rules similar to the Lex Mercatoria,[35] international law and domestic legal systems. When a legal system has such a binding effect and effective enforcement of its rules, then we face the same ideological dilemmas that for centuries we are trying to solve at a domestic jurisdictions level. The theoretical debate continued for years and the results crystallised into principles that are fair, clear and undeniable.

In any organised structure when we have a concentration of power in a few hands the solution is given by the principle of legality and the separation of powers. The essential prerequisite is the complete separation of the institutions that exercise legislative, executive and judicial authority. This entails separation of instruments and separation of powers. The separation of powers and the implementation of democratic processes must be under the guarantee that will ensure the provision of an independent judicial body and the existence of effective judicial protection,[36] an international Court for Sports of special procedural rules of state standing, in a statutory framework of international legitimacy for sport and sports activity.

### 4.3. Lex Sportiva — Lex Olympica: an Unethnic Law of International Practice

Sports law in the international sporting field, as Lex Sportiva-Lex Olympica, is actually private. This means that it is a law, which is international as anethnic because, it necessarily regulates an area with no geographic boundaries but rather the relationships of persons involved in international and Olympic sports and action. These activities are controlled in their individual states, but are also subject to this international control as well. That is, the Lex Sportiva-Olympica,

[35] Lex Mercatoria: A creation, of a set of customary rules and general principles, which constitute an autonomous legal system capable of governing in a meaningful way the international trade, although not referring to a particular state legal system, previously See Goldman (1987) The applicable law: General Principles of law-lex mercatoria in Contemporary problems in international arbitration, J.M Lew (ed), Martinus Nijhof, 116.

[36] Under the conditions imposed by the Article 6 of the ECHR.

is a really "anethnic" law internationally, to which, however, the theory does not give special power.[37] Nevertheless, it constitutes a sui generis sports law legal order imposed in the sports world heteronomously, through these international sports organisations.[38]

This new kind of law, Lex Sportiva & Lex Olympica as "anethnic" law of international practice, sets necessarily old accepted practices and organisational structures, (established under another perspective) in a way that reveals the insufficiency of practices of international law. Specifically, in a legal order that consists a different kind of law internationally, and which has an impressive feature of coercion similar to the domestic jurisdictions. Many people claim, perhaps based on thoughts of CAS[39] (that is, through the jurisprudence of the abovementioned Court) that what has been formed is a not really Lex Sportiva but rather Lex Ludica.

The Lundica concept comes from the theory of Homo Ludens of Hunginca, the game that finally has no need of rules of law[40] and can not

[37] Dimitrios P. Panagiotopoulos (2011) Sports law: Lex Sportiva and Lex Olympica..., Op. cit., pp. 117–152, Ibid (2004) Sports Law [Lex Sportiva]..., op. cit., pp. 34–49.

[38] Ibid, (1991), Olympic Law [in Gr *Δίκαιο των Ολυμπιακών*...], Op. cit. p. 249, see also D. Panagiotopoulos (1993) The Olympic Games-an institutional dimension-perspective, in: Proceedings of International Congress, (The Institution of the Olympic Games), Hellenic Centre of Research on Sports Law: Athens, pp. 527–528.

[39] Bl. CAS decision no 98/200 according to "[...] Sports law has developed and established through the years, mostly through the arbitration dispute resolution, a set of unwritten legal principles — rather like lex mercatoria for sport, or else a lex ludica — in which national and international federations have to obey. [...]", see also k. Foster (2006) Lex Sportiva — Lex Ludica: The court of Arbitration for sport Jurisprudence, in: Entertainment and Sports Law Journal, pp. 1–14. As well as same opinion by: J. Nafziger (1988) International Sports Law 2nd edition — Transnational Publishers Inc N. York (σελ. 57–61), Reeb Digest of CAS Awards II-1998-2000 Kluwer Law International, p. xxx, McLaren (2001) Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games. 12 Marq. Sports L. Rev. 515 and Different as below, Dimitrios P. Panagiotopoulos (2009), Sports Law Foundation: Lex Sportiva, a Fundamental Institutional Approach, in: Sports Law: an Emerging Legal Order — Human Rights of Athletes, Nomiki Vivliothiki: Athens, pp. 20–22 and in: International Sports law Review Pandektis, Vol. 8, Issues 1–2, pp. 6–14, Ibid see also (2008), Lex Sportiva and sporting jurisdictional order, in: International Sports law Review Pandektis, Vol. 8:3–4, pp. 335–373.

[40] See L. Silance (1977), Interaction des règles de droit du Sport et des lois et traités émanant des pouvoirs pulics in: Revew Olympic 120: Lausanne, I. O. C., p. 622, Dimitrios P. Panagiotopoulos (2003), Règlements Sportifs — Limites Juridiques et

be regulated by the law, while in the sporting action we have absolutely regulating laws — the Lex Sportiva, including technical rules of the particular character of the sport that do not constitute area of law bit they are non law rules.[41] Whilst this distinction may be erroneous, they want to give a sporting dimension to this law, but they forget that if it is Ludica it can not be Lex and vice versa.[42]

As an international sports law, a subcategory of international law, it can really only be described through the rules of international conventions on sports, the international sports conditions, and the international acts for sport governed in their application by the rules and practice of the international law. In addition, by the rules of the Code WADA, (which has been adopted by UNESCO), the United Nations organisation binds the states who signed the agreement to make it a rule of their domestic law, after approval of their parliaments, and these rules are rules of international sports law.[43] International Sports law is therefore absolutely different from the law of rules of Lex Sportiva/ Olympica.

Lex Specialis Derogat Legi Generali, in: Revue Juridique Et Economique Du Sport, Dalloz: Paris, pp. 87–98.

[41] For this theory, See Max Kummer (1973), Spielregel und Rechtsregel, Stampfli & Cie AG, Berne, contra see Jean Pier Karaquilo (1989), Le Droit du Sport et la Droit selon, 18th Conferesce for the European Community, Counsil of Europe, p. 48, J. P. Karaquilo (ed, 1995), L' Activite Sportive Dans les Balances de la Justice, T. II, Dalloz: Paris. See also, Dimitrios P. Panagiotopoulos (2009), Sports Law Foundation: Lex Sportiva, a Fundamental Institutional Approach, in: Sports Law: an Emerging Legal Order op. cit., p. 19 see also Ibid (2011) Lex Sportiva and Lex Olympica..., op. cit., pp. 107–114.

[42] See Dimitrios P. Panagiotopoulos (2009), Sports Law Foundation: Lex Sportiva, a Fundamental Institutional Approach, in: Sports Law: an Emerging..., op. cit., pp. 20, and in: International Sports law Review Pandektis, Vol. 8, Issues 1–2, p. 12.

[43] See Antonis Bredimas, Multilateral diplomacy for sport: the case of UNESCO, in: Sports Law: Implementation and the Olympic Games, [Dimitrios Panagiotopoulos Ed], Ant Sakkoulas: Athens, pp. 327–334. see also A. Bredimas (2000), The International Constitution of Physical Education and Sports of UNESCO — Legal Political dimension and Prospect, in: Sports Ethic, [D. P. Panagiotopoulos Ed.], Ellin: Athens, pp. 87–97, see also Ibid (2005), Legal Order of CIO and international Sports Federations and relation to International Legal Order [in Gr. Η νομική φύση της ΔΟΕ και των διεθνών αθλητικών ομοσπονδιών και η σχέση τους προς την διεθνή και κρατική έννομη τάξη], in : Olympic Games and Law (N. Klamaris et all Ed..), Ant Sakkoulas: Athens, pp. 80–84.

## 5. CONCLUSION

The rules of Lex Sportiva and Lex Olympica and the quality of the content of these norms with their particular characteristics in the international context of practice, demonstrate that sports law, is not a subcategory of international law, as International Sports Law, but an entirely different kind of law, Lex Sportiva/Olympica.

Lex Sportiva/Olympica, is another kind of law resulting from the synthesis of characteristics of international law (subject, object and content regulations) and the internal characteristics of domestic legal orders (with effective mechanisms of coercion, automatic incorporation norms in national laws exclusive and binding jurisdiction of judicial bodies).

This new kind of international law places necessarily old accepted practices and established organisational structures under another perspective that exists in parallel with the international law and constitutes a sui generis sports law international legal order, imposed heteronomously on the sporting world from these international organisations.[44]

International Sports Law is comprised of the rules of international acts and conventions of bodies that are governed by rules of international law such as international treaties and acts on Sport, the rules of WADA Code and the International Charter for Sport but not by the rules of a Lex Sportiva/Olympica. The need for fundamental changes in the organisation of the international sport practice under the principle of legality in international sports field becomes imperative, via a constitutional charter for sport and an international jurisdiction.

[44] Dimitrios P. Panagiotopoulos (2011) Lex Sportiva and Lex Olympica…. Op. cit., pp. 392–442, see also Ibid (1991), Olympic Law [in Gr. *Δίκαιο των Ολυμπιακών*…], Op. cit., p. 249 next, see also Ibid (1993) The Olympic Games-an institutional dimension-perspective…, Op. cit., pp. 527–528.

