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### Faculty Perspective at Art and Science College about Proposed Program in Persuasion to Develop an Academic Teaching

#### Abstract:

The purpose of this research was to explore the perspective of faculty at the college of Art and science in Salman Bin Abdulaziz university about proposed program in persuasion which designed by researcher (a vice of dean for quality and development) in order to develop academic teaching. The proposed program consists of eleven units (each called a persuasion program). In order to achieve the aims of this study the researcher distributed about 90 questionnaires and collected 42, just 39 of them were valid for research objects.

The findings of this research were as follows:

- In terms of the importance: the programs were all (high), except the sixth program, the results were (medium).
- In terms of the knowledge: the first, fifth and seventh program have been known for faculty with HIGH degree, and the other programs came with MEDIUM.
- In terms of the benefit expectancy: the fifth program took a high degree. Whereas, the rest programs were all medium.
- In terms of college/university seminars adequacy: 61.76% of the samples responded that were NOT enough. In the same time, 55.88 % of them agreed the value of training on the programs such as (communication skills, persuasion) to improve education at university.
- There were no significant statistical differences at the level of  $\alpha = 0.05$  on due to sex, specialization, qualification or experience variety.

**Keywords:** Persuasion, academic teaching, teaching development.

#### 1 Introduction

Many researches and studies have been concerned with the means and techniques of discussion as an ultimate subject of study. Here the writer is more concerned with the idea of *persuasion*, he considers dialogue and discussion as means of persuasion and that the goal of discussions is mostly to persuade and convince. He claims that persuasion is the most crucial element of human communication for its role in changing cultures, beliefs, ideologies and religions. This study tries to introduce a proposed skillful program that will help facing many challenges in the field of academic teaching and improving styles of teaching within the process of constant improvement and quality assurance of academic teaching.

People are judged by not only what they communicate to others, but also how they communicate it (Ng & Bradac, 1993). Because language use is an important part of impression management and person perception from point of view of Goffman. After even the most cursory perusal of the

literature across any of the aforementioned disciplines, one thing is clear: how something is said can at times be as important as what is said (Brennan & Williams, 1995).

It is important to provide the knowledge to students with a suitable style of teaching techniques, what students will be convinced to accept the information and understand it. We are in the information technology era, so it is necessary to present course information with evidences by proper manner such as persuasion skills.

There are many studies obtained a persuasion as a research material. However, the majority was not talking about its relationship with academic teaching. Here will review some studies which considered relative with this issue:

In some cases, behaviors could be labeled with reference to what would be the behavioral consequences of a label. This new labeling feature is referred to as functional labeling and it is attributed to the usefulness of the performed behavior (Fointiat, 2006).

Although some studies found that those in positive moods are more easily persuaded than those in negative moods (Bohner, Chaiken, & Hunyadi, 1994), others find weak evidence of this interaction (Worth & Mackie, 1987), and still others have failed to find this interaction effect (Dillard & Smith, 1997; Mitchell, 2000; Mitchell, Brown, Villagran, & Villagran, 2001).

## **2 Goals of the study**

This study aims at contributing to the improvement of academic teaching through a proposed skillful program in persuasion that aims particularly at:

- Discovering the reactions and responses of teaching staff at Salman Bin Abdulazeez University towards this proposed program based on the following elements:
  1. Their previous background about the levels of the program.
  2. Their feedback about the importance of conducting this program at higher education.
  3. Their feedback about the expected benefit of using this program in persuading their students.
- Discovering the reactions and responses of teaching staff at SAU about the necessity of training them on such a program (among others in communication skills) to improve academic teaching.
- Discovering opinions of teaching staff at SAU about communication skill programs that are being introduced by different colleges of the university which are highly demanded for academic teaching.

It turns out that the knowledge degree in the first, fifth and seventh program was (high) whereas, the programs rest degree was (medium).

The results also showed that the importance degrees of the programs were all (high), except the sixth program, the results were (medium).

The results also showed that the expected benefit degree from all programs were all (medium), except the fifth program the results were (high).

To answer the second question: “what’s the viewpoint of the faculty members at Salman Bin Abdul Aziz university on their training on programs such as (communication skills, persuasion) in order to

develop Education at university? The researcher counted the ratio and iteration of the sample study responses on (36) faculty member.

The results showed that 55.88 % agreed the value of training on the programs such as (communication skills, persuasion) to improve education at university, while 44.11% have emphasize on the program necessity.

To answer the third question:” what’s viewpoint of the faculty member at Salman bin Abdulaziz On software’s provided by (university/college) in improvement of communication skills and persuasion with the higher education in particular.

Results have showed that 61.76% of the samples responded that the programs presented by the (University/College) in developing the skills of communication and persuasion are (not enough), While 17.64% of the sample mentioned that it’s (good).

To answer the fourth question: “Are there statistical differences in Level ( $\alpha=0.05$ ) due to the variable sex? The researcher has calculated the crossed tables in Chi-squared by using SPSS program,

The results indicated that there are not statistical differences due to sex variable at level ( $\alpha=0.05$ ).

To answer the question five: “Are there statistical differences in the level ( $\alpha=0.05$ ) due to specialization variety? The researcher has calculated the crossed tables in Chi-squared by using MINITAB program, as illustrated in table (5).

The results indicated that there aren’t statistical differences due to specialization variety at level ( $\alpha=0.05$ ).

To answer the question six: “Are there statistical differences in the level ( $\alpha=0.05$ ) due to experience variety? The researcher has calculated the crossed tables in Chi-squared by using MINITAB program, as illustrated in table (6).

The results indicated that there aren’t statistical differences due to experience variety at level ( $\alpha=0.05$ ).

To answer the question seven: “Are there statistical differences in the level ( $\alpha=0.05$ ) due to the variable of qualification?” The researcher has calculated the crossed tables in Chi-squared by using MINITAB program, as illustrated in table (7).

The results showed that there aren’t statistical differences due to variable of qualification at level ( $\alpha=0.05$ ).

### **3 Methods**

The researcher designed a questionnaire distributed on faculty members at Art and Science college in Salman University in Wadi Aldawaser (Saudi Arabia) they are about 90 members, to explore their perspective about the proposed persuasion program. After collection process the valid were 38 questionnaires.

The research used T test to analysis the data and mad proper statistical procedures.

### **4 Recommendations**

1. University teaching should be developed to be updated with the learner’s quality.

2. The necessity of the students satisfied during the lectures.
3. The student's critical thinking should be improved.
4. Doing a research about the persuasion techniques in high level education.
5. The need to train teachers in modern teaching techniques especially those depends on the student's quality at the time of knowledge and technical prosperity.

## 5 The proposed program

<b>First program of persuasion</b>	
<u>Cautious</u>	<u>Directed</u>
The one who needs and warning in order to do what is needed.	The one who just needs support and encouragement to be persuaded.

<b>Second program persuasion</b>	
<u>Extrinsic</u>	<u>Intrinsic</u>
The person whose principles are what others believe and accept as something habitual and known by tradition. To persuade him, we need to tell him that is what really believe in, accept and do without hesitation.	That who has self-imposed principles that come from himself and his own cultural views. To persuade him, we need to suspect these principles and deconstructed them through the right religious beliefs and the right logic.

<b>Third program of persuasion</b>	
<u>Sacrifice for others</u>	<u>Self-benefit</u>
The one who likes to draw a smile on other's face and sacrifice for them. To persuade him, we need to tell him that the issue in hand will benefit others in the first place.	That person who considers himself as the first priority and his benefit is the most important rather than the benefit of the others. To persuade him, we need to tell him the issue in hand is for his own advantage.

<b>Fourth program of persuasion</b>	
<u>Unfortunate</u>	<u>fortunate</u>
Those who focus on differences between objects, we can persuade them to focus on the interests and the differences between what we want.	The persons who concerned on the similarities and things that closed together, we need to persuade them by bringing interest and benefit of which we want to persuade him.

<b>Fifth program of persuasion</b>	
<u>Quality</u>	<u>Experimental</u>
The persons like verified and frequent things. We persuade them by the accuracy and quality of the thing and this thing is known and ensured.	Those like discovering and changing, we persuade them to be more innovation and more experiment.

**Sixth program of persuasion**Futurists

The persons envision the future and they utilize the day for future or tomorrow. Or may be hardened themselves today for better tomorrow. We can persuade them by the planning of their future, focusing on the future and the present sacrifice.

Current person

The persons live the present time and the moment, they don't think a lot about future .their slogan "I live for the day I die tomorrow". Their concern only for the present time, they don't care about tomorrow. To persuade them, focus on the moment and try to make it better.

**Seventh program of persuasion**Realists

Those persons have bare critical Thinking. You can persuade them in logic, planning and logical words.

Creators

They are persons with vision and liberal spirit Who are happy to resent idea, desire, adventure enthusiasm, innovation and creativity. You can persuade them spontaneity and creativity, try to make criticism away from them.

**Eighth program of persuasion**Dependent persons

They are sympathetic and relaxed persons, You have to persuade them to chat, patience and encourage them to rely on you without pulling or pushing them so quickly.

Ambitious persons

Those persons are happy in a given chances so they take these aims immediately. You can persuade those people by limit the goal clearly.

**Ninth program of persuasion**The anxious

The emotions of those people have great impact on their decisions so it is easily to control them. You can persuade those persons by drawing the reactions and make control on their actions .

The calm

Those persons are independent, control their emotions, make their own decisions, you can persuade them but their emotions are difficult to control. You can persuade them by taking idea related to them without any effects.

**Tenth program of persuasion**Inductive

Those who rely on small details. You can persuade them to go from the parts to the whole, and clarify the smallest details.

Deductive

Those who rely on the general image of the idea. You can persuade them to go from the whole to parts, and clarify the entire Image and general frame work.

<b>Eleventh program for persuasion</b>	
<u>Metaphysical</u>	<u>Materialists</u>
Those people believe in supernatural power, miracles, paranormal and metaphysics. It is easily to persuade them according to their faith and believes.	They are people who shall be persuaded by moving from tangible, viewer, or audible to abstracts.

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## **IACrtHR's Influence on the Convergence of National Legislations on Women's Rights: Legitimation through Permeability**

### **Abstract:**

We analyze the evolution of Latin American legislations on women's rights protection, to address the complex issue of supranational institutions' influence on national legal orders. The examination of national legislations and IACrtHR's jurisprudence on the matter, provides elements to discern two definite phases of elaboration, pre and post the IACrtHR's first judgment involving a violation of the Belém do Pará Convention. Through a comparative analysis, we find a process of regional convergence on the adoption of a gender perspective in national legislations. This process mirrors the evolution of understanding in IACrtHR's jurisprudential interpretation of the BdPC, constructed through the interaction with scholars, civil society, national institutions and international agencies. On this basis, we argue that the permeability to exogenous conceptual elaborations is the crucial element of the reproduction of the Court's legitimation in the region and, hence, of the influence of its judgments in the region.

**Keywords:** Belém do Pará convention, women's rights, IACrtHR, gender studies, transnational constitutionalism.

### **1 Introduction**

Transnational Constitutionalism (Tsagourias, 2007, pp. 1-14) recognizes a constitutional substance (Cassese, 2006, p. 188) to international human rights instruments, reconceptualising the basic principles of constitutionalism (Pizzolo, forthcoming, p. 1-3) and emancipating them from the experience of the Nation-State. With the 1948 Universal Declaration of Human Rights, the subject of fundamental rights shifts from citizens to individuals, their protection and promotion leaves the realm of the proclamations and emerges as a positive obligation (Bobbio, 1992, p. 20). In this process human rights become *self-evident* (Mezzetti, 2010, p. 39), and the international community turns into a community of people, according to the *constitutional theory of international law* (Kelsen, 1966, pp. 375-9). Like constitutional texts in national orders, human rights instruments limit and define the competences and entitlements of the State, performing an actual foundational function (Borsari, 2007, p. 138-139), implying a resizing of their national sovereignty. The Universal Declaration, with the *core international human rights instruments*, came to constitute the



*constitutional block of international constitutional law*<sup>1</sup> and, hence, the bases for guaranteeing legal effects to their provisions.

Overlapping national and international instruments extended human rights protection, while increasing the complexity of pluralist legal contexts. The interaction between orders created the conditions for a multilevel (Pernice, 2002; Gambino 2008) - or polycentric (Morrone, 2011, p. 198) - system of protection of human rights, based on the subsidiarity of national and supra-national instruments and on complex, and often dynamic, hierarchical structures. The frequent interaction between orders through national and supra-national Courts, created the conditions for the convergence of national disciplines, even more so in those countries that adopted regional human rights instruments. One of such regional initiatives is the Inter-American System of Human Rights Protection, based on the American Convention of Human Rights (ACHR) of 1969, which came into force ten years later, and the Inter-American Court of Human Rights instituted in 1979 by the Organization of American States (OAS) to enforce and interpret ACHR's provisions.

Adopting a comparative perspective to analyse the impact of IACrTHR's rulings on national legislation, helps us identifying the processes constructing and reproducing the Court's legitimation in the region, and its influence on a regional convergence (De Vergottini, 2010, p. 49) on human rights standards of protection. With the exception of Dominican Republic, the Caribbean countries have been excluded from the analysis. The reason of such choice is that only Barbados, Haiti and Trinidad y Tobago ratified the ACHR and recognized the jurisdiction of the Court<sup>2</sup> and their sharp specificities and minor homogeneity with the regional legal, cultural and political context, weaken the accuracy of generalizations.

To address the issue of the Inter-American legitimation, we focus on the evolution of women's rights protection in the Latin American region since the proclamation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention, BdPC). Through a comparative analysis of the national legislations on violence against women, and the analysis of Inter-American Institutions' jurisprudence on the matter, we will trace the path and causes of what we consider a wide spread regional convergence on the inclusion of a gender perspective in the current relevant national legislations. In Section I we describe the legal context at the basis of our research, addressing the question of the domestic status of international human rights instruments in Latin American national orders. Section II introduces the BdPC, the specific Inter-American Instrument on women's rights protection. In Section III we present a comparative analysis of the first generation of national legislations on violence against women, direct outcome of the ratification of the BdPC. Section IV addresses the issue of IACrTHR's competence on the BdPC. Section V and VI are dedicated to the analysis of Inter-American Institutions relevant decisions and jurisprudence on the matter. Finally, Section VII offers a comparative analysis of the second generation of national legislation on women's rights.

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<sup>1</sup> For a punctual and commented collection of all international instruments integrating such *international constitutional block*, refer to Mezzetti (2010, pp. 40-41)

<sup>2</sup> In addition, Dominica ratified the Convention but did not recognize the jurisdiction of the Court. Incidentally, but out of the scope of this analysis, we mention that Trinidad y Tobago recently withdrew from the ACHR because of contrasts related to due process and the application of the death penalty.

## 2 The domestic status of the ACHR and international human rights instruments

Formally, relations between regional and national legal orders are defined in the States Parties' Constitutions. Most of them opened (De Vergottini, 2010, p. 45) to international human rights law and endorsed the influence of supranational Courts' jurisprudence through specific provisions (Pinto Bastos, 2007, p. 91), although at varying degrees. The constitutional structure of the States Parties shapes ACHR and IACrHR's jurisprudence influence on national legal systems. Addressing the unsettled debate on dualist and monist approaches to international law, started with the theories of Kelsen and Triepel, is not within the scope of this study. Nevertheless, this research provides evidence that, in the Latin American region, different but functionally equivalent solutions<sup>3</sup> provided effective mechanism of enforcement of international human rights provisions.

By Art. 2 of the ACHR, State Parties commit to adapt their national legislation to Conventional provisions (and to IACrHR jurisprudence, being ACHR's interpreter), in order to guarantee their legal effect: "*Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms*". The IACrHR performs an actual *control of conventionality*<sup>4</sup> when called to judge on the compatibility of national legislation with respect to conventional provisions. At times, this function went as far as causing a constitutional reform<sup>5</sup>. Formally, ACHR norms do not have *direct effect* in domestic orders, however practical experiences have often proved the opposite<sup>6</sup>. Similarly, although IACrHR's rulings require specific acts to be applied by the State found responsible of violating the Convention, the *praxis* has increasingly been to guarantee to them *ex tunc* and *erga omnes* effects (De Vergottini, 2010, p. 55).

Depending on the mechanism adopted to incorporate conventional instruments, exogenous norms acquire a different domestic status, namely: supra-constitutional, constitutional, sub-constitutional/supra-legislative or legislative (De Vergottini, 2010, p. 47). Reviewing Latin American countries' constitutions we can provide a brief overview of the range of solutions adopted in the region.

The majority of the countries explicitly assign a constitutional (or, arguably, supra-constitutional) status to human rights treaties. This is the case of: Argentina (Cost. 1994, Art. 31), Bolivia (Const. 2009, Art. 13-14), Brazil (Const. 1988, Art. 4, 78), Chile (Const. 1980, through the interpretation of art. 5), Colombia (Cost. 1991, Art. 93, and C-400/98 Constitutional Court ruling), Dominican Republic (Const. 2010, Art. 74), Ecuador (Const. 2008, Arts. 3, 10-11, 424-425), Guatemala (Const. 1993, Art. 46), Honduras (Const. 1982, Art. 16-17), Nicaragua (Const. 1987, Art. 46),

<sup>3</sup> The State Parties to the ECHR present a similar scenario (Stone Sweet, Keller, 2008, pp. 28-29).

<sup>4</sup> For IACrHR's jurisprudence on the control of conventionality refer to: Concurring Opinion Judge Garcia Ramirez, *Myrna Mach Chang v. Guatemala*, 25 November 2003, Series C, N. 101, *Trabajadores Cesados del Congreso (Aguardo Alfaro y otros) v. Peru*, 24 November 2006, Series C, N. 158, *Suares Rosero v. Ecuador*, 12 November 1997, Series C, N. 35, *Castillo Petruzzi v. Peru*, 4 September 1998, Series C, N. 41.

<sup>5</sup> "La Última Tentación de Cristo" (Olmedo Bustos y otros) v. Chile, 5 February 2001, Serie C, N. 73.

<sup>6</sup> However, as we will see in the following sections, some countries present specific constitutional provisions guarantee direct effect to conventional norms. For instance, this is the case of Art. 11.3 of the Ecuadorian Constitution.

Panama (Const. 1972, Art. 129), Venezuela<sup>7</sup> (Cost. 1999, Art. 23). Until 2011, the Constitution of Mexico did not contain a specific provision on human rights instruments, but the jurisprudence of the Constitutional Court had recognized to them constitutional status (Case 120/20, 2007). A specific provision was inserted in Art. 1 with the 2011 constitutional reform, which specifies the both the constitutional status of human rights treaties and the principle of the maximum standard of protection.

In other countries the rank is set below the constitution and above national legislation, such as in: Costa Rica (Const. 1949, Art. 7), El Salvador (Const. 1983, Art. 144), Paraguay (Const. 1992, Arts. 137, 141).

Others are less explicit, as in the case of: Peru, with Art. 55 of the 1993 Constitution defining human rights treaties as “*part of national law*”, without further specification, and Art. 56 providing for a special procedure to ratify treaties on constitutional matter, thus suggesting a constitutional status, and Uruguay, where the 1997 Constitution does not explicitly refer to the rank of international instruments, but a legislative status can be inferred on the basis of Art. 46, referring to national legislation and international conventions as instruments to fight social problems (“*vicios sociales*”).

IACrHR’s jurisprudence endorses the supra-constitutional/constitutional perspective, having repeatedly affirmed that the ACHR and “*the other treaties on human rights, are inspired to shared superior values (...) define obligations of objective character, and have a special nature compared to other treaties (...)*” (*Ivcher Bronstein Case*, 1999, par. 42). This has been the Court’s position since its first rulings, as proved by a 1982 Advisory Opinion, in which it states that “*approving these treaties on human rights, States submit to a legal order in which, for the common good, they undertake various obligations, not with respect to other States, but in front of the people living under their jurisdiction*” (Advisory Opinion OC-2/82).

Through the years, the Inter-American System of Human Rights strengthened and gained legitimation in the region, addressing transversal dramatic issues such as forced disappearances and the complex question of amnesty laws. Its relations with national orders evolved through time, coming to represent a crucial engine for the convergence towards regional standards on human rights.

### **3 Women Rights in the Inter-American System**

The evolution of women’s rights protection provides evidence of the influence and legitimation of the IACrHR in the region. Since the proclamation of the BdPC, national legislations have experienced two phases of reception and adaptation to conventional norms: a first generation of national laws, characterized by a focus on domestic violence, and a second generation, presenting evidence of the adoption of a gender perspective and a broader scope. In the evolution of the Court’s jurisprudence we find evidence of the mutual alimenting process that progressively developed and shaped the Inter-American Standards on women’s rights protection through the interaction between IACrHR, scholars, civil society, national institutions and international agencies. On the other hand, the Court’s jurisprudence provides elements to understand how and

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<sup>7</sup> Incidentally, we mention that Venezuela denounced the Convention in September 2012. If the State’s position remains unchanged, the withdrawal will be effective starting from in September 2013.

through which means this process influenced what we recognise as a regional convergence of national legislations on the matter.

The IACrTHR does not hold a mandate to unify national legislations on the matters of its competences. Nevertheless, given the multilevel system of protection of the region, each state is obliged by Article 2 ACHR to adapt its national legal order to guarantee its effect, regardless of the domestic status of the Convention. It should be pointed out that the margin of appreciation doctrine in the Inter-American System is not as comprehensive as in the European System, hence, national solutions in Latin America tend to vary to a lesser degree (Acosta Alvarado, Núñez Poblete, 2012). Since 1969, the IACrTHR has developed a solid jurisprudence and the ACHR has been enriched with several protocol and treaties “*one of which is the (...) Convention of Belém do Pará, a type of specific Magna Charta on woman’s rights - or better yet: women’s - that constitutes a separate and substantial chapter in the complete corpus juris that makes up the statute of the contemporary human being, based on the double foundation offered by the worldwide human right’s order and the continental version in the order of the same specialty*” (García Ramírez, Concurring Opinion, *Castro-Castro case*, 2006, par. 5). Article 7 of the 1994 BdPC prompted several States to pass legislation criminalizing acts of violence against women:

*“The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation; b) apply due diligence to prevent, investigate and impose penalties for violence against women; c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and h) adopt such legislative or other measures as may be necessary to give effect to this Convention”.*

Notwithstanding the strength of such instrument, only recently the IACrTHR received cases on women’s rights involving a violation of the BdPC. Interestingly, in the first of such cases, *Castro Prison v. Peru* case (2006), the reference was not made by the Inter-American Commission of Human Rights (IACommHR), but came from the demandants. Although the Court had dealt before with cases involving issues of gender equality (Advisory Opinion 4/84), until the mentioned case, none concerned “*directly and immediately (...) the victim’s female condition*” (García Ramírez, Concurring Opinion, *Castro-Castro case*). However, as we will see, the main reason of such delayed use was, in fact, more related to the generalised lack of familiarity with such new specific instrument, which was both cause and effect of the Court’s “self-restraint” to interpret its provisions. The Court’s attitude was, on the other hand, also based on technical reasons and

probably involved misunderstood limits to the Court's competences (García Ramírez, Cançado Trindade, Concurring Opinions, *Castro-Castro case*). However, as we will see, this problem was easily overcome when the Court was first presented with a case in which the petitioners alleged, *inter alia*, a violation of the BdPC. While such delay deferred the development of regional standards of protection of women's rights, the generalised sudden change of understanding that followed IACrHR's involvement in the subject, provides us with an interesting case to analyse the impact of Inter-American Institutions in national legislations and its crucial role as an interpreter of Inter-American instruments of human rights protection.

#### 4 Impact of the ratification of the BdP Convention: The first generation of laws

We first proceed with a comparative analysis of the regional legislative choices prompted by the ratification of the BdPC. In the '90s virtually all Latin American countries adopted specific legislation on violence against women, in abidance to Article 7 BdPC. These legislations belong to what we called the *first generation of laws*. They present several common features, such as the focus on the private dimension of violence against women, i.e. domestic violence, the scarce attention to the reasons and causes of such violence and, hence, an overall deficiency on measures of prevention and eradication.

Three cases differ from the others for country-specific reasons, as we point out below:

Paraguay, although already prompted by article 60 of its 1992 Constitution to “ (...) *promote policies to prevent violence in the family and other factors disrupting its solidarity*”, and having ratified the convention in 1995, enacts a specific law only in 2000 (Law 1600 “*Against domestic violence*”). On the contrary, Peru enacted Law 26260 “*Protection from violence in the family*” before the adoption of the BdPC. However, the case is hardly a real exception, since a year after the entry into force of the Convention, in 1997, Law 26.763 “*Reforming the law on protection against domestic violence*”, substantially extended Law 26260 scope and provisions, which in fact mainly covered child abuse. Brazil constitutes another noteworthy case, with the BdPC itself becoming a national law by 1995 Decree 107, on the basis of Article 226 of its 1988 Constitution: “ (...) 5. *The rights and duties implied in the marital status are exercised by men and women in equal conditions; (...) 8. The State guarantees assistance to the family and each one of its members, creating mechanisms to restrain violence in the context of family relations*”

Although all reviewed laws focus on domestic/intra-family violence, the definition of family tends to be broad, including former spouses, partners and former partners, relatives and persons living in the same household. This feature is noteworthy, since it implies the concept of *effect utile* and maximum expansion of protection in given social and cultural contexts, in abidance to Art. 29.d ACHR according to which “*No provision of this Convention shall be interpreted as: (...) d. excluding or limiting the effect that the American Declaration of Rights and Duties of Men and other international acts may have*”. Indeed, Inter-American instruments contain the normative basis for such material approach to the definition of the concept of family. Art. 17 ACHR recognizes the *family* as the fundamental element of society, and the duty of the State to protect it. The language of its second paragraph provides the basic grounds to found a broader interpretation of the concept of family on the basis of the principle of non-discrimination. Indeed, notwithstanding the discretionality left to the State for what concerns domestic laws on the institution of marriage, Art.

17.2 establishes that “2. *The right of men and women<sup>8</sup> of marriageable age to marry and raise a family shall be recognized, if they meet the condition required by domestic laws, insofar as such conditions do not affect the principle on non-discrimination established in this Convention*”. Additionally, Art. 2.a of the BdP Convention refers to violence “*that occurs in the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman (...)*”, abandoning all references to marriage<sup>9</sup>. According to our findings, the most restrictive definition of family is, limiting it to marital relations and partnerships (current or former) and parents of a common child is contained in Nicaraguan Law 230 of 1996 “*Reforms and integrations to prevent and sanction violence in the family*”. However, the restriction is partly motivated by the fact that, as mentions, this law is essentially a reform of the Penal Code.

The majority of the legislations establish precautionary measures to protect the victims and, in some cases, provide for alternative punishments in cases of minor violence, in abidance to Art. 7.d BdPC. Only few imply specific sanctions or reforms of the Penal Codes, as required by paragraph d of the same article. Such cases are: the mentioned Nicaragua’s Law 230, Panama’s 1995 Law 27 “*Typifying crimes of violence in the family and child abuse, establishing special institutions to attend victims of such crimes, reforming and integrating articles of the Penal Code and adopting other measures*”, Dominican Republic’s Law 24-97 “*Against violence in the family*”, Uruguay’s 1995 Law 16.707 “*On citizen safety*” (this law was replaced in 2002 by Law 17541 “*Prevention, early detection, attention and eradication of domestic violence*”), Colombia’s 1995 Law 294, “*Norms to prevent, remedy and sanction violence in the family*”, El Salvador’s 1996 Law 902 “*Against violence in the family*” and Chile’s 1994 Law 19325 “*Norms on procedures and sanctions related to acts of violence in the family*”.

The language to define acts of domestic violence, their features, victims and perpetrators tends to be gender neutral. However, in some cases women are directly mentioned as the victims of domestic violence such as in Ecuador’s 1995 Law 103 “*Against violence against women and the family*” and Venezuela’s 1999 “*Law on violence against Women and the family*”. Honduras’ 1997 Law Decree 132 “*Against domestic violence*”(completely reformed in 2005 by Law 250), at Article 5.2 goes as far as denouncing the reproduction of unequal power relations as “*(...) any behaviour directed to affect, compromise or limit the free development of the personality of a woman for reasons related to her gender*”. Panama’s 1999 Law 4, which addresses the shortcomings of the mentioned earlier Law 27, dedicates Chapter VI to “*The social policy to be promoted by the State on the subject of gender violence*” and, similarly, Dominican Republic’s Law 24-97 uses the term *gender* in its wording.

