

## **Contrasting the application of the mandatory rules of a third country in South Africa, Turkey and the European Union**

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### **ABSTRACT**

This freedom that parties enjoy, in selecting the law governing their contracts is not without limitations. One of the most important considerations in these limitations is the issue of overriding mandatory rules. Although the overriding mandatory rules of a country play a significant role in the limitation of party choice they do indeed also have a bearing on cases where there is no choice of law or where the court has had to assign a proper law to the contract and it is because of this that they may be referred to as one of the limitations, not just on party autonomy, but on the applicable law in general. This paper delves into one of the most the most controversial issues surrounding overriding mandatory rules, which is the application of a law which is neither the proper law of the contract nor the law of the place of performance the so-called mandatory rules of a third country. This paper attempts to provide a suggestion as to when the mandatory rules of a third country may be applicable.

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### *Mandatory Rules*

While always understanding what mandatory rules are, as rules that cannot be derogated from by contract, an all-encompassing definition of which rules may be considered mandatory has been a controversial issue for as long their application has been considered.<sup>1</sup> They are described as rules of an exceptional nature, rules in each legal system that the parties cannot alter or set-aside.<sup>2</sup>

Von Savigny, in the early 19<sup>th</sup> century, differentiated between two types of mandatory rules, municipal or domestic mandatory rules and internationally mandatory rules. This distinction is still relevant today, although volumes have been written on the subject since the time of Von Savigny, internationally mandatory rules can be viewed

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<sup>1</sup>Nygh *Autonomy in international contracts* 1999 199.

<sup>2</sup>Nygh (n1) 199.

as rules that have an application in an international setting or an international contract.

The problem in defining mandatory rules or finding a definition in which all mandatory rules will fit may be impossible to conceive. The best alternative is to give them a more purposive definition, as initially proposed by Nygh.<sup>3</sup> The Rome I regulation provides a good example of how this can be done, according to the Rome I Regulation at article 9(1) mandatory rules are defined as:

“... provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”<sup>4</sup>

### *Party Autonomy and mandatory rules*

As with most issues relating to private international law of contract any discussion on the overriding mandatory rules of another law must begin with a discussion on party autonomy. Party autonomy – the ability of the parties to choose the law governing their contract, is a notion that has virtually been entrenched worldwide.<sup>5</sup> It is also a concept that has been endorsed by most supra-national, regional and international instruments.<sup>6</sup> Party autonomy promotes legal certainty it allows for the determination of the law governing the contract without resort to localizing factors and is therefore one of the easiest determinants of the applicable law.<sup>7</sup>

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<sup>3</sup>Nygh (n1) 199.

<sup>4</sup>See the Regulation (EC) on the law applicable to contractual obligations (Rome I) (2008) this definition of mandatory rules is principally adopted from case law of the European Court of Justice (ECJ) in the *Arblade* decision C- 369 and 376/96 [1999] ECR I-8453 par 30 – 31. The problem in defining mandatory has led to many too many definitions jostling for acceptance among different legal scholars compare Andrew Dickinson “Third country mandatory rules in the law applicable to contractual obligations so long, farewell, auf wiedersehen, adieu?” 2007 *Journal of Private International Law* 67 with Pierre Mayer “Mandatory rules of law in international arbitration” 1986 *International Arbitration Law Review* 274 where he states that: “Mandatory rules of law are a matter of public policy and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws”.

<sup>5</sup>For examples of support for this principle see: South African law see *Representative's of Lloyd's v Classic Sailing Adventures (Pty) Ltd* 2010 5 SA 90 (SCA); in Australian law see *John Kaldor Fabricmaker (Pty) Ltd v Mitchell Cotts Freight (Australia) (Pty) Ltd* 1989 18 NSWLR 172. For the European position see further Juenger “The Inter-American convention on the law applicable to contracts: some highlights and comparisons” 1994 *The American Journal of Comparative Law*.

