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The WTO's Special Safeguard Mechanism: An Indian Perspective on the Present Paradox

SALONI KHANDERIA †

TABLE OF CONTENTS: 1. Introduction; 2. Special Safeguard Mechanisms and the W.T.O.; 3. Evaluating India's Stake in Ssm Negotiations; 3.1. Working out the Complementarities; 3.1.1. The Product Coverage; 3.1.2. Trigger Levels; 4. Conclusion.

ABSTRACT: While liberalisation of trade and the progressive reduction of tariffs have led to significant welfare gains, these may be unfeasible for developing countries where a surge in imports could potentially be detrimental to realising the objective of food security through food self-sufficiency. Developing country members of the World Trade Organization (W.T.O.) have thus been proposing a 'special safeguard mechanism' (S.S.M.). This would permit them to impose measures in circumstances wherein there has been a surge or a decline in prices of agricultural imports, so as to negatively affect the livelihood and food security interests of these nations. These deliberations have gained momentum against the backdrop of the W.T.O.'s Agreement on Agriculture (A.o.A.), which came into force in the Uruguay Round negotiations. Consequently, the W.T.O.'s Sixth Ministerial Conference held in Hong Kong in 2005, endowed developing country members with the right to recourse to S.S.M.'s on account of import surges that could potentially expose its agricultural sector to increased shocks. Nonetheless, the lack of consensus as regards the precise modalities, particularly between the United States and India, resulted in a deadlock. Consequently, during the recent Nairobi Ministerial Conference in 2016, India vehemently opposed to proceeding with any further negotiations, and in particular, as regards the Agreement on Trade Facilitation (T.F.A.). India insisted that its internal mechanisms to support food security and public stockholding - being an issue of policy space should be left unhampered despite the present stipulations of the A.o.A., which pegs the same at 10% of the value of production. Accordingly, the mandate of S.S.Ms. assumed more significance in the Nairobi Ministerial Conference insofar as modalities on these would plausibly permit developing countries to increase tariffs on account of import surges on agricultural products – and thus safeguard their food security and livelihood concerns. S.S.Ms. negotiations have been particularly important for India in its endeavour to insulate its agricultural sector from import deluges that debilitate its livelihood and food security. Its success, however, depends on the ability of the W.T.O. Members to finally negotiate the modalities of this right, in the absence of which, it continues to remain a 'lip service'. This paper, therefore, attempts to explore India's motivation in digging its heels on the S.S.M. issue, appreciating that the country's stand at the W.T.O. appears to be of vital importance to developing country Members with similar anxieties as regards the protection of livelihood and food security. It delineates parameters in these respects which could be workable keeping in mind the agricultural scenario in India.

KEYWORDS: *World Trade Organization; Agreement on Agriculture; Special Safeguard Mechanism; India; Food Security; Public Stockholding; Targeted Public Distribution System; Minimum Price Support*

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1. INTRODUCTION

Trade policy cannot quintessentially be considered to be an appropriate instrument for the purpose of achieving food security, insofar as the former principally pertains to generating foreign exchange. Nonetheless, it has significant implications on the ability of a country to achieve food security, especially in instances where unilateral liberalisation of agriculture in countries like India have in the past led to humongous world price swings and import deluges, to the disadvantage of local farmers.[1] The World Health Organization (hereinafter W.H.O.) has defined 'food security' as the 'ability of all people, at all times to have physical and economic access to basic food that they require'.[2] There has since been an increasing trend on the part of nations to consider this duty towards its citizens, as intertwined with food self-sufficiency.[3] Although the importation of food grains can assist in achieving food security, domestic production needs to be increased to operationalise self-sufficiency in this aspect. Thus, food security which is a sovereign right insofar as it permits each nation to maintain its capacity to produce food[4] becomes contingent on livelihood security, which in turn connotes the ability of a person or household to be able to make a living, over time.

Even though the liberalization of trade and the successive reduction of tariffs have led to significant welfare gains, these may be unfeasible for developing countries, where a surge in imports[5] could potentially be

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[1] *See* Ashok Gulati & Sudha Narayan, *Managing Import Competition when Developing Countries Liberalize Trade, in* REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES: KEY ISSUES FOR A PRO-DEVELOPEMENT OUTCOME OF THE DOHA ROUND NEGOTIATIONS 220, 221 (Alex F. McCalla & John Nash eds, 2007).

[2] World Health Organization, Trade, Foreign Policy, Diplomacy and Health (Feb. 23, 2016).

[3] *See* OLIVIER DE SCHUTTER, THE WORLD TRADE ORGANIZATION AND THE POST-GLOBAL FOOD CRISIS AGENDA PUTTING FOOD SECURITY FIRST IN THE INTERNATIONAL TRADE SYSTEM: ACTIVITY REPORT (Nov. 2011), https://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf. *See also* Food and Agriculture Organization (hereinafter F.A.O.), *Implications of Economic Policy for Food Security: A Training Manual,* http://www.fao.org/docrep/004/x3936e/x3936e03.html (last visited Feb. 26, 2017).

[4] *See The Doha is Dead! Time for Food Sovereignty,* LA VIA CAMPESINA STATEMENT, INT'L PEASANT'S MOVEMENT *(July 28, 2006), https://viacampesina.org/en/the-doha-round-is-dead-time-for-food-sovereignty/.*

[5] Note that there is no agreed definition of 'import surge', except that these are determined on the basis of the historical data of the country's imports, and the assessment of injury caused, thereof. It is hence, a sudden and short-lived deluge in imports. Art. 2.1 of the W.T.O.'s Agreement on Safeguards (A.S.G.), however, introduces criteria for the identification of import surges. *See*

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detrimental to realising the objective of food security through food self-sufficiency. Developing country members of the World Trade Organization (hereinafter W.T.O.)[6] have thus been proposing a 'special safeguard mechanism' (hereinafter S.S.M.), which would permit them to impose measures in circumstances wherein there has been a surge or a decline in prices of agricultural imports, insofar as such situations could potentially be detrimental to the livelihood and food security interests of these nations. These deliberations have notably been gaining momentum against the backdrop of the W.T.O.'s Agreement on Agriculture (hereinafter A.o.A.), which came into force under the Uruguay Round negotiations.[7] Although the A.o.A. currently recognises the significance of food security and the subsequent right to impose safeguard measures in the event of a sudden deluge or a price decline caused by imports, there have been increasing concerns of it being tilted for developed countries.[8] The inability of the Uruguay Round to adequately address these issues therefore became one of the prime agendas of the Doha Development Agenda (hereinafter D.D.A.), with the negotiations on S.S.Ms. indicating the negative effects of international trade on the agricultural sector of developing countries. However, these negotiations failed to reach their logical conclusion in the D.D.A., due to the lack of consensus between the developed and the developing world, and in particular between the United States on the one hand, and India and China, on the other.[9] Since then, the matter of S.S.M.'s has continued to influence negotiations in the W.T.O. context to a great extent.

In the recent Nairobi Ministerial Conference, held in December 2015, India vehemently opposed to proceeding on any further negotiations, and in particular, the Agreement on Trade Facilitation (T.F.A.). India insisted that its internal mechanisms to support food security and public stockholding - being

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Agreement of Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 154 [A.S.G.]. *See generally* Manitra A. Rakotoarisoa, Ramesh P. Sharma and David Hallam (Eds), *Agricultural import surges in developing countries: Analytical framework and insights from case studies, chapter 2: Identification of import surges*, F.A.O. Job N. I1952, Rome 2011.

[6] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15,1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

[7] *See* Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1867 U.N.T.S. 410 [hereinafter A.o.A.].

[8] A.o.A. art. 5.

[9] *See* Int'l Centre for Trade and Sustainable Development [ICTSD], *G-7 Talks on Special Safeguard Mechanism Inconclusive as Blame Game Heats Up*, Bridges Daily Update No. 9 (29 Jul. 2008), http://www.ictsd.org/bridges-news/bridges/news/bridges-daily-update-9-g-7-talks-on-special-safeguard-mechanism.

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an issue of policy space should be left unhampered irrespective of the present stipulations of the A.o.A. which pegs the same at 10% of the value of production. Accordingly, the mandate of S.S.Ms. became even more significant in the Nairobi Ministerial Conference insofar as modalities on these would plausibly permit developing countries to increase tariffs on account of import surges on agricultural products – and thus safeguard their food security and livelihood concerns.

This paper, therefore, attempts to explore India's motivation in digging its heels on the S.S.M. issue and discusses whether it is indeed time to provide teeth to this right. India's stand at the W.T.O. appears to be of vital importance to developing country Members with similar anxieties as to the protection of food security. The second part of this paper accordingly analyses the present status of S.S.M. negotiations under the aegis of the W.T.O. The third part of the paper analyses the present policies in the domestic realm in India to safeguard its food security interests. Against this backdrop, it further explores the plausible reasons as regards the country's interest and deep involvement with S.S.M. negotiations in the W.T.O. Appreciating that the deadlock in the context of S.S.M. negotiations primarily pertains to the delineation of precise modalities, *viz.*, the products that would be covered, the level beyond which the tariffs can be raised in the event of a surge and the remedies applicable, the author accordingly accentuates the factors that must be taken into consideration whilst operationalizing this right. The fourth part provides the concluding remarks.

2. SPECIAL SAFEGUARD MECHANISMS AND THE WTO

Negotiations on an S.S.M. have mainly reflected the imbalances between developed and developing country Members created by the current trade regime, which have to a large extent been felt in the agricultural sector. The concept of S.S.Ms. first appeared in the context of the D.D.A., albeit in a very narrow sense. Consequently, Article 20 of the A.o.A. underscored the significance of "substantial progressive reductions in support and protection"

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while at the same time, taking into account, inter alia, non-trade concerns and the need to provide special and differential (hereinafter S&D) treatment to developing countries. Furthermore, the D.D.A. also stressed that

> . . . . special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development . . . .[10]

Interestingly, even while the D.D.A. made no express mention of establishing an S.S.M. for developing countries, it was perceived as a starting point for formal negotiations in this regard.[11] Besides, even the W.T.O.'s 'Development Box' (hereinafter D.B.), contained proposals by developing countries as regards the urgent need for protection from the detrimental impact of trade liberalisation on their livelihood and food security concerns.[12] In particular, the D.B. operationalized the S&D treatment underscored in the D.D.A.,[13] and built upon the three pillars of the A.o.A., *viz.*, market access, domestic support and export competition.

Moreover, the issue of S.S.Ms. had been gaining increasing importance because the existing rules stipulated under the Uruguay Round's A.o.A.

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[10] World Trade Organization, Doha Ministerial Declaration of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/1 (2001).

[11] Post the Doha Round held in 2000, it was the Harbinson text (W.T.O. Committee on Agriculture. TN/AG/6 (Dec. 18, 2002); and later, by means of its two drafts: W.T.O. Committee on Agriculture, TN/AG/W/1 (February 17, 2003); and W.T.O. Committee on Agriculture, TN/AG/W1/Rev. 1 (March 18, 2003)), which first postulated the establishment of an S.S.M. For this purpose, as part of its draft modalities, it suggested that an S.S.M. may be created for Special Products (S.Ps.), which would be based on the provisions of Article 5, and applicable to all products, which have the symbol 'S.S.M.' designated next to them. This right would thus apply to developing countries for them to effectively take into account their development needs, such as food security. Thereafter, the Draft Cancun Ministerial Text (also known as the Pérez del Castillo Text) (W.T.O. Committee on Agriculture, JOB(03)/150 (August 24, 2003)), the Revised Draft Cancun Ministerial Text (also known as the Derbex Text) (W.T.O. Committee on Agriculture, JOB(03)/150/Rev.2 (Sept. 13, 2003)), and the July Framework Agreement (W.T.O. Committee on Agriculture, WT/L/589 (August 1, 2004)) specified that an S.S.M. would be established for use by developing countries. See P. PAL & D. WADHWA, *An Analysis of the Special Safeguard Mechanisms in the Doha Round of Negotiations: A Proposed Price-Trigger based Safeguard Mechanism* (Indian Council for Research in Int'l Econ. Relations, Working Paper No. 189, 2006), 33.

[12] *See* W.T.O. Committee on Agriculture, G/AG/NG/W/13 (June 23, 2000) presented by Cuba, Dominican Rep, El Salvador, Honduras, Kenya, Nigeria, Pakistan, Sri Lanka and Zimbabwe (23rd June 2000). *Cf*, World Commission on the Social Dimension of Globalization, *Food Security Box in the WTO*, (which imbibes upon the proposal made by India in this regard).

[13] *See supra* note 11.

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permitted only a limited number of W.T.O. members to adopt measures to tackle import surges, in the name of 'special agricultural safeguards' (hereinafter S.S.G.). Article 5 of the A.o.A., which conferred this right[14] was applicable to those countries that agreed to undertake 'tariffication' by converting existing non-tariff barriers in the form of *quota* into 'bound' tariffs, at the time of its negotiation.[15] The remaining W.T.O. members who had instead been maintaining significant gaps between their bound and applied tariff rates were not beneficiaries of the S.S.G. provision under Article 5 of the A.o.A.[16] As a result, Members whose agricultural products benefited from the S.S.G. provision were permitted to temporarily raise the level of existing tariffs on those (agricultural) products that underwent tariffication if there was a surge of imports. In such cases, eligible Members would not need to prove that these circumstances were causing an injury to the covered products. On the other hand, Members who maintained bound tariffs on their agricultural products were instead only permitted to so raise their tariffs within the precepts of either W.T.O.'s Agreement on Safeguards (hereinafter A.S.G.),[17] the Agreement on Subsidies and Countervailing Measures (hereinafter S.C.M.A.),[18] or the Anti-Dumping Agreement (hereinafter A.D.A.)[19]; thereby having to prove that agricultural imports have been causing an injury to the domestic market.

Appreciating that the principal beneficiaries of the S.S.G. were developed countries, developing countries began to demand a similar right to insulate their agricultural sector from price volatility in international commodity

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[14] Art. 5 of the A.o.A. confers the right of S.S.G., by which, countries eligible to this right may increase their tariffs, beyond the bound rates, in the event of a surge in the volume of imports above a specified threshold, or a decline in the price of these below a reference price. Products, which are eligible for this tariff hike, shall have the symbol 'S.S.G.' designated next to them.

[15] *Id.* art. 4.2.

[16] *See* W.T.O., *Market Access: Special Agricultural Safeguards*, https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm (last visited Feb. 20, 2017), (for a list of countries and the number of products in each of these countries, that were eligible to apply an S.S.G).

[17] Arts. 2.1 and 4.2(a) of the A.S.G.

[18] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 [S.C.M.A.]. In particular, S.C.M.A. art. 17 permits the imposition of a countervailing duty to offset the amount of subsidisation.

[19] Agreement on Implementation of Article VI. of The General Agreement On Tariffs And Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 279 [A.D.A.]. Accordingly, Members are permitted to impose an anti-dumping duty when the normal value of the imported product exceeds the price of the 'like' domestic product, within the precepts of (most notably) Arts. 2, 3 and 9.

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prices.[20] Consequently, the W.T.O.'s Sixth Ministerial Conference held in Hong Kong in 2005 defined the concept of S.S.M. for the purpose of negotiations as "A tool that will allow developing countries to raise tariffs temporarily, to deal with import surges or price falls."[21]

In general, import surges signify the existence of two types of situations, which may expose domestic agricultural sectors to greater shocks, as a result of increased openness to trade, *viz.*, i) a significant increase in the volume of imports from one year to another (volume-based); or ii) a depression in the domestic market price, which may be a result of increased connectivity to global market prices (price-based).[22] According to this right, developing countries would be permitted to raise their existing tariffs on the affected agricultural products, without being required to prove that either volume-based or price-based import surge was causing an injury to their domestic industry. This special treatment would be due to the administrative and financial constraints that these countries encounter.

Several factors have contributed to import surges. Some of these have been the result of situations persisting in the local agricultural sector of the importing country, itself.[23] For instance, volatility in the climatic conditions has caused the world market prices to fluctuate frequently. At the same time, production shortfalls as a result of less-advanced methods in the farming sector, particularly in developing countries, has also aggravated the predicament of import surges - which have occurred to cater to the domestic demands. However, an imposition of an S.S.M. measure in such cases may not always be justified.[24] Domestic agricultural policies in third countries

[20] *See* W.T.O. Secretariat background paper, *Special Agricultural Safeguard*, G/AG/NG/S/9/Rev.119 2 (Feb. 19, 2002), (for the list of countries which adopted a price or volume-trigger based S.S.G. during 1995-2001). According to this list, except Costa Rica, Slovak Republic and Korea, almost all other S.S.G. users were developed countries.

[21] WTO, *Glossary: Special Safeguard Mechanism*, https://www.wto.org/english/thewto_e/glossary_e/ssm_e.htm (last updated Feb. 15, 2017).

[22] *See* Jamie Morrison & George Mermigkas, *Import Surges and the Special Safeguard Mechanism in a Changing Global Market Context, in* TACKLING AGRICULTURE IN THE POST-BALI CONTEXT - A COLLECTION OF SHORT ESSAYS, 103, 104 http://www.ictsd.org/downloads/2014/07/part2-2.pdf. *Cf*, M. DE NIGRIS, *Statistical analysis of import surges and production trends* (F.A.O. Imp. Surge, Working Paper No. 2, 2005), (for a discussion on the problems of the quantification of import surges).

[23] *See* F.A.O. Trade and Market Division, Agricultural Import Surges in Developing Countries, Part 1 Chapter 3 (Potential Sources of Import Surges), http://www.fao.org/docrep/014/i1952e/i1952e03.pdf (2011) (for a more detailed discussion of the causal factors of import surges).

[24] *See* Alberto Valdés & William Foster, *The New SSM: A Price Floor Mechanism for Developing Countries*,

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(exogenous factors) have been another causal factor in the past, resulting in import surges, by contributing to the volatility of international commodity prices. The prevalence of export subsidies, and particularly, in the E.U. and the United States, have been reported to be one of the most impactful exogenous factors insofar as import surges are concerned.[25] Even though export subsidies in agricultural products were not prohibited until the negotiation of the A.o.A., the heavy use of these, particularly by the E.U. via its Common Agricultural Policy (C.A.P.),[26] led to import surpluses in many countries. Subsequently, E.U.'s conversion of prohibited subsidies to non-prohibited ones (namely subsidy shifting from red box to the green box) continued to contribute to price depression of agricultural products and the consequent displacement of exporters of these products.[27] Although such subsidies may not substantially depress world market prices, they do have an adverse impact on the importing market, insofar as they increase the global market share of such products, thereby creating a surge-like situation.[28]

In particular, developing countries, represented by the G-33 group,[29] have been stressing upon the urgent need for W.T.O. rules to shield them from the detrimental impacts of such import surges and the consequent price volatility in the international commodity market.[30] Arguments for an S.S.M.

INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (hereinafter I.C.T.S.D.), https://www.ictsd.org/downloads/2008/08/avaldesfinal.pdf (last updated Feb. 19, 2016).

[25] *See* FAO, *Potential Sources of Import Surges,* 21-29, , *supra* note 23, at 23-27. *See also* HOEKMAN & KOSTECKI, *supra* note 1, at 295.

[26] *See* H. GRETHE & S. NOLTE, *Agricultural Import Surges in Developing Countries: Exogenous Factors in their Emergence* (F.A.O. Imp. Surge, Working Paper No. 5, 2005), https://www.agrar.hu-berlin.de/de/institut/departments/daoe/ihe/Veroeff/Import_Surges_Grethe_Nolte.pdf/view.

[27] *See* Andrew Dorward & Jamie Morrison, *Heroes, Villains and Victims: Agricultural Subsidies and Their Impact on Food Security and Poverty Reduction*, in HANDBOOK ON THE GLOBALISATION OF AGRICULTURE (Draft Chapter for Guy Robinson, D Schmallengger & John Cleary eds).

[28] *See* Harald Grethe & Stephan Nolte, *Agricultural Import Surges in Developing Countries: How do they Arise?*, DEUTSCHER TROPENTAG CONFERENCE ON INTERNATIONAL AGRICULTURAL RESEARCH FOR DEVELOPMENT 4 (Oct. 2005), http://www.tropentag.de/2005/abstracts/full/402.pdf.

[29] The G-33 is a coalition of developing countries, urging for flexibility as regards limited market opening (liberalisation) in agriculture. A list of G-33 countries is available on: W.T.O., https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#GRP017 (last visited Feb. 19, 2017).

[30] *See generally*, Special Session of the Committee on Agriculture, *Refocusing Discussions on The Special Safeguard Mechanism (S.S.M.): Outstanding Issues and Concerns On its Design and Structure Submission by the G-33*, WTO Doc. TN/AG/GEN/30 (Jan. 28, 2010); accord Bridges Weekly, *G-33 Outlines Special Safeguard Mechanism For Developing Countries*, 9 BRIDGES Nov. 2, 2005, at 1; accord TRALAC NEWS, *G-33 Ministerial Communiqué: Nairobi, December 2015*, TRALAC.COM (Feb. 15, 2016), http://www.tralac.org/news/article/8704-g-33-ministerial-communique-nairobi-december-2015.html ; and Special Session of the Committee on Agriculture, *S.S.M. and Permanent Solution on*

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have moreover been backed by justifications that while large sections of the population in these countries engage in the agricultural sector, price volatility in international commodity prices also increases the vulnerability of consumers who tend to spend more than 75% of their income on food.[31]

The occurrence of a surge, either by an increase in volume or decline in prices of the imported agricultural product, could then have grave consequences on these countries, which endeavour to achieve their food security goals and protect the livelihood concerns of their farmers.

In addition, the Hong Kong Ministerial Decision additionally permitted developing countries to 'self-designate' the number of tariff lines as 'Special Products' (hereinafter S.Ps.), on the basis of the criteria of that set forth in the July Framework Agreement,[32] *viz.* food security, livelihood security and rural development concerns.[33] However, in the absence of a precise definition of the concept of S.Ps., these have been understood according to the context within which they appear.[34] S.S.Ms. and S.Ps. would consequently be defensive mechanisms, constituting an integral part of the modalities and the outcome of negotiations in agriculture.[35]

Given the absence of precise parameters within which the right to impose an S.S.M. would operate, the W.T.O.'s draft modalities of 10th July 2008 subsequently attempted to provide some clarifications. Apropos, it delineated that in the case of volume-based S.S.M., these would be determined by a moving average of the preceding three years (referred to as the base).[36] The tariffs would then be permitted to increase above their current level, depending

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Public Stockholding for Food Security Purposes for Balanced Nairobi Outcomes: Submission by the G-33, WTO Doc. TN/AG/GEN/40 (Dec. 11, 2015).

[31] *See* Thomas W. Hertel, Will Martin, & Amanda M. Leister, *Potential Implications of a Special Safeguard Mechanism in the World Trade Organization: the Case of Wheat*, THE WORLD BANK ECON. REV. ADVANCE ACCESS 2
See also, Andrew Dorward & Jamie Morrison, *supra* note 27, for the 'impact of developed country subsidies on development, food security, and poverty in developing countries.'

[32] *See*, World Trade Organisation, Annex A of the General Council Decision, July Agreement Framework, WTO Doc. WT/GC/W/535, para. 41 (2004).

[33] *See* World Trade Organization, Hong Kong Ministerial Declaration, WTO Doc. WT/MIN(05)/DEC, (2005).

[34] i.e. the products that are vital for developing countries to protect their food security, livelihood security and rural development concerns.

[35] W.T.O., Hong Kong Ministerial Declaration, *supra* note 33.

[36] *See* World Trade Organisation, Committee on Agriculture Special Session, Revised Draft Modalities for Agriculture, WTO Doc. TN/AG/W/4/Rev.3, para. 124 (2008).

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on the size of the trigger (i.e. the percentage of the base).[37] A trigger of 110-115% would accordingly permit a hike in tariffs of either 25% or 25 percentage points. A trigger of 115-135% would allow an increase of 40% or 40 percentage points, and lastly, a trigger of more than 135% of the base would permit an increase in the tariff by 50% or 50 percentage points.[38] As regards price-based S.S.Ms., while these would be determined from the monthly average of the imports (calculated by the c.i.f. import price) over the preceding three years, and which would be triggered if the price of a shipment fell below 85% of the reference price.[39] Consequently, price-based S.S.Ms. would be evaluated on a shipment-to-shipment basis, permitting the tariff to increase to a level of 85% of the difference between the price of the individual shipment and the trigger price.[40]

While the 10th July Decision of 2008 attempted to delineate the precise modalities within which this right would be operative, the lack of consensus regarding the level beyond which the tariffs could be raised above the pre-Doha Round or the Uruguay Round bound rate, created a deadlock. For most, the frictions caused by India and the US, could be blamed for the major spur that resulted in this logjam.[41] Thus, India demanded that the *trigger* for volume-based S.S.Ms. should be small enough and *the increase in tariff* to offset such surges such be high for it to be able to successfully take into account its livelihood concerns. On the contrary, the United States urged for higher trigger levels together with a lower increase in tariffs to potentially decrease the scope for a plausible misuse of the mechanism.[42] In an attempt to resolve this deadlock, the 'Lamy Compromise' proposed that in the event a developing country (Member)[43] experienced a volume-based surge by 40% of the base, it would be permitted to increase its current bindings on the affected product by

[37] *Id.* para. 124.
[38] *Id*. para. 124 a-c.
[39] *Id.* paras. 126, 127 and 129.
[40] *Id.* para. 127. *See also*, para. 137, which provides that developing country Members should not usually take recourse to an S.S.M. where the volume of the imports of the concerned products is either manifestly declining, or manifestly negligible.
[41] *See* Amrita Narlikar, *Reforming Institutions, Unreformed India?*, *in* RISING STATES, RISING INSTITUTIONS: CHALLENGES FOR GLOBAL GOVERNANCE 105, 117 (Alan S. Alexandroff & Andrew F. Cooper eds.).
[42] *See* HOEKMAN & KOSTECKI, *supra* note 1, at 292.
[43] Note that the 'Compromise' would only apply to developing country Members and not to L.D.Cs. or S.V.Cs. See discussion above.

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15% or 15 percentage points.[44] However, this remedy would only be available to a maximum of 2.5% of the tariff lines, insofar as it would permit the tariffs to be increased beyond the pre-Doha bound rate.[45] The G-33 rejected the 'Compromise' on two grounds. First, they should instead be allowed to increase the tariffs by 30% or 30 percentage points above the pre-Doha limit if the volume surge was more than 15% more than that of the previous three years. Second, such an increase should instead apply to 7% of the tariff lines.[46] In particular, India stressed the need for a higher remedy level *viz*., the increase in the current bound rates by 30% or 30 percentage points, as against that offered by the 'Lamy Compromise' to safeguard the sensitivities in its agricultural sector. Even though India had been maintaining a huge difference between its applied and bound tariffs in most agricultural products, it insisted upon this higher remedy to protect sensitive products, such as rice, where the bound and the applied tariffs are the same because it constituted the principal source of livelihood for its farmers. The failure to resolve these issues consequently resulted in a deadlock of the entire D.D.A.[47]

In the recent Nairobi Ministerial Conference, on December 2015, India insisted upon the fulfilment of the promise offered by the Hong Kong Ministerial Declaration, *viz*., the right to developing countries to have recourse to an S.S.M. Moreover, the replacement of the 'single undertaking' method by the 'piecemeal' approach introduced by the Director-General, Roberto Azevêdo, further obligated that the outstanding issues of the D.D.A. be agreed.[48]

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[44] *Id.* para. 134-136. *Cf*, Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/7 (Dec. 6, 2008).
[45] *Id.*
[46] *See* Int'l Centre for Trade and Sustainable Development [I.C.T.S.D.], *Agricultural Safeguard Controversy Triggers Breakdown in Doha Round Talks*, BRIDGES WEEKLY, Vol. 12 (Aug. 7, 2008), http://www.ictsd.org/bridges-news/bridges/news/agricultural-safeguard-controversy-triggers-breakdown-in-doha-round-talks (last visited Mar. 1, 2017).
[47] *See* HOEKMAN & KOSTECKI, *supra* note 1, at 293. The authors underscore five reasons that contributed to the deadlock in the Doha Rounds. First is the issue of coverage, *viz*. the goods that should be covered - all or only a subset of agricultural products. The second one being concerning the type of triggers and the levels that may be used. The third being whether pre-Doha bound rates may be exceeded (this was mainly objected by the United States). The fourth being that, in the event, a country takes recourse to an S.S.M., it must be subjected to some form of 'injury' test, *viz*., that the import surges were detrimental to the livelihood of its farmers. Finally, S.S.Ms. should also be applicable for a limited time, as in the case of S.S.G.
[48] *See* William A. Kerr, *The WTO and Food Aid: Food Security and Surplus Disposal in the 2015 Ministerial Decision on Export Competition*, 17 THE ESTEY J. INT'L L. AND TRADE POL'Y 1, 2 (2016).

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Appreciating that the frictions caused due to the disagreement as to the modalities on an S.S.M. prompted the major split between the developing and developing country Members, consequently made it important to reach an agreement on this contentious issue. According to these factors, the Nairobi Ministerial Declaration adopted its decision on an S.S.M. for the purpose of which it provides, inter alia, that "In the context of addressing outstanding agricultural issues . . . . the developing country Members will have the right to have recourse to a special safeguard (SSM) as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration . . . ."[49]

Despite the fact that the inclusion of 'S.S.Ms.' into the Nairobi Ministerial Agenda can be inferred to be mainly due to Indian efforts, there seems to be no progressive outcome beyond that which was offered in the Hong Kong Ministerial Decision. The issue of S.S.Ms. has thus proved to be merely a 'lip service' for reasons that even the Nairobi Ministerial Decision only reinforced developing countries' right to this mechanism, leaving the responsibility to further negotiate in this regard, with its Committee on Agriculture in Special Session (C.o.A.S.S.).[50]

Even though the G-33 group of countries has been pushing for an S.S.M., one can say that India has been the most pro-active in articulating its concerns as to the efficacy of the W.T.O.'s current trade regime to adequately respect its food security concerns. Against this backdrop, the next section analyses India's stake in the S.S.M. negotiations since its inception to explore whether and how an S.S.M. can potentially contribute to food security in India.

3. EVALUATING INDIA'S STAKE IN SSM NEGOTIATIONS

In the Indian context, while it has been justifying its need for an S.S.M. as a means of operationalizing its food and livelihood security concerns, research accentuates that the country has indeed been experiencing the greatest amount

[49] World Trade Organization, Ministerial Decision of 19 Dec 2015, Special Safeguard Mechanism for Developing Country Members, WT/MIN(15)/43 WT/L/978 (2015).
[50] *Id*. paras. 2-3.

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of import surges, on all food commodities.[51] This, therefore, mandates a "closer investigation of the domestic and national factors responsible for these occurrences."[52]

India's involvement as regards a viable S.S.M. has much to do with the detrimental impact of trade liberalisation on its domestic economy. Thus, India's concerns revolve around achieving food security and rural livelihood, for the purpose of which, it considers it necessary to insulate its agricultural sector from import dumping.[53]

In the past, India's experience with reducing tariffs in the agricultural sector has been quite grim. For instance, in the case of edible oils, while India progressively slashed its import duties on these from 65 to 15% in the period between 1994 to 1999, it experienced a surge in the import of these products, reaching five million and four million tonnes respectively, in the years 1999 and 2000.[54] Thereby, while such import deluges may potentially contribute to declining prices to the benefit of consumers, its debilitating impact on food self-sufficiency objectives has, in turn, prompted policy-makers to hike tariffs to achieve these mandates.[55] Moreover, appreciating that the agricultural sector is the most vulnerable sector in India, constituting about 56% of the total employment,[56] itself explains the country's defensive interests in this regard - namely to protect the livelihood concerns of the people reliant on this sector. However, the nebulousness as regards the manner in which this 'right' has been delineated, has amplified the controversy regarding the nature of products that should benefit from this provision. In this regard, even though the Nairobi Ministerial Decision underscores India's triumph in ascertaining its rights in the W.T.O., it continues to remain ambiguous as to the basic

[51] *See* BRIEF FACTS ON IMPORT SURGES, *What Is Their Frequency and Which Are the Countries and Commodities Most Affected* (F.A.O. Imp. Surge, Working Paper No. 2, 2006), which identifies an import surge by a 30% deviation from a three-year moving average. On this basis, it finds India to have experienced import surges in between 100-130 times, on all food commodities, in the period between 1982-2003.
[52] *Id.*
[53] Amrita Narlikar, *supra* note 41, at 116-119.
[54] The reduction of tariffs also resulted in deluges in the case of palm olein or palm oil, soya bean oil, rapeseed oil and sunflower oil. *See supra* note 41, at 229.
[55] *Cf,* Bipul Chatterjee & Sophia Murphy, *Trade and Food Security: Strengthening the Global Trade and Investment System for Sustainable Development*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT AND WORLD ECONOMIC FORUM PUBLICATIONS 5, (Dec. 2013).
[56] *See*, Trade Policy Review Body, *Report by the Secretariat, Trade Policy Review: India*, WTO Doc. WT/TPR/S/313/Rev.1 98 (Sept. 14, 2015).

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parameters concerning the framework within which, this right must be effected. Working out any form of modalities as regards the price and the trigger would correspondingly mandate an a priori analysis of the 'use' of an S.S.M. The delineation of the parameters as regards the product coverage of an S.S.M. involves an analysis of complex factors. Nevertheless, identifying the immediate beneficiaries to this right forms an essential basis, and could thus be the first step in resolving controversies in this regard.

India's interest in the S.S.M. negotiations primarily concerns the provision of domestic support to its agricultural sector for which, it has been adopting certain internal measures that endeavour to ensure the stability of the supply of food and consequently income, for the population that relies on agriculture as a means of livelihood. In this context, India's main contentions have been that the absence of an S.S.M. to actually tackle import surges would render its domestic support schemes futile.

Internal measures for the purpose of agricultural growth and food self-sufficiency in India are two-fold. Thus, apart from providing income support for farmers, they also endeavour to provide adequate quantities of food to the poor at affordable prices. Towards this end, the country's food security initiatives presently comprise of a complex range of measures,[57] and are explained by the fact that despite a significant percentage of the population is engaged in the agricultural sector, its contribution towards G.D.P. has been merely 20%.[58] However, central to its food security initiative,[59] have been its minimum support price (hereinafter M.S.P.) scheme coupled with its targeted public food distribution scheme (hereinafter T.P.D.S.).

According to the stipulations contained in Article 6 read along with Annex 3.8 of the A.o.A., India's M.S.P. scheme has been classified as an 'Amber Box Measure', with the caveat that government assistance provided in this regard does not exceed 10% – which is the maximum limit for developing countries.[60]

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[57] *Id.* at 100-01, which provides a list of domestic support measures notified by India.
[58] *See* Trade Policy Review Body, *Trade Policy Review: Report by India*, WTO Doc. WT/TPR/G/313 9-10 (Apr. 28, 2015).
[59] Refer to W.T.O. Report by the Secretariat, *Trade Policy Review: India*, *supra* note 56, for other domestic support measures for the purpose of food security.
[60] For a detailed discussion on India's food security initiatives, refer to the author's publication, Saloni Khanderia-Yadav, *Ramifications of the Bali Ministerial Conference on Food Security and Public Distribution Schemes: Is India Skating on Thin Ice?* 11 MANCHESTER J. INT'L ECON. L. 201, 207-10 (2014).

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Accordingly, this 10% is calculated by the difference between the M.S.P. and an external reference price (presently being the rates of the given commodity during the base year, viz. 1986-88), which is then multiplied by the total quantity of agricultural produce qualified to receive such governmental assistance. The result of this formula is referred to as the 'Aggregate Measure of Support' (hereinafter A.M.S.). A.M.S. is, therefore, a calculation of the total trade-distorting support categories (amber-box subsidies). The external reference price for India has been fixed at Rs. 3220/-, Rs. 3540/-, and Rs. 156.16 for rice, wheat and sugar, respectively. That being said, the M.S.P. scheme is presently extended to twenty-five major commodities,[61] and is aimed to protect farmers growing staple food crops, from volatilities in the market conditions.[62] It is consequently complemented with the Government's price support scheme (P.S.S.), which authorises the government-designated agencies to purchase these commodities (i.e., the staple crops), at M.S.P., if the prices fall below the M.S.P.[63]

Interestingly, even though India has been able to produce enough quantities of agricultural products, like crops, to be able to export these, it continues to face high levels of malnutrition.[64] In order to address this issue, the National Food Security Act, 2013, (hereinafter N.F.S.A.) aims to ensure food security by means of a public distribution system. This public distribution system is a 'Green box subsidy' to the extent that it relates to the Government's purchase of M.S.P. products and the stockholding of these,[65] for

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[61] *See* Directorate of Economics and Statistics, (for the list of the twenty-five commodities for 2010 – 2015).

[62] Article 6.2 of the A.o.A. read along with Annex 3.8 and 3.9, which recognises the significance of food. *See* WTO, Revised Draft Modalities for Agriculture, *supra* note 36; and DTB Associates LLP, *Agricultural Subsidies in Key Developing Countries: November 2014 Update*, 30-36 http://dtbassociates.com/docs/DomesticSupportStudy11-2014.pdf.
Cf. Shri Anand Sharma, Union Minister of Commerce and Indus., Address at the Plenary Session of the 9th Ministerial Conference of the W.T.O. at Bali (Dec. 4, 2013), http://pib.nic.in/newsite/PrintRelease.aspx?relid=101013 (updated Mar. 31, 2014); World Trade Organization, Bali Ministerial Decision on Public Stockholding for Food Security Purposes, WTO Doc. WT/MIN(13)/38 (Nov. 27, 2013); World Trade Organization, Nairobi Ministerial Decision on Public Stockholding for Food Security Purposes, WTO Doc. WT/MIN(14)/44 (Dec. 19, 2015); and Khanderia-Yadav, *supra* note 60.

[63] *See supra* note 56, for the prevailing M.S.P. rates on the 25 commodities.

[64] *See* Chatterjee & Murphy, *supra* note 55, at 238, which states that although the government of India holds large stocks of foods (sixty million tonnes as of 2002), millions of Indians continue to suffer from poverty and malnutrition.

[65] *Cf.* Annex 2.3 of the A.o.A. *See generally*, F.A.O., I.F.A.D., I.M.F., O.E.C.D., U.N.C.T.A.D., W.T.F., World Bank, W.T.O., I.F.P.R.I. and the U.N. H.L.T.F., *Policy Report, Price Volatility in Food and Agricultural Markets: Policy Responses*, at 28-30 (June 2, 2011), (for a discussion on national buffer

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subsequent sales to 'targeted' low-income consumers. The Planning Commission of India consequently determines the population in urban and rural areas that are eligible for receiving food grains (wheat, rice or course grains) at subsidised rates. Accordingly, the N.F.S.A. entitles this 'targeted' population to receive five kg of the grains as mentioned above at Rs. 2, 3, and 1 per kg, respectively. The T.P.D.S., however, entitles the eligible households to receive fifteen kg of each of these grains, per month. In this context, commodities covered by the M.S.P. scheme are those that are most susceptible to market conditions, while N.F.S.A. includes products that constitute a staple diet, for the purpose of ensuring food security.

3.1. WORKING OUT THE COMPLEMENTARITIES

3.1.1. THE PRODUCT COVERAGE

Appreciating that the S.S.M. intends to secure the livelihood concerns of local farmers from volume *and* price-based import surges, it consequently renders it significant to *at least* extend the S.S.M. provision to those twenty-five agricultural commodities, which are benefitting from the M.S.P. scheme in India. These justifications stem from the fact that these products have already been recognised at the domestic level as those, which are concomitant in providing income support and ensuring stability in food supply by being highly susceptible to market volatilities. Likewise, appreciating that the right to recourse to an S.S.M. derives its normative value in W.T.O. negotiations from, inter alia, the 'D.B.' – which entails to improve domestic food production and safeguard livelihood concerns - [66] itself supports the view that the S.S.M. provision must be extended to commodities covered under the M.S.P. scheme.

Appreciating that S.S.M. measures endeavour to enable developing country Members to raise tariffs *in the event of import surges*, by itself substantiates the idea that all products that are currently receiving some level of domestic support for a similar purpose should benefit from such a provision.

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stocks and emergency food reserves as a domestic policy option to cope with price volatility, particularly for the most vulnerable).

[66] In particular, the emphasis of the D.B. is to protect the interests of low-income farmers and additionally secure the supply of staple foods, for the purpose of which, it considers the possibility of employing higher tariffs for these purposes.

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It is in a related vein that the present author proposes the extension of S.S.M. *vis-à-vis* its product coverage to all agricultural commodities that are categorised as 'S.Ps.'[67] given the interrelationship between the issues that concern these.[68] Even though it has been contended that the prime agenda of the S.S.M. is to exclusively enable developing country members to raise tariffs in the wake of an import surge of a given commodity, as against mainly addressing livelihood security - an objective dealt with by the W.T.O. negotiations on S.Ps.,[69] one cannot repudiate the chilling effects that such deluges have on livelihood concerns. Moreover, the linkages between S.Ps. and S.S.Ms. can be evidenced by the similarity in the context in which the negotiations commenced, viz. in the interest of S&D treatment for developing countries.[70] Therefore, the product coverage for an S.S.M. should rather be the prerogative of each developing country by self-designation wherein they can select the products that are most susceptible to import surges.

