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Jurnal haqqında

Bakı Dövlət Universiteti Tələbə Hüquq Jurnalı BDU Hüquq fakültəsi Tələbə Elmi Cəmiyyətinin nəşri olmaqla tələbələr tərəfindən təşkil olunan və müvafiq akademik yoxlama qaydası ilə redaktə edilən ilk və tək jurnal olub milli, beynəlxalq və müqayisəli hüquqda mövcud olan müasir hüquq problemlərinə akademik səviyyədə peşəkar yanaşmanı təbliğ edir. Jurnalın əsası 2014-cü ilin noyabr ayında qoyulmuşdur. Nəzəri fikirləri, dünya dövlətlərinin məhkəmə və qanunvericilik təcrübəsini ümumiləşdirərək mübahisəli məqamlara aydınlıq gətirmək, hüquq cəmiyyətinə həm elmi, həm də praktiki müstəvidə yaradıcı düşüncə və hüquqi tənqid qabiliyyətini, hüquq mədəniyyətini aşılamaq Jurnalın əsas prinsipidir. Jurnal tərkibindəki məqalələr vasitəsilə aktual məsələlərə hüquqi əsaslandırılmaya istinad etməklə mümkün həllərin irəli sürülməsini və yenilikçiliyi prioritet məqsəd kimi müəyyənləşdirir. Hüquq tələbələrinin hüquqi yazı və hüquqi düşüncə bacarıqlarını üzə çıxararaq inkişaf etdirməklə onları akademik araşdırmaya həvəsləndirmək və bunu sağlam elmi rəqabət ənənəsinə çevirmək Jurnalın daimi məramını təşkil edir.

About the Review

Baku State University Law Review is the first and only student-run and peer-reviewed academic journal in Azerbaijan and a publication of Student Academic Society of Baku State University Law School. It was founded in November 2014. The Review promotes academic and professional approach to contemporary legal issues which exist in national, international and comparative law. Clarification of debatable issues with induction of theoretical concepts, judicial and legislation practice of foreign countries, foster legal criticism skills, creative thinking, and legal culture on both academic and practical sphere are basic principles of the Review. With its published articles, the Law Review promotes possible solutions to actual legal issues with reference to legal reasoning and opportunities given by legal scholarship and determines avoiding repetition as prior purposes of Review. Encouraging law students to academic research with making them improve their legal writing and legal thinking skills and make this as a fair competition are permanent goals of the Review.

Zhou Hwei *

RETHINKING CHINESE TRADEMARK LAW'S PROHIBITION OF TRADEMARKS "HAVING OTHER ADVERSE EFFECTS"

Abstract

China has developed very rapidly in both intellectual property law system and relative economy. Its quantity of trademark applications ranks number one for more than 17 years is a result of the government's incentive policy on IP and people's motivation to take up more market share. Marks "having other adverse effects" can neither be registered nor used as trademarks in China. CTMO, China TRAB and China courts employed and interpreted this miscellaneous provision in an inconsistent way makes people confused about where is the boundary of the regulation. Considering there is a gap in trademark registration prohibition between China and other countries, China should reform the system for marks to mitigate adverse effects of the current "having other adverse effects" trademark registration prohibition system. Measures of reform include unify the standard of "having other adverse effects", replace forbidden to use system with forbidden to register system, open trademark use and trademark registration based on free speech. Other supplementary measures such as China guiding cases system can be implemented.

Annotasiya

Çin həm əqli mülkiyyət hüquq sistemini, həm də əlaqədar sahələri çox tez bir zamanda inkişaf etdirmişdir. 17 ildən daha çox bir müddət ərzində Çinin əmtəə nişanı müərcətlərində lider olmasının səbəbi dövlətin əqli mülkiyyət hüququ sahəsindəki təşəbbüskarlığıdır. Çində "digər mənfi təsirlər"ə sahib olan nişanlar istifadə oluna və qeydiyyatdan keçirilə bilməz. Çin məhkəmələri və dövlət orqanları bu ifadəni düzgün təfsir etməmiş və vətəndaşlar arasında çəşqinliq yaratmışlar. Çin və digər dövlətlərin əmtəə nişanı qeydiyyatına olan qadağalar arasında böyük fərqlərin olduğunu nəzərə alaraq belə bir nəticəyə gəlinir ki, Çin qanunvericiliyində ciddi islahatlar həyata keçirilməlidir. Bu islahatlar müvafiq ifadəyə vahid anlayışın verilməsi, əmtəə nişanının sərbəst istifadəsi və s. məsələləri əhatə edir. Çin aparıcı məhkəmə işləri sistemi də yardımçı tədbirlər kimi həyata keçirilə bilər.

* Ph.D. candidate at Civil, Commercial and Economic Law School, China University of Political Science and Law, Visiting Researcher at University of California Berkeley Law School. I am grateful for professor Robert Merges, professor Mar Cohen, Ms. Alisa Surilova and Editor-in-Chief and other staffs at Baku State University Law Review. In this paper, most information of trademarks are from official websites, including China Trademark Office (<http://wsjs.saic.gov.cn>), China Trademark Review and Adjudication Board (http://wssq.saic.gov.cn:9080/tmsve/pingshen_getMain.xhtml) and China Judgements Online (<http://wenshu.court.gov.cn/>).

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Introduction

Unlike trademark regulations in the United States that allow people to obtain themselves trademark right on a trademark via use, Chinese Trademark Law shows a registration-obtain system. Based on Chinese Trademark Law, there are two methods for people to acquire a trademark right. The most important and promising one is to file an application to the Trademark Office of the State Administration for Industry and Commerce of the People’s Republic of China (CTMO). If the trademark

registration application is approved, the applicant can obtain an exclusive Right on the trademark and approved goods or services classes.¹ The second way is to get a well-known trademark by use without registration. However, the second method is becoming harder and less certain after China revised its Trademark Law in 2013, which emphasized the importance of trademark use in order to maintain the right to applicants' trademark.² Thus in China only two types of trademark can be protected by Trademark Law: registered trademarks and some qualified unregistered trademarks. An unregistered trademark can get Trademark Law's protection only if it meets the requirement of well-known trademark.³ After China revised its Trademark Law in 2013, CTMO is receiving more and more applications.⁴ In China courts, there are also more and more trademark cases emerging.⁵ Considering that China built three intellectual property courts in 2014,⁶ people's attitudes and attention on intellectual property is changing and they are likely to pay greater attention to intellectual property under the government's policy impact.

China is the second largest economy in the world and its growing wealth and large population make it a very attractive consumer market in its own right.⁷ By the end of 2017, CTMO has received 27.842 million trademark applications, 17.30 million approved registered trademarks, and 14.92 million valid registered trademarks.⁸ With such statistics, China has been ranking first in the number of trademark applications over other countries in the world for the past 17 years.

¹ See Chinese Trademark Law, art. 4(1) and art. 56 (Amendment) 2013.

² Based on the third amendment of Chinese Trademark Law in 2013, the identification of well-known trademark is a case-specific result. It means the recognition of well-known trademark only happens in some special situations and it's not a permanent well-known trademark recognition by the court. As a result of that, if people want to obtain a stable trademark right, it is the best way to get his mark registered in CTMO. See *Supra* note 1, art. 14.

³ The unregistered well-known trademark protection is still limited compared with registered trademark in some ways though unregistered trademark can acquire protection over congeneric/inhomogeneous products or services. See *Supra* note 1, art. 13(2).

⁴ CTMO received 2.285 million trademark applications in 2014, 2.876 million trademark applications in 2015, 3.691 million trademark applications in 2016 and 5.748 million trademark applications in 2017. Data from 2014 to 2016, see Annual Development Report on China's Trademark Strategy 2016 at <http://sbj.saic.gov.cn/sbtj/201709/W020170901344688293241.pdf> (last visited May 9, 2018). Data of 2017 see at http://sbj.saic.gov.cn/gzdt/201801/t20180122_271953.html (last visited May 9, 2018).

⁵ In 2016, Chinese local courts admitted 7186 IP administrative cases of first instance, among which there are 5990 trademark administrative cases of first instance. See Intellectual Property Protection by Chinese Courts in 2016. In 2013, China local courts admitted 2886 IP administrative cases of first instance, among which there are 2161 trademark administrative cases of first instance. See Intellectual Property Protection by Chinese Courts in 2013. While in 2009, Chinese local courts only admitted 1376 trademark administrative cases of first instance. See Intellectual Property Protection by Chinese Courts in 2009.

⁶ Beijing Intellectual Property Court, Shanghai Intellectual Property Court and Guangzhou Intellectual Property Court.

⁷ See Ed Perlman & Octavian Timaru, *The Wild, Wild East: Winning Trademark Registration for US Companies in China*, 20 No. 2 *Intell. Prop. & Tech. L.J.* 17, 17 (2008).

⁸ See at http://sbj.saic.gov.cn/gzdt/201801/t20180122_271953.html (last visited May 9, 2018).

Considering the above data, it is important to know what is forbidden to use as a trademark in China and what kind of signs are more likely to be approved by CTMO. Chinese Trademark Law has listed several different situations that cannot be registered as trademarks,⁹ and many scholars have written on forbidden registration regime in China.¹⁰ Prohibiting certain kinds of signs as trademarks is a general trademark system for domestic trademark law around the world. However, in China the regulations for trademark registration and use are more restrictive. Article 10 of Chinese Trademark Law stipulates that several kinds of signs are not only forbidden to register but also forbidden to use as trademarks.¹¹ The Article lists seven specific situations and one term for containing all other unlisted prohibition situations that cannot be used as trademark: “None of the following signs may be used as trademarks: ... (8) Those detrimental to socialist ethics or customs, or having other adverse effects...” (I call it “miscellaneous provision/ term/ regulation/ clause”), neither registered as trademark nor used as trademark, though the legislation word “cannot be used as trademarks” seems only prohibit using them as trademarks. The first half of the Article 10 (1) (8) is beyond the scope of this paper as its meaning is relatively clear and its independence. My emphasis is on the second half of clause (8) stipulating that “having other adverse effects” signs cannot be used as trademarks.

It is important to introduce briefly here about the status of “other adverse effects” term in Chinese Trademark Law and the practice in Chinese courts’ cases in order to make people informed of what kind of signs they should choose when they plan to use or register a trademark in China. For China itself, it is also an important opportunity to rethink the “having other adverse effects” term in Chinese Trademark Law, seeing that it introduces certain difficulties into the trademark system. For example, CTMO refused an applicant to register “周强” (“Zhou Qiang”) as a trademark solely because the name of current Chief Justice and President of the Supreme Court of China is “周强” (“Zhou Qiang”).¹² However, the applications on “周强” (“Zhou

⁹ Supra note 1, art. 11.

¹⁰ In China, there are many papers talked on this topic, but most of them stay at a domestic level and there is a lack of some research result in English. This status makes foreign people are not aware China’s attitude and policy in these forbidden trademarks. In fact, forbidden “adverse effects” signs used as trademarks is lack fairness, this has not been mentioned in Chinese research result. But it is the most important fundamental for re-crafting the adverse effects prohibition system.

¹¹ See Supra note 1, art. 10.

¹² See Application Number: 22128250 (“Notice of Rejection”, No. TMZC22128250BHTZ01), Application Number: 24142042 (“Notice of Rejection”, No. TMZC24142042BHTZ01) (In China, trademark Application Number and Registration Number are same). Both Notices of Rejection gave same reason as follows: This sign contains “周强” (“Zhou Qiang”), which is the name of President of China Supreme Court. Using it on designated goods classes will produce adverse social effects, so it cannot be used as a trademark. CTMO gave this reason according to Chinese Trademark Law Article 10 (1) (8) “The following signs shall not be used as trademarks “...having other unhealthy influence.””.

In fact, “周强” (“Zhou Qiang”) is a normal name in China., The application for trademark “周强”

Qiang”) got approved before 2014.¹³ By comparison, in the U.S., several trademark registration applications for signs containing the name “John Roberts” obtained approval, despite John Roberts’ being the current Chief Justice of the Supreme Court of the United States.¹⁴ In another case in China, the word “MLGB” was registered on Class 25, such as clothing, shoes and so on.¹⁵ A third party Yao filed a claim to China Trademark Review and Adjudication Board (China TRAB) request it to declare the “MLGB” invalid based on Article 10 (1) (8) of Chinese Trademark Law “having other adverse effects”, and as a result China TRAB made an invalid declare of trademark “MLGB”. The trademark holder Shanghai Junke Trading Co. Ltd. dissatisfied with the decision and brought a lawsuit to court. Beijing Intellectual Property Court gave the former part of Article 10 (1) (8) of Chinese Trademark Law as the legal basis of its verdict in MLGB case. The applicant in this case insisted that the mark “MLGB” means “My Life’s Getting Better”. However, Beijing Intellectual Property Court held that “MLGB”’s also having another meaning- “f.ck your mother”, it would be detrimental to social ethics or customs and could easily result in direct adverse effects on teenagers.¹⁶ In the U.S., on the other hand, the word “FUCT” trademark won in the court based on free speech protection.¹⁷ So many signs are refused to be used and registered as trademarks based on the latter term of Article 10 (1) (8) of Chinese Trademark Law that it introduces uncertainty for people who are trying to register a trademark for their businesses. Given that the words for use and registration as trademarks are harder and harder to find, people are eager to own a trademark that may help to attract the consumers and make their business successful in the market.¹⁸ However, CTMO, China TRAB and Chinese courts are showing unpredictable attitudes toward trademark applications and infringement based on the “having other adverse effects” term.

(“Zhou Qiang”) are rejected, even though both the names of the legal representatives of the applicants (Application Number: 22128250, 24142042) are “周强” (“Zhou Qiang”).

¹³ Zhou Qiang was appointed to be the President of China Supreme Court on March 15, 2013. While before 2014, all trademark registration applications got approved. See Application Number: 1758139 (applied in 2001 on Class 29), Application Number: 3275349 (applied in 2002 on Class 17), Application Number: 5849284 (applied in 2007 on Class 3), Application Number: 7123518 (applied in 2008 on Class 29), Application Number: 10877734 (applied in 2012 on Class 35), and Application Number: 13804563 (applied in 2013 on Class 6).

¹⁴ For example, “ROBERT JOHN VINEYARDS” was approved in 2012 (registration No. 4208156), “JRJ JAMES ROBERT JOHN FOR EVERYONE. FOR YOU.” was approved in 2014 (registration No. 4501444). Both of them include “JOHN” and “ROBERT” and were approved during Judge John Roberts’ term.

¹⁵ “MLGB”, Application Number: 8954893.

¹⁶ Shanghai Junke Trading Co. Ltd. v. China TRAB, Beijing Intellectual Property Court Jing73XingChu No. 6871 (2016).

¹⁷ *In re Brunetti*, 877 F.3d 1330 (Fed. Cir. 2017).

¹⁸ Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 *Harv. L. Rev.* 945 (2018).

A “miscellaneous” clause in laws provides guidance for unforeseeable situations but also introduces a potential for abuse when improperly applied. For Article 10 (1) (8) of Chinese Trademark Law, the administrative government organs and the courts is making it dysfunctional. Considering the importance of system transparency and transnational commerce frequency, China should rebuild its system on the use and registration of the so-called “having other adverse effects” marks prohibition in both legislature, administrative examination and review, and judicial activity. This article intends to expose the “wrong” way of this regulation and the risks of the current situation in Chinese trademark development because of the “having other adverse effects” trademark regulation. This article also proposes suggestions for revising the existing law and its adoption so that it retains its generality without introducing unnecessary ambiguity.

The second part of the article gives a historical perspective of the “having other adverse effects” clause in Chinese trademark laws and related government legal documents. It shows how this miscellaneous clause came to be and what effects the lawmakers wanted to obtain by introducing it.

The third and fourth parts of this article intend to explore how CTMO and Chinese Courts are treating marks “having other adverse effects” in their crucial works.¹⁹ The failures they gave in the past are destroying the efficiency and fairness of the trademark use and registration system. Controversial trademark cases are well-publicized in a variety of media modalities and created an unnecessary confusion for consumers and persons concerned with trademark application.

The fifth part of this article suggests that China legislature should revise the trademark system and limit the clause “having other adverse effects” and its adoption by CTMO, China TRAB and Chinese courts. In this part, the article also presents a comparative research that shows how China could adopt certain more successful practices of other countries.

II. The boundary of “having other adverse effects” in Chinese trademark law

Chinese law has a long history, but in the course of the 20th century it has struggled to retain its roots while introducing innovations from legal system of the West.²⁰ The trademark concept has existed in China for a long time, but Chinese Trademark Law came relatively late.²¹ During the former half of 20th

¹⁹ Their work on trademarks are very crucial not only because they are the “king” who decide whether the applicants will get their trademark registration successfully, but also because they are “wind indicator” of Chinese trademarks development. Their authority makes their decisions convincing to public people and related closely to trademark approval predictability, fair competition and economic increase in the market based on trademarks.

²⁰ Leslie A. Burton, A Review of Great Legal Traditions: Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective, 60 U. Kan. L. Rev. 1135, 1143 (2012).

²¹ China’s Long and Tortured History When It Comes to Intellectual Property Laws, 2014.

century, China got through a very hard time because of being manipulated by strong foreign powers, invasions from other countries and very cruel wars. The economy was under control, the competitive order was not in right way. So the trademark laws showed very obvious government administration and management image and not much relevant to what should be used and what should be forbidden to be used or registered as trademarks. From 1949 to 1978, Chinese economy still stayed depressed because of many ongoing reforms and systems construction.

The State Council of China enacted “Trademark Administration Regulations” to replace 1950 “Interim Regulations on Trademark Registration” in 1963. It was the first time to say “forbidden use” and “adverse effects” in trademark regulations in China. Then China went through another very hard time based on a special event from 1966 to 1976²² The trademark administration couldn’t work anymore and the trademark system also was destroyed heavily. In 1978, State Administration for Industry and Commerce (SAIC of PRC) was built. Considering that “Interim Regulations on Trademark Registration” in 1963 was out of date and China was starting the policy of “reform and opening-up”, Trademark Office, an institute under SAIC of PRC begun to do some research and wrote drafts for a new Trademark Law. Chinese Trademark Law was enacted in 1982 and became the first to be enacted among three main intellectual property laws in China. Chinese Trademark Law of 1982 has been used until now, with three times revisions, in 1993, in 2001, and 2013 respectively.

Mandatory registration of trademark system was built in 1957.²³ In order to encourage people to register trademarks based on their actual business needs, Chinese Trademark Law (1982) abolished the inappropriate mandatory trademark registration system.²⁴ In order to govern the order of trademark in China, there are nine clauses in Trademark Law (1982) listing situations that prohibition using some signs as trademarks while Trademark Law (1982) has no words saying some signs that cannot be registered as trademarks. The ninth clause of Trademark Law (1982) Article 8 says “(9) Those detrimental to socialist morals or customs, or having other adverse effects.” which is same to current Chinese Trademark Law regulation. In order to practice international treaties and join WTO and keep compliant with the TRIPs, China revised

<https://blog.jipiel.law.nyu.edu/2014/02/chinas-long-and-tortured-history-when-it-comes-to-intellectual-property-laws/> (last visited May 28, 2018).

²² See William O. Hennessey, Protection of Intellectual Property in China (30 Years and More): A Personal Reflection, 46 *Hous. L. Rev.* 1257, 1263 (2009).

²³ In January 1957, the State Council of China approved the Central Administration for Industry and Commerce’s Opinion on Implementing the System of Mandatory Registration of Trademarks. The Opinion says that the trademarks used by companies (regardless of their economic nature) and the products produced by the cooperatives must be registered. If it is not yet registered, the application procedures must complete by June 30, 1957 and unregistered trademarks cannot be used afterwards.

²⁴ Explanation on the “Chinese Trademark Law (Draft)”, art. 2 (1982).

Trademark Law for the second time with a great overhaul in 2001.²⁵ In regard to forbidden rules, it separated forbidden use situations from forbidden registration situations because China adopts the principle of voluntary registration of trademarks, so there are registered trademarks and unregistered trademarks co-existing in China market. It became essential to clarify forbidden situations for trademark registration and use.²⁶ From then on, the prohibition regulations stay very stable until recent years. Problems arose from the miscellaneous forbidden use clause were getting more and more, especially when China published Outline of the National Intellectual Property Strategy in 2008 and people started to pay more attention to and develop their intellectual property.

China is a country with statute laws. Generally speaking, one civil conduct shall be deemed to be allowed if there is no clear statute prohibition in the law especially for the sake of common interests. This tangible property principle works in the same way in intellectual property—an intangible property world.²⁷ Trademark right along with copyright and patent compose three prime intellectual property rights as well as very important civil rights. Chinese Trademark Law employs two articles to regulate what kinds of signs cannot be registered and used.²⁸ Prohibition clauses are important to guide people's conducts in trademark filed. For example, what kinds of trademarks cannot be accepted by CTMO, people cannot use a trademark in a confusing or misleading way, people cannot use other people's trademarks unless they have a license from the trademark right holder. By negative regulations, people could be clear about where is the boundary line for their conducts. "Having other adverse effects" exists as such a kind of negative clause. In theory, a negative regulation should be clear, because it is a regulation that restricts people's civil actions. The number and ambiguity of negative terms shall be minimized as much as it could because any negative clauses and their ambiguity would decrease people's opportunities to obtain trademark rights or other benefits from trademarks.

As we see in Chinese Trademark Law, there are two articles relating to trademarks prohibition. Compared with Article 11's protection on trademark distinctiveness, Article 10 lists more special situations that certain signs are forbidden to be used as trademarks. Signs in Article 10 are forbidden to be registered as trademarks as well as used as trademarks. This implies that Chinese Trademark Law gives a stricter attitude towards the protection of other official flags, names, offensive signs, social order, and public interest

²⁵ William O. Hennessey, Protection of Intellectual Property in China (30 Years and More): A Personal Reflection, 46 *Hous. L. Rev.* 1257, 1282 (2009).

²⁶ Report of the National People's Congress Law Committee on the Review of the "Revision to Chinese Trademark Law (Draft)" (2001).

²⁷ Séverine Dusollier, Inclusivity in Intellectual Property, in Graeme B. Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?*, Edward Elgar Publishing (2015), 101.

²⁸ *Supra* note 1, art. 10 and 11.

than to the protection of trademark distinctiveness. According to Article 11, if a sign lacks distinctiveness, it still can be registered as a trademark if it acquires distinctiveness via trademark use. However, there is almost no exception for Article 10 situations. If a sign falls within the scope of Article 10 situations, there is no turning chance for the sign to be a trademark. It is harsh for commercial entities and individuals that they have no idea they are using a sign as a trademark which is a conduct violating Article 10 (1) (8) "Those detrimental to socialist morals or customs, or having other adverse effects" because this term is so ambiguous and unpredictable for general people to tell. How can people know what is "having other adverse effects" even though they can tell what is "detrimental to socialist morals or customs" based on normal social ethic and common sense?

From the structure of Chinese Trademark Law, we can know that Article 10 (1) (8) is a miscellaneous provision for the previous listed seven special kinds of signs that are forbidden to be used as trademarks. As "having other adverse effects" comes after "those detrimental to socialist morals or customs", so it is also a miscellaneous provision for "those detrimental to socialist morals or customs". In this perspective, if one sign is determined to be "having other adverse effects", the sign's impact to our society shall be in the same or similar level with "detrimental to socialist morals or customs". They share a same parallel value. China has a large market and Chinese market participants do their business both around the world and on the internet, there is no excuse to deny the essential to clarify the meaning and specifics of "having other adverse effects". What we are clear in present is that: (1) "having other adverse effects" is a prohibition provision in Chinese Trademark Law; (2) "having other adverse effects" is a miscellaneous provision for previous seven kinds of prohibition situations; (3) "having other adverse effects" is a miscellaneous provision for "those detrimental to socialist morals or customs"; (4) "having other adverse effects" is an absolute negative miscellaneous provision, which means this kind of sign cannot be used as well as registered by any people and it has no exception above this term.

As a totally negative provision for trademark use and registration, it should be kept into a reasonable scope to the rule-makers' original meaning. But how CTMO examiners, China TRAB reviewers and China judges are employing and explaining this provision looks like they are going to give it a confusing way and abuse this provision to satisfy themselves or other people. Making a provision omnipotent is ruining it and destroying the market order.

III. How do CTMO, China TRAB and courts employ “having other adverse effects” clause

A. Definition of “other adverse effects” from CTMO and China TRAB

Chinese Standards for Trademark Examination and Trial (CSTET)²⁹ is one most important and authoritative document for applicants and CTMO trademark examiners and China TRAB trademark reviewers to follow. There is pretty detailed interpretation for “having other adverse effects” in CSTET. It reads:

“Other adverse effects” refers to the negative and adverse effects of the characters, graphics or other composition elements of the trademark on the politics, economy, culture, religion, nations or other social public benefits or public order of China. When determining whether a trademark will be detrimental to socialist morals or customs or have other adverse effects, it shall take into account the social background, political background, historical background, cultural tradition, national customs, religious policies and other elements, as well as the composition of trademark and its designated goods or services.³⁰

After this general define, CSTET gives nine kinds of specific “having other adverse effects” situations and a miscellaneous “other adverse effects” for “other adverse effects”. These nine situations are as follows: (1) Trademarks with unhealthy political effects, including trademarks identical or similar to the name of any leader of any country, region or international political organization, such as Runzhi, Pujing,³¹ trademarks detrimental to the sovereign, dignity or image of a State, trademarks that are composed of numbers with political significance, such as “9.11”, “seven · seven”, “nine one eight”,³² trademarks identical or similar to the same of any terrorist organization, heretical organization, organized crime organization or leader of such organizations, for example “LADENG”.³³ (2) Trademarks which contain the State name of China and may therefore lead to the abuse of the State name, and cause other negative and adverse effects on the social public interest or public order. For example, “China Jing Wine”, “XIKE China”, “China Star”. (3) Trademarks detrimental to ethnic dignity or feelings, for example, “nigger”, “HONKY”. (4) Trademarks detrimental to religious belief, religious feelings or folk belief. About what is “religious”, it says “includes

²⁹ This document was issued by CTMO and China TRAB, and was last revised in December of 2016.

³⁰ See CSTET, art. 9.

³¹ Runzhi is China previous Chairman Mao Zedong’s courtesy name. Pujing is Putin’s Chinese name.

³² “七·七” refers to July 7, which is the same month and date of Marco Polo Bridge Incident. “九一八” refers to September 18, which is the same month and date of Mukden Incident.

³³ “LADENG” is the Chinese name of Laden.

Buddhism, Taoism, Islam, Christianity, etc., and different branches of such religion". In regard to "folk belief", it says "mainly refers to Mazu and other folk beliefs".³⁴ Except for the positive regulation of religious adverse effects, it also listed two situations that should not be determined to the religious belief, religious feelings or folk beliefs. They are: First, where, pursuant to the Regulations on Religious Affairs under which social and public benefits undertaking may be legally established at the site of religious groups and activities, and without prejudice to the interests of other sites of religious activities, a religious group and the religious enterprise it authorizes applies for registration of a trademark based on the name exclusive to the site of its religious activities, for example, "Shaolin Temple" by Songshan Shaolin Temple in China. Second, where the words or graphics of a trademark are related to religion or folk belief, but have other meaning or their meaning as related to the religion has generalized, which will not cause the public to associate them with any particular religion or folk belief, for example, "Tai Chi" Diagram is one of the signs of Taoism, but has already generalized. (5) Trademarks identical or similar to the name or emblem of any party,³⁵ governmental authority, social group or other entity or organization in China. The name contains full name, abbreviation, acronym, etc.; the emblems include emblems, flags, etc. (6) Trademarks identical to any of the titles of the party or government organ of China or any of the administrative titles or military ranks of the army. (7) Trademarks identical or similar to the pattern, name or symbol of the legal tender of any country, such as "\$", "€", "¥", "KROEN", etc. (8) Trademarks containing nonstandard Chinese characters or nonstandard use of idioms, which will likely mislead the public, especially the minor. For example, wrong words writing, wrong letter in a phrase. (9) Trademarks containing words identical or similar to the name of any political, religious, historical or public figure, which are sufficient to produce negative or adverse effects on the politics, economy, culture, religion, nations or social public benefits or public order of China. For example, "Confucius". After a list of signs that having adverse effects, CSTET also gives a miscellaneous regulation named "trademarks having other adverse effects". It means it gives a sub-miscellaneous-provision for a miscellaneous provision. Here are the examples for this sub-miscellaneous-provision: "SARS", "Ebola", "Three Represents" and "Anti-corruption".

From the Standards of Trademark administrative office, we could see a scope of broad and seems having the potential of becoming unlimited for

³⁴ Mazu is the name of a Chinese Sea goddess.

³⁵ "The party" includes China Communist Party and the eight parties collectively referred to as democratic parties, namely, the Revolutionary Committee of the Chinese Kuomintang, the China Democratic League, the China Democratic National Construction Association, the China Association for Promoting Democracy, the Chinese Peasants' and Workers' Democratic Party, the China Zhi Gong Party, the Jiusan Society, and the Taiwan Democratic Self-Government League.

“having other adverse effects”. Overlapped and not well categorized miscellaneous provision interpretation provides chances for trademark examiners and administrative officers to deny too many trademark applications based on the term of “having other adverse effects”.

B. Interpretation of “having other adverse effects” from China Supreme Court

In April 2010, China Supreme Court issued “The Opinions on Several Issues Concerning the Trial of Administrative Cases Involving the Authorization and Determination of Trademark Rights”. The third Article reads “In judging whether a mark has any other adverse effect, a people’s court shall consider whether the mark or any of its elements is possible to cause any negative effect on political, economic, cultural, religious, ethnic and other public interests or the public order. If a mark would only damage certain civil rights and interests after it is registered, since the Trademark Law has provided the remedy measures and the corresponding procedures, it is not appropriate to decide that the mark has any other adverse effect.”³⁶

In December of 2016, China Supreme Court issued “Regulations on Several Issues Concerning the Trial of Administrative Cases Involving the Granting and Conformation of Trademark Rights”. Article 5 says “Where a trademark sign or its constituent parts may give rise to negative effects affecting Chinese public interest and public order, the People Courts may rule that it falls within the scope of “other adverse effects” set out in Article 10 (1) (8) of the Trademark Law. An application to register the name, etc., of a public figure in the fields of politics, economics, culture, religion, an ethnic group, etc., falls within the scope of “other adverse effects” referred to in the preceding paragraph.”³⁷

From China Supreme Court’s interpretation documents, we can see that it also has consideration for signs that are not “having adverse effects”. Especially it separates the protection for public interest from protection of private civil rights. It means the “having other adverse influence” clause shall be only used to protect public interest and public order, but not private civil rights and private civil interests. So the main function of this clause is protecting public interest.

When we compare the different definitions of “having other adverse effects” between trademark administrative office and the Supreme Court of judicial system, we can figure out the big gap. Trademark administrative office listed many specific situations and with a sub-miscellaneous-clause to cover all signs that they have the opportunity to put into the scope of “having

³⁶ Opinions on Several Issues Concerning the Trial of Administrative Cases Involving the Authorization and Determination of Trademark Rights, art. 3, Judicial Interpretation No.12 (2010).

³⁷ Regulations on Several Issues Concerning the Trial of Administrative Cases Involving the Granting and Conformation of Trademark Rights, art. 5, Judicial Interpretation No.2 (2017).

other adverse effects". The judicial system seems like attempting to use "other adverse effects" in a balanced leverage with "detrimental to socialist ethics or customs" to protect public interest and public order. But the status of trial and countless trademark cases show us a different attitude to "having other adverse effects" by China courts. It seems that most circumstances courts are standing on the same side with CTMO and China TRAB.

C. Situations belong to "having other adverse effects" in Chinese cases

In this part, I prefer to classify situations that were deemed as signs with adverse effects into several sorts as follows.

1. Dirty words

Different from trademarks disfavored offensive trademarks in the U.S., China treated trademarks including dirty words or negative words as signs with other adverse effects even though the words are not offensive to anyone. As the words "MLGB" in case *Shanghai Junke Trading Co. Ltd. v. China TRAB*, there are countless words are popular to people especially in the internet era. Most dirty words signs can be rejected by the former part of Article 10 (1) (8) "detrimental to socialist morals or customs". However, CTMO, China TRAB and China courts seem prefer to use "having other adverse effects" to determine dirty words as forbidden use trademarks. As for dirty words, not only the dirty words themselves have the potential to be rejected by trademark office and courts, so do the letters same as acronym³⁸ of dirty words or read like dirty words. Beyond that, any words that has any relationship or has any possibilities to be associated with dirty words have very great possibility to be rejected by China trademark administration offices and China courts.

In the case *Beijing Manman Station Beverage Store v. China TRAB*, the trademark applicant wanted to register "臭榴芒" ("chou liu mang", smelly durian and mango, pinyin³⁹: chòu liú máng) as a trademark on class 43.⁴⁰ CTMO and China TRAB rejected it on the ground of "having other adverse effects". Specific reason is that the phrase "臭榴芒" ("chou liu mang") reads same as "臭流氓" ("chou liu mang", smelly rascal, pinyin: chòu liú máng). Then the applicant filed a suit to Beijing Intellectual Property Court. Beijing Intellectual Property Court held that: the trademark under application "臭榴芒" ("chou liu mang") reads same with "臭流氓" ("chou liu mang"), so it is easy to make consumers think of "smelly rascal". "Rascal" generally refers to people who are idle and do nothing but evil things, or refers to people who

³⁸ For example, the case of "MLGB".

³⁹ Pinyin is the Chinese words' pronunciation. In order to make readers of this paper much easily to read and understand Chinese trademarks in this paper, I affixed pinyin for Chinese words.

⁴⁰ "臭榴芒" ("chou liu mang", smelly durian and mango), Application Number: 14042108.

act in a rascally manner and are extremely unreasonable. The term “smelly rascal” further describes the severity of the above-mentioned actions and common public’s very disgusted and aversion feeling degree to that kind of people. Therefore, the use of the word “臭榴芒” (“chou liu mang”) as a trademark makes it easy to mislead some social public about the notions of right and wrong. It is inconsistent with the socialist morality which we are promoting and this belongs to Article 10(1) (8) of the Trademark Law “having adverse effects” signs prohibition situation.⁴¹ The applicant appealed the verdict, saying that the “臭榴芒” (“chou liu mang”) refers to fresh durian and mango, which has very different Chinese characters and meanings comparing with “smelly rascal” even they share the same pronunciation. It is very easy for relevant public to distinguish them. Additionally, people will associate it with fresh durian and mango naturally but not smelly rascal when people see it used on restaurant or other services. Beijing High People’s Court held that “臭榴芒” (“chou liu mang”) shares same pronunciation with “臭流氓” (“chou liu mang”, smelly rascal). If approve the trademark registration application on “臭榴芒” (“chou liu mang”), it will not be conducive for promoting correct, positive and healthy socialist morality, which will produce adverse social effects.⁴²

There are many these kinds of signs rejected by CTMO. For example, signs with “F..CK”.⁴³ Signs with “thief” were also rejected by CTMO on the ground that words like “小偷改行” (“thief changed positions”, pinyin: xiǎo tōu gǎi háng), “小偷天敌” (“thief natural enemy”, pinyin: xiǎo tōu tiān dí), “小偷快跑” (“run, thief”, pinyin: xiǎo tōu kuài pǎo) will produce adverse effects.⁴⁴ While in the U.S., “PAIR OF THIEVES”, “KILLERS AND THIEVES”, “THIEVES LIKE US”, “THIRTEEN THIEVES”, etc. all got trademark registration approval in the U.S.⁴⁵ The word sign “牛逼” (“f..cking awesome”, pinyin: niú bī) was also rejected by CTMO.⁴⁶ It also could be seen that words like “混蛋兄弟” (“bastard brother”, pinyin: hún dàn xiōng dì), “傻帽儿”

⁴¹ Beijing Manman Station Beverage Store v. China TRAB, Beijing Intellectual Property Court, JingZhiXingChuZi No.5274 (2015).

⁴² Beijing Manman Station Beverage Store v. China TRAB, Beijing High People’s Court, JingXingZhong No.1972 (2016).

⁴³ See “F..CK LA CRISE”, Application Number: G1015515. “F..CKING BELL”, Application Number: G1056542. “F..CKINGLIFE”, Application Number: 17873862. “F..ckstone”, Application Number: 20046929. “F..CKTHELABEL FTL”, Application Number: 23437295.

⁴⁴ “小偷改行” (“thief changed positions”), Application Number: 12857734. “小偷天敌” (“thief natural enemy”), Application Number: 13768052. “小偷快跑” (“run, thief”), Application Number: 15223431.

⁴⁵ “PAIR OF THIEVES” (registration number: 5095290), “KILLERS AND THIEVES” (registration number: 5359900), “THIEVES LIKE US” (registration number: 5270980), “THIRTEEN THIEVES” (registration number: 5276347).

⁴⁶ “牛逼” (“f..cking awesome”), Application Number: 14980969. Other trademark applications such as “牛逼B” (“f..cking awesome B”), Application Number: 17603886, “牛逼爸爸 NB PAPA” (“f..cking awesome PAPA”), Application Number: 16736862 were all rejected by CTMO.

“dumbass”, pinyin: shǎ mào er), “土鳖” (“woodlouse”, pinyin: tǔ biē), and “卧槽” (“what the f..ck”/ “f..cking my life”, pinyin: wò cáo) etc. were all rejected by CTMO and TRAB.⁴⁷

If a sign has some relation with sex, it will more likely to be deemed as dirty words and be rejected based on “adverse effects” in the same way. For example, “Yellow” is a color and it also refers to something related to pornographic things in Chinese, such as yellow video, yellow journalism, yellow novel and so on. There was an applicant trying to register “黄态” (“yellow state”, pinyin: huáng tài) as his trademark. However, CTMO rejected it with the reason that it’s easy for consumers to associate “黄态” (“yellow state”) with yellow dynamic graphics.⁴⁸ The sign “going down”, CTMO rejected the registration application and said that the trademark under application reads similar to “够淫荡” (pinyin: gòu yín dàng), which means very lewd, so it is easy to produce adverse effects if using it on designated goods.⁴⁹ In the trademark “UBER LIGHT” examine, CTMO considered that the word “UBER” can be translated into “udder”, it is easy to produce adverse effects if used on designated goods.⁵⁰ However, this opinion was overturned by China TRAB and this trademark registration application got approval at last. During the examination of trademark “BITCH ELEGANCE”, CTMO held that the mark contains “BITCH” which will produce adverse effects easily if used as trademark.⁵¹ In the U.S., “SASSY BITCH” and “HOUSE OF BOSS BITCHES” were registered in the U.S. successfully.⁵²

With the development of Chinese language, new words and expressions emerge endlessly. Some of these new words and expressions are used to describe some situations or behaviors precisely. But if these words or expressions include any immoral meaning, then they have a high risk to be rejected by CTMO. For example, the words “寻欢” (“make merry”, pinyin: xún huān) refers to seeking happiness. Then it also refers to chase the opposite sex, even develops to the meaning of seek fun from opposite sex. The applicant tried to apply “寻欢” (“make merry”) as a trademark, CTMO

⁴⁷ “混蛋兄弟” (“bastard brother”), Application Number: 16062031. “傻帽儿” (“dumbass”), Application Number: 23676187. “土鳖” (“woodlouse”), Application Number: 12831447, 13313179, 13884696. “卧槽” (“what the f..ck”/ “f..cking my life”), Application Number: 15874387. So does “卧槽网” (“wocao net”, pinyin: wò cáo wǎng), Application Number: 17876107. In this trademark application, the Chinese characters are same with the former sign, and added with a “net”, this trademark application also was rejected.

⁴⁸ “黄态” (“yellow state”), Application Number: 20002706.

⁴⁹ “going down”, Application Number: 23218651.

⁵⁰ “UBER LIGHT”, Application Number: 17492467. The applying designated goods includes 1101 lamps, 1101 arc lamps, 1101 lights for vehicles, 1101 light diffusers, etc.

⁵¹ “BITCH ELEGANCE”, Application Number: 8192014.

⁵² “SASSY BITCH”, registration NO. 5464391. “HOUSE OF BOSS BITCHES”, registration NO. 5459992.

rejected it with the reason that the word “寻欢” (“make merry”) has a low taste which will produce adverse effects.⁵³ Similar results also happened to “艳遇” (“meet a beauty”, pinyin: yàn yù). This word originally means the chance or the situation to meet a beauty. People also use it for joke that meet an opposite sex or have an affair with an opposite sex. The trademark registration application was rejected by CTMO, giving the reason that the word “艳遇” (“meet a beauty”) in the sign under application “舌尖上的艳遇” (“meet with a beauty on the tip of the tongue”, pinyin: shé jiān shàng de yàn yù) has the meaning of the chance to meet a beauty, it also refers to “love affair”, which is easy to produce adverse social effects.⁵⁴ In fact, the sign “舌尖上的艳遇” (“meet with a beauty on the tip of the tongue”) has a very alive description for the situation that a food tastes good even like a romantic meeting. However, the sign was rejected because it has the potential to be interpreted as a situation with love affairs. In the trademark “夜点” (“night point”, pinyin: yè diǎn) registration application, CTMO acknowledged that the word “夜点” (“night point”) is easy to produce adverse effects and rejected the application. But this opinion was overturned by China TRAB with the reason that the trademark “夜点” (“night point”) will not bring adverse effects to the politics, economy, culture, religion, etc. social public benefits or public order of China.⁵⁵

In the case *Feihu Information Technology (TianJin) Co. Ltd. v. China TRAB*, the applicant intended to register “屌丝男士” (“Diors Man”, pinyin: diǎo sī nán shì) on Class 38 including services related to information transmission, email etc.⁵⁶ CTMO and TRAB both consider the sign “屌丝男士” (“Diors Man”) has adverse effects because “屌丝” (“Diors/loser”) is an ironic language that is generated from China internet culture. It will produce adverse social effects easily. Beijing Intellectual Property Court held that “屌丝” (“Diors/loser”) is not a canonical nor normal social culture language, it will produce negative effects on good social ethos and social culture, which can’t be removed by the applicant’s evidence that it has used “屌丝男士” (“Diors Man”) for a long time and there is no negative effects.⁵⁷ This opinion was confirmed by Beijing High People’s Court.⁵⁸

⁵³ “寻欢” (“make merry”), Application Number: 15934643, 15934694, 15934773, 15934856.

⁵⁴ “舌尖上的艳遇” (“meet with a beauty on the tip of the tongue”), Application Number: 19130445.

⁵⁵ “夜点” (“night point”), Application Number: 17864965, designated good are in class 41 and 9.

CTMO didn’t give the specific reason for the rejection, I guess it might think the word “夜点” (“night point”) sounds similar with “夜店” (“night club”).

⁵⁶ “屌丝男士” (“Diors Man”), Application Number: 1162570.

⁵⁷ *Feihu Information Technology (TianJin) Co. Ltd. v. TRAB*, Beijing First Intermediate Court, YiZhongZhiXingChuZi No. 5555 (2014).

⁵⁸ *Feihu Information Technology (TianJin) Co., Ltd. v. TRAB*, Beijing High People’s Court, GaoXing(Zhi)ZhongZi No. 3631 (2014).

Based on very decent and strict attitude, trademark examiners in CTMO take dirty words with very wide range of rejection just with a simple law basis, it is “having other adverse effects” in Article 10 (1) (8). But the opinions given by CTMO do not always get the affirmation of China TRAB even most time their opinions are coincident. In this way, China TRAB plays an important role for adverse effects recognition. Especially in these kinds of so-called dirty words which have multiple meanings. CTMO often interprets the meaning of signs with a broadly association in order to put more trademarks under application into the large basket of marks “having other adverse effects”. Because if a trademark registration is approved, the chance to revoke it is limited. However, there are enough procedures and opportunities to reexamine the application trademark even CTMO refused a trademark application. For example, the refused trademark applicant can file to China TRAB for review and go to court and seek for further judicial decision if China TRAB also refuses the application. So it seems that CTMO can transfer much trademark examination work to TRAB and court, which will make its very prudent attitude meaningful.

2. Using words in not-standard way

In order to keep the right order of Chinese words writing, formal words using in idioms and set phrases,⁵⁹ CTMO, China TRAB and Courts tend to against using words wrongfully in trademarks. The authorities condemn informal use of idioms and fixed phrases because they think using these Chinese words wrongfully will teach and guide students and teenagers to a misled way in the cognition of Chinese traditional culture including Chinese words, phrases, and idioms. In CTMO’s mind, altering such words, phrases and idioms will bring adverse effects if they are permitted to be registered as trademarks. For example, in the case “新花怒放” (“new-flower-angry-open”, means new flowers in full blossoming, pinyin: xīn huā nù fàng), the applicant changed the character “心” (“heart”, pinyin: xīn) in the idiom “心花怒放” (“heart-flower-angry-open”, means be wild with joy or heart would burst with joy) to the same pronunciation character “新” (“new”, pinyin: xīn) and formed “新花怒放” (“new-flower-angry-open”, means new flowers in full blossoming, pinyin: xīn huā nù fàng).⁶⁰ The court held that the altered idiom

⁵⁹ In China, there are many phrases and idioms with fixed words. In order to make trademarks and advertisement slogans with a catchy tune and sounds well to the consumers, merchants prefer to choose an idiom but make the idiom a little change but reads alike with the idiom. By this way, the trademark will be easier to be remembered by the market because the idioms are often familiar to people, even primary students.

⁶⁰ “新花怒放” (“new-flower-angry-open”, pinyin: xīn huā nù fang, it means new flowers in full blossoming), Application Number: 14313616.

has adverse effects.⁶¹ In the case “津津友味” (pinyin: jīn jīn yǒu wèi), the applicant also just changed one character of the idiom “津津有味” (pinyin: jīn jīn yǒu wèi) which means very tasteful, and also metaphors that with keen interest pleasure. After the change, the character “有” (“with”, pinyin: yǒu) becomes “友” (“friend/friendship”, pinyin: yǒu), the two four-character-phrases share the same pronunciation “jīn jīn yǒu wèi”. China TRAB deemed that the controversial trademark “津津友味” is an irrational use of the idiom “津津有味”, which is easy to confuse people, especially primary school and middle school students, with their recognition of specific words in idioms. It is easy to produce adverse social effects.⁶² This situation also happens to the application of sign “心满意竹 HEART TSATISFYING BAMBOO”,⁶³ “芝根芝底”,⁶⁴ “爱屋吉屋”,⁶⁵ etc. Chinese idioms contains very extensive and profound Chinese traditional culture. Every primary school and middle school student learns idioms in their Chinese classes. Sometimes these kinds of changes in idiom will make the sign more accurate, more alive and more proper especially using on special goods or services Classes. But sometimes it is really a worrying issue when we consider that the trademarks will be used on advertisements to promote the goods or services, which will mislead people, especially students in school, to a wrong way for Chinese idiom or Chinese

⁶¹ Beijing Fenghua Qiushi Culture Media Co., Ltd. v. TRAB, Beijing High People’s Court, JingXingZhong No. 1667 (2016).

⁶² “津津友味”, Application Number: 9320998.

⁶³ “心满意竹 HEART TSATISFYING BAMBOO” (pinyin: xīn mǎn yì zú), Application Number: 15063832. The sign “心满意竹 HEART TSATISFYING BAMBOO” is a transformation from the idiom “心满意足” (pinyin: xīn mǎn yì zú), which means be content with something. Chinese character “竹” (“bamboo”) pronounces same with “足” (“enough”).

⁶⁴ “芝根芝底” (“sesame-root-sesame-bottom”, pinyin: zhī gēn zhī dǐ), Application Number: 20710111 (on Class 30), 20698982 (on Class 35). The original idiom for this sign is “知根知底” (“know-root-know-bottom”, pinyin: zhī gēn zhī dǐ, it means know through and through). The applicant replaced “知” (“know”) with a same pronunciation character “芝”.


⁶⁵ Manyi (Shanghai) Real Estate Consulting Co., Ltd. v. TRAB, Beijing High People’s Court, JingXingZhong No. 1577 (2017). “爱屋吉屋 IWJW.COM” (“love-house-auspicious-house”, pinyin: ài wū jí wū), Application Number: 15012498, applying services includes leasing of real estate, estate agencies, apartment house management, etc. Beijing Intellectual Property Court and Beijing High People’s Court held that: “爱屋吉屋” (“love-house-auspicious-house”, pinyin: ài wū jí wū) is a non-standard use of the idiom “爱屋及乌” (“love-house-and-crow”, pinyin: ài wū jí wū. It means love me love, my dog.). Such a large number of trademarks that are not standard in the use of idioms will have a negative impact on China's language and writing, and will be detrimental to the inheritance of Chinese language and historical culture and the development of national cultural construction. Therefore, the application for a trademark constitutes a mark with “other adverse effects” and should not be approved for registration.

language learning.

It is often to see people change characters in idioms and keep the catchy reading, similar pronunciation is often to see in our daily life. Some applicants also choose to change the strokes in the character of a word, we can call this situation “making misspelling”. For example, in the trademark “融 360



RONG360.COM”, the applicant added one line in the character “融” and shaped one sign like “𠃉” as following picture.⁶⁶ As for the misspelling of Chinese words or idioms signs, China Courts also do not support it. In the case *XingYeDingSheng Ceramics Co., Ltd. v. China TRAB*, Beijing Intellectual Property Court held that the main identification part of the “杏野 XINGYE

and graphic” (“apricot wild”, pinyin: xìng yě)  trademark is “杏野” (“apricot wild”) which was written in an irregular way. This easily affects the public’s recognition and learning of Chinese characters and the trademark constitutes the forbidden use situation based on Article 10 (1) (8). Beijing High People’s Court confirmed the opinion and said that “杏野” (“apricot wild”) in the under dispute trademark is a misuse of Chinese character, it impacts public people’s recognition and learning of Chinese characters, which will have negative influence on the national culture education and go against to the construction of the socialist spiritual civilization. This belongs to “having other adverse effects” that described in Article 10 (1) (8) of Chinese Trademark Law.⁶⁷

There are new internet words such as “高富帅” (“tall rich handsome”, pinyin: gāo fù shuài), “矮穷矬” (“short poor stupid”, pinyin: ǎi qióng cuó), “白富美” (“white rich pretty”, pinyin: bái fù měi), etc. sound very catchy but they are not welcomed by CTMO. CTMO gives these kinds of network catchwords a cautious mind and insists that these words may lead the society with a negative value and produce adverse social effects. However, the sign “帅锅的诱惑” (“the temptation of handsome guy”, pinyin: shuài guō de yòu huò) was registered successfully on class 43.⁶⁸

⁶⁶ “融 360 RONG360.COM”, Application Number: 20952380, 20952434, 20952777.

⁶⁷ *XingYeDingSheng Ceramics Co., Ltd. v. China TRAB*, Beijing High People’s Court, JingXingZhong No. 5562 (2017).

⁶⁸ “帅锅的诱惑” (“the temptation of handsome guy”, pinyin: shuài guō de yòu huò), Application Number: 9435628. This trademark was registered on class 43 services including restaurants, tea house, Rental of transportable buildings, bar, Cafés, moving for food supply, motels, cafeterias, Day-nurseries [crèches], etc. in Chinese language, “帅锅” (handsome pot, pinyin: shuài guō) is a homophone for “帅哥” (“handsome guy”, pinyin: shuài gē) and young people often use the former word refer to the latter word.

3. Famous people's names

Famous public celebrities' names cannot be registered as a trademark, even though some signs that changed from celebrities' names.

In the case *Michael Jeffrey Jordan v. China TRAB*, Michael Jeffrey Jordan claimed that Qiaodan Sports Company registered the trademark “乔丹” (pinyin: Qiáo Dān)⁶⁹ will produce adverse effects and should be revoked. Beijing High People's Court held that if a trademark registration is only harmful to certain civil rights and interests, it should not be determined that it has adverse effects of Article 10 (1) (8), because Chinese Trademark Law has provided regulations for the remedy and corresponding procedures. In this case, the sign “乔丹” (pinyin: Qiáo Dān) itself has no elements of “those detrimental to socialist morals or customs, or having other unhealthy influences”, so there is no error of the TRAB's decision saying that the trademark “乔丹” (pinyin: Qiáo Dān) doesn't violate Article 10 (1) (8).⁷⁰ This opinion was also approved by Chinese Supreme Court.⁷¹

In *GUSS v. TRAB, Nanjing Meidi Import and Export Co. Ltd.*, TRAB consider that “other adverse effects” refers to the fact that the words, graphs, or other constituent elements of a trademark may have passive or negative influences on the public interest and public order in China.⁷² In case *Guizhou Meijiuhu Brewery Co., Ltd. v. TRAB, Li Changshou*, TRAB insists that “other adverse effects” refers to the words, graphs, or other constituent elements of a trademark may have passive or negative influences on politics, economy, religion, race, etc. kinds of public interest and public order in China. In the process of determining “having other adverse effects”, there are several elements should be considered, which including social background, history background, cultural tradition etc. as well as the product or service category. The Supreme Court consented Beijing High People's Court's verdict and held that it is an “adverse effects” to register “Li Xingfa”⁷³ and graph as trademark on alcohol beverage (except for beer) product and will mislead consumers based on Li Xingfa is a former vice manager of Moutai Distillery and he is very famous in wine field.⁷⁴

⁶⁹ “乔丹” (pinyin: Qiáo Dān), Application Number: 6020569.

⁷⁰ *Michael Jeffrey Jordan v. China TRAB*, Beijing High People's Court, GaoXing(Zhi)ZhongZi No. 1915 (2015).

⁷¹ *Michael Jeffrey Jordan v. China TRAB*, China Supreme People's Court, ZuiGaoFaXingZai No.27 (2016).

⁷² *GUSS v. TRAB, Nanjing Meidi Import and Export Co., Ltd.*, Chinese Supreme People's Court, ZuiGaoFaXingZai No. 46 (2017).

⁷³ Li Xingfa (李兴发) is Li Changshou's father, he has died when Guizhou Meijiuhu Brewery Co., Ltd. tried to register “Li Xingfa” and the graph as its trademark in 2003.

⁷⁴ *Guizhou Meijiuhu Brewery Co., Ltd. v. TRAB, Li Changshou*, Beijing High People's Court, ZhiXingZi No.11 (2012). Beijing High People's Court held same define of “unhealthy influence” with TRAB.

In January 2017, China Supreme Court promulgated “Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Administrative Cases involving Trademark Authorization and Confirmation”. The fifth Article reads “If a trademark logo or its constituent elements may have passive and negative effects on China’s social public interest and public order, people’s courts may determine that the mark has “other adverse effects” as stipulated in Article 10(1)(8) of the Trademark Law.

The application for the registration of the names of public figures in political, economic, cultural, religious, ethnic, and other fields as trademarks is former paragraph referring “other adverse effects” situation.”⁷⁵ It means that not only super stars’ names cannot be used as trademarks, but also all public figures’ names and signs with similar reading or writing cannot be used as trademarks. For the political leaders’ names, the prohibition is much stricter than normal public figures. Beijing Ximeihui Cultural Consultation Co., Ltd. filed a trademark application for the sign “习美汇” (Ximeihui, pinyin: xí měi huì). CTMO rejected with the reason that the sign “习美汇” (Ximeihui) contains the character “习” (“Xi”), it will be easy to produce adverse effects to society if used as a trademark.⁷⁶ In fact, “习” (“Xi”) refers to a Chinese surname as well as the meaning of study. Adverse effects really will be brought just because China current president’s surname is “习” (“Xi”)? Especially when we consider that the name of applicant company is “习美汇” (Ximeihui), this kind of potential of adverse effects is very limited.

4. Words related to religious and superstitious issues

Foreign countries have the prejudiced view saying that China doesn’t support or protect religions enough, however the protection of religions in China trademark law field is very strict.⁷⁷ In fact, religion plays a part during China’s development.⁷⁸ Religion and religious spirit protection in trademark law examination and trademark cases are taken seriously, much stronger than some other countries.⁷⁹ Any words related to religion issues have the potential to be rejected and denied by CTMO, TRAB and China courts even though some words have other multiple meanings except for religious related meanings. In *Taishan Gypsum Co., Ltd. v. Wanjia Group Building Materials Co., Ltd.*, TRAB, the sign “泰山大帝” (“Taishan Deity”, pinyin: tài shān dà dì) went

⁷⁵ Provisions of the Supreme People’s Court on Several Issues concerning the Trial of Administrative Cases involving Trademark Authorization and Confirmation, art. 5.

⁷⁶ “习美汇” (Ximeihui), Application Number: 21061298, 21073064, 21073289.