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# JURISPRUDENCE

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# ELEMENTS OF THE JURIDICAL COMPOSITION OF TAX IN THE THEORIES ABOUT THE TAXATION AND IN THE TAX LEGISLATION OF THE AZERBAIJAN REPUBLIC

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**Abstract**

Taxation is not a simple matter. A review of basis of common theories of taxation is made, with an expression of the author's view about the future direction where these would be best directed. The elements of the juridical composition of tax are the conditions of taxation, established by legislation about the taxes and the collections. Without the determination of the elements of tax it is not possible to present the action of laws about the taxes and the payments, and also the accomplishment of tax production. Constitutional principles of preferences from taxation must be find their expression in tax legislation, in particular, when define tax easy payment terms for tax payers. The law is concretizing fulfillment rules of tax duty, must define not only content, also the mechanism of fulfillment of tax duty and legible distribution tax burden. In consequence of the distribution tax burden the tax payers find oneself in unequal financial condition. This position is law regularity position. But taking into consideration payment solvent of tax payers the part of the persons have right to get some preferences from taxation and

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this preferences must foresee in law standards of tax legislation.The article conclused with observations on the needs facing legislators when considering modifications to tax legislation — by reference to both classical and modern economic theories as well as legal matters.

**Keywords**

Tax legislation of the Azerbaijan Republic the elements of tax, the rate of tax, tax privileges, tax base, discretionary income

**CONTENTS**



## 1. CONCEPTION AND THEORETICAL MEANING THE ELEMENTS OF THE JURIDICAL COMPOSITION OF TAX

"Taxation", in its modern meaning, was not achieved suddenly, nor easily, by the yhe legislative systems of world countries and associated tax law sciences. Rather, the development was the result of a combination of the studies of history of taxation, theoretical world views, and long-standing practices of the countries during the process of testing and realisation of economic theories and theories about the taxes.

In general, the term "taxation theory" means a combination of pure tax theory, the essence of taxes, the techniques of the application of taxation, mechanisms for determining the tax elements, and scientific views and concepts based on the experience of the role and importance of taxation in the life of society.

It is not wrong to consider overall tax theories as the basis of the tax systems model of states, for tax system models in different states

are based on generalisations on tax systems and taxation systems. The importance of classic and modern tax theories is significant, quite seperately from their effectiveness or ineffectiveness. The tax system of a particular state must be created taking into account not only the special and individual features of the national economy, but also using the "general" ideas, (embedded in theories about taxes), and the "lessons", (as demonstrated by the taxation practice in different periods — particularly relating to periods closer to their level of economic development) of the foreign countries. Taxation theories may be divided into common and special theories.

Founders of common theories currently direct and organise their studies in the following directions:

— General development of tax practices generalisations, without subdivision.

— Analysis of tax relations from the point of view of the influence of taxation regimes on the behaviour of the subjects of taxation.

— Investigating the causes of appropriate behaviour and the decisions on regulation of state tax relations.

— Studying optimal and convenient methods of taxation and warning methodologies of tax subjects, and making predictions based on these studies (Pavlov, 1998, p. 18).

With this in mind, it is my view that the main directions of common tax theories should — as we look forwards — be the followings:

— searching for the most optimal and correct methods for the regulation of taxation; This does not always require the state. For example, in the United Kingdom, there is a system of self assessment, as well as state level assessment — including review of such self assessments based upon risk profiling and other relevant criteria;

— using the results of the above, and other technologies, facilitating and creating the optimum methods for predicting the results of tax subjects;

— warning tax subjects (that have been identified through various means) about possible tax evasions. Central to this is the basis upon which such tax evasions can occur and systematic responses to deal with this.

Common tax theories study the taxation as a whole issue, as a global concept. Such theories have been developed throughout history, dating basck as far as the middle ages.

It should be noted that (theoretically speaking) the elements of the juridical composition of tax is based in fundamental tax law, which is unique and specific. However, each of the elements of tax, by virtue of its doctrinal essence, has great practical value. Largely speaking, basic problems in the tax sphere appear because of the vagueness and the gaps within the legislative standards and norms, concerning the elements of the juridical composition of tax. Such situations appear and can become the reasons of the judicial disputes between the tax bodies of the State and of taxpayers.

The task for the further development of common tax theory consists in the positioning and specific standards and requirements of the state's tax legislation having regard to the elements of the juridical composition of tax as a whole whilst maintaining correct individual assessments and liabilities. In parallel, it cannot be allowed that the position of a legislator with such a tasks would contradict ideas and principles of the theories of taxation both historical, and contemporary. In other words, the future must be based on the soundest principles established historically, before moving to future developments.

An important example is found in history. In the 17th century in regard to this, the English economist, William Petty (the founder of the classical school of political economy) published a "treatise about the taxes and their collections"[2] — which was reprinted many times in his lifetime, and subsequently. This is a seminal work in which he considers the best tax policies for economic growth. In it, he particularly emphasised that

*"the vagueness and doubts relative to the law of taxation by taxes were the reason for the large and worthy reprimand of hostile appearances from the side of population and forced strictness from the side of sovereign*".

[2] Treatise of Taxes and Contribtions, William Petty (1662) (Petty. http://emsu.ru/me/classic/1/3.htm).

In modern language, this identifies that the resistance of those who are taxed, to being taxed, (and their hostility to enforcement) is founded upon an ignorance of the reasons and principles for taxation.

Further, in the second-half of the 18th century the "classical theory of taxation" was evolved by the famous Scottish economist Adam Smith. His seminal work "The Wealth of Nations"[3] attached the enormous value "of the certainty" of tax, which in turn, indicated the determination of the elements of tax — a classical view of taxation and its theories.

He emphasised that "the tax must be determined accurately, but that it should not be arbitrary. The period of payment, the method of payment, the sum of payment — all this must be clearly and definitely for the payer and for all others (who may be similar payers in the future). In passing, it may be noted that modern tax law and practice notes — for example from the United Kingdom's HM Revenue and Customs — are in many places less than "clearly and definitely defined"[4]

He wrote:

*"Where this does not exist, it returns to a greater or lesser extent into the authority of the collector of taxes, who can burden tax for any objectionable to it payer or extort for himself by the threat of this burdening gift or bribe."*

In modern language, this identifies the consequences as being an increased degree of enforcement, and the social undesirability of the effects of this enforcement — a hardening of public opinion about taxation and its benefits.

[3] More fully, An Inquiry into the Nature and causes of the Wealth of Nation. Pub 1776 (W. Strahan and T. Cadell, London).

[4] See https://www.gov.uk/government/organisations/hm-revenue-customs and https://www.gov.uk/government/collections/self-assessment-helpsheets-main-self-assessment-tax-return. These are indeed an improvement on the older system of ten years ago, yet for all of their online status, they do not contain the volumes of cases where legitimate tax payers have had their submission challenged through the courst — leading to internal Practice Notes at the Taxation Service (HM Revenue and Customs). The more open information about the Tax Code of the United States reveals there are some 9834 sections of detailed provisions — a volume of detail which surely makes clarity for the average citizen less than possible.

The uncertainty of taxation, continued the author —

*"develops impudence and contributes to corruptibility of that discharge of people, which do not even without that enjoy popularity even when they are not characterized by impudence and corruptibility."*[5]

Again, in more modern language, Smith is identifying that where there is uncertainty, this encourages non-compliance to tax payment, even when they are normally law abiding citizens. In other words, a lack of clarity and definition has a socially corrosive effect.

Smith also noted that the tax must be collected at that time or by that method, which is most convenient for payment. This has always been somewhat controversial, for with the growth in population, and items, instruments, and activities that are taxed, it is no longer possible to have taxation payments to suit individuals — there has to be some form of systemization.

The determination of all elements of tax is at present the most pressing matter for legislators in all states — as indeed the Wealth of Nations depends on revenue.

In the first half of the 20th century, the English economist John Maynard Keynes developed the theory; it is which presented additions to classical theory. He wrote

*"the stimuli of the participants the economic process... they depend not only on the assumed income, but also on the tax policy of government."*[6]

He advanced the necessary tasks of state for economic development. However, in the theory, the resolution of a question of taxation was still more important task. According to his ideas of theory, the taxes, (in particular, heavy taxes) were the main engines of the regulation of economy and increase in its development. Keynes considered that where the larger economy was in the hands of population, being a passive source, prevented economic development. Rather, taxes should be raised by means of the heavy taxes and assigned to economic development[7] Keynes's theory does not investigate directly the elements

[5] Ibid — Smith, 2009, p. 762.

[6] JM Keynes. The General Theory of Employment, Interest and Money. Pub Palgrave McMillan 1936, ISBN 978-0-230-00476-4, p. 288.

[7] Ibid, p. 477.

of tax. Nevertheless, contained in the theory there is a determined role and the value to one of the elements namely the rates of tax in terms of economic development

The theory of monetarism was advanced in the 1950s, as a result of the work of the scientific economist, Milton Friedman. His seminal work — Capitalism and Freedom[8] led him to a Nobel Prize in Economics and a position as advisor to both Ronald Reagan and Margaret Thatcher. Friedman's views were based on the quantitative assessment of the circulation of money, and specifically taxes, as one of the mechanisms, which influence the circulation of money. Friedman's theory advanced some the economic ideas; including the idea reduction in the high tax rates as unfavorable the factor, which prevents economic development.

In the opinion M. Friedman, economic stabilization and rational behavior of people are impossible without the ruling role of free market prices in to the economy.[9]

It is necessary to note that supporters of monetarism considered that a controlled and regulated monetary stock, with a decreased or completely liquidated budget gap, is one of the factors influencing inflation in the country. For guaranteeing the financial stability of a state, the use of government control is needed on monetary stock, money emission, state crediting and subsidising. According to one analysis, these measures bring their results, and an example is given from the USA, where in 1969 financial year the Federal Budget achieved a positive balance. (Rusakova, Kashin, 1998, p. 352).

