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Editorial office Premier Publishing s.r.o.
Praha 8 – Karlín, Lyčkovo nám. 508/7, PSČ 18600

Email: pub@ppublishing.org

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Section 1. Political problems of the international relations, global and regional development

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Le Van Dinh,
Ho Chi Minh National Academy of Politics- R3
Vietnam
E-mail: duyhoaxd.vn@gmail.com

STRENGTHEN OF REGIONAL LINKAGE TO EXPLOIT AND PROMOTE EFFECTIVELY THE POTENTIAL AND STRENGTH OF THE CENTRAL HIGHLANDS

Abstract. Regional Linkage is a necessity, an indispensable condition for development and integration. Vietnam has great potentials and advantages in terms of land, minerals and natural resources. Although, there have much important development, but in general, the Central Highlands is still a poor area, small economic size, still based on agriculture with characteristics dependent on nature. One of the fundamental causes of this shortcoming is that the intra-regional economic integration is not a true content in the socio-economic development master plan and implementation of development policies in the Central Highlands. In order to overcome these constraints and to achieve the objective of socio-economic development in the Central Highlands towards sustainable development, the regional development linkage becomes an urgent need to create a unification space to promote the cooperation between localities.

Keywords: Strengthen of Regional Linkage, Central Highlands, Intra-regional economic integration, Socio-economic.

The Central Highlands consists of five provinces: Kon Tum, Gia Lai, Dak Lak, Dak Nong and Lam Dong, with a natural area of 54,474 km^2, accounting for 16.8% of the country's area, the population is about 5.4 million people, is one of the seven eco-economic regions of the country. The Central Highlands has an especially strategic position in terms of national defense and security as well as conditions for attracting investment and socio-economic development. This region has great potentials and advantages on land, minerals, specific climate resources (temperate and subtropical) and diverse flora and fauna systems for the development of agriculture with large scale, focus; system of landscapes, favorable landscape to develop tourism; It has favorable conditions for developing large-scale aluminum and alumina industry in the country. Over the past years, with the attention of the Party, the State, the investment capital has continuously increased, contributing to significantly change the face of the Central Highlands. The economics continue to increase with high growth rate: In 2014, the share of agriculture – forestry – fishery in the economic

structure of the Central Highlands is 43.7%; industry – construction is 27.97% and service is 28.33% [1]; The agricultural-forestry-fishery economy of the Central Highlands is 2.5 times higher than that of the whole country and plays the leading role in the economic structure of the Central Highlands. The rate of poor households has decreased from 18.92% (2011) to 11.22% (2014). The rate of poor households among ethnic minorities has decreased from 38.02% (2011) to 22.74% (2014). Average monthly income per capita increased from 1,506 thousand VND (2010) to 2,799 thousand VND (2014). GDP per capita increased from 22.76 million VND (2010) to 32.2 million VND (2014). Despite the important developments, the Central Highlands is still a poor region with a small economic size and still based on agriculture with nature-dependent characteristics. Non-synchronous socio-economic infrastructure is one of the main reasons limiting the speed of development, reducing the ability to attract investment. Many sectors and areas have not developed suitable with the potentials (such as processing industry, animal husbandry, export, tourism, investment), mainly exploiting natural resources, not real investing for sustainable development. The quality of human resources, the number of trained workers is very low, labor productivity is equal to 47.5% of the national average, which greatly affects the development and competitiveness of the country. Facilities and quality of education, health and culture in rural areas are still difficult. Natural resources and environment, especially forest resources, are rapidly decreasing due to inadequate harvesting, pressure from free migrants and many other issues. Land resources are degraded due to ineffective management and organization, resulting in more and more conflicts, disputes and complaints about land. Hydropower development planning has great socio-economic implications, but also negative impacts on the environment, great impacts on land, forest and water resources and the lives of people in the project areas.

One of the causes of these constraints and difficulties is: "The economic development model of the five provinces in the Central Highlands is the same, while there is no regional linkage and division among provinces in economic development; The development model is broad based mainly on resource exploitation, cheap labor, raw export, and therefore inefficient and unsustainable; The economic restructure has been slow (especially since 2001), the proportion of the processing industry has decreased, while mineral and agro-forestry resources are the specific strengths of the Central Highlands; Many key products such as coffee, tea, pepper, etc. are not linked in value chains, product chains (between localities, between enterprises, between economic sectors and households). The Geo-economic, landscape and cultural characteristics are not used properly for tourism development, service and promoting regional linkage; the living means of the population is not sustainable" [3]. The specific manifestation of such limitations are: *Firstly:* Economic restructure of the region in recent years is mainly due to the increase in volume (development of resource exploitation), little change in quality (increase productivity and create high added value more, shift to chain with higher value-added in the production value chain) [4]**.** *Secondly;* the transportation network linking localities in the Central Highlands is not enough (in terms of quantity and quality) to facilitate material activities and develop regional economic linkages [5]: In particular, the transport infrastructure does not ensure the circulation of goods and passengers at high speed and smoothly between localities in the region and inter-region; Air traffic has not yet connected to the international route; The mobilization of investment capital for infrastructure development has not met the demand; There is no mechanism to enhance coordination for intra-regional and inter-regional connectivity. Connecting the transport infrastructure of the Central Highlands with the outside is difficult both in road, air and railway. Production infrastructure is not commensurate with the scale of the agroforestry value chains and tourism potential [6]. *Thirdly*, link development of agricultural product value chain has initially formed for some products, but also sponta-

neous, not effective, stopping at the production and preliminary processing, there is no link between production – processing – markets, from the supply of inputs to the processing and marketing of final products to create products that have direct access to the global value chain with high brand and value added. The value added to the Central Highlands in the value chain of agricultural products is low and starts to decline. Coffee is an agricultural product that accounts for most of the country's coffee production, but there is no suitable market strategy to promote sustainable development. Domestic enterprises do not link production with processing and consumption. To own the market, foreign companies are pinching, dominating the market, brand [6]. *Fourthly,* the cooperation between localities in the field of tourism is not formal and effective, but it is effective and effective for each locality. The chain of cultural events of the local tourism takes place overlapping content not connected time reasonable … so not attract many tourists. *Fifthly,* the enterprise force – the key element of modern development is still very thin and weak; the linkages between enterprises are generally weak as most of the agro-processing enterprises in the locality are mainly involved in preliminary processing. Therefore, the demand for linking is limited. They only participate in a very short supply chain, so the value is low and the linkage is not high [7]: The number of enterprises in the Central Highlands only accounts for 2.67% of the total number of enterprises in the country. Although Central Highlands is an agro-forestry production area with great potential, 62.49% of Central Highlands' enterprises are in the service sector; 32.22% of enterprises in the industry and construction sector and only 5.28% in the agriculture-forestry-fishery sector. Enterprises in the Central Highlands usually have small and medium scale, the application of technology in production is not high, there are few enterprises involved in deep investment in agro-forestry processing industry that just stopped in operation of preliminary treatment. Therefore, enterprises in the Central Highlands have low competitiveness and are strongly influenced by risks from export markets, especially price risk. *Sixthly,* other support (science and technology, input supply, output, financial payment – banking, legal, training, etc) are also relatively weak and lacking, large scale purchase and sale orders; The logistics system of warehousing and transshipment between the localities in the region as a parallel system and closely related to the transportation system in the Central Highlands is in the status of shortage and weakness – in fact, the linkage outside the region overwhelmingly, overcoming intra-regional linkage. *Seventhly,* the investment capital in the Central Highlands accounts for a very small share of the total investment capital of the country. The scale and number of projects in the 2011–2015 period is limited; simple technology, labor force and mainly in urban areas; accounting for 20.52% of the total number of projects and 3.42% of the total registered capital of the Central Highland region, accounting for only 1.15% of projects and 0.4% of total registered FDI of country. The projects focus on agro-forestry products, building materials, forestation, rubber and tourism. *Eighthly,* in the master plan for socio-economic development up to 2020 in the Central Highlands provinces, intra-regional economic linkage is not considered as a true content and has a real position in Master plan for socio-economic development of the provinces in the region. The capacity for linking and coordinating the implementation of development policies of the Central Highlands provinces is not strong enough. Coordinating and linking economic actors in the Central Highlands and outside the region in the south-eastern region, the South Central region is still lax and formal, especially in the Central Highlands. There is no link between localities in the region, the mobilization of resources and exploit the potential for development. There is no effective public/private partnership mechanism to mobilize resources to exploit the potential for development.

The causes of these shortcomings are:

– In the master plan for socio-economic development up to 2020 in the Central Highlands provinces, intra-regional economic integration is not a

true content and has a real position in the master plan for the socio-economic development of the provinces in the region: Planning between the province and other provinces, between the upper and lower levels is lacking in synchronism, more planning between the provinces (at the same level) also lack of cohesion in terms of alignment. In planning and investing in socio-economic infrastructure, cooperation and cooperation are still weak, lack of database by region, no regional socio-economic indicators.

– Lack of thinking and action on the regional economy, regional linkage of the modern market economy: Localities in the region have not captured the importance of integration and harmony between the business space and natural, ecology space, policy space and institutions, have not paid due attention to the regional economy and the economic and ecological functions of each region, the pattern of regional economic growth; There is little system for management of resources, ecology, economics, as well as the organization of public service systems by region.

– Localities in the Central Highlands have not actually exchanged the content of the orientation of clear linking. The capacity for cooperation and coordination in the implementation of development policies of the Central Highlands provinces is not strong enough. Local regional interests are more prominent than common regional interests; together with difficulties and limitations in local development (resources, transport infrastructure …), the investment resources have been scattered.

– Lack of a "conductor" to direct coordination of intra-regional economic integration: Currently, there have the Central Highlands Steering Committee; however, the coordination of economic activities in this area is just one of the many functions of this committee. The Steering Committee has only the functions of advising and supervising, but not the right to have financial and human resources in decision making to link up regional development. Therefore, it is not difficult to understand the role of the Regional Steering Committees (Central Highlands, Northwest, South West) in promoting and linking provinces in the region and the link between regions is quite faint.

To overcome difficulties and shortcomings in order to achieve the socio-economic development objectives of the Central Highlands according to Conclusion No. 12-KL/TW and Decision No. 936/QD-TTg dated July 18, 2012 of the Prime Minister. It is necessary to have a regional strategy based on building a new growth model, forming a common product value chain that transforms the growth model based on resources in each region, each province closed to the level and quality of development. In this model, *regional development cooperation becomes an urgent demand* to create a unified space to promote cooperation among localities, enterprises, establishments, business households in the area and value chain; Linking economic development with social security, strengthening national defense, security and foreign affairs. Decision No. 936/QĐ-TTg dated 18 July 2012 of the Prime Minister has identified the viewpoint of linking socio-economic development in the Central Highlands to 2020: "Effective exploitation and promoting potentials, strength of the Central Highlands; promoting international integration, especially in the Vietnam – Laos – Cambodia development Triangle, intensify cooperating among localities in the whole country … ". The direction of regional integration in the Central Highlands is to: promote the coordination among localities in the Central Highlands in the implementation of development policies, mobilize and allocate resources for development investment, construct structures Infrastructure; train, attract and create jobs for laborers; environmental protection, response to climate change and desertification, security and defense [8]. To further promote cooperation among localities in the areas of investment promotion, trade and tourism; To coordinate in building raw material areas, develop processing industries and expand the market for the sale of products; coordinate the exploitation and use of water resources, protect and develop

forests; Improve the effectiveness of cooperation between the Central Highlands provinces with the South East and the South Central Coast, Prioritized areas of cooperation include: attracting investment; processing, importing and exporting, promoting trade in key products such as coffee, rubber, cashew, fruits, furniture; construction of connection axes; To build hydropower plants, to use water and raw materials for agro-forestry processing plants, promote cooperation between the Central Highlands and neighboring provinces of Laos and Cambodia in the framework of cooperation in building the Vietnam – Laos – Cambodia Development Triangle; Cooperate between provinces in the Central Highlands and provinces of Laos and Cambodia [9]. *The goal* of linking is to exploit and promote the potentials and strengths of each locality and the entire region, contribute to promote rapid economic growth and sustainable development on the basis of spatial organization of business activities. social, social; To build the infrastructure system to reach the average level in comparison with the whole country, to make fundamental changes in socio-economic development; To step by step make the Central Highlands to become the region with the driving force for economic development of the whole country; To continuously improve the material and spiritual life of the people, to protect the ecological environment; ensure national defense and security.