Several countries directly refer to the BdPC as an international instrument providing further measures to protect and guarantee women’s rights: the Considerandum of El Salvador’s 1996 Law 902, the Considerandum of Guatemala’s 1996 Law Decree 97 “*To prevent, sanction and eradicate*

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<sup>8</sup> Notably, the wording of the ACHR refers specifically to men and women as subjects of the right to marry. The recent extension of such right to homosexual partners, in countries such as Uruguay and Argentina, is clear evidence of the evolutionary interpretation of human rights norms.

<sup>9</sup> A broad definition of family was also given, in another context, in IACrHR’s Advisory Opinion 17/02 on the juridical status and human rights of the child. The Court adopts a broad concept of family and emphasises the duty of the State to protect and support the development of the family unit.

*violence in the family*”, Article 1 of Honduras’ 1997 Law Decree 132, Article 1 of Panama’s 1999 Law 4, Article 3 of Peru’s Law 26.763, the Considerandum of Dominican Republic’s Law 24-7 and Article 2 of Venezuela’s 1999 “*Law on Violence Against Women and the Family*”.

Some of the texts extensively reproduce Article 9 BdPC when defining the duties of the State to “*modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women*”. These are the cases of: Article 3 of Bolivia’s 1995 Law 1674 “*Against domestic violence and violence in the family*”, Article 21 of Costa Rica’s 1996 Law 7586 “*Against domestic violence*”, Article 13 of Guatemala’s 1996 Law Decree 97, the Considerandum of Honduras’ 1997 Law Decree 132, Article 17 of Mexico’s 1996 Law “*Assistance and prevention of violence in the family*”, Article 4 and Article 12 of Panama’s 1999 Law 4, dedicated to “*The social policy to be promoted by the State on the subject of gender violence*”, and Chapter II of Venezuela’s 1999 “*Law on violence against women and the family*”. Brazil and Colombia represent two special cases, both inserting the whole conventional text in their national legislations through laws, respectively Decree 1973 of 1996 and Law 248 of 1995.

Overall, we find a general tendency to include several forms of violence, overcoming the physical and psychological dimensions. Some legislative texts provide noteworthy wording, such as Article 3 of Mexico’s Law referring to “*physical, verbal, psycho-emotional or sexual violence in its bio-psycho-sexual sphere*”, Article 2.e of Costa Rica’s 1996 Law 7586, introducing patrimonial violence, Article 16 of Venezuela’s Law, referred to threat of violence and Article 1 of Ecuador’s Law 103, mentioning the protection of women’s sexual freedom.

Only few countries, at the time of the BdPC ratification, presented constitutional norms directly related to the subject and mentioned them in their legislations: Brazil with Article 226 of its 1988 Constitution recalled in its Decree 107: “*(...) 5. The rights and duties implied in the marital status are exercised by men and women in equal conditions; (...) 8. The State guarantees assistance to the family and each one of its members, creating mechanisms to restrain violence in the context of family relations*”, Colombia’s Article 42 of the 1991 Constitution “*(...) Relations in the family are based on equal rights and duties of the couple and mutual respect of all the family members. Any form of violence in the family is considered destructive of its harmony and unity, and is sanctioned by law. (...)*”, Article 32 of El Salvador’s 1983 Constitution “*“The Family is the basic foundation of society and the State will protect it providing the necessary legislation and appropriate services for its integration, well-being and social, cultural and economic development. The legal foundation of a family is the marriage and it is based on the juridical equality of the spouses*”. It is noteworthy to mention that El Salvador’s legislation explicitly cites this constitutional provision as its foundation, although the law was enacted more than ten years after the constitutional text and in direct coincidence with the ratification of the BdPC. Finally, Article 42 of Guatemala’s 1993 Constitution, establishes the duty of the State to protect the family and the equal rights of spouses. Interestingly, although it did not count on a specific constitutional norm on the subject, Honduras, in its legislation, explicitly refers to Article 59 of its 1982 Constitution, more broadly referring to the duty of the State to protect the individual’s inviolable dignity.

## 5 Competence of the IACrtHR on the BdP Convention

Given the crucial function of IACrtHR's interpretation of the Inter-American instruments for their full adoption and development, it is necessary to address the issue of its competence on Conventions other than the ACHR. The question is whether or not the IACrtHR has the power to apply the BdPC in a specific case, issuing a ruling regarding its infringement and, hence, to use it in the condemnatory part of the judgment.

The issue requires a careful evaluation, since it affects the legitimacy of IACrtHR's rulings, as well as the legitimacy of the institution itself. Differently from the issue of the Court's jurisgenerativity, implied when its role of interpreter is defined and inherent feature of the application of international conventions as *living instruments* (IACrtHR, Advisory Opinion 16/99), this issue refers to the fact that a supranational jurisdictional body cannot generate its own competences, that need instead to be based on judicial norms.

A similar question had been previously posed in relation to the San Salvador Protocol on Economic, Social and Cultural Rights, the Convention against Torture (OPCAT) and the Inter-American Convention on Forced Disappearances. The BdPC dedicates a specific chapter to "Inter-American Mechanisms of Protection" (Chapter IV), providing the bases to ground both the Commission and Court's competence to be presented with matters that involve a violation of its provisions. Moreover, Article 44, Chapter 7 BdPC mentions the Convention's own Art. 7, requiring States Parties to adopt measures to prevent, punish and eradicate violence against women, with evident correspondence with duties inherent to the ACHR norms: "*Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions*". This article establishes a clear interpretive link with other instruments, and its wording can be interpreted as including the possibility of recurring to the IACrtHR, when established by the Commission.

Consistently with the *pro personae* criteria, the ACHR and the BdPC are two complementary instruments, with the specific content of the latter integrating the provision of the first, general one: "*The joint reading of the ACHR, with its catalogue of general rights and guarantees, and the BdP Convention, with its declaration of specific State duties, to which women's rights correspond, results both natural and obligatory for the application of both. The second determines, illustrates or complements the content of the first in what refers to women's rights that derive from the ACHR*" (García Ramírez, Concurring Opinion, *Castro-Castro case*, 2006, par. 30).

According to IACrtHR's 2003 Advisory Opinion n. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (IACrtHR, Advisory Opinion 18/2003, par. 97-101), the principles of equality and non-discrimination belong the domain of *jus cogens*. In this sense, the Court argued that this normative framework proves sufficient to justify this "expansion" of its public function, without implying any arbitrariness. Indeed, the doctrine increasingly agrees on the need to adopt an axiological-substantial perspective when assessing the influence of Human Rights treaties, considering more the subject matter they regulate than their form or name, for being in force of their content that they generate specific obligations (Ruggeri, 2008 p. 2).



In an earlier Advisory Opinion, back in 1982, asked about her competences on “*Other Treaties*”, the IACrTHR made clear that “*to exclude, a priori, from its advisory jurisdiction international human rights treaties that are binding on American States would weaken the full guarantee of the rights proclaimed in those treaties and, in turn, conflict with the rules enunciated in Article 29 (b) of the Convention*” (IACrTHR, Advisory Opinion 1/82, p. 42). Although this opinion concerned its advisory jurisdiction, the line of argumentation suggests that the Court considers itself competent to form its opinion on the cases using all human rights instruments signed by American States, even if not directly part of the Inter-American System of Human Rights protection.

Besides the ACHR, hence, the Court considers direct normative sources of the Inter-American System virtually any other international treaty that imposes obligations related to human rights to a State Party to the Organization of American States (OAS). According to the Court, this is the sense of Art. 29.d ACHR, prohibiting the exclusion or limiting of the extent of any such obligation. The literature recognizes an explicit reference to multiple international sources in the Convention. In this sense, Bidart Campos maintains that the sources of the Inter-American System are the ACHR and “*any other convention, pact or treaty ratified by any State Party in the Inter-American system*” (Bidart Campos, 2000, p. 67-68), implying the competence of the IACrTHR to interpret the instrument creating that obligation, even if such instrument were not strictly referred to American States.

## 6 The Path-Breaking Cases: The IACommHR

While the origins of the BdPC are to be found in the international and regional context of growing sensibility towards the dimension and outcomes of discrimination against particular sectors of the society, it is not immediately that this instrument triggers the adoption of a gender perspective in the resulting legislations. As showed in the previous section, in the silence of the interpreter of the Convention, the first generation of laws focuses on the private dimension of violence and does not address the structural elements in which it originates. In the following years, the role of Inter-American Institutions in interpreting and developing Conventional standards of protection shaped their impact on national legal orders, an evidence of the process of reproduction of the IACrTHR’s legitimation in the region.

In the ‘90s, several petitions on cases of violence against women were submitted to the IACommHR<sup>10</sup>, and a few reached the IACrTHR. Amongst those addressed uniquely by the IACommHR, only two referred directly to the BdPC: *María Eugenia Morales de Sierra v. Guatemala* and *Maria da Penha Maia Fernandes vs. Brazil*. Being the first such instances in the Inter-American System, and anticipating the IACrTHR’s judgments of several years, in the following section we analyse some of their relevant features.

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<sup>10</sup> IACommHR’s cases regarding cases of violence against women that were not submitted to the Court are: *Raquel Martín de Mejía v. Peru*, Case N. 10.970, Report N. 5/96, March 1, 1996, *X and Y v. Argentina*, Case N. 10.506, Report N. 38/96, October 15, 1996, *María Eugenia Morales de Sierra v. Guatemala*, Case N. 11.625, Report N. 4/01, January 19, 2001, *Ana, Beatriz and Celia González Pérez v. México*, Case N. 11.565, Report N. 53/01, April 4, 2001, *Maria da Penha Maia Fernandes vs. Brazil*, Case N. 12.051, Report N. 54/01, 2001. Recently, in July 2011, the Commission was presented with a petition against United States, which we mention for completeness but should be considered elsewhere, because of the different position of such country in the Inter-American System (i.e. the US did not accept the competence of the IACrTHR): *Jessica Lenahan (Gonzalez) et Al v. United States*, Case 12.626, Report N. 80/11.

The first case involves Guatemala, and differs sharply from all other cases presented on the matter to the Commission or the Court, until the present time. In 1995 the Commission received a petition alleging that several articles of the Guatemalan Civil Code<sup>11</sup> provided a discriminatory definition of the roles of spouses in marriage. In 1992 the Constitutional Court had ruled the provisions constitutional (Constitutional Court, Case 84/92) since, *inter alia*, they provided juridical certainty in the allocation of roles. A second appeal on constitutionality was presented in 1996, a year after the petition to the IACommHR, which later issued Report 86/98 containing recommendations on the matter. At the time of the first appeal, in Guatemala was still in force the 1985 Constitution. However, for what concerns our analysis, this issue does not make a difference, considering that both the constitutional rank of international instruments (Art. 46, Const. 1985) and the protection of the equality of rights of spouses in the marriage (Art. 47, Const. 1985) were guaranteed in the same way as in the 1993 Constitution. The element of difference at the time of the second appeal and of the petition to the Commission was the ratification of the BdPC, which, as an international treaty on human rights, acquired constitutional rank ex Art. 46 of the 1993 Constitution. Subsequently, and in abidance to Commission's recommendations, in the following years several questioned articles were derogated by Decree 80 of 1998 and Decree 27 of 1999, which reformed the Civil Code. Moreover, 1999 Decree 7 "*Law on the dignity and integral promotion of the woman*" established, *inter alia*, the prohibition of any discrimination on the basis of civil status (Cotula, 2007, p. 101-102). On these grounds, in its 2001 Decision, the Commission found that the State had complied with the recommendations and did not submit the case to the attention of the Court. The case provides evidence of the direct impact of both the Convention and the Inter-American Institution's on national orders, however, although the Commission briefly mentions it (Case N. 11.625, Report N. 4/01, par. 45), the BdPC does not intervene in the conclusion of the case. Indeed, the responsibility of Guatemala is established on the basis of the provisions of the ACHR, although read with reference to relevant requirements of the BdP Convention.

In the 1998 petition *Maria da Penha Maia Fernandes vs. Brazil*, the petitioners present a dramatic case of reiterated domestic violence, alleging the violation of several provisions of the ACHR, of the American Declaration of the Rights and Duties of Men, Arts. 4,5 and 7 of the BdPC and suggesting that "*this case must be analysed in a context of gender-based discrimination by Brazilian State organs, which serves to reinforce the systematic pattern of violence against women and impunity in Brazil*" (Case N. 12.051, Report N. 54/01, par. 51). Incidentally, we give notice that the facts happened in 1983, when it was in force the 1967 Constitution, hence, equal rights of spouses were not constitutionally guaranteed yet, and the BdPC was still not even drafted. However, the Commission based its competence to hear the case pursuant the BdP on the on-going violation of the right to effective legal procedures (Case N. 12.051, Report N. 54/01, par. 52). In its 2001 Decision, the Commission found Brazil responsible of the violation of Art. 7 of the Convention, besides other ACHR provisions, again in relation to Art. 1.1 ACHR, for having tolerated the violence inflicted and failed to act in respect.

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<sup>11</sup> For instance, Art. 114 establishes that the husband may oppose the pursuit of his wife's activities outside the home where he provides adequately for maintenance of the home and has "sufficiently justified reasons", Art. 131 states that the husband shall administer the marital property, Art. 317 establishes that specific classes of persons may be excused from exercising certain forms of custody, including, *inter alia*, women.

## 7 The Path-breaking Cases: The IACrthR

As previously argued, through IACrthR's jurisprudence on BdPC, we can single out the elements of the construction and evolution of the Court's own understanding of the issue of gender-based violence. The Court's reasoning presents elements of interdisciplinary contributions aimed to enrich the juridical analysis with the tools offered by gender studies, sociology and anthropology, suggesting an explicit interaction in the conceptual construction between Court, scholars, civil society, national institutions and international agencies, resulting in the adoption of a gender perspective in the Court's understanding and argumentations.

The evolution of the extent and nature of women's rights protection emerged through a process of mutual alimentation and legitimation generated by the Court and all involved actors exercising their self-determination beyond the State. On the one hand, non-juridical actors have contributed their analyses to the Court, on the other, the Court's endorsement of external inputs let them come out of specific fields and enter that of law<sup>12</sup>, presenting the States with newly constructed shared understandings.

For what concerns the IACrthR, it is not until the *Castro-Castro v. Peru* case that the BdPC enters its jurisprudence. We claim a recent convergence of national legislations towards a holistic approach, began with IACrthR's judgement in *Castro-Castro v. Peru*, in which Judge Cançado Trindade referred to "*the systematic nature of discrimination against women*" (Cançado Trindade, Concurring Opinion, *Castro-Castro case*, 2006, par. 65).

Submitted to the Court in 2004, the case originates in two petitions separately presented to the IACommHR in 1992 and 1997, about facts occurred in 1992 in the Miguel Castro-Castro Prison, in Lima. A large number of the victims were women, some of them pregnant, and Peru's ratification of the BdPC allowed it to be invoked in the case. However, in its Report to the IACrthR, the Commission<sup>13</sup> only referred to violations of the ACHR: Arts. 1.1 (Obligation to respect rights), 4 (Right to life), 5 (Right to human treatment), 8.1 (Right to a fair trial) and 25 (Right to judicial protection).

Nevertheless, the 2006 judgment shows the signs of a change in the understanding of the matter. Indeed, the Court affirms: "*When analysing the facts and their consequences the Court will take into account that the women that were affected by the acts of violence differently than the men, that some acts of violence were directed specifically toward the women and others affected them in greater proportion than the men. Different Peruvian and international organizations have acknowledged that during the armed conflicts women face specific situations that breach their human rights, such as acts of sexual violence, which in many cases is used as 'a symbolic means to humiliate the other party'*" (*Castro-Castro case*, 2006, par. 223). As a reference of interpretation, to set the scope of Art. 5 ACHR in the case of violence against women, the Court mentions the Convention on the Elimination of all Forms of Violence Against Women (CEDAW), ratified by Peru in 1982 (*Castro-Castro case*, 2006, par. 276), which the Court considers part of the

<sup>12</sup> The strength of such process is now about to be tested in *Véliz Franco v. Guatemala* Case No. 12.578, submitted to the IACrthR on the 3rd of May, 2012. Documents forthcoming <<http://www.oas.org/es/cidh/decisiones/demandas.asp>>.

<sup>13</sup> Incidentally, in his Concurring Opinion Cançado Trindade refers to this element to argue the possibility to eliminate the filter of the Commission.

international *corpus juris* on the matter<sup>14</sup>. Referring to the BdPC as an instrument directly applicable to the case, the Court clarifies: “(...) they specify and complement the State’s obligation with regard to the compliance of the rights enshrined in the American Convention” ”(Castro-Castro case, 2006, par. 346).

At the background, we find the active debate on the issue of discrimination against women that was taking place internationally and regionally and involving scholars, civil society, national institutions and international agencies. Although it is not within the scope of this paper to analyse such debate, in the Court jurisprudence we find clear evidence of the conceptual “cross-fertilization” that is taking place. We claim that the responsiveness of the Court to exogenous but infra-regional conceptual constructions, contributes to consolidate the legitimation of the IACrHR in a region in which national institutions are still rebuilding credibility.

The written deposit of the petitioners, for instance, dedicates a whole chapter to the analysis of the facts as *gender violence*<sup>15</sup>, and invokes the application of the BdPC provisions. The petitioners offer a thorough interdisciplinary analysis, providing extensive argumentations and singling out gender-specific features of the violence perpetrated by the military in the massacre occurred at the Castro-Castro Prison. They assert that women were specifically punished for a *double transgression*: the transgression to the norms of society and the *status quo* (common to the male political prisoners) and the transgression of the role assigned to women in Peruvian society, i.e. their supposed loss of femininity due to political activism. Besides a detailed recollection of testimonies of extreme suffering and tortures directed especially to women, the petitioners proposed to the Court a detailed framework of analysis, underlining elements of symbolic meaning, such as the deliberate confinement of the women prisoners in a men’s prison, the separation from their children, the scheduling of the massacre in the week of Mother’s Day and its coincidence with the day of visit of the female relatives of the inmates, forced to assist to the cruelties suffered by their sons, daughters and spouses, as a punishment for being “mothers and wives of terrorists”. In finding the State responsible of the violation of Article 7.b of the BdPC (besides other provisions), the IACrHR extensively adopted the suggested framework of analysis.

In his Concurring Vote, Judge Cançado Trindade’s puts a special emphasis in advocating the adoption of a gender perspective. Cançado recalls the holistic approach developed in 1979 with the CEDAW, and the centrality of a change in the socio-cultural patterns of behaviour. His reasoning explicitly provides an overview of the evolution of the approach to the subject, fixed in documents such as the Declaration and Action Programme of Vienna in 1993 (Global Conference on Human Rights), the Beijing Platform adopted in 1995, the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women of 1994 and the CEDAW Protocol, entered into force in 2000.

This endorsement of a gender perspective of the IACrHR, with the emphasis of a thorough application of all provisions of the BdP Convention and, in particular, of the framework outlined by Article 7, contributes to the development of a *second generation* of regional legislations on violence

<sup>14</sup> For jurisprudential references see: *Hermanos Gómez Paquiyauri v. Peru*, 8 July 2004, Series C, N. 110, par. 166; *"Instituto de Reeducación del Menor" v. Paraguay*, 2 September 2004, Series C, N. 112, par. 172; Advisory Opinion 18/03, 17 September 2003. Series A, N. 118, para. 120; *"Niños de la Calle" (Villagrán Morales y otros) v. Guatemala*, 19 November 1999, Serie C, N. 63, par. 194.

<sup>15</sup> See documents attached to the case file, p. 36: [http://www.corteidh.or.cr/docs/casos/expedientes/alefi\\_int.pdf](http://www.corteidh.or.cr/docs/casos/expedientes/alefi_int.pdf)

against women. This second generation overcomes the limits of the family as specific domain of unequal relations of power, and addresses the issue as a complex structural problem rooted in the social and cultural patterns of society, preventing women to freely develop their personality and violating their human rights.

Before proceeding with the overview of what we defined the path breaking cases on the adoption of a gender perspective by the IACrHR, we should mention another case that was presented to the Court in 2007, *Perozo et al. v. Venezuela*. The case is interesting in the framework of our analysis because it discourages an interpretation of the Court's attitude as a politically biased endorsement of an activist perspective. The facts are related to hindrance to broadcast and acts of harassment and physical and verbal assault, against 44 people working with Globovisión television station and to investigations and criminal proceedings conducted by the State on the issue. The IACrHR requested the Court to declare the violation of several articles of the ACHR, such as the right to freedom of thought and expression (Art. 13). However, the representatives had alleged that "*the physical and moral attacks the [female] reporters<sup>16</sup> suffered from 'mainly 'responded to the gender'*", and invoked, *inter alia*, a violation of the BdPC. In this case the Court did not find the reference appropriate, noting that "*the representative based their arguments, mainly, on quantitative criteria to allege that the aggressive acts were caused 'because of the sex' of the alleged victims*". For what concerns one of the victims, contrary to the representatives' opinion, the Court does not find that the facts reveal that the attacks suffered had "*a reason or purpose, or at least, a connotation or effect based on the sex or gender of the victim or her condition of pregnancy*". Regarding the allegation that pro-government newspapers had denigrated one of the victims "*as a woman*", the Court discards the argument due to the representatives' failure to provide documentation. In the 2009 judgement, while the Court finds Venezuela responsible of the violation of several provisions of the ACHR, it also clarifies that "*the Court deems it is necessary to clarify that not all human right violation committed against a woman implies necessarily a violation of the provisions established in the Convention of Belem do Pará. Even though female reporters have been attacked in the facts of this case, in all the situations, they were attacked together with their male colleagues. The representatives have neither demonstrated in what way the attacks were 'especially address[ed] to women' nor have they explained the reasons why women turned into a special target '[due to their] gender'. (...) The representatives did not specify the reasons for and the way in which the State committed a 'planned or directed' action towards the alleged female victims and they neither explained to what extent the proven facts in which they were impaired 'were aggravated due to the condition of being a woman'. The representatives also failed to specify which facts and in which way those facts represent attacks that "disproportionately affected women"*". This case evidences a certain degree of caution in the Courts attitude. As we will see in the following paragraphs, this caution does not prevent the Court from endorsing an holistic gender perspective in its reasoning, when it considers it appropriate given the facts reported.

After this clarification, it is in the same year, with the *González et al. ("Cotton Field") v. Mexico case*, that the IACrHR further develops its gender perspective towards an holistic approach. Addressing the case of the forced disappearance and death of Mss. González, Herrera and Ramos, whose bodies were found in 2001 in a cotton field in Ciudad Juárez, the Court not only applies, *inter alia*, Article 7 of the BdP Convention, but also presents a reasoning based on the review of

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<sup>16</sup> 13 out of the 44 victims.

several contributions to the analysis of the complex issue of gender-based violence perpetrated in a context of widespread impunity.

In its argumentation, the Court collects the analyses offered by both the petitioners and the State. The First ones, pointing at the gender issue as a common denominator of the context of systematic violation of human rights and alleging that “*Cruel acts of violence are perpetrated against girls and women merely because of their gender and, only in some cases, are they murdered as a culmination of this public and private violence*” (*Cotton field case*, 2009, par. 128), and the second ones arguing that widespread violence is “*influenced by a culture of gender-based discrimination*” (*Cotton field case*, 2009, par. 128-129), exacerbated by the structural factor of the change in family roles<sup>17</sup> in an essentially patriarchal society. The IACommHR Rapporteur, CEDAW and Amnesty International provided further analysis on the same line. In addressing the responsibility of the State, the IACrHR referred to the definitions of *due diligence* adopted by CEDAW, the 1993 Declaration on the Elimination of Violence Against Women of the UN General Assembly, the Beijing World Conference on Women, the 2006 statements of the UN Special Rapporteur on Violence against Women and to the conclusions of the IACommHR in the *Maria Da Penha v Brazil case* of 2000.

The extensive background research is evidenced by IACrHR’s reference to the European Court of Human Rights concept of *procedural obligation* (*Cotton field case*, 2009, par. 292), to carry out effective official investigation in cases of violation of the right to life as well as the analogical adoption of ECtHR’s criterion of special emphasis on the investigation of racially motivated aggressions.

The Court’s definition of discrimination against women follows that of CEDAW: “*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*” (*Cotton field case*, 2009, par. 394). However, the Court enriches it with BdPC’s understanding of violence against women as “*a manifestation of the historically unequal power relations between women and men*”, with ECtHR jurisprudence, the *Opuz v. Turkey case*, affirming that “*the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional*” (*Cotton field case*, 2009, par. 396), as well as with its own previous jurisprudence, the *Castro-Castro case*.

The argumentative choice of explicitly referring to a wide range of authoritative sources, undoubtedly contributed to legitimate a judgment of evolutionary nature. Indeed, the Court demanded the States to adopt measures directed to eradicate a context of entrenched social inequality, addressing its complex dimensions and overcoming the tendency to circumscribe the issue of violence against women to the private sphere. Indeed, in its final requests to Mexico, the Court calls for the adoption of a gender perspective in social policies and judicial proceedings.

Other factors influencing the Court’s understanding can be traced paying attention to changes in the Court’s discourse, such as the adoption of the concept of *femicide*: “*In the light of the preceding*

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<sup>17</sup> The State explicitly refers to the changes occurred after the establishment of the Maquiladora industry, started in 1965 and increased in 1993, with the NAFTA. The majority of the employees are women and their increased economic independency triggered a sudden change in the traditional roles, often making them the household providers. On the topic see, amongst others, Cravey (2008).

paragraphs, in the instant case the Court will use the expression ‘gender-based murders or women’, also known as *femicide*” (*Cotton field*, par. 143). And it is, indeed, in those preceding paragraphs mentioned by the Court that we find the clearest evidence of that mutual alighting process, mentioned earlier in this analysis, that progressively developed and shaped the Inter-American Standards on women’s rights protection through the interaction between IACrHR, national institutions, scholars and civil society. Indeed, in Section 1.6 of the judgment, “*Regarding the alleged femicide*”, the Court extensively refers to the analysis of the petitioner’s representatives, Art. 21 of Mexico’s General Law on “*Access of Women to a Life Free of Violence*”, enacted in 2007<sup>18</sup>, Government agencies, experts’ testimonies, international agencies and NGOs.

When analysing the development of the protection of women’s rights in the region, the relevance of the Court’s adoption of the term *femicide* should not be underestimated. This choice provides evidence of its continuous interaction with scholars, civil society, national institutions and international agencies in shaping the evolution of the Inter-American System of Protection of Human Rights. A brief description of the history of the concept will, hence, prove useful to our analysis. Originally - not often - used to indicate the homicide of women, in 1992 the term was adopted by Diana Russell (1992) to name the killing of females by males *because they are female*<sup>19</sup>. The term does not indicate solely the killings following a sexual violence, but those generated by hatred, misogyny, and discrimination in an essentially patriarchal society. In the following years, scholars and feminist movements throughout the Americas elaborated the concept, beginning precisely with Mexico. There, the feminist scholar Marcela Lagarde translated the term with the Spanish word *feminicidio* (*feminicide*), and later elaborated a broader definition, based on the features of the killings in Ciudad Juarez (the same place of the killings of the *Cotton field case*<sup>20</sup>). She added to the concept the issue of impunity, defining the term as “*a hate crime against women, a misogynous crime forged by the enormous social and state tolerance of gender violence, fostered by impunity, by haphazard investigations and mishandled findings. Access to justice and fair trial have not become a reality because the authorities do not pay attention to the victims charges and seem to see women's lives as secondary or are biased against women, discrediting and blaming them. Silence, omission, negligence and the collusion of authorities responsible for preventing and eradicating crimes against women contribute to feminicide*” (in Spinelli, 2008). However, the crucial difference in her later definition was making it independent from the death of the woman. In this sense, *feminicide*, differently from *femicide*, came to refer to extreme violence against a woman, of which the killing is the most extreme outcome, violating her rights in the public and private sphere, originating in misogyny and social impunity, which put women in vulnerable positions.