In the 1970's the high rates of taxes in the USA negatively affected the financial position of companies. Rusakova and Kashin (1998 p. 352) consider there was a depreciation of the tax privileges, previously established as fixed sums. This led to the significant increase of the conditions for inflating the real tax burden of companies. Numerous tax privileges on the taxes were consolidated with the minimisation of the incomes of taxpayers. Together with an increase in the frequency on non-compliance, there was a weakening control over taxation, which overall led to losses to the federal budget of the USA.

[8] Capitalism and Freedom. Milton Friedman, pub University of Chicago Press 1962, ISBN 0-226-26421-1 .

[9] Kudrov V.M, World Economics Textbook БЕК, 1999, p. 284.

The American Congress affirmed an intermediate-term program of government control between 1981–1985, under the title "A New Beginning for America. This was a program of economic redevelopment", developed in part on the basis of the theory of monetarism. This program included the following measures:

— the reduction of the rates of the income tax and reduction in tax to the profit corporations but with a simultaneous decrease in the number of tax privileges;

— other demarcations of areas where an increase in the federal expenditures is needed to achieve a decrease of government deficit and;

— revision and the decrease of the volume of legislation supporting these measures;

— enhancements to "stabiliser money" and credit policies.

Consequently, by the basic levers of Friedman's economic theory, important elements of the juridical composition of tax were introduced — controlling and regulating the rate of tax (low rates) and various tax privileges.

## 2. SOME PROBLEMS OF LEGISLATION ABOUT THE TAXES OF THE AZERBAIJAN REPUBLIC CONCERNING THE ELEMENTS OF THE JURIDICAL COMPOSITION OF TAX

The above amalgam of law and economic theory is especially important to understand in the fields of taxation development in countries where historically there has no tbeen such a capitalistic economy and associated society. Problems on questions of tax privileges are one of the elements widely researched in the fields of taxations, and their separate properties are provided by the tax legislations of a number of the foreign countries.

In this context, there have been no major changes in the tax system of Azerbaijan during the last 10 years — specifically in the fields of reduction in the tax rates and, thus, in the direction of reduction in the gravity of taxation and tax burden. This objective is currently one of the most pressing legislative and administrative tasks for the Republic of Azerbaijan.

In the Tax Code of Azerbaijan Republic there are no normative standards, including for the fixing of rules and assignments regarding tax privileges. This stands in contrast to the tax codes of the majority of similar countries which were formerly part of the USSR — namely the, Republic of Uzbekistan, Republic of Kazakhstan, and the Republic of the Ukraine and others. The Gold Standard for this of course is the Tax Code of the Russian Federation.

In the USA the driver for the government control of tax privileges act was not only the 1986 code (following the New Beginning) — concerning internal incomes and legislation about the sequential budgets, but also particular, laws for the stimulation of economic development and about the establishment of tax privileges — as detailed by Shuvalova et al., 2010, p. 89. It is worthwhile to note that in the Tax Code of Azerbaijan Republic is absolutely silent on not only the very concept of element "tax privilege", but also its basis, value, purpose and designation, in particular, any forms of privileges.

It is suggested that it would be expedient to include in the general part of the tax code of Azerbaijan Republic an initial concept "tax privilege" and its basis. Further, it is suggested that a determination of the basic forms of privileges (withdrawal, reduction and release from the taxes) with suitable explanations would be more than useful. The task in law however, is to convert economic theory and social engineering (such as engagement of the population and businesses with taxation) — into clear and well drafted and moreover understandable and enforceable legislation.

In the Tax Code of Azerbaijan Republic the need to determine the lawful bases of tax privileges is clearly needed, since the tax privileges would be a completely independent element — to "assume the presence of its own status, and, in view of this status — create specific formal indicators" (Gracheva, Shyokin, 2009, p. 442).

It is therefore, necessary to reexamine the enumeration of the privileges, provided, in particular, in Article 102 of the Tax Code of Azerbaijan Republic relating to income tax (Tax Code of Azerbaijan Republic, 2016). Instead of an enormous quantity of tax privileges there is a view that it would be better to determine a lowered tax load for the

taxpayers. The contrary position for the legislator is to consider the bases upon which different sectors could have a reduced tax load.

Secondly, any contemporary tax system with the high tax rates and with a larger quantity of tax privileges must surely be transformed into the tax system with the lowered tax rates, but with a smaller quantity of privileges — as noted above in the Keynsian model. In my view, a small quantity of privileges is more beneficial to a state, since the result is no diminution in the volume of revenue entering into the budget. On the contrary, it can increase. From other side of the coin, the lowered rates of taxes are advantageous to taxpayers, since with the high rates of tax they are more likely to try to evade payment of tax — sums so lost are of course lost to the Revenue.

It should be noted that there are a number of pieces of work which have investigated the value and the direct characteristics of the elements of tax, such as the proportional and progressive methods of taxation, and the interrelation of tax rates with the budget. This work, if regard is given to it, will mean that any developed legislation and associated documentation is completely dedicated to the defined quantity of elements, which have both theoretical and practical value.

One of these such theories is Professor Arthur Laffer's[10] — "Theory about the interrelations of budgetary entering with the tax rates", and the associated Laffer Curve which shows that there is a certain point between 0 % and 100 % where tax revenues are maximized. The theory suggests that starting from zero, an increase in tax rates will increase the government's tax revenue; after a certain point, however, continuing to increase tax rates will cause a decrease in tax revenue. This decrease in tax revenue is explained by various factors such as decreased incentives for work and production. Laffer's suggestion is that the tax rate that maximizes revenue occurs at a much lower level than previously believed — and generally occur lower than tax rates which are actually imposed.

Some background. It is first of all, necessary to note that for investigating the points pointed out above there were the real

[10] Arthur Laffer, b 1940, latterly Professor of Economics at the Southern Califonia School of Business.

prerequisites. The maximum rate of tax to the profit of corporations in 1965–1979 in the USA was set at 48 %, and the maximum rate of the income tax for the large incomes in this country in 1963 was a staggering 91 % for the upper bands. A. Laffer it considered that, if they are reduced by 40–50 %, then this would reduce the economy, specifically investments in the particular sector of economy (Rusakova, Kashin, 1998, p. 352–354). At the root of the theory of Laffer was a reduction in the rate of tax taking into account an increase in the production and an increase in the profitableness.

It is interesting to review the scales met in the former Soviet republics, and the high rates of income tax to the earnings. For example, in the Republic of Turkmenistan the President's Decree "About the differentiated rates of the income tax from the physical persons depending on size of the obtained income" dated February 26, 2003 of No pp-3839[11] established the following rates of the income tax:

— 8 % from the size of monthly income to 150000 manat;
— 8,5 % of the size of monthly income 150001–170000 manat;
— 9 % of the size of monthly income 170001–190000 manat
— 9,5 % of the size of monthly income 190000–210000 manat;
— 10 % of the size of monthly income 210001–230000 manat;
— 10,5 % of the size of monthly income 230001–250000 manat;
— 11 % of the size of monthly income 250001–270000 manat;
— 11,5 % of the size of monthly income 270001–290000 manat;
— 12 % where the monthly income exceeds more than 290000 manat.

The method of complex progression at present is the extent of the tax progression. It is equal in overall amounts, as in the previous methods of progressions seen in earlier codes.

Together with the incremental increases, there must be discharges and payments. Each discharge or payment is completely independent as for each of them the tax rate is established individually, independent of the general tax base.

For the complete understanding of this method we need to refer to the Tax Code of Azerbaijan Republic, in particular, to the requirements of Article 101 establishes the progressive or incremental rates of the

[11] http://base.spinform.ru/show_doc.fwx?rgn=25213.

income tax. The incomes of the physical persons, as a whole, are divided by the discharges (or income bands) and tax rates with respect to each discharge they are established as follows:

1. Monthly income to 2500 manat — the rate of the income tax is 14 %.

2. Monthly income is more than 2500 manat — the rate of the income tax is 350 manat + 25 % of the income sum, which exceeds 2500 manat.

From this it follows that the high rate of tax is applied not to the entire sum as it increases but only to that its part, which exceeds the specific level.

However, the problem in this scale is concealed in the fact that, in the first place, the rates of tax grows excessively sharply, since the first rate is 14 %, and rises sharply to the second — namely 25 %. This it indicates, that if a person earns 400 manat, with the rate 14 % sum of the income tax will comprise 56 manat. As a result the person keeps 344 manat as disposable income. The rate of tax 14 % for the low incomes is too high a rate. This rate, for example, can be recalibrated for example at a rate of 8 % or 9 %. With an increase in the size of incomes it is possible to establish higher rates. But generally speaking the progression of taxation rates of tax must grow smoothly, for example, 10 %, 12 %, 14 %, 16 %, 18 %, and 20 %.

In the second place, in the progressive taxation the initial rate of the income tax to the incomes of the physical persons must be zero rates — 0 %. The legislator is obligated to establish the untaxable minimum, which includes zero rate, for example, 400 or 500 manat. Currently, this is not a circumstance enshrined in the tax legislation of the Azerbaijan Republic.

Thirdly, there is a problem consisting in the fact that it is necessary accurately to know, what rates can be established with respect to various incomes, since the passage between the sizes of incomes, it is equal as between the rates, it must not be sharp. The article 101 Tax Code of Azerbaijan Republic, which establishes the progressive method of the taxation of incomes by the income tax, does not satisfy these requirements, since they only established two sums — the first sum being an income of 2500 manat, and the second — more than

2500 manat. Therefore, the new legislator must define the smooth sums of incomes (smooth discharges or bands).