⁷⁷ There are many comments on this issue from foreign scholars. See Lawrence Cox, Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China’s Internal Migrant Workers, 8 *Asian-Pac. L. & Pol’y J.* 370, 382-391 (2007).

⁷⁸ See Zeng Chuanhui, Coalition and Hegemony: Religion’s Role in the Progress of Modernization in Reformed China, 2011 *B.Y.U. L. Rev.* 759, 774-777 (2011).

⁷⁹ David A. Simon, Register Trademarks and Keep the Faith: Trademarks, Religion and Identity, 49 *IDEA* 233, 261 (2009). The author says there is no way to protect the identity religions in the U.S. However, in China, it is permissible.

through a very volatile ups and downs. “泰山大帝” (“Taishan Deity”) was registered on gypsum products of Class 19 in CTMO in 2003 and was assigned to Wanjia Group Building Materials Co., Ltd (Wanjia) in 2010.⁸⁰ Taishan Gypsum Co., Ltd. (Taishan Gypsum) applied to TRAB to revoke Wanjia’s registered trademark “泰山大帝” (“Taishan Deity”) because the registered trademark “泰山大帝” (“Taishan Deity”) refers to “Dongyue Deity” in Taoism, it is harmful to religious beliefs, religious feelings or folk beliefs and will produce adverse effects if being used as a trademark. China TRAB held that “泰山大帝” (“Taishan Deity”) is also called “Dongyue Taishan Deity” with the full name of “Dongyue Taishan Qirensheng Deity”, one Deity in Taoism. It is prone to harm feelings of religious people and produce adverse effects if it is used as a trademark. So TRAB of China revoked “Taishan Deity”.

Wanjia filed a lawsuit to Beijing First Intermediate Court. Beijing First Intermediate Court held that: “泰山大帝” (“Taishan Deity”) refers to “Dongyue Taishan Deity”. It is one of the five mountain deities and has been worshiped by people and Taoism believers for a long time, and has a very high religious status.⁸¹ Wanjia is also located in Shandong province, where Taishan Mountain is also located in. The words “Taishan” and “Dongyue” both refer to Taishan Mountain. Wanjia should be aware of the religious meaning of “Taishan Deity”. If it is used as a trademark, it is prone to harm the feelings of religious people and Taoism believers which will produce adverse effects.⁸²

Beijing High People’s Court denied Beijing First Intermediate Court’s opinion, saying that: In general, signs cannot be registered as trademarks if they are harmful to religious beliefs, religious sentiments, or folk beliefs. To judge whether a sign is harmful, it should be considered whether the sign is authentic or definitively used by religion believers or worshippers, the sign is directly associated with the religion, and whether the sign produces influence on social public interest such as religious beliefs, religious sentiments and folk beliefs. In this case, there is no proof showing that “泰山大帝” (“Taishan Deity”) is officially used for the deity and “泰山大帝” (“Taishan Deity”) has no unique relationship with the deity, nor is it an objective appellation for the deity. The evidences in this case are not enough to prove “泰山大帝” (“Taishan Deity”) is authentic and definite to be used by religion believers

⁸⁰ “泰山大帝” (“Taishan Deity”), Application Number: 3011175.

⁸¹ For information about China five mountain deities, see Terry F. Kleeman, Mountain Deities in China: The Domestication of the Mountain God and the Subjugation of the Margins, 114 *Journal of the American Oriental Society* 226, 226-238 (1994).

⁸² Taishan Gypsum Co., Ltd. v. Wanjia Group Building Materials Co., Ltd., TRAB, Beijing First Intermediate Court, YiZhongZhiXingChuZi No. 6325 (2014). In this verdict, the court also shows: Article 10 (1) (8) is an absolute prohibition clause which doesn’t say any exception for the situation that signs having other adverse effects can get registered through use. That’s to say, if a trademark is a sign with other adverse effects, it still cannot be registered in CTMO no matter how much good reputations it has obtained by using for many years.

and worshippers in Taoism or is related to Taoism directly. So there is no possibility to produce “other adverse effects”. Moreover, Wanjia provided evidence that it has used the disputed trademark “泰山大帝” (“Taishan Deity”) for a long time and has achieved high reputation, good social benefit and positive evaluation. In order to safeguard the established and stable market order, it should be concluded that the registration of the disputed trademark is not “having other adverse effects”.⁸³

Taishan Gypsum applied for retrial. The Supreme Court of China held that: If a sign has a religious meaning, no matter whether the relevant public can generally recognize it or it has been used and has a certain reputation, it is generally considered that the registration of the sign is harmful to religious feelings, religious beliefs or folk beliefs, and has adverse effects. “泰山大帝” (“Taishan Deity”) is an objective appellation and has religion meaning. It may be harmful to religion belief, religion emotion and folk religion, so it will produce adverse effects if Wanjia registers and uses “泰山大帝” (“Taishan Deity”) as a trademark. The Supreme Court insisted that the trademark “泰山大帝” (“Taishan Deity”) violates Article 10 (1) (8) and shall be revoked.⁸⁴

In the case *Cao Xiaoqing v. China TRAB*, “土地神” (“God of the Soil and the Ground”, pinyin: tSodì shén) was rejected by CTMO and TRAB.⁸⁵ Beijing Intellectual Property Court held that if using the disputed trademark “土地神” (“God of the Soil and the Ground”) on the designated goods can easily cause the relevant public to associate it with religious beliefs and feudal superstitions. It is detrimental to socialist morality and can easily produce adverse social effects.⁸⁶ In the case *Shanghai Yupo Industrial Co., Ltd. v. China TRAB*, the sign “浮图 FUTU” was rejected by CTMO and TRAB.⁸⁷ Beijing Intellectual Property Court held that the word “浮图” is a transfer word from “佛陀” (“the Buddha”)-the appellation of Buddha, Buddhism and Buddhist pagodas. Using it on the designated goods makes it easy for the relevant public to associate it with Buddhism or certain religious figures, and this kind of secular use of it will bring adverse effects to relevant public including those who have a specific religious belief.⁸⁸ In the case *Chongqing Changcheng Tea Co., Ltd. v. China TRAB*, the sign “佛印” (“Buddha Seal”, pinyin: fó yìn) was rejected by CTMO and TRAB.⁸⁹ Beijing Intellectual Property Court held that

⁸³ Taishan Gypsum Co., Ltd. v. Wanjia Group Building Materials Co., Ltd., TRAB, Beijing High People’s Court, GaoXing(Zhi)ZhongZi No. 3390 (2014).

⁸⁴ Taishan Gypsum Co., Ltd. v. Wanjia Group Building Materials Co., Ltd., TRAB, Chinese Supreme People’s Court, ZuiGaoFaXingZai No. 21 (2016).

⁸⁵ “土地神” (“God of the Soil and the Ground”), Application Number: 18587639.

⁸⁶ Cao Xiaoqing v. China TRAB, Beijing Intellectual Property Court, Jing73XingChu No. 5769 (2017).


⁸⁷ “浮图 FUTU”, Application Number: 17222095.

⁸⁸ Shanghai Yupo Industrial Co., Ltd. v. China TRAB, Beijing Intellectual Property Court, Jing73XingChu No. 6891 (2016).

⁸⁹ “佛印” (“Buddha Seal”), Application Number: 14784436.

the “佛印” (“Buddha Seal”) will be understood as its literal meaning—stamp of Buddha, stamper of Buddha and so on even the applicant claimed that “佛印” (“Buddha Seal”) refers to “佛印山” (“Fo Yin Mountain”, pinyin: fó yìn shān) in Chongqing, because “佛印山” (“Fo Yin Mountain”) has a very limited popularity, most consumers cannot set up a corresponding relationship between “佛印” (“Buddha Seal”) and “佛印山” (“Fo Yin Mountain”). The Chinese word “佛” (“Buddha”, pinyin: fó) mainly refers to the name of an idol worshiped by a Buddhist religion or the name of a person who fulfilled the practice perfection. “佛” (“Buddha”) has special meaning among Buddhist believers in China. Therefore, using the word “佛” (“Buddha”) in the trademark can easily and negatively affect Buddhist believers in China which will also bring negative consequences to China’s religious order and constitutes “other adverse effects”.⁹⁰

The trademark application was also rejected because of adverse effects in case *Paramount Pictures v. China TRAB*. The applicant applied to register “THEGODFATHER” and graphic as a trademark on Class 8.⁹¹ CTMO, China TRAB and Beijing First Intermediate People’s Court all rejected this trademark application. CTMO and TRAB acknowledged that the


“GODFATHER”  in the trademark application can be translated to the “godfather”. In Christianity, it refers to theologians who are authoritative in the formulation and interpretation of doctrines in the second to 12th centuries. It’s easy to harm religious feelings and will produce adverse effects if using it on designated goods. The applicant claimed that the trademark under application is from its classic movie “THEGODFATHER”. The obviousness becomes strong though long-term use and broad publicity, so consumers have already established a fixed correspondence relationship between the trademark and the movie character. “GODFATHER” has a multiple meanings and the Chinese translation for “GODFATHER” and the religious meaning is generalized, so it is not in the scope of forbidden use situations. Beijing First Intermediate People’s Court didn’t support the applicant’s claim and held that “GODFATHER” refers to theologians who are authoritative in the formulation and interpretation of doctrines in the second to 12th centuries, if use it on Class 8 such as abrading instruments will hurt religious feelings easily and produce adverse social effects. The Court also interpreted that the religious meaning of Chinese translation of English language “GODFATHER” has not been generalized to a degree that cannot make public people associate it to certain religion.⁹²

⁹⁰ Chongqing Changcheng Tea Co., Ltd. v. China TRAB, Beijing Intellectual Property Court, JingZhiXingChuZi No. 6454 (2015).

⁹¹ “THEGODFATHER”, Application Number: 11352932.

⁹² *Paramount Pictures v. China TRAB*, Beijing First Intermediate People’s Court, YiZhongXing(Zhi)ChuZi No. 9765 (2014).

The sign “佛家山” (“Buddhist Mountains”, pinyin: fó jiā shān) was rejected in the case *Jiangxi Fojiashan Marketing Mangement Co., Ltd. v. China TRAB* for the reason that the sign contains “佛” (“Buddhist”) which will harm religious feelings and will produce adverse effects.⁹³ The word “禅智” (“Zen wisdom”, pinyin: chán zhì) was rejected in the case *Shanghai Mengrong Information Technology Co., Ltd. v. China TRAB*. The court held that the character “禅” (“Zen”) is widely recognized as a common Buddhist term in Chinese and represents things related to Buddhism. Even though “禅” (“zen”) has other meanings, but all the meanings are related to religion. If use it on the service like insurance, pawn, charity fundraising, financial etc. will be harmful to religious feelings and produce adverse effects easily.⁹⁴ So does a sign with the name of Xuanzang was rejected in the case *Beijing Xingzhi Exploring Cultural Development Co., Ltd. v. China TRAB* for the reason that the sign “玄奘之路 理

想·行动·坚持” (“Road of Xuanzang ideal·action·persistence”)  will harm religious feelings and will produce adverse effects even the applicant has used the sign in their activities for ten years and the trademark has been recognized as a well-known service brand, which has promoted (the development of) Gansu Province, inherited the spirit of Xuanzang, and produced a positive and positive social impact.⁹⁵

CTMO, China TRAB and China courts share very close opinions on trademarks related to religion and superstitious issues. Any potential to be related to religion will be denied by them. There is no excuse to get approval even though the applicants have used the sign for a long time and the sign has gained a broad popularity. In China the religion protection is protected very well in the field of trademark.

5. Marks with politics elements

In terms of the political adverse effects, CTMO, China TRAB and China courts are all very cautious. Many cases show that neither names of national leaders nor appellations of official posts can be registered as trademarks in China, because these kinds of trademarks’ registration or use might produce adverse political effects. As former mentioned cases, “习美汇” (Ximeihui), “习卓” (“xizuo”, pinyin: xí zhuó) were all rejected because it contains “习”

⁹³ “佛家山” (“Buddhist Mountains”), Application Number: 17906463. *Jiangxi Fojiashan Marketing Mangement Co., Ltd. v. China TRAB*, Beijing Intellectual Property Court, Jing73XingChu No. 4371 (2017).



⁹⁴ “禅智” (“Zen wisdom”), Application Number: 10491073. *Shanghai Mengrong Information Technology Co., Ltd. v. China TRAB*, Beijing High People’s Court, GaoXing(Zhi)ZhongZi No. 2491 (2014).

⁹⁵ “玄奘之路 理想·行动·坚持” (“Road of Xuanzang ideal·action·persistence”), Application Number: 12886386. *Beijing Xingzhi Exploring Cultural Development Co., Ltd. v. China TRAB*, Beijing High People’s Court, JingXingZhong No. 638 (2016).

(“Xi”), the surname of China current President.⁹⁶ “周强” (“Zhou Qiang”) was rejected because the name of current President of China Supreme Court is 周强 (Zhou Qiang).

In the case *Sichuan Guansheng Agricultural Co., Ltd. v. China TRAB*, the applicant wanted to register “官升” (“Guan Sheng”, pinyin: guān shēng) as trademark. CTMO and China TRAB deemed that if read the sign “官升” (“Guan Sheng”) from right to left, it is “升官” (“Sheng Guan”) which means “get a promotion to a higher official position”, if use “升官” (“Sheng Guan”) in commercial activities will produce adverse effects easily.⁹⁷ However, both Beijing Intellectual Property Court and Beijing High People’s Court didn’t support this opinion. Courts held that the trademark under application “官升” (“Guan Sheng”) will not produce adverse effects with the reason that “官升” (“Guan Sheng”) is also the name of a town in Sichuan province and “升官” (“Sheng Guan”) is a neutral term and objectively expresses the expectation for professional advancement. It does not have a negative or negative impact on public interest and public order in China.⁹⁸

In case *Shuangcheng Chengxu Wine Co., Ltd. v. China TRAB*, “东北老鄉長” (“northeast old township head”, pinyin: dōng běi lǎo xiāng zhǎng) was rejected.⁹⁹ China TRAB considered that “乡长” (“township head”) is the administrative officer of local township government. The trademark under application contains “鄉長” (“乡长”, “township head”), which will produce adverse effects. Beijing Intellectual Property Court held that “老乡长” (“old township head”) is a respectful calling with a certain emotion. TRAB has no good reason to prove that it is easy for using “老乡长” (“old township head”) on designated goods like wine and shochu can cause adverse effects on the image of government officials. Additionally, “东北” (“northeast”) in front of “老乡长” (“old township head”) makes no change to the meaning of “老乡长” (“old township head”).¹⁰⁰

Linyi Tianwei Pants Co., Ltd.’s trademark application was rejected by CTMO because the trademark under application  is like the special mark of China Customs . It will undermine the seriousness and dignity of the China Customs if using the sign on designated goods, which will result in

⁹⁶ “习美汇” (Ximeihui), Application Number: 21061298, 21073064, 21073289. “习卓” (“xizuo”), Application Number: 20801671, 20801828, 20801863.

⁹⁷ “官升” (“Guan Sheng”), Application Number: 17558341.

⁹⁸ *Sichuan Guansheng Agricultural Co., Ltd. v. China TRAB*, Beijing Intellectual Property Court, Jing73XingChu No. 3069 (2017). *Sichuan Guansheng Agricultural Co., Ltd. v. China TRAB*, Beijing High People’s Court, JingXingZhong No. 3696 (2017).

⁹⁹ “东北老鄉長” (“northeast old township head”), Application Number: 16413387.

¹⁰⁰ *Shuangcheng Chengxu Wine Co., Ltd. v. China TRAB*, Beijing Intellectual Property Court, Jing73XingChu No. 6976 (2016).

adverse social effects.¹⁰¹ “中國邊貿 ZHONGGUOBIANMAO” (“China Border Trade”) was also rejected for such a reason. CTMO and China TRAB insisted that the “中國邊貿 ZHONGGUOBIANMAO” (“China Border Trade”) contains “China” which is the symbol of the country. It will lead to the abuse of the country name, damage the dignity of the country and produce adverse effects if allow to register it as a trademark and use in trade. This opinion was confirmed by Beijing First Intermediate Court and Beijing High People’s Court.¹⁰²

There is no possibility to register current leaders’ names or similar names as trademarks in China. General public are also very sensitive to these kinds of negative issues and want to keep themselves away from this kind of risk. So normally, there is no people to seek a change to register leaders’ names as their trademarks. But for the general appellation, people like to try because these words have good meanings and hope to use them as their trademarks to bring them successful business. But it seems CTMO is still in a struggle in deciding which ones have potential adverse political effects.

6. Dazzling public interest

There is also a very general function word that can cover everything in the procedure of determining adverse effects, it is “public interest”. Where is the boundary of public interest, who is represent of public’s interests? There is no clear predictability. This is one of the most complex problem in determination of “having other adverse effects”.

Courts gave different viewpoints in the case *Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB, Zhang Qinghe*. Trunkbow Asia Pacific filed to register “微信” (“wei xin”, pinyin: wēi xìn) as a service trademark on Class 38 such as information transmission, telephone service, telephone communications, mobile telephone communications etc. on August 12, 2010.¹⁰³ During the publication period¹⁰⁴, Zhang Qinghe, a consumer of the social media “微信” (“Wechat”) raised an objection for the applicant’s registration of “微信” (“wei xin”) for the reason that Tencent issued the social media with the name of “微信” (“Wechat”) is totally same as the applicant’s trademark. CTMO issued a rejection to Trunkbow Asia Pacific. TRAB of China also gave a negative notice on the applicant’s trademark registration with reasonsthat: Firstly, Tencent published Wechat APP to the public before the publication of Trunkbow Asia Pacific’s trademark application on “微信” (“wei xin”), although Tencent hadn’t published Wechat software when Trunkbow Asia Pacific filed trademark registration application to CTMO.

¹⁰¹ Application Number: 1218539.

¹⁰² Yang Guodong v. China TRAB, Beijing High People’s Court, GaoXing(Zhi)ZhongZi No. 2884 (2014).

¹⁰³ “微信” (“wei xin”), Application Number: 8840949.

¹⁰⁴ From August 27, 2011.

Secondly, the quantity of Wechat APP users increased rapidly and the number went to at least 0.4 billion by July of 2013. Many government organizations, courts, schools, banks etc. started to provide their service through Wechat APP, so the public connected “微信” (“wei xin”) with Tencent. Thirdly, if Trunkbow Asia Pacific’s trademark application on “微信” (“wei xin”) is approved, it will bring much inconvenience and loss to 0.4 billion users of Wechat, then it may produce negative influence on social public interest and public order when considering that people may also mistake Trunkbow Asia Pacific’s service with the trademark “微信” (“wei xin”). Beijing Intellectual Property Courts rejected Trunkbow Asia Pacific’s claim on the ground of “having other adverse effects”.¹⁰⁵ It held that: Firstly, it will bring not only mistake to the nature, content and origin of “微信” (“Wechat”) but also negative influence on the already established stable market order if permit Trunkbow Asia Pacific’s trademark registration application on “微信” (“wei xin”). Secondly, even China opts first-file trademark right obtain policy, we should balance this policy with public interest and market order. In this case, in one hand it is the expectation interest by trademark registration of the applicant, the other hand is users of “微信” (WeChat) APP and large society cost to change the stable recognition, we choose to protect the interests of non-specific majority public.¹⁰⁶ However, Beijing High People’s Court overturned the former standpoints on “having other adverse effects” while it rejected Trunkbow Asia Pacific’s claim based on the trademark is non-obvious on services of Class 38. Beijing High People’s Court held that, “having other adverse effects” is an absolute prohibition situation for trademark registration and trademark use, a sign can neither be registered as a trademark nor be used as a trademark once it is affirmed to have “other adverse effects”. If a sign is affirmed to have “other adverse effects”, nobody can use or register it as a trademark. So we have to be very cautious when decide whether a sign has “other adverse effects”. In this case: Firstly, “微信” (“wei xin”) itself has no “other adverse effects” at all. Secondly, WeChat has many users, but the users are using the APP. The registration of “微信” (“wei xin”) by Trunkbow Asia Pacific only might influence the name or the trademark of the APP, but not the operation of the APP which is the closest to public users. Thirdly, if WeChat APP change its name, it will benefit from convenient internet technology and inform its users instantly, it has nothing to do with public users’ interests. So Beijing High People’s Court held that “微信” (“wei xin”), applied by Trunkbow Asia Pacific, has no “other adverse effects”.¹⁰⁷ This case went to China Supreme Court and China

¹⁰⁵ Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB, Zhang Qinghe, Beijing Intellectual Property Court, JingZhiXingChuZi No.67 (2014).

¹⁰⁶ Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB, Zhang Qinghe, Beijing Intellectual Property Court, JingZhiXingChuZi No.67 (2014).

¹⁰⁷ Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB, Zhang Qinghe, Beijing High People’s

Supreme People's Court said nothing related to "having other adverse effects" issues and rejected Trunkbow Asia Pacific's retrial petition.¹⁰⁸

In case *Ji Shiqin v. China TRAB*, Beijing First Intermediate People's Court held that the value of trademark comes from trademark use, it is saying that trademark should be used to recognize the sources of goods or services in order to reduce people's search cost and keep normal market order. But Ji Shiqin as a natural person registered more than 170 trademarks which are identical or same with other trademark right holders' trademarks without intention to actual use, this will result that particular people unfairly monopoly special signs, which is a conduct of undermine the order of trademark registration and this will lead producing adverse effects to China's economic, culture et. social public interest and public order.¹⁰⁹ This verdict was revised by Beijing High People's Court. Beijing High People's Court held that there is not enough evidence to prove that Ji Shiqin's conduct of applying to register the trademark has adverse effects based on Article 10 (1) (8) of Chinese Trademark Law.¹¹⁰ That is to say, Beijing First Intermediate People's Court employed law incorrectly.

The trademark application of "COACHPOPPYCOACHEST.1941" was rejected because the trademark contains "POPPY" which will produce adverse effects if use it as a trademark.¹¹¹ Beijing First Intermediate Court confirmed this opinion in the verdict.¹¹² The trademark "LL LUXURLIVING" was rejected by CTMO and China TRAB, because it has the meaning of luxury life, it's easy to produce adverse effects if use it on goods like curtain.¹¹³ Beijing First Intermediate Court and Beijing High People's Court overturned China TRAB's opinion and held that there is no adverse effects of this trademark.¹¹⁴

Court, GaoXingZhiZhongZi No.1538 (2015).

¹⁰⁸ Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB, Zhang Qinghe, China Supreme People's Court, ZuiGaoFaXingShen No. 3313 (2016).

¹⁰⁹ Ji Shiqin v. China TRAB, Beijing First Intermediate Court, YiZhongZhiXingChuZi No. 3290 (2011).

¹¹⁰ Ji Shiqin v. China TRAB, Beijing High People's Court, GaoXingZhongZi No. 1420 (2012). Beijing High Peoples' Court did the verdict on the ground that Chinese Trademark Law (2001) Article 28 "Where a trademark, for the registration of which an application is made, that does not conform to the relevant provisions of this Law or that is identical with or similar to the trademark already registered by another person or is given preliminary examination and approval for use on the same kind of goods or similar goods, the trademark office shall reject the application and shall not announce that trademark." This Article becomes Article 30 in Chinese Trademark Law (2013).

¹¹¹ "COACHPOPPYCOACHEST.1941", Application Number: 10334368.

¹¹² COACH, INC. v. China TRAB, Beijing First Intermediate Court, YiZhongXing(Zhi)ChuZi No. 7313 (2014).

¹¹³ "LL LUXURLIVING", Application Number: 9890027.

¹¹⁴ Club House Italian Stock Company v. China TRAB, Beijing High People's Court, GaoXing(Zhi)ZhongZi No. 1518 (2015).

These kinds of trademarks are deemed to be having other adverse effects because they contain things that are negative to positive value which the authority wants to advocate.

7. Most recent case: continuing ambiguity and inconsistency

Jiejue (Beijing) Network Technology Co., Ltd. intended to register “熟女” (“mature women”, pinyin: shú nǚ) on Class 4105.¹¹⁵ It was refused by CTMO and China TRAB. Jiejue filed a lawsuit to Beijing Intellectual Property Court. Beijing Intellectual Property Court insisted that the word “熟女” (“mature women”) has the meaning of sexual maturity and flirty woman. It has derogatory meaning and low taste, goes against to the public order and good customs, and is prone to produce adverse effects if used in designated services.¹¹⁶

Beijing High People’s Court overturned the verdict of the first instance.¹¹⁷ Beijing High People’s Court held that, the meaning of a trademark or its constituent elements should be determined based on the meaning given by the dictionaries, reference books and other public publications or other information carriers which general public can widely get access to. By this way, it can avoid explaining the meaning of a trademark based on external factors such as occasions and contexts, or using deducing or associating way, which will make the trademark or its constituent elements loaded with non-ordinary meanings of the words and result with improperly limiting the freedom of expression in commerce and going against to the aim of giving our country’s socialist morals and culture in positive and correct way. At the same time, burden of proof shall be on the side who claims the trademark has adverse effects when the meaning of the trademark or its constituent elements are not determined based on general cognition from common sense. In this case, Jiejue provided evidence such as network print, book contents, other trademark registration information and so on, which can prove that there is not a general understanding of the meaning of (“熟女”) “mature women” in China. China TRAB did not provide further proof or adequate explanation for interpreting (“熟女”) “mature women” to sexual maturity and flirty woman. So there is no proof that (“熟女”) “mature women” may produce adverse effects to public interest and public order such as Chinese politics, economy, culture, religion, and ethnicity et.¹¹⁸ This case is a positive attitude to the determination of “having other adverse effects” by court. Beijing High

¹¹⁵ For example, screenplay writing, videotaping, entertainer services, presentation of live performances, film production (other than advertising films), theatre productions, production of shows, and so forth.

¹¹⁶ Jiejue (Beijing) Network Technology Co., Ltd. v. TRAB, Beijing Intellectual Property Court, Jing73XingChu No. 5226 (2017).

¹¹⁷ Jiejue (Beijing) Network Technology Co., Ltd. v. TRAB, Beijing High People’s Court, JingXingZhongZi No. 231 (2018).

¹¹⁸ Jiejue (Beijing) Network Technology Co., Ltd. v. TRAB, Beijing High People’s Court, JingXingZhongZi No. 231 (2018).

People's Court didn't follow the general and ambiguous rule in other cases and put dictionaries and other publications as first resource for the explanation of the words of trademark and the trademark constituent elements. This is the right way to guide common people to use words in right way, but not be led by misuse of words.

For the words related to sex, both CTMO and China courts are very strict, but the latest case shows another side opinion from court. In the case *Beijing Weimei Quanxiang Catering Management Co., Ltd. v. China TRAB*, the applicant Beijing Weimei Quanxiang Co., Ltd. applied to register “叫个鸭子” (“call a



duck”, pinyin: jiào gè yā zi) on class 35.¹¹⁹ China TRAB insisted that the trademark under application consists of a duck picture, characters “叫个鸭子” (“call a duck”) and a black rectangular background. The words “叫个鸭子” (“call a duck”) has low taste and is easy to produce adverse social effects. Using it on the service such as advertisement constitutes a violation to Article 10 (1) (8) of Trademark Law. The applicant filed a lawsuit to Beijing Intellectual Property Court. Beijing Intellectual Property Court held that the trademark under application consists of the text “叫个鸭子” (“call a duck”), the duck cartoon graphics and black background. According to the general understanding of the public, it can't be interpreted other meanings beyond the literature meaning of the text “叫个鸭子” (“call a duck”) itself. The TRAB believes that “叫个鸭子” (“call a duck”) is in low taste is not equivalent to the social public's general understanding. Therefore, using the trademark under application on the designated services has no adverse effects.¹²⁰ Then China TRAB appealed the decision. Beijing High People's Court affirmed the first instance verdict.¹²¹

In another very similar case *Beijing Manman Station Beverage Store v. China TRAB*, the same trademark was applied on class 43.¹²² With the rejection from China TRAB, the applicant filed a lawsuit to Beijing Intellectual Property Court. Beijing Intellectual Property Court held that “duck” generally refers to a poultry, but also refers to male sex workers in non-mainstream culture. In general, using the second meaning as a trademark cannot be accepted by

¹¹⁹ “叫个鸭子” (“call a duck”), Application Number: 15739764. Designated service includes advertising, exhibitions (Organization of –) for commercial or advertising purposes, marketing, sales promotion for others, computer databases (Systemization of information into –), compilation of information into computer databases, accounting, sponsorship search, etc.

¹²⁰ *Beijing Weimei Quanxiang Catering Management Co., Ltd. v. China TRAB*, Beijing Intellectual Property Court, Jing73XingChu No. 4015 (2016).

¹²¹ *Beijing Weimei Quanxiang Catering Management Co., Ltd. v. China TRAB*, Beijing High People's Court, JingXingZhong No. 395 (2017).

¹²² (“叫个鸭子”) “call a duck”, Application Number:15740333. Applying trademark designating service includes hotels, motels, tourist homes, hotel reservations, retirement homes, day-nurseries [crèches], animals (boarding for –), bar, etc.

mainstream culture and value. The use of the dispute-claimed trademark is designated in services such as “bar service, lodging agency (hotel, boarding)” etc., especially with the term “call a duck”, this will further strengthen the relevant public cognition of and association to the second meanings of “duck”, it can easily produce adverse effects.¹²³ However, Beijing Intellectual Property Court’s verdict was overturned by Beijing High People’s Court. Beijing High People’s Court held that the term “adverse effects” as used in Trademark Law refers to the situation that the registration or use itself is harmful to moral or customs, or produce negative influence to national political, economic, cultural, religious, ethnic and etc. social public interest and public order. The TRAB’s understanding on the “call a duck” cannot equal to social public’s general understanding on it.¹²⁴

Comparing with “叫个鸭子” (“call a duck”)’s good luck, almost all the trademark applications of “叫了个鸡” (“call a chicken”, pinyin: jiào le gè jī) were rejected.¹²⁵ Even Yanji (Shanghai) Catering Business Management Co., Ltd. (the trademark applicant) has been running a very successful business based on the sign “叫了个鸡” (“call a chicken”), it was rejected for the reason that it will produce adverse effects. For Chinese words and language general use, people use “duck” and “chicken” to refer male sex workers and female sex workers respectively. If the trademark “叫了个鸡” (“call a chicken”) was rejected, then how could “叫个鸭子” (“call a duck”) get registration approval? Especially when they were applied in the similar Classes. Multiple results enhance people’s puzzling on the “other adverse effects” meaning.

When we look back similar level word signs handled by CTMO, TRAB and court, we can find different results for similar signs very easily. For the dirty words, as the most disputed trademark “MLGB”, it was approved in many kinds of Classes before the case *Shanghai Junke Trading Co. Ltd. v. China TRAB*. Same as “MLGB”, “CNM” is also the acronym of a very popular dirty words used on internet.¹²⁶ “CNM” trademark registration application was approved by CTMO in many Classes. For example, it was approved class 9, class 8, class 35, class 7, class 26 and so forth.¹²⁷ Another similar internet slang example is “碧池” (“bi chí”, pinyin: bì chí). It is a popular translation for “bitch” in China,

¹²³ Beijing Weimei Quanxiang Catering Management Co., Ltd. v. China TRAB, Beijing Intellectual Property Court, Jing73XingChu No. 2359 (2017).

¹²⁴ Beijing Weimei Quanxiang Catering Management Co., Ltd. v. China TRAB, Beijing High People’s Court, JingXingZhong No. 3393 (2017).

¹²⁵ “叫了个鸡” (“call a chicken”), Application Number: 16038402, 16045535, 16059522, 16084940, 16085280, etc.

¹²⁶ CNM is the acronym of Cao Ni Ma (the meaning is f.ck your mother). It is very popular on internet communication.

¹²⁷ “CNM” on Class 9, Application Number: 19080537, 22935807. “CNM” on Class 8, Application Number: 22952822. “CNM” on Class 35, Application Number: 19505261. “CNM” on Class 7, Application Number: 13597204. “CNM” on Class 26, Application Number: 9766108, the Class of 2601 contains clothing laces, laces, ribbons, tapes, fringes, clothing trims, frills and so forth, it is similar with the “MLGB” applying for registration on clothing.

but this sign got approved by CTMO in different Classes, for example condom, medical apparatus, cosmetics and so on.¹²⁸

For using altered idioms, Beijing First Intermediate Court held that “糖糖正正” (“tang tang zheng zheng”, pinyin: táng táng zhèng zhèng) has no adverse effect. The Chinese idiom “堂堂正正” (meaning dignified and imposing, pinyin: táng táng zhèng zhèng) is a commendatory term and has a fixed meaning of character integrity and greatness. Relevant public in our country has a clear understanding of the meaning of the idiom “堂堂正正” (meaning dignified and imposing). The application for trademark in this case changed some of the constituent characters of the above idiom, but the change did not result in any other comprehension that was clearly different from the fixed meaning of the idiom, nor did it use derogatory or distorted use of the idiom. The change in trademark under application will not cause the relevant public to have other understandings of the meaning of the idiom “堂堂正正” (meaning dignified and imposing), thereby causing misunderstanding of the fixed meaning of the idiom and thus causing adverse social influence.¹²⁹ This case was cited by many applicants in courts to justify their applying trademarks and prove that their applying trademarks will not produce adverse effects.¹³⁰ Comparing with the trademark “糖糖正正” (“tang tang zheng zheng”), there is no big difference in other cases of idioms altering use way, but the results of them are different. In the case *Beijing Manman Station Beverage Store v. China TRAB*, the applicant claimed that there have been some trademarks named “榴芒” (“liu mang”) gotten approval in CTMO and are existing until now, so it has nothing related to adverse effects. However, Beijing High People’s Court explained this problem with the logic that the application, review, and approval of other trademarks are not necessarily related to this case, nor can they be the basis for this case final verdict, in terms

¹²⁸ “碧池” (“bi chi”) on Class 10, Application Number: 20389965, 14485638. “碧池” (“bi chi”) on Class 3, Application Number: 15970175.

¹²⁹ *Beijing Hannashan Century International Commerce Clubhouse Co., Ltd. v. TRAB*, Beijing First Intermediate Court, YiZhongZhiXingChuZi No. 144 (2014).

¹³⁰ For example, in the case *Manyi (Shanghai) Real Estate Consulting Co., Ltd. v. TRAB*, the plaintiff Manyi Company insisted that: in order to keep consistency with the standard of trademark review in the case “糖糖正正” (“tang tang zheng zheng”), the trademark “爱屋吉屋 IWJW.COM” (“love-house-auspicious-house”, pinyin: ài wū jí wū, Application Number: 15012498) in this case shall get approved. Otherwise, Manyi Company will lose the reasonable expectation of specific administrative actions and it will cause obvious differences to trademark examination standards. See *Manyi (Shanghai) Real Estate Consulting Co., Ltd. v. TRAB*, Beijing High People’s Court, (2017) JingXingZhong No. 1577. In the case *Jiangyin Baiyibaishun Clothing Co., Ltd. v. TRAB*, the plaintiff wanted to cite case *Manyi (Shanghai) Real Estate Consulting Co., Ltd. v. TRAB* to justify its trademark “百衣百顺 BATTSALE” (pinyin: bǎi yī bǎi shùn) while “百依百顺” (pinyin: bǎi yī bǎi shùn) is a transformative result from Chinese idiom “百依百顺” (means obey to somebody totally, pinyin: bǎi yī bǎi shùn). Beijing Intellectual Property Court didn’t support its claim and held that the transformative use of idioms has adverse effects. See *Jiangyin Baiyibaishun Clothing Co., Ltd. v. TRAB*, Beijing Intellectual Property Court, (2016) Jing73XingChu No.2193.

of trademark examination is affected by various factors, such as the time and environment of the trademark examination's formation, or the evidence existing in the case and so forth.¹³¹

Compared with former mentioned sign “寻欢”(“make merry”, pinyin: xún huān) was rejected on Class 9, Class 38, Class 41, Class 42, Class 45, while it was registered on Class 29 successfully.¹³² “寻欢时光”(“make merry time”, pinyin: xún huān shí guāng) was rejected on Class 35 and Class 43, while it was registered on Class 29.¹³³ “寻欢记”(“make merry notes”, pinyin: xún huān jì) was also registered on Class 20 and on Class 35 successfully¹³⁴. Even “心满意竹 HEAR TSATISFYING BAMBOO” was invalidated on Class 24, but it was approved on Class 35.¹³⁵ The trademark “随心所欲”(pinyin: suí xīn suǒ yù) and “随心所遇”(pinyin: suí xīn suǒ yù) are all transformative use of the idiom “随心所欲”(meaning that do whatever one wants. pinyin: suí xīn suǒ yù), they also share the same pronunciation. But those trademark application got success on Class 11 and Class 25.¹³⁶ The sign “芝根芝底” got the approval on Class 30.¹³⁷

It is still hard to find where is the line of rejecting a trademark registration application based on “having other adverse effects”. Large amount of trademarks is treated in inconsistent ways makes people confused and lost their mind about what kind of trademark design and craft they can make. The approval of trademarks (even some of them or some similar trademarks are rejected in the same time) means there is still chance to get approval for the trademark application only if CTMO sees the hope of good effects and benefits from using this trademark wins the adverse effects. In order to keep a relative consistency among cases, court said that other trademarks' approval results have no meaning to the case under trail, it means the court did not deem the different verdicts shall be followed even the trademarks are similar. It is very confusing!

¹³¹ Beijing Manman Station Beverage Store v. China TRAB, Beijing High People's Court, JingXingZhong No. 1972 (2016).

¹³² “寻欢”(“make merry”), Application Number: 8747995 (Class 9), Application Number: 15934643 (Class 38), Application Number: 15934694 (Class 41), Application Number: 15934773 (Class 42), Application Number: 15934856 (Class 45), Application Number: 18210306 (Class 29).

¹³³ “寻欢时光”(“make merry time”), Class 35 (Application Number: 18304371), Class 43 (Application Number: 18304620), Class 29 (Application Number: 18304572).

¹³⁴ “寻欢记”(“make merry notes”), Application Number: 19509552 (on Class 20), Application Number: 19509246 (on Class 35).

¹³⁵ “心满意竹 HEAR TSATISFYING BAMBOO”: Class 24, Application Number: 15063832; Class 35, Application Number: 15061678.

¹³⁶ “随心所欲”(pinyin: suí xīn suǒ yù), Application Number: 4883629. “随心所遇”(pinyin: suí xīn suǒ yù), Application Number: 4667469.

¹³⁷ “芝根芝底”(“sesame-root-sesame-bottom”, pinyin: zhī gēn zhī dǐ), Application Number: 17064312.

D. Summary of the problems on “adverse effects” employ

Surely “having other adverse effects” provides CTMO, China TRAB and China courts a broad discretion on the trademark registration. It makes registered trademarks play a role of leading positive life and value (in fact it needn't), which seems compelling as its original function that designate the origins and sources of the goods or services.¹³⁸ Taking advantage of “having other adverse effects”, it makes consumers and public people especially students who are learning Chinese in school and teenagers who are sensitive to knowledge learning get rid of dirty and unhealthy language environment because it reduces the chances people get access to adverse effects signs by rejecting trademark application with signs “having other adverse effects”. In the end, China forbids the use and registration of any signs with adverse effects will make it reserve large amount of available trademark resources in the future when the registrable trademarks become more and more limited. This trademark registration and use policy in China may benefit its trademarks shortage very much in the future. When we stand out of law system, we also can see China is safeguarding the authority and dignity of the leaders, the governments, the community and other organizations by prohibiting using their names or similar signs as trademarks. It can be helpful for the holy power to be in force and irreparable. Additionally, it puts registration interests to an important protection role will also enhance the union of the country. However, as the original function of trademark is to distinguish the origins and sources of goods or services, there are also shortcomings by doing like this.

China trademark system's limited ability on determining “other adverse effects” becomes apparent in view of cases emerged in CTMO, China TRAB and China courts. Similar signs get different results. Different authoritative organizations have different concerns. By comparison, CTMO sets up the strictest line to prohibit some potential negative signs to keep trademarks in China positive and sets up a super high protection line for the famous political figures. However, China courts are not stand in the same line totally.¹³⁹ On the other side, it seems “having other adverse effects” also works as a results to prove other damages in law, for example public interest, detrimental to social

¹³⁸ Original functions of trademarks, see David A. Simon, Register Trademarks and Keep the Faith: Trademarks, Religion and Identity, 49 IDEA 233, 237 (2009).

¹³⁹ China courts here mostly refers to Beijing First Intermediate Court, Beijing Intellectual Property Court, Beijing High People's Court and China Supreme Court. Because before 2014, China TRAB's location was in the jurisdiction of Beijing Intermediate Court. In November 2014, Beijing Intellectual Property Court was built and trademark administrative cases started to go to Beijing Intellectual Property Court. See Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases, Documents of Judicial Interpretation No. 289 (2009). Notice of Beijing High People's Court's Implementing “Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases”, Beijing High People's Court, (2009). Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases, Documents of Judicial Interpretation No. 338 (2014).

moral, fake issues, hurt a third party's rights and prior arts, etc.

There is one important disruption in the determination of "having other adverse effects". It is whether the "adverse effects" shall be produced by the sign itself or through the use of the sign. If the "adverse effects" shall be produced from the sign itself, then anybody could not use it, there is no exception. If the "adverse effects" shall be produced through use, who should and can foresee the adverse effects is a problem. Based on trademark law general principle, subject of the judgment of whether there is "other adverse effects" on a trademark should be relevant public.¹⁴⁰ However, there is no public opinion survey during the trial and rejection of trademark registration. It means trademark examiners, trademark reviewers and judges are playing the role of relevant public, but it seems their opinion are not in relevant public's way. Does it fair for trademark applicants? Does it democratic for relevant public? Does it essential for authority to do so?

IV. It is a wrong way in China to use "having other adverse effects"

A. China legislation phrase might be not the biggest but is the primal problem

This article is not saying that there shouldn't be miscellaneous provisions exist in trademark law or general phrases shouldn't be used to trademark forbidden use terms, it is just intending to declare that the legislation phrase in Chinese Trademark Law is too general, too broad, too confusing and too easy to be manipulated, which leads to a broad scope signs are expelled out of use and registration while they could function as distinguishing the origins and sources of goods or services, and gain goodwill on them. Especially some unregistered trademarks that has been used for a long time and have the unique indicator role for the relevant public, especially consumers. General legislation can improve the flexibility of law, but too general legislation would weaken the bind of the law.

China is a statute country and it is clear to be known that there are general legislations in other parts of Chinese Trademark Law as well as other laws in China. For example, General Principles of the Civil Law of the People's Republic of China was issued four years later than Chinese Trademark Law and has been worked as primary Chinese Civil Law (China General Principles of the Civil Law) until now also contains many general provisions. The most similar provision in China General Principles of the Civil Law with the "having other adverse effects" provision in Chinese Trademark Law is public order and good customs in Article 7 which reads "Civil activities shall have respect for social ethics and shall not harm the public interest or disrupt social

¹⁴⁰ The "relevant public" is a broadly used subject in Chinese Trademark Law.

economic order.”¹⁴¹ People call this Article “public order and good customs principle” provision. But when judges use Article 7 and other general basic principle provisions in China General Principles of the Civil Law, it means there is no specific provisions available to solve the argument and disputes. That is to say, the judges do not employ the general and miscellaneous provisions unless there is no specific provisions are available to support their opinions for the trial.

There is a very general and versatile Article in the first chapter of Chinese Trademark Law. Article 1 of Chinese Trademark Law tells the law’s intention, which can help to supply the reasoning law basis if the specific articles are not appropriate and not available to apply. Although the “other adverse effects” is also put in the general chapters in China Trademark Law, it expresses the specific content in trademark use and registration article. So in fact, it works as a general rule but can be employed as a primary legal basis and be used very often.

As summary above, even Chinese Trademark Law uses a general legislative term, but it is not the biggest problem by rejecting so many trademarks based on “having other adverse effects”. The biggest reason is that CTMO and China TRAB pay a conservative attitude to trademarks that might have potential to have adverse effects flood to market. China courts also have a discreet attitude on trademarks of adverse effects, but much less than CTMO. What’s more, Chinese traditional order and culture also make the government feel powerful and liable to purify the trademarks based on the content of trademarks.

B. Reasons for CTMO, China TRAB and China courts’ actions

Because it is a miscellaneous clause, so the authorities issued relative interpretations on how to define “having other adverse effects” for their own work to follow (and guide the public). As it shows in the third part of this paper, different authorities gave different interpretations for “having other adverse effects”. In order to enhance the examination of trademarks that having other adverse effects, Trademark Examination Cooperation Center of The State Administration for Industry and Commerce of China (Trademark Examination Cooperation Center)¹⁴² released one document on the examination of trademarks having other adverse effects, named “Trademark Examination Cooperation Center Control Measures on Trademark Registration Examination Timeline Limitation and Adverse Effects Trademarks” (“Control Measures on Adverse Effects Trademarks”) in 2017. This document builds a multi-stage-monitoring method for trademarks of

¹⁴¹ See China General Principles of the Civil Law (Document Number: Order No. 37 of the president of the People’s Republic of China), art.7.

¹⁴² Trademark Examination Cooperation Center is a unit directly under SAIC. About its main responsible duties. See at <http://www.tdtm.com.cn/?jianjie.html> (last visited June 5, 2018).

adverse effects¹⁴³ This explains why there are so many trademark applications were rejected by CTMO based on “having other adverse effects”. Because if they don’t put much “attention” to reject trademarks have potential “other adverse effects”, they are probably get punishment based on this document.

Courts are using “having other adverse effects” to deny trademark registrations which they think might be harmful to society order. In September 2015, China Supreme Court promulgated “Several Opinions of the Supreme People’s Court on Improving the Judicial Accountability System of People’s Courts”. This document sets up the policy that judges are lifelong responsible for cases which are under their trial. It says “Judges shall be liable for their performance of trial duties and assume lifelong responsibility for the quality of case handling within the scope of their duties.”¹⁴⁴ In 2017, this policy was enhanced again in “Opinions of the Supreme People’s Court on the Implementation of the Judicial Accountability System (for Trial Implementation)”, the first article of which states that “...the requirements for the reform of “making triers render judgments and making judges be accountable” shall be strictly implemented on the basis of...”.¹⁴⁵ Judges have to consider whether their opinions in the cases will bring trouble to them in the future. As a result of that, judges prefer to borrow opinions from former similar cases, especially cases processed by the Supreme Court and high courts.¹⁴⁶ China built guiding cases system in 2010 even China is not a case country.¹⁴⁷ “When trying similar cases, people’s courts at all levels shall use the guiding cases issued by the Supreme People’s Court as a reference.”¹⁴⁸ It is the briefest statement of the power of guiding cases. This policy was originally used to guide lower courts for similar cases’ adjudication and

¹⁴³ See at <http://www.tdm.com.cn/?searchjg/id/213/gzgtid/231.html> (last visited May 9, 2018).

¹⁴⁴ Several Opinions of the Supreme People’s Court on Improving the Judicial Accountability System of People’s Courts (Document Number: No. 13 [2015] of the Supreme People’s Court), art. 25.

¹⁴⁵ Opinions of the Supreme People’s Court on the Implementation of the Judicial Accountability System (for Trial Implementation) (Document Number: No. 20 [2017] of the Supreme People’s Court), art. 1. This also regulates the supervision about it, it reads “After the reform of the judge quota system is completed, the people’s courts at all levels must strictly implement the reform of the judicial accountability system and ensure “the judges hear the cases to render judgments and assume related responsibilities.” No court president or division chief judge may examine, sign and issue any written judgment for cases that are not directly tried by him- or herself, except for cases decided by the judicial committee upon collective discussion, or conduct approval of any case in a disguised form by such means as giving an oral instruction, observing the hearing of the collegial panel, and reviewing the delivered written judgments.” It means that judges have to undertake the responsibility for “their own” cases.

¹⁴⁶ Mo Zhang, Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development Case Law in China, 26 Wash. Int’l L.J. 269, 270 (2017).

¹⁴⁷ About the details of guiding cases system, see Provisions of the Supreme People’s Court Concerning Work on Case Guidance (Document Number: No. 51 [2010] of the Supreme People’s Court) and Detailed Implementing Rules on the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance” (Document Number: No. 130 [2015] of the Supreme People’s Court).

¹⁴⁸ See *Id.* art 7.

provide references for lower courts.¹⁴⁹ In current China statues system, guiding cases and other cases published by the Supreme Court and higher courts are expanding the power of Courts because it should be China's legislative bodies to enact laws but not courts in China law system.¹⁵⁰ Until the end of 2017, China Supreme Court has published 92 guiding cases. In fact, except for guiding cases, China Supreme Court also issues Top 10 IPR Cases of Chinese Courts and 50 Typical IPR Cases of Chinese Courts around April 26 every year since 2009. In addition, almost every China local high court and intermediate court follows the trend to issue (local) top 10 cases decided by local courts themselves. These cases are all made public before April 26 annually as a way to celebrate the World Intellectual Property Day. With these cases' going around and getting people's competitive flavor, judges, scholars and the parties are keen to do research on these cases and try to follow some rules summarized from these cases. This makes judges keen on finding former published cases similar to cases under their deciding when they find the cases are very controversial. However, adverse effects trademark cases are mostly determined by limited specific courts in China and there are not many adverse effects trademark registration cases are published as annual cases,¹⁵¹ so it's harder for judges in court to tell the adverse effects trademarks independently. But as we could see, judges have their own rules given by courts and higher courts. In intellectual property trail system, there are much enthusiasm for following guiding cases and these annual cases even there are still many challenges to Chinese guiding cases system.¹⁵²

In recent years, Chinese courts are also respond to national industry incentive theory.¹⁵³ In some cases, they put their decision basis on public interest which in fact is about some certain industries' interests, or even some certain companies' interests. For example, in the "wechat" case, it is a far-fetched excuse saying that it will harm the public interest if stop Wechat APP using the name "wechat". Public people were represented as the

¹⁴⁹ Supra note 146.

¹⁵⁰ Jocelyn E.H. Limmer, China's New "Common Law": Using China's Guiding Cases to Understand How to Do Business in the People's Republic of China, 21 *Willamette J. Int'l L. & Disp. Resol.* 96, 99 (2013).

¹⁵¹ In China, most "having other adverse effects" trademark cases are administrative cases with TRAB as administrative lawsuit defendant. See Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases, Documents of Judicial Interpretation No. 289 (2009). Notice of Beijing High People's Court's Implementing "Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases", Beijing High People's Court, (2009). Notice of the Supreme People's Court on Issues concerning the Jurisdiction of Intellectual Property Courts over Cases, Documents of Judicial Interpretation No. 338 (2014).

¹⁵² About the challenges to Chinese guiding cases system, see Chinese Common Law? Guiding Cases and Judicial Reform, 129 *HARV. L. REV.* 2213, 2213-2234 (2016).

¹⁵³ The creation, innovation, industries incentive policies are enforced very well after the promulgation of Outlines of the National Intellectual Property Strategy in 2008. Yahong Li, Intellectual Property and Innovation: A Case Study of High-Tech Industries in China, 13 *Or. Rev. Int'l L.* 263, 303 (2011).

representatives' willing as public people don't know. It is an old trick to use public interest as endorsement for some certain private interests. Especially under China's policy of *Mass Entrepreneurship and Innovation*, China intellectual property trials have to balance the interests of promoting industries development and intellectual property rights protection, which makes stable public order and market environment essential. As a result of that, generally trademarks with any adverse effects are not welcomed by authorities, even though the trademark has been used in the market for a long period, owned some consumer fans and shaped stable market order.¹⁵⁴

C. What has been ignored by the authorities

1. Applicants' intention on disputed signs is not for so-called "other adverse effects"

Generally speaking, we can't know how individual trademark applicants are thinking when they apply their satisfied trademarks while CTMO examiners are not satisfied with, but we believe most trademark applicants are applying trademarks with intention to use on their business. The revision of Chinese Trademark Law in 2013 strengthened the use of trademark, which seems much more reasonable and protects much heavily on the goodwill accumulated on the trademark which is the soul of trademark protection comparing with before relatively pure first-file system of Chinese Trademark Law.¹⁵⁵ It means putting trademark use as a factor for right obtaining will limit chances of trademark trolls.¹⁵⁶ Most so-called other adverse effects trademarks' applicants seem have no motivation to register a trademark with obvious common sense level real adverse effects. In addition, trademark trolls don't like trademarks with real adverse effects, because trademarks with real adverse effects own high risk of selling badly which goes against trademark trolls' original intention "stock up trademarks for speculation". By the way, trademarks with real adverse effects are much more possible to get CTMO's rejection which means it will cost more for trademark trolls to struggle for a possible trademark registration on real trademarks with adverse effects.

As scholars insists that "A good brand name may not guarantee success, but a bad brand name will often doom a product or company to oblivion."¹⁵⁷ Nobody wants to make their own business fail just because some adverse

¹⁵⁴ For example, the trademark "叫了个鸡" ("call a chicken"), the applicant had gotten large amount of consumers when it was asked to give up its trademark "叫了个鸡" ("call a chicken"). It changed its trademark and the name of its shop after it got fine from the government. "叫了个鸡" ("call a chicken"), Application Number: 16038402, 16045535, 16059522, 16084940, 16085280, etc.

¹⁵⁵ Zhou Zhongqi, Key Amendments to the Chinese Trademark Law, 49 *les Nouvelles* 124, 124 (2014).

¹⁵⁶ Michael S. Mireles, Trademark Trolls: A Problem in the United States, 18 *Chap. L. Rev.* 815, 816 (2015).

¹⁵⁷ *Supra* note 18, 970.

effects factors in their trademarks, expect for trademark troll or cyber squatters who have no intention to use the trademark but just stock up trademarks for speculation. Normal trademark applicants prefer to use some signs transferred from Chinese idiom or fixed expressions, they just want to make their trademarks much easier to be remembered; they prefer to use some so-called dirty words, they might want to change the adverse effects of the words to a positive one;¹⁵⁸ many so-called not standard words trademarks showed meaningful innovative idea and even some of them make the trademark to lively by changing parts of characters or strokes in the words. Is it not a good work to reshape the words to a positive side or bring new blood to language development by make some “creating” in trademarks? It seems applicants’ good intention and occasional kind willing are ignored by the government and courts.

Stepping back a few steps, trademark is a source-identifying property and people can rely on the mark to access the information about the products where the trademark used on,¹⁵⁹ the trademark law protects the goodwill affixed on the trademark. Contemporary trademark rights protection rests on the premise of confusion theory, while goodwill appropriation stands next to it on the same footing.¹⁶⁰ If trademarks applicants have been used the marks as their unregistered trademarks for a long time and result in a goodwill on the unregistered trademarks, the government should support this goodwill on the marks but not ruin it just because the marks are born with so called “having other adverse effects” content. It is in accord with the logic of Trademark Law’s essence.

We could bet that nobody is willing to just seek a real adverse effects trademark right with sacrifice of available market at hand. People have their own recognition on the market and the consumers’ favor. They know better about the strategy on operating trademarks than examiners who are sitting in the government offices all day along.

With the lasting rapid rising enthusiasm on trademark registration, catchy and memorable trademarks are less and less easy to find.¹⁶¹ Even we believe most of them are with good intention when they apply for so-called adverse effects trademarks registration, there are still reasons to doubt their intention

¹⁵⁸ As the trademark applicant in the case *Matal v. Tam* said, “chose this moniker [“THE SLANTS”] in order to “reclaim” the term and drain its denigrating force as a derogatory term for Asian persons.” See *Matal v. Tam*, 137 S.Ct. 1744 (2017). Also as the applicant in the case *Shanghai Junke Trading Co. Ltd. v. China TRAB* that MLGB refers to “MLGB” means “My Life’s Getting Better”, not the dirty words “f..ck your mother”. See *Shanghai Junke Trading Co. Ltd. v. China TRAB*, Beijing Intellectual Property Court, Jing73XingChu No. 6871 (2016).

¹⁵⁹ Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. Rev. 547, 554 (2006).

¹⁶⁰ Apostolos Chronopoulos, *Goodwill Appropriation as a Distinct Theory of Trademark Liability: A Study on the Misappropriation Rationale in Trademark and Unfair Competition Law*, 22 Tex. Intell. Prop. L.J. 253, 254 (2014).

¹⁶¹ *Supra* note 18, 999.

of attention-seeking.¹⁶² Usually, a catchy expression is easily to be remembered by consumers and costs public less for the search, and costs people less to gain goodwill on it. Public consumers are familiar and tend to remember better on existed words and expressions which most trademark applicants prefer to use or just have a partly change. Let alone that there might be some people want to increase their companies' popularity through lawsuit. Take a free ride on a new popular net language and grasp the chance to hype loudly with China TRAB or have a lawsuit on courts will benefit the companies even they lose the lawsuit in the end. Especially in cases using a leader's name, unhealthy new popular words, etc. circumstances. This is the bad side of small number of people, we could not deny the risk of this possibility. However, these kinds of opportunistic and adventuritic actions are not normal rational people's choices.