Although the Court adopts the more restrictive term *femicide*, better suited to the case and more rigidly defined, it is clear that the choice comes as an endorsement of a particular framework of analysis, elaborated in the field of gender studies and feminist movements. Hence, in a context of raised awareness on the issue of violence against women, which called the attention of the international community, national civil society and scholars, the IACrHR influences the evolution

<sup>18</sup> This is one of those second generation laws we referred to at the beginning of this study, that will be thoroughly analysed in the following sections,

<sup>19</sup> Russel uses the term “female” intentionally, to underline the inclusion of young girls, children and older women.

<sup>20</sup> Notably, Lagarde was the author of one of the testimonies explicitly cited by the Court in the *Cotton field* judgment.

of a regional gender perspective in national legislations using a term with very defined conceptual features to indicate killings such those occurred in Ciudad Juarez.

In the next two years, the Court finds a violation of Article 7 BdPC in the cases: “*Las dos Erres*” *Massacre v. Guatemala* (2009), *Rosendo-Cantú et al. v. Mexico* (2010) and *Fernández-Ortega et al. v. Mexico* (2010). Although these judgments do not represent further developments of the discipline, they contribute to the consolidation of the IACrTHR understanding of gender-based violence. The common feature is the increasing tendency of the Court to demand specific measures to abide to the provisions of Article 7 of the Convention, such as capacitation courses and the establishment of specialized institutions for prevention and support. In the extensive *Fernández-Ortega et al. v. Mexico* judgment, the IACrTHR proves not to be satisfied the mere intention of the State to fulfil its obligation, providing evidence of the explicit intention not to relegate the adoption of a gender perspective to the domain of rhetorical exercises.

In May 2012 another case of alleged *femicide* was submitted to the Court, *Maria Isabel Véliz Franco et al v. Guatemala*. In this case it is the petition itself to name directly the violation, on the basis of the Court’s previous jurisprudence. The judgement has not yet been issued, but it will provide further material for an analysis of IACrTHR’s jurisprudence on the issue.

## 8 The Second Generation of Regional Legislations

The development of a regional gender perspective, endorsed by the IACrTHR, and the national and international debate on women’s rights, provided the basis for the adoption of new national legislations on the subject. This second generation of laws emerged after the pronouncements of the IACommHR and, more directly, after IACrTHR’s *Castro-Castro* and the mentioned following judgments. As we are going to see in the following section, the newly adopted texts show a general tendency to integrate the Court’s framework of analysis and its interpretations of the provisions of the BdPC. The texts manifest a regional convergence towards the holistic approach endorsed by the Court and internationally and regionally constructed through the interaction between institutions, civil society and scholars. Notably, this convergence also provides further evidence of the *erga omnes* effects of the Court’s rulings.

Getting back to our comparative framework, we proceed with an analysis of the changed current regional context, analysing the features of the new national legislations<sup>21</sup> addressing violence against women.

In three countries constitutional reforms included specific provisions on the issue of women’s rights: Art. 15.2 of the 2009 Constitution of Bolivia “*Everyone, particularly for what concerns women, have the right not to suffer from physical, sexual or psychological violence, in the family as in the society*”, Art. 42.2 of the 2010 Constitution of Dominican Republic “*Any form of violence in the family or based on gender is condemned. The State will guarantee by law the adoption of the necessary measures to prevent, sanction and eradicate violence against women*”, and Art. 66.3.b of the 2008 Constitution of Ecuador “*It is recognized and guaranteed to all: (...) 3. The right to personal integrity, which includes: (...) b. A life free from violence in the private and public sphere. The State will adopt the necessary measures to prevent, eliminate and sanction all forms of violence, especially those against women, children (...)*”. On the other hand, Ecuador did not enact a

<sup>21</sup> Paraguay is currently debating on a new law “*To prevent, sanction and eradicate violence against women*”, recently presented to the National Congress, but a final text has not yet been approved.



law replacing or reforming the one promulgated in 1995. However, as previously argued, that text was already one of the few directly referring to women as subjects protected by that law. We recall that these countries, amongst others, also guarantee constitutional status to international instruments on human rights in the domestic order.

The majority of the new legislative texts contain a specific reference to the BdPC or, in general, to the international instruments ratified on the matter. Specifically, this is the case of: Argentina's 2009 Law 26.485 "*Integral protection of women*" (Art. 3), Bolivia's 2013 Law 348 "*Guaranteeing to women a life free from violence*" (Art. 1), Brazil's 2006 Law 11.340 (Law Maria da Penha, from the name of the notorious case presented to the Commission) "*Mechanisms to refrain domestic violence and violence against women in the family*" (Art. 1), Colombia's 2008 Law 47.193 "*Dictating norms for raising awareness, prevent and sanction all forms of violence and discrimination against women, reforming the Penal Code, the Penal Procedure Code and Law 294/1996*", (Art. 4), Costa Rica's 2007 Law 8589 "*Penalizing violence against women*" (Arts. 1 and 3), El Salvador 2012 Decree 520 "*Special Law for a life free from violence for women*" (Art. 2), Guatemala's 2008 Decree 22 "*Law against femicide and other forms of violence against women*" (Considerandum and Art. 1), Mexico's 2006 "*Law for equality between men and women*", (Art. 4) and again Mexico's 2007 "*Law for a life free from violence for women*" (Art. 2), Nicaragua's 2012 Law 779 "*Against violence against women and reforming the Penal Code*" (Considerandum II, Arts. 4 and 5), Panama's 2011 Draft Law 401 "*Reforming the penal code to typify femicide and sanction violence against women and dictating measures of prevention of this conducts*" (Art. 2) and Venezuela's 2007 Law "*Right of women to a life free from violence*" (Art. 3.6).

While, in the majority of these second generation laws, violence against women is addressed in its public and private sphere, independently from a family or affective (current or former) relationship of any sort, a few countries maintain the laws' ambits of application limited to the private sphere, although broadly defined. It is the case of Peru and Chile, since the laws considered are limited to reforms of their Penal Codes relatively to domestic violence or typifying the crime of *femicide*. Notably, Costa Rica's reform of the Penal Code presents the most limited ambit of application, considering only the cases of spouses and partners. Brazil maintains the scope of the law limited to domestic violence and violence within the family, although both the family nucleus and the forms of violence have a very broad definition and are thoroughly defined. In Brazil's case, however, we should consider three specific factors, namely, that Brazil did not have a law similar to the first generation laws analysed in this study, that in the country the BdPC is a national law, and that, as previously seen, the mentioned Law 11.340 was promulgated as a direct response to the Commission's decision on the country's responsibility in a case of domestic violence, which also gives the name to the new national law. All this factors contribute to explain why Brazil adopted a text more similar to the first generation of regional legislations than to the second one.

With the exception of the laws limited to reforming the Penal Codes, discrimination towards women based on gender is explicitly addressed in the revised texts as the structural element causing the violence, and its elimination is set as a priority. On the other hand, in a few of them the BdPC framework of analysis as interpreted by the IACrTHR is extended, as they go further in the identification of cultural and social patterns and the reproduction of stereotypes as the origins and roots of discrimination and gender-based violence. This is the case of Argentina (Art. 2.e), Bolivia (Art. 4.12, introducing the term *de-patriarchalization*), El Salvador (Art. 2), Guatemala

(Considerandum), Mexico (Arts. 38.2, 45.7, 52.7), Nicaragua (Arts. 1, 4.1, 8-10), Panama (Arts. 3, 4.7, 8.4, 31, 32, 38, 39) and Venezuela (Arts. 1, 20.6, 20.8). On this bases, following the provisions of the BdPC and IACrTHR's jurisprudence, all these texts provide thorough inter-institutional and interdisciplinary programmes and policies for prevention, as well as provisional measures to prevent acts of violence.

Evidence of the adoption of a structural perspective is provided by the emphasis put on co-responsibility, i.e. the responsibility of society, family and the State towards eradicating all forms of violence against women, and societal proactive participation to the established programmes and policies. In particular, co-responsibility is included in the principles of the legislations of Colombia (Art. 6.1), Panama (Art. 5) and Venezuela (Art. 18). Three countries explicitly refer to the necessary participation of society, namely: Venezuela (Art.6), Nicaragua (Art. 6) and Bolivia (Art. 15), the latter also includes the requirement of social control on actions performed in violation of the law. Argentina introduces a similar concept referring to cooperation between institutions and civil society (Art. 7).

For what concerns the definition of violence, besides the common inclusion of physical, psychological and domestic violence, five legislative texts consider more complex forms, further evidence of the adoption and elaboration of a gender perspective and of addressing the problem as structural. The following provisions significantly expand the ambit of application suggested in the BdPC referring to:

- *Symbolic violence*, intended as the transmission of messages, values, icons or signs reproducing relations of dominion, inequality and discrimination and presenting women subordination in society as natural, singled out in the Laws of: Argentina (Art. 5), Bolivia (Art.7), El Salvador (Art. 9), Panama (Art. 4) and Venezuela (Art. 15).
- *Violence in the field of health care or reproductive rights*, acts or omission limiting or preventing women from being informed, oriented and attended before, during and after the pregnancy and to have free access to contraception, addressed in the same articles of the Laws of Bolivia, Argentina, Panama and Venezuela.
- *Violence in the media*, intended as the transmission of undignified, discriminatory, stereotypical messages, is included by the same four countries. Although at Art. 8.g the BdPC suggests the use of media as means for campaigning and promoting women's rights, the intention of the national legislators is far broader.
- *Institutional violence and violence in the workplace*, covering the issue of equal opportunities, besides harassment, again considered by the same four countries.
- *Political violence* – i.e. violence against political involvement and activism, equal opportunities and access to political rights in general – appears in the Laws of Panama and Bolivia. Notably, at Art. 7.13, Bolivia refers to a specific law enacted in 2012, Law 243 “*Against harassment and violence in politics against women*”. The broad definition of such form of violence mirrors the concept of “punishment for a double transgression” previously addressed.

Costa Rica provides an interesting case to introduce a crucial problem inherent to several new provisions: the indeterminacy of the concepts and the difficulties in constructing clear definitions. Indeed, Costa Rica's Constitutional Court declared unconstitutional three articles of Law 8589: Art. 22 “Maltreatment”, Art. 25 “Emotional Violence” and Art. 27 “Threat against a Woman”. Costa

Rica is not in our list of countries including a particularly wide range of forms of violence, since the provision of its law are mirrored in the majority of the texts reviewed. However, the mentioned articles were questioned for the lack of a rigid definition of the acts penalized, and the subsequent excess of discretionality left to the judiciary, creating uncertainty, and violating the principle of legality. Articles 22 and 25 have been re-introduced in 2011, after being reformed to meet the standards outlined by the Constitutional Court. The peculiarities of some countries' definition of violence and forms of violence and Costa Rica's case suggest possible future difficulties in the application of the new provisions. Addressing these questions will require an analysis of the future national responses to similar problems.

In all new legislations the neutrality of the terms identifying the victim is abandoned, although this does not imply necessarily a limitation of the subjects to women. El Salvador is an exception, restricting the scope of the law to women ex Art. 5. On the contrary, Bolivia explicitly considers other victims at Art. 5.4 of the Law: "*The provision of this law are applicable to any person that, being in a vulnerable situation, suffers any of the forms of violence sanctioned in this law, independently on gender*".

On the other hand, neutrality is maintained for what concerns the perpetrator, although this raises doubts for what concerns the specific provision typifying the crime of *femicide*, included in the legislations of: Bolivia (Art. 252bis P.C.), Chile (Art 390 P.C.), Colombia (Art. 134.e P.C.), Costa Rica (Art. 21 of the Law), El Salvador (Arts. 45-46 and 48 - *Suicidal femicide* for induction or help – of the Law), Nicaragua (Art. 9 of the Law), Guatemala (Art. 6 of the Law), Honduras (Art. 118 P.C.), Mexico (325 P.C.), Nicaragua (Art. 9 of the Law, 162 P.C.), Panama (Art. 41 of the Draft Law), Peru (Art. 107 P.C.). Notably, Art. 7 of Bolivia's Law refers to *feminicide*, although not in the broad sense elaborated by Lagarde. It is not within the scope of this analysis, needing a different analysis, addressing all the issues that such a choice raises, such as the question on the neutrality of law, the inherent difficulties of discerning a femicide from a homicide of a woman in more uncertain cases, and the problems in "translating" a concept essentially anthropological, sociological and political into a juridical category (Spinelli, 2008, p. 122-132). For what concerns our analysis, we limit ourselves to record the adoption of the term by several national legislators, following the example set by of the IACrHR<sup>22</sup> that endorsed the conceptual construction emerged in the regional debate.

The new regional scenario shows an overall convergence towards the inclusion of a gender perspective in addressing the issue of violence against women through legislation. As shown, the features of such convergence suggest a direct implementation of the framework of analysis set by IACrHR's interpretation of BdPC provisions and constructed through the interaction with movements and civil society.

## 9 Conclusion

Our research proposes an analysis of the development of women's rights protection in the Latin American region since the proclamation of the BdPC. Through a comparative analysis of what we defined as the first and second generation of laws on violence against women, and following the evolution of Inter-American Institution's jurisprudence on the subject, we argue a process of

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<sup>22</sup> The same request was presented by CEDAW, XXXVI Session, 7-25 August 2006, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Mexico*, Recommendation N. 15, p. 4.

regional convergence on the adoption of a gender perspective in the understanding of the issue and in the elaboration of legislations addressing it. Such framework of analysis rises from the interaction and reception by the Inter-American Systems of the conceptual elaborations brought forward by scholars, civil society, national institutions and international agencies, in a period of particular international, regional and national attention to the problem of gender-based violence and discrimination. This process of convergence and its roots provide evidence of the legitimation of Inter-American Institutions in the region which, although obviously not based on the theory of *pouvoir constituent* categories, arise from the constitutional substance of the matter promoted and protected and is reinforced by the responsiveness of such supranational institutions to the demands of the subjects of the fundamental rights protected. The Court's permeability to exogenous conceptual constructions is the crucial element of the reproduction of its legitimation in the region and, hence, of the influence of its judgments and reasoning, both in the countries found responsible of the violations and *erga omnes*.

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## **The Conceptualisation of Child Sexual Abuse by Parents and Guardians in Ghana**

### **Abstract:**

This is an exploratory study that sought to investigate how parents and guardians who serve as the first agent of socialization to the child perceive the concept of child sexual abuse in Ghana. Report indicates that victims of child sexual abuse in Ghana are unable to report their experience because of socio – cultural factors that influences their world view of the phenomenon , especially by their parents and guardians. Although some studies have been conducted on child sexual abuse in Ghana, yet its socio – cultural context is not well understood. It is against this background that, this study becomes relevant in filling such missing gap in literature. The study therefore unearthed the socio – cultural factors that define the phenomenon in the Ghanaian setting. This is an exploratory study that uses qualitative research methods to collect data from 10 parents and guardian in selected communities in Ghana. The findings showed that how parents and guardians perceive child sexual abuse varies from what the Convention on the Rights of the Child states.

**Keywords:** Child Sexual Abuse.

### **1 Introduction**

Child Sexual Abuse is a global phenomenon which cuts across cultures, economic class and social status (Jones and Jemmott, 2010). It is regarded as one of the major forms of abuse children experience almost every day in every society due to the vulnerability of children (Hanzi, 2006). Irrespective of this, official reports of child sexual abuse by professionals represent just a small percentage of the reality on the ground as a result of cultural reasons (Boakye, 2009). Although CSA is a global issue, different nationalities and social groups vary in the way they perceive the problem (Guma and Henda, 2004). In view of this, having a clear understanding of the concept is often marked by the ability to define it (Mathoma et al. 2004: 70). The perception of parents and guardians on what constitutes child sexual abuse is relevant because it has a direct effect on the sexual experiences of children.

The definition of child sexual abuse by parents and guardians goes a long way to impact the world view of children on their identification and disclosure of inappropriate sexual behaviours. It is believed that in most African societies, child sexual abuse is defined as sexual intercourse with children. For instance, Mathoma et al. (2006) study on the knowledge and perceptions of parents regarding child sexual in Botswana and Swaziland showed that all the respondents defined child sexual abuse as sexual intercourse with an adult. However, there are other sexual acts against children that are not penetrative. Mathoma et al. (2006) attributed this to the fact that non penetrative acts like exhibitionism and pornography are still alien to the African culture and hence not interpreted as sexual abuse. Irrespective of this view, one cannot lose sight of the fact that non contact sexual abuse also has similar effects on the development of children as sexual intercourse. The phenomenon of child sexual abuse is likely to mean different things to different people across different societies.

In social settings like Ghana, the phenomenon of child sexual abuse is understood differently from what pertains in other cultures. The view of parents and guardians regarding how child sexual abuse is defined is what is passed on from one generation to the other through socialization. Although measures are put in place to curtail the menace of child sexual abuse in Ghana, this can only be effective if efforts are made to understand what the concept mean to the people. In order to meet this target, it is worth to examine how the phenomenon of child sexual abuse is defined by parents and guardians who are the primary actors of socializing children. It is in this regard that understanding how parents and guardians define child sexual abuse in Ghana is relevant as it seeks to assist in cultural appropriate interventions in resolving the trend of child sexual abuse in the country.

## **2 OBJECTIVE**

This study specifically sought to:

- Find out how parents and guardians conceptualize childhood in Ghana.
- Explore how parents and guardians define child sexual abuse in families within the Ghanaian community.

## **3 LITERATURE REVIEW**

Child sexual abuse is one of the complex phenomena that is difficult for researchers to agree on a common definition. It is a complicated topic that cannot be explained by a single definition (Plan Ghana, 2009). This is due to the fact that the definition of child sexual abuse is confronted with difficulties as a result of cultural differences and its time – bound nature (Wurtele and Miller – Perrin, 1992). The behavioural manifestation of child sexual abuse is likely to be rooted in a cultural mindset through socialization (Boakye, 2009). The first agent of socialization is the family with parents and guardians being the primary actors.

The perception of parents and guardians on what child sexual abuse is likely to influence the mindsets of children towards the concept. It is therefore important that studies seeking to understand the problem of child sexual abuse should not be focused exclusively on the victims but pay attention to the conceptualization of the phenomenon by members of the victims family, as well as to how this perception is influenced by the larger social context ( Boakye, 2009: 963). According to Boakye ( 2009), the victim's attitude and reactions towards the concept is just a reflection of the family's believes. Hence, it is proposed that in a cultural environment where individuals sense's of identity and honour are strongly tied to the family ( Gyeke, 1996 as cited in Boakye, 2009: 963), the tendency toward indiscriminate protection of the collective interest – rather than that of a single individual, including the intra -familial child sexual abuse victim or indeed a victim of any form of child abuse – will be especially high ( Boakye, 2009: 963).

A nationwide study by Coker – Appiah and Cusack (1999) on violence against women and children in Ghana showed that most of the respondents disclosed their experience to their parents. This means that, how parents and guardians conceptualizes child sexual abuse guides children in identifying behaviours that are sexually abusive. Through socialization, with parents being the first agent of socialization, children learn how to relate to adult members of the community. Myths and false believes about victims and perpetrators of child sexual abuse by parents and adult members of the community ( Collings 1997; 2006 as cited in Boakye, 2009) is likely to influence the definition of the concept. These beliefs, when held by parents and guardians, would definitely impact the worldview of children about the phenomenon. These myths and false beliefs are likely to deny, trivialize, normalize and or justify such violence against children ( Boakye, 2009: 958). A study by Jones and Jemmott (2010) showed that greater percentage of child sexual abuse cases happened within the family. The research showed that 70.2 percent of the respondents believed that women sometimes turned a blind eye when their partners have sex with children in their families ( p. 14).

The conceptualization of the concept by parents and guardians is therefore relevant for investigation since it influences children's ability to identify and report sexual behaviours that are abusive.

#### **4 THEORETICAL MODEL**

##### **The Ecological Model**

The ecological approach views the phenomenon of child sexual abuse from the interplay of factors from the individual, family and the community level. Ecological theory posits that the functions of individuals and community organizations are interdependent and individuals have differential patterns of experiences which are related to different ecological settings (Kelly, 1966, 1968, 1971 as cited in Campbell et al. 2009: 3). The experiences of a sexually abused child are connected to the socio – cultural norms that show the response of the social world (Campbell et al, 2009). Research shows that because child sexual abuse happens within a heterogeneous group of persons, there has not been a single empirical theory to fully explain the phenomenon (Becker, 1994; Calder, 1999; Campbell et al. 2009). This is because there is not one causative factor which influences the sexual abuse of children (Becker, 1994 as cited in Townsend and Dawes, 2004). The individual ( micro), interpersonal ( mezzo) and community ( macro) factors interplay in the phenomenon of child sexual abuse.

At the mezzo level, there is the interplay between interpersonal relationships between parents and guardian and the child (Townsend and Dawes, 2004). The impact of the broader society on the family with the parents and guardians being the primary actors is likely to influence the socialization process of the child. Socialization and child rearing practices is said to play a major role in the sexual abuse of children (Townsend and Dawes, 2004). The ability of children to recognize an act as a sexual abuse is directly related to the behaviours and attitude towards the phenomenon by members of society. Most children are socialized into the ideology of the community through the family. Boys for example can learn behaviors that would let them accept, to control and intimidate, while girls can also learn to accept dynamics that are considered as 'normal' (Magwaza, 1997; Marshall and Herman, 2000). This model asserts that, at the interpersonal level, children are thought religious values that could teach them to trust, unquestioning and obey adults at all times (Tang, 2002). Research shows that cultural variations may either protect children from abuse or facilitate its commission (Aronson, Fontes; Lewis, 1999 as cited in Townsend and Dawes, 2004:63). According to this model, interpersonal relationship involving the family is likely to be influenced by socio – economic factors like living conditions, family arrangement, poor parental attachment and domestic violence. These factors can predispose the child to sexual abuse and also impacts how the family would view the sexual experiences of children as abuse (Marshall & Herman, 2000). The search for factors that influence, or create predispositions towards sexual aggression against children has included the exploration of many factors, including intra – and interpersonal as well as cultural, social and economic variables (Townsend and Dawes, 2004: 63).

This theory posits that the perception of parents on child sexual abuse also influences how they socialize children into becoming silence or outspoken when they are sexually abused. It is likely many of the issues at the interpersonal level will have a direct influence on several of the characteristics of child sexual abuse ( Townsend and Dawes, 2004). This level also shows socio – economic factors like economic conditions, overcrowding, sleeping arrangements among others which impact parents and guardians view on child sexual abuse influences the concept of child sexual abuse in various societies ( Marshall & Herman, 2000).This model is supported by the fact that families' characteristics such as family socio – economic status have specifically been correlated with children's response to adverse life circumstances like child sexual abuse ( Barrett & Turner, 2006; Neuman, Barker, Koot and Manghan, 2010; William et al., 2007 as cited in Townsend and Dawes, 2004). This research shows how the interplay of factors from the family level influences their definition of child sexual abuse in the Ghanaian setting. This in view

influences how children perceive the concept of child sexual abuse as they are taught by their parents or guardians.

### Research Method

This study is an exploratory one that sought to provide some insight relating to how child sexual abuse is perceived by parents and guardians in Ghana. The research design is qualitative and the method is phenomenology. Unstructured interview guide was used to collect data via focus group discussions. Participants perception of child sexual abuse was explored through in - depth interviews. A total number of 10 parents and guardians who have children with a history of sexual abuse were interviewed. All interviews were recorded, transcribed, coded and put into the appropriate themes for analysis.

## 5 DISCUSSION OF FINDINGS

Understanding the concept of child sexual abuse is often marked by the ability to define it (Mathoma et al. 2004). How parents or guardians view child sexual abuse goes a long way to influence children's identification of unapproved sexual actions and the reporting of it. Most participants agreed that what constitutes child sexual abuse depended on the definition of who a child is. The definition of a child they said explains who can engage in sexual activities. This supports the view that understanding child sexual abuse begins with agreement about who a child is (Jones and Jemmott, 2010). Although some participants agreed that age was necessary in determining who a child is, a greater number of them believe age was alien to Africa as a determinant of childhood. The themes that emerged in the discussion as to who a child is include:

### Physical development:

In many cultural settings childhood is identified as the stage of development from birth to puberty (Doyle, 1994). In the in - depth interviews conducted, a greater number of the respondents described childhood as the physical development of a person. According to them, childhood ends when a person gets to puberty which could be from 10 to 13 years. The participants in this study except two believe sexual activities could be permitted for people in this age category (10 to 13 years) although the constitution of Ghana clearly states the age of consent for sexual activities at 16 years. In the words of participant 2 irrespective of what age a girl menstruates, it makes her an adult.

**P1:** *“When you are 10 years and you menstruate then you are an adult because your body has developed... you have breast ... Why can't you have sex then?”*

Participant 2 states that, it is difficult to determine a person's age sometimes, since most people have not attained formal education but one way that makes this clear is through the attainment of puberty. In his words:

**P2:** *“...look at me, I no go to school before and how I go know somebody dey grow or not?...even some of the girls do not know their age madam...when you menstruate, we all know you grow and can marry...”*

According to participant 4:

**P4:** *“..when you are 13 years, you're an adult because you can menstruate....you can marry and have babies...”*

The responses in this study confirm the view that, irrespective of the universal age of adulthood, which is 18years, and the age of consent for sexual activities being 16 years, in a number of cultural settings, one's age does not determine adulthood but physical traits ( Boakye, 2009). The perception of parents and guardians of physical development being synonymous to adulthood is



likely to influence the sexual orientation of children. This invariably would predispose children to engaging in sexual activities below 16 years. Although some children develop early, it does not make them adults. Another theme that emerged in the definition of childhood is:

### **Responsibility:**

Bourdillon and Sangane (2012) emphasize that although the definitions of childhood is centered around ones age which are necessary for legal consideration, they do not reflect the responsibilities of children in different cultural settings. Most of the participants opined that the responsibilities of a person determine childhood or adulthood. Participant 1 mentioned that, when you are able to work and earn a wage then you are an adult.

P1: “ *What you can do would tell whether you are an adult or a child...If you are employed as a child, you are regarded as an adult and sometimes you can have sex because you can take care of yourself ...*”

Participant 2 explained how her 11 year daughter had a boyfriend who was 14 years old;

P2: “ *...my daughter had a 14 year old boy as her boyfriend but I regarded the boy as a man because he had a job and was able to provide for the needs of my daughter...we are poor so he helped us...so if you can take care of yourself you are an adult and can do what adults do*

*(laughs)*”

### **Definitions of child sexual abuse**

According to Conte ( 1994), one of the main barriers to cross - cultural understanding of child sexual abuse is the lack of a common definition. Definitions of child sexual abuse in most communities in Ghana are likely to be different from other cultural settings. Themes that emerged are as follows:

#### **Forced Sexual Activity with a child**

There was a consensus from all the participants that sexual abuse occurs only when the child is forced. They agreed that when a child consents to the act, it cannot be regarded as abuse.

In the words of the participants:

Consenting sex with children in exchange for money was not regarded as abuse.

P1: “ *...when the child does not prevent the sexual act it means she agrees to it....the children enjoy the sex so it is not child sexual abuse.....*”

P2: “ *...when a woman forces to have sex with a boy then it is bad but when the child is not forced then it is sexual abuse...*”

P3: “ *Hmm madam, we can say child sexual abuse is more about having sex with a child without her permission. It is as simple as that...*”

P4: “ *Some of the children enjoy it...they are “spoilt children...we can’t say this is child sexual abuse...*”

Participants questioned why an adult should be accused of child sexual abuse when the child consents to the act. They agreed that sexual abuse should only be considered when the child is forced. It is worth to note that children are vulnerable and do not have the legal right to consent to sexual activities. According to Akpabli – Honu ( 2009), any sexual intimacy with a child constitutes child sexual abuse because the victim would not be psychologically and physiologically mature for the act. It is also clear in the laws of Ghana that all forms of sexual behaviours towards a child below the ages of 16 years is regarded as child sexual abuse irrespective of the child’s consent.