Some solutions to strengthen the regional cooperation to exploit and promote effectively the potential and strength of the Central Highlands in the coming time:

Firstly; *Renovation of planning; to promote cooperation in investment in construction of economic and social infrastructures;*

– Renovating the basic planning content and planning the basis of regional vision; Building the development planning suitable with the strength of each locality in intra-regional and inter-regional economic integration (intra-regional linkage should be considered as a real content and have a real position in the master plan of the socio-economic development of the provinces in the region) in order to redistribute the production force and adjust the development planning in line with the strengths of each locality**.** Reviewing the overall socio-economic development planning, branch planning and planning of each locality so as to redistribute the production forces along the direction of prioritizing the exploitation of potentials and strengths of each locality in the Central Highlands; Link to develop industry, support services, strengthen the form of satellite business, outsource; step by step restrict the overlap in the structure of branches and products and raise the efficiency of production and business. It is necessary to study and propose the revision and promulgation of specific mechanisms and policies to create conditions for mobilizing resources for investment in the development of transport infrastructure and complete traffic systems linking the Central Highlands provinces together with provinces in South Central, Southeast and Laos, Cambodia in the Cambodia-Laos-Vietnam Development Triangle (CLV), coordinate with Laos and Cambodia to invest in connecting the population concentration points of the localities in the Development Triangle Area with the existing pair of border gates (Bo Y, Le Thanh, Bu Prang) and expect to invest in the next stage (Dak Rue, Dak Po), to form a smooth transport system, contributing to the regional socio-economic development cooperation under the commitments between the Governments of the three countries. To study and propose measures to improve and develop production infrastructure (transport, hydropower and irrigation), including the elaboration of mechanisms for coordinating the use of water between hydropower and agriculture; between provinces in the same river basin; improve irrigation and drainage capacity of the irrigation system; Mobilize resources to develop rural transport.

Secondly; *Strengthening links in production, business and human resource development, science and technology;*

– Strengthening intra-regional economic dependence with the correctness, adequacy of costs and benefits of stakeholders*:* For the Central Highlands, the policy of economic integration is not only about helping or supporting (Although it is necessary) but the most needed problem is to create the basis for linking the interdependence in the assignment and development cooperation on the basis of comparative advantage and development benefits. The new interdependence is the true indicator of the link in development. The basis for such dependence is not only on the enormous potential of natural resources but also on the role and position of the Central Highlands on the outside (geo-environment, geopolitics) – the problem makes sustainable development on the outside depends on the sustainable development of the Central Highlands. *Development of Value chain of key agro-forestry products:* It is necessary to promote the formation and development of linkages along the value chain for some key agricultural products of the region (first of all: coffee and pepper) on the basis of linkages between enterprises and household business from supplying the inputs to inward production and processing to create end-users with added value and high quality to meet market demand and have own regional identity, pay attention to preserve and process. Identify some key products to develop the Central Highlands brand for some key products; build and advertise the Central Highlands brand for the whole region, build the brand management system of Central Highlands. Issue specific mechanisms and policies linking agro-forestry production for the whole Central Highlands, formulate mechanisms and policies to support and encourage enterprises to invest in agriculture, create chains in association with deep processing, creating high added value, bringing high-yielding and sustainable to Central Highlands farmers. This is considered as the most important strategic solution for the Central Highlands. Carry out joint ventures, link up and formulate industrial value chains (coffee, pepper) … Buy – process – preserve – sell products (according to 4C, GAP, …), while ensuring the improvement of product quality, creating stable material areas for enterprises; At the same time, contributing to raise farmers' incomes (avoid competing to buy, sell or price squeeze). Formulate and perfect mechanisms and policies to support the linkage of the development of key agricultural product value chains, build the brand name and develop the consumption market of major agricultural products in the Central Highlands. Improve the institutional arrangement and decentralization between the central and local levels, and formulate a coordinating organization to coordinate and develop the value chain for each main agricultural product (coffee, pepper and rubber). … of the region in order to adapt to the development of the socialist-oriented market economy and the international economic cooperation environment to enhance the region's competitiveness, implement the application of high technology in agricultural development among the provinces in the region and between the Central Highlands and areas with potential and comparative advantage, promote sustainable farming practices, including addressing issues of improving agricultural landscapes and protecting natural resources. Encourage the development of large scale livestock, Link the global chain with the investment of large enterprises. Strengthening links to accelerate modernization of plantation value chain. Developing preferential policies for the development of the self-managed forest model, development of wood processing industry and financial services, trade and logistics to support the modernization of forest plantation value chains. Developing agroforestry-based landscape models in industrial plantations, cattle raising, creating beautiful landscapes in forest and agricultural areas, serving ecological agricultural tourism, diversify and increase income for businesses and local people. Combining forestry development with tourism and agriculture development [6]. *Formation and development of industry and support services for intra-regional economic integration:* The industry and services in the Central

Highlands are underdeveloped, in which industrial and service sectors are less developed. It seems that industry and support services in the Central Highlands have been less well developed in development planning and in actual development policy. Recent experience shows that in the Central Highlands linking the dominant region, even overlapping regional economic integration also reflects the limited realities, weaknesses of industry and support services in the region. Among the specific policy solutions for the Central Highlands, specific solutions for the formation and development of industry and support services for intra-regional economic integration. *Strengthening the link between enterprises in setting up production, distribution and consumption networks of hi-tech production branches and strongly developing export value-added processing industries such as rubber, sugarcane, pepper, cashew, tea, vegetables and minerals, hydropower:* The activities of enterprises in the Central Highlands have mainly been engaged in purchasing, processing and preliminarily processing agricultural products and markets in large part into export markets. They only participate in a very short supply chain, so the value is low and the linkage is not high [7]. *Linking in promoting investment and trade for the whole region in order to create linkage and coordination between these organizations, branches and enterprises together and ensuring the harmonious interests of each locality, promoting the combined strength of the whole region; overcoming the situation of localities in the region to promulgate policies to attract investment rampant today:* Promoting investment promotion activities in order to find strategic investors with financial and management capacity as the core for linking the development of product value chains, especially for products. Agriculture and Forestry; Encouraging business incubation, attracting businesses to invest in Central Highlands agriculture to connect with key enterprises; To support and create conditions for the development of professional social organizations of farmers as a bridge between farmers and enterprises, protecting the interests of producers and consumers. Promoting public-private partnerships (PPPs) to mobilize public and private resources for infrastructure development, agricultural and tourism value chains. Rational coordinating resources, overcoming the economic space divided by administrative boundaries. *Linking and cooperating among the provinces in the Central Highlands on "Setting up a unified tourist economic zone": To develop the common tourism programs of the whole region; Investing in the development of specific tourist products of the region; training and developing high quality tourism human resources; building a promotion program, branding to introduce tourism images in the Central Highlands as an attractive destination, linking and cooperating between the Central Highlands and other tourist areas* [10]: It is necessary to formulate a common tourism development strategy of the region on the basis of cooperation between localities and enterprises in the region and with localities and enterprises in the southern central and southeastern provinces to develop the infrastructure, promoting the comparative advantages of localities on the ecological and cultural characteristics and advantages of natural conditions for the development of tourist products, forming centers and destinations, program, tours to attracts domestic and foreign tourists and spreads to other regions, linking and corporating international in the Greater Mekong Subregion and ASEAN countries, linking tourism enterprises with enterprises operating on agricultural and forestry production, trade and services to develop specific tourism products of the Central Highlands, building and perfecting the mechanisms, policies to supports the association of tourism development, preparing policies to encourage travel enterprise to study the formation of new tourism programs, unique tourism products to attract tourists and improve the competitiveness of the region's tourism industry, linking to improve the quality of tourism services. Strengthening the role of enterprises in joint activities. Coordinating with the South Central, South East and South of Laos, Northeast Cambodia to build the

special and high quality program of tourism links. Promoting and supporting the promotion of tourism products and services, building trademarks, purchasing tourism products and tourism brand as the main promotion target through the media, Communication. Developing a strategy and action plan for the Central Highlands to protect natural resources (forests, water resources and land) to create agricultural and forestry landscapes and green, clean and beautiful environment for the development of agricultural tourism, eco-tourism, cultural tourism .. [6]. Develop a project to link tourism development in the Central Highlands based on the master plan for tourism development in the Central Highlands until 2020 with a vision to 2030. Provinces in the region should agree on a common plan for National tourist resorts and national tourist spots have been identified as development priorities to create a spillover effect throughout the region. The cooperation projects between the Central Highlands and other tourist areas, especially to the sea (North Central Coast, South Central Coast) should be emphasized. Strengthen the role of enterprises in joint activities, cooperation and development of exploitation of tourism products. Form a coordination committee to develop tourism in the Central Highlands to promote the cooperation process of cooperation [11] – *Training cooperation and human resource development; research and application of science and technology:* Cooporating in human resource training, especially high-quality human resources, with a professional structure and qualifications to meet the development demands of the Central Highlands, expanding the training scale in many forms, paying attention to training a contingent of highly skilled workers, coordinating training human resources with other regions in the country and international cooperation, prioritizing investment in scientific research in order to create databases and arguments in service of development objectives and application of advanced technology transfer into production and life; Supporting enterprises in technological renewal, applying modern technologies to raise the productivity, quality and competitiveness of products, especially the products of regional strengths such as coffee, rubber and pepper, tea, mineral processing industry, forest products. *Cooperating in building the information and exchange system for socio-economic information and investment in the locality and cooperate with environmental protection, natural disaster response and climate change;*

+***Thirdly;*** *building Institution and reforming thought in Regional Development and Regional Linkage: Promoting the establishment of a coordinating body for the Central Highlands Economic Zone:* In our country, only the Development Coordination Organization and the Steering Committee of the Development Coordination Organization for Key Economic Zones have been formed. For the Central Highlands, there is the Central Highlands Steering Committee; however, the Central Highlands Steering Committee has the function of advising and supervising, but has not been given the right to have financial and human resources in decision making to link the region. Therefore, it is not difficult to understand the role of the Regional Steering Committees (Central Highlands, North West, South West) in promoting and strengthening linkages between provinces in the region and the link between regions is quite faint. So, it needs to: establish a regional economic coordination body in the form of "*Regional Steering Committee*" or "*Regional Council"* acting as "Conductor" operating in association. In the immediate future, it is necessary to supplement the task of coordination and economic linkage for the Steering Committee of Central Highlands, Northwest and Southwest, Set up coordinating committees such as the Traffic Coordination Unit, the Tourism Coordination Board, the Coordination Committee for Development of Major Agro-Forestry Products (coffee, pepper and rubber), forest, etc.), which is chaired by the specialized management ministry and coordinated with relevant ministries, research institutes, enterprises and associations, the Central Highlands provinces

and the provices bordered with Central Highlands; Formulate joint projects in order to mobilize and concentrate development resources on a number of domains, sectors and products. Promote the establishment of "**Consultancy Group for Development Cooperation in the Central Highlands**" – including experts in agencies, institutes and universities such as Central Highland Steering Committee, Institute of Social Sciences of Central Highlands, Central Highland University, Da Lat University … to study the current situation, propose scientific solutions and foundations for the sustainable development of the Central Highlands to help the "Coordination Committee", "Regional Councils "leaders of localities to direct and consult mechanisms and policies to promote regional socio-economic development. *Overcome local thought in intra-regional link:* local thought will make local interests that govern the local co-operation; its consequence is the phenomenon of dispersed resources, investment spread out, do not create economies of scale, cause waste. *Establishing financial funds for the common development objectives of the whole Central Highlands:* To formulate regional cooperation development funds to mobilize financial, scientific and technical resources domestic and abroad, stepping up the formation of linkages for each domain and product such as: Coffee Development Assistance Fund, Tourism Product Development Assistance Fund, Transport Infrastructure Development Assistance Fund. Funds are formed mainly from the following sources: contributions from local budgets; contribution of enterprises in the locality; sponsored by organizations and individuals domestic and abroad, support from the Central … Funds are used for specific target programs as decided by the coordinating agency. The agency must also set up the necessary monitoring institutions. *Develop the nuclear center in each Central Highlands economic region*: At present, in fact, most of the economic zones in our country have formulated formally and informally nuclear centers. At present, none of the provinces in the Central Highlands has truly "played the role of nuclear center". Therefore, the orientation in the future is to form the Central Highlands nuclear centers, it is also very important and necessary. *In the long term, it is necessary to continue to implement the following contents:* Research and formulate regional linkage regimes which show the form, principles and contents of linkage and the mechanism of attracting investment resources and financial supports for regional cooperation projects; the coordinating agency shall elaborate and directly direct and supervise the implementation thereof. Promulgate criteria for assessment of socio-economic development in the locality in association with regional economic linkages, to avoid the situation of pursuing achievements, without taking into account the general efficiency factors of the whole region. Decentralizing between the central and local levels in the fields of budget, investment and socio-economic infrastructure investment linkage so that the localities in the region may take the initiative in joining the associations. Formulating specific economic institutions for economic growth poles, branches and key economic areas to form locomotives and spur motivation in the region and outside the region. Raise the role of trade associations, including the professional social organizations of the farmers. To develop cooperatives and agricultural unions in each branch of the Central Highlands, linking the whole region to forming agricultural unions in the Central Highlands for each commodity line (6);

***+Fourthly**; Strengthening linkages in the Central Highlands with inter-regional and inter-national linkage:* Improving the effectiveness of cooperation between the Central Highlands provinces and the South East and South Central Coast areas – Priority fields for cooperation include: attracting investment; Processing, importing and exporting, promoting trade in key products such as coffee, rubber, cashew, fruits, furniture. To cooperate in building transport axes linking the Central Highlands with the South East and South Central Coastal provinces, especially to sea ports and traffic hubs, the sea and island tourism routes of the

South Central Coast and the South East with ecological tourism, forests, mountains, cultural tourism of the Central Highlands. Research and build a mechanism linking the Central Highlands with the coastal areas of Central Vietnam, the Southeast, southern Laos and northeastern Cambodia, in the immediate future the pilot mechanism for development cooperation in the field of tourism and logistics. Promote cooperation between the Central Highlands and the localities of Laos and Cambodia in the framework of cooperation in building the Vietnam – Laos – Cambodia Development Triangle; Greater Mekong Subregion (GMS) cooperation; cooperation in the development of East-West corridors and bilateral cooperation; Cooperation between provinces in the Central Highlands and provinces of Laos and Cambodia.