<sup>6</sup> See The Hague Principles on Choice of Law in International Commercial Contracts per <http://www.hcch.net/upload/conventions/txt40en.pdf> (last Accessed 10/07/2015), Rome I Regulation (n 4); Inter-American Convention on the Law Applicable to International Contracts of 1994 (the Mexico City Convention) per <http://www.oas.org/juridico/english/treaties/b-56.html> (last accessed 10/07/2015); UNIDROIT Principles of International Commercial Contracts 2010 per <http://www.oas.org/juridico/english/treaties/b-56.html> (last Accessed 10/07/2015).

<sup>7</sup> Forsyth *Private International Law: The Modern Roman-Dutch law including the jurisdiction of the High Courts* (1996) 278.

This freedom that parties enjoy, in selecting the law governing their contracts is, however, not without limitations. One of the most important considerations in these limitations is the issue of overriding mandatory rules. Although the overriding mandatory rules of a country play a significant role in the limitation of party choice they do indeed still have a bearing on cases where there is no choice of law or where the court has had to assign a proper law to the contract and it is because of this that they may be referred to as one of the limitations, not just on party autonomy, but on the applicable law in general.<sup>8</sup>

#### *Application of mandatory rules of another law*

The application of the mandatory rules of the forum or the mandatory rules of the proper law is not the subject of this paper. This paper aims to focus on a more contentious issue, the application of a law which is neither the *lex fori* nor the proper law of the contract (referred to as the law of a third country). The question, ideally, is in which situations would the mandatory rules of another legal system find application.<sup>9</sup>

The problem stems from the fact that if the applicable law is not the proper law of the contract, nor do the rules form part of the forum's mandatory rules then a judge is not obliged to apply those laws. A judge is under no obligation to apply the laws of another country and is only obliged to apply the law dictated by his/her sovereign. Essentially the question formed is two-fold: 1) are there circumstances where a court should apply the laws of a third country? 2) If so, how and when should a court apply those laws?

There are two underlying theories as to why a court should consider the laws of a third country, the first one calling for this application because of the interest of the third country in having its law applied,<sup>10</sup> and the second stemming from the principle of comity.<sup>11</sup>

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<sup>8</sup>Oppong *Private International Law in Commonwealth Africa* (2013) 138.

<sup>9</sup>The application of the mandatory rules of a third country has been provoking debate since 1966 where the Dutch Court in the *Alnati* case, Hoge Raad, 13 June 1966, RCDIP 1967, 523, stated: "it may be the case that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence them in preference to the law of another State which may have been chosen by the parties to govern their contract". See further Vassiliki Marazopolou "Overriding mandatory provisions of article 9 (3) of the Rome I regulation" *Revue Hellenique de Droit International* 2011 779.

<sup>10</sup>This is commonly referred to as the American theory of government interest analysis which will be expanded on later. This reason is advocated for by Adeline Chong "The public policy and mandatory rules of third countries in international contracts" 2006 *Journal of Private International Law* 27 36. Contra Dickinson (n 5) 76.

<sup>11</sup>The principle of comity is seen to preserve relations with friendly states, foster international co-operation and encourage reciprocal action by foreign courts. Because of this the principle of comity as a justification for the application of the mandatory rules of a third country is advocated by both Chong (n 12) 37-38 and Dickinson (n 5) 76-77.

### *The case of the Greek teachers*<sup>12</sup>

This example from German and European case law can perhaps provide a good illustration of situations in which the mandatory rules of a third country may come up. A preliminary ruling was referred by the German Federal Labour Court to the ECJ on the 25<sup>th</sup> February 2015.

For the purposes of this paper the ruling relates primarily to two questions concerned with the interpretation of Art 9 of the Rome I Regulation. The case takes place against the background of the deepening financial crisis that Greece currently finds itself in. It concerns a claim for wages made by a Greek national who is employed by the Greek State at a Greek primary school in Germany, the problem faced by the German Federal Labour Court was whether to apply the Greek Saving Laws as an overriding mandatory provision, although German law was the proper law of the contract.