## Wide age gap

In most African societies including Ghana, sexual activities between adults and children where the age gap is not very wide is regarded normal ( Jones and Jemmott, 2010). This view is likely to influence how children are socialized into sexual appropriate behaviours and norms in the Ghanaian social set up. Three of the participants explained:

**P1:** *“... when the age of the woman or the man who engages in sex with a child is too wide. then it is abuse because they want to kill the child...how can a 60 year old man have sex with a five year old girl? It is abuse...a wicked one...”*

**P2:** *“ In this settlement, it is not bad for an older man to have sex with a child who is around 12years ... It is not good to even marry a man of the same age... It becomes a problem only when the man is very old with gray hair and goes in for a very young girl”*

**P3:** *“..child sexual abuse is when elderly men go in for very young girls and everybody sees that the man is an old man and the child is a child”*

This perspective of child sexual abuse by parents and guardians in the Ghanaian society is likely to encourage the continuous occurrence of the phenomenon as children would welcome their abuse as normal.

## 6 CONCLUSIONS

On the basis of the findings from this study, the following conclusions can be drawn:

- That, the definition of a child varies from what the UN Convention on the Rights of the Child, the African Charter and the Constitution of Ghana states. Childhood as seen from this study is defined by physical development, puberty and responsibility. It is therefore not surprising that although Ghana prides itself with being the first nation to ratify the UN Convention on the Rights of the Child in 1990, the emerging evidence on the ground shows that the picture of child sexual abuse has not changed much in the country (Plan, 2009). In this regard, urgent efforts must be made by the government, non -governmental organizations and all stakeholders on creating awareness of who a child is as stated clearly in the legislative instruments.
- That, child sexual abuse is perceived as a forced sexual activity with a child. It was also realized that the age gap between an adult and a child sexual who get involve in sexual activities should be wide before it could be considered as abuse. These two perspectives become the foundation that underlines the definition of child sexual abuse in the communities studied. Based on this conclusion, it is possible a far greater number of children are trapped in child sexual abuse which would never come to the attention of the public. These innocent children who are to be protected for future generations would then be suffering in silence which obviously would impact their development. The implications of this for the fight against child sexual abuse are obvious as interventions towards the elimination of child sexual abuse is solely centered on what the Convention on the Rights of the Child states.
- In sum, this paper does not see the culture of the communities studied as a problem. The purpose is to draw attention to the cultural differences of other social settings in appropriate child sexual interventions and legislations in protecting children against sexual abuse. However, there is the need for creating public awareness of child sexual abuse in Ghana from the grass root level in order for children to be socialized properly into behaviours that constitutes child sexual abuse.

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## **Modelling the Digital Divide within the Educational Value Argument**

### **Abstract:**

With educational technology value arguments being pushed by government and community and coupled with the increasing rivalry provided by the global corporatisation of education there is an imperative to get greater outcome driven value from educational technology uptake. Educational technology uptake as described by Cuban, Somekh, Weston & Bain is a complex holistic issue with various stakeholder groups involved. The willingness of the teacher to effectively use new technology in his or her teaching is central to this. How this decision is affected by Prensky's inadequately empirically confirmed digital divide argument has not been sufficiently investigated. This paper seeks to review the digital divide in the modern context using the tools of technology uptake bringing new insight into the complex holistic educational technology acceptance decision.

**Keywords:** Digital Divide; Educational Technology Acceptance; Education Technology Value.

**JEL Classification:** I210 Analysis of Education

### **1 Introduction**

Prensky's 'Digital Native' (Prensky 2001) has spectacularly ingratiated itself into a post Y2k technology-rich society lexicon. The acceptance of this populist terminology, along with the accompanying terms 'Digital Immigrant' and 'Digital Divide', has been extensive but without the scrutiny and testing that empirical review brings. The unquestioned implications to student learning and education of the ideas that Prensky proposed are on the other hand profound.

This paper attempts to review the literature that has emerged critiquing the assumptions and implications of the Prensky mantra pointing to the need for empirical review which leads to the need for an empirical understanding and analysis of the holistic nature of technology usage within an educative context.

Prensky and others have variously described the digital native as proficient with the toys of the digital age, team-orientated, technically talented, effective, experiential, learners, readily multi-task, and are dependent on information access and mutual interaction. Prensky even proposes that *"...their brains are almost certainly physiologically different"* p.10. He then fairly emotively describes the plight of the Digital Immigrant teacher *"..our Digital Immigrant instructors, who speak an outdated language (that of the pre-digital age), are struggling to teach a population that speaks an entirely different language."* p.2.

To many of the Digital Immigrants (and the Digital Ludites) this digital generation gap or 'digital divide' notion rings so true that the remaining claims of physiological change (of the brain) and the desperate need to bridge the digital divide seems a given. Scepticism and empirical scrutiny take a backward step.

Sheely (Sheely 2008) , on the other hand, evokes the socially constructed knowledge theories of Latour (Latour 1987) to debunk Prensky by noting that positive ideas can, with significant populist usage, often become 'facts' over time. Sheely further identifies that Prensky's use of only one study, a PEW Internet study (D. Oblinger & J. Oblinger 2005), and some dubiously generated 'factoids' constitute insufficient supporting evidence for the transformation of the 'Digital Divide' from idea to fact.

She points out that apparently many of the Prensky implications then follow, with the repercussions for current teaching practice being that traditional methods used by Digital Immigrant teachers are ill-equipped to deal with the impatient Digital Native student population. Hence the call by Prensky *"...for a radical review of teaching methodologies"* p.11.

Bennet et. al. (Sue Bennett et al. 2008) in their paper also question the notion of the Digital Native as being driven by an uninformed, post-Latourian, 'moral panic'. At the heart of their critique is the lack of evidence to support the Digital Native. A clear and decisive argument is the emerging substantiation that the Digital Native characteristics in the modern generation are not homogeneously distributed, in fact there appears to be a significant lack of technological sophistication amongst the modern student - particularly in relation to using the newer technologies in their learning. Bennet et. al. sum up by emphasising an alternative measured, empirically-informed strategy; *"...rather than being empirically and theoretically informed, the debate can be likened to an academic form of a 'moral panic'.....a more measured and disinterested approach is now required to investigate 'digital natives' and their implications for education."* p.1 Hence Bennet et. al. characterise the Prensky view as being too simplistic and single-minded, rather indicating that the Digital Divide debate is more complex and diversified.

Rather than being merely a critique Bennet et. al.'s appraisal is based on a rarely conducted (within an Australian educational context) survey of technology usage within a population of Australian tertiary students. Namely, the relationship of student usage of technology for personal purposes, contrasted with the uptake of technology for learning purposes. It finds that students may be technologically conversant on a day-to-day, personal basis but not nearly as much in using technology for learning, particularly in relation to the newer Web 2.0 technologies. This is despite the students valuing the use of technology in their learning.

A further detailed analysis of the data set described by Bennet et. al. reinforces the view that Prensky's Digital Divide is over-simplistic and emotive with the call for radical change in the way students are taught which is also provided by Kennedy et. al (G. Kennedy et al. 2008) in their analysis of first year student technology acceptance. Applying the empirical blowtorch in investigating the (1) *"...the degree to which incoming first year students at a large Australian metropolitan university access and use an array of technologies and technology based tools."*, (2) *".... to determine the degree to which students themselves report wanting to use particular technologies to support their studies at university "* and, (3) *"... to determine whether the extent to which students use technology in their everyday lives is related to their preferences for their use at university."* p.485. The analysis clearly provided sufficient evidence to negate the 'one size fits all' approach to the integration of ICTs into university curricula as well as the clear indications that students who use a particular technology in their everyday lives also want to use it in their studies.

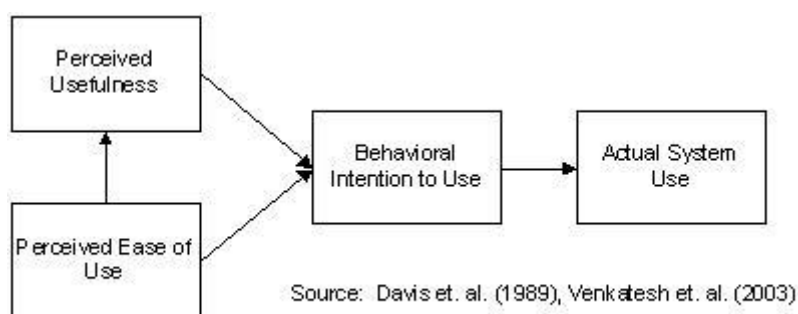
An earlier paper (G. Kennedy et al. 2007) outlining preliminary findings from the same large multi-university study had challenged two key Prensky conclusions; that digital natives are very different

to their predecessors in their expert use of technology, and, that their usage has effected physiological change in their brains resulting in a radical change to how they should be taught.

The evidence from the Australian multi-university study of Web 2.0 technology uptake indicated low web tool usage for learning purposes amongst the modern Australian student population surveyed concluding that, "*Further research is need to provide evidence of whether and how carious applications of emergent technologies and tools in higher education actually improve student learning outcomes and under what circumstances.*" p.524

The subsequent analysis of another similar dataset by Kennedy et. al. (G. E. Kennedy et al. 2008) questions the digital divide by investigating, through the analysis of survey data from a large multi-university Australian study using a factor analysis that extracted eight key factors, to compare the differences between the groups based on Role, Age and Gender. The results were surprising even though there was some evidence for the Digital Divide in non-educative technology use; in general there was little support for the Digital Divide in the university context where Role differences are small. In fact here too there were recommendations for the careful cost-benefit based implementation of technologies in the classroom, in particular, the use of non-education based applications.

The examination of the Digital Divide using Role differences is an interesting slant on the evidence gathering suggested by earlier studies. In Information Systems' research technology acceptance has been closely analysed over a significant period during the 1990s and 2000s. Much of this research is based on the use of the Technology Acceptance Model (TAM) and its variants. TAM was originally proposed by Davis (F D Davis 1989) who used a form of Roger's diffusion theory (Rogers 1995) . Davis studied ease-of-use and perceived usefulness determining that ease-of-use may be antecedent to perceived usefulness which both informed the intentions to use. This modelling had provided for a tight-knitted empirical understanding of technology usage and in particular, the drivers for technology acceptance/uptake.



The model has been extensively modified and contextualised by various researchers including Szajna (Szajna 1994) culminating in a seminal study by Venkatesh et al., (Venkatesh & Fred D. Davis 2000) which attempted to integrate the main competing user acceptance models, by formulating the Unified Theory of Acceptance and Use of Technology (UTAUT).

This model was found to outperform each of the individual models. Much testing and contextualising of the model has been undertaken since. Contextualisation and testing of TAM has also been developed within education fields. Examples include (Holden 2011), (Moran et al. 2010), (Park et al. 2009), (Jan & Contreras 2011) to the extent that a recent study (Teo & Luan 2011) investigates the use of TAM in a cultural education context which might provide a useful lead into how empirically modelling technology usage in education.

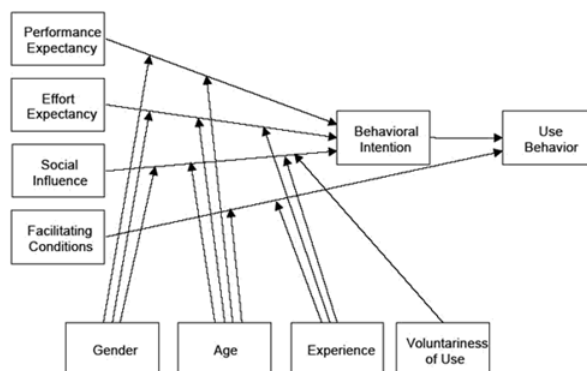


Figure 1 From Venkatesh, V., Morris, M. G., Davis, G. B., & Davis, F. D. (2003). User acceptance of information technology: Toward a unified view. *MIS Quarterly*, 27(3), 425–478.

In the pursuit of an understanding the basis for which technology is used for teaching there have been some very early debates around the usefulness of technology/media in learning. A discussion of Richard E. Clark's (R E Clark 1983) stands out as seminal commentary on the media's influence on the learning process. Clark's views, forthright as they were at the time (circa 1983), were based on a meta-analysis of the literature then available. His conclusion that "...consistent evidence is found for the generalisation that there are no learning benefits to be gained from employing any specific medium to deliver instruction." p.2 was in stark contrast to Marshall McLuhan's popular catchcry at the time - "*The media is the message*". Clark iterated that the change to learning, if it exists, comes about through the instructional design necessitated by the use of the media in learning activities. It is the method of instruction that leads to the learning not the medium. Quoting a Kulik, et. al. (J. A. Kulik et al. 1980) study that correctly designed step-by-step structured courseware has the same effect whether delivered in text form or via computer instruction, Clark was adamant that it is necessary to separate the method from the medium to truly test learning variance. The analogy used is one of the medium as the delivery vehicle and the instructional method as the product being delivered. Clark invokes Saloman (Salomon 1980) to add weight to the argument with evidence that students "...both high and low achievers gain greater results with structured instruction approaches but know that they need to invest less effort in the non-structured approaches" and with their teachers "...equally as capable of instructing as machines coded in hierarchical learning methods." p.13 Clark then concludes by recommending that the need to concentrate efforts on teaching media studies is pointless and that the effort should be directed at "...task, learner aptitude and attributions." p.14.

Needless to say the absoluteness of Clark's position would only require some contrary evidence of substance to place his stance into some significant jeopardy. Kozma (Kozma 1994) does exactly this by clearly identifying Clark's premises and then rightly says that we shouldn't be putting our head in the sand by not researching the effect of media on learning - quarantining media uptake research as a waste of effort. Instead, we should undertake research into first proving that a media learning effect doesn't exist (or does). Kozma points to Clark's limited use of behaviourist studies that lack "...any mentalist notions or descriptions of the cognitive, affective, or social processes by which learning occurs." p.2 Kozma instead proposes the creation of a theory of media grounded "...in the cognitive and social processes by which knowledge is constructed." p.2 In other words, the media isn't divorced from the instructional design, they go hand in hand. A number of example studies are referred to where Kozma seeks to debunk Clark's limiting assumptions; including the Microworld and ThinkerTools projects with which he was personally involved and studies from

(Guttman 1971); (Duffy, Thomas M.; Jonassen 2013) and (Hlynka & Belland 1991). He then concludes by mapping out the need to do the empirical work towards answering questions such as "*Do media influence learning?*" to "*In what ways can we use the capabilities of media to influence learning for particular students, tasks, and situations?*" p.22 before the push to re-structure education would get underway.

Clark later (Richard E Clark 1994) tried to refute Kozma by (I think rather emotively) reiterating his earlier mantra that no learning benefits can be gained by introducing media into the classroom without the underpinning instructional design framework. Media platforms are merely vehicles with more than one media platform being able to achieve a similar learning effect. There are no learning benefits to be gained through the use of media alone. He quotes a number of previous studies that support his case (Lumsdaine 1963); (Mielke 1968); (Schramm 1977); (Dickie, Kenneth, W., Levie, Howard 1973) and (Clark, Richard E., Salomon 1986).

He then points out that the true test for his argument - the ability to interchange media to achieve the same effect on learning (which he calls the replaceability test). And, in so doing, the only issue needing consideration in selecting the type of media to use is one of economics. That is, which is the most cost-effective media vehicle capable of delivering the instructional design for the proposed learning outcomes.

Clark also dismisses any apparent (having a dig at Kozma) link between media and learning as a failure to control for the instructional method. He emphasises this point by challenging the apparent success of CBT as an example of the success already built into an underlying CBI framework. "*The technologies deliver the simulation method - it is the method that effects the change - the media deliver it. The media that does this in the most cost-effective manner is the one for which we should plug. And of the ease of use of the technology so that the delivery method is the one associated with the learning not because of the learning but because of the "wow" and ease of use.*" p.22.

These jousts are now steeped in the past where the notions of technology acceptance were not fully developed. There have been significant changes in the way technology is viewed as it has initially slowly, and then immersevely come into common usage (e.g. 50% Australians now have smart phones). The use of technology despite large amounts of public funding in the educational context has not been so forthcoming (Somekh 2006). Usage of technology at home has outstripped its usage for education purposes. Somekh, 2006 carries the debate started, somewhat simplistically in the 1980s, to another level of sophistication. She recognises that widespread use of technology in the classroom is a significantly more complex matter. Somekh characterises school communities as holistic organisations with subliminal resistance to change. Teachers, parents and the school community, the students even, are complicit in the unreformed institution of the school. In contrast the technology enabled internet encourages multi-tasking, collaborative, anywhere, anytime, instant information access, and, a lack of order or structure - anathema to the ordered structured controlled school environment. Internet values and traditional school values are polar opposites (Sharples 2002)

*"The circumstances, conditions and the very status of knowledge, learning, teaching and researching are currently in a state of profound upheaval under the double impact of rapid and far-reaching technological changes and the massive assault on longstanding narratives of foundation and legitimation."* p.1. (Lankshear et al. 2000)



Somekh's radical call is based on the understanding that schools need to be pro-active in acceptance of ICT. Recognising the difficulty in introducing technological change that can be accommodated within school values and mores. She identifies 4 implications, (1) ICT in schools is often a discrete subject, (2) teaching ICT in schools assumes no prior knowledge from the students, (3) teaching ICT in schools appears to widen the digital divide, and, (4) constraints on Internet access by schools. Somekh's countering of these issues is summarised by the need to reduce the isolation of ICT curricula by building an integrated approach that is based on a holistic paradigm (Lewin et al. 2003). This approach caters for a spectrum of ICT capability amongst a student population and calling for a wide usage of the internet in the classroom by recognising that the dangers of usage are small and taking on the Cuban, 2001 principles described in the NotSchool experiment and study.

McLuhan's (McLuhan 1964) call of the 60s "*the media is the message*" has therefore contemporaneously taken on new meaning and has the hallmarks of Illich's de-schooled society (Illich 1971) setting with ICT providing the fundamental personal and social enabler that may be the extension of the ideal of the digital native. (Turkle 1995) categorises the computer used in this context as a portal acting as bridge to the world through the screen.

Cuban (Cuban et al. 2001) also has reservations about the effect of new technology as reforming, in fact any implementation he says, is only successful when it is used to re-enforce existing practices without innovation. This goes to the essence of the matter, where any programs introduced into school systems imposed from external drivers alone have limited success. This is reinforced by the realisation that school culture is resistant to the acceptance of programs that don't reinforce established school practices. Very little can filter down to noticeably effect the routine practices of teachers and students. Innovative teaching on a pervasive scale is a myth. Cuban hence blames implementation policies with a significant lack of teacher expertise in using informed research to innovate within the classroom.

Weston & Bain (Weston & Bain 2010) consider the big questions of scalable and sustainable change which they claim needs to be looked at before any new vision of education can be fulfilled. In the professions technology becomes part of doing business but in education technology appears to merely automates the practices of the prevailing paradigm. Form and function of usage has driven access to computers, not vice versa. Educators need to change their acceptance practices to the ideal educative practice where computers are not thought of as being separate from the innovative teaching culture - but holistically integrated.

Weston & Bain implore educators and schools to become capable of sustaining and realizing the benefit of cognitive tools. They describe six necessary components:

- The school community must simply define rules describing teaching and learning
- Use the rules to holistically embed aims, operations and actions
- The whole school community commits to the embedded design of the school
- Continuous feedback from the whole school community determines its progress
- These dynamics form the school community's schema, a shared school charter for practise
- Finally, "*...guided by the use of their schema, community members demand systemic and ubiquitous use of technology, as opposed to idiosyncratic and sporadic use of technology described in the research on many 1:1 computing programs.*" p.1`2.

Clark's rigidity seems somewhat dated now as technology has increased in sophistication with the move away from away from a hardware and software focus where the separation of design and

technology has accelerated. Even though elements of truth reside in what he says I would think that the modern view is more in tune with Kozma's stance where the design and technology are perceived to be in unison. In fact the recent views of Somekh, Cuban and Weston & Bain paint a landscape of educational technology implementation that is more complex, involved and requires adoption by whole of school communities. Communities which are more sophisticated in structure than those of the Clark era. They need to be, as holistic school communities, naturally and dynamically engaged with the teaching and learning task. In fact successful technology uptake is described as being a natural consequence of this holistic approach to implementation of new programs. A significant consequence of this approach is the need to have an informed understanding of the interplay between the various stakeholders despite the natural reluctance of the school to alter the traditional 'chalk and talk' teaching paradigm.

This interplay has at its heart the stance that the teacher takes in implementing new technology. Modelling the drivers from a teacher's perspective and then understanding the part this plays within the school's "*..explicit schema...*" will go a long way to defining the key organisational dynamics in making sure that the technology cost-benefit equation is minimised. In this modelling process much can be learned from the extensive research base that has been accumulated in attempting to understand the technology uptake in business environments.

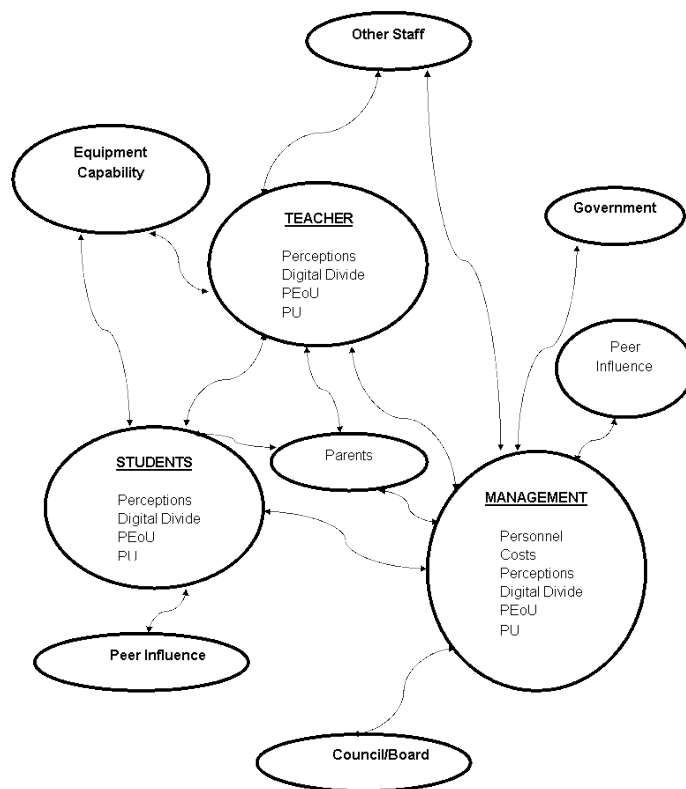
In the discussion above the referred to authors indicate that technology uptake for the purposes of learning is significantly more complex than is suggested by research described by the TAM established by Davis, and more recently Venkatesh & others.

The Venkatesh model has been a culmination of significant research interest by the information systems community over time but is limited by the nature of the modelling designed for the general uptake of technology in a business orientated environment. In the teaching take up of technology the issues are more complex with the multi-stakeholder, holistic uptake in the learning context a very different proposition than a merely TAM adapted for a teaching context. In an intimate analysis to see how a 'Digital Divide' effect may come into play when new technology is being proposed for education scenarios the teacher stakeholder perspective is crucial, and, in particular, modelling that reflects the 'value' of new technology in its ability to influence student learning. In the diagram below some of the possible stakeholder relationships identify the central nature of the teacher.

In education the issue of technology uptake cost effectiveness is just as important with spirited debate in justifying ICT usage. 'White elephant' cases litter the instructional technology landscape adding an unwarranted cost burden to an already tight education budget. The introduction of new instructional technologies needs to be scrutinised for the "value" they bring to student learning outcomes. Modelling the degree of potential usage by the teacher as one of the essential stakeholders, within educational user communities, would seem to be a very appropriate evaluative process. And, in particular, discovering the degree which the so called 'Digital Divide' affects the teacher's acceptance of new instructional technologies would seem to be essential.

At a macro level a study of this nature should be important for government education administrations who contemplate the introduction of new instructional technology programs that need to be assessed through cost versus benefit analyses.

**Influences on Education Stakeholders  
Intending to Use  
Technology for Learning**



At a micro level school administrations should be made aware of the factors that would contribute to a successful local technology implementation and providing a spring board for developing teaching

The literature points to a recognition of the importance of the teacher perspective in the uptake and sustained use of technology in the classroom. Drawing upon this discussion teacher efficacy has been seen as a key driver. Teacher efficacy is one of those concepts that have been hard to define. (Tschannen-Morana & Woolfolk Hoy 2001) in their seminal paper trying to tie down the concept define it as "...the ability of a teacher to bring about positive student outcomes on a number of factors including feedback-orientated student outcomes, motivation and classroom behaviour and to a lesser extent students' own sense of efficacy." p.785 The authors admit the difficulty in being able to measure the concept for empirical evidence purposes.

Attempts at empirical study of teacher efficacy, was first undertaken by the RAND Corporation which after analysing a Primary School survey based study data came up with the simple equation:

$$TE = GTE + PTE$$

where

GTE: Student's motivation and performance depending on other external factors i.e. General Teaching Efficacy (GTE)

PTE: Teacher's confidence in being able to deal with any adverse teaching situations i.e. Personal Teaching Efficacy (PTE)

The limitations of the 2-factor analysis were soon realised so new attempts at building instruments based on the RAND study included Guskey's (Guskey 1980) 30-item instrument used to show that

teachers were more confident in their ability to influence positive outcomes than to prevent negative ones; and, Rose and Medway's (Rose & Medway 1981) 28-item measure called the Teacher Locus of Control (TLC) in which teachers were asked to assign responsibility for student successes or failures by choosing between two competing explanations for the situations described. Of these the TLC turned out to be a better predictor in teachers' willingness to implement new instructional techniques than earlier instruments.

A little later Bandura's social cognitive theory and his construct of self-efficacy added significant importance to the evolving empirical developments. Bandura (A Bandura 1977) defined perceived self-efficacy as "*...the ability to manage the actions needed for success*".

Gibson and Dembo (Gibson & Dembo 1984) developed the Teacher Efficacy Scale (TES), building on the formulations of the RAND studies whilst adding the Bandura developments. They used an instrument of 30 items on a 6-point Likert scale as a global measure of teacher efficacy which was derived from the sum of all TLC and Bandura items. Two redefined subscales emerged from the subsequent factor analysis - Personal Teaching Efficacy (PTE) and General Teaching Efficacy (GTE).

The Gibson and Dembo teacher efficacy instrument measuring teacher efficacy, popular as it had become, lacked clarity around the meaning of the two factors as well as exhibiting instability of the factor structure necessitated further evolution.

Attempts at clarity through contextualisation and specificity were undertaken in studies (Schunk et al. 2002) that had noted that the level of specificity as one of the most difficult issues to be resolved for cognitive or motivational theories that proposed domain specificity. A good example of this is the Enochs, et. al (Enochs et al. 1999) study comparing science versus chemistry teaching efficacy relating the teacher's experiences taking science courses with laboratory experiences and experience teaching science, while chemistry self-efficacy was related to chemistry course work involving lab experiences and chemistry teaching experience.

Recognizing that many standard efficacy instruments overlooked the specific teaching context, some researchers have modified the Gibson and Dembo instrument to test teacher efficacy within particular curricula. Emmer & Hickman (Emmer & Hickman 1991) adapted the instrument to include efficacy for classroom management (3 subscales) which correlated with preferences for using positive strategies for classroom management, that is, strategies aimed at increasing or encouraging desirable student responses through praise, encouragement, attention, and rewards.

Others used a combination of items from several instruments (Midgley et al. 1989), (Brookover et al. 1978). Bandura (Albert Bandura 1997) included seven subscales: efficacy to influence decision making, efficacy to influence school resources, instructional efficacy, disciplinary efficacy, efficacy to enlist parental involvement, efficacy to enlist community involvement, and efficacy to create a positive school climate. This is now clearly took on board a very holistic view of teacher efficacy providing a multi-dimensional view of teacher efficacy beliefs without being too restrictive.

The initial simple models based on the RAND studies created a vagueness and lack of clarity around the general teacher efficacy definitions. Poor correlations contributed to the lack of explanation. Ensuing attempts to produce more complex models lead to reliability and validity issues. The truth seemed to lie between with models needing to find the proper balance between specificity and generality. The PTE having to do with a teacher's feelings of competence are clearly

understood but the external factors that are external to the classroom and are related influence, power and impact are much harder to identify, quantify and measure.

Closer analysis of GTE led Bandura (Albert Bandura 2001) to attempt this balance by recommending the inclusion of various levels of task demands.

But, after nearly a quarter of a century of work on teacher efficacy, it seems apparent that a new measure of teacher efficacy that is both reliable and valid was needed (Tschannen-Morana & Woolfolk Hoy 2001) despite the usefulness of Bandura's model with Pajares (Pajares 1996) noting that, "*...specificity and precision are often purchased at the expense of external validity and practical relevance*". p.1.