Accordingly, although the protection of commodities designated as S.Ps. is a long-term measure, whereas, on the contrary, an S.S.M. is a short-term measure,[71] the need to extend S.S.Ms. to all S.Ps. is validated by the G-33's position that links the role of both these provisions to the realisation of the goals of food security, livelihood security and rural development.[72] Apropos, if an individual commodity contributes to achieving any of these goals, it must automatically be designated as an S.P., consequently permitting the developing country Member engaged in the production of this (commodity) to temporarily raise tariffs, in the event of an import surge.

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[67] *Cf*. Chatterjee & Murphy, *supra* note 55, at 5, which in regards to the contention whether an S.S.M. should be restricted to crops relating to food security, or should it simply include those for the purpose of livelihood security, opines that "ensuring livelihood security would support the extension of the SSM to both essential food crops and those crops that are important for the income stability of farmers and farm workers".

[68] *See* discussion above.

[69] *See*, HOEKMAN & KOSTECKI, *supra* note 1, at 292.

[70] Refer to WTO, Revised Draft Modalities for Agriculture, *supra* note 36, at 23–29, which categorises S.P. and S.S.M. under the heading 'Special and Differential Treatment'.

[71] According to para. 140 of the 10th July 2008 modalities, in the case of volume surges, developing countries would be permitted to maintain an S.S.M. for a maximum period of twelve months from the initial invocation of the measure; unless the product involved is a seasonal product, in which case, the S.S.M. can only apply for a maximum period of six months, or to cover the period of actual seasonality: whichever is longer.

[72] *See* W.T.O. Committee on Agriculture Special Session, *Proposal on Indicators: Submission by the G-33* (Oct. 12, 2005).

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Drawing from India's example, even while there may be an overall need to protect all commodities covered by the M.S.P. for the purpose of S.S.M. negotiations, the ones benefitting from the T.P.D.S. (namely rice, wheat and sugar),[73] being of a 'special' character,[74] certainly demand recourse to the right in question, in the event of an import surge. It would assist in putting to rest contentions as to whether an S.S.M. must exclusively focus on safeguarding livelihood concerns of farmers that have been affected by an import surge, or if such a right should rather *additionally* extend to commodities requisite for food security purposes that have also been 'hit' by a deluge. In other words, over and above the goods covered by the M.S.P. scheme, those other products that are considered 'special' from the perspective of food security in India, and in particular under the T.D.P.S., should be eligible for an S.S.M. treatment. The interrelationship between livelihood security and food security can, for instance, be better understood with the help of India's present domestic support scheme, in this regard. Consequently, insofar as the three commodities, namely rice, wheat, and sugar, have been covered by the country's T.P.D.S., this would in itself substantiate and in turn entail that these being for the purpose of food security, should thus additionally have access to an S.S.M.[75] Consequently, indicators that conceptualise the mandate of S.Ps. would apply mutatis mutandis while deliberating upon the product coverage of an S.S.M. insofar as the former are essential for the rural economy and thus require protection from import competition.

Towards this end, any consensus vis-à-vis the 'product coverage' for an S.S.M. should pay utmost regard to the necessity to protect the importing economy from cheap, dumped imports. Doing the same would only make it discernible to encompass those products in which imports account for a significant portion of the domestic consumption. Needless to say then, of course, the right should only be warranted if the importing country not merely produces the concerned commodity, but does so in substantial quantities.

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[73] Note that: 'rice' does not benefit, at present, from the M.S.P. scheme, and neither does 'sugar'. However, 'sugarcane' is covered by the above-mentioned scheme.

[74] *Cf.* WTO, Revised Draft Modalities for Agriculture, *supra* note 36, at 55 – 56, and Luisa E. Bernal, *Guidelines for Approaching the Designation of Special Products and SSM Products in Developing Countries*, Paper Prepared for the I.C.T.S.D. Informal Consultation entitled Special Products and Special Safeguard Mechanism after July Framework: How do we Move Forward? 16-18 (Sep. 30, 2004), (for an indicative list of indicators for the designation of S.P).

[75] *Cf.* Bernal, *supra* n. 74, at 19.

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Additionally, the product should also be 'sensitive' from the perspective of the importing country.[76]

3.1.2. TRIGGER LEVELS

As aforementioned, contentions as to the trigger levels for an S.S.M. mainly revolve around the *extent to which*, members should be able to exceed their pre-Doha bound rates. In this regard, because S.S.M. is a short-term measure which entails protecting small farmers from import surges, the trigger levels for this right should apropos employ tariff rates that are not disguised restrictions on international trade, so as to impede long-term competitiveness in any given agricultural commodity. In a related context, the extent to which developing countries should be permitted to exceed the pre-Doha bound rates should be the prerogative of such countries, as long as they take into account the parameters as mentioned earlier, *viz.*, that long-term competitiveness in the covered products is not being debilitated.

In this regard, questions have often been raised as to the need for India to urge for such a demand, given that it already maintains huge gaps between its bound and applied tariffs.[77] Accordingly, an S.S.M. would be of little value to India, since it could easily increase its applied tariffs on those products affected by a surge, without as such exceeding its bound tariffs. Nevertheless, India's pro-activeness in insulating its agricultural sector can be demonstrated by the consistent increase in the imports of some of the agricultural commodities, such as, for instance, rice, wheat, cereals, fruits, pulses, jute, dairy products and oilseeds.[78] In 2014 alone, the imports for rice grew by 18.45%, wheat by 109.58%, cereal by 346.28%, pulses by 29.30%, jute by 140.30%, milk and cream by 49.19%, fruit and nuts by 23.84%, and oilseeds by

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[76] *Cf.* South Centre, *WTO's MC10: Agriculture Negotiations – Special Safeguard in Agriculture for Developing Countries*, Analytical Note, SC/TDP/AN/MC10/2, at 10 (Dec., 2015) , http://www.southcentre.int/wp-content/uploads/2015/12/AN_MC10_2_Special-Safeguard-in-Agriculture.pdf.

[77] *See, e.g.*, Int'l Centre for Trade and Sustainable Development [ICTSD], *Reconsider Farm Safeguard Focus, India's Chief Economist Urges*, BRIDGES WEEKLY, (Mar. 3, 2016), http://www.ictsd.org/bridges-news/bridges/news/reconsider-farm-safeguard-focus-india%E2%80%99s-chief-economist-urges (last visited Mar. 15, 2017).

[78] For a detailed list of imports of agricultural commodities to India, for preceding years, see DEPARTMENT OF COMMERCE, *Import of Principle Commodity Groups*, System on Foreign Trade Performance Analysis (F.T.P.A.), http://commerce.nic.in/ftpa/default.asp.

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140.30%. In this context, certain products, and in particular, wheat; pulses such as arhar, moong, masur, soybean and urad; cereals such as maize, barley, jowar, bajra, ragi; oilseeds such as safflower seed, sunflower seed, rapeseed, sesame seed and niger seed; and jute have been designated for protection under India's M.S.P. scheme. While imports can be controlled in the case of most of these commodities through the 'water in the tariffs'[79] between the bound and applied rates,[80] an S.S.M. would play a significant role in tackling import deluges for commodities such as corn and oilseeds such as rapeseed and soybean, where these gaps are virtually non-existent or very small.[81] In this regard, India's fixation with the S.S.M. issue appears justified *predominantly*[82] for the protection of commodities such as corn (cereal), rapeseed and soybean.[83] These products are delineated as vulnerable at the domestic level[84] and have been experiencing high levels of import penetration, which at present cannot be sufficiently protected otherwise, given the 'shallow waters' in its bound versus applied tariffs. In the context of rice, the present author opines that the commodity may not benefit from an S.S.M. necessarily because India's exportation outweighs the imports. Apropos, its rice exports grew by 71.65 and 39.07%, in 2013 and 2014 respectively, while imports of this product merely increased by 32.53 and 18.45%, during the same years. This, in turn, implies that, in the case of rice, India does not at present, experience any threat to its livelihood concerns or food security. As regards dairy products and fruits – which have also, in the past experienced import surges, these have not been commodities which are vulnerable at the domestic level, and hence do not encumber livelihood concerns. Although an S.S.M. could be beneficial for the protection of these sectors, insofar as the gaps between the bound and applied

[79] Narlikar, *supra* note 41, at 113. *See also* C. STEVENS, *The need for Special Products and Special Safeguard Measures for Agriculture in the WTO: A Situational Analysis* (Inst. of Dev. Studies, Paper, 2004), http://www.eldis.org/vfile/upload/1/document/0708/DOC16764.pdf.

[80] *See* Pal & Wadhwa, *supra* note 11, at 25.

[81] India's applied and bound tariffs, in agricultural products http://agricoop.nic.in/sites/default/files/Agriculture_Trade_Policy_Status_Under_FTA.pdf.

[82] For a discussion on the contribution of 'rice' towards rural development, in India, see Concepción Calpe & Adam Prakash, Sensitive and Special Products – A Rice Perspective, at 55, http://www.fao.org/fileadmin/templates/est/COMM_MARKETS_MONITORING/Rice/Documents/SpecialPerspecive.pdf.

[83] *See*, Department of Commerce, *supra* note 78, with particular reference to import penetration in cereals.

[84] The vulnerability of these commodities can be implied from the fact that these have been included in the Government (of India's) list of commodities, which will benefit from the M.S.P. scheme.

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tariffs are low, it (an S.S.M.) is not, in the opinion of the present author, a matter of urgency. In particular, corn/maize is a commodity that currently benefits from the M.S.P. scheme, and being a cereal, it would benefit from the 'S.S.M.' protection, especially because import penetration in cereals is high. At the same time, while the bound tariff on corn is seventy, the applied rate fluctuates between fifty (in the years 2006, 2009, 2010) and seventy (in 2007). Consequently, the Indian Government may want to resort to an S.S.M. if the difference between bound and applied tariff is the same, or small *and* the criteria for imposition of an S.S.M. has been satisfied. In a related vein, rapeseed and soybean face similar problems as regards high import levels coupled with high-applied rates (i.e. low gaps between the bound and applied tariffs).

Considering that India's M.S.P. scheme is to safeguard the stability of income for farmers, price-based remedies, as against volume-based remedies would be more feasible, if the imported agricultural commodity in question is depressing the price of the products benefitting from the said scheme. Therefore, the contours for price depression could be analysed mutatis mutandis to those employed in anti-dumping investigations, appreciating that an S.S.M. is nothing but a short-term response to deal with agricultural dumping.[85] Likewise, price-based remedies could also be more beneficial in the Indian scenario, where the whole aim is to safeguard the livelihood security and consequently achieve food security, insofar as these can be triggered *as soon as* international prices drop,[86] without being detrimental to the abovementioned pursuits (*viz.* livelihood security and food security).[87] Volume-based remedies, on the contrary, would require a certain amount of a given agricultural commodity to be imported before the S.S.M. can be imposed.[88] Consequently, the affected developing country Member *must first experience*

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[85] *Cf.* Arts. 3.1 and 3.2 of the A.D.A. Price depression is analysed in the context of anti-dumping investigations, to adjudge the determination of the imports on injury and per se, whether these imports are having a detrimental impact on the prices on the 'like' domestic products. Accordingly, for the purpose of imposing an S.S.M., Arts. 3.1 and 3.2 of the A.D.A. could influence the working of price triggers for an S.S.M., insofar as these would be based on whether the imports are causing an injury to the 'like' domestic agricultural commodity and thus resulting in price depression.

[86] Which implies that price-based triggers can be invoked without there being a need for actual importation of the agricultural commodity.

[87] Pal & Wadhwa, *supra* note 11, at 39.

[88] Pal & Wadhwa, *supra* note 11, at 39.

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some injury towards its domestic industry, by such a surge, irrespective of the fact that S.S.M.-rules do render the proof of such an injury a pre-requisite.

Appreciating that price-based remedies would best achieve the purposes of an S.S.M. for all developing country Members striving to safeguard the livelihood concerns of their farmers, suggests that remedies for this should similarly focus on the *objective* of the trigger, *viz.*, to insulate these countries from the negative impact of agricultural dumping. The July 2008 modalities as regards price-based remedies, permitting a tariff increase of merely 85% of the gap between the shipment and trigger price, appears to be utterly arbitrary. From this perspective, the G-33's demand that the tariff increase in the wake of price triggers should cover 100% of the gap between the shipment and the trigger price seems more appropriate.[89] This position would be comparable to the A.D.A., which in itself authorises the imposition of an anti-dumping duty, to *completely* negate the difference between the price of the imported product and the (like) domestic product.[90]

While in the case of price triggers, the imposition of a duty to completely offset the injury to the concerned product(s) according to the parameters set forth above seems more appropriate; developed and developing country Members could meet halfway for volume-triggered additional duties.[91] Thus, a remedy of 20% or 20 percentage points of the current bound rates added to the pre-Doha level seems workable,[92] especially where otherwise it seems that there would continue to be no consensus whether the Doha-bound rates should be respected.

[89] *Cf.* the discussion above, which mentions the 10th July modalities as regards price-triggers, and states that the proposed remedy would permit only a tariff increase of 85% of the gap between the shipment and trigger price.

[90] *Cf.* Arts. 9.3 and 2.1 of the A.D.A., which permits the imposition of an anti-dumping duty to offset the dumping. Dumping is calculated by the difference between the normal value and the export price.

[91] *I.e.*, the level beyond which the pre-Doha binding can be exceeded.

[92] The calculation of a 'halfway solution', *viz.*, 20% or 20 percentage points is on the basis of that suggested by the 'Lamy Compromise', *viz.*, 15% or 15 percentage points of the current bound rate, *added to the pre-Doha bound rate*, and that stipulated by the G-33, *viz.*, 30% or 30 percentage points of the current bound rate, *added to the current applied rate.*

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4. CONCLUSION

The fact that the D.D.A. failed to reach its logical conclusion exclusively because of a lack of consensus on the S.S.M. issue underscores the significance of this issue in the W.T.O., and in particular to developing country Members. Apropos, despite the recent Nairobi Ministerial Decision on S.S.M., which mainly reflects India's dominance in influencing the direction of W.T.O. negotiations,[93] its success is nevertheless contingent on the ability of W.T.O. Members to negotiate upon the modalities of this right – which continues to lack any teeth.

In particular, India's pro-activeness in articulating its concerns for an S.S.M. has much to do with ensuring the efficient functioning of its domestic support schemes, which endeavour to safeguard the livelihood and food security concerns that the country has been facing. Understanding that this Decision is important for India in the context of its agricultural domestic support schemes, any delineation of parameters to operationalise the S.S.M., must necessarily take into account the products benefiting from these. At the same time, any negotiations as regard the trigger levels must employ tariffs that do not operate as disguised restrictions on trade to debilitate long-term competitiveness in any agricultural commodity. In India's situation, even though most agricultural commodities are protected by sufficient 'water in the tariffs' between the bound and applied rates, the insistence for an S.S.M. appears justified for commodities such as maize/corn, oilseeds and rice, which are not only significant sources of livelihood, at the domestic front, but which also face high levels of import penetration. Price-based remedies could thus be more beneficial in the Indian scenario, insofar as these can be triggered without any injury being caused to the domestic industry in any of the covered products, but on the contrary, as soon as international prices drop. However, considering that an S.S.M. is a remedy that tackles agricultural dumping, price-based remedies must completely offset the decline in prices, resulting out of the import surge.

[93] In the Bali Ministerial Conference, India asserted its demand for a consensus on food security and public stockholding, which consequently led to a Decision, in this regard. *See*, S. A. Sharma, Union Minister of Commerce and Indus., Address at the Plenary Session of the 9th Ministerial Conference of the W.T.O. at Bali (Dec. 4, 2013),.
http://pib.nic.in/newsite/PrintRelease.aspx?relid=101013(updated March. 31st, 2014).

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On Recent Changes to Life Imprisonment in the Context of the Gradual Reduction in the Use of the Death Penalty in China

HUANG GUI †

TABLE OF CONTENTS: 1. Introduction; 2. Life Imprisonment for Crimes no Longer Subject to the Death Penalty: its Upgrading to the Maximum Punishment and the Reasons for this Development; 2.1. Upgrading Life Imprisonment to the Maximum Punishment; 2.2. Reasons for Upgrading Life Imprisonment to the Maximum Punishment; 2.2.1. The Proportionality Principle: Concerns regarding the Balance between the Punishment and the Crime; 2.2. The Severe Penalty Doctrine: Concerns Regarding Penalties; 2.3. LWOR for the Crimes of Embezzlement and Bribery: Political Concerns; 3. Reforms to Life Imprisonment in the Context of Reducing the Use of the Death Penalty: Applicable Conditions and Amending the Termination Mechanisms; 3.1. Conditions for Passing a Sentence of Life Imprisonment; 3.2. Reforming the Termination Mechanisms for Life Imprisonment: Increasing its Severity; 3.2.1. L.W.P.R.: Commutation; 3.2.2. L.W.P.R.: parole; 3.2.3. L.W.O.R.: Crimes of Embezzlement and Bribery; 4. Further Reform Proposals for the Life Imprisonment System; 4.1. Reducing the Number of Crimes Punishable by Life Imprisonment; 4.2. Opposing LWOR for the Crimes of Embezzlement and Bribery; 4.3. The Applicable Conditions should be explicitly provided by the General Provisions of the Criminal Law; 5. Conclusion.

ABSTRACT: China is improving its criminal law to gradually reduce the use of the death penalty, particularly in the Eighth and Ninth Amendments, and the law relating to the use of life imprisonment has also been changed in these two amendments, including upgrading it to the maximum punishment for those crimes from which h the death penalty has been removed and reforming its termination mechanisms which include life imprisonment with possibility of release (LWPR) and without release (LWOR). In the light of this, following the introductory section, this paper will explore the upgrading of life imprisonment to the maximum punishment in these two amendments and analyze the reasons for this, which include the requirements of the proportionality principle, and the influence of the severe penalty doctrine, as well as political considerations. The paper will then examine the reforms carried out by the two amendments and relative judicial interpretations for the termination mechanism of life imprisonment on the basis of the conditions for its use as a sentence, and its prevalence. Finally, the paper will make proposals for improving the current situation. These proposals include reducing the number of crimes punishable by life imprisonment and removing LWOR from the law, as well as explicitly defining applicable conditions.

KEYWORDS: *Life Imprisonment; Death Penalty; The Eighth Amendment; The Ninth Amendment; China*

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1. INTRODUCTION

In terms of the death penalty, China is one of the retentionist states, keeping company with other states like the United States, the United Arab Emirates, Japan, India, Iran, Pakistan and fifty-two others.[1] In accordance with the White Paper on Judicial Reform in China, published by the Information Office of the State Council in 2012, it is emphasized that "China retains the death penalty, but strictly controls and prudently applies it".[2] However, the Decisions of the Central Committee of the Communist Party of China (hereinafter C.P.C.), launched by the Third Plenary Session of the 18th Central Committee of the C.P.C. in 2013, to a great extent, "softens" this death policy and promises that China is implementing the policy of "gradually reducing the use of the death penalty." [3] Therefore, we can see that, in terms of legislation, China is making progress to improve its national law to reduce the possibility of the use of death penalty in judicial practice. This is clear from the fact that the use of the death penalty for twenty-two crimes was repealed by the Eighth Amendment to the Criminal Law of People Republic of China (hereinafter Criminal Law) (the Eighth Amendment)[4] and the Ninth Amendment to the Criminal Law (the Ninth Amendment)[5], in 2011 and 2015, respectively, so that the total number of crimes punishable by death has been reduced from sixty-eight before 2011 to forty-six nowadays. Meanwhile, in terms of judicial practice, under the death policy of the C.P.C., the Supreme People's Court (hereinafter S.P.C) insists on a

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[1] *See* Amnesty International, *Death Sentences and Executions in 2015*, AI Index ACT 50/3487/2016 (April 6, 2016).

[2] GUÓ WÙ YUÀN XĪN WÉN BÀN GŌNG SHÌ (国务院新闻办公室) [THE INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], *zhōng guó dí sī fǎ gǎi gé bái pí shū <(中国的司法改革>白皮书) [The White Paper on Judicial Reform in China*] (Oct. 9, 2012), Zhōng yāng zhèng fǔ mén hù wǎng zhàn (中央政府门户网站) [THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA], http://www.gov.cn/jrzg/2012-10/09/content_2239771.htm.

[3] DECISION OF THE CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA ON SOME MAJOR ISSUES CONCERNING COMPREHENSIVELY DEEPENING THE REFORM (NOV. 12, 2013).

[4] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (bā)(中华人民共和国刑法修正案（八)) [The Eighth Amendment to the Criminal Law of the People's Republic of China], (adopted by the Standing Comm.Nat'l People's Cong., Feb.25, 2011, effective May 1, 2011).

[5] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (jiǔ) (中华人民共和国刑法修正案（九)) [The Ninth Amendment to the Criminal Law of the People's Republic of China], (adopted by the Standing Comm.Nat'l People's Cong., Aug. 29, 2015, effective Nov.1, 2015).

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policy of retaining the death penalty and also emphasizes the judicial policy of "strictly controlling and prudently applying it, and making sure that the death penalty is only imposed on a very few offenders who commit the most heinous crimes."[6] However, China's courts have been able to impose the death penalty for these forty-six crimes on a large number of convicted criminals, according to an Amnesty International Report.[7] In this sense, the great number of crimes punishable by death makes the whole penalty system become a strict one,[8] in which, however, as some scholars have argued, "strategies to abolish the death penalty are only one step on the road to the reformation of the elimination of extreme sentences."[9] Obviously, with the developing reduction in the use of the death penalty, life imprisonment (in Chinese, Wuqi Tuxing) will become the next "extreme sentence", i.e., "a kind of punishment that deprives the convicts' of their rights to freedom and keeps them in prison for the rest of their lives, under which they are generally asked to accept education and reform through labor if they are able to work."[10] It can take two forms, i.e., life imprisonment with the possibility of release (hereinafter L.W.P.R.) and without release (hereinafter L.W.O.R.). De jure, life imprisonment is one of the principle punishments in China's penal system and the second heaviest punishment after execution in terms of its severity; and it has also been reformed by the

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[6] Cui Jia, *Zhōu qiáng, yào jiān chí yán gé kòng zhì hé shèn zhòng shì yòng sǐ xíng dí zhèng cè，fáng zhǐ sǐ xíng shì yòng chū xiàn dà fú bō dòng*
(周强：要坚持严格控制和慎重适用死刑的政策，防止死刑适用出现大幅波动)[*Zhou Qiang: to Insist on the Policy of Strictly Controlling and Prudently Applying the Death Penalty; To Prevent the Number of Uses of the Death Penalty Having Sharp Fluctuations*], zhōng guó rì bào (中国日报) [CHINADAILY.COM.CN] (Jan. 1, 2017), http://www.chinadaily.com.cn/interface/toutiaonew/53002523/2017-01-14/cd_27955754.html. Here, I have to point out that under China's special regime, most important criminal policies, like the death policy, are launched by the C.P.C., and the judicial authorities, including the S.P.C. and Supreme People's Procuratorate, have to implement these policies without giving any other different opinions on them, although they can interpret these policies. For example, regarding the death policy, one of the former Vice presidents of the Supreme People's Court, Huang Ermei, pointed out that, "China will not completely repeal the death penalty within a quite long period due to China's lacking the required conditions for repealing the death penalty de facto and de jure." *See also Huáng ěr méi fǎ guān: zhōng guó zài xiāng dāng shí qī nèi bù néng fèi chú sǐ xíng (*黄尔梅法官：中国在相当时期内不能废除死刑*)* [*The Judge, Huang Ermei: China will not completely repeal the death penalty within a quite long period*], Wǎng yì xīn wén (网易新闻) [WANGYI NEWS] (Mar. 7, 2008), http://news.163.com/08/0307/14/46EJDA5G0001124J.html.

[7] Amnesty International, *supra* note 1, at 2.

[8] *See* Chen Xingliang (陈兴良), *Fàn zuì fàn wéi dí kuò zhāng yǔ xíng fá jié gòu dí diào zhěng — — 《xíng fǎ xiū zhèng àn (jiǔ) 》 shù píng 》 (*《犯罪范围的扩张与刑罚结构的调整——《刑法修正案(九)》述评*) [On the Expansion of the Scope of the Crime and the Adjustment of the Penalty Structure: Comment on the Ninth Amendment]*, Fǎ lǜ kē xué (xī běi zhèng fǎ dà xué xué bào) (*法律科学*(*西北政法大学学报*)) [SCIENCE OF LAW (JOURNAL OF NORTHWEST UNIVERSITY OF POLITICAL SCIENCE AND LAW)], 2016(04), at 179, 184.

[9] Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life without Parole as an Alternative to the Death Penalty*, 67 UNIVERSITY OF MIAMI LAW REVIEW 439, 440 (2013).

[10] GĀO MÍNG XUĀN & MǍ KÈ CHĀNG (高铭暄，马克昌), XÍNG FǍ XUÉ (刑法学) [THE CRIMINAL LAW] 252 (2005).

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aforesaid two amendments, as well as other judicial interpretations, with the aim of compensating for the deficiencies in the punishment system resulting from the reduction in the use of the death penalty. In judicial practice, when selecting a criminal punishment, life imprisonment is always an optional penal measure alongside the death penalty for lethal, violent crimes, and other serious crimes, such as embezzlement and bribery, and it is the legally prescribed maximum punishment for certain crimes. Focusing on the legislative facts regarding the changes in the use of life imprisonment, therefore, this paper will examine the fact that life imprisonment has been upgraded to the maximum punishment for certain crimes in these two amendments and analyze the reasons for this in the second section, before exploring the applicable conditions for life imprisonment and its reform carried out by the two amendments and various judicial interpretations in the third section. In the final section, further proposals for reform will be offered.

2. LIFE IMPRISONMENT FOR CRIMES NO LONGER SUBJECT TO THE DEATH PENALTY: ITS UPGRADING TO THE MAXIMUM PUNISHMENT AND THE REASONS FOR THIS DEVELOPMENT

2.1. UPGRADING LIFE IMPRISONMENT TO THE MAXIMUM PUNISHMENT

Life imprisonment has been upgraded to the maximum punishment for the crimes that should have led to the death penalty under the 1997 Criminal Law, as the Eighth and Ninth Amendments have removed the death penalty as an option for thirteen crimes and nine crimes, respectively, including seven types of crimes involving smuggling, seven types of financial crime, two types of crimes involving control of cultural relics, two types of crimes related to prostitution, two types of military crimes, one crime of teaching criminal methods and the crime of larceny. These crimes were punishable by the death penalty and life imprisonment under the 1997 Criminal Law, i.e. for these crimes life imprisonment was an optional penal measure provided alongside the death penalty. For example, the crime of teaching methods of crime was punishable by the death penalty or life imprisonment under Article 295 of the 1997 Criminal Law, and the applicable conditions of the death penalty or life

imprisonment for this crime were the same, i.e. "if the circumstance is especially serious."[11] Life imprisonment became the maximum punishment for this crime when the Eighth Amendment abolished the death penalty for it; in accordance with the 1997 Criminal Law, the death penalty and life imprisonment could also be imposed on an offender who commits larceny in the same circumstances, i.e., if the offender steals from a banking institution and the amount involved is especially large, or steals precious cultural relics and the circumstances are serious.[12] However, in the light of Article 152 of the 1979 Criminal Law, the maximum punishment for larceny was life imprisonment rather than the death penalty,[13] and it was amended by the National People's Congress (hereinafter N.P.C.) Decision on Severely Punishing Criminals Who Seriously Undermine the Economy (March 8, 1982). In accordance with this Decision, if the circumstances are especially serious, the offender shall be sentenced to death or life imprisonment.[14] Currently, the maximum punishment for larceny has become life imprisonment, again. In accordance with the 1997 Criminal Law, a person who commits the crime of smuggling legally proscribed goods shall, if the circumstances are especially serious, be sentenced to life imprisonment or death.[15] The death penalty for this crime was stipulated by the Supplementary Provisions on Cracking Down on the Crime of Smuggling (21 January 1988).[16] All in all, by examining these twenty-two crimes in the 1997 Criminal Law, we can see that the applicable conditions in the Specific Provisions of the Criminal Law for life imprisonment and the death penalty for these crimes were almost the same, the only difference being that the "death penalty shall only be applied to criminals who

[11] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], (adopted by the Standing Comm.Nat'l People's Cong., Jul. 1, 1979, effective as amended Mar. 14, 1997), art. 295.
[12] *Id.* art 264.
[13] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 152.
[14] Standing Committee of the National People's Congress of the P.R.C. Decision on Severely Punishing Criminals Who Seriously Undermine the Economy, 8 Mar. 1982, art 1.
[15] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China],1997, *supra* note 11, art. 151.
[16] Quán guó rén mín dài biǎo dà huì cháng wù wěi yuán huì guān yú yán chěng yán zhòng pò huài jīng jì dí zuì fàn dí jué dìng (全国人民代表大会常务委员会关于严惩严重破坏经济的罪犯的决定) [Standing Committee of the National People's Congress of the P.R.C. Decision on Cracking Down on the Crime of Smuggling], Order no.62, 21 Jan. 1988.

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have committed extremely serious crimes"[17] as provided by Article 48; in addition, Articles 49, 50 and 51 stipulated the use of the death penalty. In these cases, life imprisonment has developed to become the legally prescribed maximum penalty without any change in the provisions. Furthermore, it must be pointed out that the L.W.O.R. is newly provided for the crime of embezzlement and bribery by the Ninth Amendment even though the death penalty still remains an available sentence for this crime. L.W.O.R. thus constitutes a severe punishment, just like the death penalty and is even "worse than a death sentence",[18] because it keeps convicts in prison for the rest of their lives. Given that "immediate execution for corruption crimes is rarely used in recent years in judicial practice,"[19] L.W.O.R. can be considered the maximum punishment for corruption crimes in judicial practice.

2.2. REASONS FOR UPGRADING LIFE IMPRISONMENT TO THE MAXIMUM PUNISHMENT

It would appear that the most important reason for life imprisonment being upgraded to the maximum punishment for those crimes from which the death penalty is removed in the Eighth and Ninth Amendments is the criminal punishment structure. Life imprisonment is the second heaviest punishment after the death penalty; consequently, it is first in line after removing the death penalty for these twenty-two crimes. However, this is only the ostensible justification and is not sufficient to explain the substantial reasons why life imprisonment - rather than punishments such as long-term fixed-term imprisonment – has been upgraded to the maximum punishment. The deep-rooted reasons for this, in accordance with the analysis of the Eighth and Ninth Amendments, may be classified as follows: concerns regarding the proportionality principle, the influence of the severe penalty doctrine, and political concerns. These three reasons are related to the problems of how to

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[17] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 48.
[18] William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO STATE LAW JOURNAL 1051, 1054 (2015).
[19] Zhào bǐng zhì (赵秉志), *Lùn zhōng guó tān wū shòu huì fàn zuì sǐ xíng dí lì fǎ kòng zhì jí qí fèi zhǐ — — yǐ < xíng fǎ xiū zhèng àn (jiǔ) > wéi shì jiǎo* (论中国贪污受贿犯罪死刑的立法控制及其废止——以<刑法修正案(九)>为视角) *[On Legislatively Controlling the Death Penalty for the Crimes of Embezzlement and Bribery and its Abolition: From the Perspective of the Ninth Amendment to the Criminal Law]*, 38 XIÀN DÀI FǍ XUÉ (现代法学) [MOD. L. SCI.], no. 1, 2016, at 8.

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determine the nature and gravity of the crime, the traditional punishment concept, and the influence of the special political regime in China.

2.2.1. THE PROPORTIONALITY PRINCIPLE: CONCERNS REGARDING THE BALANCE BETWEEN THE PUNISHMENT AND THE CRIME

The proportionality principle is provided by Article 5 of the Criminal Law: "the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender".[20] This principle must be observed in the whole process of establishing and applying criminal law, and it reveals the basic rule of the paradoxical movement between crimes and their punishments; the degree of punishment is decided by the seriousness of the crime; only serious crimes should be punished severely, while less serious crimes should receive lighter sentences, i.e., the change in punishment is caused by the severity of the offence.[21] In accordance with this principle, the Criminal Law "stipulates various punishment ranges for the different qualities of crimes, but also provides different degrees of punishment for crimes which are of the same quality but have different circumstances."[22] To measure the severity of a crime, China advocates considering two factors together, i.e., the consequences of the offence in terms of how it endangers society and the personal danger the offender represents to others.[23] Consequently, proportionally punishing the corresponding gravity of an offence emphasizes two aspects, i.e., punishing the crime which has already been committed and preventing the potential crime in line with the personal danger related to the possibility of re-offending. Both the death penalty and life imprisonment serve a function: to remove the slightest possibility of re-offending. This is why they are always used for the heinous crimes under the Criminal Law.

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[20] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 5.
[21] *See* GĀO MÍNG XUĀN & ZHÀO BǏNG ZHÌ (高铭暄，赵秉志), ZHŌNG GUÓ XÍNG FǍ LÌ FǍ ZHĪ YǍN JÌN (中国刑法立法之演进) [THE EVOLUTIONS OF CHINESE CRIMINAL LEGISLATION] 111 (2007).
[22] Lǐ yǒng shēng (李永升) , *Zuì xíng xiāng shì yīng yuán zé zài wǒ guó xíng shì lì fǎ zhōng dí tǐ xiàn* (罪刑相适应原则在我国刑事立法中的体现) *[Principles of Appropriate Sentencing Applied in China's Criminal Legislation]*, GUÌ ZHŌU MÍN ZÚ XUÉ YUÀN XUÉ BÀO: ZHÉ XUÉ SHÈ HUÌ KĒ XUÉ BǍN (贵州民族学院学报：哲学社会科学版) [JOURNAL OF GUIZHOU UNIVERSITY FOR ETHNIC MINORITIES (PHILOSOPHY AND SOCIAL SCIENCE)], No.5, 2009, at 85.
[23] *See* Lǐ Yǒng Shēng (李永升), *Zuì xíng xiāng shì yīng yuán zé dí nèi hán jiě dú* (罪刑相适应原则的内涵解读) *[Unscrambling the Intention of the Principle of Suitable Punishment for Crime]*, GĀN SÙ SHÈ HUÌ KĒ XUÉ (甘肃社会科学) [GANSU SOC. SCI.], no.4, 2005, at 71, 73.

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Analyzing the twenty-two crimes for which the death penalty was repealed, fourteen of them involve disrupting the order of the socialist market economy stipulated in Chapter 3, five are crimes of obstructing the administrative order provided in Chapter 6, one is the crime of property violation provided in Chapter 5, and two are military crimes. "Undoubtedly, the crimes punishable by death provided by the criminal law are all felonies",[24] and they should be provided with a correspondingly heavy punishment. As to these twenty-two crimes, a suitable punishment should be stipulated for them where the death penalty is repealed. Here, as examples for analysis, we will consider crimes of disrupting the order of the socialist market economy and of arranging for, or forcing, another person to engage in prostitution, provided in the Chapter 6. Specifically, as of the present moment, "the death penalty for economic crimes has already been repealed completely, except for the crimes of producing and selling quack medicine and the crimes of producing and selling toxic and hazardous food."[25] The latter two crimes can be punishable by death under the Criminal Law if death is caused to another person or especially serious harm is done to human health. Following this reasoning, the chief reason why these two economic crimes are still punishable by death is that they can result in the death of others, and thus bring full ethical accountability and - under the influence of the "traditional concept of retributive punishment of a life for life"[26] - the death penalty is the universal value proposition of the entire society for these economic crimes. "Economic crimes are statutory and administrative offenses legislated with the aim of prohibiting evil."[27] "In previous judicial experience, a severe punishment policy for economic crimes has always been adopted so as to ensure the steady development of the social

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[24] Chén Xīng Liáng (陈兴良), *Jiǎn shǎo sǐ xíng dí lì fǎ lù xiàn tú (减少死刑的立法路线图)[Reduction of the Legislation Road Map for the Death Penalty]*, ZHÈNG ZHÌ YǓ FǍ LǛ (政治与法律) [POL. SCI. & L.], no.7, 2015, at 71, 73.

[25] Yè liáng fāng, ān péng míng (叶良芳，安鹏鸣) , *Zhōng guó fèi zhǐ sǐ xíng dí lì fǎ lù jìng jí qí fāng àn —— yǐ 《 xíng fǎ xiū zhèng àn（ jiǔ ）（ cǎo àn ） 》 dí guī dìng wéi shì jiǎo* (中国废止死刑的立法路径及其方案——以《刑法修正案（九）（草案）》的规定为视角) *[The Legislative Road to Death Penalty Abolition in China and its Solutions: From a Perspective of the Provisions of the Ninth Amendment to Criminal Law (Draft)]*, XUÉ XÍ LÙN TÁN (学习论坛) [TRIB. STUDY], no.3, 2015, at 73.

[26] Wáng Lián Hé (王联合), *Guān niàn xíng lùn gāng (观念刑论纲) [Introduction of the Penalty Concept]*, FǍ XUÉ PÍNG LÙN (法学评论) [L. REV.], no.1, 2013, at 33, 34.

[27] Gāo Míng Xuān，Sū Huìy & Yú Zhìgāng (高铭暄，苏惠渔，于志刚), *cóng cǐ tà shàng fèi zhǐ sǐ xíng dí zhēng tú ——《xíng fǎ xiū zhèng àn （bā ） cǎo àn 》 sǐ xíng wèn tí sān rén tán (从此踏上废止死刑的征途——《刑法修正案（八）草案》死刑问题三人谈) [Setting Out on the Journey to the Abolition of the Death Penalty: The Trialogue on the Issues of the Death Penalty of the 'The Eighth Amendment to the Criminal Law (Draft)]*, FǍ XUÉ (法学) [L. SCI.], no.9, 2010, at 3, 6.

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economic order"[28] because, "from the legislators' and politicians' perspective, the harmful consequence[s] caused by economic crime to the whole economic system is more severe and accountable than other property crimes",[29] especially because, in "a state power society" like China, "crimes undermining economic policy are not just deemed "economic crimes", but are viewed as a "crime against the state power"; defined as the most serious crimes, they should be subject to the most severe punishment."[30] From this perspective, life imprisonment is the most suitable punishment for these kinds of economic crimes, and where the death penalty is repealed, the punishment should be upgraded to the maximum allowable, in accordance with the proportionality principle, as its degree of severity is greater than that of fixed-term imprisonment. As for the crimes of arranging for, or forcing, another person to engage in prostitution (Article 358), they break the administrative order; to be precise, "they are crimes that jeopardize social decency (Fang Ai Shehui Fenghua)."[31] Some members of the Standing Committee of the N.P.C. of China argued that the death penalty for these crimes should not be repealed due to the fact that the subjective culpability of the mind of the perpetrator is very greatand they also have the opportunity to commit this crime again. In everyday life these crimes occur frequently and cause great concerns among the people and also have a great social impact, and so for these crimes, the perpetrator has to be executed to assuage the people's anger.[32] A famous case

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[28] Yóu Wěi & Zhào Yùn Fēng (游伟，赵运锋), *Wǒ guó jīng jì fàn zuì biàn huà yǔ lì fǎ gǎi gé yán jiū (我国经济犯罪变化与立法改革研究) [Changes in Economic Crimes and Legislative Reform in China]*, DŌNG FĀNG FǍ XUÉ (东方法学) [ORIENTAL LAW], no.2, 2010, at 91, 101.

[29] Liú Yuǎn (刘远), *Jīng jì fàn zuì sǐ xíng lì fǎ dí duō wéi jiě xī (经济犯罪死刑立法的多维解析) [A Multidimensional Analysis of Legislation Imposing the Death Penalty for Economic Crime]*, XIÀN DÀI FǍ XUÉ (现代法学) [MODERN LAW SCIENCE], no.6, 2007, at 176, 179.

[30] Wang Yunhai, *The Death Penalty and Society in East-Asia - How to Understand and Compare the Death Penalty in China, Japan and South Korea*, 40 HITOTSUBASHI J. L. POL. 1, 3-4 (2012).

[31] Chén Xīng Liáng (陈兴良), *supra* note 24, at 76.

[32] *See* Chén Lì Píng (陈丽平)], Yī xiē cháng wěi wěi yuán jiàn yì rèn zhēn yán jiū jiǎn shǎo sǐ xíng zuì míng yuán zé — — zǒu sī hé cái liào zuì děng bù yīng qǔ xiāo sǐ xíng (一些常委委员建议认真研究减少死刑罪名原则——走私核材料罪等不应 取消死刑) [*Some standing committee members recommend examining carefully the principle of reducing the death penalty: the crime of smuggling nuclear materials and other crimes should not be exempt from the death penalty*] Quán guó rén mín dài biǎo dà huì (全国人民代表大会) [THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA] (Dec. 17, 2014), http://www.npc.gov.cn/npc/cwhhy/12jcwh/2014-12/17/content_1889148.htm.