2. Who ought to be the subject to decide the adverse effects of a trademark

Trademark law poses more legal tests that depends on public's opinion than any other intellectual property laws.¹⁶³ In Chinese Trademark Law, it's often to see that "relevant public" is the subject to judge trademark problems.¹⁶⁴ In 2013 Chinese Trademark Law put the standard of trademark infringement as "confusion", the relevant public's importance raised.¹⁶⁵ We could say that relevant public is the basic and principle subject factor for trademark issue decisions and judgments, for example whether a trademark has adverse effects or not, whether a trademark will be disgusting in the market. Because it is relevant public who will get in touch with the trademark most often after the trademark goes into market. Comparing with copyright and patent's incentive invention and expression function, trademark performs a different role which makes it a fundamentally regulation of consumer information.¹⁶⁶ Relevant consumers' benefit in trademarks is much more obvious and important, even much more than any other competitors.¹⁶⁷ So relevant consumers, relevant producers, these kinds of relevant public's prediction and evaluation on trademarks which have the potential to be told as having other adverse effects are ignoring the benefits of relevant public.

As above illustrated, CTMO and China courts often use the logic that one trademark has other adverse effects because it may produce adverse effects to

¹⁶² As someone says that "Brands are also sometimes chosen that aim at shocking existing and potential customers". See Enrico Bonadio, Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Trademarks, 19 Marq. Intell. Prop. L. Rev. 39, 43 (2015).

¹⁶³ Steven Wilf, Who Authors Trademarks?, 17 Cardozo Arts & Ent. L.J. 1, 1 (1999).

¹⁶⁴ See Supra note 1, art. 10 (1)(3), 10(1)(7) and 14.

¹⁶⁵ See Xiaoqing Feng, Internationalization and Local Elements: Research on Recent Amendments to the Trademark Law of China, 7 Akron Intell. Prop. J. 101, 130-133 (2015).

¹⁶⁶ Michael Grynberg, More than IP: Trademark among the Consumer Information Laws, 55 Wm. & Mary L. Rev. 1429, 1431 (2014).

¹⁶⁷ Michael Grynberg, Trademark Litigation as Consumer Conflict, 83 N.Y.U. L. Rev. 60, 117 (2008).

some community or group members, some individuals or public. However, when they say the trademark has adverse effects to individuals/community/group, they don't ask the opinion of the individuals nor the members of the group, especially in some circumstances the trademark only contains the surname of an individual or a normal name of an individual especially when the applicant's legal representative shares the same name. CTMO examiners and judges on courts take themselves as very strong representatives for these people.

Advertisement is playing the function as well as trademark to help raising the popularity of products, but there is no this kind of prohibition regulation in Chinese Advertisement law. Chinese Advertising Law Article 9 (1) (7) reads that "Interfering with social public order, or going against good social norm" is not allowed in advertising. Article 9 (1) (11) reads that "Other situations prohibited by laws and regulations" is not allowed in advertising. Chinese Advertising Law put the prohibition miscellaneous provision to "other laws and regulations" as other Chinese laws when they make a miscellaneous provision. It means for private rights are legal unless there are clear prohibition words in law. However, Chinese Trademark Law puts it as a large open prohibition for trademark right because there are no clear words say who shall be the subject to tell adverse effects while it should be the crowd whose benefit is potential to be harmed by the trademark registration and use.

The most fallacious thing is trademark examiners and courts judges determine trademarks having adverse effects to the public without any survey of public perceptions on these kinds of trademarks.¹⁶⁸ They give their conclusion mostly based on their own common sense and pretend themselves as the public's only representative. I am not totally denying the common sense of trademark examiners and judges are largely different from the trademark's relevant public. I intend to notify that trademark examiners and judges can't make themselves as the representative as they deprive applicants' trademark using right and trademark registration with easy and general excuse-the trademark "having other adverse effects" as they did in the past and they will continue doing now. It is not fair for the applicants as well as the public. The public's rights should not be granted to trademark examiners and judges all the time. If we see the registration of trademarks as a battle between applicants and trademark examiners, we can see there is still a similar leverage for consumers who don't think there is any adverse effects of the trademark and the potential being harmed public. People would say trademark examiners also permit trademark registrations against people who claim that the trademark has adverse effects and harmful to them. In this

¹⁶⁸ Even consumer survey is popular in other countries' trademark infringement litigations, it is still rare to see in China trademark litigation, not to say in the proceeding of trademark registration. The first and foremost reason is that survey is not accepted and adopted as strong evidence in court.

circumstance, trademark examiners are on the side of trademark applicants who are against the trademarks' adverse effects. Yes, it does seem so. But it is much more like a rare occasional event in which is the result of examiners and judges randomly dice play. In order to put it fair for both sides, it should be the relevant public's rights and responsibility to represent themselves and claim for themselves in case of adverse effects to them. Then somebody would suspect whether relevant public are willing to represent themselves. I am sure if the trademark is a harm to them, they have the motivation to claim for their benefit. If not, it might be the harm is fake or not enough to be protected by trademark registration prohibition.

3. Are their protecting benefits real public interest?

It is a consensus that the protecting content of prohibition using trademarks "having other adverse effects" in latter half of Article 10 (1) (8) of Chinese Trademark Law shall be similar as the former half of Article 10 (1) (8) "those detrimental to socialist morals or customs". In Chinese law system, this kind of structure should be interpreted as parallel relationship, which means they shall share the same, at least similar degree of value and protected interests. Comparing with "having other adverse effects", "detrimental to socialist morals or customs" speaks clearer of its inherent values. Surely "detrimental to socialist morals and customs" refers to some good and not bad morals and customs. But it doesn't refer to broadly public order and customs. It shall be controlled into a narrow public interest protection aiming at achieving Trademark Law legislative goals.

The public' benefits but not private interest is the object of this clause intending to protect. The public interest must be **direct** public interest, not deducing possible public interest. Because if you make it an indirect public interest, people can make any case related to public interest and government or other powerful subjects are more manipulated to utilize "public interest" for some certain fake public interest which can harm individuals' interest and true public interest. Indirect public interest becomes true prey and attracts people to call it public interest when it is profitable. This kind of interest is not the scope of interest shall be protected by "having other adverse effects" clause.

In the other way, for the signs such as change one character of one word, hide strokes or parts of a word constructing a new shape of drawing, etc., most of these kinds of signs are rejected in the name of protecting public interest. CTMO and China courts say it is bad for people's Chinese language study, they make students at school as the most important potential victims.¹⁶⁹

¹⁶⁹ In most trademark application rejection cases, CTMO and TRAB give this as the reason. Most of their opinions get approved by Chinese courts except the case "糖糖正正" ("tang tang zheng zheng", pinyin: táng táng zhèng zhèng). Beijing Hannashan Century International Commerce Clubhouse Co., Ltd. v. TRAB, Beijing First Intermediate Court, (2014) YiZhongZhiXingChuZi No. 144.

There is no evidence to prove that these kinds of signs will ruin or disorder the study of Chinese language. Students have their teachers, dictionaries to learn from. To say the least, people have to train and own their own ability to tell which words are the right writing style, which are not. Chinese words are not that easy to be learnt and not that hard to tell the difference between right and wrong. It is a good example to see from advertising. We can see there are many advertisings and slogans are from normal phrases and just changed one or more words with similar pronunciation.¹⁷⁰ Wrong spelling words and phrases advertisings are not appropriate because the advertisings are accessible to a broad of audiences due to most advertisements are spread via media. The audience in advertising situations are different from trademark situations. A trademark may be spread around the world if it becomes famous, but most of trademarks do not have that opportunity to get famous and have audiences across the nation, across all ages, or around the world even the internet is so popular. Most of the trademarks are under struggle to make profits and function as a brand name of the trademark holders. Primary school students and teenagers who are considered very seriously by CTMO, China TRAB and China courts are not so frequently exposed to trademarks as to advertisements with similar words “problems” shown on TV prime time. In terms to other public except for students, they don’t care much about trademarks very much unless those products they need or feel interested in. In this circumstance, they become relevant public of the trademarks. When we put our eyes on only one trademark, we cannot know the general probability of a trademark’s influence, especially we habitually pick a well-known or famous trademark as an example. The fact is that well-known or famous trademarks only make up a very minority part in all trademarks.¹⁷¹ So the public interest in this situation is very limited.

But I have to say, most of the protected benefits are important and are real public benefit. They are on the same level with socialist morals and customs, such as religion things. Religion is a real sensitive content not only in China, but also in most of worldwide countries. However, not every trademark that

¹⁷⁰ For example, “晋善晋美” (“jìn shàn jìn měi”) is used as an advertising slogan while “晋善晋美” (“jìn shàn jìn měi”) is a transformative four-character-words from a Chinese idiom “尽善尽美” (“jìn shàn jìn měi”, it means to reach the acme of perfection). “最美” (“zuì měi”, means the most beautiful) is altered to be “醉美” (“zuì měi”, drunk beautiful) which is used in the advertising slogan “醉美多彩贵州” (“zuì měi duō cǎi guì zhōu”, drunk beautiful, colorful Guizhou). “无屑可击” (“wú xiè kě jī”) is a changed word from “无懈可击” (“wú xiè kě jī”, it means unassailable) and refers to there is no dandruff, it is used by a hair shampoo company as its advertising slogan. See at <https://v.qq.com/x/page/m0327nrqxw9.html> (last visited May 28, 2018). There are many these kinds of advertising slogans.

¹⁷¹ See Feng Xiaqing & Deng Jingjing, Empirical Study and Theoretical Thought of Registered China Famous Brand [it shall be well-known trademarks]: Data Analysis of Registered China Famous Brand from 1983 to 2011, 37 Journal of Wuling, 65, 69 (2012).

has a little bit relationship with religion shall be condemned as having adverse effects trademarks. Chinese words are often containing multiple meanings, especially when a character appears independently. Only direct public interest may be included in this “having other adverse effects” situations. Only benefits of public social order and customs at the similar level with “detrimental to socialist morals and customs” could be counted. Keep it in a narrow way, not an unlimited extensive way.

4. Who benefit from current broad “having other adverse effects” trademark application rejection in China

Firstly, it benefits the trademark officers and judges who reject trademarks with the reason that these trademarks have other adverse effects. Because these official people can get rid of risk of being responsible for the unstable future of these trademarks. If not, they might get punished if the trademarks are found having other adverse effects finally. Rejecting any trademarks that have any possibility of negative or related to politics, religions at their first step seems their best choice to avoid the risk of being deemed as work incompetently. In the other side, most of officials in CTMO and Courts are default as decent persons and live a decent life comparing with other most non-official people, they don't want to be seen as persons of supporting negative things such as any trademarks have potential to be related to negative issues or sensitive issues. This is a tricky psychology issue based on people's instinct under the background of judges are responsible for the cases lifelong policy and examiners are responsible for their examining trademarks in China. It is not irrational for them that they have to reject many trademark applications on the ground of “having other adverse effects” merely in order to ensure their job are kept.

Secondly, Chinese trademark resources could be reserved. China is also facing the problem of trademark resource decreasing day by day especially China ranks first for many years in its quantity of trademark application annually and may last in the future which means it has exploited and utilized many of its trademark resources. Trademark depletion and congestion is not the only problem for English marks, it also could be and is the problem for Chinese language trademarks¹⁷² Rejection on most negative words trademarks can relieve this tense of trademark resource. It seems a good way to reserve these trademark resources while other countries are going to open offensive words trademark registration as the U.S..¹⁷³ It will make Chinese market full of expectation from other countries in the future because it will store words which are not hard to be put in a trademark and available to

¹⁷² About trademark depletion and congestion, see Supra note 18, 977-1021.

¹⁷³ The U.S. Supreme Court's opinion in *Matal v. Tam* illustrates that “the disparagement clause violates the Free Speech Clause of the First Amendment” can enlarge the scope of registrable trademark. See supra note 158.

register. This may be an attraction for foreigners to do business in China and raise the foreign investment in China at that time. But this benefit is just a conditioned benefit, the condition is China opens the door to use these words for registrable trademarks in the future while these words are forbidden in a strict way in present China.

Thirdly, it will benefit the social stability. This could be an obvious result benefiting from Chinese harsh attitude to trademark registration on sensitive words that might bring adverse effects to politics and religions. China people would know clearly that official leaders' names cannot be used as trademarks if lots of these kinds of applications are rejected though they do want to get good luck and raise their sense of pride by using trademarks that have connection with leaders' names or something related to authorities. This will make the society learn from these kinds of rejections that words related to authorities are not available to "you". It seems that it stays at too high level to be accessible. People respect it, honor it, support it and safeguard it, which is also can be truth based on China Confucian culture of obeying the official and authorities.¹⁷⁴ China is developing very well under its stable society and harsh authority which will last in the aspect of trademark registration because it's important to sustain the government's authority. For the religion issues, it shares the same logic. Religion is a sensitive issue and is not appropriate to be popularized. A good protection of religion feelings surely will enhance the development of religion and show government's support to religion protection.¹⁷⁵ Broad interpretation of "other adverse effects" will benefit religion stable development as well as the authorities.

Fourthly, it functions as guiding people to live a positive life sometimes. It says that laws have the function of leading people's actions.¹⁷⁶ Forbidding people using dirty words and negative words as a trademark can strengthen people's belief into positive things and will build themselves and their business in a positive direction. However, is CTMO rejecting the applicant's willing to live a better life while applicants intend to transform a phrase to a positive side by interpreting it or re-organize it? For example in the case "MLGB", the applicant's interpret "MLGB" as "My Life's Getting Better", this wasn't support by courts.¹⁷⁷

¹⁷⁴ Yan Xu, *The Cultural and Psychological Characteristics of Chinese Consumers and Their Influence on the Trademark Law in China*, 15 *Hous. Bus. & Tax L. J.* 100, 104 (2015).

¹⁷⁵ In the U.S., trademarks disparaging religions also cannot be registered in USPTO. But in China, the prohibition is stricter, any signs have any bit of association with religions might be rejected, certainly including signs that disparaging to religions.

¹⁷⁶ Chad J. Doellinger, *A New Theory of Trademarks*, 111 *Penn St. L. Rev.* 823, 823 (2007).

"...trademark law provides a normative code of proper business conduct."

¹⁷⁷ The applicant in the case *Shanghai Junke Trading Co. Ltd. v. China TRAB* insisted that MLGB refers to "MLGB" means "My Life's Getting Better", not the dirty words "f.ck your mother". *Shanghai Junke Trading Co. Ltd. v. China TRAB*, Beijing Intellectual Property Court, (2016) Jing73XingChu No. 6871.

Would consumers or relevant public could get benefit from this status? It probably not if we say consumers are benefit from trademarks because trademarks without confusion can guide the products' resources and origins, may be also presents some quality of the goods, which can be used as a tool to reduce their cost on searching goods.¹⁷⁸ Easy to read and remember trademarks will benefit the consumers when they try to remember a trademark while hard and long words trademarks may cost consumers much more to remember.¹⁷⁹ Not to speak of focusing on search cost is not a right and effective way to improve trademark development. "Focusing on search costs has had serious negative effects on trademark doctrine: courts have accepted virtually any argument sounding in consumer confusion terms, and the result has been nearly unbridled expansion."¹⁸⁰ Consumers and relevant public deserves the right to decide how much cost they want to spend on searching and they have the right to enjoy a less cost on it for which the current disputed trademarks are practicing.

Will competitors benefit from this status? It depends. If an applicant applies to register a trademark after a long time use with some degree reputation on the sign and gets rejected at last by trademark office or courts based on "having other adverse effects", it will ruin the former goodwill and the market shares. When the applicant changes its trademark because signs having other adverse effects cannot be used as a trademark, this can leave a good change to competitors to catch up and surpass to take up more market shares, in part of which should have been the applicant's market shares. However, if the applicant has not done a good business on the trademark under apply and the trademark under apply has not much reputation and fans, there should not be much benefit to competitors.

Even I don't agree trademarks play a decisive role in students' language study, I still think it may benefit student's language learning if all trademarks have the potential to be connected with negative things and wrongly spelt are eliminated totally. That will keep students in an ideal greenhouse where has no wind nor rain students can be exposed to. They will benefit it in a short time but not for the long run if we are aware that Chinese language is not the only content teenagers need to learn. Their growth is more important when they get access to some wrong things and distinguish right from wrong during this learning period. People need to know whether it is really the trademarks' wrong to influence teenagers or it is advertising. In my view, advertising is prone to be a more effective way to impact students in their language learning. If the advertising teaches students in a wrong way, they

¹⁷⁸ Mohammad Amin Naser, Re-examining the Functions of Trademark Law, 8 Chi.-Kent J. Intell. Prop. 99, 101 (2008).

¹⁷⁹ *Supra* note 18, 965, 981.

¹⁸⁰ Mark P. McKenna, A Consumer Decision-making Theory of Trademark Law, 98 Va. L. Rev. 67, 141 (2012).

have more potential to use words in corresponding wrong way and build their wrong writing and reading habits. Not the trademark.

5. What's the loss of current broad "adverse effects" trademark application rejection

China's biggest loss from current "having other adverse effects" trademark prohibition regulation is the freedom of speech as well as freedom of choosing trademarks. However, it is not a good idea to talk about freedom of speech in China because freedom of speech has many limits in Chinese Constitution Law, especially when we take China's super need for society stability into consideration.¹⁸¹ From the long term of China's market economy development goals, there should be much more flexibility on its trademark policy, because trademarks are the traders' reputation and soul, and trademarks are also the reflection of the economy of a nation. But shouldn't political civilization keep pace with economy growth? How people choose their trademarks should be their own business. The government should let its hands out of the relationship between consumers and traders as much as possible and leave people with enough space for their freedom of speech. The consumers make their decision not on the meaning of a trademark but on what the trademark indicating objects. Trademark is only a tool not the destination for consumers. A free choice of trademark can improve the efficiency of market economy, improve the incentive to the market and enhance the growth of economy.¹⁸² China is optimizing its intellectual property law system all these years and is undergoing building its rule of law system. But these years it put more and more emphasize on intellectual property protection and enforcement. It is also expanding registrable trademark scope, while it is shrinking the scope of usable trademarks based on the trademarks' meaning and connotation, we say the content of trademarks. While the west countries start to seek the justification of free speech of trademark registration, China hasn't started its topic for free speech in many fields including trademark.¹⁸³ It is a loss both for trademark law system and the whole domestic law system.

¹⁸¹ Chinese Constitution Law (2018 Amendment), art. 35 reads "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." Article 51 gives the limits for freedom, it says "Citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens."

¹⁸² Sean M. Flynn, *The Washington Declaration on Intellectual Property and the Public Interest*, 28 *Am. U. Int'l L. Rev.* 19, 20 (2012).

¹⁸³ In China, there are scholars talking about free speech in trademark, but they were talking with the center of trademark parody. See Wu Handong, *Freedom of Expression in Intellectual Property: Protection and Regulation* (in Chinese), 38 *Modern Law Science* 3, 7 (2016). Zhang Huibin, *Coordinating Free Speech and Trademark Right* (in Chinese), 22 *Journalism & Communication* 86, 88-91 (2015). Li Yufeng, *The Boundary of Companies' Trademark Right and Freedom of Speech: A Perspective from Parody in the U.S. Trademark Law* (in Chinese), 33 *Global Law Review* 18, 21 (2011).

The second biggest loss is that it can raise the cost of traders to adopt and manage a trademark for their business. It is not easy to make a trademark full of high reputation and goodwill, it should be protected as long as it is full of goodwill. But some unregistered trademark users have to quit their interest on the trademarks which are determined having other adverse effects even they have won a good business on these unregistered trademarks because “having other adverse effects” trademarks are forbidden to use as well as register.¹⁸⁴ It is a risk for traders to apply trademarks that are easier to remember but owing high risk of being rejected or revoked by authorities because of the marks content are negative. As people say trademark law is different from copyright law and patent law, and it is not intending to incentive something, but it could be used as an incentive tool to protect investments in trademarks, including investment in the creation of the mark, investment in advertising and promoting the product in association with the mark, and product-related investments such as high-quality raw materials, production equipment and quality assurance techniques.¹⁸⁵ Moreover, modern marks creation also require some kind of intense commitment of expertise and resources, trademark law shall encourage trademark creation.¹⁸⁶ For adverse effects marks forbidden to use is full of uncertainty in China, people have to wait like a lamb waiting to be killed or let free by accident one day. The law doesn't regard the creation investment and trademark applicants' investment into the marks in both the creation and management period. It is a real exhaustion for traders to rack brains to think out an ideal proper trademark to use or spend much money to buy from others while they could not use trademarks easier to discover which have the possibility to be determined as having other adverse effects. It is a discouragement for integrity traders to take an easy way to build their trademarks and invest as much as they could to manage well a trademark in some degree.

¹⁸⁴ In the case *Shanghai Junke Trading Co. Ltd. v. China TRAB*, Shanghai Junke Trading Company has been built a great population on the mark “MLGB” which meaning “My Life's Getting Better”. It insisted on court as following: After the registration of the disputed trademark “MLGB”, Shanghai Junke Company has continuously invested a lot of funds in the trademark and brand of “MLGB” building based on the trust in the authenticity of CTMO's original approval decision. If the trademark “MLGB” is revoked, accumulated reputation and market value on “MLGB” will be damaged and ruined. See *Shanghai Junke Trading Co. Ltd. v. China TRAB*, Beijing Intellectual Property Court, Jing73XingChu No. 6871 (2016).

¹⁸⁵ Barton Beebe, Thomas Cotter, Mark A. Lemley, Peter S. Menell & Robert P. Merges, *Trademarks, Unfair Competition, and Business Torts*, Wolters Kluwer (2016), 32.

¹⁸⁶ Mark Bartholomew, *Making a Mark in the Internet Economy: A Trademark Analysis of Search Engine Advertising*, 58 Okla. L. Rev. 179, 202 (2005).

V. Re-craft a proper “having other adverse effects” system

“Trademark law is an essential component of a successful economy.”¹⁸⁷ Even China has made considerable strides in entering and getting acceptance from countries around the world,¹⁸⁸ it is still being criticized for being lax in the realm of intellectual property law.¹⁸⁹ The revision of Chinese Trademark Law in 2013 did no change of trademarks “having other adverse effects”, even the revision in 2013 is an overall revision of it. Before we start to re-craft a freer policy on adverse effects trademarks, let us see what other nations’ policies on trademark registration, trademark use and trademarks having other adverse effects. Then we could figure out what China, China law-makers, Chinese official trademark examiners and reviewers, Chinese judges shall learn from them.

We can see from Article 6 of Paris Convention for the Protection of Industry Property (Paris Convention) that generally countries of the Union agree to refuse or to invalidate the registration only in circumstances that the marks’ use may bring confusion could the countries prohibit the use of the marks for example the armorial bearings, flags and other emblems which could confuse the origins of the goods.¹⁹⁰ Paris Convention also reads that “Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases... “when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.”...”¹⁹¹ As it shows clearly, there is neither miscellaneous prohibition clause nor prohibition to signs “having other adverse effects” in Paris Conventions. Paris Convention uses the phrase “contrary to morality or public order” which is similar to Chinese Trademark Law Article 10 (1) (8) former half clause “detrimental to socialist morals or customs”. But as an international convention, Paris Convention just built lowest standards for intellectual property protection.

A. Other nations’ policies on adverse effects in trademark law

Adverse effects, unhealthy influences, offensive, etc. different countries use different words to refer their non-registrable trademarks. In the U.S., it is reflected in section 2(a) of the Lanham Act, it says “No trademark by which

¹⁸⁷ Paul Kossof, *The New Chinese Trademark Law*, 104 *Trademark Rep.* 867, 867 (2014).

¹⁸⁸ Dalila Hoover, *Coercion Will Not Protect Trademark Owners in China, but an Understanding of China’s Culture Will: A Lesson the United States Has to Learn*, 15 *Marq. Intell. Prop. L. Rev.* 325, 330 (2011).

¹⁸⁹ Yan Xu, *The Cultural and Psychological Characteristics of Chinese Consumers and Their Influence on the Trademark Law in China*, 15 *Hous. Bus. & Tax L. J.* 100, 116 (2015).

¹⁹⁰ Paris Convention for the Protection of Industrial Property, art. 6^{ter} (1) (a) and 6^{ter} (9) (1883).

¹⁹¹ *Ib.* art. 6^{quinquies} B 3.

the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it-- “ (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute...”¹⁹² Firstly, in the U.S. trademark law system, it is a trademark registration prohibition clause, not a trademark use forbidden clause.¹⁹³ Even the U.S. trademark registration and its emphasis on trademark use produces its own problems,¹⁹⁴ it still shows a very open and positive attitude to encourage people to register their trademarks, use their trademarks, manage well their trademarks and win their business through trademark rights. Secondly, it has a list of which kinds of marks cannot be registered, no miscellaneous regulations that serve an open prohibition scope. In the list we can see, immoral matter, scandalous matter, matter which may disparage persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.¹⁹⁵ These lists can be contained in Chinese Trademark Law Article 10 (1) (8) except for “those having the nature of discrimination against any nationality” which is already described in Article 10 (1) (6). The regulation in the Lanham Act can also be interpreted broadly and not that clear, but it is far clearer than Chinese miscellaneous term “having other adverse effects”. Thirdly, the U.S. gets the scope of registrable trademarks broader by means of constitutional right “free speech” which is a lack in China trademark registration and trademark use field. In the case *Matal v. Tam*, the U.S. Supreme Court held that “the disparagement clause violates the Free Speech Clause of the First Amendment.”¹⁹⁶ This case makes the right of free speech in the U.S. overpass the society order which China is emphasizing strongly from the perspective of trademark usable and registrable. Considering “having other adverse effects” in Chinese Trademark Law is much broader than “disparaging” in *Matal v. Tam*, people who is reading this paper will suspect the unscientific of comparing them here. Each law has its own core purpose to improve the public interest in its own particular way.¹⁹⁷ I have to say the U.S. Supreme Court protects freedom of speech is also building its good trademark related social order which China should be cautious when China is still insisting on the public social order from a traditional way, the public order of a clean language trademark, no harmful

¹⁹² The U.S. Lanham Act § 2 (a) (15 U.S.C.A. § 1052 (a)).

¹⁹³ It says “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it...”.

¹⁹⁴ Rebecca Tushnet, Registration Disagreement: Registration in Modern American Trademark Law, 130 Harv. L. Rev. 867, 878-881 (2017).

¹⁹⁵ Supra note 192.

¹⁹⁶ Supra note 158.

¹⁹⁷ R. Anthony Reese, Copyright and Trademark Law and Public Interest Lawyering, 2 UC Irvine L. Rev. 911, 912 (2012).

to everybody. It is hard to tell which public interest is superior to another, I just want to mention that China should to concern the importance of the freedom of speech (trademark) and commerce in the way of building a rule of law country and the development of market economy system. Finally, in terms of the degree of prohibition of trademark registration, we can see China is trying its best to shrink registrable trademarks while the U.S. is intending to protect people's free willingness to select their own business trademarks and keep anyway to protect people's "freedom of speech" to the utmost. Have a prediction how large is the gap between China and the U.S. in the trademarks available on their market.

While trademark rights are also based on registration, let us see what Japanese Trademark Law is doing in this aspect. In Japan, there is also not such harsh prohibitions based on trademarks' content. Japanese Trademark Act Article 4 (1) says "Notwithstanding the preceding Article, no trademark shall be registered if the trademark... (vii) is likely to cause damage to public policy; (viii) contains the portrait of another person, or the name, famous pseudonym, professional name or pen name of another person, or famous abbreviation thereof (except those the registration of which has been approved by the person concerned)...."¹⁹⁸ In Japan, it is only a forbidden to register, not a prohibition of trademark use. However, Japan is also using a very general phrase "public policy" referring to content like Chinese Trademark Law Article 10 (1) (8) "detrimental to socialist morals or customs, or having other unhealthy influences". Korea Trademark Act (2016 Amendment) also has a broad and specific non-registrable scope, but it has no unusable trademark scope and it also uses words like public order and common moral, etc. But it emphasizes the meaning and content of the trademark which shows it decides trademarks based on the meaning and content.¹⁹⁹

In Europe, the Directive 89/104/EEC mentioned "Grounds for refusal or invalidity", Article 3 reads "The following shall not be registered or if registered shall be liable to be declared invalid:...(f) trademarks which are contrary to public policy or accepted principles of morality."²⁰⁰ Council Regulation (EC) No 40/94 Article 7 reads "1. The following shall not be registered: ...(f) trademarks which are contrary to public policy or to accepted principles of morality...."²⁰¹ So does the regulation of Council Regulation (EC)

¹⁹⁸ Japanese Trademark Act, art. 4(1), No.127 (1959). See at

<http://www.wipo.int/wipolex/en/details.jsp?id=16059> (last visited May 28, 2018).

¹⁹⁹ See at http://www.wipo.int/wipolex/en/text.jsp?file_id=456033 (last visited May 28, 2018).

²⁰⁰ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, art. 3 I. (f). See at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0104:en:HTML> (last visited May 28, 2018).

²⁰¹ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, article 7(1)(f). See at http://www.wipo.int/wipolex/zh/text.jsp?file_id=126861 (last visited May 28, 2018).

No. 207/2009 Article 7 1. (f)²⁰² and Regulation (EU) 2017/1001 Article 71. (f).²⁰³ Directive No. 200895EC Article 3 reads “1. The following shall not be registered or, if registered, shall be liable to be declared invalid: ... (f) trademarks which are contrary to public policy or to accepted principles of morality;...”.²⁰⁴ So does the regulation of Directive (EU) No. 2015/2436 Article 4 1. (f).²⁰⁵ We can see from European Union regulations, it uses the phrase “public policy or accepted principles of morality” to refer to issues in the same degree with Chinese Trademark Law Article 10 (1) (8) signs that “detrimental to socialist morals or customs, or having other unhealthy influences.” It also uses prohibition of trademark registration, not prohibition of trademark use.

This is not only China’s problem, it is a controversial problem around the world. As some people think, applicants register some “shocking” trademarks will attract consumers to buy their products where there is a need for governments to intervene.²⁰⁶ I can’t agree. The government has been intervening into trademark issues all the time and in a very strong way. Around the world, it is often to see traders need to register their trademarks in order to get an unquestioned legal protection for their trademarks and the government has the power to refuse, revoke and cancel their trademarks. This means trademark registration is a stronger way to protect people’s investments into trademarks than actual trademark use even it seems trademark use is the only way to obtain goodwill for their trademarks.²⁰⁷ The registration prohibition clauses in different European countries are similar. The conclusion from above comparisons are: 1) the U.S. has the least limits on trademark registration, especially when we put the U.S. Supreme Court’s opinion in *Matal v. Tam* into consideration; 2) Japan and European countries have the middle degree to prohibit trademark registrations and they consider much on moral acceptance; 3) China is holding the strongest opposition to the registration of trademarks that contrary to social positive development, and its prohibition of using such kinds of signs as trademarks is seldom to see in

²⁰² Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark Article 7(1) (f). See at http://www.wipo.int/wipolex/zh/text.jsp?file_id=162995 (last visited May 28, 2018). There is no change of this article in REGULATION (EU) 2015/2424 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2015. See at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015R2424> (last visited May 28, 2018).

²⁰³ REGULATION (EU) 2017/1001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the European Union trade mark Article 7 1. (f). See at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1506417891296&uri=CELEX:32017R1001> (last visited May 28, 2018). This regulation is in force now.

²⁰⁴ Directive No. 200895EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks. See at http://www.wipo.int/wipolex/zh/text.jsp?file_id=162895 (last visited May 28, 2018).

²⁰⁵ Directive (EU) No. 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks. See at http://www.wipo.int/wipolex/zh/text.jsp?file_id=395032 (last visited May 28, 2018).

²⁰⁶ *Supra* note 162, 50.

²⁰⁷ Weiguang Wu, The Balance of Two Trademarks Rights: Generation System in Japan’s Trademark Law, 17 J. Marshall Rev. Intell. Prop. L. 608, 613 (2018).

other countries. However, the incongruence happens in all countries' trademark examination and court trial for these kinds of trademarks. Some marks are deemed as unacceptable in moral while other similar marks might get approval from trademark office.²⁰⁸ Even though the prohibition content are different between China and other countries, it still can be understood and may not be very serious problem. The thought-provoking issue is that almost most countries say these kind of marks cannot be registered as trademarks while Chinese Trademark Law says these kinds of marks cannot be used as trademarks. It means if such a sign is rejected by Chinese authorities, there is no way to use them, show them and take advantage of them in the market under Chinese Trademark Law system. If we acknowledge trademark as a free speech issue in China, this problem will become more intricate. It is not only a strict on freedom of commercial, private speech, but also a self-cut foot in the development of trademark related economy and culture. Other countries' operation on trademark registration restriction share more common with the first half of Chinese Trademark Law Article 10 (1) (8) "those detrimental to socialist morals or customs".

B. How to re-craft a proper development for China "having other adverse effects" trademark issue

1. Principles of re-crafting "adverse effects" trademark system

Take principle of protecting private rights and control government power as the first principle. China government habitually treat everything in its control in a parent's way. This is not bad if it were in a planned economy regime and in some special circumstances in market economy time, for example market failure. The government would better withdraw its hand as much as it could unless there is an indeed need. For the aspect of trademark, it works in the same way. Trademark registration system exists in many countries around the world and the advantage of trademark registration system is very outstanding. Because of this, many countries choose voluntary registration system except for certain products.²⁰⁹ Governing registered trademarks is enough for the government to get involved into the market related to trademark and represent certain public interest. It serves trademarks' main function well by statutory notifying what kinds of trademarks cannot be registered. However, because this limit is a restriction on private right (trademark right is private right) which may benefit the authority power, it shall be restricted. Because there is no need for the trademark office to care and spend time on whether a trademark can be used as an unregistered trademark because in China unregistered trademark can't

²⁰⁸ Supra note 162, 44-49.

²⁰⁹ In China history there are two kinds of goods shall use registered trademarks, they are the pharmaceuticals for human use and tobacco products. See Implementing Rules of the Trademark Law of the People's Republic of China (Amendment 1995) (Expired), art. 7, para. 1.

get protection from Trademark Law unless the unregistered trademark becomes some certain famous. The unregistered trademark users cannot get any benefit from trademark office if they choose not register their mark in the trademark office. Control the power of trademark office will not only reduce the cost on examination (which comes from people's taxes), but also can leave a chance for people to run their business based on unregistered trademarks and reserve their investments in their marks. Because if the trademark law make adverse effects signs as prohibition of registration replacing prohibition of use, parts of trademark applicants might choose not to appeal and keep their so-called trademarks with other adverse effects as unregistered trademark which will surely reduce the cost of trademark office, TRAB and courts on these issues delivered by "adverse effects".

Secondly, principle of predictability. Any rules used too flexibly will ruin the stability of the law system and reduce people's trust to the law. Ensuring the predictability can save people's belief into Chinese Trademark Law. China trademark examiners and judges' different attitudes and too flexible manipulation on "having other adverse effects" can bring the risk of Chinese Trademark Law's authority decrease. China trademark law system claimed that it lays emphasis on trademark use when evaluate people's trademark rights especially after 2014. It is also a common idea that goodwill in the marks is the protection essence in China. People shall have the right to be protected after they put much their energy into an unregistered trademark and their good faith to use a mark without intention to get a free-ride on other people's marks. Improving Chinese Trademark Law's predictability will decrease this harm and safeguard its key spirits, protecting people's goodwill accumulation on a mark by using it. General legislation surely can leave a flexible space to operate the law, but too general legislation can be taken advantage of by some powerful people for their own benefit or convenience. In order to sustain Chinese trademark law in a good order, the predictability principle shall be considered seriously.

Thirdly, principle of proportionality. In IP law system, proportionality is a fundamental legislative principle. Trademark rights and interests shall be restricted in a way under principle of proportionality.²¹⁰ It means only there is more competitive interests shall be protected, and the harm of protecting trademark rights and interests outweigh the benefits these trademark rights and interests, it can be cancelled and revoked. In terms of "having other adverse effects" trademark registration prohibition, it could be prohibited to register and use trademarks with other adverse effects only if it is provable that there are competitive and more important interests over the producers' and consumers' interests on adverse effects trademark use and registration.

²¹⁰ Danny Friedmann, *Trademarks and Social Media: Towards Algorithmic Justice*, Edward Elgar Publishing (2015), 134-135.

This conclusion shows fair especially when we take the right to use a mark as trademark as a freedom of speech.²¹¹ In the case *In re Brunetti*, United States Court of Appeals 3rd Federal Circuit held that “To survive, such statutes must withstand strict scrutiny review, which requires the government to “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.””²¹² In China, similar proportionality shall be taken into consideration during prohibiting trademark registration and trademark use. It may be prohibited to use or register such trademarks only if there is enough compelling interest over applicants’ trademark interests and relative interests. Lawmakers shall do some survey from actual market and then revise China current “having other adverse effects” trademarks use prohibition clause in order to serve some interests fairly. When trademark examiners and judges determine the adverse effects trademarks based on trademark law, they shall take this principle into their mind, too.

Fourthly, principle of equity and good faith. It is tricky that there is nobody care about unapplied unregistered trademarks with so-called “other adverse effects” when it would get trademark office’s totally rejection (not only forbid the registration but also the use of the mark under application) once it is filed to trademark office. It seems like people who don’t intended to seek trademark law’s protection is safe and sound while people who are seeking legal protection will not survive. As a result of that the law is functioning as a discouragement to people’s intention to file for trademark registration. It is unfair and unequal. Some people like to choose shocking signs as their trademarks in order to attract consumers.²¹³ But is there any wrong for people to choose trademarks that are more easily to be remembered more easily remembered, attract more consumers, run their business better and provide the society a better service? Catchy and short words attract additional consumers. It’s in the logic that a flower shall not attract butterflies with its stinky scent while it is appreciated to use pleasing scent to attract butterflies. Good intention to seek business success with trademarks shall be supported especially when people are prepared well to invest into the trademarks or is investing or has been invested on the marks. It is an act of protecting people’s good faith which is emphasized heavily by Chinese Trademark Law.²¹⁴

In addition, freedom of speech theory shall be permitted to enter into consideration gradually. The relationship between trademark law and political is much far from administrative law and constitutional law with political, so determining the trademark use as a nature of free speech has not

²¹¹ I am here not saying that trademark registration is a freedom of speech as the U.S. Supreme court says in *Matal v. Tam*. I insist that the right to choose a mark as an unregistered trademark is a freedom of speech.

²¹² *In re Brunetti*, 877 F.3d 1330 (2017).

²¹³ *Supra* note 162, 43. The author says “Brands are also sometimes chosen that aim at shocking existing and potential customers.”

²¹⁴ The most important clause is Article 7 (1) of Chinese Trademark Law.

much impact on political development. In addition, China is the most important builder of “One Belt, One Road (OBOR)” which will benefit many countries’ development and their cooperation in different fields.²¹⁵ IP development is one of the most important filed and the trademark registration system and trademark use system shall be much more reasonable comparing with other countries, in this way it can make the cooperation and much more efficient. China is the biggest market in the world and it owns many potential and ongoing foreign investments and cooperators. All market entities care about their trademark in China, China shall make its trademark regulations and policies much transparent and easier to be followed based on China’s highest level intellectual property development aim.

2. Recommendation to abolish current “having other adverse effects” trademark use prohibition system and re-craft a more proper one

a. Step one: unify evaluating “having other adverse effects” standards

From current determining standards for “having other adverse effects” trademarks, we see the general miscellaneous clause cannot give any clue.²¹⁶ CTMO, China TRAB and courts may enjoy the power and honor of stretching their long arms to determine what they think about the trademarks whether they are having adverse effects and try to make public people’s living environment “better”. As the first examining official department, CTMO checks trademarks with very cautious attitude. Trademark examiners in trademark office not only have to follow the rules in “Chinese Standards for Trademark Examination and Trial” but also their internal regulations for their work such as “Trademark Examination Cooperation Center Control Measures on Trademark Registration Examination Timeline Limitation and Adverse Effects Trademarks” and other social or special “interests” they are anticipated to protect, such as the national central political interests, the social stability, the economy improvement, other famous people’s potential interests, etc. Latter interests are not their responsibilities to protect and are not regulated in rules, but they have to pay attention with the pressure because of their current post, national (trademark) civil servants! Courts have their own thinking during the trail, their most fundamental function is to solve disputes based on evidence rules, so their considerations during determination whether a trademark having adverse effects is not the same. Following measures will be helpful for unifying the standards in determining whether a mark has adverse effects.

²¹⁵ See Richard Baddeley, China’s “ONE BELT ONE ROAD” Initiative: How does IP Fit in?, <https://www.watermark.com.au/chinas-one-belt-one-road-initiative-how-does-ip-fit-in/> (last visited May 28, 2018).

²¹⁶ The “general miscellaneous clause” here refers to Chinese Trademark Law Article 10 (1) (8).

Define the boundary of “having other adverse effects” and don’t expand it too much! “Detrimental to socialist morals or customs” is already a general clause, if “other adverse effects” is in the same and at least the similar level protection content, it will blur more. (1) Deprive true private interests from this regulation. This clause shall be used to protect “public” interest, not private interest. For example, Tencent’s private interest was nearly protected against the trademark applicant in the case *Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB of China, Zhang Qinghe* based on “having other adverse effects”.²¹⁷ Because Chinese Trademark Law already has other clauses to protect private rights against related trademark registration.²¹⁸ (2) Make sure the potential being effected interests are real potential objective interests, not subjectively hypothetical interests. If there is no real public interest, there is no excuse to prohibit the use and registration of a trademark. (3) When determining marks’ effects, pick their interpretations from authoritative dictionary firstly. If the marks are coined internet catchwords, don’t treat all of them as slangs, some of them are culture development results and deserve to be encouraged if they were given with coined meanings. Because if a new phrase has not to be collected into authoritative dictionaries, there remains chances to develop them in other ways. (4) If the trademark has only one character or one normal word, check the possible meanings of it and hear the applicants’ interpretation for the mark. Especially in some circumstances that the marks contain religion or politics related words, does the marks can harm related people’s feeling? If use or register the mark as trademark is just weird but NOT harmful, what’s the public interest will be adversely effected by the trademark use or registration? If the mark is not confusing people about the origins and sources of the goods affixing the trademark and the mark is not “harmful”, approve it unless the relevant or potential victims claimed to be harmed.²¹⁹ (5) Use confusing theory as the first rule when determine whether a trademark registration shall be approved. Confusing theory is and will continue to be the first rule of trademark law because the trademark’s main and fundamental function is to indicate the origins and sources of goods or services. If the trademark registration application has no possibility of confusing people on the origins and sources of products, there is no much need to prohibit it unless there is bigger interests existing. In Chinese trademark law system, it seems not clear on this logic and value balance. It

²¹⁷ *Trunkbow Asia Pacific (Shandong) Co., Ltd. v. TRAB, Zhang Qinghe*, Beijing High People’s Court, GaoXingZhiZhongZi No.1538 (2015).

²¹⁸ For example, *supra* note 1, art. 32.

²¹⁹ For example, in the case *Shanghai Chenghuang Jewelry Co. Ltd v. China TRAB*, Chinese Taoist Association filed opposition to the trademark application on “Chenghuang” because it claimed that “Chenghuang” is a name of a taoist god and use or register it as a trademark will harm taoists’ feeling. It is a good example of the evidence to prove the potential harm to relevant public and religion interest. See *Shanghai Chenghuang Jewelry Co. Ltd v. China TRAB*, Beijing High Court, GaoXingZhongZi No. 593 (2014).

should be better if alter current Article 10 (1) (8) “Those detrimental to socialist morals or customs, or having other unhealthy influences” to “those likely to cause damage to other public orders and good morals”. In this way, it dispels private interest out of this clause clearly and keeps consistent with “Chinese General Provisions of the Civil Law” general provisions regulations.²²⁰ Chinese Trademark Law as one part of civil law shall follow Chinese Civil Law’s spirit and constraint. The files given by CTMO and the Supreme Court shall change their regulations following this way: (1) Interpret the meaning of this prohibition clause under civil law system, it means don’t raise the level of public orders and good morals comparing with Chinese Civil Law system; (2) Build its prohibition rules and examination standards based on confusing theory and put its emphasis on the function of trademarks, leave more success chances to market entities who are eager to manage their trademarks via using and managing the trademark which is the trademark law’s incentive direction; (3) As for the content of “those likely to cause damage to other public orders and good morals” in trademark application, it should be marks that obscene, feudalistic, anti-political, anti-religion and so on. It means if the mark is not directly related to things likely to cause damage to public orders and good morals, it shall not be rejected totally; (4) Cooperate together to publish non-registrable words database where market entities who are intending to apply and manage a trademark can find the prohibition contents and get out of forbidden sections as early as they can.

In China, religion issues might not be popular to all people, especially people who are national or local civil servants. Because most of civil servants are Communist Party members who are not encouraged to have any religions.²²¹ It is not convincing that trademark examiners, reviewers and trademark judges (they are civil servants) have enough quality to determine whether a trademark is harmful to people in certain groups, so it is the potential victims who have the right to claim for rejection or removal for a trademark.²²² It is not a responsibility but a right, a way to protect their interests (if there is). For this sake, it is also much better to revise current adverse effects clause to “other public orders and good morals”. In this way the trademark examiners, reviewers and trademark judges seem more qualified to determine whether a trademark is going to damage public orders and good morals. Because the standards for whether a trademark is going to damage public orders and good morals is a common public standing person’s ability to publish their opinion, not to say official people. If it has to insist

²²⁰ See Chinese General Provisions of the Civil Law, art. 8 (2017). (“The parties to civil legal relations shall not conduct civil activities in violation of the law, nor contrary to public order and good morals.”)

²²¹ See at <https://economictimes.indiatimes.com/news/international/world-news/chinas-communist-party-asks-members-to-give-up-religion/articleshow/59666001.cms> (last visited May 28, 2018).

²²² It says there are more than 85% Chinese judges are China Communist Party member. See at http://news.ifeng.com/a/20160615/49039002_0.shtml (last visited May 28, 2018).

current provision, there shall be some regulations give a way for the trademark examiners, reviewers, judges to find the right potential victims to see whether the trademark is really having other adverse effects, for example establish a market survey system as prior trademark rejection essential procedure.²²³ Because we cannot say a trademark is harmful just for one person says “I don’t like this trademark because it hurts my religion feeling.” We shall not stand at the top of morality to judge the potential influence of a trademark and decide its fortune based on the strictest requirement for social purity.

Apart from considering for potential victims from the trademark under application, consumers’ benefits shall also be balanced on the basis of reducing the research cost of the consumers and their feelings. Consumers’ interests are one of the most non-ignorable and important part in trademark field. In terms of whether a trademark has adverse effects or is going to damage public orders or good moral, the relevant public have the right to decide. Moreover, relevant public is the main subject deciding trademarks’ status in trademark law. However, there is no words mentioned relevant public in Chinese Trademark Law when deciding the adverse effects issues. For example, in Article 5 of “Regulations on Several Issues Concerning the Trial of Administrative Cases Involving the Granting and Conformation of Trademark Rights”, it only listed “what” issues while ignored “relevant public”. Relevant public refers to the consumers relating to a certain type of commodities or services to which the trademark represents and other business operators that are closely connected with the marketing of the aforesaid commodities or services.²²⁴ So the market survey shall also be delivered to relevant public to see their opinion. Surely there are some circumstances that do not need any market survey. For example some known words refers to disparaging some group or people or is damage to public order or good moral such as obscene words.²²⁵

b. Step two: replace “forbidden to use” with “forbidden to register”

China is one of minority countries who regulate the scope of trademark use prohibition in trademark law. It is time to replace “forbidden to use” system with “forbidden to register” system: change Chinese Trademark Law Article 10 to “The following signs shall not be registered as trademarks: ...” and

²²³ Shashank Upadhye, Trademark Surveys: Identifying the Relevant Universe of Confused Consumers, 8 *Fordham Intell. Prop. Media & Ent. L.J.* 549, 556 (1998).

²²⁴ Interpretation of the Supreme People’s Court Concerning the Application of Laws in the Trial of Cases of Civil Disputes Arising from Trademarks, art. 8. (“The “relevant general public” as mentioned in the Trademark Law refers to the consumers relating to a certain type of commodities or services to which the trademark represents and other business operators that are closely connected with the marketing of the aforesaid commodities or services.”)

²²⁵ “As the court held in the case “Paki”, there is no need to bring evidence that the applicant wants to shock or offend consumers; the objective fact that the sign might be perceived as a shock or an offense is enough to deny registration.” See *supra* note 162, 47.

parallel it with current Article 11 and sustain the same exceptions for current Article 11 obtaining distinctiveness. The reasons are as following:

Firstly, unlike the U.S.'s principal register and supplement register, China only has one trademark registration style: one or zero! So there is no chance left to the trademark applicant to protect its goodwill invested in the disputed mark. If there is a buffer zone for trademark applicant to prove his good faith for using and applying the trademark, for the trademark under apply is not in the meaning of against to public order and good morality, it would be helpful for efficiency of the trademark office's work and great to save the trademark applicant's investment into the trademark. For example in the case "MLGB", if the trademark law leaves the applicant for example 2 years (just as a hypothesis) to prove its good faith in that circumstances, the trademark applicant may have the chance to spread its good meaning of "My Life's Getting Better" much more broadly.²²⁶ It is a positive social development direction which is in accordance with Chinese Trademark Law's purpose.²²⁷

Secondly, this will give the producers and dealers much freedom to run their businesses. Trademark's main function is to designate the origins and sources of goods or services. The content of trademark has nothing to do with its fundamental function unless the trademark has problem of distinctiveness. In another way, a trademark with negative content may make people lose interest into its designating goods and trademark owner will probably lose its potential consumers, this is the lesson the market gives to the producer and he shall learn from this which can make him aware that negative trademark can ruin his business. This is the trademark owner's title to have this try. However, what if the trademark with negative content can catch people's eyes and make people understand the trademark content in a different way? This is most of the trademark applicants are trying to do. In the fast information era, there are some normal words and phrases given different meaning on the internet, for example teenager or internet slangs.²²⁸ If trademark owners can change these kinds of words or phrases into a positive and coined meaning, it is also a good thing to enrich the source of trademarks as well as their freedom to select their own trademarks.

Thirdly, the content of a trademark shall be protected if it is not against to Chinese Constitution Law's prohibition of free speech.²²⁹ China shall have the courage to permit the freedom to argue whether the nature of trademark is freedom of speech. Leave larger space for its development on democracy and

²²⁶ In fact, in the case "MLGB", when the case started, the applicant has set up its own interpretation of "MLGB" to the public after the trademark was approved by CTMO at first.

²²⁷ See *Supra* note 1, art. 1.

²²⁸ Caitlin Dewey, 24 Words That Mean Totally Different Things Now Than They Did Pre-Internet (2015), see at https://www.washingtonpost.com/news/the-intersect/wp/2015/10/15/24-words-that-mean-totally-different-things-now-than-they-did-pre-internet/?utm_term=.a95b33b873aa (last visited May 28, 2018).

²²⁹ See Chinese Constitution Law (Amendment 2018), art. 35.

freedom, which is essential to its construction of rule of law. If it is going to insist the limit for free speech, keep aware that if the trademark is not going against to the limit of free speech from constitution law, give it a chance to survive. It is a hard step for China to admit the trademark use is a freedom of speech. However, it should be the long-term aim of trademark law in China. Because China is developing its own democracy and justice system, and building its own rule of law system which is a good sign to let the aim anticipatable.

c. Step three: open trademark use and registration totally under trademark confusion theory

The most radical step is to open trademark use world totally. Let the trademark registration free unless it is against the theory of trademark confusion which is the most important theory that never shall be abolished. Trademark registration exists because it can benefit people and the whole society especially when we consider the future available trademark resources. With the depletion and congestion are bringing increasingly serious problems to trademark system, the available or easier available trademarks will be found at higher cost and with less benefit.²³⁰ The shortage of registrable trademarks based on current trademark law system will be a great challenge to countries around the world. In order to ensure the function of trademark never be ruined, it is the best way to open all words to trademark registration and use as long as the trademark is a combination of the words or other elements that with distinctiveness and can take the place of designate origins and sources of goods or services (distinguishable). It is the last scheme to protect our trademark generated market and the results of public interest balance. Allow trademark users to choose their trademark freely is a sign of reverting trademark right towards its private right origin.

d. Supplementary measures available to re-craft of the system of “adverse effects” trademark prohibition

Firstly, take advantage of Chinese guiding cases system. Even China is not a case law country, it is still enthusiastic into the guiding cases system and other guiding alike cases which are published by courts and other departments.²³¹ Guiding cases are useful for unifying standards especially for circumstances that general provisions in trademark law like Article 10 (1) (8) which is ambiguous and there is not available clear usable interpretations. Giving the definitions and standards in guiding cases can help to make relative general provisions much clear and easier to follow. Plus, jointly publish prohibition registration trademark database by CTMO and Chinese Supreme Court, there will be a convenient and efficient trademark

²³⁰ Supra note 18, 1024.

²³¹ For example, copyright department also publishes cases every year, so do trademark offices and other official departments.

registration order which will also save much trademark examination cost and trademark judicial cost.

Secondly, publish clear registration guiding rules for special Classes of goods or services. Some trademark registration application is rejected because they are used on some certain classes such as condom, night club, etc. At least, there should be some guiding cases or files tell people who are running relative businesses what kinds of trademarks they can use or register and what kind of trademarks they shall keep away from. Because it seems whatever trademark you choose to use on condom or night club alike goods or services, the trademark will be associated further. In the same time, in order to protect teenagers' growth environment better, there can be some restrictions on trademarks used on teenagers-centered goods or services. For example, the expression "Nuckin Futs", in connection with prepared nuts, mixtures of nuts, and dried fruits, was considered acceptable, despite the fact that it is a clear spoonerism for "f..cking nuts." The registration is, however, conditional upon the trademark not being used on goods marketed to children. Such condition should not blame the owner of the registration since the products are sold in pubs that kids cannot enter.²³²

Thirdly, build a strict advertising system if the government really hopes to build a good living environment for people. When the trademark office examiners reject the trademark with the reason that the trademark is easily to produce other adverse effects to people or using Chinese words wrongfully will teach and guide students and teenagers into a misleading way in the cognition of Chinese traditional culture including Chinese words, phrases, and idioms, they are indeed not aware that the influence is not the trademark but the advertising. One word is probable can lead one people to wrong understanding or learning direction while it can also be a "shocking" creation point to give people new ideas. Different people have different understanding and tolerance to different level language using style and methods. It's true that if people want to use a trademark, they have to "spread" their trademark. However, the using methods are multiple and advertising is just one of them, remember that it is not the only one! If people want to use certain "disputed" trademarks, they have to know that they are expected to do sacrifice in the proceeding of the trademark use: don't spread in the way of advertising which would harm people's language environment. This supplementary measure will make the advertising law obeyed and make the trademark function works well. It can benefit trademark users and protect public audience at the same time, no one will be harmed by the "disputed"

²³² Austl. Trademark Application Serial No. 14082134 (filed Mar. 3, 2011) (Austl.) in the name of Universal Trading Australia Pty Ltd as trustee for Basil and Groovy Trust. See *supra* note 162, 49.

trademarks. By the way, advertising rating system might be helpful to eliminate people's worries about language purity.²³³

Fourthly, be cautious about the theory of interests' balance. The theory of interests balance is used very broadly in intellectual property law filed in the name of public domain reservation.²³⁴ We have to be aware that public interest is distinct from the domain private interest.²³⁵ With people's overwhelming attention on public interest and thinking that public interest has the potential to be invaded, it seems private intellectual property rights develop in a restrained way, which is making the intellectual property rights stay in "cage". It is right that private intellectual property rights are strived for by many stakeholders,²³⁶ but sometimes the government pretend to say that they are doing something for the sake of "public interest" might turn out to be fake public interest. Moreover, relevant public interest is the most important part of "public interest" in trademark law. The relevant public shall be considered firstly when craft trademark system. In addition, trademark law is different from copyright law and patent law, public interest in them is fatal sometimes.²³⁷ Public interest in trademark law is much light because the most important public interest in it is economy interests. So the public interest is not too essential and shall be considered in a more utilitarianism way and economy market centered way. With the rapid economy development, the internal connotation of some trademarks may change, the public interest related to it will also alter, while traders group cost reduction interest on finding a good trademark and relevant public's cost reduction interest stand still. Therefore, too strict rejection policy is no good to the dynamic world.