The Tschannen-Moran et al. (Tschannen-Morana & Woolfolk Hoy 2001) model of teacher efficacy suggests that teacher efficacy must take into account personal competence and external influence factors. At the time, measures of teacher efficacy didn't include both.

To overcome these limitations they used a new measure, named the Ohio State Teacher Efficacy Scale (OSTES) (Suell & Piotrowski 2007) based on Bandura's work discarding Bandura's 30-item scale, 23 items were retained and 7 were discarded as not being representative of frequent activities within a teachers' work life. The construction of this scale attempted to build on earlier instruments and provide the balance between specificity and precision and external validity and practical relevance with a significant degree of success.

Others such as Mishra & Koehler (Mishra & Koehler 2006) in their article on educational technology uptake/usage attempt to address previous criticism of research in the area and its lack of theoretical grounding recognising that "*...technology integration into teaching is complex, multifaceted and situated.*" p.1017 and through the lack of recognition of this complexity resulted in the shortfall in the expected dramatic changes in learning that the widespread introduction of digital technology into the classroom was meant to effect. Subsequent government and community questioning of the investment in technology for teaching seems to have some validity.

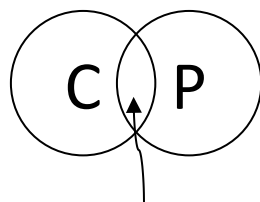
*"Part of the problem, we argue, has been a tendency to only look at the technology and not how it is used. Merely introducing technology to the educational process is not enough. The question of what teachers need to know in order to appropriately incorporate technology into their teaching has received a great deal of attention recently. It has become clear, however, that our primary focus should be on studying how the technology is used."* p.1018 (Mishra & Koehler 2006)

The problem in educational technology usage has been seen traditionally as a simplistic one with a greater monetary investment being the only driver to successful uptake and long term usage. Grounding educational technology usage in theory helps contextualises usage into a complex set of underpinning relationships that are organisationally holistic in nature. In so doing, a richer understanding of the usage and the consequent revelation of the drivers behind the uptake and long term usage of educational technology should lead to greater success in educational technology usage and better value for the community's tax dollar.

Mishra & Koehler (Mishra & Koehler 2006) in their attempt to develop a theoretical grounding framework propose the use of Design Experiments as a basis for providing a conceptual framework. They dub this the, Technological Pedagogical Content Knowledge (TPCK) which would "*.... transform the conceptualization and the practice of teacher education, teacher training, and teachers' professional development.*" p.1021

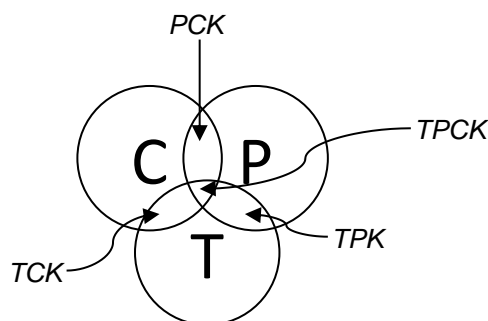
The framework describes teaching as a highly complex activity requiring a wide knowledge and skill set used in an ad-hoc structure. The expert teacher is then the best equipped practitioner within this scenario.

Based on Shulman (Shulman 1986) TPCCK combines both Content and Pedagogical Knowledge intersecting as Pedagogical-Content Knowledge.



*Intersection equates to subject matter being transformed for teaching*

Mishra & Koehler (Mishra & Koehler 2006) add a third knowledge element for technology usage creating a complex intersecting set of ideas.



where:

Content Knowledge (CK)	= the actual subject matter that is to be learned or taught
Pedagogical Knowledge (PK)	= deep knowledge about the processes and practices or methods of teaching and learning
Technology Knowledge (TK)	= knowledge about standard technologies
Technological Content Knowledge (TCK)	= the manner in which technology and content are reciprocally related
Technological Pedagogical Knowledge (TPK)	= understanding of the capabilities of technology in learning settings
Pedagogical Content Knowledge (PCK)	= knowledge of what makes concepts difficult or easy to learn

and, the integrative nature of teacher knowledge culminating in the combination of all three forms:

Technological Pedagogical Content Knowledge (TPCK) = "...model of technology integration in teaching and learning argues that developing good content requires a thoughtful interweaving of all three key sources of knowledge: technology, pedagogy, and content....." p.1025

For the aspirational teacher this defines an expert teacher as one who would bring into play all of the integrated, dynamic elements of a TPCK knowledge base anytime they teach.

With this framework a different holistic curriculum design is possible. Mishra & Koehler (Mishra & Koehler 2006) call it - Learning Technology by Design - "...affords students the opportunity to transcend the passive learner role and to take control of their learning. The move to design-based activities has implication for instructors as well. Design cannot be taught in conventional ways; design is experienced in activity, depends on recognition of design quality, entails a creative process, is understood in dialogue and action, and involves reflection in action..." p. 1036.

Not content to define TPCK the authors then proceed to describe

(1) various teaching scenarios using TPCK learning by design:

- Making Movies
- Redesigning Educational Web Sites
- Faculty Development and Online Course Design

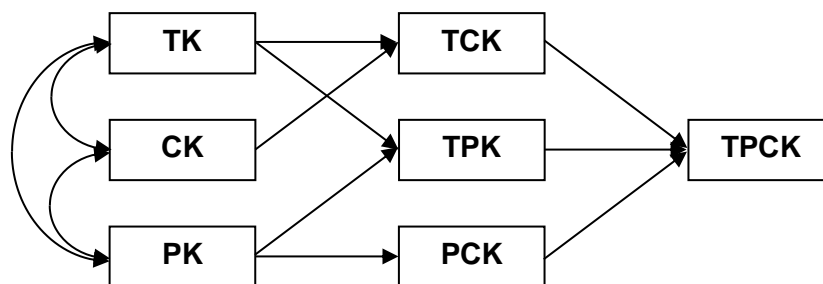
and;

(2) using TPCK as a framework for studying the development of teacher knowledge about educational technology by studying design teams as they worked on developing an online course:

- a senior faculty member at a college
- three master's students

(Koehler et al. 2004)

Attempts to verify the TPCK framework included Chai's (Chai 2013) survey of TPCK contextualisation and verification of all the 7 factors with CP, PK, TK indirectly via the TPK, TCK, PCK factors.



Results indicated positive effects of the basic knowledge factors of CK, PK, and TK were indirect through the second layer of knowledge factors (TPK, TCK, and PCK).

The study used Asian pre-service teachers for cultural diversity, 550 from China, HK, Singapore & Taiwan. The survey instrument was adapted from an earlier Chai (2011b) study and had 36 items which were then subjected to expert review. Results provided good support for the TPCK model.

This enhanced the notion of complexity in technology usage with a need to reconsider what has to be taught and/or created, how it should be taught and how pre-service teachers' competencies should be assessed.

The discussion so far has concentrated on the precursors for teacher drivers in taking up technology in the first instance with some interest in how these might be of use initially. Too often though technology used in education, which may initially show some promise is found to be 'collecting

dust' in the longer term. This is where there is a chronic disconnect between the sustainable use of educational technology and the uptake drivers. Recent research in this arena has looked at the notion of continued use with a distinctly different set of drivers than the antecedents to the drivers behind the teacher stakeholder uptake and initial use of teaching technology.

Bhattacharjee (Bhattacharjee 2001) looked at this issue in relation to a typical business environment and was motivated by the need to look at variables that drive the continued use of technology rather than just the initial acceptance as provided by earlier research based on modelling such as the TAM.

Many variables that underpin initial technology acceptance have been well researched but current acceptance models provide a limited explanation of and may sometimes contradict, continuance behaviour.

Bhattacharjee's model was based on Expectation-Confirmation Theory (ECT) and further refined using other Information Systems (IS) studies.

The ECT model is based on marketing theory and argues that continued usage is vital as it is five times cheaper to engage with existing customers than trying to pursue new initial usage (new customers). Using this Bhattacharjee's (Bhattacharjee 2001) research was then directed to answer the following two questions:

1. *What are the motivations underlying user intentions to continue using IT after its initial acceptance?*
2. *How do these motivations influence continuing usage intention?*

p.355.

To begin to answer these questions the author calls on marketing theory and consumer behaviour recognising the following stages that underpin ECT theory:

1. *Consumers form an initial expectation.*
2. *They accept and use the product or service and form perceptions about its performance.*
3. *Compare the performance against initial expectations for a degree of confirmation.*
4. *Build a satisfaction level based on 3.*
5. *Satisfied customers form a re-purchase intention while dissatisfied ones stop using the product or service.*

p.355.

The author then grounds information systems continuance into the ECT model recognising that it is widely used in consumer behaviour literature to study consumer satisfaction, post-purchase behaviour and service marketing as ECT has been widely confirmed and demonstrated over many different continuance contexts.

The basis of ECT is recognition that satisfaction is the key to customer loyalty by both changing initial expectation and providing a form of feedback for the continued usage of IT.

ECT also includes expectation as an initial determinant of satisfaction acting as a baseline from which to arrive at evaluative judgements. Modifying the ECT for information systems usage needs draws from TAM's Perceived Usefulness construct "*...is an adequate expectation in the IS continuance context because it is the only belief that is demonstrated to consistently influence user intention across temporal stages of IS use...*" p.355.



The author then draws on information systems continued usage research which is similar to a consumer's repurchase decision because it follows an initial purchase decision, is influenced by the experience (feedback), and, can lead to reversal of the decision.

A user's information systems usage continuance is then determined mostly by their satisfaction with prior information systems use. But in preliminary information systems adoption the PEU & PU constructs are important so should also be influential in continuance. Some studies show in fact that PU is whilst PEU drops off in effect over greater usage - to be expected. So combining these sets of possible influences creates a series of hypotheses:

*H1: Users' level of satisfaction with initial information systems use is positively associated with their IS continuance intention.*

*H2: Users' extent of confirmation is positively associated with their satisfaction with information systems use.*

*H3: Users' perceived usefulness of information systems is positively associated with their satisfaction with information systems use.*

*H4: Users' information systems continuance intention is positively associated with their perceived usefulness of information systems use.*

*H5: Users' extent of confirmation is positively associated with their perceived usefulness of information systems use.*

p.356.

So the continuance model is similar to TAM but different because it is richer by including extra factors associated with continued usage.

Bhattacharjee then used an Online Banking customer survey based on 1000 customers to test the hypotheses with the instrument constructs developed from previous surveys - Mathieson's Behavioural Intention scale, Spreng's Overall Satisfaction scale, Davis' PU scale and a new Confirmation construct. There was a 12% response rate from a well distributed sample of group types. Further analysis eliminated the problems with confirmation construct measures resulting in three distinctly created constructs that avoid the confusion and misunderstanding found in previous studies. Validity, reliability, goodness-of-fit analyses indicated the appropriateness of the scale items used with, notably, PEU still exhibiting robustness in relation to Continuance of Usage but with a declining effect over time.

The implications for firms included PU for acceptance intention is dominant but Satisfaction for continuance intention is also dominant which implies that "*...inform new (potential) users of the potential benefits of IS use and educate older (continued) users on how to use IS effectively so as to maximise their confirmation and satisfaction with IS use.*" p.364.

Koufaris (Koufaris 2002) improves the modelling by comparing three models from different research arenas in an attempt to model online consumer usage as a prelude to continued usage modelling. These three models were:

- TAM from adoption of new technologies in IS
- Consumer Behaviour theory from Marketing
- Flow Model from Psychology

Both TAM and Consumer Behaviour on the web had been adequately researched but as a basis of increased usage consumer behaviour this research indicated that there is clear difference between

initial acceptance and continued usage. With loyalty online being very low, continued usage research particularly in relation to the "conversion" of Web surfers to Web customers had taken on added urgency.

By using Flow Theory's psychology basis Koufaris draws on the ideas around the sensation a user derives from a single-minded focus on a task, with the two variables used as the Flow instrument (in a web consumer experience context), being Pleasure and Dominance.

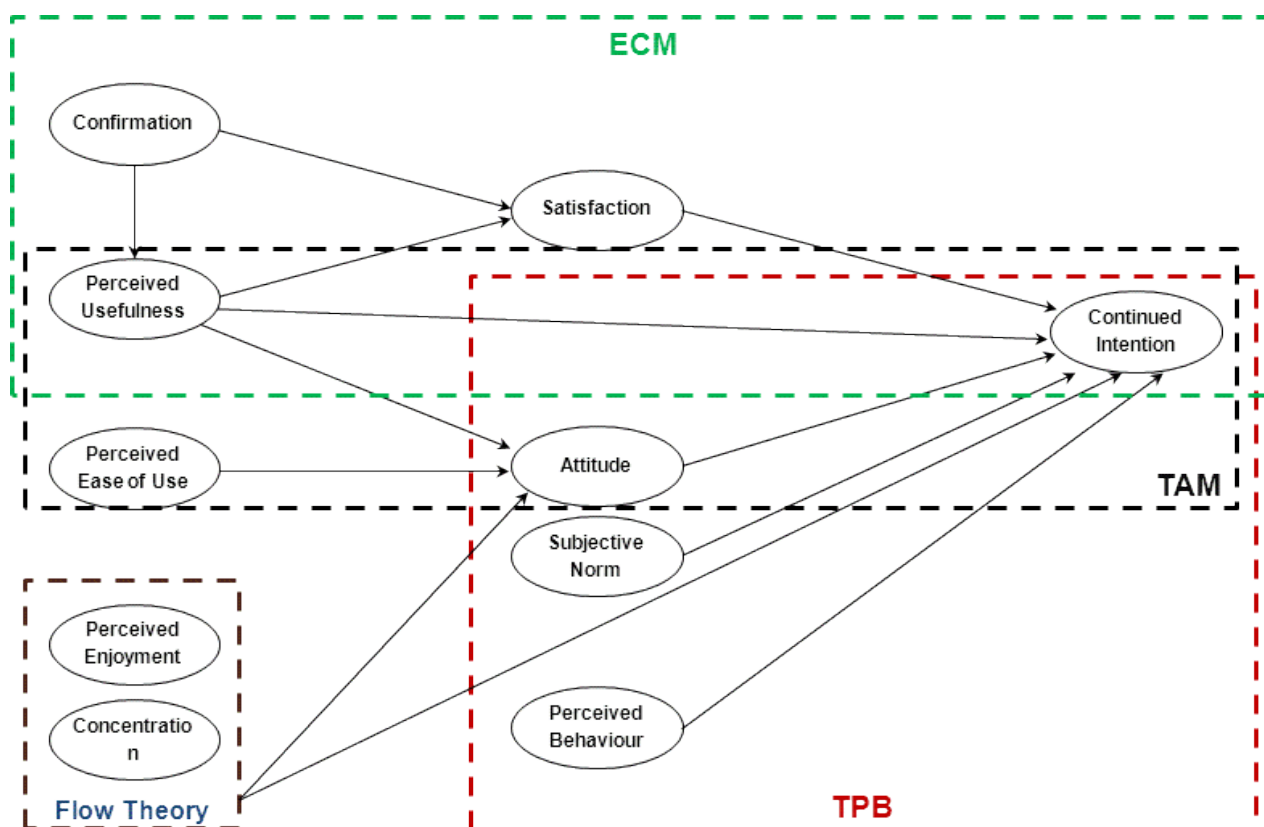
A Web bookstore was used as the test case with recruited customers to visit its website visiting twice to undertake two parts of a questionnaire. Results indicated that shopping enjoyment as the main link of intention to return, some relationship from PEU, but surprisingly there were no links to unplanned purchases raising some doubt about the effect of Flow variables. This put into question the use of Flow in the context of online shopping.

Lee's (Lee 2010) follow up study attempted to model online continued buyer behaviour by using three sets of previous research, TPB & TAM from IS, Consumer Behaviour from Marketing and Flow from Psychology. The author builds on the earlier work by Bhattacharjee and Koufaris to explain and predict a users' intentions to continue using e-learning. The hypothesized model was validated empirically using a sample collected from 363 learners of a Web-based learning program designed for continuing education.

The author recognised that much effort and large sums of money have been spent to develop e-learning programs for users which have generally resulted in very low continued usage (Chiu et al. 2007). They also recognised that users discontinue using e-learning after initially accepting it with continued usage being of great importance in an educational context.

The four models were used because even though ECM had proven to be a robust model for continued IT adoption, it employed only three variables to explain behavioural intention, namely satisfaction, confirmation, and post-adoption expectation whereas a user's behavioural intention toward adopting IT will also be affected by other factors, such as the opinions of important individuals (subjective norms). TPB addressed this gap. While TPB captured the roles of individuals, organizational members, and social influences on behavioural intention, TAM provided two attitudinal beliefs, namely perceived ease of use and perceived usefulness as two major antecedents of attitude, which make up the precedent factors of attitude for TPB. When combined, these theories may collectively provide an improved and more comprehensive understanding of the cognitive processes and behaviours related to IT usage than when each theory considered alone. Adding the flow theory allowed the capture of the elements of motivation related to fun and entertainment. (Koufaris 2002).

Lee's (Lee 2010) had gone further by integrating ECM, TAM, TPB and Flow theory in explaining long-term e-learning usage intention and an empirical evaluation of which factors were critical to affecting this intention. The findings from this paper may therefore help bridge the existing gap between acceptance and continuance streams of e-learning usage research.



Chai, C.S., 2013. Validating and modelling technological pedagogical content knowledge framework among Asian pre-service teachers. *Australasian Journal of Educational Technology*, 29(1), pp.41–53

Where the hypotheses were:

- H1: Users' satisfaction with e-learning is positively related to their continued e-learning usage intention.
- H2: Users' confirmation of expectations is positively related to their satisfaction with e-learning.
- H3: Users' perceived usefulness of e-learning is positively related to their satisfaction with e-learning.
- H4: Users' perceived usefulness of e-learning is positively related to their continued e-learning usage intention.
- H5: Users' confirmation of expectations is positively related to their perceived usefulness of e-learning.
- H6: Perceived usefulness is positively related to behavioural attitude toward e-learning.
- H7: Perceived ease of use is positively related to behavioural attitude toward e-learning.
- H8: Perceived ease of use is positively related to perceived usefulness of e-learning.
- H9: Behavioural attitude toward e-learning is positively related to the continued intention to use e-learning.
- H10: Subjective norm is positively related to the continued intention to use e-learning.
- H11: Perceived behavioural control is positively related to the continued intention to use e-learning.

p.507-509.

Each item corresponding to the constructs was measured using a seven-point Likert scale with the items for:

- perceived usefulness and perceived ease of use were adapted from Davis (F D Davis 1989)
- subjective norm, perceived behavioural control, and attitude adapted from Taylor and Todd, (Taylor & Todd 1995)
- flow perceived enjoyment and concentration adapted from Moon and Kim (Moon & Kim 2001), and the continuance intention, satisfaction, confirmation adapted from Bhattacharjee (Bhattacharjee 2001)

The questionnaire was pilot-tested by convenience sampling. There were 150 responses, of which 123 were complete, giving a valid response rate of 82%

Reliability and a factor analysis indicated that the items had high loadings on their related factors and low cross-loadings on other factors, showing good convergent and discriminate validities.

Lee's model indicated that satisfaction had the most significant effect on users' continuance intention, with perceived usefulness, attitude, concentration, subjective norm, and perceived behaviour control as weaker predictors. The implications of these findings for e-learning practitioners include:

- more use of rich multimedia
- creative approaches to make learning 'fun'
- use challenging tasks
- foster student collegiality using collaborative media

As a basis for modelling teacher centric sustainable technology usage in the classroom for the purposes of positive student learning outcomes this model offers a lot of promise as it is complex, based on holistic notions, includes age specific variables and models continued intentions.

The basis for discussion in this paper is arriving at a way of modelling technology usage in the classroom noting that sustained continued usage drivers are different to those that deal with technology uptake. The teacher as key stakeholder in an educative community involved in various ways in the initial uptake decisions and less so in the continued usage is central to the successful long term implementation of technologies that build positive measurable student learning outcomes. Simple digital divide notions, made popular by Prensky, are insufficient in advancing the deep understanding required. Evolution of understanding that takes into account the complex nature of the use of technology in a holistic educative community requires grounding in related theories (TAM, ECM, TPB, TPCK, Flow Theory), recognises the central role the teacher, empirically tests representative hybrid models and provides the measurable implications for practice that is needed to accurately drive successful technology usage.

Intentions from here on:

- Further investigate empirical holistic empirical sustained usage models
- Build hypothesised technology sustained usage model for the purpose of positive student outcomes
- Place age within model to represent digital divide factor
- Use questionnaire based on previous work to survey a stratified group of teachers – lecturers, sessional lectures, VET teachers, VET trainers

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**A Study on the Efficiency Level of Family Healthcare Centers Using the Data Envelopment Analysis Method: The Case of Konya****Abstract:**

In this study, efficiency levels of 19 different Family Healthcare Centers which are located in Konya- Meram were measured using the Data Envelopment Analysis (DEA) method. In this study, data for the year 2012 were used and they were obtained from the Public Health Agency of Konya. Efficiency evaluation was performed by means of Data Envelopment Analysis. Data were evaluated using Frontier Analyst Method. In this program, variable returns to scale (VRS) and BCC (maximize output) models were used. Input variables of DEA models are the number of doctors and the number of registered population whereas output variables of DEA models are the number of consultations, vaccinations and pregnant and child follow-ups. At the end of this research of 19 family healthcare centers, 9 were determined to be inefficient and 10 were determined to be efficient. The average efficiency level of the family healthcare centers was measured as 95,38. In addition, it was concluded that the number of doctors and patients must be reduced in some family healthcare centers and output variables must be increased in others.

**Keywords:** Family Healthcare Centers, Efficiency, Data Envelopment Analysis.

**JEL Classification:** E62, H62, C32

**1 Introduction**

Health care industry is one of the most important and expensive industries around the world. Nearly 15% of GDP of U.S. is dedicated to health care industry. It is followed by France with 11.2 %, by Switzerland with 10.7%, and by Germany with 10.5 %. In Turkey this percentage is 6.2 % (OECD 2010). Since the budget devoted is very high, operational studies as well as leading clinical trials in health care are important in order to increase cost effectiveness.

Therefore, health service is an area where significant investments are made in many communities and which constitutes an important aspect of human life. It is observed that national health services attempt to deal with a series of difficulties such as limited resources, inequalities in providing health services and a shortage of manpower in the health sector in terms of quantity and quality, and try to develop strategies in this regard (Levesque et al. 2010:11-95).

Among the modern health care system's fundamental aims is, by prioritizing primary health care services, to provide access to healthcare services, help people benefit from these services in accordance with their needs and thus increase the quality of life and standard of services. Primary Health Care (PHC) is the first degree health service that is provided to society. PHC is a fundamental branch of the healthcare system where patients and doctors initially meet. The 1978 Alma-Ata Declaration of World Health Organization (WHO) stated what services should be



involved in PHC and what should the aim of PHC be: “protect and promote” (WHO 2010). The main purpose of the efforts in health care sector is to organize, finance and provide the services effectively, efficiently and fairly. In order to reach these objectives, Primary Health Care services should be targeted to be reorganized, expanded and supplied to end-users in a modernized way.

Various studies have been conducted in Turkey in the past 20 years focusing on reorganization of the health sector. However, during the first 13 years of this process, the reform efforts in the Turkish health sector experienced many drawbacks and especially those requiring amendments to laws remained ineffective due to the deadlocks experienced during the legislation process.

Various services conducted by the Health Care Centers in providing primary healthcare before the transformation process in health began were offered as repeat services by many institutions such as Maternal and Child Health and Family Planning Center and Tuberculosis Control Dispensary. Such situations led to a lack of organization in providing health services as well as ambiguity in who received services and who offered services.

With the implementation of the Health Transformation Program in Turkey, primary healthcare services were also reorganized. The Family Medicine Practice within the scope of the Health Transformation Program is intended to strengthen and reorganize primary healthcare services. The services being offered within the framework of this reorganization were intended to be performed by authorized and executive organizations and persons, not by unnecessarily repeated services. Organizations offering primary healthcare services were determined again within the scope of the Health Transformation Program and here three fundamental institutions offering primary healthcare services were formed; Family Healthcare Center (FHC), Community Healthcare Center (CHC) and 112 Emergency Healthcare Services. It was planned that services offered by Maternal and Child Health and Family Planning Center, Malaria Control and Tuberculosis Control Centers would function more effectively under the umbrella of Community Healthcare Center (Ministry of Health, 2011a:3).

The Family Medicine Practice was begun in Düzce as a pilot city in 2005 in order to spread access to basic health services in Turkey. Thus, “The Family Medicine Model” replaced the healthcare system proposed by the “Law number 224 on Socialization of Healthcare Services”, which was adopted in 1961. Family Healthcare Centers (FHC) and Community Healthcare Centers (CHC) were established to offer primary healthcare services.

Family Healthcare Center is defined as an association of family medicine units consisting of a family physician and a family healthcare official and offering protective and curative services to individuals (Family Medicine Implementation Regulations 2013). There is a total of 6357 family healthcare centers in Turkey. Each of the 20245 family physicians who work in these centers offers primary healthcare services to an average of 3696 people. (Ministry of Health, 2011b:77).

The family physician program was initiated on 15 June 2010 in the province of Konya, which constitutes the sample of this study. There is a total of 198 family healthcare centers in Konya and each of 570 family physicians working in these units offers primary healthcare services to an average of 3621 people.

This study aims to determine the efficiency levels of the family healthcare centers in the district of Meram in the province of Konya using the Data Envelopment Analysis (DEA) method and offer guidance to relevant managers to use their resources more efficiently.

## 2 DATA ENVELOPMENT ANALYSIS

Today, the resources needed by organizations are gradually depleting and the importance of efficient use of scarce resources is increasing. Therefore, the fundamental goal of economic growth and development is to increase efficiency. Measurement of whether organizations use their resources efficiently or not can be performed by making comparisons with organizations that operate in the same sector and produce similar products by using similar production factors.

The methods of ratio analysis and regression analysis were widely used in the past in order to conduct a performance evaluation. The former of these two methods, i.e. ratio analysis, is quite a simple method and performed by comparing the inputs and outputs used by organizations unidimensionally. Regression analysis, on the other hand, is a parametric method and is performed by analyzing the relationship between one input-one output (simple regression) or more than one input and one output (multiple regression). However, organizations usually do not obtain a single output by using one input. Instead, they generate one or more than one output by using tens of different inputs. For example, hospitals obtain outputs such as polyclinic examinations, surgeries, births, tests etc. by using tens of inputs such as doctors, nurses, medical tools, consumable materials etc.

In recent years, it has been argued that it would not be very effective to make an evaluation by looking at only one parameter in the evaluation of efficiency of organizations that have obtained many outputs by using more than one input and that instead of this, it would be a more effective approach to use a multi-dimensional performance evaluation. Accordingly, Data Enveloping Analysis (DEA) technique was developed and DEA became the most commonly used measurement tool in measuring the relative effectiveness or technical efficiency of multi-input and multi-output decision-making units (Emrouznejada et al, 2008:152).

Data envelopment analysis (DEA) has become a widely used technique for efficiency measurement. DEA, mainly based on the earlier concept of Frontier Analysis (Farrell, 1957), is one of the most important techniques to analyze the efficiencies of health care organizations like hospitals (Kumar, 2010). DEA assesses the relative efficiency scores of a particular set of Decision-Making-Units (DMUs), which produce a variety of outputs by using several inputs. Unlike traditional parametric estimation methods, DEA does not impose specific functional forms between inputs and outputs, and it provides comprehensible information about the sources and magnitude of inefficiencies of a DMU (Chen et al., 2005). This approach uses a mathematical programming method to create a set of weights for each input and output, which considers how efficiency in the DMUs can be improved, and ranks individual DMUs based on efficiency scores (Liu et al., 2007; Bakar et al., 2010).