During 2015–2016 the sharp decline in oil prices in the world market, led to a depreciation of the national currency — specifically the manat against the US dollar, a devaluation which deeply influenced the economy. There was a reduction in income tax rates in the Republic of Azerbaijan in the following sequence:

— to reduce the lower rate to 12 % and upper rate to 18 % in 2018 year;

— to reduce the lower rate to 10 % and upper rate to 16 % in 2019 year;

— to reduce the lower rate to 18 % and upper rate to 14 % in 2020 year.

It should be noted that tax privileges, included the Tax Code several years ago and currently implemented, are not effective for taxpayers. For example, one such ineffective privileges is to set the minimum income tax rate of 164.5 manat per month. This seems incorrect, and the comment about such a "privilege" is that the minimum appropriate sum — 500 manat — should be determined for a 0 % income tax rate.

The tax scale may be recalibrated in law, and determined as the following, taking into consideration that according the article 101 of Tax Code of the Azerbaijan Republic determined 500 manat as not taxable income and applied tax rates:

— If the monthly income is up to 2500 manat, after deducting the minimum amount of profit tax up to 500 manat, the tax rate for the remaining amount is 12 %:

2500 manat – 500 manat = 2000 manat.

2000 manat × 12 % : 100 % = 240 manat.

If we want to know the specific rate of the 240 manat tax in the amount of 2500 manat, we can calculate the actual tax rate by the following method:

240 manat × 100 % : 2500 manat = 9,6 %.

— If the monthly income is more than 2500 manat, for example 3500 manat:

3500 manat – 2500 manat = 1000 manat.

18 % tax rate is applied to this amount:

1000 manat × 18 % : 100 % = 180 manat.

Add both achieved figures together:

180 manat + 240 manat = 420 manat.

— If we want to know the specific rate of the 240 manat tax in the amount of 3500 manat, we can calculate the actual tax rate by the following method:

420 manat × 100 % : 3500 manat = 14,8 %.

As a result, we can say:

1. An actual rate of 12 % marginal tax rate is equal to 9,6 %.

2. An actual rate of 18 % marginal tax rate is equal to 14,8 %.

From a juridical and economical point, I consider this to be a more advisable scale, for the following reasons:

— First of all, the realistic tax paying ability of people will be considered;

— Secondly, lower tax rates will lead to increasing of tax free disposible income;

— Third, people will be able to use this discrete income for purchases and improving cashflow and revenue in the economy;

— Fourth, the state budget will get additional money due to indirect taxes through enhanced circulation of revenue within the economy.

Also, low tax rates should be set for the VAT, which has a single rate of 18 % in the Republic of Azerbaijan. It should be noticed that it will be advisable to determine VAT by a differential method depending on prices of products and these rates should be more optimal. For example:

1) as a high tax rate — 15 %;

2) as a standard rate — 10–12 %;

3) as a low rate — 5–9 %;

4) finally, 0 % — otherwise known as zero rating.

A reduction of VAT tax rates will lead to the following positive results:

— First, there will be no need to create multiple tax privileges as it is enough to identify them in a small number;

— Secondly, the quantity of tax evasions will reduce;

— Third, such innovations will lead to maximal budget incomes;

— Fourth, the prices will fall and the purchasing power of the population will increase as the result of reduction of VAT tax rates.

The need for the practical legislative application of these economic ideas is proven once again in the modern era. Increasing life standards of people in conditions of strong market economy is one of the main tasks of the government. The productivity of the labour force increases with the exemption of a living minimum from taxation. Without any doubt incremental tax bands are is a convenient method of taxation and tax exemption of low incomes is critical.

The progressive method is even applied even to property tax in some countries. For example in the Russian Federation the tax of property of physical persons is determined at different rates, but in a banded form depending on sum of the amount of the inventory value and the type of property (flats, private houses, cottages, or non-residential premises). The rate of property tax increases according to the value of the property: to 0,1 %; from 0,1 % to 0,3 %; from 0,3 % to 2 % (Tax Code of Russian Federation, 2010).

Another example: Depending on value of inherited property in Great Britainthe rate of Property tax is is determined from between 0 % to 40 %, in Austria — depending on type of inherited property and kinship degree — from between 2 % to 15 %. In Spain the property tax in cities is between 0,4 % to 1,3 %, (and between 0,3–1,22 % in provinces). In Canada it is is determined between 2 % and 5 % (Kucherov, 2001, p. 125–174). In contrast, in the USA the tax rate for inherited property is determined between 18 % and 45 % with a structured scale of value bands (Shuvalova et al., 2010, p. 98).

In the Republic of Turkey the personal income tax rate is determined between 15 % and 40 %, and the VAT tax rate is between 1 % and 18 %, although the 18 % is applied in almost all cases. The band of different scales method for taxation in Turkey is applied for real assets too. But the band differentiation of tax is determined depending on type of the real asset, not value. Thus, the annual property tax for residential buildings is 0,2 %, for commercial buildings 0,4 %, for agricultural land plots 0,2 %, and for land plots for construction of commercial buildings 0,6 %. Currently the average annual sum of this tax is between 50–60 Euros for flats, and 100 Euros for villas. Annual property tax in Turkey is

calculating based on the value of the property as given in State Registry documents.[12]

Another difference is found in Georgia. According to article 202 of Tax Code of the Republic of Georgia the property tax rates for physical persons changes in the following way depending on the annual income of the family owning those property:

— annual income of the family is lower than 100 000 lary — tax rate is between 0,05–0,02 %;

— annual income of the family is more than 100 000 lary tax rate is between 0,8–1 %.

According to article 206 of the Georgina Tax Code, if the annual income of a family is less than 40 000 lary, the physical person is exempt from tax (Tax Code Georgian Republic).[13]

This approach shows the application of theories and in the modern era, enabling the increase of living standards of people in the conditions of a market economy without damaging revenue to the state. Without any doubt progressiveness is a convenient method of taxation and tax exemption of low incomes is so important. In progressive taxation tax exemption of small taxpayers causes an increase in the need to ensure payments of other taxes.

The application of progressive taxation methods to property taxes in Azerbaijan Republic would be very expedient. According to the current legislation the differential, but progressive property tax rate is used to make determinations based no t only depending on territory index, but also in correspondence with the area of a residential building. It is clear that if a resident has several residential buildings with a big area, the application of banded or differential (lower or higher) property tax rates in comparison with residents which has small residential building will be fairer.

According to article 198.1 of the Tax Code of Azerbaijan, physical persons are obliged to pay the property tax in following order and at following rates: For each square meter of building area in their ownership (as regards residential premises — the part exceeding

[12] http://www.turkey.mid.ru/rus/econom_04.html.

[13] http://www.businessombudsman. ge/cms/site_images/Sagadasaxao_A5_ Rus.pdf.

30 square meters), the rates specified in the following table are to be applied (subject to the qualification that if the building is located in Baku, then using coefficients of not less than 0.7 and not more than 1.5 to these rates, as prescribed by the relevant executive authority):

1) Baku — 0,4 manat;

2) Sumgait and Absheron — 0,3 manat;

3) other cities (except of regional subordination towns), regional centres — 0,2 manat;

4) cities, towns and villages of regional territories (except settlements and villages of Baku and Sumgait cities, as well as Absheron Baku region) — 0,1 manat.

It would however, be more efficient to determine the rates as follows:

1) Baku — 0,8–1,0 manat;

2) Sumgait and Absheron — 0,5–0,8 manat;

3) other cities (except of regional subordination towns), regional centers — 0,3–0,5 manat;

4) cities, towns and villages of regional subordination (except of settlements and villages of Baku and Sumgait cities, as well as Absheron Baku region) — 0,1–0,3 manat.

In addition, the profit tax rate in the Republic of Azerbaijan is 20 % and has remained unchanged for almost 10 years. It is in the author's opinion, this should be reduced to a relatively low rate.

In the theory of taxation such a complex progression is called "the sliding scale" (Sokolov, 2003, p. 221), or "cascade" progression (Pepelyayev, 2004, p. 116). Similar views are linked to the idea that passage from one discharge to another it occurs smoothly. But the high rate of tax is applied not to the total volume of taxable income or sum, but only to the sum of income, which exceeds the previous value band.

By the paramount task of legislator is, in my view, not simply the cancellation of the high rates of the income tax and replacement with lower rates. In my view, the main and real task of the legislator now is at present the optimisation of the rates of taxes and the decrease of a quantity of tax privileges, and the cancellation of a number of ineffective provisions.

One cannot fail to agree with the opinion of Prof. S. Q. Pepelyayev, in the theory which emphasises, that no one will work only in order to pay taxes. With higher tax requirements, the motives for tax evasion become stronger, with a corresponding increase in illegal and unregulated market activities. (Pepelyayev, 2004, p. 74).

Accordingly A. B. Laffer, — with his Laffer curve, emphasises that the reduction in the rate of taxes will actually increase the sum of tax revenues, ensuring an increase in the economy productivity, which will be stimulated. In turn, this contributes to an increase in the productivity of labour, and a reduction decrease in the level of tax evasion.

Legislators should remember, when drafting their proposals, that in Smith's theory there was the emphasisis that

*"the owner of capital appears, in the essence, by the citizen of the entire world and by no means is it compulsorily connected with any individual country. It easily can leave the country, in which it undergoes taxation by the burdensome by tax, and to transfer its capital into other country, where can with large convenience in the news its enterprise or use its state. Transferring its capital, it will end entire work, which conducted in the country abandoned by it... the tax, which leads to the ebb of capital from any country; it leads, thus, to the disappearance of the incomes... of society" (Smith, 2009, p. 783).*

In more modern language — people wil move money away from tax burdensome regimes to regimes of lower burden — thus removing revenue producing funds from an economy.