The financial crisis that Greece found itself in was to measure the result of agreements between Greece and an organization known as the Troika, which included the IMF and the EU. The purpose of these savings laws were to ensure that Greece met its obligations in terms of the loans granted to them by these institutions. They consisted of payment cuts in the public sector. The Greek teacher, the claimant in the case before the Labour court is therefore claiming the difference between his original salary and the sums that it's been reduced by because of the Greek Saving Laws.

The characterization of the Greek Savings laws as mandatory laws does not provide any difficulties. Article 9(1) of the Regulation states that mandatory rules can be defined as *“provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation, to such an extent that they are applicable to any situation within their scope, irrespective of the law otherwise applicable to the contract”*. Taking into consideration the purpose behind the Greek savings laws it could be argued that all three criteria “political, social, and economic organisation” have all been met. These laws clearly fall within the definition of mandatory rules.

A question of greater significance for this paper is whether the application of art 9 (3) means that the court cannot take Greece's Savings laws into account because of the restrictions imposed by the article. Art 9(3) states that (besides the law of the forum) the only overriding mandatory rules that can be taken into consideration are the law of the place of performance, stating that *“effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to*

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<sup>12</sup>Bundesarbeitsgericht 10/04/2013, NJW 2013 2461, Neue Zeitschrift für Arbeitsrecht 2013,1102. See further Kurt Siehr “International Contracts, Party Autonomy and Mandatory Rules” *Revue Hellenique de Droit International* 2014 801 823.

*be or have been performed, in so far as those overriding provisions render the performance of the contract unlawful...”*

There are a number of issues that can be raised against the formulation of this article. Firstly, in a contract such as the one before the labour court, there are two separate places of performance and the article fails to indicate which one of the two should be considered. It is submitted that a clause along the lines of article 4(2) would have clarified matters significantly in these cases.<sup>13</sup> If the place of characteristic performance is to be the determining factor than as the claimant performs his duties in Germany, Germany would be the place of performance. If the relevant consideration was the place of payment than again the place of performance would again be Germany. The application of Article 9(3) to the facts of the case lead the German court to the conclusion that it was not possible to apply Greek Savings Laws as mandatory rules.

It is common cause that issues such as this are of fundamental importance to the EU in its current state, and one could aver further that the inability of the court to apply the Greek Savings law a matter of extreme importance not only for Germany but for the EU as a whole must be seen to be an undesirable outcome. These examples highlight the fact that only taking into consideration the mandatory rules of *lex loci solutionis* (the law of the place of performance) may not always provide a suitable outcome.

### *South African position*

South African private international is largely left to be determined by the South African common law, i.e. Roman-Dutch law as influenced by English law. The South African position with regard to the application of mandatory rules of another law or of a foreign country is still somewhat in a state of flux, there are, however, certain decisions of the courts that can be used in this determination. In determining in which instances the mandatory rules of another law would be taken into consideration, South African courts are principally guided by English decisions, before the Rome I regulation came into force. In the *Henry* case Levinsohn J stated *obiter* that South African courts would not enforce performance that is illegal under the *lex loci solutionis*.<sup>14</sup> This position is supported by older *dicta* in the form of *Cargo Motors Corporation Lts v Tofalos Transport Ltd* which also indicates that the courts would only take the *lex loci solutionis* into consideration,<sup>15</sup> but at the same time definitively rules the *lex loci contractus* (law of the place of contracting) out. The conclusions that can be drawn from these cases are that the key consideration is illegality in terms of the place of performance. The mandatory rules of any other

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<sup>13</sup> Rome I regulation (n4) article 4(2) states that the relevant performance considered should be the characteristic performance.

<sup>14</sup> *Henry v Branfield* 1996 (1) SA 244 (D).