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took place several years ago, called the "Tanghui",[33] which caused a national debate over the issue of the abolition of the death penalty for the crime of arranging for, or forcing, another person to engage in prostitution.[34] In this case, the pros and cons of imposing the death penalty for these two crimes were balanced. The S.P.C, as China's highest court, finally rejected the death sentences because the circumstances of the crimes committed by the two perpetrators are not enough to be imposed on the death penalty. However, the opposing voices regarding the abolition of the death penalty for these two crimes continued to be heard until the discussion of the Draft to the Ninth Amendment. Some women's welfare organizations sent an advice letter to N.P.C. to express their strong feelings against the abolition of the death penalty for these two crimes as they violate the victim's rights to health, to life and to sexual autonomy, as well as disturbing the social order, and also because they are serious crimes of sexual violence; if the death penalty for them is removed, the potential perpetrator will become encouraged to continue because of the reduced cost of crime and the weakened legal deterrent, and the attraction of an exorbitant profit.[35] Although the Ninth Amendment did not adopt their suggestion, severe punishment is still provided for these two crimes just like the Explanations for the Draft of the Ninth Amendment to Criminal Law states

> These 9 crimes, which are no longer subject to the death penalty, which is rarely imposed on the convict who commits them, can be punished by the highest punishment, life imprisonment, after the abolition of death penalty... For these crimes should be punished heavily under the law if they deserve to be and, in order to guarantee

[33] In this case, Tanghui (唐慧) was the mother of the victim, an eleven-year-old girl who was forced to engage in prostitution by the perpetrators, Zhou Junhui (周军辉), Qin Xing (秦星) and others. Zhou and Qin were sentenced to death at the first trial and at the retrial, and at the second and final retrial they were sentenced to life imprisonment. *See generally*, Táng huì(唐慧)], *360BǍI KĒ (360百科) [360ENCYCLOPEDIA]*, http://baike.so.com/doc/1050580-1111313.html; *see also* Chái Huì Qún (柴会群)], *Shí me zào jiù liǎo táng huì? (什么造就了唐慧?) [What made Tanghui?]*, Nán fāng zhōu mò (南方周末) [SOUTHERN WEEKLY] (Aug. 1, 2013) , http://www.infzm.com/content/93030.

[34] *See* Zhào Bǐng Zhì (赵秉志), *Zhōng guó sǐ xíng lì fǎ gǎi gé xīn sī kǎo — — yǐ 《xíng fǎ xiū zhèng àn (jiǔ) (cǎo àn) 》 wéi zhǔ yào shì jiǎo (中国死刑立法改革新思考——以《刑法修正案(九)(草案)》为主要视角)* [*New Thinking on Death Penalty in China: With the Perspective of Amendment IX (Draft) to Criminal Law*], JÍ LÍN DÀ XUÉ SHÈ HUÌ KĒ XUÉ XUÉ BÀO (吉林大学社会科学学报) 55 [JILIN U. J. SOC. SCI. EDITION] no.1 2015, at 5, 6.

[35] *See* 9jiā jī gòu jiàn yì xiū gǎi xíng fǎ: jiāng xìng qīn nán xìng nà rù qiáng jiān zuì (9家机构建议修改刑法：将性侵男性纳入强奸罪) *[Nine Organizations Advise Amending the Criminal Law: Interpreting Sexual Assaults on Males as the Crime of Rape]* Xīn huá wǎng (新华网) [XINHUA NET] (Aug. 7, 2015), http://news.xinhuanet.com/legal/2015-08/07/c_128102881.htm.

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> the overall stability of public security, it is certain that the whole range of stricter punishments should not be restricted.[36]

In accordance with this explanation, for the sake of maintaining a tough stance on these crimes, life imprisonment is the appropriate punishment, from the perspective of both legislators and politicians. Just as the former Vice Director of the N.P.C. Law Committee, Huang Taiyun, remarked, ". . . . after removing the death penalty from these crimes, life imprisonment is still retained for them. And it [the upgrading of life imprisonment] is appropriate, in accordance with the proportionality principle, and it may make the penalty fit the crime."[37]

2.2. THE SEVERE PENALTY DOCTRINE: CONCERNS REGARDING PENALTIES

The severe penalty doctrine, which took root in the mentalities of the rulers of the different states which have emerged throughout China's history, has been transmitted through successive generations, and has had a deep influence on legislation in different eras. "The concept of 'penal severity is for chaotic times, lenient punishment is for peaceful times' has always been regarded as the Chinese people's essential concept of ruling the state and giving peace to the world for thousands of years."[38] In the long term and under the highly feudal regime, the thinking regarding punishment was strongly influenced and marked by a culture which takes nationalism as its premise and criminal instrumentalism as its basis, integrated with a retribution and deterrence theory of punishment.[39] This thinking regarding punishment was incisively and vividly demonstrated in the legal utilitarianism period, which extended

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[36] Guān yú <zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (jiǔ) (cǎo àn) > dí shuō míng (关于<中华人民共和国刑法修正案（九）（草案）>的说明) [THE EXPLANATIONS FOR THE DRAFT OF THE NINTH AMENDMENT TO CRIMINAL LAW OF PEOPLE REPUBLIC OF CHINA] quán guó rén mín dài biǎo dà huì (全国人民代表大会) [NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA] (NOV. 3, 2014), http://www.npc.gov.cn/npc/lfzt/rlys/2014-11/03/content_1885123.htm.

[37] Huáng Tàiyún (黄太云), *xíng fǎ xiū zhèng àn bā > jiě dú (yī) (<刑法修正案八>解读(一))[Eighth Amendment of Penal Law (First Explanation)]*, RÉN MÍN JIǍN CHÁ (*人民检察*) [PEOPLE'S PROCURATORIAL SEMIMONTHLY], no. 6, 2011, at 1, 7.

[38] Hú Xué Xiāng, Zhōu Tíng Tíng (胡学相，周婷婷)], *duì wǒ guó zhòng xíng zhǔ yì dí fǎn sī (对我国重刑主义的反思) [Rethinking the Severity of Penalty in China]*, FǍ LÙ SHÌ YÒNG (法律适用) [J.L. APPLICATION], no. 8, 2015, at 71.

[39] *See* Yù Wěi, Jiǎng Yǔ Yáng (喻伟，蒋羽扬)], *duì xīn shí qī zhòng xíng zhǔ yì dí fǎn sī (对新时期重刑主义的反思)[Rethinking the Severity Penalty Doctrine in the New Age]*, GUÓ JIĀ JIǍN CHÁ GUĀN XUÉ YUÀN XUÉ BÀO (国家检察官学院学报) [J. NAT'L PROSECUTORS C.], no. 2, 1997, at 3, 12.

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from 1978 to 1997.[40] During this period, "the criminal law was . . . . considered the tool and means of ruling the state",[41] and criminal punishment was deemed the most effective deterrent sanction, which best reflects the will of the national rulers.[42] In order to manage society, the ruler is expected to contain crime and restore social order through criminal penalties.[43] To illustrate this point, we can consider a speech delivered by Deng Xiaoping, who was the national leader at that time:

> The number of crimes, including serious ones, has increased substantially, and the people are very disturbed about this. Over the past few years, far from being checked, the tendency has grown. Why is that? Chiefly because we have hesitated to take prompt and stern actions to combat criminals and have given them very light sentences . . . . Serious offenders . . . . should be severely punished according to law. A number of criminals should be executed according to law . . . . The only way to stop crime is to be tough about it.[44]

Based on this speech, on 25 August 1983 the Communist Party of China C.P.C. launched the Decision on Cracking Down Severely on Crimes, which claimed that "cracking down severely on crimes is as serious a struggle of opposites as that between us and the enemy in the political areas."[45] Thus, the imposition of the death penalty upon the so-called enemy was arguably justifiable at that time. In 1986 Deng emphasized that:

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[40] *See* CuīZìlì (崔自立), *cóng rén zhì zǒu xiàng fǎ zhì — — xīn zhōng guó fǎ zhì jiàn shè zhōng fǎ zhì lǐ niàn dí biàn qiān (从人治走向法治——新中国法治建设中法治理念的变迁)[From Rule by Man to Rule of Law: the Evolution of the Concept of the Rule of Law during the Construction of New China],* GǍI GÉ YǓ KĀI FÀNG *(改革与开放) [REFORM & OPENING]*, no. 6, 2009, at 8. In this paper, the author argues that in the process of constructing the rule of law in China, the country has experienced four stages in different eras, namely, legal instrumentalism, legal nihilism in the Mao Zedong era, legal utilitarianism in the period from 1979 to 1997, and legal supremacy in the period from 1997 till now.

[41] Wèi Chāng Dōng (魏昌东), *Xīn xíng fǎ gōng jù zhǔ yì dí pī pàn yǔ fǎn sī (新刑法工具主义的批判与反思) [A New Instrumentalism in Criminal Law: Criticism and Rectification]*, *法学* [L. SCI.], no. 2, 2016, at 86.

[42] *See* Dèng Xiǎogāng (邓小刚)], *Lùn shè huì guǎn lǐ chuàng xīn shì yù xià dí lǐ xìng xíng fá guān (论社会管理创新视阈下的理性刑罚观)[On the Rational Concept of Criminal Punishment under the Vision of Social Management Innovation]*, KĒ XUÉ SHÈ HUÌ ZHǓ YÌ (科学社会主义) [SCI. SOCIALISM], no. 4, 2013, at 84.

[43] *Id.*

[44] Deng Xiaoping, "The Selected Works of Deng Xiaoping: vol.3', The Selected Works of Deng Xiaoping: Modern Day Contributions to Marxism--Leninism".

[45] CPC, *Decision On Cracking Down Severely On Crimes,* NEWS OF THE COMMUNIST PARTY OF CHINA (Sept. 31, 2016), http://cpc.people.com.cn/GB/64162/64165/68640/68665/4739396.html.

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> The death penalty cannot be abolished, and some criminals must be sentenced to death . . . . Some criminals must be executed, but of course we have to be very careful in such matters. Some of the perpetrators of serious economic or other crimes must be executed as required by law. As a matter of fact, execution is one of the indispensable means of education . . . . "Executing some of them can help save many cadres. As the saying goes, execute one as a warning to a hundred."[46]

In this regard, a Chinese scholar has argued that "the death penalty was considered as the chief means to achieve the "strike hard (*Yanda*)" effect, and its utilitarian effect was taken seriously; its deterrence effect, to a great extent, was recommended by the ruler."[47] Therefore, after launching the Decision on Cracking Down Severely on Crimes in 1983, the N.P.C. Standing Committee had successively adopted twenty-five Special Criminal Laws by the time the current Criminal Law was passed in 1997. To a great extent, the death penalty system, as the product of utilitarianism, is based primarily on these special criminal laws, and on the 1979 Criminal Law. The death penalty was repealed by the Eighth and Ninth Amendments, which originated from these Special Criminal Laws.

Even though the country is now moving towards the era of legal supremacy and is in the process of constructing a state based on the rule of law, the concept of the severe penalty still has a great influence on policy makers and legislators. As for specific policies an obvious example is that the Chinese government has periodically instituted national crack downs against crime. Referred to as "strike hard (*Yanda*)" anti-crime campaigns,[48] in which "harsher punishments were imposed on criminals, usually at a faster pace and sometimes based on violations of normal procedures",[49] these are always the preferred measure adopted by the policymakers to curb crime. As for the legislation, on the one hand, the traditional concept of "execute one as a

[46] Dèng Xiǎogāng (邓小刚), *supra* note 42.
[47] Chén Xīngliáng (陈兴良)], *Sǐ xíng zhèng cè zhī fǎ lǐ jiě dú* (*死刑政策之法理解读*)*[Death Penalty Policies: A Jurisprudential Perception]*, ZHŌNG GUÓ RÉN MÍN DÀ XUÉ XUÉ BÀO (中国人民大学学报) [J. OF RENMIN U. OF CHINA], no. 6, 2013, at 2, 4.
[48] Since 1983, China has launched five rounds of national "strike hard" campaigns, the first in 1983, with others following in 1996, 2001, 2010 and 2014.
[49] Liang Bin, *The Severe Strike Campaign in Transitional China,* 33 J. OF CRIM. JUST., 301, 387 (2005).

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warning to a hundred” still has great influence on some legislators; for example, some legislators, while discussing the Ninth Amendment, pointed out that “a serious crime which has caused great harm to society must be given severe punishment, so that the potential perpetrators may receive the signal that a severe penalty shall be imposed on them if they commit these crimes.”[50] On the other hand, according to the requirement that “China carries out judicial reform based on its national conditions”,[51] stipulating severe punishments for serious crimes has its own realistic rationale and legitimacy, due to the fact that China’s reality is always construed by the ruler and legislator as the real foundation of the severe penalty doctrine in existence at any given time. For example, the then Vice Director of the N.P.C. Law Committee, Huang Taiyun, while interpreting the Eighth Amendment, said:

> China is now in a situation where conflict is spreading between people, with serious criminal cases and complicated struggles with the enemy, [and is] facing a heavy and arduous task of maintaining social harmony and stability; it therefore must firmly and correctly use the punishment tool of execution to effectively curb the rampant rise of crimes.[52]

Even though these two amendments removed the death penalty from twenty-two crimes, and some scholars commented positively that the criminal punishment system is now moving towards a lightening of penalties, mainly due to the abolition of the death penalty,[53] some scholars were critical and pointed out that the punishment system has not changed and has, if anything, become stricter.[54] An obvious example of this is that the Ninth Amendment

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[50] Chén Lì Píng (陈丽平), *supra* note 32.
[51] Zhōng guó dí sī fǎ gǎi gé bái pí shū <(中国的司法改革>白皮书) [The White Paper on Judicial Reform in China], *supra* note 2.
[52] Huáng Tàiyún (黄太云), *supra* note 37, at 6.
[53] *See* Liú Yàn Hóng (刘艳红), *xíng fá qīng huǎn, rén quán bǎo zhàng yǔ < xíng fǎ xiū zhèng àn bā> (刑罚轻缓, 人权保障与<刑法修正案（八）>) [Leniency of Punishment, Protection of Human Rights and the Eighth Amendment to Criminal Law]*, FǍ XUÉ JIĀ (法学家) [THE JURIST], no. 3, 2011, at 36.; Zhào bǐng zhì & Jīn yì xiáng (赵秉志，金翼翔), *Xíng fá qīng huǎn huà dí shì jiè bèi jǐng yǔ zhōng guó shí jiàn (刑罚轻缓化的世界背景与中国实践) [On the Leniency of Punishment in the Context of the World and the Practice in China]*, FǍ LǙ SHÌ YÒNG (法律适用) [J. L. APPLICATION], no.6, 2012, at 7; Sū Yǒngshēng (苏永生), *biàn dòng zhōng dí xíng fá jié gòu — — xíng (jiǔ duì xíng fá jié gòu yǐng xiǎng (变动中的刑罚结构——<刑（九）>对 刑罚结构影响) [The Changing Punishment Structure: The Influences of the Ninth Amendment on the Criminal Law]*, ZHŌNG GUÓ SHÈ HUÌ KĒ XUÉ WǍNG (中国社会科学网) [CHINA’S SOCIAL SCIENCE NET] (Mar. 1, 2016), http://www.cssn.cn/fx/fx_xfx_984/201603/t20160301_2891951_1.shtml.
[54] *See* Jiǎ Jiàn & Liú Yuǎn (贾健，刘远), *xíng fá jié gòu diào zhěng dí lǐ xìng sī kǎo — — yǐ <xíng fǎ xiū*

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provides for L.W.O.R. for the serious crimes of embezzlement and bribery. One Chinese scholar remarked that "LWOR reflects the policy of severely punishing corruption, and for the potential offender who commits corruption, it can function as a deterrent and containment."[55] Consequently, the thinking behind using severe punishment to control and deter crime still has a profound effect on legislators and other Chinese people.

2.3. LWOR FOR THE CRIMES OF EMBEZZLEMENT AND BRIBERY: POLITICAL CONCERNS

As regards the relationship between law and politics, there are three characteristics of this relationship, namely politics as a goal, as a means or as an obstacle.[56] As a goal, politics defines certain predominantly legal values or institutions as its goal, and they are also the same as the values or institutions of the law; as a means, the law exists merely to fulfill certain political interests; as an obstacle, law is deemed an obstacle on the way toward the realization of certain political goals.[57] In the light of the legal development of contemporary China, the law, to a great extent, plays a key role as a means to fulfill political interests; this is particularly true for the criminal law, which, as a consequence, is determined by the country's special political regime.

According to the Preamble of the Constitution of China, the country is a one-party state, and the system is one of multiparty cooperation and political consultation led by the C.P.C.[58] The C.P.C. does not only play a political leadership role, but also directs legislation and law enforcement, and its view or standpoint is considered the national will and so becomes law.[59] Party-led

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zhèng àn (bā)> wéi qiē rù diǎn (刑罚结构调整的理性思考——以<刑法修正案（八）>为切入 点) [Rationally Thinking on The Adjustment of the Punishment Structure: from the Perspective of the Eighth Amendment], SHAN DŌNG JĬNG CHÁ XUÉ YUÀN XUÉ BÀO (山东警察学院学报) [J. SHANGDONG POLICE C.], no.4, 2011, at 11.; *see also* Wèi Dōng (魏东), *xíng fǎ xiū zhèng àn guān chá yǔ jiǎn tǎo (刑法修正案观察与检讨) [Watching and Criticizing the Amendments to the Criminal Law]*, FǍ ZHÌ YÁN JIŪ (法治研究) [RES. ON THE RULE L.], no.2, 2013, at 17.

[55] 《*Zhuān jiā tán xíng fǎ xiū zhèng àn: zhōng shēn jiān jīn ràng jù tān bǎ láo dǐ zuò chuān (专家谈刑法修正案（九）：终身监禁让巨贪把牢底坐穿) [Experts Discussing the Ninth Amendment to the Criminal Law: Life Imprisonment without Possibility of Release: Let the Arch Corrupt Official Rot in Detention]* Zhōng guó xīn wén wǎng (中国新闻网) [CHINA NEWS SERVICE WEBSITE](Sept. 8, 2015), http://www.chinanews.com/ll/2015/09-08/7510951.shtml.

[56] *See* Miro Cerar, *The Relationship between Law and Politics*, 15 ANN. SURV. INT'L & COMP. L. 19, 19-401 (2009).

[57] *Id.*

[58] Xianfa, (1982, last amended 2004).

[59] *See Zhōng gòng zhōng yāng guān yú quán miàn tuī jìn yī fǎ zhì guó ruò gān zhòng dà wèn tí dí jué dìng*

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legislation is a system with Chinese characteristics. In accordance with the Constitution of the C.P.C., "leadership by the Party means mainly political, ideological and organizational leadership".[60] As an important branch of the law, with the characteristics of the most compulsory, the criminal law, "serving as a political tool, is always highly praised,"[61] and is led by the Party and implements the Party's ruling policies and will. The penalty system, playing an important role in this, is the embodiment of this kind of mandatory nature, and is also the result of political expediency; in particular, the death penalty system "is mainly caused by the excessive politicization of the criminal law."[62] In a situation in which the crime of embezzlement and bribery is still punishable by death under Article 383 (3) of Criminal Law, stipulating L.W.O.R. for this crime is another result of political considerations. [63] On one hand, the anti-corruption initiative is now a serious political campaign in China.[64] Upon taking office in late 2012, China's President, Xi Jinping, "vowed to crack down

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(中共中央关于全面推进依法治国若干重大问题的决定)[Major Questions of Communist Party of China in Comprehensively Moving the Government of the Country According to the Law Forward](Oct.30, 2014) Zhōng guó shè huì kē xué wǎng (中国社会科学网) [CHINA SOCIAL SCIENCE NET], (Oct. 30 2014), http://www.cssn.cn/fx/fx_ttxw/201410/t20141030_1381703.shtml; Liú Jiāzhēng (刘家征), *dǎng dí lǐng dǎo hé yī fǎ zhì guó gāo dù tǒng yī (党的领导和依法治国高度统一) [On the High Unity of the Party's Leadership and Rule by Law]*, qiú shì wǎng (求是网)[QIU SHI NET])(Feb. 10, 2015) http://www.chinadaily.com.cn/interface/toutiaonew/53002523/2017-01-14/cd_27955754.html.

[60] Zhōngguó gòngchǎndǎng zhāngchéng(中国共产党章程)[Constitution of the Communist Party of China], 2012.

[61] Liú Yuǎn (刘远), *xíng fǎ dí dào dé xìng yǔ zhèng zhì xìng (刑法的道德性与政治性)[On the Morality of the Criminal Law and its Politic]*, HUÁ DŌNG ZHÈNG FǍ DÀ XUÉ XUÉ BÀO (华东政法大学学报) [J. EAST CHINA U. POL. SCI. & L.], no.5, 2007, at 54-55.

[62] *Id.* , at 54.

[63] In this regard, many Chinese scholars have criticized the fact that life imprisonment without release for the crime is a political option, or emotional legislation. *See* RÈN ZHÒNG YUAN (任重远), *xíng fǎ xiū zhèng àn jiǔ: piáo sù yòu nǚ zuì méi liǎo, zhōng shēn jiān jīn lái liǎo (刑法修正案九：嫖宿幼女罪没了，终身监禁来了) The Ninth Amendment to Criminal Law: the Crime of Prostitution Involving a Girl under the Age of 14 is Abolished and Life Imprisonment without Possibility of Release is Provided*, nán fāng zhōu mò (南方周末) [SOUTHERN WEEKLY] (Aug. 27, 2015), http://www.infzm.com/content/111506. In this interview, Professor Chu Huaizhi said that "it (life imprisonment without release) chiefly reflects political attitudes." *See also* Liú xiàn quán (刘宪权), *Xíng shì lì fǎ yīng lì jiè qíng xù — yǐ < xíng fǎ xiū zhèng àn （jiǔ） > wéi shì jiǎo (刑事立法应力戒情绪—以<刑法修正案（九）>为视角) [Criminal Legislation Should Strictly Avoid Emotion: From the Perspective of the Ninth Amendment]*, 法学评论 [L. REV.], no.1, 2016, at 86. In this paper, the author pointed out that "it [the government] may be 'forced' by the people to enact legislation inappropriately and emotionally in order to severely punish corruption officers.".

[64] WÚ JIÀNXIÓNG (吴建雄), *Zěn yàng kàn dài jìn jī nián dí "gāo yā fǎn fǔ" (怎样看待近几年的"高压反腐") How to View the 'Heavy Anti- corruption' of Recent Years*, zhōng guó gòng chǎn dǎng xīn wén wǎng (中国共产党新闻网) [COMMUNIST PARTY OF CHINA'S NEWS NET] (Feb. 25, 2016), http://theory.people.com.cn/n1/2016/0225/c143844-28150603.html; *See also* ZHÈNG YONGNIÁN (郑永年) [Zheng Yongnian], *yùn dòng shì fǎn fǔ bài fú hé zhèng zhì lǐ xìng (运动式反腐败符合政治理性) [The Campaign-style of Anti-corruption is Appropriate to Political Rationality]*, fèng huáng wǎng (凤凰网) [IFENG NET] (Aug. 13,2014),
http://news.ifeng.com/exclusive/lecture/special/zhengyongnian2/.

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on both "tigers and flies" -powerful leaders and lowly bureaucrats - in his campaign against corruption and petty officialdom"[65], "with a determination to inflict heavy punishment for them in this special time".[66] In this political context, L.W.O.R. thus has political reasons for its existence. The Deputy Director of the Criminal Law Office of the N.P.C. Standing Committee, Zang Tiewei, also noted that "it [L.W.O.R.] is primarily designed for the present situation of anti-corruption, [based] upon the Mass's requirements… and to implement the relative requirements of the central government."[67] The S.P.C.'s executive vice-president, Shen Deyong, also notedd that "it fully reflects the Party Central Committee's distinct attitude toward, and steadfast determination to severely punish, corruption crimes according to the law."[68] On the other hand, The *White Paper of Judicial Reform in China* emphasizes that "[i]t (judicial reform) sticks to the line of relying on the people, strives to meet their expectations, tackles problems of particular concern to the people, and subjects itself to their supervision and examination";[69] L.W.O.R. meets the people's requirements regarding the anti-corruption initiative. One of the legislators, while discussing the Ninth Amendment (draft) said that the fact that a corrupt official can be released early "is one of the basic reasons why the people are not satisfied with the results of anti-corruption, and it also gives these corruption officials a chance of "escape from prison.""[70] All in all, the relationship between politics and law has always existed since the founding of New China in 1949, and the instrumentalism of criminal law, serving as the

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[65] *"Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-Corruption Drive", The Guardian (Jan. 22, 2013),* https://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption.

[66] WÚ JIÀNXIÓNG (吴建雄), *supra* note 64.

[67] LǏ JÌNG & LIÚ RÓNG (李婧, 刘茸), *Zāng tiě wěi: zhōng shēn jiān jīn bù shì xīn xíng zhǒng shì yòng yú zhòng tè dà tān wū shòu huì fàn zuì (臧铁伟：终身监禁不是新刑种 适用于重特大贪污受贿犯罪) [Zang Tiewei: Life Imprisonment without Possibility of Release is not a New Penalty Type, and it is Imposed for the Serious Crime of Embezzlement and Bribery]*(Aug. 29, 2015) Rén mín wǎng - zhōng guó rén dà xīn wén wǎng (人民网–中国人大新闻网) [PEOPLE NET AND NATIONAL PEOPLE'S CONGRESS NET], http://npc.people.com.cn/n/2015/0829/c14576-27531201.html.

[68] *Zuì gāo fǎ tán duì tān guān zēng shè zhōng shēn jiān jīn: gǎi biàn wú qī míng bù fù shí xiàn xiàng (最高法谈对贪官增设终身监禁：改变无期名不副实现象) [The Supreme People's Court Talking about Adding Life Imprisonment without Possibility of Release for Corrupt Officers: Changes in the Phenomenon of Life Imprisonment are Changes in Name rather than in Reality]*(Nov. 5,2015) Rén mín wǎng (人民网) [PEOPLE'S NET] http://politics.people.com.cn/n/2015/1105/c70731-27782403.html.

[69] Zhōng guó dí sī fǎ gǎi gé bái pí shū <(中国的司法改革>白皮书) [The White Paper on Judicial Reform in China], *supra* note 2.

[70] Zhuān jiā tán xíng fǎ xiū zhèng àn (jiǔ) zhōng shēn jiān jīn ràng jù tān bǎ láo dǐ zuò chuān (专家谈刑法修正案（九）：终身监禁让巨贪把牢底坐穿) [Experts Discussing the Ninth Amendment to the Criminal Law: Life Imprisonment without Possibility of Release: Let the Arch Corrupt Official Rot in Detention], *supra* note 55.

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regulatory tool of politics, is simply manifested in a new form. L.W.O.R. is an obvious consequence of the new instrumentalism.

3. REFORMS TO LIFE IMPRISONMENT IN THE CONTEXT OF REDUCING THE USE OF THE DEATH PENALTY: APPLICABLE CONDITIONS AND AMENDING THE TERMINATION MECHANISMS

There are currently 102 crimes punishable by life imprisonment in the present Specific Provisions, accounting for 21.79% of a total of 468 crimes.[71] Almost all of these 102 crimes are provided with a fixed-term imprisonment of not less than ten years, forty-six of them are stipulated together with the death penalty, five are provided with a fixed-term imprisonment of not less than seven years, [72] and one is provided with a fixed-term imprisonment of not less than fifteen years.[73] The distribution of crimes punishable by life imprisonment is shown in Table 1 below. Based on the distribution, this section intends to examine the life imprisonment system in the Criminal Law of China and the reforms conducted by the Eighth and Ninth Amendments, together with its relative judicial interpretations.

See table in the next page

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[71] *See Xíng fǎ zuì xīn zuì míng yī lǎn biǎo (刑法最新罪名一览表)[Chart Showing the New Crimes in the Criminal Law]*, zuì míng wǎng (罪名网) [CRIMINAL NET] (Apr. 9, 2016), http://www.zuiming.net/51.html.

[72] These crimes include crimes involving the producing or selling food that is not up to safety standards (Article 143), producing fake pesticides, fake animal pharmaceuticals or fake chemical fertilizers, or selling pesticides, animal pharmaceuticals, chemical fertilizers or seeds (Article 147), forming or using superstitious sects or secret societies or 'unusual' religious organizations or using superstition to undermine the implementation of laws and administrative rules and regulations (Article 300), making arrangements for another person to illegally cross the national border (Article 318), and illegally possessing narcotic drugs (Article 348). *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], amended 2015. This is the newest Criminal Law which is amended by the Ninth Amendment. In order to differ from 1997 Criminal Law, it is hereinafter referred to as "the Criminal Law, 2015".

[73] *Id.* This is the crime of smuggling, trafficking in, transporting or manufacturing narcotic drugs, provided by Article 347 (1).

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Table 1:[74] The distribution of crimes punishable by life imprisonment.

Crimes and chapters in the Specific Provisions of the Criminal Law	**Number of crimes punishable with life imprisonment**
Crimes of endangering national security (Chapter I)	8
Crimes of endangering public security (Chapter II)	17
Crimes of disrupting the order of the socialist market economy (Chapter III)	34
Crimes of infringing upon citizens' personal and democratic rights (Chapter IV)	5
Crimes of property violation (Chapter V)	4
Crimes obstructing the administration of public order (Chapter VI)	14
Crimes of impairing the interests of national defence (Chapter VII)	3
Crimes of embezzlement and bribery (Chapter VIII)	4
Crimes of dereliction of duty (Chapter IX)	0
Crimes of servicemen's transgression of duties (Chapter X)	13
Total	102

From Table 1, we can see that the greatest number of crimes involve disrupting the order of the socialist market economy provided by Chapter III (thirty-four crimes), followed by crimes of endangering public security in Chapter II, (seventeen crimes); there is no crime punishable by life imprisonment in Chapter IX.

[74] *Id.*

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3.1. CONDITIONS FOR PASSING A SENTENCE OF LIFE IMPRISONMENT

In the General Provisions of the Criminal Law, there is no special provision to stipulate directly the applicable condition for life imprisonment, such as is provided for the use of the death penalty in some articles.[75] However, in the light of Article 17, a criminal punishment, including life imprisonment, cannot be imposed on a person who had not reached the age of fourteen-years-old when he or she committed the crime. A person who was over sixteen at the time he or she committed the crime shall be given a criminal punishment, including life imprisonment; but a person who has reached the age of fourteen but not the age of sixteen, and has committed intentional homicide, intentionally hurts another person so as to cause serious injury or death, or commits rape, robbery, drug-trafficking, arson, explosion or poisoning, has criminal liability,[76] although generally, he or she is not sentenced to life imprisonment according to relative judicial interpretation.[77] In addition, under the present Criminal Law, a person who has reached the age of seventy-five may also be sentenced to life imprisonment if he/she has committed a crime punishable by life imprisonment and/or death, even though Article 17-1, which was added by the Eighth Amendment,[78] provides that a person who has reached the age of seventy-five may be given a lighter or mitigated penalty if he/she commits an intentional crime.[79] When considering other states, we can see that their provisions for the use of life imprisonment are stricter than China's. For example, in accordance with Article 57 of the Romanian Penal Code, life imprisonment shall not be imposed on an offender who has turned sixty-five years of age at the date when the judgment to convict is returned, but shall be replaced by a prison term of thirty years and a ban on the exercise of certain rights for the maximum duration of the prison sentence[80] and "life

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[75] *Id.* These articles include Articles 48, 49, 50 and 51.
[76] *Id.* art 17.
[77] *See* Zuì gāo rén mín fǎ yuàn guān yú shěn lǐ wèi chéng nián rén xíng shì àn jiàn jù tǐ yīng yòng fǎ lǜ ruò gān wèn tí dí jiě shì (最高人民法院关于审理未成年人刑事案件具体应用法律若干问题的解释) [The SPC's Interpretation on Several Legal Issues concerning the Specific Application of the Law in Handling the Criminal Cases of Juveniles], Fǎ shì (法释) [2006]1 Hào (号) [Legal Interpretation no.1, 2006], art 13.
[78] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (bā) (中华人民共和国刑法修正案（八）) [The Eighth Amendment to the Criminal Law of the People's Republic of China], *supra* note 4, art. 1.
[79] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art 17-1.
[80] Criminal Code of the Republic of Romania, LAW # 286 of 17 July 2009, art 57.

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imprisonment is also not going to be applied for the minor offender".[81] Under the Hungarian Criminal Code, only persons over the age of twenty at the time of the commission of the crime shall be sentenced to life imprisonment.[82] Except for these considerations relating to age, in the Criminal Law of China, there is no specific general provision referring to the applicable conditions for life imprisonment. However, conditions are provided by the Specific Provisions in all kinds of crimes punishable by life imprisonment, and they include the following types:

1) Life imprisonment for "action crimes" (行为犯，*xingweifan*). The actus reus of action crimes here is simply an act or behavior which is proved to have already been committed, the consequences of which are immaterial, and which is an important type of crime; most of these crimes are generally relatively serious and are provided with a correspondingly heavy penalty, such as the death penalty and life imprisonment. In the Criminal Law, life imprisonment is normally provided for action crimes without any consideration of circumstances or any other conditions; it is normally a mandatory sentence, and in some crimes, it is the maximum legally prescribed penalty. These action crimes include treason (Article 102), aiding the enemy (Article 112), forming or leading a terrorist organization (Article 120), aircraft hijacking (Article 121), intentional homicide (Article 232) and stealing, spying into or buying military secrets for, or illegally offering such secrets to agencies, organizations or individuals outside the territory of China (Article 431 (2)). All of these six crimes are very serious crimes and all of them can be punishable by death.

2) Life imprisonment may only be imposed on a perpetrator under certain legally-prescribed circumstances according to the law. These circumstances include the crime scene, the object of the crime, the criminal consequences, the means of the crime, and the position of the perpetrator in a criminal organization, and so on. The crime scene is a significant legally prescribed circumstance for passing sentence in the Criminal Law of China; for

[81] Viorica-Mihaela Frîntu, *Pedeapsa Detenţiunii Pe Viaţă [Life Imprisonment Penalty]*, 4 ANNALS CONSTANTIN BRANCUSI U. – JURID. SCI. SERIES 93, 97 (2013). According to Article 113 of the Criminal Code of the Republic of Romania, a juvenile includes a person who is younger than sixteen years old.
[82] Criminal Code of the Republic of Hungary, ACT C of 2012, sec 41.

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example, robbing public or private property by violence, coercion or other methods carries a fixed-term imprisonment of not less than three but not more than ten years, but if the criminal intrudes into another person's residence to rob, robs on board a means of public transportation, or rapes a woman in a public place, he may be sentenced to life imprisonment or death.[83] The object of the crime is also an important sentencing factor; for example, anyone robbing a bank or any other banking institution,[84] or stealing or forcibly seizing guns, ammunition or explosives from state organs, members of the armed forces, the police or the people's militia,[85] may be sentenced to life imprisonment or death. Criminal consequence is another important sentencing factor in a majority of provisions in the Specific Provisions. Some provisions directly stipulate the consequence of crimes, with the amount of property or illegal property involved in the crime serving as the applicable condition for life imprisonment; for example, for economic crimes in Chapter 3, the amount of property or othergoods involved in the crime serves as a sentencing factor,[86] and some provisions stipulate "causing death or serious injury, or causing heavy losses of public or private property" as the applicable condition for life imprisonment. For example, Article 236 (3) provides that anyone raping a woman and causing serious injury or death to the victim may be sentenced to life imprisonment or the death penalty.[87] However, a majority of provisions, i.e. around fifty-three provisions, include the terms "commit major crimes" or "serious circumstance" or "especially serious circumstance"

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[83] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 263.
[84] *Id.*
[85] *Id.* art 127 (2).
[86] In the Specific Provisions, only the crimes of manufacturing or selling counterfeit or inferior products, which are punishable by life imprisonment, are stipulated explicitly with the amount of property involved in the crime, i.e., "if the amount of earnings from sales is more than 2 million Yuan, he shall be sentenced to a fixed-term imprisonment of 15 years or life imprisonment" (See *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art 140); most of the other provisions use the phrase "the amount involved is large or especially large" as the applicable condition for life imprisonment; see, for example, Articles 152(3), 170, 178, 192, 194, 195, 196, 197, 200, 204, 206, 207, 224, 264, 267, 382(3) and 384. Based on the specific crime, the S.P.C. makes different judicial interpretations of these vague terms. In addition, the crime of illegal drug-possession is provided with the term "quantity" as the condition for sentencing to life imprisonment, namely, illegally possessing not less than one kilogram of opium, or not less than fifty grams of heroin or methyl-aniline, or any other large quantities of narcotic drugs". See Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 384.
[87] *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, arts 115, 141, 144, 147, 234, 263, 236(3), 390, 421, 422, 423 and 424.

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which serves as the applicable condition for life imprisonment. Generally, these kinds of terms in the provision are normally regarded as “miscellaneous provisions” (兜底条款，DoudiTiaokuan), and are in practice interpreted by the S.P.C. accordance with the characteristics of different crimes, or according to mandate, by the local High People’s Court, who make this kind of interpretation according to the local economic and social situation. The means of the crime is also a sentencing element; for example, robbing with a gun,[88] or, by resorting to especially cruel means, causing severe injury to another person, or reducing the person to complete disability, [89] and using arms to protect the smuggling, trafficking in, transporting or manufacturing of narcotic drugs[90] all may bring a sentence of life imprisonment or death. The position of the perpetrator in a criminal organization is also an important applicable condition for life imprisonment; for example, anyone who is a ringleader of a gang engaged in abducting and trafficking in women and children may be sentenced to life imprisonment.[91] Meanwhile, there are other applicable conditions for life imprisonment such as the perpetrator’s attitude towards an admission of guilt, the perpetrator’s criminal record and so on.

All in all, the applicable conditions for life imprisonment are not stipulated directly by the General Provisions, except for the object of the punishment itself, but rather by the provisions providing concrete crimes in the Specific Provisions. Furthermore, life imprisonment in some crimes is stipulated together with the death penalty, which serves as an alternative option to the latter; the applicable conditions for both penalties are, in most provisions, the same.[92] In this case, the Supreme People’s Court S.P.C. generally makes the judicial interpretation or produces other kinds of judicial documents to guide the judge in choosing between the death penalty and life imprisonment. However, a fact which should not be ignored is that these judicial interpretations and documents cannot completely cover all the situations and circumstances in all capital crimes. In this case, in judicial

[88] *Id.* art 263.
[89] *Id.* art 234(2).
[90] *Id.* art 247(2).
[91] *Id.* arts 103,104,105, 170, 240, 317,318, 328 and 347.
[92] *Id.* arts. 115, 119, 125, 127, 141, 232, 234, 236, 239, 263, 347, 369, 370, 383, 421, 422, 423, 424, 430, 431, 438, 439, 446.

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practice, on one hand, the judge can decide to choose between the death penalty and life imprisonment according to the Articles 48 and 49, which provide applicable conditions for the death penalty and limits for its use, as well as details regarding the Criminal Law and its relevant judicial interpretation. On the other hand, if the judge cannot decide how to choose between the death penalty and life imprisonment in the first stage, he or she is generally granted discretion. Regarding this discretion on the choice between the death penalty and life imprisonment, the reality is that to a great extent, as some scholars point out that, "in a case [which involves a decision on] whether or not the convict should receive the death penalty with reprieve, it absolutely depends on the judge's inner conviction."[93] Unlike the characteristics and requirements of the judicial adjunctive documents, the judge generally does not explicitly explain the reasoning in the sentencing decision. In the court's criminal judgement, therefore, it is almost impossible to find the reasoning behind the choice between the death penalty and life imprisonment when the judge uses his or her inner conviction to make the decision.[94] However, in some cases, we can find some circumstances that lead the judge to use life imprisonment rather than the death penalty. For example, in the case of "Zhou Junhui and Qin Xing" forcing other persons to engage in prostitution,[95] in which the crimes committed by these two perpetrators caused serious consequences (social harm), and the perpetrator's potential to commit offences and his or her subjective mens rea are very obvious, they were sentenced to

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[93] Chén Xīngliáng (陈兴良), *sǐ xíng shì yòng dí sī fǎ kòng zhì: yǐ shǒu pī xíng shì zhǐ dǎo àn lì wéi shì jiǎo (死刑适用的司法控制：以首批刑事指导案例为视角)[Judicially Controlling the Use of the Death Penalty: From the Perspective of the First Criminal Guiding Cases],* FĂ (法) [L. SCI.], no.2, 2013, at 44.