Another important non-legal problem of China's attitude on trademarks of "having other adverse effects" is ascribed to the government's internal working system. The working documents give much pressure to trademark registrars and judges because documents push all individual officers to take full responsibility for trademarks under their examination or cases under their trial.²³⁸ This confines the officers' free evaluation of the trademarks and they prefer to take a strict attitude to the trademarks with risk to be considered having other adverse effects in order to keep their job and do everything to

²³³ In fact, some representatives of the National People's Congress have proposed for this issue. See at <http://media.people.com.cn/GB/40606/5988982.html> (2007 proposal) (last visited May 28, 2018), <https://cloud.tencent.com/info/aa03b9549d3a2fc36da57db592478097.html> (2018 proposal) (last visited May 28, 2018).

²³⁴ For example, some stakeholders may attempt to wrest control of some rights away from the owner through public interest intellectual property litigation. See Russell W. Jacobs, *In Privity with the Public Domain: The Standing Doctrine, the Public Interest, and Intellectual Property*, 30 *Santa Clara High Tech. L.J.* 415, 417 (2013).

²³⁵ Sean M. Flynn, *The Washington Declaration on Intellectual Property and the Public Interest*, 28 *Am. U. Int'l L. Rev.* 19, 20 (2012).

²³⁶ For example, some large and powerful companies and lobbyists.

²³⁷ For example, some patented medicines that work for HIV and other fatal disease.

²³⁸ For example, "Control Measures on Adverse Effects Trademarks".

avoid bear the unfavorable consequences. What the government needs to do is let the trademark registrars explain their rejection or approval themselves based on laws but not out of their fear of taking negative responsibility from the working documents. So do judges.

“Intellectual property systems are designed to serve human values and must be tailored to this end”.²³⁹ All trademark law provisions shall be built on the basis of some certain interests balance. Different economy styles shall alter their own trademark law system in order to utilize trademark law to make its people live a better life. For China, as one of the biggest market around the world, it shall consider its own trademark obtain system. Strict trademark governing system is not the best one for the benefit of its people when it claims and attempts to build its own rule of law system. Above steps for re-craft an advanced trademark system for registration for some certain trademarks are essential to be considered.

C. Potential comments and anticipated follow-up research

Empirical study on the registration rejections to trademarks “having other adverse effects” and relative judicial cases would be very helpful to this article’s conclusion. Unfortunately, the specific information of administrative rejection excuses are not disclosed to public and the judicial cases empirical are not enough to state the status of trademark “having other adverse effects” in China.²⁴⁰ However, the administrative organization is trying to disclose the review results documents to public on its website.²⁴¹ This part of research is expected to be done in the future.²⁴²

There are also some people suspect the essential to take Article 10 (1) (8) so serious. In their mind, there is not very much evidence showing this is a problem.²⁴³ I can’t agree that there is not essential to do research if the number of cases resulted from such a problem is so compelling, not to say there are real problems that may lead the determination of such marks in a high unpredictability which is not only essential but also deserves attention!²⁴⁴ In fact, the problem resulted from Article 10 (1) (8) of Chinese Trademark Law is not only a subjective law problem, but also a procedure law problem.

²³⁹ Supra note 235, 21.

²⁴⁰ On China Trademark Official website, the disclosure information is very limit and the function of advanced search can be improved much. For example, there are only 85903 information available on China TRAB official website until June 5, 2018. See at http://wssq.saic.gov.cn:9080/tmsve/pingshen_getMain.xhtml (last visited June 5, 2018).

²⁴¹ See Annual Development Report on China’s Trademark and Brand Strategy 2017, <http://www.ctmo.gov.cn/tzgg/201805/W020180513829986812509.pdf> (last visited May 28, 2018).

²⁴² It is not only important for this article, but also helpful for the future Chinese strategy on trademark resources.

²⁴³ See Yuan Bo, Whether a Mark Has “Adverse Effects”, It Still Depends on How You think (in Chinese), see at <http://news.zhichanli.cn/article/4645.html>. (last visited June 5, 2018).

²⁴⁴ There are many Chinese scholars deem that article 10 (1) (8) is being misused in practice. For example, Zhang Taolue & Zhang Weijun, The Choice of Trademark Law on the Protection of Public Interest (in Chinese), Intellectual Property 2015 (4).

Trademark examiners' work style need to be improved, for example, the trademark examiners shall give very specific for why a trademark has "other adverse effects".²⁴⁵ It can be improved for the sake of a better trademark registration system.

China starts the State Council Institutional Reform in 2018. Based on the proposal, it will reorganize the State Intellectual Property Office. The trademark administrative issues and patent administrative issues will be consolidated and administered by the State Administration for Market Regulation.²⁴⁶ Whether trademarks "having other adverse effects" will be determined much by the market shall be seen after the reform. In order to strengthen IP creation, IP protection and IP use, and improve the quality and efficiency of IP review, CTMO is seeking public comment on the fourth revision of Chinese Trademark Law.²⁴⁷ Whether there will be some change on "having other adverse effects" trademarks will be seen.

Conclusion

China current policy on marks "having other adverse effects" is formed in a special economy time. The existence of prohibition of using marks "having other adverse effects" as trademarks seems not proper in current China.

The creation of trademarks has two stages to go, the first is trademark owner associates the sign with objects, the second is public grants the required recognition to this association. Trademarks themselves are objective and trademark owners can give the objective trademark their special meaning via trademark use. Public's cognition of the trademark is mostly from the trademark owners' management and investment of the trademark. Even there is not much need and value to incentive trademark, but there is still motivation to incentive the protection of goodwill on a trademark. China's strict and complex system of trademarks "having other adverse effects" is not beneficial to the goodwill protection even though it claims to enhance the goodwill protection very much.²⁴⁸ Problems generated from Chinese Trademark Law Article 10 (1) (8) can harm both the producers' interests and the consumers' interests. While the work documents from the trademark administrative organizations and the Supreme Court further aggravated these problems.

²⁴⁵ In fact, CTMO registration procedures on whether examiners could issue examination opinions that informed applicants why the CTMO did not approve a registration was revised in 2001 and 2013. See *supra* note 187, 874.

²⁴⁶ See Decision of the First Session of the Thirteenth National People's Congress on the State Council Institutional Reform Proposal, National People's Congress (2018).

²⁴⁷ See at http://sbj.saic.gov.cn/tzgg/201804/t20180402_273481.html (last visited June 5, 2018).

²⁴⁸ See Notice of the Supreme People's Court on Issuing the Opinions on Several Issues concerning Intellectual Property Trials Serving the Overall Objective under the Current Economic Situation, Documents of Judicial Interpretation No. 23, art. 9 (2009).

From the view of legislative skills, there should not be any clause has versatile functions, especially the negative and prohibition clauses in civil law. Because private law represents the protection of private rights and interests, based on which there is a saying that “Absence of Legal Prohibition Means Freedom” for private rights. China is going further and further on employing “having other adverse effects” clause to prohibit trademark registration, declare trademarks invalid and revoke trademarks even the trademarks themselves have nothing to do with disparaging or offensive issues. China’s favor on general and miscellaneous clauses gives the administrative organs and judicial courts much space in “creating rules”, the higher level of these kinds of organizations might like these ambiguous rules but not all workers who work at the front line of trademark issues, because the work documents make them responsible for their opinions in the operation of the trademark cases. This situation can distort the trademark right obtain and protection system.

In order to keep Chinese huge amount of trademarks and the large market order, China should consider to re-craft these kinds of legislative words and change its constrained attitude on the trademarks “having other adverse effects”. In that way, it will struggle out of the chaos and hesitations, and keep a relatively actual consistent standard to guide people to have a reasonable expectation on their business based on trademarks. From an international perspective, it is also an essential to improve the predictability of Article 10 (1) (8) of Chinese Trademark Law and its proper enforcement. China is the largest trademark registration country in the world and owns the admirable largest prosperous market. It could get much more cooperation chances and foreign investments only if it makes a proper and foreseeable regulation of the “having other adverse effects” signs.

Obtaining trademark registration approval in CTMO is the first step for a full trademark protection based on Chinese Trademark Law. Unifying the standards of determining trademarks’ registrable nature is very important for the trademark law’s predictability and reduce cost for trademark registration both for applicants and the official system.

Open the topic of free speech will contribute to the solution of “having other adverse effects” trademark problems. Lacking argument about freedom of speech makes the trademark use in a blur situation and prohibit people’s chances to take advantage of unregistered trademark system and run their business based on their investments into their unregistered trademark. It is against to principle of proportionality and not fair for the goodwill protection which is the soul of trademark management based on trademark law. What China shall do is to take appropriate steps to safeguard its trademark and IP system, but not to feel too sensitive and over conscious about some not positive things, nor take individuals’ thinking for ground and go to forecast things in irrational way. Adverse effects trademarks shall be treated in general

relevant public's understanding level, don't stand at the highest point of morality to make the regulations for normal people. Think about all people except for so called public interest, especially in some fake public interest situations.

In order to re-craft a virtuous trademark ecosystem, China can revise its Article 1 (1) (8) as above mentioned perfectible steps based on principles. China has been developing its trademark system and making progress toward a harmonized and fair trademark system in the world's largest developing economy,²⁴⁹ what China will handle adverse effects and its trademark use freedom still remains to be expected.

²⁴⁹ *Supra* note 187, 893.

*Elkhan Heydarli**

WITHDRAWAL FROM THE EUROPEAN UNION: LEGAL ANALYSIS AND MODELS FOR FUTURE COOPERATION

Abstract

Since its establishment as European Coal and Steel Community (ECSC) with 1951 Paris Treaty and European Economic Community (EEC) together with European Atomic Energy Community with 1957 Rome Treaty, and gathering under one - European Union roof all these Communities with Maastricht Treaty in 1992, the European Union always continued to grow with its new members, especially with great enlargement of Eastern Bloc countries. However, in 2016 the Union experienced something that never happened through its more than half-a-century existence, a Member State decided to leave. In this article we will analyze legal aspects of withdrawal from the European Union, how the procedure works and what are the various ways for future cooperation in the areas of single market, customs union, etc. after leaving the Union.

Annotasiya

1951-ci il Paris Müqaviləsi ilə Avropa Kömür və Polad Birliyi kimi əsası qoyulan və 1957-ci il Roma Müqaviləsi ilə Avropa İqtisadi Birliyi və Avropa Atom Enerjisi Birliyi kimi fəaliyyətinə davam edən, daha sonra 1992-ci il Maastrix Müqaviləsi ilə bu birlikləri eyni ad altında birləşdirən Avropa İttifaqı yeni üzvlərin, xüsusilə Şərqi Blok ölkələrinin qoşulması ilə daimə böyüməyə və genişlənməyə davam edirdi. Lakin 2016-cı ildə Avropa İttifaqının yarım əsrlik tarixi ərzində heç baş verməyən hadisə yaşandı – Üzv Ölkə İttifaqdan çıxmaq qərarına gəldi. Məhz bu məqalədə Avropa İttifaqından çıxmanın hüquqi aspektləri, prosesin işləmə mexanizmi və gələcəkdə birgə bazar, gömrük və digər sahələrdə mümkün ola biləcək əməkdaşlıq haqqında analiz aparılacaq.

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* Baku State University, 2nd year LL.M. student in European Law.

Introduction

In June 2016 the referendum was held in the United Kingdom about whether to leave the European Union or not which was called as “BREXIT” where with a narrow majority (51.89% to 48.11%) British citizens decided to leave the Union and in March 2017 the United Kingdom triggered Article 50 of Treaty on European Union with notification to the European Council. Until this event there was not a case of leaving the EU.

There were some reasons, which can be deemed as preventing it from happening. From its foundation in form of European Communities on, there was not a single legal norm regulating the withdrawal process. This resulted in views by scholars that it was not possible to leave the Union after becoming its member, while many others argued that the unilateral withdrawal from the Union was possible under the terms of 1969 Vienna Convention on Law of Treaties. Firstly, as Vienna Convention rules, any provision which prohibits a Party State to withdraw unilaterally from international agreement, is in itself a violation of basic principle of international law - *pacta sunt servanda*.¹ Therefore, saying it was impossible to withdraw unilaterally from the EU was not correct from the perspective of international law. Moreover, it is worth to mention that in case of international agreements, which are silent on this specific issue such as Maastricht Treaty, Vienna Convention touches upon two ways for unilateral withdrawal. According to Article 56 of the said Convention, if it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right of denunciation or withdrawal may be implied by the nature of the treaty, then a Party State can withdraw from the treaty.² However, if we go deep into the previous EU treaties and other agreements among Member States, we can see that they always intended to further integrate with one another, they transferred part of their sovereignty to the supranational institutions in exclusive competence areas and achieve high degree of sustainable convergence in economic and monetary union, which means Member States excluded such an intention.

The second possibility is regulated by Article 62 of the Vienna Convention which is about *clausula rebus sic stantibus*³ where it is shown that in case fundamental change of circumstances constitutes an essential basis of the consent of the parties to be bound by the treaty or the effect of the change is radically to transform the extent of obligations still to be performed under the treaty, then the Party States can terminate or withdraw from the treaty.⁴ Many

¹ *Pacta sunt servanda* (Latin for "agreements must be kept") implies that nonfulfillment of respective obligations is a breach of the pact.

² Vienna Convention on the Law of Treaties, art. 56, May 23, 1969. (hereinafter *VCLT*)

³ *Clausula rebus sic stantibus* (Latin for "things thus standing"), in public international law, is the legal doctrine allowing for a treaty to become inapplicable because of a fundamental change of circumstances.

⁴ *VCLT*, *supra* note 2, art. 62.

academicians agree upon that conditions for *clausula rebus sic stantibus* cannot be much used in case of the EU. Herdegen reckons that the use of *clausula* can be possible only if the change can result in impossibility of execution of obligations arising from its membership of the Union.⁵ We can see such argumentation in the Maastricht judgment of German Federal Constitutional Court where it stated that the price stability was primary goal of European Monetary Union and if it was not achieved, the agreement would become meaningless and Germany would not be bound by it.⁶ Therefore, it can be said that pre-Lisbon treaties did not provide Member States with a right to withdraw from them.

Nevertheless, some might confuse the case of Greenland with unilateral withdrawal issue. Back then the population of Greenland decided to withdraw from European Communities in 1982 with referendum, but it cannot be deemed to be a precedent as it was not a Member State, but its territory (Denmark). It took place in the form of a reduction of the territorial jurisdiction of the Treaties through amendments which were ratified by all Member States and agreement of the European institutions. After it Greenland became an “associated overseas territory” under Article 204 of Treaty on Functioning of the European Union (TFEU) with special arrangements under Protocol 34 to the Treaties.

The situation changed with Lisbon Treaties in 2007 as Article 50 of Treaty on European Union (TEU) clearly defined unilateral withdrawal right of Member States. Actually, this legal norm was laid down firstly in Constitutional Treaty of 2004. However, as it failed in the referendums in France and Netherlands, its content was revived in Lisbon Treaties with some changes. There are many arguments regarding why Article 50 was added to the EU legal system. While some stress that it is a backward step against integration within the Union, others emphasize that ratio behind it was to eliminate the risk of failure in referendums as it was with Constitutional Treaty. Ferhat Chamlica thinks that it can also be for answering harsh criticism towards the European Union for being non-democratic and making leaving at any time available for Member States so that they cannot be forced to stay in.⁷ Anyway, Article 50 of TEU while creating a plan and process for leaving the Union, at the same time enables Member States to withdraw from it without having a political tension to some point. Besides making it easy for a leaving State, it also touches upon the involvement of European Council, the

⁵ M. Herdegen, *Monetary Union as a Permanent Community Based on the Rule of Law*, 52 Deutsche Bank Research Paper Series, 8 (1998).

⁶ Bundesverfassungsgericht (Federal Constitutional Court) v. 12.10.1993, 2 BvR 2134/92, 2 BvR 2159/92, BVerfGE 89, 155, 26.

⁷ Ferhat Chamlica, *Avrupa Birliđi ve Ekonomik Parasal Birlikten Ayrılmanın Lizbon Antlaşması Çerçevesinde Deđerlendirilmesi*, 11 Ankara Avrupa Çalışmaları Dergisi 25, 34 (2012).

Council of the European Union, European Commission and European Parliament as the institutions playing main role in this procedure.

Article 50 does not contain any specific norm on levels and fields of future cooperation with the Union after withdrawal. It is debated that which kinds of matters can be included in the withdrawal agreement, such as acquired rights, transitional periods, etc. and which cannot be, because some reckon that such an agreement would be international agreement with the third State that requires other type of conclusion procedure for it according to the Treaties. After BREXIT, there are many forms of cooperation with the EU that can be chosen by the Parties and which are discussed below, as well.

I. Legal aspects of Article 50: How it is hard to leave the European Union

Lisbon Treaties on European Union and on Functioning of the European Union were adopted in 2007 and entered into force from 1 December 2009. With this Treaties, legal questions about unilateral withdrawal from the Union was answered. The main Articles regulating the process are Article 50 of TEU, Article 218(3) and 238(3) of TFEU.

The first sentence of Article 50 clearly states that any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. The interesting part about the process begins even with this one. As it is laid down, if any Member State wants to leave the EU, it has to follow its own constitutional law. The European Union is founded on values such as freedom, democracy. Respect for human rights and the rule of law, according to Article 2 of TEU. Therefore, in order to eliminate the possibility of use of power by political parties and groups which are against eurointegration in different Member States the norm might be construed as so that for exiting the Union in each state constitutional requirements should be met. For example, in case of BREXIT we have witnessed a referendum in overall United Kingdom where nations of devolved states (Scotland, Wales and Northern Ireland) took part together with England. Moreover, according to the UK Supreme Court ruling of January 2017, in order to trigger Article 50 of TEU with notification to European Council, the UK government needs to get approval from British Parliament and only after approval the UK government became responsible for deciding negotiating objectives and conducting talks.⁸ Moreover, in order to answer heating debates around whether devolved legislatures can block notification or not, whether they need to be consulted or not, as in Scotland and Northern Ireland majority voted for remaining in the EU, Supreme Court ruled devolved legislatures need not to be consulted or give their agreement prior to withdrawal

⁸ R (on the application of Miller and another) v. Secretary of State for Exiting the European Union, Judgement, U.K. Supreme Court, January 24, 2017.

notification, since relations with the EU and other foreign affairs matter remain reserved to the UK government and national parliament, which means devolved legislatures do not have a right to veto on withdrawing from the European Union.⁹ Consequently, following British constitutional law on March 2017, the European Union (Notification of Withdrawal) Bill completed its way through Houses of Parliament (House of Commons and House of Lords) and received royal assent.

According to the second paragraph of Article 50, Member State should notify the European Council about its decision to leave. As it is shown in Article 15 of TEU, European Council provides define the general political directions, consequently, it is European Council which assembles and maps a guideline for future talks and conclusion of an agreement(s) in which further relationships between the EU and withdrawing Member State is regulated. The European Council will act with consensus in laying down the guidelines. The agreement is concluded on behalf of the Union by the Council of the European Union. The negotiations are carried out negotiator who is appointed by the Council according to Article 218(3) of TFEU where it is written that the Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.¹⁰ Almost in all the EU institutions appointments were made to carry out heavy workload related with BREXIT. Michel Barnier, a former European Commissioner and French foreign minister, was designated chief negotiator for the European Commission and entrusted with leading the Commission's Article 50 Task Force, The Conference of Presidents of the European Parliament designated Guy Verhofstadt, leader of the ALDE Group and former Belgian prime minister, as the Parliament's coordinator on Brexit, with Didier Seeuws leading corresponding work in the Council. The Council needs the consent of the European Parliament for concluding the withdrawal agreement. The European Parliament approves the agreement with majority of votes cast according to Article 231, which means in order to pass from European Parliament, withdrawal agreement have to be consented by majority of parliamentarians present in the voting which must be no less than one third of the component Members of Parliament, as such it is defined as the quorum according to Article 168 of the Rules of Procedure of European Parliament.¹¹ But it is not the end of the process as the Council of the EU has

⁹ *Ibid.*

¹⁰ Consolidated version of the Treaty on Functioning of European Union, C115 Official Journal of European Union 47, 144-145 (2008). (hereinafter *Consolidated Version of the Treaty*)

¹¹ Rules of Procedure of the European Parliament, art. 168 (2018).

to act in qualified majority for conclusion of an agreement. As it is generally known, according to Article 238(3)a of TFEU, qualified majority in the Council is at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States. However, as it is the case when a proposal comes from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, but not with the withdrawal agreement, a qualified majority (we would rather say “super-qualified majority”) for conclusion of such an agreement will be at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States as it is laid down in Article 238(3)b. Unlike Treaty amendments, a withdrawal agreement does not need to be ratified by all Member States- in line with the voluntary character of the withdrawal.

As a withdrawal agreement is concluded between the EU and leaving State, participation of that State in decision-making procedure in EU institutions is excluded. While it continues to take part in the procedure in other fields within the deadline period, for the purposes of conclusion a withdrawal agreement, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it, according to paragraph 4 of Article 50 of TEU. It is seen that nothing is said about participation in the voting in European Parliament. Some argue that it is because even they are elected from withdrawing Member State, Members of European Parliament (MEPs) represent all EU citizens, rather than nationals. Therefore, Treaties do not prevent MEPs from Member State in question from participating either in debates in the European Parliament and its committees, or from voting on Parliament’s motion for consenting withdrawal agreement.¹²

Paragraph 3 of Article 50 rules that the Lisbon Treaties (the primary sources of European law) will cease to apply to the State in question from the date of entry into force of the withdrawal agreement. Nonetheless, EU law would remain valid until national laws are adopted repealing or amending it. But what happens if Parties do not reach an agreement? Can Member State not exit the EU? Of course, even if the EU and leaving State cannot agree on terms of withdrawal agreement and do not conclude it, Member State is considered to have leave the Union, but after two years after European Council receives the notification. If the Union agrees with the Member State concerned to prolong this deadline, then European Council can extend this period deciding unanimously.

¹² G. Sgueo, J. Carmona, C. Cîrlig, *UK Withdrawal from the European Union. Legal and Procedural Issues*, European Parliamentary Research Service Research Paper No. PE 599.352, 6 (2017).

If leaving Member State decides to join back to the Union in the future, it has to follow the same procedure laid down in Article 49 of TEU as other states wanting to join the Union, according to the fourth paragraph of Article 50. This means there is no preferential system for post-members and they should apply for membership, and if they fulfil eligibility criteria (which are known as Copenhagen criteria), after the consent of the European Parliament with absolute majority of component members, the Council of the EU will adopt a decision about conclusion of admission agreement via acting unanimously after consulting the European Commission. Additionally, this agreement will be a subject for ratification in all other Member States according to their constitutional requirements.

As it is seen from Article 50 of TEU, the Court of Justice of the European Union (CJEU) is not involved in the withdrawal process. The withdrawal agreement, as an international agreement of the EU, is subject to CJEU judicial review. It can be contested before the Court through an action for annulment regulated by Article 263 of TFEU. In addition, questions for a preliminary ruling related to the withdrawal agreement could be referred to the CJEU by a national court of one of the remaining Member States according to Article 267 of TFEU, while a domestic court of the withdrawing Member State could do the same, if explicitly provided for by the withdrawal agreement. Furthermore, the CJEU could be requested to give an opinion on the compatibility of the draft withdrawal agreement with the EU law.

It worth to note at this point that although Article 50 regulates the unilateral withdrawal process from the European Union, there is no single norm saying that other Member States can jointly act and forcefully exclude another Member State if it violates the founding principles of the Union. In the preamble of TEU it is written that the Member States are determined to 'continue the process of creating an ever closer union among the peoples of Europe'. While the preamble has no legal effect, we know from the case law of the Court of Justice of the European Union that in the interpretation of the Treaties themselves preamble plays essential role. It can make us to jump to the conclusion that no Member State can be expelled from the Union. However, here we can put forward an argument *vice versa* that leaving behind a recalcitrant state may actually lead to much closer cooperation between the remaining Member States which in turn may make the Union more attractive to future candidate countries. Still, the EU treaties do not contain any explicit expulsion clause. That may mean *prima facie* that such possibility is not permitted. The question here: "If it is not permitted to forcefully expel a Member State and this MS does not what to voluntarily leave the Union, then what can other Member States do in order to continue further and stronger cooperation?" In fact, some mechanisms are available in the Treaty that the EU could implicitly implement. The most important one of them is laid down in the Article 20 of TEU: The Enhanced Cooperation Procedure (ECP).

According to the afore-mentioned procedure, at least eight member states can proceed to a further stage of integration within a policy area, provided that they are not contrary to EU integration efforts. Nevertheless, ECP can be used only in the areas which are in the framework of non-exclusive competence of the Union.

II. Models for future cooperation with the European Union after withdrawal

In order to regulate its relations with the EU, a withdrawing Member State can conclude an agreement where they mutually agree on the level of their future relations regarding customs union, single market, free movement rights (goods, services, people and capital), etc. While some argue that agreement on future cooperation can be part of withdrawal agreement and there may not be need to have separate agreement, others say regarding the sequencing of the agreements that the withdrawal agreement and the agreement(s) on the future relationship would logically need to be concluded one after the other. The main argument against concluding the withdrawal agreement and the agreement (or agreements) on the future relationship at the same time is the lack of a legal basis: while Article 50 TEU provides the basis for the withdrawal agreement between the EU and the withdrawing (but still a) Member State only, a future-relationship agreement would require a legal basis applicable to relations between the EU and a third country, such as Article 207 of TFEU (common commercial policy) or 217 of TFEU (association agreements). Most experts, therefore, agree that the withdrawal agreement must be concluded first, and an agreement on the future relationship can only be formally concluded and take effect after the withdrawal agreement has entered into force, transforming the withdrawing state into a third state in relation to the EU. At this point it is worth to note that any international agreement between the EU and the state which has withdrawn defining their future relationship would require ratification in the remaining Member States, unless the agreement were only to cover matters falling within the exclusive competence of the European Union.¹³

In March 2018, the European Commission released a draft withdrawal agreement where it seems parties agreed relatively on most of the issues.¹⁴ The transition period is established till the end of 31 December 2020. The Union and the UK tried to mutually regulate different areas such as goods placed on the single market, ongoing customs procedures and taxation,

¹³ Flavier H., Platon S., *Brexit: A Tale of Two Agreements*, European Law Blog, <http://europeanlawblog.eu/2016/08/30/brexit-a-tale-of-two-agreements/> (last visited Aug 23, 2018).

¹⁴ European Commission, *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 19 March, 2018.

judicial and administrative procedures and cooperation and to protect acquired rights of citizens. However, this agreement is limited mostly to the transition period and does not extend to the matters beyond it.

There are many templates which can be useful for future relations such as European Free Trade Association (EFTA), European Economic Area (EEA), Swiss model of cooperation and preferential trade agreements. The European Free Trade Association (EFTA) was founded in 1960 by the Stockholm Convention signed by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom in order to liberate trade in goods amongst its Member States. Finland became Party to the Association in 1961, Iceland in 1970 and Liechtenstein in 1991. With six of these states having joined the EU, EFTA today have four Member States: Iceland, Liechtenstein, Norway and Switzerland. Although the EFTA is not a customs union, they usually negotiate preferential trade agreements as a group. EFTA states have 27 free trade agreements covering 38 countries. However, each Member of the Association retains the right to conclude bilateral trade agreements with third countries outside the EFTA framework. The free trade agreements within the EFTA have evolved in time from trade in goods and protection of intellectual property rights to cover areas such as trade in services, investment, competition and government procurement, and more recently trade facilitation, sustainable development and cooperation.

The European Economic Area (EEA) brings together the 28 EU Member States and three of the EFTA States (Iceland, Liechtenstein and Norway). It was established by the EEA Agreement in 1992, which enables the three EFTA states to participate extensively in the single market. The EEA agreement provides for the incorporation of EU legislation in all policy areas covering the single market on a continuous basis, as and when the EU adopts legislation related with EEA. It encompasses the four freedoms, i.e. the free movement of goods, capital, services and persons, plus competition and state aid rules and horizontal areas related to the four freedoms. It has been argued that a post-withdrawal UK could simply, if it wished, retain its membership in the EEA. However, most commentators consider that, in this scenario, the UK would need to re-join EFTA once it withdraws from the EU (having left EFTA when joining the European Communities in 1973), in order to be able to subsequently re-join the EEA. If the rights and obligations arising from the EEA agreement are a matter of EU law for the EU Member States, then when EU law ceases to apply to the UK post- withdrawal, so will the EEA agreement. Commentators remark that the “status of the UK as a contracting party to the EEA agreement today is contingent upon and inherently linked to its EU membership”.¹⁵

¹⁵ Sif Tynes D., Lian Haugdsal, *In, out or in-between? The UK as a Contracting Party to the Agreement on the European Economic Area*, 41 *European Law Review* 753, (2016).

Swiss model of cooperation with the Union has its own particular nature. A member of EFTA, Switzerland rejected accession to the EEA (and to the EU) by referendum in 1992. Consequently, the Swiss-EU relationship is based on a multitude of sector-specific agreements (more than 120), negotiated over many years, starting with the 1972 Free Trade Agreement between the EEC and Switzerland. EU-Swiss cooperation is characterized by classical international cooperation, without any transfer of competences to supranational authorities, however, an exception exists in the field of air transport competition rules, where monitoring and application of these rules are a European Commission and CJEU competence, except for state aid and the bilateral agreements rely either on the equivalence of EU and Swiss legislation or on the incorporation of EU legislation. One important aspect of the bilateral relationship is the freedom of movement of persons, subject of a referendum vote in 2014 seeking to limit the free movement rights of EU citizens in Switzerland. As a result, Switzerland must implement legislation in 2017 which could infringe the existing bilateral agreements. Following the vote, the EU suspended cooperation with Switzerland in the fields of education and research. A compromise deal on the free movement of people was reached at the end of 2016.

The most widely used form of collaboration among the European Union and world countries is preferential free trade agreements. The EU's preferential trade agreements include free trade agreements (FTA), association agreements (AA), and deep and comprehensive FTAs, as well as economic partnership agreements (EPA). Concluding an FTA is a rather flexible option, as the scope of the agreement depends on what the parties agree to include. As a result, the EU's FTAs with third countries and regions vary significantly – for instance between EPAs with the African, Caribbean, and Pacific (ACP) group of states, trade agreements with countries in South America, and deep and comprehensive FTAs with some of the EU's eastern neighbors. In general, EU FTAs mean less access to the EU single market than EEA membership, for goods and particularly for services, no requirements regarding ensuring freedom of movement of labor or contributing to the EU budget, freedom to conclude trade agreements with other countries/regions, as FTAs are less integrated than a customs union, few provisions on non-tariff barriers to trade (e.g. standards and regulations), which are the most significant obstacles to trade. Newer 'comprehensive' FTAs and economic agreements go further in terms of market access (e.g. provisions on public procurement markets) and may set standards in certain areas such as intellectual property rights, investment protection and the environment.

Some recent FTAs also move beyond trade in goods to aim at greater regulatory convergence, as well as further market access in certain sectors. While there are comprehensive free trade agreements negotiated by the EU with Canada, Singapore, South Korea and Vietnam, only the EU-South Korea

FTA has entered into force since 2011. Considered a mixed agreement, CETA must be approved by the European Parliament, and by all Member States through their national procedures. Essentially, CETA eliminates tariffs on all industrial products – with some products excepted, for which tariffs will be eliminated gradually on condition that these goods comply with preferential rules of origin, eliminates tariffs and quotas on almost all products in agriculture and all in fisheries on condition that these goods comply with preferential rules of origin and provides for market access, national treatment and most favored nation (MFN) status, both at federal and provincial level (for example, in case of Canada) for environmental, telecoms, financial and other services, if not subject to specific reservations.

We should also mention that without negotiated preferential market access with the EU, the post-withdrawal United Kingdom would rely on World Trade Organization (WTO) rules in its trade relationship with the EU. This means that the EU would apply tariffs to UK goods at the most favored nation (MFN) rates that the EU applies to all WTO members without a preferential trade agreement in place with the EU. In addition, it is argued that the UK will have to renegotiate its terms of trade within the WTO, as the UK's obligations currently arise in its capacity as an EU Member State rather than through its individual WTO membership. The rights secured by the EU in the WTO for its Member States would not automatically apply to the UK upon its withdrawal from the EU, and the EU commitments at the WTO would somehow need to be separated into EU and UK commitments, concerning goods and services. In practice, this would mean negotiating and agreeing updated schedules of commitments both for goods and services for the UK with all 164 WTO members (with unanimous agreement required), pending which a degree of uncertainty would affect UK access to WTO member markets. Conversely, some experts believe there is a possibility that the UK could 'inherit' EU tariffs. However, even if this might work for most trade, complications may arise in relation to agriculture and agricultural products.

Conclusion

While there was not any single provision regarding leaving the European Union, put aside withdrawal from it, however, everything changed with Lisbon Treaties which brought legal way of exiting the Union via unilateral withdrawal. In the whole process Member State is in mutual contact with the Union institutions as they are the main players in it, no other Member States. The European Council decides on policy guidelines upon receiving the notification from the Member State in question as it is main policy-making body in the Union, the Council appoints negotiator and concludes an agreement which is consented by the European Parliament. If such an agreement is not reached within two years, then Member State leaves the Union, anyway. Nevertheless, there are some questions that remain, for

example, what withdrawal agreement should contain as Article 50 of TEU does not touch this issue. It can be assumed transitional period, contract-based rights and so on as it is the case with draft agreement with the United Kingdom.

Another question is: “Can Member State revoke its notification?” Again Article 50 is silent on this matter. While Article 68 of Vienna Convention on Law of Treaties clearly stresses that a notification of intention to withdraw from a treaty may be revoked at any time before it takes effect,¹⁶ because of the specific characteristics of Lisbon Treaties and the European Union, special provisions of Treaties take precedence. In such case, if all other Member States agree withdrawal process can be suspended, as Member States are “masters of Treaties”. By contrast, the unilateral revocation of an Article 50 notification appears much more problematic. Some commentators argue that a Member State cannot unilaterally revoke its notification to leave the EU, in the sense that this action is legally compelling the rest of the Member States to accept this revocation. However, some commentators specify that unilateral revocation is possible under certain constraints, notably if the Member State has acted genuinely and in good faith in taking a new decision not to withdraw from the EU¹⁷. The only institution which can rule about the compatibility of revocation of withdrawal notification with the Union law is the Court of Justice of the European Union as it gives ultimate interpretation to the Treaties.

Next matter concerns forcing a Member State to leave the Union. This question became a topic of heated debates especially when in the first referendum in Ireland voters said “No” to the ratification of Lisbon Treaties and some argued whether it was possible to exclude Ireland from the Union in order to keep moving on integration¹⁸. First of all, there is no single provision enabling Member States to exclude another one. The membership can be suspended if one Member State continuously and gravely breaches the values established in Article 2 of TEU.¹⁹ But it is just a suspension, not exclusion. Therefore, we can agree on that there is no possible way of exclusion of membership in the European Union.

After leaving the Union, Member State can continue its relation and cooperation with the Union. We have analyzed different ways of cooperation and their characteristics such as European Economic Area, European Free Trade Association, Swiss model of cooperation and Preferential Free Trade Agreements which can vary from regions to countries. Focusing especially on

¹⁶ *VCLT*, *supra* note 2, art. 68.

¹⁷ Eeckhout P., Frantziou E., *Brexit and Article 50 TEU: A Constitutionalist Reading*, UCL European Institute Working Paper, 41 (2016).

¹⁸ Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, 10 ECB Legal Working Paper, 8 (2009).

¹⁹ *Consolidated Version of the Treaty*, *supra* note 10, art.

BREXIT, deriving from the speech of Theresa May the UK government wants to negotiate a 'bold and ambitious free trade agreement with the European Union' allowing for the 'freest possible trade in goods and services', securing thus the greatest possible access to the EU's single market for the UK. While the draft agreement has legal norms related partly with acquired rights and transition periods, broader regulation of future cooperation can be done after conclusion of special international agreement which needs to be approved by all Member States.

*Ismayil Mahmudov**

IMMUNITY AS A MAIN OBSTACLE ON THE WAY OF NATIONAL PROSECUTION OF INTERNATIONAL CRIMES

Abstract

The immunity of foreign high-rank state officials - heads of state, heads of government, and ministers of foreign affairs – is one of the main problems on the way of their national prosecution for committing of grave international crimes. This article is mainly dedicated to give an overview of the provisions about immunity of foreign high-rank state officials, which are stipulated in the decisions and Charters of Nuremberg and other tribunals, Rome statute, as well as decisions of national courts. The notion and types of immunities, analysis of various approaches, as well as the practice of international and national courts in determination of exceptions to the immunity of foreign high-rank state officials in national and international jurisdiction are researched.

Annotasiya

Xarici yüksək vəzifəli dövlət işçilərinin – ölkə başçılarının, hökumət başçılarının və xarici işlər nazirlərinin immuniteti onların ağır beynəlxalq cinayətlərin törədilməsinə görə milli məhkəmələrdə mühakimə olunması yolunda əsas maneədir. Bu məqalə xarici yüksək vəzifəli dövlət işçilərinin immuniteti ilə bağlı Nürnberq Tribunalının Nizamnamə və qərarları, Roma Statutu, həmçinin milli məhkəmə qərarlarında əks olunan tənzimləmələrin nəzərdən keçirilməsinə həsr olunur. Bununla yanaşı, immunitetin anlayışı və növləri, müxtəlif yanaşmaların təhlili, həmçinin xarici yüksək vəzifəli şəxslərin beynəlxalq və milli yurisdiksiyada immunitetindən istisnaların müəyyən olunmasında beynəlxalq və milli məhkəmələrin təcrübəsi araşdırılmışdır.

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* Baku State University, 2nd year LL.M. student in Transnational Criminal Law.

Introduction

In recent decades, the problem of bringing of foreign high-rank state officials to criminal responsibility for committing of international crimes on the basis of the principle of *universal jurisdiction*¹ attracts increased attention by the international community. This is largely due to the development of the institute for the protection of human rights, a decrease in tolerance to gross and massive violations of human rights that qualified as international crimes, which are committed under the command of high-rank state officials. However, the realization of responsibility of high-rank state officials for committing of such international crimes faces many problems, since the position of these officials makes them practically inaccessible to national justice in their states, and in accordance with international law, the state and some of its senior officials are immune in foreign courts. It is worth noting that international law recognizes the ability of national courts to use universal and extraterritorial jurisdiction in order to prosecute persons who have committed international crimes, but their implementation may be complicated by the political will of states and the unwillingness to hold their officials accountable. All this determines the importance of criminal prosecution carried out by international courts and national courts, which operate on the basis of the principle of universal jurisdiction and can bring foreign high-rank state officials to justice. This is where a conflict between the principle of individual criminal responsibility for international crimes and international immunities arises.

There is no doubt that the norm on the immunity of high-rank state officials from foreign criminal jurisdiction has a customary legal nature, i.e. the main source of international law in relation to the international legal immunity of foreign high-rank state officials is an international custom, and the specificity of its legal nature is determined by the rights of the states, which arise from their sovereignty and is based on the principle of equality of states. Thus, the International Court of Justice in the case concerning an arrest warrant (Democratic Republic of the Congo v. Belgium) of April 11, 2000, noted that the norms on immunity of high-rank state officials belong to customary international law.²

Currently, issues relating to the problem of immunity are dealt by the International Law Commission (hereinafter ILC) under the theme "Immunity of State officials from foreign criminal jurisdiction", and there is still no clear answer on a number of issues. According to the conclusion made by the ILC, international law gives immunity from criminal jurisdiction in a foreign

¹ *Universal jurisdiction* allows states to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity.

² Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports, 62 (2002). Full text is available on www.icj-cij.org.

country to – the heads of states, heads of governments, and ministers of foreign affairs.³ These officials as the "central bodies of external relations" enjoy immunity in accordance with the customary international norms.⁴ However, a discussion of the topic of exceptions to the immunities showed a lack of consensus among members of the ILC. As a result, a number of issues arises: whether a state, on the basis of universal jurisdiction, is entitled to exercise its national criminal jurisdiction in relation to an accused foreign high-rank state official, which possesses an immunity? Commitment of which acts entails "overcoming" the immunity of high-rank state officials and creates opportunities for the prosecution of such officials? What are the exceptions to the immunity of foreign high-rank state officials?

I. Immunities of foreign high-rank state officials: *ratione personae* and *ratione materiae*

In the contemporary international law, *ratione personae* (personal) and *ratione materiae* (functional) immunities of foreign high-rank state officials from criminal prosecution in national courts are distinguished.

Immunity *ratione personae* (personal immunity) is "the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations".⁵ Immunity *ratione personae* is granted to a limited circle of high-rank state officials – the heads of state, heads of governments and ministers of foreign affairs of foreign states, whose freedom of action plays the most significant role for the functioning of states.⁶ It results from the position of the official, which he/she occupies in the public service and, naturally, from the state functions that the official must perform in connection with the position that he/she occupies. According to article 31 of the Vienna Convention on Diplomatic Relations, this immunity from foreign criminal jurisdiction is granted to officials, which hold senior government positions, and they are accredited as diplomatic agents in the host state.⁷ Immunity *ratione personae* applies to all actions of the official, regardless of whether they were carried out in connection with his/her official duties and regardless of whether he/she

³ Preliminary Report of the Special Rapporteur, Mr. Roman Anatolevich Kolodkin, 60th session of the ILC, 185 (2008). Full text is available on http://legal.un.org/ilc/documentation/english/a_cn4_601.pdf

⁴ Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Court*, 21 *The European Journal of International Law* 815, 822 (2011).

⁵ Second Report of the Special Rapporteur, Ms. Concepción Escobar Hernández, 65th session of the ILC, 50 (2013). Full text is available on <http://legal.un.org/docs/?path=../ilc/reports/2013/english/chp5.pdf&lang=EFSRAC>

⁶ *Supra* note 4, 821.

⁷ Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961.

held a public office at the time of committing of such actions.⁸ Due to the close relationship with the official's position in the public service, it is temporary in nature, and arises with the entry into office and stops when the person ceases to hold it.

Immunity *ratione materiae* (functional immunity) is "the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".⁹ All acting and former officials enjoy functional immunity. They possess it, since these actions are the actions of the state itself, in whose service they act. This type of immunity extends to all official actions performed on behalf of the state, in the performance of his/her official duties, it does not cover actions committed in a personal capacity, and it is not affected with a nature of being abroad: with an official visit or in a personal capacity. After the official stops to hold a public office, he/she continues to enjoy immunity *ratione materiae* in respect of acts performed in an official capacity.

Thus, the heads of state, heads of governments and ministers of foreign affairs of foreign states are protected both by immunity *ratione personae* and *ratione materiae*. This conclusion follows from the customary norms of international law, confirmed by decisions of international courts and state practice.¹⁰ It is worth noting that the important difference between *ratione personae* and *ratione materiae* is the presence of circumstances excluding their action: exclusions exist in relation to functional immunity, and are practically absent in respect of personal immunity. One of the grounds for depriving an official from functional immunity is the commitment international crimes.

II. International jurisdiction and immunity of foreign high-rank state officials

While the principle of the inapplicability of immunities of high-rank state officials operates in international jurisdiction, the issue of exclusions to their immunities in national jurisdictions is debatable. The ILC has not yet begun to consider the issue of exceptions to immunities. Therefore, in order to find an answer to the issue of exceptions to the immunities of high-rank state officials of foreign states in national jurisdiction, we will consider their prosecution for committing of international crimes by international courts, that is, in international jurisdiction.

The cornerstone in the history of the doctrine of absolute immunity of heads of state was the prosecution of the main war criminals after the World

⁸ *Supra* note 5, 52.

⁹ *Supra* note 5, 50.

¹⁰ Евдокимова О.Н., *Исключения из Иммунитетов Должностных Лиц Государства от Международной и Национальной Уголовной Юрисдикции*, 7 *Вопросы Российского и Международного Права* 272, 279 (2017).

War II. For the first time, the principle of inadmissibility of references to official position was enshrined in article 7 of the Charter of International Military Tribunal for the trial and punishment of the main war criminals on the European countries axis of 1945, as well as in the Nuremberg principles, adopted at the second session of the ILC in 1950, having the character of *jus cogens*¹¹. In article 7 of the Charter of International Military Tribunal was written that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."¹² The judgment of Nuremberg tribunal emphasized: "... the principle of international law, which under certain circumstances protects a state representative, cannot be applied to actions that are condemned as criminal under international law. The perpetrators of these actions cannot hide behind their official position to avoid punishment in a proper order."¹³ Similar provisions were included in the Statute of Tokyo tribunal and mentioned in its judgment.

So, in the framework of Nuremberg process, Admiral Karl Doenitz, who became a head of state after Hitler's death, appeared before the court, and during the Tokyo process four former prime ministers and eleven former ministers were brought to justice, although the Emperor of Japan, Hirohito, was not prosecuted.

After Nuremberg and Tokyo tribunals, the development of the proclaimed exception to the rule on the absolute immunity of state representatives was continued only in 1993 with the establishment of the international ad hoc tribunals for the former Yugoslavia and Rwanda. The Statutes of these tribunals stipulated that "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."¹⁴ Thus, the International Criminal Tribunal for the Former Yugoslavia in 2000 signed an indictment against S. Milosevic, who at that time still served as a President of the former Republic of Yugoslavia and who was accused of genocide of Bosnian Muslims in Srebrenica, crimes against humanity and war crimes. Although S. Milosevic never became the first acting head of state in history who was prosecuted for international crimes, as he died in prison just before a sentencing by court.

For the first time since the Nuremberg Tribunal, the conviction of the former head of state was passed on May 30, 2012 by a special court in Sierra Leone. In accordance with the sentence of the Special Court for Sierra Leone,

¹¹ *Jus cogens* (from Latin: compelling law; from English: peremptory norm) refers to certain fundamental, overriding principles of international law.

¹² Charter of the International Military Tribunal, article 7, August 8, 1945.

¹³ International Military Tribunal (Nuremberg), Judgment (1 October 1946), 14. Full text is available on https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf

¹⁴ Statute of the International Criminal Tribunal for the Former Yugoslavia, article 7.2, May 25, 1993.

former President of Liberia Charles Taylor was convicted of committing of international war crimes in the neighboring state of Sierra Leone during the civil war of 1991-1997 and was sentenced to 50 years imprisonment.¹⁵

In recent history, the impetus to the development of concept and exceptions to the doctrine of absolute immunity of heads of state was adoption of the Rome Statute. Article 27 of the Rome Statute, which established the International Criminal Court, directly enshrines the principle of irrelevance of *ratione materiae* (functional) and *ratione personae* (personal) immunities in the criminal prosecution in accordance with this Statute: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".¹⁶

Article 27 of the Rome Statute should be considered in conjunction with the norms, governing the interaction of states parties to the Statute and the International Criminal Court, in particular, in conjunction with part 1 of article 98 of the Statute: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."¹⁷ So, taking into account part 1 of article 98 of the Statute, the International Criminal Court is authorized to prosecute high-rank state officials of the state parties to the Rome Statute, and only if the accused is an official, endowed with international immunity by the "third state", the Court is obliged to obtain the consent of that state.

Thus, from all the above-mentioned we can deduct the following conclusion: international law has established the principle, according to which immunities do not prevent international criminal courts to hold high-rank state officials individually responsible for committing of international crimes. So, the myth of absolute protection of high-rank state officials, arising from absolute immunity, was eliminated.

¹⁵ War Criminal Charles Taylor to Serve 50-year Sentence in British Prison, (October 10, 2013). <https://www.theguardian.com/world/2013/oct/10/former-liberian-president-charles-taylor-british-prison> (last visited October 31, 2018).

¹⁶ Rome Statute of the International Criminal Court, article 27, July 17, 1998.

¹⁷ *Id.* article 98.1.

III. National jurisdiction and immunity of foreign high-rank state officials

The immunities of officials of a given state and immunities of officials of foreign states should be differentiated.

The Criminal Code of the Republic of Azerbaijan does not contain as a principle the inadmissibility of reference to official position. Moreover, it does not contain a norm, fixing the inapplicability of immunities related to the official status of a person (the head of state, head of government, etc.). However, the absence of a norm on the immunities of officials in the Criminal Code of the Republic of Azerbaijan is compensated by the provisions of the Constitution of the Republic of Azerbaijan. So, the principle of equality of all before the law and the court is enshrined in article 25 of the Constitution: "1. All are equal before the law and the court. 3. The state guarantees the equality of the rights and freedoms of everyone, regardless of race, nationality, religion, language, gender, origin, property status, *official position*, belief, membership in political parties, trade unions and other public associations."¹⁸ As we see from this provision, the official position is not the basis for the differentiation of rights and freedoms. Article 6 "The principle of equality of citizens before the law" of the Criminal Code of the Republic of Azerbaijan states that "persons who have committed crimes are equal before the law and are subject to criminal responsibility regardless of race, nationality, attitude to religion, language, gender, origin, property and *official status*, beliefs, affiliation to political parties, trade unions and other public associations, as well as other circumstances."¹⁹

Thus, the constitutional provisions relating to immunity, as well as article 6 of the Criminal Code of the Republic of Azerbaijan does not mean complete freedom and impunity of the actions of high-ranking state officials in case of committing of an international crime. The Constitution of the Republic of Azerbaijan designates persons who are immune from criminal prosecution, namely: The President (art. 106), Vice-President (art. 106¹), member of Milli Mejlis (art. 90), judges (art. 128). However, there are special procedures that regulate "lifting" of their immunities: in the case of impeachment of the President (on charges of serious crimes) - art. 107 of the Constitution of the Republic of Azerbaijan; for deputies who have immunities only in respect of crimes committed in the course of their activities as members of parliament - art. 90 of the Constitution of the Republic of Azerbaijan, etc.²⁰ Consequently, the presence of immunities under domestic law is not an obstacle to hold officials accountable: in case of need for bringing them to justice, a procedure of "lifting" of immunity can be initiated.

¹⁸ The Republic of Azerbaijan Const. art. 25 (1995).

¹⁹ Criminal Code of Republic of Azerbaijan art. 6 (1999).

²⁰ *Supra* note 18, art. 90 and 107.

The prosecution of foreign high-rank state officials for the committing of international crimes by national courts is more complex, since the criminal prosecution of foreign high-rank state officials by national courts of other states is greatly influenced by politics and not law, which makes such prosecution rare, but it does not make it impossible. Nevertheless, even abstracting from the political background of such processes, from a purely legal point of view, the criminal prosecution of foreign high-rank state officials by national courts is greatly hampered by the action of international immunities, this is confirmed by the practice of national and international courts.

The trial in Great Britain of former Chilean dictator general A. Pinochet became an example for initiating prosecution in national courts against high-rank state officials of foreign countries. Spain, where the criminal prosecution of A. Pinochet was initiated on charges of murdering Spanish citizens in Chile, issued an international arrest warrant. On the basis of this warrant in 1998, the former dictator, who was visiting London, was arrested by the London police on charges of torture of Spanish citizens and conspiracy to commit it. Preparations were commenced for the extradition of A. Pinochet to Spain on the basis of the European Convention on Extradition. When the case was examined in a number of instances, the issue of the immunity of the ex-dictator was central (including the House of Lords).²¹ A number of judges recognized that the institution of immunity of high-rank state officials does not cover grave international crimes: committing such acts contrary to *jus cogens* norms and their commitment is condemned by all countries as crime, and therefore A. Pinochet cannot be protected by international norms on immunity for acts performed in an official capacity. The final conclusion in A. Pinochet case was that the former head of state's immunity does not prevent his/her extradition, but because of A. Pinochet's illness, he was not extradited to Spain.

Despite the fact that the process in Spain did not take place and the dictator was not convicted, this case represents the very first case when the former head of state appeared before the national court of other state and the case of violation of international law was considered. Moreover, it was a first time, when it was recognized that the former head of a foreign state does not have immunity *ratione materiae* (functional immunity) in respect of acts prohibited by international law. However, the House of Lords in its decision did not clarify what happened to the traditional doctrine of the immunities of heads of state and whether it was finally replaced by the customary international norms introducing a new, more limited concept that denies immunity in case of committing of international crimes. The decision of the House of Lords in

²¹ U.K. House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (No. 3), All England Reports, 97 (1999).

A. Pinochet case was of a paramount importance for international law: it became the starting point for initiating criminal cases in other states, and all subsequent attempts to bring high-rank state officials to justice in one way or another were based on this decision. A number of proceedings were initiated in various states against former and acting heads of state on charges of committing international crimes. Thus, it is worth noting Lord Millet's opinion in A. Pinochet case: "The international community has established a crime against which immunity *ratione materiae* (functional immunity) cannot be applied. It cannot be assumed that international law established a crime as a norm, bearing the character of general international law (*jus cogens*), and at the same time provided for immunity, applicable equally to the obligation it imposes."²²

Another example is the decision of the Israeli Supreme Court in Eichmann case. The Supreme Court rejected Eichmann's reference to "state action", and the Court indicated that this argument cannot be applied to crimes under international law. The court ruled: "It is necessary to say about such atrocities that, in accordance with international law, they absolutely go beyond the "sovereign" jurisdiction of the state that ordered to commit them or approved their committing, and therefore those, who participated in such acts should bear personal responsibility and cannot hide behind the official nature of their task or mission, or the "laws" of the state on the basis of which they acted."²³ Their position can be compared to the position of a person who, having committed a crime in the interests of the corporation he/she represents, cannot hide behind the collective responsibility of the corporation for this crime. In other words, international law establishes the inadmissibility of a state sanctioning an action that violates the strict prohibitions provided for in international law, and from this follows the principle forming an essence of the concept of "international crime", according to which a person who participated in committing of such a crime must be brought individually accountable for its committing. If it were otherwise, the criminal-legal norms of international law would be a mockery. This position confirms that, in national practice, immunity *ratione materiae* (functional immunity) does not apply to international crimes.

We should agree with the position of S.V. Glotova, according to which: "The obligations of states to punish grave crimes are *erga omnes obligations*²⁴, which are a consequence of the concept of *jus cogens*."²⁵ Consequently, some

²² *Id.* 99.

²³ *Attorney - General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, 277 (1968).

²⁴ *Erga omnes* (Latin: "towards all") obligations, which apply to all states. Whereas in ordinary obligations the defaulting state bears responsibility towards particular interested state, in the breach of *erga omnes obligations*, all states have an interest and may take appropriate actions in response.

²⁵ Глотова С.В. *Юридические Предпосылки Применения Норм Международного Права в Российской Правовой Системе (на примере уголовной ответственности за преступления по*

lawyers point out that such obligations are the legal basis for concluding that the committing of international crimes constitutes an exception to immunity *ratione materiae* (functional immunity).

Nevertheless, not in all cases, former heads of state are held criminally responsible in foreign countries. Among the trials of the acting heads of state initiated in foreign states, we can mention the trial of Muammar al-Gaddafi. The trial against the Libyan leader Muammar al Gaddafi lasted from October 1999 to March 2001 in France. By that time, Muammar al Gaddafi actually remained the acting head of state, although he changed his post of president of the General People's Congress to the title of "leader of the great revolution on September 1". After the commencement of the process in the court of first instance, the prosecutor filed a complaint with the appellate court, referring to the fact that Gaddafi has immunity and, therefore, he is not subject to criminal prosecution. The Court of Appeal, in its decision of October 20, 2000, concluded that persons accused of committing international crimes do not enjoy international immunity. However, the French Supreme Court overturned this decision on the ground that no matter how serious the violation of international law was, no exceptions can be made to the immunity of the acting head of state.²⁶

Another interesting decision was adopted by the International Court of Justice. So, on April 11, 2000, a Belgian judge issued an international arrest warrant in absentia against the acting minister of foreign affairs of Congo, A. Y. Ndombasi, who was accused of committing international crimes. On October 17, 2000, Congo filed a statement with the International Court of Justice, in which it accused Belgium of violating international law, because by issuing an arrest warrant for the minister, Belgium violated the Congolese official's immunity, and wrongfully initiated the prosecution in absentia on the basis of principle of universal jurisdiction.

Considering this case, the International Court of Justice concluded that the acting minister of foreign affairs is immune from criminal prosecution by foreign courts and cannot be held criminally responsible, even though he is accused of committing international crimes such as, in this case, war crimes or crimes against humanity. In particular, the Court points out that the study of the practice of states, including national legislation and decisions of the supreme courts of some states, does not allow us to deduce the rule about the absence of international immunity for acting heads of state. In addition, from the provisions of the Charters of international courts, as well as their decisions on immunities or official status, it cannot be inferred that the immunities of high-rank state officials do not function in the case of prosecution of such

международному праву), 6 Российский Юридический Журнал 7, 15 (2015).