<sup>15</sup> See further *Cargo Motors Corporation Ltd v Tofalos Transport Ltd* 1972 (1) SA 186 (W); see also *Herbst v Surti* 1991 (2) SA 75 (Z) at 78 F-I.

legal system can therefore be discounted in South Africa – the application of the *lex loci contractus*, the habitual residence, the place of business and the nationality of one of the parties would therefore not be possible.<sup>16</sup> This would be a position that is also supported by Professor Forsyth who states that allowing courts a wide discretion in the application of mandatory rules would diminish legal certainty.<sup>17</sup> This position is bolstered by the working group to the Hague Principles on Choice of Law in International Commercial Contracts.<sup>18</sup>

### *Turkish Position*

The Turkish position on overriding mandatory rules can be found in the Turkish Civil Code at article 31 which states:

“When the law governing the relationship arising from the contract is being applied, the overriding mandatory rules of third country may be given effect in the case where these rules are closely connected with the contract. Regarding giving effect to and applying or not applying the rules at issue, the purpose nature, content and consequences of these rules shall be taken into consideration.”<sup>19</sup>

There are two things that are immediately apparent from this article. The first is that the Turkish position is very similar to the position under the Rome Convention.<sup>20</sup> The Turkish position calls for the application of the closest connection test. It states that if the country has a sufficiently close connection to the contract then its mandatory rules may find application. This position has been held to be highly controversial and has been tightly contested. The primary reason for this contention is the issue of legal certainty. The argument going that by allowing such a wide discretion to the court legal certainty is sacrificed, in that at the time when the parties enter into the contract and select a law to govern their contract they will not be aware of all the legal systems and all the legal rules that could apply to their agreement. It was precisely for this reason that the United Kingdom along with several other countries including Germany and Ireland entered a reservation against article 7 in the Rome Convention. Their arguments went that the reasonable expectations of the parties would never be met if the formulation of the article was left as is. The solution that was adopted in the Rome I regulation, the successor to the Rome Convention, is to only allow the application of the mandatory rules of a third country if that country is the place of performance and then only if performance is unlawful in terms of that

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<sup>16</sup> Schafer *Application of mandatory rules in the private international law of contracts* (2010) 316.

<sup>17</sup> See Forsyth *Private International Law: The Roman-Dutch law including the jurisdiction of the high court* (2012) 321, see further Schafer (n 17) 316.

<sup>18</sup> Permanent Bureau of the Hague Conference “Draft commentary on the Draft Hague Principles on the Choice of Law in International Contracts” Available on [http://www.hcch.net/upload/wop/princ\\_com.pdf](http://www.hcch.net/upload/wop/princ_com.pdf) (last accessed on 22/12/2015) 4.

<sup>19</sup> *Yearbook of Private International Law*, Volume 9, 2007, 594.

<sup>20</sup> See Article 7 of the Rome Convention of 1980.

countries laws.<sup>21</sup> As can be seen the scope of the application of mandatory rules is severely limited by this development.

The second thing that is notable and this is also a feature of the Rome Convention is that the article calls on the court to give effect to the nature, content and consequences of these rules. This part of the article calls on the court to embark on a government interest analysis as it requires that the court looks into the policy behind the rule in order to make a determination into the applicability of the rule.

In essence from the legal systems surveyed we see two separate approaches to the application of the mandatory rule of a third country. South Africa and the European Union ultimately follow the same method and both opt only for the application of the mandatory rules of the law of the place performance but only as far as those laws render performance unlawful. Turkey takes what can be described as a more liberal approach, Turkey will allow the application of the mandatory rules of any third country provided that the law has a reasonably close connection to the contract.

#### *Is the use of the lex loci solutionis alone sufficient?*

The advent of the Rome I regulation ultimately meant that in 2008 when the regulation came into force the battle between the close connection test and the *lex loci solutionis* was won in favour of the *lex loci solutionis*. The question must then become is the allowance of the application of the mandatory rules of the place of performance alone a satisfactory position?