DEA uses the least input components in those observed or analyzed DMUs and produce the most output components and so determines "the best" decision making units. These "best" DMUs compose efficiency limit and then the efficiency of any DMU is measured according to its distance to this limit. The limit which was composed by the best observations is taken as a "reference" and the radial distance (or efficiency levels) of other DMUs to this limit is measured and then whether they are efficient or not is decided (Öztürk, 2010:144-156)

Various methods have been used for efficiency in the historical process. The major ones among those methods are rate analysis, regression analysis and DEA, which has been commonly used in recent years. The DEA efficiency measurement is based on the study of Farrel (1957), which was

mentioned above. Farrell referred to a suggestion for efficiency measurement in this study to compose an efficiency limit based on the best performances and determine efficiency according to this limit. Thus, DEA, which is not a multi-faceted and parametrical measuring technique, was used in its present sense for the first time in literature in an article that was published in *European Journal of Operational Research* magazine by A. Chames, W.W. Cooper and E. Rhodes (CCR Model, 1978) and then was adapted as a new tool in the management science in analyzing comparative technical productivity of decision-making units in the public sector (Cooper, 2005:5). The first model hypothesis of Rhodes (CCR), developed under CRS- (Constant to Return Scale) and then VRS- Variable Return to Scale form, which was developed by Banker, Chames and Cooper (1984), gave a new aspect to efficiency measurement. This form of DEA is called the BCC model.

The fundamental rationale behind the DEA method is to measure the distance of each decision-making unit to the limit that was determined as the organizational efficiency limit and reveal their efficiency levels (Chames et al, 1978:429). The output belonging to the organizational unit is calculated by the help of weighted averages of all the outputs in the reference group. The input belonging to the organizational unit, on the other hand, is determined using the weighted averages of all the inputs in the reference group (Timor, 2001:1; Tetik, 2003: 222).

Therefore, in measuring the efficiency of the Decision-Making Unit (DMU), the DEA method determines the “best” observations that produce the most input component by using the least input component in an observation set. Then, the limit in question is adopted as a “reference” point and the distance of inefficient units to this limit is measured “radially”. Models are set up for each DMU and solved using the linear programming technique. The results of solutions yield the efficiency of the DMU. If the efficiency is "1", then the DMU is "efficient". If it is different from “1”, it is decided to be “inefficient” (Baysal et al., 2004:439).

In order to be able to use DEA, first similar decision-making units must be selected. After that, input and output variables belonging to these units must be determined. The important point here is that the selected input and output components are used by each of the decision-making units. If the number of selected inputs is  $m$  and the number of outputs is  $p$ , then at least  $m + p + 1$  decision-making units are a constraint for the reliability of the study. Another constraint is that the number of decision-making units that are included for evaluation must be at least twice the number of the variables (Boussofianee et al, 1991: 7; Atan, 2003:74).

DEA is prominent because it does not need any analytical functional structure, can evaluate multi-inputs and multi-outputs at the same time, distinguish efficient and non efficient decision making units from each other and compose reference points for efficient units, and can be used even in situations in which inputs and outputs cannot be expressed by a common unit; so it expands the area of application. Hence, DEA is applied successfully to evaluate the efficiency of many different organizations such as hospitals, schools, health units, banks, market research, agriculture, transportation, and public management foundations.

Despite all these positive aspects, it is said that the method has some undesirable and poor aspects. Some of these factors include measurement defects, data faults, factors occurring by chance, lack of similarity among decision making units, not paying attention to scale size and not using input-output factors in sufficient numbers (Killı and Atan, 2005).

### 3 METHOD

The study was conducted using the data from 19 family healthcare centers in the Meram District of the Konya province belonging to the year 2012. The data were obtained from the statistics unit of the Konya Public Health Agency. Efficiency evaluation has been done by means of Data Envelopment Analysis. Input variables of DEA models are the numbers of doctors, the number of registered population, whereas output variables of DEA models are the number of consultations, vaccinations and the number of pregnant and child follow-ups.

In determining the input variables, the number of health personnel, who make the greatest contribution to the family healthcare centers' service production, was taken as the input variable, while the services specifically produced by these personnel were taken as the output variable. The most appropriate criteria for industry production have been chosen from among the DEA efficiency measurement models by the analyst, who will measure the performance. Generally input oriented DEA models are used in health institutions where planning and control of the output is difficult in public utilities. Therefore, in this study, input oriented DEA models were used.

DEA aims to find DMUs that produce the highest levels of outputs by using the lowest levels of inputs. Therefore, it maximizes the ratio of weighted outputs to weighted inputs for the DMU under consideration (Sezen and Gok, 2009). This maximization objective is subject to the constraint that the same ratio for all DMUs be less than or equal to one. This leads to the following model, in which one can find the efficiency value for  $DMU_m$  (Ramanathan, 2005):

$$\begin{aligned}
 \text{Max} \quad & \frac{\sum_{j=1}^J v_{mj} y_{mj}}{\sum_{i=1}^I u_{mi} x_{mi}} & 0 \leq \frac{\sum_{j=1}^J v_{mj} y_{nj}}{\sum_{i=1}^I u_{mi} x_{ni}} \leq 1; n = 1, 2, \dots, N \\
 & & v_{mj}, u_{mi} \geq 0; i = 1, 2, \dots, I; j = 1, 2, \dots, J
 \end{aligned}$$

Here,  $i$  is the index for inputs,  $j$  is the index for outputs, and  $n$  is the index for DMUs. The variables  $v_{mj}$  and  $u_{mi}$  are the weights representing the importance of each input and output. If the efficiency score is equal to 1, the  $DMU_m$  is located on the efficiency frontier. Here, the efficiency value is a relative measure indicating how  $DMU_m$  operates compared to the other DMUs that are included in the sample (Cooper et al. 2004).

### 4 FINDINGS

The findings obtained from the study are shown in the tables below. Table 1 shows the data set of the family healthcare centers whereas Table 2 shows findings about the overall efficiency levels of the family healthcare centers; Table 3, on the other hand, shows the actual and target input amounts of the family healthcare centers and their potential to reduce inputs whereas Table 4 shows the actual and target output amounts of the family healthcare centers and the amounts of outputs that these centers must increase to be fully efficient.

Since DEA's ability to distinguish drops when too many inputs and outputs are added to the study, this number was kept within a limit. As can be seen from Table 1; input variables are the numbers of doctors, the number of registered population, whereas output variables are the number of consultations, vaccinations and the number of pregnant and child follow-ups.

**Table 1:** The Data Set of the Family Healthcare Centers

DMU (Family Healthcare Center)	Variables				
	Input Variables		Output Variables		
	Doctor	Population	Outpatient	Follow-Ups (Pregnant & Child)	Vaccination
13rd FHC	5	19651	59951	2905	1618
49th FHC	4	15707	46345	3768	2128
29th FHC	6	22322	74491	4618	2507
44th FHC	3	11105	34195	2964	1729
35th FHC	6	21397	69933	5983	3223
24th FHC	5	19702	52587	5875	3174
4th FHC	4	15198	49965	4759	2645
32th FHC	2	7402	26200	2252	1300
45th FHC	3	11518	28916	3454	1996
53rd FHC	4	15630	38527	4832	2657
18th FHC	5	18873	64499	5864	3305
38th FHC	5	18166	64499	5864	3305
19th FHC	4	15489	47051	4097	2343
30th FHC	5	18742	49844	3789	2156
10th FHC	3	11569	39123	2289	1302
47th FHC	3	9827	28341	1817	981
25th FHC	4	14846	52190	3616	2070
40th FHC	5	18248	59900	3880	2110
65th FHC	2	8002	25539	2508	1271

**Table 2:** The Overall Efficiency Levels of Family Healthcare Centers

Family Healthcare Center	Efficiency Score	Family Healthcare Center	Efficiency Score
13th FHC	92,95	53rd FHC	100,00
49th FHC	89,25	18th FHC	99,99
29th FHC	100,00	38th FHC	100,00
44th FHC	87,83	19th FHC	90,87
35th FHC	100,00	30th FHC	77,28
24th FHC	100,00	10th FHC	99,82

4th FHC	100,00	47th FHC	81,37
32nd FHC	100,00	25th FHC	100,00
45th FHC	100,00	40th FHC	92,87
		65th FHC	100,00

As can be seen from Table 2, 19 Family Healthcare Centers located in Meram District were included in the study. As a result of the input-oriented CCR-DEA that was conducted, it was found that 10 of the family healthcare centers were fully efficient whereas 9 of them were below the efficiency limit. The average efficiency of the family healthcare centers was calculated to be 97,27 %. It was found that the family healthcare center with the lowest efficiency level was 30.FHC with 77,28 %. When efficiency scores were limited, there were no family healthcare centers in the range of 0-70 %, whereas there was 1 center in the range of 71-80 %, 4 in the range of 81-90 % and 4 in the range of 91-99 %. The actual and target input levels of inefficient family healthcare centers and the number of inputs that they must reduce to become fully efficient are shown in Table 3 whereas their actual and target outputs and the number of outputs they must increase to become fully efficient are shown in Table 4.

**Table 3:** The Numbers of Actual and Target Inputs of the Family HealthCare Centers and Their Potential to Reduce Inputs

Family Healthcare Center	Doctor			Registered Population		
	Actual	Target	Potential Improvement (%)	Actual	Target	Potential Improvement (%)
13rd FHC	5	5	00,00	19651	18873	-3,96
49thFHC	4	4	00,00	15707	14963,96	-4,73
44th FHC	3	3	00,00	11105	11002,18	-0,93
18th FHC	5	5	00,00	18873	18166	-3,75
19th FHC	4	4	00,00	15489	14605,52	-5,70
30th FHC	5	5	00,00	18742	18166	-3,07
10th FHC	3	3	00,00	11569	11124	-3,85
47th FHC	3	2,68	-10,8	9827	9827	0,00
40th FHC	5	5	00,00	18248	18166	-0,45

As can be seen from Table 3, 37 doctors were employed in 9 inefficient family healthcare centers, which were investigated within the scope of the study, to serve a registered population of 139211. It is understood that for these family healthcare centers to become efficient, they need 36 doctors and a population of 134893. In this case, the number of doctors must be reduced by 1 and the number of registered people must be reduced by 4317.

**Table 4:** The Numbers of Actual and Target Outputs of the Family HealthCare Centers and Their Potentials to Reduce Outputs

Family Healthcare Center (FHC)	Outpatient			Pregnant & Child (Follow-Ups)			Vaccination		
	Actual	Target	Pot. (%)	Actual	Target	Pot. (%)	Actual	Target	Pot. (%)
13th FHC	59951	64499	7,59	2905	5864	101,86	1618	3305	104,26
49th FHC	46345	51924,69	12,04	3768	4221,65	12,04	2128	2398,74	12,72
44th FHC	34195	38931	13,85	2964	3457,94	16,66	1729	1968,5	13,85
18th FHC	64499	64499	0,00	5864	5864	0,00	3305	3305	0,00
19th FHC	47051	51779,63	10,05	4097	4552,78	11,12	2343	2578,47	10,05
30th .FHC	49844	64499	29,44	3789	5864	54,76	2156	3305	53,29
10th FHC	39123	39195	0,18	2289	2934	28,18	1302	1685	29,42
47th FHC	28341	34828	22,89	1817	3065,74	68,73	981	1751	78,56
40th FHC	59900	64499	7,68	3880	5864	51,13	2110	3305	56,64

As can be seen from Table 4, 429249 consultations, 31373 pregnant and child follow-ups and 17672 vaccinations were performed in the year 2012 in the 9 ineffective family healthcare centers included in the study. When a comparison is made with the family healthcare centers that operate efficiently, 474654 consultations, 41688 pregnant and child follow-ups and 23601 vaccinations must be performed for these units to operate efficiently.

## 5 CONCLUSION

Today, the resources that organizations need are depleting gradually whereas the importance of using scarce resources efficiently is ever increasing. Again, in today's world, where health expenses are constantly on the increase, it becomes a necessity for health care institutions to use their resources more efficiently. The costs of the services that health care institutions offer began to push the limits of not only individuals' financial strength but also health insurance systems in many countries and even the state's ability to pay in countries where these services are financed by the public. Therefore, the fundamental goal of economic growth and development is to increase efficiency.

In this context, family healthcare centers, which use a large portion of the resources allocated to healthcare, must produce healthcare that is fitting for the expectations of the society and scientific standards by using actual resources at an optimum level. For efficient use of resources, on the other hand, the efficiency levels of family healthcare centers must be measured and the level of wasted resources in the centers that do not operate efficiently must be determined.

The Data Envelopment Analysis (DEA) method was used in this study in order to measure the efficiency levels of family healthcare centers. When the relevant literature was examined, it was found that no studies were conducted to determine the efficiency levels of the family healthcare centers in Turkey using the DEA method and that the studies that were conducted in the healthcare sector usually aimed at determining the efficiency levels of hospitals.

As a result of this study, the efficiency level of the family healthcare centers in Meram district of Konya was calculated to be 97.27 % and it was found that these centers suffered from a waste of resources. It is understood that in order for inefficient family healthcare centers to be efficient, they must reduce the total number of their doctors by -1,28 % and their registered population by -3,13 %, or increase their consultations by 12,28 %, the number of pregnant and child follow-ups by 40,81 % and vaccinations by 42,5 %. The results of the study reveal that the reasons why resources can not be used efficiently must be determined and policies must be developed in order to use these resources more efficiently.

On the basis of the findings obtained from this study, new questions that arose during the study and the limitations of the study, the following suggestions can be made for the future:

- In this study, efficiency was calculated by using a limited number of input and output variables. Therefore, in future studies, efficiency levels of family healthcare centers can be determined by using input and output variables of different nature. Different cost analyses can be made especially by using the “income” output factor, which was not used in this study.
- Efficiency evaluations can be made in the studies that will be conducted in this regard in the future by including different data such as the area of the rooms that family healthcare centers use while generating their services and the number of materials.
- A comparative analysis can be made by comparing the data obtained from the family healthcare centers in this study and the findings obtained according to these data with family healthcare centers in other countries.
- According to the findings of this study, the family healthcare centers generally used their actual resources inefficiently. New policies are needed for efficient use of resources. New studies that will investigate the concept of efficiency in its different dimensions can be conducted to serve as a guide to these policies.

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## **Tour Operators' Perspective of the Macro Marketing Environment and Their Marketing Information Systems**

### **Abstract:**

Tourism is recognised as a dynamic and competitive global force, influencing almost all countries and the lives of billions on a daily basis. Correspondingly, South Africa experiences an incessant escalation in international tourist arrivals and this progressively renders entrepreneurial opportunities, particularly in the domain of tour operating. Unfortunately this trend is not reflected by advancements in either the management models used and/or in the management decision-making ability of tour operators, neither in the support tools (such as a sophisticated marketing information system) available to tour operators.

However, tourism is exceptionally susceptible to influences and factors stemming from the marketing environment and this necessitates tour operators to be knowledgeable in this regard, in terms of the probability of occurrences and also the severity thereof. Information thus becomes an indisputably precious asset that needs to be planned and managed strategically. The marketing environment is composed of the micro, market, and macro marketing environments and the focal point of this paper is the macro marketing environment and tour operating. The challenge of this study was to obtain a description of the research population and to determine empirically whether: tour operators in South Africa view macro marketing environmental information as part of marketing intelligence as important; and, whether they view information concerning the various factors of the macro marketing environment as important. An exhaustive review of existing academic literature directed the conceptualization of this pioneering research in South Africa.

A quantitative descriptive survey was undertaken and a research frame was constructed with the aid of various published sources and electronic databases. The research instrument used was a real-time web-based self-completing questionnaire which was dispatched to 1 000 tour operators and six highly-priced sponsored incentives were provided in an endeavour to increase the response rate. A completion rate of 42% was recorded. Inferential statistics revealed that 59.6% of the tour operators in South Africa do have some sort of information system whilst only 41.9% of them indicated that they do have access to marketing intelligence although most do view this type of information as important. Tour operators view it as important that an information system should be able to provide them with macro marketing environment information. The current information systems used by tour operators in South Africa do not necessarily provide them with adequate information they need for management decision-making purposes and the reason for this is ascribed to the types of information systems used. Tour operators mostly use a personal computer with general data analysis programmes and this cannot be viewed as a sophisticated marketing information system providing tour operators with macro marketing environment information needed for management decision-making purposes.

Pragmatically, the results obtained indicate that information system innovation for tour operators in South Africa is indubitably imperative. Sequential research should be undertaken and it should be

extended to incorporate all the sectors of tourism, as well as the member countries of the Southern African Developing Community (SADC) for not only comparative purposes but to investigate potential synergistic social and economic benefits on a national and regional basis, specifically in terms of marketing information systems and ultimately tourism.

**Keywords:** Marketing Information Systems, Information Technology, Macro Marketing Environment, Tourism, Tour Operators, South Africa.

**JEL Classification:** M3, M31

## 1 Introduction

Tourism is a global phenomenon and it progressively acquires consideration due to its dynamic nature. A continuous increase in tourism arrival statistics in South Africa is recorded and marketing campaigns on a national level is contributing towards escalating domestic tourism figures. These results, together with technology, innovation, and increased global competition place high managerial demands on tour operators. Tour operators therefore need superior marketing information to be able to survive, and to obtain and maintain a competitive advantage in today's business environment. Tour operators will be in a better position to manage their enterprises if only they were able to make informed decisions. Marketing information system sophistication needs to transpire before South African tour operators will be able to capitalize on their tourism practices and offerings.

South Africa is a year round tourism destination and government aims to develop South Africa into a preferred international destination in the not too distant future. Tourism has been earmarked as a key sector and the Department of Tourism launched the National Tourism Sector Strategy in 2011 with the aim of ensuring that tourism as an economic sector realises its full potential (SouthAfrica.info, S.a.). As a country, South Africa offers appealing opportunities to tour operators and tourists in a similar way. However, tourism and tour operating is a very uncertain environment and many tour operators in South Africa are confronted on a daily basis with extreme survival challenges which emanate from the marketing environment within which they function. The marketing environment consist of an orchestration of factors and forces and this blending of constituent factors and forces shape the challenges tour operators need to deal with. Therefore, tour operators need superior management and marketing information to be able to survive, and to achieve and maintain a competitive advantage in today's global tourism arena.

An extensive search of published material and electronic databases did not yield research information on the information systems of tour operators in South Africa and/or the marketing intelligence tour operators have access to via their marketing information systems, specifically information about the macro marketing environment. Thus, it is at this point in time undetermined whether tour operators in South Africa view information about the macro marketing environment they need for decision making purposes as important.

Tour operating and information systems require not only information but also knowledge to be able to make informed decisions. Tour operating and the macro marketing environment are vast topics and cannot be covered comprehensively in one single research study or paper and this paper therefore sets out to obtain insight on the following:

- To obtain a description of the research population in order to better comprehend who these business entities are.
- To determine whether tour operators in South Africa view macro marketing environment information as part of marketing intelligence as important.
- To determine whether tour operators in South Africa view information concerning the various factors of the macro marketing environment as important.

This paper consists of four sections and starts with a synopsis and review of the literature relevant to this topic and then an explanation of the research methodology and the data analysis techniques used. This is followed by a presentation of the results obtained and the paper concludes with a discussion of the main inferences, the theoretical and managerial implications, and the recommendations emanating from this study.

## 2 SYNOPSIS AND REVIEW

The macro marketing environment has been a topic of research for a number of years and Dholakia and Nason (1984) indicated as early as the 1980s that an emerging field of study is the macro marketing environment. Up to today this is still a developing field of interest because the macro (external) marketing environment consists of larger societal forces influencing the internal and external business environments (Kotler & Armstrong, 2010; George, 2012), and this includes the environments of tour operators. These forces influence demand (Middleton, Fyll & Morgan, 2009) and are ever present on the local, regional, national, and international arenas and should be taken into consideration by a tour operator. It also influences a tour operation in terms of opportunities and threats, not only within a local market context but also on a global scale (Gillespie & Hennessey, 2008). These forces can be influenced by the collective bargaining power (lobbying) of tour operators and also by related associations, such as the Southern African Tourism Services Association (SATSA), in South Africa (George, 2012). However, these forces cannot be controlled by tour operators and/or their representatives. The macro marketing environment extends into the broader sphere (and this includes tourism), the bigger societal environment and also as far as the global marketplace (Oldroyd, 2001). It is, however, important to keep in mind that the natural environmental and social/cultural impact of tourism refers specifically to sustainability (Cook, Yale & Marque, 2010) and this falls outside the scope of this paper.

However, sustainable business development applies to tour operating and risks incorporated into the macro marketing environment and its complexity should be taken into consideration as this will indisputably influence the strategic decision-making and future success of tour operations. In an attempt “to reduce an unfavourable impact of environmental changes and to use...the possibilities of acquiring (or preserving) competitive advantage”, Žvirblis and Zinkevičiūtė (2008:266) established an integrated macro environment evaluation parameter which would enable tour operators to conceptually solve their problems of quantitatively evaluating the factors in their macro marketing environment. A further development was a mathematical model developed by Žvirblis, Krutkienė and Vitkūnas (2009) and this model is based on a multiple-criteria analysis that can also be used by tour operators in South Africa to conduct a qualitative and quantitative assessment of their marketing environment. Kiple and Jewe (2012) conducted research and recorded that “enterprises of today are not equipped to cope with this increased complexity in the global environment” and recommend the implementation of systems for ‘Entropy planning’ [the quantitative measure of disorder or chaos in a system], such as in the unlikely event of an earthquake or volcanic eruption.

Such a system would be advantageous for tour operators who are dealing with international tourists and who operate on a global scale.

The macro marketing environmental forces do not necessarily have a direct impact on the day-to-day operations of a tour operation, but they are “extremely important in shaping the competitive situation and the actions and perceptions of relevant stakeholders” (Oldroyd, 2001:124). Tour operators should not only be knowledgeable but “must understand” (Grewal & Levy, 2012:119) the changing circumstances in the macro marketing environment in order to anticipate changes and adapt effectively. This can be adapting the organisation (setup) of the tour operation, its management style (business model), and/or its tourism offerings (packages and products). However, tour operators will not be able to focus on each and every macro marketing environmental factor and need to “prioritize which dimensions to focus on”, as recommended by Adidam, Banerjee and Shukla (2012:246). Layton (2007) profess that the concept of a marketing system lies at the core of macromarketing and the working definition provided is applicable to tourism. Layton (2008:216) proposes “the integrating concept of a marketing system linking micro-with macromarketing research” which incorporates service-dominant logic, and this especially relevant to tourism.

Nwankwo (2000:145) published a paper at the turn of the century already and explicitly advocated that the evolving macro-environment in sub-Saharan Africa, which includes South Africa, should be explored within the “pattern of the ongoing economic-political changes” within the peculiarities of the African environmental setting, which is not necessarily universal to all continents. Added to this are the findings of Ngamkroekjoti and Johri (2000:331) where it is indicated that environmental scanning activities “evolve continuously as a result of the volatility of the environment and the diverse nature of businesses” and this is today still relevant to the tourism industry in South Africa. The challenge for all tour operators in South Africa is to manage “the future environment” (Oldroyd, 2001:Unit 10) and this can be achieved if tour operators “integrates the knowledge of everyone in the company” (Calof & Wright, 2008:717). Added to this is being involved in environmental scanning to identify the environmental forces that will impact on the business concerns of tour operators, as recommended by Adema and Roehl (2010). Environmental scanning should not only be used to identify forces, it is a useful tool tour operators should use to “align their organisational strategies with the external environment conditions”, according to Mufudza, Jengeta and Hove (2013:26). Tour operators should also carefully evaluate expansion opportunities identified within the macro marketing environment to prevent them from becoming victims of the “growth trap” by using MATCH, a new analytical approach used for guiding strategic decision making (Sleuwaegen, 2013:97) because not all expansion results in favourable return on investment (ROI). The macro marketing environment remains a source of uncertainty and tour operators are advised to consider making use of ‘strategic foresight’ and Vecchiato (2012) presented a compendium and comparison of such models for easy reference.

It was stated before the turn of the century that the development and increased availability of information from computers, according to Liu (1998:295), “threatens to exceed our abilities...to quickly sort and choose, to find the right information, and...to absorb and understand properly its implications”. Liu then also proposed a software-agent-based support system for strategic scanning for senior managers. However, it is uncertain whether tour operators in South Africa today do have such a tool to guide their strategic decision-making and/or if their information systems have a strategic management support system incorporated. A sophisticated marketing information system,

which incorporates the macro marketing environmental forces, will enable tour operators to accept this challenge. The constituent forces of the macro marketing environment are presented below.

### **(1) Demographic forces**

The size, structure and trends of a population exert the greatest influence on demand (Wilson & Gilligan, 2005) because it involves people and people make up markets (Kotler & Armstrong, 2010). Tour operators should thus be in a position to identify any demographic change and trends that may be relevant to a tour operation in both their receiving and generating markets (George, 2012). The importance of change and trends for a tour operator lies therein that it influences segmentation and niche marketing (Middleton, Fyll & Morgan, 2009). Demographics form constraints within which consumers' motivations and buying behaviour take place. Tour operators ought to be selective in this regard and should be informed about the populations in their generating markets (the importance of identified target markets), being it South Africa for domestic tourism offerings or from any other country for tour operators who specialise in international incoming markets. Being aware of demographic trends in various global markets could reveal possible business opportunities and threats that need to be taken into consideration for strategic planning.

Various categories of important descriptors are proposed by numerous authors on this topic and it is recommended that tour operators identify those population descriptors that are important and relevant to their specific tour operation. For example: age, gender, income and education. Collecting data from Statistics South Africa and population censuses is not enough – turning it into useful knowledge is what is important to tour operators. This is where a marketing information system could assist a tour operator faced with decision-making.

### **(2) Economic factors**

The economy is a complex system and tour operators should strive to master the diagnosis of existing economic situations, domestically and internationally, in order to anticipate the direction of policy changes and to obtain a considerable edge over competitors (Oldroyd, 2001). Added to this is the influence the state of the economy has on consumers' buying of merchandise and their willingness and ability to spend money (Grewal & Levy, 2012). Economic performance is measured by gross domestic product (GDP) and purchasing power parity (PPP) and these measures will enable tour operators to compare the viability of one market (country) with another (Mullins et al., 2005). Consumers require purchasing power and this depends on current income, prices, savings, debt and also credit availability (Kotler, 2000) and changes in economic variables have a large impact on the marketplace and tour operators are advised to monitor these by means of economic forecasting (Kotler & Armstrong, 2010). Various economic indicators can be used to monitor the economy, for example the economic growth rate, the inflation rate, the unemployment rate, the exchange rate and the interest rate. This calls on tour operators to closely monitor major economic-related trends in their generating (target) markets so that any possible changes in consumer spending patterns can be detected timeously for decision-making, should such changes possibly exert influences on a tour operation.

### **(3) Legal / Political forces**

Legal and political forces are needed to protect innovators of new technology, the interests of society in general, one business from another, fair competition, and consumers (Lamb, Hair & McDaniel, 2006; Grewal & Levy, 2012). Tour operators should therefore constantly be updated about any legislation and/or regulations regulating the operations of their businesses, and this also

include pressure groups. Tour operators should concern themselves not only with existing legislation, but also be aware of the ways it is likely to develop and how this could influence the tour operation and its marketing practices on a national and international basis. An example is the Tourism Scorecard which was introduced to monitor black economic empowerment (BEE) in South Africa (George, 2012).

#### **(4) Natural factors**

The physical environment has “largely been ignored as a management and marketing issue” (Peattie & Charter, 2003:727) and out of this concern developed ‘green marketing’. The natural environment concerns limited natural resources necessary to operate a tour operation. This includes resources needed for the office and also tourist resources, such as: forests, clean beaches, pristine streams, wildlife and clean air (Kotler, Bowen & Makens, 2006) which is very often the main attraction for tourists (George, 2012). Cant et al. (2006) also include any harmful effects a business operation may have on communities and this can be made specifically applicable to tourism. A study was conducted before the turn of the century by Carey and Gountas (1997) who examined the influence tour operators have on the long-term sustainability of destinations seeing that tour operators are one of the major influences on the nature of tourism demand and instrumental in determining trends. These authors then recommended that “sustainable tourism is dependent on the effective cooperation of all stakeholders in the [tourism] industry”. Ferrell and Ferrell (2008) refer to the social responsibility of marketing and developed a framework to integrate stakeholder orientations and distributive justice (DJ) into an operational context. Tour operators should familiarise themselves with this framework as it will guide them in being ethical concerning the economic and social impact of their fair distribution of offerings and other resources through the marketing system used.