[94] Regarding this, I have already carried out research into criminal sentencing in China, and published my research paper, On the Problems of the Just Sentence in China. In this paper, I pointed out that in most criminal judgments the reasons for the final sentencing and the reasoning procedures behind it are very simple; some of the decisions contain simply a short sentence without any reasoning, and even if the judge cites the relevant provision, they declare whether "the social harm is great or not". This serves as the justification of sentencing decisions, without any explanation of the meaning of 'social harm' and without exploring the responsibility aspects of the crime. Gui Huang ,*On the Problems of Just Sentencing in China*, 56 HUNGARIAN J. L. STUD. 177, 181 (2015).

[95] *See* Zhōu Jūn Huī, Qín Xīng (周军辉，秦星) [2010] Yong the First Criminal Court First Trial. no. 55 ((2010) Yǒng zhōng xíng yī chū zì dì 55 hào (永中刑一初字第55号); [2012] Xiang High Court Third Criminal Trial. no. 31. ((2012) Xiāng gāo fǎ xíng sān zhōng zì dì 31 hào (湘高法刑三终字第31号); [2014] Xiang High Court Criminal Retrial. no.5. ((2014) Xiāng gāo fǎ xíng zhòng zì dì 5 hào (湘高法刑重字第5号). The judgement of this case can be found in the website "China Judgements Online"http://wenshu.court.gov.cn/content/content?DocID=3a471b1c-dfa8-4ea0-b53f-edf0a40d5ac5&KeyWord=%E5%91%A8%E5%86%9B%E8%BE%89%7C%E5%91%A8%E5%86%9B%E8%BE%89%EF%BC%8C%E7%A7%A6%E6%98%9F.

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death in the first and second instances. However, in the retrial instance, the sentencing results were reduced to life imprisonment because the criminal effects were not considered especially serious, although the judge did not give any further reasons for this in the judgement.[96] Actually, in China's judicial practice, when the judge has to make decision using his or her inner conviction, he or she has to consider all kinds of relevant crime factors and other external influence factors, but generally does not explicitly explain them, nor lay out his or her reasoning for the sentencing in the judgement. Except for most of the provisions previously mentioned, there are a few provisions in which the applicable conditions for the death penalty are provided which are explicitly stricter than that of life imprisonment; for instance, Article 113 provides that if the crime provided by Paragraph 2 of Article 103 and in Articles 105, 107 and 109, causes particularly grave harm to the State and the people, or if the circumstances are especially serious, the offender may be sentenced to death. In this case, the judge normally makes the sentencing decision according to the criminal law and other relevant judicial interpretations.

3.2. REFORMING THE TERMINATION MECHANISMS FOR LIFE IMPRISONMENT: INCREASING ITS SEVERITY

The termination mechanisms make life imprisonment and its severity different from fixed-term imprisonment and other punishment measures in China's punishment system. According to the present Criminal Law, a twin-track approach is adopted to terminate life imprisonment, i.e. L.W.P.R. and L.W.O.R. The Eighth and Ninth Amendments have also amended these termination mechanisms to increase the severity of life imprisonment so as to remedy the potential problems caused by the reduction of the death penalty. This section will examine the termination mechanisms and their reform.

[96] In this case, theS.P.C. gave a special press interview and answered some questions about the case. *See* Zuì gāo fǎ wèn dá: zhōu jūn huī, qín xīng wéi hé wèi bèi hé zhǔn sǐ xíng (最高法问答：周军辉、秦星 为何未被核准死刑)[THE SUPREME PEOPLE'S COURT PRESS INTERVIEW: WHY DID THE SUPREME PEOPLE'S COURT NOT APPROVE THE DEATH SENTENCE IMPOSED ON ZHOU JUNHUI AND QINXING](Jun. 13, 2014) Zhōng huá rén mín gòng hé guó zuì gāo rén mín fǎ yuàn (中华人民共和国最高人民法院) [THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA], http://www.court.gov.cn/zixun-xiangqing-6469.html.

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3.2.1. L.W.P.R.: COMMUTATION

Considering the special penalty elimination system in China, release from prison can generally come through the commutation of punishment and parole, both of which are normally applied at the same time. According to Article 78, commutation operates in two situations; namely, discretionary commutation (酌定减刑，zhuodingjianxing) and mandatory or legally provided commutation (法定减刑，fading jiangxing). Discretionary commutation of life imprisonment refers to a situation in which the penalty "may" be commutated if the offender "conscientiously observes prison regulations, accepts education and reform through labor and shows true repentance or performs meritorious services while serving his sentence,[97] but it is not certain whether the commutation will granted or no and its likelihood is lower than with mandatory commutation, which is a situation in which the penalty "shall" be commutated, and this will certainly be granted by law if the perpetrator performs any of the major meritorious services provided in the Criminal Law as detailed below:

1) Preventing another person from conducting major criminal activities;

2) Informing against major criminal activities conducted inside or outside prison and verified through investigation;

3) Assisting judiciary authorities to arrest another major suspect/offender, including a joint offender;

4) Having inventions or important technical innovations to his credit;

5) Coming to the rescue of another in everyday life and activities, at the risk of losing his own life;

6) Performing remarkable services in fighting against natural disasters or curbing major accidents; or

7) Making other major contributions to the country and society.[98]

For the offender sentenced to life imprisonment, if his performances meet the conditions for discretionary commutation, the penalty may be commuted to a

97 *Id.* art 78.
98 *Id.* art 78.

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fixed-term imprisonment of twenty-two years after serving two years of the sentence, if the offender shows true repentance or performs meritorious services; it may be commuted to a fixed-term imprisonment of twenty-one to twenty-two years if he or she shows true repentance *and* performs meritorious services;[99] by contrast, if the offender serving life imprisonment performs major meritorious service, the sentence may be commuted to a fixed-term imprisonment of twenty to twenty-one years; it may be commuted to a fixed-term imprisonment of nineteen to twenty years if the offender shows true repentance *and* performs major meritorious service.[100] These provisions have been changed significantly by the Eighth Amendment and relative judicial interpretation and are stricter than those of the 1997 Criminal Law. In accordance with the 1997 Criminal Law and its judicial interpretations, if the offender shows true repentance or performs meritorious services, his sentence might be commuted to a fixed-term imprisonment of eighteen to twenty years, and if the offender performs major meritorious service, it might be commuted to a fixed-term imprisonment of thirteen to eighteen years.[101]

Compared with discretionary commutation, mandatory commutation seems much more merciful. While serving his sentence, the offender may be granted many commutations, but the interval between two commutations shall not be less than two years, and after one or multiple commutations, the actual term of the sentence served by an offender sentenced to life imprisonment shall not be less than thirteen years, which was also increased from the ten years provided by the 1997 Criminal Law.[102] The commencement date is calculated from the date when the life imprisonment judgment is announced.[103]

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[99] *See* Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases](People's Republic of China) Supreme People Court Fǎ shì (法释) (2016)23 Hào(号) [Legal Interpretation No.23, 2016]), arts. 7 and 8.

[100] *Id.* art 7.

[101] *See* Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 78, and Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定)[Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases](People's Republic of China) Supreme People Court Fǎ shì (法释) (1997)6 Hào(号) [Legal Interpretation No.6, 1997]), art. 6.

[102] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 78(2).

[103] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic

The commutation per instance for the offender who shows true repentance or performs major meritorious service shall be no more than nine months; for the offender who shows true repentance and performs major meritorious service it shall be no more than one year; for those who perform major meritorious service it shall be no more than one and half years; for those who perform major meritorious service and show true repentance, it shall be no more than two years.[104] In order to truly prevent people engaging in malpractices for personal gain, power or corrupt financial dealings,[105] on 21 January 2014 the C.P.C.'s Central Political and Legal Affairs Commission (中共中央政法委, ZhonggongZhongyangZhengfawei) promulgated a document to strictly regulate and improve the conditions of commutation and parole for the offenders who commit any crime which involves taking advantage of a duty, disrupting the order of financial administration, or forming, leading, taking an active part in, harboring, or conniving in an organization of a criminal syndicate nature. Based on this document, in the new Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases, the S.P.C. extended the commencement date for the commutation of life imprisonment imposed on the offenders who commit any of the above mentioned crimes, i.e., it may be commuted to fixed term imprisonment after the offender has served three years of the sentence, although the actual executive terms after the commutation shall not be less than twenty years. The interval between two commutations shall be two years or more, and the commutation per instance shall be no more than one year, although these requirements are not applied to the mandatory commutation;

of China], 2015, *supra* note 11, art. 78(2) and Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 8.

[104] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 6.

[105] *See* Zhōng gòng zhōng yāng zhèng fǎ wěi guān yú yán gé guī fàn jiǎn xíng, jiǎ shì, zàn yú jiān wài zhí xíng qiē shí fáng zhǐ sī fǎ fǔ bài dí yì jiàn (中共中央政法委关于严格规范减刑、假释、暂予监外执行切实防止司法腐败的意见) [The Opinions of the Central Political and Legal Affairs Commission of the Communist Party of China (CPLACCPC) on Effectively Preventing Judicial Corruption by Strictly Regulating the Commutation, Parole and the Temporary Service of Sentences Outside Prison] (People's Republic of China) Central Political and Legal Affairs Commission of the Communist Party of China, Zhōng zhèng wěi (中政委) (2014) 5 Hào (号) [No. 5, 2014, Central Political Commission], art. 1(3).

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in other words, there is no limitation on the commencement date and interval for mandatory commutation.[106] These same restrictions on commutations are also applied to the offenders who commit the crimes of endangering national security, or terrorism, or is a ringleader of a gang engaged in drug-related crimes or recidivism of drug crimes, and the offender who is a recidivist or convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances or organized violence who is sentenced to death with reprieve.[107] There were no provisions with the same restrictions in the 1997 Criminal Law.

In addition, life imprisonment reduced from the death penalty with reprieve may be reduced to a fixed-term imprisonment of twenty-five years after the offender has served two years of the sentence if he/she shows true repentance or performs meritorious services. If he/she genuinely performs any major meritorious services, the sentence may be commuted to a fixed term imprisonment of twenty-three to twenty-five years after serving two years of the sentence. Under the 1997 Criminal Law, in this case, it may be commuted to a fixed-term imprisonment of fifteen to twenty years.[108] After one or multiple commutations, the actual term of the sentence served by an offender sentenced to the death penalty with reprieve shall not be less than fifteen years, which is three years more than that provided by the 1997 Criminal Law,[109] excluding the probation period for suspension of execution; and it may be commuted to a fixed term imprisonment after the offender has served three years of the sentence.[110] In addition, for a recidivist or someone convicted of murder, rape, robbery, abduction, arson, explosion, dissemination of

[106] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定)[Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 9.

[107] *Id.*

[108] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 50; and Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定)[Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 9.

[109] *Id.*

[110] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī ding (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 9.

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hazardous substances or organized violence who is sentenced to death with reprieve, the court may, when sentencing, decide to put restrictions on the commutation of his sentence in the light of the circumstances of the crime committed; if he/she is granted a commutation while serving the sentence of life imprisonment commuted from the death penalty with reprieve, the court should strictly apply the conditions of the commencement date, the time interval and the commutation range.[111] Namely, the life imprisonment commutated from the death penalty with reprieve may only be commuted to fixed-term imprisonment after the offender has served five years of the sentence, and the commutation per instance shall be no more than six months; for the offender who performs meritorious services, it shall be no more than one year.[112] In fact, the restrictions on commutation have been newly provided by the Eighth Amendment and the judicial interpretation.

"The commutation of punishment provided by the Criminal Law is a kind of universal penalty implementation system with distinct characteristics, and it is unique … in the world."[113] In general terms, it is even a significant condition for the convict serving life imprisonment to be granted parole because "the conditions of parole are stricter than those of commutation."[114] Furthermore, in practice, the application rate of commutation is always higher than that of parole;[115] for example, in accordance with the S.P.C.'s report, the number of commutation cases from January to September 2014 amounted to 370,998, while only 26,904 parole cases.[116] Even though it is impossible to

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[111] *Id.* art. 10, and see also Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 50(2).

[112] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, arts. 13 and 14.

[113] Xú Jìngcūn (徐静村), *Jiǎn xíng, jiǎ shì zhì dù gǎi gé ruò gān wèn tí yán jiū (减刑、假释制度改革若干问题研究) [On Several Issues on the Reform of Commutation of Punishment and Parole]*,FǍ ZHÌ YÁN JIŪ (*法治研究*) [RES. ON RULE LAW], no.2, 2010, at 3.

[114] Liú Qiáng (刘强), *Zài wǒ guó jiàn lì yǐ jiǎ shì wéi zhǔ, jiǎn xíng wéi fǔ " dí zuì fàn chū yù xīn mó shì (在我国建立以"假释为主、减刑为辅"的罪犯出狱新模式) [Establishing the New Model of Criminals Being Released from Prison – 'Parole Principally, Reduction of Penalty Secondly' – in China]*, FǍ XUÉ ZÁ ZHÌ (*法学杂志*) [L. SCI. MAG], no.1, 2012, at 45.

[115] Liǔ Yuán (柳原), *Kuò dà jiǎ shì, suō xiǎo jiǎn xíng dí shí zhèng yán jiū (扩大假释、缩小减刑的实证研究) [Empirical Research on Expanding the Application of Parole and Limiting Commutation]*, ZHŌNG GUÓ SĪ FǍ (中国司法) [JUSTICE OF CHINA], no.11, 2014, at 67.

[116] Zuì gāo rén mín fǎ yuàn (最高人民法院) [SUPREME PEOPLE'S COURT],《2014年1-9 Yuè rén mín fǎ yuàn bàn lǐ jiǎn xíng jiǎ shì àn jiàn qíng kuàng (月人民法院办理减刑假释案件情况) [REPORT ON THE COMMUTATION AND PAROLE CASES HANDLED BY THE PEOPLE'S COURT FROM JANUARY TO SEPTEMBER

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discover the exact number of cases of commutation of life imprisonment, the statistical data above show that the possibility of commutation is much greater than that of parole. One of the important reasons for this might be that most enforcement authorities have to take supervisory responsibility if the convict commits any other crime while serving his sentence outside of prison when he is granted parole, so most enforcement authorities are against parole.[117]

3.2.2. L.W.P.R.: PAROLE

Parole is another significant method of early release from prison. In accordance with Article 81 of the Criminal Law, an offender sentenced to life imprisonment who has actually served not less than thirteen years of imprisonment may be granted parole if he/she conscientiously observes the prison regulations, accepts education and reform through labor, shows true repentance and is not likely to commit any crime again. Actually, the limitations for parole are almost the same as those provided by the 1997 Criminal Law, except that the term of punishment actually to be served is longer than that provided by the 1997 Criminal Law, which was not less than ten years.[118] If special circumstances exist, upon the verification and approval of the S.P.C., parole may be granted without regard to the above restrictions on the term served.[119] Here we can see that the condition of "he conscientiously observes the prison regulations, accepts education and reform through labor, and shows true repentance" and the minimum term to be served in prison, which is not less than thirteen years, are the same as the basic condition for commutation, but the conditions of parole are higher and stricter than those of commutation because of the assessed risk of committing a crime again. Regarding this risk, it should be comprehensively evaluated based on the concrete circumstances of the crime committed by the convict, the facts of the

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2014](Apr. 1, 2015) Zhōng huá rén mín gòng hé guó zuì gāo rén mín fǎ yuàn (中华人民共和国最高人民法院)[SUPREME PEOPLE'S COURT OF PEOPLE'S REPUBLIC OF CHINA]. http://www.court.gov.cn/fabu-xiangqing-14014.html.

[117] *See generally*, Láng Shèng (郎胜), *Xíng fǎ xiū zhèng àn jiě dú* (<*刑法修正案（八）*>*解读*)*[Interpreting "the Eighth Amendment to the Criminal Law]*, GUÓ JIĀ JIǍN CHÁ GUĀN XUÉ YUÀN XUÉ BÀO (国家检察官学院学报) [J. THE NAT'L PROSECUTORS C.], no.2 (2011), at 149, 157.

[118] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法) [Criminal Law of People Republic of China], 1997, *supra* note 11, art. 81.

[119] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 81.

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original sentence, the convict's consistent performance while serving his/her sentence, the convict's age, physical condition, personality characteristics, and his/her source of livelihood after release from prison, as well as the supervision measures and conditions.[120] In addition, "when a parole decision is made on a convict, the impact of his/her release on parole on the community where he lives shall be considered,"[121] a provision which was added by Article 16 (3) of the Eighth Amendment. Article 81 (3) provides for an exception where a "special circumstance exists"; but what exactly is this circumstance? In accordance with judicial interpretation, it is a "circumstance . . . . significantly related to the whole social and state interest",[122] but this interpretation is still not clear, and some scholars have pointed out that "the concept and scope of the specific circumstance defined by judicial interpretation is ambiguous and it results in theoretical diversity and abuse in judicial practice."[123] In addition, there is a prohibiting provision on parole for some special convicts, including "the recidivist or a convict sentenced to life imprisonment for murder, rape, robbery, abduction, arson, explosion, dissemination of hazardous substances, or organized violent crime."[124] It was amended by Article 16 (2) of the Eighth Amendment. Even though those convicts falling into the categories above cannot be granted parole, they can be released early on commutation, in accordance with the present law. However, the convict who is sentenced to life imprisonment and released on parole is still supervised under the judicial authorities for a certain probation period.[125] During this probation period, the offender granted parole should observe the following requirements: 1) observing laws and administrative rules and

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[120] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art. 15.

[121] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 81(3).

[122] Zuì gāo rén mín fǎ yuàn guān yú bàn lǐ jiǎn xíng, jiǎ shì àn jiàn jù tǐ yīng yòng fǎ lǜ wèn tí dí guī dìng (最高人民法院关于办理减刑、假释案件具体应用法律问题的规定) [Supreme People Court's Provisions on Several Legal Issues concerning the Specific Application of the Law in Handling Commutation and Parole Cases], *supra* note 99, art 17.

[123] Liǔ Zhōngwèi (柳忠卫), *Duì jiǎ shì shì yòng dí lì wài xìng guī dìng hé jīn zhǐ xìng guī dìng dí lǐ xìng fēn xī (对假释适用的例外性规定和禁止性规定的理性分析) [Rational Analysis of the Exception Stipulations and Prohibiting Stipulations of Parole Application]*, ZHÈNG FǍ LÙN CÓNG (政法论丛)[J. POL. SCI. & L.], no.1, 2006, at 58.

[124] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China],2015, *supra* note 72, art. 81(2).

[125] *Id.* art 83.

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regulations, and submitting to supervision; 2) reporting on his own activities as required by the supervising organ; 3) observing the regulations for receiving visitors stipulated by the supervising organ; and 4) reporting to obtain approval from the supervising organ for any departure from the city or country he lives in or for any change in residence.[126] Furthermore, he/she shall be subjected to community correction during parole.[127] The community correction system is newly established by the Eighth Amendment.[128] If he/she commits another crime during the probation period for parole, or is discovered to have committed, before the judgment is pronounced, other crimes for which no punishment has been imposed, or he/she violates any provision of the laws, administrative regulations or the relevant department of the State Council on parole supervision and management if the above do not constitute a new crime, his parole shall be revoked.[129]

3.2.3. L.W.O.R.: CRIMES OF EMBEZZLEMENT AND BRIBERY

In fact, the convict who is not sentenced to immediate execution may be released early on parole or commutation, regardless of the crime he/she committed, if the release conditions have been satisfied, even though he/she was restricted to commutation and prohibited parole before the Ninth Amendment. However, this situation was changed by the Ninth Amendment. According to Article 44(4) of the Ninth Amendment, for a convict who commits the crimes of embezzlement or bribery and is sentenced to the death penalty with reprieve, the court may, depending on the circumstances of the crime, at the same time decide, after commuting the suspension of execution to life imprisonment on the expiry of the two year period, to imprison him for life, without commutation or parole.[130] In accordance with the judicial interpretation made by the S.P.C. and the Supreme People's Procuratorate (hereinafter: S.P.P.) on 28 March 2016, a convict who has embezzled or taken

[126] *Id.* art 84.
[127] *Id.* art 85.
[128] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (bā)(中华人民共和国刑法修正案（八)) [The Eighth Amendment to the Criminal Law of the People's Republic of China] , *supra* note 4, art. 17.
[129] Zhōng huá rén mín gòng hé guó xíng fǎ (中华人民共和国刑法)[Criminal Law of People Republic of China], 2015, *supra* note 72, art. 86.
[130] Zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn (中华人民共和国刑法修正案（九)) [The Ninth Amendment to the Criminal Law of the People's Republic of China], *supra* note 5, art. 44(4).

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bribes of not less than three million Yuan (C.N.Y.), may, in a case where the circumstances are especially serious, the social impact is especially severe and heavy losses are caused to the state and people, be sentenced to the death penalty. However, if he/she surrenders voluntarily, performs any meritorious service, confesses the crime and so on, and if the immediate execution is not deemed necessary, a two year suspension of execution may be pronounced simultaneously with the imposition of the death sentence, and at the same time a decision taken to prohibit commutation and parole, according to the circumstances of the case.[131] This decision should be made at the first and second trial, respectively, rather than upon the expiry of the two-year period, and therefore it emphasizes that once the decision to impose L.W.O.R. has been made, it will not be affected by the offender's performance during the period of suspension and it shall be enforced without any condition. Consequently, this is termed the systemic rigidity of L.W.O.R.[132]

The L.W.O.R. system was first established by the Ninth Amendment after the first criminal law was passed in 1979 and was "a brand new punishment measure".[133] Thus far, it has already been applied to three convicts.[134] The Chief Editor of the S.P.P.'s Research Office of Legal Policies,

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[131] Zuì gāo rén mín fǎ yuàn, zuì gāo rén mín jiǎn chá yuàn guān yú bàn lǐ tān wū huì lù xíng shì àn jiàn shì yòng fǎ lǜ ruò gān wèn tí dí jiě shì (最高人民法院、最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的解释) [The Supreme People's Court's and Supreme People's Procuratorate's Interpretation of Several Legal Issues Concerning the Specific Application of the Law in Handling Criminal Cases of Embezzlement and Bribery]](the People's Republic of China) Supreme People's Court's and Supreme People's Procuratorate's, 法释 (2016) 9号 [Legal Interpretation No.9, 2016]), arts. 3 and 4.

[132] Liǎng gāo fā bù bàn lǐ tān wū huì lù xíng shì àn jiàn sī fǎ jiě shì ("两高"发布办理贪污贿赂刑事案件司法解释) [Interpretations Concerning the Specific Application of the Law in Handling Criminal Cases of Embezzlement and Bribery Issued by the 'Two Supreme Judicial Authorities (Supreme People's Court and Supreme Peoples' Procuratorate)'](Apr. 18, 2016) Supreme People's Court of People's Republic of China, http://www.court.gov.cn/zixun-xiangqing-19562.html.

[133] "jù tān" jiāng bǎ láo dǐ zuò chuān ？ — — jù jiāo xíng fǎ xiū zhèng àn （ jiǔ ） cǎo àn ： duì zhòng tè dà tān wū fàn zuì zēng shè " zhōng shēn jiān jīn ("巨贪"将把牢底坐穿？——聚焦刑法修正案（九）草案：对重特大贪污犯罪增设"终身 监禁") ['WILL THE 'CORRUPT OFFICIAL' CONTINUE TO ROT IN DETENTION? FOCUS ON THE NINTH AMENDMENT TO THE CRIMINAL LAW (DRAFT): STIPULATING LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE FOR SERIOUS CRIMES OF EMBEZZLEMENT AND BRIBERY](Aug. 25, 2015) Zhōng yāng zhèng fǔ wǎng (中央政府网) [CENTRAL PEOPLE'S GOVERNMENT], http://www.gov.cn/xinwen/2015-08/25/content_2919673.htm.

[134] These three convicts are Bai Enpei, Wei Pengyuan and Yu Tieyi. All of them are sentenced to the death penalty with reprieve for having committed corruption crimes, and are not allowed to be granted commutation and parole after the death penalty with reprieve is reduced to life imprisonment. *See Bái ēn péi děng sān jù tān bèi pàn chǔ zhōng shēn jiān jīn, shì fàng chū shí me xìn hào? (白恩培等三巨贪被判处终身监禁，释放出什么信号？) [Such Bai Enpei as Three Arch Corrupt officials Are Sentenced to Life Imprisonment without Release, what Kinds of Signals Are Released]* Péng pài xīn wén wǎng (澎湃新闻网) [PENGPAI NEWS] (Dec.14, 2016), http://www.szxinghan.cn/Social/13972494.html.

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Wan Chun, said that "it is a new enforcement measure of the death penalty, which is in between the death penalty with immediate execution and the general death penalty with reprieve."[135] Even though it exists only for the crimes of embezzlement and bribery, it sends a significant signal about the alternative penalties to execution in the context of gradually reducing the death penalty. Some scholars positively affirmed L.W.O.R. and said that "according to the principle of suitable punishment for a crime, trying to impose LWOR on the convict who should have been sentenced to death for the serious crime of embezzlemnt or bribery is a positive and prudent option."[136] "Compared with the immediate execution of the death penalty, LWOR has its own humanitarian aspect."[137]

4. FURTHER REFORM PROPOSALS FOR THE LIFE IMPRISONMENT SYSTEM

According to aforesaid analysis, life imprisonment is, substantially, a long term sentence where the convict who is sentenced to life imprisonment may be released on parole or commutation, unless he/she commits a serious crime of embezzlement or bribery and is sentenced to L.W.O.R. To a great extent, this seems to be in line with the international trend of penal reform, and this long term sentence is actually shorter than in some other states, such as the Czech Republic, Finland, Romania and Turkey, and tallies with the guarantee of human rights. However, there are still some problems with life imprisonment in China should be further reformed as follows.

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[135] *Zuì gāo jiǎn wàn chūn zhǔ rèn děng zhuān jiā jiě dú tān wū huì lù sī fǎ jiě shì* ("*最高检万春主任等专家解读贪污贿赂司法解释*)[*The Chief Editor of the Research Office of the Legal Policies of the Supreme People's Procurator of the P.R.C, Wan Chun and Other Experts Explaining the Judicial Interpretations of the Anti-crime of Embezzlement and Bribery*], Jīn rì tóu tiáo (今日头条) [DAILY NEWS] (May 24, 2016), http://www.toutiao.com/i6288100038123979265/.

[136] *Id.*

[137] RUǍN QÍ LÍN (阮齐林)[Ruan Qilin], *Yī fǎ cóng yán chěng zhì tān wū huì lù fàn zuì — — jiě dú < guān yú bàn lǐ tān wū huì lù xíng shì àn jiàn shì yòng fǎ lü ruò gān wèn tí dí jiě shì* (*依法从严惩治贪污贿赂犯罪——解读<关于办理贪污贿赂刑事案件适用法 律若干问题的解释>*) [*Severely Punishing Crimes of Embezzlement and Bribery by the Law: Analyzing 'Interpretation on Several Legal Issues Concerning the Specific Application of the Law in Handling Criminal Cases of Embezzlement and Bribery*'] [LEGAL DAILY] (Apr. 18, 2016),http://www.legaldaily.com.cn/index/content/201604/18/content_6591201.htm?node=20908.

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4.1. REDUCING THE NUMBER OF CRIMES PUNISHABLE BY LIFE IMPRISONMENT

After the death penalty, life imprisonment is the second heaviest penalty in a punishment system which "is consistently deemed to be a severe penal system by Chinese academic circles."[138] Some scholars point out that "relying on the death penalty is one of the tendencies in a criminal punishment system which is becoming severe".[139] This is one important contributory factor to this severe penal system, but the distribution of life imprisonment in the Specific Provisions of the Criminal Law is another major reason. According to Table1, there are now 102 crimes punishable by life imprisonment, including the forty-six crimes punishable by death, accounting for 21.79% of all crimes which is also now the maximum legal punishment for 56 crimes. In these cases, when the death penalty was removed gradually from the Criminal Law, having life imprisonment as the maximum legal punishment for around 102 crimes still means that "the penalty system in the Specific Provisions is excessively heavy",[140] an appraisal, which applies to the penal system as a whole. In this sense, some scholars point out that "it runs counter to the efficiency of criminal punishment and deviates from the penal goal."[141] "The number of crimes punishable by life imprisonment is so high that the disadvantage to its seriousness and deterrence is fairly obvious."[142] The number of crimes punishable by life imprisonment needs to be reduced, particularly the number of economic crimes. Economic crime is a kind of crime of greed, with the aim of illegally acquiring profit; therefore, "the focus of preventing the economic crime should be on improving the regulatory system, rather than relying too

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[138] Sòng WěIwèi & Hán Méi (宋伟卫，韩玫), *Zhěng tǐ qū qīng, dān jí fā zhǎn: wǒ guó xíng fá jié gòu gǎi gé dí jī běn fāng xiàng ("整体趋轻、单极发展"：我国刑罚结构改革的基 本方向) [The Tendency to Move Towards Generally Light Penalties, and Unipolar Development': The Basic Direction of Our Penalty Structure Reform]*, HÉ BĚI FǍ XUÉ (河北法学) [HEIBEI L. SCI.], Vol.32, no.3 , 2014, at 75, 79.

[139] Péng Wénhuá (彭文华), *Wǒ guó xíng fá tǐ xì dí gǎi gé yǔ wán shàn (我国刑罚体系的改革与完善) [Reforming and Improving the Criminal Punishment System in China]*, SŪ ZHŌU DÀ XUÉ XUÉ BÀO (ZHÉ XUÉ SHÈ HUÌ KĒ XUÉ BǍN (苏州大学学报(哲学社会科学版) [J. SOOCHOW U., PHILOSOPHY & SOC. SCI. EDITION], no.1, 2015, at 100, 101.

[140] Gāo míng xuān, sū huì yú, yú zhì gāng (高铭暄，苏惠渔，于志刚) , *supra* note 27, at 8.

[141] Lǐ Xiǎo ōu (李晓欧), *Zhōng guó zhòng xíng huà bì duān jí qí xiàn zhì lù jìng — — yǐ < zhōng huá rén mín gòng hé guó xíng fǎ xiū zhèng àn （ bā ） > wéi guān zhào (中国重刑化弊端及其限制路径——以<中华人民共和国刑法修正案（八）> 为观照)[The Drawbacks of Heavy Punishment in China and the Road to Limit them: Based on the Eighth Amendment to the Criminal Law of the P.R.C.]*, DĀNG DÀI FǍ XUÉ (当代法学) [CONTEMP. L. REV.],no.6 , 2010, at 38, 40.

[142] Zēng Yà Jié (曾亚杰), *wǒ guó wú qī tú xíng zhì dù gǎi gé tàn xī (我国无期徒刑制度改革探析)[On the Reformation of the Life Imprisonment System in China]*, SHÍ DÀI FǍ XUÉ (时代法学)[PRESENTDAY L. SCI.], Vol.6, no.2 , 2008, at 68, 68 - 74.

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much on criminal punishment”, [143] and it is impossible to rely on such heavy punishments as life imprisonment.

4.2. OPPOSING LWOR FOR THE CRIMES OF EMBEZZLEMENT AND BRIBERY

As regards L.W.O.R., first provided by the Ninth Amendment for the crime of corruption, different scholars have different opinions, both pro and contra. A few scholars offer positive comments, arguing, for example, that it is an “anti-corruption edged tool”, [144] that “it can effectively remit the difficult situation in which the criminal punishment of “the death penalty is overheavy but custodial penalty is too light”, and it combines the function of abolishing and limiting the death penalty”; [145] or that “it is a new punishment measure integrating both leniency and severity for the serious crime of embezzlement and bribery.”[146] However, most scholars criticize it. Some scholars, for example, doubt the legislation’s procedural legitimacy because it was only reviewed once by the N.P.C. Standing Committee under Article 29(1) of the Legislative Code, rather than the required three times;[147] some scholars point out that “LWOR has distanced the offender from rehabilitation and his right to hope is deprived and it seriously violates the punishment aim, which is education and reform”,[148] while others argue that “it may violate the principle of equality (also limiting the legislator) provided by the Constitution”.[149]

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[143] Gāo Míngxuān, Sū Huìyú, Yú Zhìgāng (高铭暄，苏惠渔，于志刚), *supra* note 27, at 6.

[144] Huáng Jīngpíng (黄京平), *zhōng shēn jiān jīn dí fǎ lǜ dìng wèi yǔ sī fǎ shì yòng (终身监禁的法律定位与司法适用)[Legislative Role and Judicial Application of Life Imprisonment without Parole],* BEIJING LIÁN HÉ DÀ XUÉ XUÉ BÀO (RÉN WÉN SHÈ HUÌ KĒ XUÉ BAN) (北京联合大学学报（人文社会科学版）)[J. BEIJING UNION U. (HUMAN. & SOC. SCI.)], NO. 4, 2015, at 98.

[145] Huáng Yǒng Wéi & Yuán Dēng Míng (黄永维，袁登明), *< xíng fǎ xiū zhèng àn （jiǔ） > zhōng dí zhōng shēn jiān jīn (<刑法修正案（九）>中的终身监禁) [On Life Imprisonment without Possibility of Release Provided by the Ninth Amendment to the Criminal Law]*, FǍ LǛ SHÌ YÒNG (法律适用)3 [J. L. APPLICATION] 35, 35 (2016).

[146] Zhào bǐng zhì (赵秉志), *supra* note 19, at 8.

[147] Ou Yáng Běnqí (欧阳本祺), *lùn < xíng fǎ > dì 383 tiáo zhī xiū zhèng (论<刑法>第383条之修正)[On the Amendment of Article 383 of the Criminal Law],* DĀNG DÀI FǍ XUÉ (当代法学)[CONTEMP. L. REV.], NO.1, 2016 at 18.

[148] Qián Yèliù (钱叶六), *tān huì fàn zuì lì fǎ xiū zhèng shì píng jí zhǎn wàng — — yǐ < xíng fǎ xiū zhèng àn （jiǔ） > wéi shì jiǎo (贪贿犯罪立法修正释评及展望——以<刑法修正案（九）>为视角) [Reviewing the Amendment to the Crimes of Corruption and Bribery Legislation and Its Prospects: From the Perspective of the Ninth Amendment to the Criminal Law],* SŪ ZHŌU DÀ XUÉ XUÉ BÀO (ZHÉ XUÉ SHÈ HUÌ KĒ XUÉ BAN)（苏州大学学报（哲学社会科学版）[J. SOOCHOW U. (PHIL. & SOC. SCI. EDITION)], no. 6, 2015, at 99.

[149] Chē Hào (车浩), *xíng shì lì fǎ dí fǎ jiào yì xué fǎn sī — — jī yú 《xíng fǎ xiū zhèng àn （jiǔ） dí fēn xī 》(刑事立法的法教义学反思——基于《刑法修正案（九）的分析》)[Reflecting on Criminal Legislation From the Perspective of Legal Dogma: Based on the Analysis of the Ninth Amendment to the Criminal Law]*, FǍ XUÉ (法学) [LAW SCI.], no.10, 2015, at 9.

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Obviously, L.W.O.R. does not conform to the relevant international standards. Nowadays, "Europe is setting against the imposition of very lengthy terms of imprisonment that are irreducible",[150] and the E.C.t.H.R. has already clarified its attitude towards life imprisonment by case law; life imprisonment without reduction violates Article 3 of the E.C.H.R., and the courts in Germany, France, Italy and Namibia have recognized that those subject to life sentences have a right to be considered for release.[151] Professor Michael M. O'Hear asserts that "it is possible that life imprisonment without parole will enter a period of slow decline that echoes the recent history of the death penalty."[152] In the context of this international tide and in accordance with some other international standards, under the background of reduction of the death penalty, the Chinese legislator has introduced L.W.O.R. for political reasons as if it were euphemistically introducing a new death penalty; consequently, it will reduce the criminal protection of human rights in China, and will not conform to international trends, nor to the development of human rights. L.W.O.R. therefore should be removed from the Criminal Law.

4.3. THE APPLICABLE CONDITIONS SHOULD BE EXPLICITLY PROVIDED BY THE GENERAL PROVISIONS OF THE CRIMINAL LAW

As with the analysis in the third section, no explicit provisions regarding the applicable conditions for life imprisonment are provided by the General Provisions, which means that "life imprisonment is inappropriately abused in judicial practice",[153] and even violates human rights; for example, life imprisonment may be imposed on a juvenile who has reached the age of sixteen but not the age of eighteen when committing a crime,[154] on a convict who has reached the age of seventy-five, and even on women who are pregnant at the time of trial. In this situation, even disregarding the death

[150] Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink*, 23 FED. SENT'G REP. 39, 39 (2010).
[151] *See* Dirk Van Zyl Smit, *Life Imprisonment: Recent Issues in National and International Law*, 29 INT'L J. L. & PSYCHIATRY 405, 405 (2006).
[152] Michael M. O'Hear, *The Beginning of the End for Life without Parole*, 23 FED. SENT'G REP. 1,7 (2010).
[153] Lǐ Xiǎo ōu (李晓欧), *supra* note 141, at 40.
[154] It obviously violates Art. 37a of the G.A. Res. 44/25, Convention on the Rights of the Child, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), which provides that no child (who is younger than 18 years old) shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

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penalty, life imprisonment increases the severity of the present punishment system and is not in conformity with the relevant international conventions or treaties on the protection of human rights. With the aim of protecting an offender's human rights, the General Provisions should provide explicitly the applicable conditions for life imprisonment; specifically, it should not be imposed on a juvenile, nor on a person who has attained the age of 65, nor on women who are pregnant at the time of trial.

5. CONCLUSION

In the last century, and even stretching back over several centuries before that, liberal utilitarian and humanistic ideas pushed for the abolition of the death penalty across Europe,[155] and they now continue to outlaw irreducible life imprisonment, and have seen the E.C.t.H.R. putting this into practice through their case law.[156] The influence of these two important values has been sweeping through China over the past few decades; however, most Chinese scholars and legislators still focus on death penalty reform, debating how the death penalty can be removed de jure and de facto, but give less attention to the second heaviest punishment which lacks human rights protection - life imprisonment. In the context of gradually reducing the use of the death penalty, life imprisonment has already been upgraded to the maximum punishment by the Eighth and Ninth Amendments after the death penalty was removed as a possible sentence from twenty-two crimes. This is in line with the developments in most abolitionist states, where a convict who is sentenced to life imprisonment for most general crimes may be released; however, only for serious corruption crimes, a convict who is given L.W.O.R. cannot be released. These developments relating to L.W.O.R. may be attributable to the

[155] *See* Carolyn Hoyle, *"Review Essay: The Death Penalty in Japan: Will the Public Tolerate Abolition?, by Mai Sato"* THE DEATH PENALTY IN JAPAN, (Springer Press, 2013) https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2014/01/death-penalty-japan.

[156] *See generally*, Vinter and Others v. the United Kingdom, App. Nos. 66069/09, 130/10 and 3896/10, Eur. Ct. H.R (2013); Öcalan v. Turkey, App. No. 46221/99, 2005-IV Eur. Ct. H.R (2005); László Magyar v. Hungary, App. No. 73593/10 (2014); Harakchiev and Tolumov v. Bulgaria, App. Nos. 15018/11 and 61199/12, Eur. Ct. H.R (2014). In all of these cases, the ECtHR held that "whole life" sentences with no possibility of review and no prospect of release were inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights.

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present anti-corruption campaign and to political concerns. Considering the potential problems caused by the reduction in the use of the death penalty, the recent two amendments have already reformed the termination mechanism of life imprisonment to increase its severity so as to be commensurate with the punishments for crimes from which the death penalty was removed. However, the number of crimes punishable by life imprisonment is too great, the applicable conditions are not provided clearly and certain provisions limiting its use are lacking. Consequently, the punishment of life imprisonment as it operates at present should be further improved for the sake of human rights protection.

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Bankruptcy in Turkey: a Comparative Study of Turkey's Adjournment of Bankruptcy and the United States' Chapter 11 Reorganization

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ABSTRACT: To build and maintain economic fortitude, the paradigm of fiscal success remains steadfast for both developed and developing nations in one specific area: bankruptcy law. History shows that robust economies incorporate reliable bankruptcy codes into their legal schemes so that small and large businesses thrive. However, because of the influences of varied stimuli including worldviews, cultural values, and politics, not all bankruptcy laws are created equal in their respective effectiveness, fairness, and influence. For example, the current United States Bankruptcy Code, ratified after nearly one hundred years of Congressional repeals and re-enactments, is today a comprehensive, well-established legal scheme that efficiently permits debtors of varied status to file under its assorted Chapters. The United States' Code seeks to successfully balance the rights of all parties involved in a bankruptcy, while further reassuring that the honest debtor receives a 'fresh start.' To compare, the Turkish Execution and Bankruptcy Code is still evolving in its structure to better equalize the treatment of debtors and creditors. This comparative paper first looks at the Turkish Bankruptcy Code and how it evolved, specifically in the area of adjournment of bankruptcy. To compare and contrast these two diverse legal structures, the study first analyzes the impacts of the 2003 and 2016 amendments of Article 179 in the area of adjournment, then proceeds to assess the requirements an entity must adhere to when seeking adjournment, and finally concludes with an in-depth analysis and comparison of United States' Chapter 11 with the Turkish adjournment of bankruptcy.