Prof. I. A. Mayburov emphasises that it is difficult to determine the optimum rate of specific taxes, as empirical calculations have to be taken into account for the specific economic conditions of each country — and in some cases different zones of a country. In addition, "the optimum tax rate may change in the course of time" (Mayburov, 2010, p. 51). At the same time, the establishment of taxes of above the maximum permissible rate, as a rule, does damage to the economy of the country.

It is one of the contradictions between the tax theory and the tax legislation of Azerbaijan Republic that we see the ambiguity between concepts of such elements as "the object of taxation" and "the article

of tax." The approach of the tax legislation of Azerbaijan Republic to the object of taxation causes considerable doubt, since this wording makes it necessary to think about the object of taxation rather than the essence of the article of the tax, which, unfortunately, completely is absent from the list of elements. To understand this problem more, refer to article 12.3 of the Tax Code of the Azerbaijan Republic, in which it states: "The object of taxation — these are income, profit, the earth, is mineral, the cost of the allowed goods, works and services, and also other objects of taxation, determined by the present code." Greater clarification is needed to determine the essence which is subject to taxation — another challenge fro the legislator.

In the text content of this article it is not difficult to note that is a serious contradiction, since those enumerated in this formulation "income, profit, the earth, mineral" are by no means objects, and so called "articles" of tax. Thus, the concept "of the object of taxation" is determined by legislator incorrectly. "The object of taxation" and "the article of tax" are represented as identical concepts — when in fact they are not.

According to the theory of Prof. S. G. Pepelyayev, and legally speaking, in the theoretical viewpoint the object of the taxation it is defined as the juridical fact, from which arises the cause of the responsibility of subject to pay the tax (Pepelyayev, 1995, p. 49). Thus, why, tax legislation does refute scientific reality? Indeed it is understandable that the presence of one object alone does not cause the tax obligation. It is necessary that this object has to belong to someone, the person to whom lies the obligation of tax payment. Thus, the presence of juridical fact is extremely important.

This situation creates the problems in the law and practice of taxation. Similar occurrences must be eliminated. Tax legislation and theory about the taxes must not contradict each other, but on the contrary, the contemporary tax legislation must match the ideas of tax theories.

## 3. CONCLUSIONS

As a result of the study of the ideas of classical and contemporary theories about the elements of tax it is possible to make the following conclusions.

The results of investigating the theories of taxation establish the fact that the legislations of the countries of the world did not arrive at the contemporary definition of "taxation", specifically to the understanding of "the elements of the juridical composition of tax." This succeeded because of studies of theoretical world views, and long-standing practice of the countries in the process of testing and realisation of economic theories and theories about the taxes.

The tax system of each state must be legislatively formed taking into account not only the special features of the national economy, but also of the theoretical ideas, advanced by theories about the taxes, contemporary scientific views about the taxation, or "the lessons", taught by the practice of the taxation of the foreign countries.

The main direction of contemporary theories about taxes must consist in the search for the most optimum and most reasonable methods as well as the principles of the regulation of taxation.

Clear determination of the elements of tax it is at present the most necessary matter for legislative bodies of the government of Azerbaijan. This problem was one of the mainproblems of the classical theories of the taxation. The founders of historically valuable theories attached great value to the"certainty" of tax, which in turn, indicated the determination of the elements of tax, which is the basic task of contemporary legislation. In the present development stage of market relations the contemporary generation of the developers of tax legislation must consider the valuable ideas of tax theories, since in them it is possible to find the solution of many problems in the field of taxation.

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# VIETNAM'S POLICY ON JUVENILE CRIMINALS REFLECTED IN ITS NEW PROVISIONS UNDER THE NEW CRIMINAL CODE 2015 (AMENDED 2017) AND RECOMMENDATIONS

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**Abstract**

Crimes being committed by juveniles in Vietnam are increasing in number and are becoming more serious in nature, and furthermore, there is a greater number of juvenile criminals committed crimes at an earlier and earlier age. The new Criminal Code 2015 (amended in 2017) reflects the humanitarian policy in dealing with juvenile criminals, which is in line with international standards. The need to have legislation and codes that reflect international reality and requirements, including treaties, as well as in accordance with humanitarian principles is paramount. The requirements for policies that drive these is clear. In this context, the author elaborates on key aspects of criminal policy that drive new provisions and process — including matters such as inchoate offences, the age of the offender, diversion principles, and sentencing requirements depending upon different ages — including for concurrent sentencing for offences committed within different age bands.

Within this paper, the author therefore analyses the grounds for the Vietnamese State's policy on juvenile criminals and new provisions of Criminal Code 2015 (amended in 2017) reflected this policy. Additionally, the author provides recommendations to improve these provisions with respects to their content and legislative techniques in order to effectively bring the State's policy on juvenile criminals into real life.

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**Keywords**

Vietnam, Humanitarian, Juvenile, Prosecution, Conviction, Sentencing

**CONTENTS**

## 1. INTRODUCTION

A number of pieces of research throughout the country have revealed the alarming situation that crimes committed by juvenile offenders are increasing in number and gravity.[2] Furthermore, the juvenile offenders are committing crimes at an earlier and earlier age. For these reasons, during the drafting of the Criminal Code 2015, certain concerns were raised about the humanitarian policy on treatment of juvenile offenders. Although the situation of juvenile criminals was, indeed, serious, Vietnam firmly supports a more gentle policy in dealing with young offenders.

This policy of theVietnamese Government is explicitly reflected in its new Criminal Code 2015 (amended in 2017) (hereinafter "Criminal Code 2015"). In comparison with the previous criminal code, the new provisions reflects an even more humanitarian approach in dealing with juvenile offenders, including diversion principles, restricting the criminal responsibility of young offenders below the age of sixteen, mitigations in sentencing and even the removal of criminal records in certain circumstances.

Thus, this has led to the question on which grounds Vietnam continues to support and provide for such humanitarian policy on treatment of juvenile criminals? Reviewing this policy from the following three aspects: (i) bio-psychological features of juveniles, (ii) constitutional provisions; and (iii) international standards. Thus it is observed that Vietnam's policy on juvenile criminals is based on very solid theoretical and legal grounds. This policy reflects the prominent trend of modern criminal law world wide. This policy needs to be understood in-depth and to be applied in practical cases for the best interests of the offenders under the age of eighteen.

[2] See Assoc. Prof. Dr. Trinh Thi Kim Ngoc, The increase in crimes comitted by juvenile offenders — A serious warning to the sustainable development of soceity in our country, Journal on People Study No 65 (No 2/2013); Judge Pham Minh Tuyen — Chief Judge of the Bac Ninh Province Court, Prevention of crimes commited by juvenile offenders through court's trial of criminal cases — Results, shortcomings and causes, at http://hvta.toaan.gov.vn/portal/page/portal/hvta/27676686/27677461?p_page_id=27677461&pers_id=28346379&folder_id=&item_id=96168833&p_details=1 [accessed 08.05.2019].

Within this paper, the author analyses the grounds for Vietnam to continue its policy of a greater humanitarian approach to the treatment of juvenile criminals reflected in its new Criminal Code 2015. With this analysis, the author presents the supportive view towards the Government's policy. However, on the other side, the new provisions of the Criminal Code 2015 still contain certain shortcomings in terms of their content and legislative techniques. Thus, the author provides a number of recommendations to amend these provisions so that they become more accurate and logical.

## 2. THE GROUNDS FOR VIETNAM'S POLICY ON JUVENILE CRIMINALS

Naturally and obviously, the legal capacity of a human being does not exist from birth. Every person gradually gains the capacity to realize and aware of the right things to do and the capacity to control oneself behaviour through experience in their life. Therefore, the age of a person is one of the criteria to evaluate their mental development or their mental maturity. Under international standards and Vietnamese law, a person below the age of eighteen is subject to special protections, including in the field of criminal justice.

Under the criminal law of Vietnam, a person under the age of eighteen is considered as having the limited capacity in terms of cognition and behaviour. Various pieces of research have shown that persons below the age of eighteen are immature with respect to their mental and physical development.[3] Their internal regulation, including the system of internal values, has not fully developed and is not yet stable. Their capacity of self-restraint and self-control is not well-functioning. As a consequence, they may commit criminal offences due to the directions, the aiding, abetting, facilitating or counselling of others. In addition, due to the limitation in capacity, they may commit criminal offences due to wrongful evaluation of their circumstances, the seriousness of their behaviour, or the social requirements towards

[3] See more: https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf [accessed 4 May 2019].

their conduct. At the early age, the juveniles may commit a crime due to their "positive" but "wrongful" perception or promotion. For example they may commit a crime because they want to prove themselves to be strong and brave, and not wishing to fall behind their friends... It is regretful that in certain cases, juvenile offenders are punished because they are not fully aware of the social and legal requirements with respect to their behaviour. This is very different from cases in which mature people are fully aware of norms and standards but intentionally violate the rules. Viewing bio-psychological features of juveniles, on the other side, because of the internal regulation system at the young offenders is unstable, thus enabling authorities to educate and to help them with their rehabilitation. Thus, the criminal justice needs to develop special rules in dealing with young offenders.

Regarding international standards, there are several important documents which provide special protections for juveniles in criminal justice, namely: The International Covenant on Political and Civil Rights 1966; The Convention on the Rights of the Child 1989;[4] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (The Beijing Rules 1985);[5] The United Nations Standard Minimum Rules for Non-custodial Measures 1990 (The Tokyo Rules 1990); The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty 1990 (The Liberty Deprivation Rules 1990).[6]

Article 24(1) of the International Covenant on Political and Civil Rights 1966 states that "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or

[4] Section 1 Article 1 of the Convention on the Rights of a Child 1989 states that "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Whereas, under the Vietnam's Law on Care, Education and Protection of Children 2004, a child means every human being below the age of sixteen.