One could argue that the case of the German Federal Labour Court, referred to above, demonstrates very clearly a case in which a mandatory rule by its very nature should apply not only because the enacting state has defined its function extra-territorially but also because of the impact that such a law has not only for itself but for the entire European community. In the view of the author even though applying the *lex loci solutionis* rule represents legal certainty it is in itself not a final solution. If the *lex loci solutionis* rule in this case represents legal certainty then we must ask at what price does this legal certainty come, the author may agree with the well-known American judge Cardozo when referring to Private International Law in the early 20<sup>th</sup> century when he says “when I view the subject as a whole, I find logic to have been more remorseless here, more blind to final causes, than it has been in other fields. Very likely it has been too remorseless”.<sup>22</sup> A similar argument may be relevant here. The case of the federal labour court above is but one of many instances in which there is a need to apply the laws of third country which is not the place of performance. In Von Savigny’s view mandatory rules and *ordre public* were the last vestiges of unilateralism and were bound to eventually disappear.<sup>23</sup> Of course as we know this

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<sup>21</sup>See n4 above.

<sup>22</sup>Friedrich K Juenger “Conflict of Laws: A critique of interest analysis” 1984 *American Journal of Comparative Law* 3.

<sup>23</sup>Michal Wojewoda “Mandatory rules in private international law” 2000 *Maastricht Journal on European and Comparative Law* 183 185.

has not been the case if anything the world since Von Savigny has grown increasingly complicated and because of this states have enacted an ever growing number of interventionist measures.<sup>24</sup>How we deal with these measures will be a matter of extreme importance for both legal certainty and party autonomy.

*A different formulation to the test*

The primary concern in the application of the mandatory rules of a third country is that legal certainty is upheld. The most likely situations in which the mandatory rules of a third country will raise its head, is in situations where performance is unlawful in terms of the law of the place of performance. Any other suggestions are therefore only meant to ensure legal certainty in what can be termed exceptional cases. Cases like the German case discussed above. In these cases the *lex loci solutionis* test could be made subject to an escape device. As the notion of an escape device is already generally accepted in other areas of the Rome I regulation it should not be a novel idea or a completely alien idea. The exact content of this escape device might, however, still be contentious.

It is precisely for this reason that the present author proposes a course of action that is not often followed in the commonwealth – a look at the American position on private international law codified in article 187(2)(b) of the restatement second, which states that the law chosen by the parties shall not be applied if “application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially higher interest than the chosen state in the determination of the particular issue and which...would be that state of the applicable in the absence of a choice of law by the parties.”<sup>25</sup>The government interest analysis as this test is known calls for the application of mandatory rules of a third country only in cases where it would be contrary to a “fundamental” policy of another state and only if that state would have been the objective proper law of the contract were it not for the choice of law.<sup>26</sup>The last part of the test is not necessary. This government interest analysis along with certain other criteria proposed by Schafer could become a workable solution in instances where there is a need for an escape device.

In terms of this test, a modified interest analysis could be done taking into account the policy behind the rule.<sup>27</sup> This analysis will look into the rule and use the normal rules of interpretation to identify the scope and purpose behind the rule. If it is clear that not applying the rule will have a material effect on a fundamental policy of the country claiming application then provided the other factors have also been met, the court can deem those mandatory rules applicable. The test for determining whether the rules of a third country could be applicable in a given case, in order of application, could look like this:

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<sup>24</sup>Wojewoda (n 24) 185.

<sup>25</sup>Nygh (n1) 223.

<sup>26</sup>See also Australian Law Reform Commission, *Choice of law*, Report No 58 (1992) par 8.9.

<sup>27</sup>See further Juenger (n 23).

- The provision must be internationally mandatory;<sup>28</sup>
- The material effect must be tested;
- All the conditions for the application of the provision must be fulfilled;
- The content of the provision and its legal consequences must be reasonable and compatible with both the international legal order and the legal order of the forum (is the rule/interest worthy of protection) – the last criterion can be translated into a sort of reasonable country test.

The analysis set out above is meant to be applied cumulatively, firstly the provision must be internationally mandatory, by this it is meant that the rules themselves must claim application in international contract. For instance if an act professes or it is manifestly clear from its provisions that the legislation is meant to be applied both in international and domestic settings that would be the starting point.