²⁶ France will not prosecute Gaddafi, (March 13, 2001).

<http://news.bbc.co.uk/2/hi/europe/1218245.stm> (last visited October 31, 2018).

persons by national courts. The Court also indicated that the courts of foreign states may bring such persons to criminal responsibility if the state they represent decides to deprive them from their immunity, or if the person leaves the relevant post, it can be brought to justice for "acts committed before or after being in relevant position, as well as for acts committed in a private capacity during the term of office."²⁷ In particular, the Court expressed an extremely minimalist approach towards customary norms on exceptions to immunities in international law (referring to the Nuremberg Principles, UN GA resolutions, article 4 of the Genocide Convention, NGO reports and court decisions). Thus, the International Court of Justice expressed support for the action in international law of the immunity of high-rank state officials, even in the case of accusing them of committing international crimes. Moreover, according to the Court's point of view, criminal prosecution is hampered not only by the immunity *ratione personae* (personal immunity), which is granted to acting high-rank state officials, but also by the immunity *ratione materiae* (functional immunity) of former state leaders for actions performed in an official capacity. However, a detailed study of the arguments of the parties, as well as other circumstances allows us to reasonably disagree with the opinion of the distinguished Court. So, this court decision was subjected to sharp criticism not only in the literature, but also from a number of judges of this court.

The decision of the International Court of Justice on the arrest warrant practically ignores all previous development of international criminal law, since the provision that an individual cannot "hide" behind a state constitutes the very essence of the principle of individual criminal responsibility. Historically, the assertion in international law of the principle of individual criminal responsibility for significant violations of international law took place, simultaneously, with the waiver of immunities for such violations. In fact, the committing of international crimes would not have been possible if there was no participation of high-rank state officials, since they develop plans and give orders, therefore such persons should have greater responsibility than subordinates who directly committed the acts. It would be a paradox to punish only the performers, protecting the organizers from criminal responsibility.

The Rome statute, which established the International Criminal Court to prosecute crimes against humanity, genocide, war crimes and crimes of aggression, enshrined the principle of non-application of immunities on high-rank state officials under both national and international law.²⁸ This raises the following issues: Does this norm only apply if the prosecution is carried out

²⁷ *Supra* note 2, 3.

²⁸ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 *The American Journal of International Law* 22, 35 (1999).

by the International Criminal Court, i.e. in a “vertical relationship”, or do the states parties to the Rome statute also have to or can, by adopting appropriate legislation, refer to this provision when implementing criminal prosecution at the national level, i.e. in “horizontal relations”? There is a view that according to the Rome statute, on the basis of the principle of complementarity, priority is given to national courts in prosecuting international crimes and, as a result, they are “forced” to criminalize these crimes and prosecute the perpetrators, so far that participating states can act without looking back on international immunities. Another point of view is based on the literal interpretation of article 27 and article 98 of the Statute, according to which immunities are not valid only in the framework of prosecution carried out by the International Criminal Court.²⁹ It turns out that the states parties to the Statute will not be able to bring to justice the high-rank state official suspected of committing an international crime, but then the International Criminal Court will enter the matter. Most scholars advocate the correctness of such an interpretation of the Rome statute, believing that only it complies with customary international law.

Some states have already adopted legal acts on the implementation of the Rome statute, and it can be traced how they address the issue of the effect of immunities. Some part of states directly enshrined the effect of immunity *ratione personae* (personal immunity), the other part of states enshrined the rule that international immunities should not interfere with the prosecution of international crimes. However, the majority of states decided not to address this issue in the relevant acts. Thus, the states parties to the Rome statute, which have already implemented this international treaty, have taken a restrained position regarding the waiver of immunities in the prosecution of international crimes.

Conclusion

Despite the persuasiveness and consistency of the above arguments, we must not forget that the goal of granting international immunity to high-rank state officials is not only to ensure the sovereign equality of states and to guarantee non-interference of some states in the affairs of other states, but also to ensure normal and effective interstate communication. If one imagines that the national courts of separate states could, without regard to immunity *ratione personae*, bring to justice the acting heads of state, heads of government, and also the key ministers of other states, then a situation would arise when these individuals were actually restricted in their movement and the exercise of their powers. Moreover, consensus rarely reigns in international relations: sometimes different states give the opposite assessment of the same event.

²⁹ Cassese A., Gaeta P., Jones J.R.W.D, *The Rome Statute of the International Criminal Court: A Commentary*, 1 Oxford University Press, 1871-1875 (2002).

Therefore, if we admit the lack of immunity *ratione personae* of high-rank state officials, there would be an opportunity for a clear abuse of the right to bring high-rank representatives of other states to responsibility. It follows that bringing to justice the acting high-rank state officials, at least at this stage of development of the international community, would violate the existing stability in international relations of states.³⁰ Therefore, it will be fair to recognize the effect of international immunities *ratione personae* on this category of persons even if they are accused of committing international crimes. At the same time, all of the above mentioned are in no way related to the prosecution of former high-rank state officials: the granting of international immunity to them does not meet the stated goals of this institution. It follows that the responsibility of such persons for international crimes must be imposed, despite immunity *ratione materiae*.

Thus, up to the present moment in history there have not yet been any cases in which the acting head of state or other high-rank state officials were prosecuted for international crimes by foreign courts. In international law, there is no international custom about the priority of individual responsibility of high-rank state officials for committing of international crimes over international immunities *ratione personae* in the case when the prosecution occurs at the national level. At the same time, modern international law is based on the legality of the prosecution by national courts of former high-rank state officials of foreign countries, that is, immunity *ratione materiae* has lost its force. Summarizing all the above, it can be concluded that the ratio of the principle of individual criminal responsibility and international immunities varies depending on which courts, national or international, carry out the criminal prosecution.

The current situation can be potentially changed by practice of the states that ratified the Rome statute by the way of introduction of norms, regarding non-application of immunities to the high-rank state officials in the national legislation in case of conducting criminal prosecution for international crimes. But so far this trend has not yet emerged. Nevertheless, it is impossible to talk about the complete impunity of high-rank criminals, because the principle of individual criminal responsibility prevails over international immunities in the implementation of prosecution at the international level, and at the national level the *ratione materiae* immunity of former heads of state have lost their force.

³⁰ Cassese A., *When May Senior State Officials Be Tried for International Crimes? Some Comments on Congo v. Belgium Case*, 13 *European Journal of International Law* 853, 873 (2002).

*Mikayil Shaldiyev**

GOVERNMENTS' LEGAL ACCESS METHODS TO ENCRYPTED COMMUNICATION (CRYPTOGRAPHY): COMPARATIVE ANALYSIS

Abstract

Hiding text technique was used since early stages of history. After the governments of many states authorized and protected individuals in using encryption, more and more threats began to accompany the society. The governments figure out the ways in dealing with pre-crimes and minimizing the committed crimes made through encryption in future. Some found effective ways of dealing with cryptographic communication while some found hard to tackle with the problem through the law they have made. This article interprets the levels of legal access to ciphertext in different jurisdictions.

Annotasiya

Mətn gizlətmək texnikası tarixin erkən dövrlərindən bəri istifadə edilmişdir. Hökumətlər bütün şəxslərə şifrələmədən istifadə etməyə icazə verdikdən və şifrələmələri müdafiə etdikdən sonra cəmiyyətdə daha çox təhlükə müşahidə olunmağa başlandı. Hökumətlər gələcək üçün şifrələmə ilə edilmiş cinayətlərin qarşısını almağın və sayını azaltmağın yollarını axtarmağa başladılar. Bəziləri kriptografik ünsiyyətlə mübarizə aparmağın effektiv yollarını müəyyən edə bildilər, digərləri isə ərsəyə gətirdikləri qanunlar vasitəsilə şifrəli ünsiyyətlə mübarizə aparmaqda çətinlik çəkdilər. Bu məqalədə müxtəlif yurisdiksiyalarda şifrəli mətnə hüquqi girişin səviyyələri təfsir olunub.

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* Baku State University, LL.M on Information Security Law.

Introduction

Encrypting information has begun since ancient Egyptian era. Mathematically encrypting data origins from XIX century when communication was mainly made telegraphically. During that time, it was forbidden among most European nations to encrypt data except for governments. Unidentified language was regarded as a code and bound for interrogation. Beginning from 1865 individuals were allowed to send encoded messages.¹ First encryption was used through internet for military purpose. Later on, telecommunication industries joined the networking industry to be part of this tendency.²

Hazardous encrypted communication once was less researched area by the U.S. federal government, however, cryptography was on their surveillance until now.³ As reported continuous threats occurred through encrypted communication, government reacted upon it by establishing ways of obtaining information legally. It might seem easy at first sight, nonetheless, if certain data is encrypted, it requires additional procedures of decrypting it by obtaining relevant cryptographic keys.⁴ If communication is encrypted, it is impossible to identify the sender and the receiver. Doubtlessly, this “metadata” collected by the government is significant in different kinds of operations.⁵

Federal government believes that encryption of communication will be significant problem for the law enforcement authorities in the future.⁶ Unfortunately, they have predicted it right. Due to recent bombings in Brussels, several politicians, including German and French ministers said, law enforcement authorities need access to data information of any kind to prevent forthcoming crimes.⁷ According to formal statistics, more than half of cybercrimes committed within EU, was via use of encrypted language. Around half of Member states stated an increase in use of encrypted email. Encrypting text is certainly vital for confidentiality of individuals, yet at the same time, it is an issue for law enforcement authorities to depict a criminal of any sort.⁸

¹ Kevin McArthur and Christopher Parsons, *Understanding the Lawful Access Decryption Requirement*, 7. (2012). Available at SSRN: <https://ssrn.com/abstract=2148060>

² Hilarie Orman, *Encrypted Email the History and Technology of Message Privacy*, 14 (2015).

³ Adam Young, Moti Yung, *Malicious Cryptography Exposing Cryptovirology*, xxiii. (2003).

⁴ Computer Science and Telecommunications Board National Research Council, *Cryptography's Role in Securing the Information Society*, Washington, D.C.: National Academy Press, 79 (1996).

⁵ Orman, *supra* note 2, 47.

⁶ *Supra* note 4, 87.

⁷ EU Cybersecurity Agency Slams Calls for Encryption Backdoors (2016), <https://www.euractiv.com/section/digital/news/eu-cybersecurity-agency-slams-calls-for-encryption-backdoors/> (last visited November 16, 2018).

⁸ The Internet Organised Crime Threat Assessment (IOCTA), The Hague: The EUROPOL Police Office, 50 (2015).

Notwithstanding, there are also counter-arguments against government's access to encrypted data. Technological industries prioritize that allowing government's seizure of information would damage the trust of their clients. For example, in EU data holders state that it will violate the privacy rights of EU citizens.⁹ We will tend to identify perspectives of different governments in relation to privacy rights.

I. Introducing cryptography

Definition and utilization purposes of cryptography

Cryptography is a field in technical science that teaches us principles, methods and sources of hiding information. Moreover, cryptography assists us in prevention of unauthorized utilization and secretly changing of data. An individual can cover the real content of information with different methods in hardware, computers and communication channels by cryptography.¹⁰ This sphere of science is part of cryptology which deals upon either securing or violating confidentiality with certain algorithms. Cryptanalysis is the second branch of cryptology in which its mechanism characterizes as offensive. Hackers, virus creators and other maliciously acting users violate information safety of cyber world by cryptanalysis.¹¹

More precisely, cryptography uses various techniques to turn obvious text into cipher text. In process of encrypted communication, authorized access to the encoded text is made by the help of encryption keys known to the sender and the receiver.¹² Initially, cryptography has been used in military intelligence, diplomacy and state intelligence for covering the communication. Additionally, cryptography mainly used in money transactions, cash card safety and electronic signatures. The mutual aspect of all utilizations is to prevent third parties from interfering.¹³ For example, when buying a product online, encryption ensures the transaction made by the credit card is bound to be safe.¹⁴ Best example of encrypted communication is emailing process.¹⁵

⁹ *Supra* note 7.

¹⁰ Vəli Qasımov, *İnformasiya təhlükəsizliyinin əsasları*, 132-133 (2009).

¹¹ *Malicious Cryptography, Part One* (2006), <https://www.symantec.com/connect/articles/malicious-cryptography-part-one> (last visited November 4, 2018).

¹² William Stallings, *Cryptography and Network Security Principles and Practices*, 32 (4th ed. 2005).

¹³ *Uses of Cryptography*, <https://www.digit.in/technology-guides/fasttrack-to-cryptography/uses-of-cryptography.html> (last visited November 4, 2018).

¹⁴ McArthur and Parsons, *supra* note 1, 2.

¹⁵ Orman, *supra* note 2, 3.

II. Practices in various jurisdictions

A. EU perspective

Following the recent Paris and Brussels attacks head officials of certain Member States raised their concerns prior to the issue on personal data. Precisely, for safety reasons, law enforcement agencies should have legal privileges for obtaining information in order to prevent potential human disasters.¹⁶ Europol ex-director Rob Wainwright said: “Encrypted communication via the internet and smartphones are a part of the problems that investigators face.” He emphasizes potential dangers of encrypted text that is found in cell phones or other electronic gadgets of terrorists and other type of criminals, if not interfered by investigating agencies.¹⁷

Generally speaking, government access to encrypted communication is regulated on EU Member State level. EU approaches to the case with the soft law which is the 2001 non-binding resolution on cooperating with telecommunication firms in assistance of investigating encrypted data. The reason is that EU agencies and Member States have not reached mutual consent on accessing hidden private information. The argument goes about whether prioritizing privacy rights comparing to society safety rights would be reasonable, if they contradict each other.¹⁸ In the resolution, it gives right to a Member State enforcement agency to request a telecommunication company to provide certain encrypted communication in a given time period.¹⁹ Moreover, it authorizes a state official to obtain subject’s identity, service number or other distinctive identifier by the help of a telecommunication firm.²⁰

According to treaty on the functioning of the European Union, there are 2 conditions in legally solving cases – exclusive and shared. Exclusive is when authority is granted only to EU in dealing with certain matter, whereas shared competence is either EU or an EU Member State has right to mutually bind acts.²¹ Information security falls upon shared competence.²² If we consider there is no single consensus among EU executive departments, some Member States will use this opportunity to fulfil the security gap.²³

¹⁶ Government Access to Encrypted Communications (2016),

<https://www.loc.gov/law/help/encrypted-communications/index.php> (last visited Nov. 11, 2018).

¹⁷ How Europe Can Get Encryption Right (2016), <https://www.politico.eu/article/how-europe-can-get-encryption-right-data-protection-privacy-counter-terrorism-technology/> (last visited Nov. 4, 2018).

¹⁸ *Supra* note 16.

¹⁹ Council Resolution on “Law enforcement operational needs with respect to public telecommunication networks and services”, 6-9 (2001).

²⁰ *Supra* note 19, 12.

²¹ “Consolidated Version of the Treaty on the Functioning of the European Union”, Brussels: Eur-lex Official Journal C 326, art. 2, 2012.

²² *Id.* art. 4.2.

²³ *Supra* note 16.

There is no any binding resolution on EU level that requires telecommunication firms assist in giving out encryption keys for ciphered communication.

B. The UK perspective

The UK has abrupt legislature for obtaining encrypted information. Investigatory powers bill promised for law enforcement agencies right to have an access to encrypted data by forcing entities.²⁴ If terms are fulfilled, Regulation of Investigatory Powers Act 2000 gives permission to people with statutory power to have an access to encrypted communication by providing a notice to a person. The purposes are mainly characterized as preventing or detecting crime and the interests of the economic well-being of the UK.²⁵ If person refuses to obey, he becomes guilty of an offence such as imprisonment.²⁶ Investigatory Powers Act 2016 transmits even more power to law enforcement agencies. The Secretary of State issues warrants for obtaining encrypted information from an individual.²⁷ The reasons of law enforcement agencies and intelligence services to appeal to get a warrant are: (i) national security interest, (ii) detecting or preventing serious crime, (iii) interests of the economic well-being of the UK.²⁸ Judicial Commissioner also has an authority of obtaining information from a telecommunication operator by an approved notice.²⁹ If cipher text owner domiciled in Scotland, then Scottish Ministers has a right to issue a warrant for an official.³⁰

Obligation for assistance by operators is mentioned in clause 128 of the Act 2016.³¹ Foreign interference can also be made by the request of the head of an intelligence service to the Secretary of State.³²

III. Local practice

Azerbaijani perspective

In Azerbaijan, law enforcement agencies have extensive authority in accessing encrypted text. They can either have permission to obtain information by a court order or conditionally obtain themselves.³³ Normally, the process of acquisition begins with interrogator's appeal to a court for a permission order. Government official, who carries out an investigation, can annex data by his order only if he completes his task, he presents his order to

²⁴ *Supra* note 7.

²⁵ Regulation of Investigatory Powers Act, Sec 49. (2000).

²⁶ *Id.* Sec. 53.

²⁷ Investigatory Powers Act, Sec 20. (2016).

²⁸ *Id.* Sec.19.

²⁹ *Id.* Sec. 53.

³⁰ *Id.* Sec. 21.

³¹ *Id.* Sec. 128.

³² *Id.* Sec.138.

³³ Criminal Procedure Code of Azerbaijan Republic, art. 445.2 (2000).

a supervisory court and procurator no later than 48 hours.³⁴ Moreover, the content of a crime case should concern either specifically a dangerous national security offense or a grave crime against a person.³⁵ Furthermore, officials who carry out the operation should be characterized as staff of the procurator office dealing against corruption.³⁶ These also include National security and intelligence agencies of Azerbaijan.³⁷

Telecommunication companies have obligation to assist the government officials on supplying surveyed encrypted communication.³⁸ Moreover, they need to keep the given information confidential, especially when providing to national security and intelligence agencies.³⁹ It is considered as a crime, if telecommunication companies create obstacles to interrogators.⁴⁰ Sanctions include a penalty equivalent between 600 and 3000 dollars or up to 3 years of job disposal or up to 1 year of imprisonment.⁴¹ Obstacles consist of refusing to obey an order, ignoring to provide technical condition such are equipment and devices for obtaining data of any sort.⁴²

Despite the telecommunication companies have obligations on providing information, there is no obvious provision in legislation of Azerbaijan on assisting the government in decrypting data. The phrase “provide necessary condition” can enhance debates between telecommunication companies and law enforcement agencies.⁴³

Conclusion

As described in the article, encryption can be used by any person in nowadays. However, allowing use of encryption and providing its protection have led to threats and factual disasters in the world. Therefore, EU confirms that the matter should be regulated in the Member State level.⁴⁴ Due to different approaches in various countries on accessing encrypted data, unions like EU could not come up with binding solution. If we analyze the whole text, we determine that the governments mainly get authorized access to ciphertext in purpose of preventing dangers against national security and interrogating grave crimes against a person. Investigatory Powers Act 2016 gets criticized by many scholars, because it eases law enforcement agencies’ access to encrypted data and even allows them to hack computers by

³⁴ *Id.* art. 445.

³⁵ Detective-Search Activity Act of the Republic of Azerbaijan, art. 10 (1999).

³⁶ *Supra* note 32, art. 5.

³⁷ Law on Intelligence and Counter-Intelligence, art. 8 (2004).

³⁸ Law on Telecommunication of Republic of Azerbaijan, art. 33 (2005).

³⁹ *Supra* note 34, art 17.

⁴⁰ Criminal Code of Azerbaijan Republic, art. 233-3. (1999)

⁴¹ *Ibid.*

⁴² Firudin Samandarov, Commentary of Criminal Code of Republic of Azerbaijan, 627-628 (2009).

⁴³ *Supra* note 37.

⁴⁴ *Supra* note 21.

themselves.⁴⁵ Therefore, it weakens the trust between a customer and a telecommunication entity. On the other hand, it blocks forthcoming national and international terrorist attacks beforehand. In Azerbaijan, during an investigation process, encrypted data is obtained normally by an interrogator's appeal to a court for an order of obtaining. Despite this, Azerbaijan also hands wide range of rights to the government officials on accessing data, nevertheless, there is no obvious article or rule in legislation of Azerbaijan that obligates a telecommunication company to assist a law enforcement agency official on decrypting encrypted communication. Thus, we propose an obvious article in the Criminal code of Azerbaijan stipulating:

“noncooperation of a telecommunication company on decrypting data in means of averting dangers against national security and preventing serious crimes.”

⁴⁵ The Snooper's Charter Shows the Government's Total Contempt for Privacy (2016), <https://www.theguardian.com/commentisfree/2016/mar/01/proposed-snoopers-charter-shows-governments-contempt-for-privacy> (last visited December 1, 2018).

Səbinə Fərzəliyeva*

HƏKİMLƏRİN PEŞƏ MƏSULİYYƏTİNİN İCBARİ SİĞORTASI. DÜNYA TƏCRÜBƏSİ, MÖVCUD QANUNVERİCİLİKDƏ BOŞLUQLAR VƏ BUNUNLA BAĞLI TƏKLİFLƏR: MÜALİCƏ MÜQAVİLƏSİ İNSTİTUTUNA XÜSUSİ BAXIŞ

Annotasiya

Son dövrlərdə həkimlərin peşə məsuliyyətinin icbari sığortasının tətbiq edilməsinin həm həkimlər, həm də pasiyentlər üçün əhəmiyyətli olması aktualıq qazanmışdır. Burada məqsəd bir tərəfdən həkim səhvi zamanı pasiyentlərin maddi baxımdan kompensasiya edilməsi, digər tərəfdən isə həkimlərin reputasiya və peşəkar nüfuzunun təmin edilməsindən ibarətdir. Məqalədə əsas olaraq bu sığorta növünün vacibliyi, bu istiqamətdə dünya ölkələrinin təcrübəsi, ölkə qanunvericiliyinin cari vəziyyəti araşdırılmış və qanunvericiliyə əlavə və dəyişikliklər təklif edilmişdir.

Abstract

In recent years the importance of the introduction of compulsory insurance of doctors' occupational liability has raised both for doctors and patients. The goal here is to compensate the patients materially in the event of medical malpractice and, on the other hand, to ensure the reputation and professional image of doctors. In this article the author studies the importance of this type of insurance, the experience of foreign countries in this area, the current situation of the country's legislation and suggests amendments and changes to the existing legislation.

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* LL.B (Bakı), LL.M (Bakı)/(Würzburg), LL.M (Saarbrücken). Hüquq məsləhətçisi/Layihə koordinatorunun hüquq məsələləri üzrə köməkçisi – Azərbaycan Respublikası Ədliyyə Nazirliyi ilə Dünya Bankının Mütərəqqi Ədliyyə Xidmətləri və Müasir Məhkəmə İnfrastrukturunu Layihəsi.

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Giriş

Pasiyentlər (xəstələr) tərəfindən bir çox hallarda neqativ reaksiya ilə qarşılansa da, bir məqamı unutmamaq lazımdır: həkimlər də insandır və təbii olaraq səhvə yol verə bilərlər. Təəssüf ki, həkim səhvi nəticəsində zərərin yaranmasına tez-tez rast gəlinir və bir çox hallarda bu zərərin ödənilməsi üçün məbləğ kifayət qədər yüksək olur. Həkimlərin peşə fəaliyyətini həyata keçirməsi ilə əlaqədar maddi baxımdan yüksək məbləğdə zərəmə məruz qalması və professional imicinə xələl gəlməsinin qarşısının alınması, həmçinin yaranan bu məsuliyyətdən irəli gələrək öz fəaliyyətləri çərçivəsində səhvə yol vermə və ya diqqətsizlik hallarının minimuma endirilməsi və həkim-pasiyent münasibətlərinin daha yaxşı zəmində formalaşması üçün həkimlərin peşə məsuliyyətinin icbari sığortasına ehtiyac var.

I. Həkimlərin peşə məsuliyyətinin icbari sığortası ilə əlaqədar Almaniya və Türkiyə təcrübəsi

A. Almaniya modeli

Almaniyada həkimlərin peşə məsuliyyətinin sığortası tibb işçiləri üçün standart təminat sayılır. Pasiyentlər həkimin peşə fəaliyyəti ilə əlaqədar şəxsə (şəxsin həyatına və sağlamlığına), əşyalara (məsələn, göz müayinəsindən öncə həkim xəstədən eynəyi çıxarmağı xahiş edir və ehtiyatsızlıqdan həkim stolun üstünə qoyulmuş eynəyi sındırır. Bu halda xəstənin əşyası ilə bağlı maddi zərəri sığorta hesabına qarşılır) və mülkiyyətə (Almaniyada qeyd edilən sözə bizim dildə mülkiyyət, əmlak sözü uyğun gəlir, amma daha çox şəxsin malik olduğu yəni sonradan vərəsələrinə də keçə bilən bütün əmlakı nəzərdə tutulur,) zərər vurulması ilə bağlı iddia tələblərini irəli sürdükdə bu sığorta növü "işə düşür". Belə ki, sığorta şirkəti sığortalanan həkimin peşə fəaliyyəti ilə bağlı halları araşdırır, əsassız iddiaları rədd edir və əsaslı iddialar olduqda zərərin əvəzinin qarşılınmasını təmin edir və bununla da həkimi baş vermiş halların ağır əmlak itkisinə gətirib çıxaran maliyyə nəticələrindən xilas edir.¹

Həkimlərin peşə məsuliyyətinin sığortası qeyd edilən bu halları əhatə edir:²

¹ Burkhard Madea, Medizinschadensfälle und Patientensicherheit: Häufigkeit - Begutachtung – Prophylaxe, 39. (2007).

² Yəni orada.

həkimin peşə fəaliyyəti ilə bağlı şəxsə, əşyaya və əmlaka vurulan zərərlə bağlı halların sığortalanması; xidmət yerindən kənar fəaliyyətin, məsələn, ilk təcili tibbi yardım və qohumlar və tanışlar ətrafında müalicə kimi hallarla bağlı risklərinin sığortalanması; sərbəst peşə fəaliyyətinin sığortalanması; öz klinikası olan həkimlərin peşə məsuliyyətinin sığortalanması; təhsil müddətində icazə verilməyən fəaliyyətin sığortalanması.

Almaniyada tibb təhsili alan tələbələr də praktika müddətində xəstələrlə birbaşa təmasda olurlar və həkimin göstərişi və icazəsi altında xəstələrin müayinə və müalicəsində iştirak edirlər. Məsələn, tələbə körpə uşağa damcı şəklində verilməli olan dərmanı yanlışlıqla iynə vasitəsi ilə inyeksiya edir və nəticədə körpə ölür. Bu halda digər məsuliyyət növləri ilə yanaşı tibb tələbəsinin peşə fəaliyyətinin icrası zamanı vurduğu ziyanın ödənilməsi peşə məsuliyyətinin sığortası çərçivəsində həyata keçirilir.³ Bir qayda olaraq tibb işçiləri artıq tibb təhsili müddətindən başlayaraq və sonradan təyin olunmuş həkim kimi xəstəxanalar vasitəsilə peşə fəaliyyətinin sığortasına sahib olurlar. Xəstəxanalarda işləyən həkimlərin, sərbəst işləyən həkimlərin və tibb tələbələrinin peşə fəaliyyətinin sığortası fərqləndirilir.

Almaniyada həkimin peşə məsuliyyəti müalicə müqaviləsinə əsaslanır. Bu müqaviləyə əsasən, həkim xəstəni peşəkar müalicə etməyə görə məsuliyyət daşıyır, amma bu məsuliyyətə müalicənin konkret uğurla nəticələnməsi aid deyil. Həkimin peşəkar müalicəsinə müxtəlif vəzifələr daxildir: izah etmə və məlumat vermə, müalicə etmə və sənədləşdirmə və s. kimi vəzifələri misal çəkmək olar. Bu vəzifələrin həyata keçirilməsi zamanı həkim səhvə yol verərsə və bunun nəticəsində xəstəyə ziyan dəyərsə, bu halda xəstənin zərərin əvəzinin ödənilməsinə tələb etmək hüququ yaranır. Həkim xəstəyə dəymiş zərərin əvəzini ödəməlidir, yəni o öz səhvə görə məsuliyyət daşıyır. Həkimin müqavilədən irəli gələn məsuliyyəti ilə yanaşı delikt məsuliyyəti də mövcuddur. Həkimin müqavilədən irəli gələn məsuliyyətinin hüquqi əsasları Almaniya Mülki Məcəlləsinin (BGB) 280-ci və sonrakı maddələri, 630a-cı və sonrakı maddələri, delikt məsuliyyəti üçün 823-cü və sonrakı maddələridir.

Almaniyada mövcud olan 16 torpağın (Land) hər birində Həkimlər Kollegiyası tərəfindən qəbul edilən "Həkimlərin nümunəvi peşə Qaydaları"nın 21-ci maddəsində⁴ peşə məsuliyyətinin sığortalanması icbari öhdəlik kimi müəyyən edilmişdir. 2013-cü ildə "Pasiyentlər haqqında" Federal Qanunun⁵ qəbul edilməsi ilə, Federasiyanın qanunverici orqanı da bu məsələyə dair öz mövqeyini bildirdi və peşə məsuliyyətinin sığortalanması öhdəliyi birbaşa qanunla müəyyən edildi.⁶ Bu o deməkdir ki, hal-hazırda

³ Berufshaftpflichtversicherung für Ärzte – ganz verständlich (2017),

<https://www.praktischerarzt.de/blog/berufshaftpflicht-arzt/> (son baxış 23 Aprel 2018).

⁴ (Muster-)Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte – MBO-Ä 1997 – in der Fassung des Beschlusses des 118. Deutschen Ärztetages 2015 in Frankfurt am Main (2015).

⁵ Gesetz zur Verbesserung der Rechte von Patientinnen und Patienten vom 20. Februar 2013 (2013).

⁶ Yenə orada, maddə 4c.

Almaniyada peşə məsuliyyətini sığortalamayan heç bir həkim fəaliyyət göstərə bilməz. Qanunun bu göstərişinin pozulması müxtəlif sanksiya və ya məcburetmə tədbirlərinin tətbiqinə, məsələn, probasiya (approbation) mərhələsindən məhrum etməyə gətirib çıxara bilər. Amma hətta həkimlərinin peşə məsuliyyətinin sığortası barədə qanunda birbaşa göstəriş olmasa idi belə, bu sığortanın olmaması ilk növbədə həkimlərin özləri üçün maliyyə baxımından əlverişsiz olardı. Belə ki, sığorta olmaması halında yaranmış zərərlə bağlı məsuliyyəti tibb müəssisələri deyil, həkim şəxsən özü daşıyır.

Həkimin peşə məsuliyyətinin sığortası ilə yanaşı tibb müəssisəsinin fəaliyyətindən irəli gələn zərərlə bağlı yaranan məsuliyyətinin sığortası da fərqləndirilir.⁷ Bu sığorta növləri biri digərini əvəz etmir və ya biri digəri ilə tam əhatə olunmur, bu baxımdan hər iki sığorta növünün eyni zamanda mövcud olması tələb edilir. Qeyd edilən sığorta növlərinin fərqləndirilməsi üçün bir misal: Xəstə A kəskin bel ağrıları ilə müstəqil fəaliyyət göstərən həkim B-nin klinikasına gəlir. Xəstə yeni silinmiş döşəmədə sürüşdüyündən yığılır və ayağı sınır. Həkim B gərgin iş rejimi səbəbindən “Ehtiyatlı olun, sürüşmə təhlükəsi” lövhəsinin qoyulmasını tapşırmağı unutmuşdur. Burada xəstə A-nın həkim B-yə qarşı zərərin əvəzinin ödənilməsinə tələb etmək hüququ var. Həkim xəstənin xəsarət almasına görə məsuliyyət daşıyır. Amma bu məsuliyyət həkimin peşə məsuliyyətinin sığortası ilə əhatə olunmur. Çünki həkimin peşə məsuliyyətinin sığortası yalnız həkimin öz peşə fəaliyyətinin həyata keçirilməsi ilə birbaşa əlaqəli halları əhatə edir. Qeyd edilən bu misalda xəstə döşəmədə yığıldığı üçün xəsarət aldığından bununla bağlı zərər tibb müəssisəsinin fəaliyyətindən irəli gələn zərərlə bağlı yaranan məsuliyyətin sığortası ilə əhatə olunur. Bu sığorta növü ilə həm də həmin klinikada işləyən həkim olmayan işçilərin fəaliyyətindən irəli gələn zərərlə bağlı yaranan hallar əhatə olunur.⁸

Bir məqamı da qeyd etmək lazımdır ki, özəl klinika sahibi olan həkimlər üçün peşə məsuliyyətinin sığortası ilə yanaşı tibb müəssisəsinin fəaliyyətindən irəli gələn zərərlə bağlı yaranan məsuliyyətin sığortası da lazımdır.⁹ Öz klinikası olmayan, dövlət xəstəxanalarında və ya tibb universitetləri nəzdindəki klinikalarda işləyən həkimlərin bu sığorta növünə ehtiyacı yoxdur, onlar yalnız öz peşə məsuliyyətinin sığortasına sahib olmalıdırlar. Bir qayda olaraq, dövlət xəstəxanalarında və ya tibb universitetləri nəzdindəki klinikalarda peşə məsuliyyətinin sığortası müqaviləsi mövcud olur və orada çalışan həkimlər bu müqaviləyə qoşulurlar. Belə həkimlər əlavə olaraq xidmət yerindən kənar fəaliyyətdən irəli gələn məsuliyyətin sığortasına da sahib olurlar. Əgər həkimin işlədiyi xəstəxana və

⁷ Hermann Fenger, Ina Holznagel, Bettina Neuroth und Stefan Gesenhues, Schadensmanagement für Ärzte: Juristische Tipps für den Ernstfall, 11. (2009).

⁸ Grundlagen: Berufshaftpflichtversicherung für Ärzte (2017), <https://www.eundp.net/blog/grundlagen-berufshaftpflichtversicherung-fuer-aerzte> (son baxış 23 Aprel 2018).

⁹ Georg Kirschner, Arzt und Praxisabgabe: Planen, entscheiden, durchführen, 99. (2013).

ya universitet klinikası tərəfindən bağlanan sığorta müqaviləsi bütün halları əhatə etmirsə, həkim özü tam əhatəli peşə məsuliyyətinin sığortası müqaviləsini bağlamalıdır. Çünki müalicə müqaviləsi¹⁰ xəstə ilə xəstəxana arasında bağlanır və xəstəxana sonradan həkimə qarşı reqres hüququna malik olur. Əgər həkim tələb olunan diqqətliliyi xüsusilə kobud şəkildə pozmuşdursa, xəstəxananın həkimə qarşı reqres hüququ tam həcmdə yaranır (kobud səhlənkarlıq). Orta diqqətsizlikdə reqres tələbinin həcmi hər bir konkret hal üçün müəyyən edilir. Yüngül diqqətsizlikdə xəstəxananın həkimə qarşı reqres hüququ yaranmır. Vəzifəsi olan həkimlərə qarşı reqres hüququ yalnız kobud diqqətsizlik halında yaranır.¹¹

Almaniyada həkimlər təqaüdə çıxdıqda da peşə məsuliyyətinin sığortasının qüvvədə olma müddəti uzadılmalıdır. Bir qayda olaraq, bu minimum 3 il müəyyən edilmişdir, müxtəlif hallardan asılı olaraq uzadıla bilər. Bu hal xəstələrə imkan verir ki, həkim təqaüdə çıxmış olsa belə, zərərin əvəzinin ödənilməsi üçün tələb irəli sürsünlər. Bundan başqa Almaniya qanunvericiliyinə əsasən, təqaüd müddətində peşə məsuliyyətinin sığortası daha ucuz qiymətə təklif olunur və bütün sığorta şirkətləri tərəfindən fiziki şəxsin məsuliyyəti sığortası ilə birləşdirmək imkanı mövcuddur.

Yuxarıda qeyd edildiyi kimi, həkimin peşə məsuliyyətinin sığortası ilə onun yalnız birbaşa peşə fəaliyyətindən irəli gələn hallar əhatə olunur. Burada həmçinin peşə fəaliyyətinin istiqaməti də əhəmiyyət kəsb edir. Belə ki, Almaniyada həkimlər yalnız qeyd edilən konkret fəaliyyət istiqamətləri üzrə fəaliyyət göstərdiyi üçün (məsələn, göz həkimi və göz cərrahı fərqləndirilməlidir, bir qayda olaraq, bir həkim hər iki istiqamət üzrə fəaliyyət göstərmir) spesifik istiqamətdən kənara çıxan fəaliyyətlərinin də sığorta ilə əhatə olunması öncədən sığorta şirkəti ilə müzakirə edilməli və bu barədə bənd sığorta müqaviləsində öz əksini tapmalıdır.

Peşə məsuliyyətinin sığortasının həcmi "Sığorta Müqaviləsi haqqında"¹² Qanuna, "Məsuliyyətin Sığortasının Ümumi Şərtləri" nə¹³ və "Həkimlərin Məsuliyyətinin Sığortasının Xüsusi Şərtləri" nə əsaslanır. Sığorta şəxsə və əmlaka zərər vurulması ilə bağlı halları əhatə edir. Şəxsə vurulan zərəyə ölüm və xəsarət halları, sağlamlığa zərər vurulması aiddir. Əmlak zərəri əşyaların istənilən zədələnməsi və ya məhv edilməsi hallarını əhatə edir.¹⁴ Bundan başqa vərəsəlik üzrə keçən əmlaka dəyən zərərlə bağlı halların sığortalanması da mümkündür. Məsələn, uğurlu nəticələnməyən sterilizasiya nəticəsində

¹⁰ Medizinrecht von A bis Z: Behandlungsvertrag (2011), https://www.info-krankenhausrecht.de/Rechtsanwalt_Arztrecht_Medizinrecht_Behandlungsvertrag_Behandlungsvertr_g_01.html (son baxış 23 Aprel 2018).

¹¹ Yenə orada.

¹² Gesetz über den Versicherungsvertrag (Versicherungsvertragsgesetz-VVG), 2007.

¹³ Allgemeine Versicherungsbedingungen für die Haftpflichtversicherung (AHB) Musterbedingungen des GDV, 2007.

¹⁴ Medizinrecht von A bis Z: Behandlungsvertrag (2013), https://www.info-krankenhausrecht.de/Rechtsanwalt_Arztrecht_Medizinrecht_Berufshaftpflichtversicherung_Berufshaftplichtversicherung_01.html (son baxış 23 Aprel 2018).

doğulan uşaq tərəfindən qaldırılan qayğıya qalma/uşağı saxlama və tərbiyə etmə tələbi/iddiası ilə bağlı xərclərin ödənilməsi sığorta hesabına həyata keçirilir. Sığorta həm də həkimə qarşı üçüncü şəxslər iddia qaldırdıqda yaranan vəkil və məhkəmə xərclərini də əhatə edir. Peşə məsuliyyətinin sığortası sığortalanan həkimin fəaliyyətindən irəli gələn hallarla yanaşı, onun müvəqqəti təmsilçisini (nümayəndəsini), assistent həkimlərini və həkim olmayan digər personalı əhatə edir.¹⁵ Digər həkimlərin məsuliyyəti isə aid edilmir.

Digər önəmli bir məqam reseptlərlə bağlı məhdudiyyətlərdir. Burada ilk növbədə, Off Label Use adlandırılan hal fərqləndirilir. Off Label Use halı icazə verilməyən dərmanların yazılması hallarını nəzərdə tutur. Lakin belə hallar kifayət qədər məhdud şərtlər altında sığortalana bilər. Yəni bu halda zərərin sığorta tərəfindən ödənilməsi üçün 3 əsas şərt mövcud olmalıdır¹⁶: müalicə edilən xəstəlik həyat üçün təhlükəli olmalıdır; müvafiq alternativ müalicə metodları qadağan olunmalıdır; və həmin istiqamətdən olan həkimlər dairəsində xəstəliyin dərman vasitəsilə müalicəsinin pozitiv təsir göstərəcəyi barədə vahid fikir olmalıdır.

Həkimin peşə məsuliyyətinin sığortası ölkə daxilində baş verən halları əhatə edir. Xaricdə baş verən hallar bir şərtlə əhatə edilir ki, müalicənin əvvəli ölkə daxilində başlamışdır və ya əksinə ilk təcili tibbi yardım xaricdə olsa da, müalicə sonradan ölkə daxilində davam etmişdir.¹⁷ Bəzən peşə məsuliyyətinin sığortasına beynəlxalq miqyaslı fəlakətlər zamanı yaranan zərərin qarşılınması da aid olur. Həkimin peşə məsuliyyətinin sığortasına onun peşə istiqamətindən irəli gələn və onun təklif etdiyi xidmət ilə əlaqədar olan bütün zərər vurma halları aid olur. Burada həkimin təcili yardım əməliyyatlarında və ya doğuşda köməkçi qüvvə kimi işləməsinin önəmi yoxdur. Rentgen və lazer həkimi də bura daxildir.

B. Türkiyə modeli

Türkiyədə də həkimlərin peşə məsuliyyətinin icbari sığortası nəzərdə tutulmuşdur. Belə ki, 219 sayılı Qanunun Ek 12-ci maddəsi çərçivəsində “Tibbi səhv tətbiq etməklə bağlı icbari əmlak məsuliyyəti sığortasının ümumi şərtləri” (Tibbi Kötü Uygulamaya İlişkin Zorunlu Mali Sorumluluk Sigortası Genel Şartları)¹⁸ 21.07.2010-cu il tarixində 7648 sayılı qanunvericilik toplusunda (Resmi Gazete) dərc edilmişdir. Türkiyədə həkimlərin peşə məsuliyyətinin icbari sığortası bir çox xüsusiyyətlərinə görə Almaniyada

¹⁵ Yuxarıda istinad 12; 13; 14.

¹⁶ Medizinrecht von A bis Z: Arzneimittelzulassung (2012), https://www.info-krankenhausrecht.de/Rechtsanwalt_Arztrecht_Medizinrecht_Arzneimittelzulassung.html (son baxış 26 Aprel 2018).

¹⁷ Yuxarıda istinad 9.

¹⁸ Tibbi Kötü Uygulamaya İlişkin Zorunlu Mali Sorumluluk Sigortası Genel Şartları, Resmi Gazete Tarihi: 21.07.2010 (2016), <https://www.tsb.org.tr/tibbi-kotu-uygulamaya-iliskin-zorunlu-mali-sorumluluk-sigortasi.aspx?pageID=521> (son baxış 23 Aprel 2018).

mövcud olan sığorta ilə oxşardır. Bu ümumi şərtlərə əsasən, sərbəst olaraq çalışan və ya dövlət və ya özəl tibb müəssisələrində işləyən həkimlər, diş həkimləri, uzmanlık dərəcəsini əldə edən uzmanlar peşə fəaliyyətini həyata keçirərkən sığorta müqaviləsindən əvvəlki 10 il müddətində və ya sığorta müqaviləsinin qüvvədə olduğu müddətdə peşə fəaliyyətinin həyata keçirilməsi ilə bağlı vurduğu zərərlərə görə ona qarşı qaldırılan təzminat – zərərin əvəzinin ödənilməsi tələbləri, bu tələblərlə bağlı faizlər, məhkəmə xərcləri və digər xərclərin sığorta müqaviləsində nəzərdə tutulan həcmdə və limitlər daxilində sığorta hesabına ödənilməsi barədə sığorta şirkəti ilə razılığa gəlir.

Eynilə Almaniyada olduğu kimi Türkiyədə də həkimin peşə fəaliyyətinə son verdikdən sonrakı dövr üçün sığorta müqaviləsi ilə əhatə olunan minimum müddət müəyyən edilmişdir. Yəni həkimin son sığorta müqaviləsinin qüvvədə olduğu müddətdə həyata keçirdiyi fəaliyyətlə bağlı sığorta müqaviləsinin bitdiyi tarixdən sonra 2 il müddətində vurulan zərərlərlə bağlı tələblərin qarşılınması da sığorta müqaviləsi ilə əhatə edilir.¹⁹

Yenə Almaniyada olduğu kimi sığorta həm də həkimə qarşı üçüncü şəxslər iddia qaldırıqda yaranan vəkil və məhkəmə xərclərini də əhatə edir. Digər mühüm bir ortaq cəhət məhz Türkiyədə də həkimlərin peşə məsuliyyətinin icbari sığortasının onların bütün peşə fəaliyyətini əhatə etməsidir. Burada sığorta müqaviləsində həkimin peşə fəaliyyətinin həyata keçirildiyi yerin və peşə fəaliyyətinin istiqamətinin tam qeyd edilməməsi əhəmiyyət kəsb etmir.

Qeyd edilən Ümumi Şərtlərə müvafiq olaraq, dövlət xəstəxanaları dedikdə bütün dövlət tibb müəssisələri başa düşülür və onlar üçün bütün dövlət tibb müəssisələrini əhatə edən vahid sığorta müqaviləsi tərtib olunur. Belə tibb müəssisələrində işləyən həkimlər ezamiyyət, müvəqqəti başqa yerə təyin edilmə və s. səbəblərdən həmin xəstəxanada işləməsələr belə, onların fəaliyyəti də müqavilə ilə əhatə olunur və onlardan əlavə olaraq sığorta haqqı tələb edilmir. Sığorta müqaviləsi həmçinin həkimin peşə fəaliyyətini həyata keçirdiyi yer və istiqaməti ilə yaxın əlaqəli olan yer və istiqamətlə bağlı fəaliyyətdən irəli gələn zərərlərin qarşılınmasını da əhatə edir.

Sığorta müqaviləsinin qüvvədə olduğu coğrafi ərazi dəqiq olaraq müəyyən edilmişdir: Türkiyə Respublikası sərhədləri daxilində baş verən halları əhatə edir. Sığorta müqaviləsi qanunvericilik və müvafiq etika kodeksləri ilə müəyyən edilən peşə fəaliyyətindən kənar digər fəaliyyətlərdən irəli gələn zərərlərin qarşılınmasını əhatə etmir. Həmçinin sığorta olunan həkimin işlədiyi tibb müəssisəsindən kənar fəaliyyətindən yaranan zərərlər də qarşılınmır, bir şərtlə ki, həkim bu fəaliyyəti insanlıq borcunun yerinə yetirilməsi məqsədilə etməmiş olsun. İnzibati və məhkəmə qaydasında təyin edilən cərimələr, o cümlədən birbaşa peşə fəaliyyətiylə bağlı sınaqlar istisna

¹⁹ Yuxarıda istinad 18.

olmaqla, həyata keçirilən digər sınaqlardan irəli gələn zərərlərin qarşılınması da sığorta müqaviləsi ilə əhatə olunmur.

Sığorta şirkətinin sığorta olunan qarşısında öhdəliyi tam və ya qismən başa çatmış olsa da, zərərçəkmişə münasibətdə öhdəliyi icbari sığorta miqdarına qədər davam edir. Sığorta münasibətlərinin sona çatması zərərçəkmişə münasibətdə sığorta müqaviləsinin başa çatması və ya çatacağı barədə rəsmi qurumlara məlumat verildikdən 1 ay sonra qüvvəyə malikdir.²⁰ Zərər sosial müdafiə qurumları tərəfindən qarşılandığı ölçüdə sığorta şirkətinin məsuliyyəti sona çatır.

Sığorta şirkəti ödədiyi təzminata müvafiq olaraq hüquqi baxımdan sığorta olunanın yerinə keçir. Zərərçəkmiş şəxs məruz qaldığı zərərin sığorta məbləğinə uyğun hissəsini sığorta müqaviləsi üçün nəzərdə tutulan müddət çərçivəsində birbaşa sığorta şirkətindən tələb edə bilər. Sığorta əsasən aşağıdakı səbəblərdən ödənilir: peşə fəaliyyətinin icrası zamanı sığorta olunan tərəfindən qəsdən²¹ səbəb olan hər cür hadisə və davranışları; sığorta olunan və ya onun işçilərinin sığorta müqaviləsində qeyd edilən peşə fəaliyyətini icra edərkən alkoqol, narkotik və ya psixotrop maddələrin təsiri altında olması²² səbəbindən baş verən hallar; sığorta olunan tələbi ilə əlavə edilməsi lazım olan hallarda sığorta olunanın belə bir tələbi olmaması halında ödənilən təzminatın sığorta haqqına uyğun gələn hissəsi sığorta olunana ödənilir.

“Tibbi səhv tətbiq etməklə bağlı icbari əmlak məsuliyyəti sığortasının ümumi şərtləri”ndə sığorta müqaviləsi ilə bağlı bir çox digər məsələlər də tənzimlənmişdir.²³

II. Mövcud qanunvericilikdə boşluqlar və bununla bağlı təkliflər, bu təkliflərin tətbiq edilə bilmə imkanları

A. Həkimlərin peşə məsuliyyətinin icbari sığortası ilə əlaqədar AR qanunvericiliyinin mövcud vəziyyəti və boşluqlar

Həkimlərin peşə məsuliyyətinin icbari sığortası ilə bağlı qanunvericilikdə boşluqlar barədə bəhs etmədən öncə bu sahə ilə əlaqəli bəzi normaları nəzərdə keçirmək məqsədəuyğundur. “Sığorta fəaliyyəti haqqında” 25 dekabr 2007-ci il tarixli, № 519-IIIQ sayılı AR Qanununun²⁴ 14.3.3-cü maddəsində sığorta obyektinə görə əmlak sığortasına aid olan mülki məsuliyyətin

²⁰ Yuxarıda istinad 18.

²¹ Qəsdən səbəb olan halların sığorta ilə əhatə olunması səbəbi və mümkünlüyü tam aydın deyil, amma qeyd edilən Ümumi Şərtlər sənədində məhz bu formada qeyd edilməsi sual doğurur.

²² Peşə fəaliyyətini icra edərkən qeyd edilən maddələrin təsiri altında olması səbəbi və nə dərəcə mümkün olması aydın deyil. Belə halların sığorta ilə əhatə olunması və Ümumi Şərtlər sənədində məhz bu formada qeyd edilməsi sual doğurur.

²³ Yuxarıda istinad 12.

²⁴ “Sığorta fəaliyyəti haqqında” AR Qanunu, 25.12.2007, № 519-IIIQ.

sığortası üzrə siniflər qeyd edilmişdir. 14.3.3.7-ci maddədə lazımi ixtisas keyfiyyətlərinə malik olan müxtəlif peşə sahiblərinin peşəkar fəaliyyətləri zamanı etdiyi səhv və ya yol verdiyi ehtiyatsızlıq, yaxud diqqətsizlik üzündən xidmət göstərdiyi üçüncü şəxslərə dəyən zərər üzrə öhdəlikləri ilə əlaqədar sığorta ödənişinin həyata keçirilməsini nəzərdə tutan peşə məsuliyyətinin sığortası müəyyən olunmuşdur. Bu maddədə qeyd edilən müxtəlif peşə sahiblərindən hələ ki yalnız auditorların peşə məsuliyyətinin icbari sığortası ilə bağlı münasibətləri tənzimləyən 22 may 2007-ci il tarixli, № 333-IIIQ sayılı AR Qanunu²⁵ mövcuddur.

“Əhalinin sağlamlığının qorunması haqqında” 26 iyun 1997-ci il tarixli, № 360-IQ sayılı AR Qanununun²⁶ 46-cı maddəsində tibb və əczaçılıq fəaliyyəti ilə məşğul olmaq hüququ izah edilmişdir. Qanunun 51-ci maddəsində müalicə həkiminin anlayışı qeyd edilmişdir: *müalicə həkimi* ambulator-poliklinika müəssisəsində, yaxud xəstəxanada müşahidə və müalicə müddətində pasiyentə tibbi yardım göstərən həkimdir. Müalicə həkimi pasiyentin istəyi ilə müəssisə (bölmə) rəhbəri tərəfindən təyin edilir. Pasiyent müalicə həkiminin dəyişdirilməsini tələb etdiyi hallarda, müəssisə rəhbəri bu tələbi yerinə yetirməlidir. Müalicə həkimi pasiyentin vaxtında ixtisaslı müayinə və müalicəsini təşkil edir, səhhəti barədə ona məlumat verir, xəstənin, yaxud onun qanuni nümayəndəsinin təkidi ilə məsləhətçi mütəxəssisləri dəvət edir və konsilium təşkil edir. Xəstənin həyatı təhlükə altında olduğu hallar və təxirəsalınmaz vəziyyətlər istisna edilməklə, digər hallarda konsilium tərəfindən verilən məsləhətlər yalnız müalicə həkimi ilə razılaşdırıldıqdan sonra həyata keçirilir. Pasiyentin həyatı təhlükə altında olmadıqda və o, həkim təyinatını yerinə yetirmədikdə, yaxud müəssisənin daxili qaydalarını pozduqda müvafiq rəhbər şəxslə razılıq əsasında müalicə həkimi pasiyenti müşahidə və müalicə etməkdən imtina edə bilər.²⁷ Peşə vəzifələrinin lazımi səviyyədə yerinə yetirilməməsinə görə müalicə həkimi qanunvericilikdə nəzərdə tutulmuş qaydada məsuliyyət daşıyır.

“Səhiyyə sahəsinə aid olan qulluqçu vəzifələrinin və fəhlə peşələrinin Vahid Tarif-İxtisas Sorğu Kitabçası”nın²⁸ II. Mütəxəssislər adlı hissəsində *həkim-mütəxəssis (həkim)* anlayışı verilmiş, əmək funksiyası təsvir edilmişdir: öz ixtisası üzrə müasir profilaktika, diaqnostika, müalicə və reabilitasiya üsullarından istifadə etməklə əhaliyə tibbi yardım göstərir, öz işini planlaşdırır və təhlil edir, təcili və təxirəsalınmaz tibbi yardım göstərir, həkim etikasını və deontologiyasını prinsiplərinə riayət edir, orta tibb heyətinin işinə rəhbərlik edir. Bu normada, həmçinin həkimin nələri bilməli olduğu da qeyd edilmişdir: əhalinin sağlamlığının mühafizəsi haqqında qanunvericiliyin

²⁵ “Auditorun peşə məsuliyyətinin icbari sığortası haqqında” AR Qanunu, 22.05.2007, № 333-IIIQ.

²⁶ “Əhalinin sağlamlığının qorunması haqqında” AR Qanunu, 26.06.1997, № 360-IQ.

²⁷ “Əhalinin sağlamlığının qorunması haqqında” AR Qanunu, 26.06.1997, № 360-IQ, maddə 51.

²⁸ “Səhiyyə sahəsinə aid olan qulluqçu vəzifələrinin və fəhlə peşələrinin Vahid Tarif-İxtisas Sorğu Kitabçası”nın təsdiq edilməsi barədə AR Əmək və Əhalinin Sosial Müdafiəsi Nazirliyinin Kollegiyasının 19 iyun 2017-ci il tarixli, № 8 sayılı qərarı.

əsaslarını və səhiyyə müəssisələrinin fəaliyyətini müəyyən edən normativ sənədləri; əhaliyə göstərilən təcili tibbi yardımın, dərman yardımının və eləcə də seçdiyi profil üzrə (təşkilati diaqnostika, məsləhət, müalicə, profilaktika) peşəkar fəaliyyət prinsiplərini; xəstələrin müalicəsində, diaqnostikasında və dərman təchizatında tətbiq olunan yeni metodları; tibbi-sosial ekspertizanın əsaslarını; səhiyyə sisteminin strukturunu və əsas prinsiplərini, öz hüquq, vəzifə və məsuliyyətini; başqa mütəxəssislər və xidmətlərlə (sığorta şirkətləri, həkimlər assosiasiyaları və s.) ilə əməkdaşlıq prinsiplərini, büdcə-sığorta təbabətinin fəaliyyətinin və əhalinin sanitar-profilaktika və dərman yardımı ilə təminatının əsaslarını; əməyin mühafizəsi, təhlükəsizlik texnikası, istehsalat sanitariyası və yanğından mühafizə norma və qaydalarını.