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Section 2. International law

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Mishalchenko Yury Vladimirovich,
Professor of the Department of constitutional
and international law Saint Petersburg Institute (branch)
All-Russian state University of justice
(RPA of the Russian Ministry of justice)", doctor of law, Professor
E-mail: myv2008@mail.ru

Viaznikova Liudmila Leonidovna,
Master's student, Saint Petersburg Institute (branch)
All-Russian state University of justice
(RPA of the Ministry of justice of Russia)
E-mail: Lv_95@mail.ru

INTERNATIONAL LEGAL MECHANISMS FOR ECONOMIC COOPERATION BETWEEN RUSSIA AND GERMANY

Abstract. The duration, intensity and mutual interest in economic relations between Russia and Germany determine the need to maintain an optimal and stress-resistant legal regime that can evolve, ensuring mutually beneficial cooperation even under sanctions. The mechanism of international legal regulation of the analyzed trade and economic relations includes several basic blocks: trade, Finance, investment, and migration. All of them are provided with a set of international legal tools, as well as specific methods of regulation. With the creation of the EU, the further evolution of the mechanism changes the direction: from bilateral Russian-German treaties to multilateral mechanisms of regulation of Russia-EU relations. Within this context, the issue of applying the principle of German greatest favoritism to the EU members has arisen, which to a certain extent undermines the prospects for Russian-German economic relations.

Keywords: Russia, Germany, economy, cooperation, legal mechanism, EU law, German law, international Treaty.

The current legal regulations of the Russian-German trade and economic cooperation are based on a set of agreements between the USSR and the Federal Republic of Germany on general issues of trade and navigation of April 25, 1958; on promotion and mutual protection of investments of June 13, 1989; on development of large-scale cooperation in the field of economy, industry, science and technology of November 9, 1990; on good neighborhood, partnership and cooperation of November 9, 1990.

The development of international legal regulation of trade and economic relations between Russia

and Germany is facilitated by the fact that the two countries are under civil law system, which bases this mechanism on common historical and legal origins, common and understandable to the parties legal definitions, common principles of international economic law. Several international legal institutions have been created on this basis as part of the development and improvement of bilateral mechanism.

Under globalization, the development of the international legal regime of trade and economic relations between Russia and Germany is increasingly derived from relations with the European Union (EU), i.e. European-Russian relations, within which Russian-German relations are developing.

In the current conditions, the legal regulation of economic relations between the EU countries and Russia is actually subordinate to the Decision of the Council of Europe of March 17, 2014. "concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine". Under the same regulation, the negotiations on re-concluding the EU-Russia agreement have been frozen. Extensive number of publications are devoted to the legal nature of European sanctions [1].

As a trade and economic partner of Russia, Germany, first of all, is interested in the import of hydrocarbons, the legal regulation of which is subordinate to the European Energy Charter, which is now regarded as a political instrument of pressure on Russia [2]. It is a question of forced reduction of the Russian share in the total energy consumption of European states to ensure their political independence in the form of elimination of risks of using oil and gas supplies as an instrument of political pressure.

This stance is not entirely correct, as the Charter was adopted in the early 1990 s, when no sanctions were applied and relations between Europe and Russia were the best. Moreover, the Charter is based on the principle of diversification of assets for generation or production and transfer in such a way as to exclude monopolism.

On May 15, 2010, the German Federal Network Agency BNA rejected the application of Nord Stream 2 AG, which requested an exemption from the EU gas directive. The agency disagreed with arguments of the gas company about an economically functional finalisation of the project and significant investments before the new legal regulations were adopted, since the project was not technically completed by May 23, 2019. Therefore, Nord Stream 2 is actually bound to be under–loaded. An exemption could have been granted if the pipeline had been constructed before May 23, 2019, which Nord Stream 2 believes has been functionally fulfilled.

In fact, the German regulator has narrowed down the key definition of "completion of the project", which is not quite in line with traditional practice of protecting legitimate expectations. The German legislator seemed to have done everything possible, postponing the deadline for Nord Stream 2 commissioning to May 24, 2020, in late 2019. Gazprom met this deadline, but USA sanctions against pipe–laying companies (Swiss Allseas) paralyzed construction [3]. Therefore, USA political and economic interests actually put direct pressure on Russia–Germany and Russia–EU relations.

International legal regulation of trade and economic relations between Russia and Germany is subject to these principles. The priority of further European integration narrows down the possibilities of cooperation with Russia, since European regulation is primarily aimed at orienting foreign trade and investment towards European partners.

EU legislation allows a policy of protectionism in foreign trade, which reduces the opportunities for Russian exporters. The current EU legal system restrains the import of Russian products to which Germany applies anti–dumping procedures, restrictions on volumes and individual items, as well as technical norms and standards. Germany has a strict export control system for military and dual–use goods, while ordinary goods are subject to strict certification rules and complex administrative, customs, sanitary and veterinary regulations.

Membership of Germany in the European Union minimizes bilateral international legal regulation. The existing bilateral treaties between the two countries reflect only trade and economic cooperation aspects that fall within the competence of the EU member states. As this circle is constantly expanding (through the delegation of national powers to EU bodies), the potential for bilateral regulation of Russian–German relations is shrinking accordingly. Taking into account the formation of the EurAsEC and the Customs Union, within the which a part of the powers of the CU body are also transferred, trade and economic cooperation between Russia and Germany is transferred from the bilateral system of legal regulation to the interaction of the two integration associations, to which Russia and Germany are members [4].

Functioning of international legal instruments for economic cooperation between Russia and Germany is ensured by the relevant institutions. These are public administration bodies, specialized (industry) commissions, intergovernmental working groups, as well as the standing Advisory Council on Economic, Scientific and Technical Cooperation.

During the years of cooperation, a legal means for cooperation between the regions have been established, including the financing of German exports under the Hermes guarantee based on the exchange of goods. Many Russian regions have bilateral cooperation agreements with the German federal states.

In this regard, the improvement of the legal framework of bilateral economic relations, the improvement of their trade and political conditions and the investment climate in the following areas are of prospective importance: a) state support for regional cooperation with German partners; b) continuation of negotiations with the German side to improve credit and financing conditions for cooperation projects; c) In this regard, it is of promising importance to improve the legal base of bilateral economic relations, improve their trade and political conditions and the investment climate in the following areas: continuation of negotiations with the German side on improving the conditions for lending and financing cooperation projects; c) creation of a mixed CCI and the establishment of a fund to promote industrial cooperation – the fifth period (from 1945 to 1990) – the development of a mechanism for international legal regulation of economic relations between USSR and German countries (Federal Republic of Germany and German Democratic Republic).

Therefore, the formation and development of the current mechanism of international legal regulation of Russian–German trade and economic relations went from a simple set of separate contracts to regular, multifaceted and permanent contracts, covering the trade and economic sphere as a whole; from a priority dispositive method of legal regulation – to an imperative one. With the creation of the EU, the further evolution of the mechanism changes the direction: from bilateral Russian–German treaties to multilateral mechanisms of regulation of Russia–EU relations. Within this context, the issue of applying the principle of German greatest favoritism to the EU members has arisen, which to a certain extent undermines the prospects for Russian–German economic relations.

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Jesaulkova Laura,
Mg. pol. sc., Department of Political Science
Rīga Stradiņš University
E-mail: laura.jes05@gmail.com
Spruds Andris,
Prof. Dr. sc. pol., Faculty of European Studies
Rīga Stradiņš University
E-mail: Andris.Spruds@rsu.lv

WHEN DIFFUSION IS NOT ENOUGH: OPERATIONALIZATION OF NORMS AND EU POLICY ON HUMAN RIGHTS IN CENTRAL ASIA

Abstract. The article considers question how abstract norms such as human rights are translated beyond the decision-making level. Shape in which operationalization of norms takes place affects how the European Union approaches its commitment in Central Asia in regard to ongoing violations of the human rights.

Keywords: diffusion, operationalization of norms, human rights, European Union, Central Asia.

Norms have played major role in political studies for numerous centuries, however gradually over the last few decades specific norms such as human rights have shaped contemporary international system and have become one of the driving forces for the countless foreign policy decisions and initiatives. The European Union serves as a prime example on how certain ideas and perceptions can transform interstate communication and bring forward ideas, values and intentions as equally noteworthy facets for analysis as more frequently revisited interests of materialistic gains and accumulation of political and military strength.

Norm is most commonly defined as a standard of appropriate behavior for actors with a given identity [1; 3] yet ongoing debates about civil rights, self-determination, democratization and other aspects of interstate relations clearly represent that there is no fixed normative solution among the international actors, and contestation process for upper-hand in defining what is appropriate and good behavior largely defines the nature of politics [2, 342]. Over the last few decades researchers of international relations have been heavily focused on the meaning of norms, how and why certain norms make greater impact than others, and how norms spread from one society to another. Scientific literature provides various concepts to explain how international norms make their way to influence "norm recipients" such as life cycle of norm [3, 255] and diffusion [4, 85]. Life cycle of norm is viewed as a three-stage process, where the first stage is emergence of a certain norm, built by agents with vision of appropriate behavior in certain community, followed by a second stage of broad norm acceptance and institutionalization, completed by the third stage of internalization and complete takeover of the norm [3, 256–265].

Respectively diffusion of norms taps into interstate socialization and explores transfer or transmission of objects, processes, ideas and information from one population or region to another population and region by different diffusion mechanisms [4, 85]. Certain preconditions are necessary to achieve successful socialization and adaptation of norm such

as cultural match between international norm and pre-existing discourse, judicial system, bureaucratic procedures and other forms of domestic practice distinctive to the recipient of norm. Social context prior transmission holds no lesser significance since experience, values, intentions and vision of domestic agents may heavily influence to what extent certain norm will be adapted [4, 89]. On the other hand, after norm has emerged and reached its recipient, specific diffusion mechanisms serve as a pathway to reach domestic level and empower international norms after they have reached the domestic agents.

While examination of why particular norms are chosen to be adapted and reasons for the varying degrees of diffusion and compliance provides extensive insight into the decision-making on which international norms and patterns of behavior should be taken over and transmitted into domestic setting, it pays less attention to implementation of norms after the decision has been made and methods used to operationalize selected norms. Separation of the decision-making process and operationalization process becomes especially relevant in regard to such abstract and vaguely defined international norms as human rights – initially provided as normative substance, which shapes decisions, discourses and is referred to in governmental documents, while later expected to become operational in administrative environment [5, 382].

Studies on act of translating norms into operational concepts suggest that technical process of turning abstract concept into empirically measured entities to monitor the implementation could have transformative effect on the initial objectives of the norm-setters [5, 383], thus contrasting view of norm as a fixed standard which is later applied into the pre-existing domestic setting of the recipient. Furthermore, norms can be operationalized through standardized procedures, legislative documents, guidelines or by creating quantitative indicators such as number of psychological assistance centers for the victims of domestic violence, number of released political prisoners and other relevant statistical data. It follows that normative substance and actual shape of abstract ideas and expectations of good behavior is forged through the process of operationalization [5, 386]. The European Union at its current form has kept building discourse surrounding external relations with partners and neighboring regions upon importance of human rights and responsibility to share values of good governance with partners in transition. However, how effective is operationalization of human rights beyond the decision-making level under conditions, where political advantages and economic opportunities serve as main currency of the external relations?