Responsible tourism relies on the natural environment for its sustainability and this resource is becoming a major global concern. Tour operators ought to familiarise themselves with new legislation passed by governments which may have an impact on their operations and the development of their tourism offerings. For example, tours to Antarctica (the research previously mentioned) or to any other sensitive areas. This also includes the actions and activities of watchdog groups such as ‘Friends of the Earth’ and ‘Greenpeace’.

#### **(5) Social and cultural factors**

Social marketing refers to the application of marketing not only to influence the behaviour of an individual but “also the broader social, cultural, structural and policy influences on health and social behaviour” (MacFadyen, Stead & Hastings, 2003:700). Kotler and Armstrong (2010) include the social responsibility of companies, and this includes tour operators, as actively seeking ways to protect the long-term interests of consumers. The society within which consumers find themselves shapes their beliefs, values and norms. As society changes so do consumers “seek self-fulfillment and immediate gratification” (Kotler, 2000:153). This can be achieved by providing the ‘right’ tourism offerings. Tour operators should take core cultural values, subcultures and shifts of secondary cultural values into consideration when involved with strategic planning, because this will influence the development of tourism offerings and the marketing thereof.

#### **(6) Technological changes**

An exploratory analysis was conducted some time ago by Mannering et al. (1995) where travellers’ preference toward in-vehicle traffic information systems was undertaken in the mid-1990s, today

travellers do not only have in-vehicle traffic information systems but in-vehicle tour guide systems and global plotting systems on their mobile phones. Galeev et al. (1996) conducted research on the creation of an international network of Mars surface landers on MARS GLOB, more specifically on the MARS TOUR project (space tourism could be the norm of the day by 2020). Technology is developing at an accelerating rate and this could yield future prospects, or threats, for the uninformed. “The technological environment is perhaps the most dramatic force now shaping our destiny”, according to Kotler and Armstrong (2010:106).

Kotler (2000:148) postulates that one of the “most dramatic forces shaping people’s lives is technology.” For tour operators, changes and developments in technology mean “attractive new markets” and it have “a profound impact on all aspects of marketing practice” (Mullins et al., 2005:76-77), or as Kurtz and Boone (2006:22) said: it “continuously revolutionize marketing.” Tour operators should monitor the pace of technological change, opportunities for innovation, varying budgets allocated for research and development and also increased regulation regarding technology (such as international air transportation). Added to this are today’s advanced technology and social networks which could all influence and be used for marketing purposes. This all influences tourism, tourism offerings and the development thereof. George (2012) advises that note should be taken that technology affects the company (tour operation), competitors and consumers.

The above discussion of the marketing environment emphasises the importance of an environmental intelligence and scanning system that feeds into a marketing information system. It is only after a tour operator considered each and every marketing environmental factor, its importance and influences on the tour operation, that information obtained can contribute towards the MkIS and make it a valuable management tool for tour operators.

### **3 RESEARCH METHODOLOGY**

This study was a first of its kind in South Africa and a descriptive research design was followed. This study commenced with an intensive investigation of available and accessible secondary sources to obtain and extract relevant secondary information needed and an extension of this was an exhaustive search of electronic databases on tour operating and marketing intelligence. However, information deficiency necessitated primary empirical research. Thus, a quantitative survey was then conducted in order to discover if tour operators view macro marketing information as important and whether their information systems facilitate access to this type of information.

The research population (universe) targeted were all tour operations located within the political borders of South Africa. A sample frame had to be assembled because it was not possible to obtain a list of all operational tour operations in South Africa. The names of all tour operations whose e-mail address could be obtained from various published and electronic sources were included in the sample frame. The parameters sample units had to comply with are: (1) potential respondents must be an existing tour operation with an office in South Africa; and (2) they must use an information system during the course of this study. There is unfortunately no certainty that all tour operations in South Africa were included. The ideal then was to follow a non-probability convenience sampling method and sample units were selected from the sample frame specifically assembled for the purpose of this research.

The targeted sample size was 1 000 successfully delivered e-mail invitations and this is in accordance with the licensing agreement of QuestionPro.com, the on-line research tool used for the



purpose of this study. When an e-mail invitation was returned due to incorrect or terminated e-mail addresses, such an e-mail invitation was then substituted with another invitation until 1 000 invitations were successfully delivered. Unsuccessful delivery is ascribed to tour operators failing to change their names and/or contact details or affiliations with the various printed and/or electronic sources used when the sample frame was assembled. Non-responders to the original invitation e-mail requesting their participation and to contribute towards this study received a reminder e-mail, and a second and last reminder was dispatched to those who still did not respond. No further reminders were dispatched.

A questionnaire was used as research instrument for this survey and it was specifically designed to collect the information required in order to adhere to the objectives stated for the purpose of this study. The research instrument was a web-based self-completing structured electronic questionnaire and it was designed and managed by means of an on-line research tool (QuestionPro.Com). Added to the questionnaire were accompanying electronic communications. Sample units initially received an e-mail explaining the purpose of the study and inviting them to participate by clicking on a hyperlink imbedded in the e-mail. This then activated the self-administered questionnaire. Advances in technology enable research via the Internet and QuestionPro.com uses automatically captured responses to close-ended questions into a database (data collection) whilst responses to open-ended questions had to be turned into numeric representations before it was processed.

Six valued sponsorships were presented in an endeavour to increase the response rate and these were obtained from: Rovos Rail, Wilderness Safaris, Bill Harrop's Original Balloon Safaris, 1time Airline, Imperial Car Rental, and Springbok Atlas.

Following is a presentation of the results obtained from the responses received.

## **4 RESULTS**

Responses to closed ended questions were directly captured into an electronic database and these were then subjected to selected statistical test. Inferential statistics (cross-tabulations, Chi-Square-based measures of association, MANOVA and ANOVA variance analysis and the Kruskal-Wallis test, Tukey's Studentized Range test and the practical statistically significant test) were also conducted on the data.

### **Participant description**

Four descriptors were used in order to obtain to better understand of the tour operating industry in South Africa and these descriptors also served as bases for further comparative statistical analysis. The descriptors used are: have an information system; size of the tour operation; type of tour operation; and, the number of years in existence.

Tour operations in South Africa are described according to the results obtained as:

- tour operators mostly have some sort of a computerised information system (59.6%);
- size – the majority operate from small tour operations (61.4% with up to five staff members);
- type – they focus on the international incoming market (69.9%); and,
- years – have equally been in business for up to five years (31.05%) and between six and ten years (31.05%).

Further statistical analysis did not reveal any statistically significant differences between the *size* of tour operations (Chi-Square=2.8409; p-value=0.2416; Exact test p=0.2411); the different *types* of tour operations (Chi-Square=2.7058; p-value=0.4392; Exact test p=0.4368); nor the number of *years* tour operations have been in existence (Chi-Square=5.4092; p-value=0.1442; Exact test p=0.1457) as determinants of whether South African tour operators do have/do not have a marketing information system.

### Macro marketing environment information

A tour operator's marketing information system should incorporate marketing intelligence to enable the tour operator to be knowledgeable about nonrecurring events in the external (market and macro) marketing environments. Tour operators who participated in this survey were asked to indicate the importance they place on an information system's ability to provide them with macro marketing environment intelligence. The options tour operators could select from ranged from extremely important to extremely unimportant and the results obtained revealed that 40.38% of the tour operators view intelligence information about the macro marketing environment as important, and this is followed by 25.00% who indicated it as extremely important. What is concerning is that 23.08% selected a neutral stance and that 11.54% selected a negative indication for reasons unknown at this stage.

Further statistical tests did not reveal any statistically significant differences between the size of tour operations, the type of tour operations and the number of years tour operations have been in existence as determinants of the importance tour operators place on a marketing information system's ability to provide macro marketing environment intelligence. The results of the ANOVA tests are indicated in Table 1.

**TABLE 1:** ANOVA: marketing intelligence *versus* participant profile

Marketing intelligence	Statistics	Size	Type	Years
Macro environment	F	2.66	1.69	2.38
	P	0.0797	0.1816	0.0818
	KWp	0.1375	0.1662	0.0646

\*KWp - Kruskal-Wallis Test p

*This table indicates that the ANOVA and Kruskal-Wallis Test p-values are >0.05 and these results are confirmed by the Hotelling-Lawley Trace test. The p-value for size and the marco marketing environment is 0.0797 and for years it is 0.0818 and this is close to 0.05, although it is not a statistically significant difference.*

The macro marketing environment consists of the larger societal forces that should be taken into consideration by a tour operator. These forces do not necessarily have a direct impact on the day-to-day operations of a tour operation but tour operators ought to be knowledgeable about changing circumstances in the macro marketing environment so that they can manage their tour operations sustainably by incorporating and providing for any macro environmental changes.

### Macro marketing environmental forces

Following is a presentation of how important tour operators view information about the various macro marketing environmental forces. Tour operators were provided with six statements and every statement relates to one of the macro marketing environmental forces. Tour operators were

requested to indicate the importance they place on an information system's ability to provide information about the macro marketing environment and the options tour operators could select from ranged from 'extremely important' to 'extremely unimportant'. The responses obtained are indicated in Table 2 and the statements used for this purpose are indicated below the table of responses.

**TABLE 2: INFORMATION SYSTEMS AND THE MACRO MARKETING ENVIRONMENT**

Macro environment forces	Extremely important	Important	Neither important nor unimportant	Not very important	Extremely unimportant
	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>	<i>n</i>
Demographic forces	11	15	12	11	2
Economic forces	13	20	9	8	2
Legal / Political forces	15	21	10	4	2
Natural factors	14	20	11	4	2
Social and cultural factors	13	21	10	5	2
Technological changes	13	22	11	2	2

### Statements

- Demographic forces: Enabling a tour operator to keep track of **demographic forces**, such as population trends.
- Economic forces: Keeping tour operators informed about the **economic forces** influencing customers' spending habits.
- Legal / Political forces: Enabling a tour operator to know how the **legal and political forces** (domestically and internationally) influence the tour operation and all future plans.
- Natural factors: Keeping tour operators informed about the **natural environment's** impact on future operations and tour packages of the tour operation.
- Social and cultural factors: Keeping a tour operator informed about all **social and cultural forces** influencing tour packages and operations.
- Technological changes: Enabling a tour operator to know about how **technological developments** will influence the tour operation and its customers.

Table 2 indicates that South African tour operators view information about all the macro marketing environment forces and factors as 'important'. This is in concurrence with how tour operators view information concerning marketing intelligence, as indicated in Table 1. Combining the responses 'extremely important' and 'important' and expressing it as a percentage of the responses per statement, tour operators then view information about technological changes (70.0%,  $11+15 \div 51$ ) as the most important and this is followed by 69.2% ( $15+21 \div 52$ ) for information about legal and political factors, although 25.5% ( $11+2 \div 51$ ) of the responses indicate that tour operators do not value information about demographic forces taking place and this is followed by information about economic factors (19.2%,  $8+2 \div 52$ ).

However, the results obtained indicate that there are tour operators who take a neutral stance and there are also tour operators who do not view macro marketing environment-related information as important. The lack of or even disregarding information about the macro marketing environment could have a negative impact on a tour operation, taken into consideration the importance of this type of information for management decision-making.

The data was subjected to further statistical testing and the results obtained are indicated in Table 3.

**TABLE 3: ANOVA: MACRO MARKETING ENVIRONMENT INFORMATION versus PARTICIPANT PROFILE**

Macro marketing environment	Size			Type			Years		
	F	p	KWp	F	P	KWp	F	p	KWp
Demographic	1.48	0.2372	0.3035	1.71	0.1786	0.1491	1.24	0.3051	0.2960
Economic	1.61	0.2105	0.3517	1.57	0.2093	0.1605	1.21	0.3174	0.2945
Legal/political	5.58	<b>0.0065</b>	0.0395	1.40	0.2549	0.2317	3.97	<b>0.0133</b>	0.0182
Natural factors	3.32	<b>0.0446</b>	0.1597	1.52	0.2220	0.1388	3.12	<b>0.0350</b>	0.0302
Social/cultural	3.20	<b>0.0496</b>	0.1707	1.98	0.1301	0.0813	2.36	0.0839	0.0891
Technological	0.53	0.5393	0.8282	3.23	<b>0.0311</b>	0.0232	2.69	0.0578	0.0814

The table above indicates that there are statistically significant differences. There are three related differences to the *size* of the tour operation (legal/political, natural factors and social/cultural), one related difference to the *type* of the tour operation (technology) and two related differences to the number of *years* tour operations have been in existence (legal/political and natural factors). These statistically significant differences will now be further delineated.

### (1) Size of tour operation

Further statistical analysis was performed to determine exactly where the statistically significant differences are and these are presented below.

- Legal and political forces

The Kruskal-Wallis Test ( $p=0.0395$ ) confirmed that there is a statistically significant difference regarding the size of tour operations and legal/political forces. The Tukey's Studentized Range test indicate that the statistically significant difference between the size of a tour operation and information about legal and political forces lies between small and large tour operations. Small tour operations (those with up to five staff members) view this type of information as more important ( $\bar{x}=1.9411$ ) than larger tour operations ( $\bar{x}=3.1000$ ), those who do have eleven and more staff members. There is a practical statistically significant difference between small and large tour operations regarding the importance tour operators place on an information system's ability to provide information about legal and political forces in the macro marketing environment. An information system's ability to provide this type of information is more important to small tour operations than large tour operations.

- Natural factors

The Tukey's Studentized Range test indicates that the statistically significant difference between the size of a tour operation and information about natural factors lies between small and large tour

operations. Small tour operations view this type of information as more important ( $\bar{x}=1.9696$ ) than larger tour operations ( $\bar{x}=2.9000$ ). The results obtained when the above was subjected to testing for practical statistically significant differences. The results obtained indicate that there is a practical statistically significant difference between small and large tour operations regarding the importance placed on an information system's ability to provide information about natural factors in the macro marketing environment. An information system's ability to provide this type of information is more important to small tour operations than large tour operations.

- Social and cultural factors

The Tukey's Studentized Range test indicate that the statistically significant difference between the size of a tour operation and information about social and cultural factors also lie between small and large tour operations. Small tour operations view this type of information as more important ( $\bar{x}=2.0000$ ) than large tour operations ( $\bar{x}=2.9000$ ). The results obtained indicate that there is a practical statistically significant difference between small and large tour operations regarding the importance tour operators place on an information system's ability to provide information about social and cultural factors in the macro marketing environment. An information system's ability to provide this type of information is more important to small tour operations than large tour operations.

## **(2) Type of tour operation**

Further statistical analysis were performed to determine where the statistically significant difference lie, as indicated in Table 3, regarding the type of tour operation and technological changes. The Kruskal-Wallis Test ( $p=0.0232$ ) confirmed that there is a statistically significant difference regarding the type of tour operations and technological changes. However, the Tukey's Studentized Range test did not indicate that there are any statistically significant differences between the type of tour operations and information about technological changes. It can thus be concluded that all the different types of tour operations (domestic, incoming, outgoing and others) view information about technological changes as more important than unimportant (the means for all the groups range from 1.500 to 2.455). There are no practical statistically significant differences between the different types of tour operations and the importance tour operators place on an information system's ability to provide information about technological changes taking place in the macro marketing environment.

## **(3) Years in existence**

Further statistical analysis were performed to determine where the statistically significant differences lie regarding the number of years tour operations have been in existence in terms of legal and political forces and natural factors.

- Legal and political forces

The Kruskal-Wallis Test ( $p=0.0182$ ) confirmed that there is a statistically significant difference regarding the years tour operations have been in existence and legal/political forces. The Tukey's Studentized Range test indicate that the statistically significant differences between the number of years tour operations have been in existence and information about legal and political forces lie between the following groups:

- (i) Tour operations that have been in existence for 6 to 10 years and those that have been in existence for 11 to 15 years. Tour operations that have been in existence for 6 to 10 years view

information about legal and political forces as more important ( $\bar{x}=2.000$ ) whilst tour operations that have been in existence for 11 to 15 years ( $\bar{x}=3.125$ ) incline more towards neutral and even towards viewing this type of information as unimportant.

(ii) Tour operations that have been in existence for up to 5 years and those in the 11 to 15 years group. Tour operations that have been in existence for up to 5 years view information about legal and political forces as more important ( $\bar{x}=1.7333$ ) whilst tour operations that have been in existence for 11 to 15 years ( $\bar{x}=3.125$ ) incline more towards viewing this type of information as unimportant.

Tour operations in the up to 5 years group view information as more important than those in the 6 to 10 years group, when the means are compared. It can thus be concluded that tour operations that do not yet have been in existence for more than 5 years place the highest value on information about legal and political forces. There are practical statistically significant differences between tour operations that have been in business for up to 5 years and those who have been in existence for 11 to 15 years, as well as between those who have been in existence for 6 to 10 years and those who have been in existence for 11 to 15 years regarding the importance tour operators place on an information system's ability to provide them with information about political and legal forces in the macro marketing environment.

- Natural factors

The Kruskal-Wallis Test ( $p=0.0302$ ) confirmed that there is a statistically significant difference regarding the years tour operations have been in existence and information about natural factors. The Tukey's Studentized Range test indicate that the statistically significant differences between the number of years tour operations have been in existence and information about natural factors also lie between tour operations that have been in existence for 6 to 10 years and those that have been in existence for 11 to 15 years. Tour operations that have been in existence for between 6 to 10 years view information about natural factors as more important ( $\bar{x}=2.000$ ) whilst tour operations that have been in existence for 11 to 15 years ( $\bar{x}=3.125$ ) incline more towards viewing this type of information as unimportant.

Tour operations in the up to 5 years group view information as more important than those in the 6 to 10 years group, when the means are compared. It can thus be concluded that tour operations that have not yet been in existence for more than 5 years place the highest value on information about natural factors. There are practical statistically significant differences between the following groups:

(i) Tour operations that have been in existence for up to 5 years and those who have been in existence for 11 to 15 years. Tour operations that have been in existence for up to five years view information about natural factors as more important ( $\bar{x}=1.9286$ ) whilst tour operations that have been in existence for 11 to 15 years ( $\bar{x}=3.1250$ ) incline more towards neutral and even towards viewing this type of information as unimportant.

(ii) Tour operations that have been in existence for 6 to 10 years and those who have been in existence for 11 to 15 years. Tour operations that have been in existence for 6 to 10 years regard information about natural factors in the macro marketing environment as more important ( $\bar{x}=2.0000$ ) than tour operations that have been in existence for between 11 and 15 years ( $\bar{x}=3.1250$ ).

Tour operations that have been in existence for less than five years place the highest value on information about natural factors compared to those who have been in business for between 6 to 10 years and those that have been in business for 11 to 15 years, if the means are compared.

The discussion above deals with the results obtained and presented regarding the importance tour operators in South Africa place on information on the constituent forces of the macro marketing environment and their information systems' ability to provide them with this type of information. The following section deals with the managerial implications these results have on information system design.

## **5 MANAGERIAL IMPLICATIONS**

This study revealed that there is no statistically significant difference between the size of tour operations, the different types of tour operations, or the number of years tour operations in South Africa have been in existence as determinants of whether or not tour operators do have a marketing information system. Based on this finding, follow-up studies are recommended so that the reason for this could be explored.

The results presented above indicate that a significant number of tour operators in South Africa (65.38%) are favourable towards the importance of macro marketing environment information as part of marketing intelligence and that there are no statistically significant differences in terms of the participant descriptors used. Further research should be undertaken to determine if the information systems currently used by tour operators do incorporate environmental scanning and marketing intelligence so that tour operators could be provided with the vital information needed for strategic decision-making purposes.

In addition to this are the results in terms of the constituent factors and forces making up the macro marketing environment of tour operators. The results obtained indicate that some statistically significant differences were detected as presented above. The inference is made that tour operations small in size (those with up to five staff members) have a greater need for macro marketing environment information and this could be ascribed to them not having access to a larger staff compliment with diverse knowledge and experience.

No statistically significant differences were recorded for the different types of tour operations (domestic, international incoming, and international outgoing) and it can thus be said that all these tour operators equally view macro marketing environment information as important and that they all would equally benefit by having access to marketing information systems that do provide them with this type of information in the form needed for strategic management decision-making.

The results indicated that there are statistically significant differences in terms of the number of years tour operations have been in existence and the importance they place on macro marketing environment information. The inference is made that the longer a tour operation is in existence the more experienced they are and that younger tour operations are more vulnerable to changes because all systems are not yet in place and established as it should be. Younger tour operations also find it more difficult to deal with regulation and legislation changes, not only those taking place in South Africa but also those in their generating markets, should they be dealing in international tourism.

Taking it all together, tour operators collectively view macro marketing environment information as important. However, it is doubtful whether the information systems tour operators use do provide them with this type of information.

## 6 CONCLUSION

If tour operators are deprived of macro marketing environment information, then tour operators could find themselves in a position where they could face serious problems – tourism is a global phenomenon and it is influenced on a daily basis by occurrences and developments taking place in the macro marketing environment in the national and international arenas. Sophisticated marketing and management information system development and design is unfortunately not possible most within tour operations in South Africa due to the investment required by such a system. This investment includes human capital and technical expertise, as well as the financial investment required to initiate such development and then to maintain and innovate over the long-term as information needs and technology change over time. This concept exceeds the abilities of a single tour operation.

It would be ideal if all the major role-players from the private and public tourism sectors, and from all five of the sectors of tourism, could collaborate and collectively consider establishing an integrated and interconnected tourism information system for tourism-related businesses and this could also be extended to provide tourism information to the public. Such a system could even encompass tourism in all the sub-Saharan member countries of the Southern African Developing Communities (SADC).

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## **Officials Abuse from Public Functionary in Albania**

### **Abstract:**

The object of topics is to exposing some principled elements that constitute to the crime of office abuse, provided by provision of the Penal Code of the Republic of Albania, namely in Article 248. Signifier of such a theme dictated by heavy consumption of this crime, as well as its Impunity often selectively, with a severe disability and by the serious shortcomings of the justice system, which included the region the Western Balkans and claiming membership in the European Union. Through this paper, the authors hope to provide a modicum of contribution in the field of penal studies, in a so problematic direction as abuse of office within the public administration, where arbitrary violations of the law are as frequent as the conflict

**Keywords:** The Notion of Public Office and Public Service; Illegal Behavior of the Person Exercising a Public Function, Material and Nonmaterial Benefits; Subjective Element; Competition from Other Criminal Acts, Sanctions.

### **1 Introduction**

Deep reforms that have taken place in Albania, as in political life, but also in socio-economic triggered the need for change and continuous improvement of national legislation in general especially in the area of penal code. This phenomenon is supported by the fact that only the last 15 years the Penal Code of the Republic of Albania, entered into force in 1995, still now is improved over ten times, undergoing amendments to the provisions of a third of its original text.

These amendments included, among others, repeatedly the rate of abuse by public functionary,<sup>23</sup> in modern societies, especially in Albania is one of the most disturbing and has wide application valence a in everyday life (Benussi, 2004). Characteristic of this penal punishment is that it - in design and *ratio legis*, designed by legislature - has based its legitimate state interests, but also the rights of every citizen, and other legal, constitutionally protected.<sup>24</sup>

Under this context, Article 248 of the Penal Code of the Republic of Albania provides that: “Intentionally *Performing or nonperforming or inactions of acts contrary to the law, which constitutes non-compliance of duty, the person who performs public functions, when they bring him or other material or nonmaterial unfair benefits or damaged legitimate interests of the state, citizens and other legal persons, if not a criminal offense, punishable by up to seven years imprisonment and a fine of three hundred thousand to in million Leke (Albanian Money)*”.

<sup>23</sup> See: Law 8733/2001; Law 9686/2007; Law 9275/2004

<sup>24</sup> Constitute of the Republic of Albania, article 11/2: “*Prona private dhe publike mbrohen njëlloj me ligj*” and article 18/1: “*Të gjithë janë të barabartë përpara ligjit*”

Such a discipline exigencies to oversee public administration from abusing (Cattennacci, 2006),. That officials and functionaries deal with the task and therefore with illegal behavior cause damage to this administration as abstract entity, but all organizational entities and interact with it.

## **2 The notion of public office and public service**

For more accurate definition of the term 'public function' comes to the aid of administrative law<sup>25</sup>, The Convention of Council of Europe against Corruption,<sup>26</sup> as well as contemporary doctrine and jurisprudence of developed countries with functioning democracies. From the analysis of their contents have concluded that persons charged with state functions (Fiorella, 1992) are all those who has a public function, legislative, judicial, or administrative.<sup>27</sup> So every function, the exercise of which is regulated by public law

Public function characterized by the fact that the expression of the administrative volition materialize in authoritarian competences, proved, or the issuance of authorizations and verifying documents. Such volition is characterized by the formation and external manifestation of public administration, or by performing its typical elements of the administration. Nevertheless, the relevant term is abstract expression of the law, which allows the performance and achieve of the purpose for which this function is created. In this sense, can be called public officials all those who have the status of civil servants, judges, prosecutors, police officers, other court and prosecution etc.. Also part of this category are persons who carry out private activities that require licensing by the state, such as notaries, lawyers, private practitioners, legal experts and those accounting, customs agents and those of private insurance etc..

Our legislation does not provide clear, if the circle of persons charged with such tasks should include those who carry out the necessary public services, such as communication drivers of public service and emergency ambulances, workers Postal service etc.. Therefore, it is advisable that the legislator to intervene to extend settings and effects of Article 248 of the Penal Code to persons who perform a public service (Elezi, 2009), by which is meant a disciplined activity in the same form and requisites as they public function (state), but characterized by a lack of power of the last. This make evident the fact that according to which those who perform public services, regardless of qualifications that have been stripped from certification target and work toward or next to public officials (state) just as their satellites, as order-executive and, in specific cases, as complementary.

## **3 The illegal behavior of the person exercising a public function**

Normative interventions that are periodically made provision for abuse of office(Law 8733/2001; Law 9275/2004; Law 9686/2007, Article 21), is abolished 'serious consequence', being replaced by two other circumstances: unfair material or nonmaterial benefits in favor of the subject of penal action or other persons; damage of the legitimate interests. So, is increased significantly the county violations that constitute the penal act of office abuse, accounting the concept of unfair material and non-material benefits.

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<sup>25</sup> See: Law 8549/1999 "For Status Civil of officialism"

<sup>26</sup> Signed in Strasburg, in 1999

<sup>27</sup> See Law 357 Penal Code of Italia

It is important to note that providing improper benefits to the official charge position is termed as passive corruption and, depending on the subject, qualifies the Penal Code of the Republic of Albania, according to Act 259 (passive corruption of persons exercising public functions), 260 (passive corruption of high state or local elected officials) and 319 / a (passive corruption of judges, prosecutors and other judicial bodies). Consequently, the public official abuses of power and providing benefits must respond according to the above normative despotizes of corruption.

But, unfair insurance benefits snatch a broader category of unlawful actions that constitute elements than passive corruption. Generally faced with the fact according to which, abusing with official position or omission done through the achievement of the goal or goals from person for different goals (Rampioni, 1984), from those intended by the nature of the public function that it performs normally. Typical action in this regard may be involved and to identify all those activities referred to his office or function, whether they will be concrete in legal acts, even in the performance or non-performance of routine activities, whether these are advisory profile, preparatory or unconditionally anyway, but as a result of illegal behavior and produce negative effects to the detriment of the legitimate interests of the state, citizens and other legal persons.

Article 248 of the Penal Code of the Republic of Albania provides the effects that the activity carried out by a person who performs public functions have “*brought him or other unfair material or non-material benefits or damaged legitimate interests of the state, the citizens and other legal persons*”. This section of the article talks about material or non-material benefits, which bring several advantages as a result of the intervention carried out by public functionary. But what meant the effects of the activity performed by the public official brought him or other unfair material or non-material benefits?

#### **4 Material and nonmaterial benefits**

Legal doctrine has made it clear that the material benefits mean all benefits and favorable economically advantages (Romano, 2002). Thus, for example, would have the penal action of abuse of office, when the public official issuing the authorization for the exercise of an abusive economic activity, or when an individual employs in violation of rules and predefined criteria. Meanwhile, the same estimate would put the case when a public official or state, the quality of the employer, to hire his friends Fires without legal cause of his subordinates, who then appeal to the court to win the right to receive from the state of considerable amounts of money.