Həkimlərin peşə məsuliyyətinin icbari sığortasının praktikada reallaşması üçün sadəcə məhz bu istiqamətdə qanunvericilik aktlarının qəbul edilməsi kifayət etmir. Bu sahə ilə yaxından əlaqəsi olan digər istiqamətlərdə də əsaslı islahatlar aparılmalı, müvafiq normativ hüquqi aktlar qəbul edilməli və təcrübədə öz tətbiqini tapmalıdır. Belə ki, ilk növbədə, həkimlərin peşə məsuliyyətinin icbari sığortası əhalinin icbari tibbi sığortası ilə sıx əlaqəlidir. Hazırki dünya təcrübəsində bir çox inkişaf etmiş ölkələrdə əhalinin icbari tibbi sığortası ən qabacıl standartlara cavab verən formada mövcuddur. Dünyada ilk icbari tibbi sığorta Almaniyaya məxsusdur, 15 iyun 1883-cü il tarixində illik gəliri 2000 markdan aşağı olan bütün işçilər üçün icbari tibbi, pensiya, əlillik və qəza sığortasını müəyyən edən "Tibbi sığorta haqqında" Qanunun qəbul edilməsi ilə əsası qoyulmuşdur.²⁹ Hələ əsası 19-cu əsrdə qoyulan bu sistem hal-hazırda 1 yanvar 2009-cu il tarixindən etibarən "Sığorta müqaviləsi haqqında" Qanunun 193-cü maddəsi ilə tənzimlənən Ümumi icbari sığorta öhdəliyi olaraq Almaniyada yaşayış yeri olan bütün şəxslər üçün məcburidir.³⁰

Azərbaycan Respublikası qanunvericiliyində də tibbi sığortanın icbari şəkildə bütün ölkə əhalisi üçün tətbiq edilə bilməsi istiqamətində həm normativ, həm təşkilati baxımdan əhəmiyyətli addımlar atılmışdır. Belə ki, "Tibbi sığorta haqqında" 28 oktyabr 1999-cu il tarixli, № 725-IQ sayılı AR Qanununun³¹ 1-ci maddəsində icbari tibbi sığorta dövlət sosial sığortasının tərkib hissəsi olmaqla, icbari tibbi sığorta proqramına müvafiq həcmdə əhalinin tibbi və dərman yardımı almasını təmin edən, tibbi sığortanın bir forması kimi müəyyən edilmişdir. İcbari tibbi sığorta proqramının ölkə üzrə tətbiqinə dəstək məqsədilə AR Prezidentinin 27.12.2007-ci il tarixli, 2592 sayılı Sərəncamı³² ilə AR Nazirlər Kabineti yanında İcbari tibbi sığorta üzrə Dövlət

²⁹ Till Bärnighausen, Rainer Sauerborn, *One hundred and eighteen years of the German health insurance system: are there any lessons for middle- and low-income countries?*, 54 Social Science & Medicine 1559, 1575 (2002).

³⁰ Yuxarıda istinad 12.

³¹ "Tibbi sığorta haqqında" AR Qanunu, 28.10.1999, № 725-IQ.

³² "AR Nazirlər Kabineti yanında İcbari Tibbi Sığorta üzrə Dövlət Agentliyinin yaradılması haqqında" AR Prezidentinin Sərəncamı, 27.12.2007, № 2592.

Agentliyi yaradılmışdır. Azərbaycan Respublikası Prezidentinin 2017-ci il 06 sentyabr tarixli 1592 sayılı “İcbari Tibbi Sığorta üzrə Dövlət Agentliyinin fəaliyyətinin təmin edilməsi haqqında” Fərmanına³³ əsasən Azərbaycan Respublikasının Nazirlər Kabineti yanında İcbari Tibbi Sığorta üzrə Dövlət Agentliyi əsasında İcbari Tibbi Sığorta üzrə Dövlət Agentliyi publik hüquqi şəxs kimi yaradılmışdır. Respublika ərazisində tibb xidmətlərinin keyfiyyətinin yüksəldilməsi və əhalinin bu xidmətlərə əlçatanlığının təmin edilməsi məqsədilə Mingəçevir şəhərinin, Yevlax və Ağdaş rayonlarının inzibati ərazilərində icbari tibbi sığortanın tətbiqinə dair pilot layihənin həyata keçirilməsi ilə bağlı tədbirlər haqqında AR Prezidenti tərəfindən 29 noyabr 2016-cı il tarixində Fərman³⁴ imzalanmışdır. Sonradan həmin Fərmana dəyişiklik edilmiş və icbari tibbi sığortanın tətbiqinin pilot layihə olaraq Ağdaş rayonunun inzibati ərazisində həyata keçirilməsi, habelə Mingəçevir şəhərinin və Yevlax rayonunun inzibati ərazilərində davam etdirilməsi qərara alınmışdır.³⁵ Hazırda icbari tibbi sığortanın 1829 tibbi xidməti əhatə edən baza zərfi əsasında Mingəçevir şəhərində, Ağdaş və Yevlax rayonlarında pilot layihə həyata keçirilir. Gələcəkdə isə icbari tibbi sığortanın mərhələli şəkildə bütün ölkə üzrə tətbiq edilməsi planlaşdırılır.

Həkimlərin peşə məsuliyyətinin icbari sığortası ilə əhalinin icbari tibbi sığortasının əlaqəli olması bununla izah olunur ki, hal-hazırda təcrübədə istər dövlət xəstəxanalarında, istərsə də özəl klinikalarda həkim ilə pasiyent arasında müalicə müqaviləsi mövcud deyil. Azərbaycanda özəl tibb müəssisələrində müalicə müqaviləsinə bənzər sənəd olsa da, daha çox birtərəfli xarakter daşıyır və yalnız dominant rol oynayan klinikanın mənafeyi naminə xəstə tərəfindən ediləcək ödənişləri və s. nəzərdə tutur, xəstənin hüquqları, həkimin hüquq və vəzifələri, hansı hallarda məsuliyyət daşması barədə özündə hər hansı müddəa ehtiva etmir, səbəbindən asılı olmayaraq bütün məsuliyyətin xəstəyə aid olması barədə tək tərəfli və ədalətsiz müddəa nəzərdə tutur. Və digər xidmət sahələrindən fərqli olaraq bu sahədə xidmətdən istifadə edən adından göründüyü kimi xəstə olduğu üçün daha çarəsiz vəziyyətdə olduğundan o an xəstə üçün onun hüquqlarını pozan tək tərəfli müqaviləni imzalamaqdan başqa çıxış yolu olmur. Həmçinin əhalinin hüquqi savadlılıq dərəcəsi də bir çox Avropa ölkələrində olduğu kimi deyil. Müalicə müqaviləsi olmadan həkimin peşə məsuliyyətini tənzimləmək

³³ “İcbari Tibbi Sığorta üzrə Dövlət Agentliyinin fəaliyyətinin təmin edilməsi haqqında” AR Prezidentinin Fərmanı, 06.09.2017, № 1592.

³⁴ “Mingəçevir şəhərinin, Yevlax və Ağdaş rayonlarının inzibati ərazilərində icbari tibbi sığortanın tətbiqinə dair pilot layihənin həyata keçirilməsi ilə bağlı tədbirlər haqqında” AR Prezidentinin Fərmanı, 29.11.2016, № 1127.

³⁵ “İcbari tibbi sığortanın tətbiqinə dair pilot layihənin genişləndirilməsi və Mingəçevir şəhərinin və Yevlax rayonunun inzibati ərazilərində icbari tibbi sığortanın tətbiqinə dair pilot layihənin həyata keçirilməsi ilə bağlı tədbirlər haqqında” Azərbaycan Respublikası Prezidentinin 2016-cı il 29 noyabr tarixli 1127 nömrəli Fərmanında dəyişikliklər edilməsi barədə” AR Prezidentinin Fərmanı, 16.02.2018, № 1830.

və bununla bağlı fəaliyyətdən yaranan halları sığortalamaq çətindir. Beynəlxalq təcrübədə dövlət tərəfindən təmin edilən icbari tibbi sığorta müalicə müqaviləsinin əsas qarantı kimi çıxış edir, bu baxımdan artıq qeyd edildiyi kimi, bütün ölkə əhalisi üçün icbari tibbi sığortanın təmin edilməsi istiqamətində və bundan asılı olaraq həkimlə pasiyent arasında müalicə müqaviləsi institutunun formalaşması istiqamətində islahatlar aparılmalıdır. “Özəl tibbi fəaliyyət haqqında” 30 dekabr 1999-cu il, № 789-IQ sayılı AR Qanununun³⁶ 7-ci maddəsində tibbi yardım göstərilməsi barədə müqavilənin anlayışı, nələrə əks etdirməsi qeyd edilsə də, müqavilənin bağlanılmasının məcburi olması qeyd edilməmişdir. Müalicə müqaviləsinin ayrıca bir müqavilə növü kimi formalaşdığı Almaniyanın bu istiqamətdə təcrübəsinin daha müfəssəl nəzərdən keçirilməsi araşdırma məqsədləri üçün məqbul hesab edildiyindən növbəti bəndlərdə bu müqavilənin məzmununa xüsusi diqqət yetirilmişdir.

B. Müalicə müqaviləsinin Almaniya modeli

İcbari tibbi sığorta ənənəsinə malik olan Almaniyada müalicə müqaviləsi pasiyent ilə müalicə edən arasında ödənişli tibbi müalicə ilə bağlı məsələləri nəzərdə tutan xidmət müqaviləsinin xüsusi növü kimi xarakterizə olunur və Mülki Məcəllənin 630a və sonrakı maddələri ilə tənzimlənir.³⁷ Almaniyada müqavilənin subyektlərindən olan müalicə edən qismində həkim və digər həkimləri ilə yanaşı, psixoterapevtlər, fizioterapevtlər, loqopedlər, alternativ müalicə üsullarını tətbiq edən mütəxəssislər, tibbi masaj və üzgüçülük üzrə xidmət göstərənlər də bağlaya bilərlər.³⁸ Bunun əksinə olaraq, baytar həkimləri, əczaçı, optika və eşitmə cihazlarının satışı üzrə nümayəndələr bu müqavilədə nəzərdə tutulan mənada “müalicə edən” anlayışına aid edilmirlər.³⁹ Müalicə müqaviləsi şəxsən müalicə edən həkimlə yanaşı, pasiyent ilə müalicə xidməti təklif edən və hüquqi şəxs olan xəstəxana və ya özəl tibb müəssisəsi ilə də bağlana bilər. Müalicə müqaviləsinə əsasən, müalicə edən, əgər müqavilədə ayrı qayda nəzərdə tutulmamışdırsa, ümumi tanınmış ixtisas standartları nəzərə alınmaqla müvafiq müalicəni şəxsən və ya başqasının həyata keçirməsinə zəmanət verir. Müalicə anlayışı diaqnoz, yəni müayinə və xəstəliyin təyini və müvafiq terapiyanın, yəni müalicənin müəyyən edilməsini əhatə edir.⁴⁰ Müalicə edən qəti müalicə uğuruna zəmanət vermir, yalnız qəbul edilmiş qaydalara uyğun müalicə həyata keçirmək öhdəliyi daşıyır. Həkimlər qanuni icbari sığorta olunmuş xəstələri müalicə etmək vəzifəsi daşıyırlar. Müalicə etmək öhdəliyi bir sıra hallarda konkludent, amma həmçinin yazılı və ya şifahi bağlana bilən müalicə müqaviləsindən irəli gəlir. Bu öhdəlik yalnız bir sıra istisna hallarda yerinə

³⁶ “Özəl tibbi fəaliyyət haqqında” AR Qanunu, 30.12.1999, № 789-IQ.

³⁷ Bürgerliches Gesetzbuch (BGB), § 630a.

³⁸ Peter Thum, *Das Patientenrechtgesetz – Sicht der Rechtsprechung*, MedR 153, 154 (2013).

³⁹ Otto Palandt, Bürgerliches Gesetzbuch (BGB), Vorbemerkung zu § 630a. (77. Aufl. 2017).

⁴⁰ Christian Katzenmeier, *Der Behandlungsvertrag – Neuer Vertragstypus im BGB*, NJW 817, 818 (2013).

yetirilməyə bilər⁴¹: elektron sığorta kartı təqdim edilmədiyi halda; həkimin iş yükü həddindən çox olduqda; həkimlik qaydalarına riayət olunmadıqda; kifayət edən, məqsədli, iqtisadi və lazımi müalicədən daha artıq xidmətə cəhd olduqda; müalicəni aparmağın əhəmiyyətsiz olduğu göründükdə - bu xəstə daimi əsassız şikayət etdikdə, ehtiyac olmadığı halda gecələr zəng edib və ya evinə baş çəkib narahat etdikdə və ya təhqir etdikdə, həkimin özünün xəstələndiyi halda və həkimə qarşı məhkəmə prosesi olduqda nəzərdə tutulur; həkimdən ona icazə verilən istiqamətdən kənar müalicə tələb edildikdə; həkimdən hüquqa və əxlaqa zidd fəaliyyət tələb etdikdə (məsələn, öz ölümünü); tibbi sığorta tərəfindən qarşılanmayan xidmətlər göstərildiyi halda bunun sığorta tərəfindən qarşılanan xidmət kimi göstərilməsi; əsassız xəstəlik vəərəqəsinin tələb edilməsi və digər hallar.⁴²

Pasiyentin əsas vəzifələrindən biri göstərilən müalicə xidmətinin qarşılığını ödəməkdir, amma bunu onun əvəzinə üçüncü şəxs – adətən tibbi sığorta kassaları həyata keçirirlər. Özəl sığorta olunan xəstələrdən fərqli olaraq dövlət sığortası ilə sığortalanan xəstələrin müalicəsi ilə bağlı Dövlət Tibbi Sığorta Kassaları Həkimləri Birliyinin üzvü olan müalicə edən həkim mütəmadi olaraq ictimai-hüquqi əsaslarla məvacib alır.⁴³ Dövlət tibbi sığortasına aid edilən xidmətlər kataloquna aid olmayan və ya tam ödənilməyən xidmətlərə görə pasiyent özü ödəniş etməlidir, məsələn diş implantasiyasının edilməsi.⁴⁴ Belə hallarda həkim öncədən ehtimal edilən xərcləri yazılı şəkildə xəstəyə təqdim etməlidir.⁴⁵ Özəl sığorta olunan xəstələr bir qayda olaraq müalicə xərclərini özləri ödəyir, sonradan isə bunu özəl sığorta şirkətindən reqres qaydasında tələb edirlər.

Müalicə müqaviləsi çərçivəsində müalicənin həyata keçirilməsi üçün Mülki Məcəllənin 630c maddəsi həkim və pasiyentin qarşılıqlı əməkdaşlığını nəzərdə tutur. Pasiyent öz bədəninin və sağlamlığının vəziyyəti barədə müalicə edən həkimə vaxtında məlumat verməli və həkimin müalicəyə aid olan göstərişlərinə, təlimatlarına əməl etməlidir. Əgər pasiyent bu öhdəliklərini pozursa, hər hansı zərər halında onun da birgə məsuliyyəti yaranır.⁴⁶

Müalicə müqaviləsində, həmçinin müalicə edən həkimin də öhdəlikləri nəzərdə tutulur. Belə ki, o, pasiyenti müəyyən məsələlər barədə məlumatlandırmalıdır. Məlumatlandırma öhdəliyinin istisna edildiyi hallar da nəzərdə tutulmuşdur: müalicə dərhal həyata keçirilməlidirsə (məsələn, qəza hallarında), və ya xəstə özü aydın və dəqiq şəkildə məlumat almaqdan

⁴¹ Sozialgesetzbuch (SGB), V, § 95 Abs. 3.

⁴² Yəni orada.

⁴³ Yəni orada, § 85 Abs. 4, S. 1, 2.

⁴⁴ Palandt, yuxarıda istinad 39.

⁴⁵ Yuxarıda istinad 37, § 630c Abs. 3, S. 1.

⁴⁶ Yuxarıda istinad 37, § 254.

imtina edirsə⁴⁷, və ya terapevtik əsaslara görə xəstənin məlumat almağı onun həyatı və sağlamlığı üçün təhlükəli olarsa.⁴⁸

Müalicə edən həkim müalicəyə başlamadan öncə müalicə ilə bağlı mühüm olan halları pasiyentə anlaşılan dildə izah etməlidir.⁴⁹ İzah edilməli olan informasiyaya ilk növbədə diaqnoz, sağlamlıq vəziyyətinin ehtimal edilən inkişaf vəziyyəti, müalicə və müalicədən əvvəlki və sonrakı tədbirlərlə bağlı məlumatlar aiddir. Pasiyentə müalicəyə uyğun necə davranmalı olduğu izah edilməlidir. Məlumatlandırma pasiyentin sağlamlığı xeyrinə davranmalı olduğunu, həmçinin sağlamlığına ziyan verəcək davranışın nəticələri barədə xəbərdarlığı da əhatə etməlidir. Məsələn olaraq konsentrasiyanı azaldan dərmanlardan sonra avtomobil idarə edilməməsi barədə xəbərdarlığı göstərmək olar. Müalicə edən həkimin bu normada qeyd edilən məlumat vermə öhdəliyi məzmun baxımından praktikada mövcud "terapevtik izah" kimi təsvir edilən əsaslara uyğun gəlir. Bu ümumi məlumat öhdəliyini Mülki Məcəllənin 630e maddəsində nəzərdə tutulan konkret müalicə ilə bağlı izah etmə öhdəliyindən fərqləndirmək lazımdır. Məlumat vermə öhdəliyinin pozulması hər bir halda müalicə səhvidir və müalicə edən həkimin zərərə görə məsuliyyət daşması ilə nəticələnir. Amma əgər müalicə səhvi kobud deyilsə, sübut etmə yükünü xəstə daşıyır. Məlumat vermə öhdəliyinin tam yerinə yetirilməməsi xəstənin müalicəyə razılığının hüquqi qüvvəsinə təsir etmir. Müalicə səhvindən irəli gələ biləcək təhlükələrin qarşısını almaq məqsədilə və ya pasiyentin birbaşa tələbi olduqda müalicə edən həkim pasiyenti məlum olan müalicə səhvləri barədə məlumatlandırmalıdır.⁵⁰ Pasiyent məlumatları ilə əlaqəli bu "icazə" müalicə edən həkimə və ya onun nümayəndələrinə qarşı cinayət işində onların razılığı olmadan istifadə edilə bilməz (nemo tenetur əsasına müvafiq olaraq).⁵¹ Mülki hüquqdan irəli gələn zərərin əvəzinin ödənilməsi ilə bağlı işlərdə belə məhdudiyət yoxdur, həkimin məlumat vermə öhdəliyini pozmasına sübut kimi istinad edilə bilər.

Əgər müalicə edən həkim müalicə xərclərinin sığorta tərəfindən qarşılanmadığını və ya tam olaraq qarşılanmadığını bilirsə, pasiyenti müalicə xərcləri və bunların ehtimal edilən məbləği barədə öncədən yazılı şəkildə məlumatlandırmalıdır. Müalicə edən həkimin, məsələn hər hansı özəl sığorta tarifi barədə pasiyentə məlumat vermək və ona iqtisadi və hüquqi məsləhət xidməti göstərmək vəzifəsi yoxdur. Xərclər barədə məlumat vermək öhdəliyinin pozulması halında xəstə həkimin xərclərin ödənilməsi tələbini zərərin əvəzinin ödənilməsi qarşılıqlı tələbi ilə geri çevirə bilər, belə ki, əgər xərclər barədə dəqiq məlumat verilsəydi, müalicə xidmətindən imtina etmək imkanı olardı.

⁴⁷ Yuxarıda istinad 37, § 630c Abs. 4.

⁴⁸ Palandt, yuxarıda istinad 39, Vorbemerkung zu § 630c. (77. Aufl. 2017).

⁴⁹ Yuxarıda istinad 37, § 630c Abs. 2.

⁵⁰ Yuxarıda istinad 48.

⁵¹ Yuxarıda istinad 47.

Müalicə edən həkim tibbi müdaxilədən, ilk növbədə pasiyentin bədəninə və sağlamlığına hər hansı müdaxilədən, həmçinin müalicə daxilində terapeutik və diaqnostik tədbirlərdən əvvəl pasiyentdən aydın şəkildə bu tədbirlərə razılığı olub-olmadığını soruşmalıdır.⁵² Razılıq olmadan aparılan müalicəyə görə müalicə edən həkim müalicə müqaviləsindən irəli gələn öhdəliyini pozmuş olur. O cümlədən müalicə nəticəsində bədənə dəyən zərər də əsaslandırılı bilməz və məsuliyyətə səbəb olur. Razılığın alınması aydın olmalı, qaydalara uyğun izaha uyğun gəlməlidir, yəni pasiyent öz məsuliyyəti ilə və özü tərəfindən dərk edilən qərar qəbul etmək iqtidarında olmalıdır. Pasiyent istənilən vaxt öz razılığından imtina edə bilər. Əgər pasiyent özü razılıq vermək iqtidarında deyilsə, müalicə edən həkim razılığı himayəliyi həyata keçirən valideynlərdən, nümayəndədən, qəyyumdan ala bilər. Müalicə edən həkim razılığa təsir edə biləcək bütün halları, o cümlədən həyata keçiriləcək tədbirlərin növü, həcmi və həyata keçirilməsi, gözlənilən nəticələri və spesifik risklər, təbiri diaqnoz və müalicə üçün mühümlüyü və təciliyi, diaqnoz və müalicə nəzərə alınmaqla tədbirlərin uğurluluq dərəcəsi barədə pasiyentə ətraflı və anlaşılan məlumat verməlidir.⁵³ Burada məqsəd pasiyentə bütün vəziyyəti izah etməklə sərbəst və öz məsuliyyəti əsasında razı olub-olmaması barədə qərar qəbul etməsini təmin etməkdir. İzah şifahi olmalıdır ki, pasiyent həkimə öz suallarını verə bilsin, həmçinin ediləcək tədbirdən daha öncə olmalıdır ki, pasiyentin tədbir barədə sərbəst qərar qəbul etməyə vaxtı olsun və izah hər bir halda pasiyent üçün aydın olmalıdır.

Müalicə edən həkim müalicə barədə xəstə vəərəqəsinə (pasiyent aktına) müvafiq qeyd etməlidir.⁵⁴ Xəstə həmin bu aktla tanış olmaq hüququna malikdir, yalnız mühüm terapeutik əsaslar və üçüncü şəxslərin mənafeələrinə zidd olduqda bu hüquqdan istisna ola bilər.⁵⁵ Müalicə müqaviləsində tərəflərin – həkim və pasiyentin sübut etmə vəzifələri Mülki Məcəllənin 630h maddəsi ilə tənzimlənir.

Müalicə müqaviləsinin xitamı Mülki Məcəllənin 626-cı maddəsində xidmət müqavilələri üçün mühüm əsas səbəbilə müddətsiz xitam vermə normasına müvafiq olaraq mümkündür. Belə ki, müalicə müqaviləsi bir qayda olaraq şifahi və ya konkludent hərəkətlərlə bağlanır və eynilə də şifahi və ya konkludent şəkildə xitam edilə bilər. Almaniyada dövlət icbari sığortası ilə yanaşı özəl tibbi sığorta da mövcud olduğundan bu sığorta növünə sahib xəstələr müalicə müqaviləsini hər hansı mühüm səbəb göstərmədən də Mülki Məcəllənin 627-ci maddəsində nəzərdə tutulan qaydada müddətsiz xitam edə bilərlər. Dövlət icbari sığortası ilə sığortalanan pasiyentlər dövlət icbari sığortası üzrə tibbi xidmət təmin edən həkimi və ya diğ həkimini Mülki

⁵² Yuxarıda istinad 37, § 630d.

⁵³ Yuxarıda istinad 37, § 630e.

⁵⁴ Yuxarıda istinad 37, § 630f.

⁵⁵ Yuxarıda istinad 37, § 630g.

Məcəllənin 626-cı maddəsi və Sosial Qanunun 5-ci cildinin 76-cı maddəsinin 3-cü bəndinin 1-ci cümləsi nəzərə alınmaqla yalnız təqvim rübündə və yalnız mühüm əsas olduqda dəyişə bilirlər. Ev/ailə həkimi ilə təmin olunan şəxslər öz sığorta kassalarına münasibətdə yazılı öhdəlik daşıyırlar. Sığorta olunanlar bu təminat növündən istifadə barədə açıqlama təqdim edildikdən sonra iki həftə müddətində hər hansı əsas göstərmədən yazılı şəkildə imtina edə bilirlər.⁵⁶

Həkim və ya digər həkimi müalicə müqaviləsini xitam etmək istədikdə Mülki Məcəllənin 627-ci maddəsində nəzərdə tutulan qaydaya diqqət etməlidir. Həkim hər bir halda xəstəyə başqa həkim tərəfindən xidmət təklif edilməyin mümkün olması şərti ilə müqaviləni xitam edə bilər; yalnız müqavilənin dərhal xitam edilməsi üçün mühüm əsaslar olması halı istisna təşkil edir. Əgər həkim qeyd edilən müddəti gözləmədən və hər hansı mühüm əsas olmadan müalicə müqaviləsini xitam edərsə, bununla əlaqədar xəstəyə dəymiş ziyanın əvəzini ödəməlidir. Əgər pasiyentə tibbi xidmət göstərilməsi təcildirsə və tibbi xidmətin dayandırılması xəstə üçün təhlükəli ola bilərsə, həkim müalicə müqaviləsini xitam edə bilməz.⁵⁷ Həkim müalicə müqaviləsini hüquqazidd şəkildə ləğv edə bilməz və ya müalicənin göstərilməsini müalicə müqaviləsində nəzərdə tutulmayan hər hansı işin yerinə yetirilməsindən asılı edə bilməz. Həkim tərəfindən müalicə müqaviləsinə xitam verilməsinin yol verilən hallarına müalicə ilə bağlı həkim və xəstənin fikir ayrılığının olması, təhqir, böhtan və hədə-qorxu halları, davamlı gecə vaxtı narahat etmə halları, təyin edilən vaxta xəstə tərəfindən əməl edilməməsi halları və həkimin məsuliyyəti ilə bağlı məhkəmə mübahisəsində xəstənin həkimə qarşı iddiası olması kimi hallar aiddir.⁵⁸

C. Qanunvericiliyə əlavə və dəyişikliklərə dair təkliflər

Bu təhlildən belə bir nəticəyə gəlmək olar ki, müalicə müqaviləsinin ölkədə tətbiq edilməsi üçün ilk növbədə bu istiqamətdə normativ-hüquqi baza formalaşdırılmalıdır. "Özəl tibbi fəaliyyət haqqında" Qanunda tibbi yardım göstərilməsi barədə müqaviləyə aid normalar müqavilənin məcburi olduğunu ifadə etmir və həmçinin müqavilənin məzmunu barədə dəqiq göstəriş yoxdur, müqavilənin nümunəvi forması qeyd edilməmişdir. Bu müqavilə növü eynilə Almaniyada qanunvericiliyində olduğu kimi xidmət müqaviləsinin bir növü kimi nəzərdə tutula bilər, müqavilənin nümunəvi forması müvafiq icra hakimiyyəti orqanı – AR Nazirlər Kabineti tərəfindən müəyyənləşdirilə bilər, dövlət xəstəxanalarında və özəl klinikalarda tətbiqinə nəzarət AR Səhiyyə Nazirliyinə həvalə edilə bilər. Belə ki, müqavilədə tərəflər, onların hüquq və vəzifələri, bu hüquq və vəzifələrdən istisna halları, xərclər, müalicəyə razılığın əldə edilməsi və onun ifadə edilməsi, xəstə barədə

⁵⁶ Yuxarıda istinad 41, § 73b Abs. 3, S. 3.

⁵⁷ Yuxarıda istinad 37, § 627.

⁵⁸ Yuxarıda istinad 56.

məlumatların aktlaşdırılması, müqavilənin xitamı və bunun yol verilmədiyi hallar, həmçinin mübahisələrin həlli kimi maddələr nəzərdə tutulmalıdır. Bundan başqa müalicə müqaviləsinin praktikada effektiv olması və sui-istifadə hallarının qarşısının alınması üçün müvafiq qanunvericilik aktlarına həkim və xəstə anlayışlarının əhatə dairəsi, hüquq və vəzifələrin kataloqu, müxtəlif tibbi sığorta rejimləri üzrə tənzimləmələr və bu kimi bir çox məsələlər istiqamətində əlavə və dəyişikliklər edilməlidir. Həmçinin peşə məsuliyyətinin sığortasının 2 forması müəyyən edilə bilər: dövlət xəstəxanaları və tibb universiteti nəzdində tədqiqat institutları üçün müəssisə tərəfindən bağlanılan və sonradan orada çalışan hər bir həkimin fəaliyyət istiqamətinə müvafiq həcmdə mütləq qoşulmasını nəzərdə tutan məsuliyyətin sığortası müqaviləsi və özəl klinikalarda müstəqil fəaliyyət göstərən həkimlər tərəfindən bağlanan məsuliyyətin sığortası müqaviləsi.

Müalicə barədə, həmçinin həkim və xəstənin hüquq, vəzifə və məsuliyyətini ətraflı şəkildə tənzimləyən müalicə müqaviləsi dövlət və özəl xəstəxanalar üçün məcburi olmalıdır, bununla bağlı müvafiq olaraq "Əhalinin sağlamlığının qorunması haqqında" Qanunda müalicə həkiminin anlayışını nəzərdə tutan 51-ci maddəyə (müəssisə (bölmə) rəhbəri tərəfindən təyin edilir) dəyişiklik edilməsi və müalicə həkiminə özəl klinikalarda işləyən həkimlərin də əlavə edilməsi (ambulator-poliklinika müəssisəsində, yaxud xəstəxanada sözlərindən sonra özəl tibb müəssisələrindən sözü əlavə edilməlidir), "Tibbi sığorta haqqında" Qanuna yeni maddə əlavə edilməsi məqsəduyğun olar. Özəl klinikalar üçün isə bu birbaşa fəaliyyət göstərməyin əsas şərti kimi nəzərdə tutula bilər, yəni özəl tibbi fəaliyyətlə məşğul olmaq üçün lisenziyanın yalnız müvafiq formada qəbul edilmiş müalicə müqaviləsini öz təcrübəsində tətbiq etməyə hazır olan klinikalara verilə bilməsi qəti müəyyən edilməlidir. Bununla bağlı "Özəl tibbi fəaliyyət haqqında" Qanuna və bu sahəyə dair digər normativ hüquqi aktlara müalicə müqaviləsi ilə bağlı müddəalar əlavə edilməlidir.

"Əhalinin sağlamlığının qorunması haqqında" Qanunda müalicə həkiminin anlayışını nəzərdə tutan 51-ci maddəyə əsasən, yalnız normada qeyd edilən müəssisələrdə pasiyentə tibbi yardım göstərən müalicə həkimi sayılır, digər hallarda məsələn, həkim təsadüfən yolda bir şəxsə ilk tibbi yardım göstərdikdə və ya öz tanış və qohumlarına evdə tibbi yardım göstərdikdə, bu halda o, bu Qanunun qeyd edilən norması mənasında müalicə həkimi hesab edilmir. Buradan belə nəticə çıxır ki, qanunvericilikdə həkimin anlayışı məhz bu formada qeyd olunduğundan və peşə fəaliyyətinin sığortası ilə bağlı "Sığorta fəaliyyəti haqqında" AR Qanununun 14.3.3.7-ci maddəsində müxtəlif peşə sahibləri dedikdə həm də həkimlər əhatə oluna biləcəyi üçün (yəni həkimlər də peşə sahibi olaraq məsuliyyətini sığorta etdirə bilərlər), əgər biz məhz bu formada olan həkim anlayışına istinad etsək, onda həkimin tibb müəssisələrindən kənar sadalanan hallarda öz peşəsini həyata keçirməsi ilə bağlı yaranan məsuliyyət sığortadan kənar qalmış olacaq. Bu

baxımdan Qanunun bu anlayışı daha düzgün formulə edilməli, həkimlərin öz peşə fəaliyyətini həyata keçirməsi və ümumən müalicə həkimi olması hər hansı tibb müəssisəsində fəaliyyət göstərməsindən asılı olmamalıdır. Əgər bu mümkün olmazsa, onda həkimlərin peşə məsuliyyətinin sığortası ilə bağlı müəyyən ediləcək ümumi qaydalarda tibb müəssisələrindən kənar fəaliyyətin sığorta ilə əhatə olunmayacağı qəti şəkildə müəyyən edilməlidir. Belə ki, yuxarıda qeyd edildiyi kimi, Almaniyada tibb müəssisələrindən kənar fəaliyyətdən irəli gələn hallar əhatə edildiyi halda, Türkiyədə yalnız tibb müəssisəsindəki fəaliyyətindən irəli gələn hallar peşə fəaliyyətinin icbari sığortası ilə əhatə olunur (Türkiyədə həkimin müəssisədən kənar fəaliyyəti yalnız insanlıq borcunu yerinə yetirmək çərçivəsində olduğu halda istisna təşkil edir, yəni sığorta ilə əhatə olunur). Həkimlərin tibb müəssisələrindən kənar fəaliyyətindən irəli gələn hallar fiziki şəxsin məsuliyyətinin sığortası ilə əhatə oluna bilər.

“Sığorta fəaliyyəti haqqında” Qanunun 14.3.3.7-ci maddəsində nəzərdə tutulan bir çox anlayışların dəqiqləşdirilməsi üçün AR Nazirlər Kabinetinin qərarı ilə təsdiq edilmiş “Müxtəlif peşə sahiblərinin peşə məsuliyyətini icbari sığortası haqqında” Qaydalar qəbul edilməlidir. İlk növbədə, peşənin anlayışı, növləri və bu normanın təsiri altına düşən müxtəlif peşə sahiblərinin dairəsi dəqiqləşdirilməlidir. Normada qeyd edilən “lazımi ixtisas keyfiyyətləri” anlayışı və onun əhatə dairəsi hər bir peşə növü üçün müvafiq icra hakimiyyəti orqanı (AR Nazirlər Kabineti) tərəfindən müəyyən edilməlidir. Həkimlərin peşə fəaliyyəti ilə bağlı AR Səhiyyə Nazirliyinin 24.11.2008-ci il tarixli 160 sayılı əmri ilə təsdiq edilmiş, “Azərbaycan Respublikasında Klinik Protokolların tərtib edilmə qaydaları”na müvafiq olaraq AR Səhiyyə Nazirliyinin İctimai Səhiyyə və İslahatlar Mərkəzi tərəfindən klinik protokollar tərtib edilir.⁵⁹ Klinik protokollar hər hansı nozologiya və ya sindrom zamanı düzgün yardım göstərilməsi ilə bağlı qərar qəbul etməkdə həkimə kömək edən tövsiyələr toplusudur.⁶⁰ “Lazımi ixtisas keyfiyyətləri” anlayışının əhatə dairəsi müəyyən edilərkən bu klinik protokollara diqqət edilməlidir. “Səhv, ehtiyatsızlıq və diqqətsizlik” anlayışları, hansı halları əhatə etməsi dəqiq müəyyən edilməlidir. Ehtiyatsızlıq anlayışının cinayət qanunvericiliyinə aid olan ehtiyatsızlıq anlayışı ilə münasibəti dəqiqləşdirilməlidir. Həmçinin bu 3 səbəbdən başqa səhlənkarlıq da əlavə edilməlidir (Almaniya modeli hissəsində göstərilən misal). Bu qeyd edilən səbəblərin müxtəlif dərəcələri (yüngül, orta, ağır) müəyyən edilməlidir.

Peşə məsuliyyətinin sığortasının yalnız ölkədaxili halları, yoxsa xaricdə baş verən halları, həmçinin AR tərəfdar çıxdığı beynəlxalq müqavilələrə müvafiq

⁵⁹ “Azərbaycan Respublikasında Klinik Protokolların tərtib edilmə Qaydaları”, AR Səhiyyə Nazirliyinin 24.11.2008-ci il tarixli 160 sayılı əmri ilə təsdiq edilmişdir.

⁶⁰ Klinik Protokollar: İctimai Səhiyyə və İslahatlar Mərkəzi, <https://www.isim.az/az/reports/5> (son baxış 23 Aprel 2018).

olaraq təbii fəlakətlərdən irəli gələn humanitar yardım göstərilməsi ilə bağlı tibbi yardım göstərilməsini də nəzərdə tutması qaydalarla müəyyən edilməlidir. Həkimlərin peşə məsuliyyətinin icbari sığortası ilə bağlı müxtəlif istiqamətlər üzrə peşənin spesifik xüsusiyyətləri nəzərə alınaraq (məsələn, göz həkimi və pediatri'nin funksiyaları fərqli olduğu kimi) müxtəlif sığorta rejimləri formalaşdırılmalıdır, bunları nəzərdə tutan qaydalar qəbul edilməlidir. Həkimlik peşəsinin müxtəlif mərhələlərinə dair, yəni rezidentura mərhələsində işləyən həkim və həkim mütəxəssis üçün fərqli sığorta rejimlərini müəyyən edən qaydalar qəbul edilməlidir. Həmçinin həkimin pensiyaya çıxdıqdan sonra da peşə fəaliyyəti dövründə baş verən hallarla bağlı məsuliyyət daşımaları məsələsi dəqiqləşdirilməli, məsuliyyətin fəaliyyət başa çatdıqdan sonra neçə il müddətinə qüvvədə olması ilə bağlı minimum müddət müəyyən edilməlidir.

Həkimlərin peşə məsuliyyətinin icbari sığortası ilə onun fəaliyyətini tamamlayan personalın, yəni bilavasitə həkimin fəaliyyəti ilə əlaqəli olaraq işləyən assistent-həkimlərin, tibb bacılarının (qardaşlarının) fəaliyyətindən irəli gələn halların da əhatə olunması məsələsi həkimlərin peşə məsuliyyətinin icbari sığortası ilə bağlı qaydalarda öz əksini tapmalıdır.

Həkimlərin peşə məsuliyyətinin icbari sığortası ilə bağlı qaydalarda xəstəxana və klinikaların həkimə qarşı reqres hüququ məsələsi tənzimlənməlidir. Çünki sığorta hadisəsi baş verdikdə xəstə həkimə deyil, xəstəxana və ya klinikaya müraciət etməlidir. Belə ki, bu məsələdə daha zəif tərəf olan xəstə daha dəqiq ünvan olan xəstəxana və ya klinikaya qarşı zərərin ödənilməsi tələbi ilə çıxış etdikdə iddiasının təmin olunması daha realdır. Təcrübədə sığorta hadisəsi baş verdikdən sonra həkim işdən çıxarıla bilər və hətta həkim peşəsindən məhrum edilə bilər, bu vəziyyət isə xəstə və ya onun yaxınları üçün öz tələblərini irəli sürməkdə çətinlik yarada bilər. Çünki hər bir halda bu növ sığorta fiziki şəxsin məsuliyyəti sığortası deyil, konkret peşə sahibinin məhz peşə fəaliyyəti ilə əlaqədar sığortasıdır. Həkimlərin peşə məsuliyyətinin icbari sığortasının subyektləri də həkimlər olduğundan, əgər sığorta hadisəsinin baş verməsinə səbəb olan şəxsin həkim olduğunu sübut etmək çətinləşərsə, onda dəyən zərəri bu sığorta çərçivəsində tələb etmək mümkün olmaz. Bu baxımdan xəstə hər bir halda birbaşa xəstəxana və ya klinikaya müraciət etməli, onlar isə öz növbəsində həkimə qarşı reqres hüququna malik olmalıdırlar. Bu qeyd edilənlər də qaydalarda dəqiqləşdirilməlidir.

Nəticə

Həkimlərin peşə məsuliyyətinin icbari sığortası institutunun formalaşması, bu sahədə müvafiq qanunvericilik aktlarının qəbul edilməsi və bununla əlaqədar müalicə müqaviləsinin praktikada tətbiqi ölkədə tibbi xidmətin keyfiyyətinin yüksəldilməsinə kömək etməklə yanaşı, bu sahədə meydana gələn bir çox məsələlərin dövlət tərəfindən hüquqi müstəvidə

tənzimlənməsinə və bununla da, həmçinin dövlətin öz vətəndaşları üçün sosial siyasətini uğurla həyata keçirməsinə öz töhfəsini verəcəkdir.

Bu istiqamətdə ilkin olaraq vətəndaşların icbari tibbi sığortasının ölkə üzrə tətbiqinin önəmi xüsusilə vurğulanmalıdır. Hazırda dövlət tərəfindən həyata keçirilən pilot layihələr vətəndaşların icbari tibbi sığortasının yaxın gələcəkdə bütün ölkə ərazisində tətbiqinə dair məlumat verir.

Müalicə müqaviləsinin hüquqi əsasının yaradılması və təcrübədə tətbiqi həkimlərin peşənin icrası zamanı daha məsuliyyətli olmaları yolunda önəmli addım olacaqdır.

*Şahid Şükürov**

AZƏRBAYCAN DÖVLƏTİNƏ MƏXSUS MÜƏSSİSƏLƏRİN AZƏRBAYCAN RESPUBLİKASININ BEYNƏLXALQ MÜQAVİLƏLƏRİNİ BAĞLAMASI

Annotasiya

İstənilən dövlətin suveren olaraq müqavilələr, o cümlədən beynəlxalq müqavilələr bağlamaq, belə müqavilələrə daxil olmaq səlahiyyəti var. Bu səlahiyyəti dövlətin adından onun qurumları, o cümlədən dövlət müəssisələri həyata keçirir. Amma dövlət müəssisələrin bağladığı beynəlxalq müqavilələr heç də həmişə dövlətin müqaviləsi hesab edilməməlidir. Bu baxımdan, məqalə hansı beynəlxalq müqavilələrin dövlətin beynəlxalq müqaviləsi olmasını, hansı qurumların dövlət müəssisəsi hesab edilməsini, müəssisə anlayışını, dövlət müəssisələrinin beynəlxalq müqavilə praktikasını yerli qanunvericiliyin nəzərindən araşdırır.

Abstract

Any state as a sovereign is entitled to conclude or to enter into agreements, including international agreements. The competence to enter into agreements is implemented by entities of state, including state enterprises. However, not all and not always agreements signed by state enterprises shall be deemed to be agreements of the state. Therefore, this article examines and clarifies from the angle of national legislation which international agreements are considered state agreements, which entities are considered state enterprises, what is an "enterprise" and practice of state enterprises in concluding international agreements.

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* Bakı Dövlət Universiteti LL.B və LL.M, Bremen Universiteti, Avropa və Beynəlxalq Hüquq (LL.M).

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Giriş

Suverenlik və dövlətin suveren olması onun müstəqil olaraq beynəlxalq müqavilələrə daxil olması və onları bağlaması ilə ölçülə bilər. Beynəlxalq müqavilələri bağlamaq imkanı həmçinin dövlət olaraq tanınmanın mühüm hissəsidir.

Azərbaycan Respublikası müstəqilliyini bərpa etdikdən sonra bir çox dövlətlə diplomatik əlaqələrinin qurulmasını da məhz beynəlxalq müqavilələrin (protokolların) bağlanması vasitəsilə həyata keçirmişdir.

Sözsüz ki, ölkənin mərkəzi icra hakimiyyəti orqanlarının beynəlxalq müqavilələr bağlaması bu sənədləri dövlətin beynəlxalq müqavilələri kimi yaradır və tanıdır. Müvafiq olaraq belə sənədlər Azərbaycan Respublikasının beynəlxalq müqavilələri olaraq qəbul edilir.

Azərbaycan Respublikasının beynəlxalq müqavilələrini bağlamaq səlahiyyəti heç də hər kəsə verilmir. Konstitusiyaya əsasən, bu səlahiyyət yalnız ölkə başçısındadır¹, lakin ölkə başçısının verdiyi səlahiyyətlə digər şəxslər, o cümlədən Azərbaycan dövlətinə məxsus müəssisələrinin rəhbərləri də Azərbaycan Respublikasının beynəlxalq müqavilələrini bağlaya bilərlər.²

Amma Azərbaycan dövlətinə məxsus müəssisələrin bağladıkları bütün beynəlxalq müqavilələr Azərbaycan Respublikasının beynəlxalq müqavilələri sayılırmı? Azərbaycan Respublikasının beynəlxalq müqavilələri hansılardır? Azərbaycan qanunvericiliyi baxımından Azərbaycan dövlətinə məxsus müəssisələr hansılardır? Ümumiyyətlə, dövlət müəssisələri hansılardır? Müəssisə dedikdə qanunvericilik baxımından nə anlaşılır?

Hazırkı məqalənin məqsədi bu sualları aydınlaşdırılması üçün araşdırmaqdır.

Məqalənin məqsədləri üçün əsas olaraq “Azərbaycan Respublikasının beynəlxalq müqavilələrinin bağlanması, icrası və ləğv edilməsi qaydaları haqqında” Azərbaycan Respublikasının 1057 sayılı 13 iyun 1995-ci il tarixli Qanunu (“Qanun”) və “Azərbaycan Respublikasının beynəlxalq müqavilələrinin bağlanması və ya ləğv edilməsi haqqında təkliflərin mərkəzi icra hakimiyyəti orqanları və dövlətə məxsus müəssisələr tərəfindən

¹ Azərbaycan Respublikası Konstitusiyası, mad. 109.17 (1995).

² Yəni orada, mad. 110-1; “Azərbaycan Respublikasının beynəlxalq müqavilələrinin bağlanması, icrası və ləğv edilməsi qaydaları haqqında” qanun, mad. 6, 1057 (1995); “Azərbaycan Respublikasının beynəlxalq müqavilələrinin bağlanması və ya ləğv edilməsi haqqında təkliflərin mərkəzi icra hakimiyyəti orqanları və dövlətə məxsus müəssisələr tərəfindən verilməsi Qaydaları”nın təsdiq edilməsi haqqında Fərman, bənd 1.3, 373 (2011).

verilməsi Qaydaları”nın təsdiq edilməsi haqqında Azərbaycan Respublikası Prezidentinin 373 sayılı 19.01.2011 tarixli Fərmanı (“Fərman”) araşdırılacaqdır.

Məqalə ilk olaraq qanunvericilik baxımından “müəssisə” anlayışını, daha sonra hansı müəssisələrin “dövlət müəssisəsi” olmasını, eləcə də Qanun və Fərman baxımından “dövlət müəssisə”lərinin hansılar olmasını araşdırır. Bunun ardından Azərbaycan Respublikasının beynəlxalq müqavilələri - hansı müqavilələrin Azərbaycan Respublikasının beynəlxalq müqaviləsi olması, Qanun baxımından Azərbaycan Respublikasının beynəlxalq müqavilələri, Azərbaycan Respublikasının beynəlxalq müqavilələrinin bağlanması zamanı səlahiyyət məsələsi, dövlətə məxsus müəssisələrin beynəlxalq müqavilələri və dövlət müəssisələrinə səlahiyyətin verilməsi tələb edilən beynəlxalq müqavilələr məqalənin araşdırma predmeti edilmişdir.

I. Azərbaycan dövlətinə məxsus müəssisələr (dövlət müəssisələri)

A. Müəssisə

Azərbaycan qanunvericiliyi baxımından “*müəssisə*” sözü yalnız hər-hansı (dövlət yaxud qeyri-dövlət) kommərsiya şirkətinin, o cümlədən dövlət şirkətinin təsviri üçün istifadə edilmir. “*Müəssisə*” olaraq müxtəlif yerlər və qurumlar tərif edilir.

Azərbaycan Respublikasının Mülki Məcəlləsi (MM) “müəssisə” olaraq “*tərbiyə, müalicə, əhalinin sosial müdafiəsi və ya digər oxşar*” qurumları tanıyır və bəzi hallarda onları qəyyum olaraq müəyyən edir³; yaxud digər halda “*torpaq sahələri, binalar və qurğular, yaşayış və qeyri-yaşayış sahələri, fərdi yaşayış və bağ evləri, yer təkli sahələri, sututurları, meşələr və çoxillik əkmələr, əmlak kompleksi*” “*müəssisə*” olaraq qeyd edilir.⁴ Həmçinin hospitallar, sanatoriyalar və digər hərbi-müalicə yerləri də müəssisə olaraq tanınırlar.⁵ Mülki Məcəllə eyni zamanda “müəssisə” olaraq xitab etdiklərini kirayə/icarə predmeti də edir.⁶ Bunlarla yanaşı franşayzing ilə bağlı “müstəqil müəssisə” termini istifadə edilir ki, bu da “*müəssisə*” dedikdə MM baxımından yalnız kommərsiya şirkətlərinin nəzərdə tutulması qənaətinə gəlinməsinə mümkün etmir.⁷ Mülki Məcəllə maliyyə-investisiya qurumlarını da müəssisə adlandırır.⁸ “Tibb müəssisələri”, “təhsil müəssisələri”, “hərbi müəssisə” və “müalicə müəssisəsi” terminlərindən məcəllənin ayrı-ayrı maddələrində bir neçə halda istifadə edilir.⁹

³ Azərbaycan Respublikasının Mülki Məcəlləsi, maddə 35.4 (1999).

⁴ Yəne orada, maddə 139-1.1.5.

⁵ Yəne orada, maddə 362.3.1.

⁶ Yəne orada, maddə 700.

⁷ Yəne orada, maddə 723.

⁸ Yəne orada, maddə 1048-2.2.

⁹ Yəne orada, maddə 1112, 1119.5, 1121.3.2, 1181.4.

“Dövlət müəssisələri” termini MM-də belə müəssisələrin özəlləşdirilərək səhmdar cəmiyyətə çevrilməsi ilə bağlı olaraq bir halda istifadə edilir.¹⁰

Ümumən, araşdırma 1999-cu ildə yeni MM qəbul *edilmə qədər* məhdud məsuliyyətli hüquqi şəxslərə münasibətdə də “müəssisə” anlayışından istifadə edildiyini göstərir. Bu anlayış müəssisələr haqqında ayrı-ayrı qanunların Mülki Məcəllədə birləşdirilməsindən sonra “cəmiyyət” anlayışı ilə əvəz edilmişdir.

Müəssisə termininin iqtisadi qanunvericilik baxımından birbaşa tərifi yalnız Azərbaycan Respublikasının Vergilər Məcəlləsində (VM) verilir.¹¹ Məcəllə öz məqsədləri üçün aşağıdakıları “müəssisə” hesab edir:

- a. Azərbaycan Respublikasının qanunvericiliyinə müvafiq olaraq yaradılmış hüquqi şəxslər;
- b. xarici dövlətin qanunvericiliyinə uyğun olaraq yaradılmış hüquqi şəxslər (korporasiyalar, şirkətlər, firmalar və digər analogi qurumlar), habelə onların filialları və ya daimi nümayəndəlikləri;
- c. Azərbaycan qanunlarına əsasən yaradılmış hüquqi şəxslərin sərbəst balans, cari və ya digər hesablara malik olan filialları, struktur bölmələri və ya digər ayrıca bölmələri.

Müəssisə termini qanunvericilikdə yalnız mülki və iqtisadi hüquq münasibətləri kontekstində deyil, həm də cinayət hüququ kontekstində istifadə edilir. Cəzaçəkmə yerlərinin “müəssisə” adlandırılması (məs. CM maddə 55)¹², yaxud “ümumi və möhkəm rejimli tərbiyə müəssisələri” (CM maddə 55)¹³ termininin istifadəsi qanunvericilikdə müəssisə terminindən çoxşaxəli istifadənin olmasının növbəti göstəricisidir.

VM-nin verdiyi tərif çərçivəsində aydınlaşdırılmalı olan, əlbəttə ki, Mülki Məcəllə və Cinayət Məcəlləsində (CM) qeyd edilən müəssisələrin “hüquqi şəxs” olub olmamasıdır.

Mülki Məcəllə hər hansı qurumun “hüquqi şəxs” olmasını onun qeydiyyatına və qeydiyyat nəticəsində əldə etdiyi hüquq qabiliyyətinə bağlayır (MM maddə 43, 44).¹⁴ Bu baxımdan MM və CM-də qeyd edilən müəssisələrin bir qisminin “hüquqi şəxs” ola bilməsi mümkündür. Bununla belə, bəzi hallarda müəssisələrin hüquqi şəxs hesab edilməməsi də realdır. Lakin MM və CM-də qeyd edilən müəssisələrdən hüquqi şəxs hesab edilənlərinin əksər hallarda qeyri-kommersiya hüquqi şəxs olması aydınlaşır.

Qeyde edilməlidir ki, VM öz məqsədləri üçün qeyri-kommersiya və kommersiya hüquqi şəxsləri arasında fərq qoymur.

Audit xidməti haqqında qanunla müəssisələr həm də “təsərrüfat subyekti” olaraq qəbul edilir¹⁵

¹⁰ Yəni orada, mad. 98.8.

¹¹ Azərbaycan Respublikasının Vergi Məcəlləsi, mad. 13.2.39 (2000).

¹² Azərbaycan Respublikasının Cinayət Məcəlləsi, mad. 55 (1999).

¹³ Yəni orada.

¹⁴ Yuxarıda istinad 3, mad. 43.1.

¹⁵ Auditor xidməti haqqında Azərbaycan Respublikası qanunu, mad. 1, 882 (1994).

Yuxarıda qeyd edilənlər onu göstərir ki, “*müəssisə*” sözü çox geniş şəkildə “*təsisatları*” ifadə etmək üçün istifadə edilir.

Bu baxımdan, qanunvericilikdə “*müəssisə*” dedikdə (kommersiya və qeyri-kommersiya) hüquqi şəxslər və təsisatlar (təhsil, tərbiyə, çəzaçəkmə yerləri, idarələr və oxşar təsisatlar) nəzərdə tutulur. Bu mənada “*müəssisə*” dedikdə nəinki kommersiya qurumları, həm də qeyri-kommersiya qurumlarının nəzərdə tutulduğu aydınlaşır. Həmçinin qanunvericilik baxımından müvafiq anlayışın dövlət, eləcə də qeyri-dövlət müəssisələrinə aid edilən termin olduğu anlaşılır.

Hazırkı məqalənin məqsədi “*dövlət müəssisələri*” və onların beynəlxalq müqavilələri bağlaması olduğundan araşdırma bu istiqamətdə davam edəcəkdir.

B. Azərbaycan dövlətinə məxsus müəssisələr

“*Azərbaycan dövlətinə məxsus müəssisələr*” ifadəsinə mövcud qanunvericilik aktları ayrıca xüsusi anlayış vermir.

Bununla belə, “*Azərbaycan dövlətinə məxsus*” ifadəsi kifayət qədər aydındır, birmənalıdır və müəssisələrin tam olaraq Azərbaycan dövlətinə *aidliyini* göstərir. Müəssisələrin Azərbaycan dövlətinə məxsus olmasının (hər oxşar münasibətdə olduğu kimi) iki əsas istiqaməti vardır: əmlak və səhmlərin (payların) nəzarət zərfinə sahiblik. Bu isə öz növbəsində “*məxsus*” ifadəsinin mülkiyyətçini bildirmək üçün istifadə edildiyinin göstəricisidir.

Qeyd edilən iki istiqaməti də nəzərə almış olsaq: “*Azərbaycan dövlətinə məxsus olan müəssisələr*” dedikdə - *Azərbaycan dövlətinin mülkiyyətində olan, qanunvericiliklə tələb edildiyi hallarda qeydiyyata alınmış və hüquq qabiliyyəti olan kommersiya, yaxud qeyri-kommersiya hüquqi şəxsləri və təsisatlarının* nəzərdə tutulduğu anlaşılır.

Azərbaycan dövləti müxtəlif müəssisələri həm təsisat olaraq (hüquqi şəxs olmadan), həm də hüquqi şəxs kimi yaradır. Bu baxımdan, mülkiyyətçi olaraq Azərbaycan dövlətinə məxsus olan müəssisələrin sayı olduqca çoxdur.

Əmlak vs. Müəssisə: MM baxımından “*Əmlak istənilən əşyaların və qeyri-maddi əmlak nemətlərinin toplusudur*” (MM, maddə 135.2).¹⁶ Başqa halda “*Azərbaycan Respublikasına mülkiyyət hüququ ilə mənsub olan əmlak dövlət mülkiyyətidir*” (MM, maddə 155.1).¹⁷ Bu mənada, əmlak “*müəssisə*” nin (o cümlədən dövlət müəssisəsinin) tərkib hissəsidir, amma “*müəssisə*” nin özü deyildir. Bununla belə, “*müəssisə*” anlayışı ilə bağlı yuxarıdakı hissədə edilən qeydlərdə göstəriləndiyi kimi hospitallar, sanatoriyalar, müalicə təsisatları – yəni əmlakla (infrastruktur) ifadə edilən təsisatlar – “*müəssisə*” hesab edilə bilər. Lakin bu “*müəssisələr*” in rəhbərlərinin Azərbaycan Respublikasının beynəlxalq müqavilələrini imzalamaq səlahiyyəti aşağıdakı əlavə araşdırmanın predmetidir.

¹⁶ Yuxarıda istinad 3, mad. 135-2.

¹⁷ Yəni orada, mad. 155-1.