Operationalization of norms and EU policy on human rights in Central Asia

The common framework for solidifying humans rights as integral part of the Europeans Union's external policy was adopted in 2012 in a form of the Strategic Framework on Human Rights and Democracy, aimed at setting out principles, objectives and priorities, designed to improve the effectiveness and consistency of the applied human rights policy [7]. With the adapted Strategy the European Union confirmed commitment to promote universality of human rights and readiness to speak out against any ongoing violations. Thereby the Strategic Framework is in line with internationally accepted role of the fundamental rights and is consistent with the existing legal framework. But beyond the decision-making level it becomes challenging to operationalize human rights without losing in translation the initial intention of norm. Similarly there are no universal standarts and suitable indicators to measure human rights and effectivness of the operationalaized norm [5, 399]. Closer look on the approach the European Union has has in regard to human rights situation in Central Asia reveals other practical challenges at the operationalization stage, significant to explain lack of significant progress concerning efforts of the European Union to promote human rights in Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan and Turkmenistan.

Human rights in Central Asia have always been an issue of concern for the European Union as glob-

al guardsman of values and rights. Human rights practises in Kazakhstan, Uzbekistan, Kyrgyzstan, Tajikistan and Turkmenistan reflect unsatisfactory record of politically motivated detentions, tortures, persecution of the vocal political and human rights activists, journalists as well as their family members and numerous other offences [6,17–21;29–33; 8–40], which place Central Asia as a whole region further down the spectrum of general consensus on just and socially developed societies. Despite the earlier presence in the region, Central Asia became permanent vector of the external policy of the European Union in 2007 after political strategy for a Partnership with Central Asia was adopted, emphasizing development and consolidation of stable, just and open societies, adhering to international norms as essential condition to bring the partnership between the European Union and Central Asian States to full fruition [8; 7]. Good governance, the rule of law, human rights, democratisation, education and training were encoded into strategy as main areas of cooperation and shared experience, expected to lead to political stability in the region and lessen burden upon the human rights.

Since then in response to emerged flaws the strategy has been reviewed in 2015 and adapted anew in 2019 in order to further enhance partnership and foster efforts of democratization and development of the civil societies within five nations of Central Asia. But why despite the written commitments and years of partnership the European Union seems to struggle to achieve consistent changes "on the ground" in the region and evidently seems to be patchy despite the active engagement? One could argue that in case of Central Asia external factors play huge role in the development dynamic of the five nations, namely grand presence of Russia and China whose appeal is rooted in much more attainable and touchable goals of economic and political partnerships, financial investments and infrastructure projects. And it comes as no surprise to the European Union as put in words of the special representative for Central Asia Peter Burian that "China is coming with an offer nobody can refuse, while the EU is coming with an offer nobody can understand" [10].

The capacity of the European Union to support necessary reforms and aid at transition towards democratic policies is quite significant – financial aid for Central Asia over the years has steadily increased and for 2014–2020, Development Cooperation Instrument grant funding is €1.1 billion, which is 62% more than the previous programming period [11, 4]. The amplitude of the financial aid is likely to increase 2021–2027 due to the European Commission's proposal to raise total funding for its external action across the globe by 30% [11, 4]. The European Union has also promoted human rights in Central Asia by promoting legal reforms and media freedom as well as by conducting trainings and maintaining special dialogues to raise awareness for the human rights. Still, it follows that the indictors gathered by the External Action Service of the European Union heavily focus on statistical information, gathered from the data collected on the field, and distribution of funding opportunities and financial instruments such as European Instrument for Democracy and Human Rights [9]. Gathering of data plays decisive role in translation of norms and formation of its substantial meaning, yet more often than not countries are not willing to provide quantitative and qualitative data or have no capacity to gather full scope of necessary information which has been present occurrence in case of Central Asia. External relations are set under condition of expected behaviour in exchange for economic and political gains, which makes diffusion and internalization of human rights even more fragile and multi-layered in Central Asia. Yet the heavy focus of the European Union on the quantitative data as indicators of the human rights issues highlights lack of operationalization techniques for the quality research and development of appropriate statistical indicators, which could lead to consistency and strategic effectiveness on the road to fulfilled mutual normative commitments.

In conclusion this article highlights the general importance to the process of operationalization, which affects the substantial meaning to the universally shared abstract norms and ideas. Human rights policy of the European Union in Central Asia highlights the transformative effect of the norm and challenges, related to the effective translation of the initial intentions behind the commitment to promote human rights and contribute to democratization, based on partnership and mutual dialog.

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Section 3. Tax law

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Efremova Ekaterina S.,
Associate Professor of the Department of Entrepreneurial, Competition and Financial Law of the Law Institute of the Siberian Federal University, Candidate of Legal Sciences,
E-mail: Efremova1977@list.ru

THE ABILITY TO ACHIEVE TAX COMPLIANCE IN THE FACE OF FORMAL EQUALITY OF TAXATION

Abstract. This research focuses on the principle of equality of taxation. We surveyed the Tax Code of the Russian Federation and litigation practices in correspondence with the current legislation of the Russian Federation. The results obtained show that the principle of equality in taxation is not achievable.

Keywords: tax compliance, the principle of equality of taxation.

Introduction: The aim of this research is to investigate the principle of equality of taxation provided in Article 3 of the Tax Code of the Russian Federation. The principle of equality of taxation is one of the most important principles formulated by Adam Smith. This principle has been argued in literature by learned lawyers and economists for many years. The viewpoints of the Russian lawyers on the principle of equality of taxation can be divided into two groups. The first group define equality of taxation as the equality of all payers before the tax law, in other words, it means formal equality which is provided in Article 19 of the Constitution of the Russian Federation (Bryzgalin [7, P. 134]; Demin [9, P. 143]. The second group take a stand that equality of taxation is not rooted in law, but in uniformity of taxation. This equality is estimated solely on the basis of a comparison between the economic opportunities of various taxpayers (Pilipenko [15, P. 62]; Belyx [6, P. 147]; Pepelyaev [16, p. 113–115]).

According to the classical British economist John Mill, the level of welfare always correlates with revenues. For this reason, taxpayers whose revenues are equal should pay equal taxes. What logically follows is that inequality in revenues will mean inequality in taxes levied. Francis Edgeworth developed Mill's ideas and claimed that perfect equality in welfare distribution is impossible without increasing taxation on higher revenues (Jarczok-Guzy [20, P. 70–82]).

The uncertainty regarding the principle of equality of taxation raises the following questions: 1) Is the principle of equality of taxation a branch principle or is it a general principle that is being refracted within the tax law? 2) How are the provisions for tax equality implemented in taxpayers' legal relationships? To answer the question of tax equality we studied the acts of the Constitutional Court of the Russian Federation (including those adopted before the Tax Code of the RF entered into force) and a number of acts in the current legislation of the Russian

Federation. Our paper contains suggestions on how Article 3 of the Tax Code of the Russian Federation could be amended.

Methods: We reviewed available literature with a special focus on the principle of equality of taxation and carried out a comparative analysis of the legislation and litigation practices of several countries. We surveyed the acts of the Constitutional Court of the Russian Federation, some early sources on tax law of the Russian Federation and compared the taxation methods including the equivalent, proportional and progressive methods.

Results: Governments solve the problem of equality of taxation differently. Victor Thuronyi in his book "Comparative Tax Law" points to substantially different approaches to the interpretation of the principle of equality of taxation by the constitutional courts in different countries. The author maintains that in the dispute on the equality of taxation, Germany extremely favors the taxpayer, because "the *German Constitutional Court* has been active in striking down tax legislation for violating the principle of equality. In the opinion of the German Constitutional Court, tax legislation should take into account the taxpayer's ability to pay tax" (Thuronyi [17, P. 82]). In many cases the decision of the Constitutional Court (in which the fact of violation of the principle of equality is established) entails changes in the current legislation. For example, in the decision of June 27, 1991, the *German Constitutional Court* has established the fact of tax evasion, which arose as of violation of the obligation to declare interest income. As a consequence, those taxpayers who declared their income were taxed unfairly. The Court ruled that in order to avoid such a situation, one of two ways could be chosen: "it could provide for effective provision of information by banks to the tax authorities, so that declarations could be subject to effective checking, or it could impose a flat-rate withholding tax, among other possibilities" (Thuronyi [17, P. 83]).

A more moderate position on compliance with the principle of equal taxation is taken by the *French Constitutional Council.* "The Constitutional Council has invalidated tax legislation for violating the principle of equality in several cases, particularly in the instances where the tax law was seen as violating the principle of procedural equality before the law (procedural due process)" (Thuronyi [17, P. 92]).

The *Supreme Court in the United States* holds a derogation from the principle of equal taxation if there is an appropriate state interest (this is known as "rational basis") (Thuronyi [17, P. 85]).

The Constitutional Court of the Russian Federation has repeatedly defended the taxpayer, recognizing certain norms of tax legislation as violating the principle of equality of taxation. In order to identify certain aspects of the principle of equality of taxation in the Russian Federation we analyzed the acts of the Constitutional Court of the Russian Federation (including those adopted before published the Tax Code of the Russian Federation).

The results of the analysis are presented in (Table 1).

Table 1. – Some prerequisites which allow to implement the principle of equality of taxation

1.	accounting for the actual ability to pay tax [1]
2.	prohibition of discriminatory tax rules [2]
3.	unified tax calculation procedure for all taxpayers [3]
4.	statutory benefits for certain categories of subjects [4]

The analysis of the acts of the RF Constitutional Court also revealed the following issues that required could be an object for the present research:

1. What does the actual ability to pay tax mean?

2. Should wealthy citizens pay taxes at higher rates?

3. If this is the case, then should we go back to progressive taxation?

According to Isaev and Yanzhul, true equality is possible, provided all taxpayers bear an equal tax (property) burden.

Is it really so?

Taxation practices generally use three methods: equal, proportional and progressive taxation. The method of equal taxation means that all taxes are imposed on taxpayers (regardless of their income) equally. For example, in accordance with Article 333.19 of the Tax Code of the Russian Federation, all individuals and legal entities "in the event of filing a statement of claim of a property nature with a claim price of up to 20,000 rubles must pay 4 percent of the price of the claim" [5]. The method of proportional taxation means that each entity pays tax in proportion to the amount of the income received. Since 2001 an equal tax on the income of individuals has been introduced in Russia, which means that the received income of individuals (regardless of their size) is taxable by the rate of 13 percent.

If by uniformity of taxation we mean equal tax burden on all entities, these two methods (equal and proportional) do not seem applicable. Equal method does not take into account the property capacity of taxpayer. The proportional method assumes that the one who earns more pays more. This is mathematical equality, and it is by no means subjective. People with low income will pay taxes with much greater privations than rich people.

"True equality implies that the deprivation associated with the administration of the tax duty should be the same for all taxpayers; it requires not only objective, but also subjective equality, which is not ensured by mathematical equality" (Yanzhul [19, P. 252]). Thus, the introduction of a tax on the personal income with identical rate of tax (13 percent) in Russia does not correspond with the principle of equal taxation.

Galina Petrova – a highly reputed Russian authority in the area of finance expressed the view that it is possible to achieve uniformity of taxation by introducing the method of progressive taxation, which suggests increasing the tax rate with the growth of the tax base (Petrova [14, P. 34]).

In theory and practice of financial law, three types of progression are distinguished, i.e the simple bitwise progression, simple relative progression and complex progression. The essence of the simple bitwise progression is that the bits are set for the total size of the tax. Then the tax amount is determined for each bit. We will immediately emphasize the drawback of this progression – the tax amount increases abruptly. This system has been widely used in the past. The simple relative progression means that ranks are set for the total size of the tax base, and different rates are determined for each rank. An example of the simple relative progression is the scale of tax rates on property of individuals, as is established by Article 406 of the Tax Code of the Russian Federation. In accordance with this article, a taxpayer owning property worth up to 300 thousand rubles pays a tax which amounts up to 0.1 percent. A taxpayer possessing property, the value of which exceeds 300 thousand rubles, but not higher than 500 thousand rubles, is subject to taxation which amounts to 0.1 to 0.3 percent. Thus, it may happen that some individuals will pay tax at an increased rate while the value of their property exceeded the lower property rank literally by one ruble. This circumstance entails a completely logical question of whether it is in compliance with the principle of tax equality. As you can see, applying the method of progressive taxation does not contribute to the achievement of real equality of taxpayers.

Thus, if by equality of taxation we understand equal tax burden on taxpayers, none of the methods of taxation will comply with this principle, because it is impossible to achieve equal suffering of all taxpayers.