[5] The Beijing Rules sets forth the minimum standards for treatment of juvenile offenders. These standards help Member Parties to solid ate their criminal justice system applicable to juveniles in accordance with the requirements under Article 40 of the Convention on the Rights of a Child 1989.

[6] The Tokyo Rules provide for minimum standards applicable to juveniles not being applied custodial measures. These standards are applied to all person subject to prosecution, trial or execution of a sentence.

social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[7] Implementing this rule, Convention on the Rights of the Child 1989, the Beijing Rules, the Tokyo Rules and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty set forth for more detailed measures with a number of standards regarding the treatment of juvenile criminals. Among those rules, the "best interests" of a child appears to be the central principle in dealing with, and treating criminal offenders under the age of eighteen.[8] Their interests must be taken into account in the whole process of the treatment, and this should be weighed against the purpose of retribution and deterrence.

It should be emphasised that, up until now, the United Nations rules and standards with respect to children protection have been widely adopted by various countries. Vietnam ratified the Convention on the Rights of the Child 1989 on 28th February 1990.[9] Member Parties to this Convention, including Vietnam, undertake to take appropriate measures, including the legislative, to ensure the rights of a child.

Vietnam's Constitution is the national legislation which represents its commitment to ensure the rights of a child. Article 36(1) of the Vietnam's Constitution prescribes that: "The State protects marriage and family and protects the interests of mothers and children". Additionally, Article 37 of the Constitution 2013 prescribes: "Children enjoy protection, care and education by the State, family and society…". Based on these constitutional principles and international standards on protection of juveniles, Vietnam's Policy on juvenile criminal justice under its new Criminal Code 2015 continues to support the more humanitarian approach towards the treatment of juveniles.

[7] See Section 1 Article 24 of the International Covenant on Political and Civil Rights 1966.

[8] See Section 1 Article 3 of the on the Convention on the Rights of a Child 1989.

[9] Currently, 196 states already ratified and became member parties to the Convention on the Rights of a Child 1989 (see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en, accessed 09.05.2016).

## 3. VIETNAM'S POLICY ON JUVENILE CRIMINALS REFLECTED IN NEW PROVISIONS OF THE CRIMINAL CODE 2015

### 3.1. Vietnam's Policy on Juvenile Criminals Reflected in the New Provisions Regarding Principles on Treatment of Juvenile Offenders

Article 91 of the Criminal Code 2015 provides "The principles on treatment of juvenile offenders under the age of eighteen". These provisions are highly important because they serve as the backdrop for legislators to set up other provisions regulating criminal responsibility of the juvenile offenders as well as for law enforcement officers to prosecute and sentence juvenile criminals in practice. These principles are observed to be in line with international standards. Compared with the previous Criminal Code of Vietnam,[10] the new Code provides for a number of important amendments.

The principles on treatment of criminal offenders under eighteen can be categorised into three groups: (i) principles on the main direction to deal with criminals under the age of eighteen, (ii) diversion principles, (iii) principles on sentencing.

#### *i. Principles on the Main Direction to Deal with Offenders under the Age of Eighteen*

Studies of juvenile criminal offenders under eighteen have shown that one of the causes of their wrongful conduct is the shortcomings in their life which are closely related to circumstances in which they grew up, particularly the education from their family, schools and even authorised bodies. As mentioned above, emotional and mental capacity of a human being does not exist from birth. The internal control system inside every person gradually develops through their inter-relationship with others. Thus, positive support and positive perspective during the socialisation of an individual (i.e. positive bonds) tends to help that person to grow up healthily and become a good member of society. On the contrary, the link of an individual to a negative relationship or

[10] The Criminal Code 1999 (amended in 2009).

perspective (i.e. negative bonds) could damage that person and turns them to be a bad member of the community with criminal conduct.[11] Thus, family, schools and wider society bear a certain responsibility in helping individuals to develop healthily. Furthermore, in the case of persons under the age of eighteen, they still have a long life ahead. The proper education and care can heal defects in their socialisation.

In terms of international standards, Article 3(1) of the Convention on the Rights of the Child 1989 requires that in every action concerning children, "the best interests of the child shall be a primary consideration." Additionally, Article 40(1) of this Convention provides that:

"States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[12]

It should also emphasize that Rule I.1 of United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 also requires that juvenile justice system should ensure the rights, safety and promote the physical and mental well-being of juveniles. In their treatment, custodial measures should be used as the last resort.

Being in line with the mentioned international rules and standards for protecting juveniles, Article 91 (1, 3) Criminal Code 2015 provides that the principal direction in dealing with the juvenile offenders in criminal justice is *to ensure their best interests and their treatment must be aimed at rehabilitation*. These provisions are written as follows (the amendments compared with the Criminal Code 1999 are indicated):

*— The treatment of criminals under the age of eighteen must* ***ensure their best interests*** *and principally target at rehabilitation, helping them to rectify their wrongdoing, develop healthily and become a helpful citizen (Section 1).*

[11] Freda Adler, Gerhard O. W. Mueller and William S. Laufer (1991), Criminology, McGraw-Hill, New York, p. 124; Larry J Siegel (4th ed, 1992), Criminology, West Publishing Company, St Paul, West Publishing Company, p. 226.

[12] See Section 1 Article 40 of the Convention on the Rights of a Child 1989.

— ***Measures applied to juvenile offenders must take account of their ages; the capacity of juvenile offenders to aware of dangerous features of their criminal conduct; reasons and circumstances in which the criminal offences are committed*** *(Section 1).*

— *The prosecution of the juvenile criminals shall only be initiated if necessary and must take into account their personal circumstances, dangerous features of their criminal conduct, and requirements for crime prevention (Section 3).*

Under the stated rules, while considering measures applicable to juvenile offenders, authorised persons must weigh carefully various factors because of the best interests of juvenile offenders. This must include their physical, mental and social development. The treatment must endeavour to rehabilitate the offenders and help them to develop healthily.

Due to their emotional, mental and physical immaturity, (although not in all cases), juvenile offenders may not be fully aware of the danger and consequences of their conduct. Additionally, the capacities of juveniles vary, therefore, the principle requires the authority to consider the age and capacity of juveniles, as well as causes of their crimes to decide an applicable measure.

As emphasized, the treatment of offenders under eighteen must be aimed at their rehabilitation. Education and training is a process to reduce and remove negative aspects inside juvenile offenders and to build up in them positive perspectives towards themselves and society as a whole. The utmost result is to assist juvenile offenders behave properly and become a positive member of society. To achieve this, the education and training must be based on their own circumstances and requirements of crime prevention.

The main direction for dealing with juvenile offenders also requires that the prosecution of juveniles can only be initiated in necessary cases considering "crime prevention". Although, it is not clear what the term "crime prevention" actually means in practice. It is not clear whether the prosecution can only be initiated in order to prevent the offenders themselves from re-offending or, on the wider perspective,

the prosecution can be initiated to prevent not only the offender but also others. That is, the prosecution of a particular person serves as a warning to others. In this second possibility, the prosecution of a particular person acts as a social prevention measure. The author of this paper would suggest that the prosecution can only be initiated to prevent the offender(s) themselves from re-offending, because this rule should be read together with the rule "for the best interests of a child". This means that if offenders are not likely to commit another crime, the authority should not prosecute them. In order to evaluate whether they are likely to commit another offence, authorities should take into account their personal circumstances, weigh their negative versus positive features as well as the danger of their criminal conduct.

### *ii. Diversion Principles*

The term "diversion" has appeared and been used by criminal justice bodies in certain countries in dealing with juvenile offenders since the mid 1960s.[13] It has been practically observed that custodial measures contain existing (and potential) negative influences on mental, emotional and physical development of juveniles as well as their integration in society. Therefore, diversion is increasingly recognized and applied in Vietnam.

Generally, diversion is the process to alternate traditional measures in dealing with juvenile offenders by new measures that foster the engagement of community or wider society in helping wrongdoers. Diversion may be used by authorities at various stages of criminal procedure when deemed necessary. Article 40(3)(d) of the Convention on the Rights of the Child 1989 provides that: "Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected." Interpreting this, Rule 11 of the Beijing Rules 1985 stipulates the diversion, particularly Rule 11(1) of the Beijing Rules

[13] Prof. Kenneth Polk and others, Early Intervention: Diversion and Youth conferencing — A national profile and review of current approach to diverting juveniles from criminal justice system, Australian Government Attorney-General's Department, 2003, Preamble.

1985 provides that: "Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in Rule 14.1 below."[14] And, Rule I.1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 emphasizes that: "Imprisonment should be used as a last resort." Thus, the approach in treatment of juvenile offenders under eighteen is to give priority to diversion. Additionally, Section 11(3) of the Beijing Rules 1990 states: "Any diversion involving referral to an appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application". Wrongful conduct of offenders under eighteen has shown that their socialisation suffers certain defects or their education has certain imperfections. In order to solve these problems beyond criminal justice and without the deprivation of liberty, the participation of families, communities and victims is greatly important. However, the education provided to juvenile offenders only brings values and become meaningful if the receivers, i.e. juvenile offenders, themselves or their guardian, consent to it. If the referral to the community causse greater pressure on them and they do not agree, the education may not bring positive influence or the expected results can not be achieved. Thus, Rule 11.3 of the Beijing Rules 1985 requires that any diversion requires the consent of the juvenile or his/her guardian.