Mərkəzi icra hakimiyyəti orqanı vs. dövlət müəssisələri: Aydınlaşdırılmalı olan digər məsələ qanunvericilik baxımından *“dövlət müəssisələri”nin* həm də (mərkəzi yaxud yerli) *“icra hakimiyyət orqanları”* yaxud əksinə *“icra hakimiyyət orqanları”nın “dövlət müəssisələri”* olub olmamasıdır.

Qanunvericilikdə *“hakimiyyət orqanları”* yaxud *“icra hakimiyyəti orqanı”* ifadələrinə anlayış verilmir. Bunun qanunvericilik texnikası baxımından praktik səbəbləri ola bilər. Belə ki, hansı orqanın *“icra hakimiyyəti orqanı”* nın səlahiyyətlərini icra etməsi qəbul edilən normativ hüquqi aktdan asılı olaraq hər dəfə ayrıca müəyyənləşdirilir. Qanunvericilikdə *“mərkəzi icra hakimiyyəti orqanı”* na da anlayış verilmir, bu isə konkret halda beynəlxalq müqavilələrin bağlanması baxımından qeyri-müəyyənləşdirilən səbəb ola bilər. Çünki dövlət müəssisələrinin beynəlxalq müqavilələr imzalayarkən səlahiyyət verilməsi əsaslarından biri kimi Fərmanla təsdiq edilmiş qaydaların 1.2-ci bəndi göstərilir.¹⁸ Bu baxımdan, haqlı olaraq sual oluna bilər - *“Azərbaycan dövlətinə məxsus müəssisələr”* (dövlət müəssisələri) *“mərkəzi icra hakimiyyəti orqanı”* dırımı?

Maraqlıdır ki, Azərbaycan Respublikasının Nazirlər Kabinetinin *“Mərkəzi icra hakimiyyəti orqanları”* nı sadaladığı internet səhifəsində¹⁹ başlıqlardan biri *“Dövlət şirkətləri və Dövlət xidmətləri”* dir. Amma *“dövlət şirkətləri”* siyahıya əlavə edilməmişdir. Bunun konstitusion səbəbləri mövcuddur. Azərbaycan Respublikası Konstitusiyası *“mərkəzi icra hakimiyyəti orqanı”* rəhbərlərinin Nazirlər Kabinetinin tərkibinə daxil olduğunu yazır.²⁰ Əgər qəbul etsək ki, *“Dövlət şirkətləri”* mərkəzi icra hakimiyyəti orqanlarıdır, bu halda *“dövlət şirkətləri”* nin rəhbərləri Nazirlər Kabinetinin tərkibinə daxil edilməlidir. Bu isə mümkün görünür. Digər tərəfdən bilinən təcrübədir ki, bəzi hallarda *“mərkəzi icra hakimiyyəti orqanları”* nın səlahiyyətləri Azərbaycan Respublikası Prezidentinin Sərəncamları ilə dövlət şirkətlərinin səlahiyyəti edilə bilər. Buna baxmayaraq, hansısa konkret hal üçün səlahiyyətlərin/funksiyaların ötürülməsi *“dövlət şirkətləri”* ni *“mərkəzi icra hakimiyyəti orqanı”* etmir. Qanun və digər normativ aktların araşdırılması da göstərir ki, konstitusion olaraq *“mərkəzi icra hakimiyyəti orqanı”* və *“dövlət şirkətləri”* nin yerinə yetirdiyi funksiyalar fərqlidir. Normativ aktlar da bu iki instituta fərqli və ayrı-ayrılıqda yanaşır (ayrı maddələrdə, ayrı-ayrı müddəalarla, və s.).²¹

Əlbəttə, başqa bir mövzu *“mərkəzi icra hakimiyyəti orqanları”* nın *“dövlət müəssisəsi”* hesab edilib-edilməməsidir. Sözsüz ki, *lüğəti* mənada *“orqan”* əmlakı, idarəetmə aparatı, təsərrüfat fəaliyyəti və oxşar bir çox əlaməti ilə *“təsisat”* dır, bu mənada da *“müəssisə”* hesab edilə bilər. Həmçinin

¹⁸ Yuxarıda istinad 2, bənd 1.2.

¹⁹ Siyahıya əsasən Nazirliklər, Dövlət Komitələri, Dövlət Xidmətləri, Dövlət Agentliklərinin bəzisi mərkəzi icra hakimiyyəti orqanı hesab edilir. Daha ətrafı: <https://cabmin.gov.az/az/page/57/>

²⁰ Yuxarıda istinad 1, mad. 115.

²¹ Nümunə üçün: “Azərbaycan Respublikasının beynəlxalq müqavilələri” haqqında qanun, yuxarıda istinad 2, mərkəzi icra hakimiyyəti orqanları ilə dövlətə məxsus müəssisələri ayırır.

qanunvericiliyin "müəssisə" anlayışına yuxarıda təsvir edilən yanaşması da deməyə əsas verir ki, "mərkəzi icra hakimiyyəti orqanları" dövlətin müəssisələri hesab edilə bilər.

Amma nəzərə alınmalıdır ki, bu mənada hər "dövlət müəssisəsi" "dövlət şirkəti" deyildir, baxmayaraq ki, hər "dövlət şirkəti" "dövlət müəssisə"sidir.

O da qeyd edilməlidir ki, Nazirlər Kabineti qeyd edilən siyahıda "dövlət müəssisələri" anlayışından istifadə etmir. Bu ölkə idarəetmə orqanları səviyyəsində "dövlət şirkətləri" nə, "dövlət müəssisələr"indən fərqli baxıldığını və (təbiəti etibarlı ilə) bütün "dövlət müəssisələr"inin "dövlət şirkəti" olaraq nəzərdən keçirilmədiyinin göstəricisidir.

C. "Qanun" və "Fərman" baxımından "Azərbaycan dövlətinə məxsus müəssisələr"

Qanun öz məqsədləri üçün olsa belə, "Azərbaycan dövlətinə məxsus müəssisələr"ə anlayış yaxud izah vermir. Qaydalarda da ifadənin izahı yoxdur.

Nəzəri olaraq, Qanun və Qaydalar dövlətə məxsus bütün müəssisələri nəzərdə tutur (hüquqi şəxs olub-olmamasından asılı olmayaraq). Bu mənada da hər hansı məhdudiyət müəyyən edilmir.

Təcrübədə Qanun və Qaydaların əsasən dövlət şirkətlərinə tətbiq edildiyi müşahidə edilir. Amma bəzi hallarda dövlət şirkətlərindən başqa müəssisələrə də Qanun və Qaydaların tətbiq edildiyini görmək mümkündür.²² Geniş yayılmış təcrübə isə Qanun və Qaydaların, dövlət müəssisələri arasından dövlət şirkətlərinə tətbiq edilməsidir.

Maraqlıdır ki, Qanun və Qaydalar baxımından "Azərbaycan dövlətinə məxsus müəssisə" ifadəsi "mərkəzi icra hakimiyyəti orqanları"na şamil edilmir. Belə ki, Qanun və Qaydalar "mərkəzi icra hakimiyyəti orqanları"nı "dövlətə məxsus müəssisələr"dən fərqləndirməklə onlara ayrı-ayrı xitab edir, eləcə də onların "və" bağlayıcısı ilə ayrıldığı bəndlər/maddələr mövcuddur.²³ Bu isə özlüyündə göstərir ki, Qanun və Qaydalar baxımından "mərkəzi icra hakimiyyəti orqanları" və "dövlətə məxsus müəssisələr"ə eyni deyil, fərqli qurumlar olaraq yanaşılır.

²² Nümunə üçün: Azərbaycan Respublikası Prezidenti tərəfindən beynəlxalq saziş/memorandumları imzalamaq üçün Bakı Şəhər İcra Hakimiyyətinə verilmiş səlahiyyətlər - BŞİH ilə Roma şəhəri meriyası arasında Protokol (<http://e-qanun.az/framework/7410>); Azərbaycan Elmlər Akademiyasına Avropa Nüvə Tədqiqatları Təşkilatı (CERN) ilə Yüksək Enerjilər Fizikası sahəsində Saazişin imzalanması səlahiyyətinin verilməsi (<http://e-qanun.az/framework/3776>).

²³ Nümunə üçün: "Azərbaycan Respublikasının beynəlxalq müqavilələri" haqqında qanun, yuxarıda istinad 2, maddə 17; "Azərbaycan Respublikasının beynəlxalq müqavilələri Qaydaları", yuxarıda istinad 2, bənd 2.2, 2.3, "mərkəzi icra hakimiyyəti orqanları" və "dövlətə məxsus müəssisələr"ə ayrı-ayrılıqda qayda müəyyən edir.

II. Azərbaycan Respublikasının beynəlxalq müqavilələri

“Beynəlxalq müqavilələr” anlayış olaraq genişdir (beynəlxalq hüququn (xüsusi və ümumi) ayrıca sahəsidir) və hazırkı məqalənin məqsədi “*beynəlxalq müqavilələr*”i geniş mənada araşdırmaq deyildir (məqalə çərçivəsində bu fiziki olaraq mümkün də deyildir). Bu baxımdan, mövzu daha dar çərçivədə və sırf Qanun və Fərmanın perspektivindən “Azərbaycan Respublikasının beynəlxalq müqavilələri”nin nələr hesab edildiyinə və kimlərin belə müqavilələri bağlaya bilməsi məsələsinə köklənəcəkdir.

Bununla belə, Qanuna keçməzdən əvvəl ümumi olaraq qeyd edilməlidir ki, 1969-cu il Beynəlxalq Müqavilələr haqqında Vyana Konvensiyasına əsasən (termin olaraq) “*müqavilə*” dedikdə “dövlətlər arasında yazılı formada bağlanan və beynəlxalq hüquqla tənzimlənən, bir sənəddə və ya öz arasında əlaqəli olan iki və ya daha çox sənəddə əks olunmasından və konkret adından asılı olmayaraq beynəlxalq razılaşma başa düşülür.”²⁴

Bu mənada, “*Azərbaycan Respublikasının beynəlxalq müqavilələri*” də digər dövlətlərlə bağlanmış və beynəlxalq hüquqla tənzimlənən sənədlər olaraq anlaşılmalıdır. Bununla belə, Qanun Konvensiyanın müqavilə anlayışını genişləndirir ki, bu növbəti hissədə daha ətraflı araşdırılır.

A. Qanun baxımından Azərbaycan Respublikasının beynəlxalq müqavilələri

Qanunda olduqca birmənalı anlayış var: “Azərbaycan Respublikasının beynəlxalq müqaviləsi, adından asılı olmayaraq, Azərbaycan Respublikasının xarici dövlətlərlə və beynəlxalq təşkilatlarla bu Qanunla müəyyənləşdirilmiş qaydada yazılı şəkildə bağlanan razılaşmasıdır.”²⁵

Qeyd edilməsi vacibdir ki, Qanunun predmeti hər hansı beynəlxalq müqavilələr deyil, *xarici dövlətlər və beynəlxalq təşkilatlarla* olan müqavilələrdir. Bu müqavilələr Qanunda (a) dövlətlərarası və (b) hökumətlərarası olmaqla 2 yerə ayrılır.²⁶ Qanunda hətta (istisna müəyyən edilmədən) *mərkəzi icra hakimiyyəti orqanları* tərəfindən bağlanan beynəlxalq müqavilələrin də hökumətlərarası müqavilə hesab edildiyi yazılır.²⁷ Əlbəttə, dövlətin xarici qeyri-dövlət qurumları (kommersiya təşkilatları) ilə olan müqavilələri də “beynəlxalq müqavilə”dir, amma belə müqavilələr Qanunun əhatə dairəsindən kənardadır.

Dövlətlərarası müqavilələr Azərbaycan Respublikası adından imzalanan müqavilələr, hökumətlərarası müqavilələr isə Azərbaycan Respublikasının

²⁴ Müqavilələr haqqında Vyana Konvensiyası, mad. 2 (1969).

²⁵ Yuxarıda istinad 2, mad. 1.

²⁶ Yəni orada, mad. 2.

²⁷ Yəni orada. Bu maddədə göstərilən müvafiq icra hakimiyyəti orqanlarının səlahiyyətlərinin “mərkəzi icra hakimiyyəti orqanları” tərəfindən həyata keçirildiyi 27.07.2011 tarixli 480 sayılı Prezident Fərmanı ilə müəyyən edilir.

hökuməti adından imzalanan müqavilələr olaraq təsbit edilir.²⁸ Amma Qanun hansı müqavilələrin Azərbaycan Respublikası adından və hansı müqavilələrin Azərbaycan Respublikası hökuməti adından bağlanması məsələsinə ayrıca aydınlıq gətirmir, beləliklə də, bunu müqavilənin tərkibinin və xarakterinin öhdəsinə həvalə edir.

Maraqlıdır ki, Qanunun 7-ci maddəsində dövlətlərarası və Azərbaycan qanunlarından fərqli qaydalar nəzərdə tutan hökumətlərarası müqavilələri istisna edən “Azərbaycan Respublikasının digər beynəlxalq müqavilələri” anlayışından istifadə edilir. İstisnadan çıxış edib bu beynəlxalq müqavilələri müəyyən etməyə çalışsaq, onların Azərbaycan Respublikası qanunlarından fərqli qaydalar müəyyən etməyən müqavilələr olduğunu müəyyən etmiş olarıq. Belə müqavilələr barədə danışıqlar və onların imzalanması *xüsusi səlahiyyət olmadan* həyata keçirilə bilər.

Qeyd edilənlərdən müəyyən etmək mümkündür ki, beynəlxalq razılaşmanın “Azərbaycan Respublikasının beynəlxalq müqaviləsi” olması üçün bir neçə kriteriya mövcuddur:

1. Xarici dövlətlə bağlanması
2. Beynəlxalq təşkilatla bağlanması
3. Azərbaycan Respublikasının adından (dövlət yaxud hökumət olaraq) bağlanması

Bu üç xüsusiyyət beynəlxalq razılaşmanı “Azərbaycan Respublikasının beynəlxalq müqaviləsi” kimi səciyyələndirməyə imkan verir.

Qanun və Fərmanda (Qaydalarla) digər hər hansı xüsusiyyət müəyyən edilməmişdir. Buna görə də, qeyd edilən xüsusiyyətlərin olmadığı beynəlxalq razılaşmalar Azərbaycan Respublikasının beynəlxalq müqaviləsi hesab edilmir.

B. Azərbaycan Respublikasının beynəlxalq müqavilələrinin bağlanması səlahiyyəti

Azərbaycan Respublikasının dövlətlərarası və hökumətlərarası beynəlxalq müqavilələrinin imzalanması səlahiyyəti Konstitusiyaya ilə *yalnız* Azərbaycan Respublikası Prezidentinə həvalə edilmişdir.²⁹ Bu baxımdan, yalnız Azərbaycan Respublikasının Prezidenti əlavə səlahiyyət almadan Azərbaycan Respublikasının beynəlxalq müqavilələrini imzalaya bilər. Digər şəxslərin Azərbaycan Respublikasının beynəlxalq müqavilələrini imzalaması Azərbaycan Respublikası Prezidentinin müvafiq səlahiyyəti verməsi ilə mümkündür. Konstitusiyaya əsasən, Azərbaycan Respublikasının Prezidenti dövlətlərarası və hökumətlərarası beynəlxalq müqavilələri bağlamaq səlahiyyətini 1-ci vitse-prezidentə, Nazirlər Kabinetinin üzvlərinə, eləcə də müəyyən etdiyi digər şəxslərə verə bilər.³⁰

²⁸ Yuxarıda istinad 25.

²⁹ Yuxarıda istinad 1.

³⁰ Yuxarıda istinad 1, mad. 110-1.

Burada Konstitusiyanın yuxarıda qeyd edilən maddəsindəki *“müəyyən etdiyi digər şəxslər”* ifadəsi ölkə başçısına geniş seçim imkanı verir və hər hansı məhdudiyətin olmadığı kimi anlaşılır.

Qanunun 6-cı maddəsi Azərbaycan Respublikası Prezidentinin *“Azərbaycan Respublikasının beynəlxalq müqavilələrini imzalamaq səlahiyyətini müvafiq icra hakimiyyəti orqanlarının və dövlətə məxsus müəssisələrin rəhbərlərinə”* verə biləcəyini təsbit edir. Yuxarıda müzakirə etdiyimiz *“mərkəzi icra hakimiyyəti orqanları”* və *“dövlətə məxsus müəssisələr”* ə qanuvericilikdə olan fərqli yanaşma bu maddədə bariz olaraq görünür - qanunverici *“mərkəzi icra hakimiyyəti orqanları”* dedikdə *“dövlətə məxsus müəssisələr”*i nəzərdə tutmur.

Ümumən isə Qanunun 6-cı maddəsi ilə Azərbaycan Respublikası Prezidentinə beynəlxalq müqavilələri imzalamaq səlahiyyətini mərkəzi icra hakimiyyəti orqanlarının və dövlətə məxsus müəssisələrin rəhbərlərinə vermək *hüququ* verilir. Azərbaycan Respublikasının Prezidenti bu hüquqdan istifadə etməyib səlahiyyəti başqa şəxsə (məsələn Azərbaycan Respublikasının səfirinə yaxud yerli icra hakimiyyətinin başçısına) həvalə edə bilər. Təcrübədə buna tez-tez rast gəlinir.

Əksər hallarda isə Azərbaycan Respublikasının beynəlxalq müqavilələrini imzalamaq səlahiyyəti mərkəzi icra hakimiyyəti orqanlarının, yaxud Azərbaycan dövlətinə məxsus şirkətlərin rəhbərlərinə verilir. Burada qarşıya çıxan əsas sual (ki, bu sualın aydınlaşdırılması hazırkı məqalənin məqsədidir) dövlətə məxsus müəssisələrin beynəlxalq müqavilələrinin *“Azərbaycan Respublikasının beynəlxalq müqaviləsi”* hesab edilib edilməməsidir?

C. Dövlətə məxsus müəssisələrin beynəlxalq müqavilələri

Dövlət müəssisələri (şirkətləri) müxtəlif səpgili və əsasən kommersiya xarakterli beynəlxalq müqavilələr bağlayırlar. Bu təcrübə onların gündəlik təsərrüfat fəaliyyətindən irəli gəlir. Belə müqavilələrə xarici dövlətlərin şirkətləri (o cümlədən eyni sahədə fəaliyyət göstərən dövlət şirkətləri), dövlət orqanları ilə olan memorandumları, protokolları, razılaşmaları, müqavilələri aid etmək olar. Dövlət müəssisələrinin (şirkətlərinin) bağladığı belə beynəlxalq müqavilə Azərbaycan Respublikasının beynəlxalq müqaviləsi hesab edilməməlidir.

Xüsusi vurğulanmalıdır ki, Qanunda və Qaydalarda da dövlətə məxsus müəssisələrin (şirkətlərin) bağladığı beynəlxalq müqavilələr birbaşa hökumətlərarası müqavilələr yaxud dövlət müqavilələrinə aid edilmir.

Buna görədir ki, dövlətə məxsus müəssisələrin (şirkətlər) bağladığı bütünlükdə müqavilələr *“Azərbaycan Respublikasının müqaviləsi”* hesab edilmir.

Əsas olan *“dövlətə məxsus müəssisələrin bağladığı beynəlxalq müqavilələrin Azərbaycan Respublikasının olub olmamasını necə müəyyən etməli?”* sualının cavablandırılmasıdır.

Sualın cavablandırılması əslində sadədir - beynəlxalq razılaşma Qanunla müəyyən edilmiş bu məqalənin 2.1-ci paragrafında sadalanan xüsusiyyətlərə cavab vermədikcə və imza yerində “Azərbaycan dövlətinin adından” və ya “Azərbaycan hökuməti adından” yazılmadıqca belə müqavilə “Azərbaycan Respublikasının beynəlxalq müqaviləsi” hesab edilmir, hətta belə müqavilə ilə Azərbaycan Respublikası üçün (səhmdar yaxud təsisçi olaraq) dolayı öhdəliklər yaradılsa da (bu barədə aşağıda daha ətraflı).

Amma Qanunla müəyyən edilmiş, bu məqalənin 2.1-ci paragrafında sadalanan xüsusiyyətlərə cavab verən və Azərbaycan dövləti yaxud hökuməti adından bağlanan müqavilələr Azərbaycan dövlətinə məxsus müəssisələrin rəhbərləri tərəfindən imzalanırsa, bu halda Azərbaycan Respublikası Prezidentinin imzalayan şəxslərə xüsusi səlahiyyət verməsi tələb edilir.

D. Dövlətə məxsus müəssisələrin rəhbərlərinə səlahiyyət verilməsi tələb edilən beynəlxalq müqavilələr

Bundan əvvəlki hissələrdə də yazıldığı kimi dövlətə məxsus müəssisələrin *Azərbaycan Respublikasının beynəlxalq müqavilələrini* imzalamaq yaxud danışıqlar aparmaq səlahiyyəti özlüyündə yoxdur. Bu səlahiyyət Azərbaycan Respublikası Prezidenti tərəfindən verilir.

Qanunla müəyyən edilmiş, bu məqalənin 2.1-ci paragrafında sadalanan xüsusiyyətləri ehtiva edən və Azərbaycan dövləti yaxud hökuməti adından bağlanan müqavilələr Azərbaycan dövlətinə məxsus müəssisələrin rəhbərləri tərəfindən imzalanırsa, bu halda Azərbaycan Respublikası Prezidentinin imzalayan şəxslərə xüsusi səlahiyyət verir³¹.

Digər hallarda xüsusilə təşkilatlar öz adlardan beynəlxalq müqavilələr bağladıqda Qanun və Qaydalar səlahiyyətin verilməsini tələb etmir, hətta belə müqavilə ilə Azərbaycan Respublikası üçün (səhmdar yaxud təsisçi olaraq) dolayı öhdəliklər yaradılsa belə.

İddia edilə bilər ki, dövlətə məxsus müəssisələr imzaladıqları istənilən müqavilə ilə dövlət üçün - *dövlət şirkətləri dövlətin onların səhmdarı olduğundan digər şirkətlər isə təsisçiləri dövlət olduğundan (dövlətin olduqlarından)* –öhdəlik (dolayı yaxud birbaşa) yaradırlar və bu səbəbdən səlahiyyətin verilməsi tələb edilir.

Amma Qanuna və Qaydalara əsasən dövlət müəssisələrinin müqavilələrinin, *səhmdarı və təsisçisi olaraq*, dövlət üçün dolayı yaxud birbaşa öhdəlik yaratması səbəbindən müvafiq qaydada səlahiyyət üçün müraciət edilməli olduğunu demək mümkün deyil. Müəssisənin dövlətə məxsus olub-olmamasından asılı olmayaraq hər müqavilə dövlətin müqaviləsi deyil, bu mənada hər beynəlxalq müqavilə də Azərbaycan Respublikasının beynəlxalq müqaviləsi deyil.

³¹ Yuxarıda istinad 2.

Burada sual, əlbəttə ki, dövlətin öz müəssisələrinin öhdəlikləri üçün məsuliyyət daşıyıb-daşımamasıdır. Hazırkı məqalənin predmeti olmasa da, qeyd edilməlidir ki, dövlət şirkətlərində məsələyə şirkətlərin nizamnamələrinin perspektivindən baxılsa, əksər hallarda təsisçi müəssisənin öhdəliklərinə görə cavabdeh deyil və belə müəssisələrin fəaliyyəti ilə bağlı zərər üçün iştirakının (payı və /və ya səhmləri) *dəyəri* həddində risk daşıyır. İştirak 100% (yüz faiz) olsa da, onun dəyəri nizamnamə kapitalındakı həcmi ilə ölçülür.

Nəticə

Bu Məqalədə biz dövlət müəssisələrinin beynəlxalq müqavilələri imzalamaq məsələsini araşdırdıq. Araşdırarkən ən başlıcası “müəssisə” anlayışından başladığımızı. Müəyyən etdik ki, Azərbaycan qanunvericiliyinə baxdıqda “müəssisə” dedikdə təkcə “kommersiya şirkəti” nəzərdə tutulmur, həm də qeyri-kommersiya təsisatları “müəssisə” olaraq başa düşülür. “Dövlət müəssisələri” ifadəsi də bu mənada həm dövlətin yaratdığı kommersiya qurumlarını, həm də qeyri-kommersiya qurumlarını əhatə edir. Maraqlı məqamlardan biri “dövlət müəssisələrinin”, “mərkəzi icra hakimiyyəti orqanı” yaxud “icra hakimiyyəti orqanı” hesab edilib-edilməməsi idi. Müəyyən etdik ki, hər hansı nazirlik, komitə yaxud digər icra hakimiyyəti orqanı qurumları və əmlakı olan iri təsisatdır və bu mənada “dövlət müəssisəsidir”. Yəni nəzərə alsaq ki, “müəssisə” Azərbaycan qanunvericiliyi baxımından həm də qeyri-kommersiya qurumlarına şamil edilə bilən addır, “mərkəzi icra hakimiyyəti orqanı” yaxud “icra hakimiyyəti orqanı” dövlət müəssisəsi sayıla bilər. Amma yenə də hər dövlət müəssisəsinin mərkəzi icra hakimiyyəti olmasını demək qanunvericilik baxımından mümkün deyil. “Dövlət şirkətləri” də qanunvericilik baxımından “mərkəzi icra hakimiyyəti orqanı” yaxud “icra hakimiyyəti orqanı” hesab olunmur.

Bunlara baxmayaraq həm kommersiya, həm də qeyri-kommersiya dövlət müəssisələrinin müqavilə, o cümlədən beynəlxalq müqavilə bağlamaq səlahiyyəti mövcuddur. Əks halda onların təsərrüfat fəaliyyətləri mümkün olmazdı. Burada fərqləndirilməli olan dövlət müəssisələrinin beynəlxalq müqavilələri ilə Azərbaycan Respublikasının beynəlxalq müqavilələridir.

Məqalənin başlıca tezi dövlət müəssisələrinin bütün beynəlxalq müqavilələrinin “*Azərbaycan Respublikasının beynəlxalq müqavilələri*”ləri olmaması idi ki, bu tezis Qanun və Qaydaların araşdırılması ilə təsdiqini tapdı.

Bu mənada “*Azərbaycan Respublikasının beynəlxalq müqavilələri*”nin anlayışını araşdıraraq müəyyən etdik ki, “*Azərbaycan Respublikasının beynəlxalq müqavilələri*” Azərbaycan Respublikası adından xarici dövlətlər və beynəlxalq təşkilatlarla bağlanan dövlətlərarası və hökumətlərarası razılaşmalardır. Bununla bağlı qeyd etdik ki, Qanun beynəlxalq razılaşmanın “*Azərbaycan Respublikasının beynəlxalq müqaviləsi*” kimi səciyyələndirilməsi üçün 3 xüsusiyyət müəyyən edir – (a) xarici dövlətlə bağlanması (b)

beynəlxalq təşkilatla bağlanması (c) Azərbaycan Respublikasının (dövlət yaxud hökumət olaraq) adından bağlanması.

Dövlət müəssisələrinin beynəlxalq müqavilələri isə belə təşkilatların öz adlarından bağladıkları müqavilələrdir və yuxarıda qeyd edilən üç xüsusiyyətə cavab verə bilmədikdə *“Azərbaycan Respublikasının beynəlxalq müqaviləsi”* hesab edilmir.

Əgər *“Azərbaycan Respublikasının beynəlxalq müqavilələri”*ni dövlət müəssisələrinin rəhbərləri bağlayırsa, bu halda onlar Azərbaycan Respublikası Prezidenti tərəfindən müvafiq qaydada səlahiyyətləndirilməlidirlər. Lakin dövlət müəssisələri yuxarıda sadalanan xüsusiyyətlərə cavab verməyən öz beynəlxalq müqavilələrini bağlayırlarsa, bu halda onlara xüsusi səlahiyyətin verilməsi tələb edilmir.

Yekun da o da qeyd edilməlidir ki, mövcud qanunvericiliyin dövlət müəssisələrinin beynəlxalq müqavilələri imzalaması sahəsində olan hissəsinə yenidən baxılması və bu hissənin daha dəqiq və aydın ifadə edilməsi, dövlət müəssisələrinə anlayışın verilməsi, dövlət müəssisələrinin beynəlxalq müqavilələrinə anlayışın verilməsi və onların Azərbaycan Respublikasının beynəlxalq müqavilələrindən fərqləndirilməsinə ehtiyac vardır. Qanunvericinin bu sahədəki normativ aktlara müvafiq dəyişik və əlavələr etməsi bu sahədə dövlət təcrübəsində nəzərə çarpacaq təkmilləşməyə səbəb olacaqdır.

*Elnur Karimov & Sevinj Aliyeva**

“LIKE TAKING CANDY FROM A BABY”: A COMPARATIVE ANALYSIS OF THE STANDARD OF NON-OBVIOUSNESS IN THE PATENT LAW AND PRACTICE OF THE UNITED STATES, EUROPE AND AZERBAIJAN

Abstract

Unsatisfied with the standards of novelty and utility in front of the developing technology, the patent laws started to endorse a new standard which is ‘non-obviousness’. The non-obviousness standard is aimed at the elimination of simple, therefore, doable innovations invented in science or technology from patent protection, thus has an undeniable importance. However, the application of the position of the person having ordinary skill in the art may yield to various approaches in the patent practice. The current practice in the Law on Patents of Azerbaijan Republic, particularly the Article 7(6) has brought the view of the specialist working in the same field of the invention to the center of the examination of non-obviousness. In contrast, the practice in the United States and Europe introduces a different notion of the PHOSITA mainly in the case law. This article is going to discuss the said provision in the light of the comparative law and practice and recommend on the revision of the Law on Patents in this regard.

Annotasiya

İnkişaf edən texnologiyanın fonunda yenilik və faydalılıq standartlarının yetərsizliyi patent qanunvericiliyini ‘ixtira səviyyəliliyi’ adlanan yeni bir standartın axtarışına sövq etmişdir. İxtira səviyyəliliyi elm və ya texnologiyada bəsit, ona görə də asanlıqla yaradıla biləcək ixtiraları patent hüququnun mühafizəsindən kənarlaşdırmaqla mühüm əhəmiyyət kəsb edir. Buna baxmayaraq, mövcud bilgilər məcmusunda ortalama qabiliyyətli şəxsin mövqeyinin tətbiqi praktikada bir-birindən fərqli yanaşmalara gətirib çıxara bilər. Azərbaycan Respublikasının Patent haqqında Qanunu ilə formalaşan praktika, o cümlədən Qanunun 7.6-cı bəndi ixtira səviyyəliliyinin qiymətləndirilməsi üzrə prosedurunun mərkəzinə ixtira ilə eyni sahədə çalışan mütəxəssisi qoyur. Halbuki, ABŞ və Avropadakı təcrübə, xüsusilə presedent hüququ vasitəsilə ortalama qabiliyyətli şəxs anlayışını fərqli məzmununda başa düşür. Bu məqalə sözü gedən bəndi müqayisəli hüquq və praktikanın işığında müzakirə edir və bu mənada Patent haqqında Qanun üçün labüd dəyişikliklər barədə tövsiyələrini verir.

* Respectively, Marmara University LL.M Private Law & Boğaziçi University, MA International Trade Management.

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Introduction

An innovation demands effort. Looking through the latest patentability standards, this statement can easily be justified. But was it always like that? In the earlier times when people were trying to satisfy their needs in an easier way, they started to invent some device. Sparking as a result of personal or group needs, people began to work on inventions that would benefit mankind. Mostly the innovations in the 17th and 18th centuries were examined for their novelty and utility. However, the years brought more sophisticated inventions which were constructed on the prior art. Non-obviousness is what the new patent system looks for to eliminate easy developments from patent examinations.

In the U.S. and European patent laws, an invention is obvious, if it may have been thought by the person having an ordinary skill in the art (PHOSITA) with a reference to the prior art. However, in Azerbaijani law, this concept has been described in a little more differently. According to the Law on Patents, if an invention is not obviously coming out of the existing knowledge for a specialist working on the same field, it is considered non-obvious. It is clear from the definition above that the difference between the

laws originates from the status of the PHOSITA or the specialist of the same field. Being an ultimately subjective standard discussed in the judicial decision, the impact of the language of the laws used to depict the PHOSITA should not be discarded.

Although the specialist of the same field is a general explanation of the PHOSITA in both the U.S. and the European patent practice, the language of the Law on Patents of Azerbaijan Republic comes up with a restrictive provision. Firstly, the PHOSITA's employment status as a specialist can excessively increase the level of skills anticipated by this hypothetical person, while the judicial interpretation takes the practitioner of the same field in most cases in the U.S. Secondly, the requirement of 'the same field' can put the patent examiners under the duty of working on the similarity between two fields of science or technology. It may in turn yield to further workload for the examiners. In this respect, we are going to study the standards for the examination of non-obviousness in all three countries within a comparative study in this article. For this purpose, we are going to dedicate a special consideration to the difference between PHOSITA and a specialist, in order to envisage potential results of evaluation of their positions.

Part I will touch the ways the patent laws around the globe and the international patent systems evolved through the centuries and give a clue about how the invention and the patent vary from each other.

Part II will explain four criteria often referred to in the patent examination phases, including non-obviousness. For the purpose of this article, other standards of patentability will be analyzed together with non-obviousness comparatively.

Part III will be devoted to the examination phase of non-obviousness, especially to the prior art and the PHOSITA. In the light of the U.S. case law and the European regulations, Article 7(6) of the Law on Patents of Azerbaijan Republic will be discussed and necessary recommendations will be introduced for its revision.

I. The concept and development of patents

A. An invention or a patent: is that the question?

According to the Cambridge Dictionary, an invention is '*something or the way of doing something that has not been made, designed or created before*'; '*patent, on the other hand, is the official legal right provided to the inventor in order to make or sell the invention for a specific number of years*'.¹ World Intellectual Property Organization (WIPO) defines the patent as an intellectual property right granted to a product or a process that either introduces a new manner of

¹ Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/> (last visited June 19, 2018).

performing something or present a new technical solution to a problem.² Patents can be provided to brand-new inventions or incremental improvements developed upon previous inventions. In both cases, the patentee has the right to exclude third parties to commercially make, utilize or sell the invention without the permission of the owner. When compared with incremental growth patents, invention patents requires more research and development effort³, know-how and innovation⁴.

The difference between an invention and a patent should be established well because in most cases, they can be confused by people. While a patent is an intellectual property right and therefore, always intangible, an invention can either be tangible as a brand-new product or intangible as a process.

The fundamental aim of the patent system is to provide inventors with rewards.⁵ It ensures that there is an incentive in society for making innovations which in turn leads to social progress. This incentive can be provided by the government as well; however, the patent system is based on private decision-making which is expected to be better and more efficient in the long-run.⁶ From the microeconomic perspective, firms use patents for a couple of strategic purposes such as making a profit from royalties⁷ and protecting their products from imitation by competitors.⁸

B. Early History And Development Of Patent Rights

A patent is an intellectual property right granted for the innovative inventions that ignite the rapid breakthrough in science and technology. Patent rights have not always resembled today's patents. In the earlier times, patents contained simply legible documents to describe what is patented. However, as the years went by, inventions started to get more complex and the patents replaced their simple character with detailed and sometimes complicated wordings. While the first patent was issued in England, under the Statute of Monopolies in 1624, the increasing applications for patent rights from early 17th and 18th centuries required an international cooperation and the establishment of common standards for patentability.⁹

² World Intellectual Property Organization, <http://www.wipo.int/patents/en/> (last visited June 19, 2018).

³ Bin Guo and Peng Ding, *Invention or Incremental Improvement? Simulation Modeling and Empirical Testing of Firm Patenting Behavior under Performance Aspiration*, 102 *Decision Support Systems* 32, 32 (2017).

⁴ Robert D. Dewar and Jane E. Dutton, *The Adoption of Radical and Incremental Innovations: An Empirical Analysis*, 32 *Management Science* 1422, 1423 (1986).

⁵ Richard Gilbert, Carl Shapiro, *Optimal Patent Length and Breadth*, 21 *RAND Journal of Economics* 106, 106 (1990).

⁶ Polk Wagner, *The Patent Theory*, Week 3 Intellectual Property Law and Policy EdX course, (2018).

⁷ Bongsun Kim, Eonsoo Kim, Douglas J. Miller and Joseph T. Mahoney, *The Impact of the Timing of Patents on Innovation Performance*, 45 *Research Policy* 914, 917 (2016).

⁸ Guo and Ding, *supra* note 3, 32.

⁹ Hitesh Chopra and Sandeep Kumar, *Intellectual Property Protection and Rights: Historical and Current Perspective*, 6:5 *International Journal of Pharmacy and Pharmaceutical Sciences* 572, 572-573 (2014).

But the first patent rights, no doubt, goes even to the ancient times when people tried to materialize and control¹⁰ new knowledge in patents. These patent rights mainly occurred in the form of privileges or franchises in most cases in the absence of patent laws.¹¹ Decisions by the judges like in the U.S in 1641 or royal decrees in England had been the main determinative of patent rights before early patent laws entered into force.¹² After the introduction of the Statute of Monopolies and King Elizabeth's subsequent forced signature for the approval, patent rights omitted any other alternatives that had existed before.¹³ The term for the patent was 14 years. The patent system of those ages was truly complicated and required a lot of expenditure. Meanwhile, the specially designated council was responsible for the patent litigations instead of courts, so that it took lots of time and effort to develop new rules for patentability and adapt the system to the latest challenges.¹⁴

The similar trend could be observed in other European countries, more accurately in France and Italy. One of the notable granted inventions was introduced by Galileo Galilei in Italy in 1594 for the irrigation machine which functioned better and cheaper. In his patent application, the invention was characterized as the fruit of his own labor and '*common property of everybody*'.¹⁵ Moving from this notion of '*fruits of someone's own labor*', there exists a discussion over the natural-right character of patent rights supported mostly by Hugo Grotius, Pufendorf and John Locke. Without delving into the specific sides of '*social contract theory*' which exerts the social contract between the inventor and the state over the patent, we would like to remind that the initial incentive for granting patent rights to the individuals came from the desire of the crowns to advance their wealth by monopoly rights.¹⁶

The patent rights in the U.S. started to evolve quite differently, in comparison with Europe but holding some ties with the preceding system.¹⁷ Certainly, the main reasons were the decolonization of the U.S after the War of Independence and most importantly, the acceptance of patent rights as inherent rights of inventors.¹⁸ This approach appeared in the first article of the

¹⁰ Atalay Berk Damgacıoğlu, *Patent Sistemlerinde Buluş Basamağı Kriterinin Değerlendirilmesi*, Uzmanlık Tezi, Türk Patent Enstitüsü Patent Dairesi Başkanlığı, 9 (2011).

¹¹ Not coincidentally, the early deeds to endorse someone's patent rights used to be defined as 'letter of patent'. See, Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History – 1550 – 1800*, 52 *Hastings Law Journal* 1255, 1259 (2001).

¹² Bernard F. Garvey, *History of United States Patents and Present Day Norm of Patentable Inventions*, 5 *Miami Law Quarterly* 541, 541 (1951).

¹³ Worth Wade, *History of the American Patent Incentive System*, 44 *Journal of the Patent Office Society* 67, 67 (1962).

¹⁴ Damgacıoğlu, *supra* note 10, 15.

¹⁵ P.J. Federico, *Origin and Early History of Patents*, 11 *Journal of the Patent Office Society* 292, 294-295 (1929).

¹⁶ Mossoff, *supra* note 11, 1257-1258.

¹⁷ William M. Hindmarch, *A Treatise on the Law Relating to Patent Privileges, for the Use of Inventors*, 3 *Forum* 1, 15 (1875).

¹⁸ Damgacıoğlu, *supra* note 10, 16.

U.S. Federal Constitution which approves inventors' patent rights '*to promote the progress of science and useful arts*'.¹⁹ The result of this development - §101 of the U.S. Patent Act came with a broad protection for patent rights without delimitating the exceptions.²⁰ With the help of judicial decisions, the threshold of patent protection and standards have been ascertained in *common law* countries.

Today more and more types of patentable objects and process have been introduced. In addition to inventions which are the most popular type of patentable objects, patent applications in this era can consist of industrial designs, computer software if embedded in a particular technology, surgical procedures, and even plants.²¹ Patent rights are and have always been territorial in nature and valid within the boundaries of the region in which it has been granted. Regulations and procedures regarding the patent prosecution and enforcement vary across countries. Major patent offices around the world include European Patent Office (EPO), United States Patent and Trademark Office (USPTO), Japanese Patent Office (JPO), and China's State Intellectual Property Office (SIPO). However, there is an international treaty called the Patent Cooperation Treaty (PCT) which allows getting international protection in more than 150 member countries without a need to apply separately for patent protection.²² International intellectual property system aims to harmonize the patent laws worldwide and establish the cooperation between states.²³ The protection brought by the international conventions and the obligations of states support not only the local patent applicants but foreigners in the light of the '*national treatment*' standard. Together with the '*right of priority*', this standard has been undertaken by 177 states under the Paris Convention on the Protection of Industrial Property (Paris Convention).

In Azerbaijan, the development of the patent system was inconsistent during the Soviet era which did not recognize the private property constitutionally at all. Since its independence in 1991, most laws on commerce and intellectual property were adopted. The establishment of the Patent Licensing Committee in 1993 and its successor, the Committee on Standardization, Meteorology and Patent in 2001 were two necessary steps to surmount administrative hurdles. Since 1995, Azerbaijan is a member of the World Intellectual Property Organization (WIPO), and most of its

¹⁹ Wade, *supra* note 13, 67.

²⁰ Dennis D. Crouch and Mitchell L. Terry, *The History and Future of E-commerce Patents*, 7 *Landslide* 13, 14 (2015).

²¹ William W. Fisher, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, 4 (1999), <https://cyber.harvard.edu/people/ffisher/iphistory.pdf> (last visited 25 November 2018).

²² WIPO, http://www.wipo.int/pct/en/pct_contracting_states.html (last visited June 19, 2018).

²³ H.V. Sandhya, *A Critical Study of Harmonization of Patent Law and Its Impact on Indian Legal System*, Karnatak University Department of Law 1, 104 (2013).

administered treaties, such as the Paris Convention and the PCT.²⁴ The legal basis enables the current Patent and Trademark Center to receive e-applications and work with them efficiently. However, more difficulties exist in the adaptation process to the latest international standards, and patent law is not an exception.

II. The conditions for patentability in the United States, Europe and Azerbaijan

A. Novelty

The novelty requirement in patent laws had been one of the earliest criteria before the non-obviousness was introduced to the respective legislations. The main idea behind this standard is to reward innovations.²⁵ This reward in patent laws is embodied in the form of monopoly rights because an inventor contributes to society with something never done before.²⁶ As it is sufficient to check the novelty of an invention or a process, the mere comparison between the claimed subject matter of the patent application and the prior art will be the essence of novelty.

1. The United States

In the U.S. patent law, the examination of this standard encompasses three phases; firstly, the referred prior art should predate the claimed invention, secondly, there should be a strict identity between two subject matters, and finally, the referred prior art should be disclosed in detail to enable the PHOSITA to perceive it sufficiently.²⁷ In order to qualify a prior art, the previous invention should be set in the public domain; in other words, it should be known or used by others but in restrictive terms, by being reduced to practice. It is not a *sine qua non* condition for the patentee to hear about the prior art.²⁸ This provision in the §102(a) of the U.S. Patent Act puts aside the ideas of any invention which can be held known to someone and is read as known or used prior arts in practice.²⁹ The use or disclosure of the invention by the inventor which may otherwise enable others to know the claimed subject matter is excluded from the prior art. In Azerbaijani patent law, this exception is limited to 12 months.

²⁴ Azərbaycanca Patent Sistemi – 25 İl, Azərbaycan Respublikası Əqli Mülkiyyət Agentliyi Patent və Əmtəə Nişanlarının Ekspertizası Mərkəzi, <http://patent.gov.az/?sid=132> (last visited 26 November 2018).

²⁵ B.N. Roy, *Novelty and Obviousness in Patent Law*, 3 *Journal of Intellectual Property Rights* 59, 59 (1998); *Novelty and Reduction to Practice: Patent Confusion*, 75 *Yale Law Journal* 1194, 1195 (1966).

²⁶ Tun-Jen Chiang, *Defining Patent Scope by the Novelty of the Idea*, 89 *Washington University Law Review* 1211, 1217 (2012).

²⁷ Sean B. Seymore, *Rethinking Novelty in Patent Law*, 60 *Duke Law Journal* 919, 923-924 (2011).

²⁸ Damgacıoğlu, *supra* note 10, 4.

²⁹ Edward C. Walterscheid, *Novelty & the Hotchkiss Standard*, 20:2 *The Federal Circuit Bar Journal* 219, 227-228 (2010); *Novelty and Reduction to Practice: Patent Confusion*, *supra* note 25, 1195.

In order to assess the novelty, the embodiment of an invention is crucial, because the patent law does not consider ideas as the prior art.³⁰ However, an embodied prior art is *per se* insufficient, because it should be disclosed to the public which brings this closer to the standard of disclosure.

2. Europe

Concerning the European patent law, the common conventions regulating the harmonization of domestic patent laws across Europe and the community patents have a necessary impact. The same procedure can be observed in the European trademark law and practice. Despite the EPC influenced the development of the common patent practice throughout Europe, the standard of novelty is more or less similar to its U.S. version. However, the EPC accepts unpublished European patent applications as a prior art, in spite of their invalidity for the assessment of the inventive step.³¹ Under Article 52 of the EPC, the novelty requirement is pictured in the 'new patents', and '*the discoveries, scientific theories, and mathematical methods*' are indisputable prior arts which can never turn to be novel.³²

3. Azerbaijan

The patent laws in former countries of the Soviet Union sparked considerably after 1991 when all of 15 countries gained their independence.³³ Likewise, Azerbaijan adopted its Law on Patents in 1997. With the impact of the international and regional patent conventions, the definition of the patentable subject matter in Azerbaijan contains similar wordings with other Commonwealth of Independent States (CIS) countries.

According to Article 7(2) of the Law on Patents, one of the conditions for patentability is the novelty.³⁴ The Law on Patents refers to the state of art in Article 7(3) to assess the novelty standard on the filing date of the claimed patent application. Irrespective of the territorial character of patent rights, the state of art means the existing accessible knowledge all around the world.³⁵ Again quite similarly to the U.S. patent law, the disclosure of the essence of the invention by the inventor or the applicant or any person who explicitly or implicitly received such information from them is not a prejudice to the novelty of the invention, if disclosed within 12 months' period prior to the filing date, in accordance with Article 7(5) of the Law on Patents. Unlike the European practice, the Azerbaijani patent law disregards unpublished patent

³⁰ Chiang, *supra* note 26, 1218.

³¹ Iain C. Baillie, *Where Goes Europe – The European Patent*, 58 *Journal of the Patent Office Society* 153, 164 (1976).

³² Marco T. Connor and Lin Yasong, *How to Get Patent Protection in Europe*, 90 *Journal of Patent and Trademark Office Society* 169, 176 (2008).

³³ Richard P. Beem, *Patent Developments in Eastern and Central Europe and the Former Soviet Union*, 78 *Journal of the Patent and Trademark Office Society* 483, 484 (1996).

³⁴ The Law of the Republic of Azerbaijan on Patent art.4, 312-1Q (1997).

³⁵ *Azərbaycan Respublikasında Əqli Mülkiyyət Hüquqlarına Dair Bələdçi*, 25; Roy, *supra* note 25, 61.

applications for the prior art examinations.³⁶ The burden of proof here lies upon the inventor or the applicant themselves.

B. Disclosure

The main goal pursued through patent laws is not restricted to the protection of the efforts of individuals, but more than that, to foster the stability of an innovation and improvement in science and technology. To reach this goal, patent laws find it crucial to promote the disclosure of patented inventions and be a stimulus for others to further contribute to the development.³⁷ Otherwise, it would be completely unfair to charge patent infringers for infringing an undisclosed patent.

Imagine a guy who invents a flying car as a result of his continuous studies and efforts in his garage. If the inventor decides to keep the flying car secret and flies in his car around the house in a rural area, he will not be entitled to receive a patent. The reason here is that an invented subject matter and the technical information needed for further development should be disclosed. Because inventions are not developed for private use. Preventing unnecessary duplications of patented inventions³⁸, this standard creates new prior arts which help develop other innovations. By the application of this standard, the patentee can reach necessary donors for their inventions too. This requirement brings patent laws closer to the copyright that encourages the share of knowledge.³⁹ The disclosure standard is necessary to be able to exclude others from any right to the claimed invention.

Nevertheless, the descriptions commonly used in patent applications are vaguely worded to be a legal document. Thus, a patent application with its complicated wording in detail is disputed to be categorized as a source of information. This description can also vary from the area of science and technology depending on their predictability.

In order to be considered disclosed, a patent should be brought to the attention of the public. In the U.S. patent law and practice, testing the disclosure standard of any patent has been laid down in the case law, basically, in two steps. Firstly, it is recommended that the examiner should seek the fact that the patent applicant possesses the best mode to practice the invention at the filing date, and secondly, they disclose the required best mode in the patent application to enable the PHOSITA to use it without any undue experimentation.⁴⁰

The disclosure as a patentability standard is a mandatory condition in some jurisdictions, whereas, in some other countries, the laws just suggest the

³⁶ See the similar legal rule in Indian patent law. Roy, *supra* note 25, 62.

³⁷ Roy, *supra* note 25, 59.

³⁸ Jeanne C. Fromer, *Patent Disclosure*, 94 Iowa Law Review 539, 550 (2009).

³⁹ Colleen V. Chien, *Contextualizing Patent Disclosure*, 69 Vanderbilt Law Review 1849, 1851 (2016).

⁴⁰ Alan J. Devlin, *The Misunderstood Function of Disclosure in Patent Law*, 23 Harvard Journal of Law and Technology 401, 409-410 (2010).

disclosure to the applicants.⁴¹ In the Law of Azerbaijan on Patents, the standard of disclosure has not been listed among the conditions of patentability of inventions. To clarify, Article 7 of the Law on Patents does not explicitly mention the disclosure of patents. However, according to Article 13(5) of the said law, neither the employer nor the employee shall disclose the subject matter of an invention, a utility model or an industrial design until the submission of a patent application. In addition, Article 27 sets out the requirements for a patent application among which the patentee is expected to insert a clear description of an invention or a utility model disclosing its subject matter completely and necessary for use. In this regard, non-observance of this requirement in patent applications shall result in the invalidity of an invention in Article 37 of the Law on Patents.

Taking all these provisions *in toto*, it can be concluded that the disclosure standard has been implicitly mentioned as a condition for patentability in the Law of Azerbaijan on Patents.

C. Utility

The utility standard *inter alia* usually lacks enough attention in patent laws. The standard to calibrate the scale of the usefulness of any invention has not been widely discussed in the academia.⁴² The main reason for this issue probably lies in its flexible character and the application of the *de minimis* rule in most cases.⁴³ Although it is axiomatic that in order to patent an invention, it must be able to demonstrate some benefits to society, the utility of an invention can change from one case to another.⁴⁴ This requirement should never be subject to a narrow interpretation, merely because of the universal purposes of the patent system. The aim of the international patent system is to promote new inventions and contribute to science. Patent law, for this purpose, aims to protect every single invention from the fields of technology⁴⁵ and science. Thus, in general, everything is patentable; but the statement is

⁴¹ Thomas Henninger, *Disclosure Requirements in Patent Law and Related Measures: A Comparative Overview of Existing National and Regional Legislation on IP and Biodiversity*, *Dialogo Centroamericano sobre Medidas Relacionadas con la Biodiversidad y el Sistema de PI*, Costa Rica, 4 (2009).

⁴² However, it should be acknowledged that the impacts of this standard on the patent system and its adventure since when it was first introduced in many legal systems, particularly in the United States have not been miniscule. There were times in the U.S., for example, like in the cases of *Schultze v. Holtz* in 1897 and *Brewer v. Lichtenstein* in 1922 when the courts were debating over the potential utility of gambling devices and denying the patent registration of such inventions, just because their incompliance with public morals. Jay Erstling et al., *Usefulness Varies by Country: The Utility Requirement of Patent Law in the United States, Europe and Canada*, 3:1 *Cybaris - An Intellectual Property Law Review* 1, 2 (2012); Michael Risch, *Reinventing Usefulness*, 2010 *Brigham Young University Law Review* 1195, 1204 (2010).

⁴³ Sean B. Seymore, *Making Patents Useful*, 98 *Minnesota Law Review* 1046, 1048 (2014).

⁴⁴ *Id.* 1050.

⁴⁵ WIPO – World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 18 (2nd ed. 2008). ('WIPO Intellectual Property Handbook')

always besieged by legal limitations. This general rule for patent rights is reminded in Article 27.1 of the TRIPS Agreement as well.

Interestingly enough, in the legal doctrine, there is a view which supports the protection of non-useful inventions as well as a part of useful arts. According to *Risch*⁴⁶, while non-useful inventions cannot be protected in trade due to the absence of usefulness, they are still a step forward in science, so they deserve a protection. The utility of an invention barely means its potential benefits to society acquired through disclosure. Thus, this requirement should be understood in relation to the previously discussed standard of disclosure to the public.

While the extent of the utility has yet to be determined, the term used for the utility varies in some jurisdictions, for example, it is called '*industrial applicability*'⁴⁷ in Europe. Together with the bare meanings of each term in miscellaneous jurisdictions, the utility means a benefit for the society. The question again centers on the extent of the utility standard. Are we looking for a minimal or maximal benefit to the society as a whole?

1. The United States

The boundaries of this standard, therefore, have been set down by the laws and court practice in different countries. For instance, in the U.S., this requirement has been brought by §101 of the Patent Act. The U.S. Patent Office evaluates this requirement under two headlines established by law; substantial and specific utility.⁴⁸ The examination of substantial utility is so strict that the law requires the acquired public benefit and urges the applicant not to lean on future researches and potential benefits. The second headline examines this requirement from the most specific context, which means that the applicant should be as concrete as possible in the application and prefer specific wordings to describe the scope of the benefits of an invention.

The legal doctrine divides the usefulness into three groups, in comparison with the two categories endorsed by law discussed above. These groups contain operable, practical and commercial usefulness. To compare with the legislative criteria set down in the Patent Act, the first two groups match substantiality and specificity respectively. However, commercial usefulness which narrowly explains the usefulness by referring to a commercial use is not an actual requirement nowadays. When this requirement was sought in the U.S. patent examinations, even the patentability of guns was endangered like in the case of *Fuller v. Berger* in 1903, solely because of their incompatibility with public morals.⁴⁹ Although today commercial usefulness is out of the

⁴⁶ Risch, *supra* note 42, 1200.

⁴⁷ Independent from the terminology issues, we will use the term 'utility' generally through the article, and the term 'usefulness' as a synonym in some parts.

⁴⁸ Erstling et al., *supra* note 42, 5-6.

⁴⁹ Risch, *supra* note 42, 1204.

examination of the U.S Patent Office and many other authorities in other states, Article 27.2 of the TRIPS Agreement permits state parties to insert such a restriction into their respective laws.⁵⁰

2. Europe

In Europe, despite the practical difference in the terminology, the scope of the standard of the industrial applicability is relatively identical with the practice in the U.S. Article 57 of the EPC establishes that the invention is patentable if it can be made or used in any kind of industry.⁵¹ The meaning of the industry, in this regard, is interpreted quite widely that it also includes agriculture⁵². The inclusion of the industrial applicability as a condition for patentability helps us ensure the repeatable production and exclude inventions with a mere aesthetic and natural character.⁵³ Finally, in the EPC, business methods are dismissed from the patent protection system. Business methods can be summarized as the combination of several economic rules but not engaged with laws of physics or biology.⁵⁴ Business methods do not include any technological step forward either.

The EPC expressly dismisses the patentability claims for computer software *per se* under Article 52. However, in Europe, as we mentioned above, the standard of industrial applicability is interpreted so widely that if a computer software is applied in the solution of technical issues⁵⁵, it will be patentable. Because the European patent system wants to encourage industrial development, even though a computer software cannot be patented solely, its useful application in technology shall be protected.

3. Azerbaijan

In Azerbaijan, the industrial applicability of inventions is regulated by Article 7.3 of the Law on Patents. Regarding the terminology used in Azerbaijan, the law prefers to articulate both industrially applicable and useful inventions. Thus, in this term, the very provision can be characterized as a combination of American and European approaches. However, significant differences exist between these systems. Among the three groups of industrial applicability mentioned above, the law accepts all, therefore, the examination of patent applications will also focus on the commercial usefulness. The last paragraph of Article 3 of the Law on Patents establishes that

⁵⁰ WIPO Intellectual Property Handbook, *supra* note 45, 18.