The branch principles of law are designed to reflect the essential features of the branch. "Tax law as a branch is a set of legal rules governing relations of the organization and implementation of property withdrawals from individuals and organizations unilaterally by the state in order to financially support public

activities" (Kustova [12, P. 25]). Undoubtedly, the amounts of these withdrawals from individuals will always be unequal, because individuals do not have equal incomes, expenses and property. In this regard, if we understand the principle of equality of taxation as equality in taxation, then this principle cannot be recognized as the principle of the branch of tax law, since it does not reflect its specificity.

Discussion: In view of this, it should be recognized that application of the principle of equality of taxation is impossible, or to accept that it can be applied as the principle of formal equality and expressed in the equality of conditions in the obligation to pay taxes. That is, with an equal object of taxation and other conditions, taxpayers must bear equal tax burden.

Is the principle of tax equality really implemented in legal relations? To answer this question, let us consider a few practical examples.

- In accordance with Clause 3, Article 214.1 of the Tax Code (as amended on May 18, 2005), it was provided that "the income from securities purchase and sale operations is determined as the difference between the amounts of income received from the sale of securities and documented expenses for the purchase, sale, storage of securities actually made by the taxpayer, or **property tax deductions** used to reduce the proceeds of a sale in the manner prescribed by this item". Federal Law dated 06.06.2005 № 58-FL amended it; according to this amendment "in relation to income received from the sale of securities starting January 1, 2007, the tax base is calculated without applying a property tax deduction. The taxpayers that sold securities after January 1, 2007, were entitled to reduce the amount of income received only by the amount of documented expenses associated with the acquisition, sale and storage of securities". Thus, taxpayers that sold their securities before January 1, 2007, were in more favorable conditions because in the event of impossibility to confirm the costs of the acquisition and storage of securities they were entitled to take advantage of property deduction. (What is more, in accordance with the Law of December 30, 2006 № 268-FL, the norm on obtaining this tax deduction extended to legal relations arising from January 1, 2002, that is, the taxpayer could file a revised tax return for 2002–2005 with the tax authority and get a deduction.) The problem of observing of the principle of tax equality in the sphere of the sale of securities by the taxpayer arises again when the article 219.1 of the Tax Code of the Russian Federation is passed in 2013. This article provides investment tax deductions for taxpayers upon implementation of the sale of securities owned by them for more than 3 years (paragraphs 1p.1 article 219.1 of the Tax Code). Tax asset is applied to income received from the sale of securities acquired by the taxpayer after 01/01/2014 (in accordance with Federal Law No. 420-ФЗ dated 12.28.2013). Thus, taxpayers who have sold securities acquired in property before 2014 are not entitled to a deduction, and are in less favorable conditions.
- Here is another example. The Tax Code of the Russian Federation provides for the right of a taxpayer to receive a property tax deduction when acquiring a certain immovable property. The procedure and conditions for the provision of such a deduction are fixed, in particular, by subparagraph 1 of paragraph 3 of Article 220 of the Tax Code of the Russian Federation. Since January 1, 2014, the rights of taxpayers to receive property tax deduction have been expanded. So, if the taxpayer used the right to receive a property tax deduction in the amount less than its maximum amount (for example, less than 2 million rubles established by law), the remainder of the property

tax deduction until its full use can be taken into account when receiving a property tax deduction in the future for new construction or for the acquisition of other property on the territory of the Russian Federation. At the same time, taxpayers who previously (before January 1, 2014) have exercised the right to receive the corresponding tax deduction, having received it in the amount less than the maximum amount, cannot claim the remainder of the property tax deduction after January 1, 2014. Citizens believe that in this case their rights are violated. The Arbitration Courts and the Constitutional Court, on the contrary, do not see in this case a violation of the principle of equality of taxation. The norms of Article 220 of the Tax Code of the Russian Federation provide the extension of the rights of taxpayers in connection with their property tax deduction and establish the range of relations to which they will apply. The Constitutional Court noted that the adoption of these norms refer to the discretionary powers of the legislator in the field of establishing rules of preferential taxation, which cannot be regarded as violating the rights of the taxpayer.

Conclusions: Thus, even these few examples indicate that today the category of "the principle of equal taxation" is very unstable. The legislator applies this principle differently to legal relations that do not have significant differences, i.e, when this refers to one category or group of taxpayers.

In this regard, in paragraph 1 of Article 3 of the Tax Code of the Russian Federation the words on the equality of taxation should be replaced by the words on the equality of all taxpayers before acts of legislation on taxes and fees, i.e. this ought to refer to the formal equality of subjects. We believe that this phrasing will allow us to avoid the controversial situations outlined above.

Since formal equality can also be violated, the legislator, in our view, should provide a legal guarantee which will ensure the implementation of the principle of equality of all taxpayers before acts of legislation on taxes and fees.

We offer the following: the provisions of Article 21 of the Tax Code of the Russian Federation "The rights of taxpayers (tax bearer, contribution payers)" could be supplemented with a provision that taxpayers have the right not to comply with acts and requirements of tax authorities if they violate the principle of equality of all taxpayers before acts of legislation on taxes and fees, allow different legal regulation for taxpayers, which do not differ significantly.

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Section 3. Family law

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Adepoju Adebiyi Anthony,
LLB, LLM, M.PHIL, BL.
Lecturer at Faculty of Law, Redeemer's University,
Ede, Osun State and a Ph.D Student at Babcock University,
Ilishan-Remo, Ogun State
E-mail: anthony_adepoju@yahoo.com; sundaybiyi77@gmail.com
Cheluchi Onyemelukwe Onuobia,
DR. (MRS.), Lecturer and Associate Professor,
College of Law, Babcock University, Ilishan-Remo, Ogun State
E-mail: cheluchi7@yahoo.com

AN ANALYSIS OF COMPENSATION IN MEDICAL NEGLIGENCE IN NIGERIA

Abstract. The duty which a medical doctor or personnel has is to treat somebody with an ailment and thereby collect money for the services rendered. This service does not end at the point of discharging a particular patient but goes beyond that level. A medical doctor having held himself out to be someone who has possessed special skill and knowledge, he owes a duty to the patient to use due diligence in admitting care and treatment to that patient or else, he shall be liable where malpractice, mistake or negligence is recorded. Negligence is a failure to reach the expected standard of care in the course of discharging ones duty to a patient. Duties owed by the doctor include but not limited to the following:

a) Failure to attend and give prompt attention to a patient;
b) Leaving behind in a patient's abdomen an item(s) used for surgery;
c) Incompetent assessment of a patient;
d) Improper administration of injection;
e) Incorrect diagnosis;
f) Mistake in treatment;
g) Failure of communicating necessary information to the patient.

Also, where through the doctor's action, the patient incurred loss or injury which may have negative consequences, would such patent keep quiet and accept his or her fate?

In our medical jurisprudence in Nigeria, there is no provision(s) in which without any technically any injured patients(s) without engaging the services of legal practitioners can approach the civil or

criminal court to challenges action or inaction of a medical doctor**.** Another thing is our Evidence Law, most especially Evidence Act, 2011 where an injured patient is expelled to prove the existence or occurrence of any offence, the question is, How would a dying patient knows when his doctor makes mistake in the course of treatment? The available law which is the criminal code provides for stringent conditions even where ones claim would be entertained. This paper is of the opinion that if the trend of unavailability of medical reformation continues, sooner or later the interest of the injured party to make claim for loss of life or any of other medical negligence would be killed. This paper has however undertaken to provide answers to many questions which this paper has raised and went further to distinguish one type of care from others and analysed various types and levels of compensation applicable where medical negligence is recoded.

The paper concluded on a strong notion that there is need to have regulation in medical profession in Nigeria and specialized medical law so that there would be clear or distinct medical regulation put in place by the health care providers and the government where applicable.

Keywords: Analysis, Compensation, Medical, Negligence and Nigeria.

Introduction

Medical negligence is all about medical errors which occurred in the course of administering medical cares unto a patient. Basically, negligence in medical world, means analyzing a doctors course of diagnosis, or advise or treatment by a reasonable standard of his professional colleague [1], it may well be that a proof is itself a verdict of some forms of not having the required professional skills, or moral blame worthiness on the doctor's part.

In exercising of his professional skills, doctors while discharging his duty owes a duty of care to his patient generally from the point of admission for treatment to the point of discharge.

For instance, where a doctor holds himself out as someone who possess special or professional skills and knowledge and he is approached for medical solution for his or her medical challenges, such a doctor owes a duty to the patient to use due caution in undertaking the treatment [2]. If doctor in that circumstances accepts to admit any patient for treatment and doctor undertakes to treat the patient and the patient submits to his discretion and treatment accordingly, such doctor owes a duty to the patient to use due diligence, care, knowledge, skill and caution in administering the treatment in a situation like this, no contractual relationship is required neither will it be necessary that the medical service by rendered for reward [3].

The question then is, at what period will doctor or any health personnel be required to exercise professionalism? Doctor or any health personnel is required by law to exercise the care and skill of a reasonable professional.

Nature of Negligence in Medical Profession

The required standard of a reasonable professional under this context is the same as it would be required for other professionals like an accountant, legal practitioners, architects, engineers, surveyors. In the same manner, as the aforementioned professionals hold themselves to have possessed personnel or required skills, doctors or health personnel or professionals are presumed to possess the skill of a reasonable professional to treat any patient with health challenges [4].

Furthermore, negligence in its orthodox way is a failure to reach the expected standard [4]. For instance, an act of giving meaning to medical negligence, it includes but not limited to:

a) Failure to attend and give prompt attention to a patient either on admission or in any other prescribed place.

b) Leaving behind in a patient's abdomen or any other part of the body an item(s) used for surgical operation;

c) Incompetent assessment of injection or drugs;

d) Incorrect diagnosis;

e) Mistake in treatment;

f) Failure of communication;

g) Damage of any part or organ of the body of patient while carrying out investigation or administering drugs or treatment or other medical instrument [5].

However, worthy of mention is the doctor's liability which may come either contractual and or delictual of all liabilities; negligence remains the most common basis of liability in medical malpractice or negligence, whether the claim lies in contract or delict but limited to only award of damages flowing from professional negligence. In occasions it can include other causes, such as breach of medical confidentiality, for instance, revealing vital information about a patient's medical condition which a particular patient is suffering from, or failure to carry out surgical operation or giving of specified drugs already agreed upon by the doctor [6].

In *Hiske v. Cole* [7], the court was of the opinion that in order to find out whether a doctor is liable for negligence or not, his conduct should be one deserving of censure or be inexcusable in the circumstance. The legal implication of this is that the court should be circumspect to find or rarely should find negligence against a doctor. The decision followed the dictate laid by Tinda CJ where he stated that: any person who enters into a skillful profession undertakes to discharge a reasonable degree of care and skills. He does not undertake, if he is an attorney, that at all situations you shall gain your case, nor does a surgeon undertake that he will perform a cure to a disease or aliment, nor does he undertake to use the highest possible degree of skill.

There may be person(s) who have higher education and greater advantages than he has, but he undertakes to discharge a fair, reasonable and competent degree of skill or knowledge and one will say whether in this case, the injury was occasioned by the want of such skill in the defendant [8].

Similar position was reached by the court in Nigeria in the case of *Okonkwo v.* MDPRT [9] where it was submitted that the standard for fixing doctor's liability, that is the practical difficulty in linking of patient's injury to treatment received from doctor, couple with a jurisprudence that judges doctor's conduct against that of his professional colleagues and the expense of litigation, all operate to inhibit medical negligence instigation in a manner that the American system with its contingency fees and its sympathetic jurists does not [10].

Also, medical negligence is the failure to do what a reasonable man will call exercise of reasonable degree of skill and care in a particular circumstance or situation. It is the failure to exercise the standard of care or apply minimum measure of care in a particular situation or circumstance. It is a failure to exercise a standard of care or apply minimum measure of care in a particular situation. Negligence is a failure to exercise a reasonable degree of skill and care expected of an average medical doctor. In a similar situation, tort of negligence was recognized in the case of *Denoghue v. Stevenson* [11].

An act of negligent of a medical doctor can expose him or her to a civil or criminal action. For instance, if a doctor's negligence results in death of a patient; such a doctor may in addition to discipline from Nigerian Medical and Dental Council of Nigeria be charged for murder (culpable homicide punishable by death) [12] or manslaughter. Charges for murder are however likely to be rare. But a charge for manslaughter is more plausible going by the nature of doctor's work. For a negligence that leads to death (manslaughter) to attract conviction, it must be higher than that which required for a civil actionable negligence.

Thus, Privy Council in *R v. Akerele* [13] was of the opinion that the statement court made in *R v. Bateman* [14] was in line with the doctrine of necessity in the case of criminal negligence and Court went further by adding that the degree of negligence required in

criminal cases must go beyond that of civil liability and it requires showing what is called 'such disregard for the life and safety of others' to amount to manslaughter. In *R v. Akerele* [14] it was established before the court that 10 (ten) out of 47 (forty-seven) children the doctor administered injection to died, others sustained varying degrees of minor injuries. The prosecution revealed to the court that the drugs given to them were mixture of powder suite in sterile water which was overdosed.