In accordance with the mentioned international standards, Article 91(2, 4) of the Criminal Code 2015 provides for new provisions as follow:

— *The court shall only impose a sentence upon a juvenile offender if it is considered that the exemption of criminal responsibility and application any of the measures specified in Section 2 or compulsory education in a correctional institution specified in Section 3 of this Chapter do not have sufficient educational and deterrent effects.*

[14] Rule 14.1 of the Beijing Rules 1985 states: "Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial."

Article 91(2) and Section 2 of Chapter XII of the Criminal Code 2015 provide for exemption from criminal responsibility applicable only to offenders under the age of eighteen. Being exempted criminal responsibility under these provisions, the concern juveniles are subjected to one of supervisory and educational measures (i.e. reprimand, community reconciliation or compulsory educational measure in the commune) or compulsory education in the rehabilitation institutions. Those measures, from the view of their nature, promote the participation of families and communities in the education and rehabilitation of juvenile wrongdoers. It should be noted that reprimand and reconciliation in community are prescribed in Vietnamese criminal law for the first time.

Article 91(2) of the Criminal Code 2015 sets forth conditions for applying supervisory and educational measures. General conditions for applying those measures include: (i) there exist more than one mitigating circumstance; (ii) offenders voluntarily compensate part or whole damages caused by their crime and (iii) are not eligible for exemption from criminal responsibility under conditions applicable to both adults and juveniles.[15] Article 91(2) also provides for detailed conditions to exempt juveniles from criminal responsibility based on the age of offenders, categories of crimes committed or the role of offenders in committing the crime. In the author's view, these provisions do not function as the principles (the overall direction), thus these provisions should be removed from Article 91 and integrated in Section 2 of Chapter XII of the Criminal Code 2015.

### *iii. Principles on Sentencing of Offenders under the Age of Eighteen*

Article 6(5) of the International Covenant on Political and Civil Rights 1966 governs that: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age...".

[15] Article 29 of the Criminal Code 2015 provides for exemption from criminal responsibility applicable to all offenders, under which they are not subjected to any compulsory supervision or educational measures. Thus, if juveniles meet conditions for exemption of criminal responsibility under Article 29, authorities must apply these provisions to them.

Article 37(a) of the Convention on the Rights of the Child 1989 also provides that: "...Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." Vietnam's Criminal Code 2015 highly supports these humanitarian rules.

Additionally, sentencing is one of the central issues in criminal cases involving juvenile convicted criminals. Sentencing also needs to be based on the humanitarian approach in dealing with criminal under the age of eighteen. Education or rehabilitation is the primary purpose of juvenile treatment. Thus, Article 37(b) of the Convention on the Rights of the Child 1989 sets forth that: "...The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 provide for more details of these provisions.

Based on the framework of international standards, Vietnam's Criminal Code 2015 explicitly provides a number of principles on sentencing of juvenile criminals, including penalties applicable to juveniles, discretion in sentencing and recidivism. In comparison with the previous regulations,[16] the Criminal Code 2015 provides for various important amendments (new provisions are indicated):

— ***The courts shall only impose termed imprisonment to juvenile offenders under the age of eighteen if other punishment and educational measures do not have sufficient deterrent effects***.

— *When handing down sentences of termed imprisonment, the courts shall impose on them lighter sentences than those imposed on adult offenders of the corresponding crimes and* ***with the minimum necessary length***. *(Article 91(3) Criminal Code 2015).*

The stated principles on sentencing under the Vietnam's Criminal Code 2015 requires that while exercising the discretion of sentencing,

[16] Previously, Article 69(5) of the Criminal Code 1999 (amended in 2009) only requires that: "When handing down sentences applicable to juvenile convicted, termed imprisonment shall be limited to necessary cases."

courts must firstly consider non-custodial measures. Deprivation of liberty must be used as the last resort. Namely, imprisonment can only be imposed when other non-custodial measures cannot prevent them from the likelihood of re-offending. Reading this rule together with the principle on the main direction in dealing with juvenile criminals, it should be understood that in cases of offenders under eighteen, the authorities must firstly consider whether to initiate the prosecution. Then, if the prosecution is initiated, they must consider the exemption of criminal responsibility with educational measures and other non-custodial penalties before turning their option to the deprivation of liberty.

Imposing termed imprisonment on juvenile criminals, courts also decide the length to be applied. With respect to the period of imprisonment, again, courts must consider the minimum shortest length for the best interest of juveniles convicted. Additionally, the length of imprisonment imposed on juveniles must be shorter than those imposed on criminals over 18 in corresponding circumstances.

### 3.2. Criminal Policy Reflected in New Provisions on Restriction of Criminal Responsibility Based on the Offender's Age

Article 12 of the Criminal Code 2015 on the restriction of criminal responsibility based on the offender's age, again, reflects the humanitarian approach towards juvenile offenders. It should be mentioned that under the Criminal Code 1999 (amended in 2009), persons from fourteen to under sixteen must be responsible for all types of crimes of very serious and particular serious categories.[17] Article 12 of the Criminal Code 2015 provides for amendments as it limits the types of crimes to be responsible by juvenile offenders. Under these amendments, offenders under sixteen are only responsible for crimes of very serious and particular serious categories listed under Article 12(2).[18]

[17] Under Article 8 of the Criminal Code 1999 and Article 9 of the Criminal Code 2015, crimes are categorized into 4 groups: (i) less serious crimes; (ii) serious crimes; (iii) very serious crimes; and (iv) particular serious crimes.

[18] See Article 12(2) of the Criminal Code 2015.

### 3.3 Criminal Policy Reflected in New Provisions on Sentencing and Cumulative Sentences

#### *i. Sentencing in Case of Inchoate Offences*

Criminal Code 2015 prescribes new provisions on the sentencing applicable to juvenile offenders in the case of preparation and attempt of a crime. It is worthy to mention that the Criminal Code 1999 is silent on this issue, i.e. it does not set forth special protections for juveniles. Thus, the sentencing of juvenile offenders in case of incomplete offences was governed under the general rules applicable to offenders from eighteen and over.[19] The Criminal Code 2015 explicitly provides special rules on sentencing applicable to juvenile offenders in case of preparation and attempt of a crime which are much less and described below.

#### *ii. Preparation of Crime*

First, regarding the preparation of a crime, the penalty imposed upon offenders from fourteen to under sixteen cannot exceed one third (1/3) of that applicable to an offender from eighteen and over. Under the Criminal Code 1999, this proportion is one half (1/2).[20] With respects to offenders from sixteen up to eighteen, penalties applicable to them can not exceed one half (1/2) of that applicable to offender over eighteen. Under the Criminal Code 1999, this proportion is three fourths (3/4). Second, in case of a crime preparation, the Criminal Code 2015 prescribes separate penalty brackets for each relevant crime which is greatly lighter than the rules under the Criminal Code 1999.[21] For this reason, penalty applicable to offenders under eighteen is correspondingly lessen.

[19] In practice, courts impose sentences in such cases based on a resolution of the Judge's Council of the Supreme Court. This resolution provides the interpretation based on the rules applicable to offenders over eighteen under the Criminal Code 1999.

[20] See Article 74(2) of the Criminal Code 1999.

[21] Under Article 52(2) of the Criminal Code 1999, the maximum penalty for preparation of a crime is 20 years of imprisonment if the maximum penalty for corresponding complete offence is life imprisonment or death penalty, and the maximum penalty for preparation of a crime is one half of the maximum termed imprisonment applicable to complete offence.

### *iii. Attempt*

In case of an attempt, the Criminal Code 2015 also provides greater protections for juvenile offenders. Under the new provisions, a penalty imposed on offenders from fourteen to under sixteen cannot exceed one third (1/3) of the maximum termed as prescribed under Article 100 and 101 of the Criminal Code 2015. A penalty imposed on offenders from sixteen to under eighteen cannot exceed one half (1/2) as prescribed under Article 99, 100 and 101 of the Criminal Code 2015.[22] These proportions used to be one half (1/2) regarding offenders from fourteen to under sixteen and one third (3/4) regarding offenders from sixteen to under eighteen under the Criminal Code 1999.[23]

### *iv. Cumulative Sentences*

The Criminal Code 1999 does not provide special rules on cumulative sentences imposed on juvenile offenders from fourteen up to sixteen, therefore there exist different interpretations. The Criminal Code 2015 explicitly sets forth rules on this issue which reflects different policies on classified groups of offenders. The younger group of offenders (i.e. offenders from the age of fourteen to under sixteen) receives the greater protection. Generally, the maximum cumulative sentence applicable to them must not exceed 12 years of imprisonment. In contrast, the maximum cumulative sentence applicable to the older group (i.e. offenders from sixteen to under eighteen) must not exceed 18 years of imprisonment.[24]

Furthermore, the Criminal Code 2015 provides special rules on cumulative sentences in the cases where juvenile offenders committed different crimes at different ages. These rules are described below:

If juvenile offenders commit one crime when they are under sixteen and another crime afterwards, and the sentence imposed on the previous crime is harsher than that applied to the latter; the maximum

[22] See Article 102(3) of the Criminal Code 2015.

[23] Compared Article 57 and Article 102 of the Criminal Code 2015 with Article 52 and Article 74 of the Criminal Code 1999.

[24] See 103(1) of the Criminal Code 2015.

cumulative must not exceed 12 years of imprisonment. However, if the sentence imposed on the previous crime is lessen than that applied to the latter, the maximum cumulative must not exceed 18 years of imprisonment.