KEYWORDS: *Adjournment; Reorganization; Turkey; Chapter 11; United States Bankruptcy Code; Turkish Execution and Bankruptcy Code; Over-Indebtedness*

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1. INTRODUCTION

Globalization, precipitated by worldwide developments in technology, transportation, and communication, led to a complex, international financial labyrinth. Consequently, global trade expansion led to worldwide economic growth and interdependency. These universal partnerships birthed the reality that one nation's financial health predictably reflects the overall health of the global order.[1] As a result, economic decline in one country may threaten the financial stability of other countries. Two quintessential illustrations of this contagiousness are the subprime mortgage crisis in the United States (which morphed into a global financial crisis) and the Greek debt crisis (the impact of which continues to impede the growth of the European Union's economy today).[2]

Because companies encounter economic plight across all industries, developed nations incorporate bankruptcy or liquidation laws into their respective legal schemes to alleviate this pecuniary burden. Essential for all healthy domestic economies is a sound and strong bankruptcy code to guide and assuage the unavoidable impacts of financial decline and to fairly and equitably treat debtors and creditors. A sound example of the symbiotic relationship between a resolute bankruptcy code and a robust economy is found in the United States. The history of the United States Bankruptcy Code (hereinafter U.S. Code) shows one riddled with uncertainty and distrust.[3] However, in 1978 (eighty years after the Bankruptcy Act of 1898), the United States established a more workable statutory scheme that the nation's citizens and businesses could look up to and rely upon when facing economic turmoil.[4]

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[1] *See* JAMES SUNSHINE, *Globalization Has Made Economic Crises More Likely: OECD*, HUFFINGTONPOST.COM (Aug. 29, 2011), http://www.huffingtonpost.com/2011/06/29/globalization-economic-crises_n_887083.html.

[2] *Id.*

[3] *See generally* DAVID ARTHUR SKEEL JR, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 25 (Princeton U. Press, 5th ed. 2003).

[4] *See generally* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV., 1995, at 23 (Discussing History of Bankruptcy Code). Note the significant amendments made to the U.S. Bankruptcy Code, including the 2005 BAPCPA.

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Unsurprisingly, in addition to the United States, economic crises catalyze other countries to produce or build upon their own existing bankruptcy law. To illustrate, Turkey, in the aftermath of the 2001 Turkish-banking crisis, established adjournment of bankruptcy.[5] Under Turkish law, adjournment of bankruptcy enables an insolvent stock corporation (hereinafter corporation) or cooperative society (hereinafter cooperative) to avert declaring bankruptcy and liquidation if (and to the extent that) its financial position is ameliorative. Bankruptcy adjournment not only assists companies to repair financial delinquencies by regulating creditor debt collection, but it also cushions other companies in the market from possible antagonistic repercussions associated with bankruptcy and liquidation. There is however, a concern that adjournment of bankruptcy is vulnerable to exploitation by dishonest debtors wishing to avoid paying debts.[6]

This study, using a comparative method, juxtaposes the Turkish Bankruptcy Code with the more well-known United States Bankruptcy U.S. Code and each Code's respective treatment of a debtor in reorganization. First, under title 2, this article investigates the development of bankruptcy adjournment in Turkey and second, under title 3, outlines the requirements that a debtor must fulfill to adjourn bankruptcy. Following this exploration, under title 4, we leap into the complexity of Chapter 11 under the United States Bankruptcy U.S. Code and compare the two Codes' respective approach to reorganization. Following this examination, this study clarifies how the two Codes differ, why they may differ, where they are analogous, and suggests ideas to tweak Turkey's adjournment of bankruptcy to better serve creditors, debtors, and the State's economy as a whole. The study concludes under title 5 where a short summary delineates several feasible improvements to the adjournment of bankruptcy.

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[5] For further information regarding the 2001 Turkish Banking Crisis and measures taken afterwards, *see* generally, Working Paper of Banking Regulation and Supervision Agency, *From Crisis to Financial Stability (Turkey Experience)* (Banking Regulation and Supervision, Working Paper Sept. 2010).
https://www.bddk.org.tr/WebSitesi/english/Reports/Working_Papers/8675from_crisis_to_financial_stability_turkey_experience_3rd_ed.pdf.

[6] *See* MUHSIN KESKIN, *Bankruptcy Protection Provides an "Easy Way Out" in Turkey*LEXOLOGY.COM (Jul. 14, 2016), https://www.lexology.com/library/detail.aspx?g=9e325aee-0f23-4b2a-92db-860110fbfa52.

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2. DEVELOPMENT OF BANKRUPTCY ADJOURNMENT IN TURKEY

In 1987, Turkey enacted law number 3332 to address and aid corporations in financial distress and improve their financial position through reorganization.[7] Then, in response to Turkey's 2001 economic downturn, Parliament, in 2002, enacted law number 4743[8] to aid debtors realize their repayment obligations to banks and other financial organizations with whom they had a credit relationship. The purpose of this law was to maintain and precipitate economic growth by assisting debtors satisfy their repayment obligations.[9]

In harmony with this focus, Parliament amended the law regulating adjournment of bankruptcy to optimize the efficiency and efficacy of the system, which unfortunately "fell by the wayside" due to deficiencies in the law prior to the amendments.[10] In 2003, under law number 4949, adjournment of bankruptcy found its place in the Turkish Execution and Bankruptcy Code (hereinafter Bankruptcy Code) where it is regulated in detail[11] (here, it is helpful to note that the 2003 Bankruptcy Code amendments mainly align with Articles

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[7] *See* SABRI B. ARZOVA, MURAT YAVAŞ & BARIŞ KÜÇÜK, HUKUKI VE MALI YÖNDEN İFLASIN ERTELENMESI VE BORCA BATIKLIK BILANÇOSU [POSTPONEMENT OF BANKRUPTCY IN LEGAL AND FINANCIAL ASPECTS AND BALANCE SHEET OF DEBT] 27 (2016).

[8] Law on Restructuring of Debts to Financial Sector and Amendments to Some Laws, Law No. 4743, OFFICIAL GAZETTE, Jan. 31, 2002 (Turk.).

[9] *Id.*, art. 1. ("The purpose of this Law is to enable the debtors that have been involved in a credit relationship with banks and other financial organizations and that experience financial bottleneck to fulfill their repayment obligations towards the financial sector and to continue to create value added with such measures as extending maturities, renewing the credit, extending a new credit, reducing principal and/or interest, waiving interest, converting credits into participations in whole or in part, assigning or transferring the credits against a consideration in cash, in kind or subject to collection, liquidating the credits fully or partly against assets in kind belonging to debtor or third persons, making protocols by acting together with other banks, which measures shall be taken under the conditions and periods to be determined under financial restructuring for the credits opened before the effective date of this Law by banks, special finance institutions, and other financial establishments operating in Turkey under the permission obtained pursuant to their special legislation . . . .").

[10] Before the amendments, there was no in-depth law regulating the adjournment of bankruptcy. The main sources regulating the adjournment of bankruptcy were Articles 324 & 546 of the Turkish Commercial Code and Article 63 (3) of the Code of Cooperatives. No article outlined the adjournment of bankruptcy under the Turkish Execution and Bankruptcy Code. Accordingly, there was a lack of clarity regarding: (*i*) the requirements of bankruptcy adjournment; (*ii*) the measures that could be initiated by a court upon the adjournment decision; and, (*iii*) the discretion vested in the courts throughout the process. The amalgamation of these deficiencies caused malfunction, and accordingly, compromised the efficacy and the efficiency of the system. *See generally* SELÇUK OZTEK, *İflasin Ertelenmesi* [*Postponement of Bankruptcy*], 59 BANKACILAR DERGISI [BANKERS MAGAZINE] 39-83 (2006) (Turk.).

[11] Law Amending the Excecution and Bankrupcy Code, Law. No. 4949, OFFICIAL GAZETTE, Jun. 30, 2003 (Turk.).

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725 and & 725 (a) of the Swiss Code of Obligations).[12] Finally, on July 15, 2016, Parliament enacted the last amendments to the Bankruptcy Code titled under the omnibus law: "The Law Regarding Amendment of Some Laws to Improve the Investment Environment (No.6728)."[13] However, while the amendments came into force on August 9, 2016, they have yet to be administered due to the present prohibition imposed by Decree Law 669 under the State of Emergency (dated July 25, 2016).[14]

2.1. 2003 & 2016 BANKRUPTCY CODE AMENDMENTS

Amending the Bankruptcy Code brought new vigor to the adjournment of bankruptcy regime. Not only was the opacity surrounding bankruptcy adjournment remedied, but the new amendments barred mischievous parties from exploiting adjournment. Clearly discernable are the motives behind the amendments to the adjournment of bankruptcy: where the 2003 Bankruptcy Code amendments sought to strengthen and maintain Turkey's economy by affording its corporations with a 'new start' through adjournment of bankruptcy, the 2016 amendments sought to balance the interests of creditors

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[12] SCHWEIZERISCHE OBLIGATIONENRECHT [OR], CODE DES OBLIGATIONS [CO], CODICE DELLE OBBLIGAZIONI [CO], Mar. 1, 1912, SR 220, art. 725 (Switz.) ("(1) Where the last annual balance sheet shows that one-half of the share capital and the legal reserves are no longer covered, the board of directors must without delay convene a general meeting and propose financial restructuring measures. (2) Where there is good cause to suspect over-indebtedness, an interim balance sheet must be drawn up and submitted to a licensed auditor for examination. If the interim balance sheet shows that the claims of the company's creditors are not covered, whether the assets are appraised at going concern or liquidation values, the board of directors must notify the court unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit. (3) If the company does not have an auditor, the licensed auditor must comply with the reporting duties of the auditor conducting a limited audit."); Article 725 (a) of the Swiss Code of Obligations ("(1) On receiving notification, the court commences insolvency proceedings. On application by the board of directors or by a creditor it may grant a stay of insolvency proceedings where there is a prospect of financial restructuring; in this case the court orders measures to preserve the company's assets. (2) The court may appoint an administrative receiver and either deprive the board of directors of its power of disposal or make its resolutions conditional on the consent of the administrative receiver. It defines the duties of the administrative receiver. (3) Public notice of the stay of insolvency proceedings is required only where necessary to protect third parties.").

[13] Law Regarding Amendment of Some Laws to Improve the Investment Environment, Law No. 6728, OFFICIAL GAZETTE, Aug. 9, 2016 (Turk.).

[14] Decree Law on the Measures to be Taken Under the State of Emergency, Decree with force of law No. 669, art. 4, Jul, 25, 2016. According to this article, during the State of Emergency, courts shall dismiss all requests filed for the adjournment of bankruptcy. Further, pursuant to Article 10 of Decree Law 673, regarding adjournment of bankruptcy requests filed prior to the declaration of the State of Emergency, courts shall neither rule upon these requests nor grant interim injunction: *see* Decree Law on the Measures under the State of Emergency, decree with force of law No.673, Aug. 15, 2016.

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and debtors by remedying the ease by which bad faith debtors exploited the process. Because the 2003 and 2016 amendments collaborate (but were enacted on different dates), the following paragraphs initially examine the 2003 amendments and follow with an analysis of the changes brought by the 2016 amendments.

First, the 2003 amendments to the adjournment of bankruptcy are as follows:[15]

1) Creditors may report that the entity's liabilities exceed its assets. Creditors exercising this authority are not obligated to substantiate this claim;[16]

2) The competent court may conduct ex officio examination of the entity's alleged bankruptcy, regardless of the notice of bankruptcy given by the creditor, the management and representative bodies of the respective corporation or cooperative, or its liquidator in the event of liquidation;[17]

3) The Bankruptcy Code now stipulates the submission of a persuasive and serious recovery plan evincing that the entity's financial position can be cured. Further, the law necessitates that the party demanding the adjournment of bankruptcy submit all information and documents at their disposal substantiating the seriousness and persuasiveness of the recovery plan;[18]

4) The amendments further address the role of the competent court following the court's affirmation of bankruptcy adjournment. According to Article 179 (a) of the Bankruptcy Code, the court shall take all appropriate

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[15] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 29-30. *The Bankruptcy Code articles cited between footnotes 13 to 21 reflect amendments made to the Code in 2003, but do not reflect the 2016 amendments to the adjournment of bankruptcy.*

[16] TURKISH EXECUTION AND BANKRUPTCY CODE, Law. No. 2004, Jun. 9, 1932, art. 179 (amended 2003) ("If and when it is declared by the management and representative bodies or if the company or the cooperative society is in liquidation, by its liquidators or a creditor, or it is determined by the competent court that the liabilities of the capital company or the cooperatives society are more than its assets, the capital company or the cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding. . . .").

[17] *Id.* (". . . . or it is determined by the competent court that the liabilities of the capital company or the cooperatives society are more than its assets, the capital company or the cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding . . . .").

[18] *Id.* (". . . . Provided, however, that any one of the management and representative bodies or the creditors may demand adjournment of adjudication of bankruptcy by filing to the court a plan of recovery proving that the company or the cooperative society may be recovered. If the plan of recovery is found serious and persuasive, the court will adjourn adjudication of bankruptcy. Information and documents proving that the plan of recovery is serious and persuasive must also be presented to the court.").

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actions required for the protection of properties and assets of the corporation or cooperative to aid in the proper execution of the recovery plan;[19]

5) Last, 179 (b) outlines the adjournment order's intended impact. Article 179 (b) seeks to balance the interests of the creditor(s) and the debtor. According to Article 179 (b),[20] once the bankruptcy adjournment decision is rendered, no executive proceeding (including but not limited to the proceedings under the Act numbered 6183),[21] may be commenced against the debtor and any pending executive proceedings will be stopped and stayed. Further, the limitation/prescription periods and the time limits of forfeiture, permissibly suspended by a legal proceeding, will discontinue.

Notably, Article 179 (b) privileges a particular class of creditor when initiating or continuing an executive proceeding. Pursuant to the Article, during adjournment, creditors whose collection of debts are secured by a real property mortgage, chattel mortgage, or commercial enterprise pledge, may initiate an executive proceeding for realization of the mortgage or pledge, or

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[19] *Id.* (a)(" . . . . [T]he court will also take all kinds of measures required for protection of properties and assets of the company or the cooperative society by also considering the plan of recovery.").

[20] *Id.* (b)("(1) Upon an order for adjournment of adjudication of bankruptcy, no proceeding, including but not limited to the proceedings under the Code 6183, can be initiated against the debtor, and the pending proceedings will be stopped and stayed, and the limitation/prescription periods and the time limits of forfeiture which may be suspended by a legal proceeding will not continue to be counted. (2) During the period of adjournment, for collection of the debts secured and backed by a real property mortgage, chattel mortgage or commercial enterprise pledge, a legal proceeding for realization of mortgage or pledge may be initiated or the pending legal proceedings may be continued; provided, however, that conservatory measures such as seizure for security cannot be taken and the pledged or mortgaged property cannot be sold out. However, in this case, the interests which will continue to be accrued during the period of adjournment, but cannot be covered and paid by the existing mortgage or pledge are required to be separately securitized. (3) Execution proceedings for attachment can be initiated for collection of the debts listed in the first rank in article 206. (4) Maximum period of adjournment is one year. This period may be extended further by one year by considering the report of the administrative receiver. The accumulation of the extension periods, however, cannot exceed four years. The administrative receiver will regularly file reports to the court about his activities and the situation of the company or society, in intervals to be determined by the court. (5) Upon dismissal of a demand for adjournment of adjudication of bankruptcy or if it is determined at the end of the period of adjournment that recovery is not possible, the court will adjudicate the company or the cooperative society bankrupt. Furthermore, at any time during the period of adjournment if the court concludes upon reports of the receiver that it is not possible to improve and recover the financial situation of the company or the cooperative society, the court may abate the order for adjournment and adjudicate the company or the cooperative society bankrupt.").

[21] Law on Procedure of Collection of Public Receivables, Act. No. 6183, OFFICIAL GAZETTE, Jun. 28, 1953. The provisions of the Act apply to the following: principal public receivables such as taxes, duties, charges, court fees for criminal investigations and procedures, tax penalties, monetary penalties, and to auxiliary public receivables, such as delay fines and interest due to the government, the private offices of the provinces and to municipalities and to other receivables due to the same bodies from implementation of public services by the same bodies other than those due under contract, tort, misappropriation and to the follow-up costs of the same.

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may maintain the pending executive proceeding. Notwithstanding this privilege, conservatory measures shall not be taken, nor may the pledged or mortgaged property be sold.[22] Nonetheless, interests that continue to accrue during the period of suspension (but cannot be covered and paid by the existing mortgage or pledge) are required to be separately securitized.[23]

Article 179 (b) also delineates the circumstances under which a court may dismiss the bankruptcy adjournment judgement and deem the corporation or cooperative as bankrupt. According to the Article, the court may dismiss the adjournment of bankruptcy request upon: a) following the receipt of reports submitted by an administrative receiver, reflecting that the entity is unsalvageable or, b) if the court finds, at any time throughout the adjournment period, that the entity cannot be rehabilitated, that entity may be adjudged bankrupt.[24]

Next, the amendments to the adjournment of bankruptcy regime introduced by the omnibus law of 2016 are as follows:

1) Rather than relying on a sole declaration, Article 179 (1) of the Bankruptcy Code now also requires over-indebtedness to be established via an interim balance sheet organized using the presumptive sale prices of the entity's assets. This amendment clarifies the ambiguity created by Article 376 (3) of the Commercial Code. According to Article 376 (3), on the suspicions of over-indebtedness, the Board of Directors (hereinafter B.o.D) shall have an interim balance sheet prepared based upon the going-concern value and liquidation value of the assets. Here, clearly, two interim balance sheets must

[22] *Supra* note 16, art. 179 (b), ("(2) During the period of adjournment, for collection of the debts secured and backed by a real property mortgage, chattel mortgage or commercial enterprise pledge, a legal proceeding for realization of mortgage or pledge may be initiated or the pending legal proceedings may be continued; provided, however, that conservatory measures such as seizure for security cannot be taken and the pledged or mortgaged property cannot be sold out. However, in this case, the interests which will continue to be accrued during the period of adjournment, but cannot be covered and paid by the existing mortgage or pledge are required to be separately securitized").

[23] 179 (b) of the Turkish Execution and Bankruptcy Code *Id*. ("(2) . . . . the interests which will continue to be accrued during the period of adjournment, but cannot be covered and paid by the existing mortgage or pledge are required to be separately securitized.").

[24] Article 179 (b) of the Turkish Execution and Bankruptcy Code *Id*. ("Upon dismissal of a demand for adjournment of adjudication of bankruptcy or if it is determined at the end of the period of adjournment that recovery is not possible, the court will adjudicate the company or the cooperative society bankrupt. Furthermore, at any time during the period of adjournment if the court concludes upon reports of the receiver that it is not possible to improve and recover the financial situation of the company or the cooperative society, the court may abate the order for adjournment and adjudicate the company or the cooperative society bankrupt.").

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be prepared in accordance with two different criteria. This uncertainty generated confusion about which interim balance sheet determined over-indebtedness. Thus, Article 179, by identifying the criterion pursuant to which over-indebtedness is determined, clarified the ambiguity of Article 376 (3);[25]

2) Prior to the 2016 amendments, before filing a request for the adjournment of bankruptcy, corporations notoriously forum-shopped and relocated their registered addresses to other jurisdictions where the request would be favored. Subsequent to the amendments, however, to prevent the applicants from engaging in forum-shopping, jurisdiction now vests within the commercial court where the entity's headquarters were registered for over one year;[26]

3) Pursuant to Article 179 (2), the recovery plan must outline how working capital and management expenses will be disbursed during adjournment. In addition, the current legislation now specifies the documents and data that applicants shall submit, along with the recovery plan, when applying for an adjournment. According to Article 179 (3) of the Bankruptcy Code, the documents required include: the due dates and specifics of existing debts, creditors' addresses, lists displaying stocks, the stocks' amounts and waiting periods, the most recent balance sheet and income table submitted to tax authorities, trade registry certificates, and other information and documents corroborating the seriousness and persuasiveness of the recovery plan. In this context, Article 179 (4) states that if the applicant does not simultaneously provide the preceding documents along with the adjournment of bankruptcy request or fails to submit missing documents within a two-week grace period, the applicant shall be adjudged bankrupt upon the identification of over-indebtedness. Last, with the additions made to Article 179 (a),

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[25] *Id.* (1) ("If and when it is reported by the management and representative bodies or if the capital company or the cooperative society is in liquidation, by its liquidators or a creditor, or it is determined by the competent court that the capital company or the cooperative society is over-indebted pursuant to the interim balance sheet prepared in accord with the presumptive sale prices of either the capital company's or the cooperative society's assets, that capital company or cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding.") (*Translation from Turkish to English made by the author - ed.*).

[26] *Id.* ("Provided, however, that any one of the management and representative bodies or the creditors may demand the adjournment of bankruptcy adjudication by providing the court, where the company's or cooperative society's headquarters has been registered for over one year, with a recovery plan proving that company or cooperative society may be recovered.") (*Translation from Turkish to English made by the author - ed.*).

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applicants are now permitted to submit a revised recovery plan one time during adjournment proceedings.[27]

4) To prevent debtors from exploiting the adjournment of bankruptcy regime and preserve and solidify coherency among the extraordinary time limit and the adjournment of bankruptcy, Article 179 (5) now prohibits applicants, who previously benefitted from the adjournment of bankruptcy, from requesting a further one-year adjournment, starting from the cessation of the previous postponement period (including extension periods);[28]

5) According to Article 179 (a) (1), the court may now appoint multiple administrative receivers if it concludes that a sole administrative receiver will not sufficiently perform all required duties. Additionally, courts may now dismiss administrative receivers and appoint new ones if it deems necessary;[29]

6) With the 2016 amendments, creditors now enjoy a legislative basis to oppose an adjournment of bankruptcy request. According to Article 179 (a) (2), within two weeks of the request's announcement in the trade registry, creditors

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[27] *Id.* ("(2) The recovery plan must lay out the investment of new capital resources in conjunction with objective resources and precautions including, how management expenses and working capital shall be covered. (3) When applying to adjourn bankruptcy, the applicant shall provide the court with the due dates and specifics of existing debts, creditors' addresses, lists displaying stocks, the stocks' amounts and waiting periods, the most recent balance sheet and income table submitted to tax authorities, trade registry certificates, and other information and documents corroborating the seriousness and persuasiveness of the recovery plan. (4) If the applicant does not provide the preceding documents along with the adjournment of bankruptcy request or fails to submit missing documents within two-week grace period, the applicant shall be adjudged bankrupt upon the identification of over-indebtedness."); Article 179 (a) (8) of the Turkish Execution and Bankruptcy Code ("The capital company or cooperative society may submit a revised recovery plan once during the adjournment proceedings.") (*Translation from Turkish to English made by the author - ed.).*

[28] *Id.* (5)("A capital company or cooperative society, that has already benefitted from the adjournment of bankruptcy, cannot apply for a further adjournment for a year starting from the expiry of the previous adjournment period, including the extension period.") (*Translation from Turkish to English made by the author - ed.*).

[29] *Id.* (a) (1) ("Upon receiving the adjournment of bankruptcy request, the court may appoint one or more administrative receivers who hold the required professional and technical knowledge and either divest the management body of all its power and authority and delegate same to the receiver, or the court may rule that all acts and decisions of the management body will be valid and enforceable only if and when they are approved by the receiver. The administrative receiver (s) shall also be responsible for initiating and controlling the inventory preparation process."); Article 179 (a) (6) of the Turkish Execution and Bankruptcy Code ("If it is deemed necessary, the court may dismiss the administrative receiver and appoint a new one as a replacement.") (*Translation from Turkish to English made by the author - ed.*).

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may object to the request on the sole basis that the applicant fails to fulfill the statutory requirements of adjournment;[30]

7) Contrary to the former version of Article 179 (a), the amended Article 179 (a) (3) dictates that interim injunctions and provisional attachments, granted against the applicant prior to the adjournment of bankruptcy request, shall not be executed during the adjournment of bankruptcy adjudication. New Article 179 (b) (1) supplements this sentiment regarding the period following the adjournment request, once consented to by the court;[31]

8) Next, judgments furnished by the court at the conclusion of proceedings are dictated in the new Article 179 (a) (10). Pursuant to the article, the court may: (*i*) adjourn the bankruptcy if it finds the applicant to be worthy and the recovery plan to be serious and convincing; (*ii*) dismiss the adjournment of bankruptcy request if it concludes that the corporation or cooperative is not over-indebted; or (*iii*) allow the bankruptcy to proceed if the court determines that the corporation or cooperative is over-indebted, but the recovery plan is neither serious nor convincing, and accordingly, the applicant is incapable of debt reimbursement.[32]

9) Prior to the 2016 amendments, the bankruptcy adjournment period could be extended to a total of four years. However, following the amendments, extensions were reduced from four years to one year.[33] The motive behind this reduction was to address the statistically proven infertility of the four-year extension period. The figures upon which the Parliament premised the diminution, revealed that the four-year extension period disturbed the

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[30] *Id.* (a) (2) ("*. . . .* The announcement made in the trade registry pertaining to the adjournment of bankruptcy request will indicate that creditors may object to the request within two weeks of the announcement on the grounds of nonfulfillment of statutory requirements of the adjournment of bankruptcy and may demand the dismissal of the request from the court.") (*Translation from Turkish to English made by the author - ed.*).

[31] *Id.* (a) (3)(". . . . During this period of time, interim injunctions and provisional attachments shall not be enforced and, moreover, the limitation/prescription periods and the time limits of forfeiture which may be suspended by a legal proceeding, will not continue to be counted.") (*Translation from Turkish to English made by the author - ed.*).

[32] *Id.* (a) (10)("The court: (i) adjourns the bankruptcy if it concludes that the recovery plan is serious and convincing and the company or cooperative society is worthy; (ii) dismiss the adjournment of bankruptcy request and bankruptcy if it concludes that the company or cooperative society is not over-indebted; or (iii) adjudges the company or cooperative society as bankrupt.") (*Translation from Turkish to English made by the author - ed.).*

[33] *Id.* (b) (4) ("Maximum period of adjournment is one year. This period may be extended by one year if deemed appropriate by the court.") (*Translation from Turkish to English made by the author - ed.*).

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equilibrium between the interests of creditors and debtors, to the detriment of creditors, because, not only was the entity generally deprived of its assets, but also its debts escalated during the extension period.[34] Accordingly, the majority of corporations and cooperatives to which the four-year extension period was granted could not avert insolvency and liquidation.

10) With the presentation of a three-tiered court system in Turkey, a new article on the right of appeal was integrated into the Bankruptcy Code. According to the newly introduced Article 179 (c), the corporation, cooperative, or creditor that requested the adjournment of bankruptcy may dispute the commercial court's judgment before the regional appellate court within ten days subsequent to service of the decision. Third parties may also contest the judgment within ten days starting from the announcement of the judgment in the Trade Registry. It is also possible to appeal the regional appellate court's judgment before the Court of Appeals in conformity with the aforementioned principles and time limits.[35]

Markedly, amendments to the adjournment of bankruptcy do not abrogate other regulations related to the adjournment of bankruptcy already in effect. Accordingly, Articles 376 and 377 of the Turkish Commercial Code (hereinafter the Commercial Code)[36] and Article 63 of the Turkish Code of

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[34] Law Regarding Amendment of Some Laws to Improve the Investment Environment, Law No. 6728, Preamble to art. 3, OFFICIAL GAZETTE, Aug. 9, 2016 (amending Law. No. 4949, art. 179 (b)) (which amends Article 179 (b) of the Turkish Execution and Bankruptcy Code).

[35] *Supra* note 16, art. 179 (c) ("The capital company, the cooperative society, or the creditor who requested the adjournment of bankruptcy may contest the commercial court's judgment before the regional appellate court within ten days, starting from the service of the decision, or following the announcement for third parties. The judgment of the regional appellate court can also be challenged before the Court of Appeals in conformity with the same principles.") (*Translation from Turkish to English made by the author - ed.*).

[36] TURKISH COMMERCIAL CODE [TCC], Law. No. 6102, adopted Jan. 13, 2011, Official Gazette, art. 376 (repealing Law. No. 6762 of Jul. 2, 1956).("(1) If it is clear in the last annual balance sheet that half of the sum of the capital and statutory reserves is unsecured due to loss, the B.o.D. shall immediately convoke the G.A. and submit the remedial measures it considers appropriate. (2) According to the last annual balance sheet, if it is clear that two-thirds of the sum of the capital and statutory reserves are unsecured due to loss, unless the G.A. immediately convoked decides to fully supplement the capital or to be satisfied with one-third of the capital, the company shall automatically terminate. (3) If suspicions are raised that the company's liabilities exceed its assets, the B.o.D. shall have an interim balance sheet prepared based on the going concern value and based on liquidation value of the assets and shall give it to the auditor. The auditor shall inspect this interim balance sheet within seven business days and shall present his/her evaluation and proposals to the B.o.D. in the form of a report. The proposals of the early detection committee regulated in Article 378 must also be taken into account in the proposals of the auditor. If it is clear in the report that the assets are not sufficient to cover the receivables of creditors of the company, the B.o.D. shall notify the commercial court of first instance at the location of the company's headquarters of this situation and shall file a claim for bankruptcy. This shall be done

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Cooperatives (hereinafter the Code of Cooperatives)[37] preserve their enforceability. These Articles outline the process to be followed by the B.o.D. of a corporation or a cooperative prior to filing a request for the adjournment of bankruptcy. In contrast, the Articles from the Bankruptcy Code regulate the process subsequent to the filed demand for adjournment.[38] Ultimately, these articles co-exist symbiotically for the efficient and effective operation of bankruptcy adjournment.

Indisputably, these amendments addressed substantial deficiencies that hindered the efficacy of the adjournment of bankruptcy regulation. Today, the law, post amendments, not only dictates the prerequisites to adjourn bankruptcy with clarity, but also delineates the steps that a competent court must take when delivering an adjournment decision. Further, the amendments define the effects of the adjournment order, as well as dictate what constitutes a proper recovery plan to better avert exploitation. These amendments evidently resurrected the adjournment of bankruptcy system to help viable corporations confront and tackle severe economic fluctuations.[39]

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provided that before the adjudication of bankruptcy, the company's creditors representing an amount sufficient to cover the company's deficit and to eliminate the indebtedness of the Company accept in writing that they will be ranked after all other creditors and that the legitimacy, authenticity, and validity of this declaration or contract is verified by experts assigned by the court which shall be notified of the request for bankruptcy by the B.o.D. Otherwise the application made to the court for an expert inspection shall be considered as notification of bankruptcy."); *id.* art. 377 ("The B.o.D. or any creditor can request the postponement of bankruptcy by presenting to the court an improvement project indicating the objective and actual resources and measures, including the new capital contribution in cash. In such case, Articles 179 to 179/b of the Executive and Bankruptcy Law shall be applied.").

[37] TURKISH CODE OF COOPERATIVES, Law. No. 1163, Apr. 24, 1969, art. 63 (as amended by Law No. 3476, Oct. 6, 1988) ("(1) Where there are serious reasons to prove the insolvency of the cooperative, the B.o.D. shall immediately draw up an interim balance sheet on the basis of the current market prices. In case the last year's balance sheet or a liquidation balance sheet prepared afterwards, or the interim balance sheet referred to above implies that the resources of the cooperative are not sufficient any more to cover the debts, the B.o.D. shall notify the related Ministry thereof and call the General Assembly for an extraordinary meeting. (2) In a cooperative where share promissory notes have been already issued, if half of the resources of the cooperative remains to be bounced within the last year's balance sheet, the B.o.D. shall call the General Assembly for a meeting and address the situation to the information of the members. The B.o.D. shall at the same time notify the court and the related Ministry thereof. However, in case of cooperatives where the members are obliged with additional payments, if the deficit shown in the balance sheet is not covered up with the additional payments of the members within three months, the related Ministry shall be notified thereof. (3) Where it is deemed possible that the financial situation can be rectified, the court may delay the filling of an action for bankruptcy, upon the request of either the B.o.D. or one of the creditors, in which case it shall take the necessary precautions related to the protection and the maintenance of the resources of the cooperative, such as keeping the assets book or the appointment of an administrator.").

[38] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 30.

[39] *See Turkish Companies Using Bankruptcy Laws to Postpone Debts*, HÜRRIYET DAILY NEWS (Mar. 11, 2016),http://www.hurriyetdailynews.com/turkish-companies-using-bankruptcy-laws-to-

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Currently, the law bestows profound power and conviction upon judges. With broad discretion bequeathed to judges by the amendments, the healthy and legitimate operation of bankruptcy adjournment is now primarily contingent upon a judge's experience, knowledge, and diligence.[40] By duly executing this discretion, not only may judges help creditors and debtors realize anticipated outcomes from adjournment, but also, they can hamper debtors from exploiting the adjournment of bankruptcy regime.[41]

3. REQUIREMENTS TO ADJOURN BANKRUPTCY

Delivering an affirmative adjournment of bankruptcy decision is conditioned upon fulfilling the requirements laid out by relevant regulations. In light of the Turkish Supreme Court judgments and the articles from the Bankruptcy Code, the Commercial Code, and the Code of Cooperatives, the requirements necessitating fulfillment by a party seeking bankruptcy adjournment are explored as follows: (3.1) "over-indebtedness" of the entity; (3.2) court notification; (3.3) file request; (3.4) recovery plan submission; (3.5) "extraordinary time" limitations; (3.6) one-year rule; and last (3.7) expenses.

3.1. "OVER-INDEBTEDNESS" OF THE ENTITY

While there is no particular definition of "over-indebtedness," relevant articles under the Codes that regulate adjournment of bankruptcy illuminate the meaning of over-indebtedness.[42] From these articles, over-indebtedness may be defined as a financial standing where "the assets of a corporation or a

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postpone-debts.aspx?pageID=238&nID=96316&NewsCatID=345. ("Some 484 legal bankruptcy suspension demands were placed in Turkey in 2012, 645 in 2013, and 720 in 2014, before exceeding 1,000 [in 2015].").

[40] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 33.

[41] *See Ismail Kayar, Iflasin Ertelenmesinde Borca Batiklik ve Iyilestirme Projesi ile Ilgili Yargitay Kararlarinin Degerlendirilmesi [[The evaluation of supreme court decisions about negative balance at postponement of bankruptcy and improvement project]]*, 33 ERCIYES ÜNIVERSITESI İKTISADI VE İDARI BILIMLER FAKÜLTESI DERGISI [U. ERCIYES MAG. ECON. & ADMIN. SCI.], 2009, at 19, 40-41.

[42] *Supra* note 16, art 179 (". . . . the liabilities of the capital company or the cooperative society are more than its assets . . ."); *supra* note 37, art. 63 (". . . . the resources of the cooperative are not sufficient any more to cover the debts . . ."); *supra* note 36, art. 376 (". . . . the assets are not sufficient to cover the receivables of creditors of the company . . .").

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cooperative are insufficient to cover the monetary claims raised by creditors against the company or cooperative."[43]

Under the Bankruptcy Code, over-indebtedness is specified as a ground for direct bankruptcy[44] and is used solely for debtor corporations and cooperatives. In this respect, Article 179 of the Bankruptcy Code states:

> [i]f and when it is declared by the management and representative bodies or if the company or the cooperative society is in liquidation, by its liquidators or a creditor, or it is determined by the competent court that the capital company or the cooperative society is over-indebted pursuant to the interim balance sheet prepared in accord with the presumptive sale prices of either the capital company's or the cooperative society's assets, that capital company or cooperative society will be adjudged bankrupt without a prior bankruptcy proceeding. Provided, however, that any one of the management and representative bodies or the creditors may demand adjournment of adjudication of bankruptcy by filing to the court a plan of recovery proving that the company or cooperative society may be recovered.

Pursuant to this Article, in the absence of over-indebtedness, there shall be no bankruptcy order, and similarly, no legally permissible adjournment of bankruptcy. Hence, over-indebtedness is a financial prerequisite a debtor must satisfy to be eligible for an adjournment of bankruptcy. In harmony with this Article, the Turkish Supreme Court stated, ". . . . in order to adjourn the bankruptcy proceedings, the company demanding the adjournment of bankruptcy has to be over-indebted . . . ."[45] This statement, in conjunction with the Article, illustrates that over-indebtedness is a necessary prerequisite to bankruptcy adjournment.

To prove over-indebtedness, an interim balance sheet must be prepared. This document reflects presumptive sale prices of the debtor's

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[43] ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 55-58. *See also* Öztek, *supra* note 10, at 53-54.

[44] Direct bankruptcy is a method where a creditor may file a bankruptcy suit against a debtor without conducting a prior executive proceeding.

[45] ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 57 (citing 19th Civil Chamber, 2010/101 E.; 2010/1740 K. (22.02.2010) (*Translation from Turkish to English made by the author - ed.*)). *See also* Öztek, *supra* note 10, at 49 (citing 19th Civil Chamber, 2005/6312 E.; 2005/11314 K. (17.11.2005) ("In order to furnish a decision of whether or not to adjourn bankruptcy, the respective court must first determine whether the company requesting the adjournment is over-indebted.")) (*Translation from Turkish to English made by the author - ed.*).

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assets. According to Article 376 (3) of the Commercial Code, if there is "good cause" to suspect over-indebtedness, the B.o.D. shall prepare an interim balance sheet to disclose the fair market value of the assets owned by the entity. The interim balance sheet is central for a court when determining over-indebtedness because it is a core financial instrument evincing whether the entity's assets cover creditors' claims. Therefore, upon debtor-request of bankruptcy adjournment, the interim balance sheet must be submitted to the court in conjunction with the request.

Because of the complexities associated with determining the financial health of corporations and cooperatives, courts commonly assign expert witnesses to investigate interim balance sheets. Consequently, expert witness testimony largely governs whether the adjournment of bankruptcy will be granted. In accord with this procedure, the Turkish Supreme Court stated that:

> [t]o adjudge the stock corporation as bankrupt on the basis of over-indebtedness, preliminarily, its over-indebtedness must be determined. Here, the expert witness made the finding that the stock corporation's financial status failed to meet the threshold of over-indebtedness. Rather, the entity's balance sheets reflected mere financial woes, insufficient for the court to adjourn the bankruptcy . . . . [46]

Clearly, the courts will look up to and rely upon the expertise of expert witnesses and will deny an adjournment request if the expert witness' analysis reflects that the debtor is not over-indebted.

3.2. COURT NOTIFICATION

Over-indebtedness is a necessary threshold to satisfy in order to be able to adjourn bankruptcy. Articles 376 and 377 of the Commercial Code, Article 63 of the Code of Cooperatives, and Article 179 of the Bankruptcy Code collectively dictate that once the B.o.D. prepares an interim balance sheet manifesting over-indebtedness, the Board may seek refuge in adjournment of bankruptcy.

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[46] Öztek, *supra* note 10, at at 53 (citing 19th Civil Chamber, 2004/9593 E., 2004/13439 K. (30.12.2004) (*Translation from Turkish to English made by the author-ed.*)).

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First, however, to initiate the adjournment procedure, the debtor must notify the respective court regarding its over-indebtedness and file a claim for bankruptcy. Pursuant to Article 376 of the Commercial Code:

> . . . . If it is clear in the report [prepared by the auditor upon the examination of an interim balance sheet] that the assets are not sufficient to cover the receivables of creditors of the company, the Board of Directors shall notify the commercial court of first instance at the location of the company's headquarters of this situation and shall file a claim for bankruptcy . . . .

Notably, there is a bifurcation in opinion among scholars regarding the relationship between the commencement of the adjournment procedure and the notification of over-indebtedness. According to one school of thought, unless the respective court is notified of the over-indebtedness, adjournment of bankruptcy cannot be requested, nor can the relevant judicial proceedings be initiated.[47] In other words, notifying the court of over-indebtedness is a formal requirement that must be satisfied in order to embark upon the adjournment of bankruptcy procedures.

The other school of thought, however, propounds that, regardless of whether the over-indebtedness notification is given, filing a claim for bankruptcy or requesting the adjournment of bankruptcy suffices to commence the adjournment procedure.[48] Pursuant to this conviction, a claim filed for bankruptcy or a request submitted for the adjournment of bankruptcy embraces an implicit notification of over-indebtedness. Thus, even if there is no prior notification of over-indebtedness given to the court, it is possible to effectuate adjournment of bankruptcy. In tandem with this idea, the Turkish Supreme Court held, that, "[t]he request filed for the adjournment of bankruptcy also amounts to the notification of over-indebtedness given to the court."[49] Thus, the Court appears to obviate the need for prior notification.