The second part of the test will involve looking into the application of the material effect that the laws will have i.e. by investigating the policy behind the rule, using the normal rules of interpretation, the court must look at what interest the rule is meant to protect and what will the consequences of disallowing this rule be. The first two criteria will most likely be applied at the same time, a court while delving into the policy behind the rule will also be able to determine whether the intention behind the rule is that it was meant to apply in an international setting.

The third criterion speaks for itself and needs no further analysis.

The fourth criterion alludes to a reasonable country test which essentially asks the question - is this fundamental policy of the state worthy of protection? And then the question becomes from who's perspective must it be reasonable? To answer these questions this test should be applied as quality check that has both an objective and a subjective element to it.<sup>29</sup> The reasonable country test attempts a value based analysis of the rule attempting to answer the question whether the rule is worthy of protection from a number of different perspectives. The objective element would consist of the *boni mores* of the international legal order, so in order for a the mandatory rules of a third country to be applied the first step is for the court to place itself in the position of the international legal order or rather generally to ensure that rules that all countries should hold sacred are not trespassed against.<sup>30</sup>

The second part of the test is subjective, this part should have both a negative and a positive formulation. Firstly the rule must not be contrary to that particular countries legal principles and secondly it must be an interest that the country that is being

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<sup>28</sup>Internationally mandatory means that the legal rule or legislation is defined in a manner that will give the statute extra-territorial application.

<sup>29</sup>Schafer (n 17) 135.

<sup>30</sup>These rules would most likely be found in international conventions, for instance the convention against human trafficking, the cultural property initiatives, human rights etc.

asked to apply the rules would also have deemed worthy of protection were it in the place of the other country.<sup>31</sup>

These would be necessary limitations and the application of the rule in both its objective and subjective spheres ensure that no rules that are repugnant to the public policy of the forum or indeed of the international legal order are allowed through, but it also respects the personal interests that a country may have in advocating the application of a rule.

If these rules are applied cumulatively as an escape device the hesitation initially harboured by the reserve states (United Kingdom, Germany and Ireland) will be dispelled. Legal certainty is preserved in that it only the most of exceptional of cases that resort will have to be had to the escape device. Legal certainty is bolstered further in that even if a countries rules claim application without it being law of the place of performance the rules are so strict that a choice of law made by the parties will not be easily cast aside.

### *Conclusion*

The application of the mandatory rules of a third country is still a contentious issue in Private International Law. The fundamental reason behind the controversy that it invokes, is the impact that it has on legal certainty and the reasonable expectations of the parties.

From the three legal systems that were examined it is clear that there are a number of different methods that could be used to govern the application of the mandatory rules of a third country. While South Africa and the European Union opt only for the application of the mandatory rules of the law of the place of performance and only where that countries laws render performance unlawful, Turkey on the other hand elects to follow a more liberal approach through the use of the closest connection test. Both methods have their drawbacks. While the *lex loci solutionis* casts the net too narrowly in the hope of ensuring legal certainty, on occasion, it may also negatively impact legal certainty. The negative impact on party autonomy applies especially on occasions where there was a need, perhaps from the perspective of an entire regional community, that these mandatory rules were applied. The closest connection test (used by Turkey) was abandoned by the European Union because of its uncertainty. It was argued by the reservation states, the United Kingdom, Germany and Ireland that the scope of rules that could find application when making use of the closest connection test was detrimental to legal certainty and the reasonable expectations of the parties.

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<sup>31</sup>This bears a similarity to the way the courts in Germany would have applied it before the advent of the Rome I, as a fact within its own law; see further Schafer(n17)176.

This paper suggests the use of another method to this determination. This paper agrees with the use of the *lex loci solutionis* as a default position, but in exceptional circumstances where there are mandatory rules the very nature of which cannot be ignored because of their impact on the third country involved it is suggested that the *lex loci solutionis* test is made subject to an escape device. The escape device is very similar to the close connection test that would be used by a Turkish court. The essential difference being that its criteria for use are laid down more strictly and must be applied cumulatively in order for these mandatory rules to find application. It is believed that by making these laws subject to rigorous requirements they will only find application in a very limited circumstances and therefore legal certainty can still be upheld.

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