After closed look at the facts of the case and evidence adduced before the Court of law, the court held that the case of negligence was not established against defendant because prosecutor failed to establish before the court that consequence of overdose of the drugs administered to the patients (children) led to the death of the 10 (ten) children and that the consequence of the acclaimed mixture only took place at a later date.

The court went further by saying that if the change however, was for rash or negligent act not resulting in death, the degree of negligence would have been slightly lower (Section 243 of the criminal code state that any person who give medicine or medical and surgical treatment in a rash or negligent manner as to endanger life or is such as likely to cause harm to a person shall be guilty of misdemeanor).

In *Dabholkar v. King*, when considering Section 234 of the Criminal code applicable in Southern Nigeria, in comparison with Section 222 of Tanganyika (Tanzania) Penal code, the privy council was of the opinion that although the negligence which constituted offence under the above cited Section 222 of Tanganyika (Tanzania) Penal code is higher than what constituted civil actionable wrong under Section 234 of the criminal code applicable in Southern Nigeria, but nonetheless, is not as high as that for manslaughter. Flowing from this, three (3) degrees of negligence can be constructed, namely:

i. The highest degree required for prosecution of manslaughter;

ii. The intermediate degree;

iii. The lowest degree required for civil liability.

Nevertheless, Nigeria criminal code (Section 230 criminal code applicable in southern part of Nigeria) prescribed certain requirements for any doctor who in the course of performing his duties as medical personnel or doctors must possess reasonable skills and use reasonable care in acting except in a case of necessity. What the provision of section 230 of criminal code is saying is that any person who holds himself out as medical doctor must possess the requisite knowledge or skill and when administering care, treatment or surgical operation unto any patient he or she must do so with reasonable care.

The basis for imposing on the doctor the duty to possess requisite skill or knowledge and when performing his duty he must do so with reasonable care is founded on the ground that the public put certain trust on them and therefore doctor is expected to discharge degree of skill and care. The question whether or not a doctor is negligent will depend on the facts of each case and to succeed in the case of medical negligent, the parties must be able to establish the following three (3) requirements.

(h) That the doctor owes a duty of care to the patient;

(i) That the duty is breached;

(j) The result is damage.

In establishing the case of medical negligence, medical Negligence as to the duty of care, medical negligence as to the standard of care and causation, medical negligence as to damage and legal defense shall be considered at great length to be able to come to a conclusion on how compensations in medical negligence are applied.

1. Medical negligence as to the duty of care:

Where a medical doctor admits any patient with a medical challenge to treatment, such a medical doctor must have presumed to have had requisite skill and knowledge and while discharging his/her duty he/she must do so with reasonable care or else he/she shall be guilty of negligence. At any point in time, doctor's duty may include any or combination of all the following:

a) Diagnosis;

b) Medical advice;

c) Treatment.

In performing his functions of diagnosis and treatment, the standard by which the law expects the doctor's duty of care to his patient is not open to doubt.

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A doctor would not be considered to be incompetent based on the outcome of the test which is different from what other professional would get but where it is established that through doctor's omission or where such doctor has failed to discharge his duty as professional who possess the requisite skill and knowledge and has also failed to exercise care while performing his duty, such a doctor would be found guilty of negligence or where the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care [15].

It has been justifiably argued that a medical doctor or personnel should not be found guilty of negligence unless he has done something of which other people in the same profession would say "He really did make a mistake while discharging his duty, he ought not to have done it that way". Where a medical doctor admits a patient to be treated, there is always some risks, no matter what care is used. Every surgical operation involves risks. It would be wrong and, indeed bad law, to say that simply because a surgical operation is unsuccessful or there is a mishap at the end of the operation that the hospital and the doctors who carried out the operation are thereby liable. Also, it would be dangerous to the community, if it were so and mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work. And it would be forever looking over his shoulder to see if someone was coming up with a dagger, for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so and an action for negligence can wound his reputation as severely as a dagger can to his body. One must not therefore find him negligent simply because something happens to go wrong, if for instance, one of the risks inherent in operation actually takes place, or some complications ensure or if he makes an error of judgement. Such a doctor must not only be found guilty of negligence when he falls short of the standard of a reasonably skillful medical doctor or personnel, but be compelled to pay damages to the injured party [16].

However, where for instance a doctor, has admitted to treating a patient suffering from communicable or contagious disease, it is imperative that such physician gives his or her patient the proper advice about preventing the spread of the disease. Thus, the duty of a physician in such circumstance extends to those "*within the foreseeable orbit of risk of harm*" if a third person who is likely to be infected are in that environment and if erroneous advice is given to that patient to the ultimate detriment of the third person the third person shall have a cause of action against the physician [17] where a doctor is expected to identify genetic conditions which can be inherited, doctor must do all he could to prevent re-generation of that disease in the life of the person likely to suffer. Where doctor fails to do the necessary or prevent it, such doctor may be sued for breach of duty [18].

Above all, authorities who run a hospital, be it local authorities, Government boards, or any other corporation, are in law under the same duty as the doctor. Whenever they accept a patient for any treatment they expected to exercise reasonable care and skill to cure such a patient's disease or ailment. The hospital authorities cannot of course, do it by themselves, they will carry out the exercise of taking care of their patient through the staff employed, and if their staff in the course of carrying out their duties are negligent in admitting treatment they are just as liable for that medical malpractice or negligence like anyone else who employs other to do his/her duties for him [19]. A health authority is under a duty to provide pregnant women with a reasonable standard of gynecological and obstetric care, in terms of provision for the safe delivery of the baby and the health of

both mother and baby [20]. Hospital management also owes duty to employ commitment staff in the treatment of patients [21]. Since doctor does not operate in vacuum a hospital is vicariously liable for the negligence of its employee including the doctors and consultants working in the hospital [22].

With regards to hospital authorities, the duty of care would arise once the hospital had accepted any patient for treatment. Acceptance implies undertaking and therefore a duty. It is necessary to note that the duty of care equally applies to emergency situations [23]. Also, hospital may be liable to a patient when he carelessly misinforms a patient of his or her condition or when he provides accurate information but does so in a careless way resulting in psychiatric injury to the patient or the next-of-kin.

The carelessness may arise in respect of the accuracy of the information or in the manner of disclosure (This is seen in AB v. Tameside & Glossup HA where it was alleged that the defendant had carelessly informed current and former patients that a health care worker they may have come in contact with was HIV positive, the court held that the defendant had not been negligent).

Medical Negligence as to the Standard of Care and Causation

Having established that any doctor or medical personnel who hold himself or herself out as health care professional owes duty of care to the patient admitted for treatment and where unforeseen or unimaginable outcome result is recorded due to the doctor's negligence both the doctor and the hospital are going to be held liable for such. The requirement of the law, most especially law of tort and criminal code (Section 243 of Criminal Code which provides that any person who gives medicine or treatment, or medical and surgical treatment in a rash or negligent manner as to endanger life of a patient or is such as is likely to cause harm to a person shall be liable in negligence and on conviction be guilty of a misdemeanor- *R v. Akerele* (1940)8: WACA 56) which operate in southern Nigeria require that the injured party known as claimant is expected not only to establish the existence of the duty of a care, but also such a person must show that a breach of that duty of care has been breached [24].

It is important to note at this juncture that not in all situations where the case of negligence has been established that the doctor or medical personnel will be held guilty of negligence. For instance, where it has been stated or presumed that the concerned doctor has acted in accordance with the best practice accepted or known to the regulatory body like Medical and Dental Council Practitioner of Nigeria and that the concerned doctor possessed the requisite knowledge and skill, such doctor will not be disciplined and shall be exempted from being punished or be exonerated from the offence of negligence when consideration is being made [5; 7]. Also, where diagnosis and treatment are required there is ample scope for genuine difference of opinion, doctor or medical personnel should not be declared as being negligent purely as a result of his diagnosis outcome or conclusion differs from that of other professional personnel, nor because he has displayed less skill or knowledge than other would have shown. The fundamental issue is the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if discharging his primary duty with care [25].

Furthermore, in establishing the case of negligence or medical malpractice, plaintiff needs to show that the injury sustained was as a result of the doctor performance below the prescribed standard of care as opposed to being a manifestation of the risk inherent in the operation itself. In examining the issue of cause of action in negligence case there are two (2) questions to be answered:

a) Could the breach cause the injury?

b) Did the breach cause the injury?

Thus, in *Barnett v. Chelsea and Kensington Hospital Management Committee* [25], it was established in that case that the deceased, had been poisoned by ar-

senic and left untreated by the casualty officer. It was stated that this was a case of 'but for" causation. If the plaintiff could show that "but for" the defendant's failure to attend to her husband he would have lived on the balance of probabilities, then the breach is the cause of death. If the husband would have died even if there had been proper treatment, then the breach was not the cause of death. The defendant hospital admitted that this was a duty but contended that the deceased would have died even if there had been no negligent behavior. The court found that based on the evidence adduced before the court, the plaintiff had failed to establish, on the grounds of probability, that the defendant's negligence caused the death of the deceased [19]. Also in *Bolitho v. City and Hackney Health Authority* [26], Patrick Bolitho suffered catastrophic brain damage as a result of cardiac arrest induced by respiratory failure. It was established that he had suffered three (3) episodes when he had difficulty in breathing and at none of these times did the Senior Pediatric Registrar or her deputy attend. The subsequent and the third suffering led to cardiac arrest and brain damage, and the child died. The plaintiff instituted an action in court claiming that defendant was negligent in discharging their duty. The defendant health authority in the course of trial accepted that the registrar was in breach of her duty care having failed to attend to the child upon being notified by the nurse on duty and having also failed to instruct or command her deputy to stand for her in her absence. It was argued that insertion of a tube to provide Patrick with an airway would mean that there would not have been cardiac failure. It was felt that the non–attendance at Patrick Bolitho's beside was a breach of duty, but was not a cause of the cardiac arrest. The court was of the opinion that it would have been sufficient if the plaintiffs had proved that had the doctor attended to the child when his assistance was needed and that intubations would have taken place but the doctor argued that she would not have intubated. Therefore, plaintiff also needed to show that the decision not to intubate was one which no responsible doctor would have taken, from the foregoing, it can be inferred here that it is a little bit difficult to proof and establish the cause of action in the case of medical malpractice or negligence. An in practical terms, a defendant doctor may be willing to admit negligence but not necessarily causation.

Medical negligence as to the damages and legal defenses

The general rule is that for any person to succeed in the case of medical negligence, plaintiff must establish before the court of law that his suffering or injury sustained is as a result of doctor's negligence and he thereafter had suffered a great damage. Damage in this situation connotes loss or injury which can be measured and compensated monetarily. Examples of such loss includes [27]:

a) Loss of earnings;

b) Reduction in life expectancy;

c) Expenses incurred as a result of the damage;

d) Reduction in enjoyment of life arising from any physical or mental consequences of the negligent act;

e) Physical disability or deformity which might reduce the chances of marriage or inability to have children;

f) Pain and suffering whether physical or mental nervous shock, and;

g) Death may be actionable for the benefit of dependent children or relatives.

The burden of proving damage is upon the person who assert, that is, patient who incurred damage – loss or injury? He is under obligation to prove that the alleged malpractice or negligence was solely caused or substantially contributed to the loss or injury. He is required to establish one of the following:

a) That "but for" the negligence he would not have suffered any injury;

b) That "but for" the negligence he would not have suffered any identifiable part or particular aggravation of the injuries, or;

c) That the negligence materially contributed to the whole injury or an identifiable part or particular aggravation of the injuries [28].

However, it is well-known in negligence law generally and medical negligence in particular, that things can go wrong without there being a full or sufficient explanation for what actually happened. The recent practice is that the patient who wakes from the anesthetic with some form of paralysis for instance may never know the exact cause.

Economic Analysis of Compensation In Medical Profession

When a patient succeeds in an action for negligence he would often look up to the doctor or the health authority to pay the assessed compensation. To him, it does not matter who pays. Who pays is however of concern to the doctor, the health authorities and also the public especially in an era where public hospitals and the National Health Insurance Scheme (NHlS) bring more to the fore public health resources. Though negligence litigation is still embryonic in Nigeria, it is not unlikely to increase in the near future.

Considered from the perspective of society, the issues are two, (i) the difficult in making successful claim; (ii) the inadequate provision for compensation for injuries.