Behind the requirement that a debtor ought to notify the court of over-indebtedness, is a desire to protect creditor interests and to prevent the debtor

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[47] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 64.
[48] *See* Öztek, *supra* note 10, at 53.
[49] *Id.* at 50 (citing 19th Civil Chamber, 2005/448 E., 2005/3753 K. (07.04.2005) (*Translation from Turkish to English made by the author –ed.*)).

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from pursuing new contractual relationships that may exacerbate the over-indebtedness and extend financial instability to third parties.[50] Accordingly, rather than enforcing Article 376 (3) verbatim *et* literatim and demanding an explicit notification of over-indebtedness, concentration should focus upon notifying creditors and third parties of the financial downfall of the company. In accord with this goal, as seen from the foregoing judgment, the Turkish Supreme Court adopts a lenient approach to the format of over-indebtedness notification, which can be either explicit or implicit (respectively, filing a claim for bankruptcy or lodging a request for the adjournment of bankruptcy), and gives precedence to the reasoning behind the over-indebtedness notification.

According to Article 179 (1) of the Bankruptcy Code, parties authorized to notify the court of over-indebtedness are creditors, management and representative bodies, and liquidators if the company or the cooperative is in liquidation. Most common, the respective company's management and representative bodies bear the burden of diagnosing over-indebtedness and subsequently notifying the court. Both Article 376 (3) of the Commercial Code and Article 63 of the Code of Cooperatives confer this responsibility upon the B.o.D.

To fulfill this responsibility and avoid possible criminal liability arising from Article 345 (a) of the Bankruptcy Code and Article 553 (1) of the Commercial Code,[51] where there is good cause to suspect over-indebtedness, the B.o.D. must prepare an interim balance sheet premised upon the going-concern value and liquidation value of assets and shall then submit it to the auditor for scrutiny. Once the auditor receives the balance sheet, he or she must produce a report and if the report reflects that the assets are insufficient to cover the claims of the company's creditors, the B.o.D. must notify the commercial court of first instance at the location of the entity's headquarters. The B.o.D. cannot be relieved of this responsibility (following the amendments

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[50] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 64-65.

[51] *Supra* note 16, art. 345 (a) ("If the Board of Directors or liquidators do not file a claim for bankruptcy stating that the assets of company do not cover the claims of the company's creditors, there will be a sanction of imprisonment from ten days to three months upon the complaint lodged by a creditor."); *supra note* 36, art. 553 (1) ("Founders, the members of the Board of Directors, directors, and liquidators are held accountable to the company, shareholders, and creditors if they wrongfully breach their duties emerging from the law and the articles of association.").

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to the articles of association), nor can the General Assembly pass a resolution preventing the B.o.D. from notifying the court of over-indebtedness.

When informing the court of over-indebtedness, the B.o.D. should also submit the interim balance sheet evincing the entity's financial decline, along with the notification of over-indebtedness. If the B.o.D. does not present the interim balance sheet in conjunction with the notification, the court may request the issuance and submission of it from the Board.

According to Supreme Court precedent, once all documents are received, the court should assign an expert witness to examine the documents to find whether or not the entity is over-indebted. Notably, a judgment not founded upon expert witness examination contravenes precedent and very likely results in a reversal of the judgment.[52]

3.3. FILE REQUEST

Once over-indebtedness of the corporation or cooperative is established by a judicial judgment, if the entity desires to pursue adjournment, an authorized party must request an adjournment of bankruptcy. Without an explicit or implicit statement reflecting the intent of the entity to seek an adjournment of bankruptcy, the court, sua sponte, cannot adjourn bankruptcy. Pertinent articles of the Commercial Code arguably read that an adjournment of bankruptcy may not be requested absent a claim for bankruptcy. For example, Article 376 (3) of the Commercial Code states that,

> if it is clear in the report that the assets are not sufficient to cover the receivables of creditors of the company, the BoD [Board of Directors] shall notify the commercial court of first instance at the location of the company's headquarter of this situation and shall file a claim for bankruptcy.

In light of this article, some scholars assert that bankruptcy adjournment may be requested, either along with a claim lodged for bankruptcy, or throughout bankruptcy adjudication emanating from the notification of over-

[52] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 73 (citing 19th Civil Chamber, 2001/6232E., 2001/8385K. (14.02.2001)).

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indebtedness.[53] In other words, it is not possible to file a request solely directed to adjourn bankruptcy.

The Supreme Court however, generally strays from this hardened requirement and adopts a stance corroborating the individuality of the adjournment of bankruptcy request. The Supreme Court perceives the adjournment of bankruptcy to be an independent path and does not condition the admissibility of the adjournment of bankruptcy request upon its companionship with a bankruptcy claim or with the existence of an over-indebtedness notification. To illustrate, the Turkish Supreme Court held that,

> [a]ccording to Article 324 (2) of the [former] Commercial Code, the adjournment of bankruptcy request embraces the notification of over-indebtedness. Therefore, the respective court should initially determine whether the stock corporation requesting the adjournment of bankruptcy is over-indebted and if it is over-indebted, it should be examined whether it is probable to ameliorate this stock corporation's financial situation.[54]

In a modern judgment, the Supreme Court, in 2014, maintained its stance of the individual nature of the adjournment of bankruptcy request. In this judgment, the Court stated that, ". . . . the adjournment of bankruptcy request encompasses the mandatory [over-indebtedness] notification. Therefore, even if there is a waiver of the request, if the stock corporation is over-indebted, it should be adjudged bankrupt . . . ."[55]

In light of these judgments, the Turkish Supreme Court does not require an adjournment of bankruptcy request to be accompanied by a bankruptcy claim, nor does the Court require prior over-indebtedness notification.

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[53] *Id.* at 74-75 (citing Hakan Pekcanıtez, *İflasin Ertelenmesi [Postponement of Bankruptcy],* 79 ISTANBUL BAROSU DERGISI [ISTANBUL BAR ASSOCIATION MAGAZINE] 325, 358 (2005)). SEYITHAN DELIDUMAN, İFLASIN ERTLENMESININ ETKILERI [EFFECTS OF POSTPONEMENT OF BANKRUPTCY] 32 (2008); Oğuz Atalay, *İflasin Ertelenmesi [Postponement of Bankruptcy]* 47 BANKACILAR MAGAZINEI [BANKERS MAGAZINE] (2003).

[54] ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 75 (citing 19th Civil Chamber, 2004/9014E., 2005/2429K. (10.03.2005) (*Translation from Turkish to English made by the author - ed.*)).

[55] 23RD CIVIL CHAMBER, 2014/3784E., 2014/3888K. (2014), http://www.forumadalet.net/index.php?topic=2289.0 (*Translation from Turkish to English made by the author - ed.*). *See* also ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 5, at 75 n.316 (citing a Supreme Court judgment stating: "The submission of a request for the adjournment of bankruptcy amounts to the notification of over-indebtedness given to the court. Accordingly, there is no need to file a separate claim for bankruptcy." (*Translation from Turkish to English made by the author - ed.*)).

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The next question demanding clarification is who constitutes an authorized party capable of filing a request for the adjournment of bankruptcy? According to Article 179 of the Bankruptcy Code, "any one of the management and representative bodies or the creditors" may file a request for the adjournment of bankruptcy by submitting a recovery plan manifesting that the recovery of the entity is feasible. At this juncture, it is necessary to distinguish the parties authorized to notify the court of over-indebtedness from those authorized to file a request to adjourn bankruptcy.

Article 179 of the Bankruptcy Code lists the parties authorized to notify the court of over-indebtedness: (*i*) the management and representative bodies; (*ii*) liquidators of the corporation or cooperative if it is in liquidation; and (*iii*) creditors. However, according to the same article, the parties authorized to present a request for adjournment are (*i*) any one of the management and representative bodies and (*ii*) creditors. Notably, Article 179 grants liquidators the power to notify the court of over-indebtedness, and yet does not give them authority to request a bankruptcy adjournment.

According to Article 540 of the Commercial Code, liquidators, upon taking their office, shall draw up a balance sheet in conjunction with an inventory spreadsheet and shall submit it to the General Assembly for approval. Moreover, pursuant to Article 542 (c) of the Commercial Code and Article 179 of the Bankruptcy Code, where the liquidators deduce that the corporation is over-indebted, they shall notify the commercial court of first instance at the location of the corporation's headquarters. Here, of popular scholarly debate, is whether liquidators may demand the adjournment of bankruptcy along with a notification of over-indebtedness.

Liquidation occurs following an entity's dissolution. The grounds of liquidation are listed in Articles 529, 530, and 531 of the Commercial Code. With the initiation of the liquidation, the primary duties of liquidators are to[56] (*i*) represent the entity in all transactions pertaining to the liquidation process, including reaching settlements, concluding arbitration agreements, and even, where deemed necessary, effecting new transactions; (*ii*) call in share capital; (*iii*) realize the entity's assets; (*iv*) fulfill the entity's legal obligations; (*v*)

[56] *See generally supra* note 36, art. 542.

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furnish the balance sheet; (*vi*) notify the court of over-indebtedness if over-indebtedness is established; and (*vii*) avert engagement in legal transactions not required for the regular operation of liquidation.

Upon conclusion of the liquidation, liquidators file a request to the commercial register to have the entity's name deleted. Clearly, the task of liquidators is to dissolve the corporation or cooperative, essentially killing the entity, rather than reorganizing it. By adjourning bankruptcy, the entity lives and the main objective is to aid the corporation or cooperative overcome its financial obstacles.

Thus, as both the Commercial Code and the Bankruptcy Code have no language permitting liquidators to request bankruptcy adjournment, likely because of the opposing motives and goals of liquidation and adjournment, liquidators do not have vested power to request bankruptcy adjournment.

Once an authorized party files a request for bankruptcy adjournment, the next issue turns to how the court assesses the request. The focal point of the court's assessment is the alleged over-indebtedness of the corporation or cooperative. At the conclusion of the evaluation, the court may rule in three different ways.[57] First, the court may find that over-indebtedness is present, but the entity's financial position may be remedied in a recovery plan. Here, the adjournment of bankruptcy request is favored. Second, the court may find over-indebtedness, but that the entity is unsalvageable. Here, the corporation or cooperative is adjudged bankrupt. Last, the court may find that no over-indebtedness exists, and accordingly, will dismiss the adjournment of bankruptcy request.

When evaluating the adjournment of bankruptcy request, the court should consider entering an interim order to avoid further financial harm to the entity. Today, it is well accepted that a court may enter an interim order to maintain the entity's financial status until the evaluation of the adjournment request is concluded.[58]

According to Article 179 (a) (1), upon receipt of the adjournment of bankruptcy request, the court shall appoint an administrative receiver and

[57] *Supra* note 16, art. 179 (a) (10).
[58] *See generally* Öztek, *supra* note 10, at 39-83; ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 95-98.

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either deprive the B.o.D. of its disposal power or make the Board's actions contingent upon the consent of the administrative receiver. In addition, Article 179 (a) (3) prompts the court to employ any measures deemed necessary to conserve the entity's assets, ensure the maintenance of the entity's operation, and, last, enable the healthy execution of the recovery plan.

In sum, even absent without an express regulation giving the court authority to grant an interim injunction while reviewing the adjournment request, the synthesis of the above-mentioned sub-articles paves the way for the court to grant an interim injunction. However, when granting an interim injunction, the court should practice caution and be mindful of any adverse effects upon creditors' interests. Therefore, unless the expert report establishes the over-indebtedness of the applicant and finds its recovery plan serious and convincing, the court should avert granting an interim injunction to maintain equilibrium between the creditors and debtor.[59] Clearly, the expert's report influences the court's decision of whether or not an interim injunction is necessary. Resultantly, essential to proper execution of the bankruptcy adjournment is a timely filed expert witness report.[60]

3.4. RECOVERY PLAN SUBMISSION

Because approval of the adjournment of bankruptcy request is fundamentally contingent upon the prospect of financial recovery, it is essential for the respective corporation or cooperative to show the likelihood of financial rehabilitation. Here, the recovery plan, prepared and submitted by the party requesting adjournment, reflects the feasibility of financial recuperation.

A recovery plan is a document where the applicant endeavors, not only to prove that the entity's financial reclamation is probable, but also to outline the measures necessary to revive the entity from its financial woes. Prior to the 2016 amendments, legislation had no criteria with which a recovery plan had to conform. However, the 2016 amendments dictated necessary standards that

[59] ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 98.
[60] *Id.*

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a recovery plan must meet. According to the new version of Article 179 (2) of the Bankruptcy Code, a recovery plan must now incorporate, in detail, objective and actual resources and precautions, including new capital contributions (in cash), and further, outline how management expenses and working capital shall be covered throughout adjournment.

Today, it is well recognized that an applicant's recovery plan is the main element controlling a court's decision of whether or not to grant an adjournment of bankruptcy request. Therefore, it is crucial for the applicant to submit a recovery plan that is both comprehensive and demonstrative of probable financial recovery. In harmony with this, scholars and judiciary often find that it is fundamental for a recovery plan to incorporate information regarding:[61] (*i*) the reasoning upon which the adjournment of bankruptcy request is founded; (*ii*) measures to be taken to revive the corporation or cooperative from its financial failure; (*iii*) methods to be employed to recruit objective and actual resources, including new capital contribution in cash; (*iv*) new investment plans that may contribute to the rectification of the entity's financial position and how these investment plans will be executed; and (*v*) the approximate period of time that is needed to restore the entity's financial position.

Significantly, simply because a recovery plan conforms to the requirements laid out above is not, in itself, sufficient to have the adjournment of bankruptcy request granted. Article 179 (3) of the Bankruptcy Code expounds that a recovery plan must be serious and persuasive and obliges the applicant to submit specific documents in conjunction with the adjournment request. Pursuant to the article, documents requiring submission are:[62] (*i*) the due dates and specifics of existing debts; (*ii*) creditors' addresses; (*iii*) lists displaying stocks, the stocks' amounts and waiting periods; (*iv*) the most recent balance sheet and income table submitted to tax authorities; and (*v*) trade registry certificates. In addition to these papers, the applicant is encouraged to submit

[61] ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 99-105; Öztek, *supra* note 10, at 51-52.
[62] *Supra* note 42, art. 179 (3) ("(3) When *see*king adjournment, the applicant shall provide the court with the due dates and specifics of existing debts, creditors' addresses, lists displaying stocks, the stocks' amounts and waiting periods, the most recent balance sheet and income table submitted to tax authorities, trade registry certificates, and other information and documents corroborating the seriousness and persuasiveness of the recovery plan.) (*Translation from Turkish to English made by the author - ed.*).

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any supplementary documents and data that aid to establish the seriousness and persuasiveness of a recovery plan.

According to Article 179 (4) of the Bankruptcy Code, if the applicant fails to submit any or all of the preceding documents, the court will grant the applicant a two-week grace period to complete the adjournment of bankruptcy application. Where the applicant fails to submit all the documents required by the law within this two-week grace period, the court shall regard the adjournment of bankruptcy request as unproven and shall adjudge the applicant bankrupt upon the identification of over-indebtedness.[63]

When all the required documents are submitted, the court shall begin to evaluate the recovery plan. During evaluation, the court primarily concentrates upon the seriousness and persuasiveness of the recovery plan, the appropriateness of the measures and methods propounded by the applicant, the maintenance of the equilibrium of rights between the creditors and debtor, and the attainability of the recovery plan. Notably, the court is prohibited from re-designing the submitted recovery plan, designating measures and methods different from the ones set forth in the recovery plan, and may not replace these measures and methods with new ones. However, in accord with the changing circumstances and criticisms raised by the court, the applicant may invoke Article 179 (a) (8) of the Bankruptcy Code and revise the recovery plan once throughout the adjournment proceedings.[64]

3.5 "EXTRAORDINARY TIME" LIMITATIONS

An extraordinary time limit is regulated under Articles 317-329 (a) of the Bankruptcy Code. In light of Articles 317 and 318, an extraordinary time limit is an opportunity conferred upon bona fide debtors who cannot fulfill their contractual obligations due to economic depression. An extraordinary time

[63] *Id.* (4) ("(4) If the applicant fails to provide the preceding documents with the adjournment of bankruptcy request or fails to submit missing documents within a two-week grace period, the applicant shall be adjudged bankrupt upon the identification of over-indebtedness.") (*Translation from Turkish to English made by the author - ed.*).
[64] *Id.* (a) (8) ("The capital company or cooperative society may submit a revised recovery plan once during adjournment proceedings.") (*Translation from Turkish to English made by the author - ed.*).

limit becomes available for bona fide debtors who reside in particular regions specified by the Council of Ministers in the event of an economic depression.

To benefit from an extraordinary time limit, the requirements imposed by Article 318 of the Bankruptcy Code are: (*i*) economic depression; (*ii*) a bona fide debtor who cannot perform contractual obligations; (*iii*) a debtor residing in a region specified by the Council of Ministers; and, (*iv*) a prospect of a financial recovery and, accordingly, fulfillment of contractual obligations at the cessation of an extraordinary time limit.

Article 329 (a) of the Bankruptcy Code regulates the nexus between an extraordinary time limit and the adjournment of bankruptcy regime. This article states:

> (1) In the event that a capital company or cooperative society is granted an extraordinary time limit, it will not be eligible for the adjournment of bankruptcy under Article 179 et sequent for one year following the end of the time limit. (2) If the bankruptcy of a capital company or a cooperative society is adjourned pursuant to Article 179 et sequent, an extraordinary time limit cannot be granted for one year following the end of the period of adjournment.

The language of this Article evidences a desire to eliminate exploitation of both extensions and adjournments. However, a tension remains in the Article, as there is also a desire to allot the company or cooperative with sufficient time to reorganize its affairs in hopeful economic reorganization. In this vein, Article 329 (a) of the Bankruptcy Code causes scholarly divergence. The majority opines that, while over-indebtedness is not a requirement for obtaining an extraordinary time limit, this is not determinative of whether or not the entity will become over-indebted within a year subsequent to the cessation of an extraordinary time limit.[65] Therefore, supporters of this view believe that a corporation or cooperative, over-indebted within a year following the end of an extraordinary time limit, should be able to find recourse in adjournment, so long as there is a likelihood of financial recovery.

[65] *See* ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 105-06. *See* also Nükhet Eroğlu, İflasın Ertelenmesi Talebi Üzerine Alınabilecek Tedbirler ve Erteleme Kararının Sonuçları (2014) (unpublished LL.M. thesis, Başkent Üniversitesi Sosyal Bilimler Enstitüsü İcra ve İflas Hukuku Anabilim Dalı Özel Hukuk Yüksek Lisans Programı).

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There are, however, scholars skeptical of the majority view regarding the balance of interests between creditors and debtors. Members of this assessment assert that allowing debtors to consecutively benefit from an extraordinary time limit and the adjournment of bankruptcy regime compels the creditor to "coercive" sacrifice and disturbs the equilibrium between the interests of creditors and debtors.

Here, by revising the language of Article 329 (a) of the Bankruptcy Code and espousing a more resilient approach to the relationship between an extraordinary time limit and the adjournment of bankruptcy regime the law will prove constructive for the interests of both creditors and debtors. In this respect, Article 329 (a)'s prohibitory language based upon the "mutual exclusivity" of an extraordinary time limit and the adjournment of bankruptcy regime should be tailored and courts should be vested with discretionary authority allowing them to conduct a case-by-case analysis within the context of Article 329 (a).

3.6 ONE-YEAR RULE

With the 2016 amendments to the adjournment of bankruptcy regime, it is no longer permissible for applicants, who already benefited from the adjournment of bankruptcy, to request a further adjournment for a year starting from the cessation of the previous postponement period, including the extension period. According to Article 179 (5) of the Bankruptcy Code: "A capital company or cooperative society, which has already benefited from the adjournment of bankruptcy, cannot apply for a further adjournment for a year starting from the expiry of the previous adjournment period, including the extension period."[66]

Undoubtedly, this Article seeks to maintain a fair and equitable balance between creditors and debtors by preventing the debtor from exploiting the adjournment of bankruptcy process in pursuit of an unending stay of executive proceedings.

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[66] *Translation from Turkish to English made by the author – ed..*

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3.7. EXPENSES

Although not directly regulated under the Bankruptcy Code, it is well accepted that money going towards expenses associated with the adjournment of bankruptcy request must be deposited into the respective court's treasury to initiate judicial proceedings concerning the adjournment request. In consonance with this, the Turkish Supreme Court held:

> By virtue of the relation between public order and bankruptcy, the party requesting the adjournment of bankruptcy is required to deposit money with the respective court's treasury to meet the expenses that will be originating from: (*i*) announcing the adjournment request; (*ii*) notifying the relevant third parties of the adjournment request; (*iii*) appointing an administrative receiver; and, (*iv*) measures that will be taken by the court . . . . [67]

Here, even if an applicant fulfills the other legal requirements, unless the required money is deposited with the respective court's treasury, not only will the adjournment request be dismissed, but the entity will also be adjudged bankrupt.[68]

In sum, the recent amendments to the Turkish Bankruptcy Code in bankruptcy adjournment seek to balance the rights of creditors with the rights and needs of financially troubled entities. The 2003 amendments, in conjunction with the 2016 amendments, furnish creditors with a stronger voice in court proceedings, prevents forum-shopping, demands greater evidence of viability in an entity's recovery plan, and gives the entity a better chance for financial recovery by enacting a "*stay*" on proceedings. Further, because the law now requires an interim balance sheet to be prepared, courts are better able to determine whether the company or cooperative is salvageable. However, while these additions all contribute to an "improved" Bankruptcy Code, this study will illustrate how the U.S. Bankruptcy Code treats businesses in financial distress and will proceed to illustrate how the Turkish Bankruptcy Code may adopt certain provisions of the U.S. Code to enhance its efficacy in balancing the rights of creditors and debtors.

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[67] ARZOVA, YAVAŞ & KÜÇÜK, *supra* note 7, at 106.
[68] *Id*. at 107.

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4. CHAPTER 11 REORGANIZATION

To better understand the advantages and disadvantages of bankruptcy adjournment, it is auspicious to compare Turkey's Execution and Bankruptcy Code with the United States Bankruptcy U.S. Code (hereinafter U.S. Code). This title compares the similarities and differences of the U.S. Code's Chapter 11 (commonly referred to as the "reorganization" chapter) with Turkey's own "reorganization" regime (adjournment of bankruptcy) by investigating the following Chapter 11 aspects: (*4.1*) debtor eligibility; (*4.2*) debtor preparation (including subheadings 4.2.1-4.2.7); (*4.3*) the U.S. Code's protective powers and who controls the entity (including subheadings 4.3.1-4.3.3); (*4.4*) rights exercised by the debtor in possession (hereinafter D.I.P) and creditors (including subheadings 4.4.1-4.4.8); (*4.5*) plan confirmation; and finally, (*4.6*) options for the debtor if the case fails. Throughout this examination, this study compares and contrasts the two codes and concludes the comparison with recommendations aimed at strengthening and refining the Turkish adjournment of bankruptcy.

4.1. ELIGIBILITY

First, while the bankruptcy codes of both Turkey and the United States provide debtors with the opportunity to reorganize, the two codes diverge in regarding who or what constitutes a qualifying debtor. Under adjournment, an insolvent corporation, a struggling cooperative society,[69] or a creditor may petition the court for a bankruptcy adjournment.[70] However, in the interest of protecting small businesses and large entities alike, the U.S. Code is more flexible.

Pursuant to 11 U.S.C. §§ 109 (a) & (d), to file a Chapter 11 petition, a debtor must reside, be domiciled, or have property within the United States and may be a railroad, a qualifying debtor under Chapter 7 (with certain exceptions), or a corporation. This definition allows for individuals, small

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[69] *See supra* note 37, art. 1 (As amended by Law No. 3476) ("A cooperative is defined as a body with variable members, variable capital and legal identity that is established by natural and public legal entities and private administrations, municipalities, villages, societies and associations in order to ensure and maintain certain economic interests and specifically the needs of their members toward professional life and living standards by means of mutual assistance, solidarity and service as trustees to each other.").

[70] *See also supra* note 42, art. 179.

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businesses, and large corporations to pursue reorganization. In addition, the U.S. Code specifically dictates that a "small business debtor" may file for Chapter 11 protection and generally places the cap of aggregated debts at $2,000,000.00.[71]

Akin to Turkish law, under the U.S. Code, creditors may also petition for reorganization (recovery). Under the Turkish Code, if a creditor is aware of the financial woes of a corporation or cooperation, a creditor may file for adjournment of bankruptcy, stipulating that the creditor supplies the court with an effective recovery plan.[72] Similarly, the U.S. Code grants creditors the ability to file a Chapter 11 involuntary petition, provided that the creditor holds a statutorily defined claim against the debtor.[73] Thus, while both codes permit creditors to instigate reorganization procedures, when compared to the U.S. Code, the Turkish Code is more limited in its allowance of who may request bankruptcy adjournment. To allow more entities to benefit from adjournment, this definition may easily be expanded to include individuals and small businesses. By expanding the definition of debtor, the Turkish domestic economy will favor, not only its large companies, but also, its "mom-and-pop" shops and encourage the growth of a stronger middle and upper-middle-class population.

4.2. DEBTOR PREPARATION

Both codes of the United States and Turkey outline specific requirements a debtor must satisfy prior to seeking reorganization. To receive an adjournment in Turkey, the debtor must meet the threshold of over-indebtedness, notify the court of over-indebtedness, file a request to adjourn bankruptcy, submit a recovery plan, deposit costs of adjournment into the court's treasury, be in accord with the one-year rule, and must not have benefitted from an extraordinary time limit.[74] Debtors in the United States must also fulfill statutory requirements. These requirements resemble those outlined by the Turkish Code, but naturally, contrast with others.

[71] 11 U.S.C. §§ 101 (51C)-(51D) (2010).
[72] *See supra* note 16, art. 179.
[73] 11 U.S.C. §§ 303 (a)-(b) (2010).
[74] *See supra* pp. 17-34 (Section B: Requirements to Adjourn Bankruptcy).

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4.2.1. THE PETITION

First, to commence filing under the U.S. Code, the debtor must file (if voluntarily), a voluntary petition.[75] The voluntary petition reflects the debtor's general identification, such as name, address, social security number (or tax identification), the Chapter the debtor intends to file under, and the debtor's plan, or the debtor's intent to file a plan. Here, clearly in contrast to adjournment of bankruptcy, the U.S. debtor is not required to immediately submit a plan to the court. Rather, unlike Turkish law, a debtor in the United States may submit its plan of reorganization following the filing for bankruptcy. Once a voluntary petition is filed, the debtor assumes the debtor in possession [76] identity, which grants the debtor the same powers that a trustee has in other Chapter filings.[77]

4.2.2. CREDITOR INFORMATION

In addition to the petition, and similar to the Turkish debtor's responsibility to submit a list of known creditors (albeit, in its recovery plan),[78] the U.S. debtor must, in accordance with Rule 1007 of the Federal Rules of Bankruptcy Procedure, dictate an address list of foreseeable creditors to be included on Schedules D (creditors holding secured claims), E/F (creditors holding unsecured claims), G (creditors with executory contracts and unexpired leases), and H (co-debtors). Further, when filing Chapter 11, the debtor must complete a list of its twenty largest unsecured creditors and provide the names, addresses, and claim amounts.[79] Also as outlined by Rule 1007, the debtor, if a corporation, must additionally file a corporate ownership interest statement. Should the petition be involuntary, the debtor has seven days to include the creditor contact list.[80]

Notably, unlike in Turkey, where courts take a "hands-on" approach to determine whether the debtor is "over-indebted" and grant an adjournment of

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[75] *See* 11 U.S.C. § 301 (2005).
[76] *See* 11 U.S.C. § 1101(1) (1978).
[77] 11 U.S.C. § 1107 (a) (1984).
[78] *See supra* note 42, art. 179 (3).
[79] FED. R. BANKR. P. 1007(d).
[80] *Id.* at 1007(a)(2).

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bankruptcy, in the United States bankruptcy courts do not investigate, at this primary stage, whether the debtor is sufficiently "over-indebted" to allow it to file Chapter 11. Perhaps this is because in Turkey, where liquidation and bankruptcy are largely synonymous, a debtor wishing to reorganize has no alternative but to adjourn bankruptcy, while, in the United States, different Chapters provide a debtor with an initial choice of reorganization or liquidation. This is clearly an advantage for debtors in the United States. Thus, rather than the U.S. Code demanding a minimum debt in order to file Chapter 7 (liquidation), the U.S. Code places qualifying numbers for filing under Chapter 13[81] and if the debtor's debts exceed those of Chapter 13, the debtor must file under Chapter 11 if the debtor wishes to pursue reorganization.

4.2.3. CREDIT COUNSELING

Next, unlike Turkish law, to file for Chapter 11 protection, the debtor, if an individual (or joint petition), must submit to the court, within 180 days prior to filing, a certificate of credit counseling.[82] Mandatory under the Bankruptcy Abuse Prevention and Consumer Protection Act (B.A.C.P.A.),[83] this regulation seeks to prevent fraud and to provide financial education to debtors prior to filing for bankruptcy. The Turkish Code does not require such a document to adjourn bankruptcy.

4.2.4. SCHEDULES

Along with filing the petition, creditor list, and credit counseling (if applicable), under Rule 1007(b) of the Federal Rules of Bankruptcy Procedure, the debtor, either at the time of filing, or within the designated timeline,[84] must file with the court the following documents: schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, statement of financial affairs, a copy

[81] *See* 11 U.S.C. § 109 (2010).
[82] *Id*. at. §§109(h)(1) & 111.
[83] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.
[84] FED. R. BANKR. P. 1007(c).

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of income from an employer within sixty days prior to filing (if applicable), and report any interest a debtor has, as defined in § 521(c) of the Code.[85] These requirements do parallel Turkish law, in that, the Turkish entity must provide the court with its assets, liabilities, and other documents to help the court understand the financial status. However, the time to provide the Turkish court with these documents is earlier than that explicated by the U.S. Code.

Because adjournment of bankruptcy is an innovation to avoid liquidation, the court must, at first blush, determine the debtor's viability. However, in the United States, the U.S. Code provides some breathing room for the debtor regarding the time limits to file these additional documents and allows the debtor to seek extensions *via* motion, (given that the reasoning is for a good cause and if the proper parties are notified).[86] Notably, it is not uncommon for debtors in the United States to file under emergency circumstances. By filing an emergency petition, the debtor gains the protection of the automatic stay. Then, the debtor is given time to collect all required documents and information. This breathing room is essential to a healthy functioning bankruptcy system.

4.2.5. SMALL BUSINESS DEBTOR: ADDITIONAL REQUIREMENTS

While Chapter 11, for the most part, is an option for "larger" entities, small businesses (and on occasion individuals), may also file Chapter 11. It is because of this flexibility that requires the small business debtor to file additional documents. First, to qualify under this section, the debtor must satisfy the definition of "small business debtor" under the Code.[87] Once a debtor is found eligible, the duties and responsibilities of an overseeing U.S. Trustee expand. Typically, small business cases do not have large creditors (or creditors interested in forming committees) and thus, the trustee must have a method for greater oversight. Resultantly, the U.S. Code dictates additional supervision under 11 U.S.C. § 1116. Pursuant to this section, the D.I.P. must also file (with

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[85] 11 U.S.C. § 521(b) (2014).
[86] *See* FED. R. BANKR. P. 1007(a)(5), (c).
[87] 11 U.S.C. § 101(51D) (2010).

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the petition or within seven days if involuntary), a balance sheet, statement of operations, cash-flow statement, and Federal income tax return (or, if not filed or prepared, the debtor must file a statement swearing to the same).

Along with these documents, small business debtors must also file intermittent reports that reflect its profitability, cash disbursements and receipts (comparing these with prior reports), and demonstrate continued compliance with post-petition requirements.[88] These additional requests allow the trustee to maintain a watchful eye on the debtor and quickly identify whether or not the debtor is capable of plan confirmation. Should Turkish law allow small business debtors to take advantage of its reorganization provision and monitor them as the U.S. Code outlines, it is likely that the Turkish economy will strengthen, as these entities are numerous and may be considered the lifeblood foundation of all domestic economies.

4.2.6. THE PLAN

While bankruptcy codes of both Turkey and the United States dictate that the debtor must submit a plan, the U.S. Code is again, more lenient regarding the statutory timeframe of submission (likely because Turkish courts must immediately evaluate whether a debtor is over-indebted, but financially recoverable). Pursuant to the U.S. Code, a debtor (voluntary or involuntary) may file a plan with the petition, or at any time during a case.[89] Further, the U.S. Code gives the debtor 120 days following the petition's filing, to be the sole entity capable of proposing a plan.[90] In the event the debtor[91] fails to file a plan after the 120 days, or is unable to confirm a plan within 180 days, other interested parties may propose a plan.[92] Notably, the courts have judicial discretion to alter these dates, for cause, given that the extended timeframe

[88] *Id.* § 308.
[89] *Id.* § 1121(a).
[90] *Id.* § 1121(b).
[91] Note: the small business debtor must follow a slightly different timeline to the 'regular' Chapter 11 debtor. Regulations of this timeframe is found in 11 U.S.C. § 1121(e) (2005).
[92] 11 U.S.C. § 1121(c) (2005).

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falls within the dates dictated by the U.S. Code and the proper parties are notified.[93]

Historically, critics categorized the notion of allotting a debtor with greater time to reorganize, to be abuse. However, Elizabeth Warren and Jay L. Westbrook, dismiss this argument and argue,

> [a]ny thoughtful evaluation of Chapter 11 eventually boils down to weighing costs and benefits. It is clear that any legal system that allows for reorganization will incur costs from delayed liquidation that must be balanced against the benefits of reorganization. The problem of costs is often overstated, but costs remain substantial nonetheless. The professional fees and other expenses associated with a Chapter 11 case diminish the value available to creditors, a consequence that is felt most sharply if the reorganization fails and liquidation follows. In addition, the time spent in bankruptcy itself leads to the loss of value, comprising an indirect cost. On the other side of the ledger, it is generally thought that successful reorganization pre- serves value, especially going-concern value, compared with a liquidation option. A reorganization is also thought to produce substantial positive externalities, such as maintaining employment, preserving the local tax base, and advancing community stability. To ensure that these benefits exceed the costs of delay and the administrative expense of reorganization, a reorganization system should move cases through the system quickly, giving an opportunity to those with a real chance of success and disposing of those that were destined for liquidation.[94]

Clearly, Warren and Westbrook believe a balance in equity must be reached regarding debtor and creditor rights. However, both scholars find that the benefits of a successful reorganization outweigh the costs of a longer timeframe.[95] This is an idea that the Turkish Parliament should revisit. Because the amendments to the Turkish Code seek to minimize the time a debtor may take to "recover," Warren and Westbrook would argue that this strategy likely inhibits the prospects of successful recovery.

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[93] *Id.* § 1121(d)(1)-(2).

[94] Elizabeth Warren & Jay L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 625 (2009).

[95] *See generally id.* (This finding was shown through Warren and Westbrook's studies on the success rates of reorganization where debtors are granted greater time to reorganize).

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Interestingly, while the Turkish recovery plan contrasts with the American reorganization plan, there are similarities. Generally, both plans must be comprehensive and realistic. If a debtor is reorganizing under the U.S. Code, the debtor's plan must: a) categorize each class and treat each class the same (unless by creditor agreement, treated less than others within that class);[96] b) dictate any impaired claims under the plan and explain how they will be treated; c) specify any unimpaired claims; and d) illustrate how the plan will succeed and how creditors will continue to be paid.[97] These requirements are not unlike those demanded by the new amendments under Turkish adjournment.[98] Both laws seek to treat creditors equitably and fairly, while simultaneously giving the debtor a chance to recover and reorganize.

However, the plans contrast greatly in terms of creditor involvement. With the enactment of the 2016 Turkish amendments, creditors do have a right to a) oppose an adjournment of bankruptcy, in the event they find that the debtor is not satisfying statutory requirements[99] and b) request an adjournment of bankruptcy, provided that they propose a recovery plan satisfying the Turkish Code's requirements.[100] Thus, while creditors have a voice in the adjournment process, under the U.S. Code, creditors are an integral aspect of the debtor's plan and a plan cannot be accepted, nor confirmed without their participation.

Under the U.S. Code, Chapter 11 creditors may play a large role in influencing the plan's content. The U.S. Code demands that the U.S. Trustee shape and develop willing creditor committees (usually consisting of the seven largest unsecured claims).[101] If appropriate, the U.S. Trustee, a creditor of the debtor, or an equity security holder of the debtor may request the formation of additional committees to assure adequate protection and representation.[102]

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[96] 11 U.S.C. § 1122 (1978).
[97] *Id.* § 1123 (2005).
[98] *See supra* pp. 5-17 for "Development of Bankruptcy Adjournment in Turkey."
[99] *See supra* note 16, art. 179 (a)(2). *Discussed supra.*
[100] *See supra*, Discussion on the over-indebtedness of the stock corporation or cooperative.
[101] 11 U.S.C. § 1102.
[102] *Id.*

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Notably, in small business cases, if good cause is shown, a party in interest may request that a committee of creditors not be formed.[103]

Creditor committees are required to meet at a scheduled time and place and may appoint attorneys and accountants to represent their interests.[104] Powers of creditors are numerous and include the ability to:

- consult with the trustee or D.I.P. concerning the administration of the case;

- investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

- participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

- request the appointment of a trustee or examiner under section 1104 of this title;

- perform such other services as are in the interest of those represented.[105]

Clearly, the U.S. Code, by bestowing these powers upon creditor committees, seeks to assure the fair and equitable treatment of all interested entities.

Next, a plan may only be confirmed upon committee agreement as outlined by § 1126 of the U.S. Code. Under § 1126(c), a class of claims accepts the plan when, "at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors" approves. Further, a plan cannot be confirmed unless all impaired claim holders approve of the plan or are adequately protected by property value (if liquidated).[106] Once

[103] *Id.*
[104] *Id.* § 1103.
[105] *Id.* § 1103(c).
[106] *Id.* § 1129(a)(7).

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a plan is accepted, but prior to confirmation, the party proposing the plan may modify the plan. However, in accordance with Rule 3019 of the Federal Rules of Bankruptcy Procedure, this is conditioned upon a judge, following a court hearing, finding that the plan does not adversely impact any creditor who has not signed the modified plan. In sum, while creditors in Turkey indeed have a voice in adjournment of bankruptcy, creditors in the United States are obviously integral to reorganization.

4.2.7. DISCLOSURE

Finally, when a plan is filed, the debtor must also file a disclosure statement.[107] This document is not separately required in adjournment of bankruptcy. Influenced by a case's complexity, this document often falls under the purview of judicial discretion. This document's purpose is to aid creditors to make informed decisions regarding the debtor's plan by listing the debtor's assets, liabilities, and other economic interests.[108] A plan's confirmation is conditioned upon judicial approval of the disclosure statement.

Unsurprisingly, when a debtor seeks to reorganize, the Turkish Bankruptcy Code and the U.S. Code differ in their respective procedures. Where the United States has a regulated, but flexible timeline to file a petition, plan, and associated documents, the Turkish Code is less forgiving and demands that the debtor provide more information at the start. As noted earlier, this is, in part, a likely side effect of the differing goals of each debtor. For instance, a Turkish debtor seeks to delay bankruptcy and the American debtor seeks to take refuge under it. However, while the two codes differ in timeline and specific document requirements, the two codes do share a common goal of fair and equitable creditor treatment through proper notice and participation in both the adjournment of bankruptcy request and the reorganization plan.

[107] The small business debtor may be exempt from this requirement if the court finds sufficient information is already within the plan. *See* 11 U.S.C. § 1129(f) (2010).
[108] *See* 11 U.S.C. § 1125 (2005).

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4.3. CODE'S PROTECTIVE POWERS AND WHO CONTROLS

4.3.1. THE AUTOMATIC STAY

When a U.S. debtor considers bankruptcy, the shelter and breathing room of the automatic stay offers strong incentive for the debtor to file. [109] This device protects the debtor at the time of filing and shields the debtor from creditor collection efforts, repossessions, and foreclosures. The automatic stay thus shelters the debtor and prevents further irreparable harm. Notably different from adjournment, in the United States, the debtor must *file* for bankruptcy to be protected. In Turkey, because the debtor seeks to avoid bankruptcy, legislation addresses the need to temporarily protect debtors from aggressive creditors by providing courts with a staying power, notwithstanding the absence of an actual bankruptcy filing. Article 179(a) of the Turkish Code gives a court the power to "take all appropriate actions required for the protection of properties and assets of the corporation or cooperative to aid in the proper execution of the recovery plan."[110] Undoubtedly, this includes the power to order a stay.