⁵¹ Erstling et al., *supra* note 42, 10.

⁵² Sivaramjani Thambisetty, *Legal Transplants in Patent Law: Why Utility is the New Industrial Applicability?*, 49:2 *Jurimetrics* 155, 157 (2009).

⁵³ John R. Thomas, *The Post-Industrial Patent System*, 10 *Fordham Intellectual Property Media & Entertainment Law Journal* 3, 7 (1999).

⁵⁴ *Id.* 53-54.

⁵⁵ *Id.* 52.

If a commercial use of an invention, a utility model or an industrial design contradicts with public order, humanism and moral principles and causes a serious harm on the environment, the protection of plants and human and animal life and health, they shall not be granted a patent and their use shall be prohibited. [emphasis added]

Apparently, the Azerbaijani law not only prevents the registration of such inventions but goes further by prohibiting their use. This feature is absolutely different from similar laws of the U.S and Europe. In addition, it is obvious from the concept of the patents systems that the U.S. law focuses on the use of an invention in any field of industry, while the European law seeks the applicability which means that if an invention can be made in any field of industry, that will satisfy the condition. Unlike these differences, the Azerbaijani law remains a combination of both conceptions. According to Article 7.7 of the Law on Patents, the industrial applicability requirement shall be satisfied if an invention is able to be made **or** used in any field of industry and agriculture.

From our point of view, the term commonly used in Europe describes the standard of usefulness better, if we take the industry from a wider perspective. It means that an invention shall demonstrate practical implications and not obsess with pure theories. Aside from the positive effects of the search for practical inventions on the improvement of science and technology, a competitive market is also the main beneficiary. To illustrate, there is an eternal competition over the introduction of best and high-quality products in markets and companies fight with each other to win this battle and sell more, even in pre-production phases. The more patents are obtained rapidly, the stronger capacity is available for the use of the patentee company. That's why companies would be extremely willing to register patent rights for inventions which only have a theoretical background or consist of pure ideas. However, in contrast, the expectations of science and technology are entirely realistic that they want inventions already in hand. For this reason, the patent laws aim to protect practical inventions, and the application of the standard of utility or industrial applicability is a perfect method to preclude theories.

D. Non-obviousness

Coming finally to the last condition for patentability which is the gist of our research at the same time, it must be held that the condition of non-obviousness is a common reason why many patent applications fail. The non-obviousness of any patent application requires that the invention becomes a result of the inventor's skills. In other words, if an invention is obvious, it may have been thought by the PHOSITA with a reference to the prior art.⁵⁶ This standard, together with the PHOSITA was first introduced in the seminal case

⁵⁶ James Boyle and Jennifer Jenkins, *Intellectual Property: Law and the Information Society Cases and Materials*, 743 (3rd ed. 2016).

of *Hotchkiss v. Greenwood*⁵⁷ in the U.S.⁵⁸ Here for a better picture of the condition of non-obviousness, we should draw a line between the condition of novelty discussed above and the non-obviousness itself.

While referring to the novelty, a patent examiner is much more certain with their task. An examiner should only look up in the existing prior art to evaluate the novelty of an invention. On the other hand, they should examine the possibility of the introduction of the invention by the PHOSITA, in order to reach a conclusion about the non-obviousness. The latter one is quite uneasy that it has no well-established formula to cite.⁵⁹ The non-obvious invention has something more than a novel invention – one step forward from the prior art.⁶⁰

Nonetheless, the condition of non-obviousness should not be considered totally abstract or groundless; otherwise, the law could not regulate the rules for its application. It is quite perceivable from the description above that the reference to a prior art and the position of the PHOSITA are two essential components of an examination. For this reasons, it is necessary to understand an existing prior art and the capability of an ordinary person for having a better image of non-obviousness. For example, an idea of one-click shopping patented by Amazon.com was disputed enough in the legal doctrine.⁶¹ Because in the presence of a database of the users' shipping and billing addresses, the one-click shopping technique was allegedly obvious.⁶² Taking our example for a more clear explanation of obviousness, the idea of the one-click shopping is allegedly obvious, because the PHOSITA would have simply thought about that.

The rationale for the application of this condition on patent examinations, historically speaking, derive from the insufficiency of conditions of novelty and utility. Non-obviousness means everything to patent laws because it is directly related to its object and purposes. By applying the non-obviousness, a state can easily eliminate easy and doable inventions from patent examinations and award those which brings a notable breakthrough.⁶³

⁵⁷ *Hotchkiss v. Greenwood*, 52 U.S. 248 (1850), <https://supreme.justia.com/cases/federal/us/52/248/> (last visited 06 December 2018).

⁵⁸ Matthew Herder, *Demythologizing PHOSITA – Applying the Non-Obviousness Requirement under Canadian Patent Law to Keep Knowledge in the Public Domain and Foster Innovation*, 47:4 *Osgoode Hall Law Journal* 695, 703-704 (2009); Miriam Divya Williams and T.K. Bandyopadhyay, *An Analysis of Obviousness Standard in Patent Law – U.S. and Indian Perspective*, *Rajiv Gandhi School of Intellectual Property Law* 1, 3 (2015).

⁵⁹ Although in the U.S. case law, there is a milestone case, such as *Graham v. John Deere Co.* that is going to be discussed below, and sets down the criteria for the assessment of the non-obviousness in the legislative framework, it is difficult to come up with a certain formula for the non-obviousness. Unlike the novelty standard, the wording used to describe the non-obviousness in most legislations is unclear and always needs judicial interpretation.

⁶⁰ Damgacioğlu, *supra* note 10, 5.

⁶¹ Jeanne C. Fromer, *The Layers of Obviousness in Patent Law*, 22:1 *Harvard Journal of Law and Technology* 75, 86 (2008).

⁶² Crouch and Terry, *supra* note 20, 16.

⁶³ Fromer, *The Layers of Obviousness*, *supra* note 61, 75-76.

Additionally, as the law grants a patent monopoly to a patent owner, the condition of non-obviousness is applied meticulously to require a high level of innovative activity⁶⁴. Even though this sort of monopoly is time-limited, the law cannot take a risk to grant such a monopoly for simple inventions without any innovative character.

Unlike the deep differences in the concept of utility in the U.S and the EPC, Article 56 of the EPC and §103 of the U.S. Patent Act establish similar descriptions of non-obviousness by putting the PHOSITA right in the middle of patent examinations. However, again the EPC uses a different term for non-obviousness – ‘*inventive step*’.⁶⁵

In contrast, the Law of Azerbaijan Republic on Patents establishes a different approach to the non-obviousness of inventions. Article 7.2 of the Law on Patents places the non-obviousness among other conditions for patentability. The law seeks an inventive step like the practice in Europe. According to Article 7.6 of the Law on Patents:

If an invention is not obviously coming out of the existing knowledge for a specialist working on the same field, it is considered non-obvious.

This wording explains the possible application of the position of a specialist who has been working in the same field, to define the likeliness of an invention as regards the state of art. The patent law in Azerbaijan limits the subjective standard merely to the specialist of the same field. In the legal doctrine, there is a view⁶⁶ which construes the notion of ‘the specialist’ as the experts of patent offices, just because they are able to do research and well-equipped to act as an expert in these fields. However, we completely disagree with this restrictive explanation of the provision. The replacement of the PHOSITA with an expert, no doubt, will increase the amount of granted patents in Azerbaijan improperly. This view will be discussed in more detail in the last part of our research.

III. The examination of non-obviousness in the United States, Europe and Azerbaijan

During the examination of non-obviousness, it is important to review prior arts. The concept of existing prior arts here comprise not only similar inventions but well-known arts⁶⁷, the existing knowledge in technology and science or the state of art, which everybody has ever heard of. In other words, an invention can be examined in comparison with more than one prior arts. This review process in most jurisdictions starts with the interpretation of a

⁶⁴ Stanley Lai, *The Future of Inventive Step in Patent Law*, 24 Singapore Academy of Law Journal 599, 599 (2012).

⁶⁵ Kotaro Kageyama, *Determining Inventive Step or Non-obviousness for a Patent Requirement in View of the Formation Process of an Invention*, 7 Beijing Law Review 238, 241 (2016).

⁶⁶ S.S. Allahverdiyev, *Əqli Mülkiyyət Hüququ*, 315 (2006).

⁶⁷ Kageyama, *supra* note 65, 243.

patent application.⁶⁸ In this stage, patent examiners try to percept what makes this application inventive without discussing it with the inventor. However, patent offices struggle to make this test as objective as possible by checking the non-obviousness of an invention in the absence of the obviousness of an invention. Basically, if an invention is not easily thinkable given the existing knowledge and prior arts in the following field, it will be non-obvious, therefore inventive. In one of the prominent cases examined in the United Kingdom, Lord Russell of Killowen defined this criterion as '*superior to what had gone before*'.⁶⁹

It is worth to recall the practice of the evaluation of non-obviousness in the U.S. which is outlined in the seminal case of *Graham v. John Deere Co.*⁷⁰ in 1966. The U.S. Supreme Court listed four categories for examination in this case, which included the determination of the closest existing prior arts⁷¹, finding out differences between the claimed and existing inventions, thinking about the level of an ordinary skill in the claimed invention and finally, the examination of the objective evidence. The test introduced by this case is entirely factor-based⁷², which, in the end, declares obvious patent applications invalid, in case they fail to meet these factors.

A. Prior Art

In the practice established by the EPC, the prior art is made known to the public⁷³ by use or other means of written or oral descriptions, before the filing date of the European patent application.⁷⁴ Apparently, only early publications are considered in terms of the EPC, however, it should not be discarded that early applications for patentability can be taken into account to examine novelty.⁷⁵

The concept of the prior art in Article 54 of the EPC is quite broad that it does not eliminate any kind of invention merely because of their inventors' age, language or home country.⁷⁶ The European practice excludes the secret prior art from the patent examinations of the inventive step.

⁶⁸ Hazel Moir, *An Inventive Step for the Patent System?*, The Australian National University Center for Policy Innovation 1, 3 (2012).

⁶⁹ Paul Abel, *The Inventive Step*, 26 *Journal of the Patent Office Society* 494, 495 (1944).

⁷⁰ *Graham v. John Deere Co.*, 383 U.S. 1 (1966), <https://supreme.justia.com/cases/federal/us/383/1/> (last visited 2 December 2018).

⁷¹ Most patent offices do also look for the technical problem solved by the claimed invention in relation to the identification of the prior art. Arnie Clarke and Jack Shepherd, *EPO: Inventive Step - The Most Effective Patent Killer*, 262 *Managing Intellectual Property* 37, 37 (2016).

⁷² Matthew Faga, *Non-obviousness: The Fulcrum of Combination Patent Validity*, 85:2 *Denver University Law Review* 485, 490 (2007).

⁷³ Allahverdiyev, *supra* note 66, 314.

⁷⁴ Assessment of Inventive Step under the EPC (2010), 6,

http://www.bardehle.com/uploads/tx_toco3bardehle_files/Inventive_Step_en.pdf (last visited 13 July 2018).

⁷⁵ *Id.* 6.

⁷⁶ Chih-Hao Chou, *Comparative Analysis of Inventive Step/Non-obviousness Standard and Case Study Thereof – from the Aspect of 'the Problem to Be Solved'*, 25 *IIP Bulletin* 1, 2 (2016).

To compare from the American perspective, according to the first and second sentences of §102 (a) of the U.S. Patent Act, the prior art comprises each invention published before the effective filing date of the patent application⁷⁷, plus secret prior art which is applied before the following date but disclosed or published afterward.⁷⁸ It marks the difference between two laws and practice in the U.S. and Europe that the latter never allows the examination of the secret prior art in terms of the non-obviousness.

In one of the notable cases that described the concept of non-obviousness by referring to the prior art, the *Smith v. Hayashi*⁷⁹ examined by the Federal Circuit in the U.S., the court discussed if the Hayashi's use of vitreous selenium as a replacement of the phthalocyanine in the electrophotography was obvious.⁸⁰ According to the court's view, as far as both phthalocyanine and selenium are considered photoconductors in the electrophotography, the use of the latter was obvious, thus could not be patented. In this case, the prior art is not only the invention claim of the Smith, which was briefly the use of phthalocyanine but also its similar use with selenium.⁸¹ The use of selenium as a photoconductor was known in the electrophotography, that's why no one can patent it after the Smith's invention.

The examination of non-obviousness in terms of the prior art is straightforward when compared to the subjectivity brought by the PHOSITA. The prior inventions are at least accessible through the internet or databases. The classified database of most patent and trademark offices could help the examination of this criterion⁸² via their well-established store of patented inventions.

B. The PHOSITA⁸³

In any patent examination, the view seen through the PHOSITA's eyes is highly vital. Because the level of non-obviousness is scaled by giving a consideration to what the PHOSITA thinks of the claimed invention. Unlike trademark examinations in which the level of knowledge expected from an average customer is sought, the PHOSITA is not an ordinary person but in contrast, a skilled person who can give an input with regard to the

⁷⁷ *Id.* 2.

⁷⁸ This practice is mentioned as 'whole-contents approach', and its main difference from 'prior-claim approach' is that the secret prior art or the patent application should be disclosed to be considered. C. Douglass Thomas, *Secret Prior Art –Get Your Priorities Straight!*, 9:1 Harvard Journal of Law & Technology 148, 150 (1996).

⁷⁹ *Smith v. Hayashi*, 209 USPQ 754 (1980).

⁸⁰ The U.S. International Trade Commission, *In the Matter of Certain Integrated Circuits, Processes for Making Same and Products Containing Same*, 31 (August 2003).

⁸¹ John H. Barton, *Non-obviousness*, 43 IDEA – The Journal of Law and Technology 475, 481 (2003).

⁸² Homer J. Schneider, *Non-obviousness, the Supreme Court, and the Prospects for Stability*, 60 Journal of the Patent Office Society 304, 310 (1978).

⁸³ The term PHOSITA is an abbreviated form of the 'person having an ordinary skill in the art' which is commonly preferred in the legal doctrine.

obviousness in question. However, the definitions given to this category of persons vary in different jurisdictions.

In the EPC, the PHOSITA is a skilled practitioner with average knowledge in the field of science or technology, the invention refers to at the relevant filing date.⁸⁴ The notion of the PHOSITA is closely interrelated with the state of art and it establishes a threshold to determine where the general common knowledge in the relevant field lies.⁸⁵ 'The problem and solution approach'⁸⁶ commonly practiced in Europe checks if the solution of the problem is obvious to the PHOSITA compared to the state of art.

Apparently, in order to qualify the PHOSITA, one is not required necessarily to work in the relevant field but possess the needed average skills in the U.S. and Europe. This category should exclude, for example, technology nerds⁸⁷ or innovators, and those who have already gained an exceptionally high amount of knowledge and skills as a researcher or an inventor in the same field of the claimed invention. The PHOSITA in the European practice is not required to acquire inventive capabilities.⁸⁸ In cases when an invention demands a multidisciplinary approach for a technical solution or a travel from technical to non-technical realms, the PHOSITA will be assumed to be a person who has such a multidisciplinary background. The creativity is what marks the difference between the PHOSITA and the inventors.⁸⁹

Turning to the U.S. patent law and practice, the notion of the PHOSITA is relatively same with the understanding of the EPC. In general, the U.S. practice prefers the 'teaching-suggestion-motivation' approach⁹⁰ which in turn focuses on something in the prior art which is inclined to suggest the claimed invention to the PHOSITA. However, the *KSR case*⁹¹ decided by the U.S. Supreme Court attributed a new character to the PHOSITA, which is elaborated as 'ordinary creativity' in the legal doctrine.⁹² The level of creativity does not reach, however, the level of the inventor's creativity, but

⁸⁴ Chou, *supra* note 76, 4.

⁸⁵ Kageyama, *supra* note 65, 241.

⁸⁶ Fouad H. Darras and Chen Liu, *Introducing the "Person Having Ordinary Skills in the Art" (PHOSITA) into pharmaceutical Patent Prosecution at the EPO and the USPTO Introducing Person Having Ordinary Skills in the Art*, Social Science Research Network 1, 9 (2017).

⁸⁷ However, in the initial judgments in the U.S., the PHOSITA was perceived as the nerds who knew everything in the state of art but did not combine them tactfully to develop an invention. See, in detail, Brenda M. Simon, *Rules, Standards and the Reality of Obviousness*, 65:1 Case Western Reserve Law Review 25, 40 (2014).

⁸⁸ Assessment of the Inventive Step under the EPC, Bardehle Pagenberg, 5, http://www.bardehle.com/uploads/tx_toco3bardehle_files/Inventive_Step_en.pdf (last visited 06 December 2018).

⁸⁹ Chou, *supra* note 76, 4.

⁹⁰ Darras and Liu, *supra* note 86, 9.

⁹¹ *KSR International Co. v. Teleflex Inc. et al.*, 550 U.S. 398 (2007), <https://www.supremecourt.gov/opinions/06pdf/04-1350.pdf> (last visited 02 December 2018). (*KSR case*).

⁹² Jonathan J. Darrow, *The Neglected Dimension of Patent Law's PHOSITA Standard*, 23:1 Harvard Journal of Law & Technology 227, 228 (2009); Chou, *supra* note 76, 4.

the ordinary one. The Court simplified this definition by giving an example of pieces of a puzzle, thus, looked for the PHOSITA's ordinary ability to combine multiple patents and complete the puzzle.⁹³

From our point of view, although the European practice avoids making reference to the creative PHOSITA, the PHOSITA should not be deprived of their creative skills, unless it is required in the same way as a researcher or an inventor. The level of ordinary creativity, therefore, should not be interpreted excessively. Otherwise, most patentable inventions may fail when they encounter with the creative PHOSITA to whom many articles are obvious. The more skills the PHOSITA possesses in their suitcase, the less likely an inventor can defeat obviousness.⁹⁴ The PHOSITA should be deemed ordinarily skilled in the relevant field⁹⁵ but this high bar should not equalize the PHOSITA with a researcher who seeks inventions in their daily work. The skill bar owned by the PHOSITA should be set quite carefully because the shorter bar would conversely let more and more trivial innovations be patentable. This could be seen in the case when the decision-makers themselves play the role of the PHOSITA⁹⁶, because these examiners of patent offices or judges do not mostly enjoy the needed ordinary skills in relevant fields. The word 'ordinary' should be seen as a key to determine the level of skills of the PHOSITA to avoid creativity.

The filing date should in all cases be the determining time for the PHOSITA.⁹⁷ The reason for its importance is related to the disclosure of a patent application. As soon as the patent becomes disclosed which happens certainly after the filing date, the PHOSITA – whoever they are, will be fully aware of the invention and it will be fully obvious.

Apart from the skills possessed by the imaginary PHOSITA in the patent examinations, the specifications assigned to the state of art in different fields can influence the PHOSITA's predictions. This issue has been discussed in the doctrine in the light of the classification by the U.S. Supreme Court, concerning the predictability of arts. The judicial practice still tends to consider computer science as a predictable art and accepts the level of PHOSITA higher than unpredictable arts like biotechnology. As the Supreme Court insists on its old case law to determine if a particular field of science or technology is predictable, this view is critiqued in the doctrine.⁹⁸

The Law of Azerbaijan Republic on Patents does not give an explanation to the PHOSITA. Article 7(6) of the Law on Patents mentions 'the specialist working on the same field' to describe the PHOSITA. While the meaning of

⁹³ KSR case, *supra* note 91, 5.

⁹⁴ Boyle and Jenkins, *supra* note 56, 767.

⁹⁵ Darrow, *supra* note 92, 233.

⁹⁶ Rebecca S. Eisenberg, *Obvious to Whom? Evaluating Inventions from the Perspective of PHOSITA*, 19 Berkeley Technology Law Journal 885, 888 (2004).

⁹⁷ *Id.* 888.

⁹⁸ Boyle and Jenkins, *supra* note 56, 767.

the term used is close to the PHOSITA's commonly accepted understanding, the PHOSITA is a clearer description than the specialist who is working on the same field.

In the legal doctrine of Azerbaijan, 'the specialist' is interpreted in the way to comprise the persons with average knowledge working on the field the invention belongs to, and refer to the experts of patent offices.⁹⁹ Although we agree that the examination of the PHOSITA's position is highly subjective, the PHOSITA or the specialist as mentioned in the Law on Patents can never be read as the experts of patent offices, merely because of their professional background, specialization, work experience or research skills. The doctrinal view cited above is mistaken by assigning 'the specialist' status to the patent examiners, just because the PHOSITA is a legally constructed hypothetical person to scale the non-obviousness, rather than real persons who work at patent offices.

In conclusion, the PHOSITA should always be seen as ordinarily skilled in the relevant field selected among those other than the decision-makers and the persons with ordinary skill in the relevant field. The level of knowledge and skills stored in the PHOSITA's mind should not be found too broad as to encompass everything, despite the fact that technology and internet today have widened the scope of information and most importantly, eased their accessibility.¹⁰⁰

C. Secondary Considerations

In the patent laws, although the prior art and the view of the PHOSITA are of importance, other factors may also be taken into account for the determination of non-obviousness. These factors comprise the commercial success of the invention, the *de facto* need in the society for the relevant innovation, and an easy acceptance by the public. Given the fact that these factors can be laid on the table to prove the non-obvious character of the disputed invention, they shall never be deemed merely determinative.¹⁰¹

The examination of secondary considerations for the non-obviousness of the claimed invention is mainly preferred in the U.S. practice.¹⁰² The increasing commercial success of the invention supposedly reveals that the invention was non-obvious at the time it was introduced because otherwise, it would simply be rejected by the public. But from our perspective, such evidence should only be seen complementary to the other main list of evidence which contains the prior art, the PHOSITA and finally, the predictability of the invention standing in the PHOSITA's shoes. If the commercial success of an invention was satisfactory for proving non-

⁹⁹ Allahverdiyev, *supra* note 66, 315.

¹⁰⁰ Simon, *supra* note 87, 38-39.

¹⁰¹ Herder, *supra* note 58, 709.

¹⁰² David J. Abraham and Shinpo-Sei, *Japanese Inventive Step Meets U.S. Non-obviousness*, 77:7 *Journal of the Patent and Trademark Office Society* 528, 529 (1995).

obviousness, most companies would invade the patent application system of patent offices merely relying on their accomplishment.

Conclusion

While the standards of novelty and utility satisfied the examination of the patent applications before, new standards such as non-obviousness became a need to examine developing art after the inventions started to be built on the prior art. This condition, if applied properly, helps state authorities grant patent rights to worthy candidates and award inventors for their intellectual labor. The invention should be considered obvious if there is no boom – anyone could have come up with such a “good” idea. Non-obviousness sparks the development of new Eureka.

The examination standards of non-obviousness in the U.S. and Europe have been much more advanced than Azerbaijan. This examination process should encompass the identification of prior art and the position of the PHOSITA. However, the predetermined classification of the arts based on their predictability can pose a bias in the mind of the decision-makers. Thus, instead of prejudging the arts, it would be more effective to do a case-to-case analysis and come to a proper conclusion about the predictability of the invention by the PHOSITA.

Article 7(6) of the Law on Patents of Azerbaijan Republic needs to be revised in this regard. To have an ordinary skill in the art and to work on the same field are two different phenomena, thus, the latter obviously limits the scope of persons to their employment status. Because working in the same field as the claimed invention as a specialist is not the only way to gain enough insight to predict the invention. A person who is not working in that field but in some way related to the field of the invention can be imagined for the examination as well. The PHOSITA should never be attributed to patent examiners or judges *in personam* but examined by them. What’s more, the definition in the Law on Patents looks for the similarity between two fields of science or technology which means further work burden.

Thus, the non-obviousness in Article 7(6) needs to be revised to comprise ‘the person having ordinary skill in the art’ and be understood as an average practitioner from the relevant field of the invention, other than creative inventors or researchers.

*Safar Safarli & Sabina Mammadzadeh**

PUBLIC MORAL EXCEPTION UNDER GATT: TRADITIONAL AND NEW APPROACHES

Abstract

The World Trade Organization (WTO) regulates the trade between states. The WTO is a treaty-based trade regime with Member States currently representing some ninety-five percent (by value) of all international trade. The WTO contains a number of core agreements including GATT, GATS and side agreements on other matters such as sanitary and phytosanitary measures and technical barriers to trade. The Article discusses interpretation of moral exceptions clause. The "public morals" clause, which appears in both GATT and GATS, formulates one of the general exceptions to the basic obligation of trade liberalization contained in those agreements. Several trends suggest that the public morals exception will play an increasingly important role in international trade relationships within and outside of the WTO.

Annotasiya

Ümumdünya Ticarət Təşkilatı dövlətlərarası ticarəti tənzimləməkdədir. ÜTT bütün beynəlxalq ticarətin doxsan beş faizini təşkil edən ticarət rejimli üzv dövlətlər arasında bağlanmış müqavilə əsasında formalaşmışdır. ÜTT bir neçə əsas müqavilələri ehtiva edir ki, buraya GATT, GATS və digər məsələlər üzrə sanitar və fitosanitar tədbirlər, ticarətə texniki maneələr daxil olmaqla tərəfdaşlıq sazişləri də daxildir. Məqalədə GATT-in ümumi ictimai dəyərlərlə bağlı istisnaları araşdırılmışdır. Bu istisnaların yaranma səbəbləri, onların tarixi və şərhli verilmiş, eyni zamanda konkret məhkəmə təcrübələri əsasında yazılmışdır. Həm GATT, həm də GATS-də təsbit olunmuş "ictimai dəyər" maddəsi bu sazişlərdə olan ticarətin liberallaşdırılması əsas öhdəliyinə bir sıra ümumi istisnalardan biridir. Bir çox araşdırmalar göstərir ki, ictimai dəyər istisnası ÜTT çərçivəsində və xaricində beynəlxalq ticarət əlaqələrində getdikcə daha vacib rol oynayacaqdır.

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* Both, Baku State University, 4th year LL.B students, SABAH groups.

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Introduction

The last rise of the number of public moral exception disputes depicts that this brand new trend will play an important role in forthcoming trade agreements. Accordingly, there are several reasons which support this point. Firstly, the increased heterogeneity of the WTO, combined with the growing economic importance of foreign trade to Member States, may increase the frequency of trade-morality disputes.¹ In contrast to the twenty-three members of the original 1947 GATT, the modern WTO consists of 164 member states which represent a diverse variety of religious, cultural, ethnic, and social backgrounds. A second reason to expect increasing use of the public morals exception is a tightening of the WTO regime governing environmental, human health, and other regulations.² Besides both stated reasons, technological development requires the advent of new trends that blur the line between health, environment and public moral. For instance, since 1998, the European Union (EU) has maintained a ban on beef treated with growth hormones despite an Appellate Body ruling that this measure violates the SPS Agreement.³ However, the EU has refused to change its regime and the base for this opposition stems from a desire to preserve traditional European methods of farming and food production⁴ against the

¹ Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 New York University Law Review 802, 808 (2006).

² *Id.*, 809.

³ *Id.* 810.

⁴ Mark A. Pollack & Gregory C. Shaffer, *Biotechnology: The Next Transatlantic Trade War?*, 23 The Washington Quarterly 41, 43 (2000).

spread of recent large-scale commercial farming techniques, interests. which could conceivably be cast as matters of public morality.⁵ As a result, considering all relevant reasons for importance of public moral exception, it is essential to review the legal meaning, defects of its application and new approaches to this trend. Before applying all these practical issues, it is necessary to dig into the interpretation of public moral exception of GATT with diverse tools of interpretation.

I. Interpretation of moral exception clause

There are five basic sources for interpretation of public moral exception under GATT:

A. History of moral exception clause

The history of any norm is essential for determining the intent of parties that incorporated it into any bilateral or international agreements. Thus we can find out the planned use of this norm and moreover apply to this history in any contradiction about that norm. For public moral exception this is complicated and the reason is that it remains unclear whether there was widely applied public moral exception before 1927. However, incorporation of this exception into agreements goes approximately to the early years of XIX century.

Anti-slavery treaties were the first global regime to prohibit trade for moral reasons.⁶ The treaty of 1881 between Madagascar and the United States declares that commerce between the people of the two countries "shall be perfectly free,"⁷ although it permits the Malagasy government to ban imports "tending to the injury of the health or morals of Her Majesty's subjects"⁸ The term "public morals" was used as early as 1919 in the Protection of Minorities Treaty.⁹ Then in 1925, a multilateral Convention for the Suppression of Contraband Traffic in Liquor was signed.¹⁰ Noting that this traffic "constitutes a danger for public morals," the parties agreed to prohibit vessels weighing less than 100 tons to export alcoholic liquors.¹¹

Genoa Conference was the first step for defining a moral exception as an international trade rule in 1922. The agreement stated that certain exceptions must be anticipated, such as measures for "the safeguarding of public health,

⁵ Marwell, *supra* note 1, 810.

⁶ Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 *International Organization* 479, 491 (1990).

⁷ Treaty of Peace, Friendship, and Commerce, U.S.-Madag., art. IV (1), May 13, 1881, 22 Stat. 952, 955.

⁸ *Id.* Article IV (9), 956. The treaty does not accord the same exception to the U.S. government.

⁹ Treaty between the Allied and Associated Powers and Poland (Protection of Minorities), June 28, 1919, reprinted in 1 *International Legislation, A Collection of the Texts of Multipartite International Instruments of General Interest* 283, 287, art. 2.

¹⁰ Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors, Aug. 19, 1925, 42 LNTS.75.

¹¹ *Id.* Preamble, art. 2.

morals or security." The conference did not adopt the agreement however. One year later, another international conference was more successful in attaining agreement for the first international trade treaty. This was the International Convention Relating to the Simplification of Customs Formalities.¹² The protocol of the convention declared that the obligations of the convention "do not in any way affect those which they [i.e., parties] have contracted or may in future contract under international treaties or agreements relating to the preservation of the health of human beings, animals or plants (particularly the International Opium Convention), the protection of public morals or international security"¹³ and that was the first general multilateral trade agreement on public moral exception.

However, in comparison with the other previous treaties only the liquor treaties explicitly mentioned "moral consequences" or "public morals," on the other hand it seems undisputed that the international lawmaking considers slavery, firearms, opium, pornography, and animal cruelty as the traditional scope of public moral exception.¹⁴

Consequently, coming to the history of article XX of GATT there is very little legislative history. The U.S. government wrote the first outline of the ITO Charter in December 1945. That outline included a list of exceptions; the first exception was for measures "necessary to protect public morals".¹⁵ In September 1946, the U.S. government issued a "Suggested Charter" which contained an identical exception. At the preparatory meeting in London in November 1946, the minutes show that "it was generally recognized that there must be General Exceptions such as those usually included in commercial treaties, to protect public health, morals, etc." In early 1947, a drafting committee meeting in New York considered the General Exceptions and agreed to the language on public morals contained in the Suggested Charter.¹⁶ During the preparatory meeting of the Drafting Committee held in New York in 1947, a Norwegian Delegate elucidated that their country's restriction on importation, production and sale of alcoholic beverages were sheltered under the exception on public morals and health.¹⁷ The innovation is the inclusion of a chapeau which corresponds, more or less, to the current chapeau of Art. XX GATT. In the Geneva session later that year, the

¹² International Convention Relating to the Simplification of Customs Formalities, Nov. 3, 1923, 30 U. N. T. S. 371.

¹³ *Id.* 409.

¹⁴ S. Charnovitz, *The Moral Exception in Trade Policy*, 38 *Virginia Journal of International Law* 689, 700 (1998).

¹⁵ *Id.* 697.

¹⁶ Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. ESCOR, U.N. Doc. E/PC/T/34, 31 (Mar. 5, 1947).

¹⁷ Tyler M. Smith, *Much Needed Reform in the Realm of Public Morals: A Proposed Addition to The GATT Article XX (A) "Public Morals" Framework, Resulting from China Audio Visual*, 19 *CARDOZO J. OF INT'L & COMP. LAW* 733, 741-745 (2011).

negotiators accepted the New York language on "public morals."¹⁸ This language was put into the GATT and into the final ITO Charter (or Havana Charter). Therefore, while GATT negotiators based their drafting on provisions of prior treaties with public moral exception, it would seem reasonable to consider such treaties as "preparatory work" usable as a supplementary means of GATT interpretation.

B. Ordinary meaning of public moral expression

In order to determine the exact meaning of public moral expression we should separately analyze the meanings of public, moral and public moral as a whole.

The word "public" is needed for the legal interpretation of the GATT Article XX(a) general exception. According to the Shorter Oxford English Dictionary, this word may be interpreted as adjective and noun. As an adjective, its first meaning is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." In its sixth section, the dictionary makes the following reference: "of or pertaining to the international community" and adds "of or common to the whole human race". Thus "public" means "something belongs to whole community, publicity or group of people".

However, the word "moral" is a very complex one. It can be both a noun and an adjective as the previous word. The Shorter Oxford English Dictionary explains its various meanings. According to this dictionary, the noun "moral" refers, among other things, to "moral habits, conduct, or (formerly) qualities; habits of life with regard to right or wrong conduct; especially sexual conduct; without qualification, good or right habits or conduct".¹⁹

Moreover, the adjective "moral" may be interpreted in three ways according to The Shorter Oxford English Dictionary. Its first meaning is (a) "Of or pertaining to the human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings; ethical; (of knowledge, judgments, etc.) pertaining to the nature and application to this distinction. (b) Of a feeling: arising from the contemplation of something as good or bad. (c) Of a concept or term: involving ethical praise or blame."²⁰

C. Scholars' interpretation on public moral expression

It is evident that well-known GATT and GATS researchers' interpretations are crucial in order to determine the main meaning of any expression as well as public moral.

¹⁸ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, U.N. ESCOR, U.N. Doc. E/PC/T/A/PV/25, 18-21 (1947).

¹⁹ John Kendall, Shorter Oxford English Dictionary on historical principles, 1834-1835 (6th ed. 2007).

²⁰ *Ibid.*

First of all Wu, defines two approaches regarding to public morals: On the one hand, “public morals” include those moral principles that are universal or widely shared by all humankind and on the other hand each state can unilaterally define its own public morals.²¹ In first case there are a handful of moral principles widely recognized in the international community such as; prohibitions against genocide, slavery or execution of mentally retarded.²² For the second one as an example some Muslim countries banned the importation of alcohol based on the public moral; however, abstention from alcohol consumption is hardly a moral that is universally recognized, though it is shared among Muslim societies.²³

According to Maxwell, it is far more difficult to draw substantive boundaries around the term “public morals” based on commonly accepted objective evidence.²⁴ Measures related to a core of near-universal human moral values can probably be identified, such as prohibitions on murder, genocide, slavery, and torture, though the precise content of such norms and even the extent of consensus on such issues is probably debatable.²⁵ Charnovitz as well-known researcher of this field interpreted the public moral as mostly related to trade in pornography, gambling, alcohol, and illegal drugs,²⁶ which is undisputable among approximately all commentators according to the survey of multilateral and unilateral agreements before GATT.

D. Interpretations of Panel and AB

Panel and AB have defined in their decisions the meaning, characteristics and scope of application for public moral exception under GATT and GATS agreements which is essential as juridical interpretation and base for upcoming cases.

In its decision considering EU Seal regime case, the Panel concluded that the measure could be justified as a matter of public moral, because of the seal welfare concern this measure was adopted, which is component of the “standards of right and wrong conducted by or on the behalf of” the EU.²⁷ On appeal, the AB affirmed that the seals regime was provisionally justified under the public moral exceptions.

²¹ Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 *Yale Journal of International Law* 215, 231 (2008).

²² *Id.* 232.

²³ *Ibid.*

²⁴ Maxwell, *supra* note 1, 816.

²⁵ *Ibid.*

²⁶ Charnovitz, *supra* note 14, 709.

²⁷ *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, Request for the Establishment of a Panel by Norway (WT/DS401/R), Request for the Establishment of a Panel by Canada (WT/DS400/R), Feb. 14, 2011, para. 7.409 (hereinafter *EC-Seal Products*).

Moreover, referring to the Panel statement in China-Audiovisuals case “public morals can vary from Member to Member”²⁸ could be assumed that Members have the right to determine the appropriate level of protection, depending on their discretionary evaluation in the given situations, meaning that, if they deem it appropriate, they can also select very high or zero levels of protection.²⁹

In Gambling case the Panel found that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”³⁰ The Panel further found that the definition of the term “order”, read in conjunction with footnote 5 of the GATS, “suggests that ‘public order’ refers to the preservation of the fundamental interests of a society, as reflected in public policy and law.”³¹ The Panel then referred to Congressional reports and testimony establishing that “the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.”³² On this basis, the Panel found that the three federal statutes are “measures that are designed to ‘protect public morals’ and/or ‘to maintain public order’ within the meaning of Article XIV(a).”³³

E. Interpretation of Vienna Convention

We should start with the directive in article 31 of the Vienna Convention to interpret a treaty in accordance with its ordinary meaning and in light of its object and purpose.³⁴ However considering the object and purpose of the GATT leads to an ambiguous result since the exception is meant to allow deviation from the rules.³⁵ Then moving to the supplementary means of interpretation within the meaning of article 31.3 of the Vienna Convention for the following reasons reveals that there were no relevant rule of international law applicable in the relations between the parties regarding article XX, there was no subsequent agreement between the parties regarding Article XX(a) and no subsequent explicit practice between the parties regarding Article XX(a).³⁶

²⁸ *China, Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Panel (WT/DS363/R), 12 Aug. 2009, para. 7.763.

²⁹ *Id.* para. 7.819

³⁰ *United States, Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Panel (WT/DS285/R), 10 Nov. 2014, para. 6.46 (hereinafter *US-Gambling and Betting*).

³¹ *Id.* para. 6.467

³² *Id.* para. 6.486.

³³ *Id.* para. 6.487.

³⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31.1 (hereinafter *VCLT*).

³⁵ Charnovitz, *supra* note 14, 702.

³⁶ *VCLT*, *supra* note 34, art. 31.3.

Article 32 of Vienna Convention on law of treaties defines that “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 a) leaves the meaning ambiguous or obscure b) leads to absurd or unreasonable result.”³⁷

According to that article the *travaux préparatoires* for article XX(a) reveals that at international conferences, the need to exempt import bans relating to narcotics, pornography, and lottery tickets was specifically discussed.

Consequently, the Vienna Convention is useless from the aspect of defining the final word on how to interpret treaties.³⁸

II. Whose moral and which moral

In fact, the basic dilemma is about which and whose moral questions in the realization process of public moral exception. It has been suggested that the two ends of this question lie, on the one hand, in the moral principles represented by the national sovereign states and, at the other extreme, the moral values of a universal type shared by all humankind.

First of all, in determining the meaning of whose moral question two types of targets had been developed:

1. Outwardly – directed - trade measures used to protect the morals of foreigners residing outside one's own country. For example, in 1997, the U.S. Congress forbade border officials from allowing importation of products made by forced or indentured child labor.³⁹

2. Inwardly – directed - trade measures used to protect morals of persons in one's own country. For example, Islamic states ban import of pork for religious reasons and this trade measure would be absolutely inwardly – directed.⁴⁰

However, in some cases it is difficult to define the direction of measure as inwardly or outwardly. For example, suppose a government bans imports made by indentured children and in this case the ban can be characterized such as outwardly-directed because the purpose would be to react against such kind of production, on the other hand, this ban might also be characterized as inwardly-directed to prevent domestic consumers from suffering a moral taint from serving as a market for such products.⁴¹

³⁷ *Id.* art. 32.

³⁸ Charnovitz, *supra* note 14, 703.

³⁹ Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 634, 111 Stat. 1272, 1316 (1997).

⁴⁰ Charnovitz, *supra* note 14, 702.

⁴¹ *Ibid.*

In this stage it is also important to define the scope of the moral within the meaning of article XX an of GATT.

The dilemma between universalism- defines public moral as relating to the general moral sense of humankind and unilateralism- defines public moral as the standards relating to each society itself was left unresolved by the Appellate Body, at least in specific terms.⁴²

However, in the Gambling case, our attention is drawn to one point: the practice of the judiciary indicates that while trying to define a moral standard, it examines the practices and legislations of other countries.⁴³ The decision, at least implicitly, suggests that States invoking a public morals defense will be expected to present evidence of similar practice by other states or in other word the Gambling doctrine might be read as implying that states cannot unilaterally define public morals.⁴⁴

According to Marwell, for doctrinal, policy, and normative reasons, WTO members should have leeway to define public morals based solely on domestic circumstances.⁴⁵

Consequently, a review of recent WTO Trade Policy Reviews reveals that products currently subject to morality-based import restrictions include alcohol, pornographic or obscene materials, child pornography, gambling equipment or games of chance, hate propaganda illegal drugs, lottery tickets, non-kosher meat products, posters depicting crime or violence, stolen goods, treasonous or seditious materials, automobile radar detectors and video tapes and laser discs.⁴⁶

III. Conceptions for eliminating the abuse of public moral exception

In modern literature there are 4 main conceptions that have own ways to eliminate the abuse of public moral exception:

A. Universalism

As was in Gambling case this approach requires parties to refer to universal or near-universal practice of other WTO member states in order to show that a given issue is morality issue in the meaning of GATT art XX a: e.g., modern prohibitions on slavery, genocide, or torture.⁴⁷ In the public morals context, evidence of widespread international consensus might be found, for instance, in the aspirational preamble language of broadly subscribed international

⁴² Emil Sirgado Díaz, Human Rights and the “Public Morals” Exception in the WTO, (unpublished Ph.D. dissertation), 397 (2014).

⁴³ *Ibid.*

⁴⁴ Marwell, *supra* note 1, 817.

⁴⁵ *Id.* 806.

⁴⁶ *Id.* 817-818.

⁴⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984).

agreements or conventions.⁴⁸ However, the drawback of this approach is that states will need trade-restrictive measures to protect its population against products or services produced by foreigners with different moral standards, but not in the areas where international consensus has been reached, for instance, a ban on lingerie imposed by a conservative Muslim state, or restrictions on Christian evangelical materials by a non-Christian state.⁴⁹

B. Moral Majority or Multiplicity

A less constricting alternative would be to require widespread, though not universal, state practice, especially amongst states most likely to be affected.⁵⁰ Such an approach would encompass issues agreed to be moral by certain groups of states, such as free speech, labor standards, women's rights,⁵¹ nondiscrimination on the basis of gender or sexual orientation or alcohol restriction of Muslim community. The weak point of this conception is that it neglects article XIV of GATS which applies to the measures of any Member State but not States or communities.

C. Unilateralism

According to this approach states might be permitted to define public morals unilaterally. The most obvious concern here is the need to impose some boundary on what could be included⁵² in the public morals exception in order to eliminate the potential abuse of public moral exception.

D. Mix of moral majority and unilateralism

Another conception is a recent and complex one while proposed approach requires state actions that unilaterally defined and supported with evidences such historical practice, contemporary public opinion polls, results of political referenda, or statements of accredited religious leaders.⁵³ The advantage of this approach is that instead of deciding whether a particular issue, as a general category, is related to public morals, the tribunal's task would be to judge whether the interest, as articulated by the regulating state, was credible based on factual circumstances within that country.⁵⁴

⁴⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 55 (calling upon U.N. member countries to promote "universal respect for, and observance of, human rights and fundamental freedoms for all").

⁴⁹ Marwell, *supra* note 1, 821.

⁵⁰ *North Sea Continental Shelf Case* (F.R.G. v. Den.), 1969 I.C.J. 3, 42 (Feb. 20) (noting that conventional rule may "be considered to have become a general rule of international law... [if a] widespread and representative" group adopts that rule).

⁵¹ Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 MICH. J. INT'L L. 219, 219 (2000).

⁵² Marwell, *supra* note 1, 823.

⁵³ *Id.* 824-825.

⁵⁴ *Id.* 826.

IV. Three-tier Test

Article XX of the GATT defines a "two-tier analysis" in order to justify Member's trade restrictive measure under that provision. Firstly, it should be determined A) whether the challenged measure falls within the scope of one of the paragraphs of Article XX and this requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected.⁵⁵ Where the challenged measure has been found to fall within one of the paragraphs of Article XX, we should then consider B) whether that measure is necessary to restrict unmoral trade transactions. Thirdly, we must check out C) whether the measure satisfies the requirements of the chapeau of Article XX.⁵⁶

A. The challenged measure at issue must fall under one of the exceptions – sub-paragraphs (a) to (j) - listed under Article XX while each sub-paragraph is related to different objectives.

It is far more difficult to draw substantive boundaries around the term "public morals" based on commonly accepted objective evidence. However there is at best a tenuous consensus on issues such as trade in pornography, gambling, alcohol, and illegal drugs, which many commentators would perhaps readily agree fall within the public morals exception.⁵⁷

B. Necessary to protect Public Morals.

Subparagraph of the public moral exception requires, as a distinct condition, that a measure must be "necessary" to achieve a legitimate objective.⁵⁸ The Appellate Body discussed the meaning of this term in Korea-Various Measures on Beef and said that a measure's "necessity" for achieving one of the objectives in the subparagraphs depends on the "weighing and balancing" of several factors including followings:⁵⁹

1. The contribution made by the measure to the achievement of its objective.

The Appellate Body has explained that a contribution exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".⁶⁰ The contribution must not be "marginal or

⁵⁵ *United States, Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Appellate Body (WT/DS285/AB/R), 7 Apr. 2005, para. 292 (hereinafter *US-Gambling*).

⁵⁶ *Ibid.*

⁵⁷ Mark Wu, *supra* note 21, 232.

⁵⁸ GATT 1994: *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), art. XX(a) (hereinafter *GATT 1994*).

⁵⁹ *Korea, Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body (WT/DS161/AB/R), 11 Dec 2000, para. 164 (hereinafter *Korea-Beef*).

⁶⁰ *Brazil, Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (WT/DS332/AB/R), 3 Dec. 2007, para. 210 (hereinafter *Brazil- Retreaded Tyres*).

insignificant"; rather, the measure must be "apt to make a material contribution to the achievement of its objective".⁶¹

2. The importance of the interests or values at stake.

The Appellate Body also has observed that the more vital or important the common interests or values pursued, the easier it would be to accept as "necessary" a measure designed to achieve those ends.⁶²

3. The trade-restrictiveness of the measure.

This factor defines that the measure has to be compared with possible available alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.⁶³ It is significant that the Appellate Body refers here to a reasonably available, "less WTO inconsistent" alternative measure.⁶⁴ According to J. Maxwell (less restrictive measure) adopted in *Gambling* case is more useful than weighing and balancing in the context of public morality, involves an inquiry as to whether a less trade-restrictive measure (LRM) is "reasonably available, based on the degree to which an alternative measure achieves the stated goal, the difficulty of implementing the alternative measure, and the identity of parties bearing any additional costs."⁶⁵

C. Chapeau of Article XX

The other prong of the two-tier analysis is the chapeau of article XX, which is as essential as necessity test. The chapeau provides that a measure that is adopted for one of the legitimate objectives listed in the subparagraphs of these provisions not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."⁶⁶

In *U.S.-Gasoline*, the Appellate Body's initial distinction between a measure's "specific contents" and its "application" set the stage for its view that the chapeau is concerned with preventing the abuse of rights granted under the general exceptions.⁶⁷ Moreover, in *U.S.-Shrimp* it was defined that:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the

⁶¹ *Id.* para. 150.

⁶² *Korea-Beef*, *supra* note 59, para. 162.

⁶³ *Brazil-Retreaded Tyres*, *supra* note 60, para 156.

⁶⁴ Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 *Am. J. Int'l L.* 95, 106 (2015).

⁶⁵ Maxwell, *supra* note 1, 828.

⁶⁶ *GATT 1994*, *supra* note 58, art. XX. The chapeau of GATS, Art. XIV, uses the term "like conditions" instead of "same conditions," but this difference does not appear to be significant.

⁶⁷ *United States, Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (WT/DS2/AB/R), 29 Apr. 1996, 22 (hereinafter *US-Gasoline*).

doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."⁶⁸

1. Application of Chapeau

Bin Cheng explains spirit and legal root of purpose of chapeau in his *General principles of law as applied by international courts and tribunals* book as following:

"Whatever the limits of the right might have been before the assumption of the obligation, from then onwards, the right is subject to a restriction. Henceforth, whenever its exercise impinges on the field covered by the treaty obligation, it must be exercised bona fide, that is to say reasonably. A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty."

The AB, in its report on US—Shrimp, held that for a measure to be chapeau consistent, it should:

1. Not amount to an arbitrary and unjustifiable discrimination between countries where the same conditions prevail; and
2. Not be a disguised restriction to trade either.⁶⁹

GATT/WTO case-law has often examined the arbitrary or unjustifiable discrimination requirement in tandem, but without distinguishing between its two elements.⁷⁰ It was only in US—Shrimps case that Panel differentiated between unjustifiable and arbitrary and defined that unjustifiable discrimination refers to the substantive aspect or the material effects of the application of the measure.⁷¹ Furthermore, the AB has already observed that if the resulting discrimination could have been foreseen, the measure can in turn be unjustifiable.⁷² While arbitrary discrimination refers to the formal aspect of the application of the measure, such that the measure is arbitrary according to the method in which it has been applied; arbitrary in this sense refers to procedural requirements. In addition, arbitrary also means, according to the AB, to be inflexible or rigid, as in the use of national certification schemes, for example.⁷³ Moreover Lorand Bartels differentiate

⁶⁸ *United States, Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (WT/DS58/AB/R), 12 Oct. 1998, para. 158 (hereinafter *US-Shrimp*)

⁶⁹ *Id.* para 150.

⁷⁰ *US- Shrimp*, *supra* note 68, para 150.

⁷¹ *Id.* paras. 161-176.

⁷² *US-Gasoline*, *supra* note 67, 25.

⁷³ *US- Shrimp*, *supra* note 68, para 177.

both words as following: "arbitrary" discrimination could refer to discrimination for which no rationale is offered, whereas "unjustifiable" discrimination could refer to discrimination for which the proposed rationale either is illegitimate or does not justify the measure that has been adopted.⁷⁴

Appellate Body, in its report on US—Gasoline, discusses the issue whether the term 'between countries where the same conditions prevail' should be understood as referring only to exporting countries or, conversely, whether it should encompass the importing country as well. Although the AB did not formally rule on this issue on this occasion, it saw no reason to deviate from the prevailing practice of WTO members which privileged the latter interpretation.⁷⁵ Actually, 'between countries where the same conditions prevail' means, it is not acceptable, in international trade relations, for one WTO Member to use a trade restrictive measure toward other Members without taking into consideration different conditions which may occur in the territories of those other Members.⁷⁶ In EC—Seal Products, the Appellate Body said that "conditions" relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau.⁷⁷ It might also be suggested that these "conditions" should be defined in terms of not only the measure's objective but also the degree to which that measure achieves its objective, for example, for a measure prohibiting imports of products produced by prison labor, "conditions" would be the same in countries where products are, to the same degree, produced by prison labor, but they would be different in countries where products are not produced by prison labor to the same degree.⁷⁸

The second of the conditions in the chapeau requires that a measure not be applied in a manner that constitutes a "disguised restriction on international trade. In the US—Gasoline case, the AB defined "disguised restrictions" as following:

Whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.⁷⁹

Moreover it was in the EC—Asbestos case the Panel defined the term "disguise" as the intention to conceal something, and that it covers measures the compliance with which is "only a disguise to conceal the pursuit of trade restrictive objectives".⁸⁰

⁷⁴ Bartels, *supra* note 64, 123.

⁷⁵ US—Gasoline, *supra* note 67, 24.

⁷⁶ Marwell, *supra* note 1, 112.

⁷⁷ EC—Seal Products, *supra* note 27, para. 5.300.

⁷⁸ Bartels, *supra* note 64, 112.

⁷⁹ US—Gasoline, *supra* note 67, 25.

⁸⁰ European Communities, *Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel (WT/DS135/R), 18 Sept. 2000, para 8.236.

i. Importance of negotiation for interpretation of unjustifiable discrimination

In some cases, Panel and AB can interpret measures without previous consultation as discriminatory and unjustifiable. In US–Shrimps, the AB stated that bilateral and multilateral negotiations could be an alternative to unilateral and non-consensual procedures.⁸¹ In this case, the importing country had conducted negotiations with some countries, but denied access to its markets without previously attempting to reach an agreement with some other countries which led to the following decision of AB:

“Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.”⁸²

However sometimes AB may consider previous negotiation as useless. In US–Gambling, the Panel first established that the measure was not necessary because the United States did not engage in previous consultations with Antigua before applying the restrictive measure.⁸³ However, the organ of appeal considered that previous consultation was not an appropriate alternative measure as following:

“In our view, the Panel’s “necessity” analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States’ measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.”⁸⁴

ii. When can justifiable discrimination happen?

A logically separate question is how to identify the set of rationales that can justify discrimination under the chapeau and the chapeau's text leaves this issue entirely open. However according to Lorand Bartels there are some options for justifying discriminatory measure: *“Firstly, discrimination could be justified on grounds recognized elsewhere in the agreement at issue or other WTO*

⁸¹ *US-Schrimp*, *supra* note 68, para. 171.

⁸² *Id.* para. 172.

⁸³ *US-Gambling and Betting*, *supra* note 30, paras. 6.533-6.535.

⁸⁴ *US-Gambling*, *supra* note 55, para 317.

agreements. Discrimination might accordingly be justified in terms of the right to form a regional trade agreement or the right to discriminate, in certain respects, in favor of developing countries. Secondly, discrimination could be justified for reasons recognized in international standards.”⁸⁵

In few cases discriminatory measure may be considered as justifiable by Panel and AB. The Appellate Body supported the same position in EC-Tariff Preferences and defined that a developing country's "needs" in relation to the WTO Enabling Clause 3(c) are to be assessed according to broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations”.⁸⁶

In EU Seal Regime AB finds that the European Union has not demonstrated that the EU Seal Regime, in particular with respect to the IC exception—an exception under the EU Seal Regime for seal products obtained from seals hunted by Inuit or other indigenous communities, is designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT 1994.⁸⁷

In some cases, Panel and Appellate Body can be in contradiction regarding to the justifiable and unjustifiable discrimination. In Brazil-Retreaded Tyres, government of Brazil imposed an import ban on retreaded tyres but “MERCOSUR” (Mercado Común del Sur (Southern Common Market)) states were out of the imposition of this ban measure.⁸⁸ According to Appellate Body Report

“Appellate Body reverses the Panel’s findings, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel’s findings, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX.”⁸⁹

iii. Burden of proof

Coming to the procedural matters, the main issue is about burden of proof, especially which party is obliged to prove the necessity of measure. In US-Gambling Case, Appellate Body decided as following:

“It is well-established that a responding party invoking an affirmative defense bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defense. In the context of Article XIV(a), this means that the responding party must show that its measure is “necessary” to achieve objectives relating to public morals or public order. In our view, however, it is not the

⁸⁵ Bartels, *supra* note 64, 118.

⁸⁶ *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body (WT/DS246/AB/R), 7 Apr. 2004, para. 163.

⁸⁷ *EC-Seal Products*, *supra* note 27, para. 6.3.

⁸⁸ *Brazil-Retreaded Tyres*, *supra* note 60, para. 122.

⁸⁹ *Id.*, para. 258.

*responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective".*⁹⁰

V. New approach on two-tier test

Recently, there is a new approach toward necessity test especially, its structure. In exact words, up to now it has been defined by Appellate Body in most cases that following the structure of two-tier test is mandatory. For instance, in US-Shrimp case Appellate Body decided that where the specific exception threatened with abuse has not been firstly identified and examined it makes task of interpretation very difficult.⁹¹ However according to Lorand Bartels "it is necessary to identify a measure's purpose in order to determine whether the "same conditions" prevail in different countries and also whether the measure constitutes a "disguised restriction on international trade."⁹² This approach does not ignore the significance of Two-tier test and the advantage of new approach would show its effect on sphere of judicial economy.

Conclusion

The public moral exceptions play an important role in world trade process. Among WTO Member States, public moral clause could mean anything from religious views on drinking alcohol or eating some harmful food, society's attitudes towards pornography to human rights, norms' of labor and etc. In most cases different countries define public moral exceptions properly from social and religious aspects. However, a more extensive interpretation of public moral clause should not be given; as such interpretation may leave room for illicit protectionism. In addition, Panel and Appellate Body while surveying trade restrictive measures on public moral should not look into only domestic laws to check whether the State has naturalized even mechanism to preserve such morals. In this period of appearing trade, it is substantial to abolish the lack in the clause and put forward a more relating interpretation of the term public moral.

⁹⁰ *US-Gambling*, *supra* note 55, para. 309.

⁹¹ *US-Schrimp*, *supra* note 68, para. 120.

⁹² Bartels, *supra* note 64, 105.