If juvenile offenders commit one crime when they are under eighteen and another crime afterwards, and the sentence imposed on the previous crime is harsher than that applied to the latter; the maximum cumulative must not exceed 18 years of imprisonment. However, if the sentence imposed on the previous is less than that applied to the latter, the maximum cumulative is not restricted. In other words, the general rules on cumulative sentences are applied.[25]

### 3.4. Criminal Policy Reflected in New Provisions on Expungement of Criminal Records on Conviction

Criminal Code 2015 provides a more gentle treatment of juveniles convicted for the first time, two situations where the convicted are not subjected to records of conviction (i.e. they are expunged of criminal records), namely:

– The offenders are from the age of fourteen to under sixteen;

– The offenders from the age of sixteen to under eighteen are convicted of a less serious crime than a serious crime, or very serious crime with unintention.[26]

Additionally, the periods for expungement of conviction records for offenders from sixteen to under eighteen are shorter than the offenders from eighteen and over.[27]

[25] See Article 103 (2 and 3) of the Criminal Code 2015.

[26] See Article 107(1) of the Criminal Code 2015. Article 107(2) of the Criminal Code 2015 also prescribes that offenders from under 18 imposed judicial measure are not subjected to conviction records. However, this provision is the same as regulated under Article 77(2) of the Criminal Code 1999.

[27] See Article 107(3) Criminal Code 2015.

## 4. RECOMMENDATIONS ON AMENDMENT OF CERTAIN PROVISIONS OF THE CRIMINAL CODE 2015

### 4.1. Recommendations on Amendment of the Provisions Regarding Principles on Treatment of Juvenile Criminals

As noted above, Article 91 of the Criminal Code 2015 regarding the principles on treatment of juveniles reflects the greater humanitarian good and is in line with international standards. Nonetheless, there are still some shortcomings. First, the term "citizen" in Article 91(1) has limited the application of the scope of these principles. Under international standards, juvenile offenders must be treated without distinction of national origin. Thus, the principles under Article 91 must be applicable to juvenile offenders of all nationality, including persons without nationality.

Secondly, the prioritising of various principles under Article 91 appears not to be entirely logical from the view of stages of criminal proceedings. Article 91(3) sets forth the rule on prosecution, namely, authorities can only initiate the prosecution against an offender when deemed necessary. However, this rule is written behind Article 91(2) regarding the exemption of criminal responsibility. This reflects the illogical order as if the prosecution is not initiated, the exemption of criminal responsibility is not the matter to be discussed. Thus, Section 3 should be written and applied in practice before Section 2.

Furthermore, Article 91(3) lists three factors which must be taken into account to decide the initiation of the prosecution. These include: (i) dangerous features of the alleged criminal conduct, (ii) the juvenile's personal circumstances and (iii) the requirement of crime prevention. We would argue that these factors must be considered during the whole process of handling juvenile offenders, not only at the prosecution stage. Namely, under Article 50 of the Criminal Code 2015, factors (i) and (ii) must be considered for sentencing in all criminal cases and factor (iii) is included in considering the punishment applicable to the convicted. It is worthy to note that the second paragraph of Article 91(1) already provides for factors to be taken in cases involved juvenile offenders, including: the age of juvenile offenders; the awareness of juvenile offenders regarding dangerous features of their conduct and the causes

and circumstances in which a crime is committed. Thus, the author recommends that certain provisions of Article 91(3) should be included in Article 91(1).

Thirdly, Article 91 is titled as "principles on the treatment of juvenile offenders", whereas provisions under Article 91(2), indeed, are relating to specific conditions for imposing educational and supervision measures in case of exemption from criminal liability. Thus, the author suggests that those conditions under Article 91 should be moved to Chapter XII(2) of the Criminal Code 2015.

Fourthly, Article 91(4) regulates that courts can only impose terms of imprisonment if other educational and supervisory measures; or education in rehabilitation institutions do not have sufficient educational and deterrent effects. Nonetheless, Article 91 (1, 2 and 3) do not yet mention measures of education in rehabilitation institutions. This is a special measure applicable only to juveniles and should be emphasised. This measure can be applied as an alternative measure for a term of imprisonment, i.e. of a diversion nature. Thus, it should be included in Article 91(2).

Fifthly, Article 91(7) provides that "A sentence imposed upon an offender aged under 16 shall not be used as the basis for a determination of recidivism or dangerous recidivism."[28] However, Article 107(1)(a) of the Criminal Code 2015 governs that a juvenile convicted under the age of sixteen is not subject to a criminal record — and having a criminal record is the prerequisite condition for determination of recidivism or dangerous recidivism. Thus, Article 91(7) become meaningless and should be removed.

With the above-analysis, Article 91 should be re-written as follow:

***Article 91. Principles on the treatment of juvenile offender under the age of eighteen***

*1. Treatment of juvenile offenders must be taken in their best interests and for the purpose of rehabilitation, helping them to redress their wrongs, develop healthily and become persons useful to society.*

[28] See Article 53 of the Criminal Code 2015 on recidivism and dangerous recidivism.

*Treatment of juvenile offenders must be based on personal circumstances, particularly their age, their capacity to be aware of dangerous features of their criminal conduct, and causes and circumstances in which criminal conduct is committed.*

*2. Criminal prosecution against a juvenile offender shall only be initiated if necessary for preventing them from re-offending.*

*3. Juvenile offenders under eighteen may be exempt from criminal responsibility and having imposed upon them the measures specified in Section 2 of this Chapter provided it is not the case specified in Article 29 or alternatively, being imposed education in rehabilitation institutions specified in Section 3 of this Chapter.*

*4. Courts shall only impose terms of imprisonment upon juvenile offenders if measures specified in Section 2 and 3 of this Chapter do not have sufficient educational and deterrent effects.*

*When handing down sentences of termed imprisonment, courts shall impose on them lighter sentences than those imposed on adult offenders of the corresponding crimes and with the minimum necessary length.*

*5. Life imprisonment, the death sentence and pecuniary penalties shall not be imposed on juvenile offenders.*

### 4.2. Recommendations on Amendment of the Provisions on Cumulative Sentences

As analysed in Section 2.4, Article103(3) of the Criminal Code 2015 provides for clearer rules on cumulative sentences applicable to juvenile offenders. Nonetheless, the language of Article 103(1 and 3) is not appropriate. Article 103(1) of the Criminal Code 2015 provides as follows:

1. Where a juvenile offender commits multiple crimes, the court shall impose a sentence for each of them and a cumulative sentence in accordance with Article 55 hereof.

*If the cumulative sentence is a community sentence, the duration shall not exceed 3 years. If the cumulative sentence is a term of imprisonment, its duration shall not exceed 18 years for a convicted*

*offender aged from 16 to under 18, and 12 years for a convicted offender aged from 14 to under 16.*[29]

First, as the stated provisions do not provide for the scope of application, it may be argued that the maximum cumulative sentence of 12 years are applicable to all offenders aged from fourteen to under sixteen, irrelevant if he commits any crime afterwards. Correspondingly, it may be argued that the maximum cumulative sentence of 18 years are applicable to all offenders aged from sixteen to under eighteen, irrelevant if he commits any crime afterwards. Thus, Article 103 (2 and 3) of the Criminal Code 2015 appear to be unsound from the view of Article 103 (1).

In addition, the second paragraph of Article 103(1) regarding the maximum cumulative sentence of the non-custodial reform is not necessary, as it is the same as prescribed under Article 55 of the Criminal Code 2015.

Second, Article 103 (3) provides for the case of juveniles under eighteen and Article 103(2) provides for the case of juveniles under sixteen. In terms of language use, it can be argued that juveniles under eighteen include juveniles under sixteen. Thus, Article 103(3) appears to overlap with Article 103(2).

For those reasons, the author would suggest the revisions of Article 103 as follows (revisions are indicated):

> ***Article 103. Cummulative sentences***
>
> *1. Where a juvenile offender commits multiple crimes, the court shall impose a sentence for each of them and a cumulative sentence in accordance with Article 55 hereof.*
>
> *If the cumulative sentence is non-custodial reform, the duration shall not exceed 03 years. (text to be deleted)*
>
> *If the cumulative sentence is a term of imprisonment, its duration shall not exceed 18 years for a convicted offender aged from 16 to under 18* ***when committing multiple crimes****, and 12 years for a convicted offender aged from 14 to under 16* ***when committing multiple crimes****.*
>
> *2....*

[29] Emphasis is added.

*3. Where a juvenile offender commits multiple crimes and one or some of which are committed before he/she reaches the age of 18, and the other afterwards:*

*a) If the sentence for the crime committed when the offender is* ***from 16 up to under 18*** *is heavier or the same as that for the crime committed* ***when he/she is from 18 and over****, the cummulative sentence shall not exceed the heaviest sentence specified in Clause 1 of this Article;*

*b) If the sentence for the crime committed when the offender is* ***from 16 to under 18*** *is heavier or the same as that for the crime committed when he/she reaches the age of 18, the cumulative sentence shall be the same as that imposed upon an adult offender.*

## 5. CONCLUSION

The Criminal Code 2015 demonstrates the greater humanitarian policy on juvenile offenders in various aspects. This policy is based on bio-psychological features of persons under eighteen as well as in line with international norms and standards. Personally, the author supports this policy.

However, certain provisions under the Criminal Code 2015 contain shortcomings, such as illogicality or a lack of clarity in meaning. Thus, the author provides a number of recommendations to revise those provisions, including the principles on treatment of juvenile offenders and cumulative sentences.

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