Next, and similar to Turkish law, the U.S. Code leaves room for a) specific proceedings to be immune from the stay and b) specific creditors able to request relief from the stay.[111] Proceedings immune from the stay include, but are not limited to, criminal proceedings, establishment of paternity, domestic violence proceedings, domestic support obligations, and interception of tax refunds.[112] Creditors desiring relief from the automatic stay must file with the court, a motion for relief[113] and cite one or more of the following: "for cause, including the lack of adequate protection of an interest in property of such party in interest . . . ."[114] or, regarding a relief of an interest in property, show that "the debtor does not have an equity in such property *and* such property is not necessary to an effective reorganization."[115] To compare, Article 179 (b)(2) of the Turkish Bankruptcy Code, dictates, in the spirit of balancing

[109] 11 U.S.C. § 362 (2010).
[110] *See supra* pp. 7-10 for discussion on 2003 amendments.
[111] *Supra* note 109.
[112] *Id.*
[113] *See* FED. R. BANKR. P. 4001.
[114] 11 U.S.C. § 362 (d)(1) (2010).
[115] *Id.* at § 362 (d)(2) (emphasis added).

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the rights of the debtor and creditor, that particular creditors are exempt from the court's stay.[116] Clearly, regarding the staying power of the courts, there are parallel goals sought by both codes.

4.3.2. DEBTOR IN POSSESSION

After a Chapter 11 case is filed, the debtor usually assumes the role of D.I.P. .[117] A D.I.P. controls the entity during reorganization and has the duty to report and "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan . . . ."[118]. When a debtor maintains control, a case trustee[119] is not appointed and the D.I.P. may use special powers that a case trustee, if appointed, would employ.[120] A D.I.P. may hold this title until the plan's confirmation, but will lose this identity if the plan is converted to liquidation or if a trustee takes control of the entity (by election or appointment). The idea of a D.I.P. does not exist in Turkey.

Debtor control (albeit with judicial oversight), is foreign to adjournment, where the court either a) appoints an administrative receiver to manage the entity or b) makes every decision of the debtor contingent upon the administrative receiver's consent.[121] The administrative receiver's role is essential during bankruptcy adjournment. The receiver studies the presented recovery plan to determine whether the financial progress of the entity is in accord with the plan and will report to the court every three months on the entity's progress.[122] If the receiver reports that the entity is not financially viable the court will discontinue the adjournment, adjudge the entity bankrupt, and proceed with liquidation.[123] In sum, while the duties of the administrative

[116] *See supra* at 7-10 concerning Article 179 (b)(2) of the Turkish Execution and Bankruptcy Code and discussion of the 2003 amendments.
[117] 11 U.S.C. § 1101 (1978).
[118] 11 U.S.C. § 1106(3) (2010); FED. R. BANKR. P. 2015.
[119] Note: a case trustee differs from a U.S. Trustee. The U.S. Trustee plays a great role in Chapter 11 administration.
[120] *See* 11 U.S.C. § 1107 (1984).
[121] *See supra* note 16, art. 179(a).
[122] *Id.*
[123] *Id.*

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receiver and the D.I.P. are comparable, the control bestowed upon the D.I.P. in the United States is more beneficial for reorganization because, unlike the Turkish receiver, the D.I.P. is familiar with the necessary day-to-day business decisions that keep the insolvent business afloat.

4.3.3. THE U.S. TRUSTEE AND EXAMINER

While the D.I.P. controls the assets and manages the bankrupt entity, the U.S. Trustee plays a large oversight role to keep the entity on track in its case and plan. To illustrate, the U.S. Trustee collects the debtor's reports and conducts the creditor's meeting, "within a reasonable time after the order for relief in the case"[124] (341(a) meeting).[125] Notably, the court has no involvement in 341(a) meetings. The purpose of the meeting is to question the debtor under oath and assure the propriety of its actions in management of the bankrupt entity. Here, drawing comparison between the two codes, the duties and responsibilities of the U.S. trustee and the administrative receiver are notably similar. Because the administrative receiver has strong control over the debtor corporation or cooperative in a bankruptcy adjournment, if the receiver is playing a supervisory role, undoubtedly, the receiver must be able to question the debtor's actions. Because the receiver must consent to the actions of the debtor, this is an inherent role. However, there is no formal meeting such as the 341(a) established under the Turkish Code.

Next, an examiner may play a role in Chapter 11.[126] Although rarely ordered, an examiner has duties similar, but more limited, to those of a trustee. At the request of either an interested party or the U.S. Trustee (so long as a case trustee has not been appointed), the court may assign an examiner if such appointment is in the interest of creditors and the debtor's debts exceed $5,000,000.00.[127] The U.S. Code permits the examiner to investigate the debtor's actions and file a statement of investigation.[128] A court has judicial discretion in what an examiner may do when a D.I.P. cannot perform a

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[124] S. Rep. No. 95-989, at 1 (1978).
[125] 11 U.S.C. § 341 (2005).
[126] *Id.* § 1106(b).
[127] *Id.* § 1104(c).
[128] *Id.*

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required duty. Although rare, an examiner may play a valuable role, especially under suspicion of a debtor's fraud, dishonesty, and mismanagement. Under Turkish law, it is likely that the administrative receiver would also fulfill this role. However, prior to reaching a judicially approved adjournment, the court performs an in-depth investigation of the corporation or cooperative. Any signs of fraud, mismanagement, or dishonesty would likely be spotted by the court and be resolved at an early stage.

4.4 RIGHTS EXERCISED BY THE DEBTOR IN POSSESSION AND CREDITORS

4.4.1 AVOIDABLE TRANSFERS

A Chapter 11 case is often riddled with claims, legal actions, and court appearances. This is because both the D.I.P. and creditors have many legal recourses under the U.S. Code. This allows for an even playing field for both parties. For example, one power of the D.I.P. (or case trustee if assigned) in a Chapter 11 case, is the avoidance power. Under the U.S. Code, the debtor may avoid money or property transfers made within 90 days prior to filing.[129] The purpose of this power is to regain monies or property of the debtor for the benefit of paying creditors. While the U.S. Code dictates a 90-day period, the period of transfer may be extended for transfers to insiders.[130] Avoidance transfers are a complicated section of the U.S. Code and are dependent on the kind of transfer, to whom the transfer was made, what law governs it, and how long ago the transfer was made.

To compare the U.S. debtor's avoidance powers in Chapter 11 with those of a Turkish debtor in adjournment of bankruptcy, there is not much similarity. In Turkey's adjournment of bankruptcy provision, the law fails to clarify whether the administrator should (or must) 'look back' to the debtor's prior transactions to determine whether they are avoidable and recoverable for the benefit of creditors. However, it can be reasonably gleaned that, in a Turkish court's analysis of whether or not an adjournment is the proper manner in which to proceed, the court would employ a good faith standard and

[129] *Id.* § 547.
[130] *Id.*

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if corrupt acts (fraud, mismanagement, etc.) were suspected, a court may overrule bad faith transactions for the benefit of the creditors. Notably, and in direct contrast to a D.I.P., the over-indebted corporation or cooperative in Turkey does not have avoidance powers, whether for good faith prior transactions or for insider or bad faith dealings.

4.4.2. DEBTOR IN POSSESSION'S POWER TO USE, SELL, OR LEASE PROPERTY

When the D.I.P. is operating a business under a plan of reorganization, there will likely be costs associated within the sphere of the ordinary course of business. Under § 363 of the U.S. Code, the D.I.P. (or case trustee if appointed), may sell or lease property of the estate, without judicial approval, if such action is within the "ordinary course" of the debtor's business.[131] However, any actions taken by the debtor that impact the estate's property that are deemed *not* within the ordinary course of business, must be approved by the court following notice and a hearing.[132] This section of the U.S. Code seeks to balance case efficiency with creditor protection. Because the debtor must frequently utilize the estate's property within the ordinary course of business, it would not be efficient to the debtor or the courts if the debtor were required to constantly seek permission to act, as this would take time and flood the courts with unnecessary motions and delay the debtor in its necessary endeavors. However, to protect creditors, when debtors act beyond the ordinary course of business, they must seek judicial permission prior to acting, as well as notify creditors.

In contrast, in Turkey, if an over-indebted entity is approved for bankruptcy adjournment, the court will bestow one of two duties upon an administrative receiver. First, if the debtor is permitted to manage the entity, the debtor must seek the receiver's approval for "all acts and decisions...[and these acts will be]... valid and enforceable only if and when they [are] approved by the administrative receiver."[133] Plainly, this is not an efficient provision. For a business to succeed, the debtor must be unfettered in decisions made within

[131] *Id*. § 363.
[132] *Id*.
[133] *Supra* note 16, art, 179 (a).

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the ordinary course of business. Second, if the court divests the debtor of all management powers and delegates them to the administrative receiver, the receiver likely does not need to alert the court of actions taken upon the entity's properties, so long as they are within the ordinary course of business.[134] Because the receiver's duties are to assure that the business follows the recovery plan, any acts taken by the receiver are in support of that goal. While the Turkish Code does not explicitly state, if the receiver wishes to use the property outside the scope of the ordinary course of business, it is likely that the receiver would be required to ask the court for judicial approval.[135] Clearly, critical to efficient reorganization under both codes are prompt decisions regarding actions made within the ordinary course of business.

4.4.3. CASH COLLATERAL

Next, necessary to reorganization under Chapter 11 is whether the D.I.P. may use cash collateral. Defined under § 363 of the Code, cash collateral is:

> cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

To use cash collateral the D.I.P. must ask permission from the secured creditor or the court. If the debtor seeks judicial approval, the court investigates whether the secured creditor is adequately protected.[136] If the court deems that the creditor is adequately protected, the creditor whose property interest is being used, has the right to request the court to limit the use to the extent that

[134] This is arguably the better route to take in adjournment, as decisions in the ordinary course of business may be made quickly. However, the negative behind the receiver maintaining control, is that a debtor obviously has a better understanding of how the business functions. Thus, these are considerations for the Turkish court to consider.
[135] *Id*.
[136] 11 U.S.C. § 363 (2010).

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the creditor is adequately protected. The court monitors and oversees the debtor's use of cash collateral and imposes additional accounting requirements upon the debtor.[137]

When compared to the Turkish Code, the discussion here parallels the discussion supra on the debtor's use, lease, or sale of estate property. Again, the focus is on the administrative receiver and the goals of the recovery plan. While the section on adjournment of bankruptcy does not dictate how cash collateral shall be used, it is probable that, if the use of cash collateral is in pursuit of recovery, so long as the receiver deems that creditors are adequately protected, the use is legitimate. However, the question of a creditor's powers in the use of cash collateral are ambiguous, as this section of the Turkish Code does not specify whether creditors have the right to petition the court to demand additional protection in the event of cash collateral. This absence bestows great responsibility upon the receiver and the court, as both entities are charged with assuring that creditors are protected during recovery.

4.4.4. DEBTOR'S RIGHT TO CREDIT

Another power the debtor (or trustee) has, to maintain the bankrupt entity in the United States, is the power to obtain credit. Governed by § 364, the D.I.P., in the ordinary course of business, may incur additional unsecured debts, deemed administrative expenses.[138] Prior to incurring additional debts not within the ordinary course of business, the D.I.P. must seek judicial approval.[139] Importantly, because a debtor often encounters challenges when seeking additional funds, the court (after notice and a hearing, as authorized by § 364 (c)), may allow the debtor to obtain credit with either a) super priority over any administrative expenses, b) secured by an unencumbered property lien of the estate, or c) secured by a second junior lien on property of the estate already encumbered by a lien. This provision of the U.S. Code is again in the spirit of encouraging successful reorganization.

[137] *Id*. § 363(c)(4).
[138] *Id*. § 364(a).
[139] *Id*. § 364(b).

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Again, when compared to adjournment, there is ambiguity in the Turkish Code on obtaining unsecured credit while in the recovery phase. If the debtor is not in control and the administrative receiver is managing the entity, the spirit of the recovery plan demands an analysis of whether the entity is sufficiently viable to competently repay additional incurred debts. This would likely be a strict analysis by the receiver and possibly the judiciary (in the event that the receiver submitted such a request to the court).

4.4.5. EXECUTORY CONTRACTS AND UNEXPIRED LEASES

In Chapter 11, another question the D.I.P. may face is whether the entity will maintain executory contracts and/or unexpired leases.[140] Under § 365 (a) of the U.S. Code, the D.I.P. (or trustee), "subject to the court's approval, may assume or reject any executory contract or unexpired lease." This section of the U.S. Code is riddled with complexity and debate.[141] Because of the intricacy of this section and the limited space to dedicate to it here, it must suffice to generalize and state that, the D.I.P. may have the power to assume or reject an executory contract or unexpired lease, albeit, with adequate creditor protection.

Here, consistent with the discussion supra, the Turkish Code is silent on whether a debtor or receiver may assume or (assume and) assign executory contracts or unexpired leases. However, pursuant to Article 179, because the court requires the debtor to provide an in-depth recovery plan, this plan must dictate the entity's assets, debts, and due dates of debts. Here, likely at this initial stage, the debtor must list the entity's executory contracts and/or unexpired leases. And, while possible, it is unlikely that a creditor with an executory contract would object (at this early phase) to the debtor maintaining said contract. Nonetheless, should a creditor wish to discontinue an executory contract or unexpired lease, the court must analyze whether an adjournment of bankruptcy alters the nature of their contractual relationship, is in the overall

[140] Executory contracts: in the context of bankruptcy filings, are usually between a debtor and creditor, where both parties have yet to fulfill performance.

[141] For an in-depth look into the mire of the Circuit Split of section 365 and intellectual property contracts, and whether the D.I.P. has the right to assume an executory contract when the debtor has no intent on assigning it to a third party, notwithstanding non-bankruptcy law, and notwithstanding a disagreeable creditor, see Kristi R. Sutton, *To Assume or Assume & Assign? That is the Question: A Critique of the Circuit Split of §365*, NORTON BANKR. L. ADVISOR, Aug. 2014, at 8.

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best interests of the debtor and its creditors, and whether it is to the creditor's detriment to continue this relationship with a debtor in adjournment.

4.4.6. ADEQUATE PROTECTION

Our investigation now turns to the rights and powers of creditors, creditor committees, and how the U.S. Code seeks to protect their interests. First, and related to a debtor's use of cash collateral, is a creditor's right to be adequately protected. Sections 363 (c) (2) (a) & (b) prevent the D.I.P. (or trustee) from using, selling, or leasing cash collateral unless "each entity that has an interest in such cash collateral consents; or the court, after notice and a hearing, authorizes such use, sale, or lease . . . .". Further, § 361 outlines if the party in interest risks a decline in property value as a result of the debtor using said property, the debtor must make cash payments or periodic cash payments to the interested party, to the extent of the declined value. Section 361 is clearly geared towards assuring creditor protection.

To compare the U.S. Code with Turkish law, it appears that creditors involved in adjournment must rely on the administrative receiver's duty to maintain equity between the parties. During adjournment, because the receiver is the principle guarantor of an entity's ability to stay on track during recovery, the receiver has the duty to assure creditors that they will be fairly and equitably treated.[142] Again, absent under Turkish law, is an exact explication of the possible recourse creditors may seek in the event that their interests are diminished by the indebted entity. However, because bankruptcy in Turkey (automatic liquidation) holds a very different meaning from bankruptcy in the United States, it can safely be adduced that, because the insolvent entity seeks viability, it is in the best interests of creditors to encourage this pursuit, as liquidation undoubtedly results in greater losses for all parties.

[142] *See supra* note 16, art. 179 (a).

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4.4.7. CREDITORS' CLAIMS

While the U.S. Code demands that the debtor list creditors at the initial filing,[143] sometimes creditors are unwittingly omitted. If creditors desire to have their claims recognized and they are not scheduled, they must file a proof of claim.[144] In addition, if creditors are scheduled, but their priorities on the debtor's schedules are incorrect, they may, in accord with Rule 3003 of the Federal Rules of Bankruptcy Procedure, file a claim. If done correctly, "[a] proof of claim or interest executed and filed in accordance with this subdivision [Rule 3003(c)(4)] shall supersede any scheduling of that claim or interest..."[145]. Thus, it is clearly in the best interests of creditors to be diligent on whether their claims are listed on the debtor's schedules and to investigate whether their claims are scheduled correctly.

Like the U.S. Code, Turkish law requires that the debtor list all creditors and debts when requesting an adjournment of bankruptcy.[146] However, where the creditors have a concrete role in Chapter 11 (*e.g.* plan confirmation), creditors in an adjournment, do not maintain the same role. Further, the priority of claims in a Chapter 11 case is central, as superior claims are given precedence in payment over others in a plan. Because the Turkish recovery plan is a mechanism to get the entity "back on track" without filing for bankruptcy, creditors do not, at this stage, need to be so concerned about whether (or in what manner) their claims are outlined. Rather, the purpose of listing the creditors and debts in a recovery plan is not to provide information for a repayment plan, but to notify the court of its over-indebtedness and to prevent violations of a future "stay" by listed creditors. Clearly, the need to provide creditors with the power to file claims is not so pressing at the Turkish adjournment of bankruptcy stage as it is in a U.S. reorganization plan.

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[143] *See supra*, discussion on requirements to list creditors; FED. R. BANKR. P. 1007(d).
[144] *See* FED. R. BANK. PRO. 3003(2).
[145] *Id.*
[146] *See supra* note 16, art. 179 (3), discussed *supra*.

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4.4.8. ADDITIONAL CREDITOR RELIEF

Finally, creditors involved in a U.S. reorganization plan may motion the court for relief from the automatic stay[147] or may proceed with an adversary proceeding.[148] A creditor may request relief for cause or may seek relief regarding property if the debtor has no equity in the property and the property is not necessary for the debtor's reorganization.[149] This is a powerful tool for a creditor who is not adequately protected. Another common action by creditors involves adversary proceedings. Governed by Part VII of the Federal Rules of Bankruptcy Procedure, the scope of adversary proceedings is vast (as the term is synonymous to a lawsuit, but in the bankruptcy context).[150] Here, on occasion and with court approval, a creditors committee may pursue adversary proceedings, to which a debtor must respond.

Notably, mirroring the U.S. Code, Article 179 (b) of the Turkish Bankruptcy Code dictates that specific creditors may seek relief from a court's stay.[151] This section balances the interests of debtors and creditors and where a creditor is at risk of loss, the Turkish Code's provisions ensure protection of those threatened interests. Further, regarding adversary proceedings, a stay in an adjournment, like in a U.S. bankruptcy filing, largely prevents any further proceedings that may hinder the entity's recovery. However, Article 179 (b) of the Turkish Code does leave room for specific creditors to initiate or continue executive proceedings.

In sum, while the goal of recovery is similar for debtors in the United States and Turkey, the two codes differ in the expressed relationship between debtor and creditor. Because a Chapter 11 plan requires creditor consent, the U.S. Code's express delegation of powers of debtors and creditors is of the utmost necessity. This contrasts the adjournment of bankruptcy regime, which, in its present form, does not evince such a necessary working relationship between the parties.

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[147] *See* 11 U.S.C. § 362(d) (2010).
[148] *See* FED. R. BANK. PRO. 7001.
[149] *Id.*
[150] *Id.*
[151] *See supra* pp. 5-17 for discussion of the development of Bankruptcy Adjournment in Turkey.

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To summarize, under a Chapter 11 plan, the D.I.P. may feasibly control the insolvent entity for many years, but in adjournment, notwithstanding the debtor's management powers, an administrative receiver's control is significantly shorter in time (at most, one to two years). Thus, the necessity of a debtor needing credit, tapping into cash collateral, or conserving executory contracts, is considerably greater in Chapter 11 reorganization than in adjournment. Further, because of significant creditor involvement in reorganization, creditors must have access to adequate protection actions or relief from the automatic stay. This contrasts with the needs of most creditors in a bankruptcy adjournment because creditors in these actions simply do not have a large role to play. Therefore, while the Turkish Code should explicitly state, in greater detail, what debtors and creditors may do while an adjournment of bankruptcy is proceeding, it is easily understood why the U.S. Code, when compared to the Turkish Code, evidences greater concern to identify and clarify the parties' powers.

4.5. PLAN CONFIRMATION

Plan confirmation, unsurprisingly, is the ultimate goal for the Chapter 11 debtor. Reorganization, devoid of plan confirmation, must either be dismissed or converted to another Chapter. Section 1129 outlines the extensive necessary obligations that must be met to confirm a plan and demands that the plan is a) offered in good faith, b) is reasonable and workable, c) shows that any payments made or to be made by the debtor (or other interested party) are reasonable, d) the debtor has disclosed all possible controlling officers, e) all impaired creditors have accepted the plan or are adequately protected to receive, at least liquidation value of its interests, and f) other showings of the protection of all classes of creditors, whether or not impaired.[152] This section of the U.S. Code reflects the necessary cooperation of debtors and creditors and assures that reorganization may not be exploited to avoid obligations. To assure equal treatment of debtors and creditors, even at this stage, any party in

[152] 11 U.S.C. § 1129 (2010).

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interest may still object to a plan's confirmation at the court's confirmation hearing.[153]

Importantly, there may be occasions where the debtor must modify the confirmed plan. Once a plan is confirmed, the debtor may,

> modify such plan at any time after confirmation of such plan and before substantial consummation of such plan . . . . [so long as the plan is in accord with the Code and] . . . . becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified . . . . [154]

In the event that the debtor must cure omissions, fix errors, or acknowledge a change of circumstance, this provision allows for the plan to be changed, so long as it is in good faith, reasonable, and not objected to by interested parties. Following confirmation, the debtor is discharged of the debts arising prior to confirmation, as provided in § 1141.[155] Following confirmation, the D.I.P. no longer exists and the newly discharged entity will continue to adhere to the reorganization plan for the defined time that the confirmed plan dictates.

In Turkey, a recovery plan may be modified once at the beginning of an adjournment of bankruptcy[156] and once more if extension is granted to the entity.[157] A modification at the initial stage occurs largely when a court analyzes a recovery plan and finds that specific changes to the plan may result in granting the adjournment request. However, because courts may not themselves modify a recovery plan, this gives the debtor a second chance at adjournment. Dissimilar to a debtor's plan in Chapter, the Turkish recovery plan is not "confirmed" in the same sense as in the United States. For a recovery plan to be approved by the courts, it must adhere to statutory guidelines and must be serious and persuasive.[158] Here, when compared to the power of creditor committees in Chapter 11, creditors involved in an adjournment, do not have much power over whether or not a court approves a

[153] *Id.* § 1128 (1978).
[154] *Id.* § 1127 (b) (2010).
[155] Note, there are exceptions to this rule, as provided in 11 U.S.C. § 1141 (2010).
[156] *See supra* note 16, 179 (a)(8). Article 179 (a)(8) of the Turkish Execution and Bankruptcy Code.
[157] *Id.* § 179 (b)(4).
[158] *See supra*, discussion: (iv) Submission of a Recovery Plan & Article 179 (3) of the Turkish Execution and Bankruptcy Code.

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recovery plan. Creditors must instead, rely on the statutory demands of the Turkish Code, a court's strict adherence in assuring that creditors are fairly and equitably treated, and an administrative receiver's duties to maintain the entity's assets and assure that the business is operated in accordance with an approved recovery plan. There are clearly positives and negatives to this lack of power on behalf of the creditors. However, time will show, once the adjournment of bankruptcy is again an available device to pursue in Turkey, whether the 2016 amendments sufficiently protect all interested parties.

4.6 OPTIONS IF CASE FAILS

The U.S. Code, with limited exception, permits a Chapter 11 D.I.P. to convert its case to a Chapter 7.[159] A court will convert a case to Chapter 7 if doing so is in "the best interests of creditors and the estate, for cause, unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."[160] Here, the definition of "for cause" is extensive and may include, but is not limited to, the following: i) gross mismanagement of the estate, ii) failure to comply with an order of the court, iii) failure of the debtor to pay domestic support; or iv) failure to file a disclosure or have a plan confirmed within the statutory timeline.[161] When a Chapter 11 case is converted to Chapter 7 (liquidation), the debtor's assets are collected, sold, and the proceeds go towards compensating creditors; this is essentially the death of the entity.[162]

Under the U.S. Code, a Chapter 11 conversion to Chapter 7 is similar in effect to when an over-indebted entity in Turkey fails to thrive under its recovery plan. When the recovery plan fails, the corporation or cooperative is deemed bankrupt by the court and liquidated. Article 179 (b) of Turkey's Code outlines when a court may dismiss the adjournment of bankruptcy request and

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[159] 11 U.S.C. § 1112(a) (2010).
[160] *Id*. § 1112(b)(1).
[161] *Id.* § 1112(b)(4).
[162] Note: while not as common as conversion to Chapter 7, in some circumstances, the U.S. Code also permits the D.I.P. to seek conversion to Chapter 12 or 13 if the debtor meets the statutory guidelines and such an action is fair and equitable to all interested parties. *See* 11 U.S.C. § 1112(d) (2010).

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declare the entity as bankrupt.[163] When the court receives reports from an administrative receiver reflecting that the entity is unsalvageable or when the court itself finds, at any time during adjournment, that the entity cannot be saved, the entity may be declared bankrupt.[164]

In addition to case conversion, the U.S. Code dictates that, if the court finds that the best interests of the creditors are served by dismissal, the court may order the dismissal. The effect of dismissal differs from conversion. When a court dismisses a bankruptcy case, there is no discharge, the case ends, and all adversary proceedings stop. A dismissal may be voluntary or involuntary. If a trustee or creditor files a motion to dismiss and the court grants it, the case is dismissed. Another effect of dismissal is that, depending on the Chapter, the entity's status, and circumstances of the dismissal, the debtor will face a statutory time limit before it may file another case. Notably, the U.S. Code, under § 349 (a) clarifies that:

> [u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

This section of the U.S. Code is critical in that it reflects the spirit of bankruptcy in the United States, where the debtor may again seek a second chance to reorganize and have a "fresh start."

Case dismissal in the United States and failed recovery in Turkey operate similarly, but with some great differences. Noted supra, when a Turkish court finds that an entity cannot successfully follow a recovery plan and cannot be saved, the insolvent entity reaches the "end of the road" and is liquidated; there are no second chances. While appeal is an option to pursue (by debtors and creditors), due to the potential significant amount of time for an appeal to be heard by the appellate court, an entity in financial woes may not survive to appeal.[165] This makes the appellate procedure, arguably,

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[163] *Supra* note 42, art. 179(b).
[164] *Id*.
[165] *Id. (c)*.

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ineffectual in adjournment. The inability for an over-indebted entity to seek shelter under multiple modified recovery plans demonstrates the Turkish Code's desire to rid its economy of unviable businesses, even if it is not in the best interests of the creditors to do so. Perhaps, if the Turkish Code modified its sections on adjournment to allow the debtor to easily amend its recovery plan, plans would be more likely to succeed; as daily changes in circumstance may negatively impact the entity's success in one plan but make it feasible to succeed in a modified plan. Until the Turkish Code is more forgiving and flexible in its implementation, an insolvent entity's rate of realization in bankruptcy adjournment will be minimal.

5. CONCLUSION

While the Turkish Code experienced a positive overhaul in procedure when Parliament amended the laws of bankruptcy adjournment, when compared to the U.S. Code's finely tuned Chapter 11, much legislative work remains to make adjournment equally effective to the U.S. Code's reorganization. Further, while much ambiguity inherent in the 2003 amendments found clarification in the 2016 amendments, remaining uncertainties must be made plain. In light of the comparative discussion of the Turkish Bankruptcy Code and the U.S. Code, the following list outlines a few suggestions to build adjournment of bankruptcy into a more effective and beneficial legal strategy for debtors and creditors.

5.1 AUTHORS' RECOMMENDATIONS AND CRITIQUE

1) Definition of Debtor: Article 179 of the Turkish Bankruptcy Code dictates that an adjournment of bankruptcy request may be made by a) management and representative bodies (cooperative or corporation) or b) creditors. To sufficiently cover all entities in need of financial aid, this definition should expand to include small businesses and individuals. This will provide smaller entities with an opportunity to take advantage of bankruptcy adjournment and encourage growth in Turkey's domestic economy.

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2) Requirements to Adjourn Bankruptcy:

a) First, the requirement of over-indebtedness is arguably an unworkable threshold that may dampen the percentage of possible recovery. While over-indebtedness is a key aspect to request adjournment, this rule is exceedingly strict. Under the U.S. Code, there are several Chapters ranging from liquidation to reorganization. While Chapter 11 debtors must have debts exceeding statutorily defined amounts, in excess of those outlined for Chapter 13, the Code's spirit is to encourage financial recovery before the entity is too deep in debt to be salvaged. This is critical for reorganization. Arguably, the over-indebtedness threshold negatively prevents entities in financial distress from seeking refuge in adjournment and inhibits the ability for the B.o.D. to get a "jump-start" on financial recovery under the protection of a court's staying powers.

b) Second, Turkish bankruptcy law requires a debtor to estimate how long a recovery may take and provide the court with a timeframe. While the court must be aware of a timeline for recovery, because the debtor has minimal time to submit all necessary documents to the court and because the period of adjournment is limited to one or two years, asking the debtor to provide this timeline is both challenging and unrealistic. In contrast, while a reorganization plan in Chapter 11 indeed has a timeline, there is significant time and planning on behalf of debtor and creditor alike to carefully craft a workable plan and timeframe. In some cases, Chapter 11 plans carry on for years. While some critiques cite this as exploitation, taking time is not bad faith and is a legitimate way to assure recovery. The adjournment of bankruptcy process would benefit from acknowledging that simply because an entity is sheltered for years, does not insinuate debtor corruption or exploitation.

c) Third, adjournment of bankruptcy would benefit from being less strict in the timeline of documents submission. While adjournment basically delays bankruptcy, a debtor must be given more time, for cause, to submit all required documents. Under Article 179 (3) of the Turkish Code, the debtor has a mere two-week grace period to submit all documents and should the debtor fail, the court has the right to liquidate the entity once over-indebtedness is shown. This is a drastic and dangerous repercussion. In the United States,

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many debtors file emergency petitions and are unable to include all the complicated documents and necessary schedules. The U.S. Code provides breathing room for this situation and allots debtors additional time to collect documents while under the shield of the automatic stay. In adjournment of bankruptcy, there will be cases where a debtor is in serious financial troubles, but still wishes to try recovery over liquidation. The Turkish Code should acknowledge and understand this possibility and provide a more flexible deadline to submit all papers.

d) Last, the Turkish Code demands that debtors seeking to adjourn bankruptcy must provide all up-front costs associated with adjournment. This may prove cumbersome for a struggling entity. For example, these costs include the administrative receiver's retainer and because these costs are established by the court on a case-by-case basis and depend on a case's complexity, this payment may prove impossible. Thus, the costs for a receiver (or receivers) could be large. Here, legislation should look to Chapter 11 and note that costs to the debtor may be treated within the reorganization plan. While there are upfront statutory filing fees to be paid to the court, the very purpose of Chapter 11 is to give the debtor the time and ability to repay its debts. By forcing the debtor to provide the Turkish court's treasury with possibly a large sum of money at the beginning of a case, this undoubtedly hinders its ability to recover and defeats the purpose of adjournment.

3) Debtor Powers:

a) When a debtor seeks adjournment, the court will either divest all powers from the entity's management body and place them into the administrative receiver's hands or will allow the entity's management to stay in place, but make their actions answerable to the receiver. In contrast, the U.S. Code (usually) allows the D.I.P. to maintain control over the insolvent entity. Because the D.I.P. is answerable to the U.S. Trustee, the creditors, and the court, this oversight prevents mismanagement. Keeping the D.I.P. lowers costs and maintains the business, as the debtor knows how the business functions and what decisions must be made in the ordinary course of business. By dictating that the D.I.P. must seek court approval for actions beyond the ordinary course of business, the U.S. Code assures that all parties are protected.

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Keeping the debtor in control during adjournment would likely lower the costs, lessen the court's responsibilities, and increase the likelihood of success.

b) Where the powers of the D.I.P., trustee, or examiner are clearly outlined by the U.S. Code, there is great ambiguity in the powers of the administrative receiver. For example, the U.S. Code states that an examiner may conduct investigations of the debtor and that a D.I.P. (or trustee) may avoid transfers, seek additional credit, use, sell, or lease property, or, with court approval, use cash collateral. However, the Turkish Code is largely void in what the administrative receiver may do with or without court approval. And, while the adjournment process is presently much shorter than typical Chapter 11 reorganizations, the ability to pursue these powers may be essential to a successful recovery. Thus, it would behoove Parliament to amend Article 179 to address these powers and state clearly what an administrative receiver may do, with or without court approval.

4) Creditor Involvement: Creditor power and involvement in adjournment of bankruptcy drastically differs from creditor action in Chapter 11 reorganization. Where creditor presence is almost nonexistent in Turkish recovery, creditors involved in U.S. reorganization are present every step of the way. Perhaps because the recovery timeline is short, the Parliament did not see the need to have creditors control the plan or be influential players. However, one of the main reasons Chapter 11 plans succeed is because, to confirm a plan, all interested parties must be "on board" with the plan's treatment of claims. Where creditors have great express power in Chapter 11, creditors in Turkish recovery have very little influence and rely on the administrative receiver to assure their adequate protection. Here, if the adjournment of bankruptcy process were extended in time, creditors could be similarly prioritized and bestowed with powers to accept or reject proposed plans and assure their own protection.

5) Modification and Plan Confirmation: Under the Turkish Code, a debtor is limited in the number of permitted plan modifications. The debtor may modify a plan once prior to a court adjourning bankruptcy and once more prior to an extension (if granted). This is not conducive to recovery. Businesses change every day and a plan for one day may not encourage recovery on

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another day. The U.S. Code accounts for these changes in circumstance and provides the D.I.P. with statutory rights to request plan modification. With proper notice to all parties and a court hearing, a Chapter 11 debtor may modify a plan prior to confirmation, after acceptance, and even post-confirmation. This process assures that creditors are notified and provided with objection power in the event they feel the proposed modification negatively impacts their rights. In Turkey, failure of a bankruptcy adjournment equates to liquidation. This drastic result should incentivize Turkish legislation to modify Article 179 to provide for "good faith" recovery plan modifications with the purpose of aiding struggling cooperatives and corporations.

6) Failed Plans: As made plain, failed bankruptcy adjournment in Turkey equates to liquidation and death to the insolvent entity. However, in the United States, the U.S. Code provides the debtor with several options. First, and similar to the Turkish Code's finding that an entity is bankrupt and will be liquidated, Chapter 11 may be converted to Chapter 7 liquidation. However, conversion to Chapter 12 or 13 may be a viable option to keep the case alive if the debtor satisfies the statutory requirements and the court finds that it is in the best interests of the creditors to convert to one of these Chapters. Further, the court may dismiss the case. Depending on the circumstance of dismissal and the statutory timeline for filing multiple cases, the debtor may file another case, in search of a fresh start. Obviously, these options are less drastic than liquidation. While Turkish law provides the debtor or creditor with an appellate procedure to protest the initial court's decision on adjournment, this is not efficient. As a general rule, appellate cases take time; time that an insolvent entity likely does not have. Thus, a probable result to an appeal is the entity losing its viability and being forced to liquidate before a decision is rendered.

To conclude, in a time of globalization, nations cannot ignore the economic needs of their domestic and international institutions. A sound bankruptcy law is a necessary step towards assuring a healthy economy. With the amendments to the Turkish bankruptcy law, particularly in 2003 and 2016, Turkish Parliament acknowledged this void in their bankruptcy law and amended its code in hopes of pursuing a legal scheme that fairly and efficiently served its citizens. These amendments improved the Turkish law because they

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gave creditors a voice, bestowed greater judicial power upon the court, demanded a more inclusive recovery plan, and prevented the indebted entity from exploiting time extensions to delay debt obligations.[166]

While these amendments to the adjournment of bankruptcy were necessary, much still needs to be done to make the process competent, impartial, and successful for both debtors and creditors. Thus, the U.S. Code and Chapter 11 reorganization may act as an excellent template for many nations, including Turkey, to adopt when building upon and developing a recovery or reorganization process. Clear from the comparison of the two codes, the U.S. Code could positively influence the Turkish Code in the areas of debtor definition, debtors' duties, and adjustments in the requirements of bankruptcy adjournment.

This study sought to illustrate the benefits that the U.S. Code may provide for developing economies. It is clear from recent legislation that Turkish legislators strive to build a stronger bankruptcy framework. By looking abroad, and adopting other successful legal schemes, Turkish bankruptcy law will be fortified and this strength will undoubtedly encourage domestic economic growth and enhance the State's international presence.

[166] *See supra* notes 16-18: Discussion of Article 179.

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The Term "Local Authority" in the European Charter of Local-Self Government: Different Meanings Lead to Different Implementation

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TABLE OF CONTENTS: 1. Introduction; 2. The Charter's Term; 3. The Charter's Provisions; 4. The Historical Processes and the Documents; 5. The Dictionary and Translating; 6. The Provisions of the European Outline Convention on Transfrontier Co-Operation Between Territorial Communities or Authorities; 7. Information about Reservations and Declarations and Domestic Legislation of Member States of the Council of Europe; 8. Conclusions.

ABSTRACT: The article takes a critical look at the meaning of the term "local authority" which is one of the main terms of the European Charter of Local-Self Government and considers the question: "can the meaning of the term "local authority" change the essence of local democracy in Europe?".

KEYWORDS: *Law; Public law; Local Autonomy; Local Authority; Local Self-Government; Local Government; European Charter of Local Self-Government*

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1. INTRODUCTION

This article is prompted by three considerations:

1) A number of European Countries which are member states of the Council of Europe have signed the European Charter of Local Self-Government[1] and have given different meanings to the term "local authority".

2) The Charter gave all member states of the Council of Europe which have signed this document the possibility to autonomously interpret and implement meanings, principles and terms.

3) The Charter in the author's opinion has inconsistencies in the text with the terms.[2]

Thus, this article is about correcting the meaning of the Charter's term "local authority". The paper includes some questions about the problems of the different terms' translation and of understanding the principles and implementation of the Charter in domestic legislation of the member states of the Council of Europe.

2. THE CHARTER'S TERM

Local democracy is the main part of any democratic regime in the World.[3] The main document of the local democracy in Europe is the European Charter of Local Self-Government (hereinafter "the Charter"), which includes basic principles of local self-government.

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[1] Council of Europe, European Charter of Local Self-Government, Oct. 15, 1985, E.T.S. No. 122. Was entered into force on September 01, 1988.
[2] M. Pittsyk et al., Pryntsypy Evropeys' koyi khartii mistsevoho samovryaduvannya [Principles of the European Charter of Local Self-Government] 136 (2000).
[3] Sergiy Panasyuk, Aktualni problemy rozuminnya, vyznannya ta realizatsii pryntsypu mistsevoho samovryaduvanniya v zakonodavstvi Ukrainy [Actual problems of understanding, recognition and implementation of the principle of local self-government in the legislation of Ukraine], Visnyk tsentralnoi vyborchoi komisii [Bull. of the Cent. Election Comm'n of Ukr.], Dec. 2 2013, at 70, 73.

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The Charter[4] was opened for signature on 15 October 1985, but scholars from different European Countries are still discussing about its essence.[5]

One of such discussions concerns the meaning of the Charter's term "local authority".

It is one of the main terms of the Charter and its correct understanding is very important for the correct implementation of the Charter.

Member states of the Council of Europe have intrerpreted the term "local authority" differently. Some of its meanings include: "local communities", "local councils", "local government bodies", "local group of people" and others.[6]

To understand the reasons and arguments of why so many versions of the term "local authority" exist, we need to understand a few key details.

Firstly, we should analyze the text of the Charter. Then, we should proceed to a reconstruction of the historical documents, the drafting procedure, and the adoption of the Charter. Finally, we should examine the Member States' information about the adoption of the Charter and their domestic legislation.

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[4] The European Charter of Local Self-Government was drawn up within the Council of Europe by a committee of governmental experts under the authority of the Steering Committee for Regional and Municipal Matters on the basis of a draft proposed by the Standing Conference of Local and Regional Authorities of Europe. 47 countries (member states of the Council of Europe) have signed the Charter.

[5] See Pittsyk et al, *supra* note 2.
Nataliya Kaminskaya, Mistseve samovryaduvanniya: teoretyko-istorychnyy i porivniialno-pravovyy analiz [Local Self-Government: Theoretical-Historical and Comparative-Legal Analysis: Teaching Manual]229 (2010).
Vyacheslav Maklakov, Evropeyskaya Khartiya Mestnoho Samoupravleniya [The European Charter of Local Self-Government], in Reformy mestnoho upravleniya v stranakh Zapadnoi Evropy [Local Government Reforms in Western European Countries] 111-124 (1993).
A. Zamotaev, Mestnoe samoupravleniye kak element hosudarstvennoho ustroystva [Local self-government as an element of the state system], Rossiyskayayustitsiya [Russian Just.], no. 6, 1996, at 17.
Oleg Tarasov, Yuriy Dmitriev, Evropeyskaya khartiya mestnoho samoupravleniya i rossiyskoe zakonodatel'stvo [European Charter of Local Self-Government and Russian Legislation], Pravo y zhyzn [Right and life], no. 12, 1997, at 162-172.