Empirically, the proportion of successful medical negligence claims is lower than those for general negligence. The reasons are obvious. It is difficult to prove medical negligence. The patient hardly knows enough of what has gone wrong Doctor's conspiracy of silence and general colleague solidarity prevents the availability of relevant evidence for the patient. It is said that attempts to establish fault, cause and effect in negligence suits turns the system into a lottery for the patient. Not to be forgotten is the inadequacy of compensation regime for medical injuries. Unfortunately even though most injuries are described as cases of negligence, in truth most are not due to negligence. They properly are mere errors or accidents. It has therefore been suggested in some quarters that a no-fault compensation regime, presently run in some jurisdictions such as in Sweden and New Zealand better satisfies the competing ethics for assuaging a patient loss resulting from medical injuries.

In reaction to the flood of negligence or malpractice litigations in the United States of America (a practice that have led doctors to practice defensive medicine) many jurisdictions in the USA are now attempting to curb the success rate of such law suits and the huge compensation recoverable? Increasingly courts are restricting the application of res Ipsa Ioquitur and by moving in the direction of increased burden of proof on the plaintiff. Some jurisdictions have adopted the practice that only the evidence of a doctor who is an expert in the particular specialty in question with comparative experience in the area would be admissible evidence sufficient to raise negligence. Furthermore, the standard of care requirement is increasingly being judged in is of 'locality'. By so doing a rural doctor stands more chances of escaping liability.

Defenses to Negligence Litigation

Defenses to negligence litigation generally follow the same pattern as general tort defenses. These are as follows:

(i) Contributory Negligence.

Just as the doctor is under a duty to take reasonable care in the treatment of the patient, the patient is also under certain duties to the doctor. He must be reasonable

If he is not and his unreasonableness is the factual and proximate cause of his injury he would be treated as having contributed and his compensation will be reduced accordingly. ln *Crussman v. Stewart* the British Columbia court reduced the compensation of the patient to £26, 666 of the sum of £80,000 assessed damages for injury that resulted in his blindness because it found that the patient had two-thirds of the blame. She combined the prescribed drug from an unorthodox source and used them longer than prescribed In the Quebec case of *Hospital Notre-Dame dc L' Espezarice v. Laurent*, damages were reduced because the patient was passive in his treatment. Though the doctor was held negligent in failing to diagnose a fracture in the head of the femur, the patient failed to get further medical treatment for over three months.

(ii) Voluntary assumption of risk

If the plaintiff agrees, expressly or impliedly to waive the duty of care owed to him, it may be relevant in determining negligence though the Court will generally be reluctant to use it as a reference considering the inequality of power relation in the doctor-patient relationship. It can even be argued with justification that the very nature of medical care underlined by public policy considerations ought to refuse voluntary assumption of risk as a defense to an action for negligence. Any such waiver should be treated as striking at the root of the essence of care and so should not be considered a defense at all, for if it were otherwise it can destroy the very soul of medical care.

(iii) Miscellaneous

The miscellaneous defense may include the defense of limitation

Conclusion

Having described the circumstances which can make doctor or any medical personnel liable for the loss or injuries their patients suffered while admitting them to treatment. Doctor(s), having held themselves bound as professional who before admitting any patient to treatment presumed to have possessed requisite prerequisite knowledge or skill owes duty of care as to the standard of care ought to have given a patient and where a doctors fall short of the required care expected of him, then the issue of malpractice, error and negligence as the case may be arise.

As not to allow an injured patient to go unremidized, certain steps have to be taken to make sure that an error is corrected if not to bring back to original situation but at least get some succor inform of compensation to the injured party.

The question we must ask at this juncture is, to what extent is compensation adequate for the situation where there is a loss of life? Then, how easy is it to succeed in the claim of negligence where it is recorded?

As earlier stated, there is no quantum of amount of money ordered by the court or judicial tribunal that can bring back the dead where negligence has resulted in death, however, where it is necessary to pay compensation, the quantum which the court of law will order must be reasonable enough to at least bring comfort and succor to the injured patient otherwise the purpose or motive behind ordering such compensation will not be fulfilled. To achieve this, there is need to have enabling laws that will first define the offence of negligence in medical profession and later prescribed the punishment that will attach to such offence.

Also, difficulty attached to the success of the case of medical negligence is attributed to none existence of codified medical laws at different levels. Medical issues as at present is ambiguous because, certain aspect of it are contained under exclusive legislature list of the Federal Government of Nigeria while some are also contained under the concurrent legislative list. Most people who have the reason to bring the claim of negligence do not know under what law that claims should be brought. Presently, there is confusion whether such claim should be brought under the state law or the federal law. If this is not settled, and particular matter is expected to be filed at State High Court and such matter is filed before the Federal High Court or Federal Capital Territory High Court, the issue of jurisdiction of the court may be raised against the matter and such may lead to the end of that matter.

Moreover, difficulty as to the proof of evidence is another issue, how would a patient with an ailment be expected to know or detect the exact stage where negligence occur? For issue like this to be legally addressed, there must be reform in medical profession where each stage of action is documented. Also, there must be regulatory frame work in medical profession in Nigeria otherwise the difficulty will still continue.

Above all, what constitute duty of care owes by the medical doctor must be clearly defined. Level of education in medical profession, additional qualification and years of practice must also be put into consideration in determining reasonable standard of care expected from a doctor or medical personnel. Level of medical satisfaction or treatment must also be clearly defined in any suggest reformation, time within which medical doctor is expected to spend

with a patient must however, be defined to enable a patient measure value for the fees or bill he or she is going to pay for the treatment. I believe if the above mentioned suggestions are put into consideration in Nigeria, medical doctor/patient relationship would be a robust one.

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Zeniv Mariia,
PhD student at the Jagiellonian University in Cracow,
the Faculty of Law and Administration
E-mail: mariia.zeniv@gmail.com

CRITICAL REFLECTIONS ON THE REGULATION OF THE SURROGATE MOTHERHOOD AGREEMENT IN UKRAINIAN LAW

Abstract. The article is devoted to the problems concerning conclusion of the surrogate motherhood agreement in the light of Ukrainian law. Analysis of legal rules applicable thereto is provided. Attention is paid to inconsistency of legal regulation in this area as well as the influence of the worldwide pandemic situation related to Covid-19. Some critical remarks are made with respect to the nature of the surrogacy agreement.

Keywords: surrogate motherhood, surrogacy agreement, assisted reproductive technologies, surrogate mother, intended parents.

The actuality of the chosen topic is determined by the nature of the surrogacy agreement itself as well as by the ethical dilemmas and inconsistent legal regulation of procedures of surrogate motherhood in Ukraine. The regulation of the issues of surrogate motherhood in Ukraine is provided by a number of legal acts, among which: Family Code of Ukraine, Civil Code of Ukraine, Law on Fundamentals of the Legislation of Ukraine on Health Care of 19 November 1992, and the legal acts approved by the Ministry of Justice of Ukraine and ministry of Health of Ukraine. With regard to this, it is stated in the doctrine that the existing gaps in the regulation call for a separate legal act to be adopted or the detailed provisions be included in the Family Code of Ukraine to provide for a comprehensive legal framework of surrogate motherhood issues [4, 27, 31; 5, 425, 428–429, 433; 7, 39–40; 9, 103; 10, 44–55; 11, 133; 12; 13, 66; 14, 59, 63]. In this regard, it is rightly asserted by I. Senyuta that the detailed and coherent legislation regulating the activities of the assisted reproductive technology clinics and other intermediaries is needed, together with a state control over them [12].

Introduction of the surrogate motherhood procedures in Ukraine was explained by a growing tendency of low birth rates as well as increase in reproductive health problems, as stated in the Concept of the state program regarding reproductive health of the nation for the period of 2006–2015, adopted by the government on April 27, 2006 [2]. According to the Procedure for the Use of Assisted Reproductive Technologies in Ukraine, approved by the Oder of 9 September 2013 of the Ministry of Health of Ukraine [1], the surrogate motherhood is defined as one of the methods of infertility treatment by use of assisted reproductive technologies.

In Ukraine, both altruistic (free of charge) and commercial forms of surrogate motherhood are permitted, although they are not directly prescribed by the law. The regulation of surrogate motherhood is dispersed among a number of legal acts, none of which provides for specific regulation of the issues related to conclusion or termination of the surrogacy agreement. However, this regulation derives from general civil law principles and rules of conclusion of contracts, such as prohibition of any arbitrary intervention in a person's private life, freedom of the contract, freedom of business activities, which are set forth in Article 3 of Ukrainian Civil Code. In this regard, Ukrainian doctrine underlines that the persons'

rights to maternity and paternity undoubtedly belong to personal non-property rights entitling them to dispose of them freely and without interference. Additionally, Article 281 of Ukraine's Civil Code stipulates that women and men with full legal capacity have the right to undergo treatment by the use of assisted reproductive technologies carried out in accordance with the procedure and conditions set out by the law and based on medical need [9, 103; 12].

It is important to note that conclusion of the surrogate motherhood agreement is a required prerequisite for carrying out surrogacy in Ukraine aiming at providing for precise regulation of rights and obligations of the parties. Because the Ukrainian law does not either stipulate such kind of a contract as the surrogacy contract or contain specific regulation thereof, the conclusion of the surrogacy contract shall meet the requirements for civil law contracts. In particular, the rules concerning conclusion, performance and termination of the contracts for provision of services are applied [4, 28, 30; 5, 438, 447; 9, 103–105; 11; 13, 66–67]. According to the opinion expressed in the Ukrainian doctrine by I. Veres and A. Herts, taking into account the similar purpose of a surrogate motherhood's institution and institution of adoption, the specific requirements imposed on the adopters in accordance with the provisions of Articles 211 and 212 of the Ukraine's Family Code should be also applied to the intended parents [4, 29–30; 5, 431–433].

It should be underlined that Ukrainian legislation only allows for a gestational surrogate motherhood when at least one of the intended parents has a genetic connection with the child and a surrogate mother is not genetically related with it [15, 233–240]. As regards the parties of the surrogate motherhood agreement, it is to be concluded between two parties: the commissioning party who are the child's prospective parents (the intended parents) being in a heterosexual marriage between themselves, on the one side, and a surrogate mother, on the other side. In this regard, a question arises as to whether a single person is eligible to undergo the procedure of surrogate motherhood in the light of Ukrainian law. The Family Code answers this question negatively, because the Article 123 of Ukraine's Family Code requires the commissioning party to be a married heterosexual couple. However, in this respect there is lack of compatibility of Ukrainian legislation. The surrogate motherhood, as stated above, being one of the kinds of assisted reproductive technologies is regulated by both general provisions related to all kinds of assisted reproductive technologies and specific provisions only concerning the surrogate motherhood. Sharing the opinion expressed in the doctrine, it should be underlined that the Ukrainian law does not prohibits single persons from having been treated by use of assisted reproductive technologies while in the Ukraine's Family Code it indicates only the spouses as being the intended parents of the child born through surrogate motherhood [5, 428, 446].

Conclusion of the surrogacy agreement serves as a legal basis for the two additional agreements to be concluded with regard to the provision of medical services, i.e. the agreement between the medical institution and the intended parents and the agreement between the medical institution and the surrogate mother. Notwithstanding the lack of specific legal provisions, it is recommended to have a surrogacy agreement concluded in a written notarially certified form. As rightly stressed in the doctrine, among the documents necessary for carrying out the procedure of surrogate motherhood, the aforementioned Procedure for the Use of Assisted Reproductive Technologies in Ukraine provides for a notarially certified copy of a written agreement between a surrogate mother and the intended parents to be submitted [5, 431, 435, 438, 447; 9, 104–105].

As regards the problem of potential refusal to transfer the child by the surrogate mother to the intended parents, the Ukrainian law clearly defines such a refusal as being unlawful. In particular, its unlawfulness directly derives from the provisions of the Family Code of Ukraine. According to its Article 123 paragraph 2, the legal parents of the a child born through

surrogate motherhood are the intended parents who are also its genetic parents, or at least is one of them.

In terms of its appropriateness to account for specific nature of child's related issues, the critical attention should be given to the fact that application of the general provisions of contracts for services implies that a surrogacy agreement, as similarly to other contracts for services, has a payable nature, if otherwise not specified therein. This entails that considering the payable nature of the surrogacy contract, it is suggested in the doctrine that a material part of the surrogacy agreement indicates two types of costs to be covered by the intended parents, i.e. all the costs associated with the procedure of surrogate motherhood (all the medical costs of procedure, as well as expenses relating to the child's delivery and nutrition of the surrogate mother) and the remuneration for pregnancy, carrying the child and its delivery [4, 30; 5, 433–434; 9, 106; 10].