Abuse of office elements we find in the activity of notaries, not original documents that prove (photocopy), which made the verification result with false contents, thus harming the legitimate interests of the state property, the citizens and persons other entities. Estimated to be responsible for the crime of office abuse lawyer who betrays the interests of his clients in civil matters, and destroyed their property documents and cooperating with opposing parties.

But the failure of the duty of the public official evidenced when he gives up the performance of an obligatory action of his position (Martino, 2002) Therefore, to be faced with the offense of abuse of power, when a director of the Tax Office, although finds a violation by a private person or entity, in the exercise of a commercial activity carried orders not to this individual operations required by law, such as that of imposing fines. Bypassing the measure or it favors the dealer and he does not fulfill his duty functional.

The crime of abuse of duty or position is considered consumed also when the head of the municipality or the head of the commune, gives his neighbor a building permit, in violation of laws

on urban planning, undermining the necessary space for community residents and green areas in the local unit where he was elected. However, the embodiment of benefit observed in all cases, the abuse of office brings not only material goods, but also meets the legal position of such subjective, in whose favor it is put into action (performance or nonperformance of duty) of public official (Giusino, 1994).

While the discussion for material or non-material benefits become more complex, because the advantages can be various. In doctrine (Giusino, 1994), and jurisprudence talk about a number of categories, this for reasons of practical examination can be specified in part as follows:

- a) public official commits an illegal act, or does not take an act to a mandatory function, to obtain a reward immaterial, it may be that sexual intercourse;
- b) public functionary, to favor the electoral process of a political force which is affiliated or who sympathizes, disappeared during counting those pro opposing force, with the purpose of enabling the party, which serves unlawfully, bringing itself in elite environments;
- c) public functionary may cover criminal activity, to hide criminal looking individuals, or not to punish them, with the desire to benefit their gratitude;
- d) public official, by his acts or omissions in violation of the law could cause havoc with consequences for the environment, but also directly to the health of citizens;
- e) public functionary from his illegal actions could seriously undermine the rights and freedoms of the individual, emerging phenomenon of discrimination against various social categories, etc.,

## 5 Necessity coming of actual effect

The crime of office abuse cannot be considered without prejudice to perform or damaged legitimate interests of the state, citizens and other legal persons. So, this is a condition without which the objective will be missing the penal act. Such a circumstance seems to have a universal definition of all entities operating in correlation with public functionaries.

Consequently, the above condition or circumstance provides damaged area of interest to the performance or nonperformance of illegal actions by public functionary brings other subjects. In this sense, providing material or nonmaterial benefits is not essential to the objective side of the offense of abuse of office; while the actual arrival of the effect is necessary. (B. Mete, 2005)

In subsequent statements to the penal act noted the addition of a new element: the damage can be caused not only the state, or the citizens, but also legal persons. This additional provision fills a gap in the past, because practically create difficulties to identify responsibility, when the damage was caused to legal persons. Simultaneously, with this addition made possible a balance between the rights and responsibilities of legal entities. Moreover it is possible to balance this, when in Article 45 of the Penal Code of the Republic of Albania (with add-ons that are made during periodic changes) already envisaged criminal liability for legal persons.

And, in general, *ratio legis* of this current provision part for the crime of office abuse related to the supervision of the legal relationship (Elezi, 2009), established by law or by-laws, in order to ensure protection of both public , as well as third parties that collaborate with the '(citizens and other legal entities. Article 248 of the Penal Code of the Republic of Albania aims therefore to protect these

entities from arbitrary acts or unlawful acts of public official position that it occupies in the organizational state can manifest by indiscriminate use of resources and tools provided for the exercise The task of charge, or to selectively suspend their use.

## 6 The subjective element

To understand the qualification 'intentional', which determines the subjective element of the penal act of abuse of office perhaps we would have to analyze the structural point of view, referring to a person that exercising a public function. Thus, subject to full operational willingly act contrary to his duty, by failing to conduct or acts contrary to the legal provisions and in defiance of certain tasks assigned to it(Stille, Cupelli,206).

Public official during a crime of office abuse mostly predicts consequences stemming from his criminal behavior. Acting in violation of legal provisions and beyond his duty ordained to bring his self or others material or non-material benefits, harms legitimate interests of the state, citizens or other legal persons. In this case it can be concluded that 'intent' is direct and deliberate. (Musco, 2009)

Also, abuse of office (which represents individual crime), can be realized only in the form of attempt. While, in terms of cooperation in this offense, it can be said that it is predictable when configured a responsibility on the part of those who have had direct interest to conduct illegal activity, or duties or exercise of legitimate of a public functionary (Antolisei, 2007), However, in the specific case of cooperation is necessary to prove criminal pact or agreement, or encouragement to implement it.

But criminal cooperation cannot be understood solely on the ground that the entity interested in making a profit from the exercise or non- of specific duties of the public official is this last requirement to perform an illegal action. Collaboration also can be configured even when the public official has made recommendations or expressed only signals, which are then not led to positive actions that dictate the behavior of skilled agent, its public functionary.

## 7 Competition from other penal acts

Although it often happens that the elements contained in article 248 of the Penal Code of the Republic of Albania confused (Elezi, 2009) with those set out in other provisions of this Code, that discipline penal act of passive and active corruption,<sup>28</sup> obligation condition set by law, according to whose Abusing be judged as such "if not a criminal offense" to the last will eliminate erroneous judicial practices.

In this sense, when the legislator because of the pronounced volatility of the penal act, or the special qualities of the subject has sanctioned special provisions for acts that performed or consumed by office abuse, the legal qualification of the penal act should be made by Specific provisions provided for in Article 248 of the Penal Code. Therefore, special attention should be given to how an offense is formalized in the case of a public functionary, and what were the consequences, the benefits of which have been taken, the effect of the exercise of his duties by the illegally.

For illustration we can mention that, if a Customs officer commits the crime of smuggling, he would respond under a different section of the Penal Code of the Republic of Albania and not under

<sup>28</sup> Penal Code of Republic of Albania, article 259, 260, 319/a, 244, 245

Article 248 of this Code. This attitude has kept the country's Supreme Court, which correct decisions by lower courts stated that: “...*the crime figures smuggling by employees relating to customs operations, provided by Article 175 of Penal Code, is a variant of the general picture of the crime of abuse of power, provided by its Article 248, which carried a specific area of state activity as is the custom, and therefore these two crime figures cannot compete with each other*”.<sup>29</sup>

To continue illustrations, can also be said that, abuse of office cannot compete on counterfeiting crime, carried out by a public functionary of unlawful exercise of duties (Articles 186-191 of the Penal Code) cannot even compete the crime of theft through abuse of office, provided by Article 135 of our Penal Code. So, the act will be termed 'abuse of office' only if the actions or omissions of a public functionary elements do not form another specific criminal act.

In contrast, if there are elements of a criminal act, regardless of those 'abuse of power', both these works can compete. For example, when the head of a regional customs favors a commercial entity, taking a lot of money in the form of bribes, to unfairly blocking competitor activity to the subject (and actually blocks the activity) should be answered also for passive corruption crime, even for him malfeasance; Should be answered thus dubbed because elements of both works exist, regardless of each other.

## 8 Sanctions

Sanctions offense of abuse of office seems to have undergone a growth rate: from six months to five years imprisonment envisioned in the previous provision, currently committing this offense is punishable by up to seven years. But, obviously, the fact of not having a "floor" limiting can create a dangerous gap in the formulation of the sentence, what creates the judge the opportunity to decide on a sentence of, say, five days, that is the minimum punishment imprisonment.<sup>30</sup>

Meanwhile, alternative punishment sanctioned by fines as mandatory punishment, even as the second major penalty, in addition to imprisonment. However, we believe that here, in the formulas of the provision, there is a contradiction. For a fine, penalty as the second main motivation is necessarily related to the acquisition of property insurance or any other kind of benefit, while the crime of malfeasance can be performed, as the law and as we have noted above Even without the profit motive property, as well as without providing any other material benefit, when it comes, for example, by causing damage to the environment and the health of citizens, or the violation of human rights and their fundamental freedoms.

Also (the last, but not the Least), Article 248 of the Penal Code does not require necessarily serious consequences as a condition for the existence of its target element. So, according to the wording of this provision, provided that the unlawful acts and omissions which constitute failure of duty of the person exercising a public function to be damaged legitimate interests of the state, citizens or other legal persons, and crime considered malfeasance committed. But not any damage to the legitimate interests of the state, citizens or other legal entities automatically responds to crime malfeasance. On the contrary, it would require more responsibility for administrative and financial violations.

So, which can be border line between crime and administrative contraventions? Under administrative law, the latter defined as a violation (action or inaction) of provisions issued by state

<sup>29</sup> Unifiqueted decizioni of High Court of Republic of Albania 1/2002

<sup>30</sup> Article 32 of Penal Code of Republic of Albania

authorities, competent, committed the crime and the persons responsible for that, because of the small social dangerousness, is assigned administrative penalty. By this definition, the difference between the two acts can be done:

- a) the society dangerousness;
- b) From the fact whether it violated any laws and administrative acts for its implementation, or an administrative act whatsoever.

Thus, society dangerousness of the offense and the nature of the infringed provision should be determined case by case, noting the damage that has been the legitimate interests of the state, the citizens or legal entities.

However, when society dangerousness of the penal act is small, then the missing material feature of the offense, therefore we are not in front of malfeasance crime. Also, when there isn't break the law and regulations for its implementation, this time missing a fundamental condition of the crime of malfeasance. So, to set this crime, it is imperative that the above two conditions are met.

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## **Constitutional Manipulations in the Post-Soviet Space**

### **Abstract:**

In the article the author explores a variety of constitutional manipulations in post-Soviet regimes of imitative democracy. Political leaders and the elite often try to adapt a Constitution to accommodate their interests. Such manipulations contain a hidden meaning, thus aiming to cover reality with an illusion of common good. Most often, post-Soviet countries have engaged in constitutional manipulations to change the term of the current President. The author discusses these ‘tricks’ in detail. He comes to the conclusion that constitutional manipulations harm society, inhibit establishment of institutional foundations of democracy, and contribute to creation of systems that simulate democracy.

**Keywords:** Constitution, Constitutional Changes, Manipulation, Post-Soviet Countries, Imitative Democracy, Term of Presidency.

### **1 Introduction**

The issue of constitutional manipulation is relevant in countries that seek to modernize their political and legal systems. In an effort to retain power, political leaders and the elite often try to adapt a Constitution to accommodate their interests and resort to a variety of manipulations of the basic law. In recent years “manipulation of international standards, norms, institutions, and laws [...] has practically become the rule” in many countries of the Commonwealth of Independent States (Guliyev, 2011: 91-92).

It is important, in my view, to understand changes in Constitutions and constitutional laws that are designed to achieve the selfish objectives of political leaders and elites. Such manipulations often contain a hidden meaning, thus aiming to cover reality with an illusion of some kind. The changes may masquerade as efforts to take care of the people, or to ensure stability and security. When a Constitution is changed with skill and dexterity the manipulators can make misleading statements about the meaning of planned political innovations and create a false sense of the common good.

The purpose of constitutional manipulation is to impress. This is the case if the changes have demonstrable effects on the citizens of the country, foreign countries, and the global community. For example, the government of Kazakhstan recently changed certain rules. Beginning in 2012, presidential terms were reduced from seven to five years; the Prime Minister is now to be appointed by the President after consultation with political parties in Parliament and only after approval by a majority of deputies of the Majlis (the lower chamber of Parliament). These innovations can be regarded as propaganda aimed at creating a positive image of a democratic country in the eyes of Europe and elsewhere in the West.

As a rule, constitutional manipulations harm society, inhibit establishment of institutional foundations of democracy, and contribute to the establishment and consolidation of authoritarian

regimes. Indeed, numerous instances of such manipulation are evident in post-Soviet countries. These include “corrections” of the term of the President in power, and changing the rules governing transfer of presidential powers in the event of the President’s death or incapacity.

Constitutional manipulations take place in regimes that claim to be democratic. Leaders and ruling groups regularly attempt to fit the law to their own interests. The Constitution is viewed in a utilitarian manner; the Constitution is a means to achieve, maintain, and consolidate power. Political regimes readily change Constitutions to accommodate current political considerations, and constitutionalism is “mostly ephemeral and imaginary” (Medushevsky, 2011: 13).

Regimes characterized by imitative democracy actively seek a democratic “camouflage”; the Constitution proclaims popular sovereignty, a separation of powers, the rule of law, and the presence of checks and balances. All of elections, referenda, and the institutions of democracy, feature. More brutal (totalitarian and closed authoritarian) regimes are less inclined to support democracy via legal means and rather violate or ignore the Constitution. In extreme cases, leaders may abolish the Constitution, engage in anti-constitutional acts, dissolve unwanted authorities, put pressure on courts, destroy political opponents, disregard the law, and take other actions without seeking to legitimize their behavior. For example, in Uzbekistan, a constitutional provision limiting the President to two consecutive terms (Art. 90 of the Constitution) was simply ignored in 2007 when the incumbent president ran for the third time, despite the constitutional ban, and was successfully re-elected. As a rule, leaders of post-Soviet countries do not reject Constitutions as a means of legitimizing power. They strive to maintain a commitment to certain principles of law and the rules, or create an illusion of such commitment. Thus, existing regimes acquire legal and quasi-legal respectability. However, if rules can be established by individual leaders the danger exists that someone else wins using these rules, and that person may change the rules once more to entrench him in power. Therefore, if Constitutions are simply composed by individual presidents, legitimacy is purely external in nature. The rules can always be changed or simply discarded.

## **2 THE DIVERSITY OF CONSTITUTIONAL MANIPULATIONS IN THE POST-SOVIET SPACE**

Most often, post-Soviet countries have engaged in constitutional manipulation to change the term of the current President. I will discuss these events in detail.

One clever trick is “correct” calculation of the term of the President in power by “zeroing” his present term by adoption of a new Constitution or by amending the current Constitution. The logic of such manipulators is as follows: there is a new law and therefore a new counting of terms. As the first term began before the new law was introduced, this is not counted. Therefore, the present President may run for another term, which is (in reality) the second term. In the former Soviet Union, the Ukrainian leader Leonid Kuchma attempted to use this method, and a few leaders have successfully implemented it. These include Askar Akayev in Kyrgyzstan, Islam Karimov in Uzbekistan, Alexander Lukashenko in Belarus, Nursultan Nazarbayev in Kazakhstan, and Emomali Rahmon in Tajikistan.

Adoption of a new Constitution of Kazakhstan in 1995 led to a new counting of the number of presidential elections. In other words, Nazarbayev’s four-year period in power was not considered. The same method of “resetting” was used again in 2005, to legitimize the 14-year tenure of one individual. In 2002, Uzbekistan passed a referendum to amend the Constitution, which later became

officially interpreted as allowing new rules to be created and, therefore, allowing President Islam Karimov to have an additional term.

Other constitutional manipulations create exceptions to the “two terms” rule to benefit an incumbent. In 2007, Kazakhstan used such legal trickery. As a Constitution should contain general rules, thus without reference to a specific person (i.e., Nazarbayev), then the Constitution established a *de jure* position of “First President of the Republic of Kazakhstan” with powers and privileges fixed by law. The Constitution was amended to state that restriction on the election of the same President more than twice in a row did not apply to “the First President of the Republic of Kazakhstan” (addition to Part 5, Art. 42 of the Constitution of the Republic of Kazakhstan). This brings to mind the famous saying of George Orwell: “all men are equal, but some - more equal than others”.

Many frauds involving manipulation of presidential terms are accompanied by creation of an illusion of popular support. A referendum on extending the President’s powers, held instead of popular elections, looks more “convincing” than simply repealing term limits to benefit the person in power. For example, such referenda were held in Turkmenistan in 1994, and Kazakhstan and Uzbekistan in 1995. In 2010, a request to government to hold a referendum extending the powers of the President of Kazakhstan until 2020 received more than five million signatures. In such cases citizens indeed go to the polls, in a manner reminiscent of a normal presidential election. Authorities tend not to speak of the “substitution” (of a referendum for an election), rather focusing on the democratic procedure of direct expression. Such action is best described as “manipulation”.

Many leaders of post-Soviet countries claim to “care” about continuity of government and controlled transfer of power to a “successor”. There is no doubt that the institution of “succession” is inherently undemocratic, thus contrary to the spirit of elections and changes in power and accountability that are imposed by the public.

However, post-Soviet presidents are taking action to ensure their desired “continuity”. In the Commonwealth of Independent States, transfer of power to a successor appointed by the President has occurred in just two countries, Russia and Azerbaijan (Furman, 2007: 256-257). In Russia, such transfer was not associated with amendment of the Constitution. In Azerbaijan, the constitutional arrangement for “transfer” of presidential powers in the event of death or incapacity was changed. Thus, Heydar Aliyev made efforts to ensure that his son Ilham became president. In 2002, a referendum passed amendments to the Constitution according to which “the second man” of the state was not the speaker of the Parliament but rather the prime minister (at that time Ilham Aliyev held that position).

A change in how the office of the President might be “transferred” occurred in Turkmenistan in 2006. After the death of the incumbent President Niyazov, Berdimukhamedov hastily changed the procedure for transfer of presidential power. This was no longer to be to the speaker of the Majlis (Parliament), as provided by the Constitution at that time, but rather to the Deputy Chairman of the Cabinet of Ministers (Berdimuhamedov himself). A possible competitor, the chairman of the Majlis O. Ataev was removed from office and arrested without prior approval of the People’s Council (at that time, the “standing supreme representative body of the people's power”; the Council is now abolished). These actions allowed Berdimuhamedov to become interim President; he then won the presidential election. In March 2007, the Constitution of Turkmenistan was extended as follows: “If the President of the People's Council of Turkmenistan or the President of Turkmenistan, for whatever reason, cannot perform his duties, the People's Council of Turkmenistan shall be

convened by a decision of the National Security Council” (Part 2 of Art. 7). Thus, the transfer of power that occurred after the death of Niyazov was formalized. Berdymukhamedov succeeded in gaining complete control of the system that he had earlier only slightly “corrected”. He privately and painlessly eliminated his potential competitors (Malashenko, 2011: 81) by manipulating the law.

Most post-Soviet countries are characterized by exaggerated roles of Presidents in the triangle “president - government - parliament”; enormous powers that are not substantially constrained are placed in the hands of the President. Notably, the informal component of such power is large, which further increases the real power of the President. The Constitutions of such states contain extensive lists of presidential powers, many of which are quite significant. The President intrudes even into areas where his (or her) presence is unnecessary. For example, in Uzbekistan, the President proposes candidates for Speaker of the Senate of the Oliy Majlis (the Parliament) for election by the Senate (Section 9 of Art. 93 of the Constitution of Uzbekistan), although it is clear that election of the Speaker should be a prerogative of parliament.

A further example may be helpful. In Kazakhstan, the Houses of Parliament can write a “petition” addressed to the President. The Constitution states that one outcome of the hearing of a report by a Minister in parliament is that the legislature can appeal to the President to dismiss that Minister in the event that he has broken the law. If the President rejects such a request, the deputies may, at the expiration of six months from the date of the first call, once more ask the President to dismiss that member of the government, and the President must then dismiss that member (paragraph 6 of Art. 57 of the Constitution of the Republic of Kazakhstan). There is no doubt that Parliament should pass a vote of no confidence without presidential interference.

The law allows the President of Kazakhstan to ignore the opinions of Parliament on a number of important issues. Thus, as the Supreme Commander of the Armed Forces of the Republic of Kazakhstan, the President may impose a state of emergency or martial law on all or some of the country, activate the armed forces, and declare partial or total mobilization, all without the consent of Parliament. Under the Constitution, the President is required only to “promptly inform” Parliament (paragraphs 16 and 17 of Part 1 of Art. 44).

When parliaments are weak, Presidents have resorted to various legal manipulations to maintain their dominance. Legal tricks are used to negate the will of Parliament, in particular, questions of resignations of governments. For example, the Constitution of Kazakhstan provides for a vote of no confidence in the government. The reform of 2007 softened the previously rather high standard set before such a vote would succeed. Previously, a vote of no confidence was taken at a joint session of the two parliamentary chambers and a two-thirds passing majority was required. Now, the Majlis alone decides; the initiative must be taken by at least 20% of the deputies and the vote is passed by simple majority (Part 2 of Art. 56 of the Constitution of Kazakhstan). Previously, the second rejection by House of Parliament of a governmental program (by a two-thirds majority) was considered, by the Constitution, to be a vote of no confidence, but, today, initial rejection of a governmental report on implementation of the national budget is an expression of no confidence (Part 2 of Art. 53 of the Constitution of Kazakhstan). If a vote of no confidence is passed the government may ask the President to resign but the President can ignore this request if he wishes (Part 4 of Art. 70 of the Constitution of Kazakhstan). Thus, thanks to ingenious rules, Presidents can simply ignore parliamentary decisions.

One clever legal method of creating an obedient parliament, in particular, a compliant Upper House, is to change the method by which a legislature is formed. In three republics (Kazakhstan, Tajikistan, and Uzbekistan), Presidents were recently empowered to appoint some members of the Chamber directly. Direct Presidential appointment of deputies to Parliament is a characteristic of the monarchical governments and traditional regimes. Appointment by the President of part of the Senate is claimed to be for “good” purposes (recall that most manipulations try to create an illusion). Such constitutional provisions fit well with the overall trend toward creation of archaic political regimes and a return to the “original” values of society, among which is a special understanding of the need of a revered President to have an advisory body.

One of the most common constitutional manipulations in post-Soviet countries is parliamentarization (Zaznaev, 2011). In recent years, several Central Asian states have introduced reforms aimed at changing the balance of the President-Parliament relationship in favor of Parliament; this occurred in Kazakhstan and Uzbekistan in 2007. It would seem that weakening of Presidential powers and strengthening of parliamentary elements would help countries move away from the autocratic regime of the former Soviet Union, dominated by personality considerations. Thus, one should welcome constitutional reforms aimed at redistribution of power between the President, government, and Parliament. However, the changes have been largely cosmetic in nature.

In March 2007, the Oliy Majlis of Uzbekistan unanimously approved the President’s constitutional amendment aimed at “strengthening the role of political parties”. In fact, the political reform was superficial and did not attempt to change the position of the President within the state or the status of opposition parties. In May 2007, Kazakhstan instituted constitutional reforms that sought to parliamentarize the state. As in Uzbekistan, the President made “overtures” to political parties. Thus, in particular, a provision of the Constitution allowing the President to suspend his membership in a political party was removed from the Basic Law (Part 2 of Art. 43). However, the President retains most legislative and executive powers.

In post-Soviet countries featuring some regular political competition, a process termed “pulling the blanket” may be observed. Various political forces: the President, the Parliament, and the executive, pull in different directions. Presidents, having gathered considerable powers, seek to expand those powers. Parliaments resist this. The process is accompanied by constitutional manipulations seeking extensions of democracy, limitation of the absolute power of the President, continuing the fight against tribalism, preventing corruption, etc.

In Central Asia, Kyrgyzstan is such a country. The Constitution of May 5, 1993 was intended to create a system with a strong President controlling all branches of government, and enjoying a mandate “from the people”. During the tenure of Askar Akayev, the Constitution was substantially amended. In late 2006, after six years of confrontation between the President, Parliament, and the Prime Minister, and the opposition’s struggle against the President and the government, Jogorku Kenesh (Parliament) adopted amendments to the Constitution, significantly increasing the powers of the Parliament of Kyrgyzstan. The government was formed after a parliamentary election, and was responsible and accountable not only to the President, but also to Jogorku Kenesh. New forms of parliamentary control over government were instituted. Parliament could express confidence in the government after hearing a report of the Prime Minister.

However, in September 2007, the Constitutional Court overturned two versions of the Basic Law that had been adopted in November and December 2006. As a result, the Constitution of Akayev became in force once again; the country was again a “superpresidential” republic. Constitutional

reform, which dwelt extensively on the topic of “revolutionaries”, turned into a farce. In October 2007, a referendum was held on a draft constitution proposed by President Bakiyev. The draft provided for creation of a “semi-presidential” republic, in fact dominated by the President. A new chapter in the apparently endless constitutional saga in Kyrgyzstan commenced after the overthrow of President Bakiyev in April 2010. An interim government, led by Roza Otunbayeva, held a referendum on 27 June 2010 to adopt a new Constitution which promised, according to authorities, “the parliamentary form of government”. The official government website explains the reforms in high-flying language: “under the old system, the president was untouchable figure, the main politician in the country” which “all ran, but would not bear the responsibility”; “the fate of the people should not depend on a single person or one party”; a strong, powerful opposition “will not allow the parliamentary majority and the government to abuse power”.

Thus, Kyrgyzstan made yet another significant constitutional “somersault”. However, the constitutional wars may not have ended. The interests of clans and leaders, the lack of even a minimal parliamentary culture, and a tradition of authoritarianism, may trigger further constitutional manipulations. Moreover, the Constitution and laws can be easily revised, resulting in usurpation of power in a new way. The parliament may seek to do this, or the President may use his rubber stamp to overrule a parliamentary majority.

Constitutional manipulations may also include “adaptation” of institutions that designed to achieve the selfish objectives of leaders. For example, one such technique is a change from a presidential or semi-presidential form of government (Zaznaev 2008) to a parliamentary form, thus altering the balance of power in favor of a Prime Minister, who may be an outgoing President. The head of state is a figurehead and the real power is concentrated in a head of government representing the party that got the most votes in parliamentary elections. However, there is no restriction on re-election of the Prime Minister. This idea was popular in the former Soviet Union, and is discussed in Ukraine before retiring Leonid Kuchma as President and Armenia before the end of Robert Kocharyan’s second term. Russian President Vladimir Putin became Prime Minister in 2008. In Georgia, in 2010, Mikheil Saakashvili introduced constitutional reform to strengthen the role of the Prime Minister.

Finally, another method that aims to create an illusion of democracy may be identified; this is the creation of new democratic institutions and the recognition of new democratic rights, but usually verbally. Thus, in 2007, Uzbekistan adopted a constitutional law “On strengthening the role of political parties in the renewal and further democratization of state governance and modernization of the country”. This was a new step; the terms “faction” and “opposition faction” were introduced. Part 1 of Art. 2 of the Act states that “the faction of a political party is an association of deputies nominated by a political party, in order to express its interests in the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan.” The following point of law was innovative: factions of political parties may declare themselves as an opposition (Part 4 of Art. 2 of the Act). However, it is quite possible that actions of authorities will cause such early steps toward liberalization to fail.

### **3 CONCLUSION**

Thus, post-Soviet regimes actively manipulate Constitutions and laws to prevent political conflicts. However, such strategies essentially seek to preserve the power of the elite; the democratic touches are superficial and purely formal. The tricks of a regime are easily discerned by opposition forces, and conflicts become latent. Conservation of autocratic political regimes via the use of

constitutional manipulation cannot serve as a long-term basis for public policy. Consequently, existing conflicts may be exacerbated and new conflicts emerge. Kyrgyzstan is a good example: the regimes of Akaev and Bakyiev diligently created a legal shell, but this collapsed rapidly during “revolutions”.

It should be noted that the ruling elite uses a wide variety of tools to maintain and strengthen regimes practicing imitative democracy. These include administrative resources for holding elections, high electoral thresholds, imposition of challenging conditions for registration of political parties, establishment of pro-presidential parties, imaginary multi-party control over the media, and use of force against opponents. Although a Constitution contributes to creation of only a “shell” of respectability, the Constitution cannot be ignored in construction of analytical models. As M. Duverger has noted, “...no-one would dream of watching a game of football or of bridge without taking into account the rules of the game. They constitute a fundamental aspect of the players’ strategy and tactics, the framework of which they define” (Duverger, 1980: 166-167). Therefore, constitutional manipulations in the political life of post-Soviet countries make a contribution to creation of systems that simulate democracy. As D. Furman has quipped, constitutions are “fig leaves” but you cannot go out without this “fig leaf” (Furman, 2007: 238).

Constitutional manipulations in post-Soviet countries are features of regimes that seek to imitate democracy. They take a variety of forms. Further understanding of these issues is necessary to open the deep springs of post-Soviet politics, to identify ways to counter rule by personal and partisan interests, and to define conditions needed for successful implementation of the principles of the rule of law.

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