[6] Comm. of Ministers, *Explanatory Report to the European Charter of Local Self-Government,* E.T.S. No. 122 (1985).
Eur. Conf of Local Authorities., *Resolution 64 (1968) on a Declaration of Principles of local autonomy,* 7th Sess., (1968).
Conf. of Local and Regional Authorities of Europe, Resolution 126 (1981) on the principles of local self government, 16th Sess., (1981).

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3. THE CHARTER'S PROVISIONS

The main part of any legal document is the preamble. In the preamble, we can find the main principles of the document and the essence of the terms, as laid down by its authors.

In paragraph 4 of the Charter's Preamble is noted: "Considering that the local authorities are one of the main foundations of any democratic regime".

As we know, the terms "democracy" and "democratic regime", first of all mean rule of the people.[7] In this case, it would mean – rule of the people who live in a local area.

Paragraph 5 confirms the Author's point of view and states that: "Considering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe".

So, citizens have basic and inalienable right to participate in the local self-government.

Paragraph 7 of the Preamble of the Charter denotes that: "the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen".

It is known the term "citizen" has at least two meanings: "a person who is a member of a particular country and who has rights because of being born there or because of being given rights" and "a person who lives in a particular town or city".[8]

Also, we should notice that the term "citizens" should be analyzed in two aspects: "as a group of people who have electoral rights" and "as a group of people without such rights".

Next question is: if the term "local authority" is not citizens, does it mean that local authority is a local body or local council?

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[7] DEMOCRACY AND THE RULE OF LAW (José María Maravall & Adam Przeworski eds., 2003).
[8] THE CAMBRIDGE DICTIONARY: https://dictionary.cambridge.org/dictionary/english/citizen.

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The Preamble of the Charter (in its paragraph 9) says that: "this entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfillment".

If the local authority can have decision-making bodies which are the councils, the term "local authority" can't mean the council.

Maybe, in the Charter (in paragraph 7 of the Preamble) it is written about citizens like people who don't have electoral rights in that local area and just live there.

The author thinks that the term "local authority" can mean a group of people who live in local area and have electoral rights. It is very important because not every person who lives in a local area can elect or be elected. Why are electoral rights so important? Electoral rights give people real possibilities to influence local policies and local affairs.

However, as we know from paragraph 5 of the Charter's Preamble, citizens have rights.

Next provisions might be helpful in finding the solution.

Article 3 (1) of the Charter declares that: "the local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population".

The local authority realizes its right and its ability in the interests of the local population.

First, as we know from paragraph 5 of the Charter's Preamble, citizens have the right to participate in the conduct of public affairs. So, local self-government should be the citizens' right.

We can also say that the local authority is not the local population.

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So, what does the term "local population" mean?

The local population is the number of people who live in a local territory (area).

The author thinks that the term "local population" means the group of people who live in local area and don't have electoral rights.

Article 3(2) denotes that: "the right of local authorities shall be exercised by councils or assemblies".

As we can see, the basic right of local authorities on local self-government can be realized by elected bodies. This provision, as we thought, proves that the local authority can't be neither councils nor assemblies.

Article 4 (3) of the Charter denotes that: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen".

If the local authority is neither local bodies nor citizens, what is a local authority?

Article 4 (4) of the Charter considers another authority the central authority, which can't be group of the people.

Article 5 of the Charter denotes that: "Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute".

Local authorities have boundaries and should consult with local communities. This provision is not about local authorities like the group of people (local communities).

Article 10 of the Charter identifies the possibility for local auhoroties to co-operate and establish associations.

As we can see, the Charter's provisions can't give a clear answer about the meaning of the term "local authority".

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The author thinks that if we want to understand the essence of the meanings or terms of any legal document we should analyze the historical processes and documents about the adopting procedure of the text.

4. THE HISTORICAL PROCESSES AND THE DOCUMENTS

There are many historical documents which can help us understand the essence of the Charter and the meaning of its terms.

Before we start to analyze historical documents, we should remember that most of the documents of the Council of Europe were done in English and French (both texts are equally authentic), and that in the Charter the term "local authorities" has French synonym "*collectivités locales*".

First of all, we should analyze two historical documents which in the author's opinion can help us understand the essence of the term "local authority".

These documents were mentioned in the Explanatory Report[9] to the Charter: Resolution 64 (1968)[10] of the European Conference of Local Authorities and Resolution 126 (1981)[11] of the Conference of Local and Regional Authorities of Europe.

In Resolution 64 (1968) the Declaration of Principles on Local Autonomy was adopted which was the historical prototype of the Charter.[12] The principles of this Declaration proclaimed the rights of local communities:

> The Conference,
>
> Convinced that one of the essential guarantees of the rights and freedoms of man lies in a guarantee of the rights and freedoms of local communities;

[9] COMM. OF MINISTERS, *Explanatory Report to the European Charter of Local Self-Government*, E.T.S. No. 122 (1985).
[10] EUR. CONF OF LOCAL AUTHORITIES., *Resolution 64 (1968) on a Declaration of Principles of local autonomy,* 7th Sess., (1968).
[11] CONF. OF LOCAL AND REGIONAL AUTHORITIES OF EUROPE, *Resolution 126 (1981) on the principles of local self government,* 16th Sess., (1981).
[12] These documents have same principles and Ideas.

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> Whereas the extension of the activities and prerogatives of individual states and the European Communities or international institutions increase the necessity for such a guarantee;
>
> Whereas an organised Europe must comprise a number of common rules legally ensuring local autonomy in the same way as the principal human rights are already guaranteed,
>
> Adopts the following Declaration:.

In Resolution 64 (1968) we can also see that the term "local communities" was used which has French synonym "*collectivités locales*". However, in the Charter the French term "collectivités locales" has synonym"local authority".

Also, parahraph 1 of the Declaration of Principles on Local Autonomy denotes: "the autonomy of a local community is the right of that community to manage under its own responsibility its own affairs with a freely elected Assembly".

Considering that the Declaration of Principles on Local Autonomy is a prototype of the Charter and that the provision under paragraph 1 is so similar to the provision under Article 3 of the Charter, we can tell that the term "local community" is historical synonym of the term "local authority".

However, in 1981, Resolution 126 was accepted which uses the terms "local authorities" (which has the French translation *"collectivités locales"*) and "local community" (which has the French translation *"communauté locale"*): "Whereas, in the conditions of the modern state, the genuine autonomy of local authorities is an indispensable element of democratic government and essential to safeguarding the rights and liberties of the citizen in his local community".

As we can see, the different English terms (the term "local communities" in Resolution 64 (1968) and the term "local authorities" in Resolution 126 (1981)) have one and only French translation *"collectivités locales*".

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Also, the provisions under Resolution 126 are linked to the Recommendation 615[13] which offered a new edition (version) of the Declaration of Principles on Local Autonomy and has the same provision as Resolution 64: "The autonomy of the local communities is the right of those communities to manage under their own responsibility their own affairs through freely elected assemblies".

The Declaration of Principles on Local Autonomy which was in Recommendation 615 uses the term "local community" which is translated into French with "*collectivités locales*".

Recommendation 615 is linked to another document:

> Recalling its Resolution 410 (1969) approving the principles contained in Resolution 64 (1968) adopted by the European Conference of Local Authorities, and instructing the Committee on Regional Planning and Local Authorities to prepare a joint text meeting the considerations both of the Consultative Assembly and of the European Conference of Local Authorities.

Resolution 410[14] states: "Recalling once again that the political structures of European civilisation and its fundamental liberties have their deepest and oldest roots in the autonomy of local communities".

It uses the term "local communities" (autonomy of local communities) with new French synonym "*autonomies locales*".

This is a very interesting fact, because Resolution 410 (1969) is the middle document between Resolution 64 (1968) and Recommendation 615 (1970), but uses a French word to express the term "local communities".

To understand what happened we searched for later documents[15] and found an interesting Report[16] of the Mr. Ziyad Ebuzziya[17].

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[13] EUR. PARL. ASS., *Declaration of Principles on Local Autonomy*, 19th Sess., Recc. 615 (1970).
[14] EUR. PARL. ASS., *Declaration of Principles on Local Autonomy*, 7th Sess., R DOC. NO. 2560 (1969).
[15] Resolution 20, available at
http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta52/ERES20.html
Motion for a resolution, available at
http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=307&Language=EN
Introducing Council of European Municipalities and Regions, available at http://www.ccre.org/en/article/3_2
Report of the Committee on Rules of Procedure, Immunities and Institutional Affairs, available at http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=411&Language=EN
Report of the Committee on Regional Planning and Local Authorities, available at

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We found that there was a problem with the terms in Report's provision all the time.

First, we have analyzed the title of the Report: "Inquiry into the national or international bodies connected with local government and examination of the best means whereby these bodies and the local authorities themselves may help in the propagation of the European idea".

After analyzing the French version we saw that the term "local government" is translated in French with "*collectivités locales*" and the term "local authorities' with "*pouvoirs locaux*".

But the languages discrepancies were not just in these examples.

In paragraph 1 of the Explanatory Memorandum of the Report the terms "local authorities" and "municipal units" (in its English version)[18] have the same French synonym "*collectivités locales*": "L'Europe en construction ne peut trouver ses fondements effectifs que dans les éléments sains qu'elle renferme. Âucun effort profond de renouvellement n'aura lieu qui n'utilisera l'une, de ces cellules si vivantes que constitue toujours en Europe la collectivité locale et, la plus vivante des *collectivités locales*, la commune" (in French version).

In paragraph 2 of the Explanatory Memorandum, we can see that the municipal unit and Commune are local authorities, and that the mayors, deputy mayors, municipal and provincial councillors are local representatives, not local authority.

Also, paragraph 3 (of the Explanatory Memorandum) talks about the powerful support of the local authorities and uses the French equivalent "*pouvoirs locaux".*

If we are talking about the meaning of the terms then we should analyze translations and dictionary meanings.

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http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=532&lang=en.

[16] EUR. PARL. ASS., *Inquiry into the national or international bodies connected with local government and examination of the best means whereby these bodies and the local authorities themselves may help in the propagation of the European idea*, 5th Sess., DOC. NO. 173 (1953).

[17] The member of the Committee on Regional Planning and Local Authorities of the Parliamentary Assembly of the Council of Europe.

[18] The new Europe can only be based effectively on the soundest of its existing elements. There can be no far-reaching renovation without recourse to that most vital and consistent element in the body social: the local authority, and that most vital of local authorities: the municipal unit or Commune.

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5. THE DICTIONARY AND TRANSLATING

The Cambridge Dictionary[19] says:

1) Self-government - the control of a country or an area by the people living there, or the control of an organization by a group of people independent of central or local government.

2) Local government - the control and organization of towns and small areas, and the services they provide, by people who are elected by those living in the area.

3) Local authority - the group of people who govern an area, especially a city.

We can draw the conclusion that the term "local authority" probably means the group of people. Is it a group of people who live in a local area? Should they be citizens? Can this group of people take part in local elections?

Also, if we try to translate the term "local authority" into French it will be "*autorité locale*".

If we try to translate the term "local community" into French it will be "communauté locale".

But if we try to translate French term "collectivité locale" into English it will be both "local community" and "local authority".

According to the Oxford Dictionary,[20] local authority means an administrative body in local government.

There is no correct answer. The reason for that lies in the different meanings of the terms and the different ways member States of the Council of Europe have implemented the Charter.

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[19] THE CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/.

[20] THE OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/local_authority.

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6. THE PROVISIONS OF THE EUROPEAN OUTLINE CONVENTION ON TRANSFRONTIER CO-OPERATION BETWEEN TERRITORIAL COMMUNITIES OR AUTHORITIES

The author thinks that to understand the term "local authority" we should analyze the provisions of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities[21] (hereinafter the Convention), because the Convention promotes European co-operation between local authorities in a number of specifically local fields recognised as such in national law.

Article 2 (2) denotes:

> For the purpose of this Convention, the expression "territorial communities or authorities" shall mean communities, authorities or bodies exercising local and regional functions and regarded as such under the domestic law of each State. However, each Contracting Party may, at the time of signing this Convention or by subsequent notification to the Secretary General of the Council of Europe, name the communities, authorities or bodies, subjects and forms to which it intends to confine the scope of the Convention or which it intends to exclude from its scope.

The Explanatory Report to the Convention denotes: "This paragraph specifies the Convention's scope regarding, first of all, the bodies concerned by transfrontier co-operation at local and regional level",[22] has an important role in understanding the provisions of the Convention. Here, the criterion of the Convention's applicability is the concept of regional or local function. "Territorial communities or authorities" was chosen as a term for covering the various potential cases without having too close a connection with the existing law of any one member State[23].

The term "territorial" has a geographical connotation, denoting powers covering a smaller area than those of the State. It should not be interpreted as referring only to "territorial communities", a precise concept in the law of

[21] Council of Europe, European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, May 21, 1980, E.T.S. No. 106.
[22] COMM. OF MINISTERS., *Explanatory Report to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities*, E.T.S. No. 106 (1980).
[23] Article 2 of the Convention.

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some member States which is too narrow for the Convention's purposes. It is intended to embrace the diversity of systems that characterize the administrative organisations at both the local and regional level in the States concerned.

However, the general definition adopted for the Convention is subject to certain limits:

Paragraph 2 of Article 2 also provides that "a State may define in so far as it is concerned, either positively (by drawing up a list) or negatively (by excluding certain bodies or authorities from co-operation), the substance of the concept of territorial authority or community. It is thus always possible for a State to specify, for example, which of its regions fall within the Convention's scope and which ones are excluded there from".

As we can see, the Convention gives large possibilities for member States of the Council of Europe to give different meanings to the terms "territorial communities" or "territorial authorities".

Also, the terms "territorial communities" or "territorial authorities" and "local authority", in the author' opinion, are the same.

Such opinion is proved by Recommendation 470 (1966)[24] which includes Draft Convention on European co-operation between local authorities and has provision: "Considering that co-operation between local authorities of different European countries is desirable and has indeed become a necessity in certain frontier zones".

The above provisions, in the author's opinion, give us some understanding that in different States and different legislations, including differences in language, we could use the terms in different ways and with different understandings.

We will now analyze the legislation of the member States of the Council of Europe and the meanings which these States give to the term "local authority".

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[24] EUR. PARL. ASS., *Draft Convention on European co-operation between local authorities*, 15th Sess., DOC. NO. 2109 (1966).

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7. INFORMATION ABOUT RESERVATIONS AND DECLARATIONS AND DOMESTIC LEGISLATION OF MEMBER STATES OF THE COUNCIL OF EUROPE

Article 16 (1) of the Charter declares that: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Charter shall apply".

If we analyze the information about the reservations and declarations[25] for the Charter from member States of the Council of Europe and if we analyze the implementation processes and domestic legislation of the different countries, we will discover many interesting details. In the author's opinion, countries have different understanding of the terms and principles of the Charter[26].

We will now analyze the information about the reservations, declarations and domestic legislation of different member States of the Council of Europe.

Ukraine ratified the Charter without any reservation. There is no information about declarations, denunciations, derogations from Ukraine on the official website of the Council of Europe.

The Ukrainian Parliament ratified the Charter in 1997.

However, Ukraine has a problem with the translation of the term "local authority" and its meaning in domestic legislation.

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[25] Council of Europe, European Charter of Local Self-Government, Oct. 15, 1985, E.T.S. No. 122.

[26] Sergiy Panasyuk, Aktual'ni problemy tlumachennya terminu «implementatsiya» v konteksti yakisnoho vprovadzennya pryntsypiv Evropeĭs'koyi khartiyi mistsevoho samovryaduvannya v zakonodavstvo Ukrayiny [Actual Problems of Understanding of the term "Implementation" in the context of correct realization of the principles of the European Charter of Local Self-Government in the Ukrainian Legislation], Naukovyĭ visnyk Akademiï munitsypal'noho upravlinnya [2 Vol. J. Acad. Mun. Mgmt],192, 192-198 (2012). Sergiy Panasyuk, Zakhyst terytorial'nykh kordoniv mistsevykh spivtovarystv: realii ta perspektyvy implementatsii pryntsypu Evropeyskoyi khartii mistsevoho samovryaduvannya v zakonodavstvo Ukrayiny [Protection of territorial boundaries of local communities: realities and prospects of implementation of the principle of the European Charter of local self-government in the legislation of Ukraine], Derzhava i pravo: Zbirnyk naukovyx prats'. yurydychni i politychni nauky, [St. and L.: Collection Sci. Works. Legal and Pol. Sci], no. 62, 2013, at 459-466.

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In the official Ukrainian translation[27] of the Charter the term "local authority" means "organs of local self-government" (local self-government bodies).

However, if we analyze the Act of Local Self-Government in Ukraine [28], we will not find what "organs of local self-government" (local self-government bodies) means.

The term "local authority" does not have detailing in the Ukrainian legislation.

On the other hand, in the Act of Local Self-Government in Ukraine[29], for example, we can find that local councils are representative organs of local self-government (local self-government bodies). This is confirmed in Article 140 of The Constitution of Ukraine[30].

This brings us to a question: does the term 'local authority' mean the organ of local self-government (body of local self-government) or local council?

The answer is neither.

According to Article 2 of the Act of Local Self-Government in Ukraine and Article 140 of The Constitution of Ukraine the local self-government is the right of the territorial community (citizens of local area).

If we compare Article 3(1) of the Charter with Article 140 (1) of The Constitution of Ukraine, we can draw the conclusion that local self-government relates to the right and the ability of local authorities (which are called in Ukraine "territorial communities").

Furthermore, according to Article 140 of The Constitution of Ukraine the territorial community creates the organs of local self-government (local self-government body). Such "organs of local self-government" were translated into "local authority" in the Ukrainian text of the Charter.

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[27] Yevropeys'ka khartiya mistsevoho samovryaduvannya [European Charter of Local Self-Government].
[28] Local Self-Government in Ukraine, 1997, No. 280/97-BP, Acts of Parliament, 1997 (Ukraine).
[29] *Id.*
[30] CONSTITUTION OF UKRAINE, 1996, No. 254к/96-BP, Acts of Parliament, 1996 (Ukraine).

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The problems with translating the term "local authority" were denoted in the Report on Compliance of the Ukrainian Legislation with the Principles of the European Charter for Local Self-Government[31]:

> Comparison of the various linguistic versions of the Charter may create some difficulties for the interpretation of the Charter. For example, where the English version refers to "local authorities", the French version refers to "*collectivités locales*"; in the French legal language, "authority" is usually linked with administration, rather than with local government (with its political meaning). Where the English version refers to "powers and responsibilities", the French version uses the word "competence". To describe the matter of the activity of local government, the English law makes use of the words "function", "powers" and "duties". Local self-government, as the basic concept of the Charter is translated in the French version as "*autonomie locale*", whereas French law considers this expression as equivalent to the constitutional concept of "libre administration des *collectivités locales*", currently used in the decisions of the Constitutional Council. In French legislation, there is no difficulty with the expression "territorial community"; it is reflected in the Charter by the expression "collectivité locale", as the subject of the self-government rights. This is even more so in Sweden, where the Constitution states that the citizens exercise their sovereignty rights also at the municipal level when they form the local government bodies (chapter 1, article 1). On the contrary, in English law, the councils, not the community, are legal subjects of self-government rights, because they are conferred upon them by parliament. A similar position, although with differences, is followed in Russia and in Ukraine, where not only the councils, but also all local government bodies, including the administration (in the Russian law of 2003) are legal subjects.

[31] Directorate General of Democracy and Political Affairs, *Report on Compliance of the Ukrainian Legislation with the Principles of the European Charter for Local Self-Government,* DPA/PAD 1/2010 (July 30, 2010) available at http://www.slg-coe.org.ua/wp-content/uploads/2012/11/CoE-Report-on-Compliance-of-the-Ukrainian-Legislation-with-the-Principles-of-the-European-Charter-for-Local-Self-Government_2010.pdf

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The other example is Montenegro. Article 1 of the Law on Local Self-Government of the Republic of Montenegro[32] states that: “Local self-government includes the right of citizens and local self-government bodies to regulate and administrate, within the limits of the law, certain public and other affairs based on their own responsibility and in the interest of the local population”.

Then, the term “local authority” in Montenegro means both “citizens” and “local self-government bodies”.

If we analyze the information about reservations and declarations for the Charter of the French Republic we will discover some interesting details: “The French Republic considers that the provisions of Article 3, paragraph 2, must be interpreted as giving to the States the possibility to make the executive organ answerable to the deliberative organ of a territorial authority”.

The Constitution of the French Republic distinguishes three subjects “executive organ”, “deliberative organ” and “territorial authority”.

Article 72 (1) of the Constitution of the French Republic says that: “The territorial communities of the Republic shall be the Communes, the Departments, the Regions, the Special-Status communities and the Overseas Territorial communities”.

The French version of the term “territorial communities” is “collectivités territoriales”.

Also, Article 72 (2) of the Constitution of the French Republic affirms: “In the conditions provided for by statute, these communities shall be self-governing through elected councils and shall have power to make regulations for matters coming within their jurisdiction”.

Then, we can draw the conclusion that territorial communities are not elected councils.

[32] Law on local self-government, Official Gazette of Montenegro, No. 42/2003, 28/2004, 75/2005, 13/2006 and Official Gazette of Montenegro, No. 88/2009 and 3/2010.

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If we translate the terms "collectivités territoriales" and "*collectivités locales*" we will have one translation "local authorities".

If we analyze the information about reservations and declarations for the Charter of Ireland[33], we can see that Ireland intends to confine the scope of the Charter to the following categories of authorities: county councils, city councils, town councils. So, in Ireland the term "local authority" means councils.

It is proven by Local Government Act (2001)[34] which denotes that "local authority" means: a county council, a city council, a town council.

The United Kingdom in its information about reservations and declarations[35] for the Charter denotes that it intends to confine the scope of the Charter to the following categories of authority:

For England – county councils, district councils, London borough councils and the Council of the Isles of Scilly.

For Wales – all councils were constituted under Section 2 of the Local Government (Wales) Act in 1994.

For Scotland – all councils were constituted under Section 2 of the Local Government (Scotland) Act in 1994.

The term "local authority" in the United Kingdom means also a council.

In Switzerland, as we can see from its information about reservations and declarations for the Charter, the term "local authority" means local bodies: "the Charter shall apply in Switzerland to the political communes ("Einwohnergemeinde"/comuni politici)".

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[33] Reservations and Declarations for Treaty No.122 - European Charter of Local Self-Government, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122/declarations?p_auth=VD1z2dZK.
[34] Local Government Act of Ireland, No. 37, (2001).
[35] Reservations and Declarations for Treaty No.122, *supra* note 34. Reservations and Declarations for Treaty No.122, *supra* note 34.

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8. CONCLUSIONS

There are many questions about the meanings of the terms and about the implementation of the Charter.

The reasons are attributed to the countries' different cultures, different histories and different meanings of the loca democracies[36].

Then, there is no correct answer about the meaning of the term "local authority" and the main question is: should there be one?

One of the aims of the Charter was to draft a single document which included principles of local democracy.

The Charter tried to consolidate all European countries and to create European standards of local self-government. An effort that ended in a success.

However, the Charter is not an order, it just tries to connect different countries and to spread the "European idea" of good local self-government.

There is no ideal version of local democracy or ideal definition of the term "local authority".

Maybe now experts should limit themselves to making corrections about inconsistencies or contradictions with one aim in mind: "to create the best local democracy system and to provide the best quality of life in the local area". It is not about the meaning of some term or its translation, it is about good local government across Europe and all over the world.

[36] The member states of the Council of Europe, which have signed the Charter.

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The Transfer of Going Concern in Italy: Who Pays the Trade Debts?

GREGORIO SALATINO†

TABLE OF CONTENTS: 1. Introduction. Article 2560, Paragraph 2, of The Italian Civil Code; 2. The Sharing of the Liability for Trade Debts Pertaining to the Transferred Going Concern Between the Transferor and the Transferee; 3. The Requirements for the Joint Liability of the Transferee; 4. The Case in Which the Transferor Did not Keep Separate Accounts Regarding the Trade Debts Pertaining to Different Business Units; 5. Conclusions.

ABSTRACT: Article 2560, paragraph 2, of the Italian Civil Code sets forth a specific regulation of the trade debts in the context of the transfer of a going concern. Such provision of law seems apparently clear. However, case law and the scholars show that its actual applicability has raised several issues over the years. This paper examines some of these issues, especially focusing on the interpretation followed by the majority of case law, with the specific aim to give, once for all, some guidelines to the practitioners.

KEYWORDS: *Going Concern; Trade Debts; Transfer; Italy*

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1. INTRODUCTION. ARTICLE 2560, PARAGRAPH 2, OF THE ITALIAN CIVIL CODE

According to Italian Law,[1] a going concern is the complex of assets organized by the entrepreneur for the sake of performing a certain business activity.[2] The Italian Civil Code contains certain provisions that, setting forth a derogation to the general principles of civil law, aim at favouring the transfer of going concerns.

In this respect, the transferee of the going concern automatically steps into the commercial agreements pertaining to the going concern, with the exclusion of those agreements having a "personal nature" (therefore, in a derogation of general principles of civil law, it is not necessary to request to each third party contractor the consent to the assignment of the relevant agreements); the assignment of receivables pertaining to the going concern becomes effective towards all the third party debtors since the registration of the transfer of the going concern with the Company's Register (therefore, again in derogation of the general principles of civil law, it is not necessary to notify to each third party debtor the transfer).

A special regulation has been set forth also in relation to trade debts pertaining to the transferred going concern. This paper will specifically focus on this topic.

According to Article 2560 of the Italian Civil Code, the transferor is not released from the trade debts pertaining to the transferred going concern that have incurred prior to the transfer, unless the creditors have given their consent. However, if the creditors have not released the transferor, the latter will not be the only entity liable for such debts.

According to Article 2560, paragraph 2, of the Italian Civil Code the transferee becomes jointly liable with the transferor for the trade debts

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[1] *See* CODICE CIVILE [C.c.] [CIVIL CODE] art. 2555.
[2] The scholars (see, e.g., GIAN FRANCO CAMPOBASSO, MANUALE DI DIRITTO COMMERCIALE [COMMERCIAL LAW MANUAL] 138 (4th ed. 2007)) and case law (see, e.g., Tribunale amministrativo regionale (TAR) Lombardy Milan, 24 Marzo 2011, n. 786, point out that the going concern is characterized by: (i) a group of tangible (or intangible) assets; (ii) to which the entrepreneur give an unitary purpose.

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pertaining to the transferred going concern, provided however that such debts are recorded in the mandatory accounting books.[3]

Consequently, by operation of law, the liability of the transferee is "added" to the liability of the transferor. The rationale of the above provisions is to assure the creditors that their receivables will not be prejudiced by the transfer of the going concern. The transferor might indeed transfer the going concern to an entity whose net worth is not enough to pay all the debts. In order to avoid such risk, Italian law provides, on the one hand, that the transferor is not automatically released from the debts; and, on the other hand, that also the transferee becomes liable. However, in order to lay down a protection in favour of the transferee (otherwise the transfer of going concern would be excessively burdensome for transferees), Italian law states that the transferee becomes liable only for those debts that have been recorded in the mandatory accounting books (and not also for the other debts not included in such books).

Indeed, the transferee, when purchasing a going concern, should be made aware of the precise amount of the debts it will become liable for.

Article 2560, paragraph 2, of the Italian Civil Code seems apparently clear. However, case law and the scholars show that the actual applicability of the provision at stake has raised several issues over the years.

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[3] Please note that art. 2560 of the C.c. applies neither to labour debts nor to tax debts. To such other debts apply other specific regulation. As far as labour debts are concerned, according to art.2112 of the C. c., the transferor and the transferee are jointly liable for all the receivables that the employees had at the time of the transfer of the going concern. Consequently, the transferee is liable for the labour debts, regardless whether such debts are recorded with the mandatory accounting books or not and even if the transferee was not aware of such debts (CAMPOBASSO, *supra* note 2, at 157). The aim of such regulation is to lay down a higher standard of protection for the employees (CAMPOBASSO, *supra* note 2, at 157). As far as tax debts are concerned, according to art. 14 of D.Lgs. n. 472/1997, G.U., the transferee is jointly liable with the transferor for any taxes and penalties due in connection with violations committed in the fiscal year in which the transfer of the going concern has occurred and the two preceding fiscal years as well as for any taxes and penalties issued and claimed in the same period even if related to violations committed in previous fiscal years. Such joint liability is however subject to the following restrictions: (i) it arises only if the transferor does not pay the taxes and penalties; (ii) the overall amount to be paid cannot exceed the value of the transferred going-concern; (iii) the transferee is jointly liable with the transferor only for the tax liabilities resulting from an certain certificate that is issued by the tax authority as of the date of transfer of the going-concern. According to the jurisprudence of the Italian Supreme Court (see e.g., Decision, 13 Luglio 2017, n. 17264) the afore-mentioned art. 14 of D.Lgs. n. 472/1997, G.U., is a "special provision" with respect to art. 2560, ¶2, C.c..

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In light of the above, the aim of this paper is to briefly point out the outcome of the interpretation of Article 2560, paragraph 2, of the Italian Civil Code, in order to give, once for all, some guidelines to the practitioners.

More in detail, this paper will deal with the issues of: (i) the sharing of the liability for trade debts pertaining to the transferred going concern between the transferor and the transferee; (ii) the requirements for the joint liability of the transferee; (iii) the case in which the transferor is transferring not the whole going concern but only a business unit and did not keep separate accounts regarding the trade debts pertaining such business unit to be transferred.

2. THE SHARING OF THE LIABILITY FOR TRADE DEBTS PERTAINING TO THE TRANSFERRED GOING CONCERN BETWEEN THE TRANSFEROR AND THE TRANSFEREE

As a preliminary remark, it is worth noting that Article 2560, paragraph 2, of the Italian Civil Code, does not specify if through the transfer of the going concern the trade debts are automatically transferred from the transferor to the transferee. Article 2560, paragraph 2, of the Italian Civil Code provides only that the transferee becomes jointly liable with the transferor for such debts.

The issue consists in understanding if, according to the interpretation of Article 2560, paragraph 2, of the Italian Civil Code, the debts remain upon the transferor or, by operation of law, are automatically transferred upon the transferee.

The consequences of one approach or the other are material.

If the debts are automatically transferred from the transferor to the transferee, should the transferor pay the creditors, it will have a right of recourse against the transferee.

However, if the debts are not automatically transferred from the transferor to the transferee (consequently, the debts remain upon the transferor), should the transferee pay the creditors, it will have a right of recourse against the transferor.

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The first approach was followed in the past by some case law.[4] However, currently the majority of case law and the scholars follow the second one.[5]

It has been clarified, indeed, that the joint liability provided for by Article 2560, paragraph 2, of the Italian Civil Code, consists in an assumption of liability by operation of law (accollo ex lege),[6] whereby, though the debts remain upon the transferor, in order to lay down a further protection in favour of the creditors, the transferee also will become liable for such debts. As a consequence, should the transferee pay the creditors, the transferee shall have a right of recourse against the transferor (on the contrary no right of recourse can be exercised by the transferor that has paid the relevant debts).[7]

It is worth specifying that according to case law and scholar's interpretation of Article 2560, paragraph 2, of the Italian Civil Code, the latter sets forth a regulation that is mandatory exclusively towards the creditors.

Consequently, the transferor and the transferee may derogate the above provision in their internal relationship and expressly agree that all or some of the debts will be transferred from the transferor to the transferee and/or the transferee will be liable for all or for some of the debts.

Such an agreement, however, will be enforceable only in the relationship between the transferor and the transferee, but not towards the third party creditors, which are always entitled to ask the payment of the debts both to the transferor and the transferee.

3. THE REQUIREMENTS FOR THE JOINT LIABILITY OF THE TRANSFEREE

According to Article 2560, paragraph 2, of the Italian Civil Code, the joint liability of the transferor and the transferee operates upon occurrence of one

[4] *See* Corte di Cassazione (Corte Cass.) (Supreme Court), 15 Febbraio 1979, n. 1001; see also Corte Cass., 25 Luglio 1979, n. 3723.
[5] *See, e.g.*, Corte Cass., 22 Dicembre 2004, n. 23780; Corte Cass., 3 Ottobre 2011, n. 20153; Corte Cass., 30 Giugno 2015, n. 13319; GIORGIO CIAN & ALBERTO TRABUCCHI, COMMENTARIO BREVE AL CODICE CIVILE [BRIEF COMMENT TO THE CIVIL CODE] 3363 (2014, 11th ed.).
[6] Colombo, *L'azienda [The Company]*, *in* III TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA [COMMERCIAL LAW AND PUBLIC ECONOMY LAW TREATISE] 159 (Francesco Galgano ed., 1979); CIAN, TRABUCCHI, *supra* note 5, at 3364.
[7] *See* Corte Cass., 22 Dicembre 2004, n. 23780.

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requirement: the trade debts pertaining to the transferred going concern need to be recorded in the mandatory accounting books. As pointed out, the requirement is necessary in order ensure that the transferee is made aware of the precise amount of the debts it will become liable for.

In this respect, the mandatory accounting books article 2560, paragraph 2, of the Italian Civil Code references are those books identified by article 2214 of the Italian Civil Code, *i.e.* the journal (*libro giornale*), the inventory ledger (*libro degli inventari*), and any other accounting entries required by the kind and the size of the company. As far as joint-stock companies and limited liability companies are concerned, the main mandatory accounting document required by these kind of companies are the financial statements of the transferor.[8]

According to the majority of the case law and the scholars, the registration of the debts with the accounting books is mandatory for the sake of the applicability of the joint liability according to Article 2560, paragraph 2, of the Italian Civil Code.[9] In this respect, as the provision must be interpreted restrictively[10] (and, consequently, only to the mandatory accounting books shall be made reference) it is excluded that the joint liability of the transferee may occur for those debts resulting through other sources, and regardless of the actual knowledge that the transferee may have had of such debts.[11] By way of example, it has been even excluded that the transferee might be liable in respect to debts resulting from the V.A.T. registers.[12]

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[8] *See* TAR Catanzaro, 17 Dicembre 2013, n. 1162; see also Tribunale (Trib.) (ordinary court of first instance) Bari, 3 Febbraio 2014.

[9] *See* Corte Cass., 26 Settembre 2017, n. 22418. As far as scholars are concerned, please see Tullio Ascarelli, Corso di diritto commerciale [*Commercial Law Course*] 352 (3rd ed. 1962); Angelo De Martini, *In tema di debiti relativi all'azienda* ceduta [*In terms of debts related to the sold company*], RIVISTA DEL DIRITTO COMMERCIALE [J. COM. L.], fascicolo [issue] 11- 12, 385 (1952); Colombo, *supra* note 6, at 147.

[10] *See* Corte Cass, 10 Novembre 2010, n. 22831.

[11] *See, e.g.,* Corte Cass., 30 Giugno 2015, n. 13319; Corte Cass., 10 Novembre 2010, n. 22831; Corte Cass., 3 Aprile 2002, n. 4726; Corte di Appello (App.) (ordinary court of appeal) Milano, 8 Marzo 2014, Società, 2014, 1001; Trib. Milano, 19 Aprile 2012, in Pluris; CESARE RUPERTO, LA GIURISPRUDENZA SUL CODICE CIVILE [THE JURISPRUDENCE ON THE CIVIL CODE] 3586 (2005); CIAN, TRABUCCHI, *supra* note 5, at 3364. More in detail, case law has pointed out that it is upon the creditor to give evidence of the registration of debt in the mandatory accounting books, see in this respect, Corte Cass., 20 Giugno 1998, n. 6173; Trib. Milano, 6 Novembre 2012, Dejure.

[12] *See* Italian Supreme Court, March 3, 1994, no. 2108. GIORGIO CIAN & ALBERTO TRABUCCHI, CODICE CIVILE E LEGGI COLLEGATE [CIVIL CODE AND RELATED LAWS] 4521 (2016).

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Please note, in this respect, that it has also been held that the transferee is not liable for the debts if the transferor has not kept the mandatory accounting books.[13]

In light of the above, if a debt pertaining to the transferred going concern does not result from the mandatory accounting books, the transferee will not be liable for such debt.

4. THE CASE IN WHICH THE TRANSFEROR DID NOT KEEP SEPARATE ACCOUNTS REGARDING THE TRADE DEBTS PERTAINING TO DIFFERENT BUSINESS UNITS

All the above principles would apply in case of transfer of a going concern. However, what happens if the transferor is not transferring the entire going concern but only a business unit?

The issue may be particularly material when the transferor has not kept separate accounts in respect to the various business units. In such an event, what should be the extent of the liability of the transferee?

The issue has been specifically addressed by the Italian Supreme Court in the decision June 30, 2015, no. 13319. In the case under the examination of the Italian Supreme Court, the creditor requested to the transferee the payment of a supply performed to the transferor before the transfer of the business unit. Though the debt arising out of said supply did not pertain to the transferred business unit, the Court of Appeal of Trieste, in the previous instance of the proceedings, held that the transferee was liable pro-quota also for such debt, as the transferor did not keep separate accounts for each business unit.

The Italian Supreme Court has overruled the decision of the Court of Appeal of Trieste, confirming, also in case of transfer of a business unit the principles examined above.

More in detail, the Italian Supreme Court has expressly pointed out the rationale under Article 2560, paragraph 2 of the Italian Civil Code, which is to

[13] CIAN, TRABUCCHI, *supra* note 5, at 3364.

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lay down a protection for both the third party creditors and the transferee, but not for the transferor.

Again, the Italian Supreme Court stressed that, as far as the creditors are concerned, the transfer of the going concern from a more reliable company to a less reliable one may cause a detriment to the guarantees of the creditors to have their receivables fulfilled; and, as far as the transferee is concerned, the transferee must always be put in the condition to be precisely aware of the amount of debts it will become liable for.

In order to comply with the rationale of Article 2560, paragraph 2 of the Italian Civil Code in respect to the protection of the transferee, it is necessary that also in case of transfer of a business unit, the transferee is liable only for those debts that, according to the mandatory accounting books, pertain exclusively to the transferred business unit. Consequently, the transferee will be liable neither for the debts that though registered with the mandatory accounting books do not specifically pertain to the transferred business unit, nor pro-quota for those debts that pertain to the overall management of the company.

In other words, if the transferor did not keep separate accounts, the transferee will be jointly liable, according to article 2560, paragraph 2, of the Italian Civil Code, only for those debts that through the examination of the mandatory accounting books it is possible to ascertain that they pertain to the transferred business unit.[14]

We agree with the approach followed by the Italian Supreme Court.

Such an approach is fully consistent with the principles arising from the interpretation given by the majority of the case law and the scholars of Article 2560, paragraph 2, of the Italian Civil Code.

Moreover, a different approach would cause more uncertainty in defining the extent of the liability of the transferor. Such liability would depend on the accuracy of the transferor, whether it has duly kept separate

[14] Also scholars have followed the approach of the Italian Supreme Court. *See* CIAN, TRABUCCHI, *supra* note 5, at 3364; Roberto Caspani, *Responsabilità del cessionario per debiti inerenti al ramo d'azienda trasferito* [*Liability of the assignee for debts relating to the transferred business unit*], 43 GIURISPRUDENZA COMMERCIALE [COM. JURIS.] 1012 (2016); Colombo, *supra* note 6, at. 152.

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accounts or not. In this scenario, the transferee that is purchasing the business unit from a transferor that has not kept separate accounts would be in worse conditions than the transferee that is purchasing the business unit from a transferor that has kept such separate accounts. Considering that the aim of Article 2560, paragraph 2, of the Italian Civil Code is to lay down a protection for the transferee, such an approach would not be acceptable.

Consequently, also in order to avoid possible (and unfair) disparity between transferees, the approach followed by the Italian Supreme Court should be welcomed.

5. CONCLUSIONS

In order to draw our conclusions on the issues examined in this paper, we can point out what follows: (i) the transfer of going concern does not automatically imply the transfer of the trade debts incurred prior to the transfer: such debts remain upon the transferor and, consequently, should the transferee pay any of such trade debts, the transferee shall have a right of recourse against the transferor (of course, unless the transferor and the transferee have expressly agreed, by means of a specific provision, that the transferor is also selling to the transferee the trade debts. In such an event, however, it is worth noting that the transfer of the trade debts is not occurring automatically, but by means of an express understanding between the parties); (ii) the transferee becomes jointly liable only for those trade debts that have been recorded in the mandatory accounting books: such a requirement is mandatory and the liability of the transferee is excluded in respect of those debts that may eventually result through other sources (and regardless of the actual knowledge that the transferee may have of such debts); (iii) the above principle would also apply when only a business unit is transferred and, therefore, the transferee shall be liable only for those trade debts that, according to the mandatory accounting books pertain exclusively to the transferred business unit. Consequently, if the transferor has not kept a separate account in respect of the business unit, the transferee will be liable neither for the debts that

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though registered with the mandatory accounting books do not specifically pertain to the transferred business unit, nor pro-quota for those debts that pertain to the overall management of the company.

The above is the output emerging from the current case law and the majority of scholars. Time will tell if such principles will be also confirmed in the years to come.

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