Recently, on 28th of April 2020 the Commissioner of the Verkhovna Rada of Ukraine for Human Rights (Ombudsman) made a statement regarding the surrogate motherhood. It is rightly stated there that the worldwide pandemic situation related to Covid-19 demonstrated the imperfection of legal regulation of surrogate motherhood under Ukrainian law. Additionally, it is stressed there that the cases of illegal transportation of children born out of surrogacy arrangements illustrate the necessity of legislation changes in this area by providing only the Ukrainians be eligible to use the procedures of surrogate motherhood in Ukraine.

To conclude, it is to be stressed that despite the declared goal of fighting infertility and helping the spouses to have their own children, the procedures of surrogate motherhood in Ukraine resemble running a business with so-called assumption of the payable nature of surrogacy contracts emanating from the rules applicable to all the contracts for services, if otherwise not specified. Moreover, relatively low costs related to surrogacy procedures and proximity within Europe made Ukraine the most popular destination for surrogacy tourism in Europe, as revealed by studies from France [3], Germany [16, 999–1000], the Baltic States (Estonia, Latvia and Lithuania) [8], Poland [6], Spain [16, 1000–1001]. In addition, regulation of surrogate motherhood in Ukraine is not thorough, and it lacks consistency. Overall, existence of the institution of surrogate motherhood does not provide the children with protection of their right to identity by getting access to information of the circumstances of their birth and origin. Also, unresolved remain other questions associated with this institution, among which is the enforceability of surrogate motherhood agreements. Such lack of consistency of legal rules in this area results in so-called judicial legislative activism basing on the concept of the child's best interests.

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Zeniv Mariia,
PhD student at the Jagiellonian University in Cracow,
the Faculty of Law and Administration
E-mail: mariia.zeniv@gmail.com

THE DIVERGENT APPROACH TO REGULATION OF SURROGATE MOTHERHOOD TAKEN IN GERMANY AND UKRAINE: A COMPARATIVE ANALYSIS

Abstract. The article is devoted to the problems concerning the institution of surrogate motherhood under the law of Germany and Ukraine. Paying attention to the divergent regulation thereof throughout the world, three presumptions of maternity are presented. Detailed consideration is given to the establishment of filiation as well as to registration of a child's birth in case of surrogate motherhood. In conclusion, some critical remarks are made to the adverse implications for the civil status of the child born through surrogacy.

Keywords: surrogate motherhood, surrogate mother, intended parents, filiation, maternity, genetic connection, registration.

The regulation of surrogate motherhood varies among the legal systems of the world, starting from its strict prohibition or lack of regulation in this area and ending with national legal systems where both altruistic and commercial forms of surrogacy are allowed. As examples of states with a divergent approach to regulating surrogate motherhood are Germany and Ukraine. Germany belongs to the group of states strictly prohibiting the procedure of surrogate motherhood. On the contrary, the Ukrainian law allows for both altruistic and commercial forms of surrogacy.

Taking into account the variety of surrogate motherhood regulations applicable throughout the world, the legal doctrine distinguishes three concepts of determining the filiation of children born through surrogate motherhood. The first is maternity of a woman who gave birth to a child, what in practice means maternity of a surrogate mother (called as the presumption of gestational maternity). The second states that a legal mother is a woman who has expressed her intention to be a mother of a child born by the surrogate mother (called as the presumption of social maternity). The third determines the maternity of a woman who has a genetic connection with a child born as a result of surrogate motherhood [14, 53, 66]. Such divergence of legal presumptions of maternity results in many problems associated with the child's civil status issues in cross-border surrogate motherhood cases.

With regard to Ukrainian law, it is important to underline that it only allows for gestational surrogacy which provides for the use of genetic materials of at least one of the intended parents, while the use of the surrogate mother's gametes (so-called "ovum surrogacy" or "traditional surrogacy") is not permitted. As mentioned above, the Ukrainian law allows for services of surrogate motherhood to be provided both on a commercial and altruistic basis. In this respect, it should be stressed that the Ukrainian regulation of surrogate motherhood is disseminated in several legal acts, and it lacks consistency. According to the Order of the Ministry of Health of Ukraine of 9 September 2013 "On the Procedure for the Use of Assisted Reproductive Technologies in Ukraine", surrogate motherhood is perceived as one of the methods of infertility treat-

ment by the use of assisted reproductive technologies [5]. It is laid out in the provisions of paragraph 6.1 of chapter VI thereof that a child should have a genetic connection with at least one of the intended parents while a surrogate mother should not be genetically related to it. In this regard, attention should be also drawn to the requirement that the intended parents of that child should be a married heterosexual couple. It means that under Ukrainian law when establishing the origin (filiation) of a child born through surrogacy, the social and genetic bond with a child prevails over the gestational (biological) bond. Also, the Family Code of Ukraine of 10 January 2002 in its Article 123 § 2 stipulates an unrebutted presumption of a genetic mother's maternity of a child born through surrogate motherhood. Examination of judicial practice in this regard reveals that Ukrainian courts, referring to the provisions of Article 123 of the Ukrainian Family Code, do not satisfy the surrogate mothers' applications for the establishment of their maternity, if the child is born by the use of surrogacy. The attempts of surrogate mothers to challenge the maternity of genetic mothers are not successful as well. While the Ukrainian law does not allow for challenging the maternity of an intended mother being made by a surrogate mother, it provides the intended mother with the possibility to challenge the maternity of a woman who gave birth to the child (i.e. the surrogate mother), which in practice takes place when the surrogate mother registers the child as her own [16, 240–244].

As aforementioned, the provisions of Article 123 of the Family Code of Ukraine are based on the presumption of so-called social maternity, i.e. maternity of an intended mother in cases of surrogate motherhood. Furthermore, in these cases, acknowledgment and establishment of maternity take place before a child is delivered, in particular, at the moment of conclusion of a surrogacy agreement. In this respect, it is rightly stressed in the Ukrainian doctrine that, notwithstanding the genetic connection with a child, when for creation of the embryo a donor's egg is being used, a donor woman does not acquire any maternity rights to a child born as a result of assisted reproduction. In Ukrainian doctrine, the establishment of filiation of a child from the intended mother is justified by invoking the argument that this allows for achieving the main purpose of surrogacy, i.e. to resolve the infertility problems of spouses who want to become parents but are not able to have their own children due to natural infertility or other health-related problems [12, 126–127; 10, 42]. In this context, it is to be added that the theory of social parenthood that gives priority to the filiation of a child from the intended parents is also maintained under the law of some states of the United States [14, 66; 15, 410–411].

The registration of a child born as a result of a surrogate motherhood arrangement is carried out by the State Civil Registration Office according to the "Rules of State Registration of Civil Status Acts" of 18 October 2000 [6]. It is stipulated therein that a newborn child should be registered not later that one month from the date of the child's birth, upon a written or oral application of its parents (or one of them), at the place of the child's birth or the place of residence of the parents. Under the paragraph 1 of Chapter 1 of Section III of this Legal Act, the state registration of the child's birth is carried out with the simultaneous determination of its filiation and assigning it a surname, name and patronymic. According to the provisions of paragraph 11 of this Chapter, if the child was delivered by a woman to whom a human embryo conceived by the married intended parents as a result of the use of assisted reproductive technologies has been transferred (i.e. by a surrogate mother), the state registration of the child's birth is carried out upon the application of the spouses who agreed to such transfer.

According to the mentioned Rules of State Registration of Civil Status Acts in Ukraine, in order to register a child's birth at the Civil Registry Office, the following documents are to be attached in the case of surrogate motherhood:

– a notarially certified written consent of the surrogate mother for registration of the married couple as legal parents of the child;

– an application of the married intended parents for state registration of the child's birth;

– passports of the intended parents;

– a marriage certificate of the intended parents;

– a medical certificate confirming the child's birth;

– a certificate confirming the genetic relationships between the intended parents (or one of them) and the child;

– a consent of a husband of the surrogate mother for her participation in surrogate motherhood, with exception for a single surrogate mother.

In the Ukrainian doctrine, it is disputed whether such a consent of a husband of the surrogate mother is obligatory to be submitted for the registration of the child's birth. Proponents of this requirement refer to the presumption of paternity of the husband of a woman who gave birth to a child. Opponents justifiably argue that such an attachment is superfluous because Ukrainian legislation requires such consent of the surrogate mother's husband at the beginning of application of surrogate motherhood to her [10, 43].

The legal regulation of filiation of the child under the German law is different from that set out in the Ukrainian legislation. The primary difference relates to the presumption of maternity of a child. According to paragraph 1591 of the Civil Code of Germany (Burgerliches Gestzbuch) [1], the mother of the child is a woman who gave birth to it ("*Mutter eines Kindes ist die Frau, die es geboren hat*"). This presumption of maternity corresponds to the Roman law principle of "*mater semper certa est*", which means that the mother is always certain. According to paragraph 1592 of the German Civil Code, the father of a child is the man who is married to the woman at the time of child's birth, or a man who acknowledged his paternity or whose paternity is established by the court's judgment [9, 436–437; 12, 125]. It is also to be noted that in Germany there is the Act for Protection of Embryos (*Embryonenschutzgesetz, EschG*) [2] of 13 December 1990, which regulates the issues of extracorporeal (*in vitro*) fertilization. It prohibits the artificial insemination of a woman who, after delivering the child, intends to transfer the child and her parental rights to the intended mother through a surrogate arrangement. The 1976 German Adoption Mediation Act (*Adoptionsvermittlungsgesetz)* [3] does not allow for the arrangement of a surrogate mother be considered as placement for adoption in both internal and cross-border cases. In addition, advertising of the offers related to surrogate motherhood might be considered as an administrative offence. Moreover, the use of surrogate motherhood is prohibited under the German criminal law [11, 233–240; 13, 60]. However, it is stated in the German doctrine that the consequences of surrogacy carried out in violation of the law must be given particular consideration in every individual case [17; 84].

Concerning surrogate motherhood, the important judgment was rendered by the Federal Court of Justice of Germnay (*Bundesgerichtshof, BGH*) on "*Anerkennungsfahigkeit einer auslandischen Entscheidung uber die rechtliche Elternschaft des biologischen Vaters und seines eingetragenen Lebenspartners im Fall der Leihmutterschaft*" of 10 December 2014 [4]. This judgment allowed for recognition of a foreign decisions establishing the filiation of a child from the intended parents. It derives therefrom that the recognition of foreign judgments establishing the paternity of the child born as a result of transnational surrogacy arrangements is not contrary to the German public order (*orde public*), if there is a genetic connection between a child and one or both of intended parents. This is justified by the statement that when examining whether the decision violates public policy, human rights guaranteed by the European Convention on Human Rights must also be taken into account [12, 125]. The line of reasoning expressed in this judgment has been later challenged by the *Oberlandesgericht Braunschweig* in its judgment of 12 April 2017 refusing to recognize the foreign judgment determining the filiation of a child with the intended parents basing on the justification that such recognition would be contrary to the German public order (in particular, the fundamental rules

prohibiting the use of surrogate motherhood, as well as the presumption of maternity of a woman who gave birth to the child) [7, 654].

In this context, it is also vital to mention the recently rendered judgment of the Federal Court of Justice of Germany of 20 March 2019. In this judgment, despite the existence of a genetic connection between both the intended parents and a child, the maternity of a surrogate mother as the legal mother of the child born by the use of surrogate motherhood is confirmed. It is ruled that the surrogate mother should be entered into the German Birth Registry as the mother of that child. It is worth underlining that in this case the Ukrainian birth certificate as a foreign one was given declaratory character and, as it is not a judicial decision, the rules of recognition and enforcement of foreign judgments were not applied. In order to establish the filiation of the child, the conflict of laws rules were applied leading to determination of the German law as the law applicable. According to the German material law, as it was stated above, a mother of a child is the woman who gave birth to it. It is concluded in this case that after paternity of the intended father is confirmed, in order for the intended mother to become a legal mother of the child the adoption procedure should be used [8, 857–866].

Summarizing, it should be pointed out that in cross-border surrogacy cases one of the most acute problems is that of determining the filiation of a child born as a result of surrogate motherhood. The present study analyzing the regulation of surrogate motherhood in Germany and Ukraine illustrates the complexity of problems that derive from the use of surrogate motherhood in cross-border situations when the intended parents attempt to have the foreign child's birth certificate as well as their parentage of the child born abroad through the use of surrogate motherhood being recognized in the country of their residence where surrogate motherhood is prohibited by the law. This brings to the statement that a lack of consistent regulation of the situation of the child born by a surrogate mother has adverse implications for the civil status of the child throughout the world. Furthermore, the uncertainty of the child's legal status and problems arising from the use of surrogate motherhood put a child in an unfavorable situation and does not conform with its best interests. At the same time, given the issues of the filiation of the child being embedded in national legal and cultural traditions, the widespread accession by states all over the world to a potential international treaty in this field seems not to be successfully achieved.

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Contents